

# EMPLOYMENT ENTITLEMENTS TO CARER'S LEAVE

## Domesticating Diverse Subjectivities

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This article explores the normative underpinnings of two main sets of minimum employment standards in Australia: parental leave following birth or adoption of a child, and personal/carer's leave in order to attend to the short-term care needs of a member of the employee's 'immediate family' or 'household'. The article reveals how these leave arrangements are structured around a set of assumptions about what constitutes a real family. The rules normalise a conservative form of heterosexed nuclear family, especially in relation to the care of babies, where gendered understandings of care (and work) remain strong. Recently, both sets of leave entitlements have been explicitly extended to same-sex couples. This formal equality approach to law reform disrupts the opposite gender marker of the normative relationship, but largely continues the normativity of the two-adult couple and its conservative form of caring practice idealised in law.

### Introduction

Conflict between paid work and care responsibilities has become a focus for psychologists, equal opportunity bodies, trade unions and community groups. Scholars from a range of disciplines have sought to explore the interconnections and tensions, especially as experienced by women, between what are often seen as the realms of work and family. Although legal scholars have examined the potential of various law reform initiatives, case decisions and structures of regulation to address the strain between employment and care responsibilities, the role of law in shaping normative understandings of work and care practices has not received thorough attention in Australia. In particular, much of the legal scholarship does not directly engage with, or seek to explore, the norms embedded in the legal rules themselves. Only a relatively small — albeit growing — body of work seeks to conduct such investigations. One of the more sustained examinations of this description was conducted by Sandra Berns in her 2002 text, *Women Going Backwards: Law and Change in a Family Unfriendly Society*.<sup>1</sup> This text, which

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<sup>1</sup> Berns (2002).

positions itself as an exploration at the theoretical and conceptual level, rather than as an empirical examination of legal rules, focuses on gender and the legal framework. In addition, Rosemary Owens has authored a substantial body of work over the course of 10 years at least that analyses various aspects of labour market legal regulation, for its gendering of legal norms around work and social reproduction.<sup>2</sup>

Neither the scholarship of Professor Berns nor that of Professor Owens has examined directly the norms of sexuality, family and care in Australian employment law.<sup>3</sup> This article seeks to do that by engaging with the particularities of relationships and caring practices constituted as normative in two main groups of legal entitlements for employees to take leave to care for another person. Those provisions are parental leave following the birth or adoption of a baby or infant, and personal/carer's leave which has developed as an omnibus provision to cover an employee's own sickness, bereavement, and leave in order to provide care and support for members of the employee's 'immediate family' or 'household'.

The article seeks to reveal the normative caring relationships inscribed and reinforced through those rules. It will be shown that these leave arrangements are structured around a set of assumptions about what constitutes a real family. The rules have normalised a conservative form of heterosexed nuclear family, especially in relation to the care of babies, where gendered understandings of care (and work) remain strong. The ideal family of parental leave entitlements has been the one (male) worker, one (female) carer couple, where the worker has few care responsibilities and the carer is the primary caregiver to the child/children and does not, for that reason, engage in the labour market. Recently, these leave entitlements, with their breadwinner/carer dualism, have been explicitly extended to same-sex couples. This formal equality approach to law reform disrupts the opposite gender marker of the normative relationship, but largely continues the normativity of the two-adult couple and its conservative form of caring practice idealised in law.

Family studies literature reveals that parents in same-sex relationships (especially women, and especially where the child has been born into the relationship) do family and care differently than female–male couples.<sup>4</sup> Notably, they share household and care work far more evenly than do parents in opposite-sex couples with children. The level of involvement of non-birthing female parents is generally as high as that for parents who gave birth. In addition, they also undertake the role of wage earner more equitably, with the main model being that both parents undertake less than full-time work, or alternate the role of being the main income earner.<sup>5</sup> People in same-sex relationships come to parenting through diverse pathways, sometimes with children from an earlier heterosexual relationship, sometimes (and increasingly) through a birth within a lesbian relationship, and sometimes through foster parenting.<sup>6</sup> This potentially creates wide networks of care

<sup>2</sup> See, in particular, Owens (1993, 1995, 2005, 2006).

<sup>3</sup> Some scholarship has sought to do that in Australia, although that work remains disparate: Trabsky (2005); Chapman (2007).

<sup>4</sup> The idea of doing family — that is, family as a verb — comes from Reid (2008).

<sup>5</sup> Short et al (2007); Perlesz and McNair (2004), p 136; see also Kentlyn (2007), p 121.

<sup>6</sup> Short et al (2007); Perlesz and McNair (2004), p 131.

relationships. Some researchers write of the importance of broader kinship networks and community in queer families,<sup>7</sup> further potentially widening the care relationships shared between adults. A participant in an Australian study of lesbian parenting said:

Our daughter has very important relationships with other adults, somewhat independently of us. These include a bevy of adoring lesbian 'aunty' types. Because we question so much of the way(s) 'family' is constructed, we place a lot of importance on these other relationships.<sup>8</sup>

Although it is important to acknowledge that recent law reform initiatives which recognise same-sex couples in the employment field have generated tangible and substantial improvements for many people and their children,<sup>9</sup> those initiatives have nonetheless reinscribed a hierarchy of relationship and family forms. Same-sex couples who most appear in these rules to be just like heterosexual unions move to insider status in this process, with same-sex relationships and broader intimate and care practices least like the heteronormative nuclear family being constructed as other — indeed, as non-family and non-care relation.

The article first sets out the legal developments examined. These legal rules provide mandatory minimum standards in employment law, within a framework that anticipates employers and employees bargaining and reaching enterprise agreements that produce more favourable outcomes. At least in relation to the sorts of legal standards examined in this paper, though, that picture of bargained outcomes is not realised for many employees in the Australian workforce. In 2005, the Full Bench of the Australian Industrial Relations Commission surveyed the available empirical evidence on bargaining and agreement-making in relation to care responsibilities and concluded that 'bargaining has not delivered family friendly arrangements uniformly. Certainly, some sectors and some workplaces have agreed to implement some family friendly measures — but the results are uneven and mixed.'<sup>10</sup> The minimum standards examined in this paper are important as a topic of examination in their own right, as they set the mandatory minimum. Moreover, for many employees, these minima represent the actual entitlement, having not successfully bargained for a more favourable provision through an enterprise agreement.

After setting out the relevant legal rules on leave to care for others, I draw out two main interacting themes: the normativity of the couple, and the normativity of a primary caregiver model, especially in relation to the care of babies and young children. Together, these produce an understanding of a conservative couple as the ideal form through which care is provided.

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<sup>7</sup> Perlesz and McNair (2004), p 136; Reid (2008), pp 65–66.

<sup>8</sup> Perlesz and McNair (2004), p 136.

<sup>9</sup> The same cannot be said for the recent recognition of same-sex couples in the social security system, which has inscribed assumptions of financial dependence within same-sex relationships, resulting in loss of benefits to many people. On the cohabitation rule in social security law generally, see Tranter et al (2008).

<sup>10</sup> *Parental Leave Test Case* (2005) 143 IR 245 at 277.

