WOMEN, 'ATYPICAL' WORK RELATIONSHIPS AND THE LAW

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[*The growth in the participation of women in the paid workforce through 'atypical' work has been hailed as evidence of the modern recognition of women's equality. 'Atypical' work has also been promoted as responsive to many of the criticisms which feminists have made regarding women's exclusion from the paid workforce. The article examines the legal regulation of 'atypical' work in its historical context, the ways in which the law privileges the 'typical' worker, and recent efforts at reform which attempt to ameliorate the exploitation suffered by 'atypical' workers. From this examination of the law it argues that the promotion of 'atypical' work as women's work is as oppressive as was their exclusion from the paid workforce because it continues to organise women's work according to 'the sexual contract', and reifies the public / private dichotomy as it applies to work relationships. It is argued that the appropriate strategy for feminists in this context is not to promote any particular structure of work relationships but to maintain a critical stance in the evaluation of all the aspects of work relationships.*]

INTRODUCTION

Feminists have observed that women's work is different to that of men: women perform different tasks, they work in different places and the time for which they work is different. However, the feminist focus is not simply the work that women do. Rather, it is to understand women's experience of work and the nature of the relationships that are created in and through work. Law, as the expression of just relationships, is inevitably the concern of feminists.

During the last three decades in Australia women have entered the paid work force in unprecedented numbers and at a rate that has been increasing rapidly.[1] However, when women enter the paid work force they do not lose their responsibility for work in the home.[2] The assumption that the home is the natural and rightful place for women to work persists and work in the paid work force is considered secondary for women. Women have thus become the 'atypical' workers: they are the 'part-timer', the 'casual', the 'temp', and the 'outworker'.[3]

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[1] There is an abundance of statistical information relating to the participation of women in the paid workforce. In August 1992 the Australian labour force participation rates of women and men were 52 percent and 74 percent respectively. Between 1966 and 1992 the labour force participation of married women increased from 29 percent to 53 percent: Australian Bureau of Statistics, *Women in Australia*, (Cat 4113.0, March 1993) 118. The rate of increase has been even more dramatic during the last decade, women's employment growing by 33.4 percent between April 1983 and April 1989: Australian Department of Employment, Education, and Training, Women's Bureau, *New Brooms: Restructuring And Training Issues For Women In The Service Sector* (1989) 11, while from 1966-1988 the percentage of the Australian paid workforce composed of women increased from 36.3 percent to 49.4 percent: Dawkins, P., and Norris, K., *Casual Employment In Australia* (1987). Now 4/5 of married women are in paid employment : Australian Bureau of Statistics, *Womens Work, South Australia* (Cat 6204.4, 1991).

[2] See Bittman, M., *Juggling Time: How Australian Families Use Time* (1991), and Baxter, J., and Gibson, D., with Lynch-Blosse, M., *Double Take: The Links Between Paid And Unpaid Work* (1990).

[3] The statistics reveal that in 1990 women accounted for 88.3 percent of the permanent part-time

Women do not conform to the established norm of the worker who, having someone else to provide domestic support, works in the paid work force full-time, on a regular and permanent basis, without break for the entirety of a working lifetime, at the premises of the employer. That norm is male.

This article seeks to understand the nature of work relationships and women's place within them through an examination of 'atypical' work, particularly part-time work and casual work, and the law in relation to it.

1. *WORK AND LAW*

Feminist jurisprudence has exposed the law as part of the structure of power in the patriarchal state. One manifestation of this is the way the categories of the law have been constructed from men's experience. These categories not only obliterate much in women's experience, but also serve to obscure the interrelationship of many elements in the construction of women's place in social relationships.[4] While labour law has not been immune from feminist critiques,[5] feminists have also shown that working relationships are the subject of more than labour law. The sexual division of labour in marriage, which means that men have the primary role in the paid work force and women work in the home dependent upon them, is reinforced and perpetuated through the law relating to the division of property after the breakdown of marriage.[6] Social welfare policy and law also conspire to maintain women as dependent, if not on a man, then on the (male) state.[7] The law

workforce, 62.6 percent of the casual workforce and 79.9 percent of the part-time workforce: Australian Bureau of Statistics, *The Labour Force Australia*, (Cat 6203.0, 1990). This survey also showed that 47 percent of employed married women and about 30 percent of employed unmarried women worked part-time, while only about 8 percent of employed males worked part-time: Australian Bureau of Statistics, *The Labour Force Australia* (Cat 6203.0, 1990) 24. The overwhelming majority (74 percent) of people who work from home are women, and the majority (57 percent) of these have children under 14 years of age: Australian Bureau of Statistics, *Persons Employed At Home In Australia,* (Cat 6275.0, 1989) 3, 5. For further statistical information see Australian Bureau of Statistics, *Women In Australia* (Cat 4113.0, 1993), *Alternative Working Arrangements, Australia, September To November 1986* (Cat 6341.0, 1988), and *Type and Conditions of Part-Time Employment Survey, South Australia, October 1986* (Cat 6203.4, 1986). For a more detailed discussion of the statistics see generally Lewis, H., *Part-Time Work: Trends and Issues* (1990); Romeyn, J., *Flexible Working Time: Part-Time and Casual Employment* (1992); Women's Adviser's Unit, Department of Labour, South Australia, *Same Time Next Week: The Extent and Nature of Part-Time Work in South Australia* (1991). Women of course work in many other ways, for example, as voluntary workers; as partners in the family business (See Walker, J., 'The Production Of Exchange Values Within The Home' (1989) 9 *Australian Feminist Studies* 51 (especially 76-8), and *Clarke v. Evans* (1990) *Australian Industrial Law Review* 352); by job sharing (see Leighton, P., 'Job Sharing — Some Issues For Labour Law' (1986) 15 *Industrial Law Journal* 173).

4 See Graycar, R., 'Legal Categories and Women's Work: Explorations for a Cross Doctrinal Feminist Jurisprudence' (1993) 6 *Canadian Journal of Women and the Law* (forthcoming); Graycar, R., and Morgan, J., *The Hidden Gender Of Law* (1990); and Dahl, T.S., *Women's Law: An Introduction To Feminist Jurisprudence* (1987).

5 See Hunter, R., 'Representing Gender in Legal Analysis: A Case/Book Study in Labour Law' (1991) 18 M.U.L.R. 305; Conaghan , J., 'The Invisibility of Women in Labour Law: Gender Neutrality in Model Building' (1986) 14 *International Journal of Sociology of Law* 377; Crain, M., 'Feminising Unions: Challenging The Gendered Structure Of Wage Labour' (1991) 89 *Michigan Law Review* 1155; and Vander Velde, L., 'The Gendered Origins Of the Lumley Doctrine: Binding Men's Consciences and Women's Fidelity' (1992) 101 *Yale Law Journal* 775.

6 See Charlesworth, H., and Ingleby, R., 'The Sexual Division of Labour and Family Property Law' (1988) 6 *Law in Context* 29; Graycar and Morgan, *op. cit.* n.4, especially 127-39; and Neave, M., 'Living Together — The Legal Effects of the Sexual Division of Labour in Four Common Law Countries' (1991) 17 *Monash University Law Review* 14.

7 See Baldock, C.V., and Cass, B., (eds), *Women, Social Welfare and the State In Australia* (1988); Graycar and Morgan, *op. cit.* n.4, especially 147-74; Law, S., 'Women, Work, Welfare and the Preservation of Patriarchy' (1983) 131 *University of Pensylvania Law Review* 1249; Neave, M.,

of torts in failing to compensate adequately work in the home fails to recognise much of women's work.[8] In all these areas the law perpetuates the sexual division of labour whereby men retain a dominance in the paid work force and work in the home is identified as worthless and as the province of women.

Historically, the law of work relationships was encompassed by 'the law of domestic relations.'[9] It grew out of feudal society where all production was situated in the manorial home and a broad concept of family incorporated the social relations of master and servant, husband and wife, and parent and child. Women had no place in this law. Although the primary social unit was the family, the law recognised only the head of the household: the husband, the father and master. The husband took the benefit of any work performed by his wife for another: any earnings belonged to her husband, and he could sue for them in his own name. The proceedings of any joint labour of the husband and the wife also belonged to him.[10] So natural were these relations perceived to be that change in them was effected only by legislative action, the *Married Women's Property Acts*, towards the end of the 19th century.

The transition from feudal to industrial society was marked by the movement of many of the forms of production away from the home into the factory. This transition was neither simple nor linear, but at its completion there had emerged a new concept of work, one which required the separation of work from home.[11] This in turn brought forth new categories in the law of work relationships. Labour law became separate from the law of domestic relations. Socially, the transition from feudal to industrial society was seen as a passage from the family to the individual. In the law it was a movement from status to contract.[12] Work relations were no longer a matter of status within the family but a matter of choice, an agreement between free individuals. These new relations represented a progression from the worker as an object, property of the master, to the worker as independent subject, a human being.

'From Difference to Sameness — Law and Women's Work' (1992) 18 M.U.L.R. 768, especially 789-806.

8 See *Van Gervan v. Fenton* (1992) 66 A.L.J.R. 828, 834-7 and 838. *Cf. Sharman v. Evans* (1977) 138 C.L.R. 563, 598 *per* Murphy J. See also Graycar and Morgan, *op. cit.* n.4, especially 74-83; Graycar, R. 'Women's Work: Who Cares?' (1992) 14 *Sydney Law Review* 86; and Neave, M., 'Production And Reproduction: Does the Law Recognise The Value Of Women's Work?' (1991) *Australian Legal Convention Proceedings* 227-49.

9 See William Blackstone, *Commentaries on the Laws of England,* vol. I (1978) 422*ff.* This classification prevailed in some texts well into this century: see Cairns, A., *Eversley's Law of Domestic Relations* (1926).

10 For the law relating to the work of married women, see Manley, G., *A treatise on the Law of Master and Servant* (1860), especially 1-6; Schouler, J., *A Treatise on the Law of Domestic Relations* (5th ed., 1895), especially 74-5 and 132-4; see also *Buckley v. Collier* 1 Salk 114; and *Cooper v. Wellington* 7 CAR. & P. 531; 173 E.R. 234. See also Larsen, J.E., 'Women Understand So Little They Call My Good Nature "Deceit": A Feminist Rethinking of Seduction' (1993) 93 *Columbia Law Review* 374, 382-7, for the history of the law of seduction, which originally recognised the father's right to sue for the loss of services of his daughter.

11 For an account of the complexities of the process, see Joyce, P., (ed.), *The Historical Meanings of Work* (1987), particularly the contribution by Berg. M., 'Women's Work, Mechanisation and the Early Phases of Industrialisation in England' 64*ff.* See also Carbone, J., and Brinig. M.F., 'Rethinking Marriage: Feminist Ideology, Economic Change and Divorce Reform' (1991) 65 *Tulane Law Review* 953, especially 961-87, and Olsen, F., 'The Family and The Market: A Study Of Ideology And Legal Reform' (1983) 96 *Harvard Law Review* 1497, especially 1516-8, 1525-8.

12 See Sir Henry Maine, *Ancient Law* (1917 (first published 1861)), especially 74 and 100; and Glendon, M.A., *The New Family and the New Property* (1981), especially ch. 4.

However, for women the new categories of legal relationships meant something entirely different. Women continued to work in the home, but a wife was not able to contract either for or out of working for her husband: everything in the relationship between a husband and wife was subsumed by the marriage contract.[13] The work a wife performed for her husband remained a matter of status, her position under the marriage contract. Yet it could not be admitted that the marriage contract was also a contract for work: marriage was a contract for a lifetime and in terms of work relationships that would leave little distinction between a wife and a slave. The new categories required the absolute separation between work and family, and so transformed reality. The work of women, who engaged in the reproductive and productive labour of the home, was no longer to be seen as work.

Women's doing became a feeling. Through work in the home women love, nurture and care and this is the social measure of their lives. Internalising society's values, women often find their own sense of worth in these terms: 'I do not *work*. I *am* a (good) housewife/mother/daughter.' The contradiction that work in the home is not work renders it invisible and valueless by every accepted social and economic measure.[14] Work in the home thus bears the construction of patriarchal society: it is that for which women are most valued and, at the same time, it is that which is valueless. Attempts to ascribe a value to what it is that women do in the home retreat from the recognition of the all pervasive reality of this work. What is work and what is leisure? And for whom? Is the work to be valued according to the individual tasks (the cost of each task in the marketplace)? But what is the value of two tasks performed simultaneously (the ironing and the child care)? Or is the value the sum of all the tasks (the cost of a housekeeper)? What is the validity of ascribing a value to that which is valueless? Answers destroy the boundaries of the very categories assumed by the questions. In the end it is far easier to see work in the home as 'part of the mutual give-and-take of marriage.'[15] Women give. Men take.

