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Disruptive Time: Parental Leave, Flexible Work, and Superannuation in Australia

by

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2018

Abstract

Reproduction and child-rearing are distinctly gendered, temporalising acts in Australia. As such, reproduction is structured around temporalities of care and labour, and these temporalities emerge and disrupt established orderings in daily life, lifetimes, and larger-scale timelines. This thesis uncovers the underlying conception of time in the Australian legal regimes of parental leave, flexible work, and superannuation and its gendered connotations. As a socio-legal project, this thesis uses existing empirical evidence and theoretical material to conceptualise, critically analyse, and theorise the gendered temporalities of women with children in Australia. By constructing a feminist critique of neo-maternalistic productivism in Australia's parental leave, flexible work and superannuation systems, the thesis provides an alternate theory of disrupted temporalities in maternity.

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Introduction

The time that parents can share with children shifts over the life cycle, beginning at birth or adoption, and then shifting as children age and life circumstances change. How parents can maintain an income whilst caring for children, how work is organised to allow for the exigencies of life, especially the care of children, and how employment relations are converted into retirement income are regulated by law. This thesis is about the construction of time for women with children in Australia's parental leave, flexible work, and superannuation regimes. My thesis addresses three central questions:

- 1) What is the dominant conception of time underlying Australian work and parenting laws and policies in parental leave, flexible work, and superannuation?
- 2) In what sense is that conception gendered, particularly as it relates to women with children?
- 3) What alternative conceptions of time are possible?

This thesis investigates and identifies the legal temporalities¹ – the representation and conception of time and temporality in law and legal text – of each legal regime and proposes more inclusive alternative conceptions of time and temporality for those with caring responsibilities. In response to these questions, I focus on what I call the 'worker-mother laws' of parental leave, flexible work, and certain

¹ See Grabham's use of 'legal temporalities' in Emily Grabham, 'The Strange Temporalities of Work-Life Balance Law' (2014) 4(1) *feminists@law* <<https://journals.kent.ac.uk/index.php/feministsatlaw/article/view/101>>; Emily Grabham, *Brewing Legal Times: Things, Form, and the Enactment of Law* (University of Toronto Press, 2016).

superannuation reforms and argue that there is one dominant conception of time in the legislation, what I have conceptualised as neo-maternalistic productivism. The ideology of neo-maternalistic productivism advances a hegemonic time that structures women's role as subservient to the productivistic regime of Australia's neoliberal capitalism. I examine the laws regulating these three worker-mother regimes, place them into a broader social context to examine how women experience time, and use analytic tools from other disciplines to help understand the relationship between this hegemonic temporality constructed in the laws and women's experiences of time.

Throughout this thesis, I return to the core themes of the life cycle, neo-liberalism, chrono-normativity, and labour relations. In this introduction, I situate the thesis within these core concepts while providing a background and overview of the thesis. I begin with a deeper discussion of my research questions, followed by a brief outline of the theory and method used throughout this thesis (which is elaborated in more detail in Chapter 1). Section II provides an abbreviated political background and context for the thesis, mapping out the major shift in Australian labour relations in the late 20th century and into the 21st century. Section III of this introduction expands on the life cycle literature to illustrate how the three worker-mother laws relate to each other before providing additional legal context to each case study. I further introduce key background issues in labour centred on working time and child care, as well as introduce the themes of chrono-

normativity and neo-liberalism before concluding with a chapter outline of the thesis.

I. Overview of Research, Research Questions, and Method

There is a great deal of empirical evidence documenting that Australian women consistently suffer compounding economic disadvantage across multiple stages of the life cycle. I argue that understanding the construction and role of time in law and society is critical to first, illustrate how the gender-time gap consistently disadvantages women across these stages of the adult life cycle, and second, begin to redress that disadvantage. This thesis is motivated by concern about the ways in which legal regimes meant to redress women's economic disadvantage, namely, parental leave, flexible work, and various reforms of Australia's superannuation system, instead perpetuate the gendered problems that they claim to remedy, most especially the gender-time gap.

My thesis takes as its particular focus the dominant construction of time underlying the three distinct but related legal regimes of parental leave, flexible work, and superannuation. Taken as case studies, I interrogate the extent to which these laws help to construct gendered experiences of time for women with children over multiple phases of the life cycle. Therefore, the analysis begins with the birth or adoption of a child with parental leave, cycles through to flexible work, and ends with retirement in my discussion of superannuation. In addressing my first two research questions, additional, related questions and their answers

surface: what assumptions and ideologies underlie these laws, particularly about gender and maternity? Do the laws' outcomes match their public rhetoric? I argue that these laws reinforce idealised images of gendered labour, while maintaining the primacy of paid work in the hierarchy of time needs.

As the first two research questions and their related corollary questions are addressed in relation to each case study, the third research question emerges, asking 'what alternative conceptions of time are possible?' In the process of answering this question, I investigate alternatives proposed by other scholars and legal academics, develop my own theoretical approach, and explore comprehensive reform.

In response to these main questions, my thesis builds two central arguments. First, I argue that neo-maternalistic productivism is the dominant conception of time underlying, informing, and constructing parental leave, flexible work, and superannuation in Australia. Neo-maternalistic productivism, I argue, is a hetero-capitalistic time that elevates productivism and productivistic economism over care and the temporalities of care. That is, the practice and concept of neo-maternalistic productivism describes how legal, political, and social actors eschew or obfuscate gender-sensitive constructions of time in order to promote and achieve its own ideological ends based largely in heteronormative and neoliberal capitalism's rationalities. Thus, it is both gendered and gendering. Second, I argue that time for those with

caring responsibilities is better conceptualised as the care-based temporalities of disruptive time.

Part I, comprising Chapters 2 through 4, introduces and forms the substantive analysis of parental leave, flexible work, and superannuation, and constitutes the main part of my first argument.

Arising from this first argument are specific outcomes of my research in each case study locating exclusion and disadvantage to women with children across parental leave, flexible work practices, and superannuation reform efforts. Despite completing more labour hours over a life course than men, women with children suffer compounding disadvantage that often culminate in economic insecurity in older age.

The motivating, core contentions of my thesis form part of a second, but related argument, about reflecting a more inclusive construction of time within law and policy. One of the aims of this thesis is to bring insight on time, critical temporalities, and time-use to bear on the reform of laws and policies meant to alleviate disproportionately gendered outcomes borne by those with caring responsibilities. This aim is discussed in my methodology in Chapter 1, followed by an analysis and proposal in Part II (Chapters 5 and 6). How this aim is achieved is addressed in more detail in Chapter 5, which introduces my concept of disruptive time within the context of critical temporalities and caring responsibilities, and Chapter 6, which suggests and then analyses an alternative to the established legal regimes and organisation of labour in Australia through transitional labour markets.

Theory and Method

As a socio-legal project, this thesis provides a fuller and more accurate description, analysis, and critique of the gendered temporal implications of parental leave, flexible work, and superannuation in Australia, which I treat as separate case studies of legal time. Socio-legal methods extend beyond a closed system of legal theory and jurisprudence to answer questions that legal text alone cannot sufficiently answer. This involves careful reference to both empirical and theoretical methods and is explained in more detail in Chapter 1.

The empirical component draws on secondary quantitative and qualitative data to demonstrate disparate effects drawn along gender lines. The quantitative data, which includes time-use surveys, labour statistics, and economic markers, drawn predominantly from the Australian Bureau of Statistics, demonstrates quantifiable differences along gender lines. My use of qualitative data, which includes other social indicators related to time-use and time-stress and references to the *type* and *quality* of child care provided, demonstrates differences in reported attitudes, subjective experiences, and how time in care-related activities is characterised. These data provide the necessary backdrop to the worker-mother laws but do not entirely account for disparate experiences of time and care. Therefore, I turn to theoretical methods and models to understand what some of the empirical data indicate.

Although a basic doctrinal analysis of worker-mother laws would demonstrate the statutory underpinnings and interpretations of the

relevant laws, the theoretical component of this project is essential to address the question of dominant time in Australia and in what sense that concept of time is gendered, particularly in reference to women with children. Accordingly, I draw on a range of feminist perspectives in a variety of disciplines including law, sociology, cultural studies, and labour economics to develop a feminist theory of disruptive time. This theory emerges, in part, through careful analysis and feminist interpretation of sociologist Pierre Bourdieu's *Pascalian Meditations*² and his concept of embodied time. Taken further, theoretical methods are essential to analysing the gendered conceptions of time in the first two research questions and three case studies, and theories of time are vital to providing robust, alternative conceptions of time in answering the final research question. In sum, the empirical component demonstrates *what* is happening, while the theoretical part analyses *how and why* it is happening. I provide the foregoing overview to portray the broad bases forming the interdisciplinary nature of this socio-legal thesis. In building this interdisciplinary approach, however, I have had to recount the political and legal context underpinning my case studies and the marked shift in labour relations that occurred at the cusp of the 21st century.

² Pierre Bourdieu, *Pascalian Meditations* (Stanford University Press, 2000).

II. Australia: Legal and Political Context

In much-publicised attempts and largely at the urging of the Australian Human Rights Commission, the Commonwealth has introduced a number of legislative reforms in the last fifteen years aimed at increasing women's workforce participation rates in an effort to alleviate the economic burdens of existing legal frameworks. The archetypal examples of these laws, which I refer to as Australia's 'worker-mother laws,' are parental leave, flexible work, and mandated wage-contingent retirement savings (superannuation). These legal reforms have been largely successful at increasing women's employment,³ in that they facilitate the combination of paid work with the unpaid labour of care.

However, notwithstanding the good intentions that may have led to these laws, they have had unintended consequences. When the first such laws were designed, labour economics scholars expected that the increase in maternal employment would lead to more equal sharing of care and domestic labours between men and women.⁴ The assumption was that women's care work would be redistributed or shared, such that

³ See, eg, Commonwealth of Australia and Bureau of Statistics, 'Gender Indicators, Australia, Feb 2016' (4125.0, 23 February 2016) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4125.0~Feb%202016~Main%20Features~Economic%20Security~6151>>; see also Marian Baird, Sue Williamson and Alexandra Heron, 'Women, Work and Policy Settings in Australia in 2011' (2012) 54(3) *Journal of Industrial Relations* 326, 328 citing successive years of ABS gender indicators.

⁴ See Lyn Craig and Killian Mullan, 'How Mothers and Fathers Share Childcare A Cross-National Time-Use Comparison' (2011) 76(6) *American Sociological Review* 834, 834.

without expending greater effort, women could become more economically independent and self-sufficient. In this way, care work and paid labour could be harmoniously combined. Yet, labour and time-use surveys indicate that this sharing of labour has not occurred. As women's waged work has increased, the expected offset from men has not eventuated. Men's child care activities have increased only marginally, and without any decrease in their waged working hours.⁵ Meanwhile, women have not substantially decreased their time spent providing child care. As a result, women have experienced increased time-pressure in direct proportion to their increase in waged working hours.⁶ Such has been the outcome of Australia's worker-mother laws in the face of the nation's longstanding gendered division of labour, in which the male serves as the predominant breadwinner and the female as, overwhelmingly, the predominant caregiver.⁷ The consequence of

⁵ See Lyn Craig, 'Does Father Care Mean Fathers Share? A Comparison of How Mothers and Fathers in Intact Families Spend Time with Children' (2006) 20(2) *Gender & Society* 259; Lyn Craig, 'Parental Education, Time in Paid Work and Time with Children: An Australian Time-Diary Analysis' (2006) 57(4) *The British journal of sociology* 553; Lyn Craig, 'How Employed Mothers in Australia Find Time for Both Market Work and Childcare' (2007) 28(1) *Journal of Family and Economic Issues* 69.

⁶ What the data shows is that this effect is gendered: women who work full-time report the highest levels of time-pressure and stress whereas their male partners report lower rates. See Lyn Craig et al, 'Domestic Outsourcing, Housework Time, and Subjective Time Pressure: New Insights From Longitudinal Data' (2016) 78(5) *Journal of Marriage and Family* 1224; Barbara Pocock, Sara Charlesworth and Janine Chapman, 'Work-Family and Work-Life Pressures in Australia: Advancing Gender Equality in "Good Times"?' (2013) 33(9/10) *International Journal of Sociology and Social Policy* 594; Lyn Craig and Killian Mullan, "'The Policeman and the Part-Time Sales Assistant": Household Labour Supply, Family Time and Subjective Time Pressure in Australia 1997-2006' (2009) 40(4) *Journal of Comparative Family Studies* 547.

⁷ See Australian Bureau of Statistics, 'Fathers' Work and Family Balance' (Australian Social Trends 4102.0, 20 July 2006)

these laws, then, has been the emergence of a complicated relationship among individuals, laws, and societal norms and expectations around gender, care, and labour, unfolding over the course of the life cycle.

Australia is an appropriate site for this study for three reasons. First, as discussed above, successive Australian governments have maintained a policy platform aimed at women, care, and waged work,⁸ with the express goal of increasing women's workforce participation rates, especially the rates of women with children. Yet, this platform simultaneously emphasises 'economic efficiency'.⁹ The likelihood of conflict between these two aims – helping women with caring responsibilities and economic efficiency – raises the question of how effective these policies actually are for women with children. The second reason for focusing this study on Australia is that it is one of the more recent sites where bipartisan political aims and platforms have implemented (partisan) legislative reforms specifically targeting women with children. Because these reforms are relatively recent (discussed in more detail below), Australia's established workplace norms and

<<http://www.abs.gov.au/AUSSTATS/abs@.nsf/7d12b0f6763c78caca257061001cc588/acf29854f8c8509eca2571b00010329b!OpenDocument>>.

⁸ See Marian Baird and Sue Williamson, 'Women, Work and Industrial Relations in 2008' (2009) 51(3) *Journal of Industrial Relations* 331; Marian Baird and Sue Williamson, 'Women, Work and Industrial Relations in 2009' (2010) 52(3) *Journal of Industrial Relations* 355; Marian Baird and Sue Williamson, 'Women, Work and Industrial Relations in 2010' (2011) 53(3) *Journal of Industrial Relations* 337; see also Baird, Williamson and Heron, above n 3, 327–28.

⁹ See Baird and Williamson, 'Women, Work and Industrial Relations in 2009', above n 8, 355.

practices are currently in a state of change and confrontation, providing a uniquely nascent legal and social window to study. Third, Australia is an appropriate site for this study because it provides a telling example of how gendered time manifests across the life cycle. With robust time-use data collected by the Australian Bureau of Statistics, as well as additional time-use research by university-affiliated researchers, there is accurate data with which to analyse time across waged work, unwaged work, and gender. Further, the three Australian legal frameworks under investigation, parental leave, flexible work, and superannuation, specifically implicate time and temporality in the statutory language, but have not been analysed together as archetypal laws in the gendered life cycle. These three worker-mother laws provide a continuum of legislation to study over the gendered life course.

Labour Relations in Australia: A Brief Overview of Recent History

This section begins with a brief introduction of the social and political landscape in Australia under the Howard Government (1996-2007) before demonstrating how Howard Government legislation changed the process of industrial relations from a negotiated approach to a constrained voluntarist approach. Between 1996 and 2008, the Howard Government's approach to gender and care took the form of mounting tensions between the Coalition Government's social conservatism and its contradictory positions on women's workforce participation. Centred around decollectivising labour relations, deregulating working time, and promoting a hetero-capitalist approach to work and labour,

the Howard Government pledged to help working families 'balance work and family responsibilities'.¹⁰ However, this stance on 'flexibility' failed to address the gendered embodiment of time for women with caring responsibilities.

The twentieth century saw a shift in women's waged employment in Australia. Women suffered legally sanctioned job discrimination and lower rates of pay prior to the 1970s.¹¹ This 'marriage bar' that kept married women outside of waged labour in many job classifications began to be dismantled under feminist pressure in the second half of the twentieth century. In 1969, the Equal Pay Case¹² was brought before the federal Arbitration and Conciliation Commission, followed in 1972 by another Equal Pay Case¹³ and a litany of federal and state anti-discrimination laws. As legal hurdles were increasingly addressed, the employment of married and unmarried women, regardless of class, increased significantly from the 1970s.

By the time John Howard and the Liberal-National conservative coalition took government in 1996, the gender-time gap was at a critical point. For the first time in labour history, over half of working-age

¹⁰ See, eg, Australian Government, 'WorkChoices: WorkChoices and Australian Families' (Fact Sheet 26, Commonwealth of Australia, 2006).

¹¹ See Glenda Strachan, 'Still Working for the Man? Women's Employment Experiences in Australia since 1950.' (2010) 45(1) *Australian Journal of Social Issues* (Australian Council of Social Service).

¹² *Australasian Meat Industry Employees Union & Others v Meat and Allied Trades Federation of Australia & Others (Equal Pay Cases)* (1969) 127 CAR 1142.

¹³ *National Wage and Equal Pay Cases* (1972) 147 CAR 172.

women were participating in some form of waged employment by the early 1990s.¹⁴ Just over 60% of women in a couple with children were engaged in waged labour,¹⁵ however a trend was emerging: even as women were increasing their presence in the waged workforce, this declined for mothers of young children (aged 0-4), and men with children were increasing their working hours.¹⁶ The 1990s and 2000s was a pivotal period in the gendered division of labour, and the Howard Government had the potential to curb the outcomes of the gender-time and gender-wage gaps while addressing the time-pressure of an increasingly overworked, neoliberal society and shift the ways in which women's time was constructed and valued. However, rather than address this, the Howard Government encouraged this gender-time gap while supporting a 'flexible' work place publicly aimed at helping 'employees and employers to negotiate workplace agreements incorporating family friendly working agreements'.¹⁷

¹⁴ The figure was 52.8% in 1996, Australian Bureau of Statistics, 'Australian Social Trends, 2008: Labour Force Participation across Australia' (4102.0, 23 July 2008)
<<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Chapter7002008>>.

¹⁵ Of the 61.4% of mothers in a couple engaged in waged labour, 57% were in part-time waged work; for lone mothers 56.8% of those in waged labour did so on a part-time basis, *ibid*.

¹⁶ *Ibid*; see also Deborah Brennan, 'Babies, Budgets, and Birthrates: Work/Family Policy in Australia 1996-2006' (2007) 14(1) *Social Politics: International Studies in Gender, State & Society* 31, 36.

¹⁷ Australian Government, above n 10.

Part of the Howard Government's objective was to activate more women with children into the part-time waged labour market.¹⁸ The *Workplace Relations Act 1996* (Cth) and subsequent amendments known as *Work Choices*¹⁹ introduced radical and systemic changes to Australia's established labour laws, practices and regulations. Because *Work Choices* amended the *Workplace Relations Act 1996* and was presented as the final iteration of the Howard Government approach to work and labour, this section focuses predominantly on this Act to provide a more comprehensive background to subsequent legislation covered by this thesis. In the public policy materials promoted at the time, *Work Choices* was presented as helping to 'balance work and family responsibilities' and as 'particularly suited to tailoring working arrangements' for families.²⁰ The Howard Government relied on a dominant rhetoric centred on 'flexibility' and 'choice' to communicate the benefits of *Work Choices* to Australian workers, with special regard to workers with children.²¹

¹⁸ See, eg, Interview with Melissa Doyle and Mark Baretta, 'Interview with Prime Minister John Howard' (11 May 2005).

¹⁹ *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

²⁰ Australian Government, above n 10; see also *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) s 3(1) providing a 'principal object' as 'assisting employees to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers'.

²¹ Australian Government, above n 10.

Background to Work Choices

What the Howard Government attempted to do (and succeeded for a short while) was to shift the practices of regulating working patterns from a negotiated approach to that of externally constrained voluntarism²². Externally constrained voluntarism is an approach that eschews legislated labour regulations in favour of voluntary self-regulation and private forces external to the government and law. It reflects a neoliberal approach to work pattern flexibility, vesting power in capital-based market forces and traditional employer demands and power. We see this legacy endure beyond the Howard Government despite the repeals made under the *Fair Work Act 2009* (Cth).

States that rely on externally constrained voluntarism to regulate work pattern flexibility tend to be based on more individual employment contracts with a wide distribution of normal working hours, spanning from longer hours to sporadic, shorter hour jobs.²³ These hours tend to be highly gendered and classed, resulting in men (usually fathers) working longer hour jobs, and women and the impoverished working

²² For discussions on negotiated flexibility and constrained voluntarism, see Immaculada Cebrian, Michel Lallement and Jacqueline O'Reilly, 'Introduction' in Jacqueline O'Reilly, Inmaculada Cebrián and Michel Lallement (eds), *Working-time changes: social integration through transitional labour markets* (Edward Elgar Publishing, 2000); Günther Schmid, 'Transitional Labour Markets: A New European Employment Strategy' (Discussion Paper 98-206, October 1998) <<http://www.ssoar.info/ssoar/handle/document/12885>>; Bernard Gazier and Günther Schmid, 'The Dynamics of Full Employment: An Introductory Overview' in *The Dynamics of Full Employment: Social Integration through Transitional Labour Markets* (Elgar, 2002) 1.

²³ Barbara Pocock, 'Labour Market "Deregulation" and Prospects for an Improved Australian Work/Care Regime' in Joe Isaac and Duncan Lansbury (eds), *Labour Market Deregulation: Rewriting the Rules* (2005) 75.

the other end of the spectrum in highly precarious positions. The UK is one example of a system built largely on voluntarism with weakened collective bargaining power and a highly gendered distribution of paid and unpaid labour hours.²⁴

Prior to the suite of changes ushered in during the Howard Government, Australia had largely operated under a negotiated approach to labour law and regulation. Working patterns and labour conditions were negotiated between unions and employers or set by industrial tribunals, with relatively generous deference to union demands and priorities. During the previous Australian Labor Party ('ALP') Governments, various formal agreements were brokered between the trade union movement, represented by the Australian Council of Trade Unions ('ACTU'), and the ALP. These Accords established a cooperative relationship between the ALP and trade unions, and regulated traditional labour issues such as wages and hours. The Accords also included broader areas of social concern such as social security, education, and health care. During this time, child care rebates, anti-discrimination legislation, and income support were introduced, earning the ALP Government a reputation of applying a

²⁴ Ibid; see also Silke Bothfield and Jacqueline O'Reilly, 'Moving up or Moving Out? Transitions through Part-Time Employment in Britain and Germany' in Jacqueline O'Reilly, Immaculada Cebrián and Michel Lallement (eds), *Working Time Changes: Social Integration through Transitional Labour Markets* (Edward Elgar Publishing, 2000); Mark Smith et al, 'Transitions through Part-Time Work in Spain and the United Kingdom: A Route into Secure Employment?' in Jacqueline O'Reilly, Immaculada Cebrián and Michel Lallement (eds), *Working Time Changes: Social Integration through Transitional Labour Markets* (Edward Elgar Publishing, 2000).

'femocrat strategy'.²⁵ This 'femocrat' strategy came about as a negotiated outcome between feminist activists, trade unions, and the ALP.²⁶

Under the Australian Constitution, the federal government does not have the power to set wages, but does have the power to create laws with respect to 'conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state' (s 51(xxxv)).²⁷ Over the twentieth century, Australia (and New Zealand) developed a unique approach to labour regulation largely set by union priorities. Wages, working patterns, and labour conditions were set by negotiation between trade unions and employers and captured in legally binding awards. There are thousands of awards each applying to specific classifications; each job belongs to a classification and is thus covered by an award. Where negotiation broke down, federal arbitration bodies would decide awards.

Shifting Labour Relations under Work Choices

Under Howard, this negotiated mechanism by which labour conditions and laws were decided was set to change, resulting in a perceptible shift

²⁵ Brennan, above n 16, 32 citing Franzway, Court, and Connell 1989, Eisenstein 1996; Chappell 2002; Sawyer 2003; see also Hester Eisenstein, *Inside Agitators: Australian Femocrats and the State* (Temple University Press, 1996); Carol Johnson, 'Negotiating the Politics of Inclusion: Women and Australian Labor Governments 1983 to 1995' (1996) 52(1) *Feminist Review* 102; Suzanne Franzway, Robert William Connell and Dianne Court, *Staking a Claim: Feminism, Bureaucracy and the State* (Allen & Unwin, 1989).

²⁶ Brennan, above n 16, 32; Johnson, above n 25, 105.

²⁷ The legislation was passed using the corporations power under the *Australian Constitution* s 51(xx).

in transitional labour markets, working patterns, and the gendered distribution of labour and time-use. In this introduction, and again in Chapter 3, I focus on two Acts from the Howard Government: *Workplace Relations Act 1996* (Cth) and *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) ('*Work Choices*'). The rhetoric surrounding both acts relied heavily on 'flexibility'. The Howard Government used 'flexibility' to convey a flexibility of industrial relations and labour regulation with an aim toward employer interests and neoliberal values.²⁸ This flexibility was changing the mechanism by which labour regulations were made, shifting it from a negotiated approach to a constrained voluntarist approach.

²⁸ See, eg, Commonwealth, Parliamentary Debates 2005 2 November 2005, 4–5 (Kevin Andrews, Minister for Employment and Workplace Relations); Commonwealth of Australia, 'Media Release from PM John Howard on WorkChoices' (9 October 2005) <<http://australianpolitics.com/2005/10/09/howard-announces-workchoices.html>>; 'Text of Prime Minister's Statement on Workplace Relations' *Sydney Morning Herald*, 26 May 2005 <<http://www.smh.com.au/articles/2005/05/26/1116950798933.html>>; Interview with John Howard, 'Interview with John Laws Radio 2US' (20 June 2006) <<http://pmtranscripts.dpmc.gov.au/browse.php?did=22332>>; John Howard, 'Joint Press Conference with The Hon Joe Hockey MP, Minister for Employment and Workplace Relations Commonwealth Parliamentary Offices, Melbourne' (4 May 2007); Rae Cooper and Bradon Ellem, 'The Neoliberal State, Trade Unions and Collective Bargaining in Australia' (2008) 46(3) *British Journal of Industrial Relations* 532; Christopher Jon Arup et al, 'Assessing the Impact of Employment Legislation: The Coalition Government's Labour Law Programme 1996-2007 and the Challenge of Research' (Research Report, Workplace and Corporate Law Research Group Department of Business Law and Taxation and Australian Centre for Research in Employment and Work Department of Management, Monash University, 2009) 4–6 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1544028>.

The Howard Government concentrated efforts toward decollectivising²⁹ labour relations. The Coalition ran a campaign based on the 'great principle of choice' and flexibility.³⁰ In promoting *Work Choices*,

Howard PM explained:

The purpose of this legislation is to add to the future economic strength of Australia because we are living in a competitive world and we have to have more flexibility, we have to encourage workers and their bosses to make agreements at the workplace level.³¹

'Choice' was closely related to 'flexibility' in the rhetoric of *Work Choices*.

The Howard Government's use of the term 'flexibility' predominantly applied to describe the balance of forces between the workforce and employers, rather than working patterns of hours, days or place.

Howard's PM use of 'industrial relations flexibility'³² and 'flexible

²⁹ Note difference between 'decollectivise and "deregulate". Although Howard PM argued that he was "deregulating" the labour market, he was actually decollectivising decision-making and instead relegating workplace relations to the place of employment; to do this *Work Choices* actually increased the length and complexity of regulations and legislation. The Workplace Relations Amendment (Work Choices) Act 2004 was over 706 pages long, with subsequent amendments and changes increasing the length and complexity. The legislation "constitute a high point of direct government regulation of employment relationships in Australia in employers' interests' Barbara Pocock et al, 'The Impact of Work Choices on Women in Low Paid Employment in Australia: A Qualitative Analysis' (2008) 50(3) *Journal of Industrial Relations* 475. Therefore, the term 'decollectivise' is more appropriate than 'deregulate' to describe what Howard sought to achieve.

³⁰ 'John Howard's Acceptance Speech' *Sydney Morning Herald*, 10 October 2004 <<http://www.smh.com.au/articles/2004/10/10/1097346684255.html>>; Interview with John Howard PM, 'John Laws Interviews John Howard PM on Radio 2UE Transcript No 21858' (10 August 2005).

³¹ Interview with John Howard PM, above n 30.

³² One Millionth AWA Announcement Comrec Elizabeth Downs; Prime Minister - Howard, John; Interview - 05 October 2006

workplaces free of rigidity in the industrial system'³³ belies his understanding of 'flexibility' to describe a decollectivised and atomistic system of workplace relations.

Work Choices was meant to grant employers and employees the 'choice' to be flexible with the way in which they negotiate labour; it was largely about privatising an otherwise collectively negotiated and publicly regulated relationship between labour and employment. Kevin Andrews, then Minister for Employment and Workplace Relations, introduced the *Work Choices Bill* in 2005 as accommodating:

the greater demand for choice and flexibility in our workplaces. It continues a process of evolution, begun over a decade ago, towards a system that trusts Australian men and women to make their own decisions in the workplace and to do so in a way which best suits them.³⁴

The approach exemplified under *Work Choices* disempowered union-based collective bargaining and industrial tribunals in favour of individualised Australian Workplace Agreements (AWAs) and employer mandated standards and conditions.³⁵ Under *Work Choices*, new employees could be forced to sign AWAs as a condition of

³³ 'John Howard's Acceptance Speech', above n 30.

³⁴ Commonwealth, Parliamentary Debates 2005 12 (Kevin Andrews).

³⁵ *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) pt 8; unilateral employer-based decision as 'greenfields agreements' ss 329-330; see also *Workplace Relations Act 1996* (Cth); *Workplace Relations and Other Legislation Amendment Act 1996* (Cth); Cooper and Ellem, above n 28; Angela Barns and Alison Preston, 'Women, Work and Welfare: Globalisation, Labour Market Reform and the Rhetoric of Choice' (2002) 17 *Austl. Feminist LJ* 17.

employment. Awards were stripped of their force, relegated to twenty allowable matters, beyond which the Australian Industrial Relations Commission was no longer able to arbitrate.³⁶ *Work Choices* displaced the previous centralised system based on negotiated flexibility with a neoliberal approach to working conditions and employment contracts, reflecting a more individualistic paradigm based.

Under *Work Choices*, once the award and collectively bargained agreement expired, there was no requirement or obligation to renegotiate a new agreement or maintain previously awarded entitlements and conditions. Instead, employers had the option to formalise the employment relationship as an AWA. The No Disadvantage Test, which was originally introduced into the Australian Industrial Relations Commission, was meant to ensure that workers under AWAs were no worse off than workers under collectively bargained agreements and awards.³⁷ However, *Work Choices* removed the No Disadvantage Test, replacing it instead with the Australian Fair Pay and Conditions Standard (AFPCS). The AFPCS articulated the minimal legal standards in:

- (a) basic rates of pay and casual loadings;
- (b) maximum ordinary hours of work;
- (c) annual leave;
- (d) personal leave;

³⁶ Cooper and Ellem, above n 28, 539.

³⁷ Ibid.

(e) parental leave and related entitlements.³⁸

Essentially, the AFPCS wrested power from awards to cover minimum pay, maximum hours, and leave. Penalty rates and overtime rates were not covered, and aside from basic maximum hours (set to 38 hours per week, but averaged over 12 months by agreement), working hours were not legislated. Flexible working arrangements 'can be given in return for the non-payment of penalty rates'.³⁹ Further, where previously agreements were to be subject to substantive scrutiny and oversight from the state and federal commission bodies, *Work Choices* introduced a 'streamlined' approval process by which AWAs and Union Greenfields Agreements were automatically accepted after 'lodgment' to the newly created Office of the Employment Advocate ('OEA').⁴⁰ 'Lodgment' simply means the employer filled out the required form and gave it to the Employment Advocate.⁴¹ It was then a validly lodged workplace agreement, without need for further scrutiny or oversight.

³⁸ *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) s 89(2).

³⁹ Howard, above n 28; Interview with John Howard, 'Interview with Fran Kelly ABC Radio National' (26 April 2007) <<http://pmtranscripts.dpmc.gov.au/browse.php?did=15668>>; see also *Workplace Relations Amendment (A Stronger Safety Net) Act 2007* (Cth) sch 1, subdiv C, 346M, (3) incorporating 'family responsibilities' into the Workplace Authority's understanding of 'fair compensation' for passage of the Fairness Test.

⁴⁰ *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) div 5, s 99; see also Cooper and Ellem, above n 28, 538; Carolyn Sutherland, 'Industrial Legislation in 2008' (2009) 51(3) *Journal of Industrial Relations* 297; The OEA was created with the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) sch 3 but this streamlining occurred in *Work Choices*.

⁴¹ *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) s 99B.

Where a previous award or collectively bargained agreement existed, the Act stipulated that certain terms and conditions were ‘protected’:⁴² rest breaks, incentive-based payments and bonuses, annual leave loadings, public holidays, overtime or shift loadings, some monetary allowances, penalty rates and outworker conditions.⁴³⁴⁴ But without the No Disadvantage Test, this ‘protection’ merely meant that these terms were treated as retained unless explicitly addressed as removed or modified in the terms of the contract. Employers were required to explicitly spell out in the agreement where any of those protected items were removed or modified – otherwise they were deemed to be retained under the original award or agreement.⁴⁵

In response to public dissatisfaction with the loss of entitlements under *Work Choices* and the loss of the No Disadvantage Test, a ‘Fairness Test’ was introduced in July of 2007.⁴⁶ This test, conducted by the newly created Workplace Authority,⁴⁷ is limited only to a requirement that ‘fair compensation’ be provided for the loss of any protected award conditions, or if there is not ‘fair compensation’ that the employee’s or

⁴² Ibid s 354.

⁴³ Sutherland, above n 40, 3 Check this cite for 2008 at 3.

⁴⁴ Sutherland (2008) at 3.

⁴⁵ Sutherland (2008) at 3; Cooper & Ellem at 538; Coulthard 1999; Creighton and Stewart 2005; MacDermott 1997.

⁴⁶ *Workplace Relations Amendment (A Stronger Safety Net) Act 2007* (Cth) sch 1: Fairness Test See also Sutherland (2008) 3.

⁴⁷ Ibid sch 2 Workplace Authority, 150B(1)(f).

employer's circumstances justify ratification nonetheless.⁴⁸ 'Fair compensation' is defined as 'monetary and non-monetary compensation' as well as 'the work obligations', with regard to 'personal circumstances', including 'in particular the family responsibilities' of the relevant employees.⁴⁹ This meant that certain benefits or entitlements could be exchanged so long as 'fair compensation' was demonstrated. Flexible work patterns could be traded for monetary or non-monetary 'compensation'. This disproportionately impacted women who, in Australia, are predominantly the primary carers in society.⁵⁰

Rather than operating on a consensus-based negotiation approach to labour regulations, labour relations became 'flexible' by becoming fractured and atomised to specific workplaces with the rise of individual and workplace bargaining. The AWA epitomised this individualising approach to labour relations by granting primacy to agreements made between individuals and employers.

Individualisation was further supported by the introduction of Greenfields Agreements, specified as either 'Union' Greenfields Agreements, where an employer seeks to open a new business and prior to hiring any employees negotiates with a union to draw up an

⁴⁸ Ibid sch 1, subdiv C, 346M, (4)-(5); see also Sutherland (2008) 3-4.

⁴⁹ Ibid sch 1 subdiv 346M (2)-(3).

⁵⁰ See Australian Human Rights Commission, 'Investing in Care: Recognising and Valuing Those Who Care' (2013) 5
<http://humanrights.gov.au/sex_discrimination/VUCW_australiaResearchPrj/index.htm#vol1>.

agreement,⁵¹ or an Employer Greenfields Agreements which granted unilateral agreement-making ability to employers without any other party involved in the process or outcome.⁵² The Act allowed the employer to unilaterally create a document before any persons were actually employed, and this document was to be treated as a valid, enforceable workplace agreement.⁵³ Under *Work Choices*, awards lost the power to govern whole swaths of work classifications⁵⁴ as individual enterprises negotiated agreements and replaced awards. Thus, the priorities of labour as a collective whole and the trade union-led project of society-wide redistribution of income and social wages gave way to individual and enterprise-based negotiations representing increasingly fractured and individualised interests.

Labour could no longer operate as a collective group representing the interests of workers taken broadly; instead bargaining power shifted to different factions of enterprises, employers, and individuals.⁵⁵ This individualisation of labour disproportionately impacted women because the majority of workplaces most likely to employ women with

⁵¹ *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) s 96C.

⁵² *Ibid* s 96D.

⁵³ *Ibid* 96G(4).

⁵⁴ *Ibid* div 2, s 11C(B)(1).

⁵⁵ Cooper and Ellem, above n 28, 538.

children are on an award-basis.⁵⁶ The 1996 Act as well as *Work Choices* sought to, amongst other considerable retractions, undermine the industrial tribunals and award system by facilitating and encouraging individual workplace agreements.⁵⁷ The rise of the workplace agreement without the previous protection of awards shifted the bargaining power away from employees.⁵⁸ *Work Choices* achieved this, in part, by removing protections against unfair dismissal in workplaces with up to 100 employees.⁵⁹ The protection against unfair dismissal is a central fulcrum of bargaining power, one that had been enshrined in Australian law since 1994.⁶⁰ This left many workers without the power to influence their wages, working hours, or request flexibility.⁶¹

We see this reflected in the wage disparity after *Work Choices*. Wage increases under the award stream, around 1.5% per annum, were significantly below the average 4% per annum increase afforded to the

⁵⁶ Barns and Preston, above n 35, 13; David Peetz, *Assessing the Impact of 'WorkChoices' One Year on: Report to Department of Innovation, Industry and Regional Development, Victoria* (Industrial Relations Victoria, 2007) 55.

⁵⁷ *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) sch 1, s 3; 115(c)(i).

⁵⁸ See *ibid* pt VI see also div 2, s 11(6)(1) specifying 'allowable award matters' which does not include pay but does include working hours (sub s a) and working time status (sub s 1). Further, transitional hours, conditions, or working patterns are not included. Parental leave is subject to special attention in the Act at s 94C - 94Z.

⁵⁹ See, eg, *ibid* s 94Q allowing employers to terminate employment during maternity or paternity leave, so long as any required notice is given.

⁶⁰ Pocock et al, above n 29, 478.

⁶¹ See also *ibid* 475.

bargaining stream.⁶² This disparity is even more marked by gender: women earned an estimated 11% less on AWAs than men did on registered collective agreements.⁶³ The gendered segregation of industries, such as mining, had a further impact: in the State of Western Australian where the male-dominated mining boom was continuing, men earned 22% *more* under AWAs than under collective agreements, whereas women in WA earned 9% *less* than under collective agreements.⁶⁴ In the overall private sector, the gender pay gap had been narrowing slightly until *Work Choices* came into effect: 70% of the gains achieved in the previous ten years was eradicated in the first nine months after the legislation came into effect.⁶⁵ Women in the public sector fared better, where average weekly ordinary time earnings for full-time employees were equal between men and women (0.4%) between February and December 2006.⁶⁶

This disparity between public and private sector workers relates closely to the way in which wage negotiations are conducted and negotiated. Public sector workers are most likely to be covered by collectively bargained agreements, but in the private sector women are more likely

⁶² Barns and Preston, above n 35, 13.

⁶³ Cooper and Ellem, above n 28, 544–45.

⁶⁴ Peetz, above n 56, 30–35; cited in Cooper and Ellem, above n 28, 545.

⁶⁵ Peetz, above n 56, 55 the gender pay gap had narrowed from 79.6% in February of 1996 to 81.3% in February 2006, then fell sharply in just nine months to 80.1% in November of 2006.

⁶⁶ *Ibid.*

than men to be covered by an award (one in three women in the private sector are covered by an award, compared to one in six men).⁶⁷

Enterprise bargaining is more likely to occur in large firms and workplaces who employ full-time workers – statistically, this is most likely to be men.⁶⁸

Combining the public and private sectors saw a similar increase in the gender pay gap after *Work Choices*, finding that 55% of the gains made toward narrowing the gender pay gap were erased in nine months.⁶⁹ In addition to wages, awards provide other protections such as favourable working conditions and patterns, overtime, pay loading, and holidays.⁷⁰ Therefore, an accurate portrait of the gendered loss from *Work Choices* extends beyond wages to its impact on parental labour transitions and resultant gender-time gap.

However, the relevancy of analysing *Work Choices*, labour relations, and the gender-time gap during the Howard Government is in mapping its legacy in contemporary Australia. Though the specific labour laws that the Howard Government implemented were repealed by the *Fair Work Act 2009* (Cth), the neoliberal rationality underlying the Howard Government reforms remain with Australian labour law today, along with the gendered implications and outcomes of its neo-maternalistic

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Ibid see above n 62.

⁷⁰ *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) see above n 55.

productivism. This thesis argues that second point, following from the Howard Government's rhetoric of 'flexibility'. This neoliberal rationality and its attendant impact on time in the life cycle are discussed below.

III. Situating the Thesis in Time: The Life Cycle, Chrono-normativity, and Neo-liberalism

In articulating the framework of this thesis, the life cycle literature has been particularly relevant to my research organisation together with a critical analysis of chrono-normativity and neo-liberalism as they relate to Australia. Chrono-normativity is a concept developed by Elizabeth Freeman to describes a mode of temporal implantation – 'the way in which institutional, hegemonic forces and values come to seem like somatic facts in the rhythm of life'.⁷¹ In this part of the introduction, I situate the thesis within the life cycle literature to illustrate how the three worker-mother laws relate to each other before providing additional legal context and background to each case study of parental leave, flexible work, and superannuation. I conclude this section by further discussing chrono-normativity and neo-liberalism in the life cycle.

The gender-time gap is best analysed through the lens of the life cycle. The three case studies of parental leave, flexible work, and superannuation each exemplify how the gender-time gap disproportionately impacts women across the life cycle after children

⁷¹ Elizabeth Freeman, *Time Binds: Queer Temporalities, Queer Histories* (Duke University Press, 2010) 3.

enter the household. Further, each corresponds to a stage in the worker-mother's life cycle.

In the literature, the life cycle tends to be framed in terms of the age of a worker,⁷² assumed to be a male, paid labourer. However, in this thesis, the understanding of the life cycle incorporates caring responsibilities and is framed in terms of the age of children through a carer's life cycle.⁷³ In the following sub-sections, I discuss each of the three life cycle stages and its associated worker-mother law. For each stage and law, I (a) identify and describe the law, and (b) introduce problems with the law: its gendered consequences in neoliberal Australia. This thesis is the first legal analysis that takes the life cycle as an organising feature of the research. These issues of the life cycle and the worker-mother laws are discussed in more detail in subsequent chapters.

Parental leave

The starting point in this thesis is the transition into what I call the 'parental care labour' where parents are faced with simultaneously caring for dependents in a non-material sense (eg, care), while procuring the material, economic needs of the family. The case study of parental leave best encapsulates the start of this life phase. Parental leave allows for a bracket of time, after a child is born, for women to transition from

⁷² Patricia Apps and Ray Rees, 'Gender, Time Use, and Public Policy over the Life Cycle' (2005) 21 *Oxford Review of Economic Policy* 439, 442; see also Martin Kohli, 'The Institutionalization of the Life Course: Looking Back to Look Ahead' (2007) 4(3-4) *Research in Human Development* 253.

⁷³ See also Apps and Rees, above n 72.

paid labour to the unpaid labour of child care. That is, it marks the legislatively protected temporal disruption of the life cycle from waged work-based temporalities to one of care-based temporalities.⁷⁴ At present in Australia, parental leave pay is codified in the *Paid Parental Leave Act 2010* (Cth) and unpaid parental leave in the *Fair Work Act 2009* (Cth). Parental leave pay is the prototypical policy platform maintained by successive Australian governments aimed at women, work, and care.⁷⁵ In its original form, which came into effect in 2010, it provided a workplace entitlement to eligible parents (mainly ‘birth mothers’)⁷⁶ on parental leave to a maximum of 18 weeks of payment at the federal minimum wage.⁷⁷ Although the recent *Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017* proposes extending paid parental leave to 20 weeks for those without any employer-provided paid parental leave, along with other substantive

⁷⁴ Parental leave legislation protects the transition from waged work to child care responsibilities in eligible workers, but does not address other forms of caring responsibilities such as those provided to other family members or friends for a variety of reasons. Other legislation exists for these carers but is beyond the scope of this thesis. By focusing on women with children, this thesis does not seek to diminish the import or reject the existence of these other caring responsibilities. For this thesis my analysis pertains to those with child care responsibilities, although I believe that a version of my theory of time as a disruption to established hegemonic temporal orderings applies also to these other experiences and practices of care.

⁷⁵ See Baird, Williamson and Heron, above n 3, 326.

⁷⁶ *Paid Parental Leave Act 2010* (Cth) s 3A(1); div 3; because the Act requires 330 hours of qualifying work in a given work test period, usually 392 days for eligibility.

⁷⁷ The current version now provides leave for either parent, subject to certain conditions explained in more detail in Chapter 2, following the birth or adoption of a child or children. *Paid Parental Leave Act 2010* (Cth).

changes to the paid parental leave scheme, it seems unlikely to pass in its current form.⁷⁸ The current Paid Parental Leave scheme provides 18 weeks of federal minimum wage payments to primary carers (still currently aimed at ‘birth mothers’ first and foremost) and up to two weeks of minimum wage payment to ‘fathers and partners’.⁷⁹ To be eligible for parental leave pay, a claimant must have worked for ten out of the previous 13 months, for a minimum of 330 hours in those 10 months, with no more than an 8-week gap between two consecutive working days.⁸⁰ To be eligible for statutory unpaid parental leave governed by the Fair Work Act, an eligible parent must have been employed by the same employer on a ‘regular and systematic basis’ for at least 12 months. Therefore, it is plausible that an employee will have switched employers or stopped work in time to be eligible for PLP but not the full 12 months of unpaid parental leave. Eligibility is further set by a citizenship/residency test and income ceiling.⁸¹ When the law initially passed in 2010, public commentators in Australia cheered in

⁷⁸ See Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017 schs 17-18; political reporter Jane Norman, *Proposed Changes to Paid Parental Leave Explained* (26 October 2016) ABC News <<http://www.abc.net.au/news/2016-10-26/paid-parental-leave-changes-explained/7968284>> reports that Labor and the Greens oppose the Bill, and as of February, 2017, there were still insufficient cross-benchers committed to supporting the Bill. The treatment of the law in this thesis is current as of March, 2017.