## The Legal Landscape of Leave to Care

For most of the twentieth century, there was no entitlement in Australian law for employees to take leave for the purpose of providing care and support to another person. The first broad-based legal recognition of leave for this purpose came in 1973 when women employees in the Commonwealth public sector were given a right to maternity leave.<sup>11</sup> In 1979, maternity leave was recognised as a general legal entitlement for women in the private sector,<sup>12</sup> and women were granted adoption leave in 1985.<sup>13</sup> In 1990, leave entitlements were extended to men in the form of adoption leave and paternity leave for ‘spouses’, ‘former spouses’ and ‘de facto spouses’ of women who gave birth.<sup>14</sup>

These entitlements to take leave in the private sector in relation to birth or adoption, which collectively became known as parental leave, arose through Commonwealth test cases in the award system, and subsequently became generalised through the Commonwealth and state award systems.<sup>15</sup> The core feature

<sup>11</sup> The entitlement in the Commonwealth public sector was for 12 weeks of paid maternity leave: *Maternity Leave (Commonwealth Employees) Act 1973* (Cth). Notably, leave in relation to the death of a closely defined class of people developed first in state jurisdictions: *Re Foremen's (TAA) Award* (1964) 106 CAR 231 at 256; *HJ Harvey* (1963) AILR 228. The rationale for bereavement leave was not to care for the ill or injured person (or other grieving relatives). Rather, it was explicitly to attend to funeral and other arrangements, and to the employee's own grief: *Brass, Copper and Non-Ferrous Metals Case* (1968) 124 CAR 190 at 203; *Re Vehicle Industry Award* (1969) 130 CAR 711 at 712.

<sup>12</sup> The entitlement in the private sector was to unpaid leave, and arose through a federal award test case: *Federated Miscellaneous Workers Union of Australia v ACT Employers Federation* (1979) 218 CAR 120 (*Maternity Leave Test Case*). At the time of writing, there is still no national scheme, or broad-based minimum legal entitlement, to paid leave following birth (or adoption) in Australia, although the Commonwealth government has announced that it will establish a scheme from 2011 that provides 18 weeks of parental leave, paid at the level of the federal minimum wage, and limited to primary carers who earn less than \$150,000 per year: Productivity Commission (2008); Rudd (2009).

<sup>13</sup> *Re Clothing & Allied Trades Union of Australia* (1985) 298 CAR 321 (*Adoption Leave Test Case*). The adoptions covered related to a child under the age of five years who had not previously lived continuously with the employee for a period of six months, or who was not a child or step-child of the employee or her spouse: at 328.

<sup>14</sup> *Parental Leave Case* (1990) 36 IR 1; *Parental Leave Case (No 2)* (1990) 39 IR 344. The references to ‘spouses’, ‘former spouses’ and ‘de facto spouses’ are found in *Parental Leave Case (No 2)* (1990) 39 IR 344 at 344, 345.

<sup>15</sup> These standards became generalised through both Commonwealth awards and legislation, and state awards and legislation. See, for example, *Master Builders' Association (NSW) v Building Workers' Industrial Union of Australia* (1985) 16 IR 284 at 287; *Award Simplification Decision* (1997) 75 IR 272 at 292–93; *Re Hospitality Industry — Accommodation, Hotels, Resorts and Gaming Award 1998* (1998) 44 AILR 3-893 (*Supplementary Award Simplification Decision*); *Industrial Relations Reform Act 1993* (Cth) Pt VIA Div 5, Sch 14, amending *Industrial Relations Act 1988* (Cth); *Reference by Minister of Labour and Industry Pursuant to sec 45 of Labour and Industry Act re Maternity Leave* (1980) 22(6) AILR 78 (which approved the *Maternity*

was to establish a right for employees with at least 12 months' continuous service to take an unpaid absence from work obligations for up to 52 weeks in total, in connection with a birth or adoption, with a protected path back to the person's former position once parental leave came to an end.<sup>16</sup> Where the person's former position no longer existed, then the employee was to be returned to a position as nearly comparable in status and salary to that former position.<sup>17</sup> The 52 weeks of unpaid leave was the total that a couple could take, so that no couple was to take more than 52 weeks of leave between them. Couples were permitted to concurrently take up to one week's maternity and paternity leave immediately following birth. In relation to the placement of a child for adoption, they were permitted to take up to three weeks of adoption leave at the same time as each other. Apart from those specified periods, only one person in the couple was to be on parental leave at the one time.<sup>18</sup>

Leave for the purpose of providing care and support, outside the exigencies of birth and adoption, was first recognised in a systematised form in Australia through a 1994–96 Commonwealth award test case.<sup>19</sup> The package of measures granted in this case became standard legal entitlements across the federal award system,<sup>20</sup> and were adopted into state award jurisdictions.<sup>21</sup> The central provision was to permit

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*Leave Test Case* for flow on to Victorian state awards); *Referral by Minister for Labour for Flow-on of Federal Parental Leave Test Case Decision to Private Sector Awards* (1991) AILR 250(9) (which approved the flow on of the *Parental Leave Case (No 2) 1990* to Victorian awards); *Application by AWU (Queensland Branch) for a Declaration of Policy and/or a General Ruling by the Commission in Relation to Maternity Leave Standards* (1980) 22(8) AILR 109 (adoption of a statement of policy on maternity leave for Queensland state awards); *Re Australian Workers' Union, Queensland & Ors* (1992) AILR 40 (Queensland parental leave award on substantially the same terms as the *Parental Leave Case (No 2) 1990*); *Employee Relations Act 1992* (Vic), Sch 1; *Industrial Relations Act 1999* (Qld), Pt 2, Div 1 (as enacted).

<sup>16</sup> The stipulation of a maximum of 52 weeks is found in: *Maternity Leave Test Case* (1979) 218 CAR 120 at 125; *Adoption Leave Test Case* (1985) 298 CAR 321 at 328; *Parental Leave Case (No 2)* (1990) 39 IR 344 at 353, 357, 360.

<sup>17</sup> *Maternity Leave Test Case* (1979) 218 CAR 120 at 131; *Adoption Leave Test Case* (1985) 298 CAR 321 at 323, 331; *Parental Leave Case (No 2)* (1990) 39 IR 344 at 356, 359, 363.

<sup>18</sup> *Parental Leave Case (No 2)* (1990) 39 IR 344 at 353–54, 357–58, 360–61.

<sup>19</sup> *Family Leave Test Case — November 1994* (1994) 57 IR 121; *Family Leave Test Case, Supplementary Decision* (1995) AILR 3-060; *Personal/Carer's Leave Test Case — Stage 2 — November 1995* (1995) 62 IR 48; *Personal/Carer's Leave Test Case — Stage 2 — March 1996* (1996) 66 IR 138. The test case was prompted by a 1993 legislative amendment to the *Industrial Relations Act 1988* (Cth). That amendment was itself introduced following Australia's ratification in 1990 of ILO Convention 156 — *Workers with Family Responsibilities Convention*.

<sup>20</sup> This is implicit in the *Award Simplification Decision* (1997) 75 IR 272 at 292–93; *Supplementary Award Simplification Decision* (1998) 44 AILR 3-893.

