INFORMATION TO USERS

This manuscript has been reproduced from the microfilm master. UMI films the text directly from the original or copy submitted. Thus, some thesis and dissertation copies are in typewriter face, while others may be from any type of computer printer.

The quality of this reproduction is dependent upon the quality of the copy submitted. Broken or indistinct print, colored or poor quality illustrations and photographs, print bleedthrough, substandard margins, and improper alignment can adversely affect reproduction.

In the unlikely event that the author did not send UMI a complete manuscript and there are missing pages, these will be noted. Also, if unauthorized copyright material had to be removed, a note will indicate the deletion.

Oversize materials (e.g., maps, drawings, charts) are reproduced by sectioning the original, beginning at the upper left-hand corner and continuing from left to right in equal sections with small overlaps.

Photographs included in the original manuscript have been reproduced xerographically in this copy. Higher quality 6" x 9" black and white photographic prints are available for any photographs or illustrations appearing in this copy for an additional charge. Contact UMI directly to order.

Bell & Howell Information and Learning
300 North Zeeb Road, Ann Arbor, MI 48106-1346 USA
800-521-0600

UMI
The artisan and the ghost: rewriting the subject of labour law

Ronnit Lifschitz
Faculty of Law
McGill University
Montreal, Canada

November 1998

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfilment of the requirements of the degree of Master of Laws

© Ronnit Lifschitz, 1998
The author has granted a non-exclusive licence allowing the National Library of Canada to reproduce, loan, distribute or sell copies of this thesis in microform, paper or electronic formats.

The author retains ownership of the copyright in this thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without the author’s permission.

L’auteur a accordé une licence non exclusive permettant à la Bibliothèque nationale du Canada de reproduire, prêter, distribuer ou vendre des copies de cette thèse sous la forme de microfiche/film, de reproduction sur papier ou sur format électronique.

L’auteur conserve la propriété du droit d’auteur qui protège cette thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.
ABSTRACT

The subject constructed by and for labour law - the "worker" - is bodiless, sexless, genderless, and male. This thesis investigates how and why this construction occurs, both through a discussion of general theoretical issues surrounding the way law constructs its subjects, and through a specific case study. The case study considers a set of sexual harassment cases decided in the "mainstream" unfair dismissal jurisdiction. As a site of women's overt presence in the labour market, these cases are disruptive to settled constructions of "the worker". particularly because they connect the sexuality of women (and their gender) to their status as worker. In so doing, they suggest the possibility of a "womanworker" - a woman who is simultaneously woman and worker. The thesis concludes by exploring the consequences of this possibility and asks how the recognition of women's experiences, needs and specificities can allow the subject of labour law to be reconstructed.

"Le travailleur", sujet crée par et pour le droit du travail, est sans corps, sans sexe, sans genre et mâle. Cette thèse cherche à établir la raison et la façon de cette création de concept de "travailleur" selon deux approches: par un survol des problèmes théoriques généraux relatifs à la façon dont le droit crée ses sujets, et par une étude de cas spécifiques. L'étude de cas concerne un nombre de décisions de harcèlement sexuel s'inscrivant dans la tendance générale de congédiement sans cause. Dans un monde où la présence des femmes est évidente, ces décisions vont à l'encontre de l'interprétation du "travailleur", surtout dans la mesure où elles mettent en relation la sexualité des femmes (et leur genre) ainsi que leur statut en tant que travailleur. Elles suggèrent ainsi l'existence d'une "femme travailleur", une femme qui serait simultanément une femme et un travailleur. L'auteur de cette thèse conclut en étudiant les conséquences de cette possibilité et soulève la question de savoir comment les expériences, les besoins et les particularités de la femme, peuvent permettre au sujet de droit du travail d'être interprété d'une nouvelle façon.
ACKNOWLEDGMENTS

Anyone who has had anything to do with my time at McGill and, ultimately, with this thesis knows its long and painful history. I am grateful for this opportunity to thank the Faculty of Law at McGill University and, in particular, Professor Stephen Toope, Professor Jeremy Webber, Professor Blaine Baker, Ms Ginette van Leynseele and Libby Parker for their continued, tenacious and compassionate support and assistance. My deepest thanks go to Professor Colleen Sheppard for her constant and long-standing encouragement, her incisive comments and her genuine commitment to addressing the structural constraints on working women.

Friends who I made at McGill and who will remain my friends always - Juliette d’Hollander, Sarah Wilson, Claire McDairmid and Desmond Manderson - are owed a large debt of gratitude. Jenni Millbank, Cath Zimdahl and Bronwen Morgan - friends from “home” - are owed the same.

Without my uncle and aunt, Don and Judith Karabelnik, and my cousin Lisa and without the love and support of my parents, Stan and Abirah Lifschitz and my brother, Yaron. I would not have been in a position to complete this thesis. There is no way they can be adequately thanked.

Most of all, this thesis exists because of Johnathan Redman, my husband, without whom I would not have been able to begin again.
# TABLE OF CONTENTS

## Introduction
Overview 1
Structure of the thesis 3

## Chapter 1
### Constructions of labour law

Introduction 7
Women and the labour market 8
The worker in labour law 14
Conclusion 29

## Chapter 2
### Talking about sexual harassment

Introduction 31
The naming of sexual harassment as sex discrimination 33
Remedies for sexual harassment in Australia 35
The failed promise 41
Conclusion 60

## Chapter 3
### The unfair dismissal remedy

Introduction 61
A brief history of the unfair dismissal remedy 62
Unfair dismissal today 68
Defining the acceptable workplace 72
Utilising the unfair dismissal remedy for women 75
Conclusion 79

## Chapter 4
### A survey of sexual harassment cases

Introduction 81
Methodology 82
Results 87
Outcomes from the survey set 92
Comparable cases in other jurisdictions 101
Conclusion 107

## Chapter 5
### Constructions of sexual harassment

Introduction 109
Language and the constructions of law 109
Rhetoric, sexual harassment cases and the "worker" in labour law 113
Conclusion 132
Chapter 6
Regendering the labour market

Introduction 135
A feminist revisioning of labour law 137
Investigate presences 138
Investigate absences 141
Consider language 148
Investigate relationships 151
The gendered workplace 155

Conclusion 159

Bibliography 161
INTRODUCTION

OVERVIEW

My thesis is that the meaning of "work" and of the "worker" is defined and constructed, at least partially, by the law: most particularly but not entirely by labour law. This construction is evident in a range of different doctrinal areas and occurs by way of a variety of techniques. One important movement in this construction is the perceived asexuality/objectivity and lack of gender of the subject of labour law. The "worker" of labour law is bodiless, sexless, genderless, humourless, pain free and emotion free. And, except in very defined and highly circumscribed circumstances, the worker is a man.

This thesis will attempt to understand this construction: how it occurs, by means of which mechanisms, in what way and by whom. And it asks whether and how these constructions can be changed for the benefit of those who have traditionally been denied the status of subject.

In undertaking this analysis, this thesis outlines and explores both general theoretical concerns and a specific case study. In Chapter 1, a theoretical outline of the parameters of labour law and its construction of the "worker" is commenced. This discussion looks to the overall question of the construction of the worker and the workplace in and through the doctrines of labour law. The discussion encompasses a variety of different areas in which this construction occurs: in legislation ascribing benefits, in case law defining the boundary of what has become known as the "employee" and in industrial processes.

A detailed contextual analysis, with a central case study, is undertaken in Chapters 2-5. In Chapter 4, a case study using original data explores in a specific context the theoretical issues earlier discussed. This context is a set of sexual harassment cases which have been decided in the unfair dismissal jurisdiction. Chapters 2 and 3 provide the necessary background for the case study. Chapter 2 outlines sexual harassment law, theory and practice and Chapter 3 explains the industrial context of the unfair dismissal remedy.
The case study in Chapter 4 reveals some surprising outcomes. Contrary to expectations, on the whole women workers do very well out of the industrial jurisdiction. It is rare for a woman not to be granted a remedy for her dismissal due to sexual harassment and it is similarly rare for a dismissed harasser to achieve a remedy.

Nevertheless, the case study reveals some worrying trends in relation to the way in which the decisions are reached. The "ways of speaking" found in the cases are discussed in Chapter 5 which links the case study material to the general theoretical issues raised in Chapter 1 by attempting to understand how the data exemplifies and reflects the general "construction thesis". Chapter 6 follows through these conclusions, returning from the case study context to the broader concerns foreshadowed in Chapter 1.

It is important to realise that the case study found in Chapters 2-5 is provided both as case study and exemplar, and as a special object of interest. As case study, its choice is clear: this is an area which particularly affects women in the labour market and through which the construction of the "worker" and the notion of the acceptable workplace can be explored. It is a site within the labour market where women are specifically at issue: thus, the construction of the gendered worker is brought clearly to the fore. As a special object of interest, however, the sexual harassment cases are important because they connect the sexuality of women (and their gender) with their status as worker. Consequently, they define, delimit and allow the possibility of the "womanworker" - a woman who is simultaneously woman and worker. They directly challenge the genderlessness and the sexlessness of the paradigmatic worker. In addition, these cases are interesting because they are overtly concerned with sex - they are cases in which a resounding discord sounds over and over again: if there are no women and no bodies in the workplace then how come there is sex?1

---

1 I do not wish to imply that only heterosexual sex is possible, of course, only that the perception is such. This is not the only area in which this question arises. Another example is pregnancy and another is occupational health and safety where the body in pain is very much at issue.
STRUCTURE OF THE THESIS

The paper is structured as follows. The general movement commences in Chapter 1 which contains a detailed discussion of the construction of the worker in traditional labour law as well as a briefer historical account of the way in which women have worked outside of the home. The reality is (and has mostly always been) that women do paid work in the labour force. Although this reality is becoming harder and harder to deny and although the ideal of the eighteenth century workplace has become increasingly difficult to sustain. law, as a founding mythology of the workworld, operates in a number of increasingly circuitous ways to define, circumscribe and obliterate gender. This chapter looks at the general mechanisms by which labour law constructs its subjects and considers how this erases the experiences of women who do, in reality, work in the labour market.

The more detailed contextual analysis commences in Chapter 2. As mentioned above, although it is also challenged in many other ways, the genderlessness of the "worker" is directly challenged when sex overtly enters the workplace. In sexual harassment cases, the myth that the worker is devoid of gender and of sex is definitively exploded. Thus, the major focus of this thesis is an exploration of the implications of sexual harassment claims for the legal construction of the worker and the workplace. To put this discussion in context, Chapter 2 gives a broad overview of sexual harassment law, practice and theory in Australia. This practice occurs primarily in the human rights tribunals with their own particular strand of jurisprudence. The human rights remedies available to women workers who have been sexually harassed and the limitations of these remedies are discussed.

The set of cases which I have selected for detailed discussion are cases which arise in the unfair dismissal jurisdiction. These cases arise under industrial statutes and are heard by specialist industrial arbitrators (or, in some cases, by a specialist judicial body). I have chosen these cases because they represent a form of "mainstream" industrial practice where the construction thesis can be scrutinised. Although this approach may to some extent reinforce this perception, in Australia human rights tribunals do not represent
mainstream labour law. They were set up to provide avenues of redress for breach of human rights but they did not and still do not entirely interact with the industrial processes which determine important questions about workers' lives: what workers get paid, what leave they get, their safety at work and so on. To circumvent or turn back this rather familiar movement, this thesis considers the role of sexual harassment within the arena of the unfair dismissal laws. The mainstream industrial jurisprudence these laws represent are detailed in Chapter 3 as a precursor and background to the discussion of the cases surveyed in Chapter 4.

Traditionally, unfair dismissal has been the primary individual remedy within an essentially collective industrial arbitration system. The remedy has been based in large part on the idea of a "fair go all around" with decision makers assessing what constitutes fair and reasonable conduct within the workplace. These cases squarely raise the question of what the appropriate contours of a safe and proper workplace should be. They also raise questions about the gendered worker within a quintessentially "male" jurisdiction. It is in this arena that questions of sex and gender need to be grappled with because it is these decision makers who are every day making and remaking the world of work. Chapter 3, therefore, outlines this system and considers, at a general level, how it operates and to whom it gives access.

The general discussion in Chapter 3 of the unfair dismissal legislation is a precursor to the specific case study in Chapter 4. In this part of the thesis, a set of 51 unfair dismissal sexual harassment cases is surveyed. These cases are the set of all cases in a particular time period in the federal unfair dismissal jurisdiction that deal with sexual harassment from the point of view of the victim and from the perspective of the alleged harasser. The discussion of these cases analyses the ability of women to achieve remedial outcomes for harassment in the workplace from within the industrial system. It tells us how these cases are decided, who wins and in what circumstances. As mentioned above, women workers who have been sexually harassed and then dismissed tend to be successful in terms of outcome. The unfair dismissal cases generally grant them remedies and, conversely, deny remedies to harassers challenging their dismissals.
Chapter 5 continues the discussion of the results of the survey and draws explicit links with the theoretical concerns raised in Chapter 1. Beyond the "outcome analysis" of the data in Chapter 4, this discussion looks at the way that the survey cases have been decided. In investigating judicial "ways of speaking" that reinforce paternalistic, stereotyped and protectionist views of women workers, this chapter investigates how the "construction thesis" is exemplified and operates through the survey set cases: in paying attention to what the decision makers say and how they say it, this chapter considers what the cases reveal about the notion of work, about the definition and construction of the "worker" and about what is deemed acceptable in today's workplace. The discussion of the survey cases from this perspective indicates that the real harm of harassment at work - the erosion of women's subjectivity and, hence, citizenship in the world of work - is rarely captured by the decision makers. This harm is invisible and the "worker" which these cases construct is not a woman.

Chapter 6 develops these insights for the more general movement prefigured in Chapter 1. In this chapter, I build on the lessons from the cases drawn out in Chapter 5, place these lessons in the general theoretical framework of the "construction thesis" and return to further general examples of this thesis. From attempting an understanding of the mechanisms which allow this construction to occur, this chapter then asks whether and how the workplace can be gendered or regendered. This regendering or reconstruction is based on the perception that what is constructed through language may be reconstructed in the same way. This reconstruction is based on the recognition that women in the workforce are both woman and workers - they are "womenworkers" - and to be genuinely so called they require full industrial citizenship and a full opportunity for participation in the contemporary industrial community. Chapter 6 concludes with a few tentative suggestions for effecting this reconstruction.
CHAPTER 1

CONSTRUCTIONS OF LABOUR LAW

The construction of the "worker" presupposes that he is a man who has a woman, a (house)wife to take care of his daily needs ... the sturdy figure of the "worker", the artisan, in clean overalls, with a bag of tools and a lunch box, is always accompanied by the ghostly figure of his wife.1

INTRODUCTION

Labour law is the law which regulates how men do paid work in the world outside of the home.2 Like many doctrinal areas in the law, it is haunted by an absence that it refuses to recognise and refuses to name. Again, like other areas, this refusal is not simply historical or contingent, it is necessary to the continued existence of both the doctrinal area and the behaviour which it attempts to regulate.

When labour law turns its face from the spectre of women it does so through a complicated and interrelated series of manoeuvres which range from denial to rejection. These moves are, to a greater or lesser extent, deliberate choices. I shall discuss these in detail in Section II below. The primary move, as is frequently elsewhere the case, involves the construction of a false but deeply pervasive universal. This is primarily a movement of denial and it is an attempt to construct the whole of the world in the image of a part.

This chapter is an attempt to understand and to begin the rethinking of labour law by disintering the ghost of woman and requiring that she and the artisan enter into some type of dialogue. In Section I below, I outline a very brief history of women in the world of paid work. History shows us that the ghost has dirty hands and that, far from standing

2 The textbook definition of labour law generally is: 'the relationship between individual workers and their employers, the collective relations between organised labour and capital and the regulation of the labour market by the state'. See Rosemary Hunter, "Representing Gender in Legal Analysis: A Case/Book Study in Labour Law" (1991) 18 Melbourne University Law Review 305 at 306.
and waiting for the man she services to return from the cold world outside, she has always been engaged in work. The section also contains a brief outline of her current position in the labour market.\(^3\)

In Section II, I consider how labour law has been constituted and the types of legal subject which it has constructed. This section looks at the general mechanisms by which labour law constructs its subjects and considers how this either reflects or erases the experiences of women who do, in reality, work in the labour market. The way in which the typical subject - the figure of the artisan - has been constructed and has managed to remain pervasive will be explored through a number of different examples from the field of labour law. The discussion here lays the groundwork for the case study in Chapters 2-5 and provides the general theoretical justification and underpinning for that investigation.

I. WOMEN AND THE LABOUR MARKET\(^3\)

Where we have come from

Women have always worked. The relationship between paid work and the "other" work that women do - unpaid work in the home - will be further discussed in Chapter 6 but for the present, at the risk of over simplification, it will be sufficient to outline briefly the historical movement of women in the paid labour market.

In England during the pre-industrial period, there was a clear rural division of labour. However, women did work as agricultural labourers during the Napoleonic wars and took on heavier farm duties as well.\(^5\) The kind of work that women did in this era is not well

---

3 The figures are for Australia but they are mirrored to a significant extent in other developed countries. The labour market positioning of women in developing countries is a very different matter and this thesis does not attempt to deal with it. This is not to deny its importance to millions of women, only to recognise the limited scope of this paper.

4 The discussion in this section is drawn primarily from Australian research. However, apart from matters of detail, the broad themes are the same in the UK, the US and in Canada. The specific labour market data later used are taken from NSW, Australia. It is fairly representative of the Australian labour market (NSW being the most populous state) and does not differ in essence and theme from data and trends found overseas.

understood and research is divided as to its precise nature.  

It is clear that, in the early colonial history of the United States and Australia, women worked primarily in the home and wage earning work was performed predominantly by domestic servants. This period reflected the traditional preindustrial pattern transferred from England. It should be noted, however, that in this period the rigid split between domestic labour and productive relations in the labour market had not yet developed. Alice Kessler-Harris describes work on an American colonial plantation as follows:

In the division of responsibility, women got the bulk of internal domestic chores. Normally, they took care of the house - including the preparation of food, cloth, candles and soap - and supervised farm animals and kitchen garden, while husbands did the plowing, planting, and harvesting. Yet interaction never stopped.

Industrialisation brought considerable change to this picture and a much clearer demarcation between waged work outside the home and unwaged domestic work was established. This demarcation was spatial as well as functional and the family changed from "a locus of production to one of reproduction and consumption". Although the dominant pattern was of men moving into the new factory system, large numbers of women also entered the waged workforce in textile, clothing and other manufacturing industries. For example, Berg writes that "the early factory cotton industry was dominated by women" and spinning, too, was predominantly female.

Some commentators have characterised this entrance into the waged labour market as

8 See Margaret Bevege et al (eds) Worth her Salt: Women at Work in Australia (Sydney: Hale and Iremonger, 1982). It is important to note that Australia's penal heritage had an effect on the type of work that women did in early colonial history. It is not possible here to detail this effect. The majority of women convicts were assigned as domestic servants. see Ryan and Conlon, supra note 5, at 21.
9 Kessler-Harris, supra note 7, at 7.
10 Berg, supra note 6, at 69.
11 Ibid, at 71.
profoundly problematic for women who moved from being skilled domestic craftswomen to being deskill production workers. Women worked then (as now) from a sense of economic necessity and there was a sharp class distinction between those women who did not have to work and those for whom there was little choice. By the end of the eighteenth century, women were predominantly employed in domestic service, governessing and the clothing and textile trades.

At the same time that the factory system was removing the chance of profitable household labour from women, the ideology of the home as the sphere of women was strengthened in the United States by the depression of the early nineteenth century. When jobs were scarcer and possibilities for women constricted, the rise of the unsympathetic and impersonal market demanded the rise of a "haven" of the home. As Kessler-Harris has described it, the domestic ideology was that the "home required women's moral and spiritual presence more than her wage labour". This ideology held that women were pure and that the haven or sanctuary of the home was necessary as a counter to the competitive, avaricious and amoral world of the market. Liberal laissez-faire economic values stressed individualism, success and competition. It was the home that would be the "repository of the higher moral and ethical values lost in the cold business community".

It is important to realise that, although occupational choices for women were restricted, women, often with the help of technology, did "take over" and replace men in a number of occupations. Ryan and Conlon have argued that, in Australia, they were regarded as "invaders" of men's occupations who must be repulsed. By the beginning of the twentieth century, women's labour had made a significant contribution to the Australian economy and "in spite of the widely accepted notion that women did not and should not work outside the home after marriage, working for wages had proved necessary for a great many Australian women".

Kessler-Harris, supra note 7, at 29.
Ryan and Conlon, supra note 5, at 9.
Kessler-Harris, supra note 7, at 46.
Ibid. at 49.
Ibid. at 50.
Ryan and Conlon, supra note 5, at 15-16.
Ibid. at 48.
For decades until the 1960s when the feminisation of the workforce occurred in an unprecedented way, women entered and left the paid workforce according to various external imperatives. They entered out of economic necessity, but left as soon as possible when they got married. They entered in wartime, but were required to leave when the troops returned. In Australia, as elsewhere, prior to the outbreak of World War II, "working women were mostly either single, deserted or economically disadvantaged". With the war came a "critical need for the vast increases in the participation of women in the paid workforce".

For women, the struggle throughout the nineteenth and early twentieth century was for freedom from exploitation, for protection, for opportunities and for the ability to earn a living and decent wage. It was also a struggle to gain employment outside of the very narrow band of occupations in which they had traditionally been employed.

Where we are now

If we take a quick "snapshot" of the contemporary labour market a number of important themes emerge. First, the feminisation of the workforce has proceeded at an exponential rate over the past three decades. In 1966 women made up approximately 31% of the workforce in New South Wales, in 1995 they constituted almost 43%. In 1995, over 52% of all women over the age of 15 years participated in the labour force compared with 72.7% of men. In general terms, the expansion of women's employment in the 30 years since the mid 1960s has been assisted by the restructuring of the economy and the growth

---

19 Kessler-Harris, supra note 7, at 71.
20 Lynne Beaton "The Importance of Women's Paid Labour: Women at Work in WWII" in Bevege, supra note 8, at 84.
21 This discussion is based on the labour market situation in NSW, Australia. To a large extent the trends reflect those across the industrialised world.
23 Australian Bureau of Statistics (ABS) and the NSW Ministry for the Status and Advancement of Women Women in NSW, Catalogue 4107.1.
25 Ibid.
in service sector employment.\textsuperscript{26} This expansion is also predicted to continue to increase over the next 30 years.\textsuperscript{27}

Second, a large proportion of women's employment is on a part time basis. Of all employed women, almost 40\% work part time and women make up a full three quarters of all part time employees.\textsuperscript{28} Women also dominate casual employment (whether full or part time). Over 30\% of working women are employed on a casual basis, and casual part time employment accounts for about a quarter of all women employees.\textsuperscript{29} It will be important to remember the casual and part time nature of women's employment when the bases of labour regulation are later discussed.

Third, it is important to note the extent to which the gender segregation of the workforce continues in Australia. Although there has been some change in the extent of female participation in male-dominated industries in the past two decades.\textsuperscript{30} Australia remains one of the most sex segregated economies of the OECD\textsuperscript{31} and more than half of all employed women are located in two occupational groups - clerks and salespersons, and personal service workers.\textsuperscript{32} Thus "horizontal" segregation across occupations and industry groupings remains strong. It is also the case that "vertical" segregation whereby women cluster at the lower ends of an occupational hierarchy is still much in evidence. In 1994, for example, only 7.3\% of women were found in the category "Managers and Administrators" compared with 14.9\% of men.\textsuperscript{33}

Women tend also to be segregated by industry grouping, comprising 75\% of employees in

\textsuperscript{26} NSW Pay Equity Taskforce A Woman's Worth: Pay Equity and the Undervaluation of Women's Skills in NSW, Issues Paper, August 1996 at 12.

\textsuperscript{27} Australian Centre for Industrial Relations Research and Training (ACIRRT) Reforming Working Time: Alternatives to Unemployment, Casualisation and Excessive Hours, July 1996 at 13.

\textsuperscript{28} ABS, supra note 24; see also Economic Planning Advisory Committee Future Labour Market Issues for Australia, July 1996 at 50.

\textsuperscript{29} ABS, supra note 23.

\textsuperscript{30} NSW Pay Equity Taskforce, supra note 26, at 14.

\textsuperscript{31} See studies cited in Margaret Thornton "Comment on Linda Dickens' Road Blocks on the Road to Equality: The Failure of Sex Discrimination Legislation in Britain" (1992) 18 Melbourne University Law Review 298 at 299.


\textsuperscript{33} ABS, supra note 23.
health and community services and 67.4% of workers in education. Women comprise 50% of employees in other service sector industries such as Finance and Insurance, Retail Trade and Accommodation, Cafes and Restaurants while making up only a very small percentage of employment in Mining and Construction.

Fourth, it is important to note that the distribution and nature of women's employment has a significant effect on their earnings (amongst other things). Although compared with other industrialised nations Australia has a relatively small gender wage differential, there remains a substantial gender wage gap. In 1995 adult women in full time employment outside of the managerial sphere earned 89.6% of their male counterparts' average weekly total wages. When managers are included, the percentage falls to 78.2% and when part time workers are included the percentage falls again to 65.5%.

Finally, there are many other responsibilities which impact upon the lives of women workers. With an ageing population and a decline in the safety net provided by the social security system along with a rapidly diminishing government commitment to childcare funding, employees have been assuming a greater proportion of caring responsibilities for young, disabled and aged members of their families. These responsibilities fall disproportionately upon women. In 1994, a time use survey indicated that women with dependents who worked full time spent only 48% of their time in paid labour force activities while men in the same position spent 73% of their working time in the labour force. Women's disproportionate share of the responsibility for domestic and caring duties has not proportionately declined with their increasing participation in the paid labour force.

---

34 ABS, supra note 24, and see NSW Pay Equity Taskforce, supra note 26, at 16.
35 NSW Pay Equity Taskforce, supra note 26, at 16.
36 This is generally attributed to Australia's system of centralised wage fixation whereby gains won by some employees can be passed on through the system; see Gillian Whitehouse "Legislation and Labour Market Gender Equality: An Analysis of OECD Countries" (1992) 6 Work, Employment and Society 80; Jill Rubery and C Fagan "Equal Pay Policy and Wage Regulation Systems in Europe" (1994) 25 Journal of Industrial Relations 281; NSW Pay Equity Taskforce, supra note 26, at 41.
38 Australian Bureau of Statistics How Australians Use their Time, Catalogue No. 4153.0.
The above analysis demonstrates that, at an empirical level, the experiences of women in the labour market markedly differ from those of men. They work on a casual basis, they are paid less and they have significant responsibilities outside of the paid workforce. Yet it is generally only the labour market experiences of men that have constructed the categories of labour law. It is the different experiences of women which have been erased and which need to be resurrected and reconnected to the definitions and categories of the law.

II. THE WORKER IN LABOUR LAW

The subject of labour law

I am the artisan and I am the subject of whom you speak. I am 45 years old and I work in the second job that I have held since I began work. I work eight hours a day, five days a week. I sometimes work extra hours to earn some extra money for the family. I work 11 months of the year and for one month I take holidays with my family. I have been working since I was 20 years old and I will retire from my job when I am 65. I have two children. My wife went back to work after the children left school. She works 3 days a week.

Law is constitutive of its subjects, marking out both legal and social terrain and constructing those it recognises. In this regard it is important to realise that law is not a neutral set of rules - positivist theory notwithstanding - and legal rules do not just regulate or even just reflect society. Law is just one of a number of interrelated discourses that operates in a constitutive way and, of course, economic and sociological discourses are also operative and influential and cannot readily be separated out. Labour law is a good example of this concurrence of discourses because there is a considerable degree of overlap with other related disciplines - economics, management, industrial relations, sociology and so on. It is all these discourses, all these ways of speaking, that define the parameters of the discipline.


Standard working arrangements have been described as "an eight hour day worked over a five day work week during 11 months of the year over a 45 year working life", ACIRRT. supra note 27, at 10.
However, beyond defining the limits of the various disciplines, law also constitutes the subjects to which it gives its attention. In important ways, for example, family law constitutes "the family" and "mothers" and "children". Contract law recognises only those with capacity to contract. The subjects of corporate law are artificial entities created on incorporation and recognised by the statutory regime governing that incorporation. Tax law looks to the "taxpayer", welfare law to the "welfare recipient", compensation law to the "injured".

In much the same way, labour law constitutes the "worker" as its subject. I have chosen the word "worker" here deliberately because, although the word "employee" is perhaps more accurate, the ideology of work is better encapsulated in the former word. "Worker" also has a more universal flavour, which will become important in our later discussion of how a particular type of work (that work that is paid) and a particular type of worker (a male working full time) has become the only type of worker that labour law will recognise.

A number of legal theorists have looked at how legal discourse actually constitutes its subjects. Through an investigation of legislation, judgments and other legal texts, writers such as James Boyd White, Mary Joe Frug and Vicki Schultz have looked at how what judges say, what legislators write and what constitutions do are able to define and construct the subjects of their attention. For example, James Boyd White writes about what he calls "constitutive rhetoric" by which he means that the utterances of legal writers create and constitute worlds and relationships with specific political and ethical consequences. In this type of analysis, it is important to consider not only what is said by judges (for example) but the way in which it is said. As Kenneth Schneyer has said, "those who "talk law" - judges, legislators, lawyers, administrative officials - are in a real way shaping the world with their words."
This discussion will be returned to in more detail in Chapter 5 when the ways of speaking in the case study set of cases are considered. For present purposes, however, suffice it to say that the way decision makers talk, the way that legislation is written, the means by which language is used, the exclusions that are made (but not made explicit) are all crucial in understanding what is or is not within the discipline and who is or is not a "worker". In this section, I argue that the subject of labour law is constructed in and through language by means of a variety of specialised techniques.

In her important and much-quoted piece of a decade ago, Joanne Conaghan sets out very clearly how legal rules reflect a male conception of the worker. She said that:

"labour law is a world made up of full-time male breadwinners and the legal rules reflect this conception of the worker." 45

Indeed it would be also true to say that, not only do these rules reflect a notion of the worker that is based on the full-time male model she describes, but that these rules actually construct this notion. Rosemary Owens asserts that this construction means that women doing atypical work are not subjects of labour law at all. they are, in fact, "objects not subjects in the paid work force." 46

This construction of the typical worker occurs in a number of different ways and through a variety of means. In Australia, labour law is found in quite a diverse set of sources. These range from direct legislation in relation to employment benefits to legislation at both state and federal level setting up the mechanisms of a system of conciliation and arbitration. This system means that legislated benefits are relatively few and that most benefits come about through decisions of arbitrators. These decisions apply generally to employees across the economy by means of quasi-legislative instruments which are known as "awards". In addition, labour regulation occurs through judicial decisions, through the terms of collective agreements and through what is or is not permitted to occur in the individual employment contract.

46 Owens. supra note 40, at 425.
Across all of these mechanisms, a number of techniques or themes are apparent by which the construction of the typical worker occurs. In this section I will discuss three such techniques by way of example only. I will return to this discussion in Chapters 5 and 6 after a specific example - sexual harassment - is considered in Chapters 2-4. The techniques to be discussed here are:

i. rules based upon an undisclosed paradigm:

ii. the explicit use of a benchmark: and

iii. the disembodiment of the worker.

Rules based upon an undisclosed paradigm

Full time continuous employment is very much the typical employment pattern recognised by labour law. The typical worker is an employee who has standard and regular working conditions and hours, who has regular and secure employment, and who is paid and who works in an office/factory/site.

In Australian, most employment benefits such as parental leave (Industrial Relations Act 1996 (NSW)), long service leave (Long Service Leave Act 1955 (NSW)) and superannuation (Superannuation Guarantee (Administration) Act 1992 (Cth)) rely on there being a continuous period of employment with one employer or a minimum monthly wage. Without this pattern of employment, important work-related benefits are simply not available. As Rosemary Owens points out:

because of their work commitments in the home, the pattern of participation of many women in the paid work force is characterised by multiple entries and exits.

It is interesting to note that these parental leave provisions (maternity, paternity and adoption leave) are as recent as 1996 in origin. The legislation simply carries forward earlier legislation with scant consideration of whether this is appropriate for the the contemporary labour market. It is also relevant to note that, traditionally, parental leave was an award benefit and not a legislated benefit in Australia: see Maternity Leave Test Case (1979) 218 CAR 120, Adoption Leave Test Case (1985) 298 CAR 321 and Parental Leave Test Case (1990) 36 IR 1. State legislation has generally adopted these test case standards.

See Conaghan, supra note 45, at 382 discussing a similar situation in the UK.
Thus, where employment benefits and protections are tied explicitly to years of continuous service with one employer, they are likely to discriminate indirectly against women.49

Pregnancy legislation is particularly interesting. Although anti discrimination law which prohibits discrimination on the grounds of pregnancy or sex "allows" women in the labour market to be pregnant, legislation conferring benefits on pregnant women does so in such a way as to preclude access for many women. This paradoxical "allowing" and "exclusion" takes away with one hand what it gives with the other. Without disclosing the paradigm according to which the benefits are conferred, this tension cannot be resolved.

Much the same can be said for remedies in relation to unfair termination of employment. The Workplace Relations Act 1996 (Cth) excludes, by regulation, casual employees of under 12 months' employment from its unfair dismissal provisions. Similar regulations have been made in NSW.50 Although these apparently neutral regulations appear to use length of service as a reasonable criterion for entry into the jurisdiction, in fact such criteria operate in a discriminatory way to exclude the atypical, casual or contract worker from achieving a measure of employment security. Such remedial avenues are particularly important in sectors of the market which are otherwise marginal.