⁷⁹ *Paid Parental Leave and Other Legislation Amendment (Dad and Partner Pay and Other Measures) Act 2012* (Cth); *Paid Parental Leave Act 2010* (Cth).

⁸⁰ *Paid Parental Leave Act 2010* (Cth) s 32.

⁸¹ *Ibid* pt 2-3. Eligibility is discussed in more detail in Chapter 2.

victory.⁸² Sex Discrimination Commissioner Elizabeth Broderick heralded the Act as a ‘major triumph’ that ‘will assist mothers to maintain skills and income by encouraging workplace attachment for workers who have historically been forced to downgrade in both areas [skills and income] when they have a child’.⁸³

However, Australia’s parental leave laws have not lived up to their promise of improving gender parity in the care of new infants, or the economic consequences that follow. Nearly a decade after the passage of the law, this moment in the worker’s life cycle – the shift as a child is born or adopted into a male-female, two-parent household – often marks the establishment of economic inequalities between the man and the woman. The ‘skills and income’ that Commissioner Broderick suggested women would no longer have to sacrifice upon having children, continue to be eroded after the birth or adoption of children. It is also this period of leave that corresponds quite closely with women’s

⁸² See, eg, Patricia Karvelas, ‘Australia Gets First National Paid Parental Leave Scheme | The Australian’ *The Australian*, 17 June 2010 <<http://www.theaustralian.com.au/news/australia-gets-first-national-paid-parental-leave-scheme/story-e6frg6n6-1225881031472>> ‘landmark reform’; Australian Human Rights Commission, ‘2010 Media Release: After 30 years, PML finally delivered’ (Australian Human Rights Commission, 17 June 2010) <<http://www.humanrights.gov.au/news/media-releases/2010-media-release-after-30-years-pml-finally-delivered>> the Australian Human Rights Commission ‘congratulated’ the Australian Government and Parliament; Cecily-Anna Bennett, ‘Paid Leave Helps Banish the Baby Blues’ *Weekend Australian* (Canberra, ACT), 25 February 2011 1; Natalie Craig, ‘Paid Parental Leave the Icing on the Cake for New Mothers’ *The Sunday Age* (Melbourne, Vic), 2 January 2011 5; Jessica Wright and Alicia Wood, ‘Late, but It’s Here at Last: Generation Miss out on Paid Leave’ *Sun Herald* (Sydney, NSW), 2 January 2011 5.

⁸³ Australian Human Rights Commission, ‘2010 Media Release’, above n 82.

workforce attachment: the longer a woman spends away from paid labour after parental leave is exhausted, the less likely she is to reattach to full-time waged work.⁸⁴ However, on average, women work more than men when both paid and unpaid labour hours are considered.⁸⁵ But women in Australia still face increased risks of poverty in old age.⁸⁶ Whatever the intention of the law, it does not counteract the disproportionate detriment to women's economic security.

⁸⁴ See Olivier Thévenon and Anne Solaz, 'Labour Market Effects of Parental Leave Policies in OECD Countries' (OECD Social, Employment and Migration Working Papers 141, 10 January 2013) <http://www.oecd-ilibrary.org/social-issues-migration-health/labour-market-effects-of-parental-leave-policies-in-oecd-countries_5k8xb6hw1wjf-en>; Uta Schönberg and Johannes Ludsteck, 'Expansions in Maternity Leave Coverage and Mothers' Labor Market Outcomes after Childbirth' (2014) 32(3) *Journal of Labor Economics* 469; Yusuf Emre Akgunduz and Janneke Plantenga, 'Labour Market Effects of Parental Leave in Europe' (2013) 37(4) *Cambridge Journal of Economics* 845; but see Michelle J Budig, Joya Misra and Irene Boeckmann, 'The Motherhood Penalty in Cross-National Perspective: The Importance of Work-Family Policies and Cultural Attitudes' (2012) 19(2) *Social Politics: International Studies in Gender, State & Society* 163 showing the integral role of culture and finding that parental leave is only one of a variety of policies that shape labour force participation outcomes for women with children.

⁸⁵ Australian Bureau of Statistics, '4125.0: Gender Indicators, Australia, August 2016' (4125.0, ABS) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/allprimarymainfeatures/9EB41EC162734A01CA25801F00185B67?opendocument>>.

⁸⁶ See Australian Council of Social Service, 'Poverty in Australia 2016' (Australian Council of Social Service, 2016) <www.acoss.org.au/wp-content/uploads/2016/10/Poverty-in-Australia-2016.pdf>; Siobhan Austen, 'Gender Issues in an Ageing Society' (2016) 49(4) *The Australian Economic Review* 494; The Government of Australia, Senate Standing Committees on Economics, "'A Husband Is Not a Retirement Plan" Achieving Economic Security for Women in Retirement' (April 2016) <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Economic_security_for_women_in_retirement/Report>.

Flexible Work

Once the worker-mother has shifted from leave back to the paid workforce, the issue of combining paid labour with caring responsibilities emerges. The next phase in the worker-mother's life cycle, then, and the second category of worker-mother laws and practices considered in this thesis, is flexible work. Governed by provisions under the *Fair Work Act 2009* (Cth), workers with caring responsibilities, usually women, may make a request to their employer that their hours and location of work be varied – for example, workers can request to decrease their working hours, spread them throughout the day or week, and/or work from home, in an attempt to be available for care labour.⁸⁷ This provides a right to *request* flexible work, not a right *to* flexible work.

As mentioned above, the Howard Government undertook an unprecedented, radical whole-scale reform of Australian labour laws, principally aimed at 'flexibilising' labour. The *Workplace Relations Act 1996* (Cth) initially repealed the previously operating *Industrial Relations Act 1988* (Cth), but *Work Choices* went further and wholly dismantled the existing system of labour relations whereby trade unions had worked closely with the Australian Labor Party to share power in industrial relations. By invoking what I term the 'rhetoric of flexibility', the Howard Government mobilised public policy toward employer

⁸⁷ *Fair Work Act 2009* (Cth) s 65.

demands. Frequent reference to and use of the term 'flexible' in the *Work Choices* campaign marks, I argue, a deliberately obfuscatory approach to strategically confuse the polity. 'Flexibility' in relation to labour was characterised by the Howard Government as the ability to 'negotiate workplace agreements incorporating family friendly working agreements'.⁸⁸ However, the actual intended result and demonstrated outcomes were very different from the proposition of family friendly working arrangements: any purported 'negotiation' was effectively dismantled by the Howard Government's decollectivisation of labour relations and employers were imbued with the unilateral power to alter working arrangements.⁸⁹ The result of these policies demonstrably retarded previous Governments' efforts toward gender equality: women with children were increasingly shut out of the workforce, women's workplace participation rates decreased, and the gender disparity of working hours increased.⁹⁰

These outcomes are sustained today with data indicating that Australia's flexible work laws have decidedly gendered outcomes. In 2014, 29.1% of women with children requested some form of flexible

⁸⁸ Australian Government, above n 10.

⁸⁹ See, eg, *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) ss 329-330.

⁹⁰ See Pocock et al, above n 29; Baird and Williamson, 'Women, Work and Industrial Relations in 2008', above n 8; see also Australian Bureau of Statistics, '4150.0 - Time Use Survey: User Guide, 2006' (21 February 2008) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4150.0>>; Australian Bureau of Statistics, '4125.0: Gender Indicators, Australia, August 2016', above n 85.

work practices, and the majority of these women had children under school-age.⁹¹ Half as many men with children requested flexible work, demonstrating the gendering of care in Australia.⁹² Current laws, though implemented to replace *Work Choices*, do not go far enough to counteract the harms done by the Howard Government and the attendant engrained social norms.

Retirement and Superannuation

The third stage in the worker-mother's life cycle is marked by the shift from paid labour into retirement. At this point, workers begin to receive retirement income pulled from savings, pension, and/or superannuation. Superannuation is a forced retirement-savings device based on prior workforce participation. A percentage of earned income is diverted into an approved superannuation account available to the retired worker upon maturation (and subject to conditions set by statute, eg retirement age).

Data from superannuation funds indicate that Australia's superannuation system disproportionately penalises women, particularly women who have been carers.⁹³ The average Australian

⁹¹ Natalie Skinner et al, *The Australian Work and Life Index 2014: The Persistent Challenge : Living, Working and Caring in Australia in 2014* (2014) 40–41.

⁹² *Ibid* 40.

⁹³ See, eg, Ross Clare and Association of Superannuation Funds of Australia Limited, 'Superannuation Account Balances by Age and Gender' (December 2015); Therese Jefferson and Alison Preston, 'Australia's "Other" Gender Wage Gap: Baby Boomers and Compulsory Superannuation Accounts' (2005) 11(2) *Feminist Economics* 79; The Association of Superannuation Funds of Australia, 'Superannuation Statistics' (Superannuation Statistics, February 2016)

man retires with almost twice the average superannuation balance of a woman.⁹⁴ Because Australia's superannuation system is linked to waged work, women are consistently disadvantaged along four main points in superannuation. First, women are disadvantaged from the outset of their working lives: because superannuation contributions are calculated as a percentage of earned income, the persistent gender-wage gap decreases accumulated savings in superannuation.⁹⁵ Second, in Australia and indeed all societies, women are more likely than men to take time off of waged work for care and other unpaid labours.⁹⁶ This introduces an expanse of time where women are not earning income and have no employer-funded superannuation contributions. The system currently assumes these women have higher income-earning

<<http://www.superannuation.asn.au/ArticleDocuments/129/SuperStats-Feb2016.pdf.aspx>>.

⁹⁴ Rebecca Cassells et al, *The Impact of a Sustained Gender Wage Gap on the Australian Economy: Report to the Office for Women, Department of Families, Community Services, Housing and Indigenous Affairs* (Canberra, Australia. Retrieved from http://www.dss.gov.au/sites/default/files/documents/05_2012/gender_wage_gap.pdf, 2009) <<http://www.voced.edu.au/content/ngv:30329>>; Rebecca Cassells et al, 'She Works Hard for the Money: Australian Women and the Gender Divide' (AMP.NATSEM Income and Wealth Report Issue 22, National Centre for Social and Economic Modelling University of Canberra, April 2009) <http://www.natsem.canberra.edu.au/storage/AMP_NATSEM_22.pdf>.

⁹⁵ Workplace Gender Equality Agency, Commonwealth of Australia, *Parenting, Work and the Gender Pay Gap: Perspective Paper* (online) 2016 <https://www.wgea.gov.au/sites/default/files/2014-03-04_PP_Pay_Gap_and_Parenting.pdf> 1 (last accessed 30 Sept 2016); see also Australian Bureau of Statistics above n 3.

⁹⁶ As above; see also Patricia Apps and Ray Rees, 'Gender, Time Use, and Public Policy over the Life Cycle' (2005) 21(3) *Oxford Review of Economic Policy* 439 at 440; Shahra Razavi, *The Political and Social Economy of Care in a Development Context: Conceptual Issues, Research Questions and Policy Options* (United Nations Research Institute for Social Development 2007) 2.

partners who may contribute on their behalf.⁹⁷ However, this leads us to the third point: relationship breakdown is an increasing reality in many Australian households, leaving women without the support of partners, and the number of sole woman-headed households is increasing.⁹⁸ Fourth and finally, women outlive men in Australia.⁹⁹ A man retiring at age 67 can expect to live, on average, to the age of 80, whereas a woman retiring at age 67 can expect to live, on average, past the age of 84,¹⁰⁰ leaving a four-year funding gap in an already disparate superannuation system. Superannuation is a system that demonstrates that a lifetime of unpaid caring responsibilities can leave many women in older age poverty. It is at this point in the life cycle that we see the cumulative effects of compounding inequalities in women's precarious economic security over the life course.

Contextualising the Worker-Mother Laws

This section introduces the broader child care related context of female labour force participation in Australia. Implicit within each argument of the worker-mother laws is the issue of gendered part-time waged work.

⁹⁷ See *Income Tax Assessment Act 1997* (Cth) s 290.230.

⁹⁸ See Commonwealth of Australia and Bureau of Statistics, 'Family Characteristics, Australia, 2009-10' (4442.0, 27 May 2011) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Previousproducts/4442.0Main%20Features22009-10>>.

⁹⁹ Australian Institute of Health and Welfare, Commonwealth of Australia, *Life Expectancy* (online) <<http://www.aihw.gov.au/deaths/life-expectancy/>> (last accessed 30 Sept 2016).

¹⁰⁰ As above.

This gendering is largely a result of the temporal characteristics of caring responsibilities. This section begins by discussing part-time employment including the policies and practices relating to part-time working hours. It then discusses the phenomenon of part-time work in the context of school hours and child care.

With nearly half of all employed women working part-time, Australia is characterised as a 'part-time country'.¹⁰¹ Part-time work is defined by the ABS as working 35 hours or less a week.¹⁰² But in Australia, part-time work largely has a 'degraded' status – it is predominantly made up of casualised labour with very limited rights and entitlements and little job security.¹⁰³ Australia has low levels of permanent part-time work¹⁰⁴ – although the *Fair Work Act* provides certain eligible employees

¹⁰¹ As of September 2017, 45% of employed women were employed on a part-time basis, Commonwealth of Australia, 'Gender Indicators, Australia, Sep 2017' (Gender Indicators 4125.0, Australian Bureau of Statistics, 19 September 2017) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4125.0~Sep%202017~Main%20Features~Economic%20Security~4>>; see Ann Roeters and Lyn Craig, 'Part-Time Work, Women's Work-Life Conflict, and Job Satisfaction: A Cross-National Comparison of Australia, the Netherlands, Germany, Sweden, and the United Kingdom' (2014) 55(3) *International Journal of Comparative Sociology* 185, 186.

¹⁰² Commonwealth of Australia, 'Gender Indicators, Australia, Sep 2017', above n 101.

¹⁰³ Over half of part-time work is casual, Natasha Cassidy and Stephanie Parsons, 'The Rising Share of Part Time Employment' (Quarterly Bulletin, Reserve Bank of Australia, September 2017) 8, 19; Barbara Pocock, 'Work/Care Regimes: Institutions, Culture and Behaviour and the Australian Case' (2005) 12(1) *Gender, Work & Organization* 32, 34.

¹⁰⁴ Geoff Gilfillan, 'Characteristics and Use of Casual Employees in Australia' (Statistical Snapshot, Parliament of Australia, 19 January 2018) 8.

the right to request flexible and part-time work after the birth or adoption of a child.¹⁰⁵

In Australia, women are more likely than men to be employed part-time. This has been demonstrated, in part, to be due to a number of factors, including those discussed in this thesis around the temporalities of care-work. Furthermore, we know that school and child care hours in Australia, like most comparator countries, are short relative to normal working hours, making part-time work more suitable to providing parental care.¹⁰⁶ Normal primary school hours, generally starting between 8.30 - 9.30am and finishing around 3.30pm, are unfriendly to usual full-time working hours which are typically 8.00am to 5.00pm. Those who work non-standard working hours which include evenings and weekends face additional difficulties coordinating waged work, child schooling, and care-work (along with sleep and self-care).

Child care poses a similar problem of available hours. Early child care in Australia falls into two categories: informal care and formal care. A third category of early childhood education (pre-school) should also be noted as it provides a substitute for child care in the 1-2 years prior to starting school. Informal care is made up of care provided by

¹⁰⁵ *Fair Work Act 2009* (Cth) s 65(1B). It should be noted that the Act does not provide a right to request or return to full-time status following a period of part-time employment related to child care.

¹⁰⁶ Roeters and Craig, above n 101, 188; citing Suzanne M Bianchi, 'Maternal Employment and Time with Children: Dramatic Change or Surprising Continuity?' (2000) 37(4) *Demography* 401.

grandparents, and other family members, friends, or nannies. Formal care includes day care centres, long day care centres, family day care (approved day care centres operated out of someone else's home), and out-of-school-hours care.¹⁰⁷ It seems that the distinction between 'formal' and 'informal' care relates to care that has set and timed availability. However, I find it more relevant and accurate to think of child care in terms of unpaid and marketised care because even friends, families, and nannies may have set availability. A majority of children will receive some form of non-parental care in the first two years of their lives (before pre-school is available) and most families will use a combination of unpaid care and marketised care to meet employment demands.¹⁰⁸

Overwhelmingly, parents who rely on marketised child care in the form of day care centres have to contend with day care hours that are generally 8.00am – 5.00pm or, less typically, 7.30 – 7.00pm for long day care. Without the assistance of additional care providers, day care centres provide little opportunity for parents to commit to the longer hours or non-standard hours associated with various employment.

¹⁰⁷ Jennifer Baxter, 'Child Care and Early Childhood Education in Australia' (Fact Sheet, Australian Institute of Family Studies, 21 May 2015) 2 <<https://aifs.gov.au/publications/child-care-and-early-childhood-education-australia>>.

¹⁰⁸ I use the distinction of unpaid and marketised care to reflect the unpaid and paid varieties of care. Baxter, above n 107.

Coordinating waged work and day care can be especially difficult for parents facing a significant commute to work.¹⁰⁹

Though the hours available for marketised care poses one constraint, the costs of day care provide another significant constraint. Paying for private, non-familial child care is expensive. Areas in Sydney and Melbourne attract the most expensive child care fees, up to \$190 per child per day, but paid child care across the country can be cost prohibitive. Under the current child care policy,¹¹⁰ there are two types of child care financial support available: Child Care Rebate ('Rebate') and Child Care Benefit ('Benefit').¹¹¹ The Rebate is not income-tested and provides 50% of out-of-pocket child care costs up to \$7,613 per child in 2017-18. The Benefit is income-tested and is calculated depending on the hours of child care received, age of child, and the number of children in care. In 2013, the average cost of child care in Australia was \$11,288.33,¹¹² and costs have continued to rise, far outpacing government child care benefits. HILDA data demonstrates that the

¹⁰⁹ I suspect we will see the rise of this care-commuting problem in capital cities such as Sydney and Melbourne where housing prices in inner city neighbourhoods continue to be unattainable for many young families – forcing them into the outer suburbs, while employment opportunities continue to be concentrated in the inner city.

¹¹⁰ This is set to change on 1 July 2018.

¹¹¹ Australian Government, *MyChild.Gov.Au: Child Care Benefit and Child Care Rebate* (1 July 2017) MyChild.gov.au <<https://www.mychild.gov.au/childcare-information/rebate>>.

¹¹² OECD, 'Starting Strong IV: Early Childhood Education and Care, Australia' (Data Country Note, OECD, 2016) 4 <<http://www.oecd.org/education/school/ECECDCN-Australia.pdf>>.

median weekly costs of childcare rose 109% from 2002 to 2014, from \$53 per week for couple families in 2002 to \$111 in 2014.¹¹³

Additionally, the norms around child care in Australia preference parental and familial care.¹¹⁴ In part, this is an issue of the perception of quality; there remains an enduring attitude that marketised care is of a lower quality than parent or family-provided child care.¹¹⁵ But I suspect this is also linked to notions of class, gender norms, and who has the financial ability to be an 'ideal mother'.¹¹⁶

Finally, child care is not always accessible. Even if there is the will, the want, and the money for it, some inner-city child care centres have wait lists that last months or years.¹¹⁷ Finding quality and accessible child care leaves many families with unmet needs. There has been a push in recent years to increase the number of child care centres and placements

¹¹³ Costs are shown in December 2014 dollars, Roger Wilkins, 'The Household, Income and Labour Dynamics in Australia Survey: Selected Findings from Waves 1 to 14' (Annual Statistical Report of the HILDA Survey 11, Melbourne Institute of Applied Economic and Social Research, The University of Melbourne, 2016) 124, 12.

¹¹⁴ Pocock, 'Work/Care Regimes', above n 103, 41.

¹¹⁵ See *ibid*; see also, eg, Annabel Crabb, *The Wife Drought* (Random House, 2015) 2-3 and throughout, where she reports the preference for parental care; for example, Crabb recounts a colleague saying, 'My wife has quit her job, so I can be absolutely confident our child's getting the best of care', at 2.

¹¹⁶ The ideal mother is discussed in more detail in this thesis.

¹¹⁷ See also Rebecca Nash, 'Industry Group Joins Call for an Overhaul of the Australian Childcare System' *ABC News*, 2 August 2013 <<http://www.abc.net.au/news/2013-07-25/push-to-overhaul-childcare-system/4841160>>; CareforKids.com.au, *Survey Results: Child Care and Workforce Participation Annual Survey 2016* CareforKids.com.au <<https://www.careforkids.com.au/child-care-survey/2016>>.

available.¹¹⁸ This may not meet the deficit of care available; many centres have placements available for older children but lack placements for infants and younger toddlers. In Australia, data demonstrate that women with older toddlers are more likely to be in the waged workforce,¹¹⁹ which corresponds with the uptake in formal child care places.¹²⁰ However, there remains high levels of underemployment for women with children, while there is no corresponding rise in underemployment rates for men with children.¹²¹

The Life Cycle, Chrono-normativity and Neo-liberalism

In examining the three legal areas of parental leave, flexible work and superannuation, each corresponding to a stage of the worker's life cycle, we see that the worker's life is structured around three transitions: the transition into parental care labours, the transition into combining paid labour and unpaid child care labour, and the transition from waged labour into retirement. First, paid parental leave provided by the

¹¹⁸ There were 1200 planning applications for new centres across Australia in 2017, Australian Childcare Alliance, 'National Childcare Barometer 2017' (Survey Findings, Australian Childcare Alliance, 2017) 8 <<https://www.australianchildcarealliance.org.au/documents/policy/national-childcare-barometer/68-national-childcare-barometer-2017/file>>.

¹¹⁹ See Commonwealth of Australia, 'Gender Indicators, Australia, Sep 2017', above n 101.

¹²⁰ See Baxter, above n 107, 3-4.

¹²¹ 'Underemployment rates tend to rise for mothers of dependent children, but not for fathers. The underemployment rates for women with school aged children (6-14 years) and non-school aged children (0-5 year olds) were 12% and 9.1% respectively in 2016-17. These proportions have been reasonably consistent over the past decade, as have those of fathers: 3.5% of fathers of dependent children were underemployed in 2016-17', Commonwealth of Australia, 'Gender Indicators, Australia, Sep 2017', above n 101.

federal government takes the birth or adoption of a child as the starting point in transitional temporalities as the worker transitions into caring responsibilities. Second, flexible work marks the transition into combining paid labour and unpaid care labour. Finally, superannuation is the culmination of a system based on waged work for retirement income. These transitions take on gendered dimensions in Australia. In this thesis, which traces these stages and their associated laws, we track issues of gendered care-based temporalities as they emerge through the life cycle of agents with children.

In analysing the worker-mother laws across the stages of the life cycle, we will consider their basis in chrono-norms: hegemonically imposed expectations about how individuals must perceive time and time-use. Chrono-norms speak directly to the imposed expectations of individuals under the neoliberal hegemony, while Freeman's chrono-normativity relates to the specific 'mode of implantation'.¹²² Chrono-normativity, as previously mentioned and discussed in more detail in the following chapter, describes the embodied use of time to orientate humans toward maximum productivity.¹²³ Freeman suggests a temporal counterpoint to chrono-normativity and its emphasis on productivity through sexual dissidents and the queer as 'figures for and bearers of new corporeal sensations'. I return to these queer temporal referents in later chapters, especially Chapter 5.

¹²² See Freeman, above n 71, 3.

¹²³ Ibid 7.

By contrast to Freeman's chrono-normativity, my use of chrono-norms shifts the emphasis from one on the ideology of temporalised sexualised norms, to the neoliberal standard of economic rationalisation of time and the body. In other words, chrono-norms refer to temporal norms inculcating capitalist demands and perpetuate the dominant, normative time of neoliberalised global capitalism.¹²⁴ Chrono-norms pervade all aspects of the individual and collective, infiltrating the organisation, management, and experience of time on the personal scale, societal scale, and global scale; like chrono-normativity as the process, chrono-norms are part of the technology of governmentality.¹²⁵ In the legal context, chrono-norms both contribute to and perpetuate neo-maternalistic productivism by shaping how time is written, practiced, and interpreted in law and legislation. This thesis is specifically concerned with the hegemonic temporal regimes perpetuated in Australia's worker-mother laws and policies which I identify as neo-maternalistic productivism.

¹²⁴ See generally Moishe Postone, *Time, Labour and Social Domination, A Reexamination of Marx's Critical Theory* (Cambridge University Press, 1993); Moishe Postone, 'History and Helplessness: Mass Mobilization and Contemporary Forms of Anticapitalism' (2006) 18(1) *Public Culture* 93; see also Jonathan Martineau, *Time, Capitalism, and Alienation: A Socio-Historical Inquiry into the Making of Modern Time* (Brill, 2015).

¹²⁵ See Thomas Lemke, "'The Birth of Bio-Politics': Michele Foucault's Lecture at the College de Grance on Neo-Liberal Governmentality' (2001) 30(2) *Economy and Society* 190; see also Andrew Barry Goldsmith's College et al, *Foucault and Political Reason: Liberalism, Neo-Liberalism and the Rationalities of Government* (Routledge, 2013); Yvonne Hartman, 'In Bed with the Enemy: Some Ideas on the Connections between Neoliberalism and the Welfare State' (2005) 53(1) *Current Sociology* 57.

As an understanding of temporal norms, neo-maternalistic productivism emerges from neo-liberalism's hegemony in Australia and globally. It confines women's roles to primary carers and secondary wage earners. Rather than reflecting the maternalism of the early twentieth century which sought women's integration into society based on their motherly or nurturing characteristics,¹²⁶ the ideology of neo-maternalistic productivism advances that women's role is in service to the productivistic regime of neoliberal capitalism. It perfectly captures John Howard's 'part-time sales assistant' worker-mother as the one who provides intense mothering, but then transitions to the waged workforce in a part-time, casual, and often under-employed and under-paid role.¹²⁷ This speaks to the governmentality of time, chrononormativity, in undercutting the temporalities of care. Neo-maternalistic productivism is a hegemonic time, serving the hegemony by privileging heteronormativity within neoliberal capitalism's confines. Neo-liberalism is commonly understood as a suite of economic policies aimed at affirming free markets through simultaneous deregulation and control.¹²⁸ It works closely with capitalism by applying capitalism's valuation and value system to all domains of the political, social and

¹²⁶ See Seth Kovel and Sonya Michel, 'Introduction: "Mother Worlds"' in *Mothers of a New World: Maternalist Politics and the Origins of Welfare States* (Routledge, 1993) 1, 2 and generally.

¹²⁷ See Craig and Mullan, above n 6; see also Chapter 3 of this thesis.

¹²⁸ See Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (MIT Press, 2015) 28, 49.

personal. Ideologically, neo-liberalism refers to a governing rationality that applies the model of the market to all aspects of life and society; as Wendy Brown describes it, neoliberal rationality ‘configures human beings exhaustively as market actors, always, only, and everywhere as *homo oeconomicus*’, as singularly economised actors.¹²⁹ This economisation of neoliberal ideology demotes alternately held norms and values of equality, care, and national sovereignty and transposes those from a justice-based framework to an economic register.¹³⁰ Thus, under neo-maternalistic productivism, norms and expectations of time and time-use emerge in subservience to neo-liberalism’s stranglehold on capitalism, co-opting agents and actors to act, react, and interact in singularly economised rationalities and trajectories. No import is given to the gendering of time, and the relational care aspects of the life cycle.

Chapter Outline

This thesis is organised around the adult life cycle of women with children, tracking and analysing the labour-based case studies across the trajectory of legal frameworks of parental leave, flexible work, and retirement. As a socio-legal thesis, it provides several original insights into the legal temporality of parental leave, flexible work, and superannuation in Australia, as well as unique contributions to feminist discourse and law reform on the intersection of time and labour.

¹²⁹ Ibid 31.

¹³⁰ See *ibid* 40–41.

Chapter 1 introduces core concepts, frameworks, and methodologies. Part I, which is made up of Chapters 2, 3, and 4, analyse the substantive legal frameworks on parental leave, flexible work, and superannuation respectively, focusing on answering my first two main research questions for each legal regime. Part II, comprised of the remaining two chapters, focuses on addressing my third research question, 'What alternative conceptions of time are possible?' Chapter 5 introduces my theory of disruptive time and maps it across the legal temporalities of preceding chapters before concluding with a discussion of transitional labour markets. Chapter 6 concludes the thesis with by demonstrating how the research questions and outcomes relate specifically to policy objectives.

Chapter 1 outlines in detail the theory, methods and framework that I apply and analyse in answering my research questions while simultaneously situating my work within the emerging field of socio-legal research in time and law. By emphasising how the investigation of time is important and relevant beyond the research outcomes of this thesis, this chapter provides an anchor to broader conversations in law, critique, and society. First, the qualitative data sources and quantitative scope are described in more detail. Then, the chapter introduces key concepts and ideologies structuring Australia's work and care regimes and superstructures by reference to feminist and labour scholarship. This includes Pierre Bourdieu's concept of *habitus*, an important sociological framework that informs my understanding of the social

agent in time, and time in the social agent. Additionally, this chapter analyses and critiques neo-liberalism in Australia with particular reference to the various forms of labour and time informing Australia's legal and social contexts, particularly regarding parenthood and the vicissitudes of gendered temporality in motherhood.

Chapter 2 is the first of the three substantive chapters addressing the three worker-mother legal case studies. It discusses Australia's *Paid Parental Leave Act 2010 (Cth)* and its attendant legal temporalities, focusing on addressing my research questions as they relate to parental leave. As described above, the Paid Parental Leave Act creates a bracket of time whereby mothers can temporarily transition away from waged work in order to engage in the unpaid labour of social reproduction. However, in practice, the law leads to a gender-time gap and significantly contributes to the gendered uptake of care responsibilities; women are expected to provide primary care to their young children but suffer disproportionate disadvantages when they are unable or unwilling to resume work as ideal, full-time waged workers. Therefore, I argue that the construction of time in the *Paid Parental Leave Act 2010 (Cth)* relies on the ideology of neo-maternalistic productivism. Targeted at women in particular, it provides a short period of parental leave pay to provide (gendered) parental care with the explicit aim to re-engage women in the waged workforce. It provides very little legislative attention to fathers in caring roles or the undulating and unpredictable nature of care-based temporalities.

I further argue that the Act is gender blind: it purports to provide the mechanisms for care-related leave from waged labour but ignores the material reality of gendered time. Gender blindness refers to a position of wilful ignorance or suppression as to the gendering and gendered outcomes of laws, policies, regulations, and practices.¹³¹ Women experience a distinct disjuncture between social norms and expectations, and legal standards of work time and work patterns. This chapter provides an original examination of the temporal labour requirements established in the *Paid Parental Leave Act 2010 (Cth)*, and analyses how the law manifests neo-liberalism's enforcement of neo-maternalistic productivism. To illuminate how neo-maternalistic productivism manifests through the legislation, the fraught relationship between eligibility for leave, leave duration, and job protection status is discussed. The discussion of maternal disruptive time in work and labour, as it relates to paid parental leave in Australia, is guided by a Bourdieusian analysis of temporalities in the *habitus*.

Chapter 3 discusses the practice and laws of flexible work in Australia through reference to the policies of the Howard Government.

Specifically, I consider how the administration used the rhetoric of

¹³² *Superannuation Guarantee (Administration) Act 1992 (Cth)*; See, eg, Australian Treasury, 'Australia's Future Tax System: The Retirement Income System-Report on Strategic Issues' [2009] *Australian Government* 8-13; Nareen Young and DCA CEO, 'Grey Areas-Age Barriers to Work in Commonwealth Laws' ch 8 <http://www.alrc.gov.au/sites/default/files/pdfs/40._diversity_council_australia_final.pdf>; Jenni Millbank, 'Hey Girls, Have We Got a Super Deal for You: Reform of Superannuation and Matrimonial Property' (1993) 7(2) *Australian Journal of Family Law* 104, 111.

'flexibility' to justify its unprecedented and radical, whole-scale reforms of Australian labour law under the guise of 'flexibility'. I argue that this 'flexibility' was not a targeted response to address the care-based temporalities of child care and child-rearing, but rather a neoliberal trope for deregulated workforce relations. From that, I develop my original claims in answering the research questions as they relate to flexible work, further situating the underlying logic of neo-maternalistic productivism within flexible work. This chapter, by recognising the role of 'flexibility' (as a rhetorical device and as a concept) in the Australian government's economisation of the maternal waged worker, charts how neoliberal time has been sustained from Howard to contemporaneous Australian law and policy in flexible work.

Chapter 4 discusses superannuation in Australia. Superannuation is one part of Australia's multi-pillared retirement income system, and operates as a compulsory savings system whereby an individual's employer is required to submit a percentage of the employee's income, up to a quarterly maximum, into a superannuation fund or account, which may then be topped-up by the individual subject to certain tax provisions.¹³² The average Australian woman retires with about half the

¹³² *Superannuation Guarantee (Administration) Act 1992* (Cth); See, eg, Australian Treasury, 'Australia's Future Tax System: The Retirement Income System- Report on Strategic Issues' [2009] *Australian Government* 8-13; Nareen Young and DCA CEO, 'Grey Areas-Age Barriers to Work in Commonwealth Laws' ch 8 <http://www.alrc.gov.au/sites/default/files/pdfs/40._diversity_council_australia_final.pdf>; Jenni Millbank, 'Hey Girls, Have We Got a Super Deal for You: Reform of Superannuation and Matrimonial Property' (1993) 7(2) *Australian Journal of Family Law* 104, 111.

superannuation balance of the average Australian man.¹³³ This chapter analyses how and why women are disproportionately disadvantaged under Australia's current superannuation system while addressing the underlying conception of time in superannuation and its gendered connotations. I explore how this system, premised on chrono-norms, uses neo-maternalistic productivism to disadvantage women who cannot and do not adhere to a lifetime of uninterrupted waged labour, and fails to value other modes of temporal experiences or lived values. This chapter's analysis highlights the disproportionate labour hours completed by women and how the gender-time gap and gender-wage gap combine to leave women at higher risk of poverty in older age than men. It ends by suggesting a sex discrimination pension as a more appropriate method of government-mandated retirement savings.

Chapter 5 distils the preceding chapters' findings on the gender-time gap in Australia with respect to waged and unwaged work. Building on the preceding chapters, I develop my own conception of time by showing that time is not a singular thing, and temporalities of care disrupt neo-maternalistic productivism and hetero-capitalist orderings in unexpected and unimaginable ways. This chapter focuses on a comprehensive approach to answering my second research question

¹³³ The Association of Superannuation Funds of Australia, *Superannuation Statistics: September 2016* (online) September 2016 <<http://www.superannuation.asn.au/ArticleDocuments/269/SuperStats-Sep2016.pdf.aspx>> (last accessed 30 Sept 2016); Senate Economics References Committee, Commonwealth of Australia, *'A Husband is Not a Retirement Plan' Achieving Economic Security for Women in Retirement* (April 2016) 9 (*'Economic Security for Women in Retirement Senate Report'*).

based on alternative conceptions of time. After introducing my alternative theory of time, disruptive time, the chapter maps that theory across the legal temporalities of parental leave, flexible work, and superannuation. By reference to the maternal, I ground my conception of disruptive time in a logic and praxis of care. The chapter then critically analyses transitional labour markets as one possibility to account for disruptive time across the life course and provide a gender-sensitive shift in Australian legal temporalities.

Chapter 6 provides the conclusion to the thesis, drawing together the outcomes of the research project in light of ongoing policy considerations. By referencing back to the first main argument of this thesis, namely, that neo-maternalistic productivism is the dominant construction of time that perpetuates the gender-time gap and women's compounding economic disadvantage, it recalls how the second main argument of this thesis, that based on time and temporalising law, informs this research project. By more accurately accounting for how time is experienced by those with caring responsibilities, worker-mother related legal reform can begin to achieve that which is sets out to do: alleviate the disproportionate disadvantages borne by women, particularly women with children.

Chapter 1

Methods and Frameworks in Law and Time

Introduction

This thesis uncovers the underlying dominant conception of time and temporality in the Australian legal frameworks of parental leave, flexible work, and superannuation and constructs an alternative vision through the use of feminist temporalities. In describing legal temporalities, Grabham provides that 'legal temporalities produce as well as govern, and that they govern productively, often in service to biopolitical projects'.¹³⁴ As such, I analyse specific laws, policies, and practices around parental leave, flexible work, and superannuation to understand the legal temporalities and more significantly, the disparate gendered outcomes associated with parenthood under these legal frameworks. Specifically, this thesis addresses the following main question: What is the dominant conception of time underlying Australian work and parenting laws and policies in parental leave, flexible work, and superannuation, and in what sense is that conception gendered, particularly as it relates to women with children? The second part of this thesis addresses the following question: What alternative conceptions of time are possible? In doing so, I investigate multiple conceptions of time before providing an alternative theory of disruptive time that more accurately represents the experience of time for women with caring responsibility of children.

¹³⁴ Grabham, above n 1, 10.

My central argument is that the laws and policies of Australia's parental leave, flexible work, and superannuation are informed and constructed by neo-maternalistic productivism – that is, an understanding of time that specifies women's roles as subordinate to neoliberal capitalist demands. In this initial chapter, I position my argument within the intersection of sociological, feminist, and legal literature, and I outline how the thesis contributes to the scholarship and discourse surrounding law's relationship with time in society. In so doing, I provide both an overview of the relevant literature and empirical claims, as well as an outline of the main approaches used within this thesis.

Socio-legal scholarship is broad and far-reaching, but this thesis and research is located in a small but growing subset of socio-legal scholarship that relates specifically to gender and time. As such, I rely on empirical data sources to appreciate the measurable distinctions between genders in relation to time. This includes time-use data, labour statistics, and other social indicators. I also incorporate sociological theory and models to understand the individual in relation to society and the social, turning particularly to the literature and research on the life cycle, models of gendered labour and the division of labour, and Pierre Bourdieu's *habitus*. I also reference theoretical work in what I call critical temporalities – the critical study of time and temporal experience – as well as feminist traditions within law and society.

Accordingly, Section I of this chapter situates my method within the interdisciplinary area of socio-legal scholarship and empirical data

sources. Section II provides a basis for this thesis' critical interdisciplinarity and argues that it matters how time is conceptualised in law and society, especially when calling on law makers and legal scholars to be more sensitive to gender and the outcomes of gendered time and gendered labour. In particular, I argue that certain ideologies influence how legislators, legal academics, and other political and legal actors conceive of and represent time, rather than turning to how social agents actually perceive and experience time and temporalities. Section III explores the key literature on critical temporalities, which largely seeks to investigate and/or theorise how social agents experience time and temporalities. I include Pierre Bourdieu's concept of *habitus* in this designation of critical temporalities as a way to best conceptualise the individual in society through a theorisation of time and embodiment. As such, it has significantly influenced my understanding of social agents' experiences of time in law and society. Finally, Section IV synthesises the foregoing to present my methodological framework, which incorporates sociological data, theories, and feminist legal insights and interpretations. By reference to empirical data and by drawing on the work of Julia Kristeva, Pierre Bourdieu, and several critical temporal theorists, I establish a critical interdisciplinary method to address my research questions on legal temporalities. Before concluding the chapter, I orientate this thesis in time, drawing on some of the aforementioned scholars to situate this work in temporal reflexivity.

I. Interdisciplinarity and Data Sources

As a critical, interdisciplinary thesis, the research spans across legal doctrinal, social sciences, and theoretical methods and sources. In answering my research questions, my aim is three-fold: to expand beyond doctrinal studies to investigate the underlying conception of time in the relevant acts and provisions, to uncover how that dominant conception of time is gendered, particularly as it relates to women, and to conceptualise alternative imaginings of time that more accurately reflect the experience of women with caring responsibilities. Underlying its methods and approaches, these aims signal this thesis' contribution to the larger project of understanding how time is conceptualised and utilised in law and society. Achieving this requires an interdisciplinary approach, but with a recognition of the benefits and boundaries of each method and approach.

Doctrinal studies of law use interpretive methods and statutory approaches to read cases, statutes, and other sources of law.¹³⁵ As a system of rules, norms and principles, law is understood to be many things, including a formal instrument of regulation, a body of rules and decisions, a practice, and an academic discipline.¹³⁶ The task of a

¹³⁵ Some legislation describe the ways in which certain statutes should be read. See also Reza Banakar and Max Travers, 'Law, Sociology and Method' in Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing, 2005) 7.

¹³⁶ See *ibid* 6-7; see also Herbert Lionel Adolphus Hart, *The Concept of Law* (OUP Oxford, 2012); Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986).

doctrinal legal project is to provide coherence to these established legal norms, rules, and principles within the closed system of law. By looking directly at the statutory text, crucial points of the law become clear. The legislation itself establishes key legal operations such as the scope, powers, applicability or eligibility, and extent of the provisions.

Although doctrinal analysis is useful for clarifying the scope and provisions of a given law, it is limited to the text and legal doctrine. Because I understand law as embedded in a political and social context from which individual rules and laws cannot be severed, I also use socio-legal methods to extend beyond this closed system of law to answer questions that doctrinal analysis alone cannot legitimately answer. A socio-legal methodology provides an alternative to the singular understanding found in 'black-letter law', thereby giving access to broader context, alternative viewpoints, and a richer, more complex picture of social dynamics. In the next sub-section, I will describe the empirical data sources that I use to quantitatively and qualitatively assess time-use along gender lines in Australia. Theoretical perspectives will be discussed in more detail in sections II and III below. Together, these socio-legal methods enable me to address my research questions regarding the gendered temporalities that underlie Australia's worker-mother laws and policies.

Empirical Data Sources

To assess time-use along gender lines in Australia, I have synthesised primary and secondary sources of both quantitative and qualitative

data. Primary sources include data from the Australian Bureau of Statistics ('ABS') on labour, time-use, superannuation, and finance,¹³⁷ described below. Secondary sources include analyses of the above data, as well as qualitative data including time-diary analyses and time-quality assessments, life cycle studies, and other social indicators.¹³⁸

Quantitative Data

The quantitative data for this study comes primarily from the ABS. The ABS is Australia's national statistical agency, established by statute and government-funded.¹³⁹ Providing official statistics, the ABS is often relied upon by economists, social scientists, journalists and other political and academic actors. Several key sociologists that I rely on and reference use data provided by the ABS in developing their research on gender and labour in Australia. Accordingly, an important quantitative and qualitative component of this thesis is information from Australia's

¹³⁷ See, eg, Australian Bureau of Statistics, 'Time Use Survey' (6 June 2002) <<http://www.abs.gov.au/ausstats/abs@.nsf/dossbytitle/0A95B1782162EA4ACA256BD000279391?OpenDocument>>; Australian Bureau of Statistics, '4125.0: Gender Indicators, Australia, August 2016', above n 85; Australian Bureau of Statistics, 'Fathers' Work and Family Balance' (20 July 2006) 39 <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/7d12b0f6763c78caca257061001cc588/acf29854f8c8509eca2571b00010329b!OpenDocument>>.

¹³⁸ See, eg, Lyn Craig, 'Parental Education, Time in Paid Work and Time with Children: An Australian Time-diary Analysis' (2006) 57(4) *The British Journal of Sociology* 553; Craig, 'Does Father Care Mean Fathers Share?', above n 5; Lyn Craig, *Time to Care: A Comparison of How Couple and Sole Parent Households Allocate Time to Work and Children* (Social Policy Research Centre, University of New South Wales, 2004) <<https://www.sprc.unsw.edu.au/media/SPRCFile/DP133.pdf>>; Barbara Pocock, 'Work/Care Regimes: Institutions, Culture and Behaviour and the Australian Case' (2005) 12(1) *Gender, Work & Organization* 32; Pocock et al, above n 29; Apps and Rees, above n 72.

¹³⁹ Census and Statistics Act 1905 (Cth); Australian Bureau of Statistics Act 1975 (Cth).

National Time-Use Surveys. These are national time-diary surveys conducted by the ABS, first in 1992, and later in 1997 and 2006.¹⁴⁰ The time-use survey is meticulous, methodical, and detailed;¹⁴¹ it requires¹⁴² participants to detail each day's activities, participants, and objectives in three-minute intervals for two weeks. At its outset and in line with a growing trend for international time-use surveys, these surveys sought to capture time in 'all' of its uses including paid and unpaid labour. The first survey, in 1992 (unlike subsequent surveys), asked participants what their primary, secondary, and tertiary activities were during a given time slot. This is particularly notable, as it had the potential to capture how caring activities and emotional labour imbued the time-use of primary activities. For example, a participant may write 'commute to work' as her primary activity during a given time slot. However, her secondary and tertiary activities may include, 'drop [child] off at childcare' and 'phone Granny for her birthday', indicated other forms of labour including unpaid care labour and emotional labour. This also had the effect of revealing when leisure time was 'contaminated' by work and the gendering of activities. Time-diary surveys remain the most accurate record of unpaid labour, but the last scheduled survey in

¹⁴⁰ Australian Bureau of Statistics, '3414.0 - Guide to Migrant Statistical Sources, 2011 (Edition 2)' (29 March 2011) <[<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/3414.0main+features262011%20\(Edition%202\)>](http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/3414.0main+features262011%20(Edition%202))>.

¹⁴¹ Australian Bureau of Statistics, '4150.0 - Time Use Survey: User Guide, 2006', above n 90.

¹⁴² If requested, participation is required by law. *Census and Statistics Act 1905* (Cth) s 10.