<sup>21</sup> See, for example, *ACTU, Qld Branch v Qld Confederation of Industry Ltd* (1995) AILR 9-030; *Industrial Relations Act 1999* (Qld), s 39 (as enacted); *Family Leave Test Case (NSW)* (1995) 59 IR 1; *Family Leave/Personal Leave Carer's Leave Case 1996* (Tas)

employees to use their aggregated entitlements to paid sick leave and bereavement leave (to a maximum of five days per annum) to provide care or support to a member of their 'immediate family' or 'household' who was ill or injured, and needed their care.<sup>22</sup> This aggregated entitlement became known as personal/carer's leave.<sup>23</sup> Importantly, prior to this test case employees were not generally entitled in a legal sense to use their sick leave for the purpose of caring for another person, although evidence during the case indicated that this was in fact a common practice amongst parents with a sick child.<sup>24</sup>

In 2005, a Commonwealth test case formulated important extensions to the award parental leave entitlements following birth or adoption, and the 1994–96 personal/carer's leave provisions.<sup>25</sup> In relation to parental leave, the clause formulated entitled an employee to request an extension of unpaid maternity, adoption and paternity leave from 52 weeks to 104 weeks. The clause also provided a right to request an extension of the period that parents can simultaneously take immediately following the birth or placement of a child to a maximum of eight weeks. Employers were entitled to refuse each of these requests, but only on 'reasonable grounds' related to the employer's business.<sup>26</sup>

In terms of personal/carer's leave, the parties reached agreement in the conciliation stage of the 2005 test case regarding a model leave clause. The new entitlement permitted the use of up to 10 days of paid personal leave each year for the purpose of caring for a member of the employee's 'immediate family' or 'household' who was ill or injured, or faced an unexpected emergency. This doubled the amount of personal leave available for caring purposes. In addition, by agreement an employee could use other accrued leave for caring purposes, and where all paid leave had been exhausted, the employee was entitled to take unpaid

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(1997) 71 IR 231; *Re Application for Adoption of Provisions for Family Leave (SA)* (1997) 41 AILR 11-064.

<sup>22</sup> The first decision extended this to sick leave alone and did not impose a cap: (1994) 57 IR 121 at 146. The second decision added bereavement leave to the aggregated pool of leave and imposed the cap of five days per annum: (1995) 62 IR 48 at 54, 59. In 1997, eligibility for sick leave, bereavement leave and carer's leave was made uniform by extending bereavement leave to the death of a member of the employee's 'immediate family' or 'household': *Award Simplification Decision* (1997) 75 IR 272 at 314.

<sup>23</sup> A second aspect of the 1994–96 test case was to formulate provisions that permitted the establishment of a system of identified measures that could be utilised at an employee's election, with the consent of their employer. The measures included being able to take up to five days of annual leave in single-day periods (or parts of a single day), and greater flexibility in working hours (to enable, for example, time off instead of paid overtime). Prior to the test case, those flexibilities were not generally permitted: (1994) 57 IR 121 at 145, 147–48; (1995) 62 IR 48 at 65–66; (1996) 66 IR 138 at 156.

<sup>24</sup> The decision indicates that generally employers chose to ignore that unlawful practice: *Family Leave Test Case — November 1994* (1994) 57 IR 121 at 145.

<sup>25</sup> *Parental Leave Test Case* (2005) 143 IR 245.

<sup>26</sup> *Parental Leave Test Case* (2005) 143 IR 245 at 333, 337. In addition, employees were given the right to request a return to work following parental leave on a part-time basis until the child reached school age; an employer could refuse such a request on 'reasonable' grounds only.

leave for caring purposes, either for a period agreed between the employer and the employee, or for up to two days per occasion.<sup>27</sup>

The Work Choices legislation of the previous federal Parliament took effect from March 2006 to substantially wind back the improvements made to parental leave in the 2005 test case.<sup>28</sup> The result was that the pre-2005 minimum standards of parental leave continued in relation to many employees. In contrast, in terms of personal/carer's leave, Work Choices provided in a similar way (although at a slightly lower standard) to the agreement reached in the 2005 test case, thereby generalising those provisions more broadly through legislation.<sup>29</sup>

The latest chapter in this legal account of leave to care for another person is dated to the *Fair Work Act 2009* (Cth), which passed both Houses of Parliament in March 2009. The relevant provisions — part of the National Employment Standards — are expected to commence in January 2010.<sup>30</sup> In relation to parental leave following birth or adoption, the *Fair Work Act* provides that each parent is entitled to up to 12 months' leave at separate times, or one parent may request an extra 12 months' leave, with such a request only to be refused on 'reasonable business grounds'.<sup>31</sup> Employers are required to provide a written response to such a request within 21 days, and if the request is refused, the written response must 'include

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<sup>27</sup> *Parental Leave Test Case 2005* (2005) 143 IR 245 at Appendix 2 (p 343).

<sup>28</sup> The Work Choices legislation is the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth). This Act amended the *Workplace Relations Act 1996* (Cth). For an assessment of how far the 2005 test case standards were adopted into awards, see Williamson and Baird (2007), p 59.

<sup>29</sup> For example, the 2005 test case provided for 10 days' paid leave per year for the purpose of caring for another (*Parental Leave Test Case* (2005) 143 IR 245 Appendix 2, p 343), while Work Choices provided 10 days' paid leave per year for the purpose of the employee's own sickness (as sick leave) and for the purpose of caring for another: *Workplace Relations Act*, s 246(2). Work Choices was further limited in that an employee was not entitled to take more than 10 days' paid carer's leave over a 12-month period: *Workplace Relations Act*, s 249.

<sup>30</sup> Stewart (2009), p 10. The *Fair Work Act* contains a provision enabling employees to request 'a change in working arrangements' (such as a change in hours of work, patterns of work or location of work) to assist them in caring for a child under school age, or a child under the age of 18 who has a disability. Employers must agree to such requests unless there are 'reasonable business grounds' to refuse: *Fair Work Act*, Part 2-2, Division 4. This new provision appears to have its genesis in the right to request provision of the *Parental Leave Test Case* (2005) 143 IR 245. It may offer important potential for employees to adjust the work and care dynamic of their lives, at least so far as young children and children with a disability are concerned. The provision is not examined further, and the focus of the article on statutory minimum standards of parental leave and personal/carer's leave is maintained.

<sup>31</sup> *Fair Work Act*, Part 2-2, Division 5. This entitlement to parental leave applies to 'national system employee[s]' (see ss 13, 14) with at least 12 months' continuous service with that employer, and casual employees who have been employed on a 'regular and systematic basis' for a sequence of periods of at least 12 months and who have 'a reasonable expectation' of continuing employment by the employer on that basis: s 67(1), (2), s 12 (definition of 'long-term casual employee').

details of the reasons for the refusal'.<sup>32</sup> A maximum of three weeks of concurrent leave is permitted to be taken by both parents.<sup>33</sup>

In terms of personal/carer's leave, the *Fair Work Act* continues in substantively similar terms the Work Choices framework, which had encompassed the 2005 standards.<sup>34</sup> This is for 10 days' paid personal/carer's leave per year, plus paid compassionate leave of two days per occasion, and two days of unpaid carer's leave as needed.<sup>35</sup>

## The Normativity of the Couple

### *Parental Leave and Couples*

From the recognition of paternity leave following birth in 1990, paternity leave at the Commonwealth level has been, and remains (until the commencement of the *Fair Work Act*), available specifically for male employees who are spouses (including de facto spouses and former spouses) of the woman who gave birth.<sup>36</sup> Clearly it is based on a model of a female–male couple — and a spousal, or spousal-like, couple at that. Although non-married female–male couples are recognised along with married female–male couples, a marriage-like relationship is privileged in that it remains the benchmark for the recognition of non-marriage relationships, in the sense of de facto although not de jure, spouses. These definitions emphasise the mother's primary intimate adult relationship, in that eligibility for paternity leave revolves around the status of the man's relationship with the woman who gave birth to the baby, and not the man's biological relationship, or social care relationship, with the baby. In this, a marriage, or marriage-like relationship is emphasised, and biological (and social) fatherhood is irrelevant. A biological father who is not a spouse or de facto spouse of the woman who gave birth is not entitled to paternity leave.