This is not simply the case for rules embodied in legislation. Industrial tribunals in setting test case standards have relied upon this unexpressed paradigm. The Australian Industrial Relations Commission in its Parental Leave Test Case51 similarly required a period of continuous service in order for eligibility for parental leave benefits to accrue. Other recent

49 Owens, supra note 40, at 411.
50 See section 170CC and regulation 30B to the Workplace Relations Act 1996 (Cth) and regulation 5B of the Industrial Relations (General) Regulation 1996 (NSW).
51 (1990) 36 IR 1. Note that these "test cases" are usually applications by unions to amend one or more major awards. They do not arise out of any particular set of facts. The industrial relations commission hears evidence and submissions (often economic) and decides whether to amend these awards to include the suggested changes, which are often in the form of a standard clause. Usually, these standard clauses are inserted, on application by other unions, into other awards. In this way, the decision flows-on across the economy. In NSW in one recent test case, the clause was automatically inserted into all awards which meant the flow-on was immediate and did not rely on the will of any particular union to ensure its insertion. This is of enormous benefit to women. see NSW Personal/Carer's Leave Test Case. NSW Industrial Relations Commission, 1996.
test cases dealing with "family leave" or "personal/carer's leave" have based entitlements to leave to care for ill family members on current entitlements to sick leave. However, it is clear that, given the feminisation of the casual workforce, a large number of women who have family responsibilities will not be able to avail themselves of this important benefit. This is particularly problematic because a new benefit, expressed to be necessary to deal with contemporary conditions, has piggybacked on an older benefit - sick leave - to which a large number of women remain unentitled. A more constructive approach would have been for the Commission to have re-evaluated the differential impact of the way that current sick leave entitlements have been distributed.

In relation to any of these employment benefits, anyone who does not fall within these parameters is seen as an "atypical" worker as opposed to an ordinary or normal worker or even just a "worker". Simply by exclusion from these common benefits, "atypical" workers are not just denied the status of "typical worker", they are in effect denied the status of "worker" at all. As Joanne Conaghan has said, legislation of this nature "by no means captures the variety of workers who make up the labour force" and it is a cruel irony that those excluded are the very ones most in need of employment protection.

What is particularly important to note here is that "typicality" is not based on any empirical observations about the composition of the labour market. The figures briefly expounded in Section I above indicate that atypicality is the norm and that a significant majority of workers do not fit the description of the standard working arrangements that the artisan has customarily worked. For one thing, only just over 36% of workers actually work standard weekly hours and a larger number of women workers deviate from that standard week. For another, the ordinary working lifetime is similarly no longer the 45 years prescribed by the standard model. People retire early, take career breaks and change jobs and careers far more frequently than they did in the past.

53 Conaghan, supra note 45, at 382. It is also interesting to note that this experience is replicated across the industrialised world, see, for example, Hanne Petersen "Perspectives of Women on Work and Law" (1989) 17 International Journal of Sociology of Law 327 at 329 (considering Denmark).
54 ACIRRT, supra note 27, at 11.
Thus it is quite apparent that, in relying on a model which no longer reflects any practical reality and deviates from labour market experience in a number of significant ways, our labour laws are based on both historically determined exclusions and upon fixed "ideas" about the subject of labour law and the sort of character or person who works in the public world. This is a model based on the sorts of things that men customarily did.  

It is interesting in this regard that the paradigm that is being used is never made explicit. The laws referred to do not say "all workers who are male and who fit the profile of a labour force that no longer exists but which may have had some currency prior to the second world war are entitled to benefits". They actually say, in very neutral ways, things like "all employees with greater than 12 months continuous service" or "all employees employed for 10 years with one employer" as if it were entirely reasonable that "employee" be qualified in this way. And what this means, in the end, is that "employee" comes to mean, without further qualification, "employee with continuous service" or "employee working full time".

Thus a paradigm for assigning benefits has been utilised but has simultaneously been hidden. If we cannot see the filter (and hence who is excluded), then we take those who have been included as constituting the entire set of workers whom the law can take into account. Thus, those who have been able to pass through the filter are the "workers". In this way, the law has been able to constitute a worker from the sheer force of its partial attention.

Another way of conceptualising this hidden paradigm is to perceive the object of labour law's regulatory attention as a false universal. This is to say that labour law constructs "a worker" masquerading as "the worker". Because it is expressed to apply to everyone (but in fact does not) and because it is expressed to be entirely gender neutral (but in fact is...
not), labour law masquerades as having universal applicability. It implies that the artisan is the only subject of its attention. It implies also that there is no ghost. And, crucially, it implies that anyone who is not the artisan is not a worker and is not the subject of labour law. For if something is universal and you do not come within it, then you must, somehow, be beyond the pale. You are, in effect, unspeakable within the paradigm.

The reason why this use of the undisclosed paradigm can be so problematic is again discussed by Joanne Conaghan. She points out that protection for non-paradigmatic employees is not seen as an entitlement. It is something that must be aimed at or justified in some way whereas merely falling within the central paradigm entitles you to benefits without further justification.\footnote{Conaghan, supra note 45, at 382.} You are per se a "worker" and you do not have to argue to be so found. For women, every benefit, every entitlement, every "right" is the result of a struggle which must be fought over and over again.

**The explicit use of a benchmark**

There are two clear examples of the explicit use of a benchmark in labour law. The first is the use of the work that men customarily do to ascribe value to work. The second is the standard of the "white, Anglo-Celtic, heterosexual, able bodied male"\footnote{Thomson, supra note 31, at 301.} used in anti-discrimination law. Both of these examples benchmark the male worker as "typical".

\(a\) Pay equity

The history of pay equity in Australia has been a process of incremental gain and a to-and-fro movement whereby a male benchmark has been simultaneously advantageous and disadvantageous for the relative earnings of women. A short historical overview will illustrate this point.

The entrenchment of a gender wage differential began with the case of *Ex parte H. V. McKay (the Harvester Case)*\footnote{(1907) 2 CAR 1.} which established a basic wage for males that was premised on their status as the head of a family and their consequent obligation to provide...
for a wife and children. Thus the basic wage was, in reality, a family wage. Soon after, the Conciliation and Arbitration Commission followed this premise to its logical conclusion in refusing to set the basic wage for men and women at the same level. In 1969 the federal Commission finally adopted a principle of equal pay for equal work and in 1972 decided that women were entitled to equal pay for equal work in circumstances where they worked like "women" and, in 1986, to equal pay for work of equal value.

The problematic nature of "pay equity" or comparable value can be seen by the Commission's fear at the importation of a supposedly "foreign" concept. It took the view that the idea of "comparable worth" would "strike at the heart of long accepted methods of wage fixation in this country and would be particularly destructive of wage fixing principles". This is manifestly untrue when considering other industrial processes in Australia (such as the notion of "comparative wage justice", aligning occupation classifications across different industries). Indeed, the introduction of the "minimum rates adjustment process" (MRA process) in 1989 provided an explicit mechanism for ensuring that minimum rates in some awards could be compared with minimum rates in others.

This process was designed to ensure that work undertaken under individual award

---

59 *Rural Workers' Union and United Laborer's Union v Mildura Branch of the Australian Dried Fruits Association (the Fruitpickers Case)* (1912) 6 CAR 61. Unless women worked in "male" occupations to avoid undercutting the men.


61 *Second Equal Pay Case* (1972) 147 CAR 172.


64 An "award" is a quasi-legislative instrument setting terms and conditions across an entire industry (such as the Metal Industry Award) or in a particular occupation (such as the clerical awards). Awards typically regulate the employment of a large number of people who work for many different employers. An award can be made under federal legislation or under state legislation in one of the state systems.

65 The MRA process had clear pay equity outcomes but was not an explicit pay equity process. A "general", "neutral", "universal" process such as this was considerably more acceptable to the industrial tribunals than was an explicitly gendered process such as that placed before the federal Commission in 1986.

classifications was valued appropriately to work done under comparable classifications in other awards. It uses an explicit benchmark in order to compare classifications: the metals award and the building industry award were chosen and a matrix of relativities was established with classifications in these awards. With these benchmarks in place, it became possible to compare work done under an undervalued female award (such as a childcare award) with a traditionally well paid male award (such as the metals award). The process allowed for these comparisons to occur on the basis of work value, even though there was no similarity in the type of work actually performed.

This benchmarking process has had a number of clear advantages for women. First, the centralised nature of the wage fixing system has allowed gains won by powerful industrial interests to be passed on through the system to sectors of the economy with less industrial muscle. This has meant that, internationally speaking, Australia has a relatively small gender wage gap.

Second, explicit benchmarking to an award which is well structured, well remunerated and which has the centre ground in discourse concerning industrial regulation allows women to compare themselves to something which has considerable power and status. It has long been the case in pay equity in Australia that undervalued and poorly paid female service industries have found themselves compared with other undervalued and poorly paid female service industries. The shift from this to a male centre of power is important.

Third, the economy-wide (or at least industry-wide) scope of comparison in Australia means that the practical problems associated with comparisons in jurisdictions which rely

---

67 Berg, supra note 6, at 84 makes the point that male preponderance in metal manufacturing goes back to mythical associations of Hephaestus the armourer and Achilles the warrior. The metals award has traditionally been the benchmark in Australia.

on inter-organisational comparators is not encountered. In a sex segregated labour market where undervalued female occupations tend to cluster in female dominated establishments, a breadth of comparison is crucial.

Having said this, the structuring of pay equity around a male standard has also had a number of deleterious effects. First, it is clear where the norm lies. "Work" is that which is done by a metals tradesperson, working under a federal award and being afforded adequate wages and conditions. The metals tradesperson is generally a full time worker, he has no family responsibilities and he has security of employment. This tradesperson is quintessentially our "artisan" and the benchmarking process has arrived at this "typical" worker.

It is important to realise that this is a powerful position to be in and it is not unreasonable to wish to similarly accord this power to women. But it is unreasonable to expect them to be this male worker in order to achieve this level of power. The MRA process does not ever explicitly say this. On the surface it says "you don't have to be a metal fitter to get paid like one, you can be a childcare worker and you will be paid what you are worth". But what it says underneath is "if you want to be worth anything you have to be as much like a metal fitter as possible". There is nothing in this principle which would allow women to say: I have a family and I wish to work part time and I want adequate wages and conditions and I want security of employment. There is nothing here which will value women's work in our own terms.

We discussed earlier how entitlements for women have had to be actively argued for. This

---

69 See, for example, in Canada, Pay Equity Act 1987 (Ontario) where, despite experiments with proxy comparators, the system remains essentially based around the establishment. See in the UK, Equal Pay Act 1970 (UK).
70 The division of powers for industrial relations in Australia is relatively complex. In general terms, the federal system covers larger employers who have been able to be made respondent to an "interstate industrial dispute". The resolution of such a dispute is a federal award which is binding on the unions and all employers who are respondent to it. By contrast, state awards operate as "common rules". This means that they apply to all employers who fall within their scope of operation. Thus smaller employers would tend to be bound by state awards. Because women disproportionately work for smaller organisations, they tend to be disproportionately found within the state system. Although this is changing in the current political climate, historically the state systems followed the federal system.
is especially true in relation to pay equity where the industrial and political discourse is a constant argument as to how much it will cost industry. The discourse proceeds as if the status quo is natural and right rather than historically constructed and discriminatory and as if the cost of removing discrimination is a matter for legitimate discussion and rightly contingent upon an employer's ability to pay. Benchmarking to a norm always involves the possibility that the historical contingency of the norm will be hidden and the norm, now seen as universal, will be strengthened.

Jan Kainer has articulated this problem with clarity. Attempting to locate pay equity strategy within the liberal program, she points out that many feminist theorists have found "women's right to pay equity [as] ... premised on the views of the male worker" and entailing "a male standard upon which to argue increases for women's wages". Yet Kainer's argument is more subtle than this. She argues that it is possible to see pay equity discourse as actually confronting the male standard because although it clearly refers to a male standard, it is not requiring women to be "just like men" in order to receive equal remuneration but simply requires that women be paid like them to reflect an equally valuable contribution. This is an argument for equivalence, rather than equality where the "reference to the male wage is used to give women what men have and are loath to give up, namely more money" but does not require women to behave like men in order to get it.

This discussion has shown that the use of a benchmark has been instrumental in constituting the subject of labour law and defining the "artisan", the typical worker. As I have argued, however, the use of a benchmark has had important benefits for women and to simply reject it would constitute a serious strategic mistake. What is important is to uncover how the use of the benchmark has operated, how it functions strategically within

---

71 Kainer, supra note 68, at 451.
72 Ibid. at 459.
73 Ibid. at 459. See also, Drucilla Cornell "Sexual Difference, the Feminine, and Equivalency: A Critique of MacKinnon's Towards a Feminist Theory of the State" (1991) 100 Yale Law Journal 2247 discussing "equivalency rights" for women.
74 Kainer, supra note 68, at 460.
the discourse and how its meaning may be transformed to the benefit of women.  

(b) *The subject of anti discrimination law*

In assessing the state of equality in the labour market in contemporary Britain, Linda Dickens points to the liberal notion of formal equality which is embodied in anti discrimination legislation and policies. She describes the "symmetrical approach" which is taken to an essentially asymmetrical problem and, in particular, to the fact that it is a "weakness in the formulation of equality ... that women are at best to be offered equality on male terms and within male structures".77 She says that the sex discrimination legislation offers women "equality in terms of a norm set by and for men and no real challenge to male power or masculinity is being mounted".78 This is because the legislation adopts an explicitly comparative focus and requires not unfavourable treatment but *less* favourable treatment of women relative to men.

The convolutions that such a comparative approach has led to in many jurisdictions, particularly in relation to pregnancy, have been well documented.79 Such convolutions are required where there is no direct comparison available at all (as with pregnancy), where there is no direct comparison to be drawn within an organisation (as with pay equity) or where no direct comparison should, in fact, be drawn (as with sexual harassment).

But it is even more interesting to note Margaret Thornton's point that anti discrimination legislation *bolsters* the male dominated workplace. She argues that:

anti discrimination legislation, through its focus on direct discrimination, actually enhances male domination within the workplace. The benchmark

---

75 For a similar argument, see Diana Majury "Strategizing in Equality" in T Brettel Dawson *Women, Law and Social Change* (Carlton: Captus Press, 1993) at 239.


77 Ibid. at 291.

78 Ibid. at 291. It is also because the equality legislation is administered by judges steeped in the common law, ibid. at 287.

79 Sec, for example, Dickens, supra note 76; Conaghan and Chudleigh, supra note 55; Lucinda Finley "Transcending Equality Theory: A Way Out of the Maternity and Workplace Debate" (1986) 86 *Columbia Law Review* 1118.
standard against which women and others are differentiated is a white, Anglo-Celtic, heterosexual, able-bodied male standard. If women cannot comply with this standard, no discrimination will be found to have occurred. Thus, discriminatory harms arising from sexual segmentation of the workplace, childcare responsibilities and so on can be dismissed because women are not similarly situated to men. Equality, which is bereft of meaning without reference to a specific context, has been deployed by the dominant to reinforce the status quo.80

Thornton recognises that indirect discrimination may permit the "masculinist structure of work to be addressed"81 but argues (with clear justification) that the complexity, difficulty and fluidity of the legal test have made direct discrimination the "favoured form".

Thus, anti discrimination legislation is not only constructed around a workplace which has as its subject the paradigmatic male worker, but it operates further to reinforce this standard. The artisan is not threatened by the advent of anti discrimination legislation: indeed he is accepted by it, valorised through it and strengthened because of it.

This movement will be discussed further in Chapter 2 when we discuss the role of sexual harassment as a part of anti discrimination law and its consequent marginalisation.

**The disembodiment of the worker**

Common sense tells us that workers have bodies, have families, have lives. We know that a worker works in a context, with a history and with a future. Yet labour law describes an entirely abstract individual. This worker, this artisan, is characterised by his disembodiedness. His wife is a ghost precisely because she does not really exist. The ghost exists only to the extent that the real bodily and psychological needs of the artisan can be projected onto her. Joan Acker has said that the "closest this disembodied worker comes to a real worker is the man for whom work is full time and life long and who

80 Thornton, supra note 31, at 301. See also, Conaghan and Chudleigh, supra note 55, at 139 arguing that by directing women to strive for the male norm, the equality principle "becomes central, unchallenged and consequently reinforced".

81 Thornton, supra note 31, at 303.
has his material daily survival needs and children tended to by a woman".82

The interesting thing about this disembodied abstract worker, construed in strictly gender neutral terms. is that he is clearly male. The very idea of neutrality, of ungendered abstraction is a male concept. As Acker observes in relation to jobs: "gender images are implicit in the understanding of the job as a disembodied abstract thing".83 And it is only men who have wives on whom to project the messiness and complexity of everyday life.

Further, there is no question that women in the labour market are embodied. They get pregnant, after all, and they are subject to harassment on the basis of their embodied sexuality. This latter point demonstrates with clarity how women workers are sexualised in the workplace and clearly refutes the notion of the abstract and disembodied worker. The everyday experience of women in the labour market simply belies the notion of a "worker" who merely works. And it is feminist practice to listen to and take account of the varied experiences of women. This issue will be taken up in detail in Chapter 2.

It is also interesting in this context to revisit the comments made by Mary Joe Frug as to how bodies are constructed by legal discourse. In her "Postmodern Legal Manifesto" she shows in some detail how legal rules encode the female body with meaning: through terrorisation, maternalisation and sexualisation. legal discourse constructs the body as made for sex and maternity while existing in fear. At the same time as the law codes our bodies in this way, it denies that it does so, rendering the meaning "natural".84 In the context of the labour market, legal rules code the female body in a specific way. First, they deny that a body exists at all and treat the worker in an abstract way. Second, and only in relation to the female body, they construct it as maternalised (via maternity provisions and discrimination legislation) and sexualised (via sexual harassment legislation).

Frug would say that the encoding of bodies and the inscription and reinscription of sexual

83 Ibid. at 220.
84 Mary Joe Frug Postmodern Legal Feminism (New York: Routledge, 1991) at 129.
difference means that difference cannot be transcended. Frug's question is "not whether sex differences exist - they do - or how to transcend them - we can't - but the character of their treatment in law".85

It is this possibility for reinscription and reinterpretation which means that the fragmented encoding of bodies can have a political program. Frug allows us to see how the embodiment of the female worker (by the visibility of its inscriptions) can allow for the embodiment of the subject of labour law. This embodiment and engendering of work will bring us closer to an analysis of the labour force which reflects the experiences and understandings of all its participants.

This embodiment is very important for the woman subjected to sexual harassment. Her body, at least, cannot be denied. This point will be taken up further in Chapters 2, 4, 5 and 6.

CONCLUSION

The worker, then, is not a neutral being that has an existence independent of the way he or she is viewed and discussed. The worker is a social construct and legal discourse has an important role to play in this construction. This chapter has discussed how this social construction can occur in legal writing and decision making. It has looked at a variety of common techniques which apply across all areas of labour law and which construct the "worker" as male. It has discussed how the gender of the "worker" has been obliterated by the false universal of the ungendered worker (who is clearly male).

We turn now to a discussion of one particular instance of women's presence in the labour market: the question of sexual harassment.

85 Ibid. at 131.
CHAPTER 2

TALKING ABOUT SEXUAL HARASSMENT

*Office at Night* by Edward Hopper:¹ The secretary stands at the filing cabinet, turned towards the room. The boss sits at his desk, coat on, reading papers. The secretary is voluptuous, her lips a slash of red. He is neat, contained. A paper has fallen to the floor. She looks at it. He is oblivious. The scene is sexualised: the aloneness, the body of the woman, the lateness of the hour. As with all of Hopper's work, this is a scene of the ordinary, the commonplace.

Sex is like paperclips in the office: commonplace, useful, underestimated, ubiquitous. Hardly appreciated until it goes wrong, it is the cement in every working relationship. It has little to do with sweating bosses cuddling their secretaries behind closed doors - though lots of that goes on. It is more adult, more complicated, more of a weapon.²

Sexual harassment refers to the unwanted imposition of sexual requirements in the context of a relationship of unequal power. Central to the concept is the use of power derived from one social sphere to lever benefits or impose deprivations in another.³

INTRODUCTION

The worker, as we have seen, is an abstraction that (ostensibly) has no gender and has no sex. Indeed, given the nature of the entity that labour law views as the subject of its attention, there can be no question of sex occurring within the workplace. The workplace participant, the artisan, is essentially asexual. Sexuality arises only after the working day is over, when the artisan returns to his family and the ghostly wife that stands behind him.

¹ Office at Night, 1940. Walker Art Centre, Minneapolis.
Yet this description is patently false. Any person who actually does participate in the workforce knows that the workplace is often sexualised - whether for good or for ill. Workers, despite the abstraction of the law, are embodied. What is curious is that one of the only types of sexuality in the workplace that is recognised by the law is transgressive.

Sexual harassment means that workers have bodies. It means that workers have a sex. Harassment inscribes the previously asexual body of the artisan/worker with a new sexual identity. And this identity is one of coercion and oppression.

This inscription of oppression does not lead us to conclude that there should be no sex in the workplace or that all sex at work is presumptively damaging or oppressive. It is simply that our only discourse of sex in the workplace has been in relation to sex which is damaging. And paradoxically, much of this discourse does not even recognise this damage. Sexual harassment cases are replete in references to "horseplay" and "jokes". Thus, sex which is unwelcome or intimidating or coercive is simultaneously viewed as playful or frivolous.

Chapter 4 of this thesis adopts a detailed perspective on this discourse of sex in the workplace by considering a survey set of cases which deals with sexual harassment in a particular context. This chapter will take a more general look at sexual harassment in the workplace as a form of legal recognition that the abstract artisan is a myth. The first section will briefly consider the problem of harassment which, until the mid 1970s, was a

---

4. The only other instance where sexuality is recognised in the workplace is in relation to pregnancy. The ambivalent relationship of labour law to pregnant women and the difficulties that feminists have had in conceptualising how best to deal with a workplace manifestation of difference has been well documented. See, for example, Lucinda Finley "Transcending Equality Theory: A Way Out of the Maternity and Workplace Debate" (1986) 86 Columbia Law Review 1118; Joanne Conaghan "Pregnancy and the Workplace: A Question of Strategy" in Anne Bottomley and Joanne Conaghan (eds) Feminist Theory and Legal Strategy (Cambridge: Blackwell, 1996). One of the interesting insights in relation to pregnancy in the workplace is that a pregnant woman is something which cannot be seen in a place of work. see Anti Discrimination Board of NSW Why Don't You Ever See A Pregnant Waitress: Report of the Inquiry into Pregnancy Related Discrimination (Redfern: Anti Discrimination Board, 1993). Although pregnancy in the workplace is crucial in determining the way in which the artisan has become embodied, it is beyond the scope of this paper and will not be further discussed.

problem which essentially had no name. The second section will look at how this problem became coded into legislation in Australia and the current state of the law in New South Wales, both in the anti discrimination jurisdictions and elsewhere.

The third section moves to consider why anti discrimination legislation finds it so difficult to tackle the deep problem of harassment. why the "liberal promise" has failed women when it comes to safety in the workplace. This discussion places sexual harassment very squarely within the mainstream context of women in the labour market and argues that it is impossible to consider an individualised response to instances of harassment without an appreciation of the structural inequalities which pervade the workplace.

I. THE NAMING OF SEXUAL HARASSMENT AS SEX DISCRIMINATION

When Catharine MacKinnon published Sexual Harassment of Working Women in the late 1970s, sexual harassment was an experience which had not often been named or coded as a legal harm. It was a violation which was both "invisible" and "inaudible" to society and to the law. it was something that simply "happened to women".

The experience of harassment as described by women places it in the context of exploitation and power. The experience of women is not that they lack a sense of humour or that they are unable to participate in "horseplay". Their response is that conduct of this nature is demeaning and humiliating and that it prevents them from full and adequate participation as a worker. Of course, harassment is not experienced in the same way by all women. In Australia, for example, Aboriginal women and women from non-English speaking backgrounds are in an already disadvantaged labour market position. Their

6 The term is from Margaret Thornton The Liberal Promise: Anti Discrimination Legislation in Australia (Melbourne: Oxford University Press. 1990).
7 MacKinnon. supra note 3. at 1. Note our earlier discussion of how law is created in language and how language creates the subject of law. This is the same movement whereby it is asserted that naming can change experiences of conduct and can shape the meaning of those experiences. The rhetorical processes of decision making will be taken up further in relation to sexual harassment in Chapter 5.

33
experience of harassment from this perspective reflects a complex interplay (that is not simply "additive") between their race or ethnic origin and their sex.

This naming of the problem, so crucial for women, must not, as MacKinnon argues, be mistaken for its first existence. Sexual harassment of working women has existed from the first forays of women into the workforce. In The Secret Oppression: Sexual Harassment of Working Women, Backhouse and Cohen describe the historical roots of the modern day concept of sexual harassment. In their account, harassment was rife during the industrial revolution, where concern with the "morality" of workers failed to address the real questions of exploitation and abuse. Abuse in factories, as well as abuse in domestic service was coded primarily as a "moral" failing or as a destruction of the chastity of young girls. Any legislative protections for women, such as they were, focused on the prevention of seduction and the preservation of a woman's virtue.

The crucial step taken by MacKinnon and by various courts in the late 1970s and early 1980s was that the harm of sexual harassment, as told by women, was recognised as a form of discrimination. This step was important because it moved away from the moralistic tone of previous attempts to proscribe sexual exploitation. The "harm" of harassment in discrimination terms is not that a woman may have lost her virtue, but that she has been denied the opportunity for her full personhood in the workplace. This is a move from protection to autonomy - or from chattel to citizen. On MacKinnon's analysis, the harm envisaged by sexual harassment is "harm to a woman's claim to equality, not to a notion of 'morality'."

---

9 MacKinnon, supra note 3, at 28
11 Ibid. at 69.
II. REMEDIES FOR SEXUAL HARASSMENT IN AUSTRALIA

Legislation in Australia has mirrored to a large extent legislative and jurisprudential developments in the United States, Canada and Britain. Each Australian state and territory has its own anti discrimination statute and the Sex Discrimination Act 1984 (Cth) applies at a federal level. Subject to some exceptions, most women in Australia can utilise the federal jurisdiction.

Since O'Callaghan v Loder was decided by the NSW Equal Opportunity Tribunal, it has been clear that sexual harassment has constituted sex discrimination for the purpose of the discrimination statutes. When the Sex Discrimination Act was enacted it included a specific prohibition on sexual harassment and most subsequent state acts have included sections of this sort. The NSW legislation, which is one of the oldest anti discrimination statutes in the country, was also recently amended to include a specific prohibition on sexual harassment. Although the statutes now specifically render sexual harassment unlawful and do not require liability to be teased out of sex discrimination provisions, in some cases complainants have argued both that sexual harassment under the sexual harassment provisions has occurred as well as that sex discrimination in the terms and conditions of employment has taken place. This allows complainants some flexibility in formulating their cases. The question of whether "non sexual" but gender-related

---


15 Now s.22A of Anti Discrimination Act 1977 (NSW).

conduct should be taken into account in determining whether sexual harassment has occurred would seem to be precluded by the terms of the legislation.\textsuperscript{17}

As it is beyond the scope of this paper to give an overview of the legislation and jurisprudence in each jurisdiction in Australia, the provisions of the \textit{Sex Discrimination Act} will be considered in some detail below by way of example.\textsuperscript{18} There has, unfortunately, been very little appellate court consideration of the meaning of harassment and the High Court of Australia has never directly considered the issue.

\textit{Definition of sexual harassment}

The \textit{Sex Discrimination Act} provides that sexual harassment\textsuperscript{19} will occur if:

(a) a person makes an unwelcome sexual advance, unwelcome request for sexual favours or engages in unwelcome conduct of a sexual nature; and

(b) a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated.

Generally speaking, conduct of a sexual nature has been construed broadly. It can include verbal or written conduct as well as touching or other gestures. In the federal Act, there is

\textsuperscript{17} See the argument of Vicki Schultz "Telling Stories about Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Case" (1990) 103 \textit{Harvard Law Review} 1750, that Title VII of the US Civil Rights Act was always intended to ensure the breakdown of job segregation of sex, regardless of whether the conduct was "sexual" or "desire" oriented or based on the undermining of women because of their gender. Schultz notes that, in the US, "there is nothing in the language or purpose of [Title VII] itself that requires or intimates an emphasis on sexual conduct". at 1732.

\textsuperscript{18} The federal \textit{Sex Discrimination Act} has been chosen because the unfair dismissal cases discussed in Chapter 4 are in the federal jurisdiction. It should be noted, however, that the jurisdictional requirements for accessing the two pieces of legislation are not the same. Very simply, all women in Australia can use the \textit{Sex Discrimination Act} (with some exceptions) while the jurisdictional basis for unfair dismissal claims differs according to whether the termination is alleged to be unlawful (all women) or unfair (all women covered by federal awards employed by constitutional corporations and various other situations).

\textsuperscript{19} Section 28A (commenced operation in January 1993 replacing the earlier definition in s.28). The various state statutes contain different provisions. The \textit{Anti Discrimination Act} of Queensland contains an unusually detailed definition (ss.118-120) although in the context of a very broad area of proscription.
no requirement that the conduct be persistent or repeated: "an" unwelcome advance or request is sufficient under s.28A.²⁰

It is not clear whether the conduct itself must be objectively sexual (that is, a reasonable person would perceive it as sexual) or whether it must be subjectively sexual and, indeed, whose state of mind is at issue (that is, whether the harasser or the victim must perceive it as sexual). This can arise in the context of conduct which is threatening but without any overt sexual component (such as overbearing physical postures or loud shouting). In such a case, a woman who has a fear for her sexual safety may well view the conduct as of a sexual nature. In Clifford v SBS, a decision of the Human Rights and Equal Opportunity Commission, Sir Ronald Wilson found that the respondent's conduct was "boorish and overbearing" but it was not "of a sexual nature". The test involved was not made explicit and the Commissioner was of the view that, in the circumstances, the complainant had not perceived the conduct as sexual until later, after the death of the harasser, with the prompting of her therapist. A myriad of questions arises from this case concerning what is "sexual conduct", who must view it as such and when.

Whether conduct is "unwelcome" will be a question of fact to be determined in every case. In some cases which have dealt with purportedly consensual "affairs",²¹ there has been a finding that sexual harassment has not occurred. In others, particularly where the complainant is young, the Commission has been prepared to find that harassment had taken place.²²

Although there is no legislative warrant for this distinction, the categorisation of conduct into "quid pro quo" harassment and "hostile work environment" harassment does occur and the cases tend to fall into one or other category.

In relation to the state of mind of the harasser, there is no statutory requirement for the harasser to have intended any particular consequence. The conduct will be harassment if a ²⁰See also Hall v Sheiban (1989) EOC 92-250.
²¹See, for example, Ashton v Wall (1992) EOC 92-447, holding that the test was whether the acts were unwelcome at the time they occurred and not how they were viewed in retrospect.
²²Aldridge v Booth (1986) EOC 92-177.
reasonable person would have anticipated that the victim would feel offended, humiliated or intimidated. Despite the slightly bizarre prospect of determining what a "reasonable harasser" would consider, the human rights tribunals seem to have paid little attention to this requirement. In many cases, the inquiry tends to centre around whether the conduct was "unwelcome" or not.

**Where is sexual harassment proscribed?**

The federal legislation proscribes sexual harassment in employment, education, the provision of goods, services and facilities, the provision of accommodation, land transactions, clubs, and in the administration of Commonwealth laws and programs.

However, by far the most frequent use of the harassment legislation occurs in the area of employment. Indeed, sexual harassment makes up a significant proportion of all sex discrimination complaints.

Although the sexual harassment provisions are available for both men and women, there are constitutional reasons in the federal sphere which mean the coverage of men is quite limited.

In employment, sexual harassment is proscribed when it occurs between employers, employees, prospective employees, commission agents or partners. Further, "workplace participants" (such as employees of different employers in the same workplace or a

---

23 Compare the ACT legislation imposing an objective standard from the viewpoint of the victim.

24 The situation is slightly different in each state and territory but note the Queensland legislation which proscribes sexual harassment of one person by another with no further limitations.

25 In 1997, 48% of all complaints under the *Sex Discrimination Act* were sexual harassment complaints; *Human Rights and Equal Opportunity Commission Annual Report 1997*. Over 83% of complaints under the Act are in relation to employment.

26 Under the Australian constitution, there is no general legislative power in the Commonwealth in relation to human rights. The source of power must always be some other head of power such as the power to implement international treaties (the external affairs power), the power to regulate corporations or the power over Commonwealth servants. These limitations mean that men are only covered by the legislation where they are Commonwealth employees or where there is a Commonwealth program involved, as well as in other defined situations. Women, because of constitutional reliance on the *Convention on the Elimination of All Forms of Discrimination Against Women*, can use the legislation more generally. There are no such constitutional limitations in relation to the various pieces of territory or state legislation.

27 In addition, members of bodies conferring occupational qualifications, members of trade unions, and employment agencies are also covered.
commission agent and an employee) must not sexually harass each other. The scope of
the legislation is wide and employees are, per se, prevented from harassing each other.
regardless of whether the conduct has any nexus with the workplace.

Vicarious liability

The Sex Discrimination Act includes broad vicarious liability provisions which hold
employers responsible for the acts of their employees unless they can show that they have
taken all reasonable steps to ensure that the conduct did not occur. These provisions have
been interpreted strictly to require employers to do far more than simply institute a "paper"
system of harassment prevention. Tribunals have required employers to take steps which
involve not only the promulgation of policies but their dissemination, communication and
the specific education of employees in relation to harassment in the workplace. Importantl
the tribunals have also imposed substantial duties on trade unions to take
steps to prevent harassment in the workplace or to be both personally or vicariously liable
for the actions of their members.

Outcomes

In general, most human rights tribunals have arrived at favourable outcomes for women
victims of harassment and have found for complainants in a majority of cases. In a survey
of cases from 1988 to 1997 in all human rights jurisdictions in the country, the tribunal
found for the complainant on 86% of occasions and dismissed the complaint on 13% of
occasions.

30. Recently, liability has been imposed on trade unions who have contributed to the maintenance of

advising clients.
Despite findings in favour of complainants, however, tribunals have been reluctant to award significant sums in damages and the highest sums awarded tend to hover around the $50,000 mark in very serious cases. Recently, however, a policewoman who was harassed during her employment was awarded $120,000 by the Victorian tribunal. This is a substantially greater sum than those awarded in past cases.

**Practical considerations**

The major practical difficulties with cases in both state and federal jurisdictions have been that damages awards have been extremely low and that the process takes a long period of time with substantial delays occurring in most jurisdictions. As a complaints-based jurisdiction (although ostensibly a cheap and expeditious one) the onus is on the individual to present and fund a case. Union support for women who have been harassed before human rights tribunals is not strong and it is extremely rare to find a woman in a human rights sexual harassment case funded and supported by her union. In addition, in the federal jurisdiction, the unenforceability of Commission orders poses an additional practical problem for complainants.