2013 was abandoned by the ABS as part of a budget cut.¹⁴³ Accordingly, the most recently available time-use survey is from 2006 – this was during the Howard Government and several years before the implementation of statutory paid parental leave in Australia. Overall, time-use data demonstrates the disparity of labour between male and female parents, both waged and unwaged. Chapter 3 and its discussion of flexible work discusses the results of this time-use survey in more detail.

Qualitative Data

In addition to the quantitative time-use data, I also incorporate secondary research on qualitative data. This data includes qualitative aspects of the time-use surveys, life cycle assessments, and other social indicators including indicators of wellbeing, job satisfaction, technology use, the outsourcing of domestic tasks, and subjective time stress.¹⁴⁴ I also draw on secondary materials analysing attitudinal data, such as Barbara Pocock's work on attitudes to mothering, Lyn Craig's work on the gendered division of labour, and secondary research on the HILDA Survey results.¹⁴⁵ The HILDA Project was initiated and is funded by the

¹⁴³ Marian Sawer, Michael Bittman and Julie Smith, *Counting for Nothing: Cancellation of Time-Use Survey* Australian National University: Gender Institute <<http://genderinstitute.anu.edu.au/news/counting-nothing-cancellation-time-use-survey>>.

¹⁴⁴ Australian Bureau of Statistics, 'Time Use Survey', above n 113.

¹⁴⁵ Eg, Pocock, 'Work/Care Regimes', above n 114; Barbara Pocock, *The Work/Life Collision: What Work Is Doing to Australians and What to Do about It* (Federation Press, 2003). This paper uses unit record data from the Household, Income and Labour Dynamics in Australia (HILDA) Survey. The HILDA Project was initiated and is funded by the Australian Government Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA)

Australian Government Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) and is managed by the Melbourne Institute of Applied Economic and Social Research (Melbourne Institute). It is a household-based longitudinal study which began in 2001¹⁴⁶ and surveys households on subjective wellbeing, labour market dynamics, and family dynamics.¹⁴⁷ It seeks to locate the intersection of household and labour dynamics on an annual basis using questionnaires and interviews.¹⁴⁸ As a longitudinal study, it indicates social changes over time, and can be linked more closely to policy impacts and outcomes. Using the 'household' as the unit of analysis, it is subject to similar criticisms as those linked to the time-use surveys including its overrepresentation of urban, non-Indigenous, and middle and higher income respondents.¹⁴⁹ Like my use of ABS data, I do not

and is managed by the Melbourne Institute of Applied Economic and Social Research (Melbourne Institute). The findings and views reported in this paper, however, are those of the author and should not be attributed to either FaHCSIA or the Melbourne Institute.

¹⁴⁶ Melbourne Institute, the University of Melbourne, *HILDA Survey* (29 April 2016) Melbourne Institute: The Household, Income and Labour Dynamics in Australia (HILDA) Survey <<https://www.melbourneinstitute.com/hilda/>>; see also Mark Wooden and Nicole Watson, 'The HILDA Survey and Its Contribution to Economic and Social Research (so Far)*' (2007) 83(261) *Economic Record* 208, 208.

¹⁴⁷ Melbourne Institute, the University of Melbourne, above n 122.

¹⁴⁸ *Ibid.*

¹⁴⁹ Hunter and Smith identify potential biases of HILDA that could marginalise Indigenous, young, and un- or under-employed populations. Boyd Hunter and Diane Evelyn Smith, 'Surveying Mobile Populations: Lessons from Recent Longitudinal Surveys of Indigenous Australians' (203/2000, Centre for Aboriginal Economic Policy Research, 2000) <http://caepr.anu.edu.au/sites/default/files/Publications/DP/2000_DP203.pdf>.

use raw data from the HILDA Survey, but instead draw upon Selected Findings and secondary research on HILDA data.¹⁵⁰

Pulling the Data Together

This thesis synthesises, analyses, and interprets the foregoing sources to provide new knowledge and understandings of the discipline. This includes a critical engagement with the temporal ideology of neo-maternalistic productivism. As such, this thesis combines a number of sources to provide the empirical foundation to a novel conceptualisation of time in Australia's neoliberal law and society. While existing literature has analysed and interpreted empirical data as applied to gender and society as well as law and society, this thesis interjects a critical temporal component within legal argument. This is explained in more detail in the following section.

II. Bases: Critical and Ideological

In this section, I provide a basis for this thesis' critical interdisciplinarity, arguing that it matters how time is conceptualised in law and society. I outline here dominant ideologies informing how certain political agents perceive and understand time in society. Though I expand my analysis and critique to women with children in this thesis, in this section I am predominantly interested in the agents intimately involved in the construction of legal temporalities, including legislators, lawyers (and

¹⁵⁰ Roger Wilkins, 'The Household, Income and Labour Dynamics in Australia Survey: Selected Findings from Waves 1 to 12' (Melbourne Institute of Applied Economic and Social Research, The University of Melbourne, 2015) <http://www.melbourneinstitute.com/downloads/hilda/Stat_Report/statreport-v7-2012.pdf>.

judges), and legal academics and other political actors. In particular, I focus on those assumptions and systems of thought underlying the worker-mother policies and laws.

Ideology is one tool by which political regimes and actors attempt to justify their positions, rally support, and impose their political will.¹⁵¹ All ideologies are contingent, but dominant ideologies masquerade as universal truths: these dominant ideologies serve the critical function of 'structur[ing] beliefs and limit[ing] a vision of possible alternatives to those that are constructed by the powerful.'¹⁵² For example, laws forbidding married women from working prior to the 1960s in Australia relegated a significant subset of women to a particular outcome constructed by men in power.¹⁵³ It is the work of critical analysis to expose how the law (and other constructions) are shaped by ideological rationalities. Attention to ideologies is essential to this thesis's legal-temporal analysis because ideologies influence law and legal practices. By shaping the law, ideologies help to shape individuals' temporal experiences.¹⁵⁴ This thesis is primarily concerned with the relationship between the law and gendered temporal experiences.

¹⁵¹ See also Carroll L Estes, 'Social Security Privatization and Older Women: A Feminist Political Economy Perspective' (2004) 18 *Journal of Aging Studies* 9, 17.

¹⁵² *Ibid* 18.

¹⁵³ See Public Service Act (No 2) 1966 (Cth).

¹⁵⁴ See also this and subsequent chapters' discussion of *habitus*.

In doing legal research, as Clare McGlynn has explained, it is important to critically analyse the existing and dominant ideologies of the jurisdiction in question because only then can their contingent nature – and the possible alternatives – be recognised.¹⁵⁵ In the case of laws regarding women’s roles and relationships, McGlynn notes, the underlying ideologies of gender need to be understood because they shape and uphold stereotypes about what men and women can and should do. Legal practices work to reproduce ‘ideas circumscribing women’s relationships to children, men and the family . . . because the dominant “ideology” reproduces stereotypes and norms for women, men and the family, which may not reflect reality’; and moreover, despite the artificiality of these ideologies, they ‘frame the discussion of issues and [are the standard] against which the legitimacy of individual claims are judged.’¹⁵⁶ This thesis adopts this type of critical analysis to most effectively engage and critique the legal temporality for women with children, and build from that imaginative alternatives.

As mentioned in the Introduction, the most pervasive ideology in Australia today is neo-liberalism, a political-economic doctrine that elevates the market above the individual. To understand this multivalent ideology, I rely, most prominently, on the work of political theorist Wendy Brown. Brown describes neo-liberalism as a

¹⁵⁵ Clare McGlynn, ‘Ideologies of Motherhood in European Community Sex Equality Law’ (2000) 6(1) *European Law Journal* 29.

¹⁵⁶ *Ibid* 30.

government rationality relying on an agenda of marketisation, privatisation, and decollectivisation in the individual as well as the state and market.¹⁵⁷ Neo-liberalism enshrines market-based capitalism as the preferred economic approach of nations, and looks to markets as a guiding principle for all matters of governance and regulation.¹⁵⁸ Neoliberal rationality extends beyond governance and economic doctrine, to the organising principles and practices of society and individuals. Unlike classical liberalism, which circumscribes the freedom of the individual as the precondition for rational and legitimate government,¹⁵⁹ the role of the individual under neoliberal states is to serve the market and to embody and enact market-based practices and principles. Politically, this shift in focus from a social contract between individual and state to a relationship between individual and market renders the state as responsible merely to support the primacy of market-based economism. By emphasising the ways in which individuals serve their own needs through participation in the market, the state's role in developing and administering welfare retracts behind the foreground of markets and wages.

Neo-liberalism, like any ideology, embeds a certain morality, albeit a paradoxical one. According to Hartman, neoliberal ideology has a

¹⁵⁷ Brown, above n 105.

¹⁵⁸ Hartman, above n 104, 58–9.

¹⁵⁹ Lemke, above n 104, 200, citing Foucault Lecture 31 January 1979; Lecture 7 Feb 1979.

'twin, contradictory commitment to a libertarian economic philosophy combined with a morally conservative [view]'.¹⁶⁰ This moralistic conservatism is illustrated, for example, in neo-liberalism's approach to welfare, which it views as a 'scourge producing economic inefficiencies and dependency in its recipients.'¹⁶¹ Under neoliberal ideology, the failure of some individuals to 'successfully' participate in 'the solution of specific matters and problems'¹⁶² is understood as the moral failing of those individuals, rather than a market failure. Under the neoliberal project, the basic unit of analysis for failure will always be the individual and not the market. Indeed, the ultimate 'success' of neo-liberalism lies in the fact that its emphasis on markets and economisation obfuscates the role of the neoliberal state in *constructing* the market-based society that it purports to already exist.¹⁶³ That is, neo-liberalism manages to conceal its own constructed artificiality.

A core argument of this thesis centres on critiquing neo-liberalism's hegemony of time in law and policy. In her study of contemporary attitudes to mothers and mothering in the neoliberal global north, Julie Stephens found a profound 'cultural anxiety around nurture, human

¹⁶⁰ Hartman, above n 104, 59; in the context of Anglophone nation-states (including Australia).

¹⁶¹ Ibid 58.

¹⁶² Lemke, above n 104, 202.

¹⁶³ Ibid 203; see also Brown, above n 105.

dependency, caregiving, and emotion'.¹⁶⁴ Rooting this rejection of care and dependency in neo-liberalism, Stephens turns to the 'postmaternal' to describe these insights:

the post-maternal therefore becomes a fantasy of self-sufficiency, the desire for sovereignty promised but never provided by market individualism. The idea of the unencumbered, self-sufficient, rational, and freely choosing agent is thus the antithesis of maternal notions of subjectivity. Yet, it is the unencumbered self the most easily conforms to the instrumental rationality of the neoliberal marketplace.¹⁶⁵

Tracking the 'unmothering' of public life back through social and political thought, Stephens begins with an overview of the various understandings and definitions of the ideology of maternalism.¹⁶⁶

Amongst the many approaches, Stephens identifies the common thread of maternalism as 'an assertion of the public, social importance of motherhood and the nurture and care of children'.¹⁶⁷ Throughout her critique, Stephens is careful to conceptually separate maternalism from feminism(s), but concludes by imagining an 'alternative feminist maternalism'¹⁶⁸ that rejects contemporary strains of the 'new and regressive' maternalism.¹⁶⁹ It is this 'new and regressive' maternalism that I identify as Australia's neo-maternalism.

¹⁶⁴ Julie Stephens, *Confronting Postmaternal Thinking* (Columbia University Press, 2011) 1.

¹⁶⁵ *Ibid* 7.

¹⁶⁶ *Ibid* 2-5.

¹⁶⁷ *Ibid* 4.

¹⁶⁸ See *ibid* Conclusion.

¹⁶⁹ *Ibid* xiii.

As is already made clear, neoliberal rationality and ideology feature prominently in the construction of neo-maternalistic productivism. Situating neo-maternalistic productivism within contemporaneous accounts of neoliberal law and policy distinguishes it from a more general patriarchal time that pre-existed neo-liberalism. Rather, neo-maternalistic productivism relies on neoliberal laws and policies to shape the individual within marketised, gendered spheres.

However, the prefix 'neo' is also a temporal term used to reflect the ideology's temporal character. Accordingly, it slots into the temporal progressivism and processualism of the hegemonic temporalities of Australia. Neo-maternalistic productivism is both gendered and gendering – it genders time in ways that promote and elevate quantifiable productivism over other experiences such as care, while simultaneously rendering these actual experiences of care-based temporalities as gendered. Under neo-maternalistic productivism, the time of the ideal worker, focused as it is on productivistic and quantifiable endeavours, is normatively and ideologically preferred, while child care-related (and indeed any care-related) time is treated as a possible distraction to the ideal worker and, as such, a time to be dealt with by secondary, supportive and largely invisible agents (eg wives). This then allows the ideal worker the luxury of more productive time – and the ability to commit to overtime, which he will inevitably need now that his previously income earning partner is on extended unpaid parental leave or transitioned to part-time work.

Implicit in neoliberal thought, time is subservient to the market, while the market relies on the state to maintain its primacy. Neo-maternalistic productivism, describes a hegemonic temporality as it relates to individuals within the neoliberal state, where the individual is expected to serve the market, and embody and enact market-based practices, principles, and temporalities. Neoliberal rationalities further perpetuate a hierarchy and distinction between market as public and home as private, while expecting neoliberal temporalities to apply within all aspects of this artificial hetero-capitalistic divide.

For our purposes, the implications of neo-liberalism in Australian society are exemplified by the persistence of the heteronormative household. Such a household is made up of usually heterosexual, two-parent family with children; women provide the majority of care, and men are 'bread-winners' providing the majority of household income. Under this household, the woman's labour is unpaid care work, while the man's is paid labour. However, what we saw emerging most clearly in political rhetoric in the Howard Government and that which endures today as Australia's neo-maternalistic productivism is a view of women's labour as a delicate mix of primary care and secondary income earning. This dual role captures women's service to productivity – women both complete the vast majority of caring duties so that the male of the household may continue his waged work unimpeded by caring concerns or demands, but also engage with an employment policy that seeks to mobilise women into the waged workforce. This household

structure would seem to place the woman at an economic disadvantage, but it is presumed that there is adequate sharing of resources within the relationship, namely financial, and that this household will remain intact and endure as is.¹⁷⁰ The heteronormative household is premised on and supported by a number of neoliberal assumptions, including the public-private divide and the gendered division of labour.

Furthermore, neo-liberalism's and, in turn, neo-maternalistic productivism's, model of the life cycle is centred around waged labour. These assumptions in turn inform Australia's dominant norms and practices of motherhood and care. Importantly for this project, these norms and practices are further circumscribed by legislation spanning across economic policies, family law, tax law, labour law, and government benefits. Arguably, these normative restrictions are most explicit in the worker-mother laws of parental leave, flexible work, and superannuation.

The Public-Private Divide

In a neoliberal capitalist state such as Australia, it is typical for the public and private realms to be constructed as separate. The public-private dichotomy tends to dictate that the male identity and material contribution is rooted in his activities outside the home, while the female role is to be the wife, mother, and primary caregiver – which, as noted above, is today known as the heteronormative family structure.

¹⁷⁰ Gary Stanley Becker, *A Treatise on the Family* (Harvard University Press, 2009) see esp ch 2.

This distinction between the public and private realms can be traced back through the English common law to the classical liberal thought of Thomas Hobbes and John Locke, and the romantic thought of Jean-Jacques Rousseau.¹⁷¹ In each case, the public-private divide implies a hierarchy, in which the man is elevated over the woman, using this as a source of dominance over her.

The idea of the public-private divide (and its implicit elevation of man) endured for centuries into the neoliberal era. In the 1970s, three hundred years after John Locke wrote of the 'father of the family',¹⁷² John Rawls in his *A Theory of Justice* declared the man to be still the head of the family and, indeed, of all morality.¹⁷³ According to Rawls, the formative figure of humankind, the one who is most capable of meaningful political thought, morality and persuasion, is the 'reasonable man' in the original position. This person operates in Rawls' theoretical, economised moral space and makes decisions without communal, societal, familial, or transgenerational connections or encumbrances, but

¹⁷¹ See Thomas Hobbes, *Hobbes: On the Citizen* (Cambridge University Press, 1998); see also Gordon J Schochet, 'Thomas Hobbes on the Family and the State of Nature' (1967) 82(3) *Political Science Quarterly* 427. See John Locke, *Second Treatise of Government and A Letter Concerning Toleration* (Oxford University Press, 2016); Jean-Jacques Rousseau, *Emile: Or, on Education* (Basic Books, 1979) <https://books.google.com.au/books?hl=en&lr=&id=VocWKgK9SxQC&oi=fnd&pg=PR7&dq=rousseau+emile&ots=NNmKNxWjfp&sig=IDad_Es3Ouj7hh1LW3lq9xIRy_A>. Cf Margaret Thornton, *Public and Private Feminist Legal Debates* (Oxford University Press, 1995) 2-3 tracing and discussing the origins of the public/private distinction to and in Ancient Greece's Athenian citizenship.

¹⁷² See, eg, Locke, above n 141.

¹⁷³ Margaret Thornton, 'The Public/Private Dichotomy: Gendered and Discriminatory' (1991) 18(4) *Journal of Law and Society* 448, 449.

with basic understandings of physical science, neoliberal economics, and basic laws.¹⁷⁴ Though purporting to be gender neutral without knowledge of being male or female, Rawls' 'reasonable and rational' person implicitly excludes women and bases morality on an enduring public-private divide firmly rooted in a gendered, public arena of knowledge and skill. This 'reasonable and rational' standard is the exemplary individual for whom the law should be written and justice afforded.

Law has played a crucial role in the institutionalisation of this public-private divide.¹⁷⁵ In recent decades, the 'reasonable man' evolved into the purportedly gender neutral 'reasonable person' standard, which is used as the threshold of acceptable legal conduct across a number of Australian laws.¹⁷⁶ By using the word 'person' instead of 'man', the phrase was meant to become gender neutral. However, unsexing the

¹⁷⁴ John Rawls, *A Theory of Justice* (Harvard University Press, 2009).

¹⁷⁵ See, eg, Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 2002); Catharine A MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987); Caroline Forell and Donna M Matthews, *A Law of Her Own: The Reasonable Woman as a Measure of Man* (NYU Press, 2001).

¹⁷⁶ See also Leslie Bender, 'A Lawyer's Primer on Feminist Theory and Tort' (1988) 38(1/2) *Journal of Legal Education* 3; Lucinda M Finley, 'Break in the Silence: Including Women's Issues in a Torts Course, A' (1989) 1 *Yale JL & Feminism* 41; Forell and Matthews, above n 145; Caroline Forell, 'Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia' (2006) 14 *American University Journal of Gender, Society, Policy & Law* 27; Leslie Bender, 'Overview of Feminist Torts Scholarship' (1992) 78 *Cornell L. Rev.* 575. For Australian statutes incorporating the reasonable person standard see, eg, *Sex Discrimination Act 1984* (Cth) s 28A(1A); *Anti-Discrimination Act 1977* (NSW) s 22A; *Equal Opportunity Act 1995* (Vic) s 85; *Discrimination Act 1991* (ACT) s 58; *Crimes Act 1958* (Vic) s 37G; *Civil Liability Act 1936* (SA) s 73.

phrase did nothing to remove the gendered connotations in law and legal decision-making, nor did it rectify enduring issues of defining reasonableness.¹⁷⁷ The gender neutrality of the law's language, including that found in the context of the laws examined in this thesis, belies the gendered nature of the law's outcomes.

Gendered Division of Labour: Ideal Mother and Ideal Worker

The public-private divide in neo-liberalism makes it possible to assign men and women complementary ideals to fulfil. In this way, the separation of spheres supports the heteronormative household's gendered division of labour. Elizabeth Freeman tracks the time and tempo of domesticity and situates this within her critique of the heteronormative household.¹⁷⁸ Domestic time, according to Freeman, is a class-inflected temporal manifestation of this public-private divide, synchronising household work to the efficiency and discipline of industrial capitalism.¹⁷⁹

Domestic manuals such as Catharine Beecher's *A Treatise on Domestic Economy* (1841) stressed the need for order and efficiency in the home, at the same time that women's labor was naturalized into feminine influence through the figure of the angel in the house who magically kept things clean and people fed without seeming to lift a finger. In other words, middle-class

¹⁷⁷ See also Graycar and Morgan, above n 145, 390–398; Finley, above n 146, 64; Forell and Matthews, above n 145.

¹⁷⁸ See Freeman, above n 71, 39–44.

¹⁷⁹ See *ibid* 39; for a brief discussion of Freeman's account of domestic time as it relates to gender and class, see also Starla Hargita, 'Australia's Parental Leave Pay Scheme: Temporal Disruption and "Genuine" Attachment to Waged Work' (2017) 7(2) *Feminists@Law* 24–25.

femininity became a matter of synchronic attunement to factory rhythms, but with the machinery hidden.¹⁸⁰

In Australia, the two ideals that heavily shape gender norms, particularly with respect to labour and, relatedly, time, are the ideal mother and the ideal worker. The ideal mother, also known as the intensive mother, embodies Australia's dominant ideology of motherhood, fulfilling a role of primary care. She not only spends vast quantities of time on her mothering; she also engages in high-quality mothering as a hands-on and intensive practice of care. By contrast, the ideal worker is keen to satisfy the needs of his employers by working longer hours and overtime (albeit without penalty rates) when that is needed, but also equally satisfied with reduced hours when requested. Rather than resting on a full-time employment contract, the ideal worker narrative relies on an *employment relationship* that goes beyond contractual or legal obligations. (The role of the employment relationship is expanded upon in Chapter 3.) These two ideals, the ideal mother and the ideal worker, reinforce the gendered division of labour. These ideals also locate the gender-time gap in an enduring ideology with a long history in the common law.

The gendered division of labour in Australia, in which men are waged workers and women are unpaid providers of care labour, represents what Barbara Pocock refers to as a work/care regime.¹⁸¹ Pocock

¹⁸⁰ Ibid.

¹⁸¹ Barbara Pocock, above n 121, 241.

recognised that Australia's work/care regime relegates men to the 'ideal worker' norm and women to the 'ideal mother' norm; she reminds us that the male breadwinner in Australia 'has stood for so long at the centre of the workplace and social welfare systems, and at the heart of the definition of masculinity itself.'¹⁸² And the role of women as homemakers and caretakers is intertwined with Australia's legal and social interpretation of capitalism, replicating this gendered social order.

Pocock introduced the concept of the work/care regime to explain how social, political, and economic structures push individuals into certain types of labour. A work/care regime is made up of the relevant culture, institutions, and collective actions, preferences and behaviours of those in paid and unpaid labour and care. The culture influences and is constructed by the actions, preferences and behaviour of individuals and institutions.¹⁸³ Pocock explained that a society's work/care regime operates within its gender order, which is '[c]onstructed by the division of labour and gendered social and power relations'.¹⁸⁴ The work/care regime is subject to the external super-structures of industrial relations (the 'balance of forces between employers and employees')¹⁸⁵ and the

¹⁸² Ibid.

¹⁸³ Pocock, 'Work/Care Regimes', above n 114.

¹⁸⁴ Ibid 38 citing also Connell 1987 116.

¹⁸⁵ Ibid 39.

role of the political state – incorporating Esping-Andersen’s welfare state typology to understand the state and industrial systems.¹⁸⁶

Australia’s work/care regime has endured even through the past four decades of efforts to disassemble it. As discussed in the Introduction chapter, up to the 1970s women’s employment in Australia was largely based on marital status, class, and economic need, and women suffered legally sanctioned job discrimination and lower rates of pay.¹⁸⁷ As legal hurdles were increasingly addressed, the employment of married and unmarried women, regardless of class, increased significantly from the 1970s. However, despite these advances, labour surveys have demonstrated that the male head-of-household have prevailed in two-parent families in Australia; mothers of young children have averaged the least amount of waged labour, while fathers of young children have averaged the most hours of waged labour in Australia.¹⁸⁸

Neoliberal theories suggest that the gendered division of labour is both an appropriate economic response to the exigencies of waged work and care responsibilities, as well as a morally appropriate reflection of accepted heteronormative family mores.¹⁸⁹ But the heteronormative

¹⁸⁶ See Gosta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Princeton University Press, 1990).

¹⁸⁷ See Strachan, above n 11.

¹⁸⁸ See, eg, Australian Bureau of Statistics, ‘Fathers’ Work and Family Balance’, above n 113.

¹⁸⁹ Hartman, above n 104, 59; see also Joan C Williams, ‘Deconstructing Gender’ (1989) 87(4) *Michigan Law Review* 797; Brown, above n 105, 104-05; Simon Duncan and Rosalind Edwards, ‘Lone Mothers and Paid Work-Rational

family model that is so prevalent in neoliberal Australia is problematic: both of the ideals on which it is based – the intensive mother and the ideal (male) worker – are incongruous with the reality of many who live in Australia.

In the case of the motherhood ideal, the cultural expectation that a woman will become a mother and spend her time caring for her children shapes the ways in which women experience motherhood by demanding unrealistic expectations of women and their time. In Pocock's analysis of Australia's work/care regime, she identifies an individual and social conflict in the gap between the 'ideal' mother and what women can realistically do – leaving women highly stressed and overwhelmed.¹⁹⁰ Thus, a gap emerges between what women are culturally expected to do and what they are actually able to do.¹⁹¹ This gap has the effect of dramatically increasing the guilt and shame felt by women as they inevitably fall short of this ideal of motherhood.¹⁹²

In contrast, men's experience of fatherhood and the ideal of 'proper fatherhood' are radically different. In neoliberal Australia, the empirical

Economic Man or Gendered Moral Rationalities?' (1997) 3(2) *Feminist Economics* 29; Becker, above n 140.

¹⁹⁰ See Barbara Pocock, above n 121, 94; see also Daniel Freeman and Jason Freeman, *The Stressed Sex: Uncovering the Truth about Men, Women, and Mental Health* (Oxford University Press, 2013) 127–28; Lyn Craig and Judith E Brown, 'Feeling Rushed: Gendered Time Quality, Work Hours, Nonstandard Work Schedules, and Spousal Crossover' [2016] *Journal of Marriage and Family* <<http://onlinelibrary.wiley.com/doi/10.1111/jomf.12320/full>>.

¹⁹¹ Barbara Pocock, above n 121, 239.

¹⁹² *Ibid* 239–40.

evidence demonstrates that very few fathers are as heavily involved as mothers in child care, and those fathers who are not as heavily involved in parental care do not share the same level of shame and guilt as women.¹⁹³ This, despite the fact that survey data demonstrate that over 90% of participants report that a father should be ‘as heavily involved in the care of his children as the mother’.¹⁹⁴ This discrepancy is in part a reflection of cultural attitudes toward the ‘proper’ role of men and women, and a gendered orientation towards time and (paid and unpaid) labour.

Like the motherhood ideal, the ideology of the ideal worker is also problematic. The pattern of work idealised in the narrative – an uninterrupted life cycle of labour in employment for an employer – reflects neo-liberal capitalist labour preferences. It orients itself toward retirement as neo-liberalism’s privatised and individualised achievement of productive output. The ideal worker narrative draws heavily on employers’ idealised conceptions of labour in employment in an uninterrupted male life cycle.¹⁹⁵ As such, the narrative does not account for interruptions for disability, illness, care of one’s children or other family members, or any unpaid leave for holiday, tertiary or post-graduation education, work-related education certificates, or other activities. Situated within neo-liberalism, it is an imagined labourer

¹⁹³ Ibid 240.

¹⁹⁴ *Australian Social Attitudes: The First Report* (UNSW Press) 59.

¹⁹⁵ See Williams, ‘Deconstructing Gender’, above n 159, 801, 822–24.

with no dependency ties, atomistic and fully flexible to prioritise work above all else.¹⁹⁶ The ideal worker exists as such only as a corollary to a supportive partner – a ‘wife’.¹⁹⁷ It is this relationship between the ideal worker and mother that gives rise to the heteronormative ideology of neo-maternalistic productivism.

When calling on legislators, politicians, and other legal actors to be more sensitive to the ways in which legal temporalities disproportionately impact women’s economic security, we need more than an uncritical reliance on dominant ideologies and gendered narratives. To address the disproportionate impacts on women, we need a more compelling investigation, understanding, and representation of time in law and society. This thesis contributes to these discourses by critically analysing across a number of disciplines to more accurately and robustly conceptualise time in law and society. The following section investigates the critical temporalities that inform this thesis’ understandings of time and temporality.

¹⁹⁶ These conceptions of labour also invoke class by reflecting paradigmatically white male earning patterns for middle- and high-income earners who have outsourced any caring responsibilities. Grabham, ‘The Strange Temporalities of Work-Life Balance Law’, above n 1; see also Emily Grabham, ‘Dilemmas of Value in Post-Industrial Economies: Retrieving Clock Time through the Four-Day Work Week’ (2009) 42 *Connecticut Law Review* 1285.

¹⁹⁷ I use the term ‘wife’ here in the same way that Crabb does in Crabb, above n 115 to mean someone who completes the necessary duties of daily life besides (or in addition to) waged work.

III. Critical Temporalities as Theory and Method

This section provides an overview of critical temporalities in feminist, queer, and temporal literature. I use the phrase 'critical temporalities' to refer specifically to the critical approach taken by certain scholars analysing and theorising time and temporalities. It then gives an overview of Bourdieu's theory of temporal embodiment and applies this theory to consider the construction of parenthood in Australia. Where the previous two sections helped address the relevant methods and approaches to answer my first research question: What is the dominant conception of time underlying Australian work and parenting laws and policies, and in what sense is that conception gendered, particularly as it relates to women with children? This section addresses the second research question: What alternative conceptions of time are possible? Overall, the section further demonstrates the critical interdisciplinarity of this thesis and works toward a conception of how the mother-worker's life cycle, and the associated labour transitions, can be reimagined outside the mandates of neo-maternalistic productivism.

Though contemporary scholarship in critical temporalities and critical time studies is expanding, for the purposes of this thesis I am most interested in work applying a feminist socio-legal approach to time. With notable exceptions, there are few scholars working in this specific research area. Generally, research on critical temporalities seems to be concentrated in feminist and queer literatures, and only tangentially in socio-legal and feminist labour law research. Contemporary research on

critical temporalities in feminist literature generally falls into one of two categories with some overlap: empirical time-use studies and labour-and-work related feminist scholarship. The first uses empirical time-use data to demonstrate and analyse the gendered division of labour,¹⁹⁸ whereas scholars falling into the second group focus pointedly on feminist analyses of the gendered division of labour.¹⁹⁹ Because their scholarship has been directed elsewhere, neither category provides a robust body of literature *theorising* temporalities in the feminist tradition.

Though there are a number of socio-legal scholars engaging in temporal research, temporalities appear tangentially, rather than centrally, as methodological inquiry or minor referents alongside other fields, such as in work by Davina Cooper,²⁰⁰ Karin van Marle,²⁰¹ and Stacy

¹⁹⁸ See, eg, Lyn Craig, 'Parental Education, Time in Paid Work and Time with Children: An Australian Time-Diary Analysis' (2006) 57 *The British journal of sociology* 553; Barbara Pocock, Natalie Skinner and Philippa Williams, *Time Bomb: Work, Rest and Play in Australia Today* (NewSouth Publishing, 2012).

¹⁹⁹ See, eg, Kathi Weeks, *The Problem with Work: Feminism, Marxism, Antiwork Politics, and Postwork Imaginaries* (Duke University Press, 2011); Nancy Fraser, 'Feminism, Capitalism, and the Cunning of History' in Winfried Fluck, Donald E Pease and John Carlos Rowe (eds), *Re-Framing the Transnational Turn in American Studies* (Dartmouth College Press, 2011) 374 <<http://halshs.archives-ouvertes.fr/halshs-00725055/>>; Nichole Shippen, *Decolonizing Time: Work, Leisure, and Freedom* (Springer, 2014).

²⁰⁰ See, eg, Davina Cooper, 'Time against Time: Normative Temporalities and the Failure of Community Labour in Local Exchange Trading Schemes' (2013) 22 *Time & Society* 31.

²⁰¹ Karin van Marle and Isolde de Villiers, 'Pretoria: Space, History and the Everyday' (2013) 38 *Australian Feminist Law Journal* 129; van Marle, Karin, 'Law's Time, Particularity and Slowness' 19 *South African Journal on Human Rights* 239.

Douglas.²⁰² Cooper, for example, has used normative time as a methodological inquiry into cooperative economic practices, while van Marle and Douglas have used time as a narrative window to situate a cultural critique of site-specific law. These scholars use time to further their substantive argument – for Cooper, this substantive argument is based around cooperative practices, for van Marle it is around particularity and place, and for Douglas it is the use of history in building political community. However, neither sought to directly theorise the development, construction, or experience of time.

Though there has been a marked increase in research and critical analysis of time and temporalities across a number of fields both tangentially and substantively, there remains a gap in feminist scholarship on labour law. Feminist labour lawyers and legal scholars provide important research and scholarship on labour law, but few feminist labour lawyers are engaging in a directly theoretical examination of the temporal turn.²⁰³ As this thesis demonstrates, time, labour, and law are inextricably bound together and reflexively impact on gendered outcomes. Therefore, critical temporalities would seem a

²⁰² Stacy Douglas, 'The Time That Binds: Constitutionalism, Museums, and the Production of Political Community' (2013) 38 *Australian Feminist Law Journal* 75.

²⁰³ With the notable exception of Emily Grabham. Grabham's work examines and theorises how time is represented and manifests in British socio-legal settings of labour law. See, eg, Grabham, 'Dilemmas of Value in Post-Industrial Economies', above n 165; Emily Grabham, 'Legal Form and Temporal Rationalities in UK Work-Life Balance Law' (2014) 29(79) *Australian Feminist Studies* 67; Grabham, 'The Strange Temporalities of Work-Life Balance Law', above n 1.

fertile ground for feminist labour law critique and scholarship. Failing to account for time in law is failing to account for a significant aspect and factor in the gendering of labour. In consideration of this, this thesis seeks to contribute to this nascent feminist labour law discourse by adopting a critical stance on the temporalities of work and labour relations found in particular aspects of Australia's parental leave, flexible work, and superannuation systems.

Critical Temporalities

This sub-section introduces the key feminist and queer literature on critical temporalities informing this thesis. It begins by referencing Julia Kristeva's influential essay, 'Women's Time'²⁰⁴ which is Kristeva's attempt to create a gendered model of time that prioritises maternal experience. This section then addresses the work of Elizabeth Freeman and Judith/Jack Halberstam who each reveal the ways in which a mainstream approach to time in fact reflects a dominant heteronormativity, a critical approach that I use in this thesis to show that law and government policy are themselves dependent on an invisible heteronormativity in ways that undermine women's use and experience of time and temporalities. Aligning with queer time, this section then segues to the research of Kathi Weeks and her sense of 'life against work'. I link these theorists back to the foundational work of Kristeva and her theorising the role of maternity in conceptualising a

²⁰⁴ Julia Kristeva, 'Women's Time' (1981) 7(1) *Signs* 13.

politics of time. This allows me to take a political and feminist approach to time in analysing the gendered nature of Australian worker-mother laws.

In 1979, Julia Kristeva's influential essay, 'Women's Time' was first published in France, and was later translated in 1981 for English-language audiences.²⁰⁵ 'Women's Time' offers a dialectical approach to identifying and interrogating the gendering of time and specifically considers the workforce participation of women with children. In the article, Kristeva makes three important moves: she dialectically engages in the divisive issue of maternity in feminist discourses;²⁰⁶ she directly critiques patriarchal, capitalist-based hegemonic temporality; and as an alternative, she theorises 'women's time' centred on maternity as a cyclical temporality of gendered care. Kristeva thus provides a clear, reproducible meta-method with which to critique the enduring hegemony of hetero-capitalist time. I adopt Kristeva's three-part approach as a standard in analysing existing scholarship on critical temporalities and use it as a benchmark for developing my own

²⁰⁵ Ibid.

²⁰⁶ The question of maternity in feminist discourses was arguably at its height in the 1970s and 80s. See, eg, Shulamith Firestone, 'The Dialectic of Sex (1970)' [1979] *Excerpted in Kolmar and Bartkowski* 224; Adrienne Rich, *Of Woman Born* (Norton, 1976); Marilyn French, *Beyond Power: On Women, Men, and Morals* (Olympic Marketing Corp, 1985); Lucinda M Finley, 'Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate' (1986) 86 *Columbia Law Review* 1118; Robin West, 'Jurisprudence and Gender' (1988) 55(1) *The University of Chicago Law Review* 1; see also Linda MG Zerilli, 'A Process without a Subject: Simone de Beauvoir and Julia Kristeva on Maternity' (1992) 18(1) *Signs: Journal of Women in Culture & Society* 111.

approach to critical temporalities within the context of feminist socio-legal methodologies. My approach to 'women's time', however, incorporates theoretical insights as provided by Bourdieu, Freeman, and Felski, amongst others, while conceptualising an alternative to singular 'women's time' through multiple temporalities undulating through moments of care, vulnerability, and paid and unpaid labour.

Though coming from a queer perspective, the work of theorists Elizabeth Freeman²⁰⁷ and Jack/Judith Halberstam²⁰⁸ also engages with hegemonic time and theorises alternate, queer temporalities.

Halberstam's queer time privileges the transgender body and subcultural spaces,²⁰⁹ and Freeman's concept of chrono-normativity²¹⁰ speaks directly to the ways in which time uses the gendered body to maximise productivity. This is important given my project's emphasis on unpacking the gendered temporal implications of Australia's worker-mother laws. Both scholars agitate against hegemonic time by deconstructing the ways in which dominant ideologies of time-use, gender, and heteronormativity as technologies of control. By highlighting this exploitative nexus, Halberstam and Freeman position themselves in contrast to hegemonic time by providing queer

²⁰⁷ Freeman, above n 71.

²⁰⁸ Judith Halberstam, *In a Queer Time and Place: Transgender Bodies, Subcultural Lives* (NYU Press, 2005); Judith Halberstam, *The Queer Art of Failure* (Duke University Press, 2011).

²⁰⁹ Carolyn Dinshaw et al, 'Theorizing Queer Temporalities: A Roundtable Discussion' (2007) 13(2) *GLQ: A Journal of Lesbian and Gay Studies* 177, 182.

²¹⁰ Freeman, above n 71.

alternatives to heteronormative and chrono-normative time. I link these theorists to my own work in dismantling hegemonic time in Australia and its emphasis on heteronormative capitalist structures.

Kathi Weeks, too, challenges the established hegemonic temporal institutions when she proposed a shorter hour work week, which is couched in terms of 'getting a life' as a 'provocation' to capitalism's hegemony. Weeks' reference to a 'life' is broadly construed beyond social reproduction, and in doing so she draws on queer time. A shorter hour work week, Weeks argues, provides the freedom to explore and reshape our intimate relations and socialities beyond chrono-normative practices and orientations, while rejecting the confines of capitalist-imposed 'repro-time'. Child or child-related care fell within this 'repro-time' seen as part of the hegemonic temporal order.

Bourdieu's Theory of Temporal Embodiment

In Pierre Bourdieu's conception, temporality is embodied and expressed through individuals' actions and choices. Individuals are 'social agents'²¹¹ in that their agency is conceived as a series of socially constructed actions and normatively constrained choices.²¹² Those actions and choices, according to Bourdieu, constitute the *habitus*: the

²¹¹ See Lois McNay, 'Meditations on Pascalian Meditations' (2001) 30(1) *Economy and Society* 139, 149.

²¹² See Bourdieu, above n 2; Pierre Bourdieu, 'Structures, Habitus, Power: Basis for a Theory of Symbolic Power' in Nicholas B Dirks, Geoff Eley and Sherry B Ortner (eds), *Culture/Power/History: A Reader in Contemporary Social Theory* (1994) 155; Pierre Bourdieu and Loic Wacquant, 'An Invitation to Reflexive Sociology' [1992] *Cambridge: Polity*.

embodiment and expression of temporalities. Bourdieu defines the habitus as the conscious and unconscious practices, linguistics, mannerisms, and appearances that identify the agent as part of a specific group or social space.²¹³ The habitus is embedded within a specific space, or *field*, which further constrains the individual's agency.²¹⁴ In Bourdieu's theory of the habitus, the mechanisms by which an agent locates himself or herself within the field (eg, social group) include dress, language and accent, mannerisms, and outward affects.²¹⁵ Agents can exist in multiple fields simultaneously, and fields may be large or small, including, for example, class, family, work organisation or discipline, educational cohort, mother's group, and urban areas. Inclusion in a field can be 'implicit,' when the agent makes no deliberate or voluntary commitment or contract for inclusion.²¹⁶ Temporality is embodied and expressed via the habitus both consciously and unconsciously.

In Bourdieu's conception, the past, present and future all contribute to the habitus: the body is inscribed upon by the past; it enacts shifts through choices and actions within the present moment; and it is oriented toward the future. Regarding the past, Bourdieu understood

²¹³ See Bourdieu, above n 2, 138–43.

²¹⁴ See *ibid* 213; see also Beverley Skeggs, 'Context and Background: Pierre Bourdieu's Analysis of Class Gender and Sexuality' (2004) 52 *Sociological Review* 19, 22.

²¹⁵ See Bourdieu, above n 2, 11.

²¹⁶ *Ibid*.

the body to carry within it, to inscribe, perform and *embody* multiple histories – collective, familial, individual, social.²¹⁷ He wrote, ‘The unconscious is history’, specifically, ‘the collective history that has produced our categories of thought, and the individual history through which they have been inculcated in us’.²¹⁸ Regarding the present, Bourdieu wrote that this is when the practices that construct and reconstruct the habitus occur. Although some aspects of the outward demonstration of habitus may be immutable, others may consciously or unconsciously change in relation to a field.²¹⁹ These shifts depend on the moment or practice, just as an agent may speak and act differently around her rabbi than she might around her younger sister. These shifts are possible because the habitus is inherently temporal, and time is experienced through practice. Finally, regarding the future, Bourdieu understood the practice of the habitus to be future-oriented: social agents are able to construct habitus through practice precisely because of their ‘capacity to anticipate’.²²⁰ This orientation to the future is both an explicit motivator (to learn something, work towards goals, accumulate), but also as an unconscious artefact of embodiment. In short, an individual’s habitus accumulates over time, while also being

²¹⁷ See McNay, above n 181, 149 who discusses Bourdieu’s reflexive embodiment in contrast to Foucault’s theory of somatisation.

²¹⁸ Bourdieu, above n 2, 9.

²¹⁹ See *ibid* 153–55.

²²⁰ *Ibid* 213.

reflexively changed by orientations in time – to the future and the past, manifested in the present.²²¹

This corporeal approach sees the body as a temporal agent anticipating systems of power through modifying behaviours and dispositions.²²²

This is explained through the habitus as corporeal experience:

The agent engaged in practice knows the world but with a knowledge which ... is not set up in the relation of externality of a knowing consciousness. He [sic] knows it, in a sense, too well, without objectifying distance, takes it for granted, precisely because he is caught up in it, bound up with it; he inhabits it like a garment [*un habit*] or a familiar habitat. He feels at home in the world because the world is also in him, in the form of habitus, a virtue made of necessity which implies a form of love of necessity, *amor fati*.²²³

Through the habitus and the field, Bourdieu crafts a temporal dimension to his understanding of the body.²²⁴ The habitus, mediated as it is by the field, is actively manifested of the 'whole past'.²²⁵ The habitus is embodied by individuals through 'durable, transposable dispositions'; these dispositions, albeit reflexive, are predominantly reflective of dominant norms and institutional demands as a result of the habitus constituted by all that came before (the 'whole past').

Although the habitus is manifested of the accumulation of experienced

²²¹ See, eg, *ibid* 148, 150–154; see also McNay, above n 181, 149.

²²² Bourdieu, above n 2, 135.

²²³ *Ibid* 142–43.

²²⁴ See also Lois McNay, 'Gender, Habitus and the Field: Pierre Bourdieu and the Limits of Reflexivity' (1999) 16(1) *Theory, Culture & Society* 95, 101.

²²⁵ *Ibid* 102.

temporal norms and actions, it is also shaped by the anticipation of future-oriented practice. By reference to the forth-coming, the body is also subject to the future. However, Bourdieu's theory of embodiment provides space for the fluidity of identity and embodiment, providing that 'the embodied subject is constituted through dominant norms but is not reducible to them'.²²⁶

Applying a Bourdieusian approach, agents' experience of time and how they practice it should not be imposed from without, but instead be reflexively constructed by agents themselves.²²⁷ Habitus is inherently temporal because it is emergent, continually being (re)enacted and (re)constructed in time. The nature of habitus at a given moment is the outgrowth from all that came before; the habitus is informed and constructed by the 'whole past' of its agents, as over time, the social group absorbs new elements into its accepted norms and practices. Just as the habitus contains and encodes the past, it also points toward the future, as the shape it will take on tomorrow is being created today through agents' conscious and unconscious attempts at new vocabulary, mannerisms, and practices. New elements become accepted as part of the habitus through the passage of time and repetitive adoption in the group; the habitus is based on all that came before as well as on agents' future-oriented practice. Through agents' process of embodying the

²²⁶ Ibid 99.

²²⁷ Bourdieu, above n 2, 213.

habitus, their practical action actually shapes and creates their experience of temporality. Thus, the habitus is necessarily reflexive.

The relationship between the habitus and practical action is the basis of Bourdieu's theorisation of the embodiment of temporalities. For Bourdieu, time is constructed through the enacting of the habitus: a living out of multiple histories in a way that, paradoxically, is inherently future-orientated.

Bourdieu understood the body to carry within it – to inscribe, perform and *embody* – multiple histories that are collective, familial, individual, social.²²⁸ Echoing this view of multiplicity, Rita Felski suggests that time unfolds across three simultaneous levels.²²⁹ Felski conceptualises time as a plurality across the everyday, the life scale and larger scale expansions. Everyday time, Felski argues, is the phenomenological sense of time as we experience it on a day-to-day basis.²³⁰ Though the unit is delimited to a 'day', everyday time goes beyond a unit-based conception of time to include the real, lived experiences of practice, habit, and surprise, incorporating the minutiae and vicissitudes of daily life. Life time expands beyond the everyday to include life as a temporal project that connects the 'random segments of daily

²²⁸ See also McNay, above n 181, 149.