2. *WOMEN AT WORK*

The recognition of women's doing, their work in the home, has been an important part of the feminist project.[16] The recent Australian study, *Juggling Time*,[17] confirms what women have long known: that they bear the primary responsibility for the unpaid work in the home. Regardless of income, education, social background, employment or age, women do more unpaid work in the home than men. Significantly, marriage increases a woman's unpaid work massively

[13] See *Balfour v. Balfour* [1919] 2 K.B. 571 and, more generally, Graycar and Morgan, *op. cit.* n.4, 34-40. For an analysis of these issues see Pateman, C., *The Sexual Contract* (1988) especially ch. 5.

[14] See Australian Bureau of Statistics, *Measuring Unpaid Housework: Issues and Experimental Estimates*, (Cat 5236.0 1990); *cf.* Ironmonger, D., (ed.) *Households Work: Productive activities, women and income in the household economy* (1989). See also Burton, C., *The Promise And The Price* (1991); Waring, M., *Counting For Nothing: What Men Value And What Women Are Worth* (1988).

[15] *Van Gervan v. Fenton* (1992) 66 A.L.J.R. 828, 835 *per* Deane and Dawson JJ.

[16] See Oakley, A., *The Sociology of Housework* (1974) especially 182-5 and Delphy, C., *Close To Home: A materialist analysis of women's oppression* (1984). For a survey of recent literature see Baxter, J., 'Domestic Labour: Issues and Studies' (1990) 3 *Labour and Industry* 112.

[17] Bittman, *op. cit.* n.2. See also Probert, B., *Working Life* (1989) especially ch. 5.

(by 60 percent) and the greatest amount of work is done by women with young children (a new child increasing unpaid work by 91 percent). Despite a prevailing view to the contrary, it is also clear that even with smaller family sizes and the many technological developments that have been introduced into homes, such as the washing machine, the dishwasher, the microwave, and the car, there has been no decrease in the amount of work to be done in the home.[18] Rather, new products and patterns of consumption have created additional dimensions to the work of the household. The expansion of the perimeters of neighbourhood community has meant that transportation now takes a more significant place in the work of the household. In many instances that which was once a part of the work in the paid work force, such as the selection, packing and delivery of shopping purchases, has been re-incorporated into the work of the home. Domestic work thus remains significant through a constant state of redefinition and recreation.

The relationships surrounding work in the home are ignored by law. Modern labour law is concerned solely with relationships in the paid work force. For many years this law explicitly sanctioned discrimination against women in the paid work force, both by their exclusion from it and their differential and inferior treatment within it. Having little or no access to work relationships in the paid work force or to the protection of the full range of rights and benefits for those relationships, women have been denied the 'new property'[19] as certainly as they once were the old. The primary legal mechanism for addressing these issues has been anti-discrimination legislation. Undeniably it has had some impact: there has been some mollification in the societal view that women are not entitled to participate in the paid work force, and for women who do work in the paid work force there have also been some gains.

Yet despite the legislative reforms, there has been little change in most women's experiences of work. On its own terms anti-discrimination legislation has failed to bring about real equality for women in their working relationships.[20] Feminist criticism has gone further. The concept of equality underpinning anti-discrimination legislation requires a comparison between the treatment of men and women. This involves a judgement that women are relevantly the same as men, in order to be worthy of equal treatment. As Catharine MacKinnon has pointed out, the concept of equality underpinning anti-discrimination legislation has never been carefully scrutinised: 'Unquestioned is how difference is socially created or defined, who sets the point of reference for sameness, or the comparative empirical approach itself.'[21] Feminists have also noted the many ways in

[18] See Game, A., and Pringle, R., *Gender At Work* (1983) especially ch. 6 and Young, C., *Balancing Families And Work: A Demographic Study Of Women's Labour Force Participation* (1990).

[19] The term 'new property' was coined by Reich, C., 'The New Property' (1964) 73 *Yale Law Journal* 733. It is now frequently used as a conceptual tool in the analysis of labour law — see Levine, P.J., 'Towards A Property Right In Employment' (1973) 22 *Buffalo Law Review* 1081; Gould, W.B., 'The Idea Of The Job As Property In Contemporary America: The Legal And Collective Bargaining Framework' [1986] *Brigham Young University Law Review* 885; Glendon, *op. cit.* n.12, especially 91-5, 151-76, 192-205.

[20] Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Half Way To Equal: Report of the Inquiry Into Equal Opportunity and Equal Status for Women in Australia* (1992).

[21] MacKinnon, C., 'Reflections On Sex Equality Under The Law' (1991) 100 *Yale Law Journal* 1281, 1286-7. See also MacKinnon, C., *Feminism Unmodified: Discources on Life and Law* (1987) 40.

which anti-discrimination legislation does nothing to break outside the existing (male) structures of work and law.[22] Most significantly, the legislation assumes the separation of work and home. It incorporates the 'public/private' dichotomy which feminists have identified as one of the ideological foundations of the patriarchal state, and ignores the fact that at the centre of this bifurcated view of the world lies the contradiction of the interdependency of the 'private' and 'public' worlds. Thus it is unable to grapple with the inequalities in the 'public' sphere which are grounded in the inequalities of the 'private' sphere of the home, and has done nothing to challenge the structure of the work relationships in the home which are integral to the structure of relationships in the paid work force. This is now especially significant given the emergence of 'atypical' work.

The nature of women's participation in the paid work force is seen by many as merely coincidental with developments in industrial relations resulting from economic and business imperatives.[23] The growth in the 'atypical' work force has been noted in most industrialised societies in recent years and Australia is no exception.[24] This trend is expected both to continue and to increase in importance in Australia. The greatest growth in part-time and casual labour has been in the service sector industries which are, in turn, the fastest growing areas of national employment. The concentration of 'atypical' workers in such industries has been notable: nearly one-third of all casuals are employed in the wholesale and retail industry, while nearly two-thirds are in just three industries: wholesale and retail,

22 There is a vast literature on this topic. See, for example, Abrams, K., 'Gender Discrimination and the Transformation of Workplace Norms' (1989) 42 *Vanderbilt Law Review* 1183; Dickens, L., 'Road Blocks On The Route To Equality: The Failure of Sex Discrimination Legislation in Britain' (1991) 18 M.U.L.R. 277; Thornton, M., *The Liberal Promise: Anti Discrimination Legislation In Australia* (1990) and 'Feminism And The Contradictions Of Law Reform' (paper delivered at the Law And Society Conference, Griffith University, Brisbane, 7-9 December, 1990). See too West, R., 'The Difference in Women's Hedonic Lives: A Phenomenological Critique Of Feminist Legal Theory' (1987) 3 *Wisconsin Women's Law Journal* 81 for a critique of law reform as a compromise of liberal feminists with the (male) state.

23 For two different explanations of the growth of one sector of the 'atypical' labour market see Sadler, C., and Aungles, P., 'Part-Time Employment Growth in Australia, 1978-1989' (1990) 16 *Australian Bulletin.* 286 and Robertson, P., 'Explanations For The Growth of Part-Time Employment In Australia' (1989) 15 *Australian Bulletin of Labour* 384.

24 For an account of this trend see Rodgers, G., and Rodgers, J., (eds), *Precarious Jobs In Labour Market Regulation: The Growth of Atypical Employment In Western Europe* (1989) and Cordova, E., 'From Full-Time Wage Employment To Atypical Employment: A Major Shift In The Evolution of Labour Relations?' (1986) 125 *International Labour Review* 641. For the United Kingdom see Beechey, V., 'The Shape Of The Workforce To Come' (1985) *Marxism Today* 11; Beechey, V., and Perkins, T., *A Matter Of Hours: Women, Part-Time Work And The Labour Market* (1987) and Leighton, P., 'Marginal Workers' in Lewis, R., (ed.), *Labour Law In Britain* (1986) 503; Robertson, O., 'The Changing Labour Market: Growth Of Part-Time Employment and Labour Market Segmentation In Britain' in Walby, S., (ed.), *Gender Segregation at Work* (1988). For the United States see Chamellas, M., 'Women's And Part-Time Work: The Case For Pay Equity And Equal Access' (1986) 64 *North Carolina Law Review* 709, especially 714-5. It has been estimated that in Australia whilst total employment grew only by 14.8 percent in the decade from 1977-1986, the growth in part-time employment was a staggering 44.7 percent: Lewis, H., *Part-Time Work: Trends and Issues* (1990) 89. The currently available statistical information, whilst not allowing for a precise delineation between workers who are part-time and casual, reveals that more than one fifth of the paid workforce is engaged in 'atypical' employment: Australian Bureau of Statistics, *Labour Statistics 1988* (Cat. 6101.0 1990) 40; 20 percent of all employees were part-time: Australian Bureau of Statistics, *Alternative Working Arrangements September-November 1986* (Cat. 6341.0, 1988) 10; 19.8 percent of all employees are employed on a casual basis: Australian Bureau of Statistics, *Alternative Working Arrangements September-November 1986* (Cat. 6341.0, 1988) 7.

community services and recreation and personal services.[25] The increasing use of 'atypical' labour permits the 'vertical disintegration'[26] of industry, a process whereby many of the costs and risks of production are shifted from industry to the worker, and the savings to business extended potentially far beyond those of workers' compensation levies, sickness and annual leave pay. Neo-classical economic analysis would suggest that from the employer's perspective much would be gained if the unit costs of 'atypical' labour were lower. Furthermore, the use of 'atypical' labour gives industry a flexibility that is likely to be in demand in the future. Flexibility has been identified as one of the key factors which would promote economic, and thus social and national, survival through ensuring international competitiveness.[27] Increasingly, the legal regulation of industrial relations has this broad focus.[28] Since August 1988, when the Australian Industrial Relations Commission laid down the 'Structural Efficiency Principles' in the *National Wage Case*, the idea that a more flexible work force would promote industrial efficiency has been given official sanction in Australia. As part of this strategy in the August 1989 *National Wage Case*, the Commission encouraged a review of 'the incidence of, and terms and conditions for, part-time employment and casual employment,' and this has become an important factor in the process of award restructuring.[29]

However, the two trends, the increased feminisation and the increased marginalisation of the paid work force, appear to be related. Whilst the number of people who are in 'atypical' work relationships has undoubtedly increased in recent years, the overall pattern of women's involvement in the paid work force is very different to that of men. Men engage, for example, in part-time or casual jobs at the periphery of their working lives, in their youth and old age, or when they are studying. For them this employment pattern is 'atypical': they are not engaging in *their* norm of full-time employment. But for women 'atypical' employment is a life-time pattern.[30] The high degree of coincidence between the increased feminisation of the paid work force and the increased incidence of 'atypical' work demands an explanation beyond a gender neutral operation of industrial, business and technological forces.

[25] See Dawkins and Norris, *op. cit.* n.1; Australian Department of Employment, Education and Training, Women's Bureau, *op. cit.* n.1; Romeyn, *op. cit.* n.3, 31-4.

[26] *Cf.* Collins, H., 'Independent Contractors and the Challenge of Vertical Disintegration in Employment Protection Laws' (1990) 10 *Oxford Journal of Legal Studies* 353.

[27] Flexibility as the term is used in the industry can be of a number of different types. Here the term is used to refer to numerical flexibility. See Boyer, R., 'Labour Flexibilities: Many Forms, Uncertain Effects?' (1987) 12 *Labour and Society* 107 and Horstman, B., 'Labour Flexibility Strategies and Management Style' (1988) 30 *Journal of Industrial Relations* 412.

[28] See Collins, H., 'Labour Law As A Vocation' (1989) 105 *Law Quarterly Review* 468.

[29] Australian Industrial Relations Commision, *National Wage Case* (1988) 25 I.R. 170 and *National Wage Case August 1989* (1989) 30 I.R. 81. See Rimmer, M., and Zappala, J., 'Labour Market Flexibility and The Second Tier' (1988) 14 *Australian Bulletin of Labour* 564, and Stewart, A., 'Flexibility In Working Time' (1990), Australian Report To XII International Congress of Comparative Law, Section IIIC (copy on file with the author).

[30] Australian Bureau of Statisics, *Alternative Working Arrangements, Australia, September to November 1986*, (Cat 6341.0 1988). See also Lever-Tracy, C., and Tracy, N., 'Gender Differences In Participation Rates and Hours Of Work In The Paid Workforce: A Research Note' (1988) 24 *Australian New Zealand Journal of Sociology* 124 and Lewis, H., *Part-Time Work: Trends And Issues* (1989).

3. *'ATYPICAL' WORK AND THE INDUSTRIAL RELATIONS COMMISSIONS*

In Australia the most powerful institutions in the governance of the working lives of men and women are the statutory industrial relations commissions. Many of the most significant work place rights of 85 percent of Australia's paid workers are created through the awards made by these commissions. Awards govern everything from rates of pay and the provision of leave entitlements to the delineation of job and career structures. Through these awards the commissions have created the working lives of women both in the paid work force and beyond, in the home.