Although the anti discrimination legislation is not the only avenue through which to seek redress for sexual harassment in the workplace, it is by far the most common. Common law tort claims for negligence and some intentional torts have been run, although this has

---

32 See *Hopper v Mount Isa Mines* (1997) EOC 92-879 ($58,000); *Horne v Press Clough Joint Venture* (1994) EOC 92-640 ($51,000); *Bevacqua v Klinkert (No.2)* (1993) EOC 92-452 ($50,000). Note that, anecdotally, settlements in cases that do not proceed to hearing are significantly higher.


34 Unions have been more supportive of large scale sex discrimination claims: see *Finance Sector Union v Commonwealth Bank* (1997) EOC 92-889.

35 The High Court held in *Brand v HREOC* (1995) EOC 92-662 that the Human Rights and Equal Opportunity Commission was exercising a judicial function contrary to the Constitution. Legislation to rectify this situation by conferring the jurisdiction on the Federal Court (which brings with it another set of practical, mainly cost, difficulties for complainants) is currently before the Parliament; see *Human Rights Legislation Amendment Bill No.1* 1997 (Cth).
been primarily in the absence of a statutory discrimination remedy. The cost of Supreme Court proceedings would be a deterrent in the majority of cases.

III. THE FAILED PROMISE

Structural conditions for harassment

The "liberal promise" has not been realised in relation to the harm caused by sexual harassment. Although legal cognisance of harassment has been taken in the form of anti discrimination law, sexual harassment still presents as a serious workplace issue and its fundamental harm is not easily addressed by the individualised avenue presented by these laws.

In considering why this may be so, and why the anti discrimination legislation finds it so difficult to tackle the deep problem of harassment, attention must focus on the role that sexual harassment plays in the context of the participation of women in the labour market. It is inevitable that an individualised response to instances of harassment without an appreciation of the structural inequalities which pervade the workplace will not only fail to address those instances but will leave in place the structural factors which enabled them to occur.

In Sexual Harassment of Working Women, Catharine MacKinnon recognised the structural basis of sexual harassment. She said that it is necessary to locate harassment

---

16. See Barker v Hobart City Council, unreported jury decision, 12 July 1993, Supreme Court of Tasmania, discussed in Therese MacDermott "The Duty to Provide an Harassment Free Work Environment" (1995) 37 Journal of Industrial Relations 495 at 507. Note that the complainant was not able to proceed under a discrimination statute as there was no state legislation in Tasmania at the time and the federal legislation does not apply to municipal employees. Note that the possibility of claims in tort has been raised in all jurisdictions, see Irene Mackay and Jill Earnshaw "Sexual Harassment in the UK - A Wider Perspective" (1995) 3 International Journal of Employment Studies 53: Argun Aggarwal Sexual Harassment in the Workplace (Toronto: Butterworths, 2nd ed. 1992). Aggarwal discusses tort claims as well as the civil action for breach of fiduciary duty.

17. Note, however, that for some women at an executive level who may have to leave their employment, the damages awarded by human rights tribunals (maximum of approximately $50,000) may not be adequate compensation for loss of a highly remunerated job. Women in this position may wish to pursue common law remedies. The complainant in Barker, supra note 36, received $120,000 in compensation.
"empirically in the context of women's work" which demonstrates that "the structure of the workworld that women occupy makes them systematically vulnerable to this form of abuse". In Chapter 2 of her book she outlines this structural context in which "women work 'as women'". The matters she discusses - occupational segregation, vertical segregation and pay inequities - have been outlined in Chapter 1 of this thesis. Her conclusion clearly links women's relative position in the labour market to their vulnerability to harassment:

sexual harassment of women can occur largely because women occupy inferior job positions and job roles and at the same time sexual harassment works to keep women in such positions. Sexual harassment, then, uses and helps create women's structurally inferior status."

Indeed, some commentators have even suggested that sexual harassment is a form of "gatekeeping" to ensure that women retain their marginal place in the labour market and that entrenched male privilege is not disturbed. If (as will later be argued) the public world of work in which men have carved out a position of privilege is not only coexistent with but premised upon a private, inferior, domestic sphere, then there is a clear interest in maintaining this realm. When women become "interlopers" or cross the border, then there is an inevitable rearguard action to protect the integrity of the male realm.

**Sex in the workplace**

In one highly paradoxical way, sexual harassment is important for women workers. The ungendered artisan, as we have seen, is a mythical construct which has serious material implications for working women's lives. The presence in the workplace of a clear refutation of this construct - whether through the body of a pregnant woman or through

---

38 MacKinnon, supra note 3. at 4.
39 Ibid. at 9-10.
40 Patricia Hughes "The Evolving Conceptual Framework of Sexual Harassment" (1993) 3 Canadian Labour and Employment Law Journal 1 at 19 indicating that sexual harassment is a way of reminding women of their inferior status. Indeed, Hughes argues that, although all men do not sexually harass women, nearly all men benefit from its existence.
41 Ibid. at 28.
the sexualisation of the workplace - undermines and complicates this abstraction. Although this presence may lead to a "gatekeeping" function as described above, the disruption of woman means that there is the potential for the disrupted workplace to be put back together - or rewritten - in a new way.

Patricia Hughes has stated that "through sexual harassment, women are reminded of their status of being a "body 'for' sex with men", a status which by its constant presence transcends or overrides women's employment position or status as worker". While this is certainly true, the harm lies deeper than women workers being defined solely through their sex. If Hughes is right, then the desirable aim is for women to become the artisan, to be defined solely qua worker. Yet an abstraction such as this, a disembodied, asexual abstraction, cannot be the type of worker that women aim to become. Women know that they have a sex and a gender, they know that they cannot easily dissociate their family lives from their work lives. To be simply "workers" would mean that women would need to adopt the understanding of the workforce which they have had no part in writing. And it would be profoundly contrary to the experience of women for whom living legal abstractions is often an anathema.

In fact, Mary Jo Frug's work points out the shifting, complicated nature of sexuality and, indeed, the whole notion of gender. The inscription of women's bodies as being 'for' sex with men is not immutable. The very indeterminacy of language and the way in which we use it allows these inscriptions to be made over and over again.

We must be clear, however, that the argument for the disruptive influence of sexual harassment is not an argument that sexual harassment does not also have serious detrimental material and psychological implications for working women. There is no question that sexual harassment has both economic and emotional implications which sustain and maintain the subordinate position of women in the workforce relative to men.

---

42 Hughes, supra note 40, at 20 citing Mary Joe Frug Postmodern Legal Feminism (New York: Routledge, 1991) at 129-130.
43 See, for example, Robin West "The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory" (1987) Wisconsin Women's Law Journal 81 arguing that women experience the world in a distinctly connected and weblike way.
Yet, the explicit existence of sex is important. The unequivocal stated fact that workers are women and men, as well as workers, is also important. If, historically, the "worker" has been male and the universal has been deeply gendered, then the disruption of this equation by the unruliness of sex may have benefits that cannot be denied. As Rosemary Pringle puts it:

It is not sufficient merely to assert that secretaries are workers (as much feminist literature has done) and that sexuality and femininity have no place at work ... Opposition to sexual harassment is only one component of a sexual politics in the workplace. It needs to be supplemented with analyses of the way sexual pleasure might be used to disrupt male rationality and to empower women. Merely to drive sexuality from the workplace leaves the ideology of separate spheres effectively unchallenged.**

Sexuality cannot be 'banished' from the workplace. Attempts to treat it as an 'intruder' are basic to the negative representation of women/sexuality/secretaries. It is by insisting on its presence, making it visible, asserting women's rights to be subjects rather than objects of sexual discourses that bureaucracy can be challenged.***

This can be a dangerous assertion and it must be treated with care. The argument is not that conduct constituting sexual harassment is acceptable, desirable or should be maintained or that transgressive or coercive sexual relations can be elided into consensual ones. Nor is it an argument that the statutory or common law claim for damage suffered as a consequence of this conduct is inappropriate. It is an argument, however, that how we talk about sexual harassment is important.

If we say that sexual harassment is an "inappropriate" activity because "sex does not belong in the workplace" then we run the risk of bolstering and valorising the separate spheres ideology (discussed below) which permeates and delineates the paradigmatic male

---

** Pringle, supra note 2, at 96.
*** Ibid. at 100.
**** Jenny Morgan, supra note 12, at 106.
workplace. And we run the risk of defining women's sexuality according to the norms set down by men and according to their values. If we see sex in the workplace purely as sexual harassment, then we deny women any agency in relation to their sexuality and we bolster the liberal fear that the presence of woman - the presence of the private in the public - will be simply destructive and must be relegated to the home from whence it came. Again, as Pringle puts it, "making sexuality visible involves an exploration of what it means to be sexual subjects rather than objects". 47

If, on the other hand, we talk about sexual harassment in terms of coercion and intimidation (that is, in terms of abuse of power) then we do not have to banish sex entirely from the workplace. And in doing so, by refusing to accept the liberal division of family and market whereby sex is relegated entirely to the family, we are in a position to reinscribe the worker and the workplace with values and assumptions which belong to all workers.

Sexual harassment and sex segregation in the workforce

A recent article of Vicki Schultz has challenged this "sexualised" notion of what sexual harassment is about.48 Schultz argues that the recognition of sexual harassment as actionable sex discrimination was an important step forward. MacKinnon's arguments were instrumental in this progression. However, Schultz says that the courts have subsequently adopted this "sexual desire-dominance paradigm" without due consideration for the overall significance of gender-based harassment in the workplace. This type of harassment, whether based on overtly sexual behaviour or not, operates as a "gender guarding, competence undermining function". She argues cogently that harassment, "by subverting women's capacity to perform favoured lines of work ... polices the boundaries of work and protects its idealised masculine image".49 The under-inclusive perspective of the "sexual" paradigm means that this "gatekeeping" type of function is less visible.

47 Pringle, supra note 2, at 101.
49 Ibid. at 1691.
To oversimplify: Schultz is arguing that the "gender" in sexual harassment has been neglected in favour of the "sexual" and that there is no statutory warrant for this. This thesis argues that the full contextualisation of sexual harassment - as conduct directed against women as women, against women as workers and against women as sexual beings - is crucial in order to understand the gatekeeping function which Schultz describes. It is also crucial in terms of understanding which remedies may be most advantageous for women. This thesis argues that the way that we talk about sexual harassment is pivotal in understanding how women are able to view themselves as autonomous industrial citizens. Consequently, it is important that, in revisioning and rethinking how we talk about harassment, we do not collapse either aspect out of view. Sexual harassment without "sex" or sexuality does not take into account the sexualised nature of women's oppression in the workplace. It also obscures the "how" or the mechanism for harassment. But sexual harassment without an understanding of gender-based, competence focused harassment is underinclusive and misses the "why" of much harassing conduct.

In assessing how the revisioning discussed above is to be achieved, we need to begin with an understanding of how the private/public dichotomy is conceived in labour law.

_The public and the private_

The nature of the "public/private" distinction is crucial to many areas of law and no less so in labour law. The distinction between private and public life appears in a number of guises: it is sometimes drawn between the family and the market, sometimes between the state and the realms of both family and market.⁵⁰ In all of these incarnations it has been

---

⁵⁰Ruth Gavison "Feminism and the Public/Private Distinction" (1992) 45 Stanford Law Review 1 at 21 points out that the economic realm is generally considered an element of the private for liberal political theorists while Marxists would regard it as an element of the public.
subjected to a great deal of criticism, particularly from feminist theorists.\textsuperscript{51}

The "public/private" distinction has become something of a stock character in feminist analysis and in critical legal theory. But it is undoubtedly an elusive character. The meanings of the so-called dichotomy are myriad and there is no clear understanding of why it operates as such a tenacious social construct. In labour law, it has been customary to see the distinction as one between the sphere of the market (private, unregulated, laissez-faire) and the sphere of government (public, regulated). This is the distinction employed by Karl Klare in an influential piece.\textsuperscript{52} Although Klare gestures towards feminist concerns with the distinction between the world of "work and government" and the world of the family, he concludes that "the most important usage in labor law ... has to do with the distinction between the state and civil society".\textsuperscript{53}

Klare's analysis of the rhetorical uses of the distinction in labour law is acute. He points out how reasoning from premises regarding the "privateness" or "publicness" of a particular phenomenon can lead to conflicting results and concludes that the distinction has no reality but simply comprises a set of "imageries and metaphors" designed to "organise judicial thinking according to recurrent, value-laden patterns".\textsuperscript{54} This analysis is similar to that discussed by Ruth Gavison when she refers to some uses of the distinction as "conclusory" by which she means that they function as a rationalisation for decisions rather than as a justification.\textsuperscript{55} Klare also makes the important point that the ideological function of the distinction is to mask the essential connection between the spheres\textsuperscript{56} and.

\textsuperscript{51} Much has been written on the subject. See the sources quoted in Gavison, supra note 50. Gavison, supra note 50, at 22-28 categorises the reasons as to why feminists are concerned with present uses of the distinction as follows: (i) that privatisation of women has resulted in their marginalisation (ii) that ascribing certain characteristics to each sphere has resulted in the continued oppression of women (iii) that the private and public realms are not autonomous as they are commonly viewed to be (iv) that there is an important normative difference between the two realms and (v) that the division of life into these realms is seen as inevitable or natural and, hence, desirable.


\textsuperscript{53} Ibid. at 1359.

\textsuperscript{54} Ibid. at 1361.

\textsuperscript{55} Gavison, supra note 50, at 11.

\textsuperscript{56} Klare, supra note 52, at 1417.
thereby to deny workers power and participation in industrial life.  

But what Klare's analysis does not do is to indicate why it is that "the most important" usage is the distinction between the state and civil society. For women, historically excluded from and oppressed in both, this may be a distinction without a difference. For women, the distinction which has the most direct and real effect on their lives is clearly that drawn between the realm of work and the realm of the family. While Klare is plainly correct in saying that the distinction can be simply an "after the fact rhetorical device used to justify political conclusions", it is important to appreciate that the rhetoric operates differently with respect to women and justifies different political ends. The core ideological function of the distinction with respect to women is to deny or limit the opportunities of women in the public world of the workforce.

This ideological function has been explored in depth by Frances Olsen. She, like Klare, views the distinctions (however conceived) as part of a radically dichotomised way of thinking about the world which is problematic because it "externalises conflict through compartmentalisation". This insight about the language of dichotomies reflects a wariness of the ability of such "either-or" concepts to capture the variety of complex human relationships. Olsen regards the ideological function of the distinction between the family and the market as dual. The split which arose when men's work was removed to the factory system simultaneously glorified and devalued the home. Thus, "while the dichotomy tended to mask the inferior, degraded position of women, it also provided a degree of autonomy and a base from which women could and did improve their status."

---

57 Ibid. at 1418.
58 Ibid. at 1362.
60 Ibid. at 1569.
61 See, for example, Martha Minow Making all the Difference: Inclusion, Exclusion and American Law (Ithaca: Cornell University Press. 1990) who observes at 236 "how crudely each duality divides varieties and ranges of perceptions and experience".
62 Olsen, supra note 59, at 1499.
63 Ibid. at 1500.
Carole Pateman has described the relationship between the private sphere of the family and the civil sphere as a *necessary* one.\(^6^4\) Her thesis is that the construction of sexual difference and the construction of the private sphere is central to civil society.\(^6^5\) She argues that "the civil, public sphere does not come into being on its own, and the 'worker', his 'work' and his 'working' class cannot be understood independently of the private sphere and his conjugal rights as a husband."\(^6^6\)

It is important to take this historical and ideological link into account when considering the regendering of the workplace. The relationship raises questions about whether the workplace or work can in fact be gendered (or regendered) since it is predicated upon the existence of a private sphere into which emotion, bodies and genders can be displaced. Thus, the artisan can go to work only because the ghost irons his shirts and cooks his food.

**Breaking down the distinction**

This distinction between the "public" and the "private" is a shifting one. The slippage between the spheres and the reinterpretation of boundaries is posited as an important step for the position of women. This slippage is the reason why sexual harassment can be seen as being destructive of the artificial barrier between home and market which has operated as an ideological barrier to women's participation in the workforce. Commentators have noted that sex is traditionally seen as belonging to the private world of the family and not the public world of work. Sexual harassment is proscribed because it has transgressed this categorisation.\(^6^7\) As Jenny Morgan suggests, the courts have seen sexual harassment as wrong, not because it diminishes women's autonomy and safety in the workplace, but because it occurs in the wrong place.\(^6^8\)

Other commentators have also suggested that mere condemnation of sexual harassment

---

\(^6^5\) Ibid. at 16.
\(^6^6\) Ibid. at 135.
\(^6^7\) Olsen, supra note 59. at 1551.
\(^6^8\) Morgan, supra note 12. at 94 citing Olsen, supra note 59. at 1551.
does not recognise the opportunity which it presents to renegotiate the boundary between the private and public realms.\textsuperscript{69} The point is perhaps best articulated by Rosemary Pringle who says that \textit{"merely to attempt to drive sexuality from the workplace leaves the ideology of separate spheres unchallenged."}\textsuperscript{70}

Thus, there are two main aspects of the renegotiation of the private/public that can be played out in talking about sexual harassment. The first is Pringle's point that if we attempt to remove sexuality from the workplace then we allow a male construction of the sexuality of women to flourish. A discourse about sex in the workplace would allow women to write their own role in the workplace and construct their own sexuality rather than being the passive recipients of unwelcome harassing behaviour. It would allow women to be defined other than as sexual victims in the workplace or mothers in the home.

The second is the ability for such conduct to drag the private into the public.\textsuperscript{71} As discussed above, the feminist critique has meant that the line between the spheres has blurred. This has some extremely positive consequences for working women for whom the ideological divide had rendered their work status at best secondary and at worst non-existent. One example may be in the sphere of pay equity. As discussed in Chapter 1, traditionally, where women have brought with them into the market the skills that they may have used at home - such as "caring" or "communication" - then these have been significantly undervalued by comparison with so called "male" skills which do not have their genesis in the private sphere. It is the nexus with the private that devalues these skills. The more this line comes to be blurred, however, and the more that the private is dragged into the public, then the less power the private (or the ascription of the private) will have to diminish value. The skills born in the private may then be valued objectively and remunerated accordingly.

\textbf{However, this analysis cannot be taken too far.} There are some senses in which the

\textsuperscript{69} See Morgan, supra note 12; Martha Chamallas "Consent, Equality and the Legal Control of Sexual Conduct" (1988) 61 \textit{Southern California Law Review} 777; Pringle, supra note 2.

\textsuperscript{70} Pringle, supra note 2, at 96; cited in Morgan, supra note 12, at 106.

\textsuperscript{71} See Morgan, supra note 12, at 107.
notion of "privacy" is very important to women: for example in relation to their right to control their bodies and in relation to their ability to choose their sexual relationships and orientation.72 Indeed, in some societies where there is a high degree of state surveillance, privacy is a positive good. Thus, the "blurring" discussed above is not a claim that there are no senses in which privacy is not beneficial to women. Jodi Dean makes this point by conceiving of the private, not as a sphere to which one can retreat or in which one is placed, but as a boundary which one creates on an ongoing basis.73 Dean discusses the idea of privacy as something which can protect women’s interests by demarcating a boundary between actions which are acceptable and those which are not.74 Thus, "once freed from the traditional private sphere, women are able to use privacy as a protection, as a boundary establishing the appropriateness of particular performances."

**Talking about sexual harassment**

The naming of sexual harassment was an extremely important step. The word "sexual" meant that the private was there in the workplace, visible for all to see. As MacKinnon argued out, conduct of this sort had clearly existed for many years, but it had never been explicitly named.

The legal coding of sexual harassment as discrimination was also important. It did not rely on a protective or paternalistic notion of the prevention of sullied womanhood, but on the basis of the diminution of women’s rights and opportunities in the paid workforce. It pointed to the issue of women’s equality and revealed how harassment operates to prevent women from challenging the subordination under which they laboured. Although aspects of it may have been underinclusive, it was successful in rewriting harassment as a human rights abuse within the workplace.

---


74 Ibid. at 352.

75 Ibid. at 360.
But the discrimination rhetoric may not be entirely successful in capturing the harm of sexual harassment while remaining sufficiently nuanced so that the private and public blurring that harassment exemplifies can be used to the benefit of women. First, the discrimination action is an extremely individualised remedy. Although a statutorily proscribed conduct (as opposed to the private wrongs of the law of tort), discrimination tends to require individual complainants to negotiate the boundary between public and private on their own. Second, the "wrongdoer" is also conceived in highly individualised terms with sexual harassment as the aberrant conduct of an individual. Third, discrimination discourse sets up comparisons with male benchmarks (see, for example, under MacKinnon's "difference" analysis) that, in some senses, bolster these benchmarks as the paradigmatic norm of workplace culture. Fourth, the use of human rights tribunals sets up a type of "women's remedy" which is institutionally and conceptually distinct from the industrial remedies which apply to workers in other situations. Finally, the human rights remedy utilises a discourse of "rights" which, although a potentially powerful strategic tool for women, can limit the scope of change.

The major problem with the discrimination analysis is that it has no positive tools for

---

76 In some jurisdictions, practical problems with the individualised remedy render its effectiveness somewhat limited. In Australia, for example, the problems with accessing the discrimination jurisdictions include (a) cost (b) delays (c) limited availability of legal aid (d) formality of proceedings (e) unenforceability of federal decisions for constitutional reasons (f) the size of damages awards. Indeed, the most useful function of the tribunal proceedings is often as a point of leverage in settlement discussions.

77 Colleen Sheppard "Systemic Inequality and Workplace Culture: Challenging the Institutionalisation of Sexual Harassment" 3 Canadian Labour and Employment Law Journal 249 at 250.

rewriting the workplace in a way that is more conducive to the reality of its workforce. It has no way of realigning the male generated norms of the industrial system with a changed demographic. The best it is able to do is to provide an "add on" remedy for a problem which has arisen due to border crossings of women who have moved into the public sphere from their place in the private. As Fay Faraday has written of the human rights remedy for harassment:

[Human rights litigation] assumes that once women have entered a workplace, equality is served by treating men and women in the same way. In practice, this means that women must accommodate themselves to the social and institutional norms already in place at the establishment, although women have had no part in shaping those norms."

What is needed is a broader range of ways of speaking about sexual harassment that truly challenges the structural bases which allow it to flourish. This is not to say that the anti discrimination remedy (and common law and informal remedies) are not useful and necessary. There is no question that an individual mechanism of redress is crucial. It is simply to indicate that they may not be sufficient, particularly in the longer term. This broader perspective looks to two matters. The first is the forum for decision making and the role of the mainstream industrial system in the prevention of sexual harassment. The second is the conceptualisation of sexual harassment as a generalised safety issue that utilises mainstream industrial safety mechanisms. Both of these will be discussed below.

The major focus of the broader approach is on women inscribing their experiences onto

---

70 Although the human rights jurisdiction may have a limited ability to effect change at the structural level, it can recognise the impact of structural factors. A number of sexual harassment cases in the human rights tribunals have specifically recognised the difficulties of women in all male environments and have responded appropriately by awarding high levels of damages: see Hopper v Mount Isa Mines (1997) EOC 92-879 (awarding nearly $50,000 to the first female apprentice at the employer's mine) and Bebbington v Dove (1993) EOC 92-543 (noting the difficulties of a young girl in an all male trucking company and finding that "it appeared from the evidence that it was almost as though the male employees had the view that they were entitled to treat the complainant in this fashion because she was attempting to work in an all male culture in the transport and trucking industry which was a culture that was rough and required a person to cope").

80 Faraday, supra note 78. at 55.
the workplace and utilising techniques that focus both on their specificity as women and on their sameness as workers. Thus, for example, sexual harassment may happen primarily to women, but industrial injury happens to all workers. The legal system must take cognisance of a form of behaviour that is both the same as falling off a girder and different to it. Sexual harassment will not stop until women are able, not to take the workplace as they find it, but to shape it in their own image - as workers and as women.

Thus, in regendering the workplace, and making it fair, representative and reflective of the experiences of all workers, the task of decision makers, workers, scholars, unions and employers is to conceive of women not as "women" or "workers" but as "womenworkers" or as "industrial citizens". Citizenship has been defined as follows:

In classical definitional terms, citizenship is the status determining membership of a legally cognisable political community, although it involves more than a passive belonging. First, it includes abstract rights that are legally recognised and apply equally to all citizens, at least in a formal sense. Second, the concept includes a more subtle layer of meaning that operates to qualify the first, relating to the degree of participation within the community of citizens...

The notion of "industrial citizenship" draws upon this definition but is applied to an industrial community, rather than a political community. It carries with it a similar range of connotations. These include the classic liberal rights of citizenship - equality, liberty and fraternity. It also includes a notion of participation and inclusion in the processes that go towards defining the contours of the industrial community. In so doing, a full industrial citizen will have his or her experience and concerns reflected in that community and will have a role in defining its values and norms.

81 Jeffrey Minson Bureaucratic Culture and the Management of Sexual Harassment (Cultural Policy Studies, Occasional Paper No.2. Institute for Cultural Policy Studies) at 1 refers to the status of women as "equal industrial citizens".
82 Margaret Thornton "Embodying the Citizen" in Thornton (ed), supra note 6, at 200.
83 Note that the notion of political citizenship is one which feminists have critiqued as not adequately encompassing the "personhood" of women and also contemplating an abstract, disembodied citizen which is profoundly masculine; see Thornton, supra note 6.
The notion of industrial citizenship carries with it a mechanism for understanding whether a particular policy or practice is appropriately designed to assist a particular group.\textsuperscript{84} For example, instead of asking "does sexual harassment harm women because it treats them differently from the way it treats men and therefore constitutes discrimination", we can ask "does this behaviour diminish the ability of women to fully participate in the workforce as an industrial citizen". Although the answer to the first question may well also answer the second, such a discourse would preclude us conceiving of sexual harassment in a "protective" way. Such a paternalistic or moralistic view of sexual harassment would not accord women the full citizenship rights which they deserve. It also prevents to some extent the convoluted arguments of sameness and difference over which feminists have agonised. Women are both the same and different. Much like Catharine MacKinnon's "subordination" approach to discrimination, the question here asked looks to the material effect of a particular behaviour or course of action on women's lives.

To begin the dialogue about the industrial citizenship of women workers in relation to sexual harassment two mechanisms are proffered - first, the utilisation of mainstream industrial remedies\textsuperscript{85} and, second, the conceptualisation of harassment as an industrial safety issue. The first issue is discussed in detail in Chapters 4 and 5, where a survey set of sexual harassment cases in the mainstream unfair dismissal jurisdiction is considered. These cases conceptualise the harms of sexual harassment in a different way to cases decided under the human rights legislation. The mainstream forum and the mainstream legislation are ways in which women's experiences of the workplace can be spoken of in the same terms as the concerns of male workers. This is not to say that the human rights remedy is not important and material, only that the unfair dismissal remedy also needs to be considered in terms of the experiences of women in the workplace. It is surprising how little has been written on women and unfair dismissals. This thesis provides, in a small

\textsuperscript{84} For example, in relation to the notion of political citizenship, Ruth Lister has argued that citizenship is an "invaluable strategic theoretical concept for the analysis of women's subordination and a potentially powerful political weapon in the struggle against it". Ruth Lister \textit{Citizenship: Feminist Perspectives} (London: MacMillan, 1997) at 195.

\textsuperscript{85} MacDermott, supra note 36, at 522-523 indicates that there is merit in the argument that genuine change in relation to sexual harassment can only be effected through mainstream industrial relations institutions.
way, a specific focus on an area which warrants further consideration.

The second issue is one that has been raised by a number of commentators, both in Australia and in overseas jurisdictions. In Australia, Therese MacDermott has considered the methods by which sexual harassment may be conceived as an occupational health and safety issue. MacDermott shows that, although the general aims of occupational health and safety are broad and encompass the physical, social and mental wellbeing of all workers, in practice regulation:

has shown a preponderant concern for the physical structure and environment of the workplace and the impact of this on occupationally related illnesses and accidents. This is apparent in the conventional focus on issues such as guarding dangerous machinery, minimising exposure to dangerous substances and providing protective apparatus.

While not downplaying the importance of these issues, MacDermott describes a reconstruction of this model to highlight the concerns of women. Naming sexual harassment as the "quintessential occupational health and safety issue for women", she describes how harassment can be regarded as a "workplace hazard" that applies potentially to all women and can be equated to other hazards (such as unfenced machinery) which might give rise to an industrial accident. Importantly, she acknowledges that the

"conventional perception of sexual harassment as a discrimination issue involving

See Karen Schucher “Achieving a Workplace Free of Sexual Harassment: The Employer’s Obligations” 3 Canadian Labour and Employment Law Journal 171; Mary Cornish and Suzanne Lopez “Changing the Workplace Culture through Effective Harassment Remedies” (1995) 3 Canadian Labour and Employment Law Journal 95; Faraday, supra note 78. Indeed in Canada, the Supreme Court of Canada has indicated that the most important remedy for harassment is “a healthy work environment” Robichaud v The Queen [1987] 2 SCR 84 at 94 cited in Cornish and Lopez, supra, at 99.

MacDermott, supra note 36, at 515.

the aberrant conduct of individuals masks the manner in which the very structuring and organisation of the work environment and the culture of the workplace contribute to an environment in which sexual harassment occurs."

Colleen Sheppard's description of this workplace environment brings these "risk" factors to the fore. For Sheppard, structural considerations such as the isolation of women in male dominated work, the sexualisation of traditionally female jobs, the impact of racism, sexist supervisory structures and the precariousness of women's job security create an environment at which women are at risk of sexual harassment." It is only by understanding and addressing these institutional factors that sexual harassment can be eliminated. As Faraday has put it, these remedies "avoid the decontextualisation of human rights discourse, which frames the legal relevance of sexual harassment in terms of a conflict between abstract rights"."

For this reason it is crucial to engage with the mainstream industrial relations and workplace safety systems. No real change can occur on the periphery. The naming of sexual harassment as a workplace injury brings it to the mainstream of the industrial system. And, even more so than the individualised unfair dismissal remedy discussed in Chapters 3 and 4, the workplace safety model is a particularly appropriate model for dealing with structural risk. As MacDermott points out, the safety model requires compliance prior to the occurrence of any injury and allows the system to address wider structural matters in a proactive way rather than simply responding to individualised cases." Of course, the reactive arm of any safety system, the workers compensation

89 MacDermott, supra note 36, at 517.
90 Sheppard, supra note 77. see also Cornish and Lopez, supra note 86, at 102-103. For an excellent discussion of the utility of sexual harassment mechanisms for women working in the male dominated construction industry in New York City, see Elvia Arriola "What's the Big Deal? Women in the New York City Construction Industry and Sexual Harassment Law, 1970-1985" in D Kelly Weisberg Applications of Feminist Legal Theory to Women's Lives (Philadelphia: Temple University Press, 1996) at 779. Arriola also makes the point that issues of class, colour and sexuality contribute to the perspective from which harassment is experienced for the women she interviewed.
91 Faraday, supra note 78. at 62.
92 MacDermott, supra note 36. at 517. She notes at 523 that the unfair dismissal regime is also an individualised regulatory mechanism.
system, would allow for individual recompense for injury suffered."

MacDermott outlines in some detail how the general duties set out in the occupational health and safety legislation and associated regulations and codes of practice can be utilised to address the risk of sexual harassment. She refers to some basic "minima" for the establishment of a risk-free environment: these include a sexual harassment policy that is maintained and enforced, an effective grievance handling procedure, effective education procedures, specific personnel and prevention strategies." One might also add that, in addition to these minima, the specific risk factors to which Sheppard refers could be addressed. Some of these could be addressed at an organisational level, such as the isolation of women in all male environments. Thus compliance in a high risk environment (such as a mine or a restaurant) would need to involve specific attention to these risk factors.

The empowering factor about a process of this nature is that the link between sexual harassment and the institutional risk factors is explicitly made and that these risk factors themselves can be addressed. Even if an employer is acting within the law in employing women on short term contracts in an all male environment, these risk factors would need to be taken into account in addressing the question of sexual harassment in a systemic way. MacDermott concludes that:

if the preventative aspect of occupational health and safety regulation were to be taken to its logical conclusion in the context of sexual harassment a major reframing of work arrangements and power arrangements within a workplace would be required ... [women's] disadvantaged position within the labour market makes women vulnerable to sexual harassment and perpetuates a work environment in which sexual harassment is likely to occur.

---

93 See Schucher, supra note 85, at 179 referring to the development of workers compensation claims for stress related disorders consequent on harassment. See also Arjun Aggarwal Sexual Harassment in the Workplace (Toronto: Butterworths, 1992, 2nd ed) at 273ff for a detailed discussion of the granting of workers compensation for disablement due to stress suffered as a result of sexual harassment.

94 MacDermott, supra note 36, at 518.
health and safety regulation of sexual harassment should acknowledge the social and economic context in which sexual harassment occurs and foster strategies that address the role of women generally in the labour market."

Because it fundamentally addresses the nexus between harassment and the structure of the labour market, this approach has the potential to rewrite the norms on which labour law and our workplaces are premised. By recognising these issues as being other than marginal, as being "integral to the proper functioning of the workplace" this approach renders it impossible to conceive of this proper functioning without ensuring an harassment free environment."

Finally, the concurrence of the two mechanisms is also possible. Although cases of this sort are rare, at least one major decision has dealt with the question of sexual harassment as a health and safety issue within the framework of the mainstream industrial jurisdiction. In Australian Nurses Federation v Minister Administering the Tasmanian Services Act a union notified a dispute to the Australian Industrial Relations Commission because it felt that a sexual harassment complaint made by one of its members had not been sufficiently investigated by management. The union framed its claim as one of occupational health and safety because in order for the Commission to have jurisdiction to arbitrate an interstate industrial dispute, the matter at hand had to come within the scope of an earlier dispute. There had been an earlier finding of dispute in relation to occupational health and safety. For this reason, the claim was framed in terms of the provision of a "safe working environment" free from sexual harassment.

The Commission found that it had jurisdiction to hear the matter and that the union's claim fell squarely within the scope of the earlier dispute. It found that keeping employees safe from sexual harassment was clearly a health and safety issue. Interestingly, apart from

95 Ibid. at 521-522.
96 Schuchter, supra note 85, at 180.
97 Other writers have attempted to utilise health and safety discourse as a strategy in related areas of labour law, see for example Joanne Conaghan "Pregnancy and the Workplace: A Question of Strategy" in Bottomley and Conaghan, supra note 4, in relation to pregnancy in the workplace.
disciplinary proceedings recommended in relation to the harasser. the Commission found that it had the responsibility to consider the claim for a safe working environment for the future, quite apart from the outcome of the disciplinary proceedings.