This spousal model in the recognition of paternity leave has remained dominant in the Commonwealth system, through both subsequent test case

<sup>32</sup> *Fair Work Act*, s 76(3), (4).

<sup>33</sup> *Fair Work Act*, s 72(5).

<sup>34</sup> *Fair Work Act*, Part 2-2, Division 7. Work Choices capped the taking of paid carer's leave to a maximum of 10 days in a 12-month period (*Workplace Relations Act*, s 249); the *Fair Work Act* removes this.

<sup>35</sup> These forms of leave apply to 'national system employee[s]' (see ss 13, 14 for definition). While paid personal/carer's leave does not apply to casual employees (*Fair Work Act*, s 95), unpaid carer's leave and unpaid compassionate leave are available to casuals.

<sup>36</sup> *Parental Leave Case (No 2)* (1990) 39 IR 344 at 344, 345. The concepts of 'spouse' and 'de facto spouse' were not defined. The provisions were drafted to be gender specific: maternity leave was stated to be for women; paternity leave for men: at 353, 357. Note that in Australian law marriage is defined as the 'union of a man and a woman', and marriages between people of the same sex solemnised in a foreign jurisdiction are not recognised in Australian law: *Marriage Act 1961* (Cth), s 5, as amended by the *Marriage Amendment Act 2004* (Cth). This position seems unlikely to change under the current federal ALP government: Duffy (2007); House of Representatives *Hansard* (2008).



standards<sup>37</sup> and legislation.<sup>38</sup> Indeed, federal legislation has been quite specific on the marriage-like character of the concept of de facto spouse. Legislation enacted in 1993 defined 'de facto spouse' for these purposes inclusively as 'a person of the opposite sex to the employee who lives with the employee in a marriage-like relationship, although not legally married to the employee',<sup>39</sup> while the *Workplace Relations Act 1996* (Cth) defined de facto spouse to mean 'a person of the opposite sex to the employee who lives with the employee as the employee's husband or wife on a genuine domestic basis although not legally married to the employee'.<sup>40</sup>

The new *Fair Work Act* moves beyond the female-male de facto couple to encompass same-sex de facto couples. It does this by replacing the definition of 'de facto spouse' in the parental leave provisions with 'de facto partner', which is then defined to mean 'a person who, although not legally married to the employee, lives with the employee in a relationship as a couple on a genuine domestic basis (whether the employee and the person are of the same sex or different sexes)' and includes a former de facto partner.<sup>41</sup> This provides recognition to same-sex relationships, to the extent that they are couple relationships where the two people live together 'on a genuine domestic basis'. The centrality of the couple and the de facto character of the couple in this new definition are confirmed in the Explanatory Memorandum for the Bill.<sup>42</sup>

Over the past five years or so, several state jurisdictions have extended state parental leave provisions to same-sex couple relationships. The state schemes continue to include spouses, and have broadened coverage by reshaping the concept of de facto spouse into, for example, a 'domestic partner' (in South Australia from 2007),<sup>43</sup> a 'de facto partner' (in Western Australia from 2003<sup>44</sup> and New South Wales from 2008),<sup>45</sup> and a 'partner' (in Tasmania from 2006).<sup>46</sup> In Queensland, provisions covering same-sex couples existed from 1999 to 2002 only.<sup>47</sup>

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<sup>37</sup> *Award Simplification Decision* (1997) 75 IR 272, 473-74; *Supplementary Award Simplification Decision* (1998) 44 AIRL 3-893; *Parental Leave Test Case* (2005) 143 IR 1 at 338-9. The concept of de facto spouse was not further articulated in these decisions.

<sup>38</sup> *Workplace Relations Act*, s 263.

<sup>39</sup> *Industrial Relations Reform Act 1993* (Cth), Pt VIA, Div 5, Sch 14, amending *Industrial Relations Act 1998* (Cth).

<sup>40</sup> *Workplace Relations Act*, s 263.

<sup>41</sup> *Fair Work Act*, s 12 (definition of 'de facto partner').

<sup>42</sup> House of Representatives, *Explanatory Memorandum* (2008), para 26.

<sup>43</sup> 'Domestic partner' is then defined by reference to the concept of 'a close personal relationship': *Statutes Amendment (Domestic Partners) Act 2006* (SA), amending *Fair Work Act 1994* (SA) and the *Family Relationships Act 1975* (SA).

<sup>44</sup> See *Acts Amendment (Equality of Status) Act 2003* (WA), amending *Minimum Conditions of Employment Act 1993* (WA). See also the concept of 'de facto partner' and 'de facto relationship' in *Acts Interpretation Act 1984* (WA), amended by *Acts Amendment (Lesbian and Gay Law Reform) Act 2002* (WA).

<sup>45</sup> See *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008* (NSW), amending *Industrial Relations Act 1996* (NSW). See also the concept of 'de facto

Some shared understandings underlie these extensions of coverage. The characteristic of two adults, as a couple, is a central and common feature of these state legislative provisions.<sup>48</sup> Some jurisdictions explain this further. For example, South Australia requires that the two adults ‘live together as a couple on a genuine domestic basis’,<sup>49</sup> while Western Australia requires that the couple live together ‘in a marriage-like relationship’.<sup>50</sup>

The state jurisdictions typically provide that, in determining whether or not a particular relationship is covered in the legislative scheme, all relevant circumstances must be taken into account, including where appropriate an inclusive list of factors. The list in the South Australian jurisdiction is:

- (a) the duration of the relationship;
- (b) the nature and extent of common residence;
- (c) the degree of financial dependence and interdependence, or arrangements for financial support;
- (d) the ownership, use and acquisition of property;
- (e) the degree of mutual commitment to a shared life;
- (f) any domestic partnership agreement made under the *Domestic Partners Property Act 1996* [SA];
- (g) the care and support of children;
- (h) the performance of household duties;
- (i) the reputation and public aspects of the relationship.<sup>51</sup>

The lists in other jurisdictions are very similar, although the existence of a sexual relationship is specified as a potentially relevant factor to take into account in other state jurisdictions, except in the Tasmanian understanding of ‘caring relationship’ (discussed below).<sup>52</sup> South Australia additionally requires either that the two people have been living together for three years, or alternatively that they

relationship’ in *Property (Relationships) Act 1984* (NSW), amended by *Property (Relationships) Legislation Amendment Act 1999* (NSW).

<sup>46</sup> See *Industrial Relations Amendment (Fair Conditions) Act 2005* (Tas), amending *Industrial Relations Act 1984* (Tas). See also the concepts of ‘partner’, ‘personal relationship’, ‘significant relationship’ and ‘caring relationship’ in the *Relationships Act 2003* (Tas).