²²⁹ Rita Felski, *Doing Time: Feminist Theory and Postmodern Culture* (New York University Press, 2000).

²³⁰ *Ibid* 17.

experience' into an ongoing creation of the subject self.²³¹ Large-scale time, then, expands the relevance of life time to incorporate a reference to the long-term processes of time.²³² In this sense, large-scale time collectivises the everyday and life time toward a monumental time that allows for the linear as well as cyclical nature of large-scale processes and movements. I understand this to connect the everyday and life time to the collective unit, as temporalities coalesce to inform and shape large-scale, collective projects and units. This pluralistic understanding of time views multiple temporalities as existing simultaneously across three levels, so that practices reflexively construct everyday time, life time, and large-scale time.

Reading Felski's pluralistic time across Bourdieu's embodiment of time crafts an understanding of practice as temporalising acts both constructing and manifesting across each level of time. Temporality, according to Bourdieu, is embodied through the habitus, linked to the forth coming, to a future-orientated approach to act upon the 'objective potentialities in the present structure'.²³³ He wrote that, 'The unconscious is history', meaning that we are shaped unconsciously by both collective and individual histories – 'the collective history that has produced our categories of thought, and the individual backgrounds

²³¹ Ibid.

²³² Ibid 18.

²³³ Bourdieu, above n 2, 213.

and history through which they have been inculcated in us'.²³⁴ These multiple histories inscribe habitus in the body, which then interacts intimately with the field to express those histories corporeally.²³⁵

According to Bourdieusian scholar Beverley Skeggs, '[e]mbodiment is the product of the composition and volumes of capital that can be accrued and carried by the body and the fit between the habitus (the disposition organising mechanism) and the field'.²³⁶ Temporality is linked to that which is forthcoming; he conceptualises a future-orientated approach to acting upon the 'objective potentialities in the present structure'.²³⁷

To conceive of time as reflexively constructed across multiple temporalities agitates against neo-maternalistic productivism, suggesting instead an alternative temporal orientation that cyclically radiates between individual and group. As social agents, we are constantly relating to others, consciously and unconsciously accepting, adjusting, shifting, and reflecting on practical actions as they impact upon us as individual members of a group – while also reflexively noting the impact of these collectivisations of actions as they impact on the construction of the group.²³⁸ Conceptualising time as a plurality

²³⁴ Ibid 9.

²³⁵ Ibid 138.

²³⁶ Skeggs, above n 184, 22.

²³⁷ Bourdieu, above n 2, 213.

²³⁸ See Bourdieu, above n 2.

across multiple levels captures the day-to-day time of the everyday minutiae and vicissitudes in the individual, but then carries this across the lifetime and into the collective, expanding from an individualised, atomistic concept of time to one that is also collectively embodied and experienced.

In short, for Bourdieu, time is embodied and enacted, not hegemonically imposed. Thus, he provides a conceptual framework for imagining an alternative approach to legal temporalities in Australia. Bourdieu's approach to time provides a way to question the assumption that the power to control time is or ought to be centralised in the state. He suggests instead that that power can be dispersed among individuals operating within social settings, who may live non-linear, unscripted lives of interruption, disruption, and creation outside the mandate of maximising economic productivity.

Accordingly, Bourdieu understands a source of power in controlling time. The underlying foundation of this illustration of temporality as future-orientated practice is based on an alignment of field and habitus as it occurs in a capitalist economy.²³⁹ Bourdieu accepts capitalism and productivism as structural factors constraining and constructing the habitus and fields of agents in contemporary late modern societies. He references the very constraints and constructs of a late modern

²³⁹ Lisa Adkins, 'Sociological Futures: From Clock Time to Event Time' (2009) 14(4) *Sociological Research Online* 8, [2.5].

capitalistic labour context of productivism when he writes of the expression of power through waiting, 'of delaying without destroying hope' that seeks to keep people motivated without driving them to despair.²⁴⁰ Bourdieu recognises a significant exercise of power in 'controlling time and the rate of fulfilment of expectations'.²⁴¹

By contrast, Bourdieu recognises the powerlessness of not being able to control time. He elaborates on just what powerlessness might be in relation to time in his analysis of the 'subproletarian'. The subproletarians, according to Bourdieu, are those who are 'excluded from the ordinary (economic) world' through chronic unemployment or underemployment.²⁴² The experience of time for the subproletarian is described by Bourdieu as 'dead-time'.

Bourdieu is suggesting that where both material capital and immaterial capital are lacking for the subproletarian, it is clock-time that is 'dead'. Because their relationship to the objective universe is stalled and stunted by chronic under-employment, their relationship to free time is transformed as well, as if the one relies on the other to orientate the agent. It is this chrono-normativity that a parent potentially agitates against. And, like the subproletarian, this relationship to time depends on the parent's relationship to waged labour.

²⁴⁰ Bourdieu, above n 2, 228.

²⁴¹ Ibid 222, 228.

²⁴² Bourdieu, 2000, 223.

Although Bourdieu accounts for class, sociality, temporality, and individual agency, he does not account for gender, parenthood, or law in any specific or extended form. That is, Bourdieu's earlier work on law explains the interaction of what he calls the 'juridical field' with the habitus,²⁴³ and further disambiguates the role of power in society, but it fails to specifically address the role of gender and the ways in which gender interacts with the habitus and fields. In my use of Bourdieu's theory of time, I articulate how experiences and constructions of time are deeply gendered in maternity, and how legal constructs interact intimately with the habitus to give rise to such gendered temporalities. The following section synthesises the forgoing insights to develop my methodology.

IV. Formulating a Feminist Methodology

This is a socio-legal project using a variety of sources including statutory text, parliamentary debates, time-use surveys, and social indicators to critically analyse the underlying conception of time and its gendered manifestation in Australia's worker-mother laws. Being 'socio-legal' means that this thesis combines sociological critique with legal analysis, and it does so through reference to empirical data as well as theoretical sources, claims, and concepts. By reference to empirical research, the thesis looks to qualitative and quantitative data to

²⁴³ Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1986) 38 *Hastings LJ* 805; see also Yves Dezalay and Mikael Rask Madsen, 'The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law' (2012) 8 *Annual Review of Law and Social Science* 433.

understand the context of work,²⁴⁴ labour, time-use, and gender in Australia.²⁴⁵ As a theoretical work, it critiques how dominant narratives of work and care treat maternity in Australia, with specific regard to the gender-time gap in the narratives of the ideal worker and the ideal mother. Despite its reference to maternalism, neo-maternalistic productivism treats care as the necessary but inferior task of women done in support of productivistic labour. Accounting for the temporal hegemony of global capitalism and neoliberal policy platforms in Australia, this thesis suggests a counter-narrative of care-based temporalities in disruptive time. That is, rather than treating care as inimical to neo-maternalistic productivism's linear, financialised, output-based trajectory, disruptive time conceptualises care as central to

²⁴⁴ I use the term 'work' to specify waged employment. I make no distinction between employment in a 'career' or a 'job', although this distinction is explored briefly in Chapter 3. Other jurisdictions, such as Great Britain, distinguish between a worker and an employee, but because Australian law does not, I use the terms interchangeably.

²⁴⁵ Throughout this the remainder of this thesis, I use the term 'labour' to refer to all forms of labour, paid and unpaid, including domestic, caring, emotional and organisational labour. Emotional and affective labour refers to the cultivated labour of managing the feelings, experiences, and psychological care of the self and others. See Arlie Russell Hochschild, *The Managed Heart: Commercialization of Human Feeling* (Univ of California Press, Twentieth Anniversary, 2003); Nancy Folbre, "'Holding Hands at Midnight": The Paradox of Caring Labor' (1995) 1(1) *Feminist Economics* 73; Kathi Weeks, 'Life within and against Work: Affective Labor, Feminist Critique, and Post-Fordist Politics' (2007) 7(1) *Ephemera* 233. In this same sense I use the phrase 'organisational labour' as it relates to emotional labour; accordingly it refers to the efforts taken to imagine, plan, prepare, construct, and coordinate the logistics of quotidian life and the emotional landscapes of daily life. see, eg, Alison J Clarke, 'Making Sameness: Mothering, Commerce and the Culture of Children's Birthday Parties' in Emma Casey and Lydia Martens (eds), *Gender and Consumption: Domestic Cultures and the Commercialisation of Everyday Life* (Routledge, 2007) 79; Nicky James, 'Care= Organisation+ Physical Labour+ Emotional Labour' (1992) 14(4) *Sociology of Health & Illness* 488.

a temporality with potential to subvert Australia's prevailing ideologies of gendered time-use. It concludes by analysing transitional labour markets as a gender-sensitive approach to legal temporalities of labour law and labour relations.

This project relies on feminist approaches to women's experiences of time and labour. In doing so, I consider a number of theorists that expand on sociological inquiry, temporality, and gender. The work of Pierre Bourdieu and, most especially, his concept of the *habitus*, feature prominently in this thesis, as does Lois McNay's, Elizabeth Freeman's, and Lisa Adkin's feminist interpretations and analyses of Bourdieu. I consider, also, the critical work on labour and gender by Kathi Weeks, and the marriage of cultural critique and time provided by Rita Felski. I also turn, repeatedly, to the work of Barbara Pocock and Lyn Craig and their respective sociological critiques of gendered work and time paradigms.

My methodology

In this study, I conduct doctrinal analysis of the worker-mother laws governing Australian parental leave, flexible work, and superannuation by employing critical interpretation to specifically analyse the relevant acts and sections.²⁴⁶ My goal in doing so is to understand the statutory

²⁴⁶ These acts include Paid Parental Leave Act 2010 (Cth); Paid Parental Leave and Other Legislation Amendment (Dad and Partner Pay and Other Measures) Act 2012 (Cth); certain provisions of the Fair Work Act 2009 (Cth) addressing parental leave and flexible work; Workplace Relations Amendment (Work Choices) Act 2005 (Cth); Superannuation Guarantee (Administration) Act 1992

text as an initial starting point of analysis. Without this foundational understanding of the relevant laws, subsequent analyses could easily fail to relate specifically to the statutory actions and powers conferred under the relevant acts. However, the boundaries of doctrinal analysis stop at the legal text, and this research project incorporates interdisciplinary methods to expand my inquiry beyond the relevant acts and provisions.

This thesis considers empirical data, most predominantly time-specific labour statistics, including income and wages, as provided by the ABS and often broken down by gender or sex. Labour force statistics and income-related data are supplied specific to a given time-period (eg month, year). Conducted by the ABS, the Labour Force Survey is a monthly survey done throughout Australia that measures labour market activity of civilian residents aged 15 years and over.²⁴⁷ I have referenced employment statistics to understand what the relevant levels of part-time, full-time, and casual work are in relation to gender in Australia. Furthermore, I have referenced quantitative economic data

(Cth); Superannuation (Government Co-Contribution for Low Income Earners) Act 2003 (Cth), amongst others.

²⁴⁷ Australian Bureau of Statistics, '6202.0 - Labour Force, Australia, Mar 2016: Quality Declaration' (14 April 2016) <<http://www.abs.gov.au/Ausstats/abs@.nsf/0/D14CACAD37B9A863CA257D2C001245D3?OpenDocument>>.

on superannuation accumulation and savings levels across gender and age.²⁴⁸

However valuable the time-use surveys, HILDA data, and labour indicators are, there are two broad limitations associated with them. First, they over-represent urban, non-Indigenous, and more affluent residents. Despite being of leading global-standards, the surveys did not extend to very remote or Aboriginal communities.²⁴⁹ Second, these surveys reproduce and mirror the neoliberal ideology of marketisation of time. Time is 'used' or 'spent' rather than lived and constructed. However, these surveys continue to be the only reliable source of time-use data representing a large proportion of residents in Australia completed in a methodical manner and according to global standards. They therefore provide an important aspect of time in this research project without being the only representation of time relied upon.

Together, these socio-legal analyses help me construct a picture of time-use along gender lines, particularly with respect to paid work and unpaid care labour. By critically re-evaluating and re-reading empirical data on the gendered division of care in Australia, I understand temporalities manifesting primarily through maternal care labours.

²⁴⁸ These data are often done by superannuation funds and the like. See, eg, Clare and Association of Superannuation Funds of Australia Limited, above n 93.

²⁴⁹ Australian Bureau of Statistics, 'How Australians Use Their Time, 2006' (4153.0, 21 February 2008) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4153.0Explanatory%20Notes12006?OpenDocument>>.

This re-interpretation of the data situates the practices and actions of maternal care labours as potentially disruptive practices agitating against a hegemonic temporal norm, discussed in more detail in the final chapter.

What emerges from the data is a disjunction between law, policy, and practice: a gender-time gap underlying the law and policies. Australian leave provisions and policies lag behind what women are actually doing as primary carers, but race ahead of what men are actually doing in terms of care.²⁵⁰ Women are completing more combined labour hours of paid work and unpaid caring responsibilities than ever before, while men are still not taking comparable parental leave despite having it available to them and having two-weeks set aside especially for them.²⁵¹ This policy and legal lag results in a gendered disparity in time-use that demonstrates a disparity not just in the quantity of child care provided by each parent, but the quality of that care. This is in addition to the quantity and quality of time used in other activities, be they paid, unpaid, leisure, and volunteer or other. I refer to this as the gender-time gap.

²⁵⁰ Pocock, 'Work/Care Regimes', above n 114, 38.

²⁵¹ Ibid; If eligible, fathers and partners may take some or all of the federal paid parental leave after the birth or adoption of a child. Dad and Partner Pay is a two-week payment set aside specifically for fathers and partners. See generally *Paid Parental Leave Act 2010* (Cth) s 4. However, see Chapter 3 for additional critique and analyses on the gendering of paid parental leave.

Understanding and Situating Ideological Influences

A society's dominant ideologies are those that work most powerfully to persuade the agents within it, both consciously and unconsciously, by setting out their objective chances and subjective choices. Following Bourdieu, it is possible to argue that a society's ideologies influence the way its agents construct their habitus, and the ways in which the habitus manifests through time. Thus, we can see how Bourdieu's concepts of temporality, habitus and field are useful for understanding the construction of parenthood in neoliberal Australia. Here, as in any society or culture, 'parenthood' is the manifestation of a set of cultural and physical norms of gendered care—in this case the 'mother' as caregiver and the 'father' as economic provider. And like any habitus, the concept of 'parenthood' is an expression shaped by past, present and future. Its dominant norms are made up of the 'whole *past*' of Australian and colonial visions of gendered care, tempered by each individual embodiment of 'parental care'. For many women, parenthood is continually (re)constructed in the *present* moment through embodied experiences of copulation, pregnancy, childbirth, and breastfeeding, as well through the ongoing cultural norms and ideologies of gendered care that impact women regardless of ability or experience with pregnancy, childbirth, or breastfeeding. For fathers, parenthood emerges as gender-specific pressure to increase their take-home earnings, especially where their female partners have decreased or paused any waged work. Finally, parenthood is *future*-oriented in that it is social reproduction—a phase in the life cycle that invokes

legacy and cyclical references to future generations.²⁵² Parental practices become modified, in part, through a reference to the future – the future of the child, the parent, the parental unit, family unit, community, and/or broader society.

Although individuals' habitus can be shaped by the dominant ideologies in the field(s) they occupy, that influence need not be total or inevitable. Individuals are social agents, capable of choosing and responding to a multitude of inputs, accumulating an array of various kinds of capital. Bourdieu acknowledges the individual agent's capacity for resistance in the face of institutional values and dominant norms:

I do not see how relations of domination, whether material or symbolic, could possibly operate without implying, activating resistance. The dominated, in any social universe, can always exert a certain force, inasmuch as belonging to a field means by definition that one is capable of producing effects in it...²⁵³

Bourdieu's concept of habitus helps us envision how the habitus (the temporal experience) of parenthood can exist distinct from, and even at odds with, the chrono-nuclear norms of the ideal worker: the concept of habitus helps us see, among other things, how labour is contingent upon multiple factors, and it shifts over time as the individual undergoes labour transitions. Two tools for understanding how agents construct

²⁵² I am deliberately avoiding any argument regarding legacy vis-à-vis inheritance, although Halberstam provides a timely critique at Judith Halberstam, *In a Queer Time and Place: Transgender Bodies, Subcultural Lives* (NYU Press, 2005); see also Chapter 5, section II of this thesis.

²⁵³ Bourdieu and Wacquant, above n 182, 80 (emphasis in original).

the habitus of parenthood in neoliberal Australia are described below: a new life cycle model that acknowledges the importance of child-care in the worker's life, and the concept of transitional labour markets.

First, as a tool for understanding the construction of parenthood-as-habitus in neoliberal Australia, we have the modified model of the worker life cycle proposed by Patricia Apps and Ray Rees. Unlike the hetero-capitalist norms of the ideal worker, or the impossible life cycle of the ideal worker-mother (which as discussed above, is embedded in the current laws regarding parental leave, flexible work and superannuation), Apps and Rees's model acknowledges the impact of child care work on the life cycle. The model grew out of the authors' dissatisfaction with research and policy that defined individuals merely by their labour force participation. Apps and Rees's concept of the 'life cycle' does not simply describe the age of the (male) worker in a work-cycle, but instead uses existing demographic and household data to conceptualise labour as contingent on multiple forces. Specifically, Apps and Rees define the stages of life according to the presence and age of children in a household.²⁵⁴ In their model, the adult life cycle has eight phases:

Phase 1: of child-bearing age but without children;

Phase 2: with children of pre-school age;

Phase 3: with children of primary school age;

²⁵⁴ Apps and Rees, above n 72, 440.

Phase 4: with children predominantly in the age range 13-15;

Phase 5: with children aged 15 and over and living at home;

Phase 6: of working age where the children have left home;

Phase 7: approaching retirement age;

Phase 8: of retirement age.²⁵⁵

Though Apps and Rees do not explicitly invoke Bourdieu, their conception of the life cycle rests on an assumption that the underlying perspective of the individual can be interpreted as a unit of the social. This aligns with Bourdieu's understanding of the individual and the habitus. Further, this life cycle approach accounts for non-normative family forms including sole women with children.²⁵⁶ As compared to previous life cycle models, the Apps and Rees model better encapsulates the phases of labour in life in relation to those with child care responsibilities and provides a more diverse account of what the 'household' is than traditional accounts.

In addition to this life cycle model, another tool for understanding the construction of parenthood-as-habitus in neoliberal Australia is the concept of transitional labour markets.²⁵⁷ Implicit in any life cycle model is the existence of *transitions* in between the various stages or

²⁵⁵ Ibid.

²⁵⁶ This approach, however, is focused on explaining the life cycle of those with children and does not adequately represent the life cycle of those without children.

²⁵⁷ Transitional labour markets are discussed at more length in Chapter 5.

phases in the model. In the course of a life cycle, a worker may move periodically between unemployment and employment, or between different working-time statuses (part-time, full-time). The neoliberal, ideal worker life cycle model fails to acknowledge and account for these transitional moments in the labour and employment relationship.

However, we can infer from Apps and Rees's counter-narrative life cycle model above that there are many moments in the course a life when transitions may be prompted by any number of personal and public circumstances. Moreover, work may take forms other than that provided by the employer/employee relationship. To understand the construction of parenthood-as-habitus, we need to understand the types of transitions a worker may go through over the course of the life cycle.

The quality and type of transitions available to workers in a given economic regime make up its transitional labour markets (TLMs).²⁵⁸

Transitional labour markets represent the temporal and economic space between waged labour and other life cycle activities. Transitional labour markets are important because they demarcate the relationships between waged and unwaged labour that all agents experience over a lifetime. Each transitional pathway marks a moment within the life course that an agent-labourer's relationship with employment changes,

²⁵⁸ See Schmid, 'Transitional Labour Markets', above n 22, ch 1.

whether moving into or out of employment, or moving between different working-time statuses.²⁵⁹

Without the proper supports and structures, these transitions have the capability to profoundly change the habitus of a worker-parent, with potential for substantial damage arising from unplanned and unexpected transitional outcomes. Mark Freedland argues that the employment relationship encompasses unarticulated expectations and obligations between employers and employees that lack statutory protection and legal backing.²⁶⁰ For example, a common employee expectation might be for continuity of employment after unprotected leave, while common employer expectations might be for the employee to be willing to work uncompensated overtime or take responsibility for work functions while on leave. Workers and employers have a series of expectations that go beyond the written words captured in a statute or workplace agreement, and these expectations often extend to transitional periods between contracts and employment relationships.

²⁵⁹ Immaculada Cebrian, Michel Lallement and Jacqueline O'Reilly, above n 22, 2.

²⁶⁰ Mark R Freedland, *The Personal Employment Contract* (Oxford University Press, 2006) 6.; Although Freedland was writing from the British perspective, his argument is especially applicable to the Work Choices paradigm of labour relations, where 'flexibility' favoured the bargaining position of employers and confined the employment relationship to exclusionary labour transitions. Schmid, 'Transitional Labour Markets', above n 22; See Sue Williamson and Marian Baird, 'Family Provisions and WorkChoices: Testing Times' (2007) 20(1) *Australian Journal of Labour Law* 53; see also Commonwealth of Australia; Human Rights and Equal Opportunity Commission, 'Stretching Flexibility: Enterprise Bargaining, Women Workers and Changes to Working Hours' (HREOC, 1997).

As Schmid notes, significant conflicts can arise in the employment relationship during transitional periods in an individual's work history²⁶¹ if, during those transitions, the worker and employer have differing expectations of what each one owes to the other. Without statutory and common-law protections, this conflict tends to favour employers.

Bourdieu's theory helps us conceptualise the construction of parenthood and parental labour in neoliberal Australia. By reference to the temporal aspects inherent in habitus, as well as the life cycle labour transitions experienced by actual worker-parents in Australia, we can better understand how parenthood emerges in relation to its socio-legal context. This is a crucial step in imagining alternatives in my second research question because it provides us with the gaps, misalignments, and conflicts in need of attention and substantive responses. Chapter 5 of this thesis further elaborates on alternative approaches to time in relation to parenthood in Australia.

V. Looking Forward: Orientations in Time

This thesis is fundamentally future-oriented. Like Bourdieu, I emphasise the embodied present, as inscribed upon by the past, while looking with a certain cautious optimism toward a future of social and legal transformation. Specifically, I consider how past, present and future are held together within the embodied temporalities of

²⁶¹ See Schmid, 'Transitional Labour Markets', above n 22, 7–8.

transformative experiences in motherhood.²⁶² For me, as for Bourdieu, the prioritisation of the present is important because it creates the space of agency, change, and praxis. This prioritisation allows for temporal reflexivity, unlike neo-maternalistic productivism's self-referential hyperfixation on the present moment as a *utility* of a processual historicism and neo-liberalism's future orientation. The cultural critic Lauren Berlant argued in *Cruel Optimism* that the job of historians, including cultural and literary critics, is to illuminate the present with an eye toward the future: to first expose the present as 'a history of the forces that bear on the everyday and [to] interrupt its appearance of apparent homogeneity to reveal cracks in the local experience of life,' and, after that, to (re)organise that present toward alternative imaginaries.²⁶³ Berlant measures the present as an opportunity to

produce some better ways of mediating the sense of a historical moment that is affectively felt but undefined in the social world ... so that it would be possible to imagine a potentialised present that does not reproduce all of the conventional collateral damage.²⁶⁴

Berlant suggests that we can find alternatives to the economisation and financialisation of the neoliberal life cycle within imaginaries of intimacy and sociality. Berlant's reference to critique and alternative imaginaries captures two important aspects of this thesis: first, it

²⁶² I see motherhood as one such transformative experience; see chapter 5 for discussion of the transformative experience.

²⁶³ Lauren Gail Berlant, *Cruel Optimism* (Duke University Press, 2011) 68.

²⁶⁴ *Ibid* 263.

highlights that it matters how time is conceptualised in society, and second, it uncovers the potential social transformations available in that orientation.

Like Berlant, the feminist scholar Kathi Weeks also locates resistance to neoliberal work-based paradigms of living within an affective temporality of the present. Weeks's orientation, though, is self-avowedly utopian.²⁶⁵ Resisting the idea of an immutable, processual future, Weeks declares that a

more hopeful temporality thus requires that we can first wrestle a viable present from the past, that we can alter our relationship to a past that threatens to render us not the authors of the present but merely its artefacts.²⁶⁶

Writing from a deeply hopeful perspective on political futures, Weeks argues that hope requires a cognitive orientation of 'affirmation' as a wilful interpolation toward the past so as to enable a different future.²⁶⁷ This affirmation, according to Weeks, relies on agentic change as 'an active intervention into our ways of inhabiting the past'.²⁶⁸ Weeks wrestles with the imprint of temporalities in agents, and aims at collectively mobilising life and sociality against work. Work, as Weeks sees it, is problematic as the constant orientation to waged work obstructs the ability to 'get a life' – and by that she means a socially and

²⁶⁵ Weeks, above n 169, ch 5.

²⁶⁶ *Ibid* 199.

²⁶⁷ *Ibid* ch 5; 200-01.

²⁶⁸ *Ibid* 201.

communally meaningful life beyond the paradigm of wages.²⁶⁹ Weeks' approach and critique is important to this thesis in two ways. First, it presents a deeply theoretical and ultimately hopeful critique of the work-based paradigm presented by neoliberal ideologies of labour and work. Second, Weeks' is clear that her understanding of 'life' in the sense of 'getting a life' refers not to an individual life, but to 'a life of singularities rather than individualities, a life that is common to and shared with others without being the same as theirs'.²⁷⁰ These threads of critique and social connection work to sharpen the answers to my research questions by guiding my ethos and approach throughout this thesis. Importantly for this thesis, Weeks orientates her work toward understanding how time interacts with society through identifying and critiquing the political-economic structures pressuring agents toward work-based life cycles; Weeks, too, finds the potential for change through collective efforts toward sociality.

Ultimately, this thesis relies on a vision of futurity that resists neoliberalism's processual, linear conceptions of time and upward mobility while developing a novel approach to time and temporalities that account for the subversive potential of a care-based paradigm of time. My approach to legal temporality sets a feminist politics against the gendering function of dominant time and temporalities. This thesis goes beyond simply uncovering how time is conceptualised in law to

²⁶⁹ Ibid 231–32.

²⁷⁰ Ibid 232 internal citations omitted.

acknowledge and emphasise maternal temporalities of care. The result of this is a deeper understanding of the relationship between law and time emerging within the worker-mother laws.

The works of Bourdieu, Berlant, and Weeks all bring together a prioritisation of the present whilst accounting for temporal reflexivity. However, what is missing is an extended engagement with the law and legal temporalities. The socio-legal aspect of this study contributes this legal material and analysis, combined with sociological critique and informed by empirical data. In this thesis, by examining both political economic ideology and care, I have further resisted the divide between the personal and political, providing that the public/private divide is a constructed establishment of governmentality to further the aims of dominant ideologies. This work requires a temporal confrontation with the prominent neoliberal 'solutions' as posed by contemporaneous legal, political, and social manifestations of parental leave, flexible work, and retirement income.

Conclusion

As I seek to uncover the underlying conception of time in Australia's worker-mother laws, I resist essentialising the woman as mother.

Throughout this thesis, I address and critique the related laws and dominant ideologies used to describe, dominate, and influence the time of women with children. In fact, a central tenet of this thesis is engagement in an anti-essentialist ethic while recognising how law, in part, contributes to gendered experiences of time.

This thesis contributes to this evolving body of work by re-reading social science empirical work on labour from a feminist perspective to deconstruct and agitate against the heteronormative temporal hegemony. By referencing the specific temporal experience of maternity within the intersection of law and time, I apply Kristeva's meta-methodology in the Australian labour context with reference to Pierre Bourdieu's *habitus*.

In sum, this socio-legal project uses doctrinal analysis and empirical evidence to better understand the social impact of legislative acts and their gendered relationship to time and temporalities. Further, this thesis applies feminist and temporal theories to analytically challenge neo-maternalistic productivism through the care-related temporalities of disruptive time. I forge my own theories and critiques to three legal frameworks in Australian society: parental leave, flexible work and superannuation. My emphasis is on the intersection of time and gender through the everyday practices and actions of paid and unpaid labour, with a view to the potentially subversive and disruptive practices of maternal care.

Part I
Legal Temporalities

Chapter 2

Gendering Care: Parental Leave

This chapter considers paid and unpaid parental leave in Australia. As the beginning of this thesis' discussion on substantive laws and policies, the chapter starts with the birth or adoption of a child. As I have addressed in the preceding chapters, the legal regime relating to parental leave is the starting point in this thesis to examine new care-based temporalities that are alternative to the ideal of full-time and uninterrupted waged work found in law, policy, and discourse. This marks a period of transition in the life cycle – that from full-time waged worker to carer. The transition to full-time carer (that is, not combined with waged work) may be for weeks, months, or years, or it may initiate new combinations of waged work and unpaid care. It nonetheless marks the period in the life cycle of transition into care-based temporalities. The chapters following discuss how these care-based temporalities manifest in subsequent stages in the life cycle. Chapter 3 addresses the transition back into waged work by focusing on flexible work in Australia and Chapter 4 investigates the outcomes of waged work and retirement in Australia through analysis of the superannuation system.

These care-based temporalities may be crafted and experienced in virtually endless informal and formalised variations of paid and unpaid labour, but our discussion begins with its initiation in parental leave. Unlike flexible work, which is a rearrangement of working time and

patterns, and unlike retirement, which marks the end of the waged work life phase, parental leave provides a temporal suspension from waged work, indicating a resumption in the future. Parental leave demarcates a pre-set period of time away from waged work, but with the legislative intention to provide a segue back into waged work.

This chapter focuses on three main arguments addressing my research questions in relation to parental leave: 'What is the dominant conception of time underlying parental leave?' and 'In what sense is that conception gendered, particularly as it relates to women with children?' By initially setting out the eligibility criteria for both paid and unpaid parental leave, the first argument relates to the duration of paid parental leave, which is 18 weeks at federal minimum wage. However, the policy documents largely informing the paid parental leave legislation expressly enumerated that 26 weeks is the ideal minimum period of leave for parents. Therefore, this first argument focuses on the funding gap between the 26 weeks minimum suggested leave and the 18 weeks of statutory parental leave pay and how this gap is justified in the policy literature through 'co-funding'. The second main argument in this chapter addresses who the leave is targeted at and how that demographic is actually excluded by eligibility criteria related to 'genuine' ties to the waged workforce. This legal regime leaves women outside of the traditional labour market, or those with closely spaced children, ineligible for paid parental leave. By drawing on the above two arguments and critically examining the legal and policy documents

informing the paid parental leave system, this chapter then argues, thirdly, that the legal temporalities of parental leave construct parental leave as a neoliberal, heteronormative institution that perpetuates the dual ideologies of the ideal worker and intensive mother. This chapter will explain the legal regime relating to parental leave, establish the reasons for, and effects of, co-funding of parental leave, and explore how the legal regime sets up assumptions and practice of time that create material difficulties for a diverse range of women. Effectively, the underlying construction of legal temporalities in parental leave relies on neo-maternalistic productivism. This construction of time heavily contributes to the gendered uptake of care responsibilities and waged labour.

Introduction

In Australia, having children has been identified as a pivot point for women's economic parity with men. Although the gender pay gap narrows before children, after having children women earn significantly less than their male counterparts with children, and this inequality compounds over the life cycle.²⁷¹ Successive Australian governments have responded to this enduring disparity by adopting a series of laws and policies designed to rectify the gender inequalities associated with

²⁷¹ See Tanya Livermore, Joan Rodgers and Peter Siminski, 'The Effect of Motherhood on Wages and Wage Growth: Evidence for Australia' (2011) 87 *Economic Record* 80; see also Workplace Gender Equality Agency, Commonwealth of Australia, 'Gender Pay Gap Statistics' (Workplace Gender Equality Agency, March 2016) <https://www.wgea.gov.au/sites/default/files/Gender_Pay_Gap_Factsheet.pdf>.

having children. One such set of legislation provides for parental leave and parental leave pay. The purpose of having a system for parental leave is multi-faceted: it ensures women can have enough time to recover from childbirth (where applicable), it allows for parental bonding and early care of an infant or child in the earliest stages, and it provides a temporally defined labour shift into infant or child care. But in Australia, the system that has emerged for providing parental leave is deeply problematic. As a system centred on waged work, neo-maternalistic productivism privileges productivity over care and builds a system of parental leave to reflect this hierarchy through the legal construction and control of time. By privileging productivity and waged work, the parental leave scheme ignores the ways in which care work permanently disrupts the experience and construction of time by those with caring responsibilities.

This construction of time takes on an additional problematic dimension when analysing the expectations and realities of men as fathers. Despite surveys showing that most Australians think that a father should be 'as heavily involved in the care of his children as the mother', few Australian fathers are actually so involved.²⁷² When a couple has a child, the Australian trend is for an increased, longer-hours working time load for fathers as women decrease their working time to provide primary

²⁷² *Australian Social Attitudes: The First Report*, above n 194, 59.

care.²⁷³ The quantity of time that a man spends alone with his children is dramatically less than the time that women spend alone with their children, with one study showing the figure to be just over 40% of women's alone time with children.²⁷⁴ However, the quality of time-use is also markedly different: men tend to spend much more time in leisure (eg doing hobbies, socialising, and in entertainment activities) than women, and this leisure time is much less likely to be in the presence of children.²⁷⁵ This pattern begins at birth and in early childhood, where women experience extended periods of parental leave that cannot be shared with a father or partner. Women are often left as sole carers, without assistance, because they are either the only parent eligible to take parental leave or they are left with the constrained choice to become the primary carer. The legal structures of parental leave do not provide for both parents to be equally involved in the care and raising of their young children, and relegate care largely to women without extended assistance from fathers or partners. The legal temporalities of

²⁷³ Craig, 'How Employed Mothers in Australia Find Time for Both Market Work and Childcare', above n 5; Pocock, 'Labour Market "Deregulation" and Prospects for an Improved Australian Work/Care Regime', above n 23, 75; see also Barbara Pocock, *The Labour Market Ate My Babies: Work, Children and a Sustainable Future* (Federation Press, 2006).

²⁷⁴ Lyn Craig and Abigail Powell, 'Non-Standard Work Schedules, Work-Family Balance and the Gendered Division of Childcare' (2011) 25(2) *Work, Employment & Society* 274, 281-82; see also Lyn Craig and Killian Mullan, 'Shared Parent-child Leisure Time in Four Countries' (2012) 31(2) *Leisure Studies* 211; Craig, 'Does Father Care Mean Fathers Share?', above n 5; Craig and Mullan, 'How Mothers and Fathers Share Childcare A Cross-National Time-Use Comparison', above n 4.

²⁷⁵ Craig and Powell, above n 234; Craig, 'Does Father Care Mean Fathers Share?', above n 5; Craig and Mullan, 'Shared Parent-child Leisure Time in Four Countries', above n 234.

parental leave reflect the state's attempted control of time and its preference for neo-maternalistic productive uses of time. This chapter suggests wresting that control of time away from the state and its emphasis on productivity, instead recognising how time is embodied in social agents and transformed by care. Law and policy should instead construct parental leave based on maternal rhythms of care.²⁷⁶

At present, the parental leave system in Australia comprises two statutory components:

(a) *statutory parental leave*, which is protected absence from waged work for 12 months after childbirth, extendable up to 24 months, as governed by the *Fair Work Act 2009* (Cth); and

(b) *statutory parental leave pay*, which is the provision of the federal minimum wage for up to 18 weeks for the primary carer.²⁷⁷

These two components of the parental leave system operate independently, are subject to separate eligibility criteria, and take different approaches to confining and defining time around maternity and caring responsibilities. For example, the *Fair Work Act 2009* (Cth)

²⁷⁶ See also Chapter 5 for a detailed discussion of these care-based temporalities.

²⁷⁷ *Paid Parental Leave Act 2010* (Cth); the *Paid Parental Leave and Other Legislation Amendment (Dad and Partner Pay and Other Measures) Act 2012* (Cth) provides up to two weeks of paid leave at the minimum wage for eligible fathers or partners. Employers may, and many do, provide more generous entitlements. However, because these are often negotiated in workplace agreements and awards, there are innumerable variations. Currently existing in tandem with the statutory system, but operating above and beyond the statutory minimum, these additional entitlements are workplace-specific. Because the statutory system applies to all eligible workers and is not workplace-dependent, this thesis will focus on the entitlements provided by statute.

provides for up to 24 months of leave, while the *Paid Parental Leave Act 2010* (Cth) provides 18 weeks of pay. The legislated objectives of the Paid Parental Leave (PPL) scheme are to: (a) signal that taking time out of the paid workforce to care for a child is part of the usual course of life and work for both parents; and (b) promote equality between men and women and balance between work and family life.²⁷⁸ However, in their current form, parental leave provisions in Australia construct gendered uptake of caring responsibilities by relegating care in the earliest months to one parent, usually the mother.

Although the parental leave provisions were enacted with the intent of promoting gender-time parity and softening the economic burden of motherhood,²⁷⁹ in fact, they disproportionately handicap certain groups of women. The centrepiece of parental leave pay legislation, Australia's *Paid Parental Leave Act 2010* (Cth), came into effect 1 January 2011 and grants eligible parents²⁸⁰ 18 weeks of parental leave pay at federal minimum wage. The authors of the Act use gender-neutral language around parental leave, as seen in its reference to the 'primary carer' of a child as 'the person [who] meets the child's physical needs more than anyone else in that period.'²⁸¹ Yet the gender neutrality of this language

²⁷⁸ *Paid Parental Leave Act 2010* (Cth) s 3A(1B).

²⁷⁹ *Ibid.*

²⁸⁰ To be eligible for parental leave pay, the applicant must be a 'primary carer' who meets the work, residency, and income tests. *Ibid* pt 2-2. These are described in detail below.

²⁸¹ *Ibid* s 47.

belies the statute's heteronormative preference for birth mothers found in Part 2-2 of the Act and further obfuscates Australia's gender-specific norm of women as mothers and primary carers. Indeed, Australia remains a society where the overwhelming majority of primary carers are women.²⁸² As I argue in this chapter, the legislation regarding parental leave pay ('PLP') rewards workers who spend more time working for wages, and penalises those workers who take time for unpaid care work. In short, the framing of these parental leave provisions sidesteps the very sharing of care that it purports to enable.²⁸³ What is more, the provisions ultimately fail to promote gender-time parity for the reasons outlined in this chapter.

The gender-based inequality in Australian parental leave – the exclusion of (mostly female) unwaged primary carers from the benefits provided to those who engage in more waged work – rests on the assumption that hetero-capitalistic, productivistic uses of time ought to be rewarded financially. That is, women with 'genuine' ties to the waged workforce

²⁸² This applies to women as carers of children and adults, including the elderly. See Lyn Craig, *Contemporary Motherhood: The Impact of Children on Adult Time* (Ashgate Publishing, Ltd., 2012); See also Australian Bureau of Statistics, '4150.0 - Time Use Survey: User Guide, 2006', above n 90; Australian Bureau of Statistics, 'Women's Participation in Paid Work Lower than Men's (Media Release)' <<http://www.abs.gov.au/ausstats/abs@.nsf/products/BBFFAEB8C564175BCA257CD20025F9D9?OpenDocument>> Therefore, when I refer throughout this chapter to 'maternity leave' rather than 'parental leave,' I do so because of the empirical evidence that women take an overwhelming majority of parental leave.

²⁸³ See Commonwealth of Australia, Productivity Commission, *Paid Parental Leave: Support for Parents with Newborn Children* (Productivity Commission, 2009) [2.25].

who are the secondary earners in a household are eligible for parental leave. But women who diverge from this neo-maternalistic productivism, either prior to parental leave or during extended parental leave, are penalised by non-payment and loss of work entitlements. This draws a line with neoliberal value systems that reflect the priority of capital and view time as a commodity.²⁸⁴ According to this hegemonic perspective, time should be productively 'used' or rationally 'spent' rather than lived and experienced. And those persons who spend their time in steady productivistic waged labour receive parental leave pay, whereas those who allow their waged labour to be displaced or disrupted by unpaid care and other unpaid or disrupted labours do not.

The legal construct of parental leave pay is anchored to 'clock-time', but not simply to 'clock-time' as anything that can be measured by the clock.²⁸⁵ If that were the situation than most activities including care could be measured by a linear, quantifiable clock-time. Rather, the legal temporality of statutory parental leave pay refers to time-disciplined activities, 'genuine' uses of time as those that are subject to 'objective time' as that which the clock can regulate. Think of the starting and ending of the work day as provided by the punching-in and punching-out of a shift, dictated by the clock; productivity targets, subject to delivery times and output timelines; global financial markets subject to the time zones of dependent stock exchanges; and other forms of

²⁸⁴ See, eg, Brown, above n 105.

²⁸⁵ See Adkins, above n 209.

quantifiable productivity.²⁸⁶ This neoliberalisation of clock-time focuses on the individual labour inputs and outputs, rather than any other social construction of time. As discussed in the preceding chapter, domestic time, too, became subject to the same rationalities of neoliberalism. As the housewives of the 1950s became increasingly self-reliant through various cleaning and cooking technologies, this allowed for 'efficiency' to rule domestic time as well as industrial time.²⁸⁷

As I proposed in Chapter 1, Elizabeth Freeman's 'chrono-normativity' refers to the use of time to orientate human bodies toward institutional values and forces.²⁸⁸ Neo-maternalistic productivism, also mentioned in the preceding chapter, refers to the specifically neoliberal and heteronormative values and expectations of time-use that emphasise maximum productivity as the dominant goal. Though chrono-normativity can privilege any dominant conception of time, the contemporaneous approach identifies time as the primary tool to structure human relations of power to maximise individual bodies' productivity and future-orientation to waged work. In this chapter, I argue that Australia's framing of their parental leave pay laws rests on neo-maternalistic productivism. The laws rest on the assumption that people should spend their time engaging in the neoliberal economy in

²⁸⁶ See Grabham, 'The Strange Temporalities of Work-Life Balance Law', above n 1 for a discussion of legal temporalities and a unit-driven clock-time.

²⁸⁷ See Freeman, above n 71, 39–44.

²⁸⁸ Ibid 3.

modes that privilege waged work and minimise the impact of care-based transitions. Doing so requires parents to remain wholly within the legal temporalities enumerated by the Paid Parental Leave Act.

The concept of chrono-normativity as advanced by Freeman interprets the work of Pierre Bourdieu. As discussed in more detail in Chapter 1, Bourdieu understands time to be constructed as a future-oriented practice that does not simply take place in time, but actually *creates* time through the temporal referents of practice that simultaneously look forward in time and backwards to social signals of time to create the present. This understanding of practice as a temporal mechanism is anchored in Bourdieu's concept of the habitus. This relationship between the habitus, practical action, and temporalities is what Bourdieu calls on when he theorises the embodiment of temporalities. In this chapter, I expand on Bourdieu's theorisation of temporal embodiment to conceptualise the construction of time for labouring parents. Identifying the problematic issues in the existing legislation as ones based on time, I suggest an alternative temporal model drawing on a Bourdieusian analytics of care-based temporalities that wrests control of time from neo-liberalised institutions and re-installs that power in the bodies of social agents.

In examining Australia's parental leave pay laws, this chapter explores what these laws reveal about subsequent Australian governments' hegemonic understanding of time, and imagines an alternative in which economically 'productive' uses of time are not privileged over all

others – an alternative in which value is also placed on forms of time, such as care-based temporalities, that are disruptive, ‘disingenuous’, and transformative.²⁸⁹ Doing so would challenge the existing structure of parental leave from one based on a singular absence from waged work to one based on enduring relationships with employment over multiple, undulating engagements across the waged-work and care life phase.²⁹⁰

The chapter unfolds as follows. First, in Section I, I briefly describe the Australian parental leave systems of leave and pay as codified by the legislation, particularly the eligibility requirements that individuals must meet to qualify for parental leave pay. I also provide an overview of the Productivity Commission’s report which largely informed the construction of the *Paid Parental Leave Act 2010* (Cth). In Section II, I focus on addressing my research questions by analysing the reports and legislation to show their basis in hetero-capitalist assumptions and their consequent shortcomings. By focusing on the co-funding model promoted by the Productivity Commission and codified in the *Paid Parental Leave Act 2010* (Cth), and the work test as an exemplar, this section constructs claims about the underlying conception of time in the Act. This section goes on to consider the Productivity Commission’s

²⁸⁹ See Chapter 5 for an in depth discussion of disrupted temporalities and transformative experiences. See also Laurie Ann Paul, *Transformative Experience* (Oxford University Press, 2014).

²⁹⁰ See also Chapters 5 for a discussion of alternatives to hegemonic time in transitional labour markets.

recommendation report and its prioritisation of 'genuine' attachments to waged work to demonstrate the reflexive reliance on and construction of neo-maternalistic productivism. Identifying this 'genuine' attachment as being about gendered notions of time, I investigate the notion of the disingenuous in terms of labour, time, and chrono-normativity. In doing so, I suggest a framework of three temporal transitions around parental leave and waged work, applying this framework to critique 'genuine attachment' to waged work. Recognising 'disingenuous' attachments as connections to the labour market that do not meet the temporal requirements of neo-maternalistic productivism, this sub-section uses disingenuous attachments to highlight the nature of who is excluded from the scheme. This section concludes by drawing on the two arguments above to demonstrate how the terms of parental leave pay in Australia are dictated by neo-maternalistic productivism and uses chrono-normativity as the preferred mode of social inculcation. I examine how problems arise with the legislation when parental practices of care disrupt waged work-based trajectories through the proliferation of the dual narratives of the ideal worker and intensive mother. I conclude with the outcomes of the chapter, namely, that the current legal construction of parental leave in Australia provides the temporal foundation for the gendered uptake of particular labours, specifically care and waged work.