This case is an indication of the way forward. It conceives of sexual harassment in terms of the safety of employees, and, in particular, in terms of the safety of all employees in that workplace. The case proceeds on the initiative of a union and in a collective jurisdiction. It utilises the mainstream dispute initiation process and the offices of the Commission to seek a remedy.99

CONCLUSION

As we have seen, it is important to utilise the mainstream of industrial regulation in order to prevent the marginalisation of women's workplace experiences. It is also important to begin to talk about sexual harassment in a way that recognises its structural bases and allows women to enter into the workforce upon their own terms. This "rewriting" will be addressed again in Chapter 6 of this thesis. I now turn to an analysis of the other mainstream industrial forum in which sexual harassment has been raised: the unfair dismissal jurisdiction.

99 Every jurisdiction has a dispute notification procedure through which a trade union can notify the relevant commission of a dispute concerning an industrial matter with the employer. The commission then has a statutory duty to conciliate and, if conciliation is unsuccessful, to proceed to compulsory arbitration.
CHAPTER 3

THE UNFAIR DISMISSAL REMEDY

The object of the remedy must be a "fair go all round".¹

INTRODUCTION

Remedies for the arbitrary termination of employment have traditionally been remedies designed for the circumstances of male workers who have been dismissed. This is evident in their genesis and, at least in Australia, in their current interpretation and utilisation. Unfair dismissal jurisprudence looks at what is or is not acceptable within a workplace: what would be a "valid reason" for dismissing a worker on the one hand and what would be "harsh and unfair" on the other. This body of case law bases its account of what is "acceptable" or what may constitute "industrial justice" on the typical paradigm of the worker which was discussed in Chapter 1.

In Australia, unfair dismissal laws are now (and have always been) creatures of industrial arbitration and have developed from the type of "rough" industrial justice that is the hallmark of the arbitral approach. The move away from the strict approach of the common law courts in deciding termination cases purely on the basis of breach of contract to the new arbitral/statutory jurisdiction of unfair dismissal may have appeared to usher in a new, informal and accessible system for the worker, particularly in the employment context where differences in power and resources between the parties to litigation are so marked. Yet, while the administration of "informal justice" may bring significant benefits to male workers, the utilisation of such remedies by women and their utilisation by men in circumstances where there are elements of sexist conduct in the workplace serves to highlight again the construction of the "male worker" as the "worker" and the "male workplace" as simply the norm. This is evident at both state and federal levels even where, in the federal jurisdiction, cases are mostly heard, for constitutional reasons, by judicial

¹ Re Loty and Holloway v AWU [1971] AR 95.
registrars in the Federal Court.  

This chapter will examine the history and context of unfair dismissal arbitration and legislation in Australia as a precursor to the examination of a set of unfair dismissal sexual harassment cases in Chapter 4. It will start with a discussion of the history of the unfair dismissal remedy internationally and in the United Kingdom. Developments in Australia will then be outlined, together with a discussion of the peculiarly "male" nature of the arbitral system from which they sprang. The chapter will conclude with a brief discussion of the current system and the nature of the decisions which are customarily made by the tribunals.

I. A BRIEF HISTORY OF THE UNFAIR DISMISSAL REMEDY

At common law, the remedy for an arbitrary or unfair termination is an action for damages for breach of contract. On general contractual principles, a repudiation of the contract by the employer (such as a wrongful dismissal) entitles the employee to treat the contract as at an end and sue for damages.  

Dismissal can be wrongful and in breach of contract if it is, for example, in breach of the contractual notice period or if the employer has failed to follow termination procedures contractually provided for.

In Australia, for a brief period of time, the courts held that provisions in awards prohibiting "harsh, unfair and unreasonable" dismissals were automatically imported in the contract of employment. The courts allowed workers to sue for damages for breach of these clauses. Damages awards in these cases tended to be relatively high as they were based upon the principle that assessment of damages must compare the plaintiff's position.

---

2 The distinction drawn here is between the narrow range of termination remedies available at common law and the broader, fairness based, statutory dismissal remedy. In Australia at a federal level, for constitutional reasons, much of the unfair dismissal jurisdiction is administered by a judicial body, the Federal Court (previously by a specialist federal court, the Industrial Relations Court of Australia). The Federal Court does, however, administer the broad unfair dismissal law. The thrust of the argument here will be the type of judging that is possible when the substantive law is expanded beyond the traditional, common law remedies for breach at termination and whether the broad injunction to an employer not to act "unfairly" in a termination can assist women workers.

after the dismissal with his or her position had the dismissal not occurred.\(^5\)

In general, however, common law remedies were extremely limited and rarely used.\(^6\) In ordinary contract cases, damages tend to be limited, being generally the period of proper contractual notice or the term of a fixed term contract. In addition, damages in breach of contract for distress and disappointment, injured feelings and mental distress are not recoverable.\(^7\) The common law courts were slow and expensive and could not provide an adequate forum for the ordinary worker who had lost his or her job in circumstances which may be considered to be unfair.


Recommendation 119 provided that:

> Termination of employment should not take place unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking establishment or service.\(^8\)

It went on to list what did not constitute valid reasons, including sex, race, colour.

---

\(^5\) See *Gregory v Phillip Morris* (1988) 80 ALR 455; *Lane v Arrowcrest* (1990) 99 ALR 45 and *Bostick v Gorgevski* (1992) 41 IR 452. Although the notion of automatic incorporation was overturned by the High Court in *Byrne and Frew v Australian Airlines* (1995) 185 CLR 410, it is still possible for a contract to expressly or by necessary implication incorporate award terms.

\(^6\) Note that other remedies for unfair dismissal are available including the use of statutory discrimination procedures, an action for wages for work actually performed but not paid and an action for wages due for work performed under a contract or an industrial award. In NSW, there are also remedies for unfair contract (including where the contractual notice provisions are inadequate) which may (in some circumstances) be utilised upon dismissal: see section 106 *Industrial Relations Act 1996* (NSW).

\(^7\) *Addis v Gramophone Co* [1909] AC 488, see *Baltic Shipping v Dillon* (1993) 176 CLR 344. But see more recently *Malik v Bank of Credit and Commerce International* (1997) 3 WLR 95 (awarding damages for loss of reputation for breach of implied term not to damage relationship of trust and confidence) and *Burazin v Blacktown City Council* (1996) 142 ALR 144 (awarding damages for distress and for breach of implied term to protect employee from harassment and loss of job satisfaction).

\(^8\) Section 2.
participation in union activities and so on. Section 4 required that a worker have a right to complain about his or her termination to a neutral body.

Building on the 1963 Recommendation, the 1982 Convention and Recommendation provided for - or purported to provide for - general standards for the termination of a worker's employment. In contradistinction to its first breath, however,9 - This convention applies to all branches of economic activity and all employed persons - the Convention in its second breath allows signatories to exclude many women workers10 - A member may exclude ... workers engaged under a contract of employment for a specified period of time or a specified task ... workers engaged on a casual basis for a short period.

As with Recommendation 119, the Convention provides that employment is not to be terminated unless there is a valid reason for doing so11 and indicates a range of reasons which will not be valid. These include: union membership or activity, race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin. The reasons specifically include absence from work during maternity leave.12

Further, the Convention and Recommendation provide for procedural steps to be taken prior to termination, including provisions for warning, procedural fairness and dismissal within a reasonable time.13

It is extremely interesting that, although specific mention is made of discriminatory reasons for termination (which clearly contemplate that women are within its purview and are afforded specific concern), the context in which the Convention is written and the types of exclusions which it embodies indicate that structurally it is written for and to reflect the dominant employment patterns of men. It is worth noting that the ILO had

---

9 Article 2.1.
10 Article 2.2.
11 Article 4.
12 Article 5.
13 Article 7 and Articles 7 - 13 of Recommendation.
already produced its Discrimination (Employment and Occupation) Convention No. 111 in 1958 and that at least one commentator has referred to the ILO as having always been in the "vanguard in addressing discrimination against working women".\textsuperscript{14}

This interpretation of the ILO instruments and remedy they suggest is clearly made in the Report of the Donovan Commission in the United Kingdom in 1968. This Report suggested the introduction of a statutory unfair dismissal mechanism partly in the interests of justice and partly from the need to stem a large number of industrial disputes consequent on dismissals.\textsuperscript{15}

The Donovan Report was quite explicit about the type of employee it considered that a remedy should be provided for and why this should be the case:

In reality people build much of their lives around their jobs. Their incomes and prospects for the future are inevitably founded in the expectation that their jobs will continue. For workers in many situations dismissal is a disaster. For some workers it may make inevitable the breaking up of a community and the uprooting of homes and families.\textsuperscript{16}

Although non gender specific, by implicitly adopting stereotypes about work, this statement is not really referring to "people": it is referring to men. Stereotypically, women do not generally build their lives around their jobs. If they work at all, they work for "pin money" or because the children have grown up. They certainly are not the "breadwinner" on whom the family depends. And it would be unthinkable for a woman who had lost her job to uproot her family and husband (what about his job?).

This is not to say that employment security and remedies for arbitrary dismissal are not important and necessary in labour law and relations. It is just useful to notice the type of assumptions upon which these remedies are built. Workers in this view of the world are


\textsuperscript{16} \textit{Report of the Royal Commission on Trade Unions and Employers Associations} (1968) Cmnd 3623 at 142. cited in Macken, O'Grady and Sappideen, supra note 4. at 310.
male; they work in permanent jobs. they have a family and breadwinning responsibilities and they have an expectation of job security. For women. whose employment has always been of a much more precarious sort. these concerns may be less pressing or less relevant.

In the context of the labour market of 1968. the statement of the Donovan Committee could only have been intended to apply to the "real" workers and these real workers were men. And. indeed. when the Industrial Relations Act 1971 (UK) was enacted to embody these provisions. it was only those workers with over two years' continuous employment with their employer who could commence proceedings. As discussed in Chapter 1. women's working patterns differ significantly from men's and the requirement of two years' continuous service is one which women would find it disproportionately more difficult to meet. In the United Kingdom these provisions have been challenged on the ground that they are indirectly discriminatory on the basis of sex. In 1995. the English Court of Appeal found that the provisions were discriminatory and the House of Lords referred the matter to the European Court of Justice where it currently rests.

In Australia. statutory dismissal remedies are of much more recent provenance. Until the early 1990s at federal level. the only available avenue was through the general arbitral jurisdiction of the Australian Industrial Relations Commission. This avenue was accessed by unions notifying disputes to the Commission concerning the dismissal of a member. In order to access this procedure. an employee would have to be employed under a federal award and be a member of a union. They would also have to have the support of the union to take the claim as they would not have had standing as an individual to approach the Commission. Although there were a number of serious constitutional problems in relation

---

18 R v Secretary of State for Employment; Ex parte Seymour Smith [1997] ICR 371 (House of Lords) and [1995] ICR 889 (Court of Appeal).
19 There have. however. been statutory provisions at a state level in most jurisdictions for some time.
to the Commission assuming a reinstatement jurisdiction of this nature.\textsuperscript{20} by the early 1990s it was clear that such a jurisdiction did exist in the Commission and it was exercised frequently.

An important plank of the Commission's approach was the decision in the \textit{Termination Change and Redundancy Case} (TCR Case) in 1984.\textsuperscript{21} This was a "test case" brought by the Australian Council of Trade Unions (ACTU) in relation to redundancy and the termination of employment. In it, the ACTU argued that the ILO Convention and Recommendation embodied a new international standard in relation to unfair dismissals and further relied upon the statutory regime introduced in the United Kingdom. The Commission inserted a "TCR Clause" into federal awards which included provision that the termination of employment shall not be harsh, unjust or unreasonable. The clause also included a procedure by which an employee aggrieved by an unfair termination could raise it with his or her union who could then submit it to the Commission to be resolved by conciliation.

As may be evident, the reliance of this jurisdiction on both coverage by a federal award and union membership meant that it was primarily the province of male workers.\textsuperscript{22} Given that the union density of women is considerably lower than it is for men and given that women belong to unions which tend to have less industrial strength, the possibility of a woman accessing Commission arbitration in relation to an unfair termination is significantly diminished. There was no avenue at all for an individual employee to access the Commission to seek a remedy for unfair termination.

\textsuperscript{20} In relation to the "interstate" nature of the dispute (\textit{Re Ranger Uranium Mines: Ex parte FMWU} (1987) 163 CLR 656; \textit{Re PIU: Ex Parte Vista Paper Products} (1993) 67 ALJR 604), in relation to whether a dispute between an employer and a former employee was an industrial dispute (\textit{Re Boyne Smelters} (1993) 177 CLR 446) and in relation to whether reinstatement involved the Commission in an impermissible exercise of the judicial power of the Commonwealth (\textit{Re Ranger Uranium Mines: Ex parte FMWU} (1987) 163 CLR 656). Note also that the Commission exercised a thriving "beyond jurisdiction" jurisdiction where disputes in relation to termination were arbitrated by consent of the parties.


\textsuperscript{22} Although women did tend to have greater coverage under state awards, it is more likely that they utilised the state reinstatement systems. Nevertheless, these systems also relied on collective standing and the difference in levels of union membership for women would have made a difference.
In 1993 the *Industrial Relations Reform Act* introduced a specific statutory dismissal regime for the first time in federal industrial law. Division 3 of Part VIA of the *Industrial Relations Act 1988* (Cth) was intended to give effect to the *Termination of Employment Convention and Recommendation* and conferred on the Industrial Relations Court of Australia the power to order reinstatement, re-employment or to make an order of compensation. In 1995 jurisdiction was conferred on the Australian Industrial Relations Commission to hear and determine claims under Division 3 of Pt VIA by means of consent arbitration.

The new provisions required that an employer not terminate an employee's employment unless it had a valid reason to do so. A reason could not be valid if, in all the circumstances of the case, it was harsh, unjust and unreasonable. Termination on certain grounds (such as race, sex, disability and so on) was also prohibited. Again, by Regulation based on the Convention, certain employees were excluded from the operation of the Act. These include short-term casual employees and employees engaged on a contract for a specified period or specified task.

II. UNFAIR DISMISSAL TODAY

The 1993 provisions were recently substantially amended by the *Workplace Relations Act 1996* (Cth). Under Division 3 of Pt VIA an employee can ask the Commission to arbitrate if the termination was harsh, unjust or unreasonable (Subdivision B) or can apply to the Federal Court if they have been unlawfully terminated (Subdivision C). For constitutional reasons there is differential access to the two subdivisions, with access to all employees only available to the unlawful termination provisions in Subdivision C. Subdivision B claims are generally referred to as "unfair dismissal" claims and Subdivision C claims as "unlawful termination" claims. Although the mechanisms for seeking redress are quite different for each "stream", for the purpose of this thesis all

---

23 The unfair dismissal jurisdiction in Subdivision B is available only to Commonwealth public sector employees, employees in the territories, federal award employees employed by constitutional corporations and federal award employees engaged in interstate or overseas trade.

24 A person may have both claims and the Act provides a complicated election mechanism.
claims for unfair and/or unlawful dismissal will be dealt with together.

The provisions of Subdivision B are expressed to ensure that "a fair go all round" is afforded to the employee and the employer. The expression "fair go all round" is taken from the oft-quoted early NSW decision of Sheldon J in Re Lory and Holloway v AWU where his Honour conceived his duty to be to ensure that "a fair go all round" or a "fair deal" was provided to the parties concerned and to obtain the objective of "industrial justice". The new federal legislation thus specifically imports the general "fairness" model developed in the state reinstatement jurisdictions and by the federal Commission under the TCR clauses.

The cases appear to consider that this "industrial justice" can be done by a broad application of discretion taking into account all the circumstances of the case. In Re Lory, Sheldon J said that the importance of being able to manage a business (but not the inviolability of this prerogative), the nature and quality of the work, the circumstances surrounding the dismissal and the likely practical outcome of reinstatement must all be considered in the circumstances of the case. In Bostik v Gorgevski the Federal Court thought that the words "harsh, unjust or unreasonable" were ordinary non-technical words "intended to apply to an infinite variety of situations".

The Commission's discretion in determining whether a dismissal is unfair is guided to some extent by the provisions of the Act. Section 170CG(3) requires the Commission to have regard to whether the employer has a valid reason for termination connected with the capacity or conduct of the employee or with the operational requirements of the business.

Although the legislation does not contain a specific procedural "code" for terminations, section 170CG(3) also provides that the Commission must have regard to whether the employee was notified of the employer's reasons, whether he or she was given an opportunity to respond and whether they were warned if performance was the issue.

---

25 Section 170CA.
26 [1971] AR 95.
28 (1992) 41 IR 452 at 459.
Commission is also required to have regard to "any other matter" and precise circumstances of the manner of termination will be relevant to whether, in all the circumstances, a dismissal is harsh, unjust or unreasonable. In general terms, the industrial tribunals have fleshed out the legislative provisions by interpreting the need for procedural fairness to involve consultation with the employee, a warning of unsatisfactory performance, identification of allegations of misconduct and an opportunity to meet these contentions.\(^\text{29}\)

The unfair dismissal provisions do not make a clear distinction between substantive and procedural unfairness. A termination can be harsh and unjust because it was done for an invalid reason or because it was done in a manner which was itself unfair. Generally speaking, however, most cases of this nature focus on the manner or procedure by which a termination was effected. It is interesting that the High Court in *Byrne and Frew v Australian Airlines*\(^\text{30}\) commented that the distinction between substance and procedure has proved "elusive" and that consequently there was no need to examine substance prior to examining procedure.

It is important to note that the onus lies on the employee to show that his or her dismissal was unfair. However, if the employer alleges some misconduct as the "valid reason" for dismissal, then the evidentiary burden shifts to the employer in relation to that alleged conduct.\(^\text{31}\) Thus, in one case where an employee had been dismissed for fighting and there were no witnesses to the fight, the Commission was unable to prefer either of the two employees' stories and the dismissal was held to be unfair because the employer could not discharge the onus of proving misconduct.\(^\text{32}\)

The unlawful termination provisions in Subdivision C can be accessed by all workers not excluded by regulation (see below). They relate to termination without the statutory

\(^{29}\) Note, however, that each case must be decided on its own merits and the particular facts before the Commission, see *Smith v Director General of School Education* (1993) 51 IR 204.

\(^{30}\) *Pastrycooks Employees Union v Gartrell White* (1990) 35 IR 70. Note that a "valid reason" is one which is "sound, defensible or well founded" and not "capricious" see *Shorten v Australian Meat Holdings* (1996) 70 IR 360 at 371.

amount of notice. termination where notice has not been given of large scale redundancies. termination in breach of Commission orders and termination for a "prohibited reason". Prohibited reasons include terminations on the ground of race, sex, trade union membership and so on. Again, where the reason for dismissal is a prohibited reason, the onus shifts to the employer to show that dismissal was for a reason that was not prohibited.  

It is worth noting in this context that section 170CM(1)(c) provides that notice is not required where there has been "serious misconduct". Regulation 30CA defines such conduct to include theft, fraud, assault, intoxication at work and refusal to carry out a lawful and reasonable order of the employer. Sexual harassment is not explicitly mentioned although in certain circumstances it may fall within the definition of assault.

The unfair dismissal procedures (in both Subdivisions B and C) are applicable only in relation to some workers. In general, the provisions apply only to employees. The exceptions in the Regulations exclude workers employed on a casual basis for under six months, those on short term and fixed term contracts, probationary employees and those earning over a certain indexed amount. New legislation currently before the Parliament seeks to further exempt small business from the unfair provisions of the Act. These provisions (and proposed provisions) make access to the jurisdiction differentially available to men and women. The precariousness of women's employment within the labour market means that they are much more likely to fall within the scope of the exemptions. If the small business exemption passes into law, this too will have a disproportionate effect on women workers.

---

33 Section 170CG.
34 In some state jurisdictions such as NSW, "employee" is given a broader meaning by statute. Under the Industrial Relations Act 1996 (NSW), there is both an extended definition of "employee" and a list of "deemed employees" which include cleaners and clothing industry outworkers. There are no such provisions in the federal legislation.
35 Section 170CC and regulation 30. See also in NSW, regulation 5B of Industrial Relations (General) Regulation 1996.
III. DEFINING THE ACCEPTABLE WORKPLACE

The unfair dismissal remedy in all of its various incarnations involves the broadest of discretions. Although there is some legislative guidance in relation to prohibited or discriminatory reasons, the length of notice of termination and the types of procedural steps that should appropriately be taken, the task of the decision maker is above all to decide whether a particular termination has been "unfair" or "harsh, unjust or unreasonable". As discussed above, this task has been described in Australia as a search for "industrial justice" in all the circumstances of the case.

Similarly, in the United Kingdom, the National Joint Advisory Committee charged with the responsibility for investigating the implementation of a new unfair dismissal procedure following ILO Recommendation 119, stated that the tribunal established to hear claims should be given the "maximum flexibility in reaching its decisions". They preferred not to draw up rules of universal application in favour of the "application of common sense and ordinary fairness" and allowing the tribunal the "widest discretion".

This approach involves a Commissioner, tribunal member or a judge dispensing "industrial justice" according to practically unfettered and value-laden assessments of the conduct that has occurred. Although case law develops which provides a guide for the decision maker, the task is to look at the case at hand and to decide, in all the circumstances, whether the employer has acted "unfairly" or "unreasonably" in terminating the worker's employment in the way that it was done.

Manifestly, this role must rely on assumptions, explicit or implicit, about what is or is not acceptable in a workplace. These judgments must draw on the decision maker's common sense and knowledge of the workplace, on his or her assumptions about behaviour, and on his or her view of the scope of managerial prerogative. Inevitably, ascertaining "reasonableness" must draw on how frequently these circumstances have arisen and on how other employers have reacted in similar situations.

In many ways, the notion of what is "fair" is a curiously empty one. It is often possible to point to instances of what we would consider to be "unfair" or harsh, but "fairness" itself is a concept which is so contextual, which is so defined and delineated by what has come before it (particularly in the industrial context) that any determination of what is or is not fair must ultimately be the decision maker projecting his or her own subjective value judgements onto a blank screen. This is not dissimilar to the postmodern claim that all value judgements are subjective and that there is no bedrock of certainty on which to ground various claims. Such a claim is unproblematic, the search for objectivity and certainty is flawed and cannot assist in positing a practical and workable morality. Nevertheless, given the vagueness of the concept, we must ensure that we are aware of what we are doing. Thus, we must first ensure that we understand that "fairness" has no fixed or set meaning and that its finding in any particular case depends on a wide variety of determinants. Second, we must attempt to place the finding in the particular context from which it arises and resist any tendency to universalise. Third, we should listen carefully to the language in which the determination is made to see the assumptions on which it is based. This is because the assumptions, based on repetition and reiteration of the often stereotyped projections of how workers should behave, encode sexist and gendered ideas within their layers.

When decision makers decide, for example, that sacking a worker who has stolen or fought in the workplace is unfair, they are drawing from a set of assumptions about appropriate behaviour in the workplace. They are both enforcing morality and creating a set of mores for how the workplace should be structured and should operate. JM Thomson in "Crime Morality and Unfair Dismissal" considers that the whole of the law of unfair dismissal is about the legal enforcement of morals, in a similar fashion to the way the criminal law enforces the morality of the community.

Thomson categorises the type of behaviour which may justify a dismissal into four groups:

---

(a) dishonest behaviour:

(b) other misconduct:

(c) sexual offences: and

(d) non criminal behaviour

and discusses the type of approach taken by the industrial tribunals to conduct falling within each of these groups. Although there are other types of cases, the sorts of situations that the tribunals have been concerned with are matters such as: stealing and dishonest behaviour, breach of confidentiality, breach of discipline, safety breaches, drunkenness, verbal abuse, destruction of property, fighting at work and conviction of sexual offences. Other situations arise when an employee is ill or is dismissed due to some discriminatory reason such as sex or marital status.

In discussing the types of situations in which the English tribunals have upheld a dismissal in the above situations, Thomson found that it was "inevitable that the employee's behaviour would be judged according to standards generally accepted by both his employer and his fellow workers". Thus, recourse was had to community and workplace standards in judging the fairness or otherwise of any particular dismissal. Indeed, Thomson concludes that "it is perhaps the most serious defect in the present law of unfair dismissal that a dismissal can be reasonable because it reflects strongly held and widespread prejudice". This conclusion would come as no surprise to feminist theorists who have unpacked ostensibly neutral and ungendered concepts such as "reasonableness" and demonstrated that they are, in fact, false universals laden with stereotypical assumptions. For example, many feminist tort scholars have looked closely at the foundational "reasonable man" and realised that a simple name change would not make such an abstraction applicable to both genders. Indeed, the very abstract quality of the reasonable man - sexless, genderless.

38 Ibid. at 465.
39 Ibid. at 467.
featureless - renders him peculiarly male. As Conaghan has put it:

[the gender specificity is not just a linguistic convention, whereby both sexes are denoted by reference to the masculine: the reasonable man is, in fact, male. It follows that the standard he expresses has a significant gender content."

This critique is damaging to the notion that the law of unfair dismissal is equally applicable, equally available and equally relevant to women. The notions used to determine whether a particular dismissal is justified - fairness, reasonableness, harshness - are in themselves empty. They gain meaning from the way in which they are used and the assumptions upon which they are based. These assumptions have been drawn from the type of work that men do, from the type of behaviour that men have engaged in in the workplace and from the attitude of employers to the male notion of permanent employment.

IV. UTILISING THE UNFAIR DISMISSAL REGIME FOR WOMEN

Given the questions discussed in Chapters 1 and 2, it is not surprising that the central individualised plank of the collective industrial system is based on a male view of what occurs in a workplace and what is or is not acceptable there. It is not surprising that the system addresses male concerns and reflects a workplace in which men fight, swear and steal. It is hard not to read the list of cases presented by Thomson (and the cases in Australia are no different) and see a workplace peopled by men.

Yet despite its history and despite the type of theoretical concerns in relation to "open" concepts such as fairness, the unfair dismissal system in Australia has a number of features which work in favour of women accessing the system and which mean that their voices and concerns may have an opportunity to be heard.

The first is that the very openness of the concept of fairness leaves it subject to revision and renaming. If the concept is contentless, and requires inscription by decision makers in

each individual case, then it can be reinscribed in the future. Feminist argument in particular cases can make it clear that the reasonableness is to be interpreted so as to reflect the way of being of all workers. This argument will be considered in more detail in Chapter 5.

Second, the industrial system and the anti discrimination system are becoming closer and more interwoven. The dichotomy between industrial justice for men (the industrial system) and anti discrimination law for women (the human rights system) is breaking down. Human rights tribunals are becoming more cognisant of the industrial context in which many of their cases arise and the industrial relations systems are importing human rights norms into their systems and infusing them into their decision making. This is important to women seeking recognition for themselves as mainstream workers and for their concerns as mainstream industrial issues. This issue will be explored further in Chapter 6 of this thesis.

Third, the fact that the Federal Court hears unfair dismissal cases at a federal level means that there is some accretion of precedent and some transparency of process. Although most cases are dealt with by conciliation in the Australian Industrial Relations Commission or by consent arbitration there, those that do make it to the Federal Court are decided by a judicial decision maker taking into account the same "open" legislation. This is some safeguard for women that "common industrial practice" and the notion of industrial justice are not used to render their concerns and issues invisible.

Beyond these "theoretical" reasons why the unfair dismissal remedy may be advantageous for women, a number of more practical factors also arise. There is a large volume of cases within the unfair dismissal jurisdiction and this allows for far more expeditious remedies in a relatively informal setting. Paradoxically for jurisdictions designed for unrepresented complainants, Australian human rights tribunals are relatively formal in procedure and, in the majority of cases, require legal representation. For example, in the Human Rights and Equal Opportunity Commission, the federal body, pre-hearing procedures are quite informal and pleadings are not required. However, at the hearing itself, parties tend to be
legally represented. In the Equal Opportunity Tribunal of NSW, the pre-hearing procedures are conducted by way of semi-formal pleadings and quasi-judicial procedures such as summons and discovery are often used by the parties. By contrast, the various industrial commissions tend to be informally run with greater opportunities for self-representation and/or representation by union officials.

Of particular concern to complainants is the length of time taken to process their complaints. A complaint made in a human rights commission can take from 6 months to 2 years until hearing. Unfair dismissal claims are required to be lodged within 21 days of the dismissal and the delay before hearing is generally quite short. Conciliations will generally take place within a few weeks and, if these do not succeed, arbitration can occur within a month or so. This process - which is both quicker, less formal and cheaper - is one which women need to carefully consider when reviewing all of the options for vindication of their rights.

Thus, the unfair dismissal remedy may be advantageous to women for both theoretical and practical reasons. For a practitioner advising a client, all relevant factors need to be weighed up. It will be relevant to note the different bases upon which damages are calculated. For example, the unfair dismissal jurisdiction is designed for and adept at awarding money for lost wages but more reluctant - although it has the power to do so - to award damages for pain and suffering. The nature of the decision maker and the type of jurisprudence coming out of a particular body will also be of concern. The type of reasoning utilised by decision makers and the method by which they come to their conclusions (including how consistent this methodology turns out to be) will be factors to be weighed in the balance.

The unfair dismissal remedy must be placed in the armoury of methods to assist women and it must be used strategically and in appropriate situations. Practitioners must listen to

Note that when the Human Rights and Equal Opportunity Legislation Amendment Bill No. 1 1997 (Cth) is finally passed by the Parliament, the hearing function of the Human Rights and Equal Opportunity Commission will be removed and given to the Federal Court. This will render hearings formal, judicial processes and make them far less accessible for complainants. The change in jurisdiction is due to the constitutional inability of the Commission to make binding determinations.
their clients, ascertain their needs and advise them as to the best avenue for pursuing their rights in their particular situations. The purpose of this thesis is not to make this assessment. It is to look at the way in which women are dealt with in the judgments of the unfair dismissal cases and to ascertain how this serves to "construct" what is known as the "worker". Nevertheless, the results of this survey will assist in advising women as to appropriate remedial action and should be considered in any assessment of a woman's options.

It is also important when looking to the industrial system for the protection of human rights to be vigilant to ensure that the baby is not thrown out with the bathwater. It is crucial to remember that there are not two distinct options - utilise a "male remedy" and risk misunderstanding or utilise a "female" remedy and risk marginalisation. One of the main concerns in recent years has been to ensure that the industrial and human rights systems are construed together and are interpreted in light of the same basic principles. This means that a choice of remedies must not buy into the negative perceptions underlying any one system. Thus, it is important not to dismiss human rights tribunals as "women's remedies" and (hence) marginal. It is also important not to dismiss the industrial commissions as "men's commissions" and (hence) insensitive to sexual harassment victims. Human rights tribunals are, indeed, fairly marginal in Australia at present. The lack of constitutionally protected rights means that rights discourse and rights-based litigation is in its infancy in this country.\footnote{It is also under significant threat politically with the conservative Government's campaign to destroy the Human Rights and Equal Opportunity Commission. Note, however, that the Government is none too fond of the Australian Industrial Relations Commission either.} This marginality must be challenged but this cannot occur if the only avenue to vindicate the breach of women's human rights is in these tribunals.

What this means is that we must begin to talk about sexual harassment and the breach of women's human rights in all available fora. We must stress that women are unsafe at work and we must use the language of workplace safety \textit{and} the discourse of human rights. We must reiterate that human rights principles mean that freedom from assault and harassment is a basic requirement of equality and we must use the language of rights \textit{and} the language
of safety. We must do this in all available jurisdictions.

CONCLUSION

In this chapter I have outlined the unfair dismissal remedy and considered the two parameters along which its utility for women may be conceptualised.

First, on both a theoretical and practical level, it is important for women to participate in a mainstream jurisdiction in which mainstream ideas of the "worker" are formulated. Second, for purely practical reasons, the unfair dismissal systems allow women a further choice of remedy. This provides women with an opportunity to respond flexibly to the pursuit of remedies for sexual harassment in the workplace.

In addition, the discussion serves as context and background for the set of unfair dismissal cases dealing with sexual harassment which will be discussed in the following chapters.
CHAPTER 4

A SURVEY OF SEXUAL HARASSMENT CASES

The word 'inappropriate' might be in current fashion, but one thing that might be said about its use is that it covers a wide range of possible conduct, from conduct proscribed by the criminal law, conduct made unlawful by statute which may result in civil penalties to conduct which is merely in bad taste or contrary to the prevailing sense of fashion, like wearing brown shoes with a navy suit or drinking red wine with fish.¹

INTRODUCTION

This chapter looks at a set of sexual harassment cases (the survey set) drawn from one selected jurisdiction and analyses them in terms of a number of parameters. The analysis of these cases in the following chapter reflects the feminist thesis that it is important to pay close attention to the words of decision makers and the way in which these words can shape the outcomes for the applicant and for the idea of the workplace in general.

In the first section, the methodology used in this survey will be discussed, followed by a brief discussion of what is excluded by using this method of investigation.

In the second section, brief "results" of the survey are tabulated and discussed.

In the third section, the cases are grouped into four categories and a discussion of each of these categories is undertaken.

In the fourth section, similar unfair dismissal cases in other jurisdictions are briefly discussed. The cases indicate that there are some significant differences in outcome depending on jurisdiction, although there are similarities in the way in which the issues are discussed.

¹ Chambers v James Cook University, 25/8/1995, Spender J.
In the final section, some brief conclusions are drawn from the cases in terms of outcome: what do the cases tell us about the ability of women to achieve remedial outcomes for harassment at the workplace from within the industrial system?

In Chapter 5, what the cases can tell us about the notion of work, about the definition and construction of the "worker" and about what is deemed acceptable in today's workplace is considered in detail.

I. METHODOLOGY

Since the commencement of the federal unfair dismissal jurisdiction in 1993, and for some small time prior to this, the Australian Industrial Relations Commission (the AIRC) and the Industrial Relations Court of Australia (now the Federal Court) (the IRCA) have made determinations in termination of employment cases where issues of sexual harassment have arisen.

These cases can broadly be divided into two subsets. The first of these subsets is where a person (usually but not always a woman) has been dismissed from her employment because she has been harassed at work. Some of these cases involve constructive dismissals where the complainant has been forced to resign as a consequence of the harassment.

The second subset involves applicants who have been dismissed from their employment as a consequence of their behaviour in harassing a fellow employee or a customer of the employer.

It is important to note that, in a number of the cases, the applicant may have been dismissed for more than one reason. Thus, alleged sexual harassment can play a dominant role, a secondary role or a very minor role.