3.1 *The Worker As 'Breadwinner'*

Since the *Harvester* judgment in 1907, the institutional goal of the wage policies of the Australian arbitration system, as expressed by Higgins J., has been to provide for 'the normal needs of the average employee *regarded as a human being* living in a civilized community'.[31] In the *Harvester* judgment Higgins J. decided that 'a fair and reasonable' wage was one that allowed an unskilled worker to support himself, his wife and three children in a condition of frugal comfort. The decision confirmed that, in the eyes of the legal system, the worker was a male 'breadwinner'.[32] The 'breadwinner' ideology assumed that there was someone to care for the domestic needs of the worker, and so created the woman as a housewife and a dependent, and constructed the world of work accordingly. While the separation of work and home appeared to be the outward manifestation of the 'breadwinner' ideology, its hidden postulate was the interrelationship between the two:

> 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 private and the public spheres of civil society are separate, reflecting the natural order of sexual difference, and inseparable, incapable of being understood in isolation from each other.[33]

The reality was that many women did, of course, work in the paid work force, but the 'living wage' established by the *Harvester* judgment was never a wage for women. In the *Fruitpicker's Case*,[34] the Commonwealth Arbitration Court refused to extend the *Harvester* 'living wage' to women workers. The organising principle for the implementation of its wage policies was therefore never the needs of the employee, but rather their gender. To be a woman was not, in this Court, 'the name of a way of being human.'[35] Women's familial responsibilities were dismissed as 'exceptional' and not entailing any legal (that is, real) obligations. The social norm was one of women dependent upon men. If women did work in the

[31] *Ex Parte H.V. McKay* (1907) 2 C.A.R. 1, 3 (the *Harvester* judgment) (emphasis added). See also Ryan, E., and Conlon, A., *Gentle Invaders: Australian Women At Work* (1989) especially ch. 5.

[32] See Bennett, L., 'Legal Intervention and the Female Workforce: The Australian Conciliation and Arbitration Court 1907-1921' (1984) 12 *International Journal of the Sociology of Law* 23, who points out that the *Harvester* decision was a confirmation, rather than a redirection, of existing social policies.

[33] Pateman *op. cit.* n.13, 131.

[34] *Rural Workers' Union and South Australian United Labourers' Union v. Mildura Branch of the Australian Dried Fruits Association* (1912) 6 C.A.R. 61.

[35] MacKinnon, C., 'Reflections on Sex Equality Under Law' (1991) 100 *Yale Law Journal* 1281, 1299. See also Rorty, R., 'Feminism And Pragmatism' (1991) 30 *Michigan Quarterly Review* 231, 234.

paid work force it was assumed that they had only to support themselves.[36] This gendered norm assumed by the Court was to ensure the continuance of women's inferior place in the paid work force into the future. Henceforth, women's wages were calculated solely according to whether their work threatened the position of men in the marketplace: if paying women less would be to encourage their employment over that of men then they were to be paid the same minimum wage as men, but where women were employed to do women's work a lower rate sufficed.[37] In this way, the discouragement of women from working in the paid work force has been the deliberate policy of the arbitration system which has thus, over time, fully embraced an ideology which locates women's primary place of work within the home and only secondarily in the paid work force.

With the advent of the 'equal pay' decisions of the 1970s in Australia, the rhetoric of the worker as 'breadwinner' has all but disappeared. However, the ideology associated with it remains strong and continues to be incorporated implicitly into the decisions of the commissions and hence the very structure of the work place. The conception of the worker as 'breadwinner' also imposed the requirement of a primary commitment to work in the paid work force. The 'fair and reasonable' wage of the breadwinner was calculated for the male employee who worked 'full-time'. The idea of 'breadwinner' and family dependency implied a necessary level of ongoing stability and security so that the worker could have 'a certainty of sufficient provision for his family or dependents.'[38] Ideally work was permanent, the worker having a lifetime attachment to a particular place of employment. The standards 'full-time' and 'permanent' were, of course, never absolute, external or objective, but gave expression to what was the norm for the male worker: 'full-time' did not mean 'all the time,' but for the length of the average male's working week; and 'permanent' did not mean for a lifetime, but without a break between recruitment and retirement.

3.2 *Part-Time Work*

Awards have, historically, rarely provided for 'atypical' work because anything less than the male norm of 'full-time' and 'permanent' work has been seen as a threat to the concept of the worker as 'breadwinner'. Regular part-time work, especially, has been seen not only as eroding the preferred male standard of 'full-time' work, but as entrenching an alternative to it.

The introduction of regular part-time clauses in some awards from the 1950s was a temporary measure designed to deal with the specific problem of lack of men available to do the work.[39] These early provisions confined part-time work

[36] See *The Fruitpickers' case* (1912) 6 C.A.R. 61, 71-2 and *Federated Clothing Trades v. Archer (Archer's Case)* (1919) 13 C.A.R. 647, especially 691-2.

[37] See the *Fruitpicker's Case* (1912) 6 C.A.R. 61, 72; *Archer's Case* 13 C.A.R. 647, 701; *Australian Workers Union v. Allen* 11 C.A.R. 113, 117; *Australian Workers Union v. Irvine* (1920) 14 C.A.R. 204; and *In re Commercial Clerks' Board* (1913) 19 Argus Law Reports 142 (Cussen J. in the Victorian Court of Industrial Appeals). See also Bennett, *op. cit.* n.32; Hunter, R., 'Women Workers and Federal Industrial Law: From *Harvester* to Comparable Worth' (1988) 1 *Australian Journal of Labour Law* 147; and Ryan and Conlon *op. cit.* n.31.

[38] *Australian Workers Union v. Irvine* (1920) 14 C.A.R. 204.

[39] See, for example, *The Clerks (State) Award* [1953] A.R. (N.S.W.) 199, especially 224; *Victorian Chamber of Manufacturers v. Clothing and Allied Trades Union Of Australia* (1957) 87 C.A.R. 327, 339; and comments in Alexander, R., and Frank, S., *Award Restructuring and Part-Time Work in Banking* (1990) 16 on *Bank Officials (Federal) Award* (1963).

to women, the 'reserve army' of workers. They carried restrictions which explicitly identified such women's work as both secondary and inferior to that of men. Part-time work was usually only permissible if there was no full-time worker available to do the job. The numbers of part-time workers were strictly controlled in relation to the numbers of full-time employees; any concessions in the numbers of part-time workers were traded in negotiations with benefits for full-time workers; and there were financial penalties imposed on those who worked part-time as the rates of pay for part-time work were lower than they were for the same work done by the full-time worker.

The trade union movement, the recognised voice of employees in the arbitration system, was always opposed in principle to part-time work and never advocated any improvement in the conditions attached to it.[40] This position reflected the trade union movement's strong attachment to the concept of the worker as 'breadwinner'. Consequently, even into the 1970s there was the view within the arbitration system that part-time work was an aberration, only to be permitted where it was necessary for the viability of the industry and on the condition that it was not detrimental to full-time (male) employment.[41]

Change has been slow. However, in recent years there has been something of a policy reformulation by the Australian trade union movement in relation to some aspects of 'atypical' work.[42] Notably, trade unions now perceive part-time work as more acceptable if the poor conditions attached to it are eliminated. Some of the outcomes of the award restructuring process have been influenced very largely by this shift in policy, and part-time employees have been granted *pro-rata* salaries and other benefits such as access to superannuation, some opportunities for career advancement, and the guarantee of transfer from part-time to full-time employment when required.[43] The new policy of the unions is, however, still constrained by an overriding preference for full-time employment and the view that part-time employment should not take away from the full-time jobs of workers. The policy of the unions in respect of 'atypical' employment is a policy for *women's* employment.[44]

Today, consistent with past practice, part-time work is still constructed in the arbitration system as women's work. The legacy of past restrictions remains, and many awards still do not provide for work that is other than full-time and permanent.[45] Now, where part-time work is introduced in 'male' industries it is often

[40] For a discussion of the evolving relationship between trade unions and 'atypical' workers see Lever-Tracy, C., 'Union Strategy In Relation To Part-Time Workers' in Bray, M., and Taylor, V., (eds), *The Other Side Of Flexibility: Unions And Marginal Workers In Australia* (1991) 75. *Cf.* Martha Chamellas, *op. cit.* n.24, 725 for the similar situation in the United States.

[41] *Clerks Newspapers Award* [1976] A.R. (N.S.W.) 839, 903.

[42] See Australian Council of Trade Unions, *Guidelines and Negotiating Exhibit on Part-Time, Casual Work and Job Sharing* (1990).

[43] For a summary of some outcomes see Romeyn, J., *Flexible Working Time: Part-Time and Casual Employment*, Appendix 2, 'Selected Industry Developments under Award Restructuring' 95-105.

[44] Australian Council of Trade Unions, *Working Women's Charter* (1981).

[45] Lewis, *op. cit.* n.24, 23 indicates that only thirty percent of federal awards make provision for regular part-time employment; Women's Advisor's Unit, Department of Labour, South Australia, *Same Time Next Week: The Extent and Nature of Part-Time Work in South Australia* (1991) shows that of a total of 224 State awards only 65 make provision for part-time employment and 168 for

for a limited period only, the commissions acknowledging it as an 'extraordinary response' to extraordinary economic conditions.[46] Suggestions that provision for part-time employment be incorporated into awards because it is necessary for the economic viability of industry, or in order to prevent the wholesale loss of jobs in times of recession, are strenuously resisted by the trade union representatives of workers in 'male' industries who demand protection for the full-time nature of the employment. In *Re Vehicle Industry — Repair Services and Retail — Award 1980*,[47] for instance, the Union argued against provision for part-time work in the award in order to protect the full-time employee, on the basis that the industry was spread over a wide geographic area, and included small to medium sized businesses where there was a low rate of unionisation. In such industrial conditions, it argued, the effect of the introduction of part-time work would be to reduce wages below the poverty line. The Commission decided against the introduction of part-time work in the award.

Despite the fact that women are more often employed in these same industrial conditions — that is, in work places with few employees — and that they tend to have low rates of unionisation, there is evidently no concern that the wages of women will fall below the poverty line.[48] Rather, part-time work, like other forms of 'atypical' work, is now presented as being particularly advantageous to women as a form of work that allows women to incorporate and accommodate the demands of their work responsibilities in the home, while allowing them to participate in the paid work force. Improving the award conditions of part-time workers and increasing the opportunity for part-time work are seen as important when the part-time worker is female:

> I have been informed that the overwhelming number of persons covered by the award are female and those particular modes of employment have been found most suitable to them. I think the benefits of part-time work are notorious and speak for themselves; they truly provide an employer with a greater flexibility in the engagement of suitable employees.[49]

The rhetoric attached to part-time work thus continues to be governed solely by the gender of the worker. There is no longer the explicit expression of the view that work in the paid work force is inappropriate for women, but the construction of part-time work as particularly suitable for women reveals certain assumptions about women's social place and their working relationships. Issues of wage justice and poverty are ignored through an acceptance of women's assumed dependence upon men through marriage. When marriage also means that the women's labour in the home is appropriated by a man, the consequence is not just that men are free to enter the paid work force on a full-time basis, but that women are less able

casual employment. See also Phillips, L., *Casual And Part-Time Work: A Survey Of The Provisions Contained In New South Wales Awards* (1982).

46 See, for example, *BTR Engineering Case* (Decision of the Australian Industrial Relations Commission, 28 March 1991, Print No. J 7260).

47 (1983) 5 I.R. 100. Contrast the view of the trade unions in relation to part-time work for women in Australian Council of Trade Unions *Women's Employment Strategy* (1989). See also *Re Shop Employees (State) Award & Anor* (1985) Australian Industrial Law Review 314.

48 See Australian Council of Trade Unions, *Women's Employment Strategy* (1989).

49 *Tea Packing Employees (State) Award 1990* (Hungerford J. in NSW Industrial Commission, No. 775, 1990). See also the decision of Sweeney J. of the N.S.W. Commission incorporating permanent part-time clauses into two hospital awards covering radiographers and nuclear medicine technologists because, as he said, the work was particularly suited to mothers with young children (No. 425/1989, 22 November); and *Re Shop Employees (State) Award & Anor* (1985) 27 A.I.L.R. 314.

to enter the work force on that same basis. Part-time work for women in the paid work force is accepted because it is not an aberration from, but an accommodation of, the true (natural) role played by women through their work in the home.

3.3 *Casual Work*

Despite the hegemony of the concept of the worker as 'breadwinner', there have always been some industries where work is intermittent in nature and the workers are engaged in less than 'full-time' and 'permanent' employment. The inclusion in awards of provisions governing the conditions of employment of 'casual' workers dates from the earliest years of the arbitration system. In contrast to the paucity of provision for part-time work, the majority of awards in the federal arena provides for casual employment. However, casual work has also been regarded with suspicion in the arbitration system. It was perceived as depriving the male worker of the opportunity of 'full-time' work and consequent moral virtue: casual work brought with it 'prolonged periods of idleness', a 'tremendous waste of potential human energy'.[50] For men, work in the paid work force was the only work that counted.