I: Legislation on Parental Leave in Australia

Eligible parents in Australia are provided unpaid parental leave by the *Fair Work Act 2009* (Cth),²⁹¹ and paid parental leave by the *Paid Parental Leave Act 2010* (Cth). Claimants for PLP must be the birth mother or an eligible secondary claimant, must meet residency and visa requirements, must satisfy the work test, and must fall within enumerated income limits.²⁹² The paid parental leave ('PPL') scheme arose out of the 2008 Productivity Commission Report²⁹³ recommending a more coherent federally mandated parental leave pay system, discussed below.

In Australia, eligible parents have 12 months of parental leave (extendable up to an additional 12 months), 18 weeks of 'parental' leave pay (usually taken by the birth mother), and 2 weeks of 'Dad and Partner' pay ('DAPP').²⁹⁴ These components are legislatively and operatively independent. As of November 2011, Australian women took, on average, 32 weeks of leave from paid employment upon the birth of a child.²⁹⁵ Where eligible, 18 weeks of that leave would have

²⁹¹ See esp *Fair Work Act 2009* (Cth) s 70.

²⁹² DAPP has the same eligibility criteria. See *Paid Parental Leave Act 2010* (Cth) pt 2-3 and s 115BL. See also Chapter 1 for a brief overview of the parental leave scheme's requirements for employment hours.

²⁹³ Commonwealth of Australia, Productivity Commission, above n 243.

²⁹⁴ *Fair Work Act 2009* (Cth) ss 70, 76; *Paid Parental Leave Act 2010* (Cth) s 4; *Paid Parental Leave and Other Legislation Amendment (Dad and Partner Pay and Other Measures) Act 2012* (Cth), respectively.

²⁹⁵ Australian Bureau of Statistics, '4102.0 Australian Social Trends' (4102.0, 20 November 2013)

been paid at federal minimum wage by the PPL scheme. Though unpaid parental leave is available to all eligible parents, mothers are more likely than fathers to take unpaid leave.²⁹⁶ Nevertheless, over 80% of fathers and partners take leave related to the birth or adoption of a child – albeit this leave is more likely to be short and paid.²⁹⁷ In cases where both members of a couple meet the eligibility requirements for unpaid parental leave, then both may take a maximum of eight weeks concurrently.²⁹⁸ The length of leave taken by fathers varies significantly by sector; a great majority of private sector employees took two weeks or less (70%), but public sector employees tend to take longer leave.²⁹⁹ Statistics on take-up of DAPP are still being calculated, but the first financial year in operation (1 Jan 2013 - 30 June 2013) saw 27,240 claimants access DAPP.³⁰⁰ DAPP can only be taken in conjunction with

<<http://www.abs.gov.au/AUSSTATS/abs@.nsf/allprimarymainfeatures/5849F483A2C5646ECA257C9E00177D59?opendocument>>.

²⁹⁶ See, eg, Jennifer Baxter, 'Parents Working out Work' (Australian Family Trends 1, Australian Institute of Family Studies, April 2013) <<https://aifs.gov.au/publications/parents-working-out-work>>; Commonwealth of Australia, Department of Social Services, 'Paid Parental Leave Scheme: Review Report' (Department of Social Services, June 2014) <https://www.dss.gov.au/sites/default/files/documents/06_2014/paid_parental_leave_scheme_review_report.pdf>; Australian Human Rights Commission, 'Investing in Care: Recognising and Valuing Those Who Care', above n 50.

²⁹⁷ 81%; Australian Bureau of Statistics, '4102.0 Australian Social Trends', above n 255.

²⁹⁸ Fair Work Act 2009 (Cth) s 72.

²⁹⁹ Commonwealth of Australia, *4102.0 Australian Social Trends - Pregnancy and Work Transitions* (20 November 2013) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4102.0Main+Features10Nov+2013>>.

³⁰⁰ Department of Social Services, 'PPL Evaluation: Final Report' (Institute for Social Science Research, November 2014) 1

unpaid leave (thus barring double payments from paid leave and the DAPP scheme).³⁰¹ Although the introduction of DAPP marks an important change in parental leave entitlements for couples and two-parent families, my analysis will focus on the temporality of PLP as it is predominantly taken by women.³⁰²

Parental Leave Pay Scheme: A Product of the Productivity Commission Report

The current parental leave system in Australia, as codified in the *Paid Parental Leave Act 2010 (Cth)*, arose in large part from a report commissioned by the government and conducted by the Productivity Commission.³⁰³ The report considered the ‘economic, productivity and social costs and benefits of providing paid maternity, paternity and parental leave’ in Australia.³⁰⁴ To develop the report, the Productivity Commission investigated how women could ‘balance’ employment with the ‘important job’ of child-rearing, and identified child and maternal health and welfare as the primary goal of the parental leave pay.³⁰⁵ As a government agency, the Productivity Commission advises

<https://www.dss.gov.au/sites/default/files/documents/03_2015/finalphas_e4_report_6_march_2015_0.pdf>.

³⁰¹ This is in direct contrast to PLP which is crafted to exist concurrently with existing employer-funded parental leave pay. See *Paid Parental Leave Act 2010 (Cth)* 3A(3).

³⁰² See, eg, Australian Bureau of Statistics, ‘Women’s Participation in Paid Work Lower than Men’s (Media Release)’, above n 242.

³⁰³ Joint Media Release Treasury Portfolio Minister Wayne Swan No. 010 2009).

³⁰⁴ Commonwealth of Australia, Productivity Commission, above n 243, XVI.

³⁰⁵ See *ibid* XXV.

the Government on matters related to 'industry, industry development, or the productive performance of the economy as a whole'.³⁰⁶ The statutorily mandated policy guidelines instruct the Commission to give specific regard to reducing regulation of industry³⁰⁷ and improving 'overall economic performance of the economy through higher productivity in the public and private sectors'.³⁰⁸ When the Productivity Commission completed its report in 2008, its charge was not only to 'ensur[e] strong and sustainable economic growth', but also to protect care work: specifically, investigate how 'to make it as easy as possible for working mums to balance their employment with the important job of raising a new generation of Australians'.³⁰⁹ However, in this report we see how the Productivity Commission is particularly concerned with hetero-capitalist values specifically expressed by parents' 'genuine attachment to the labour market.'

As previously mentioned, leave provided under the *Fair Work Act 2009* (Cth) operates independently from pay provided by the *Paid Parental Leave Act 2010* (Cth). The Productivity Commission explicitly rejected efforts to bring the work eligibility schemes of unpaid and paid parental leave into harmony: 'The Commission found that 12 continuous months with a single employer has been accepted as a reasonable qualifying

³⁰⁶ Productivity Commission Act 1998 (Cth) s 6(2).

³⁰⁷ Productivity Commission Act 1998 (Cth) Sec 8(1)(b).

³⁰⁸ Productivity Commission Act 1998 (Cth) s 8(1)(a).

³⁰⁹ Joint Media Release Treasury Portfolio Minister Wayne Swan No. 010 2009).

period for unpaid parental leave to balance the burden on the employer to provide a significant period of leave and return to work guarantee'.³¹⁰ Rather than address the eligibility and temporal discrepancies, the Commission noted that parents can simply negotiate employment contracts directly with their employer for unpaid leave and a return to work guarantee³¹¹ – though the Commission also noted that only about half of employees managed paid parental leave as a result of privately negotiating with their employees.³¹² In fact, the Commission conceded that low-income, financially constrained families are particularly at risk of unpaid leave absent a statutorily mandated system, given their 'low representation in privately negotiated paid parental leave schemes'.³¹³ Further, employers are under no legal obligation to agree to an employee's proposal for paid or unpaid leave, subject to discrimination limitations.³¹⁴

This privileged approach to parental leave leaves lower-income workers who have children even more precariously placed. It also, however, may leave families that have subsequent children within a relatively

³¹⁰ DSS at 44.

³¹¹ DSS at 44.

³¹² PC Report, xv.

³¹³ PC Report, xxii.

³¹⁴ However, refusal to provide any leave may constitute indirect sex discrimination under the *Sex Discrimination Act 1984* (Cth), as well as under certain state legislation. Additionally, it may raise the issue of carers discrimination under those acts as well. See also Caroline Lambert, 'Reproducing Discrimination' in Margaret Thornton (ed), *Sex Discrimination in Uncertain Times* (ANU Press, 2010) 153.

short period of time in precarious financial and employment positions. As of March 2014, parents who have children closer together may count previous periods of PPL towards 'work' for the 'work' portion of the eligibility test for subsequent PLP. This was not the case prior to March 2014, and unpaid parental leave still does not count towards the 'work' test for PLP. Accordingly, a woman who has children relatively close together may not meet the 'work' test, despite acknowledgement by the Rudd Government that childrearing is 'an important job'.³¹⁵

While receiving PLP, the claimant must be 'caring' for the child and cannot be engaged in waged labour – nor can the PLP be stopped and then started again; it must be paid in one continuous block. This effectively puts a block on waged work during periods of parental transition, and disallows any sort of experimentation combining patterns of waged work and care. Paid parental leave (as both PLP and DAPP) is based on birth mothers as the 'primary claimant', meaning that the eligibility test begins first with the birth mother; even where she is not taking any of the parental leave pay, or only a portion of it, she must first pass the eligibility criteria before the secondary applicant can even begin the process. This is most evident in the way the income tests are structured: first, the birth mother's income is tested, and only if her income falls below the cut-off amount is her partner's income tested.

³¹⁵ Joint Media Release.

Under ordinary circumstances (ie barring death or serious illness), only birth mothers are eligible as ‘primary claimants’ for PLP purposes.³¹⁶ In practice, more than 99% of all recipients of PLP are female if we take the 2012-13 financial year as indicative.³¹⁷ If the primary claimant (birth mother) returns to waged work, then the following people may qualify as ‘secondary claimants’ given both the primary claimant and the secondary claimant meet the same eligibility requirements:

- 4) · the birth mother’s partner (e.g. the birth father), or
- 5) · the child’s other legal parent where the birth parents are not a couple, or
- 6) · the partner of the child’s other legal parent.³¹⁸

The income threshold for PPL eligibility is tied first to the birth mother’s income, and then to the income of any secondary claimant. This requirement reflects an assumption that birth mothers will be earning less than their partners or other secondary claimants.³¹⁹ In other words, if a secondary claimant would like to take PPL, the scheme looks first at the birth mother’s income; if her income falls below the stated threshold, then the scheme will consider the income of the secondary claimant. As of 2015, the income threshold is set at AUD \$150,000. Anyone earning

³¹⁶ Commonwealth of Australia, *Paid Parental Leave Guide: 2.2.7 Primary Carer Is Person Other than Birth Mother for PLP Purposes* (20 September 2016) Paid Parental Leave Guide <<http://guides.dss.gov.au/paid-parental-leave-guide/2/2/7>>.

³¹⁷ Department of Social Services, above n 260, 28.

³¹⁸ *Ibid* 52.

³¹⁹ Statistically, women with children earn, on average, less than any other group. ABS

over \$150,000 is not eligible for PLP.³²⁰ By setting the income threshold at \$150,000 tied first and foremost to the income of the birth mother, this assumes that women are secondary earners in double income households; a woman who earns more than \$150,000 as a secondary earner in a dual-income household is presumably sufficiently supported by virtue of her and her partner's high combined incomes (and can thus 'co-fund' as the PC put it).³²¹ However, the threshold takes no account for high income-earning, single-income households, or households where the birth mother is the primary earner.³²²

In constructing this income test, the Productivity Commission identified 'genuine' attachments to waged work as a 'critical' prerequisite to any parental leave pay.³²³ Defining this 'genuine' attachment to waged work in hegemonic temporal terms, the subsequent *Paid Parental Leave Act 2010* (Cth) retained the recommended work test for pay eligibility. The work test averages out to just over 8 hours of waged labour a week. To the unencumbered worker in a maintenance transitional labour

³²⁰ Though she or he may be eligible for unpaid parental leave or parental leave pay as provided privately by her employer.

³²¹ I am intentionally ignoring an argument that late-capitalist economies may commodify these higher-earner households to an even more extreme degree, and defer instead to the evidence that demonstrates these households may have access to generous parental leave provisions provided by private employment contracts; see also Commonwealth of Australia, above n 259.

³²² Admittedly, these are a minority of Australian households; see Australian Bureau of Statistics, '4102.0 Australian Social Trends', above n 255.

³²³ Commonwealth of Australia, Productivity Commission, above n 243.

market,³²⁴ this is a low threshold and speaks to the successes of hetero-capitalistic chrono-normativity in shifting societal norms of time. Time experienced in any other form of labour would not receive PLP.

Disrupted temporalities around care and other precarious labour situations are effectively treated as ‘dead time’³²⁵ – unproductive and unremunerated – unless ‘genuine’ work ties are maintained, signalling the future orientation of chrono-normative workforce attachment after ‘reasonable’ parental leave time is taken.³²⁶ But in order to qualify for leave at all, the worker must be engaged in waged labour.

Characterising time away from waged labour as ‘leave’ renders the time impermanent and transient, while ignoring the ways in which temporalities become disrupted by caring. The concept of ‘leave’ normally signals a temporary absence from paid work, and the concept of remunerating that absence remains a legal construct. The bracketing of legal time for paid and unpaid parental leave is most starkly illuminated by the way time interacts with eligibility for PLP for subsequent children and other women outside of the traditional labour market. These women, for whom much of the PPL Act was constructed,³²⁷ are most likely to suffer life-long consequences that

³²⁴ See Chapter 1 for an introduction to transitional labour markets and Chapter 5 for additional discussion.

³²⁵ See Chapter 1’s discussion of Bourdieu and dead time.

³²⁶ For the Productivity Commission’s argument for ‘reasonable’ absence from work and ‘genuine’ workforce ties, see Commonwealth of Australia, Productivity Commission, above n 243, esp 2.25.

³²⁷ This is discussed in more detail in the following subsections.

compound over the life cycle as a result of being less likely to re-enter the workforce after extended absence from waged labour, or to re-enter at a position with lower pay and benefits than what they otherwise would have had they remained engaged in a maintenance-based transitional labour market.³²⁸ The PPL scheme will not apply if a parent cannot demonstrate a 'genuine' and future-orientated attachment to waged work.

The 'anxiety' around compensating a worker that is not engaged in waged work, one who is on parental leave, is reflected in the legislation: first, strict eligibility criteria were established and subsequently reinforced, second, the paid leave period is for only 18-weeks – the lowest of all OECD countries offering paid parental leave,³²⁹ third, the compensation for parental leave is the lowest possible minimum wage. However, once the parent shifts beyond the protected federal leave period (if she qualifies at all), she shifts into precarious parental leave within the established chrono-normative framework.³³⁰ Compare parental leave to paid sick leave or annual leave. During sick leave or annual leave, there is no implicit assumption, expressed expectation, or popular rhetoric surrounding work or labour occurring during this

³²⁸ See preceding chapter for additional discussion on transitional labour markets.

³²⁹ The USA remains the only OECD country that does not offer universal paid parental leave.

³³⁰ This was outlined in the legal-temporal relationships to parental leave at the beginning of Section II.

period away from waged work. Workers are presumed to be out sick or on holiday (respectively), and are paid at a full wage to do so.

However, parental leave, which is a care-based leave, is characterised and valued very differently despite demonstrated affiliations and commitments to waged work and financial markets. The workers, despite established affiliations and despite being expected to engage in care work, are not paid at full pay but instead at the federal minimum wage.

II: Parental Leave as Neoliberal and Hetero-Capitalist

Set within the political economic context of contemporaneous Australia, parental leave pay provides an opportunity for eligible women to receive federal minimum pay during a period of parental leave. The Productivity Commission accepted 26-weeks of parental leave as the ideal minimum for the health and welfare of the child, but ultimately proposed funding 18 weeks at federal minimum wage. As a result, waged workers will shift through multiple legal-temporal relationships when transitioning into the care-based temporalities of providing care in early childhood. The swing out of waged work and into unpaid care work, then, gives rise to three legal-temporal relationships to parental leave in Australia:

- 1) **Statutory paid parental leave.** This type of leave (PLP and DAPP) only exists where the applicant parent is also a waged labourer to a sufficient degree to satisfy eligibility requirements, as discussed above. This type of leave has been legislatively designed as a bracket set out from the broader context of waged labour.

- 2) **Unpaid parental leave.** In this type of leave, financial remuneration is not provided. Instead, the parent accrues immaterial capital in the form of parental care. Parents will usually transition into unpaid parental leave either from or to paid parental leave. This type of leave is taken by parents who have the financial, social, and employment capital to afford unpaid parental leave. Like the paid parental leave, this type of leave has also been legislatively designed as a bracket set out from the broader context of waged labour; it is unavailable to workers without sufficient and sustained workforce ties.

- 3) **Disrupted and precarious parental leave.** This type of leave is separate from the waged work trajectory and refuses an ideal worker paradigm framed around waged work. This 'leave' is not legislatively mandated or protected and consist of other leave entitlements (if available), negotiated unpaid leave, or accepting periods of unprotected absence from employment. These periods of non-employment may be for undefined periods of time resulting from a move to casual or precarious labour. This will be the type of leave if parents either do not qualify for either of the two other leave types, or if they have exhausted their above leave allotments. Parents who take this type of leave do not qualify for protected leave, or have exhausted the other types of leave – it therefore can begin as soon as the birth or adoption, or begin once another type of leave is exhausted. Being precarious necessarily renders the claimant more vulnerable to the preferences of her workplace. As a result, she is more reliant on her workplace to grant her leave and work. This type of leave becomes precarious without statutory protections of employment.

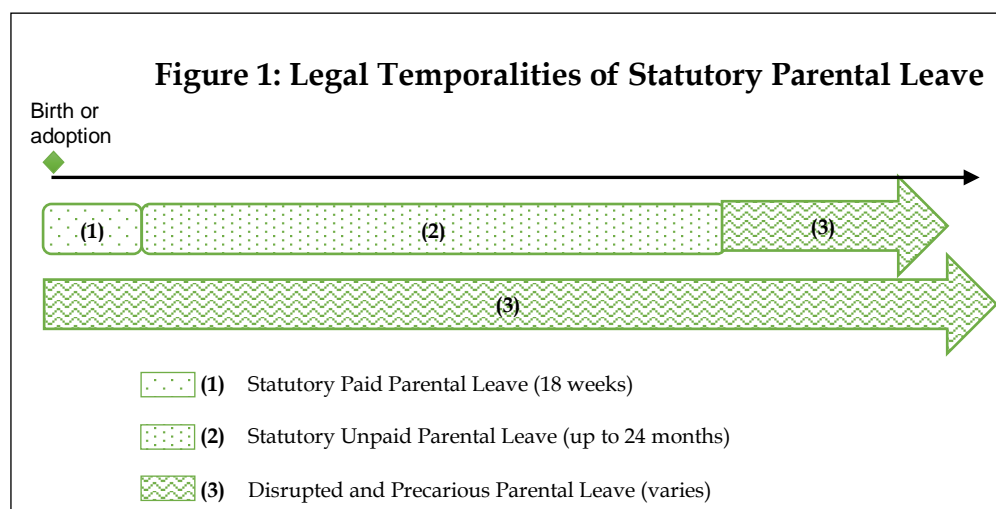


Figure 1 depicts the three types of leave on an imagined parental temporal trajectory. It demonstrates how disrupted and precarious leave can begin either when one of the other two types of leave ends or from birth or adoption if the applicant is ineligible for statutory parental leave.

A parent on leave from waged labour will necessarily experience at least one of these temporal shifts. For the parent who experiences two or all three types of parental leave, the transition between them may not be linear or sequential. Although disrupted parental leave occurs only after the other parental leaves have been exhausted, paid and unpaid parental leave may be exchanged in time – a parent can start out on unpaid parental leave, transition to PPL, then transition back to unpaid parental leave. Unpaid parental leave is the most temporally flexible – it may be shifted around, taken in chunks around paid parental leave. But it may not, at the time of writing, be stopped and started again. Once a parent commences statutory parental leave – either paid or unpaid – they must remain on parental leave until they return to work in an agreed upon full or part-time capacity. Any leave taken after resumed waged work would be in other forms of leave, either carers' leave, holiday, sick leave, and the like. This 'take all at once' approach does not allow for disrupted temporalities, nor does it allow for other unexpected transformative experiences and temporalities of care. Instead, in setting the boundaries of the legal-temporal relationships as a 'take all at once' approach, it privileges waged work above care,

regardless of how that characterisation may impact on waged work and care obligations in the future. Furthermore, it does little to alleviate the financial burden of funding early parental care between 18 weeks of federal minimum wage and additional unpaid or precarious parental leave.

‘Co-Funding’ the Gap?

The Productivity Commission defended the provision of an 18-week pay period because parents (note the plural form) were expected to ‘co-fund’ parental leave arrangements through savings, reduced consumption, and ‘borrowing on the basis of housing equity’.³³¹ The latter funding source, ‘housing equity,’ is presumed to rely on a distinctly chrono-normative approach to parental leave – time is used as an economic tool to maximise productivity and is closely aligned with household debt. In assuming co-funding through housing equity and other sources, the Commission concluded, without reference to financial data or evidence, that an 18-week period of leave would allow most parents the opportunity to extend leave to 26 weeks.³³² This conclusion presumes a household that is not simply heteronormative two-parent and double-income, but also home-owning, in possession of significant savings, and consistently living a comfortable lifestyle with sufficient

³³¹ Department of Social Services, above n 260, [4.6].

³³² Ibid.

buffer to 'reduce consumption'.³³³ The Commission suggested that because parents 'already use many co-funding options', 18 weeks of parental leave pay would allow the 'overwhelming majority of parents the option of taking at least 26 weeks of leave without undue financial stress'.³³⁴

However, the Commission's assumption that parents can and do co-fund their parental leave seems to miss the point. Of course parents were self-funding their leave at the time that the Commission did their report because at that time there was no federally funded parental leave pay. Without a funded parental leave system, parents had no choice but to cobble together their own arrangements in order to provide parental care and to allow for maternal recovery (where necessary). To suggest that these improvisations amounts to a sort of 'co-funding' scheme is to ignore the temporality of care prior to a funded leave system without high quality, accessible, and affordable child care, a system preferencing women's return to work required parents be left with no choice but to privately fund what little leave they could afford on their own or with the assistance of employers and/or family resources. Additionally, constructing a leave system that continues to rely on the previously used co-funding model ignores how it relies on a classed

³³³ See also Fiona Allon, 'The Feminisation of Finance: Gender, Labour and the Limits of Inclusion' (2014) 79 *Australian Feminist Studies* 12.

³³⁴ Commonwealth of Australia, Productivity Commission, above n 243, [4.6].

heteronormativity perpetuating gendered norms around waged work and unpaid labour.

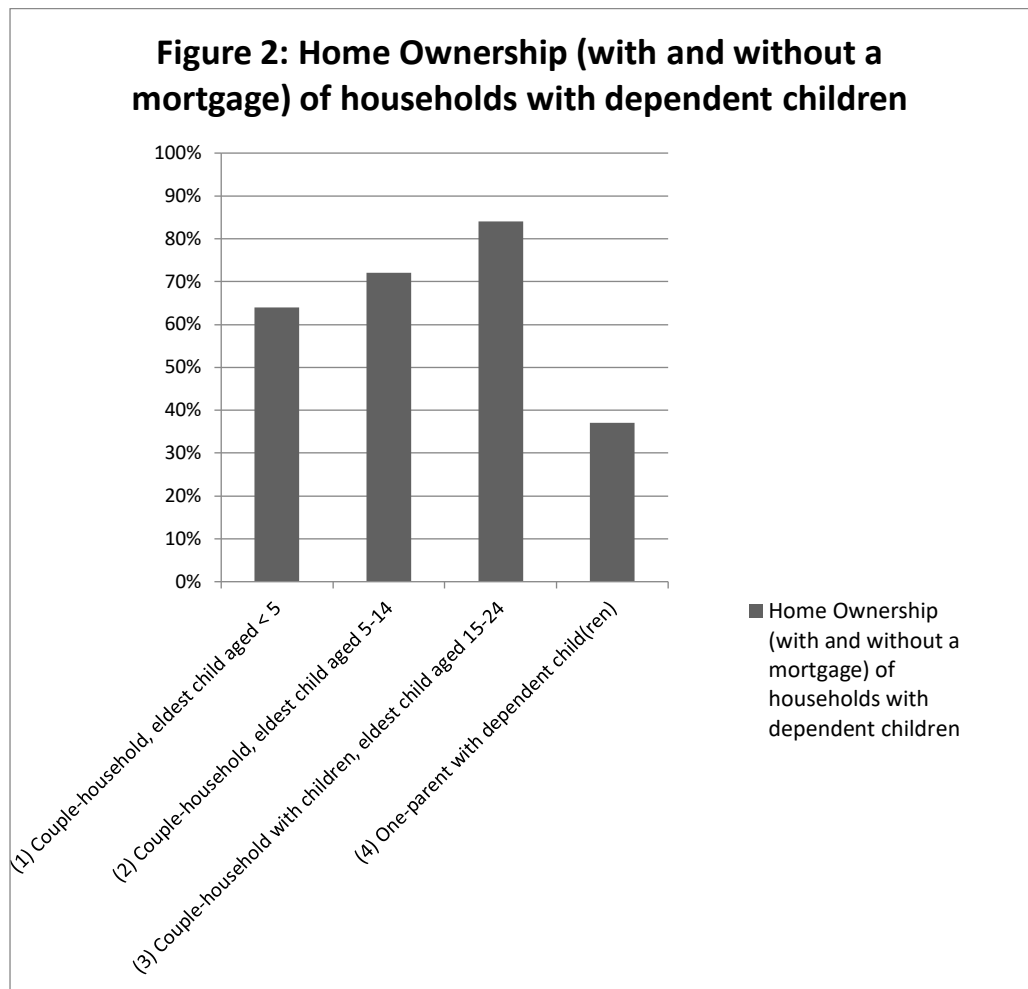
The statistics on home ownership belie the assumption that many families can use their home equity to co-fund parental leave. Although the median value of purchased dwellings increased from 2011-12 to 2013-14, relative data for home ownership remain largely stable.³³⁵ In 2011-12, less than half of young couples owned their home, with or without a mortgage.³³⁶ When presenting the statistics on homeowners with dependent children, the ABS breaks home ownership (with and without a mortgage) into four groups:³³⁷

- 1) Couple-household with children, eldest child aged under 5
- 2) Couple-household with children, eldest child aged 5-14
- 3) Couple-household with children, eldest child aged 15-24
- 4) One-parent with dependent child(ren)

³³⁵ Australian Bureau of Statistics, 'Housing Occupancy and Costs, 2013-14' (4130.0, Australian Bureau of Statistics, 16 October 2015) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4130.0~2013-14~Main%20Features~First%20Home%20Buyers~7>>.

³³⁶ Forty-five percent of young couples with the reference person aged under age 35, Australian Bureau of Statistics, 'Housing Occupancy and Costs, 2011-12' (4130.0, Australian Bureau of Statistics, 28 August 2013) <<http://www.abs.gov.au/ausstats/abs@.nsf/Previousproducts/4130.0Main%20Features22011-12?opendocument&tabname=Summary&prodno=4130.0&issue=2011-12&num=&view=>>>.

³³⁷ See Australian Bureau of Statistics, 'Changes to ABS First Home Buyer Statistics, Australia, 2016' (Information Paper 5609.0.55.004, 4 October 2016) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/5609.0.55.004>> showing that the previous statistic over-estimated the number of first-time home buyers prior to August 2016, suggested that the following data are higher than actual first time home purchases.



Further, couple-households with and without children make up the majority of first-time home buyers with a mortgage in 2011 – 12 (65%),³³⁸ and nearly one-third of all first-time homebuyers with a mortgage in 2011 – 12 were couples with dependent children.³³⁹ Data demonstrates

³³⁸ ABS Housing Occupancy and Costs, 2011-12, <http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/4130.0Main%20Features22011-12?opendocument&tabname=Summary&prodno=4130.0&issue=2011-12&num=&view=> First Home Buyers with a Mortgage

³³⁹ 30%; Extrapolated from the statistics provided in ABS Housing Occupancy and Costs, 2011-12, couple-households with and without children make up the majority of first-time home buyers with a mortgage in 2011-12 (65%), with 47% of these couples constituting couples with dependent children <http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/4130.0Main%20Features22011->

that the median amount of mortgage outstanding remains high for these first-time home buyers at \$300,000.³⁴⁰ Although there is no recent data on housing equity, the available data suggests severe constraints on the ability of these households to draw on home equity to finance any ongoing, unpaid parental leave to reach the 26-week benchmark. By setting a benchmark at 26 weeks, but only funding leave to partially cover that period further demonstrates the neoliberal rationality of the policy and law. The unit of the couple is tasked with providing for their own economic security (and that of their young child), rather than rely on PPL as any adequate statutory support for care. A system predicated on co-funding where data increasingly demonstrates the difficulty for young families to adequately do so, leaves a gap from 18 weeks to 26 weeks and after, and often forces families to return to waged work both before they otherwise would have and before it is recommended by health experts (and the Productivity Commission).³⁴¹

[12?opendocument&tabname=Summary&prodno=4130.0&issue=2011-12&num=&view=](#) First Home Buyers with a Mortgage

³⁴⁰ This amount is not adjusted for the increase in housing costs in capital cities such as Sydney and Melbourne, Australian Bureau of Statistics, 'Housing Occupancy and Costs, 2013-14', above n 295.

³⁴¹ In addition to Commonwealth of Australia, Productivity Commission, above n 243; see also Australian Nursing and Midwifery Federation, 'Paid Parental Leave' (July 2015) <http://www.nswnma.asn.au/wp-content/uploads/2015/08/Paid_Parental_Leave_Survey_Report.pdf> where the Australian Nursing and Midwifery Federation agreed that 6 months of parental leave is the minimum optimum amount of leave, and also demonstrating that 90% of survey participants cited financial constraints as the main reason they returned to work, 3.

However, a second serious issue arises in terms of eligibility for parental leave: who is actually eligible for paid parental leave, and how does this indicate the underlying conception of time in Australia's parental leave scheme? The following section addresses this very issue with reference to the Productivity Commission's distinction between women who have 'genuine' workforce ties (and thus are eligible for paid parental leave), and those who do not.

Disingenuous and Other Attachments to Unwaged work

Tying paid parental leave's dichotomy of genuine and disingenuous attachments to waged work, this section highlights the gendered implications of this dichotomy in terms of who has access to the benefits of parental leave pay. It then considers who defies neoliberal rationalities in their decision around care and waged work and how this exposes problems in the PLP scheme. A system built on 'genuine' attachments to waged work as a prerequisite for parental leave payments excludes those with 'disingenuous' attachments to waged work.

Through adequate planning and future orientation, the ideal family can reap the rewards of this legislation: 18 weeks of federally funded parental leave combined with co-funding by the family allowing for the mother to provide primary care for six months. She is then expected to promptly return to work (in a part-time capacity because care is now her primary and 'important job') to work for at least another 'sufficient' and 'durable' amount so as to pass the work tests for the birth or

adoption of the family's second or subsequent child. The majority of women of reproductive age without children in Australia work full-time and thus have a sufficiently 'genuine' attachment to waged work, so it is not these women that the legislation is targeting.

Notwithstanding, the existing PLP scheme is problematic for those women at whom the scheme is most directly targeted— those who defy neo-maternalistic productivism. These women fall into one of two groups: women in precarious, disrupted relationships with waged labour and women who have children to 'too closely' spaced for neo-maternalistic productivism. Yet, it is these women that the parental leave scheme was explicitly constructed to address — to 'encourage women to continue to participate in the workforce'³⁴² and address the consequent disengagement from the waged workforce that often occurs after subsequent children are born or adopted.³⁴³ These women's engagement with neo-maternalistic productivism's mandate for full-time waged work is disrupted, failing to reflect a 'genuine' attachment to waged work simply because it lacks continuous enough payments to meet the work tests for either the parental leave pay scheme or the unpaid parental leave system.

³⁴² Paid Parental Leave Act 2010 (Cth) s 3A(1)(c).

³⁴³ Commonwealth of Australia, Productivity Commission, above n 243, sch J.

Group 1: Women in Precarious Labour outside the Traditional Labour Market

The first category of women is those outside of the traditionally waged labour market due to unremunerated, under-paid, or alternatively valued labour. Women in precarious labour are those engaged in various forms of labour and who may or may not receive some form of remuneration. If remuneration is received, it is either not often enough so as to represent 'genuine' attachment according to the temporal definition provided by the Commission or in a form unrecognised by the Commission as waged income. Let me be clear that I am discussing women who are labouring – but these women's 'disingenuous' attachment arises either because they lack actual 'wages' for the labour or those wages are not continuous enough. These include:

- a. women who provide care to another adult or child, either as primary-carers or shared-carers (these women may also fall into the second category if this role arises out of having children 'too' closely together for neo-maternalistic productivism's purposes);
- b. students with scholarships, grants, awards, or fellowships;
- c. interns who may be labouring with or without remuneration or who receive in-kind remuneration in the form of facilities or otherwise;
- d. creative workers and artists operating under grants, residencies, fellowships, or sporadic sales or leases of their artworks; and
- e. certain migrants who would otherwise qualify for PLP but work outside of documented or legally sanctioned systems, or the recently arrived.

In response to this group of disrupted labourers, the Commission simply reported that waged work is a 'critical prerequisite' for parental

leave pay.³⁴⁴ The Commission concluded that granting parental leave pay to women with precarious links to waged work would 'create perverse incentives' and would cause women to get a job merely for the minimum-wage benefits of PLP.³⁴⁵ So though these women are engaged in labour and in the practices of care, knowledge, or creative arts, they fail to demonstrate 'genuine' attachments to the waged labour market. Without meeting the work tests, if and when they have or adopt a child they are unable to avail themselves of the legislative benefits.³⁴⁶

Group 2: Families with Closely Spaced Children

The second type of women defying neo-maternalistic productivism most adeptly exposes flaws in the PLP scheme. When a woman has a second or subsequent child, especially if closely spaced to the first, she is vulnerable to enduring precariousness and subject to compounding economic insecurities.³⁴⁷ The woman who has children spaced 'too closely' for neo-maternalistic productivism violates the primacy principle of waged work in becoming eligible for parental leave pay. In addressing the birth or adoption of the first child, the legislation easily provides parental leave and pay to most women taking time away from

³⁴⁴ Ibid 2.22.

³⁴⁵ Ibid 2.25.

³⁴⁶ Except those falling within the prescribed legislative category of the self-employed.

³⁴⁷ See Trevor Breusch, Edith Gray and others, 'New Estimates of Mothers' Forgone Earnings Using HILDA Data' (2004) 7(2) *Australian Journal of Labour Economics* 125, 145; see also Lyn Craig and Michael Bittman, 'The Incremental Time Costs of Children: An Analysis of Children's Impact on Adult Time Use in Australia' (2008) 14(2) *Feminist Economics* 59.

waged work to provide primary care to the child. However, if subsequent children are born too soon for neoliberal, capitalist purposes, then the primary carer, usually the mother, will be refused one or both parts of the parental leave systems (pay or leave).

In addressing the issue of women with subsequent children, the Commission explicitly identified these women as a target of a parental leave payment scheme. In so doing, the Commission reported that a successful paid leave scheme should 'help reduce the disincentives faced by mothers outside the labour force to re-enter work on at least a part-time basis'.³⁴⁸ It aimed to do so by crafting a work test that rewarded timely re-integration according to the dictates of neo-maternalistic productivism and avoided 'undesirable outcomes'.³⁴⁹ The Commission described these 'undesirable outcomes' as:

- i. Women providing less than 6 months of care to their child(ren)
- ii. Women significantly delaying subsequent children, especially women having children later in life
- iii. A 'large group of mothers' failing the work test due to closely spaced children.³⁵⁰

However, these undesirable outcomes can and do occur. For example, imagine a woman who falls pregnant six months after the birth of her first child (see Figure 3). Let us assume she has worked full-time for

³⁴⁸ Commonwealth of Australia, Productivity Commission, above n 243, 2.23.

³⁴⁹ Ibid J.4.

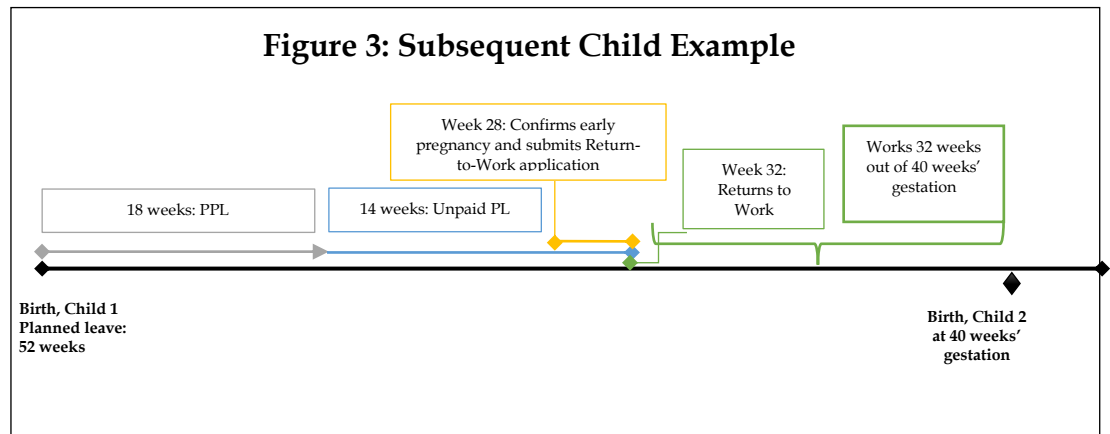
³⁵⁰ Ibid.

several years prior to the birth of her first child. She had planned to take 52 weeks of leave after the birth of her first child, 18 of which qualified as statutory paid parental leave. At the end of her 52 weeks of leave, she is six months pregnant and returns to work full-time for the remainder of her subsequent pregnancy. Even if she works until the day of birth, she can only work for up to 3 months.³⁵¹ Because the unpaid parental leave she took following the 18-weeks of parental leave pay does not count toward the work test, she would not be eligible for statutory parental leave pay after the birth of her second child. Unless she carefully plans when she takes statutory, unpaid parental leave and when she takes statutory, paid parental leave, she could quite easily fail to qualify as 'genuinely' attached to the waged labour market, despite returning to waged work full-time after the birth of her second child.

Even assuming this woman requested to return to work immediately after discovering she was pregnant again, she still might not meet the requisite working hours threshold because the statute requires a 4-week notice period to return to work prior to the intended date.³⁵²

³⁵¹ One year is calculated as 52.18 weeks because $365.25/7 = 52.18$. An average month is 4.35 weeks because only February (in a non-leap year) has exactly four weeks, while all remaining months have an additional 1-3 days.

³⁵² *Fair Work Act 2009* (Cth) s 74(4).



This mother will have worked for 32 weeks of her pregnancy (out of an average of a 40-week gestation) but she will not qualify for statutory paid parental leave with her second child. This is despite the earliest possible detection of pregnancy as well as prompt resumption of waged labour upon discovering her pregnancy. She would be ineligible for paid parental leave because she would fail the legislation's work test: assuming she works up to 40 weeks of her pregnancy she will have violated the 8-week bar on a gap between 2 consecutive working days. This is because she took 14 weeks of unpaid leave (10 weeks of unpaid parental leave plus the four additional weeks after she submitted her return-to-work application) *after* she took her 18 weeks of PPL – meaning that there were 14 weeks of non-work time in between the time she finished her 18 weeks of paid parental leave and the time she resumed work again, 8 weeks pregnant. Paid parental leave qualifies as 'work' time to meet the work test for PPL – but unpaid parental leave

does not qualify. As the DSS Review Report cautions,³⁵³ had she taken unpaid leave *first*, and only then taken statutory paid leave, she would have qualified for paid parental leave with her second child.

Where children are closely spaced, one might argue that qualifying for subsequent PLP requires meticulous timing, luck, and forethought and that this is not actually how many parents experience pregnancy, family timing and spacing.³⁵⁴ But this meticulous timing, luck, and forethought is actually in relation to paid labour and a financialised, future-based orientation. Instead, this orientation toward ‘properly’ spaced family formation is a chrono-normative one that prioritises a financialised, hegemonic orientation to time, labour, and family planning. Further, the work test, as presently legislated, pays no attention to employer actions, including dismissals, that affect a woman’s ability to engage in waged labour – it does not even allow for extenuating circumstances where a woman is terminated from employment due to pregnancy-based discrimination.³⁵⁵ Further, it requires a high level of literacy regarding the laws and policies that govern leave. For example, it requires the parent to carefully plan and parse out which leave she will

³⁵³ DSS at 60.

³⁵⁴ See Sara Holton, Jane Fisher and Heather Rowe, ‘To Have or Not to Have? Australian Women’s Childbearing Desires, Expectations and Outcomes’ (2011) 28(4) *Journal of Population Research* 353, citing research showing that 1/3 to 1/2 of all pregnancy in Australia are unintended (citing Hewitt et al. 2010; Maher et al. 2004; Marie Stopes International 2008; Weisberg et al. 2008).

³⁵⁵ Commonwealth of Australia, Department of Social Services, above n 256, Submission 43, 18.

take at what point in time. PLP cannot be stopped and restarted, but it also need not be taken immediately following the birth or adoption, so long as care has been continuously provided by a parent since birth. Just as the DSS Report cautioned, a high level of legal leave literacy is required in order to retain certain legal entitlements and benefits.

So, when it comes to parental leave, it is not how the time is used, but rather how the time is statutorily characterised and allocated by the claimant. As a result, how that time is rendered legally, and valued thus, depends very much on its statutory characterisation, not on actual experiences of transformative and disrupted temporalities of care.

The Commission repeatedly referred to the availability of the Baby Bonus for those without workforce ties. At the time that the Commission was writing, the Baby Bonus was a series of payments paid fortnightly to the parent upon the birth/adoption of a child totalling \$5,000 per first child, and \$3,000 for any subsequent children. It was abolished in 2014³⁵⁶ and was replaced by the Newborn Upfront Payment and Newborn Supplement as part of the Family Tax Benefit Part A, with a combined maximum of \$2,097.32 that decreases with subsequent children. Thus, my argument remains: parental leave pay's work test and its reliance on 'genuine' attachment excludes women who labour outside of the dictates of neo-maternalistic productivism. By

³⁵⁶ Family Assistance and Other Legislation Amendment Act 2013 (Cth) sch 2A.

reference to the disingenuous, a reliance on chrono-norms emerges, highlighting neo-maternalistic productivism's emphasis on waged work and ignorance of care-based temporalities of day-to-day time, life time, and collectively embodied time.

Temporality of Gendered Division of Labour: Chrono-normativity and Neo-maternalistic Productivism

Chrono-normativity, as discussed in Chapter 1, refers to the use of time to organise human bodies toward institutional mandates. The effect of chrono-normativity is to subtly naturalise a privileged temporal experience and expectation so that new temporalities become somatic facts.³⁵⁷ According to Freeman, individuals are born, made, crafted, and transformed by time in the habitus, meaning that time is used as a mechanism to group, regulate, and maximise productivity, and through that process, people are bound to one another and 'made to feel coherently collective'.³⁵⁸ Freeman illustrates her point with the temporal example of waged work: the shift from agriculture-based labour reliant on seasonal and climatological rhythms to waged work of the industrialised, productivised era 'entailed a violent temporalisation of bodies'.³⁵⁹ And so the masses of people sharing in the labour of waged work, made temporally possible through the forces of chrono-normativity, are a constructed collectivity, a socio-economic inculcation

³⁵⁷ Freeman, above n 71, 3.

³⁵⁸ Elizabeth Freeman, 'Time Binds, or, Erotohistoriography' (2005) 23(3/4_84-85) *Social Text* 57, 3.

³⁵⁹ Freeman, above n 71, 3.

of new temporal norms and practices.³⁶⁰ Chrono-normativity as we see it today sells time that privileges the legal and ideological temporalities of the neoliberal state. This state is ‘formally’ equal in gender-neutral statutory language, but relies on a gendered division of labour that belies heteronormative preferencing. This is most evident in the hegemonic view of ‘domestic time’, discussed in Chapter 1. Domestic time, as Freeman saw it and as I use it here, is a heterogendered and class-inflected temporal ideology.³⁶¹ It arose in its enduring form in the mid-20th century when middle class femininity was portrayed in popular media as highly attuned to the standardised, efficient synchronicities of the factory, but with invisible machinery.³⁶² Feminine domestic labour was meant to be invisible, thus erasing the time it took to complete it. As women shifted from the home to the waged labour market, these home rituals of domesticity were left to endure without disruption by waged work. Indeed, increasingly in middle class homes, this domestic work is now completed by unseen workers – cleaners and other domestic workers who come into the home while the inhabitants work out of the home. This view of heteronormativity aligns it with capitalist productivism, using bodies as tools for the capitalist trade and privileging financialised and productivised spaces and temporalities.

³⁶⁰ Ibid 3–5.

³⁶¹ Ibid 39.

³⁶² Ibid.