Sexual harassment cases were selected for this survey for the reasons outlined in the introduction to this thesis. First, the cases were chosen because they provide a good example of the types of issues that women face in the workplace. In addition, sexual
harassment cases are important because they explicitly connect women as women with their status as worker. The survey set contains cases from both "sides" as it were: cases involving the alleged harasser (called the applicant perpetrator in the ensuing discussion) and cases involving the alleged victim (called the applicant victim).

The survey set is drawn from cases in only one jurisdiction and dealing with only one issue; that is, termination of employment cases in the federal unfair dismissal jurisdiction. The limitations of this methodology are discussed below. However, one object of the survey is to consider an issue experienced by women in the workplace within the context of a male driven industrial remedy.

The cases chosen for this survey were selected from the OSIRIS and AustLII internet caselaw databases. These databases purport to contain all decided cases for the period they cover. Although their comprehensiveness may sometimes be in doubt, they are the most reliable complete source of AIRC and IRCA decisions. The vast majority of the cases are unreported in any hard copy full industrial law report.²

The jurisdiction chosen was the federal jurisdiction which involves cases in both the AIRC and in the IRCA. Because the AIRC generally conciliates off the record and consent arbitrations prior to 1996 have been rare, the majority of the cases are decisions of the IRCA.

The set of cases discussed is the set of all cases available on the above databases which involve sexual harassment in unfair dismissal proceedings from 1991 to the end of 1997. There are 51 cases altogether in the survey set. Of these, 46 cases are direct decisions on the termination of employment. The remaining 5 cases are reviews of the decisions of Judicial Registrars, appeals or interlocutory decisions (including a decision for the suppression of names).³

² Some are reported in the AILR series of digested cases. The only case reported in the official Industrial Relations Court Reports is Chambers v James Cook University (No.1 & 2) 1 ICR 596, 620.
³ The degree of appellate scrutiny of these cases is fairly low. In only two cases, Thomas and Chambers, is the decision of the Judicial Registrar reviewed by a Judge of the Court.
The set demonstrates something of a progression from a purely industrial mechanism for dealing with unfair dismissals in the AIRC to the AIRC and IRCA making decisions under the new statutory provisions. Thus, the set includes 7 early cases decided between 1991 to 1994 in which the union notified an industrial dispute to the AIRC. These cases rely on the AIRC’s general dispute resolution power and not on any specific statutory prohibition on the unfair termination of employment. The remainder of the cases are decisions of the IRCA and the AIRC under the new statutory provisions in the Industrial Relations Reform Act and its legislative successor, the Workplace Relations Act.

After the set of cases was determined, the cases were printed from the databases and scrutinised. The following features of each case were recorded:

- the name, date and jurisdiction of the case:
- who decided the case:
- who the complainant was:
- the facts of the case:
- the industry/occupation involved:
- union involvement:
- what statutory provisions were used:
- how the case was decided:
- comments made by the decision maker as to the facts/law:
- the result of the case:
- the remedy given.

In particular, attention was paid to the way that the decision makers came to the
conclusions that they did: whether they relied on assumptions that were not explicit, whether they used standard stereotypical figures and whether they appeared to understand the harm that sexual harassment in the workplace caused to women workers.

In utilising this methodology, the following constraints should be noted.

First, the survey amalgamates cases decided by the AIRC under dispute resolution procedures and cases decided by the IRCA and the AIRC under statutory provisions. The cases have been amalgamated because the same kind of issues are canvassed, although the source of power is different.

Second, some cases deal with situations where a dismissal has occurred solely by reason of an incident of sexual harassment and others where the incident was only part of the reason for dismissal. Where sexual harassment is a very minor or practically irrelevant factor, the cases have been excluded from the survey set. Where sexual harassment is one among a number of factors, this has been noted in the results.

It is also important to realise that the vast majority of matters before the AIRC are dealt with by conciliation and that only a small proportion of cases proceed to arbitration. This may skew the results in some senses, in that it may be that only a certain "type" of case is not amenable to a conciliated outcome. This is unavoidable, however, as matters which are successfully conciliated are not in the public domain and settlements are in the main confidential. The slant that may arise as a consequence of the type of cases that go through to the arbitration stage must simply be recognised.

The fact that the majority of the cases are decided by the IRCA and not the AIRC is ignored for the purposes of the survey set. However, a discussion of a sample of cases from state commissions in Section IV below is undertaken to investigate whether any significant differences are evident in decisions made by arbitral rather than judicial bodies.

The cases are not examined to ascertain whether the human rights jurisdiction or the unfair dismissal jurisdiction provides the "better" remedy for women dismissed as a consequence of an incident of sexual harassment. It is assumed that there will be a range of positive and
negative factors for each. Some of these issues are discussed above in Chapter 3 and many of the negative factors of human rights litigation are discussed above in Chapter 2. Nevertheless, the discussion will provide some indicators of the utility of the unfair dismissal remedy for women workers in respect of conduct constituting sexual harassment. It must be stressed, however, that the unfair dismissal remedy is something of an oblique remedy for sexual harassment. While a human rights tribunal will directly consider the conduct: that is, the sexual harassment, the industrial tribunal must only consider the consequence of the conduct: that is, the dismissal. Thus, for example, it is possible to attempt to achieve a remedy in both jurisdictions.1

In addition, the jurisdictional limitations discussed in Chapter 3 must be taken into account. A large number of short term and casual employees are excluded from the unfair dismissal jurisdiction and many women fall into these categories. Casuals can access the jurisdiction in many cases (where they have been employed for a lengthy period or where the point is not raised in conciliation), however it is important to note that the legislative framework in and of itself excludes many potential women applicants.

Finally, the results are provided for qualitative purposes and are not intended to have any quantitative statistical significance. Although the survey set is the set of all cases in the federal jurisdiction in the relevant period and is not a sample, the purpose of the survey is not to determine how many instances were successful and how many cases were not. While these results are available from the survey, it is not considered that on their own they demonstrate anything of significance. The important factor, again, is the way in which these outcomes have been reached. Nevertheless, Section II below contains a brief tabulation of the basic results of the survey.

---

1 See Dawson v Daqui, 30/1/1996, Ritter JR, IRCA (holding that there was no valid reason for dismissal and awarding $1000 damages) and Dawson v Daqui (1998) EOC 92-913 where the NSW Equal Opportunity Tribunal held that the same complainant had suffered distress caused other than simply by the termination of her employment and awarded her $3000 in general damages for constant sexual harassment over the period of her employment.
II. RESULTS

Basic results

Total cases in survey set
Total cases in jurisdiction (including reviews, appeals and interlocutory decisions) 51
Total cases in survey set 46
Total cases in which applicant was victim of sexual harassment 19 (41.3%)
Total cases in which applicant was perpetrator of sexual harassment 27 (58.7%)

Types of cases
Section 99 dispute notification in AIRC 7 (15.2%)
Unfair dismissal legislation - Judicial Registrar/Judge in Industrial Relations Court 34 (73.9%)
Unfair dismissal legislation - consent arbitration in AIRC 5 (10.9%)
Public sector legislation - Federal Court 1 (2.2%)

Union involvement
Union involved for applicant perpetrators of sexual harassment 11 (40.7%)
Union involved for applicant victims of sexual harassment 4 (21.1%)

Cases in which applicant was victim of sexual harassment (19 cases)
Solely concerning sexual harassment 11 (57.9%)
Applicant resigned 2 (10.5%)
Applicant fired 17 (89.5%)
Applicant a woman 16 (84.2%)
Applicant a man 3 (15.8%)
Total cases 19 (100%)

These cases included 3 reviews of decisions of the Judicial Registrar, 1 application for extension of time to appeal and 1 application for an order to suppress names.
Total successful 14 (73.7%)
Total unsuccessful 5 (26.3%)
Men successful (3 men in total) 1 (33.3%)
Women successful (16 women in total) 13 (81.2%)

**Cases in which applicant was perpetrator of sexual harassment (27 cases)**

Solely concerning sexual harassment 21 (77.7%)
Applicant a woman 0 (0%)
Applicant a man 27 (100%)
Applicant a gay man 1 (3.7%)
Total cases 27 (100%)
Total successful 9 (33.3%)
Total unsuccessful 18 (66.6%)

**Discussion of basic results**

The results set out above demonstrate the following features of sexual harassment cases in the unfair dismissal jurisdiction.

First, the majority of these cases are brought by perpetrators of sexual harassment (who are male in all the surveyed cases) seeking reinstatement/compensation for having lost their jobs as a consequence of their conduct. Victims of harassment are less likely to bring a claim, although whether this is because they are less likely to lose their jobs as a result of the conduct of others, whether they bring their claims in alternate jurisdictions or whether

---

6 Note that perpetrator applicants also have other remedies available to them although they are infrequently (if ever) used in Australia. In the United States, however, one commentator has listed the following causes of action available to an alleged sexual harasser: tortious interference with contract, defamation, breach of contract and other tortious claims such as intentional infliction of emotional distress: see Hope Comisky "Beware of the Alleged Harasser - Lawsuits by Those Accused of Sexual Harassment" (1996) 12 *The Labor Lawyer* 277. Note, however, that perpetrator claims are not new. In 1957 the High Court of Australia considered a breach of contract case involving the summary dismissal of a university lecturer, Sydney Sparkes Orr. for the "seduction" of one of his students. The Court had no hesitation in unpholding the dismissal, which had become notorious throughout the country, see *Orr v University of Tasmania* (1957) 100 CLR 526.
they are less likely to complain cannot be ascertained from the data.

Second, of the men who bring claims for reinstatement or compensation, a significant majority do not succeed with their claims. Again, a majority of these claims dealt with sackings for the sole reason that an incident or incidents of sexual harassment had occurred. In a smaller number of cases, sexual harassment was one of a number of factors contributing to the termination of employment.

Third, of the victims of harassment who bring claims for reinstatement or compensation, the vast majority of them were actually fired by their employer. Only a small minority resigned and argued that they had been constructively dismissed.7

Fourth, of the victims of harassment, a large majority were women, although there were a small number of men. Although the numbers are quite small, women are more likely to be successful than men. Overall, the success rate of victims is high, with almost three quarters of all claims succeeding. Interestingly, although sexual harassment was the sole reason for termination in cases where the applicant was the perpetrator, in cases where the victim was the applicant, there was a significantly higher proportion of cases where there were multiple reasons given for termination.

Fifth, in relation to union involvement, if the 7 cases which stem from section 99 dispute notifications (which can only be made by a registered organisation) are removed, then victims of harassment were represented by unions in only one case. This case was brought by a male victim of harassment who had been fired when sexual harassment had led to fighting in the workplace.8 As discussed in Chapter 1, women have a significantly lower union density than men and their unions tend to be weaker. Nevertheless, it is also possible that unions have traditionally not regarded the unfair dismissal remedy as

7 Although the point will not be developed here, it is interesting to speculate whether this is because the law of constructive dismissal is unduly restrictive to women for whom sexual harassment has rendered the workplace intolerable. Constructive dismissal has been defined as "a departure from employment which, though formally accomplished by the act of the employee is to be regarded in some sense or in some circumstances as a dismissal by the employer". see Greg McCarr "Constructive Dismissal of Employees in Australia" (1994) 68 Australian Law Journal 494 at 495.

8 Ramirez v Kraft Foods, 26/4/95, Millane JR, IRCA.
appropriately used by women in the circumstances which arise in the cases in the survey. The cases where men as perpetrators are involved are sufficiently analogous to dismissal for fighting or swearing cases for unions to recognise their traditional role. In a number of cases, the matter came before the IRCA or AIRC following a sympathy strike by employees protesting the sacking of a colleague. In all of these cases, the colleague dismissed was a man accused of harassment.

Finally, it is relevant to note the occupational and industry context in which the cases occur. There is a great deal of variation in the cases and the full context is often not clear. In one case which dealt with harassment at an aluminium smelter at a remote location, the Commissioner specifically noted the presence of women working at the refinery and indicated that the remote Northern Territory was a "unique and special place". Further, the Commissioner noted that "pornographic pictures can be viewed in numerous rest and crib facilities throughout the plant". Despite this "wild frontier" construction of the industry, the Commissioner found that the behaviour of the perpetrator was inappropriate and refused him a remedy.

Although this degree of explicitness concerning the context of the harassment is rare in the cases, sexual harassment occurred in the following contexts in the survey set:

- Restaurants, cinemas, clubs 8
- Secretarial or clerical in male dominated workplaces (including car sales, doctors surgeries, electronic sales) 8

A discussion of the role of unions in sexual harassment cases is beyond the scope of this paper. This discussion is closely related to the role of unions in assisting women in the labour market more generally. The literature is extensive, but see for example, Marion Crane "Feminising Unions: Challenging the Gendered Structure of Wage Labor" in D Kelly Weisberg (ed) Applications of Feminist Legal Theory to Women's Lives (Philadelphia: Temple University Press, 1995); Marlene Kadar "Sexual Harassment: Where we Stand, Research and Policy" (1983) 3 Windsor Yearbook of Access to Justice 358; Barbara Pocock "Gender and Activism in Australian Unions" (1995) Journal of Industrial Relations 377; Peter Barnacle et al "Unions and Sexual Harassment in the Workplace" 3 Canadian Labour and Employment Law Journal 201. Ericsson v NUW, 16/4/1992, Deputy President Keogh, AIRC.
Male dominated workplaces and industries including factories, refineries, metal workshops

Municipal councils

Public service and post office

Universities and technical colleges

Women appear vulnerable in all-male workplaces (such as factories) and where they are employed as secretaries in male dominated workplaces where they may be relatively isolated (such as car sales or doctors' surgeries). Many of the instances of harassment in factories deal with two male production workers or with women cleaners or office workers. There are numerous instances of harassment in clubs and restaurants, where there may be many women in precarious employment situations supervised by men. Universities and schools also present problems for students, in vulnerable relationships vis a vis their lecturers or teachers.

The vulnerability of women in precarious employment situations and in certain male dominated industries is demonstrated in the cases to some extent although there are few examples of this. This is primarily because employees with precarious employment situations generally do not have access to the unfair dismissal jurisdiction. It may also be unstated in some of the cases where the jurisdictional point is not taken or not contested. In one case where the casual nature of the employment was made explicit, the Commissioner noted that the perpetrator had "control over the work roster for cashiers" of which the victim was one and was able to "influence the amount of work individual cashiers could receive". In another, it was noted that the young woman was on a training programme. It may be that cases involving casual employees are dealt with in the human rights tribunals where there is no jurisdictional requirement of a permanent employment relationship.

Meikle v Franklins Pty Ltd, 2/10/1996, Commissioner Lawson, AIRC.

III. OUTCOMES FROM THE SURVEY SET

The cases in the survey set fall into four broad categories of outcome which will be discussed in turn. Although there are often significant differences within the categories, it is possible to perform these broad categorisations in order to find some common ground between the cases in terms of outcome.

Category 1 - Successful perpetrator applicants

The likelihood of an employee sacked by reason of sexual harassment being successfully reinstated or compensated is fairly low. Only about one third of perpetrator applicants succeeded in their claims.

In reality, however, the proportion of successful applicant perpetrators is much higher. The survey set encompasses only those cases which do not settle in conciliation and which are placed on the record. Although there is no way of quantifying or verifying this claim, the writer has anecdotal evidence that cases involving perpetrator applicants often settle in the applicant’s favour in conciliation. This is frequently because the employer has either summarily dismissed or dismissed the applicant with few warnings following an incident of harassment. In these cases, the applicant generally argues that their dismissal has been procedurally unfair. Although reinstatement is generally not at issue, it is often in the employer’s interests to pay a small amount of compensation rather than to proceed to hearing.

In one case of which the writer is aware, a perpetrator applicant won a settlement from his employer after the Commissioner indicated that it would have been procedurally unfair not to inform the applicant of the name of the person making allegations against him, even though this person was a child.14 Thus, although applicant perpetrators have a small chance of success at hearing, it is generally the case that a dismissal for sexual harassment will inevitably result in a claim being made and some kind of small settlement agreed to.

14 The employer did not have legal representation at the time and accepted this as an accurate statement of the law. The case of Pucio v Catholic Education Office, 17/5/1996, Von Doussa J, IRCA, was obviously not known to the decision maker.
Nevertheless, at hearing, the chances of a successful result for an applicant perpetrator are not strong. The types of cases in which perpetrators have been successful fall into two main groups.

The first is where the harassing behaviour is one issue amongst many or is not "serious". These cases rank or "grade" the types of behaviour which can be seen as being acceptable in the workplace and draw the line in a particular way. Note, however, the decision in AMASCU v Glenorchy City Council where the AIRC ordered that the applicant be reemployed subject to a number of conditions. Although the Senior Deputy President regarded the matter as a "very sorry event" and indicated that the woman involved had the right to protection from "pests", the "reprehensible and offensive" conduct of the applicant was not such as to render his dismissal fair in all the circumstances.

The second group of cases is where the behaviour has been proven but the procedural steps afforded to the applicant prior to termination of employment have been insufficient. In Chambers v James Cook University an extremely abusive course of conduct by a university lecturer involving intercourse with a number of students was not sufficient to warrant dismissal because the charges had not been sufficiently particularised to give the lecturer an adequate opportunity to respond to them. This case was appealed by the University to a Judge of the IRCA and the decision of the Judicial Registrar was upheld.

15 See, for example, Donnelly v Wildwood, 26/4/1995. Millane JR. IRCA. The main issue in this case was whether the employee had been sacked for his union activities. Note also that the respondent was unrepresented and brought very little evidence as to what had occurred. The applicant's story was never properly tested.

16 Till v Swan Hill Pioneer Settlement, 14/5/1996. Murphy JR. IRCA. This case involved a summary dismissal for an incident of sexual harassment and a safety issue. While the Court thought the matter was "finessly balanced", it was not an instance of serious misconduct.

17 8/10/1993. Senior Deputy President Riordan. AIRC.

18 Audison v Woolworths, 31/3/1995. McIlwaine JR. IRCA. holding that the allegations were never put to the applicant in "a proper manner".

19 10/2/1995. Boulton JR. IRCA.

20 25/8/1995. Spender J. IRCA. See also Rigby v Technisearch, 3/5/1996. Marshall J. IRCA. in which a flawed internal investigation during which the applicant was never provided with a copy of the complaint was said to render the dismissal of a university teacher unfair even where the relationship with an overseas student had an extreme possibility of abuse.
Although Spender J made a number of comments concerning the genuine public concern about sexual harassment and the seriousness of the allegations, his Honour still felt that the lack of particularisation rendered the dismissal unfair.

In a similar vein, an employee was reinstated when he was sacked pursuant to a company sexual harassment policy which had not been publicised or disseminated to employees.\(^{21}\) In cases like this, the Court has proven eager to avoid dismissals where there was no warning to employees that their behaviour had been unacceptable, despite the fact that sexual harassment is proscribed by the general law. In *Andrews v Linfox*\(^ {22}\) the applicant relied on the employer’s failure to train him in relation to sexual harassment. In this case, the Court looked at a range of factors which indicated that a sacking in the circumstances would have been harsh and unjust. These included (in addition to the failure to train): the willingness of the applicant to apologise, his good service record, his own recognition that he had “stepped over a line” and the fact that it was a single incident. It is noted that the union was strongly behind the applicant in this matter and had threatened industrial action against the employer if reinstatement did not occur.\(^ {23}\)

One very interesting phenomenon is that the "public" face of the survey set is the successful applicant perpetrator. The only case reported in the official Industrial Relations Court Reports is *Chambers v James Cook University (No. 1 & 2)*.\(^ {24}\) As noted above, this is one of the few cases in which the perpetrator applicant was successful, both at first instance and on appellate review. This is extremely interesting in terms of the construction of the "worker". Judgments have power in relation to the parties in the particular case and in a common law system, through precedent. That is, the words of judges "construct" the workplace through the judgment itself and through the use that is subsequently made of it. Thus, the only "officially" reported decision in a sexual harassment dismissal case is one in which an applicant perpetrator was successful, a situation which the data in the survey

\(^{21}\) *AWU v ACL*, 8/6/1995, Farrell JR, IRCA.

\(^{22}\) 4/12/1995, Murphy JR, IRCA.

\(^{23}\) Note that in this case the harassment was directed against a customer of the employer and not a fellow employee. Reinstatement was, therefore, more practicable.

\(^{24}\) 1 IRCR 596 and 620.
set indicates is an extremely rare occurrence. The perception, then, is that conduct of the sort engaged in by Dr Chambers is acceptable and that the workplace encompasses and tolerates this manner of behaviour.

**Category 2 - Unsuccessful perpetrator applicants**

By far the larger category dismissed perpetrators of sexual harassment are, for the most part, denied a remedy under the legislation.

In many cases it is not clear the basis on which the decision has been made. On one occasion, despite apparent trivialisation of the conduct as "horseplay" and "part and parcel of life", the dismissal was upheld. In another, the apparent right of the employer to terminate the employee's services was considered sufficient to uphold a dismissal.

Again, however, the cases tend to fall into two main groups which are the converse of those discussed in Category 1 above. The first group contains cases in which the conduct itself is said to be sufficiently serious to warrant dismissal and the second contains those cases in which the procedural aspects of the termination are not able to be impugned.

The first group is of cases in which the conduct of the applicant has been so serious as to warrant a dismissal. In *Illardo v Village Roadshow* the Court thought that the termination "teetered" on the brink of being harsh and unfair but found it not to be so because of the "serious infringement" to the "personal integrity" of the victim of the harassment. In *Whitaker v Australia Post* a long series of harassing remarks and conduct towards a number of different women was sufficient to warrant a dismissal. In

*Bryant v City of Fairfield RSL* conduct amounting to indecent assault was such as to warrant a dismissal. In *FMSCEU v City of Hobart*, 27/5/1991, Commissioner Hoffman. AIRC. In other cases, such as *Reader v P&O Catering*, 3/10/1996, Boon JR. IRCA, the dismissal was upheld, despite "not serious" sexual harassment, because of other issues.

*Ericsson v NUW*, 16/4/1992. Deputy President Keogh. AIRC. Again in *Bail v Cadbury Schweppes*, 31/10/1997. Ryan JR. IRCA, the Court found that although there was a range of seriousness in relation to sexual harassment, it was not the role of the court to put itself in the managerial chair. The dismissal was upheld.

16/8/1995. McIlwaine JR. IRCA.

17/11/1995. Boon JR. IRCA.

16/12/1997. McIlwaine JR. IRCA.
warrant summary dismissal and in *Puccio v Catholic Education Office*\textsuperscript{30} the conduct of a teacher in continuing to touch students, in breach of the employer’s lawful orders, was sufficiently serious to warrant dismissal.

In *M v ANU*\textsuperscript{31} the gross misuse of power by a university lecturer against a Chinese PhD student (including a number of incidents of rape over a long period of time) was sufficient to render the dismissal warranted. The Court looked at the nature of the relationship between the supervisor and the student and concluded that “the student’s dependency on the applicant ... is, in my opinion, manifest”. The conduct of the applicant, even viewed in its most favourable light “involved a gross abuse of his position within the university and his position in relation to the student as her de facto sponsor.”

In a similar vein, the Court regarded the breach of trust and ethics involved in a psychiatric nurse’s sexual relationship with the wife of a patient as warranting dismissal.\textsuperscript{32} Although it is tempting to regard these latter two cases are indicating a particular concern for presumptively abusive relationships (teacher/student: nurse/patient), the *Chambers* and *Righy* cases discussed in Category 1 would seem to contradict this.

The second group contains cases in which procedural fairness has been used to uphold the dismissal. In *Fisher v Commonwealth*,\textsuperscript{33} for example, the Court found that it was not harsh or unjust to terminate the employment of a worker where the consequences of his conduct had been carefully explained to him.

Although the cases tend to regard the substantive and the procedural aspects of dismissal as running along parallel axes, in some cases the Court has said that even a procedurally suspect dismissal is warranted in certain, serious, cases. Thus in *Puccio v Catholic Education Office*\textsuperscript{34} the conduct of a teacher in touching children under his care was seen as being so serious that the fact that the names of the children alleging the conduct were

\textsuperscript{30} 17/5/1996, Von Doussa J. IRCA.
\textsuperscript{31} 20/8/1996, Moore J. IRCA.
\textsuperscript{32} *Baxter v Bendigo Health Care*, 28/10/1996, Ryan JR. IRCA.
\textsuperscript{33} 25/10/1994, Tomlinson JR. IRCA.
\textsuperscript{34} 17/5/1996, Von Doussa J. IRCA.
not disclosed to him could not vitiate the fairness of his dismissal. The duty of the school to the children under its care overrode the right of the applicant to know the case against him. Again, in *Beck v Clayton RSL*, the lack of detail in particularising the allegations against the employee did not render the dismissal unfair as the employee knew what he was being accused of when confronted and in *Bryant*, the lack of opportunity to respond to allegations was not fatal because the conduct was itself sufficiently serious to warrant summary dismissal.

Perhaps the best discussion of the substantive and procedural issues involved in the termination of an employee accused of sexual harassment is found in the judgment of Wilcox CJ in *Thomas v Westpac*. This was a case in which an employee had deliberately touched a colleague's genitals at a work lunch in full view of a number of other employees. Other incidents had previously taken place. In looking at the substantive aspects of whether the dismissal was harsh, his Honour considered the facts of the incident and found in favour of the victim's story. He considered the victim's immediate complaint, her discernible distress and the seriousness of the conduct.

In relation to questions of procedural fairness, his Honour considered whether all relevant witnesses had been interviewed, whether the premises had been inspected, whether the applicant had been fully informed of the allegations against him, whether he had been given a copy of the victim's statement, whether he had been allowed to have a representative with him and the conduct of the interview. His Honour concluded that there had been no procedural unfairness in the investigation. In the *Thomas* case, the applicant failed to demonstrate unfairness on either substantive or procedural grounds. It is interesting to note that Wilcox CJ draws a clear line between substance and procedure in relation to matters of this nature. He was of the view that:

Substantive and procedural unfairness . . are separate subjects which have to be separately addressed. It is of course possible for there to be substantive unfairness in making a decision, notwithstanding meticulous adherence to

---

35 31/5/1996. Ryan JR, IRCA.
procedural requirements. It is also possible for there to be procedural unfairness even though the ultimate decision is one that appears justifiable in substantive terms.

**Category 3 - Successful victim applicants**

Almost three quarters of victim applicants are successful in their claims for unfair dismissal.

In the majority of the cases in which victim applicants were successful, the case came down to a matter of evidence and whom the Court believed in the circumstances. The legislation is structured such that if the applicant can show that the reason for dismissal was a prohibited one such as sex, then the dismissal will be unfair unless the employer can discharge the burden of showing that the termination was not terminated because of the applicant's sex. In practice, if the employee is alleging a prohibited reason (such as a complaint of sexual harassment) then the case will come down to a question of evidence as between the applicant's story and the alternate valid reason for termination put forward by the employer (frequently poor performance). Perhaps because of the heavy burden on the employer, most cases involve the courts believing the victim applicant where evidence was contended.

In a number of cases, sexual harassment was incidental or simply part of a wider pattern of unfair conduct. In one case, the applicant's claim that she had been chosen for redundancy because of a prior complaint of sexual harassment was not accepted by the Court but her claim was upheld on another ground (failure to consult). However, the

---

37 See for example Milner v Amtron, 20/12/1994. Staindl JR. IRCA. Note that Catharine MacKinnon in *Sexual Harassment of Working Women* (New Haven and London: Yale University Press, 1979) at 35 writes that it is common for "sudden allegations of job incompetence and poor attitude" to follow rejection of sexual advances and used to support employment consequences.

38 Sealy v Carvene, 7/11/1996. Ryan JR. IRCA. Note that the Judicial Registrar also found that it was "notoriously difficult to substantiate .. allegations [of sexual harassment] where independent objective corroborating evidence does not exist".


40 Goodfellow v Scrymgar Printers, 5/7/1996. Farrell JR. IRCA.
Court has held that sexual harassment need only be *one* factor in order for the dismissal to be invalid.41

It is worth noting that the remedy for a successful victim applicant is usually damages. Awards tend to be low, ranging from $2000 to $18,000. Although damages which took into account suffering, mental distress and humiliation were awarded in a number of cases in the early 1990s, prior to the decision of the full Federal Court in *Burazin v Blacktown City Guardian*42 which found definitively that such damages for "shock, humiliation and distress" were available under the statutory unfair dismissal regime, there was some controversy about whether such compensation was available.

In *Eggleston v Kingsgrove Medical Centre*,43 decided after *Burazin*, the Court awarded $6000 in damages for distress and humiliation and took into account the whole series of events leading up to the dismissal as being relevant to the assessment of damages. All events and incidents of sexual harassment were taken into account as forming the "background to the termination of her employment." In finding "unusual exacerbating circumstances" which would justify the award of damages for distress, the Court found that the history of physical and sexual harassment in its entirety was relevant.

Reinstatement is not a remedy generally granted in these situations. In one case, a male victim applicant was reinstated after a fight which followed an incident of sexual harassment.44 Reinstatement of perpetrator applicants is, in fact, more common. It is often the case, however, that victim applicants do not seek reinstatement as they do not wish to be returned to the scene of harassment.

It is interesting that only a small number of the victim applicant cases deal with the constructive dismissal situation where sexual harassment has rendered the workplace so

42 (1996) 142 ALR 144.
difficult that the victim had no choice but to resign.\textsuperscript{45} Although it is difficult to know, it is a reasonable assumption to make that many women simply choose to resign from an harassing situation, rather than take legal action to seek redress for losing their jobs. Because there is a relatively short time frame to lodge an unfair dismissal application (21 days), it is less likely that a woman who resigns will subsequently be in a position to lodge a claim. In these circumstances, a claim under the human rights legislation with its considerably more generous lodgement period would be the more likely avenue to pursue. There are a much larger number of cases in the human rights tribunals dealing with women who have resigned as a consequence of sexual harassment because the difficulty of demonstrating that a "dismissal" has occurred is circumvented and the course of harassing conduct in itself (apart from a consequential dismissal) can be considered.

\textit{Category 4 - Unsuccessful victim applicants}

Just over a quarter of victims of harassment who take action under the unfair dismissal laws are unsuccessful. This is a significantly lower proportion than the unsuccessful perpetrator applicants. Indeed, of the few unsuccessful victim applicants, a number were unsuccessful for jurisdictional reasons, others in circumstances where the harassment was a part only of the reason for dismissal and others where there was some manifest lack of merit in the claim. Of the five unsuccessful victims in the survey set, two were men, constituting two thirds of the male victim applicants.

Thus, in one early case, a challenge to the jurisdiction of the AIRC was made and the AIRC refused to hear the matter as it was then before the Human Rights Commission.\textsuperscript{46} In another early case, a complaint about not being offered a tenured job (with an associated sexual harassment complaint) resulted in the dismissal of the complaint but a strong

\textsuperscript{45} \textit{Dawson v Daqui}, 30/1/1996, Ritter JR, IRCA. But see recently the case of \textit{Italiano v Bethesda Hospital}, 28/6/1998, Parkinson JR, which falls outside the survey set but which contains interesting comments concerning constructive dismissal. This was a case where a gay hospital worker resigned following persistent harassment from other staff. Parkinson JR found that this was a termination at the initiative of the employer (despite the resignation) because the employer's acts were of "sufficient seriousness and proximity" to the act of resignation. Because of this, the acts of the employer can be said to have "initiated" or "set in train" the termination of the applicant's employment.

\textsuperscript{46} \textit{ATAIU v Deloraine}, 23/4/1991, Commissioner Merriman, AIRC.
recommendation by the AIRC for the university to find the applicant a tenured position.\textsuperscript{47}

In another case, a female victim made allegations against her female boss that were found by the Court to be manifestly unsubstantiated and the dismissal was upheld.\textsuperscript{48}

In a common pattern of events for male applicants, a male employee was sacked for fighting following an incident of sexual harassment and the dismissal was upheld on the basis that the fighting was a serious incident.\textsuperscript{49} From the cases, it appears that a not untypical reaction for men when faced with harassment is to respond with violence. This then leads to dismissal or to other serious disciplinary proceedings.

In the final case in this category, Broadbent \textit{v} Carvene,\textsuperscript{50} sexual harassment was one element among many for which the Court found no evidence and the case was decided on other grounds.

These cases demonstrate that it is extremely rare for a meritorious claim of sexual harassment by a victim applicant to be dismissed by the Court. In the majority of victim applicant cases, the Court is prepared to grant a remedy.

\section*{IV. COMPARABLE CASES IN OTHER JURISDICTIONS}

Very similar issues arise in other jurisdictions and courts and tribunals have performed much the same task in relation to deciding what is and what is not acceptable conduct in the context of sexual harassment. In this section, a brief look will be taken at wrongful dismissal cases in three other jurisdictions: state industrial tribunals in Australia, arbitrators in Canada and arbitrators in the United States. It is worth noting that the Australian industrial system is somewhat unique in that it has traditionally relied heavily on "awards" which are quasi legislative prescriptions applying across an entire industry, rather than on

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{47} FAVSA \textit{v} University of Queensland. 11/4/1994, Commissioner Leary. AIRC.
\item \textsuperscript{48} Fuller \textit{v} Law Society. 17/2/1995, Parkinson JR. IRCA.
\item \textsuperscript{49} Paz \textit{v} Mack Trucks. 13/9/1996, McIlwaine JR. IRCA.
\item \textsuperscript{50} 25/11/1996, Murphy JR. IRCA.
\end{itemize}
\end{footnotesize}
collective bargaining agreements applicable to a particular enterprise. Arbitration under the award system derived its force from the legislation under which the awards were made, rather than the agreement of the parties. For constitutional reasons, grievances in relation to reinstatement at a federal level were hemmed in by difficulties and the jurisdiction only came into its own with the new statutory provisions in 1993.

**State unfair dismissal systems**

The Australian states have exercised a reinstatement (although not a compensation) jurisdiction under the various state industrial statutes since the early years of the twentieth century. The gravamen of the state jurisdiction was the "fair go all round" principle discussed in Chapter 3. All state commissions now exercise power under specific statutory provisions which allow the awarding of compensation for an unfair dismissal.

In recent years, state commissions have dealt with cases involving sexual harassment in exercising their unfair jurisdiction. Many of the same considerations which pertain at federal level are also evident in the state systems.