<sup>47</sup> Legislation enacted in 1999 included coverage of ‘a de facto spouse, including a spouse of the same sex as the employee’: *Industrial Relations Act 1999* (Qld), Sch 5 (dictionary). In 2002, the reference to de facto spouse and same sex partner was deleted from the parental leave provisions in the *Industrial Relations Act 1999* (Qld): *Discrimination Law Amendment Act 2002* (Qld), s 90, Sch.

<sup>48</sup> See, for example, *Family Relationships Act 1975* (SA), s 11; *Property (Relationships) Act 1984* (NSW), s 4(1); *Relationships Act 2003* (Tas), s 4(1) definition of ‘significant relationship’; *Acts Interpretation Act 1984* (WA), s 13A(1).

<sup>49</sup> *Family Relationships Act 1975* (SA), s 11.

<sup>50</sup> *Acts Interpretation Act 1984* (WA), s 13A(1).

<sup>51</sup> *Family Relationships Act 1975* (SA), s 11B(3) (emphasis removed).

<sup>52</sup> See, for example, *Property (Relationships) Act 1984* (NSW), s 4(2); *Relationships Act 2003* (Tas), s 4(3), s 5(5); *Acts Interpretation Act 1984* (WA), s 13A(2).

are parents of a baby together.<sup>53</sup> Two state schemes — those of South Australia and Western Australia — contain an explicit statement to the effect that it does not matter whether the two adults are the same sex or not.<sup>54</sup>

Tasmania potentially provides broader coverage than other state jurisdictions in that it identifies ‘caring relationships’ as covered by the statutory scheme. These are relationships between two adults where one of them provides the other with ‘domestic support and personal care’ (other than through a commercial arrangement). Such a relationship may exist whether those persons are related to each other by family or not.<sup>55</sup> This idea of a ‘caring relationship’ clearly does not, on its face, invoke a couple concept. This is further emphasised in that whether the parties have, or have had, a sexual relationship is not listed as a relevant factor to take into account in determining whether the relationship is indeed a ‘caring relationship’ within the meaning of the legislation.<sup>56</sup> This broad drawing of ‘caring relationships’ is, however, more ambivalent than is at first apparent. Its potential scope may be somewhat overshadowed because the list of factors to consider is, apart from the lack of reference to a sexual relationship, almost identical to the list provided in relation to identifying the more conventionally described couple relationships covered in the Tasmanian statute. For example, the list for ‘caring relationships’ brings in indicia of a shared residence, financial interdependence, ‘the degree of mutual commitment to a shared life’ and ‘the reputation and public aspects of the relationship’ — all resonant of a couple relationship.<sup>57</sup> This may reflect ambivalence and uncertainty within the Tasmanian parliament at stepping outside the familiar concept of the couple.

Leaving aside the potentially broader provisions in Tasmania regarding ‘caring relationships’, all these relatively new state statutory provisions both disrupt, and at the same time reinforce, law’s privileging of marriage-like relationships. The same can be said for the new provisions in the *Fair Work Act* extending parental leave to same-sex ‘de facto partners’. Broadening the couples recognised to include same-sex couples disrupts the female–male gendered character of parental leave’s couple. However, and importantly, the ideology of the couple remains central, with indicia referencing marriage-like relationships — such as a shared residence and shared finances — continuing to play a central role in identifying those entitled to unpaid parental leave. Some commentators have written that lists such as these have their origins in early divorce case decisions dealing with separation under the same roof.<sup>58</sup> The ideology of the couple remains central, even in Tasmania’s attempt to move towards a broader recognition of ‘caring relationships’. Some jurisdictions, namely Western Australia, are explicit, ruling that recognition attaches only to relationships that are ‘marriage-like’. In other words, some forms of diversity are recognised in these extensions of parental leave standards to same-sex couples, but

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<sup>53</sup> *Family Relationships Act 1975* (SA) s 11A(a), (b).

<sup>54</sup> *Family Relationships Act 1975* (SA) s 11; *Acts Interpretation Act 1984* (WA) s 13A(3).

<sup>55</sup> *Relationships Act 2003* (Tas) s 5(1), (2), (3).

<sup>56</sup> *Relationships Act 2003* (Tas) s 5(5).

<sup>57</sup> *Relationships Act 2003* (Tas) s 5(5).

<sup>58</sup> Fehlberg and Behrens (2008), p 136.

only where they are able to be identified as a two-adult marriage-like couple. Non-couple relationships — between, for example, close friends and people in multiple intimate and/or caring relationships, aunts, uncles and grandparents, and more broadly extended community, appear unlikely — at least outside Tasmania — to be able to establish a relationship with the birth mother such as to attract an entitlement to the minimum standard of unpaid parental leave.

### *Personal/Carer's Leave, Couples and Households*

Since its inception in 1994–96, the minimum standard of personal/carer's leave has revolved around the eligibility concepts of 'immediate family' and 'household'. The leave has been available to provide care and support for a member of the employee's 'immediate family', or 'household', who is ill or injured or faces an unexpected emergency.

In the initial recognition of this type of leave, 'immediate family' was defined to mean substantially the same as that concept in the *Sex Discrimination Act 1984* (Cth).<sup>59</sup> At that time, the *Sex Discrimination Act* defined 'immediate family' around spouses, former spouses, (opposite-sex) de facto spouses and former (opposite-sex) de facto spouses, in addition to parents, grandparents and siblings of the employee, or the employee's spouse or opposite-sex de facto spouse.<sup>60</sup> That concept of 'immediate family' privileged marriage-like relationships of female–male couples, and conventional understandings of family as parents, siblings, grandparents and children, and not understandings of family based on diverse intimate, caring or kinship relationships.

The second — mutually exclusive — group recognised initially in the 1994–96 test case in relation to which the employee is entitled to carer's leave consists of people who are members of the employee's 'household'.<sup>61</sup> This concept of 'household' was formulated for the purpose of ensuring that the entitlement to personal/carer's leave was 'non-discriminatory'. Interveners in the hearing, including the Australian Council for Lesbian and Gay Rights (in a joint submission with the Australian Federation of AIDS Organisations) and the NSW Aboriginal Women's Legal Resources Inc group,<sup>62</sup> had argued that 'immediate family' would

<sup>59</sup> (1994) 57 IR 121 at 146; (1995) AILR 3-060; (1996) 66 IR 138 at 145. Although note that 'child' was added to the concept of 'immediate family' in the test case: (1995) AILR 3-060, order CI 1.3(iii)(b). 'Child' was not part of the *Sex Discrimination Act* concept of immediate family.

<sup>60</sup> *Sex Discrimination Act 1984* (Cth), s 4A (definitions of 'family responsibilities', 'immediate family member' and 'spouse'), s 4 ('de facto spouse') (prior to December 2008). The *Same-Sex Relationships (Equal Treatment in Commonwealth Laws — General Law Reform) Act 2008* (Cth) amended the *Sex Discrimination Act* concept of 'immediate family' to include same-sex couple relationships.

<sup>61</sup> (1994) 57 IR 121 at 146; (1995) 62 IR 48 at 56-58.