The hetero-capitalist legal construct of Australia's parental leave is a result of the combined heteronormativity and emphasis on productivity and financialised capital. Rather than emerging from an underlying conception of time based on care-based temporalities, the time of parental leave is based on neo-maternalistic productivism. As an illustration, consider the Productivity Commission's report on the PLP system. The Commission was tasked with evaluating the effect of paid parental leave on the health of the mother and the development of young children, 'including the particular development needs of newborns in their first 2 years'.³⁶³ The report does contain many references to child welfare and development, yet the predominant language of the report's conclusions and findings are constructed not around care or welfare but around 'work' (eg an 'appropriate length of absence from work' expressed in chronological units of time (weeks/months)). The Commission's reference to 'clock time' in reference to 'work' reflects a chrono-nuclear approach to time. The Commission chose to revert to chronological units of time and money rather than expand on the literature of maternal and child welfare, or the empirical evidence of parental experiences of work and care transitions. Women whose labour falls outside of this hegemonic, hetero-capitalist approach – those who engage in labour in disrupted or precarious forms – are 'disingenuous' in their attachments to the waged labour market and therefore do not qualify for parental leave pay. The

³⁶³ Terms of Reference in Joint Media Release

legislation supports social reproduction through financial assets and instruments such as home equity and mortgages. Such an approach relies on market attachment through savings, home equity, and a second income.

Another example of this emphasis is seen in the Commission's treatment of leave length. The relationship between the leave 'time' and money began to falter when the Commission failed to establish a direct relationship between parental leave and parental leave pay by harmonising the schemes. Though six months was accepted as beneficial for 'child and maternal health', as discussed above, with longer periods also acknowledged, the Commission supported the legislative decision to restrict PLP to 18 weeks. This means that the Commission calculated parental leave pay to allow the 'overwhelming majority' of families to reach 26 weeks of parental leave so long as they 'co-fund'. This reflects an approach to work and care that co-implicates the financialisation of time.³⁶⁴

The extent to which the Commission referenced and relied on the financialisation of social reproduction is further elucidated by the disjunction between eligibility requirements for PLP/DAPP and unpaid parental leave. Though the Commission advocated for parental care in the first six months of a child's life, it failed to grasp how a disjunction between PLP/DAPP and unpaid parental leave would render this

³⁶⁴ See also Allon, above n 293.

impossible for some parents. For many parents, 18 weeks of parental leave paid at the minimum wage may be the maximum amount of time they can afford to take off from waged work. When assessing the income and housing costs associated with households, we see that lower-income earners spend more on housing costs, with an average 34% of their gross weekly income spent on housing costs.³⁶⁵ It is unlikely that these parents can 'co-fund' the remaining 8-9 weeks of parental leave to achieve a minimum of 26 weeks (6 months) of parental child care, especially as they are likely to already be 'co-funding' the first 18 weeks beyond the minimum wage entitlement. However, there are also a significant minority of parents that are simply ineligible for unpaid parental leave, even if they met the eligibility requirements for PLP.

To keep the leave relatively short (18 weeks), and the remuneration also quite low (at federal minimum wage), it keeps precarious labourers and lower-income families focused on re-entry to the labour market, with a future-orientated perspective on wage earning again. Federal paid parental leave is payable for up to 18 weeks and must be taken within the first year of the birth or adoption of a child. It cannot be taken at half-pay or reduced pay for a longer duration of time. Eighteen weeks of

³⁶⁵ In its most recent published report, the ABS analysed rental stress in lower-income populations in Australia. Rental stress is defined as occurring when more than 30% of household income is spent on housing costs. In 2013-14, 50% of lower-income Australians suffered from rental stress. Australian Bureau of Statistics, 'Housing Occupancy and Costs, 2013-14', above n 295. Housing costs are much higher in Sydney and Melbourne.

paid leave was the minimum at which the Productivity Commission speculated would allow the 'overwhelming majority' of parents the opportunity to 'co-fund' 26 full weeks of parental care with a new child. Eighteen weeks seems to have been chosen as a length of time that strikes the balance of neo-maternalistic productivism and parental care in the earliest months, but ignores other constructions of temporality. This serves the explicitly accepted goal of six months of parental care; after six-months, families will be in a financial situation so as to *need* to go back to waged work.

In Australia's existing PLP scheme, both paid and unpaid parental leave are strictly structured around the temporal confines of waged labour. To promote hetero-capitalist and neoliberal objectives, the legislation relies on specific constructions of labour and time, but without harmonising eligibility criteria for unpaid and paid parental leave. These specific constructions of labour and time rely on 'genuine attachment' to waged work, and the disharmony in the eligibility criteria means that women may be eligible for parental leave pay but not unpaid parental leave. The result of this disharmony is that women in more precarious employment or vulnerable situations suffer from increased time pressure as they navigate the transitions between parental leave and remuneration. This reality is most starkly illuminated by the work test of the eligibility criteria and how time taken away from waged labour while on parental leave interacts with eligibility to take paid parental leave.

In order to constrain parental leave, the Productivity Commission recommended a number of limiting and containment measures, namely: continuous block payment; rate of pay; bar on half-pay or reduced pay; residential requirements, and employment status requirements. While on leave, the parent has the right to adjust the date of return only once³⁶⁶ before the employer recaptures the power of waiting. These containment measures attempt to minimise employers' anxiety and tightly orientate the practical relation to the forth-coming as one focused on productivity rather than care.

This has the added complication of perpetuating the gendered division of labour. The hierarchy of the family is set against that of the hierarchy of the market and based on productivity and earnings. Emerging from this, we see that the legislation is predicated on the notion of an ideal family and an ideal worker. An ideal family is made up of a heteronormative, able-bodied, middle-or-upper class, two-parent family who have sufficient and enduring workforce ties so as to have embodied the ideals of neo-maternalistic productivism in their everyday and long-term lifetimes. An ideal worker is presumptively male, one who is ever-present and flexible for workplace and employer demands without any encumbrances outside of waged labour.

³⁶⁶ *Fair Work Act 2009* (Cth) s 75. The employee has the right to request one extension (s 75[4]), but employers may agree to additional extensions (s 75[5]).

In Australia, the ideal worker narrative relies on the construct of the 'one-and-a-half income-earning' family.³⁶⁷ Such a family typically comprises a male partner who works longer hours and overtime, and a female partner who works part-time and/or irregular hours³⁶⁸ -- but not *too* irregular lest they be construed as disingenuously attached to the labour market. This allows for the necessary care work to begin first with wives or female partners, and where there is no partner, the fathers' mothers (grandmother care), often in conjunction with formal child care facilities as the child ages. The primary carer, who is the woman in a heteronormative couple as the ideal mother, is the secondary earner but has sufficient workforce ties so as to meet the work tests of both the unpaid parental leave and the parental leave pay.

Conclusion

Australia's paid parental leave scheme, created to provide time for care in the waged work and care life phase, fails to reference or incorporate the cumulative and reflexive embodiment of care-based temporalities. Any scheme based on neo-maternalistic productivism will always agitate against the actual care labour that the scheme purports to enable. This is because care is outside and irreverent of the hegemonic temporality of financialised labour and individualised productivism

³⁶⁷ Barbara Pocock, above n 121, 29; see also Lyn Craig and Killian Mullan, "'The Policeman and the Part-Time Sales Assistant': Household Labour Supply, Family Time and Subjective Time Pressure In' (2009) 40 *Journal of Comparative Family Studies* 4; Pocock, 'Work/Care Regimes', above n 114, 33.

³⁶⁸ Barbara Pocock, above n 121, 29-30.

and consumption; to treat it as just another unit of neo-maternalistic productivism ignores the disruptions of care-based temporalities. In their current form, parental leave provisions in Australia penalise women who engage in unwaged labour outside of the strictures of neo-maternalistic productivism. The construction of time between parent and child is reflexive, based on a number of factors beyond legal temporalities and employers demands. Because of the unplanned and unknowable nature of care, disruptions will occur. Where these disruptions are based on care and other unpaid labours, they should not preclude women from PLP.

As mentioned above, the construction of time as 'leave' renders it transitional and temporary. As a legal construct and an organisational tool for human resource management, 'leave' signals a temporary absence; though leave can be contemporaneously extended in certain circumstances (such as sick leave), it is constructed as a pre-selected and planned absence from work parsed out in hours, days or weeks. These periods of leave are flagged in advance as intended absence from work, signalling that once it finishes, the worker will return to the waged work status quo. Remunerating that period of absence remains a legal construct and workplace benefit. Leave is oriented to waged work because it is a construct of waged work. As presently constructed, it pays no regard to the ways in which temporalities become disrupted and altered by care work.

This chapter has addressed my research questions as they relate to

Australia's parental leave scheme and analysed how the terms of PLP are based on hegemonic dictates and chrono-normative assumptions. It further identified how the scheme's reliance on 'genuine' work as labour market connections belies its disparate treatment of gendered labour and time. This chapter suggested that a gender-sensitive approach to time in parental leave incorporates a Bourdieusian approach to time as embodied and enacted, especially where care of subsequent children is at issue. There is a fundamental incompatibility between care work and neoliberal rationalities. Although it seems almost too obvious to state, a child's care needs do not change depending on how her parent's time is statutorily characterised. Rather, a child's care needs change over time, and the expectation of care needs change with the passage of time.³⁶⁹ Therefore, it follows that a parent's experience of time does not change when the time is characterised as 'paid parental leave' or as 'unpaid parental leave', made especially salient because a parent can simply change the order of leave to meet future needs. However, a high level of technical and legal understanding of the legal temporal regimes of parental leave is necessary, coupled with implacable foresight, planning and timing. These are not characteristics or luxuries of many working parents.

³⁶⁹ I do not wish to engage in an analysis of expectations, but note here that expectations of care are subject to social construction; although largely objective, some aspects of actual care needs are also, to some degree, subject to social construction.

Parental leave, as currently constructed in Australia, creates the temporal foundations for the gendered division of this care work. The legislation presumes that mothers are secondary earners in middle class households with the means to co-fund parental leave. This hetero-capitalist paradigm reflects neo-maternalistic productivism's underlying construction of Australia's parental leave scheme and ignores other experiences of family and time. Even where women are secondary earners in middle class households, predicating a parental leave scheme on this assumption perpetuates the gendered uptake of care and waged work. Rather than relying on neo-maternalistic productivism, parental leave should instead be constructed on the child-paced rhythms of care-based temporalities.

Having discussed the transition out of waged work and into care-based temporalities with parental leave, the following chapter discusses the transition toward combining care and waged work. In analysing flexible work, it investigates the gendered impact and enduring legacy left behind by the Howard Government's rhetoric of flexibility.

Chapter 3

The Enduring Temporality of Flexible Work in *Work Choices*

This chapter addresses the gendered temporality manifesting under the Howard Government (1996 – 2007) in its interventions in the work-care regime, and the enduring legacy of this intervention. By specifically considering *Work Choices*,³⁷⁰ it analyses the Howard Government's interpretation and application of 'flexibility' for working parents in the 2000s. It discusses how the Howard Government implemented a change in legal policy which decreased entitlements in ways that disproportionately impacted women and marginalised gendered forms of work patterns. By applying Bourdieu's concept of the *habitus*, explored in previous chapters, as well as previously discussed understandings of collective and individual agency, this chapter argues that the gendered distribution of labour in Australia under the Howard Government was further entrenched by the flexibilisation strategy adopted in *Work Choices*, that is, the decentralising efforts of Howard Government legislation on labour relations. This chapter addresses the use of the ideal worker narrative, intensive mothering norms, and working time transitions in understanding labour and 'flexibility' as constructed by the legal temporalities of Howard Government laws and policies.

³⁷⁰ Workplace Relations Amendment (Work Choices) Act 2005 (Cth).

Under the Howard Government's approach, laws and policies were enacted on the expectation that women would leave the waged labour market once they had their first child. Maternity leave, as discussed elsewhere, was not a federally protected paid entitlement and, although nearly every other OECD country had paid maternity leave,³⁷¹ the Howard Government persisted in a commitment to not implement such an entitlement. The Howard Government failed to acknowledge and resolve the conflict of women's expectations and preferences arising in the habitus of motherhood, and it failed to address the resulting economic insecurity arising from its policies.

Drawing on the account of *Work Choices* and labour relations presented in Chapter 1, this chapter further discusses the gendered outcomes of the decollectivisation under the Howard Government and illustrates how *Work Choices* gave legal structure to the ideal worker narrative and further entrenched the ideal, intensive mother norm. It begins by discussing the theoretical and conceptual models of gender and care introduced in earlier chapters to analyse how *Work Choices* shifted gendered temporalities in Australia. With specific application of Barbara Pocock's work/care regime and Bourdieu's concept of the habitus, section I analyses the gendered temporal relationships developed under

³⁷¹ New Zealand and Switzerland both introduced paid leave entitlements in 2002 and 2005, respectively; the United States remains the only OECD country that has never introduced a federal paid parental leave benefit, Organisation for Economic Co-operation and Development, 'Trends in Parental Leave Policy Since 1970' (PF2.5, OECD, 2017) see esp Annex, 30, 41, 45 <https://www.oecd.org/els/family/PF2_5_Trends_in_leave_entitlements_around_childbirth.pdf>.

Work Choices through reference to the intensive mother and the ideal worker narratives. Section II elaborates on the intersection of parenthood and labour by further investigating the materialities and impacts of working time transitions. By applying this analytical framework to the Australian system, section II examines how the Howard Government adopts a specific, exclusionary normative definition of flexibility in line with an exclusionary working time transition and transitional labour market. Finally, section III explains the persistence of the Howard Government's conception of 'flexible' time and labour into contemporary Australian labour approaches to paid and unpaid labour and the dominant conceptions of time in flexible work today.

I. Theoretical and Conceptual Models

Ten years before the Howard Government's Liberal-National coalition won the 1996 Australian federal election, Lucinda Finley argued that America's ideology of 'separate spheres' perpetuated the gendered division of paid and unpaid labour.³⁷² She wrote:

Assumptions and stereotypes about the emotional and physical effects of pregnancy and motherhood, about the appropriate role of women in society stemming from the physical fact of children bearing, and about the perceived response of women to childbearing have contributed more than any other factor to the discriminatory treatment of women in the workplace

³⁷² Finley, above n 176.

and to the maintenance of the ideology of separate spheres.³⁷³

Though written from an American perspective, Finley's argument resonates with Australian gender relations, especially those entrenched during the Howard Government. The Howard Government, through a series of reforms, endorsed and facilitated a particular vision of gendered 'separate spheres'.³⁷⁴ In the 'separate spheres', entrenched under *Work Choices*' rhetoric of flexibility, two conceptual illustrations implicating flexibility emerge: the intensive mother and the ideal worker. This section further discusses the relationship of these with the habitus of women with children, in other words, women who experience simultaneously conflicting expectations and experiences of motherhood, and Australia's enduring work/care regime.

Barbara Pocock has developed a model to explain the inputs and outputs of waged work and unwaged care in a given state and society, which she termed the 'work/care regime'.³⁷⁵ The work/care regime operates within an existing society's gender order, which is '[c]onstructed by the division of labour and gendered social and power relations'.³⁷⁶ In her analysis of Australia, Pocock finds a dissonance between the expectations and preferences of women and the available

³⁷³ Ibid 1119.

³⁷⁴ For an argument applying a similar analysis to European Community sex equality law, see McGlynn, above n 131.

³⁷⁵ I will use her phrasing 'work/care regime' without detracting from the work that care labour is, Pocock, 'Work/Care Regimes', above n 114.

³⁷⁶ Ibid 38.

leave provisions and labour policies.³⁷⁷ This is largely reflected in Australian labour relations and expressed in the gendered norms of care between 'proper fatherhood' as 'male breadwinner' and 'proper motherhood' as 'primary carer'.³⁷⁸ A time disparity emerges as a result, organised principally by gender: women engage in far longer hours of unremunerated labour and take extended transitions from and between waged work, while men increase the time spent in waged employment in both short term and long term accounts of time-use.³⁷⁹

A given society's work/care regime is subject to the external super-structures of industrial relations, which Pocock aptly describes as the 'balance of forces between employers and employees'³⁸⁰ and the role of the political state.³⁸¹ Pocock conceptualised the work/care regime as the relevant culture, institutions, collective actions, preferences and behaviours of those in paid and unpaid labour and care. Interpreting Pocock and Bourdieu, we can see how this reflexivity reflects an

³⁷⁷ Ibid.

³⁷⁸ Ibid.

³⁷⁹ Australian Bureau of Statistics, 'Fathers' Work and Family Balance', above n 113; Australian Bureau of Statistics, 'Pregnancy and Employment Transitions, Australia, Nov 2005' (23 October 2006) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4913.0Main+Features1Nov%202005?OpenDocument>> showing that fathers have twice the level of regular overtime compared to mothers, and the percentage of fathers working overtime increased over the Howard Government leadership, from 46% in 1993 to 50% in 2003.

³⁸⁰ Pocock, 'Work/Care Regimes', above n 114.

³⁸¹ I rely, in part, on Esping-Andersen's welfare state typology to understand the state and industrial systems. Esping-Andersen understood capitalist states to fall within one of three categories on social welfare based largely on labour relations and state-provisioning. Esping-Andersen, above n 156.

exchange flowing between social agents, institutions, and cultures, mirrored in individual and collective actions, preferences, and behaviours. This reflexivity can also be found in Bourdieu's concepts of the habitus, as well as its relationship to the field,³⁸² discussed in more detail below.

Working from an empirically-informed model, Pocock situates her analysis on qualitative surveys, interviews, statistics, and time-use data. From these methods, Pocock determines that preferences of women are deeply in conflict with cultural and social norms of 'proper motherhood' in Australia.³⁸³ Pocock identifies a temporal and legal gap between what she calls 'realistic mothering' and 'intensive mothering.' Through interviews, survey data, and secondary analysis of qualitative studies, Pocock describes a contemporary rendering of 'proper' mothering through intensified time-heavy obligations of care.³⁸⁴ Intensive mothering describes both the quality of time spent 'mothering' as well as the quantity – that is, care-based temporalities. The cultural norm of intensive mothering constructs gendered temporalities of care, since under this paradigm, women are expected to focus intently on anticipating and meeting every possible need and interest of their children, and in ways that are displayed and manifested publicly. In the intensive mother model, childhood 'needs' are socially constructed,

³⁸² See Chapter 3 for a general discussion of Bourdieu's field and habitus.

³⁸³ Pocock, 'Work/Care Regimes', above n 114, 41.

³⁸⁴ Ibid; Pocock, *The Labour Market Ate My Babies*, above n 233, 239.

while the 'proper' mother is one who accepts an intensification of care-based temporalities, and the attendant time-stress that results.

Bourdieu's theory, which captures how the social is incorporated into a durable yet dynamic corporeal body, helps to explain the persistence of the ideology of intensive mothering in Australia.³⁸⁵ His approach acknowledges that autonomy and agency exist as a dialectic between the individual and the collective: 'Because the social is also instituted in biological individuals, there is, in each biological individual, something of the collective'.³⁸⁶ Gender identity is not an atemporal expression of dominant norms, but instead deeply temporally reliant. That means that despite the increase in women's participation in the paid workforce, the internalised sense of 'proper' motherhood as 'intensive' mothering remains 'firmly wedded to the traditional notion that averrable, nurturing mothers should take primary responsibility for care' in the turn of the twenty-first century Australia.³⁸⁷ This seeming anachronism is explained by providing the temporal embodiment of motherhood as the inculcation of institutional demands, existing relations of power, and values mediated by the habitus and the field, that is, the specific groups or social spaces experienced by the woman.

³⁸⁵ See McNay, above n 194, 95.

³⁸⁶ Bourdieu, above n 2, 156.

³⁸⁷ Pocock, 'Labour Market "Deregulation" and Prospects for an Improved Australian Work/Care Regime', above n 23, 58.

That the norm of 'intensive mothering' influences the choices, or objective chances, available to parents of any gender does not provide that it will be accepted and adhered to by all parents as an immutable gender norm. Lois McNay is careful to point out that Bourdieu is not arguing that conformity to social norms is 'reducible to the idea of rule following' but instead argues that 'it is a more uncertain and dynamic process where the enactment of norms results in their reproduction and transformation on a collective level'.³⁸⁸ Ultimately, the habitus is dynamic, reflexively subject to the pressures of actions, preferences, and conflicts from social agents.

One such conflict arises in the habitus of the mother. Surveys of general attitudes of what mothers *should* do are different, and temporally lag behind, what women as mothers *actually* do.³⁸⁹ Pocock references Belinda Probert's study of women in the 1950s and the 1990s which showed that 'attitudes to motherhood itself, and beliefs about what children need, are remarkably unchanged' despite a massive shift in women's participation in waged work activities.³⁹⁰ This interview-based study demonstrates women's beliefs that children 'need' their mothers

³⁸⁸ McNay, above n 181, 149.

³⁸⁹ Pocock, 'Labour Market "Deregulation" and Prospects for an Improved Australian Work/Care Regime', above n 23, 41; Pocock, *The Labour Market Ate My Babies*, above n 233, 239; Pocock, 'Work/Care Regimes', above n 114, 32; see also Barbara Pocock, above n 121.

³⁹⁰ Pocock, 'Labour Market "Deregulation" and Prospects for an Improved Australian Work/Care Regime', above n 23, 58; quoting Belinda Probert, "'Grateful Slaves" or "Self-Made Women": A Matter of Choice or Policy?' (2002) 17(37) *Australian Feminist Studies* 7, 8.

as the primary carer and in a time intensive way.³⁹¹ Formal childcare remains expensive and mostly privately provided in Australia, and maternal attitudes reflect a disfavour for formal care centres over mother and family provided care, reflexively contributing to the pervasiveness of intensive motherhood.³⁹² One clear manifestation of the gendered outcomes and impacts of intensive mothering emerge in the data addressing leisure time.

On average, women spend more time with their children than men do and more of their total leisure time is spent with children.³⁹³ In a comparison of Australia, the USA, Denmark, and France, fathers averaged significantly more leisure time across all countries, particularly more child-free leisure, than mothers.³⁹⁴ Compared to mothers, fathers averaged longer unbroken periods of relaxation and were much less likely to have their leisure immediately followed by childcare.³⁹⁵ More of women's leisure occurs in the home with children

³⁹¹ Probert, above n 351.

³⁹² See Pocock, 'Labour Market "Deregulation" and Prospects for an Improved Australian Work/Care Regime', above n 23, 58; Lyn Craig, Abigail Powell and Natasha Cortis, 'Self-Employment, Work-Family Time and the Gender Division of Labour' (2012) 26(5) *Work, Employment & Society* 716, 720; Lyn Craig, *Contemporary Motherhood: The Impact of Children on Adult Time* (Ashgate, 2007); Probert, above n 351; Barbara Pocock, above n 121.

³⁹³ Craig, 'How Employed Mothers in Australia Find Time for Both Market Work and Childcare', above n 5, 84; Craig and Mullan, 'Shared Parent-child Leisure Time in Four Countries', above n 234, 222.

³⁹⁴ Craig and Mullan, 'Shared Parent-child Leisure Time in Four Countries', above n 234.

³⁹⁵ Lyn Craig and Killian Mullan, 'Parental Leisure Time: A Gender Comparison in Five Countries' (2013) 20(3) *Social Politics* 329, 350.

present, impacting on the ways, means, and quality of women's leisure and their ability to schedule their leisure-time.³⁹⁶ Mothers are more likely than fathers to be the sole adult present during periods of shared parent-child leisure, so by default must be the one to respond to children's needs as and when these arise.³⁹⁷ In addition, women are more likely to be responsible for organising and managing shared family leisure activities.³⁹⁸ So even when partners are both present, mothers are more likely to have planned and to monitor the leisure event, actively managing the mutual enjoyment for all participants.³⁹⁹ These factors all potentially prevent women's leisure being an opportunity for unencumbered relaxation.

Mothers engage in more routine childcare, more physical care, and more solo care than men. Whereas women provide all forms and qualities of care-based activities including transportation, feeding, changing, chaperoning for appointments, teaching, playing, disciplining, as well as having children present for more of their leisure and working time

³⁹⁶ Craig, 'How Employed Mothers in Australia Find Time for Both Market Work and Childcare', above n 5, 84; see also Craig, above n 353; Craig and Mullan, 'Shared Parent-child Leisure Time in Four Countries', above n 234.

³⁹⁷ Craig and Mullan, 'Shared Parent-child Leisure Time in Four Countries', above n 234; see also Craig and Mullan, 'How Mothers and Fathers Share Childcare A Cross-National Time-Use Comparison', above n 4; Craig, 'How Employed Mothers in Australia Find Time for Both Market Work and Childcare', above n 5.

³⁹⁸ Craig and Mullan, 'Shared Parent-child Leisure Time in Four Countries', above n 234, 212.

³⁹⁹ Ibid.

than do men.⁴⁰⁰ This gendered time disparity of leisure, routine childcare, and physical care, as well as which activities are done in the presence of children, contributes to the time intensification of motherhood.

This gendered disjunction of care-based temporalities leads to what Pocock identifies as 'instability' in the work/care regime, working specifically on analysing the instability that occurred during the Howard Government. By 'instability', Pocock means the mismatch between institutionalised structures and personal attitudes and preferences, what Bourdieu has elsewhere identifies as the gulf between objective chances and agent expectations.⁴⁰¹ Though Pocock identifies the norm of the intensive mother, she also identifies that women are increasingly working outside of the home, giving rise to a mismatch between expectations of women's paid work and care.⁴⁰² The reflexivity of the work/care regime is subject to instability and contradiction; this instability, in combination with the mismatch of institutions, culture, and actions, produces 'personal troubles and, beyond them, public troubles'.⁴⁰³ Drawing on qualitative data demonstrating that Australian social attitudes toward parental care are in conflict with social norms

⁴⁰⁰ See Craig and Mullan, 'How Mothers and Fathers Share Childcare A Cross-National Time-Use Comparison', above n 4, 835 citing Craig 2006a; Fuligni and Brooks-Gunn 2004.

⁴⁰¹ Bourdieu, above n 2.

⁴⁰² See Pocock, 'Work/Care Regimes', above n 114, 34.

⁴⁰³ Ibid 39.

and practices of care and labour, Pocock notes that this division is largely along gendered lines relegating women to intensified care while struggling to also meet the expectations of an increase in paid work participation, while men experience intensified paid work hours with a minimal increase in normative expectations of paternal care. These normative expectations epitomise the impact of neo-maternalistic productivism. Referring to Dana Luciano's concept of chronobiopolitics as 'the sexual arrangement of the time of life' of entire populations,⁴⁰⁴ Freeman's chrono-normativity also speaks to these sex-based and sexualised norms. What we see emerging from these imposed norms is a conflict between the norms and the actions of social agents. Pocock suggests that these 'personal troubles' within individuals and groups reflect and reverberate as 'public troubles' through political and cultural conflict.⁴⁰⁵

These 'troubles' in men's and women's waged work and unwaged care, can be best understood as a form of temporal tension between what Bourdieu calls 'objective chances' and subjective expectations. The objective chances available to any one agent depends on several factors, including how that person embodies time through her experience of her field(s) and relations of power. The field is likened to the social groups in which we operate – be it family, workplace, cohort, or community-

⁴⁰⁴ Freeman, above n 71, 3.

⁴⁰⁵ Pocock, 'Labour Market "Deregulation" and Prospects for an Improved Australian Work/Care Regime', above n 23.

based groups. As members of multiple groups, agents move between fields, shifting behaviours and interactions depending on the reflexive social norms inherent to the field.

Objective chances are shaped by the existing power relations in Australia, reflected in the work/care regime. The 'practical relation to the forth-coming, in which the experience of time is generated,' described Bourdieu, 'depends on power and the objective chances it opens'.⁴⁰⁶ Applying a Bourdieusian interpretation, this tension is experienced fully 'when the correspondence between expectations and chances is broken'.⁴⁰⁷

The instability of Australia's work/care regime became even more entrenched as the Howard Government, through public rhetoric and legislation, altered the correspondence between expectations and objective chances by politically and legislatively supporting two gendered work and care models: what the literature calls the 'male breadwinner model' and what John Howard coined the 'policeman and part-time sales assistant' model.⁴⁰⁸ The male breadwinner model reflects societal norms for a heterosexual, two-parent family with children where the male works outside the home in full-time (and largely

⁴⁰⁶ Bourdieu, above n 2, 231.

⁴⁰⁷ McNay, above n 181, 150.

⁴⁰⁸ John Howard, 'John Howard Speech to the Liberal Party Women's Conference, 7 June, Adelaide' (Speech, Adelaide, SA, 7 June 2003); see also Craig and Mullan, "'The Policeman and the Part-Time Sales Assistant'", above n 328.

overtime) waged labour, while the female remains in unpaid labour in the home and community. Howard's 'policeman and part-time sale assistant' model exemplifies the modified breadwinner model where the male in a heterosexual, two-parent family works full-time, while the female engages in part-time waged labour while predominantly caring for the children of the couple. This model speaks to neo-maternalistic productivism, furthering the time intensification of women with children who are tasked with running the home, raising the children, and engaging in waged work.

From a Bourdieusian perspective, these models act as normative forces, influencing how social agents behave, interact, speak, dress and act, and these forces accumulate over time, reflecting back on previous norms to create current and future norms. At the same time, the anticipation of future outcomes influences contemporaneous practices and norms. As an individual within fields, the social agent is constantly anticipating and adjusting her place amongst the social. But it is this anticipation that can be 'overdetermined' by power relations through 'the shaping of the agent expectations and orientation toward the future'.⁴⁰⁹ That is, expectations are inevitably informed and shaped by an agent's habitus, personal inclinations, and field. But these expectations can starkly mismatch the objective chances available to a given agent who was an employee under *Work Choices*.

⁴⁰⁹ McNay, above n 181, 150.

Imagine an employee who had enjoyed union-negotiated working hours prior to *Work Choices*. Her expectations of negotiated flexibility, set by previous experience in the workforce, came into conflict with the new objective chances set out by *Work Choices*. Instead of union-bargained terms, *Work Choices* allowed employers to unilaterally change these terms in some circumstances. Further, *Work Choices* allowed employers to trade flexible working times, amongst other terms, for an adjustment in wages – so an employee that had previously enjoyed flexible working hours without any decrease in her pay may face diminished wages as a trade-off for flexible working patterns. Instability could, and did, emerge in the transformed labour relations of the gendered work/care regime under *Work Choices*.

These instabilities locate the social, political, and legal areas most in conflict and therefore most in need of change and Pocock suggests that instability can act as a compass for public reform.⁴¹⁰ In part, Pocock is suggesting that public reforms will impact on personal actions by providing vehicles for social change. In other words, by changing the ways in which work and care are treated by social, political, and legal institutions, Pocock argues, individuals have the wherewithal to change their relationships to care. Instead of redressing these conflicts, the Howard Government sought to use labour law and regulation as a mechanism to control the formation of the employment relationship in a

⁴¹⁰ Pocock, 'Work/Care Regimes', above n 114, 42.

way that exacerbated instability. The following section analyses how transitional labour markets interact with the gendered temporalities of the work/care regime.

II. Parenthood, Labour, and the Employment Contract becomes the Employment Relationship

Work Choices sought to statutorily enshrine a new, broader relationship between employers and employees. This is best described as a shift from an employment contract with specifically enumerated rights and entitlements, to an employment relationship where employers hold the balance of power. Mark Freedland describes the shift from an employment contract to an employment relationship as encompassing far more than the contractual obligations set by industrial bargaining and legal constraints.⁴¹¹ Freedland argues that the employment relationship expands beyond a contract to include unarticulated obligations between employers and employees who often lack bargaining power or legal protections. For example, some common expectations might include continuity of employment after unprotected leave, willingness to work uncompensated overtime, or to perform work functions while on leave. Under the employment relationship, workers and employers have a series of expectations that go beyond the written words captured in a workplace agreement and often extend to transitional periods between contracts and employment relationships.

⁴¹¹ Mark R Freedland, above n 229, 6.

A significant point of instability arises during transitional periods in an individual's work history; the employment relationship enters a grey area where a worker or employer anticipates the employment relationship to extend beyond that which the other party expects.

Without statutory and common law protections, this conflict tends to favour employers. Although Freedland was writing from the British perspective, his argument is especially applicable to the *Work Choices* paradigm of labour relations, where 'flexibility' favoured the bargaining position of employers and confined the employment relationship to exclusionary labour transitions.

Working Time Transitions and Transitional Labour Markets

The quality and type of transitions available to workers make up the transitional labour markets ('TLMs') of a given economic regime. TLMs are economic, social and labour supports established to facilitate multiple transitions into and out of the waged labour market over a life course. TLMs are important because they are shorthand for understanding the landscape of work and labour over a lifetime. The move towards *Work Choices* had profound impacts on transitional labour markets and, despite using 'flexibility' to describe industrial relations, it entrenched gendered working patterns.

Günther Schmid has identified four main transitions in an agent's labour trajectory.⁴¹² These pathways incorporate transitions within the

⁴¹² Schmid, 'Transitional Labour Markets', above n 22.

employment relationship by agents moving between different working-time statuses (part-time, full-time).⁴¹³ Whether a person is moving from unemployment or non-employment depends on the employment contract and the working-pattern transition maintained by government policies and laws. Schmid identified these transitions as:

1. School-to-waged labour: this marks the transition from vocational, technical, university, or post-graduate education or training into waged labour, whether related or not to the previous field of study.
2. Unemployment-to-waged labour: This occurs when someone has been identified as 'unemployed' and seeks to transition back into the waged workforce.
3. Non-employment-to-waged labour: 'non-employment' is a specific term Schmidt uses to identify employment relationships that are not exemplified by a recognisable working time status, i.e. full-time or part-time. 'Non-employment' most usually refers to someone on leave.
4. Transition to retirement.⁴¹⁴

The ideal worker narrative, discussed in Chapter 1, presumes that the only transitions occur from school, education, or training to the waged workforce and then to retirement.⁴¹⁵ In reality, all workers will likely experience multiple labour transitions throughout their working lives. Parents occupy a space outside of the ideal worker-narrative by taking time off paid work for infant and maternal health and wellbeing.

⁴¹³ Immaculada Cebrian, Michel Lallement and Jacqueline O'Reilly, above n 22, 2.

⁴¹⁴ Schmid, 'Transitional Labour Markets', above n 22. See also Chapter 5 for additional discussion.

⁴¹⁵ Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do about It* (Oxford University Press, 2001).

Further, based on labour force statistics, women remain more likely to take longer leave from waged labour for care-related activities.⁴¹⁶ Parental leave, by definition, is followed by another transition: back to the waged workforce. These transitions mark a temporal shift from one set of labours to another, marking it, essentially, as ‘parental labour transitions’ rather than as a singular, monolithic parental leave; parents on leave from waged labour to care for young children are largely engaging in unpaid care and domestic labours, and when they return to waged work they are transitioning back to paid labour often in a reduced or flexible working arrangement. In a well-coordinated TLM, employer-set flexible working would be fully integrated and supported. It is important to highlight here that the gender-neutral wording of ‘parental’ leave fails to accommodate the reality of the Australian work/care regime. More women than men experience parental labour transitions, and these transitions are typically longer for women than for men.⁴¹⁷ Despite gender-neutral language around care-related leave, parental leave remains largely feminised in Australia; this was true during the Howard Government and remains true today,⁴¹⁸ even

⁴¹⁶ See, eg, Australian Bureau of Statistics, ‘Time Use Survey’, above n 113; Australian Bureau of Statistics, ‘4102.0 Australian Social Trends’, above n 255; Australian Bureau of Statistics, ‘Pregnancy and Employment Transitions’ (4913.0, Australian Bureau of Statistics, November 2011) <[http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/5BAE2DE90539240DCA257AB700100F6A/\\$File/49130_nov%202011.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/5BAE2DE90539240DCA257AB700100F6A/$File/49130_nov%202011.pdf)>.

⁴¹⁷ Commonwealth of Australia, above n 259 see esp ‘Partners’ Leave Arrangements’.

⁴¹⁸ See Chapter 2 on parental leave.

following the introduction of two weeks of 'Dad and Partner Pay'⁴¹⁹ in 2013.⁴²⁰

This parental labour transition speaks directly to the variable ways that an average Australian parent – a mother – and waged worker weaves into and out of the waged workforce, with the weight of the 'whole past' of gendered parenting ideology embodied in the habitus of motherhood. Although all workers experience multiple transitions in a lifetime, women with children as a class of habitus embody a unique temporality. The 'whole past' of gendered parenting ideology in Australia combine with reference to the forth-coming, including intergenerational concerns for child welfare (itself in part socially constructed) to create the individual and collective temporalities of women with children.

The quality of the labour market transition is reflected by the policies that support transitions to paid employment, and supports available when out of waged employment.⁴²¹ Cebrian et al identifies three key types of working-time transitions:

⁴¹⁹ Paid Parental Leave and Other Legislation Amendment (Dad and Partner Pay and Other Measures) Act 2012 (Cth).

⁴²⁰ See Australian Bureau of Statistics, 'Australian Social Trends 2007: Maternity Leave Arrangements' (Article 4102.0, Australian Bureau of Statistics) <[http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/2DC476A215C81A80CA25732F001C9D91/\\$File/41020_Maternity%20leave%20arrangements_2007.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/2DC476A215C81A80CA25732F001C9D91/$File/41020_Maternity%20leave%20arrangements_2007.pdf)>.

⁴²¹ Immaculada Cebrian, Michel Lallement and Jacqueline O'Reilly, above n 22, 3.

1) integrative transitions: these transitions focus on integrating people coming from outside waged work (unemployed or non-employed, in education or training) into waged work: 'the extent to which they could be integrated into and remain in paid work'.⁴²² Although Cebrian et al describes integrative transitions that integrate people into full-time waged labour through part-time work, I take a broader approach to integrative transitions as any working pattern to integrate agents into a sustainable employment relationship (either part-time or full-time).

2) maintenance transitions: these transitions apply to people already in waged work who experience life cycle changes or other changes to their lives necessitating alterations in their relationship with and patterns of paid employment.⁴²³ These transitions aim to maintain workforce ties and includes leave, alterations in working hours, flexible stop/start times, flexible work locale, etc.

3) exclusionary transitions: these transitions occur where periods of work break-up long spells of non-employment or unemployment; 'where periods of part-time or temporary employment, or unsociable working hours, are merely interruptions of long patterns of non-employment or unemployment'.⁴²⁴ These transitions do not support long-term social integration into waged labour. This relies on the conditions of work as well as working time patterns, while also relating closely to skills and education levels.

Cebrian et al approaches labour from a full-time perspective. The goal with these transitions is chrono-normativity: to craft policies that construct full-time work as the preferred paradigm, thus facilitating agents into full-time waged work and then maintaining these full-time attachments. Part-time work and flexible work patterns appear in this theory as transitional, assisting the worker into eventual full-time work. Such an approach fails to appreciate the gendered 'time-bomb'

⁴²² Ibid.

⁴²³ Ibid 3-4.

⁴²⁴ Ibid 4.

described by Pocock et al: that the dominant Australian work/care regime is not built for a sustainable and equal combination of full-time working hours and child-rearing.⁴²⁵ It becomes clear that reducing working hours for both parents and increasing the share of care from mothers to fathers are key to remedying the work/care instability. However, instead of facilitating this, the Australian working hour culture increased to become a 'long hours' culture amongst international standards during the Howard Government, averaging 41.3 hours per week in 2001.⁴²⁶

While working hours were declining in many countries, they continued to grow in Australia, as the spread of hours between women and men lengthened: men were working longer hours, while women were increasingly taking up shorter hours, part-time waged work. This gender-time gap widened due, in large part, to the shift in power toward employer demands, the increase in precarity, and unfavourable tax provisions to secondary earners, all created by *Work Choices*. In a gender regime where intensive mothering infiltrated the gendered habitus of agents, a long hours work regime was incompatible with the parenting expectations of women with children. Part of the social-conservatism of the Liberal-National Coalition included the perpetuation of gendered expectations of work and care. Mothers of

⁴²⁵ Barbara Pocock, Natalie Skinner and Philippa Williams, *Time Bomb: Work, Rest and Play in Australia Today* (NewSouth Publishing, 2012).

⁴²⁶ Pocock, 'Work/Care Regimes', above n 114, 35.

babies and toddlers were expected to be primary carers and non-earners, but mothers of school-aged children were expected to return to work part-time as secondary earners while maintaining primary care giving responsibilities.⁴²⁷

However, the Howard Government failed in two ways: to acknowledge and resolve the conflict of expectations, norms, and preferences arising in the habitus of motherhood, and to address the resulting economic insecurity arising from their policies. Despite social norms and institutional factors shaping the habitus of motherhood, individual parents retain some agency in how each one inhabits their practical expectations and chances. Instability arises in the work/care regime when individual agents and, in this specific case, mothers and fathers, find the practical expectations of their labour transitions starkly mismatched with the objective chances available within the operational transitional labour market.

Labour Transitions

Where the habitus reflects chrono-normative expectations based on gender, an agent's temporal experience is necessarily influenced by this. The dominant political rhetoric during the Howard Government reflected a gendered approach to work and care: women were expected to leave the workforce to care for their young children, then return to part-time work six years later, but without a work/care regime that

⁴²⁷ See, eg, Interview with Doyle and Baretta, above n 18.

supported lower levels of waged work despite an increase in unremunerated labour activities (largely in the form of care and domestic labours).⁴²⁸

Individual and collective agency and longer-term perspectives on work and care were eschewed by policies in lieu of a largely exclusionary-based transitional labour market for parents. To better account for agency and reconcile objective chances with the transitioning social attitudes toward gendered caregiving, the Howard Government could have crafted *Work Choices* to foster greater temporal flexibility and fluidity for parental labour transitions through supportive, maintenance transitional labour market. Rather than take part-time work as the preferred status or established male patterns of full-time and overtime work as transitional (for example, prior to family formation), the Howard Government maintained a heteronormative approach to work and care with the established gender care norms. For all its rhetoric on 'choice', the Howard Government did not afford parents much choice. A work/care regime that honoured the agency of individual parental units to choose the labour patterns best suited to their work and care preferences would require establishing transitional labour markets to better address the disruptive time of care-based temporalities over a life-course. This means standardising benefits regardless of working time

⁴²⁸ See, eg, *ibid* where Howard PM describes women staying at home until their youngest child is six years old as 'a very good idea', and to then return to part-time work; see also Howard, above n 368.

status and providing labour transitions to allow for fluid transitions between part-time, full-time, and over time work. However, the Howard Government failed to address any gendered transition beyond the chrono-normative, two-parent, heteronormative transition model, more fully explained in the following section.

In addition to changing the way employment relations were decided and established and weakening the bargaining position of workers, *Work Choices* changed the durability of employment relations by removing protections for unfair dismissal.⁴²⁹ This had the effect of decreasing the bargaining power of workers, and increasing the power of employers, thereby stymying the fluidity between working time status and weakening bargaining leverage for leave provisions. This power disparity was further enhanced by *Work Choices* because it enshrined the employer's ability to coerce new employees to sign AWAs. Non-employment to work transitions gave way to unemployment to work transitions, belying an emergence of exclusionary transitions.

These exclusionary transitions were exacerbated by the Howard Government's promotion of two gendered work and care models, introduced above: the male breadwinner model and the modified male

⁴²⁹ See, eg, *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) s 94Q allowing employers to terminate employment during maternity or paternity leave, so long as any required notice is given.

breadwinner model. Neither model adequately addressed the waged work and care issues and conflicts experienced by parents.

Under the Howard Government, the male breadwinner model applied to families with children under school age, and the modified breadwinner model applied to families with children in school. Under both models the male of the family remained the ideal worker and primary breadwinner employed in full-time waged labour. Though his work and social groups may change, his chrono-normative habitus remains static: the male in the two-parent, heterosexual family remains the primary earner and waged labourer despite any changes in his family status or composition. He became educated and trained, entered the workforce as a full-time worker, and remained such despite any marriage, children, or fluctuated family care needs. This maximally productive stance is made possible by the women of this two-parent model family norm who, under the Howard Government's dual-regime approach, shifted her values, expectations, and behaviours multiple times over a life cycle.

Waged Work and Care for the Two-Parent

Chrono-normative Family over the Life Course

Fathers: Education/Training → FT work → Retirement

Mothers: Education/Training → FT labour → Children: No Paid Labour (transition from non-employment while on leave to unemployment after leave was exhausted and she did not return to her waged work) → unemployment → school-age children; PT labour → ? → retirement

This gendered approach to work and care presumed the durability of the original two-parent family. Although this ignores the realities of many Australian families who experience a variety of family structures, it further ignores the gender disparity of retirement income and savings and mounting economic vulnerability of women with relationship breakdown.⁴³⁰ The flow-on effects of encouraging more caring work to accrue to the women in heterosexual partnerships leads to more precarious economic status for women through reduced pay equity, lower superannuation balances, and increased vulnerability to poverty with relationship breakdown.⁴³¹

Remaining with the original models as presented and promoted by the Howard Government, it failed to achieve even that which it promoted. There was no TLM to facilitate women's parental labour transitions from unpaid caring labour to part-time waged labour. Further, the transition of women beyond part-time work after their children had left

⁴³⁰ See Chapter 4.

⁴³¹ See, eg, Australian Human Rights Commission, 'Accumulating Poverty? Women's Experiences of Inequality over the Lifecycle' (Australian Human Rights Commission, 2009); Australian Human Rights Commission, 'Investing in Care: Recognising and Valuing Those Who Care', above n 50; Millbank, above n 109.

home went largely undiscussed in government policy or laws. The Howard Government's TLM policies and laws did not support a transition from part-time work to full-time work, and there was no maintenance transition to support workforce attachment from a mother's original place of full-time labour before she had or adopted children. Fathers were also constrained in their choices. Although they formally had the option to take short or long paternity leave,⁴³² any leave they took would be subtracted from their partner's ordinary maternity leave.⁴³³ This had the effect of preferencing women's leave arrangements around birth, and further attaching men to an ideal worker narrative. No transitions existed for fathers to transition out of full-time work into part-time work to share caring responsibilities and there was no option of shared extended parental leave.⁴³⁴ The Howard Government omitted to initiate or sustain any meaningful public discussion of male workers on paternity leave, extended care-related leave or flexible working patterns.⁴³⁵ The publicly communicated norms for male workers lacked any sort of temporal resonance encouraging

⁴³² Workplace Relations Amendment (Work Choices) Act 2005 (Cth) s 94T.