For example, the focus on procedure is greatly in evidence and inconsistencies in investigation, including departure from stated guidelines is generally utilised to establish that a dismissal was harsh, unjust or unreasonable. In a recent decision of the Full Bench of the South Australian Industrial Relations Commission, the Commission found that there were serious procedural defects in the dismissal of the applicant and ordered reemployment and backpay. The Commission quoted extensively from case law and international conventions concerning the right to be afforded procedural fairness in termination of employment. In other cases, however, procedural fairness is said to render

51 The advent of the Liberal (conservative) government in 1995 and the new Workplace Relations Act 1996 (Cth) substantially downgraded the role of awards and refocused the system on collective and individual agreements.
52 There is a state industrial relations commission in every Australian state except Victoria which has referred its powers in relation to industrial relations to the Commonwealth.
53 Walker v NSW Department of School Education, 31/7/1995. NSW IRC.
54 Sutton v Tick Tock Australia, 16/7/1997. Full Bench, SA IRC.
the dismissal fair. " Where the harassing conduct is ongoing or severe, small procedural defects will not be sufficient to afford the perpetrator applicant relief."

The question of a sexually permeated working environment was raised in the Queensland IRC in Sikora v Mount Isa Mines Limited. In that case, Commissioner Bechley found that if the evidence had founded a valid reason for the dismissal of the applicant then it would have also been sufficient reason in relation to a valid reason to dismiss all of the other staff. With respect, this is the most blatant example of the self-justifying harassing environment yet seen in the cases. If the status quo is so bad as to justify the behaviour of one employee because of the behaviour of all the others, then there is little chance that the jurisdiction can be used for transformative purposes.

However, other cases have gone the opposite way. In Rapp and Waugh v Wauchope RSL Club the Commissioner described the working environment (the restaurant of a servicemen's club) as becoming a "theatre" for the amusement and humour of the applicant. This left the women feeling "intimidated, uncomfortable and in a position of weakness". The dismissals were upheld.

In a number of the state cases, conduct which would constitute sexual harassment under the anti-discrimination statutes was deemed acceptable for the purposes of the dismissal proceedings. For example, one case appeared to require a "deliberate" act of harassment before dismissal could be warranted." In other cases, Commissions have relied on a "continuum of ills" of sexual harassment to find that conduct lay at the "very low end of the scale" and did not, therefore, warrant dismissal even in the context of an earlier warning." A recent Queensland decision, however, refused to allow an action characterised by the applicant as "horseplay" to render the dismissal unfair. The

56 Richas v B & R Lovell 26/1/1990, SA IRC.
57 13/12/1996, Queensland IRC.
58 5/7/1995, NSW IRC. This case was appealed to the Full Bench of the Commission and the appeal was dismissed, 19/12/1995.
59 Turnbull v TBM Newcastle 16/6/1995, NSW IRC.
60 Sutton v Tick Tock Australia 16/7/1997, Full Bench. SA IRC.
Commissioner pointed to the fact that the applicant had seen two harassment videos and been given six or seven warnings about other incidents to justify the dismissal. These types of rhetorical devices are also much in evidence in the federal cases and are discussed at length in Chapter 5.

There appear to be fewer cases with victim applicants in the state jurisdictions. In *Garrido v G'Day Cafe Coffee House* a waitress who had been allegedly dismissed for theft alleged sexual harassment. The case was dismissed because it was found that no dismissal had occurred. In *Stojanovska v Bell Plastics Sydney Limited* dismissal of a woman employee was found to be harsh because she had been sacked for incompetence without a proper investigation and any opportunity to defend herself. The Commissioner found that the attitude of the company's supervisors to the female machine operators was unacceptable and condescending. Again, in *Wallace v Glynburn Contractors Port Road P/L* the Commission found that the applicant victim had been unfairly dismissed in circumstances where she had ostensibly been sacked because the working relationship between her and her harassing boss had "broken down".

**Canada**

Arjun Aggarwal has conducted a survey of Canadian arbitration cases in which grievances of both victims and perpetrators were considered. Using a not dissimilar methodology from that adopted in relation to the survey set, Aggarwal considered 37 arbitration cases of which only 6 involved victim applicants. This can be contrasted with the much higher proportion of victim applicants in the survey set. In addition, of the 6 victim applicant cases, four were dismissed as not disclosing the existence of sexual harassment.

---

61 Perry v Country Bake. 30/1/1998. Commissioner Bloomfield. Qld IRC. One wonders why no action had been taken before given the number of warnings.

62 23/10/1995. NSW IRC.

63 15/3/1996. NSW IRC.

64 7/5/1993. SA IRC.

In relation to perpetrator applicants, out of 27 cases of dismissal (4 cases were suspensions), the arbitrator upheld the dismissal in 13 cases and imposed a lesser penalty in 11 cases. In only 3 cases was the perpetrator applicant completely exonerated. This is an interesting contrast to the Australian cases where the court does not have an "intermediate" remedy (such as suspension) open to it.

Aggarwal concludes that:

Arbitrators in Canada generally have no difficulty in recognising sexual harassment as serious misconduct and unacceptable behaviour. By and large, they have found the testimony of victims to be credible. In fact, the arbitrators in most cases have preferred the testimonies of the victims to that of alleged harassers.

Aggarwal updated his research in 1993. In this period, only 2 out of 34 cases were brought by victims and neither was successful.

Many of the "themes" and "ways of speaking" which will be discussed in Chapter 5 below in relation to the continuum of harassment and the question of "horseplay" are addressed by Canadian arbitrators. Although one article welcomes the role of arbitrators in the area of sexual harassment as providing a "unique forum for workplace parties to develop remedies tailored to their unique circumstances" Aggarwal finds little solace in the small number of women applicants in arbitral proceedings. He regards this as "discouraging and disappointing" and speculates that women must have little faith in the arbitration process for resolving sexual harassment complaints. He cites lack of union support and lack of prompt employer remedial action as contributing to this reluctance.

But see McEvoy v Broadlex Cleaning, 9/10/1997. Commissioner Raffaelli, AIRC, holding that dismissal was harsh and unjust because the employer had an intermediate option (transfer of perpetrator) and had chosen not to use it.

Aggarwal, supra note 65, at 12.


Cornish and Lopez, supra note 65, at 128.

Aggarwal, supra note 68, at 76.
Arbitration awards in the United States

Vern Hauck and Thomas Pearce considered a set of 100 labor arbitration awards dealing with sexual harassment grievances. The results of the study showed that arbitrators found in favour of the employer in 47% of cases, however in 56% of cases dismissals for sexual harassment have been either overturned or reduced to a lesser penalty. Termination only stands where the sexual harassment is "excessive" or "impacts heavily on the work environment". Again, termination appears not to be warranted for "single, minor" incidents or where the conduct is "in reality, horseplay". The finding was that "arbitrators have distinguished between excessive and non excessive sexual harassment, a distinction akin to the de minimus cases." Other interesting data are found in the discussion by Jeffrey Sarles in regard to appellate review of arbitration awards in relation to sexual harassment. Sarles' discussion focuses on the situation where appellate courts have had to decide whether or not to interfere with arbitral awards on the ground of public policy. The awards under consideration deal with grievances from disciplinary actions on the grounds that they are without "just cause".

Sarles concludes that although two out of the four cases declared the award void as contrary to public policy, none of the cases "resoundingly vindicated the rights or recognised the interests of the harassed woman". He makes the point (which is also made by Aggarwal) that the voices of the harassed women are noticeably absent in the perpetrator applicant cases. They are "the missing women" who are not party to the proceedings and who are not given an opportunity to have input into the proceedings.

71 "Sexual Harassment and Arbitration" (1992) Labor Law Journal 31. The awards went back to 1945 but 98% were decided in the decade prior to 1992. Note that the survey does not deal with victim applicants.
72 Ibid. at 34.
73 Ibid. at 35.
74 Ibid. at 37.
76 Ibid. at 38.
This is an interesting point, because sexual harassment cases are different in this respect from other dismissal proceedings. In other proceedings, there is a diad of interests: the employer and the employee. In perpetrator applicant dismissal proceedings, there is a triad of interests: the employer, the employee and the employee victim. It is extremely important to remember that the victim is an employee too and the effects of the harassment may well be felt beyond the immediate victim in relation to other women in the workforce. Indeed, the third arm of the triad may be the entire female workforce, rather than simply the immediate victim.

CONCLUSION

The "lessons" in relation to outcome have been foreshadowed above. In general terms, in the survey set at least, decision makers have been sympathetic to the needs of women applicant victims and the success rate for perpetrator applicants has generally been low. The "success rate" for women would appear to be high and the ability of women to begin to utilise the industrial mechanisms available to them is encouraging. The mere fact that sexual harassment is discussed in the mainstream industrial system is also extremely important. The cases discussed here have allowed us to see, in a practical sense, how women fare in taking their concerns to the "mainstream". Thus, the very presence of these questions - in amongst discussions of termination of employment for theft or absenteeism - serves to place them in the forefront of industrial practice. This presence is itself empowering, it is women taking their concerns to the system that would render them invisible and it is women insisting that their gender and their sexuality is important and that it must not be used against them. This presence is clearly to be fostered.

The other reason why the survey set research is important is that specific attention has been paid to unfair dismissal cases in the context of women's concerns. There has been little work done on this topic and scant attention has been paid to how women may utilise what are purported to be generalised remedies. For this reason, the new data are helpful in assessing the viability of these remedies for women and in helping us to think along new remedial lines.

See Aggarwal, supra note 65, at 15.
Beyond the outcomes, however, a worrying (but not unexpected) trend in relation to the ways that the decision makers come to their conclusions is evident. In Chapter 5, I return to earlier theoretical concerns in relation to the construction thesis and ask how the way that decision makers come to their conclusions in the survey set serves to construct the worker and the workplace.
CHAPTER 5

CONSTRUCTIONS OF SEXUAL HARASSMENT

INTRODUCTION

In Chapter 1 I discussed what I called the "construction thesis". This thesis is that law and lawmakers construct the subjects of their attention and continually make and define the parameters of a discipline and its subjects. Thus, the "worker" of labour law is constructed in and through language. This thesis was introduced and discussed utilising general examples from labour law in Chapter 1. In this chapter the ways of speaking of the decision makers in the survey set of cases investigated in Chapter 4 will be considered in light of these theoretical concerns.

In Section I below, I outline the work of Mary Joe Frug and Vicki Schultz as leading feminist proponents of the construction thesis and the idea that law (as and through language) both reflects and constructs its subjects.

In Section II, I discuss a number of ways of speaking and rhetorical usages which are drawn from the survey set of cases introduced in Chapter 4. These ways of speaking tell us something about who the "worker" is and delimit the notion of what is "acceptable" within the contemporary workplace.

I. LANGUAGE AND THE CONSTRUCTIONS OF LAW

Vicki Schultz's paper about women and work (specifically, about sex segregation in the workplace) is written from a conviction that "what judges say and do matters." Because law both organises meaning and orchestrates power, the stories that judges tell about sex segregation in the workplace can become true. Schultz analyses in detail the judicial rhetoric involved in "lack of interest" arguments when sex segregation has been challenged

2 Ibid. at 1757.
3 Ibid. at 1758. See, also, in relation to the power of legal language, Robert Cover "Violence and the Word" (1986) 95 Yale Law Journal 1601.
in lower courts under Title VII of the US Civil Rights Act. Her analysis shows that the decisions are not necessary or inevitable, but come from a set of cultural understandings about woman as beings "formed in and for the private domestic sphere".

Judges in these cases have moved between two "stories". The first is a conservative story of choice in which women are feminine, clean and delicate and are set in stark opposition to dirty, heavy male workers. In this story, women choose not to enter non traditional jobs. The second is a liberal story of coercion in which gender is completely invisible. In this story, the individualised woman comes to the workforce with no gender and a preexisting preference for non traditional work which she is coerced to forgo.

Schultz argues that both stories are partial and neither explain how employers actively construct gendered job aspirations within the market. An alternative story would look at how women's work preferences are created within work cultures themselves. Understanding how these dominant stories are inadequate leads one to an understanding of how women's subordination is part of an overall system of social control which must be "exercised powerfully within the workplace itself." The new story that judges can and must tell should recognise that the workplace is "a central site of development for women's aspirations and identities as workers" and that the portrayal of "women" as "workers" involves "no contradiction in terms". Schultz's analysis is important because it shows how a close attention to judicial rhetoric can uncover the ideological underpinnings on which stories about the law are told.

A central tenet of Mary Joe Frug's *Postmodern Legal Feminism* is that identity and experience are constructed through language and that interpretive struggles within legal discourse are an important site of change. For her, this is because legal discourse constructs the meaning of sexual difference and of gender and inscribes identity onto

---

4 She shows this partly through drawing a contrast with race discrimination cases.
5 Schultz, supra note 1, at 1771.
6 Ibid. at 1815.
7 Ibid. at 1816.
8 Ibid. at 1824.
9 Ibid. at 1840-1.
women's bodies. A corollary of this is that legal discourse constructs not only the meaning of sexual difference simpliciter but the meaning of sexual difference as inscribed on women's bodies or embodied in a particular legal subject.

In her essay "A Postmodern Legal Manifesto", Frug shows in some detail how legal rules encode the female body with meaning: through terrorisation, maternalisation and sexualisation. Legal discourse constructs the body as made for sex, yet simultaneously made for maternity while existing in fear. At the same time as the law codes our bodies in this way, it denies that it does so, rendering the meaning "natural".11 This simultaneous encoding of the body by a number of discourses is an analogous movement to the creation and constitution of the idea of a legal subject.

What is particularly useful in Frug's work is her appreciation that this analysis of language has significant transformative potential. In her book, she says that because sexual identity is constructed in and through language and other systems of signs, it is both unstable and multiple. Thus the meaning of gender or of sexual difference can never be fixed and her "postmodern stance" will be able to challenge the "congealed meanings" of the female body.12 Her stance involves a perpetual undermining of fixed representations. Thus, although discourse can constitute a subject, slippages in meaning will mean that it will be impossible for this subject to be fixed and unchangeable. She does not argue that legal rules will not or should not construct our bodies, but that if we are aware of this mechanism then we can attempt a new construction. And, because language and meaning are unstable, these recodings are not foreclosed.

This transformative aspect of Frug's work is important because it is possible to argue that if the view is taken that language and interpretation constructs what the law sees and, indeed, constructs our very bodies, then this is inevitable and unchangeable. It may also mean that simple legislative solutions or law reform will not be able to easily shift these meanings which are encoded in our very speech and in our very metaphors. But the political implications of Frug's work are quite different, for they mean that unpacking our

11 "Postmodern Legal Manifesto" in Frug, supra note 10, at 129.
12 Ibid. at 138.
language and understanding the mechanisms involved in the constitutive nature of legal discourse can lead to change because there is always room for movement and transformation in the indeterminacies of language.

For present purposes, one important aspect of the type of interpretive reading engaged in by both Schultz and Frug is to see the sort of "characters" that a legal text might be using. These characters or roles are the typical inhabitants of the world constructed by the legal text. They are, in effect, the subject of attention of that particular discourse. Mary Joe Frug's work is peopled by a whole cast of characters who are her readers - her contracts casebook for example is read in many different ways by a cast of many readers.13

The aspect of Frug's characterisation that is most crucial is the multiplicity of her characters. This diversity is important because the way that characters are described can often solidify and become reality. Kenneth Schneyer has described the effect of writing in relation to characterisation in this way:

"a writer casts her readers and others in particular roles, defining the way that these roles interact. ... there is an implied statement that the reader should play such a role, that others should be talked about in this way, the communities ought to behave in the way the author has them behave (emphasis in original)."14

Thus, by casting the scenario in a certain way, by talking about characters in a particular way, a speaker can make a normative statement about them and imply, for example, that this is the only way to behave, that this is the only role that is possible in any particular context. The multiple understandings and readings mean that the solidified normative positions can and should shift, relative to the perspectives of the experiences of the character. Frug's variety of perspectives allows subjectivity to be inscribed in multiple and ever-changing ways.

II. RHETORIC, SEXUAL HARASSMENT CASES AND THE "WORKER" IN LABOUR LAW

The approach adopted by Schultz and Frug can be extremely useful in analysing the rhetoric of decision makers in the sexual harassment cases of the survey set. The actual outcomes of these cases have been described above in Chapter 4. This section takes a more "thematic" approach to the cases and looks at the type of statements and reasoning utilised by decision makers in making judgments about both victim and perpetrator applicants. It looks at how decision makers arrive at the conclusions they did, rather than at the actual decisions.

These statements, rhetorical devices and methods of reasoning reveal a great deal about the way the courts perceive the workplace and what is and is not acceptable conduct within it. As discussed in detail in Chapter 1, legal statements of this nature not only reflect a perception of the workplace and a notion of the worker but actually serve to construct them. Thus, while judgments in unfair dismissal cases cannot tell us the whole story about what is or is not allowable or acceptable in the workplace and, hence, what constitutes the world of work, they can and do form an important part of this construction.

*What does sexual harassment actually mean?*

The primary "theme" or rhetorical aspect to be considered in the survey set is the definition of sexual harassment itself. Because the unfair dismissal jurisdiction does not rely on a statutory definition of sexual harassment (unlike a complaint to a human rights body), there is no uniformity as to the definition of sexual harassment or the elements necessary to comprise it. Many victim applicants argue that their employment was terminated on certain grounds, including that of their sex, under s.170DF (now s.170CK) of the Act. It is important, therefore, where decision makers are operating in a context which is not legislatively constrained as to definitions, to consider how sexual harassment is defined and the extent to which this may differ between decision makers.

Some judges do specifically refer to statutory definitions under appropriate legislation -
such as the *Sex Discrimination Act* - however they undertake a different exercise from a
court in directly applying the terms of a statute. This is because the injunction in the unfair
dismissal legislation is to look broadly at whether the conduct of the employer was
"unfair" or whether employment was terminated on a prohibited ground. Breach of a
human rights statutory provision by the employee will be relevant (but not determinative)
as will breach of company policy or what may be seen as a serious lapse of standards of
behaviour.

In *Jones v Armas*¹⁵ the Judicial Registrar discussed in some depth the meaning of sexual
harassment. He drew from a recently reported defamation case dealing with harassment of
women and considered the definitions of harassment in the Victorian *Equal Opportunity
Act* 1984 (Vic) and the *Sex Discrimination Act*. He concluded that the conduct
complained of was clearly sexual harassment. Then, the Judicial Registrar referred to the
NSW Equal Opportunity Tribunal case of *Aldridge v Booth*¹⁶ holding that sexual
harassment is a form of sex discrimination. Section 170DF(1) of the Industrial Relations
Act then relevantly provided as follows:

An employer must not terminate an employee's employment for any one or
more of the following reasons or for reasons including any one or more of the
following reasons:

....

(f) race, colour, sex, sexual preference ....

The Judicial Registrar found that termination of employment by reason of sexual
harassment clearly comes within the scope of this section. This is because one of the
"objects of the section is to prohibit termination of employment based on an employee's
sex". This decision - referring to human rights cases and statutes - is a fairly sophisticated
discussion of the meaning of sexual harassment according to the relevant anti

---

¹⁵ 22/12/1994, Millane JR, IRCA.
discrimination legislation.

In a number of cases, the understanding of the legislative prohibition on sexual harassment is glossed over in the circumstances of the case or "additional" requirements to making out a case are imposed. In one such situation, the Judicial Registrar found that the requirement in the *Sex Discrimination Act* that a reasonable person would have anticipated that the victim would be offended was not made out because the perpetrator applicant could not reasonably have been expected to know that his conduct was unwelcome without being told so by the victim or some other person. While it is recognised that sexual harassment policies and procedures are of the first importance and are crucial in attaching vicarious liability to employers, it cannot be the case that an individual can raise the employer's lack of a policy as a defence to a claim of sexual harassment on the grounds that he could not reasonably be expected to know that the conduct was unwelcome. There is little recognition among the decision makers that the individual is to be presumed to know the law of the land and that sexual harassment has been proscribed in employment at least since 1977 in NSW.

In relation to this general question of what type of behaviour constitutes sexual harassment, a particularly troubling statement is that of Murphy JR in *Andrews v Linfox*. In this case, the behaviour of the perpetrator applicant is described as "the type of behaviour that Australian males have often been criticised for and which society has indicated through legislation such as the *Sex Discrimination Act* is unacceptable". Is the conduct that was before the Judicial Registrar only wrong because it is proscribed by the *Sex Discrimination Act*? Why does the *Sex Discrimination Act* proscribe this type of conduct? The broad statement implies at some level that this type of conduct is the cultural birthright of the larrikan Australian male and that it is only some externally imposed legislative barrier which renders it problematic. Significantly, no mention whatever is made of the difficulties that the conduct of the applicant in that case may have caused to the young woman involved and the long term effect this could have on her employment prospects.

---

17 *AWU v ACL*, 8/6/1995, Farrell JR, IRCA.
In *AWU v ACL*, Farrell JR indicates that sexual harassment contemplates a broad range of conduct and that the characterisation of the conduct depends on the state of mind of the recipient. This much is uncontroversial. What is disturbing, however, is the placing of the onus on the victim to ensure that this state of mind is clearly and adequately communicated to the perpetrator. There is no onus placed on the perpetrator to ensure that his conduct is welcome or to inform himself as to the requirements of the law. The description of the law by Farrell JR is inadequate to capture the dynamic of sexual harassment in the workplace whereby a woman may feel constrained in being explicit about saying "no" and in which a man is presumed to be right unless specifically told otherwise. Sexual harassment legislation notwithstanding.

There is, unfortunately, very little discussion in any of the cases that demonstrates an understanding of the type of material harm that sexual harassment can cause to working women. In some recent cases, however, the decision makers do refer to the power dynamics occurring in workplaces which underlie the harm of sexual harassment and attempt to name the real harm that has occurred. As in *M v ANU*, however, these instances seem to be where the power differential is glaringly obvious and a "gross misuse of position". There are no cases in which the power imbalance in the ordinary employer/employee relationship or the male employee/female employee relationship appear to be explored.

In addition, a number of recent cases are beginning to make reference to the necessity for employers to maintain a safe system of work. As discussed in Chapter 2, such a conceptualisation of the harm of sexual harassment is important in moving beyond an individualised, discrimination-based concept or even, in the unfair dismissal cases, a decency-based conception (see discussion below).

---

18 20/8/1996, Moore J, IRCA.
19 In *Flight Attendants’ Association v Qantas Airways*, 21/3/1996, Commissioner Gay in the AIRC refused to deal with an alleged "power imbalance" argued to be inherent in the relationship between flight attendant and passenger. He considered that these "broader policy issues" were not relevant to his decision.
Thus, in *Bryant v City of Fairfield RSL*\(^{20}\) harassing conduct (of a man by a man) was said to constitute a criminal offence and a breach of the employer’s duty to maintain a safe workplace. McIlwaine JR was of the view that:

> the experience of this court obtained in many trials and mediations involving sexual harassment or assault issues is that early incidents or signs of violence are often ignored in the workplace on the basis that it is hoped that the parties will deal with the issues themselves and the unpleasantness will simply go away. This is not good enough in an employment relationship or indeed in any other situation. Inaction by a responsible employer is in my view in conflict with their general duty at common law and under the occupational health and safety legislation in NSW.

Again, in *McManus*, the need for an employer to take into account the potential liability to employees for “injury” was commented on.

As discussed in Chapter 2, sexual harassment is clearly a major safety risk for working women and it is important that it be recognised as such.\(^{21}\) It is interesting, however, that *Bryant*, which has by far the most detailed discussion of workplace safety, was a case of sexual harassment by a man against a male work colleague in circumstances in which the harassment constituted a physical assault. It is less clear whether non-physical harassment against a woman would be seen to amount to the sort of harm that can be coded as a workplace injury. *Bryant* is important for what it does say, but it is also necessary to make arguments in these terms in cases where more “subtle” forms of harassment have occurred. It is *not* in the interests of women to have sexual harassment coded as an injury only where it approximates the type of injury which men typically suffer in the workplace.

This conceptualising of sexual harassment in terms of the harms that men typically suffer is also evident in relation to the cases that deal with fighting in the workplace. In *AWU v*

---

\(^{20}\) 16/12/1997, McIlwaine JR, IRCA.

ACL: Farrell JR considered incidents of sexual comments and touching in a busy and noisy factory. There was a company policy against sexual harassment although, apparently, no one knew about it. The Judicial Registrar compared sexual harassment to fighting in the workplace in these circumstances. In Andison v Woolworths the Court referred to an incident of sexual harassment and said that it was an issue which required proper investigation under the company's policy. The court then went on to discuss a matter of "a more serious nature" which was an altercation at the workplace. The altercation itself was an argument which the Court considered could better have been held in private but which was not violent. There is a clear hierarchy of ills occurring here: from the most serious which is an altercation between men, to the least serious which are instances of sexual harassment between men and women. For some reason, the applicant "raising his voice" in an argument is a more serious matter than comments with sexual overtones concerning a colleague's appearance.

The comparison with fighting is both apt and not apt. On the one hand, fighting is seen as serious misconduct and taken very seriously. In this respect the analogy is not inappropriate and it is useful for women to have the harm they suffer compared to something that is taken seriously. On the other hand, sexual harassment captures a very different type of harm that may stem from a significant differential in power. In one sense, fighting carries with it connotations of a certain evenness in power; sexual harassment carries connotations of a disparity. In this sense, it is problematic for women to have to compare themselves to a benchmark type of harm in order that their experiences be taken seriously. And, of course, in cases such as Andison there is always the risk that fighting (serious) will be contrasted with sexual harassment (not serious).

Further, sexual harassment covers a wide spectrum of conduct from touching, comments and propositions to a poisoned and sexualised workplace. While fighting may be analogous to a slice of this conduct, it cannot be compared with the full spectrum of conduct and behaviour which harassment may encompass. If harassment is conceived

---

22 8/6/1995, Farrell JR, IRCA.
23 31/3/1995, McIlwaine JR, IRCA.
only in terms of physical violence, then verbal abuse or more subtle forms of harassment will not be covered.

In *Thomas v Westpac*\(^2^4\) Wilcox CJ made one of the few statements in any of the cases which even remotely begins to approach the real harm of sexual harassment. His Honour said:

> It seems to me that his attitude towards [the victim] was one that failed to acknowledge her as an equal and a person worthy of respect. A course of constant putting down and derogative remarks is essentially attempted domination. Sexual assaults often have the same motivation.

McIlwaine JR in *Ilardo v Village Roadshow* also appeared to recognise that the actions of the applicant perpetrator had seriously infringed the “personal integrity” of the victim and that consequently, the dismissal was not unfair. It is troubling that this type of language is not utilised to a greater extent in the cases and that the affront to a woman’s dignity and capacity fully to participate in the workplace that is sexual harassment is not more readily perceived and condemned in these terms.

In addition to this general "way of speaking" through and about the definitions of harassment, decisions makers in the survey set utilised a number of devices and fell back on a range of assumptions which together serve to construct workers within the contemporary workplace.

"*Appropriate*" conduct

One term which keeps cropping up again and again in the cases is the word "inappropriate". Thus, in many cases, the conduct of the perpetrator is described as "inappropriate" without any explanation as to why this is so or even without any reference to the general law proscribing such behaviour.\(^2^5\)

---

\(^2^4\) 26/6/1995. IRCA.

In *Chambers v James Cook University*[^26^] Spender J considered the use of this terminology in a manner which was both extremely perceptive and extremely problematic. His Honour was describing a finding of an investigatory committee into allegations of misconduct by a university lecturer. The committee had found, inter alia, that the applicant had engaged in "inappropriate physical liberties". His Honour had this to say about the allegation of inappropriateness:

> The word 'inappropriate' might be in current fashion, but one thing that might be said about its use is that it covers a wide range of possible conduct, from conduct proscribed by the criminal law, conduct made unlawful by statute which may result in civil penalties to conduct which is merely in bad taste or contrary to the prevailing sense of fashion, like wearing brown shoes with a navy suit or drinking red wine with fish.

His Honour made these comments in the context of finding that a charge of inappropriate physical liberties was not sufficiently particularised to allow the applicant an adequate opportunity to respond. As a consequence, His Honour upheld the decision of Boulton JR reinstating the applicant to his former position.

Yet, putting aside this procedural issue, the question of "inappropriateness" could be further teased out. When one says that certain behaviour is inappropriate in a workplace, one does not mean that it is contrary to fashion or manners or offensive to etiquette. One means that, in the context of the work relationship, such behaviour has serious deleterious and material effects on certain workers. In this context, Jenny Morgan's comments on the language of decisions are particularly apt. You will recall that Morgan was commenting on Frances Olsen's insight that sexual harassment has been proscribed by an "unconscious invocation of the public/private dichotomy" which defines sexual harassment in the workplace as "inappropriate" rather than a question of abuse or equality.[^27^] Thus the language of "inappropriateness" or morality bolsters this view of the role of sexual

[^26^]: 25/8/1995. Spender J reviewing decision of Boulton JR.
Yet:

to see sexual harassment as an injury to morality is to turn it into an extreme
case of bad manners, when the point is that it is the kind of bad manners almost
exclusively visited upon women by men with the power to get away with it.

**Workplace "decency"**

In a similar vein are cases in which recourse is had to the discourse of "decency". In
AMASCU v Glenorchy City Council" the AIRC ordered that the applicant be reemployed
subject to a number of conditions. His Honour referred to the notion of "workplace
decency" as a norm to be upheld and indicated that the victim was entitled to a measure of
protection from workplace "pests". This language is revealing in that it posits a workplace
of a certain standard of behaviour and morality, encapsulated by the word "decency". The
dynamic of sexual harassment which stems from an abuse of power within the workplace
and which can have serious material consequences for women's employment is reduced to
a question of "decency" in which it appears that the worst behaviour is that which would
offend the etiquette and mores of a Sunday tea party.

This is not to say that the AIRC was not criticising the behaviour before it (although the
employee was reinstated). It is the mode of criticism, however, which places the "harm"
of harassment at the level of a breach of a code of etiquette which fails to recognise and to
name the true harm suffered by the women who are subject to this conduct.

**A continuum of ills**

There is no question that there is a grading system in operation in respect of various types
and degrees of sexual harassment. There is also no question that some types of harassment
are more serious than others. No one would deny that a single comment is of a different

---

28 Morgan, supra note 27, refers also to Rabidue v Osceola 805 F.2d 611 and Bennett v Everitt
(1988) EOC 92-244 as adopting a similar approach in other jurisdictions.

29 Catharine MacKinnon *Sexual Harassment of Working Women* (New Haven and London: Yale
University Press. 1979) at 173.

30 8/10/1993. Senior Deputy President Riordan. AIRC.
order to a sexual or indecent assault and most cases reflect this recognition that sexual harassment contemplates a broad range of conduct. In *Thomas v Westpac*, for example, Wilcox CJ indicated that the harassment which had occurred was "serious" as it had amounted to a sexual assault.

What is disturbing, however, is that the gradings and rankings are frequently made with little understanding of the impact of sexual harassment and that conduct is consigned to the "trivial" basket with scant appreciation of the real effects that it may have.\(^3\) Indeed, the very category of "serious" sexual harassment is predicated on the existence of a category of "non serious" sexual harassment.

The presence of this grading or ranking system and its frequent use by judges means that women not only have to jump the hurdle of demonstrating sexual harassment, but also the second hurdle that it be "serious". In *Andrews v Linfax*\(^3^2\) the Judicial Registrar considered that the conduct of the applicant did amount to sexual harassment but then asked "how serious was it". He placed it in the "low to mid range" of such conduct.\(^3^1\) His view was that such an assessment would always be a matter of "impression and judgement". In *Andrews*, the applicant admitted that he did "step over a line" and apologised for his conduct. But what exactly is that line? Is it the line which prompts a complaint? Is it the line in which physical contact occurs? What if he had just pulled back from the line but continued to make sexually charged comments to young women on a regular basis. Would this not have been profoundly damaging to their self esteem and their ability to perceive themselves as competent workers doing a job and not the "pornographic cover girl" the young woman at issue had been compared to. And crucially, even if such a line could be identified, who is it that has the power to draw it?

Thus, after a decision like this, one must ask: to whom is the conduct "serious"? and on whose standard is the range determined? On what basis is this "impression" formed?

\(^3^1\) See *Reader v P&O Catering* 3/10/1996. Boon JR. IRCA. indicating that "in any event, [the conduct was not] serious".

\(^3^2\) 4/12/1995. Murphy JR. IRCA.

\(^3^3\) In the context of the decision it was entirely unclear why this finding was necessary as the applicant had relied on the employer's complete failure to train.
Without explicit understanding that women may react in different ways, that the effects of harassment may be psychological, material or economic and without an appreciation that the victims may wish to have a say in determining the seriousness of certain conduct, the grading or ranking of harassment according to its "seriousness" can have the effect of diminishing the real harm that such conduct causes.

There has been considerable debate in the feminist literature about the nature of the "reasonable person" test in sexual harassment cases. There is a notion of "reasonableness" at work in most regimes proscribing sexual harassment. This may be a standard imposed by the courts or it may be a legislative standard such as the one under the Sex Discrimination Act requiring the reasonable harasser to have known that his conduct would have been offensive. This standard, in one form or another, is supposed to differentiate between cases in which harassment is serious and actionable and those cases which are just the idiosyncratic reaction of a particularly vulnerable plaintiff. As Jodi Dean has pointed out, the courts have tended to use the reasonableness standard as "a guide for intervention, as a way of identifying a point along a continuum of conduct that separates (prohibited) discrimination from (protected) freedom."

In whatever guise, the feminist critique has clearly indicated that there is no absolute notion of reasonable to which decision makers may have recourse. Too often, the notion for which they reach is informed by and developed from a male notion of what is reasonable. As Jodi Dean has indicated, "reasonableness" as a standard can be criticised both because of the particular way that it has been applied (eg. by failing to accommodate the experiences of women) and because the very idea of reasonableness itself is problematic (eg. because it reproduces shared cultural understandings which themselves

---


may be discriminatory). Indeed, any reasonableness standard must take care not to entrench a particular viewpoint and fail to take into account the diversity of perspectives which make up the female workforce.

Although few of the arbitration cases make explicit recourse to a concept of "reasonableness", the continuum of ills utilised can serve much the same function. Indeed, the critique of reasonableness that considers its entrenchment of preexisting societal understandings is seen fairly clearly in the cases. If recourse is made to some notion of "community standards" to ascertain the level of seriousness, if the "line" stepped over by Mr Andrews was drawn by the community, then the court runs the risk of simply entrenching gendered assumptions. As Susan Estrich has clearly pointed out:

> In defining what counts as trivial or "de minimus", many courts have wrongly looked to social interaction outside the workplace as the standard, ignoring not only the "captive audience" nature of the employment context but also the fact that "society" hardly reflects a normative standard which women have had an equal role in shaping.