<sup>62</sup> (1994) 57 IR 121 at 130; (1995) 62 IR 48 at 56-57. The NSW Aboriginal Women's Legal Resources Inc is reported in the decision as stating that many Aboriginal people live in extended family arrangements and that the concept of 'immediate family' will not cover established caring practices in Indigenous communities. HREOC argued that family leave should recognise the diversity of family structures. The Carers'

not adequately cover same-sex partners, carers of people with disabilities and Indigenous caring arrangements. Both the federal ALP government at the time, and initially the Australian Council of Trade Unions (ACTU), supported limiting carer's leave to 'dependent children' and 'immediate family'.<sup>63</sup> Ultimately, in the second decision in the test case, the commission agreed with the interveners, and now with the ACTU, on the need to formulate the new carer's leave standard in a non-discriminatory manner.<sup>64</sup>

The legislative amendment that prompted the 1994–96 test case (and the international convention upon which the legislation drew) referred to establishing entitlements to leave to provide care and support in relation to the category of 'immediate family'.<sup>65</sup> In stepping beyond the way that concept was defined at the time in the *Sex Discrimination Act*, to embrace members of the employee's 'household', the test case disrupted, to some degree, the normativity of the marriage-like female–male couple concept of 'immediate family'. It did recognise and constitute in some way its subject worker as having potentially wider care and family responsibilities than contained within the concept of 'immediate family'. That recognition, though, was fraught. Notably, the entitlement in relation to a member of the employee's 'household' is weaker and more constrained in that it appears to require a residence-type link, whereas there was no such requirement in relation to 'immediate family'. Indeed, the commission recognised this in noting that the 'household' concept would not necessarily cover all Indigenous caring arrangements, stating that this would be determined on a case-by-case basis.<sup>66</sup> Secondly, the bifurcation of the entitlement into 'immediate family' and member of the employee's 'household' reserved the appellation of 'immediately family' for the

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Association of Australia Inc supported the extension of leave in relation to people with whom the employee had a 'primary caring relationship', including friends, same-sex partners and sometimes neighbours. The Australian Family Association argued against the inclusion of same-sex partners. See (1994) 57 IR 121 at 130; (1995) 62 IR 48 at 56–57.

<sup>63</sup> In relation to the ACTU's claims, see: (1994) 57 IR 121 at 123 (claim (a)(i)). The first commission summarised the ACTU claim as supporting a minimum definition of 'family' as applied in relation to award bereavement leave provisions, which it identified as spouse, de facto spouse, parents, step-parents, siblings, children, step-children, parents in law and grandparents: (1994) 57 IR 121 at 126–127. In relation to the federal government's position, see: (1994) 57 IR 121 at 127. By the November 1995 hearing, the ACTU supported the provision of the entitlement in respect of 'immediate family', member of the 'household', a same-sex partner 'who lives with the employee as the de facto partner of that employee on a bona fide domestic basis', and 'traditional kinship' relationships: (1995) 62 IR 48 at 56. The ACTU drew on the *State Family Leave Case (NSW)* (1995) 59 IR 1.

<sup>64</sup> (1995) 62 IR 48 at 58. Owens and Riley make the point that the AIRC was '[u]ndoubtedly influenced' by the NSW Family Provisions test case, which had been handed down and explicitly extended eligibility to same-sex couples: Owens and Riley (2007), p 317.

<sup>65</sup> *Industrial Relations Act 1988* (Cth), s 170KAA; ILO Convention 158, Art 1(2). Neither instrument further defined or articulated the meaning of 'immediate family'.

<sup>66</sup> (1994) 62 IR 48 at 57.

narrow band of relationships covered at that time under the *Sex Discrimination Act*, relegating relationships outside that norm as merely ‘household[s]’. Notably, there was no real discussion in the case of extending the entitlement to cover providing care and support to close friends, people in broader intimate and caring relationships, neighbours and extended community.

Interestingly, the first decision in the 1994–96 test case used the language of ‘family’ consistently, in describing the type of leave being discussed, in identifying that an employee’s ‘family’ consists of ‘immediate family’ members and ‘household’ members, and in the title of the decision.<sup>67</sup> By stage two, though, the commission (constituted by the same members) expressed its view that ‘personal/carer’s’ leave was the more appropriate expression to use, and this was reflected in the altered title given to the leave, and the name of the case.<sup>68</sup> The reason the commission gave for this shift in nomenclature was its agreement on this point with the Australian Catholic Commission for Industrial Relations (ACCIR).<sup>69</sup> ACCIR’s definition of family (as recorded in the Full Bench decision) was a unit ‘whose members are committed to each other through marriage, blood or adoption’.<sup>70</sup> For ACCIR, once the provision for leave extended to other (non-family) groupings where people care for each other (an extension which it notably supported), the broader label of carer’s leave ‘more appropriately reflected the range of domestic arrangements under which individuals care for each other, than implied in the term “family leave”’.<sup>71</sup> The assumption of ACCIR, and by adoption the Full Bench, was that same-sex relationships and other caring relationships formed outside ‘marriage, blood or adoption’ are not families at all, and so cannot be appropriately included under the banner of family leave. For ACCIR and implicitly the Full Bench, once leave was extended to non-marriage, blood and adoption caring practices, the appellation of family needed to be replaced.

This framework of ‘immediate family’ and ‘household’ was not revisited in any substantive sense in the 2005 test case extensions,<sup>72</sup> or the Work Choices

<sup>67</sup> *Family Leave Test Case — November 1994* (1994) 57 IR 121 at 146; *Family Leave Test Case, Supplementary Decision* (1995) AIRL 3-060.

<sup>68</sup> *Personal/Carer’s Leave Test Case — Stage 2 — November 1995* (1995) 62 IR 48 at 58. And see *Personal/Carer’s Leave Test Case — Stage 2 — March 1996* (1996) 66 IR 138.

<sup>69</sup> (1995) 62 IR 48 at 58. In the 1995 NSW test case that provided carer’s leave in the state jurisdiction, the Catholic Hierarchy of New South Wales, like its counterpart in the federal case, was described by the New South Wales commission as being ‘particularly concerned’ should the commission’s order (covering unmarried opposite sex partners and same sex partners) be cast as family leave rather than, for example, carer’s leave or compassionate leave: *Family Leave Test Case (NSW)* (1995) 59 IR 1 at 10.

<sup>70</sup> (1995) 62 IR 48 at 57.

<sup>71</sup> (1995) 62 IR 48 at 57–58.

<sup>72</sup> The interveners present in the 1994–96 test case — the Indigenous women’s legal service, the gay and lesbian group and the AIDS organisation — were not present in the 2005 test case. Notably, the main written submission made by the ACTU in the 2005 case contained no reference or discussion of the need to extend protection to Indigenous caring arrangements, or the caring arrangements of lesbians and gay men, in either the discussion in the submission of the changing social context of families in Australia (section 3) or elsewhere in the 363-page submission.

amendments in 2006.<sup>73</sup> The *Fair Work Act* also continues the 'immediate family' and 'household' categories.<sup>74</sup> Importantly, though, the Act reconstitutes 'immediate family' by replacing 'de facto spouse' with 'de facto partner'.<sup>75</sup> That term — 'de facto partner' — means the same as it does in relation to parental leave (discussed above).