⁴³³ Ibid s 94D(3).

⁴³⁴ These problems persist today.

⁴³⁵ See Government of Australia and Department of the Prime Minister and Cabinet, *Search: PM Transcripts (John Howard)* (2015) PM Transcripts: Transcripts from the Prime Ministers of Australia <<http://pmtranscripts.pmc.gov.au/>>; Commonwealth of Australia and National Library of Australia, *Australian Government Web Archive* (2016) <<http://webarchive.nla.gov.au/gov/>>.

work and care flexibility,⁴³⁶ while women's expectations around transitioning between work and unpaid care became constrained and prescribed by TLMs under the Howard Government.

The Howard Government's approach to flexibility failed to address how chrono-normativity conflicted with expectations and experiences of care. This is most clearly illustrated by time-use data, which was contemporaneously conducted during the Howard Government in 1997 and 2006.⁴³⁷ The time-use data demonstrated the extreme disparity of labour between parents – waged and unwaged. The average amount of combined paid and unpaid labour the average Australian completed increased over the course of the Howard Government by about two hours from 1997 to 2006 reaching a high of nearly 53 hours (52:58) of labour for women a week and nearly 52 hours (51:55) for men.⁴³⁸ However, the amount of time spent on domestic labour increased during that time only for women, reaching 36 hours, 31 minutes of domestic labour per week for women; men continued to spend, on

⁴³⁶ See Pocock, 'Work/Care Regimes', above n 114; Craig and Mullan, "'The Policeman and the Part-Time Sales Assistant'", above n 328; Craig, above n 353.

⁴³⁷ Australian Bureau of Statistics, '3414.0 - Guide to Migrant Statistical Sources, 2011 (Edition 2)', above n 116.

⁴³⁸ Commonwealth of Australia, 'Media Release - We're Spending Less Time Playing, Sleeping and Eating but Working Longer' (21 February 2008) <<http://www.abs.gov.au/ausstats/abs@.nsf/mediareleasesbytopic/C1866BB6582046A5CA2573F5001959CF?OpenDocument>>.

average, 20 hours 4 minutes on domestic labour in 2006 as they did in 1997.⁴³⁹

If the expectation that women were to leave waged work once they had their first child was not always explicit in public rhetoric, the lack of legal protections around employment and maternity leave clarified it. Without statutory paid parental leave, under *Work Choices*, workers could take up to 52 weeks unpaid parental leave.⁴⁴⁰ However any leave taken 'because of the expected birth' would be subtracted from the 52 weeks; any long service leave, special maternity leave, annual leave would be deemed to be 'other authorised leave' and deducted from any remaining time on ordinary maternity leave.⁴⁴¹ This meant that if the spouse or partner of a mother took any leave 'because of the expected birth' that would also have been deducted from the 52 weeks of maternity leave.⁴⁴²

Without the addition of a supportive maintenance-based TLM, maternity leave appears almost irrelevant under the dominant work/care regime, which presumed long periods out of work for care-giving.⁴⁴³ The years out of the paid workforce to care for a child would

⁴³⁹ Ibid.

⁴⁴⁰ Workplace Relations Amendment (Work Choices) Act 2005 (Cth) s 94C.

⁴⁴¹ Ibid s 94D(3).

⁴⁴² Ibid.

⁴⁴³ Bearing in mind that it was the Howard Government's Treasurer, Peter Costello, who urged parents to have 'one for your husband, one for your wife,

be extended upon the birth of any subsequent children, until the youngest reached school age.

At the same time, the tax institutions under the Howard Government were contradictory in their approach to work and care. The tax policy adopted under Howard promoted the male breadwinner model, but ongoing policy and rhetoric advanced a modified breadwinner model.⁴⁴⁴ The 2000 budget lowered the marginal tax rate for secondary earners. As a result, in a two-parent household, secondary earners were subject to a high effective marginal and average tax rate, edging out the financial benefits of secondary earners and promoting longer-hours for primary earners.⁴⁴⁵ This endures in amended form today. In the 2004 budget, allowances were made for families with dependent children and

and one for the country', Peter Costello, 'Transcript of Budget Lock-Up' (Press Conference, Parliament House, Canberra, 11 May 2004).

⁴⁴⁴ See, eg, Interview with John Howard, 'Transcript of the Prime Minister the Hon John Howard MP Radio Interview with Alan Jones Radio 2UE' (16 March 1998) <<http://pmtranscripts.pmc.gov.au/release/transcript-10678>> where Howard spoke of the family tax policy, stating that 'if they want one of the parents to be at home when children are young, either part-time or full-time, that to the maximum extent possible everybody who wants to do that ought to be able to do it and not just the well-off'; Howard, above n 368 where Howard promoted his 'police officer and the part-time sales assistant' model; Liz Van Acker, 'The Howard Government's Budgets: Stay-at-Home Mothers Good--Single Mothers Bad' (2005) 31(2) *Hecate* 90; Craig and Mullan, "'The Policeman and the Part-Time Sales Assistant'", above n 328; Probert, above n 351; Australian Government, above n 10.

⁴⁴⁵ Pru Goward, *Striking the Balance: Women, Men, Work and Family: Discussion Paper 2005* (Human Rights and Equal Opportunity Commission, 2005) 106; see also Peter Apps, 'Submission on Childcare: Submission to Productivity Commission Childcare and Early Childhood Learning Public Inquiry' (20 February 2014) 6 <<http://www.pc.gov.au/inquiries/completed/childcare/submissions/initial/submission-counter/sub414-childcare.pdf>>; Brennan, above n 16, 38.

benefits included the maternity allowance, maternity immunisation allowance, Family Tax Benefit ('FTB') Part A and Part B, child care benefits, and the baby bonus.⁴⁴⁶ Family Tax Benefit Part A and Part B were introduced to address family tax systems in Australia. For mothers to receive the full benefits of the baby bonus as a refundable tax offset, primary carers would have to stay at home for five years.⁴⁴⁷ By 2005, the Howard Government's budget increased the income threshold for FTB Part A to \$37,500 so that low-income earners could also transition into the preferred work/care regime without cutting family assistance.⁴⁴⁸ Labour laws and work entitlements preferred the full-time earner, and working hours and patterns were largely shaped for the unencumbered, ideal worker.⁴⁴⁹ John Howard was explicit and unapologetic in promoting gendered work norms.⁴⁵⁰ The public rhetoric and the legislative changes had the effect of promoting a male breadwinner chrono-normative regime.

The Howard Government publicly encouraged a shift from a male breadwinner model to the 'policeman and part-time sales assistant' model once the children became school-aged. This work/care regime provided for a full-time male worker and a female carer and part-time

⁴⁴⁶ Van Acker, above n 404, 93.

⁴⁴⁷ Ibid.

⁴⁴⁸ Ibid 95.

⁴⁴⁹ Ibid 100.

⁴⁵⁰ Interview with Alan Jones, 'Radio Interview with John Howard' (20 June 2003).

worker.⁴⁵¹ The culture, as made up of dominant values and social norms, provides that middle-class women continue to be the primary carers, contributing to waged labour in small, part-time chunks of the day when their caring labour can be postponed (ie when her male partner is at work and her children are in school). However, nothing was said to reconcile the time norms around unpaid labour in a two-parent family, to say nothing of sole parents. The role of fathers became further essentialised as income-earners not care-givers, as working hours lengthened, further entrenching the gendered division of labour.

As a result, the work/care regimes under the Howard Government suffered serious and considerable contradictions. The labour market changes introduced under the Howard Government did not address the transitional labour market required to maintain a mother's dual-carer/part-time worker role under the modified-breadwinner model and did not allow for dual-carer/part-time worker roles for fathers. Instead, *Work Choices* stripped many positions of the entitlements previously provided by industrial tribunals, further marginalising part-time work. Without legal standards enshrining part-time work with the same basic entitlements as full-time work, workers were left to bargain for the working patterns and conditions necessary to meet their employment and care needs. The result, however, was that more women were relegated to precarious and insecure employment, with

⁴⁵¹ Pocock, 'Work/Care Regimes', above n 114, 40.

wages subject to a higher marginal tax rate under the Howard tax policy. For women who were secondary earners, they were subject to higher tax rates despite low earnings or shorter-hour jobs.

Under the Howard Government, the institutions of law, regulation, and policy shifted, but without the temporal flexibility that parental labour transitions require and maintenance transitional labour markets incorporate. Women heard the political rhetoric sending them back to work once their children were school aged, saw the reduction in welfare and state supports marking the transition time, but encountered employment relationships (established by legal and regulatory institutions) hostile to such transitions. Fathers found no maintenance-based approaches to support a transition from full-time work to part-time work or any fluidity of working time status during early childhood years (or at any other time). Thus, the habitus reflects temporal instability embodied as a tension between gender-neutral expectations and deeply gendered norms of care and work. These mark the serious contradictions within the Howard Government's work/care regime, where these embodied 'personal troubles' reflect 'public troubles'.⁴⁵²

Had the Howard Government analysed the temporal qualities of parental labour transitions, it would have identified how best to support transitions between parental labours – both paid and unpaid. Instead, flexibility under the Howard Government adopted a specific,

⁴⁵² Ibid 39.

exclusionary normative definition, demonstrated through empirics of exclusionary labour transitions and disparate working hours. TLMs went unexamined and unsupported, even while Howard was campaigning and promoting neo-maternalistic productivism through the transition to a modified breadwinner work/care regime.

Toward the end of the Howard Government leadership, the ABS conducted a survey in November of 2005 of birth mothers with children under the age of two.⁴⁵³ Most of these Australian women (52%) transitioned from employment to unemployment after the birth of their children.⁴⁵⁴ However, by the time their children reached school age, most women (82%) re-engaged in waged labour in a part-time capacity, with nearly half (45%) working 15 hours or less.⁴⁵⁵ Despite increased calls for greater involvement with their children,⁴⁵⁶ fathers, too, experienced negative impacts on their work and care responsibilities under the Howard Government as the number of fathers working overtime

⁴⁵³ Australian Bureau of Statistics, 'Pregnancy and Employment Transitions, Australia, Nov 2005', above n 340.

⁴⁵⁴ Ibid showing 52% of women with children under the age of two years were not engaged in waged labour.

⁴⁵⁵ Australian Bureau of Statistics, 'Pregnancy and Employment Transitions, Australia, Nov 2005' (23 October 2006)
<<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4913.0Main+Features1Nov%202005?OpenDocument>>.

⁴⁵⁶ Howard, above n 405.

increased from 46% in 1993 to 50% in 2003, which was twice the regular overtime of women.⁴⁵⁷

Labour Transitions for the Two-Parent Chrono-normative Family

Key: *italics* = *working status*; **bold** = **labour transition**

Fathers: school to waged labour – *waged labour employment* –
[Full-time] Employment to Retirement

Mothers: school-to-waged labour – *waged labour employment* –
Non-employment (maternity leave) – *Unemployment* (leave
exhausted) – **Unemployment to waged labour** (Part-time
Work) – **[Part-time] Employment/Precarious Carer to
Retirement**

With the 'flexible' labour approach advocated by Howard and installed by *Work Choices*, the parental labour transition became an exclusionary transition, relegating mothers to precarious work for flexible working patterns and both mothers and fathers to unsustainable labour patterns and high levels of time-stress. Rather than create the work/care regime conducive to Howard's modified breadwinner model by fostering TLMs supportive to parental labour transitions, this exclusionary approach

⁴⁵⁷ Australian Bureau of Statistics, 'Fathers' Work and Family Balance', above n 113.

contributes to a gendered accumulation of waged work benefits in the form of (but not limited to) wages, superannuation, and opportunities for promotion and skills development that disadvantage women and deprive men of participation in rich networks of care.

Remaining Instability and Time Stress

The Howard Government emphasised the need for flexibility in labour relations in order to meet their twin objectives of decollectivising labour and increasing women's workforce participation. However, had the Howard Government considered the realities of women and men's lived experiences of time, evidenced in part through time-use data available to them through the Australian Bureau of Statistics, it would have recognised the importance of a policy built around transitional labour markets. Time was represented as a quantifiable, finite resource by the ABS. Taken as such, the Howard Government could have easily recognised the value in developing TLMs supportive of parental labour transitions. Further, had the Howard Government recognised research demonstrating fathers' increased desire for greater involvement in childrearing,⁴⁵⁸ the Government's rhetoric for 'choice' and 'flexibility' would have been consistent with supportive labour transitions. This would translate as a maintenance-based transitional labour system facilitating parental leave for all parents as continuing an employment relationship, but with emphasis on flexible working patterns and

⁴⁵⁸ Goward, above n 405.

flexible working time status. By developing a maintenance transitional labour market that fostered non-employment rather than unemployment, parents could more easily meet their temporal needs and preferences, which in turn would be experienced as a greater alliance between objective chances and subjective preferences. A key component of this would be flexible working patterns and working time status.

Further, under a maintenance TLM the distinction between 'jobs' and 'careers' collapses. Freeman distinguishes 'careers' as positions that provide skill enhancement, ongoing training and upward mobility.⁴⁵⁹ These are premised, posits Freeman, on the assumption of full-time work and longer-term retention. Jobs, on the other hand, and are largely based on exclusionary models of employment criteria and rights, operate on temporary or part-time working patterns, and provide few entitlements, training opportunities, and opportunities for skill enhancement. Freeman champions the skill-enhancing entitlements of 'careers' rather than 'jobs', regardless of the working time status. This is premised on an understanding that whether a position is part-time or full-time does not dictate the entitlements available to a given position. Entitlements are tied rather to a specific employment relationship, and not the working time status within a workplace.

⁴⁵⁹ Mark R Freedland, above n 229.

Work Choices, rather than fostering entitlements, limited them in scope. Awards, where protected, were subject to dismantling upon expiration, allowing for specific terms and conditions to be renegotiated and bargained away. Under the Howard Government, there were little supports facilitating maintenance transitions. Full-time labour to meet the needs of employers was prioritised, having the effect of marginalising part-time and transitional work patterns, while job security was sacrificed to the whims of Greenfields agreements and unenforceable AWAs, discussed in Chapter 1. This made transitions more difficult and provided additional barriers to mothers already burdened with the double-shift and stress of combining the roles of primary carer and secondary earner. It also relegated working fathers to a certain model of low-level care and lower rates of active involvement and household labour, commodifying his role in the family as primary earner.

This gendered division of labour resulted in increasing time stress. Lyn Craig, who has developed a significant body of scholarship on Australian time-use data, published a paper with Killian Mullan in 2009 comparing families' use of time and time pressure over the course of the Howard Government.⁴⁶⁰ Their research showed that as more mothers transitioned from non-employed carers to part-time waged workers, their experience of subjective time pressure increased. Women spent,

⁴⁶⁰ Craig and Mullan, "The Policeman and the Part-Time Sales Assistant", above n 328.

on average, 57% more time on domestic labour than men.⁴⁶¹ In a labour landscape where working hours are increased, this had the effect of disproportionately increasing the overall workload of women.⁴⁶² This study demonstrates that as women transition into longer hours work (full-time and over), the stress felt by *both* parents increased markedly.

A noticeable emphasis on waged work and employer demands emerged during the decade of the Howard Government. More men and women were engaged in labour, and for longer hours. The availability of casual work increased, and more women were employed in part-time work than ever before in history. But while the hours of unpaid labour remained steady for men over the decade, their hours of waged labour increased, while women's labour increased in both the paid and unpaid capacity. By the end of the Howard Government, the modified breadwinner model applied to the majority of Australian families. But with that shift came the highest recorded experience of time stress than ever before, with well over 80% of working mothers reporting always or often feeling rushed for time; and the proportion of fathers increasing significantly as well.⁴⁶³ Time-stress reflects the enormous cost of

⁴⁶¹ Australian Bureau of Statistics, 'How Australians Use Their Time, 1997' (4153.0, 16 December 1998) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4153.0Main+Features11997>>.

⁴⁶² Ibid.

⁴⁶³ In 2006, 80% of mothers working part-time in waged labour reported feeling time-stressed; 93% of mothers working full-time in waged labour reported the same, Craig and Mullan, 'The Policeman and the Part-Time Sales Assistant', above n 6, 557.

temporal accumulation in the habitus; it is Australia's unstable work/care regime embodied as contradictory personal expectations and gendered norms.

The more hours a mother engaged in paid labour, the more she reported feeling 'always' or 'often' rushed or pressed for time – this was true in 1997 as well as in 2006.⁴⁶⁴ However, two important changes occurred during the Howard years in terms of subjective time pressure. First, the subjective time pressure felt by working mothers increased markedly, and most drastically for mothers in dual-full-time earner households. In 1997, 76% of mothers in dual full-time earner households reported feeling always or often rushed or pressed for time, but by 2006 the proportion had increased to 93% of mothers in these households.⁴⁶⁵

Secondly, the experience of time pressure impacted working fathers in unexpected ways. Male breadwinners have consistently reported the lowest level of subjective time pressure, whether that be in 1997 or 2006.⁴⁶⁶ However, in 1997, just over half of fathers in dual full-time earner households experienced feeling always or often rushed or pressed for time;⁴⁶⁷ 53% compared with 67% of fathers in one-and-a-half earner households. But by 2006, this number had risen to 78% of father

⁴⁶⁴ Ibid.

⁴⁶⁵ Ibid.

⁴⁶⁶ Craig and Mullan, 'The Policeman and the Part-Time Sales Assistant', above n 6.

⁴⁶⁷ Ibid 557.

respondents – an increase of twenty-five percentage points.⁴⁶⁸ By 2006, a similar proportion of fathers with working partners reported high levels of time stress.

Fewer fathers than mothers reported high levels of subjective time pressure, regardless of their earning role or whether it was reported in 1997 or 2006. But the gap in time stress narrowed between the sexes over the decade – while it rose for all parents. Although both the exact causes and the cumulative effect of these subjective time pressures are beyond the scope of this paper, it provides a partial picture of subjective time pressure during a massive policy transition. Further, several studies have shown that stress has profound impacts on mental and physical health, productivity, relationship satisfaction and longevity, as well as other factors of wellbeing.⁴⁶⁹

⁴⁶⁸ Ibid 558.

⁴⁶⁹ See, eg, Robert-Paul Juster, Bruce S McEwen and Sonia J Lupien, 'Allostatic Load Biomarkers of Chronic Stress and Impact on Health and Cognition' (2010) 35(1) *Neuroscience & Biobehavioral Reviews* 2; Anita DeLongis, Susan Folkman and Richard S Lazarus, 'The Impact of Daily Stress on Health and Mood: Psychological and Social Resources as Mediators' (1988) 54(3) *Journal of Personality and Social Psychology* 486; Bert N Uchino, 'Understanding the Links Between Social Support and Physical Health: A Life-Span Perspective With Emphasis on the Separability of Perceived and Received Support' (2009) 4(3) *Perspectives on Psychological Science* 236; George P Chrousos, 'Stress and Disorders of the Stress System' (2009) 5(7) *Nature Reviews Endocrinology* 374; R Jay Turner, 'Understanding Health Disparities: The Promise of the Stress Process Model' in William R Avison et al (eds), *Advances in the Conceptualization of the Stress Process* (Springer New York, 2009) 3; Michiel Kompier and Cary L Cooper, *Preventing Stress, Improving Productivity: European Case Studies in the Workplace* (Psychology Press, 1999); Jeffrey R Edwards and Nancy P Rothbard, 'Work and Family Stress and Well-Being: An Examination of Person-Environment Fit in the Work and Family Domains' (1999) 77(2) *Organizational Behavior and Human Decision Processes* 85; Samuel Aryee et al, 'Role Stressors, Interrole Conflict, and Well-Being: The Moderating Influence of Spousal Support and Coping Behaviors among Employed Parents in Hong Kong' (1999) 54(2) *Journal of Vocational Behavior* 259; Ashley K Randall and Guy

III. Conclusion

Under the Howard Government and alongside the dual narratives of intensive mothering and the ideal worker, flexibility turned into entrenched gender norms of time, work and care, and a diminished capacity to transition into and out of paid work and unpaid care. Read together, Pocock and Bourdieu demonstrate the significant public and personal instability in the work/care regimes promulgated by the Howard Government. Pocock's empirical data captures the social attitudes of mothering in the 1990s, and Bourdieu explains how those attitudes arose in a reflexively constituent context. The conceptions of time and labour from the Howard Government's understanding of flexibility have enduring effect in contemporary labour approaches to paid and unpaid labour and the disruptions and transitions between the two. Gendered experiences of care-based temporalities remain under-addressed in law and policy, resulting in the continuation of exclusionary transitional labour markets.

The Howard Government purported to facilitate a modified breadwinner work/care regime, but failed to create the parental labour transitions necessary to facilitate the transitions between paid work and unpaid care labour. John Howard, especially, publicly touted his vision of the 'policeman and the part-time sales assistant' model family, but without the TLM to support it. Instead, the Howard Government

Bodenmann, 'The Role of Stress on Close Relationships and Marital Satisfaction' (2009) 29(2) *Clinical Psychology Review* 105.

passed laws that preferenced the male breadwinner model and its gendered chrono-normative work ideals. Neither the male breadwinner model nor the modified male breadwinner model, both championed by the Howard Government adequately addressed the work and care issues of an unstable chrono-normative embodiment of time, nor was public rhetoric or policy materials demonstrative of class concerns between the two models. Instead of addressing the temporal conflicts arising from the models, the Howard Government's 'flexibility' referred to labour relations rather than to the temporal flexibility that parental labour transitions would flourish with.

The Howard Government's use of the language of 'industrial relations flexibility'⁴⁷⁰ and 'flexible workplaces free of rigidity in the industrial system'⁴⁷¹ belies its understanding of 'flexibility' to describe a decollectivised and atomistic system of workplace relations. Although John Howard as Prime Minister and the Howard Government relegated 'flexibility' to describe industrial relations and the move towards *Work Choices*, such a system necessarily had profound impacts on transitional labour markets and working patterns.

The Howard Government's use of flexibility refused a temporal approach that would have addressed and incorporated the disruptive

⁴⁷⁰ Interview with John Howard, 'One Millionith (Sic) AWA Announcement Comrec Elizabeth Downs; Prime Minister - Howard, John; Interview - 05 October 2006' (5 October 2006) <<http://pmtranscripts.pmc.gov.au/>>.

⁴⁷¹ 'John Howard's Acceptance Speech', above n 30.

time of care-based temporalities. This neoliberal preference for full-time, uninterrupted paid labour over a life course forms the current chrono-normative system in Australia and contributes to the economic insecurity of women during their working lives, as well as in older age. The issue of superannuation in the following chapter addresses these very concerns in older age.

Chapter 4

Superannuation: Waged Work and Labour Hours⁴⁷²

I. Introduction

As has been demonstrated throughout this thesis, having children is the tipping point for significant financial inequality between men and women in Australia. This inequality compounds over time, becoming even more stark in older age. In Australia, a distinct pattern of earning emerges with the birth or adoption of children: men with children earn nearly twice the lifetime earnings of women with children.⁴⁷³ Women, who are often the ones to engage in part-time or decreased hours of

⁴⁷² Portions of this chapter have been previously published, Starla Hargita, 'Disrupting the Hegemonic Temporality of Superannuation' (2016) 42(2) *Australian Feminist Law Journal* 223.

⁴⁷³ Men earned with children earned, on average, \$2.5 million compared to \$1.3 million for women with children. Rebecca Cassells et al, 'The Impact of a Sustained Gender Wage Gap on the Australian Economy' (Report to the Office for Women, Department of Families, Community Services, Housing and Indigenous Affairs, National Centre for Social and Economic Modelling University of Canberra, November 2009) 9 <https://melbourneinstitute.com/downloads/hilda/Bibliography/Other_Publications/pre2010/Cassells_etal_gender_wage_gap.pdf>; Cassells et al, 'She Works Hard for the Money', above n 94, 32.

waged work to combine caring responsibilities, will see diminished earnings over a life course as compared to men.⁴⁷⁴ Over the life cycle, this reduction in earned income translates to considerably more retirement savings in superannuation for men with children compared to women with children. This financial outcome in older age emerges despite evidence that women complete more combined labour hours of paid and unpaid work than men over the life course.⁴⁷⁵

This chapter discusses superannuation, Australia's government subsidised, contribution-based retirement savings programme.

Superannuation is one part of Australia's multi-pillared retirement income system.⁴⁷⁶ Other tiers or pillars include voluntary savings accounts, assets (including shares, real estate, and the family home), and the Age Pension, Australia's means tested pension system.

Superannuation is a compulsory savings system in place since 1992 whereby an individual's employer is required to submit a set percentage of the employee's income, up to a quarterly maximum dollar amount, into a superannuation fund or account, which may then be topped up by the individual (or their partner) subject to certain tax provisions.⁴⁷⁷

Although there are limited circumstances where superannuation funds

⁴⁷⁴ See Chapter 3.

⁴⁷⁵ Commonwealth of Australia and Bureau of Statistics, above n 3.

⁴⁷⁶ See Treasury, above n 132, 8–13; Young and CEO, above n 132, ch 8; Millbank, above n 132, 111.

⁴⁷⁷ *Superannuation Guarantee (Administration) Act 1992* (Cth).

are available before retirement, the funds generally become accessible once the individual reaches preservation age. Preservation age depends on when the individual is born and is set by statute.⁴⁷⁸

Empirical data suggest that in Australia, men and women retire with significantly unequal funds in their superannuation accounts.⁴⁷⁹ In 2011-12, nearly 35% of women reported having no superannuation, compared with only 26% of men.⁴⁸⁰ As men and women approach retirement, their superannuation balances are significantly disproportionate: in 2013-14, men aged 55-64 had on average \$321,993 in their superannuation accounts, while women had \$180,013.⁴⁸¹ Data further suggest that this gendered inequality emerges from the gendered consequences of having and raising children.⁴⁸² This chapter

⁴⁷⁸ Preservation age generally falls in the early or mid-60s, but proposals suggest the age of 70 by 2035. *Superannuation Industry (Supervision) Regulations 1994* (Cth) s 6.01; see also OECD, '2015 Pension Policy Notes: Australia' (Policy Notes and Reviews, 2015) <www.oecd.org/els/public-pensions/OECD-Pension-Policy-Notes-Australia.pdf>.

⁴⁷⁹ Australian Bureau of Statistics, 'Gender Indicators, Australia, August 2016: Economic Security' (4125.0, 31 August 2016) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4125.0~August%202016~Main%20Features~Economic%20Security~6151>>; see also Workplace Gender Equality Agency, Commonwealth of Australia, 'Women's Economic Security in Retirement' (Perspective Paper, 2015) <https://www.wgea.gov.au/sites/default/files/PP_womens_economic_security_in_retirement.pdf>; Clare and Association of Superannuation Funds of Australia Limited, above n 93.

⁴⁸⁰ Thirty-four point six per cent (34.6%) of women reported having no superannuation balance, Ross Clare, 'An Update on the Level and Distribution of Retirement Savings' (Association of Superannuation Funds of Australia, March 2014).

⁴⁸¹ Australian Bureau of Statistics, 'Gender Indicators, Australia, August 2016: Economic Security', above n 484.

⁴⁸² See, eg, Australian Human Rights Commission, 'Investing in Care: Recognising and Valuing Those Who Care', above n 50; Australian Human

focuses on the compounding financial inequality over time that emerges from an earned-income based approach to retirement security. Given the disproportionate superannuation balances between women and men, it is evident that some individuals are excluded from an equitable share of the superannuation system – specifically, those whose life cycles do not adhere to the ideal worker paradigm of a waged labour based temporal trajectory. Because superannuation is predominantly made up of employer contributions based on a percentage of earned income, those who spend more labour hours in unwaged work (namely, women) accumulate less earned income for superannuation purposes. Where superannuation fails to provide income security in older age, older Australians are forced to rely on one or all of the remaining pillars of Australia’s retirement system: voluntary savings, assets (including the family home), and the means tested Age Pension.⁴⁸³ However, recent reports indicate that older age Australians are more at risk of poverty, and women are at greater risk than men in older age.⁴⁸⁴ This comes as no surprise when approximately one-third of Australians over the age of 65 relying on the Age Pension live on less than 60% of the

Rights Commission, ‘Accumulating Poverty? Women’s Experiences of Inequality over the Lifecycle’ (Australian Human Rights Commission, 2009); Lyn Craig, *Contemporary Motherhood: The Impact of Children on Adult Time* (Ashgate, 2007); Craig, ‘Does Father Care Mean Fathers Share?’, above n 5; Barbara Pocock, *The Labour Market Ate My Babies: Work, Children and a Sustainable Future* (Federation Press, 2006).

⁴⁸³ See Jefferson and Preston, above n 93.

⁴⁸⁴ See Australian Council of Social Service, above n 86; Austen, above n 86; The Government of Australia, Senate Standing Committees on Economics, above n 86.

national median income.⁴⁸⁵ Older age poverty is often the consequence for deviation from the life course of the ideal worker. To combat that, Australia needs a system that recognises women's increased labour hours over a lifetime, accounts for the decreased wages women earn for the same or similar work over a lifetime, and supports the disparate material needs in retirement.

Superannuation is important to analyse because consecutive Australian governments have increasingly shifted the retirement emphasis from the Age Pension to superannuation.⁴⁸⁶ Superannuation and other investments now form 45% of retirement incomes in Australia.⁴⁸⁷ Compulsory superannuation was incrementally introduced across industries and sectors beginning in 1992.⁴⁸⁸ As the superannuation system 'matures' to cover the entire working lives of all Australians, estimated to be by 2043,⁴⁸⁹ the disparity in superannuation may incrementally improve but not resolve. System maturation will do

⁴⁸⁵ Australian Council of Social Service, above n 86.

⁴⁸⁶ See Austen, above n 86, 500; The Government of Australia, Senate Standing Committees on Economics, above n 86.

⁴⁸⁷ OECD, 'Australia: Highlights from the OECD Pensions at a Glance 2009' (OECD, 2009) <<http://www.oecd.org/australia/43071222.pdf>>.

⁴⁸⁸ Australian Government, Productivity Commission, 'Superannuation Policy for Post-Retirement, Vol 1: Chapters' (Productivity Commission Research Paper, Productivity Commission, July 2015) 4.

⁴⁸⁹ Marcia Keegan, Ann Harding and Simon Kelly, 'The Adequacy of a Mature Superannuation System: A Dynamic Microsimulation Analysis' (National Centre for Social and Economic Modelling, University of Canberra, 12 July 2010) <http://www.natsem.canberra.edu.au/storage/KeeganHardingKelly_The%20adequacy%20of%20a%20mature%20superannuation%20system_a%20dynamic%20microsimulation%20analysis.pdf>.

nothing to resolve the underlying issues that cause the gendered disparity in the first place. Women live longer than men⁴⁹⁰ and complete more total labour hours over a lifetime⁴⁹¹ but face increased vulnerability to poverty in older age. This economic insecurity is exacerbated by the current superannuation system.⁴⁹²

A number of scholars have identified factors contributing to the gendered situation of financial insecurity in older age.⁴⁹³ Four predominant factors are noted in this chapter: income disparity, time out of the waged workforce, relationship breakdown, and women's increased life expectancy. Then, in the following section, I demonstrate how these connect to chrono-nuclear norms of the ideal worker foundational in neo-maternalistic productivism. Reforms addressing aspects of superannuation considering these factors fail to address the

⁴⁹⁰ Australian Institute of Health and Welfare and Commonwealth of Australia, *Life Expectancy* (2016) <<http://www.aihw.gov.au/deaths/life-expectancy/>>.

⁴⁹¹ Commonwealth of Australia and Bureau of Statistics, above n 3.

⁴⁹² See Australian Human Rights Commission, 'Accumulating Poverty', above n 487; see also The Government of Australia, Senate Standing Committees on Economics, above n 86.

⁴⁹³ See, eg, Apps and Rees, above n 72; Shahra Razavi, 'The Political and Social Economy of Care in a Development Context: Conceptual Issues, Research Questions and Policy Options' (United Nations Research Institute for Social Development Geneva, 2007) <<http://www.unrisd.org/UNrisd/website/document.nsf/0/2dbe6a93350a7783c12573240036d5a0?OpenDocument&language=fr>>; Jay Ginn and Sara Arber, 'Pension Penalties: The Gendered Division of Occupational Welfare' (1993) 7(1) *Work, Employment & Society* 47; Austen, above n 86; see also Workplace Gender Equality Agency, Commonwealth of Australia and Commonwealth of Australia, 'Parenting, Work and the Gender Pay Gap: Perspective Paper' (Perspective Paper, 2016) <https://www.wgea.gov.au/sites/default/files/2014-03-04_PP_Pay_Gap_and_Parenting.pdf>.

gender-time gap because each one focuses on a specific aspect without considering the impact of time and time-use.

Although it has become more commonly understood that the gender-wage gap contributes significantly to the disparity of retirement incomes for older age Australians, what is missing is the opportunity to develop a system that does not favour the time of the ideal worker. Superannuation privileges the ideal worker in older age based solely on earned income, and not on labour completed over a lifetime. It takes no heed of needs at retirement, nor unwaged contributions to family and society. On average, women complete more total labour hours over a lifetime than do men, and yet men, who work far fewer hours, are better off in retirement. It is men more than women who are more likely to have their care provided in older age by their (female) partner or (female) child.⁴⁹⁴ Women, who have fewer assets in retirement, are more likely to be dependent on care from outside the home (and pay for it).⁴⁹⁵

By analysing the factors listed above, this chapter will demonstrate how each reflects a specific, hegemonic paradigm of time as earnings, borne out in women's increased vulnerability in older age, and point to superannuation as exacerbating the problem. This chapter will further

⁴⁹⁴ Australian Bureau of Statistics, 'Caring in the Community, Australia, 2012' (4436.0, ABS, 2014) items 4, 10
<www.abs.gov.au/ausstates/abs@.nsf/mf/4436.0>.

⁴⁹⁵ Ibid; Austen, above n 86, 495.

analyse the disproportionate outcomes associated with superannuation.

This chapter begins with an overview of the superannuation system. This legal and policy background introduces the Superannuation Guarantee provided under statute⁴⁹⁶ as well as the recent debates in the form of Government reports on the topic. Section II analyses the factors contributing to women's financial insecurity in older age in Australia, and how each factor compounds over time. This section also discusses reforms associated with the factors and how each fails to adequately address underlying issues and bring about significant improvement for women in older age. Section III demonstrates how all the factors are unified under a dominant paradigm of time privileging the hegemony before analysing actual and proposed reforms in Section IV. In Section V, I situate the problem of women's insecurity in retirement largely in superannuation, and explore one particular alternative in a 'sex discrimination pension'. As a proposed amendment to the *Sex Discrimination Act 1984* (Cth), I suggest that such a pension has the potential to better address the specifically gendered risk of poverty facing women in older age. In conclusion, I suggest that superannuation is one method of neoliberal burden shifting, leaving individual income-earners with the task of preparing for retirement. However, this gender-blind approach ignores the disproportionate impact on women and contributes to gendered outcomes throughout the life cycle.

⁴⁹⁶ *Superannuation Guarantee (Administration) Act 1992* (Cth).

II. Superannuation: Legal and Policy Background

This section outlines how superannuation operates legally, and recent government debates on the topic. This section begins by outlining how superannuation functions in Australia's labour and retirement systems by reference to the corresponding statutes. It then continues by investigating the ways in which the policies fail to properly investigate and remedy how superannuation contributes to the increased risk of poverty for women in older age. Finally, the section discusses a current inquiry by the Productivity Commission into superannuation that continues the legacy of efficiency without any examination of fundamental inequities arising from an overemphasis on efficiency and productivity.

The Function of Superannuation

The superannuation legislation does not identify what the objectives of superannuation is, but it is generally assumed to provide a savings device to reduce or eliminate individuals' reliance on the Age Pension.⁴⁹⁷ Superannuation is a legally mandated retirement savings vehicle for waged workers, whereby employers must contribute to individual government subsidised accounts and individuals may also contribute.⁴⁹⁸ An employer's mandatory contribution, the

⁴⁹⁷ See The Government of Australia, Senate Standing Committees on Economics, above n 86, 6.8; Australian Government, Productivity Commission, 'Superannuation Policy for Post-Retirement, Vol 1: Chapters', above n 493, 3-7; see also Superannuation (Objective) Bill 2016.

⁴⁹⁸ *Superannuation Guarantee (Administration) Act 1992* (Cth); see Treasury, above n 132, 8-13; Young and CEO, above n 132, 8.

'Superannuation Guarantee' ('SG'), is a percentage of the employee's income, up to a quarterly maximum, that the employer must submit into a superannuation fund or account (including a self-managed fund).⁴⁹⁹ The SG applies to adults earning over \$450 a month and is currently set at 9.5%, and the rate is set to increase to 12% by 2025.⁵⁰⁰ The maximum contribution base is \$52,760 per quarter, which acts as the quarterly upper limit of the SG for an individual earner for 2017-18.⁵⁰¹ At the current rate, which depends on the indexation factor for the year, an individual earner can earn up to \$211,040 annually and receive employer funded superannuation contributions for 9.5% of that amount, in addition to any voluntary private contributions added by the individual or partner.⁵⁰² This means that an individual earning over \$200,000 can accumulate nearly \$20,000 annually to his or her superannuation balance, which may then increase through fund returns. In addition to the Superannuation Guarantee, an individual earner can voluntarily contribute to their own superannuation fund, dependent on income related rules. A waged worker earning more than \$37,000 may 'salary sacrifice,' forfeiting some portion of her salary before tax to contribute to her own superannuation fund.⁵⁰³ This sort of savings

⁴⁹⁹ *Superannuation Guarantee (Administration) Act 1992* (Cth) ss 11-12, 16.

⁵⁰⁰ *Ibid* s 19(2).

⁵⁰¹ *Ibid* s 15(3), the SG is required for employees earning at least \$450 a month. *Ibid* s 27(2).

⁵⁰² *Superannuation Guarantee (Administration) Act 1992* (Cth) s 15.

⁵⁰³ The Australian Government, Australian Taxation Office, *Salary Sacrifice Arrangements for Employees* (16 October 2015)

mechanism, known as a ‘concessional contribution’, is encouraged with a special tax rate of 15%.⁵⁰⁴ A worker can also contribute after tax to her superannuation fund up to \$180,000 before it is subject to extra additional taxation. Though calculations estimating the cost of superannuation in terms of superannuation taxation concessions vary, the Treasury estimated over \$50 billion in costs in subsidising superannuation in 2012-13, and set to rise.⁵⁰⁵ As evidenced by these generous terms, the Australian Government treats superannuation as the preferred retirement savings vehicle but without the necessary considerations to address gender disparity at retirement.

Policy and Women’s Economic Security

This benefits and drawbacks of this preference for superannuation was investigated in the Senate Standing Committee on Economics Report, ‘*A Husband is not a Retirement Plan’ Achieving Economic Security for Women in Retirement*.⁵⁰⁶ On 17 April 2015, the issue of women’s economic security in retirement was referred to the Economics References Committee of

<[https://www.ato.gov.au/General/Fringe-benefits-tax-\(FBT\)/In-detail/Employees/Salary-sacrifice-arrangements-for-employees/](https://www.ato.gov.au/General/Fringe-benefits-tax-(FBT)/In-detail/Employees/Salary-sacrifice-arrangements-for-employees/)>.

⁵⁰⁴ *Income Tax Assessment Act 1997* (Cth) ss 292-25, 292-165, 995-1.

⁵⁰⁵ Commonwealth of Australia, The Treasury, ‘A Super Charter: Fewer Changes, Better Outcomes-- a Report to the Treasurer and Minister Assisting for Financial Services and Superannuation’ (Charter Group, 9 May 2013) s 2; Australian Treasury, ‘Tax Expenditures Statement 2016’ (Treasury, 2017) s C.

⁵⁰⁶ The Government of Australia, Senate Standing Committees on Economics, above n 86 Made up of senators from the Australian Labor Party, the Liberal Party, the Nationals, and one independent, the Report solicited submissions and held five public hearings across the country. Collating and evaluating 92 submissions, the Report adequately identified the problematic, gendered outcomes with Australia’s superannuation system generally. See also app 1-2.

the Senate to produce a report in 2016.⁵⁰⁷ The terms of reference for the report referred to:

- i. the impact inadequate superannuation savings has on the retirement outcomes for women,
- ii. the extent of the gender retirement income gap and causes of this gap, and its potential drivers including the gender pay gap and women's caring responsibilities,
- iii. whether there are any structural impediments in the superannuation system [impacting on the superannuation savings gap],
- iv. the adequacy of the main sources of retirement income for women, and
- v. what measures would provide women with access to adequate and secure retirement incomes; including:
 - o assistance to employers to assist female employees' superannuation savings,
 - o Government assistance, with reference to the success of previous schemes, and
 - o any possible reforms to current laws relating to superannuation, social security payments, paid parental leave, discrimination, or any other relevant measure.⁵⁰⁸

These terms of reference framed both the problem and the solution to women's economic security in retirement within the superannuation system. The Report extended across eleven chapters investigating the broad issues covered in the terms of reference, including the gender pay

⁵⁰⁷ Ibid 1.14.

⁵⁰⁸ Ibid 1.16.

gap,⁵⁰⁹ financial literacy,⁵¹⁰ child care,⁵¹¹ housing,⁵¹² and achieving dignity in retirement.⁵¹³

Time and time-use, however, was not a focus of the Report. It was only discussed in terms of part-time and full-time work and the gendered uptake of each, as well as the ways in which superannuation privileges the ideal, full-time, uninterrupted worker. Although the disparity of part-time and full-time waged work was discussed extensively, the assumption of waged work as the individualised source of retirement income was unquestioned. Doing so fails to address how an emphasis on waged work systematically ignores other uses and experiences of time and instead leads to gendered outcomes in retirement.

The Report's conclusory recommendations were overly broad and imprecise. The Report recommended review of the *Fair Work Act 2009* (Cth), the *Paid Parental Leave Act 2010* (Cth) and superannuation legislation but did not specify what should be altered.⁵¹⁴ Additionally, it

⁵⁰⁹ Ibid ch 3.

⁵¹⁰ Ibid ch 10.

⁵¹¹ Ibid ch 4.

⁵¹² Ibid ch 9.

⁵¹³ Ibid ch 11.

⁵¹⁴ For example, the Report recommended 'The committee recommends that the Australian Government review the Fair Work Act 2009 to determine the effectiveness of Equal Remuneration Orders in addressing gender pay equity, and consequently in closing the gender pay gap' and 'The committee recommends that the Commonwealth Paid Parental Leave Scheme continue to be improved over time to allow for 26 weeks paid parental leave through the combination of government and employer funding'. Ibid xi-xii.

recommended that ‘any changes to the retirement income system are measured against the guiding principle of dignity in retirement’,⁵¹⁵ but neither specified what those guiding principles looked like in practice, nor what they would achieve beyond improved general outcomes for women in retirement. Citing guiding principles such as ‘a decent standard of living’, the ‘interrelationship between the three pillars’ of Australia’s retirement income system, and the ‘diversity of experience and outcomes in retirement incomes’,⁵¹⁶ the Report lacked comprehensive, rigorous investigation into specific recommendations and outcomes and largely relied on submissions for input. Although the Report implied that the superannuation system was itself a significant problem, instead of advocating for radical restructuring of the retirement income system, the enumerated recommendations instead suggested a familiar pattern of piecemeal tinkering with aspects of the system. This accepts the superannuation system as given, despite demonstrating how the system disproportionately harms women in retirement.

Several other reports commissioned by the Australian Government similarly assume the benefits of superannuation without adequate remedy to the consequences borne on women in retirement.⁵¹⁷ An

⁵¹⁵ See *ibid* 5.38.

⁵¹⁶ *Ibid* xii–xiii.

⁵¹⁷ See, eg, Australian Government, Productivity Commission, ‘Superannuation Policy for Post-Retirement, Vol 1: Chapters’, above n 493; Australian Government, Productivity Commission, ‘Workplace Relations Framework, Vol 1’ (Productivity Commission Inquiry Report 76, Productivity

inquiry into superannuation is currently being conducted by the Productivity Commission at the time of writing.⁵¹⁸ The terms of reference provide for this review to ‘develop criteria to assess the efficiency and competitiveness of the superannuation system; and an inquiry to develop alternative models for a formal competitive process for allocating default fund members to products’.⁵¹⁹ Stage one of the review was completed in November 2016, and included no sustained investigation, insight, or analysis of women’s decreased superannuation balances, except to provide that women have ‘lower financial literacy and lower levels of knowledge about superannuation than men’ and have lower rates of voluntary contributions than men.⁵²⁰ No explanation or further discussion was provided. Stages two and three of the inquiry aim to develop and assess alternative models for fund competitiveness by investigating allocating default fund members to default

Commission, 30 November 2015); Commonwealth of Australia, The Treasury, above n 510; Australian Government, Productivity Commission, ‘How to Assess the Competitiveness and Efficiency of the Superannuation System’ (Productivity Commission Research Report, Productivity Commission, November 2016).

⁵¹⁸ Scott Morrison, ‘Superannuation: Terms of Reference (17 February 2016)’ <<http://www.pc.gov.au/inquiries/current/superannuation/terms-of-reference>>.

⁵¹⁹ Ibid.

⁵²⁰ Australian Government, Productivity Commission, ‘How to Assess the Competitiveness and Efficiency of the Superannuation System’, above n 522, 195, 192.

superannuation products and will be reported by June 2018.⁵²¹ By focusing solely on competition between funds, the inquiry appears set to ignore women's disproportionate superannuation balances and the factors contributing to women's economic insecurity in retirement.