**It is only "horseplay"**

Something of a subset of the "graded" notion of sexual harassment is that some conduct is simply "horseplay" or "skylarking" or a joke. What is not made explicit in this characterisation is who has defined the joke, who finds it funny and at whose expense the joke is made. In the *City of Hobart* case, for example, the "horseplay" consisted of an employee physically restraining another - conduct which by any standards should be perceived as fairly serious and conduct which a male witness gave evidence to the effect

---

36 Dean, supra note 34. See also Colleen Sheppard "Systemic Inequality and Workplace Culture: Challenging the Institutionalisation of Sexual Harassment" (1995) 3 Canadian Labour and Employment Law Journal 249 at 253ff arguing that notions of reasonableness entrench a "perpetrator perspective" in the law of sexual harassment.
37 See Chamallas, supra note 34.
38 Susan Estrich "Sex at Work" in Weisberg, supra note 34. at 768.
that "I wouldn't have liked it if that had been me" and "it was against her will - yes".

This terminology, with its connotations of lads enjoying themselves, can be diminishing and demeaning of the experience of women who may not find conduct of this nature funny and who may, in fact, find it confronting and traumatic. Indeed, the Commissioner in the City of Hobart case went so far as to recommend reemployment on the grounds that there was a background level of "horseplay" occurring in the workplace. As Catharine MacKinnon pointed out in Sexual Harassment of Working Women "trivialisation of sexual harassment has been a major means through which its invisibility has been enforced. Humour, which may reflect unconscious hostility, has been a major form of that trivialisation". Language which reflects this trivialisation through humour is particularly revealing of a view of the workplace in which "humour" is defined by some to be inflicted on others.

In some cases, however, decision makers have explicitly refused to participate in this characterisation. In Bryant v City of Fairfield RSL, the Judicial Registrar referred to the conduct which had occurred as "horseplay", utilising inverted commas to so describe it. Although he was clearly not of the view that the conduct was in any way harmless and was rejecting a "humourous characterisation", it would be a progressive step to rename the conduct altogether and remove any connotation that the element of a "game" is condoned.

The refuge of procedure

The distinction between substance and procedure that is drawn most clearly by Wilcox CJ in Thomas v Westpac is one which is called into service on a number of occasions. By far the greatest number of cases in which applicant perpetrators have succeeded is where there has been some procedural defect in relation to the termination of their employment.

40 MacKinnon, supra note 29, at 52.
41 16/12/1997, McIlwaine JR. IRCA.
42 Ibid.
You will recall that Wilcox CJ's view of the procedure/substance distinction was that:

Substantive and procedural unfairness are separate subjects which have to be separately addressed. It is of course possible for there to be substantive unfairness in making a decision, notwithstanding meticulous adherence to procedural requirements. It is also possible for there to be procedural unfairness even though the ultimate decision is one that appears justifiable in substantive terms.

As an analytic device, this is unexceptional. Indeed, in *Thomas*, Wilcox CJ did not allow a range of procedural defects to vitiate the termination. On the other hand, the judgment of Spender J in *Chambers v University of Queensland* contains some extraordinary judicial manoeuvrings in attempting to uphold an applicant perpetrator's claim on the basis that allegations had not adequately been put to him.

In finding that the procedural defects rendered the termination unfair, his Honour was at pains to point out that he was conscious that "whatever decision I reach will not please everybody" and that he came to his decision on the evidence before him "quite divorced from any perception of how such conclusions may be received by this section or that in the community". His Honour went so far as to quote from a speech by the Chief Justice of the High Court that the judiciary must make decisions according to the rule of law and not the rule of mass opinion.

His Honour surely protests too much. If he genuinely believed that there were serious procedural defects to render the termination unfair, then it would have been in the mainstream of judicial decision making to overturn the dismissal. If, on the other hand, procedure was simply a refuge from the substantive questions of how the employee had behaved to his students then this protest makes more sense. With respect, the rule of law is done no service by invoking its name to effect an injustice. It is important in cases such as this to pay careful attention to devices - such as procedure - which can be used to shield or sidestep the substantive matters at issue.
Public/private

There is little in the cases in the survey set which considers the line between the public world of work and the private world of the family. As we have seen, this rhetorical device can be an important element in the construction of a male workworld. In one case, there is a peripheral reference to the applicant perpetrator's wife and to her reaction to the conduct.\textsuperscript{13} In other cases, the applicant victim's marital status and homelife is stated very clearly right up front in the judgment for no apparent reason.

Yet the private/public divide is something which is relatively controversial in sexual harassment law and practice. It has been the writer's experience that in a number of instances, male harassers appear unable to understand why they are "allowed" to behave in a particular way at home but are not at work. They believe that if the conduct is \textit{per se} lawful and condoned by society, then its proscription at work is hypocritical and wrong.

Of course, such views are rarely repeated to a court and no instances of this perspective have arisen in the data set. Nevertheless, the nexus between "private" and "public" sexually harassing behaviour has been considered. In \textit{McManus v Robin Scott-Charlton}\textsuperscript{14} some interesting comments were made about the scope of an employer's right lawfully to direct its employees not to engage in certain conduct. The applicant had disobeyed an instruction of his employer not to contact a fellow employee outside of the requirements of his official duties by calling her at her home. The question was whether the direction of the employer was lawful and reasonable within the scope of the statement of the High Court in \textit{R v Darling Island Stevedoring: Ex Parte Halliday and Sullivan} that "the lawful commands of an employer that an employee must obey are those which fall within the

\textsuperscript{13} \textit{Till v Swan Hill Pioneer Settlement}, 14/5/1996. Murphy JR. IRCA.

\textsuperscript{14} 13/10/1996. Finn J. Federal Court. Note that this case is a review under the \textit{Administrative Decisions (Judicial Review) Act} 1977 (Cth) of a disciplinary proceedings commenced under the \textit{Public Service Act} 1922 (Cth). As such, it differs from the unfair dismissal cases elsewhere discussed. Despite this, the issues are very similar and there is no substantive difference in principle which would indicate that this case should be excluded from the survey set. Note, however, that the public service context of the case means that, in the public interest, the level of scrutiny of employees will be greater than that which may be deemed acceptable in the private sector.
scope of the contract of service and are reasonable".  

In that case, Finn J was of the belief that anti discrimination legislation regulating workplace behaviour necessitated some level of supervision of the relationship between employees as between each other. Although there was no statutory warrant for the employer's direction, Finn J found that the employer had a legitimate interest in such a direction because the conduct did have a relationship to his employment and because it might sound in consequences in the workplace. Thus there are examples of situations where conduct outside the workplace has adverse workplace effects. In these situations, an employer will be justified in directing an employee to cease this conduct.

This case is particularly important because it means that sexual harassment is not proscribed in a bubble that is "the workplace". It looks more broadly to proscribe conduct which will have an effect in that workplace. This is clearly in accord with the terms and objects of the anti discrimination legislation which exists not to arbitrarily place barriers on certain conduct in a geographical area called the "workplace" but to ensure that the workworld of women is free of pressure, coercion and harassment based upon their sex.

**It is just the way things are**

In the *City of Hobart* case, the Commissioner referred to the conduct that had occurred as simply "part and parcel of life". Statements like this are very revealing. They recall the infamous judgment of Einfeld J in *Hall v Sheiban* that "women with the normal experiences of their own and others' personal relationships and social lives involving considerable exchanges with other men and women know very well the various ways in which some men occasionally behave".  

---

45 (1938) 60 CLR 601 at 621-22.

46 (1988) EOC 92-227. This statement was roundly criticised by the Full Federal Court on appeal. see (1989) EOC 92-250, particularly the judgment of Wilcox J. This case is one of the few sexual harassment decisions at appellate level in Australia. Their Honours on appeal also rejected the notion that some comments were so outrageous that they should not be taken seriously and could not constitute sexual harassment (Einfeld J had indicated that a proposal of intercourse from a doctor to a receptionist many years his junior "could not be conceived as other than a tragic or funny joke").
In *Ramirez v Kraft Foods* a situation arose in which two men came to blows in the workplace after the harassment of one of them by the other. Millane JR referred to the "climate of behaviour" in the factory of which the applicant should have been aware. In *Sealey v Carvene* it was found that bad language was "commonplace" in car sales outlets.

In *FMSCEUA v City of Hobart* the union representing the applicant perpetrator argued that there was a culture of "general horseplay" which was "part and parcel of accepted behaviour". The young woman who had been harassed was "a bit of a giggler" and had participated in the conduct.

Statements like this require women to take the workworld as they find it. They require women to accept that behaviour which is experienced by them as traumatic and which may materially affect their prospects and level of remuneration is just part of the way that things are. They require women to be other than what they are and to experience things differently to what they would otherwise do. They also posit the "way things are" as something that is eternal, universal and neutral. Something that cannot change because it reflects a fundamental way of being. Yet, the very presence of women and the diversity of their reactions to conduct amounting to sexual harassment means that this "way things are" is not eternal, is not universal and can be read and experienced from a multiplicity of different perspectives.

The experience of women in sexual harassment cases clearly demonstrates that the "way things are" is no monolith. The universal is false and it is the myriad of different perspectives from which conduct can be viewed that is the clearest evidence of this fact. A

---

27 17/5/1995. Millane JR. IRCA.
28 7/11/1996. Ryan JR. IRCA.
30 Comments of this nature are found in sexual harassment cases in every jurisdiction. One commentator notes the "implicit - sometimes explicit - belief that women must take the workplace as they find it"; see Patricia Hughes "The Evolving Conceptual Framework of Sexual Harassment" (1993) 3 Canadian Labour and Employment Law Journal 1 at 27. The 1986 case of *Rabidue v Osceola* (1986) 805 F.2d 611 is often cited for the comment that in some workplaces pornography and lewd language are commonplace and that it is not the role of Title VII of the Civil Rights Act to change this.
man may view "bad language" as commonplace and acceptable but a woman may view it as humiliating and distressing and, thus, sexual harassment.

Not all cases take the way things are at face value. In *Illardo v Village Roadshow*\(^{51}\) McIlwaine JR referred to a workplace culture of sexual innuendo as being "totally unacceptable in a workplace". Statements of this nature are progressive because they state the workplace culture and then state that it is unacceptable. Although the reasons for this are not explicit and the harms are not named, this critique of the culture itself is a step towards a realisation that workplace is not immutable and that some things need to be changed.

It is worth noting, however, that *Illardo* dealt with a workplace in the entertainment industry. The "real" industrial climate of the factory in *Ramirez* is perhaps perceived to be something altogether different. The unfortunate thing about this, however, is that such a distinction creates and maintains the occupational segregation which reinforces women's material difference and disadvantage in the workplace.

**Requirement of complaint**

One of the disturbing things which has arisen in a number of judgments is the question of whether the lack of complaint (or fresh complaint) meant that the conduct did not occur.

In *Fuller v Law Institute*\(^{52}\) the Judicial Registrar found that there was no sexual harassment on (inter alia) the following grounds:

(a) that there was no complaint of harassment in a three year period; and

(b) that the conduct was never raised by the applicant with the persons concerned;

Although the *Fuller* case does seem to have been an unmeritorious one, it is strange that statements of this nature should be allowed to stand without any qualification. There appears to be a clear requirement to complain or even to raise the matter with the harasser.

\(^{51}\) 16/8/1995. McIlwaine JR. IRCA.

\(^{52}\) 17/2/1995. Parkinson JR. IRCA.
This is an extraordinary requirement and pays little heed to the economic nexus involved in employer/employee harassment.

This may be contrasted with *Eggleston v Kingsgrove Medical Centre*\(^53\) in which the Judicial Registrar made the following finding:

> It is not unusual for persons who are the unwilling victims of sexual advances in the workplace not to report them to their fellow employees. It is the experience of the courts and tribunals in this country that the unwilling victims of such advances often feel powerless and will do nothing or little about it for a long time, particularly when the perpetrator of the advances is the person in charge of the business, as was the case here.

Patch JR provided no evidence for the above statement and appears to have taken judicial notice of the fact that reporting may be difficult. This statement is important in attempting to ensure that myths peddled in other areas of the law (such as sexual assault) in relation to fresh complaint are not repeated in the context of sexual harassment in the workplace. It is unfortunate that there is no clear standard emerging in relation to the need for immediate complaint.

**Behaviour of the complainant**

In *AMASCU v Glenorchy City Council*\(^4\) the AIRC ordered that the applicant be reemployed subject to a number of conditions. The Commissioner referred to the woman involved as acting "properly" and with propriety in her own interest. It is not clear how this was relevant to the determination of the AIRC and it is troubling when the conduct of the victim becomes a factor in determining whether the conduct of the perpetrator was justified or not.

In *Jones v Armas Nominees*\(^5\) an application was upheld and the applicant awarded

\(^{53}\) 1/11/1996. Patch JR, IRCA.

\(^{54}\) 8/10/1993. Senior Deputy President Riordan, AIRC.

\(^{55}\) 22/12/1994. Millane JR, IRCA.
S3000 in damages. The respondent in that case had raised the "aggressive" and "pushy" nature of the applicant. Although this argument was rejected by the court it was never questioned as to why this attitude was problematic.

In Jones, Millane JR described the applicant's marital status and the number of children that she had. The judgment begins:

The Applicant is a young woman and mother of two children aged 2 1/2 and 5 years respectively. She is married and in July this year was separated from her husband and attempting to pay off her own home.

This may well be relevant for the assessment of damages (in relation to her ability to mitigate) but it does not seem relevant to deciding if she had been fired as a consequence of sexual harassment. Not one of the cases dealing with male applicants provides personal details of this sort.

CONCLUSION

Chapter 4 described the cases in the survey set and analysed them in terms of outcome. Quite surprisingly, outcomes for women workers utilising the remedy as applicant victims are good and the success rate for perpetrator applicants was lower than expected. Nevertheless, as discussed in this chapter, the way in which these decisions are made reveals some problematic rhetorical usages and assumptions on the part of decision makers.

The cases discussed in Chapter 4 allowed us to see how, in a practical sense, women fare in terms of pure outcomes. However, the discussion in this chapter has highlighted some worrying trends. ways of speaking and assumptions in the way that sexual harassment and sexual harassment victims are conceptualised. These ways of speaking directly construct the "worker" within the system of labour law. In essence, they construct the subject of the law's attention.

Thus, it is apparent that the way in which harassment is conceived and spoken about is
inadequate to capture the actual harm suffered by the victims. These mechanisms - trivialisation, grading, belittling, moralising, asserting a preexisting standard of behaviour - all operate to diminish the significance and the harm of sexual harassment in the lives of working women. Further, in a number of cases, harm is conceived in terms of the harm typically suffered by men in the workplace. Thus, physical injury is clearly seen as a "harm" and fighting is the paradigmatic type of "misbehaviour" or inappropriate behaviour for which dismissal may be warranted. Yet physically aggressive conduct - conduct which has customarily occurred at work between men - should not be the norm of "inappropriate" conduct against which other, perhaps non-physical, conduct is judged. The "harm" suffered by women as a result of sexual harassment may be psychological, emotional, spiritual and economic as well as physical. It may be subtle harm to self confidence and to a woman's ability to perceive herself as a worker amongst other workers. If the male norm of appropriate behaviour is used, then this harm will not be captured at all.

This attention to the way the decisions in the survey set are made allow us to see how the "worker" is constructed. These decisions exemplify the construction thesis discussed in a general way in Chapter 1. The worrying assumptions and statements made by decision makers mean that workers - and, more specifically, women workers - are constructed in such a way that the real problems encountered by women are not seen or coded by the law. The subject of labour law can apparently be harassed (and provided with a remedy for this) but the actual harm that harassment causes is not visible. The subject is, therefore, an inadequate and partial construct.

It is the few cases that speak in terms of safety and dignity and equality: that is, in terms of the real harm that is done to women by harassment in the workplace, which begin to point a way towards the construction of a worker who is not the subject of paternalistic or moralistic concern. This worker is not diminished by the need to call upon the constraints of "decency" - essentially the constraints of the home - to protect her. She is protected by the rigours of the law in relation to safety and the protection of her basic rights as a worker to dignity and equality - just as is every other worker who falls off a girder or who is hit...
by a crane. Yet her gendered specificity need not be erased by this. the particularity of her experience can be accommodated within the broader concept of safety and the fact that her sex has been at issue and simultaneously recognised (the conduct is sexual harassment) and irrelevant (the context is safety) is crucial for the existence of the womanworker and for the revisioning of the gendered workplace.

In the final chapter of this thesis, I build on these conclusions regarding the construction thesis relative to sexual harassment and return to the general construction thesis which commenced in Chapter 1: the construction of the "worker" by and for labour law. Chapter 6 looks at how women - in the context of sexual harassment and otherwise - can disrupt this construction, can reinscribe the obliteration of gender in the workforce and can attempt to remake and reconstruct the "worker" and the workplace more closely in their own image(s).
CHAPTER 6

REGENDERING THE LABOUR MARKET

I am the ghost and I am both here and not here. I am a figment of your imagination but I have also, thereby, become real. When women work in the paid market I am there. I hover over them. I determine where they work, what they do and what they earn. I am their myth but I am also their reality. I am ghost and not-ghost for I have a body and a sex and a gender. I cannot and will not be banished.

INTRODUCTION

In Chapter 5 we considered how courts hearing unfair dismissal cases spoke about, thought about and conceived of women workers in situations were sexual harassment was at issue. These courts are telling us what can and cannot occur in the workplace. Implicitly, they are also telling us what constitutes the workplace and, consequently, who is or is not a worker. We have seen that, outside the constraints of legislative guidance as to what comprises sexual harassment, the courts have had to work out what is fair and reasonable in all the circumstances. Interestingly, as we saw in Chapter 4, women were successful in the majority of cases brought by them and male perpetrator applicants were very much less successful.

Despite this "success" in terms of outcome, we saw how important it was to pay close attention to the way in which the cases were decided and the manner in which the experiences of women were described by the decision makers. We saw that a variety of techniques were used to minimise, to belittle and to trivialise the experience of sexual harassment for women. We saw that a system of grading is in place which operates to place women's stories on a hierarchy of seriousness. a hierarchy which they have had no part in determining. Importantly, we saw that recourse was often had to what was "accepted" behaviour in the workplace: as if this somehow translated into behaviour that was "acceptable".
Unfair dismissal cases were considered partly because it was thought that this more informal jurisdiction, with its vast experience of the world of work would be practised at recognising the real harms that face workers. To some extent the courts were able to effect this recognition, in that women were often afforded remedies. However, only a very small minority of cases recognised and articulated the real difficulties facing women in the workplace, the real dangers involved in sex segregated work and the real safety issues inherent in sexual harassment. Insofar as the unfair dismissal cases contribute to the construction of the "worker", they do so in a paradoxical way. On the one hand, they enable women to utilise the mainstream industrial processes available to all workers and they do so with a marked degree of success. On the other hand, they only rarely recognise the actual harm caused to women by conduct which is sexually harassing and they only infrequently attempt to place harassment into a safety or human rights context.

In this chapter I ask how a feminist might revisit or revision the labour market. This is not a simple process of "adding women and stirring".¹ I am not inviting the ghost to work alongside the artisan or to become him. Nor am I investigating in an empirical way the changing demography of the labour market. This chapter will consider how, when we notice women, when we talk about them, when we pay attention to their needs and their specificities and their samenesses, we may construct a labour market that is fundamentally inclusive and reflective of the differences of all of its citizens. I would argue that this cannot be done without understanding gender and that this, in turn, cannot be done without an understanding of sexual harassment. As discussed in Chapter 2, sexual harassment is both exemplar of the general movement and a special case of interest in itself. It is an important way in which women and gender have been spoken about within the system of labour law. As such, it is an important site of the presence of women in labour law.

However, sexual harassment is not the only movement through which the construction of the worker occurs. A number of other factors will also be discussed in this chapter: such

¹ This phrase is Regina Graycar's. See Regina Graycar "Legal Categories and Women's Work: Explorations for a Cross-Doctrinal Feminist Jurisprudence" (1994) 7 Canadian Journal of Women and the Law 34 at 36.
as the need to pay attention to the sites where women or their attributes are absent. An important example of this is the occupational segregation of the labour force and the invisibility of women's skills. The reconsideration of the relationship between the market and the home and the distinction between what is perceived to be "work" and what is perceived to be "non work" will also be discussed.

1. A FEMINIST REVISIONING OF LABOUR LAW

When we see women in the workforce as women and as workers and when we talk about them as such, then our ideas of the "worker" will change. When we speak about the "worker" in this new way then the operation of the labour market will change as a result. This is a feminist revisioning of labour law and, in particular, a revisioning of its subject, the worker.

A feminist analysis of the terrain of labour law would occur in four movements. These have been suggested by the gap between the artisan and the ghost and the need for a discourse to occur in regard to this relationship.

The first movement is an investigation of the presences of labour law. This involves watching the artisan and seeing what he does and where his strengths lie. It also involves watching where the ghost shows her presence. The presences of the artisan have been discussed in Chapter 1. These are the norms around which the paradigmatic artisan has been constructed. The discussion in this section centres around equality theory, one substantive presence of the ghost. The other substantive ghostly presence is the law concerning sexual harassment which has been discussed at length in Chapters 2-5.

The second movement is a listening for, and seeking out of, absences. These are the gaps, the sites where the ghost exists only as a ghost. The discussion centres on "asking the woman question" to investigate where the ghost is not. It also investigates the complexities and diversity of the ghost in labour law.

The third movement looks at language and at how both the artisan and the ghost have been constructed in and through the language of labour law. Aspects of this have been
discussed in Chapter 1 (in relation to the construction of the worker) and Chapter 5 (in the discussion of Mary Joe Frug's work and in relation to the rhetoric of the survey set of cases). This chapter will examine how labour law may be re-thought or refigured within language.

The fourth movement asks what these presences and absences mean and how they relate to each other. This requires the ghost and the artisan to enter into a conversation with each other. In essence, this movement investigates the relationship between the private and the public in labour law and invites the ghost into conversation with the artisan. Finally, it looks at the doctrinal links between labour law and other areas in which "work" is investigated.

II. INVESTIGATE PRESENCES

The presence of the ghost - equality theory and the labour market

A great deal of equality theory has stemmed from its use to counter inequality in the labour market and in large measure, women's sole presence in labour law has been their attempt to insist that they conform to the standard benchmark of a man. The avenue for this is anti-discrimination legislation and the problems that are inherent in its reliance on comparability to a norm that is alien to women has been discussed above in Chapter 1. While in no way denying that concerns about equality are important in the day-to-day reality of women's working lives, anti-discrimination legislation operates in many respects as an "add on" to assist women to be more like men. And it must be problematic when one of the only voices that women have is constantly to be heard insisting that women are, as much as possible, just like men.

It is also problematic that women's labour market presence is often defined solely by reference to anti-discrimination legislation. It is that part of industrial relations theory and practice which is "for the girls". In Australia, this is manifest in the fact that a separate system of tribunals administers the human rights legislation to that which administer the
industrial system. The industrial relations systems, administered by the conciliation and arbitration commissions, provide a collective jurisdiction in which structural issues such as wages and conditions can be addressed via collective means. These collective means are industrial instruments such as awards or certified agreements which regulate the terms and conditions of a large number of people. Although this is not a rule-based system, and informality and discretionary decision making are central, this system is designed for and operates on behalf of the interests of men.

The anti discrimination systems, administered by the human rights tribunals, provide an individual complaints mechanism. These tribunals rely on an individual having the resources, knowledge and tenacity to bring a complaint and to follow it through. Most complaints are dealt with through conciliation. Remedies are individual and the tribunals cannot order the amendment of collective agreements or awards. Although there is no doubt that women have won important gains through anti discrimination legislation, these tribunals present an individualised response to a structural problem which does little to address the systemic bases of discrimination in the workplace. This system is designed to provide a marginal means of redress for problems encountered by women in the labour market.

It is particularly interesting to note the reaction when the presence of women in the labour market (anti discrimination) confronts the presence of men (industrial tribunals). Since the early 1990s, attempts have been made to incorporate principles of discrimination

---

2 There are, in fact, four separate systems: state and federal industrial jurisdictions and state and federal human rights jurisdictions.

3 There are also proactive affirmative action systems such as Part 9A of the Anti Discrimination Act 1977 (NSW) and the Affirmative Action (Equal Opportunity for Women) Act 1986 (Cth). These systems will not be considered in any detail here. They apply mainly to the public sector (State level) and to large companies, educational institutions and the federal public sector (Commonwealth level). These systems attempt to take a structural, proactive approach to dealing with problems of discrimination in the workplace. They are hampered by a lack of enforcement mechanisms and a perception that they are "toothless tigers".

4 The major case on indirect discrimination, involving a number of women at a steelworks who challenged a "late on, first off" retrenchment policy, took approximately 10 years: Australian Iron and Steel v Banovic (1989) 168 CLR 165.
within the industrial relations system itself. A recent example of this are the equity provisions of the Industrial Relations Act 1996 (NSW). The objects of the Act provide that the legislation is intended to "prevent and eliminate discrimination in the workplace and in particular to ensure equal remuneration for work of equal or comparable value" (s.3(g)). "Industrial matter", the foundation of an industrial dispute that can bring a matter before the Commission, is defined in s.6(f) to include discrimination. The Commission is required to take into account the objects of the Act and the principles of the Anti Discrimination Act 1977 (NSW) in the exercise of its functions (s.146(2) and s.169). When reviewing awards the Commission must take discrimination into account (s.19(3)) and in the approval of an enterprise agreement, the Commission must ensure that compliance with the anti discrimination legislation has been achieved (s.35).

This "overlap" is of considerable importance to women and it is an attempt to remove discrimination issues from a marginal tribunal to the centre of industrial regulation. Having said this, there are concerns about a tribunal with no experience, expertise or sympathy with the principles of equality theory in making decisions involving discrimination. The retention of the current complaint based system should be strongly supported. Nevertheless, this is the type of movement for the future which will need to be monitored and fostered.

The cases discussed in Chapter 4 are another example of this presence. These cases deal with issues normally ventilated in human rights tribunals within the mainstream industrial system. As discussed above, the mere fact of this presence is important and allows women

---

5 I am not saying that only discrimination issues are relevant to women and if they are incorporated in their rightful place in the industrial system then there will be no further problem. All industrial issues - wages, conditions, unionisation - are women's issues. However, this discussion looks to one example of how a "girl's" system met a "boy's" system.

6 Pioneering efforts were made at a federal level in the Industrial Relations Act 1988 (Cth). For a discussion of these initiatives, see Therese McDermott "Equality of Employment Opportunity in a Decentralised Industrial Relations System" in Ron McCallum, Greg McCurry and Paul Ronfeldt (eds) Employment Security (Sydney: The Federation Press, 1994).

7 The NSW Pay Equity Taskforce recommended that information packages and materials for Commissioners and judges be developed in relation to discrimination and pay equity. The Government has not yet responded to this and some other recommendations of the Taskforce, although it has established a Ministerial Inquiry to investigate gender wage differentials in NSW, see NSW Pay Equity Taskforce, Report, March 1997.
to conceptualise their concerns as being those of womenworkers, rather than those simply of women. It is empowering for women to utilise those processes which have traditionally been sites of male power. It is crucial, however, for the language and concepts that are used within those systems to reflect the diversity of the voices that come before them. These processes will need to utilise the concepts and assumptions upon which the lives of womenworkers are based. As the cases discussed in Chapter 4 clearly illustrate, this does not always happen. However, the investigation of these presences, the noticing and the listening to how decision makers speak is the first and critical step in unsettling these assumptions and remaking them.

This investigation of presences and the movement of these presences throughout the entire industrial system is a process of engendering the law. It is a process which is still in its infancy but is one which should be nurtured and encouraged.

_The presence of the ghost - sexual harassment_

We have seen the other significant presence of the ghost in labour law in Chapters 2-5 of this thesis. The presence of sexual harassment in the workplace precludes insistence that workers are men and that there is no sex in the workplace. It blurs the line between the private and the public and it clearly engenders the worker. For this reason it is important to a feminist revisioning of labour law. Understanding how the presence of sexual harassment operates at all levels and understanding how the terms of the discourse are crucial is a fundamental part of this revisioning.

III. INVESTIGATE ABSENCES

_"Asking the woman question"_

This section looks at absences in labour law, places where women are not found, places where they have only a ghostly presence. Where women are not found, or are found on the margins, it is important to ask where they are, or to ask why they have been pushed to one side. Joan Acker has acutely pointed out that "marginalisation is not simply a pushing to the side ... but an active process of creating what is most urgent, interesting or
significant".8

Kathleen Bartlett describes a process of identifying and challenging those elements of existing legal doctrine that leave out or disadvantage women and members of other excluded groups. She calls this "asking the woman question". This question involves adopting a range of different positions from which the diversity of experiences of women can be understood. It involves the identification of the gender implications of otherwise neutral rules and policies.

An example of this "woman question" is to ask what it is that women do that has to date been invisible. An example of an answer to this question is the myriad of skills that women utilise in the labour market for which they are rarely or inadequately remunerated. As Joan Acker has pointed out:

> the goal of comparable worth is to make visible and equitably reward the previously hidden skills demanded in many female-predominant jobs. One of the reasons that this goal is difficult is that it is not simply error that keeps skill unseen. Invisibility is embedded in the interests and processes of both class and gender ... The active production of invisibility is an ideological process grounded in the material reality of class and gender inequality and with clear material consequences for both women and men.10

Recent research in Australia in relation to child care workers and hairdressers11 has indicated the range of skills which these service workers use which are not industrially visible but are seen only as "natural" or "domestic". "Emotional labour" which may be patterned on the sorts of relationships which appear to be predominantly domestic or personal has, because of this association with the private, become invisible to the mechanisms which determine remuneration. It is important in these cases to recognise and

---

9 Kathleen Bartlett "Feminist Legal Methods" in T Brettel Dawson Women, Law and Social Change (Carlton: Capitus Press, 1993) at 239.
10 Acker, supra note 8, at 213.
11 Case study. NSW Department of Industrial Relations, Women's Equity Bureau, 1997.
to name these skills as "work". As many feminists have pointed out, naming is an act of power. To take a skill of a flight attendant, for example, which has been described in the past as simply caring for the wellbeing of passengers and name it as an industrial skill, a type of emotional labour, is a very important step in making the absences present.

Another example is found in the continuing degree of occupational segregation in the labour market. The absence of women in mining, in construction and in some manufacturing sectors is continuing. If the "woman question" is asked, and these absences are investigated, a range of different and interesting questions arises. For example, it is too simple to say that segregation is historical and that equal employment opportunity will eventually rectify the situation. We might need to consider the role that sexual harassment - both actual and feared - in non-traditional workplaces operates to ensure that women remain in the relative safety of female dominated occupations. The extent to which sexual harassment may provide this "gatekeeping function" has been discussed above in Chapter 2. This fear may have serious consequences for women’s remuneration and overall position within the labour market.

Finally, it is crucial when asking the woman question to investigate the actual labour market experiences of women and to take them as central. These are experiences which have also been hidden. What does it feel like to be harassed at work? How can one be expected to be devoted 100% to one’s job when one has other pressing responsibilities? How can one concentrate if one has a sick child? What does it mean to know you can be dismissed on one day’s notice? What does it mean when one’s skills are not remunerated? Why does protective legislation exclude me? As Hanne Petersen found, the "problems and conflicts [of women] are almost invisible on a formal legal level". Consequently, it is the task of a feminist revisioning to "develop new analytic frameworks within which to consider women’s work so that the courts might better understand aspects of the real lives of women." The sexual harassment cases discussed in Chapter 4 indicate how important

---

12 For a recent example, see Hopper v. Mount Isa Mines (1997) EOC 92-288.
13 Graycar, supra note 1, at 39 refers to the centrality of women’s experiences.
14 Hanne Petersen "Perspectives of Women on Work and Law" (1989) 17 International Journal of Sociology of Law 327 at 336, talking about the invisibility of women in the law reports.
15 Graycar, supra note 1, at 44.
it is for the actual, real life experiences of women to be considered. The device of the "continuum of ills" is one which is defined and graded by men. It is up to women to define their own continuum (if such a thing is appropriate) and to name their own experiences and their own perceptions of harm. Regendering the subject of labour law relies on the grounding of subjectivity in real lived experience and women must speak this experience in courts and tribunals and in all fora which set the parameters of the contemporary workplace.

**Recognising diversity and the gaps in the gaps**

It is impossible to conceptualise gender in the labour market without considering its intersection with a number of other questions. To do so would be to leave gaps as yawning as the ungendered vision of work. Two areas in particular which must be considered are the intersection of gender with class and the intersection of gender with race. There are clearly other "categories" which can be seen as "gaps" in the typical analysis: for example, sexuality, disability and age. but I shall only consider class and race here. All of these areas point to the need to investigate subjectivity for women in labour law as a complex and non-unitary phenomenon.

It is important to realise that one of the great presences of women’s activism in the labour market - the struggle for equality - has been seen as an essentially middle class undertaking. This is because it is perceived to be allied to the liberal project and to accept and thereby validate its underlying assumptions. As Joan Acker has pointed out. "to imply that only gender concerns us is to build our images of female existence around the experience of educated white women, since we are those with the time and money to theorise. Such images will inevitably be inadequate as representations of women in

---

16 Contemporary feminist thought has, in general, moved away from an “essentialist” position in relation to using the category of "woman", towards a more complex and intersectional understanding. See, for example, Sherene Razack "Issues of Difference in Constitutional Reform: Saying Goodbye to the Universal Woman" in Dawson. supra note 9; Angela Harris "Race and Essentialism in Legal Theory" in Dawson, supra note 9.