More significantly, the loss of steadiness in work meant casual work brought with it the loss of the possibility of providing for a family. The fact of casual work for male workers had to be incorporated into the ideology that maintained the male as 'breadwinner'. The more precarious situation of the casual worker in the marketplace was neither to threaten the position of the 'full-time' and 'permanent' worker, nor to undermine the position of the male worker *vis-a-vis* the private sphere of the home. Therefore casual work had to be simultaneously deterred and compensated. The mechanism to achieve this was the rate of pay:

> [A weekly wage] assures to the employee reasonable certainty of provision for his family and dependents . . . the waste of time is a serious interference with a wage based on the cost of living; and if one has to provide a living wage for these workers they should get something more to cover the lost time.[51]

Thus casual workers were paid a loading over and above the rate of pay for the 'full-time' and 'permanent' worker. The loading was to be not be so high as to attract men to this type of work, but high enough to supplement the wage of the male worker so that he could continue to fulfil his role as 'breadwinner'. Familial ideology was upheld and the dependence of women maintained.

The loading for casual workers made perfect sense as a compensatory payment to buttress the idea of the worker as 'breadwinner'. Once a large proportion of casual workers became women the meaning of the payment had to change. Nowadays the casual loading is looked upon as serving the dual functions of

[50] See *Waterside Workers Federation v. Commonwealth Steam-Ship Owners Association* (1914) 8 C.A.R. 53; *Federated Storemen and Packers' Union of Australia v. Skin and Hide Merchants' Association of Brisbane* (1916) 10 C.A.R. 629; *Federated Ship Painters and Dockers' Union of Australia v. The Commonwealth Steam-Ship Owners Association* (1918) 12 C.A.R. 623; *The Waterside Workers' Federation of Australia v. The Commonwealth Steam-Ship Owners' Association* (1919) 13 C.A.R. 599; *The Australian Workers Union v. Irvine* (1920) 14 C.A.R. 204; *The Amalgamated Society of Engineers v. The Adelaide Steamship Company Ltd* (1921) 15 C.A.R. 297; *The Australian Builders Labourers' Federation v. LJ Adam* (1923) 17 C.A.R. 19.

[51] *The Australian Workers Union v. Irvine* (1920) 14 C.A.R. 204, 215. See also cases in the preceeding note.

deterrence and compensation. The 'employment revolution' demonstrates its failure as a deterrent.[52] The new rationale of the loading as compensation is that it is for employment rights forgone. But this was never going to stand up to serious scrutiny, because the rights were an acknowledgement that the worker was a human being not a piece of machinery, and in that context they could not be bargained away. Moreover, as such the loading is quite inadequate.[53] As women now make up the great majority of casual workers it is no surprise that the loading is increasingly under threat.[54]

4. *BENEFITS AND RIGHTS IN EMPLOYMENT LAW FOR 'ATYPICAL' WORKERS*

Workers who are part-time or casual are significantly disadvantaged in the receipt of rights and benefits in the work place. In all categories of sick leave, annual leave, long service leave, and superannuation, only between one-third and one-quarter, and sometimes as few as one-sixth, of employees who work less than full-time qualify for benefits.[55] In the arbitration system the rights and benefits of employment have been structured according to the concept of the worker as 'breadwinner'. Family dependency, a part of that concept, requires security of paid employment for the worker, and a 'lifetime' attachment to the place of employment has been the means to ensure it. Consequently, many of the rights and benefits attached to employment reward and protect continuity, length and stability of service. In this way the law of work relationships privileges those workers who are committed to working primarily in the paid work force.

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.[56] 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.[57] Many women are unable to have access to some of the most important of the rights and benefits in the paid work force. In the case of termination of employment as a result of redundancy, for instance, the usual 'T.C.R.' clause in awards[58] provides a schedule of benefits which increase

52 See Macken, J., *The Employment Revolution* (1992). Dawkins and Norris, *op. cit.* n.1, point out that even in industries, such as the hospitality industry, where the loading has been up to 50 percent this has been no deterrent to the use of casual labour.

53 See Dawkins and Norris, *op. cit.* n.1.

54 See for example *Application by the Australian Hotels Association re The Hotels, Resorts and Hospitality Industry Award 1992* (1993) A.I.L.R. 215.

55 Australian Bureau of Statistics, *Employee Benefits* (Cat 6334.0, 1987). See also Australian Bureau of Statistics, *Labour Statistics, Australia 1989* (Cat 6101.0, 1991) which shows that only 70.5 percent of part-time and 32.3 percent of casual workers get employer funded superannuation; Lewis, *op. cit.* n.24, 23-9.

56 Young, C., *Balancing Families and Work: A Demographic Study of Women's Labour Force Participation* (1990) especially ch. 2.

57 *Cf. Australian Iron & Steel Pty Ltd v. Banovic* (1990) 64 A.L.J.R. 53. Indirect discrimination has been of some importance in the United Kingdom and Europe in the area of 'atypical' work: see, *e.g., Clarke v. Eley (I.M.I.) Kynoch Ltd* [1983] I.C.R. 165; *Kidd v. D.R.G. (U.K.) Ltd* (1985) I.C.R. 405; *Bilka v. Hartz* (1986) European Court Reports 1607 ((1986) 11 European Law Review 363); and *Rinner-Kuhn v. F.W.W. Special-Gebaudereinigung GmbH and Co* [1989] I.R.L.R. 493. On the Australian position see Hunter, R., *Indirect Discrimination in the Workplace* (1992) especially 156-9.

58 *The Termination, Change and Redundancy Case* (1984) 8 I.R. 34, 9 I.R. 115 established a range of rights and obligations, including the employer's obligation to consult with workers regarding proposed redundancies, a period of notice in respect of any termination of employment, additional

proportionately according to the employee's length of service with the employer. The T.C.R. clauses thus offer most to those workers who have had a long term and continuous place in the paid work force. The rationale for the structure of the T.C.R. clause is undeniably to support and reward the worker as 'breadwinner': redundancy payments were from the beginning created as a compensation to workers for their loss of expectation of a lifelong career.[59] There are many reasons which could suggest the need for different rules. In the case of redundancy, for instance, it is certainly arguable that a more important consideration is the protection of those who, because of their shorter attachment to the paid work force, are less able to find alternative employment and hence are more vulnerable.

However, many women who do have a long and continuous employment history often find themselves excluded from the rights and benefits which attach to employment because they are 'atypical' workers. The structural organisation of the paid work force, constructed by the classification of 'atypical' workers in awards, means that most women who are 'atypical' workers must work as casual, rather than part-time, employees for award purposes. Casual work, being the very antithesis of the permanent work of the 'breadwinner,' has few rights and benefits attached to it in awards.[60] The extension of T.C.R. clauses to casual workers, for example, has always been refused.[61] Casual workers, the law proclaims, could have no expectation of lifelong employment.[62] The impact of the law upon many women workers is typified by the circumstances in *Hendy v. Esquire Motor Inn.*[63] Under the relevant award Mrs Hendy was paid as a casual by the motel. She worked there as a cook and in the laundry for 30 hours *per* week for nine years. When the motel restructured its operations, reducing kitchen staff and tendering out the laundry work to improve efficiency, Mrs Hendy lost her job. She was given no prior warning regarding the cessation of her duties in the kitchen, and one day's notice regarding the laundry. Because she was a casual employee according to the award definition, the T.C.R. clause was not a relevant consideration in her case and she was not entitled to any compensation on redundancy. Nor was her dismissal considered unfair, because it was a situation of redundancy. Mrs Hendy is typical of many women — she worked continuously and for a long period of time for one employer and yet she was denied the protection of the law because she was 'a casual'.

The effects of the construction of 'atypical' workers as casual employees through awards extend far beyond the arbitration system. The cases involving the

payments in accordance with years of service, and retraining and time off to enable them to seek alternative employment.

59 See *Federated Miscellaneous Workers Union (S.A.) v. Adelaide Milk Supply Co-operative Ltd* (1978) 20 A.I.L.R. 418 and (1979) 21 A.I.L.R. 48 and *The Federated Ironworkers Association of Australia v. Johns Perry Ltd* (1979) A.I.L.R. 157. See also *Wynes v. Southrepps Hall Broiler Farm Ltd* [1968] I.T.R. 407.

60 For example, of 454 federal awards only 25 provide annual leave for casuals, and only 6 provide sick leave — see Lewis, *op. cit.* n.24.

61 See *Re Termination Change & Redundancies — Casual* (1986) A.I.L.R. 479 and *Brimacomber v. Entex Chemicals (S.A.) Pty Ltd* (1988) A.I.L.R. 489.

62 *The Milk Redundancy Case* (1979) 46 S.A.I.R. 817. See also *Federated Miscellaneous Workers Union v. Adelaide Milk Supply Co-operative* (1979) 20 A.I.L.R. 48; *Milk Processing and Cheese etc Manufacturing Redundancy Clause Reference Case* (1980) 47 S.A.I.R. 939; *Termination, Change and Redundancy Case* (1984) 8 I.R. 34; 9 I.R. 115.

63 (1987) 54 S.A.I.R. 54 (Industrial Commission of South Australia) and (1987) 54 S.A.I.R. 215 (Full Commission of the Industrial Commission of South Australia).

legislative rights to long service leave and to protection against unfair dismissal show that although many women have worked part-time for one employer for a considerable period of time, sometimes ranging up to 21 years, they are frequently ineligible for the rights and benefits the law provides. The construction of any work which is other than 'full-time' as 'casual' by the arbitration system means that at the beginning of the employment relationship they are invariably offered a position as 'a casual'. Despite the reality of the long term work relationships between these women and their respective employers, the initial offer enables the common law to characterise it, not as a single relationship, but as a number of discrete relationships created through a series of separate contracts. The law does not recognise any continuity in the relationship. As a consequence these women are denied employment rights. They are denied long service leave when it depends upon establishing a period of 'continuous service'.[64] They are unable to avail themselves of the protections offered to workers who are unlawfully dismissed, because the law sees no dismissal here, merely the termination of one contract of service and a failure by the employer to offer a further one.[65]

This response of the common law is not a necessary one.[66] At common law the agreement between the parties is the basis of the relationship, and awards are incorporated into the agreement.[67] In determining the nature of the work relationship at common law the status of a worker under an award may therefore be a relevant, but not the sole, factor in the inquiry.[68] Despite this, the award classification is frequently treated as determinative, and legislatively-created rights become dependent upon the arbitrary wording of the definitions in awards. Thus in *Howe and Kosier v. Hutt Street Private Hospital Pty Ltd*,[69] two women who had worked part-time for a substantial length of time on a roster basis were unable

64 See *Neil v. Cameron* (1977) 19 A.I.L.R. 330 (15 years service); *Ewald v. Gabinka Pty Ltd* (1982) A.I.L.R. 118 (15 years service); *Mitchell v. T.A.B.* (1979) 21 A.I.L.R. 207 (10 years service); *Sheppard v. T.A.B.* (1989) 31 A.I.L.R. 351 (21 years service). Note that the legislative definition of 'continuity of service' is sometimes expressed to include a period of service under a series of contracts — see, for example the Long Service Leave Amendment Act 1987 (S.A.) and the Long Service Leave Amendment Act 1985 (N.S.W.).

65 The decisions in the cases concerning the dismissal of 'casual' employees depend very much on the particular facts — see *Terrigal Memorial Country Club Ltd v. F.L.A.I.E.U.* (1990) 32 A.I.L.R. 435 (12 1/2 years service); *Esquire Motor Inn v. Wood* (1987) 54 S.A.I.R. 48, 201 (14 years service at the same motel; 1 year with the most recent employer); *Hendy v. Esquire Motor Inn* (1987) 54 S.A.I.R. 54, 215 (9 years service); *Stewart v. Noarlunga Hotel Ltd* (1980) 47 S.A.I.R. 406; *Kable v. Magnamail Pty Ltd* (1990) A.I.L.R. 99; and *Appeal By The Licensed Club's Association of Victoria and The Victorian Employers Federation v. Award of the Chairperson of Licensed Clubs Employee Conciliation and Arbitration (Higgins' Case)* (1988) 32 A.I.L.R. 25. In *Higgins' Case* the Industrial Relations Commission in Full Session (Victoria) found that a dismissal was unreasonable and ordered the worker back to work. It took the more realistic approach of looking at a number of factors including, *inter alia*, the number of hours worked, the regularity of the pattern of employment , whether there was a roster system and whether there was a reasonable mutual expectation of continuity of employment. The case represents a discernible trend toward the recognition of the rights of 'casual' employees in relation to 'dismissal'.