Some state jurisdictions extend personal/carer's leave to same-sex couple relationships, with New South Wales the first jurisdiction to do so. In 1996, the New South Wales commission formulated a test case award clause that was not framed around the two broad eligibility categories of 'family' and 'household'. Rather, the clause contained a list of people in relation to whom carer's leave was available. That list included 'a same sex partner who lives with the employee as the de facto partner of that employee on a bona fide domestic basis'. The clause also covered 'a relative of the employee who is a member of the same household', defining 'household' to mean 'a family group living in the same domestic dwelling'.<sup>76</sup>

Other state jurisdictions have more recently recognised same-sex couple relationships for the purposes of personal/carer's leave. For example, from 2007 the South Australian legislative framework has provided a minimum standard of carer's leave in relation to members of the employee's 'family'. That concept is defined to include a 'domestic partner', 'any other member of the person's household' and 'any other person who is dependent on the person's care'.<sup>77</sup> Western Australia provides carer's leave in relation to one category — identified as a 'member of the employee's family or household'. That phrase is defined to include the sorts of relationships covered under the federal concept of 'immediate family', plus from 2003 it has included a 'de facto partner'.<sup>78</sup> These concepts — 'domestic partner' in South Australia and 'de facto partner' in Western Australia — are used also in relation to entitlements to parental leave and as discussed above are defined in ways that reference a two-adult couple, including a same-sex couple.<sup>79</sup> The same can be said for the New South Wales description of a same-sex partner covered under the standard state clause.<sup>80</sup> In contrast, Queensland legislation on minimum carer's leave does not provide any recognition of same-sex relationships, and most closely tracks the Work Choices provisions on personal/carer's leave.<sup>81</sup>

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<sup>73</sup> *Workplace Relations Act*, s 250.

<sup>74</sup> *Fair Work Act*, ss 97(b), 102, 104.

<sup>75</sup> *Fair Work Act*, s 12 (definition of 'immediate family').

<sup>76</sup> *Family Leave Test Case (NSW)* (1995) 59 IR 1 at 13. The state commission consciously contracted the scope of the household to relatives only: at 10.

<sup>77</sup> *Fair Work Act 1994* (SA), Sch 3, s 4.

<sup>78</sup> *Minimum Conditions of Employment Act 1993* (WA), s 20A.

<sup>79</sup> On the meaning of 'domestic partner' in South Australia, see *Family Relationships Act 1975* (SA) (referred to above). On the meaning of 'de facto partner' in Western Australia, see *Acts Interpretation Act 1984* (WA) (referred to above).

<sup>80</sup> *Family Leave Test Case (NSW)* (1995) 59 IR 1 at 13.

<sup>81</sup> *Industrial Relations Act 1999* (Qld), s 39, Sch 5 (Dictionary).

Eligibility for personal/carer's leave reflects the tenacity of the two-adult couple. Although that model is potentially decentred through the extension of eligibility to 'household' members, it is reinscribed through the recognition of same-sex couple relationships. Over this time, the determination to withhold the appellation of family from same-sex couples has become less vociferous, and relevant, especially at state level and now also at the federal level. The origin of the legal recognition of personal/carer's leave was the concept of 'immediate family' in the *Sex Discrimination Act*. At that time, that Act contained a strong normative couple, and an explicitly female-male couple at that. The development of the concept of 'household' in the 1994-96 test case broadened eligibility beyond the couple to people sharing a household. Although there are reasons to critique the decision in the test case to create this separate category for caring relations identified and labelled as non-family — including same-sex relations and Indigenous caring relations — the recognition of 'household' did disrupt to some degree the couple as the ideal care relation. 'Household' recognises that people provide care and support to each other outside the couple, albeit within a shared residence. Some state jurisdictions have taken a broader vision of care relations than 'household', namely the South Australian inclusion of 'any other person who is dependent on the person's care'.<sup>82</sup> Notably, though, the growing inclusion of same-sex couple relationships, and often as cohabitants, ensures that the couple remains at the fore at the state level, and in the new *Fair Work Act* provisions.

### The Normativity of One Carer (and One Worker)

To date, the parental leave schemes have strongly reinforced a model of caring based on one adult being the main or sole carer for the baby or infant, rather than caring and labour market work being shared more evenly and/or widely between adults. This model is seen in two interacting legal rules. The first rule imposes constraints on the amount of parental leave that the two adults can take at the same time as each other. In some sets of legal entitlements, the permissible length of concurrent leave is very short — a maximum of one week following birth and three weeks from an adoption placement.<sup>83</sup> Other jurisdictions provide even less to employees — a maximum of one week of concurrent leave following both birth and adoption.<sup>84</sup> The 2005 test case extended the time period to a right to request a maximum of eight weeks' concurrent leave following birth or adoption; an employer may reject such a request on 'reasonable' business grounds only.<sup>85</sup> The *Fair Work Act* adopts a middle path, permitting a maximum of three weeks of concurrent leave in relation to both birth and adoption.<sup>86</sup> Apart from these various

<sup>82</sup> *Fair Work Act 1994* (SA), s 4 (definition of 'family').

<sup>83</sup> See, for example, *Parental Leave Case (No 2)* (1990) 39 IR 344 at 353-54, 357, 360; *Workplace Relations Act*, ss 282(1)(a), 284, 300(1)(a), 302; *Industrial Relations Act 1996* (NSW), ss 55(3)(a), 55(4)(a).

<sup>84</sup> *Fair Work Act 1994* (SA), Sch 5; *Industrial Relations Act 1984* (Tas), Sch 2; *Minimum Conditions of Employment Act 1993* (WA), s 33(3).

<sup>85</sup> *Parental Leave Test Case* (2005) 143 IR 245 at 332-33.

<sup>86</sup> *Fair Work Act*, s 72(5).



provisions for concurrent leave, the legal framework has contemplated — and indeed required — that only one of the adults entitled to parental leave will be on leave at the one time.<sup>87</sup>

The second rule of relevance is the requirement in several sets of provisions that parental leave is for the purpose of being the 'primary caregiver' of the baby or infant.<sup>88</sup> Some provisions define that concept as being 'a person who assumes the principal role of providing care and attention to' the child.<sup>89</sup> Notably, the *Fair Work Act* encompasses a potentially more flexible approach in providing that parental leave arises if 'the employee has or will have a responsibility for the care of the child'.<sup>90</sup> The new wording does not seem to necessitate that the employee must be the only or primary caregiver to the child. As against that, though, the Act continues the idea of only one member of an 'employee couple' being on leave at the one time, outside the permitted short periods of concurrent leave.<sup>91</sup>

Putting to one side the new provisions in the *Fair Work Act*, these jurisdictions that constrain concurrent leave and require that the person on parental leave be the 'primary caregiver' assume a particular type of caring relationship — that one adult in the couple takes the sole, or at least main, role in caring for the baby or infant and for that reason does not engage in labour market work for a time. The rules inscribe that model, rather than a model of two or more adults sharing the care (and presumably reduced labour market engagement), without one of them being the principal caregiver as such. This reinforces a couple relationship of two adults comprising one (full-time) carer on parental leave and one wage earner, rather than fluid relationships of shared caring and wage-earning. The *Fair Work Act*, with its apparent abandonment of the 'primary caregiver' rule, may support more diverse forms of work and care than articulated to date. This remains to be seen.