17 See Kathryn Abrams "Title VII and the Complex Legal Subject" (1994) *University of Michigan Law Review* 2479 for a discussion of the antiessentialist critique in feminist legal theory and the extent to which the complex subjectivity of the female subject has been recognised in anti discrimination law.
other social, economic and cultural situations”.\textsuperscript{18}

Class. of course. has been the locus of the Marxist analysis of labour and permeates all contemporary discussions of labour law. Joanne Conaghan has analysed how the juxtaposed notion of capital versus labour without a gendered understanding of the dichotomy has produced a labour law which is partial only.\textsuperscript{19} Nevertheless, a number of feminist writers have argued that gendering labour without retaining a class analysis will not lead to an accurate picture. Joan Acker, in particular, has made a subtle argument for a dual understanding of class and gender. She says that it is necessary:

\begin{quote}

...to see gender and class in their dynamic interaction, believing that a theory of gendered class relations should illuminate the processes of creation and re-creation of class and gender relations as they take place simultaneously and involve both material and ideological dimensions.\textsuperscript{20}
\end{quote}

Acker's understanding of class and gender or "gender/class", is a dynamic one and one which rejects grand theorising as inimical to the feminist project. She uses the example of the introduction of pay equity in Oregon to demonstrate how, at times, class and gender interests may be opposed to each other (in this case because pay equity was seen to support intervention in collective bargaining by using the management tool of job evaluation). But she also says that it was important for the women workers to have the support of a strong labour movement. The goal of achieving a fair wages system (which organised labour supported) using a system which supported management led to a complex and often difficult process. Acker uses this example to demonstrate that theories of undifferentiated patriarchal subordination of women cannot explain the more complicated and nuanced reality. In the process she describes, the interests of managers and male workers were at odds, as were the interests of male workers and female workers. This "gendered class process" is, indeed, "complex and variable".\textsuperscript{21}

\begin{flushright}
\textsuperscript{18} Acker, supra note 8, at 14.
\textsuperscript{20} Acker, supra note 8, at 200.
\textsuperscript{21} Ibid. at 207.
\end{flushright}
Although there are no clear answers, the project is to understand "class and gender as intrinsically linked processes, bound together in a dance of oppositions and contradictions in which each mediates the other". Gender and class will mediate each other in different ways at different historical times. What is important is to try and grasp the changing relationship and to hold each concept simultaneously, privileging neither a priori but attempting to understand their interaction. Only then will gender inform class inform gender. As Mary Joe Frug demonstrated, taking the "contradictory" position of simultaneously using the category of woman and rejecting it can lead to a deeper and more complex understanding of the life experiences of women.

The second "category" which is frequently part of the experiences of women in the labour market is that of race. In Australia, for example, ethnicity is an important line which differentiates the labour market experiences of both men and women. Two common examples are the ethnic backgrounds of women who are homeworkers in the textile and clothing industry and domestic workers. The situation of domestic work is of particular importance to middle class white feminists who will often employ domestic workers. Sherene Razack uses the example of domestic workers to demonstrate that the "essential" or "universal" woman is deeply problematic. Further than this, however, she investigates what happens when we move from the certainty of dualistic categories to the complexity of the realisation that "women also oppress other women". Questions of race are also important when sexual harassment is considered. Patricia Hughes has pointed out that sexual harassment doctrine has traditionally regarded all harassment as occurring as if "a

---

22 Ibid. at 17.
23 See, for example, the discussion of pay equity and race in Jan Kainer "Pay Equity Strategy and Feminist Legal Theory: Challenging the Bounds of Liberalism" (1995) 8 Canadian Journal of Women and the Law 440 at 460ff. See also, more generally, the discussion by Jan Pettman in Living in the Margins: Racism, Sexism and Feminism in Australia (Sydney: Allen and Unwin, 1992) which explores the possibilities of conceptualising women's multiple oppression and looks at the intersections of race, ethnicity, class and gender in the lives of Aboriginal and non-English speaking background women in Australia.
24 Razack, supra note 16. at 243.
white man had harassed a white woman". To perceive harassment in this way is to simplify and distort women’s diverse experiences in such a way as to prevent us from understanding the real harm caused and thus preventing us from adequately addressing this harm.

Razack says that a feminist practice will involve detailed and complex investigations of the historical, sociological and practical realities of the situation in which "domestic and childcare workers who are foreign born do not enjoy the same protections in the labour code as do other workers" and for whom race is as relevant as gender. She asks, most pertinently:

\[ \text{how is the middle class woman professional, the subject of employment equity debates, constructed by the assignment of foreign-born domestic workers to the periphery of the system ... we have to expose the fact, and confront it squarely, that systems of exploitation, such as the one faced by domestic workers and nannies, rely on and are driven by women in certain supporting roles.} \]

Identifying the absences in labour law must involve the identification of all of the absences and it must investigate the relationship between them. It is important to remember that issues which may be crucial to white middle class women (such as equal employment opportunity) may have less relevance for ethnic women doing piecework at home. When one considers, for example, that part time work is less prevalent amongst non-English

---


26 Razack, supra note 16. at 244.

27 Ibid. at 244.

28 But see the discussion of the complex subject in Abrams, supra note 17. In discussing the intersection of race and sex discrimination claims, Abrams does not reject Title VII litigation on the grounds that it stems from a middle class or white understanding but seeks to ensure that claimants from a multiply constructed subgroup move from being marginal players to part of the mainstream, supra note 17. at 2527.
speaking women workers, strategies to ensure access to part time work and to ensure the protection of award and legislative provisions to part time workers must take this into account at a policy level.

Investigation of absences might also mean that the more complex, fragmented notion of a subject is all that we are left with. This post-modern insight might be frightening for women who are still struggling to achieve the status of subject within the discourse of the labour law system, but it will be important to remember that the idea of the universal, undifferentiated subject has never been of value to women. As Martha Minow comments:

It is not as though the people who try to shield themselves from complexity and ambiguity are so much better off when it comes to political mobilisation or when it comes to the search for truth. When we deny the complexity of the issues, we deny complexity and division within the group we want to mobilise.

IV. CONSIDER LANGUAGE

How is the ghost constructed in actual legal language and can this be changed?

In Chapter 5 of this paper, I discussed how legal discourses construct work and workers and considered Mary Joe Frug's ideas about how legal rules encode the female body with meaning. I will not traverse the same ground here but simply point out that the neither the ghost nor the artisan will ever be really seen until we can understand where, how and how often they are spoken about and in what terms. The use of particular forms of expression and language to talk about the subjects of the law's regulatory attention is deeply important. Thus, the cases in the survey set are considered not only for their outcomes

29 Audrey Vanderstaal and Mark Wooden *Non English Speaking Background Women and Part time Work* (National Institute of Labour Studies, 1996).
30 Hanne Petersen, writing from a legal pluralist perspective, makes the interesting point that the differences between women emerge more starkly when investigations on a "local" rather than a national level are made. *supra* note 14, at 341.
31 *Ibid*, at 342.
(which are generally supportive of women's claims) but for the way in which they are decided (which contain a number of problematic assumptions about the nature of harassment).

Much of the discussion in this paper is premised on the notion that language is important, that metaphor matters and that what something is called or labelled can have important effects on the material conditions of people's lives. The construction of women as (non)subjects of labour law and their relegation to the ghostly realm occurs in and through language. Their resurrection to the status of subject, to the realm of industrial citizen, is something that also can only occur in and through language.

One aspect of this question is the approach adopted by a number of feminist scholars who look at how various "characters" or tropes are constructed. An excellent example of this is the work of Rosemary Hunter.31 She analyses a labour law textbook as a stage on which a number of characters play out the drama of the law. Hunter points out that "the range of characters in a text or casebook also projects a particular descriptive/normative view of reality, including gender roles".34 This statement is equally true of the text of a judgment of the court or of the text of an award or agreement. Hunter's characters are the "victims", "sexual women", and "disobedient uppity women". The victims are powerless and passive, they are injured, dismissed and defrauded. The sexual women are those who appear simply by virtue of their sexuality. These are cases of sexual harassment or of women who appear by virtue of their sexual encounters with their husband's employees. The uppity women are swiftly put in their place. The drama Hunter describes is a "mythic world" of "good" and "bad" women who are either too vulnerable or too assertive. The characterisation of these women, the elevation to mythic archetypes is important in assessing how the law views the gendered worker.

Related to this last example is the importance of renaming events in light of women's

31 See also Carol Smart "Law's Truth: Women's Experiences" in Regina Graycar (ed) Dissenting Opinions: Feminist Explorations in Law and Society (Sydney: Allen and Unwin, 1990) 1 at 7, describing women in the law as "mothers, wives, sexual objects, pregnant women, deserted mothers, single mother and so on".

experiences. As we saw in Chapter 2, sexual harassment in the workplace has always occurred. It is just that only recently has it been named and coded as discrimination. What was called "horseplay" or "social interaction" is now named as harassment. 35 This taking back of language and rendering of use to describe the way women live is an essential part of a feminist analysis. It is why so much emphasis has been placed in this paper on how decision makers decide and the conceptual systems within which they work.

It is important to realise that women's voices have been effectively silenced within the system of industrial regulation. It is particularly difficult for them to name their experiences as discrimination or inappropriate or oppressive because they have had few institutional avenues through which to speak. The main avenue through which workers have spoken has traditionally been the voice of organised labour - the trade union movement. In Australia, at least, unions have been somewhat unresponsive to women's demands for equality and adequate remuneration. Indeed, in the early part of this century, they were active proponents of the family wage and the discriminatory distinctions which went with it. Joanne Conaghan points out that, historically, trade unions have perpetuated and romanticised the ideology of women as belonging in the home which has resulted in a "sanctification" of the family and a campaign in favour of the family wage. 36 Thus, as Conaghan notes, it is fundamental to a "feminist approach to labour law .. to challenge the assumption that unions represent the interests of the workers". 37 It is fundamental to ensure that women have their own voice within the system or that the union movement speaks in this voice.

Thus, part of a feminist practice in labour law will be to investigate the presence and location of women's voices within the labour movement. At present, in Australia, women are under-represented in trade unions. Approximately 33% of women employees in NSW

35 See Abrams, supra note 17, at 2537.
36 Conaghan, supra note 19, at 385.
37 Ibid. at 385. Great care must, however, be taken in undertaking a critique of the trade union movement at a time of political conservatism where the value of unionism as a whole is under threat. This is not to say that the quest to make unions more responsive to women cannot take place at such a time (indeed, a broader base of membership may well be at its of great value to unions) only that care must be paid to the forum for and terms of the debate.
belonged to a union in 1995, compared with 42% of men.\(^{38}\) They are also under represented within the organisation of unions and, in particular, in the senior ranks.\(^{39}\) In order to ensure women's voices are heard, unions must change to allow women to fully participate in their running, organisation and, crucially, agenda setting. More than this, however, in order to ensure that workers' voices continue to be heard, it is crucial to understand that, in an age where union membership is on the decline, the participation of women will be fundamental to the continued survival of the movement.\(^{40}\)

When women find their voices within the union movement (and the union movement realises that its voice is thereby strengthened) they will have one way of beginning to name and articulate their particular experiences within the labour market. They will be able to speak for themselves.

V. INVESTIGATE RELATIONSHIPS

The distinction between the market and the home

The distinction between the market and the home coded as the distinction between the public and the private has been discussed in relation to sexual harassment in Chapter 2. Although sexual harassment is a particularly interesting example because sex is seen as so quintessentially private, the observations made in relation to it are applicable to many other areas of labour law. It is clear that the public/private boundary permeates our understanding of many doctrinal issues.

Olsen, for example, describes an extremely complex relationship between market and family and details reform efforts in relation to both spheres. For example, the advent of anti discrimination laws can be seen as an effort to allow women to integrate into the free market and to make the market more free by eliminating discriminatory actions that would

\(^{38}\) Australian Bureau of Statistics and NSW Ministry for Status and Advancement of Women Women in NSW, Catalogue 4107.1.


distort choices. Another example might be the various "work and family" initiatives which are becoming increasingly popular with governments and business. Initiatives such as paid maternity leave, family leave, job sharing and teleworking all attempt to ameliorate the harshness of the market by forcing it to respond to human needs. This can be viewed as an attempt to make the market more like the family.

In all areas of labour law it is important to pay careful attention to the way that the private is conceptualised and to the way in which the distinction may be used in a "conclusory" manner in order to justify certain political conclusions. In revisioning the labour market, the rhetoric of "separate spheres" must be scrutinised with care. Those aspects which are useful (such as defining a boundary of personal privacy in relation to sexual harassment) must be retained. Those aspects which are detrimental (such as pay inequities due to the undervaluation of women's work) must be rejected. Thus, no use of a reified distinction between public and private can be made. Each instance in which the "private" is to be invoked must be considered on an individualised and strategic level. Each must be argued for and separately justified.

**The distinction between "work" and "non work"**

Carole Pateman argues that "housework is not 'work'". Work, she argues, "takes place in the men's world of capitalism and workplaces." This is because the "meaning of 'work' depends on the (repressed) connection between the private and civil spheres." Part of this construction of work in the home as not-work stems from the devices that labour law uses to ensure that it patrols its own borders. The first device is a set of technical definitions in relation to who is an employee and where employees can work. The second device is a recourse to a defined doctrinal boundaries to ensure that "work" comes to mean "waged work".

In relation to the first device, Rosemary Owens has pointed out that the categories of the

---

42 Unusual in Australia where the norm has been 12 months unpaid leave.
43 Olsen, supra note 41. at 1548-9.
law have been constructed from the experience of men. Thus a standard textbook can point out that employees generally: are not in familial relationships with their employers, work outside the home, are paid a wage and so on. Women are frequently not found to be an "employee" because they do not conform to the norm of the artisan. Rosemary Hunter argues that these differences are presented as a priori classifications with no argument as to why or how they have come to be formed and how they might operate to disadvantage women or to distort their labour market experiences. She says that the writers of a text:

assert that labour law "recognises" and applies different rules to different kinds of relationships, such as employer/employee, employer/independent contractor, and familial, as if these relationships had some pre- or extra-legal existence. In truth, labour law helps to construct these relationships.

Feminists have frequently criticised the ossified nature of legal categories and have urged women to think outside of their constraints. As Christine Littleton has suggested:

[Feminist jurisprudence must] take women's experience as central and legal categories or doctrines as merely raw material - to be cut and pasted, stretched, arranged, and sewn together to fit that experience. When legal categories do not match our experiences as women, the categories must expand, contract or move - not us.

In relation to the second device, Regina Graycar has provided a subtle argument as to how the definition of "women's work" must take into account a range of doctrinal categories. She argues that legal problems have been arranged into doctrinal categories which women have had no role in formulating. Often, these doctrines do not capture the specificities of

---

46 Hunter, supra note 34, at 316.
48 Graycar, supra note 1. A related but separate point is made by Linda Dickins "Road Blocks on the Road to Equality" (1993) 18 Melbourne University Law Review 277 at 295, who argues that the anti discrimination legislation is undermined and contradicted by images of women presented in other doctrinal areas. Thus, images of domesticity, dependency and femininity from the criminal law, property and family law undermine their claims to equality in the labour market.
women's' experiences. Thus, for example, in order to really understand the work that women do, labour law will not be sufficient. If we "focus solely on the position of women in the paid labour force when we scrutinise "work". we may be (unwittingly) entrenching a false distinction between "work" and "non work".".49

Many feminists have argued that it is unjust and illogical to exclude the overwhelming number of activities that women customarily perform in the home, in the fields and in the nursery as not constituting "work". A famous defence of including all of the work that women do has been mounted by Marilyn Waring.50 From a labour market perspective, Anne-Marie Daune-Richard has argued that the existing approaches to theorising women's labour force have limitations which can only be overcome if "the category 'women's work' incorporates the duality of female activity - paid labour, within the sphere of market relations, and domestic labour, within the sphere of the reproduction of individuals".51

Daune-Richard outlines a number of ways in which women's participation in the labour market may be theorised. First, the biologically determinist essentialist model whereby women in the labour market suffer the social handicap of their biologically determined reproductive role. Second, a feminist model focussing on domestic labour as the primary site of women's exploitation. Third, the neo-Marxist approach attempting to focus on the interconnection of production and reproduction. She argues that it is crucial to a valid analysis of the labour market to begin with the hypothesis that an "individual's locations in the family and in production must be considered simultaneously"52 and that it is also necessary to create an intersectional category of "women's work" which is situated at the junction of paid and domestic labour.

Graycar's analysis is telling here. She comments that it is critical to scrutinise each doctrinal category in which women work. This is important for the legal recognition of the economic value of work in the home, but it is also important because:

49 Graycar, supra note 1, at 42.
52 Ibid. at 264.
a more detailed exploration of women's work outside the paid workforce would necessarily involve a reexamination of some of the assumptions made about the sphere of paid work that have led to the privileging of that arena while at the same time enabling the maintenance of women's "secondary" status within it.53

It is not enough for a feminist revisioning of the labour market to look at already defined categories of "work". It must look to the work that women do, wherever that may have been done and however it may have been categorised. An intersectional category is, indeed, required because a focus simply on paid work will reinforce the male assumptions behind the designation of unpaid work as "not work".

VI. THE GENDERED WORKER/WORKPLACE

"Look", says the ghost, "the artisan has no clothes".

It often takes a perspective from the outside to see that the emperor has no clothes. The marginal position of the ghost, the site of the woman in the labour market, is pivotal in providing a perspective from which this can become visible. In order to move ahead, the denuded artisan and the ghost must commence a dialogue about who and where they are in the labour market and in the family.

In her book *Postmodern Legal Feminism*, Frug provides a set of readings which show how understanding or noticing or disrupting gender informs our understanding of legal doctrine. For example, in relation to contract doctrine, when she demonstrates that the "rule" is often associated with male parties and the "exception" with female54 this enables readers to give preference to the rule and construe the (female) countercase as the exception rather than an equally valid counterrule. At the same time as this "gendered" reading informs our understanding of contract doctrine, Frug asserts that it also enables an alternative, oppositional reading which loosens the traditional ideas about gender that

53 Graycar, supra note 1, 58.

155
"constrain readers’ lives": it permits an alternative understanding of the work that women do and investigates the traditional images and characters of women.

Frug’s complicated, gendered analysis allows alternative readings. Gender is the fulcrum with which to disrupt congealed and oppressive meanings. Can gender be the stylus with which to write new meanings onto the idea of a worker?

The workplace is already gendered. Veronica Beechey provides a fascinating list of empirical results which indicates that "gender matters". These studies show that gender is important in the workplace in relation to: definitions of skill and the distinction between skilled and non skilled work, occupational sex-typing, the forms of authority and supervision within the workplace, the differential experiences of men and women to work, hours of work for men and women, views as to the future organisation of working time, the extent to which men and women benefit from the unpaid work of their partners, the impact on trade union activity and participation, differential experiences of redundancy and unemployment. One could certainly add security of employment, the experiences of harassment and levels of stress to this list.

The discussion of sexual harassment in Chapter 4 shows clearly that all sorts of workplaces are the site of sexual harassment. In these workplaces, sexuality is overt and transgressive. It is undeniable that there are bodies in these workplaces and that these some of these bodies (women’s bodies) are constructed in fear, in discomfort, in embarrassment. Sexual harassment constitutes the bright glare of sexism in the labour market. It is sexism unmasked but it also clothes the ghost, embodies her, makes her visible.

Thus, the workplace is already full of bodies. Anti discrimination legislation demonstrates clearly that conduct in relation to those who stray from the norm is common and recognises the embodiment of difference in workers. Sexual harassment is based on the

55 "Rereading Cases: Challenging the Gender of Two Contract Decisions" in *Postmodern Legal Feminism*, supra note 54.
57 Ibid. at 65ff.
58 Veronica Beechey "Rethinking the Definition of Work" in Jenson, supra note 51, 45 at 55.
existence of bodies which have become sexualised within the workplace. Although sexual harassment as one of the major overt indicators of sex in the workplace deals with transgressive sexuality, this need not be so. The fear of sexuality in the public sphere because of its association with the private must be addressed and made explicit. The private will not lose its power to consign women to inferior positions by remaining invisible.

A gendered workplace would reveal and display its gender. It would be proud of its embodiment. It would be proud of its embeddedness in context - where workers exist in a relationship with a family, with a partner, with the rest of a human life. There would be sex in such a workplace and it would be proscribed to the extent that it was unwelcome and unsafe. It would not be proscribed because it was "inappropriate" or a category mistake, an interloper from the private.

A gendered workplace would have no benchmark. It would be made of the complexity of the experiences of all of its participants. Feminists have rightly displayed a suspicion of paradigms and of overarching theoretical constructs. It would not be consistent to attempt to erect a different, female norm.

A gendered workplace would embody a notion of "balance". It would exist within a dialogue with the home and with the other responsibilities a real, gendered, embodied human being has. A gendered workplace would be based on the understanding that workers have bodies and minds and emotions and souls and families and outside interests. In a gendered workplace, no woman would need to be either a woman or a worker in order to feel competent and safe. She would be a womanworker and her competence and safety would flow from her ability to be all that she is at work.

The labour law that defines and is defined by the gendered workplace would reveal and display its subject and give us a more comprehensive understanding of work, its value and its participants. The subject of labour law, the "worker", would be a more fluid construction, based on the real lived experiences of the men and women who comprise the workforce and reflective of all their concerns and needs. This subject would have his or
her real concerns addressed - the harms of harassment, for example, would be spoken for what they are, rather than as part of a moralistic discourse or as an affront to manners. All the experiences of workers - male and female - would inform the constructions of the law and the law would take cognisance of these and accord to them real importance.

In relation to this I would add two caveats. The first is that short term political ends may be gained by strategic use of male norms. Feminists must not deny this and must strategise subtly in making use of existing categories. A good example of this is achieving increased remuneration for women. The second is that change will be slow, it will be incremental and it will occur perhaps in sites where it is least expected. This may be a particular judgment, the change in a union's rules or a legislative recognition of the change in the working week. It may come from outside the discipline, perhaps from the recognition of the economic value of women's work in other doctrinal areas.

What is important is for these changes to be spoken in women's voices, after having listened to women and taken cognisance of our experiences. These changes involve a dialogue, a full and fair and free dialogue between the artisan and the ghost. Their aim is nothing more and nothing less than:

just work relationships between women and men. Relationships which recognise
the dignity of all workers and provide an opportunity to every worker to express
and develop their particular talents.59

It is important, then, to talk about women and work in the terms which we ourselves use. In courtrooms, in the workplace, in submissions, in arguments, in negotiations, in policy formation, in mediations, we should talk about work and care. We should talk about work and bodies. We must talk about work and people. And work and fear. And work and exclusion. And work and sex. Only when these juxtapositions sound ordinary will we know that we have begun to reshape the idea of work with our words.

59 Owens, supra note 45, at 429. Kathryn Abrams "Gender Discrimination and the Transformation of Workplace Norms" (1989) 42 Vanderbilt Law Review 1183 at 1235 says that a perspective formed by the experiences of women would bring "a desire for a workplace that elicits workers' satisfaction, while it respects their humanity".
CONCLUSION

The construction of the worker through the language of law - the construction thesis - is a complex phenomenon and this paper has not attempted to traverse its every manifestation. Nevertheless, through a general theoretical discussion of the construction of the worker in labour law and via a specific case study examining sexual harassment, I have attempted to commence an investigation of how the subject of labour law is rendered genderless, sexless and bodiless and how this effaced subject comes to operate as the universal.

The results of the survey set of cases which form the central focus of this paper came as a surprise to me. I undertook the analysis of the cases in the full expectation that women would, in terms of outcome, do extremely badly. What I found, however, was that women applicant victims almost always succeed at arbitration and that only the most unmeritorious cases were dismissed by the decision maker. In relation to perpetrator applicants, I had fully expected to find that men did well out of the jurisdiction, that their customary mode of operation within the workplace would be valorised and upheld. Again, this is not what I found. Male perpetrator applicants were rarely successful (although in a few cases they did achieve a remedy). I had expected a blatant "double standard" and I did not find it, at least in respect of the results.

Yet, when I paid close attention to the way in which the decisions were reached, it became clear that the worker that the decision makers had in mind was not a woman. The harms actually experienced by women in sexual harassment were hardly at all in evidence. Instead, the subjects of the decisions were concerned about "decency" and "appropriate" conduct. To them, sexual harassment was akin to fighting and existed on a continuum of seriousness which bore little relationship to the real harms experienced by women in the workplace. The cases showed that women were seen paternalistically and they did not define or speak their own experiences. The cases showed that the decision makers constructed a worker who, even in a context that was blatantly about sex, was the artisan. The ghost, the gendered spectre of the worker, was visible in some cases, but only very rarely.
When we returned, in Chapter 6, to the general construction thesis, I attempted to ask how this construction of the worker (exemplified by but not restricted to the sexual harassment cases) could be disrupted. The lever by which this disruption could occur, it was posited, was that the construction of the worker had occurred in and through language and, thus, in and through language it could be reconstructed. In addition, the disrupting influence of gender was relied upon. the unruliness of women disturbing our settled expectations of the paradigmatic subject.

I think that this reconstruction can begin through the four movements which I outlined in Chapter 6: through paying attention to presences of labour law, through seeking out the absences in labour law, through listening carefully to language and through clear attention to relationships. These movements are not enough and they are not, themselves, going to change the material conditions of women's lives. But they are a start, a tentative reaching towards of form of discourse that will speak in women's voices, that will ask the right questions, that will be sufficiently inclusive to listen to all manner of women's experiences. This reconstruction - a listening and a respeaking - will occur when law begins to speak in these terms. There is slow progress in this respect and the instances in the survey set of cases which name the harms of sexual harassment for what they are are encouraging. There is a long way yet to go.

Finally, it is crucial to remember that reconstruction occurs because the construction thesis itself contains the seeds of its own rewriting. That language is malleable and that our discourses are infinitely open to reinscription is a source of power. The reconstruction of the subject of labour law from the artisan to a gendered worker - for women to a "womenworker", a full industrial citizen - is an incremental process. It occurs in every judgment, in every legal textbook, in every certified agreement, in every award. It must be spoken over and over. The act of this speaking will in every case be an act of transformation that will lead, imperceptibly but ultimately, to a fairer, more inclusive, more representative workplace.
BIBLIOGRAPHY

BOOKS, ARTICLES AND REPORTS


Abrams, Kathryn "Title VII and the Complex Legal Subject" (1994) University of Michigan Law Review 2479


Aggarwal, Arjun Sexual Harassment in the Workplace (Toronto: Butterworths. 1992, 2nd ed)


Australian Bureau of Statistics and the NSW Ministry for the Status and Advancement of Women Women in NSW. Catalogue 4107.1


Australian Bureau of Statistics Distribution and Composition of Employee Earnings and Hours for NSW May 1995. Catalogue No. 6306

Australian Bureau of Statistics How Australians Use their Time. Catalogue No. 4153.0


Australian Centre for Industrial Relations Research and Training Reforming Working Time: Alternatives to Unemployment, Casualisation and Excessive Hours. July 1996

Australian Law Reform Commission Equality Before the Law (Discussion Paper 54, 161
July 1993)

Bacchi. Carol and Jose. Jim "Dealing with Sexual Harassment: Persuade, Discipline or Punish?" (1994) 10 Australian Journal of Law and Society 1


Comisky. Hope “Beware the Alleged Harasser - Lawsuits by Those Accused of Sexual
Harassment" (1996) 12 The Labor Lawyer 277


Cornish, Mary and Lopez, Suzanne "Changing the Workplace Culture through Effective Harassment Remedies" (1994) Canadian Labour and Employment Law Journal 95

Cover, Robert "Violence and the Word" (1986) 95 Yale Law Journal 1601


Dawson, T Brettel Women, Law and Social Change (Carlton: Captus Press. 1993)

Dean, Jodi "From Sphere to Boundary: Sexual Harassment, Identity and the Shift in Privacy" (1994) Yale Journal of Law and Feminism 349

Dickens, Linda "Road Blocks on the Road to Equality" (1993) 18 Melbourne University Law Review 277


Friedman, Sharon "Labour Law in Flux: The Changing Composition of the Workforce" (1997) 26 Industrial Law Journal 337


Frug, Mary Joe Postmodern Legal Feminism (New York: Routledge. 1991)


Gavison, Ruth "Feminism and the Public/Private Distinction" (1992) 45 Stanford Law Review 1

Graycar, Regina and Morgan, Jenny The Hidden Gender of Law (Sydney: The Federation Press. 1990)

Graycar, Regina "Legal Categories and Women's Work: Explorations for Cross Doctrinal Feminist Jurisprudence" (1994) 7 Canadian Journal of Women and the Law 34


164
Hunter, Rosemary "Gender Gap in Compensation" (1993) 82 Georgetown Law Journal 147

Hunter, Rosemary "Regulation of Independent Contractors" (1992) 5 Corporate and Business Law Journal 165

Hughes, Patricia "The Evolving Conceptual Framework of Sexual Harassment" (1993) 3 Canadian Labour and Employment Law Journal 1


Kelly, Rosemary Pay Equity for Women in the Confectionary Industry: An Analysis of Issues and Options for Change (Canberra: Department of Industrial Relations. 1992)


Korn, Jane "The Fungible Woman and Other Myths of Sexual Harassment" (1993) 67 Tulane Law Review 1363

Levinson, Sandford "Law as Literature" (1982) 60 Texas Law Review 373


Macken, James, O'Grady, Paul and Sappideen, Carolyn, *The Law of Employment* (Sydney: Law Book Company, 1997)


MacDermott, Therese “The Duty to Provide a Harassment-Free Work Environment” (1995) 37 *Journal of Industrial Relations* 495


MacKinnon, Catharine “Reflections on Sex Equality under the Law” (1991) 100 *Yale Law Journal* 1281

Minson, Jeffrey *Bureaucratic Culture and the Management of Sexual Harassment* (Griffith University: Cultural Policy Studies Occasional Paper No.12)


Mullen, Elizabeth "Workplace Violence: Cause for Concern or the Construction of a New Category of Fear" (1997) 39 *Journal of Industrial Relations* 21


Pettman, Jan *Living in the Margins: Racism, Sexism and Feminism in Australia* (Sydney: Allen & Unwin, 1992)

Pocock, Barbara "Gender and Activism in Australian Unions" (1995) *Journal of Industrial Relations* 377


Pringle, Rosemary *Secretaries Talk: Sexuality, Power and Work* (Sydney: Allen & Unwin, 1988)


Ronalds, Chris *Affirmative Action and Sex Discrimination* (Sydney: Pluto Press, 1987)


Schneider, Elizabeth "The Dialectic of Rights and Politics: Perspectives From the Women's Movement" (1986) 61 *New York University Law Review* 589


Sheppard. Colleen " Systemic Inequality and Workplace Culture: Challenging the Institutionalisation of Sexual Harassment" 3 Canadian Labour and Employment Law Journal 249


Thornton. Margaret "Comment on Linda Dickens’ Road Blocks on the Road to Equality" (1993) 18 Melbourne University Law Review 298


Thornton. Margaret The Liberal Promise: Anti Discrimination Legislation in Australia (Melbourne: Oxford University Press. 1990)


**TABLE OF CASES DISCUSSED IN CHAPTERS 4 AND 5**

**Ericsson v NUW.** 16/4/1992. Deputy President Keogh. AIRC  
**AMASCU v Glenorchy City Council.** 8/10/1993. SDP Riordan. AIRC  
**Milner v Antron.** 20/12/1994. Staindl JR. IRCA  
**Jones v Armas.** 22/12/1994. Millane JR. IRCA  
**Chambers v James Cook University.** 10/2/1995. Boulton JR. IRCA  
**Fuller v Law Society.** 17/2/1995. Parkinson JR. IRCA  
**Flight Attendant's Assoc v Qantas Airways.** 21/3/1996. Commissioner Gay. AIRC  
**Andison v Woolworths.** 31/3/1995. McIlwaine JR. IRCA  
**AWU v ACL.** 8/6/1995. Farrell JR. IRCA  
**Thomas v Westpac.** 26/6/1995. Wilcox CJ. IRCA  
**Illardo v Village Roadshow.** 16/8/1995. McIlwaine JR. IRCA  
**Chambers v James Cook University.** 25/8/1995. Spender J. IRCA  
**Whitaker v Australia Post.** 17/11/1995. Boon JR. IRCA  
**Andrews v Linfox.** 4/12/1995. Murphy JR. IRCA  
**Dawson v Daqui.** 30/1/1996. Ritter JR. IRCA  
**Till v Swan Hill Pioneer Settlement.** 14/5/1996. Murphy JR. IRCA  
**Puccio v Catholic Education Office.** 17/5/1996. Von Doussa J. IRCA  
**Beck v Clayton RSL.** 31/5/1996. Ryan JR. IRCA  
**Goodfellow v Scrymgar Printers.** 5/7/1996. Farrell JR. IRCA  
**M v ANU.** 20/8/1996. Moore J. IRCA  
**Paz v Mack Trucks.** 13/9/1996. McIlwaine JR. IRCA  
**Meikle v Franklin Pty Ltd.** 2/10/1996. Commissioner Lawson. AIRC  
McManus v Scott Charlton, 13/10/1996, Finn J, Federal Court
Baxter v Bendigo Health Care, 28/10/1996, Ryan JR, IRCA
Sealy v Carvene, 7/11/1996, Ryan JR, IRCA
Broadbent v Carvene, 25/11/1996, Murphy JR, IRCA
Eggleston v Kingsgrove Medical Centre, 5/3/1997, Patch JR, IRCA
McEvoy v Broadlex Cleaning, 9/10/1997, Commissioner Raffaelli, AIRC
Ball v Cadbury Schweppes, 31/10/1997, Ryan JR, IRCA
Bryant v City of Fairfield RSL, 16/12/1997, McIlwaine JR, IRCA

Italiano v Bethesda Hospital, 28/6/1998, Parkinson JR, Federal Court
Burazin v Blacktown City Guardian (1996) 142 ALR 144 (Federal Court)
Walker v NSW Department of School Education, 31/7/1995, NSW IRC
Rapp and Waugh v Wauchope RSL Club, 5/7/1995, NSW IRC
Judd v Toukely RSL Club, 23/9/1996, NSW IRC
Turnbull v TBM Newcastle, 16/6/1995, NSW IRC
Garrido v G'Day Cafe Coffee House, 23/10/1995, NSW IRC
Stojanovska v Bell Plastics Sydney Limited, 15/3/1996, NSW IRC
Sutton v Tick Tock Australia, 16/7/1997, Full Bench, SA IRC
Gryn v Civil and Civic, 25/2/1994, SA IRC
Richas v B&R Lovell, 26/1/1990, SA IRC
Wallace v Glynburn Contractors Port Road P/L 7/5/1993, SA IRC
Turnbull v Sikora v Mount Isa Mines Limited, 13/12/1996, Qld IRC
Perry v Country Bake, 30/1/1998, Commissioner Bloomfield, Qld IRC
Dickenson v Woolworths Safeways, 15/4/1994, Victorian IRC