66 *Furnari v. Connolly* (1991) 58 S.A.I.R. 217 recognises that the status of an employee under an award may not be identical with their status at common law.

67 *Amalgamated Collieries of W.A. Ltd v. True* (1937) 59 C.L.R. 417, 423 *per* Latham C.J. On the way in which awards are incorporated into the contract of employment see *Gregory v. Phillip Morris* (1987) 77 A.L.R. 79 and Tolhurst, G.J., 'Contractual Confusion and Industrial Illusion: A Contract Law Perspective on Awards, Collective Agreements and the Contract of Employment' (1992) 66 *Australian Law Journal* 705.

68 See *Hotels Clubs etc Award (Question of Law) Case* (1980) 47 S.A.I.R. 345, 402 (*per* Haese D.P.).

69 *Howe v. Hutt Street Private Hospital Pty Ltd* (1987) 54 S.A.I.R. 222, 423 and *Kosier v. Hutt Street Private Hospital Pty Ltd* (1987) 54 S.A.I.R. 232, 423.

to establish that they had been dismissed, and thus successfully take action against their employer, because they were paid as casuals under the award. The award which covered their work defined a casual worker as one who was 'engaged and paid as such', while a part-time employee was defined in terms of the number of hours worked. The mere fact of being told by the employer at the commencement of the employment relationship that they were being taken on as casuals and their treatment as casuals for the purposes of pay under the award was sufficient for the Commission to confirm their status at common law as casuals. The impact of variously phrased award terms can be seen by comparing *Pritchard v. Dolly Dolly Creations Pty Ltd.*[70] Ms Pritchard was taken on as a casual shop assistant and worked according to a weekly roster for an average of 27 1/2 hours *per* week. However, the award governing her employment defined a casual employee as a person 'specifically engaged under a contract of hiring less than weekly', while workers 'specifically engaged by the week' to work between 18 and 38 hours were 'deemed to be part-time employees'. The deeming provision of the award was relied upon in the decision that Ms Pritchard was a part-time employee, not a casual, and therefore able to bring an action for unfair dismissal.

In both *Howe and Kosier's Case* and *Pritchard's Case* the women were told when employed that they were casuals. Given the power of employers to define the terms of employment and the way in which women's participation in the work place is viewed, women are more likely than men to be construed as casuals. However, the two cases illustrate the different ways in which the wider industrial context of 'atypical' work can in turn be construed by courts and industrial commissions. In *Howe and Kosier's Case*, the terms of the offer of a position as a casual to work in accordance with a roster were seen, following *Leg Trap Hotel v. Rebbeck*,[71] as implying nothing more than that the women could expect the possibility of an offer of employment if they attended work pursuant to the roster. In contrast to this, in *Pritchard's Case* being taken on as a casual was seen as an arrangement under which there was an inherent expectation that the hours could vary or be altered by the employer, but also that the worker would continue to be offered work because the shop required adequate staff.

Of all employment rights and benefits introduced in recent years, 'maternity leave' was the one specifically created to help secure, promote and protect the position of women in the paid work force.[72] Yet the right to maternity leave has been rendered illusory for many women, largely because its formulation fails

[70] (1989) 56 S.A.I.R. 487.

[71] (1979) 46 S.A.I.R. 739, 752. *Cf. Higgins' Case.*

[72] 'Maternity leave' in Australia has been sometimes established legislatively (*e.g.* the Maternity Leave (Commonwealth Employees) Act 1973 (Cth)) but more usually by awards (see *Association of Architects, Engineers, Surveyors and Draughtsmen of Australia v. Metal Trades Industry Association of Australia* (1979) 218 C.A.R. 120) being established for the private sector after the 1979 test case *Re Electrical Trades Union of Australia* (1979) 218 C.A.R. 120. In Western Australia the introduction of maternity leave as a common rule has been rejected and it must be established on an award by award basis — see *Trades and Labour Council of Western Australia v. Confederation of Western Australian Industry (Inc.)* (1990) A.I.L.R. 375. Maternity leave includes the right to leave (usually unpaid and up to 52 weeks), transfer to a safe job if possible, the right to have such leave constitute no break of service, and the right to return to one's position, or a comparable position, at the end of the leave.

to take account of the way in which women do in fact participate in the paid work force.

The case for the creation and recognition of the right to maternity leave has been argued, in Australia as elsewhere,[73] within the context of the 'sameness/difference' debate about the equality of women. The 'sameness' approach to work force rights urges that equality between the sexes in the work place is to be gained through the application of the same rights for all workers. The assumed 'sameness' of men and women does not warrant different or 'special' treatment. On this view pregnancy, childbirth and breastfeeding are analogous to a temporary disability and any treatment which singles them out and rewards them over other disabilities is illegitimate. The 'difference' approach, on the other hand, argues that real sex differences be taken into account in the formulation of rights for men and women. The critical issue is the identification of the 'real' differences between the sexes. With a starting point of 'difference' between men and women, differential treatment is not discriminatory.

Both approaches were influential in the most important decision creating the right to maternity leave in Australia, the *Maternity Leave Test Case*.[74] With the impetus of the then newly enacted anti-discrimination legislation in some Australian States, it was argued in this test case that the role of women in Australian society was changing, and that their significant contributions in the paid work force should be protected. The claim for maternity leave was put as a claim for 'the special interests of those who elect to combine motherhood and continued participation in the work force'. Ostensibly the right thus created recognised the way in which women were different from men. But the maternity leave decision was also pervaded by the sentiment that this right was in some way special and should not be used unfairly 'to confer an advantage over those who remain to perform work for the employer'. That implied a sameness between all workers.

The contradictions in the different rationales for the creation of a right to maternity leave were in the end resolved in a way that simply strengthened and supported the existing work relationships between men and women. From the beginning maternity leave was unpaid,[75] reinforcing women's dependency upon men. During the period of maternity leave entitlements arising from the employment relationship were not to continue to accrue, thus emphasising the incompatibility of work in the home and work in the paid work force. Most importantly, the very preconditions to be satisfied in order to exercise the right revealed a disregard for the reality of the paid working lives of those who are

[73] Compare the debate in the United States of America: Dowd, N., 'Maternity Leave: Taking Sex Differences Into Account' (1986) *54 Fordham Law Review* 699; Kay, H., 'Equality and Difference: The Case of Pregnancy' (1985) 1 *Berkley Women's Law Journal* 1; Finley, L.M., 'Transcending Equality Theory: A Way Out Of The Maternity and Workplace Debate' (1986) 86 *Columbia Law Review* 1118; Williams, W., 'Equality's Riddle: Pregnancy and The Equal / Special Treatment Debate' (1984-5) *New York University Review of Law & Social Change* 325; and Bacchi, C., *Same Difference: Feminism and Sexual Difference* (1990), especially ch. 5.

[74] *Association of Architects, Engineers, Surveyors and Draughtsmen of Australia v. Metal Trades Industry Association of Australia* (1979) 218 C.A.R. 120.

[75] Very few women currently have access to any period of paid maternity leave in Australia. However, the issue of paid maternity leave is on the political agenda in Australia: see National

mothers: there was a qualifying period of 12 months continuous service[76] and the award benefit was expressly denied to casual employees. These conditions operate in ways that impede the access of women to equality in the work place. The requirement of twelve months continuous service for eligibility for maternity leave is particularly harsh given the reality of the lives of women who already have young children, for it is they who will be most likely to have had a break in service. The position of such women in the work force is rendered even more precarious by the denial of maternity leave. Many women who can satisfy the requirement of continuous service will still be excluded from claiming maternity leave because they fall within the definition of 'casual' worker in their particular award.

The precarious nature of the entitlement to maternity leave of women who engage in 'atypical' work is demonstrated by *Cotter v. C.J. Coles.*[77] Ms Cotter claimed the right to maternity leave. She had been a full-time employee for nine months, prior to which she had worked for three years on a more casual basis. During this earlier period she worked according to a weekly roster, her hours being flexible, for approximately twenty hours *per* week and was paid at the casual rate. She had received neither annual leave nor sick leave although, somewhat incongruously, had been required to present a medical certificate to her employer when ill. It was held that she was entitled to maternity leave despite the 'casual' nature of her earlier employment. The decision depended entirely on the definition clauses in the relevant award, according to which a casual was 'engaged under a contract of hiring less than weekly and [was] deemed as hired by the hour' (clause 5), whereas a part-time employee was 'engaged by the week for a specified number of hours less than forty, but at least twenty' (clause 6). Given the flexible hours worked by Ms Cotter her position was borderline, and only assisted by a further clause which deemed a contract of hiring to be by the week in the absence of an express statement to the contrary.

The woman in *Taylor v. Walter Fashions Pty Ltd*[78] was not as fortunate. She had been employed for a period of eight years and four months, during which time she had taken (or so she thought) maternity leave, so that her period of actual service was seven years and six months. Upon leaving employment she sought a *pro-rata* payment under the Long Service Leave Act 1967 (S.A.). Although she had originally been taken into employment on a full-time basis, after a year her work was reduced to four days *per* week and thereafter she was paid at the casual rate. According to the definition in her award, where the criterion was not permanency but hours worked, she was a casual. The mere fact of her casual status under the award did not disable her from satisfying the requirement of continuous service for the purposes of the Long Service Leave Act . However, because of that status she had never been entitled to maternity leave and consequently her service had been broken by the period of 'leave' taken for the birth of her child.

Women's Consultative Council, *Paid Maternity Leave: A Discussion Paper on Paid Maternity Leave in Australia* (1993).

76 Similar qualifications are imposed by legislation: see for example the Industrial Relations (Miscellaneous Provisions) Act 1992 (S.A.), s.37.

77 South Australian Industrial Court, Print I57/1985.

78 (1987) 54 S.A.I.R. 239.

Taylor's Case thus illustrates the way in which women who work as 'casual' employees may in fact have to satisfy a number of differing criteria to enjoy work place rights.

Little wonder then that the available evidence suggests that the right to maternity leave is, more than a decade and a half since its introduction to the private sector, illusory for many women. In a survey of maternity leave in Australia[79] it was found that although 94 percent of female wage and salary earners worked under federal or state awards, 25 percent of women in the work force were not eligible for maternity leave. Whilst awareness and use of maternity leave was quite high in the public sector (78 percent of maternity leave was taken here), the case for private industry was radically different, and only 35 percent of private businesses experienced women taking maternity leave. Not surprisingly, those sectors of industry where there were the highest rates of 'atypical' work correlated with the lowest use of maternity leave.[80] The experience of Australian women thus replicates that of women in the United Kingdom and the United States of America.[81]

For women the issue of work force rights and benefits illustrates their position in the market place. On the one hand women do not benefit from the existing rights and benefits available in the work place to the same extent as men, very often because of their over-representation amongst 'atypical' workers. As a result they are disadvantaged even further in the market place, their powerlessness increasing the precariousness of their place there and reinforcing their position of dependency as a worker in the home.

5. *AWARD RESTRUCTURING AND 'ATYPICAL' WORK*

The issue of 'atypical' work has become an important focus of Australian industrial relations as part of the process of award restructuring initiated in the late 1980s in the industrial relations commissions. As part of this process women have done much to place themselves on the agenda. They have pointed out that for them the issues in award restructuring may often be exactly the opposite of what they are for male workers — an increase rather than a reduction in classifications, or a guarantee that there are real career paths and opportunities for training for women.[82] Because women in the paid work force are predominantly

[79] Glezer, H., *Maternity Leave In Australia* (1988). See also Australian Bureau of Statistics, *Women's Employment Patterns, Adelaide Statistical Division, November 1992* (Cat 6215.4), which shows that while 41 percent of women gave the birth of a child and care of children as the reason for taking their most recent break from the paid workforce, only 10.6 percent had taken maternity leave.

[80] Australian Bureau of Statistics, *ibid.* (Table 34).

[81] See Upex, R., and Morris, A., 'Maternity Rights — Illusion or Reality ?' (1981) 10 *Industrial Law Journal* 218, 220 and 239; Conaghan, J., and Chudleigh, L., 'Women In Confinement: Can Labour Law Deliver The Goods ?' (1987) 14 *Journal of Law & Society* 133, 136 and 142; O'Dowd, *op. cit.* n.73, especially 710; and Finley, *op. cit.* n.73.

[82] See Alexander, R., and Frank, S., *Award Restructuring and Part-Time Work in Banking* (1990); Bolton, D., 'Labour Market Disadvantage Of Women: New Solutions or Further Aggravation?' (1989) 33 *Refactory Girl* 5; Callinan, S., *Award Restructuring and Women Workers: A Discussion Paper* (1989); Hall, P., 'Women And Award Restructuring' (1989) 33 *Refactory Girl* 13; Employment and Skills Formation Council, *Guidelines On Women And Award Restructuring* (1989); Davis, E.M., and Pratt, V., *Making the Link*, (1990) 20-3; Roxon, N., 'Potential and Reality: Women Workers And The Structural Efficiency Principle', *Working Paper No. 56, Centre For Industrial Relations And Labour Studies* (1991) especially 12-5 and 66-7.