In contrast to the parental leave provisions, the legal rules relating to personal/carer's leave have been more ambivalent about the need for the employee taking the leave to be the primary caregiver. In the 1994–96 test case, the Australian

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<sup>87</sup> See, for example, *Parental Leave Case (No 2)* (1990) 39 IR 344 at 353–54, 357–58, 360–61; *Parental Leave Test Case* (2005) 143 IR 245 at 339; *Workplace Relations Act*, ss 285, 303; *Fair Work Act 1994* (SA), Sch 5; *Industrial Relations Act 1999* (Qld), s 25; *Industrial Relations Act 1996* (NSW), s 60; *Industrial Relations Act 1984* (Tas), Sch 2; *Minimum Conditions of Employment Act 1993* (WA), s 33(3). See also *Fair Work Act*, s 72(3)(b), (4)(b).

<sup>88</sup> See, for example, *Parental Leave Case (No 2)* (1990) 39 IR 344 at 357, 360; *Parental Leave Test Case* (2005) 143 IR 245 at 340–41; *Workplace Relations Act*, ss 277, 282(1)(b), 300(1)(b); *Industrial Relations Act 1999* (Qld), ss 18(2)(b), 31; *Industrial Relations Act 1996* (NSW), s 55(3)(b), (4)(b).

<sup>89</sup> *Parental Leave Case (No 2)* (1990) 39 IR 344 at 357, 360; *Workplace Relations Act*, s 263. The following sets of provisions (which include this requirement) do not define the concept of 'primary caregiver': *Parental Leave Test Case* (2005) 143 IR 245; *Industrial Relations Act 1999* (Qld); *Industrial Relations Act 1996* (NSW).

<sup>90</sup> *Fair Work Act*, s 70(b). If the employee 'ceases to have any responsibility for the care of the child' during unpaid parental leave, then the employer may require (by written notice) that the employee return to work: s 78. Unfortunately, the Explanatory Memorandum for the Bill does not provide any explication of this change in s 70(b).

<sup>91</sup> *Fair Work Act*, s 72.

Chamber of Commerce and Industry (ACCI) argued that it would be consistent with the earlier 1990 test case on paternity leave to provide that only one employee should take leave to care for the same family member at the one time. The ACTU opposed this, arguing that there may be circumstances where leave for two employees in relation to the same ill person would be appropriate. The union cited the example of two employee-parents who both take leave to attend to their critically ill child in hospital. The commission expressed the view that both the ACCI position and the ACTU position had merit, and adopted the following provision: 'In normal circumstances an employee shall not take carer's leave under this clause where another person has taken leave to care for the same person.'<sup>92</sup> The commission expressed the opinion that the opening words of 'In normal circumstances' would allow sufficient flexibility to address the concern raised by the ACTU.<sup>93</sup>

Since the late 1990s, the federal jurisdiction on personal/carer's leave has not continued with this 'normal circumstances' constraint, and has indeed been silent on this matter of two employees taking leave to care for the same person.<sup>94</sup> The jurisdictions have merely required that the leave be taken for the purpose of providing care and support to a person who needs the employee's care and support.<sup>95</sup>

Some state provisions have constituted a default position of one employee only on leave at the one time to care for a person, while others have not.<sup>96</sup> For example, Queensland imposed a strict rule in its statutory scheme from 1999 that 'an employee can not take carer's leave if another person has taken leave to care for the same person'.<sup>97</sup> The current provision in Queensland is more flexible, providing that: 'An employee can not take carer's leave if another person has take leave to care for the same person unless there are special circumstances requiring more than one person to care to the person.'<sup>98</sup> The New South Wales jurisdiction established a default position of only one employee on leave at the one time, by providing that: 'In normal circumstances an employee shall not take carer's leave ... where another person has taken leave to care for the same person.'<sup>99</sup>

<sup>92</sup> *Personal/Carer's Leave Test Case — Stage 2 — November 1995* (1995) 62 IR 48 at 59.

<sup>93</sup> *Personal/Carer's Leave Test Case — Stage 2 — November 1995* (1995) 62 IR 48 at 59.

<sup>94</sup> The 'normal circumstances' constraint was continued in the *Award Simplification Decision* (1997) 75 IR 272 at 319 (proposed clause 31.5.1), but discontinued in sets of provisions after this date, including the *Supplementary Award Simplification Decision* (1998) 44 AILR 3-893, *Parental Leave Test Case* (2005) 143 IR 245, *Workplace Relations Act*, and *Fair Work Act*.

<sup>95</sup> See *Personal/Carer's Leave Test Case — Stage 2 — November 1995* (1995) 62 IR 48 at 58; *Personal/Carer's Leave Test Case — Stage 2 — March 1996* (1996) 66 IR 138 at 146; *Parental Leave Test Case* (2005) 143 IR 245 at 343; *Workplace Relations Act*, ss 244(b), 250(1); *Fair Work Act*, ss 97(b), 102.

<sup>96</sup> For example, the *Fair Work Act 1994* (SA) and the *Minimum Conditions of Employment Act 1993* (WA) do not impose this constraint or impose a default position of this form.

<sup>97</sup> *Industrial Relations Act 1999* (Qld), s 39(3) (as enacted).

<sup>98</sup> *Industrial Relations Act 1999* (Qld), s 39(4).

<sup>99</sup> *Family Leave Test Case (NSW)* (1995) 59 IR 1 Cl 1.1.2.

Parental leave contains a strong vision of a two-adult couple comprising one carer (and one wage earner). Essentialist assumptions about a woman's role in nurturing babies and infants and a man's role as a wage earner, and the natural complementarity of those different functions, appear to percolate through the history of these legal rules. Personal/carer's leave is, by contrast, more ambivalent about the primary caregiver concept, providing currently at the federal level and in some state jurisdictions that two or more adults may take leave to care for the same person at the one time. These jurisdictions recognise that employees can engage in shared short-term caring, and do so without one of them being the primary caregiver as such. They countenance and reinforce more diverse forms of caring, with the greater flexibility in relation to shorter term personal/carer's leave underlining the rigidity of the model reinforced through the rules of parental leave.

## Conclusions

This article has sought to explore the normative underpinnings of two main sets of employment entitlements in Australia to take leave for the purpose of providing care and support to another person. Those entitlements were parental leave following birth or adoption of a child, and personal/carer's leave in order to attend to the short-term care needs of another person, where that person is a member of the employee's 'immediate family' or 'household'. The rules examined provide the minimum standards on these topics, although for many employees they represent the actual legal entitlement operative in their work arrangements.

The exploration has shown that these legal rules are built on, and in turn reinforce, a strong model of a couple as the natural caregiving unit. This is particularly so in relation to parental leave following the birth or adoption of a child, which also contains a model of a couple in which one adult is the primary caregiver of the baby or infant, rather than diverse forms of caring (and presumably labour market engagement). Until recently, law's couple has been a female–male couple, although more limited recognition was given to same–sex relationships and Indigenous relationships of caring through the 'household' category developed in relation to personal/carer's leave in 1994–96. The explicit extension of both parental leave and personal/carer's leave entitlements to same-sex couples at state level over the past five years or so, and recently at the Commonwealth level, disturbs the gendered character of the couple that holds law's gaze, even as it reinforces the two-adult couple as the ideal caregiving unit, especially in relation to babies and infants. This two-adult couple is less strong in the personal/carer's leave provisions, because the legal framework recognises the 'household' as a caring unit, although certainly it is revealed there as well through the concept of 'immediate family', and in the way that relationships have been labeled in those developments. In short, a two-adult couple has been, and remains, the ideological gatekeeper to employment law entitlements in Australia in relation to the care of others.

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