'atypical' workers, it has been assumed that an improvement in the conditions of part-time and casual work would benefit them.

'Atypical' work has resolved into two main issues in the context of award restructuring in the industrial commissions. First, the trade unions have tried to ensure that more opportunities are created for 'atypical' workers to work part-time rather than as casuals, thus providing security of employment in the paid work force to an increased number.[83] This development has been implemented in a number of areas significant for women workers.[84] The advantages of this move may appear undeniable: the insecurity that attaches to casual work is removed, the rights and benefits which are denied to the casual worker are available to the part-time worker, and the risks of business are no longer inappropriately placed on the worker. However, this strategy is one that has not been without controversy among women workers themselves, as they have perceived a greater flexibility in casual work and identified this as crucial to the possibility of them holding any position in the paid work force at all.[85]

Secondly, a high priority has been placed upon ensuring clarity in award definitions of 'atypical' workers. At present a major problem is the plethora of different definitions to be found in awards. A 'casual' might be one who is 'employed for irregular hours', or 'engaged and paid as such', or 'any employee not engaged by the week'. The more open the definition, the greater number of workers who will be caught within it. Within any award the definitions identifying 'atypical' employees are critical for they determine access to the conditions of employment set out therein. The consequence of falling within the definition of 'casual' is that the worker has a far more restricted access to the benefits and rights which are accorded to other employees in the market place.[86]

The clauses defining 'atypical' workers in awards are also frequently ambiguous and the relationship between these definitions are often not clear. If a 'part-time employee' is defined in an award as someone 'engaged to work more than 18 hours and less than 35 hours', and in the same award the 'casual employee' is a person 'engaged and paid as such' then the status of the person who works for

[83] See Australian Council of Trade Unions, *Guidelines and Negotiating Exhibit on Part-Time, Casual and Job Sharing* (1990), especially appendices D & F.

[84] Early initiatives were taken in retailing and nursing — see, for example, *Shop Employees (State) Award*; *Applications by R.T.A., S.D.A.E.A. and the Shop Assistants and Warehouse Employees' Federation of Australia, Newcastle and Northern New South Wales for a new award* (1988) 30 A.I.L.R. 232; *Nurses (South Australia) Award (Definitions) Case* (1987) 54 S.A.I.R. 222; *Re Shop Employees (State) Award & Anor* (1985) 27 A.I.L.R. 314; 56 N.S.W. Industrial Arbitration Reports 337.

[85] There was evidence of this view among the nurses themselves in *Nurses (South Australia) Award (Definitions) Case* (1987) 54 S.A.I.R. 222. In *Zurek v. Hospital Corporation Australia Pty Ltd T/A Warringal Private Hospital* (1992) E.O.C. 92-459, 92-460 a group of women argued before the Victorian Equal Opportunity Board that reclassification under award restructuring discriminated against them. The women had all been casuals who worked at the hospital on weekends and cared for their children during the week. After the award was restructured they were reclassified as part-time employees and were thus required to conform to a new rostering system which meant they had to work on week days. The women were ultimately unsuccessful in their argument because s.21(4)(d) of the *Equal Opportunity Act* (Vic.) provided an exemption for anything done pursuant to an industrial agreement.

[86] Though the statistics do not distinguish between permanent part-time and casual workers, the proportions of those who are defined as casuals in awards who fail to qualify must be of a far greater magnitude than those who are within the award definition of a part-time worker — *supra* nn.55 and 60 and accompanying text.

more than 18 hours *per* week but is paid at the casual rate will be uncertain. In *Howe and Kosier's Case*,[87] the work of two women employed for an average of 24 hours *per* week and paid as casuals was governed by an award precisely in these terms. In the Full Industrial Commission of South Australia, Judge Allan A.P. found that the women were casuals, not part-time employees, under the award. When taken into employment they were told by their employer that they were casuals, and both they and their employer considered that they were casuals. The significant thing, the Judge said, was what they were *engaged* to do, and they did not become part-time workers under the award simply because they in fact worked the hours of a part-time worker. In his view that would only have been so if the clause 'deemed' workers who worked more than 18 hours to be part-time. The coincidence of the power of employers to define the terms of the contractual bargain, of the perception by both employers and employees of women as having only a marginal attachment to the paid work force, and of broad award definitions, has necessitated only a small step to ensuring women's peripheral position in the law of the paid work force.

The situation which arose in *Howe and Kosier's Case* is not uncommon: frequently in practice the casual definition overrides the part-time definition and leads to the virtual casualisation of the whole industry.[88] The solution most commonly adopted by the industrial relations commissions to this problem has been to rewrite the definition of casual employee, restricting it in terms of the length of hours worked and the period of employment. Thus, regardless of the regularity of employment, the question of who is or is not a casual employee is determined by the number of hours worked. The definition eventually chosen by the South Australian Industrial Commission in *The Nurses (South Australia) Award (Definitions) Case* is typical. That award now defines a casual worker as anyone on 'not more than 2 shifts *per* week . . . engaged to relieve permanent staff and engaged for less than one month'.[89] The dominant preference of the trade unions is still the protection of the full-time worker, and in negotiating particular award conditions there is often a demand that only a very limited range of hours (say a minimum of 18 hours and a maximum of 28 hours) be available for part-time work. Concessions are sometimes made, but the response of the commissions, conditioned by an historic antipathy to part-time work, is usually conservative. As the Full Commission observed in the *Clerks (S.A. Building Society) Award*, when awarding part-time provision at a level which represented a compromise between the demands of business and labour:

> Such a figure . . . conforms with the level of caution which we consider suitable in introducing

[87] *Supra* n.69.

[88] In the *Nurses (South Australia) Award (Definitions) Case* (1987) 54 S.A.I.R. 222 there was evidence that nursing in private hospitals was virtually totally casualized as a result of this process.

[89] *Nurses (South Australia) Award (Definitions) Case* (1987) 54 S.A.I.R. 222. The Australian Council of Trade Unions favours clauses such as this which restrict the length of time the casual can be employed (see ACTU, *Guidelines and Negotiating Exhibit on Part-Time, Casual Work and Job Sharing* (1990)). Such clauses do not necessarily prevent employers engaging the worker in a series of contracts, perhaps with some break between them, and hence still complying with the new definitions. Nor do such clauses deal with the increasingly common phenomena of the agency worker, usually employed on a casual basis specifically in situations described by this award definition.

part-time work into this award . . . It has long been the position in industrial principle that part-time work will not be awarded lightly and that suitable limitations will attach to it.[90]

The problem with these solutions is that they do not address the structure of the problem of 'atypical' work at all, but merely push it into a more limited framework. Often the definition of part-time work in awards is now in terms of the number of hours worked, and it is common to find that this number ranges from 16 to 30 hours. In effect, the Australian position has become the same as that in the United Kingdom, where many protections are accorded only to those in the paid work force who are committed to it for that defined period of time. Experience in the United Kingdom has taught that this is not in fact a solution at all, and that the problems for women in the paid work force remain as significant and intractable as ever.[91]

6. *FEMINIST STRATEGY AND 'ATYPICAL' WORK*

Feminist scholarship in the area of work and law has given expression to many women's experience of the relationship between work in the home and work in the paid work force as paradoxical.[92] For many women there is a conflict between work in the home and in the paid work force which makes engaging in the two impossible. Men experience no such conflict: marriage and family increase the likelihood that they are in the paid work force and married men have the greatest success in the paid work force.[93] For women the conflict expresses itself in many ways. Most obviously it exists in time, both in the immediacy of the present and over the extended period of a lifetime: it is the conflict between the standard hours of the work force and the hours of the school day, between the days of a year in the work place and the days of the school year, between the demands for greatest devotion of time when there are young children in the family and the identical demand of the work place in the early stages of a career, and between the time demanded for the care of aged or sick members of the family in the years when careers might be re-established or consolidated. The conflict between work in the home and work in the paid work force is, then, a gendered reality.

For these reasons some feminists have at times advocated the restructuring of the paid work force so that it is able to accommodate different working patterns valued equally through a system of *pro-rata* rights and benefits. Revealing the concept of the worker as 'breadwinner' as incorporating the conflict between

90 *Clerks (S.A. Building Society) Award* (Full Commission).

91 For an analysis of the position of those who work less than the statutory minimum set for the enjoyment of rights in the United Kingdom see Dickens, L., 'Falling Through The Net: Employment Change And Worker Protection' *Industrial Relations Journal*; Disney, R., and Szyczczak, E., 'Protective Legislation and Part-Time Employment in Britain' (1984) 22 *British Journal of Industrial Relations* 78; Hakim, C., 'Employment Rights: A Comparison of Part-Time and Full-Time Employees' (1989) 18 *Industrial Law Journal* 69; Disney, R., and Szyczczak, E., 'Part-Time Work: A Reply To Catherine Hakim' (1989) 18 *Industrial Law Journal* 223; Hepple, A., and Napier, W., 'Temporary Workers And The Law' (1978) 7 *Industrial Law Journal* 84; Upex and Morris, *op. cit.* n.81.

92 See for example Dowd, N., 'Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace' (1989) 24 *Harvard Civil Liberties Law Review* 79 as well as 'Work and Family: Restructuring the Workplace' (1990) 32 *Arizona Law Review* 431; Olsen, F., 'The Family and the Market: A Study of Ideology and Legal Reform' (1983) 96 *Harvard Law Review* 1497, 1520-1; and Chamallas, M., 'Women and Part-Time Work: The Case For Pay Equity And Equal Access' (1986) 64 *North Carolina Law Review* 709, especially 725.

93 Dowd, N., 'Work and Family: Restructuring the Workplace' *ibid.*

work in the home and work in the paid work force into the norms and structure of the paid work force, feminists have sought to 'expose the partiality of these debilitating norms and structures, and insist that they be modified to reflect the perspectives of women'.[94] Some feminists argue that the ultimate goal of this strategy is the eventual integration, both sexual and structural, of 'atypical' and 'typical' work in such a way that will serve to bring about the transformation of the whole of work relationships, including those in the home.[95]

There is now a widespread and general acceptance of the need to resolve the conflict between work in the home and work in the paid work force. It is something which is being treated with some urgency in Australia as a matter of international obligations. The issue has moulded the policies of the trade union movement and hence shaped the arguments presented by it before industrial relations commissions.[96] A plethora of government reports examining the issue recommend a now familiar range of options to deal with the problem of 'workers with family responsibilities'. Foremost among these is increasing the opportunities for 'atypical' work, and especially part-time work. Also important are the introduction of parental leave, and the provision of more child care facilities including after school and holiday care, and care for sick children.[97] Legislative implementation of these options is now underway.[98] 'Atypical' work is, in this sense, moving in from the margins and being accorded a more central position in the structure of the paid work force. And it is being hailed as an important step toward the redistribution of power between men and women.[99]

The entry of large numbers of women into the paid work force through 'atypical' work would seem to be a victory for feminism, which for so long has challenged the exclusion of women from the paid work force. It is now clear, however, that women's participation in the paid work force through 'atypical' work may be just as oppressive as their exclusion from it. As more and more women have come to work in the paid work force their experience has been that 'atypical' work does not entirely accommodate, much less resolve, the conflict between work in the home and work in the paid work force. The problem of child care illustrates the point. Permanent part-time work cannot take account of the

[94] Abrams, K., 'Gender Discrimination and the Transformation of Workplace Norms' (1989) 42 *Vanderbilt Law Review* 1183, 1190. See also Frug, M., 'Securing Job Equality For Women: Labour Market Hostility To Working Mothers' (1979) 59 *Boston University Law Review* 55.

[95] See Chamallas, M., *op. cit.* n.92, especially 733.

[96] See the *Parental Leave Test Case* (A.I.R.C., Print No. J3596, 1990) and note the trend towards replacing maternity leave provisions with the gender neutral parental leave clauses, such as in *Application by Tasmanian Trades and Labour Council re Private Sector Awards* (1993) A.I.L.R. 38.

[97] See Work and Family Unit in the Department of Industrial Relations, *Workers With Family Responsibilities: Strategy for Implementing International Labour Organisation Convention across Commonwealth Policies and Program* (1992). This unit was set up after the ratification by the Australian government in 1990 of the I.L.O. Convention on Workers With Family Responsibilities (No. 156). The unit was set up to advise on issues of flexibility, maternity, paternity leave, etc. See also House of Representatives Standing Committee on Legal and Constitutional Affairs, *Half Way To Equal* (1992), especially chs 3-4; Bittman, *op. cit.* n.2; and Affirmative Action Agency, *Taking Steps* (1990), especially 33.

[98] See for example the Industrial Relations (Miscellaneous Provisions) Act 1992 (S.A.) s.37, which inserts a new schedule entitled 'Family Leave' into the Industrial Relations Act 1972 (S.A.) so as to provide paternity leave and the possibility of working part-time for men and women for two years after the birth or adoption of a child.

[99] See, for example, Stewart, A., 'Atypical Employment and the Failure of Labour Law' (1992) 18 *Australian Bulletin of Labour* 217, 220.

differing demands for child care between school term and school holidays, and women are often forced to relinquish permanency and become casuals as they enter and exit the work force according to the pattern of a school year. Even casual work is not entirely convenient, particularly where the worker is responsible for pre-school age children. The times of work for the casual may well be unpredictable and the resultant lack of routine is unable to be accommodated by child care centres. Further, the casual worker whose child cannot be sent to school or a child care centre, either because of school holidays or illness, will lose her tentative place in the work force if this conflict between family and work is resolved too often in favour of family. Although in theory the casual worker may accept or reject each specific offer of employment, the likelihood of being offered further work is closely related to the reliability of her unrestricted availability.[100] In an effort to maintain a position in the paid work force as 'atypical' workers, many women find themselves having to resort to others, usually women family and friends, to enable them to accommodate the demands of the work place.[101] For women who work either part-time or as casuals, child care is most often a hotch-potch of several different types of arrangements.

The flexibility of 'atypical' work is not then a flexibility in the system of paid work[102] to suit the needs of women: it is not responsive to the infinite and unpredictable complexity of the demands of work in the home. Rather, it is the assumed flexibility of women to meet the demands of the whole system of work, which is work both in the home and in the paid work force. All of the evidence suggests that when women work in the paid work force their responsibility for work in the home continues to be far greater than that of men and, as a consequence, they must work the double shift.[103] To the extent that the conflict between work and home is apparently resolved by 'atypical' work, it is so only 'on the backs of women'.[104]

When women work as 'atypical' workers the patriarchal structure of work relationships remains uncompromised. The construction of 'atypical' work in the paid work force as women's work affirms their primary responsibility for work in the home. Women's work in the home is appropriated by men under 'the sexual contract'.[105] Part of what it is to be a wife is to work in the home. Through work in the home women are subordinated: they are invisible, not recognised by the law, and therefore reduced to objects rather than recognised as subjects. In 'atypical' work the employment contract of women in the paid work force is determined by their work responsibilities imposed by 'the sexual contract'.

'Atypical' work, like the 'breadwinner' ideology, maintains women as

[100] See *Mitchell v. T.A.B. of Queensland* (1979) A.I.L.R. 207, and *O'Kelly v. Trusthouse Forte PLC* [1983] I.C.R. 728, 741, 754, and 759-60 for judicial recognition of the fact that the freedom of the casual worker to accept or reject an offer of employment is more apparent than real.

[101] A well documented study of this is provided by Gatfield, R., and Griffin, V., *Shiftworkers and Childcare: A Study of the Needs Of Queensland Nurses* (1990). It examines the difficulties of childcare for nurses when the shifts are not predictable over a long period of time. In the nursing industry shifts are often only known three days in advance and the roster covers rotating shifts.

[102] See Dickens, L., *Whose Flexibility? Discrimination and Equality Issues in Atypical Work* (1992).

[103] See Baxter and Gibson, *op. cit.* n.2, and Bittman, *op. cit.* n.2.

[104] Williams, J., 'Deconstructing Gender' (1989) 87 *Michigan Law Review* 797, 833.

[105] See Pateman, *op. cit.* n.13, especially ch. 5.

economically dependent upon men. Economic independence, enabling a real participation and enjoyment in the life of the community, is a precursor to social freedom.[106] Economic dependence is an integral part of the structure of women's social subordination. When work in the market place is expressed, as it still often is, as a luxury for married women,[107] there is the assumption that married women are rightfully and naturally dependent on their husbands. The wage earned through 'atypical' work does not, except in the most rare of circumstances, bring with it economic independence.

The very crudest articulation of wage justice, requiring that workers be able to maintain themselves in an economic sense through the efforts of their labour, is still calculated according to a 'male' standard — that is, in terms of the rates of pay for the worker who works 'full-time.' The poverty of women who work less than full-time is ignored by industrial relations commissions because those women remain mere appendages to men and invisible as human beings. The income women earn through 'atypical' work is characterised as secondary to the money earned by men. It is usually supposed that women engage in 'atypical' work either to provide for the luxuries rather than the necessities or because the money earned by the 'breadwinner' is inadequate for the needs of the family unit. Although women's work might in some cases be acknowledged as necessary, the wage earned is only an adjunct, never sufficient of itself. The money women earn through 'atypical' work is still regarded in popular parlance as 'pin money',[108] and this character ascribed to women's earnings dismisses issues of wage justice that would otherwise ordinarily be raised.

Today the expression 'pin money' is often understood to be that which will buy trivial extras, the luxuries which can be done without. However, the origin of the term 'pin money' means it carries another nuance. Historically, 'pin money' was a legal provision found in the marriage settlements of the more wealthy in society.[109] It was an annual payment that a wife was to be given by her husband so that she could supply herself with articles of personal use, such as dress and ornaments. 'Pin money' was to keep the wife in 'a station suitable to the degree of her husband,' and so she could 'dress according to his rank not her own'. 'Pin money' was always subject to the duty to apply it in the manner indicated in the marriage settlement:

> [It is not for] the purpose of the wife alone: it is for the establishment, for the joint concern, it is for the maintenance of the common dignity; it is for the support of that family whose brightest ornament very probably is the wife; whose support and strength is the husband, but whose ornament is the wife.[110]

[106] See Dahl, T.S., *Womens' Law: An Introduction To Feminist Jurisprudence* (1987), especially ch. 6; and Graycar and Morgan, *op. cit.* n.4, especially ch. 6.

[107] For a recent example see *Jenkins v. Maddeford* (unreported). This decision of the Full Court of the Supreme Court of South Australia (Judgment No. 2174, 10 April 1990) was a case involving assessment of damages under the *Wrongs Act* (S.A.). White J. said: 'This plaintiff is not forced to work. She chooses to work. She is married.'

[108] See Australian Department of Employment, Education and Training, Women's Bureau, *op. cit.* n.1, 138 for an account of the prevalence of this attitude.

[109] The exact origins of these provisions are unclear — some claim to be able to trace them to the time of the Restoration, others as far back as feudal times — see *Howard v. Digby* [1834] 2 Cl. & F. 634.

[110] *Howard v. Digby* [1834] 2 Cl. & F. 634, 671; see also 655 and 677.

Through 'pin money' the wife was maintained as an object within the marriage. She was a mirror to reflect the social status of the husband. Thus, although it was money given to a wife by her husband for the provision of her own things, it was controlled by her husband: in so far as it was a gift, it was subject to conditions. 'Pin money,' being subject to such restrictions, did not belong to the wife exclusively as her separate property: it was not the same as money settled for the separate use of the wife with any surplus belonging to her husband.[111] If 'pin money' was not paid by the husband he could not be sued in order to recover it, unless within a year, and certainly not by the personal representatives of the wife after her death.[112]

The meaning of the term 'pin money' thus incorporates the historical and legal expression of the subordination and dependency of the wife on her husband during the coverture. Its present day use to describe the earnings of women who work as 'atypical' workers in the paid work force assimilates the condition of women across generations. It is very clear that in the early times the significance of the 'pin money' was not that it was small in amount, indeed it was often quite a considerable sum, but that it was within the control of the husband, and was to be spent only at his intercession and instance. Thus, in a subtle way, the subordination of women within marriage is reflected and reinforced through the characterisation of their earnings from 'atypical' work as 'pin money'.

The whole of the law governing the work relationships of 'atypical' workers can be reread for women in terms of 'the sexual contract'. The law governing redundancy payments illustrates this. 'Atypical' workers who are casuals have no entitlement to redundancy payments. This is usually explained by reference solely to the employment relationship:

> A premium was paid *and received* as consideration for the right of the employer to utilize the services of the casual as and when required, *without further commitment* . . . to accept the premium (pay loading) and then to establish a right to a redundancy payment is both a contradiction in terms and a renunciation of the express contractual relationship.[113]

But for women the employment contract is determined by the 'sexual contract'. Women are not legal subjects contracting freely in their work relationships. Women remain objects in their work relationships, the property of men. The wage a woman receives through her 'atypical' work is 'pin money.' 'Pin money' is money controlled by men. Men (husbands) in the private sphere of the home release women (wives) to work in the public sphere of the paid work force, on the condition that they continue to fulfil their obligations under the 'sexual contract' to work in the home. Men in the public sphere join in this purpose by ensuring that the work available to women in the paid work force does not detract from their primary work obligations in the home. The employment contract for women has re-incorporated the terms of the marriage settlement. There need never be a commitment by the employer in the paid work force for payment beyond the

[111] Lush, M., and Griffith, W.H., *The Law of Husband and Wife* (2nd ed., 1896) 48-9; Schouler, J., *A Treatise on the Law of Domestic Relations* (5th ed., 1895) 248-9.

[112] *Howard v. Digby* [1834] 2 Cl. & F. 634.

[113] The *Milk Redundancy Case* 46 S.A.I.R. 817. See also *Federated Miscellaneous Workers Union v. Adelaide Milk Supply Cooperative* (1979) A.I.L.R. 48; *Milk Processing and Cheese etc Manufacturing Redundancy Clause Reference Case* (1980) 47 S.A.I.R. 939; and the *Termination, Change and Redundancy Case* (1984) 8 I.R. 34; 9 I.R. 115.

wage, the 'pin money.' When she no longer works for the employer she is dependent entirely upon her husband — any 'pin money' comes from him. Women have no real claim to their own place in the paid work force. They are not the owners of its 'new property'. Their place is in the home, where they are the property. Thus redundancy pay could never be an issue for the woman who is a casual worker.

Women 'atypical' workers are objects not subjects in the paid work force. They have no power there, and their place itself is not just precarious but illusory. The protection of the law is not for them. This is not simply evidence of women's inferior position in that forum, but also of the means by which their place in the home is perpetuated. 'Atypical' work in the paid work force assumes certain social relationships and works to create those relationships where they do not exist. If the only paid work available to women is 'atypical' work they are very quickly forced into a relationship of financial dependency either upon a man or the state. By privileging certain social relationships the law both entrenches and creates them.[114]

The usual rejoinder to any criticism of 'atypical' work is an assertion that women are subjects: it is a matter of women's own choice. The reality for many women is that work responsibilities in the home determine the nature of their participation in the paid work force: many women do not work in the paid work force at all because of this constraint,[115] and women's paid employment also reveals a complex pattern of multiple exits and re-entries to the labour market for reasons related to family and sexuality.[116] 'Atypical' work, it is argued, is women's way of reconciling the two areas of their lives. And there is much evidence that 'atypical' work is a matter of women's choice. The predominant reasons given by women for taking employment on a part-time or casual basis are related to their work responsibilities in the home, the care of children and other family members, or are identified simply as a matter of choice.[117]

Yet it is obvious that when women express a preference for 'atypical' work their choice is constrained by what is available to them by the structure and organisation of the paid work place. Studies of the 'atypical' work force in other countries have identified the way in which gender constructs and organises the work place.[118] These studies show that employers expect women to have lower

[114] See Finley, L.M., 'Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning' (1989) 64 *Notre Dame Law Review* 886, especially 908.

[115] The evidence is that the proportion of women amongst those who are marginally attached (that is people who could, and wanted to, enter the workforce but were not looking for work because of other commitments, such as the looking after of children) to the workforce is high (70 percent): Australian Bureau of Statistics *Women's Work, South Australia* (Cat 6204.4).

[116] Young, *op. cit.* n.18, ch. 2 shows that women are seven times more likely than men to leave the workforce for these reasons.

[117] See Australian Bureau of Statistics, *Type And Conditions Of Part-Time Employment, South Australia, October 1986*, (Cat 6203.4, 1987) for a statistical analysis of the reasons given by men and women for taking 'atypical' employment.

[118] In the United Kingdom, studies have shown that the use of part-time female labour was directly related to patterns of occupational segregation. Where the full-time workforce was female, the need for flexibility and improved efficiency in industry was met by the imposition of part-time work patterns, whereas the response in male areas of employment was to extend working time by the provision of overtime to meet the demands of industry. See Beechey and Perkins, *op. cit.* n.24; Beechey, *op. cit.* n.24; and Beechey, V., 'Rethinking the Definition of Work' in Jenson, J., Hagenard,

work force attachments, think that women will resolve work and family conflicts in favour of home, and assume that women only work in the paid work force to get a supplementary income. Consequently, women are viewed by employers as a 'naturally' contingent work force, adaptable to high turn-over forms of employment. Anecdotal evidence in Australia suggesting such a process in the construction and organisation of 'female' industries in the work place is now well supported by empirical studies.[119] Not surprisingly, patterns of 'atypical' employment are related to patterns of sex segregation within the work place. Requirements of industrial flexibility and improved productivity have been met in 'male' industries not by 'atypical' work patterns, but by increasing the access to overtime,[120] which is based on certain assumptions about the commitments of workers outside the work place and their responsibilities to support others financially. All evidence thus points to the conclusion that:

> The construction of a contingent work force is not a natural event or a structural inevitability thrown up by the process of industry restructuring. It is as much a construct, or a social artefact, as the emergence of a highly skilled core work force. It was begotten by old stereotypes upon new forms of work organization.[121]

The collusion of the law in the creation of 'atypical' work as women's work is now evident.[122] It is based upon acceptance of the present material reality in which many women live, and of gendered assumptions regarding women's familial work responsibilities and their economic dependence upon men. From this foundation the law identifies the work that *women* can do in the paid work force: an agenda for the creation of opportunities for 'atypical' work has been evident only in the 'female' industries or sections of industries. Gender is the organising principle in the creation of the law of work relations. When the law constructs the work of women as 'atypical' work it does so for all women, so that now all women, regardless of their marital status and familial situation, are far more likely than men to have 'atypical' work.[123] In a symbiotic relationship gender constructs work and law, and work and law in turn construct gender.

Significantly, women have no real voice in the legal institutions which create the work place. In the industrial relations commissions the trade union movement is the legally recognised voice of workers. Women exercise no real power here: there are barriers to their participation, they are massively under-represented in decision-making offices, and the agenda is not set by them.[124] When the union

H., and Reddy, C., (eds), *Feminization of the Labour Force: Paradoxes and Promises* (1988) 44, especially 57-8.

[119] Australian Department of Employment, Education and Training, Women's Bureau, *op. cit.* n.1; Jamieson, N., and Webber, M., 'Flexibility and Part-Time Employment in Retailing' (1991) 4 *Labour and Industry* 55; and Alexander, R., and Frank, S., *Award Restructuring and Part-Time Work in Banking* (1990).

[120] Lever-Tracy, C., 'The Flexibility Debate: Part time Work' (1988) 1 *Labour and Industry* 210. *Cf.* the economic rationalist view of Brereton, D., 'Gender Differences In Overtime' (1990) 32 *Journal of Industrial Relations* 370, especially 380, who attributes the difference to the higher on-costs of employment in male industries.

[121] Australian Department of Employment, Education and Training, Women's Bureau, *op. cit.* n.1, 13-4.

[122] See earlier section of article.

[123] Australian Bureau of Statistics, *Labour Force Survey* (Cat 6203.0) shows that 30 percent of employed unmarried women work part-time. In families where both partners were employed 62.4 percent of women were in part time employment, and of female one parent families 46.6 percent were in the labour force and of these 42 percent worked full time and 40 percent worked part time.

[124] Australian Bureau of Statistics, *Trade Union Members, August 1990* (Cat 6325.00); Ryan, E., and Prendergast, H., 'Unions Are For Women Too!' in Cole, K., (ed.) *Power, Conflict and Control in*

movement does identify women's interests in work it still treats them as subordinate to the interests of men, as it has always done.[125] Further, trade unions are only ever concerned with work relationships in the paid work force and seeing only one-half of the work relationships in women's lives they cannot respond adequately to women.[126]

The rhetoric of choice treats women as powerful in the formulation of their work relationships. It ignores the way in which the construction of the paid work force through the law determines the work that is available for women. It thus simplifies and privatises the causes of women's participation in the paid work force and removes them from critical scrutiny.[127] It transforms the imposed structure of work relationships into women's own and serves to legitimate their place within that structure. Further, the analysis incorporated in this rhetoric never questions women's responsibility for work in the home, but accepts it as the foundation of all else. The primacy of women's work in the home is never questioned. Women's participation in the paid work force is thus determined by, and must accommodate, their work in the home.

The current changes in the composition and structure of the paid work force might seem now to present a dilemma for feminists. An agenda for action which gives a high priority to an extension in the opportunities for 'atypical' work and an improvement of the legal rights and benefits attaching to it is attractive in so far as it may be immediately palliative. The present reality in which many women live is one where they are primarily responsible for work in the home. For these women it provides more diversity in their working lives, enables them to use a greater range of skills, and promises a greater range of options in their work relationships in years to come. On the other hand, that agenda is likely to entrench more deeply present stereotypes and assumptions that women bear the primary responsibility for work in the home, and that participation in the paid work force is only a secondary issue for them. Short term gains may result in changes which in the long term are even more oppressive for women and very difficult to alter.[128]

The critique of 'atypical' work for women compels the conclusion that the changes in the structure and composition of the paid work force represent, in Joan Williams' phrase, a 'reinvention of the gender system . . . [rather than] a paradigm shift'.[129] In this, 'atypical' work is revelatory of the nature of patriarchal power. The power of patriarchy is never static, finding an expression in any one material

Australia's Trade Unions; Pocock, B., *Women Count: Women in South Australian Trade Unions* (1992).

125 See Australian Council of Trade Unions, *op. cit.* n.48; and Lever-Tracy, C., 'Reorienting Union Strategies on Part-Time Work' in Bray, M., and Taylor, V., (eds), *The Other Side Of Flexibility: Unions And Marginal Workers In Australia* (1991).

126 There is a growing feminist literature which discusses the issue of women and trade unions. See, *e.g.*, O'Donnnell, C., and Hall, P., *Getting Equal* (1988), especially ch. 2; and Crain, M., 'Feminising Unions: Challenging the Gendered Structure of Wage Labour' (1991) 89 *Michigan Law Review* 1155.

127 See Abrams, K., 'Ideology and Women's Choices' (1990) 24 *Georgia Law Review* 761. See also Schultz, V., 'Telling Stories About Women And Work: Judicial Interpretations Of Sex Segregation In The Workplace In Title VII Cases Raising The Lack Of Interest Argument' (1990) 103 *Harvard Law Review* 1750, who examines these issues in the context of the sex segregation of the workplace.

128 *Cf.* Bennett, L., 'Women, Exploitation And The Australian Childcare Industry: Breaking The Vicious Cycle' (1991) 33 *Journal of Industrial Relations* 20, for this critique of the award restructuring process in the childcare industry.

129 Williams, J.C., 'Deconstructing Gender' (1989) 87 *Michigan Law Review* 797, 833.

reality, but always fluid, moulding and shaping itself to the material reality that it has created. The patriarchal concept of the worker as 'breadwinner' promoted and maintained the separation of the public world of work in the paid work force and the private world of home by assuming and demanding that the worker be able to be committed to the work place full-time and permanently. The feminist critique revealed the meaning of this 'public/private' dichotomy:

> [T]he 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 private and the public spheres of civil life are separate, reflecting the natural order of sexual difference and inseparable, incapable of being understood in isolation from each other.[130]

The public/private dichotomy caused the relationships surrounding work in the home to be at once rendered invisible and made the foundation of the structure of work relationships in the paid work force. The public/private dichotomy was thus the expression of the powerlessness of women in work relationships. Now in 'atypical' work the patriarchal state appears to abandon the public/private dichotomy and embrace the recognition of the interdependency of women's work in the home and the paid work force.

In this appropriation by the patriarchal state the feminist critique is destroyed and turned against women in an assertion of the external and objective reality of the world. Patriarchy would have it that the *thing* of work — work in the home, work in the paid work force — is real, as are the connections between those *things*. But there is no one fixed external and objective reality. The conflict between work in the home and work in the paid work force is a *gendered* reality. It means different things for men and women. And at different times. Once it meant the exclusion of women from the paid work force. Now it means women can be included to the extent that they can accommodate the conflict. 'Atypical' work is created as a gendered reality: the *thing* of work is structured by *thought*, an ideology which recognises work in the home, but sees women as naturally responsible for it and therefore limited by it in everything they do. The ability of patriarchy to shape and mould itself to different material circumstances betrays its implicit understanding that there is no external and objective reality. The power of patriarchy is the denial that it is so.

Feminism is a critical response to the power that is patriarchy. It gives a voice to women, it validates and makes real their experience. Consciousness raising, the method of feminism, is the understanding that the world is created in a complex interaction of *thought* and *thing*.[131] The feminist critique of the public/private dichotomy in relation to work, for instance, was never a description of the mere *thing* of work, but an insight into *thought*, the 'structure of consciousness'.[132] Feminist method in acknowledging the place of thought in the construction of the world recognises that the meaning of the *thing* of work is always contingent upon

130 Pateman, C., *op. cit.* n.13, 131. Feminists have long criticised the 'public/private' dichotomy as a tool of patriarchy — see O'Donovan, K., *Sexual Divisions in Law* (1985) and Pateman, C., 'Feminist Critiques of the Public/Private Dichotomy' in Benn, S., and Gaus, G., (eds) *Public and Private In Social Life* (1984).

131 The analysis owes much to MacKinnon, C., 'Feminism, Marxism, Method and the State: An Agenda for Theory' (1982) 7 *Signs* 515, especially 543.

132 Olsen, *op. cit.* n.92, 1498.

thought. The ultimate concern of feminism, then, is the place of women in work relationships, whatever the work they are doing.

In the context of work, feminists have sometimes been seduced by the idea that their goal is simply one in respect of the *thing* of work: what women do, getting women into the paid work force. Equality theorists, for instance, have never moved beyond a preoccupation with the work that women do in the paid work force, and how it is the same as or different to the work that men do. Under this theory the opening up of the paid work place to women through 'atypical' work is necessarily a step in the right direction: part-time work is part way to doing what men do, part way to equal. Equality theory has been useful to deal with some of the issues of exploitation, pay equity and systemic discrimination, which have arisen in relation to 'atypical' work.[133] But its usefulness is limited because exploitation is not the fundamental issue. The legal arguments about equality have done nothing to challenge the way women are subordinated through the structure of work relationships in the home which are integral to the structure of the work place. Further, under the influence of equality theory, the analysis of those issues has been deflected through gender neutral language from the real problems experienced by women in their working lives. The rhetoric of 'workers with family responsibilities', so widely accepted now, suggests that it is the conflict *per se* between work and family which is the problem to be addressed, rather than the relationship of power which the conflict happens to express. No real progress can be made for women in this way. Women's inequality in their work relationships has never been just a question of the sameness or the difference of the work they do as compared with men. It is, and has always been, a question of their powerlessness.

Feminism has no interest in promoting any particular form of work. The goal for feminists has never been to put more women in the paid work force as an end in itself. Nor do they simply wish to get more men to do work in the home. The most insidious demand made of feminists is that they chart the physical features of an ideal world of work. The feminist recognition that the *thing* of work is contingent upon *thought* compels the insight that no physical aspect of work is an inevitable part of patriarchal power. Even economic dependence, a major aspect of women's existing position, is not a necessary component of subordination. A new patriarchal world might have women as slaves, responsible for the economic support of men and used by men to further their own ends. By corollary then, there is no physical thing which necessarily constitutes a feminist ideal of work. The demand to concede that there is such a physical thing is the final demand that feminism surrender to patriarchy.

There is no feminist ideal of work, only of work relations. Feminism is concerned with 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, untrammelled by the limitations of gender. Relationships where every worker is valued and considered truly equal — that is, not subordinated in the relationship to another. Relationships

[133] See Chamallas, *op. cit.* n.92. See also n.56 *supra*.

which occur in an organisational structure which respects fully the humanity of every worker.

The task of feminism is to provide a critical analysis of a presently existing reality — patriarchy. In so doing it never accedes to it or participates in it. 'Atypical' work relationships thus present no dilemma for feminists. The political practice of feminism is theory in action — consciousness raising. Feminism never assumes that simply changing the *thing* of work will bring about a set of just work relationships. It is a social critique, always 'asking the woman question'.[134] In relationships it examines how women are subordinated and thereby ignored, disadvantaged, devalued, exploited. The feminist critique will be alert to the ways in which the law, while purporting to be objective, remains deeply gendered and thus an instrument of power in the patriarchal state. It will not ignore the gendered context in which the law operates. It will demonstrate that the gendered context is real and yet not the only reality.

A feminist analysis of 'atypical' work for women thus seeks to expose the present complexity of the structure of women's subordination by men. The sexual relations of women and men in the 'private' sphere of the home have a social dimension through which the category 'woman' is constructed. Part of the meaning of what it is to be a woman is to work in the home. The appropriation of this work by men frees them to work in the 'public' sphere of the paid work force. In the paid work force there is the 'new property'. Women who enter the paid work force do not have any ownership of this 'new property', for they have no independent right to work there. Women are allowed into the paid work force only on the condition that their participation there reinforces their position under the sexual contract and does not threaten the position of men under that same contract. In 'atypical' work at present women remain powerless, subordinated to men. Feminism is the insight that it might be otherwise.

[134] Bartlett, K.T., 'Feminist Legal Methods' (1990) 103 *Harvard Law Review* 829.