III. Temporal Analysis and Alternatives

Despite their decades of the 'double day', [women] approach their retirement years being told that they must work on longer – that the nation cannot afford their pension and that their superannuation balances are woefully inadequate.⁵²²

This section examines what the policy reports do not: the factors contributing to women's economic insecurity in retirement. It does so by analysing how the dominant paradigm of time codified in contemporary superannuation laws privilege neo-maternalistic productivism. Even where chrono-normativity influences the habitus, as previously discussed, an expanding sense of time from the hegemonic to a pluralistic approach allows for a more inclusive approach to retirement income.

The gendered inequity of retirement outcomes in Australia can be explained by the system's basis in the temporal norms of neo-maternalistic productivism. The superannuation system rewards those

⁵²¹ Scott Morrison, above n 523; Australian Government, Productivity Commission, 'Current Inquiries: Superannuation' <<http://www.pc.gov.au/inquiries/current/superannuation>>.

⁵²² Barbara Pocock, 'Holding up Half the Sky? Women at Work in the 21st Century' (2016) 27(2) *The Economic and Labour Relations Review* 147, 149–50.

who use their time according to the dominant neoliberal assumptions about how time 'should' be used. These assumptions of time are preserved in the waged labour basis in superannuation, rewarding the ideal worker and, by extension, the ideal worker's wife who adhered to her prescribed supportive role, in retirement. Though work entitlements of personal leave, sick leave, and annual leave all see superannuation payments connected with those paid leave entitlements, statutory parental leave does not. We also see these temporal assumptions emerge in the way women's diverse experiences of time are ignored in the Productivity Commission inquiry discussed above and other government reports.⁵²³ As we have seen, the material conditions of retirement are experienced differentially by individuals, depending on their level of conformity to chrono-nuclear norms – those whose adherence is high and minimise disruption from waged labour see much higher superannuation account balances, whereas women whose work is largely unremunerated face startlingly lower balances and are often forced to rely on the Age Pension.

Theorising the temporal basis of Australia's superannuation programme illustrates the assumptions that underlie superannuation as a retirement income mechanism. Among those assumptions is the neoliberal ideal of maximum productivity performed by the individual, defined in terms of waged labour, by contrast to 'unproductive' – unwaged – domestic

⁵²³ See section I(b) above; Scott Morrison, above n 523; Australian Government, Productivity Commission, 'Current Inquiries: Superannuation', above n 526.

and care work. A corollary to this is the assumption of the intact family unit at retirement – that if the neoliberal unit is not the individual, it is the family unit where the head-of-household provides the material needs to his wife. This locates the connection between superannuation and neo-maternalistic productivism in a shared neoliberal ideology found specifically in one who adheres to chrono-nuclear norms.

Australia's superannuation retirement scheme has emerged within a neoliberal context. Neoliberal rationality would suggest that the gendered division of labour is both an appropriate economic response to waged work and care responsibilities as well as a morally appropriate reflection of accepted heteronormative family mores. Under this approach, a household is made up of a heterosexual, two-parent family with children; women provide the majority of care and men provide the majority of household income.⁵²⁴ These roles are presented as rational choices selected by the agents. It is presumed that there is adequate sharing of resources within the relationship, namely financial, and that this household will remain intact and endure as is through the death of both partners.⁵²⁵ These assumptions facilitate a gender blind approach to law and policy, assuming that any ensuing gender disparity is

⁵²⁴ See, eg, Robert Maier, Willibrord De Graaf and Patricia Frericks, 'Pension Reforms in Europe and Life-Course Politics' (2007) 41(5) *Social Policy & Administration* 487, 489.

⁵²⁵ See also Fiona Allon, "'Home Economics': The Management of the Household as an Enterprise' [2011] (68) *The Journal of Australian Political Economy* 128.

rectified within each individual heteronormative family unit.⁵²⁶

However, this neoliberal approach fails on multiple fronts: first, it ignores what Bourdieu shows is constrained choice in the habitus,⁵²⁷ second, it ignores evidence definitively demonstrating that poverty is directly related to marital status,⁵²⁸ and third, it ignores the gendered temporalities of the changing life cycle and its disproportionate detriment to women's economic security, regardless of relationship status.

Chrono-normativity in Australia relies on a hegemonic reading of time to manage the body through historicist narratives of the nation-state, industrial capitalism, and sub-cultural politicised identities.⁵²⁹

According to Freeman, individuals are born, made, crafted, and transformed by time in the habitus, meaning that time is used as a mechanism to group, regulate, and maximise productivity. Through that process, people are bound to one another and 'made to feel coherently collective'.⁵³⁰ But this feeling is, to a significant degree, an

⁵²⁶ See *ibid.*

⁵²⁷ See Bourdieu, above n 2; see also Williams' discussion of Bourdieu's logic of practice, Joan C Williams, 'From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition' (2001) 76 *Chicago-Kent Law Review* 1441, 1473–1476, see also preceding chapters and especially Chapter 1.

⁵²⁸ See Carroll L Estes, 'Social Security Privatization and Older Women: A Feminist Political Economy Perspective' (2004) 18 *Journal of Aging Studies* 9, 10; Grania Sheehan, April Chrzanowski and John Dewar, 'Superannuation and Divorce in Australia: An Evaluation of Post-Reform Practice and Settlement Outcomes' (2008) 22 *International Journal of Law, Policy and the Family* 206.

⁵²⁹ As above.

⁵³⁰ As above.

orchestrated manipulation through the inculcation of chrono-normativity.

Australia's superannuation system is premised on this hegemonic temporality.⁵³¹ Specifically, superannuation laws and policies rely on two notions of time: time in waged work and working-time patterns. An individual's superannuation balance upon retirement relies on these two chrono-normative manifestations of time. Time in waged work reflects the duration in paid employment: there is no Superannuation Guarantee for anyone who is not engaged in the time of waged work.⁵³² Whilst engaging in the time of waged work, superannuation then relies on working-time relationships and patterns: is the worker engaged part-time or full-time, as a contractor (in self-employment), as a casual worker, or in an ongoing and permanent contract? The answer to those questions translates into financial earnings for time in waged work, which the *Superannuation Guarantee (Administration) Act 1992* (Cth) calls 'ordinary time earnings'.⁵³³

Both of these understandings of time reflect hegemonic temporalities and demonstrate the enduring relationship between chrono-norms and neoliberal law and policy. An individual who engages in

⁵³¹ See also Matt Hodges, 'Immanent Anthropology: A Comparative Study of "process" in Contemporary France' (2014) 20 *Journal of the Royal Anthropological Institute* 33.

⁵³² However, there are other ways to contribute towards an existing superannuation fund, as discussed above.

⁵³³ *Superannuation Guarantee (Administration) Act 1992* (Cth) s 6.

uninterrupted, full-time waged work from the end of schooling, education, or training until retirement will have significantly higher superannuation balances than the individual who takes time out of waged work for unpaid caring labours or who works part-time for significant stretches of time. This chrono-normative approach to subsidised, forced retirement savings penalises women in retirement for their assistance toward unpaid caring and domestic labours. Though it captures bodies in production, this approach ignores the gendered body in reproduction and care, failing to value time spent in activities that are not directly wage-based.⁵³⁴ As a result, women have significantly higher rates of poverty in retirement than men, and are far more reliant on the Age Pension and private or family charity.⁵³⁵

By relying on neo-maternalistic productivism, the superannuation system contributes to the gendered disparity of outcomes in retirement and otherwise. It ignores the empirically demonstrated time differential experienced by men and women with children that dissolves the 'public' and 'private' division of paid and unpaid labour.⁵³⁶

⁵³⁴ See also Lisa Adkins and Maryanne Dever, 'Housework, Wages and Money: The Category of the Female Principal Breadwinner in Financial Capitalism' (2014) 29(79) *Australian Feminist Studies* 50; Peta Tancred, 'Women's Work: A Challenge to the Sociology of Work' (1995) 2(1) *Gender, Work & Organization* 11; Marilyn Waring, *If Women Counted: A New Feminist Economics* (Harper & Row San Francisco, 1988) <<http://www.roiw.org/1992/237.pdf>>.

⁵³⁵ See Workplace Gender Equality Agency, Commonwealth of Australia, 'Women's Economic Security in Retirement', above n 484, 1; Australian Council of Social Service, above n 86, 10.

⁵³⁶ See Australian Human Rights Commission, 'Investing in Care: Recognising and Valuing Those Who Care', above n 50; Australian Human Rights Commission, 'Accumulating Poverty', above n 487; Lois Bryson, 'Revaluing

Reproductive and caring labours that manifest within the 'private' sphere are interconnected with, and have important implications in, what unfolds in time in the financial and waged labour markets.⁵³⁷ The link between time and money means the personal is always political – time is a way of demolishing the distinction between the private and public spheres so that what occurs 'at home', in 'domestic' space, in the 'private' realm impacts tremendously and enables that which occurs 'publicly' in financialised markets. An approach to retirement savings that increasingly depends on the superannuation system, which in turn relies on the false dichotomy of the public and private, leaves women disproportionately impoverished in older age. Further, it entirely ignores the gender-time gap, whereby women complete more combined labour hours over a lifetime than do men.

In Australia, women spend just over an hour more a week doing

the Household Economy' in *Women's Studies International Forum* (Elsevier, 1996) 207
<<http://www.sciencedirect.com/science/article/pii/0277539596000076>>; Jenny Cameron and Julie Katherine Gibson-Graham, 'Feminising the Economy: Metaphors, Strategies, Politics' (2003) 10(2) *Gender, Place and Culture: A Journal of Feminist Geography* 145; Craig, 'Parental Education, Time in Paid Work and Time with Children', above n 5; Nancy Folbre, 'Measuring Care: Gender, Empowerment, and the Care Economy' (2006) 7(2) *Journal of Human Development* 183; Nancy Folbre and Michael Bittman, *Family Time: The Social Organization of Care* (Psychology Press, 2004) vol 2; Duncan Ironmonger, 'Counting Outputs, Capital Inputs and Caring Labor: Estimating Gross Household Product' (1996) 2(3) *Feminist Economics* 37; Barbara Pocock, *The Work/Life Collision: What Work Is Doing to Australians and What to Do about It* (Federation Press, 2003); see also, generally, Judy Fudge and Rosemary Joan Owens, *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms*. (Hart Publishing, 2006).

⁵³⁷ See also Jo Grady, 'Gendering Pensions: Making Women Visible' (2015) 22(5) *Gender, Work & Organization* 445; Ginn and Arber, above n 498; Tancred, above n 539; Adkins and Dever, above n 539.

combined paid and unpaid labour than do men⁵³⁸ – which adds up over a lifetime. In 2006, the time spent on paid and unpaid work by people aged 15 years and over averaged 7 hours and 25 minutes per day for men and 7 hours and 34 minutes per day for women.⁵³⁹ Because the Australian Government de-funded the ABS Time Use Survey,⁵⁴⁰ there have been no more recent research done on average working hours, but trends seem to maintain a disparity of hours worked between men and women, suggesting that women are working more hours of paid and unpaid labour than men.⁵⁴¹ ABS research calculates that women spend an average of 2 hrs 52 min per day on domestic activities, whereas men spend 1 hr 37 min. Given that waged work does not usually occur for 52 weeks of the year, but instead has periods of holiday, leave, and sick days, while domestic, unpaid work does not have the luxury of leave, holiday, or sick days (except, of course, when a couple or family is away on holiday, or when someone's illness is so severe as to be totally debilitating), the discrepancy of total labour hours is likely to be much higher. This calculation also does not account for the likelihood that

⁵³⁸ Commonwealth of Australia and Bureau of Statistics, above n 3.

⁵³⁹ Australian Bureau of Statistics, '4150.0 - Time Use Survey: User Guide, 2006', above n 90.

⁵⁴⁰ Marian Sawer, Michael Bittman and Julie Smith, *Counting for Nothing: Cancellation of Time-Use Survey* Australian National University: Gender Institute <<http://genderinstitute.anu.edu.au/news/counting-nothing-cancellation-time-use-survey>>.

⁵⁴¹ See Melbourne Institute, the University of Melbourne, *HILDA Survey* (29 April 2016) Melbourne Institute: The Household, Income and Labour Dynamics in Australia (HILDA) Survey <<https://www.melbourneinstitute.com/hilda/>>.

women increase their unpaid labour during periods of decrease in waged work (eg during Christmas or other public holidays when, for example, child care centres are closed). Adopting a conservative view that women complete one hour of additional total labour hours per week than men, over a working lifetime (20-64), that adds up to 2,288 additional hours. This additional work is unremunerated at the time it is completed and, perhaps more disturbingly, is penalised at retirement age.

Assigning a minimum dollar value, this additional 52 hours of annual unremunerated work is worth approximately \$920 at federal minimum wage.⁵⁴² If this amount did not change and there was no increase across 44 years of a waged work phase of an adult before retirement at age 65, the additional amount earned would be over \$40,480. However, considering a more realistic increase of 2.1% inflation rate with minimum wage at 2017 across 44 years, the total adds up to \$66,063.50, uncompounded, by the time a woman reaches 65 years of age. Adding a 5% compound interest with each year's 52 extra hours of work, the total adds up to over \$200,000 over a waged work phase life cycle (\$203,497.85). Add to this the average lifetime earnings lost to the gender-wage gap, and women have earned well over \$800,000 over their

⁵⁴² At the time of writing in July, 2017, the federal minimum wage was \$17.70 per hour Fair Work Commission, 'Annual Wage Review 2016-17' (C2017/1, Australian Government, 26 June 2017) <www.fairwork.gov.au/pay/minimum-wages>.

working age life phase of *unrealised income*.⁵⁴³

Combining lost earnings from the gender-time gap and the gender wage-gap provides this conservative figure of unrealised income over the waged work phase of a women's life cycle. This does not represent the actual market figure of this labour, nor does it account for the time-pressure, quality of time, lost leisure time, and the stress of conflicting preferences of time-use.⁵⁴⁴ Nor does this figure begin to address the gender-time imbalance in older age, where research indicates that women continue to provide much more unremunerated labour, especially care, than do men.⁵⁴⁵ In short, women in Australia, as elsewhere, face empirically demonstrable structural disadvantages in funding retirement.⁵⁴⁶ The laws governing retirement funding are based on gender blind and inaccurate assumptions and norms regarding heteronormative family forms and the gendered division of labour, without regard to women's experience of time over a life cycle or their

⁵⁴³ This is calculated using the average weekly gender pay gap of \$277.70 across 52 weeks and 44 years, giving a total average life-time loss to the gender pay gap of \$635,377.60. It should be noted that there remain variations across industry and state or territory. Workplace Gender Equality Agency, Commonwealth of Australia, 'Gender Pay Gap Statistics' (Workplace Gender Equality Agency, March 2016) <https://www.wgea.gov.au/sites/default/files/Gender_Pay_Gap_Factsheet.pdf>.

⁵⁴⁴ See preceding chapter for discussion of preferences and resulting conflicts.

⁵⁴⁵ See Pocock, 'Holding up Half the Sky? Women at Work in the 21st Century', above n 527, 419; Australian Bureau of Statistics, 'Caring in the Community, Australia, 2012', above n 499.

⁵⁴⁶ See Australian Human Rights Commission, 'Accumulating Poverty', above n 487; Millbank, above n 132; see also Grady, above n 542.

material needs in retirement. Women are expected to rely on male partners with their larger superannuation accounts, yet women are the ones that experience significant financial hardship when the relationship breaks down and superannuation funds are not fairly allocated.⁵⁴⁷ Ultimately, superannuation's basis in waged work is unfair to people who do unpaid care work or who cannot work. As elsewhere, women in Australia are disproportionately the ones providing unpaid labour, earning fewer and lower wages than men.⁵⁴⁸ And yet, despite the stark empirical evidence demonstrating the gendered distribution of labour and Australia's enduring gender-wage gap, political rhetoric and legal mechanisms privilege superannuation as a retirement solution. The evidence overwhelmingly proves that superannuation is not the solution for women.

IV. Analysis of Actual and Proposed Reforms

This section discusses the four main explanations for the gender disparity in Australia's superannuation system. By using the factors as a framework to discuss related reform approaches, this section further

⁵⁴⁷ See Sheehan, Chrzanowski and Dewar, above n 533; Grania Sheehan, 'Financial Aspects of the Divorce Transition in Australia: Recent Empirical Findings' (2002) 16(1) *International Journal of Law, Policy and the Family* 95.

⁵⁴⁸ See Australian Human Rights Commission, 'Accumulating Poverty', above n 487; Australian Human Rights Commission, 'Investing in Care: Recognising and Valuing Those Who Care', above n 50; Lyn Craig, Abigail Powell and Natasha Cortis, 'Self-Employment, Work-Family Time and the Gender Division of Labour' (2012) 26(5) *Work, Employment & Society* 716; MV Lee Badgett and Nancy Folbre, 'Assigning Care: Gender Norms and Economic Outcomes' (1999) 138 *International Labour Review* 311; Folbre and Bittman, above n 541; Tancred, above n 539; see also Apps and Rees, above n 72; Kohli, above n 72.

demonstrates the failure of such efforts. This section then explores the ways in which each explanation and attempted reform in fact makes up a component of the Australian habitus, further reflexively contributing to the construction of social agents' temporal experiences. By outlining this pluralistic approach to time, neo-maternalistic productivism is further disambiguated.

Four explanations have been advanced for the gender disparity in Australia's superannuation system. The first explanation is that women are disadvantaged from the outset of their working lives: superannuation contributions are calculated as a percentage of income, and the fact that the gender-wage gap leaves women who work full-time earning, on average, 18% less than men who work full-time translates directly into lower superannuation contributions.⁵⁴⁹ Once part-time work is accounted for in this, the gap extends to over 20%.⁵⁵⁰ Second, in Australia, women are more likely than men to take time off of waged work for care and other unpaid labours.⁵⁵¹ This introduces a

⁵⁴⁹ Workplace Gender Equality Agency, Commonwealth of Australia and Commonwealth of Australia, above n 498; see also Australian Bureau of Statistics, 'Gender Indicators, Australia, August 2016: Economic Security', above n 484.

⁵⁵⁰ Workplace Gender Equality Agency, Commonwealth of Australia, 'The Part-Time/Full-Time Wage Gap' (Fact Sheet 17, Workplace Research Centre, University of Sydney, ND)
<https://www.wgea.gov.au/sites/default/files/Australia_at_Work_part_time_full_time_wage_gap_tag.pdf>.

⁵⁵¹ Workplace Gender Equality Agency, Commonwealth of Australia and Commonwealth of Australia, above n 498; Australian Bureau of Statistics, 'Gender Indicators, Australia, August 2016: Economic Security', above n 484; see also Apps and Rees, above n 72, 440; Razavi, above n 498, 2.

period of time, sometimes spanning years, when women are not receiving wages and thus, no regular superannuation contributions. Additionally, time away from waged work effects occupational mobility by limiting advancement opportunities and decreasing the rate of pay raises.⁵⁵² Furthermore, an extended period away from waged work can often mean a return to part-time waged work, not full-time waged work, further compounding the economic effects of care-based temporalities in Australia's current economic context. Third, relationship breakdown leaves women without access to the superannuation accumulated by a partner. Finally, women outlive men in Australia.⁵⁵³ A man retiring at age 67 can expect to live, on average, for an additional 17.3 years, whereas a woman retiring at age 67 can expect to live, on average, for an additional 20.1 years.⁵⁵⁴ Women's superannuation balances would need to be approximately 16% more than men's to account for their increased longevity;⁵⁵⁵ however, recent

⁵⁵² See Ginn and Arber, above n 498.

⁵⁵³ Australian Institute of Health and Welfare and Commonwealth of Australia, above n 495.

⁵⁵⁴ Ibid.

⁵⁵⁵ See Rice Warner Actuaries, 'Initiative to Close Superannuation Savings Gap for Females: Application for Temporary Exemption under the Sex Discrimination Act to the Australian Human Rights Commission' <http://www.humanrights.gov.au/sites/default/files/content/legal/exemptions/sda_exemption/exemption/rice_warner_IGA_25_9_2012_12_15_19_709.pdf>.

reports demonstrate that women's balances are about half the superannuation balances of men.⁵⁵⁶

Each of these factors contributes to the structural inequality in the super system.⁵⁵⁷ Yet piecemeal reforms have not brought about meaningful change because none have challenged the gender-time disparity and addressed the gender blindness inherent in it. Gender blindness does not acknowledge the differences between men and women in society, thus perpetuating patriarchal standards and norms.⁵⁵⁸ The reform of income disparity with taxation approaches fails because it does not address how women's relationship with waged work is inconsistent and unrelated to the male uninterrupted work pattern of the ideal worker. Regarding women's time out of waged work, the proposal to pay superannuation during parental leave does not deal with the gendered disparity of time and labour. Third, regarding relationship breakdown, proposed reforms have also failed to deal with the fundamental time and work imbalance of women in relationships with men. Finally,

⁵⁵⁶ Ibid; ANZ, 'Women's Report: Barriers to Achieving Financial Gender Equity' (2009) 9.

⁵⁵⁷ See, eg, The Government of Australia, Senate Standing Committees on Economics, above n 86.

⁵⁵⁸ See Diane Elson, *Male Bias in the Development Process* (Manchester University Press, 1991); Grady, above n 542; Johanna Kantola, *Feminists Theorize the State* (Palgrave Macmillan, 2006); Patricia Lewis, 'The Quest for Invisibility: Female Entrepreneurs and the Masculine Norm of Entrepreneurship' (2006) 13(5) *Gender, Work & Organization* 453; Janet Smithson and Elizabeth H Stokoe, 'Discourses of Work-Life Balance: Negotiating "Genderblind" Terms in Organizations' (2005) 12(2) *Gender, Work & Organization* 147; Waring, above n 539; see also Stephen Linstead, 'Comment: Gender Blindness or Gender Suppression? A Comment on Fiona Wilson's Research Note' (2000) 21(1) *Organization Studies* 297.

reforms attempting to deal with women living longer than men are strictly voluntary and are, again, premised on women's relationship to waged work prior to retirement.

A. Income Disparity

Superannuation is a compulsory savings programme premised on waged work. It requires employers to contribute an amount to each employee's superannuation fund based on a percentage of income from waged work. Even for women who do not have children and have remained in work full-time, the average Australian woman still has just over half the superannuation savings of men.⁵⁵⁹ The very foundation of superannuation is built on income disparity and ignores the gendered disparity of income accumulation of the gender-wage gap. As a result, superannuation perpetuates class and gender-based inequalities and accumulates and compounds these inequalities until retirement.

Reforms have centred around progressive taxation of superannuation contributions. But reforms such as these fail to grasp the *gendered* component of this very foundation of superannuation accumulation from the gender-wage gap and gender-time gap, and further widens the class division at retirement.

⁵⁵⁹ ANZ, 'ANZ Women's Report: Barriers to Achieving Financial Gender Equity' (ANZ Ltd, July 2015) 9
<<http://www.women.anz.com/content/dam/Women/Documents/pdf/ANZ-Womens-Report-July-2015.pdf>>, also note that this figure does not account for women who have little or no superannuation.

The dominant reform in this area suggests that all contributions to superannuation be non-concessional and taxed at a progressive taxation rate. Therefore, all income would be taxed, there would be no ‘salary-sacrificing’ or concessional contributions, and tax credits would take the place of concessions for lower-income earners. The Australian Council of Social Service (ACOSS) suggests this in its 2012 report on taxation and superannuation.⁵⁶⁰ Indeed, such reform would diminish the tax advantages of high income superannuation contributions and spousal contributions, but would do little to address the gendered foundations of the superannuation system as it stands today.

So long as superannuation is based on a percentage of income, retirement inequalities will be borne by those engaging in lower waged or unwaged labours, who are more likely to be women. The *Superannuation (Government Co-contribution for Low Income Earners) Act 2003* (Cth) is one attempt to offer some targeted relief for low income earners. It provides a superannuation co-contribution of up to \$500 by the Australian Government into an eligible income earner’s superannuation fund.⁵⁶¹ Concessional superannuation contributions are taxed at a 15% rate, but low-income earners pay no income tax on the first \$18,200 of their earnings, and a 19% tax on the next \$18,800 on their

⁵⁶⁰ Australian Council of Social Service, ‘Building Super on a Fair Foundation: Reform of the Taxation of Superannuation Contributions’ (ACOSS Paper 185, Australian Council of Social Service, February 2012).

⁵⁶¹ *Superannuation (Government Co-Contribution for Low Income Earners) Act 2003* (Cth); as amended by *Treasury Laws Amendment (Fair and Sustainable Superannuation) Act 2016* (Cth) sch 4.

income up to \$37,000. The co-contribution ensures that low income earners do not pay more tax on their compulsory superannuation contributions than they pay on their income. This measure has been replaced by the Low Income Superannuation Tax Offset ('LISTO') beginning in July 2017, which operates as the co-contribution did.⁵⁶² LISTO refunds the tax paid on concessional superannuation contributions for low income earners in the form of a 15% offset, up to \$500.⁵⁶³ The eligibility criteria remain the same between both schemes: a low income earner must be earning \$37,000 or less of adjustable taxable income and must contribute to his or her superannuation fund. LISTO tapers according to income from a maximum of \$500 for the lowest earning individual to \$10 for eligible low-income earners at the top end of the \$37,000 cut-off.⁵⁶⁴ In total, this allows for a partnered individual earner, earning less than \$37,000, to receive up to an additional \$1040 into her superannuation fund by co-contributions from both the Government (up to \$500) and her partner (up to \$540 for tax offsets). However, this amount would be significantly lower than the average annual contribution of men in waged work.⁵⁶⁵

⁵⁶² *Minerals Resource Rent Tax Repeal and Other Measures Act 2014 (Cth)* sch 7; *Treasury Laws Amendment (Fair and Sustainable Superannuation) Act 2016 (Cth)* sch 4.

⁵⁶³ *Superannuation (Government Co-Contribution for Low Income Earners) Act 2003 (Cth)* 12E(2); as amended by *Treasury Laws Amendment (Fair and Sustainable Superannuation) Act 2016 (Cth)* sch 4.

⁵⁶⁴ *Superannuation (Government Co-Contribution for Low Income Earners) Act 2003 (Cth)* s 12C(2).

⁵⁶⁵ Australian Bureau of Statistics, 'Employment Arrangements, Retirement and Superannuation, Australia (Apr to Jul 2007 (Re-Issue))' (6361.0, 2009) 23

B. Time out of Waged Work

As this thesis has thus far demonstrated, the adoption or birth of a child marks an important transition in the working lives of parents. The use of early child care providers outside of the family is common in other societies but in Australia mothers are the most likely candidate to provide child care in the earliest years of a child's life.⁵⁶⁶ Because this care labour is not waged, it is not remunerated in the current construction of Australia's superannuation system. Even after a woman with children returns to waged labour, her experience of employment and time will change as her role broadens to include additional care responsibilities.⁵⁶⁷

The life-cycle approach, discussed above, with the eight phases of a life-cycle in relation to working age and children in a household, provides an important mechanism to demonstrate how gendered time and time-use is in two-parent households. In Australia, women are still tasked with the majority of child care and domestic responsibilities, and this

<[http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/1A653F883363040DCA2575C8001ECB4E/\\$File/63610_apr%20to%20jul%202007%20\(re-issue\).pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/1A653F883363040DCA2575C8001ECB4E/$File/63610_apr%20to%20jul%202007%20(re-issue).pdf)>; The Government of Australia, Senate Standing Committees on Economics, above n 86.

⁵⁶⁶ See Denise Doiron and Guyonne Kalb, 'Demands for Childcare and Household Labour Supply in Australia' (Melbourne Institute Working Paper 6/04, April 2004); see also Barbara Pocock, above n 541; Pocock, 'Work/Care Regimes', above n 103.

⁵⁶⁷ See, eg, Stephanie Brown et al, *Missing Voices: The Experience of Motherhood* (Oxford University Press Australia, 1994).

only widens with additional children.⁵⁶⁸ This means that for the average Australian woman, the time calculated as actual hours in waged work diminishes when she has children, while the actual hours of waged work increases for men with children (in heterosexual partnerships).⁵⁶⁹ Rather than waged work, women increase the time devoted to unpaid labours including care and domestic labour, whereas men will often decrease their contribution to care and domestic labours following the birth of a child as their waged work hours increase.⁵⁷⁰

As a result, the disparity of superannuation balances between women and men diverge quite starkly upon the birth or adoption of children, and increase and compound over the life-cycle. Women with children see a rapid decline in the rate of retirement income accumulation in superannuation, whereas men with children will often see an increase in the rate of accumulation of superannuation savings. The Superannuation Funds of Australia coined this effect the 'super baby

⁵⁶⁸ See Barbara Pocock, Natalie Skinner and Philippa Williams, *Time Bomb: Work, Rest and Play in Australia Today* (NewSouth Publishing, 2012).

⁵⁶⁹ Lyn Craig and Michael Bittman, 'The Incremental Time Costs of Children: An Analysis of Children's Impact on Adult Time Use in Australia' (2008) 14(2) *Feminist Economics* 59; Lyn Craig and Michael Bittman, *The Effect of Children on Adult's Time Use: An Analysis of the Incremental Time Costs of Children in Australia* (Social Policy Research Centre, 2005) <<http://www.crr.unsw.edu.au/media/File/DP143.pdf>>.

⁵⁷⁰ Apps and Rees, above n 72.

debt' that women with children accumulate, leading to accumulated superannuation deficit of up to \$50,000 over their working lives.⁵⁷¹

To alleviate this point of disjuncture, reform proposals have focused on providing parents with superannuation contributions during parental leave.⁵⁷² Although the relevant equivalent is legally mandated in many parts of the world,⁵⁷³ Australia does not require the payment of superannuation contributions during any period of parental leave, care-related leave, or decreased hours as a result of family care obligations. Calls for reform provide superannuation coverage during care-related leave. This is the reform I seek to analyse and critique. It comes in two forms: voluntary coverage and government mandated superannuation coverage. I will address each in turn.

A voluntary system already exists. This approach relies on the market, and social and business-case pressure to persuade businesses to provide superannuation contributions during periods of leave. Both Westpac and ANZ have pledged to continue contributing superannuation amounts to employees on paid and unpaid parental

⁵⁷¹ *Super Baby Debt - ASFA Super Guru*

<<http://www.superguru.com.au/about-super/women-and-super/super-baby-debt>>.

⁵⁷² See, eg, Australian Human Rights Commission, 'Accumulating Poverty', above n 487, 25; Australian Human Rights Commission, 'Investing in Care: Recognising and Valuing Those Who Care', above n 50, 11.3.

⁵⁷³ See, eg, Elaine Fultz, 'Pension Crediting for Caregivers: Policies in Finland, France, Germany, Sweden, the United Kingdom, Canada, and Japan' [2011] *Washington, DC: Institute for Women's Policy Research*.

leave.⁵⁷⁴ Presumably, other Australian companies and employers have agreed to pay employees superannuation contributions during periods of parental leave.⁵⁷⁵

A government mandated approach would require that superannuation be paid during any period of parental leave or care-related leave. Other systems have adopted two different approaches to addressing the accumulation of disparate super balances during periods of parental leave: paying the contributions rate based on the individual's rate of pay immediately prior to taking parental leave, or paying a flat rate of parental leave pay and retirement system contribution. The first approach is favoured by Sweden and the UK (albeit most of these countries include a later period of flat-rate, lower pay, falling into the second category).⁵⁷⁶ The second approach is adopted by Poland and France.⁵⁷⁷

⁵⁷⁴ Westpac, *Gender Equality Inclusion Means Everyone Matters* <<https://www.westpac.com.au/about-westpac/inclusion-and-diversity/Inclusion-means-everyone-matters/gender-equality/>>; ANZ, *We Are Bridging the Super Gap* ANZ Women <<http://women.anz.com/at-anz/we-are-bridging-the-super-gap>>.

⁵⁷⁵ See, eg, Viva Energy Australia, *Viva Energy Becomes First Australian Company to Pay Full Super Benefit to Part-Time Parents for Five Years* (2017) Viva Energy Australia <<https://www.vivaenergy.com.au/about-us/media-centre/news/2017/viva-energy-becomes-first-australian-company-to-pay-full-super-benefit-to-part-time-parents-for-five-years>>; Commonwealth Bank of Australia, *CBA Earns Major Accolade for Gender Equality Strategy* (8 December 2016) Newsroom <<https://www.commbank.com.au/content/shared/newsroom/2016/12/cba-earns-major-accolade-for-gender-equality-strategy>>; ASX, *Benefits* About ASX <<http://www.asx.com.au/about/benefits.htm>>.

⁵⁷⁶ Australian Human Rights Commission, 'Investing in Care: Recognising and Valuing Those Who Care', above n 50, vol II, 110.

⁵⁷⁷ *Ibid.*

The second category pays a flat rate of parental leave pay and, presumably in a superannuation system, a contribution based on that flat rate of minimum payment.⁵⁷⁸ In the current parental leave system in Australia, eligible workers are entitled to 18 weeks of parental leave at the rate of the national minimum wage. If the superannuation guarantee then applied during this period of leave, eligible workers would accrue a percentage (currently 9.5%) of the minimum wage as their SG.⁵⁷⁹ This would represent a significant decrease in the rate of pay and superannuation contributions for many parents engaged in waged work prior to the birth or adoption of a child. However, even this reform would only cover the superannuation contributions of waged workers during the 18 weeks of Parental Leave Pay, leaving no superannuation coverage during the remaining time of federally protected parental leave (up to two years, see also Chapter 2).

Further, many Australian women transition from full-time waged work to full-time unwaged work or part-time waged work after the birth or adoption of a child in the early years.⁵⁸⁰ As has been discussed in previous chapters, at varying times and to varying extents, the

⁵⁷⁸ See also *ibid* vol II, 62-64 for this proposed approach in Australia.

⁵⁷⁹ The current national minimum wage is \$694.90 per week, Fair Work Commission, above n 547 achieving a SG of approximately \$66 per week, minus fees.

⁵⁸⁰ See Commonwealth of Australia, *4102.0 Australian Social Trends - Pregnancy and Work Transitions* (20 November 2013) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4102.0Main+Features10Nov+2013>>.

Australian tax and welfare systems indeed favour and incentivise one member of a couple to engage in waged work in a part-time capacity, if at all, in the early years of a child's life. This, again, reflects a political preference for the hetero-nuclear family and ongoing social attitudes of familial child care as preferential and maternal care as superior to other members of the family.⁵⁸¹

The reform approach fails to fully address the gendered disparity of superannuation for several reasons. First, this approach is, so far, voluntary. Accordingly, few companies are publicly touting the payment of superannuation during parental leave (with ANZ and Westpac being two of the most conspicuous). But even if payment during parental leave were mandated by law, it would become cumbersome to reconcile this with the separate systems of paid and unpaid parental leave. If such a reform only applied during periods of statutory paid parental leave, it would contribute the SG for the national minimum wage for 18 weeks. If it extended beyond paid parental leave to apply to periods of unpaid parental leave, then it potentially applies the SG for up to two years (but at what rate, minimum wage, previous wages, or some other rate?). At best, such a reform would only begin to alleviate the disparity of superannuation income accumulation arising from periods of parental leave (up to two years), and would not address the accumulating disparity after parental leave, or the attendant

⁵⁸¹ See Chapter 2 for additional discussion on this point.

decrease in pay that might arise as women incorporate caring responsibilities into their working weeks. In summary, reforming superannuation to provide contributions during periods of paid or unpaid parental leave would not address the gender-wage gap, the gender-time gap, nor the gender disparity of retirement wealth.

C. Relationship Breakdown

The majority of women with children are in a couple relationship.⁵⁸² Though the average Australian parent at the time of the birth or adoption of a child is a member of a couple, it is an unavoidable statistical reality that many relationships will breakdown.⁵⁸³ Due to a number of compounding factors, in Australia, single women are at the highest risk of persistent poverty in retirement.⁵⁸⁴ Most women of a couple who have children will take time away from full-time waged work,⁵⁸⁵ resulting in loss to their superannuation balances. Further, women's unpaid labour rises when she becomes a member of a

⁵⁸² Australian Bureau of Statistics, 'Love Me Do' (Australian Social Trends 4102.0, ABS, 4 April 2012) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features30March+Quarter+2012>>; Ruth Weston, Lixia Qu and Jennifer Baxter, 'Australian Families with Children and Adolescents' (Australian Family Trends 5, Australian Institute of Family Studies, July 2013) <<https://aifs.gov.au/sites/default/files/publication-documents/aft5.pdf>>.

⁵⁸³ There were 48,517 divorces granted in Australia in 2015 and the crude divorce rate remained at 2.0 per 1,000, Australian Bureau of Statistics, 'Marriages and Divorces, Australia, 2015' (3310.0, ABS, 30 November 2016) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/3310.0>>.

⁵⁸⁴ Australian Human Rights Commission, 'Accumulating Poverty', above n 487, 4.

⁵⁸⁵ See Apps and Rees, above n 72.

heterosexual couple, regardless of whether her paid labour decreases.⁵⁸⁶ This unpaid labour contributes toward supporting the husband as he accumulates waged work hours and the attendant superannuation contributions resulting from the increase in waged work earnings, but it could have deleterious effects on the financial security of women.

Admittedly, most members of a couple do not plan for the breakdown of their relationship at marriage or registration.⁵⁸⁷ As a result, couples are left with the problem of retirement income to deal with at legal and de facto dissolution. Failure to adequately split the superannuation balance of a higher income-earning spouse with a lower or no-income earning spouse has the potential of leaving the latter with significantly fewer resources at retirement, while also depriving that spouse of the assets that she contributed in her support of her partner's full-time waged work. Australian family law has proposed several approaches to alleviate the accumulation of retirement savings disparity resulting from relationship breakdown, discussed below.

⁵⁸⁶ Ibid; see also Lyn Craig, *Time to Care: A Comparison of How Couple and Sole Parent Households Allocate Time to Work and Children* (Social Policy Research Centre, University of New South Wales, 2004) 8 <<https://www.sprc.unsw.edu.au/media/SPRCFile/DP133.pdf>>.

⁵⁸⁷ Though financial agreements (colloquially known as 'prenuptial agreements' or 'prenups') are legal, there are no statistics available in Australia on the number of couples that draft and sign financial agreements before or during a marriage or de facto relationship. *Family Law Act 1975* (Cth) 90B-90KA (marriage); 90UA-90UN (de facto).

Prior to 2002 for married couples and 2009 for de facto couples, family courts could not issue orders to third-party trustees.⁵⁸⁸ Because superannuation accounts are held in trust, the Family Court was thus barred from splitting superannuation funds.⁵⁸⁹ Courts were to consider the superannuation funds in determining the distribution of assets, but could not directly split any accruing or unvested superannuation. Splitting is still not legally mandated, though family law reforms now allow for splitting at the source either by financial agreement or court order.⁵⁹⁰ The Family Court may split superannuation interests in accordance with one of the three specified approaches in the statute:

- (a) For non-percentage-only interests: the Court is entitled to calculate a base rate that will be payable once the fund goes into payment phase;
- (b) For percentage and non-percentage interests: Splitting is based on percentage amount to be payable once the fund achieves payment phase;
- (c) For percentage-only interests: the Court is entitled to calculate a percentage amount to be paid with reference to the percentage specified in the order.⁵⁹¹

These three approaches attempt to remunerate the contributions of a non-superannuated, non-member partner, particularly 'women out of

⁵⁸⁸ See *Family Law Legislation Amendment (Superannuation) Act 2001* (Cth); *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth).

⁵⁸⁹ See *Superannuation Industry (Supervision) Regulations 1994* (Cth); *Family Law Legislation Amendment (Superannuation) Act 2001* (Cth); *Family Law Act 1975* (Cth) reforms; see also *Family Law (Superannuation) Regulations 2001* (Cth); see also splitting orders under s 90MT of the *Family Law Act 1975* (Cth).

⁵⁹⁰ *Family Law Act 1975* (Cth) s 66K.

⁵⁹¹ *Ibid* s 90MT(a)-(c).

the workforce because of homemaker and child-rearing responsibilities'.⁵⁹² Unfortunately, each of these options fails to accurately represent the contribution made by the non-member spouse. First and foremost, it is difficult if not impossible to accurately and consistently quantify the amount and quality of contribution a non-member partner provided for the superannuated partner. Secondly, splitting orders falling under (a), and less so under (b) and (c), may not allow for the non-member partner's interests to adequately compound over time. Despite the ability to do so, there remains a low incidence of splitting orders.⁵⁹³

Flagging orders provide another conduit for preserving a non-member spouse's interests. These are orders that bar superannuation trustees from issuing any splittable payments before the 'flag' has been lifted either by agreement or by permission from the Court.⁵⁹⁴ It can be useful where the parties decide to wait until the interests have fully vested before splitting the interests.

Both splitting orders and flagging orders attempt to address superannuation interests at relationship breakdown. To do so requires careful valuation and projections; the value of the superannuation

⁵⁹² *Revised Explanatory Memorandum, Family Law Legislation Amendment (Superannuation) Bill 2000 2001 (Cth)*.

⁵⁹³ See Sheehan, Chrzanowski and Dewar, above n 533.

⁵⁹⁴ *Family Law Act 1975 (Cth) s 90MU; Revised Explanatory Memorandum, Family Law Legislation Amendment (Superannuation) Bill 2000 2001 (Cth)*.

interest(s) must be assessed along with all other assets, and then the court is required to consider seven key concerns in allocating a 'just and equitable' property distribution:

- (a) Direct and indirect financial contributions;
- (b) Direct and indirect non-financial contributions;
- (c) The 'contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of homemaker or parent';
- (d) The impact of any proposed order on the earning capacity of either party;
- (e) Spousal maintenance (if relevant);
- (f) Any other order made affecting either party or child of the relationship;
- (g) Any child support (if relevant).⁵⁹⁵

Determining proportions or cash amounts of unvested interests is an imperfect science. Rather than wait until dissolution to calculate partner shares of superannuation interests, one alternative approach proposes splitting superannuation upon marriage or registration.

This reform recommends splitting superannuation fund beneficiaries into two autonomous, separate accounts upon marriage or registration, with contributions automatically equally distributed between the two accounts during eligible waged work. It would require that superannuation funds be administratively split to benefit each

⁵⁹⁵ *Family Law Act 1975* (Cth) s 79(4)(a)-(g).

individual member of a couple; one superannuation account would essentially become partitioned into two superannuation accounts. Contributions would be split evenly between the two accounts during the lifetime of the relationship. Should the relationship breakdown, each will already have their own separate account, and so the Family Court would not be tasked with any complicated method of valuing or dividing a deferred benefit. This approach also has the added benefit of alleviating some of the burden of the age pension and clarifying difficulties in calculating benefits for members of a couple that have separated but remain legally married.⁵⁹⁶

However, such an approach may disturb the delicate balance currently playing out in Family Courts of Australia. Prior to the 2001 reforms allowing for superannuation splitting, woman in a dissolving couple were usually awarded the family home as both a compensatory feature of the superannuation difficulties, and as a method of alleviating retirement disparities for dissolving couples.⁵⁹⁷ Even after the reforms,

⁵⁹⁶ See *Fuda and Secretary for Department of Social Services*, [2015] AATA 279, 30 April 2015 (Senior Member Taylor) which found that the members of a couple, though living in the same home and still legally married, were not 'members of a couple' for purposes of the age pension; see also *Gordon and Secretary, Department of Employment and Workplace Relations* [2006] AATA 792 (15 September 2006) which found that despite evidence of spousal abuse, the application to be paid the single rate of the aged pension failed: 'although the relationship between the applicant and Mr Gordon is poor there is a sufficient degree of co-operation and sharing between the couple, including in financial and other responsibilities and joint decision-making and commitments to satisfy it that the applicant and Mr Gordon are not living separately and apart' [43].

⁵⁹⁷ Grania Sheehan and Jody Hughes, 'Division of Matrimonial Property in Australia' (Research Paper 25, Australian Institute of Family Studies, 2001); see also Millbank, above n 132, 111-13.

research in 2008 demonstrated little change: women in a dissolving couple still, largely, received the family home and men still retained the superannuation interests reserved in his name.⁵⁹⁸ Surprisingly, there has been no recent statistical and empirical research done on property allocation post-separation in Australia.⁵⁹⁹ A superannuation system that is predicated on hours worked and rate paid, rather than on any objective measure of women's needs at retirement, will necessarily leave women less well off than men.

Another mechanism that has emerged in attempts to alleviate the gendered disparity in relationships is the 'spousal contribution,' by which partners (de facto or married) may contribute to the fund of low or no-income earning partners (known colloquially as 'spousal contributions').⁶⁰⁰ This results in a tax offset of up to \$540 annually for

⁵⁹⁸ Sheehan, Chrzanowski and Dewar, above n 533; Sheehan, above n 552, 102.

⁵⁹⁹ See Belinda Fehlberg and Christine Millward, 'Family Violence and Financial Outcomes after Parental Separation' in *Families, policy and the law: Selected essays on contemporary issues for Australia* (2014) 235 <<https://aifs.gov.au/sites/default/files/fpl24.pdf>> noting no recent research; one exception is the small study of 60 separated parents conducted by Belinda Fehlberg and Christine Millward which examined the parenting and financial arrangements of shared-care parents post-separation. The preliminary reports on this research demonstrates similar findings: 'As a group, the mothers in our study were more financially disadvantaged than fathers due to their lower incomes, the lower share of property they received relative to the amount of time spent with children (most were primary time parents, but few received more than half of the property)...' Belinda Fehlberg, Christine Millward and others, 'Post-Separation Parenting and Financial Arrangements over Time Recent Qualitative Findings' [2013] (92) *Family Matters* 29, 38.

⁶⁰⁰ *Superannuation Industry (Supervision) Regulations 1994* (Cth) div 6.7; The Australian Government, Australian Taxation Office, *T3 Superannuation Contributions on Behalf of Your Spouse 2015* (29 May 2015) The Australian Government, Australian Taxation Office <<https://www.ato.gov.au/Individuals/Tax-return/2015/Supplementary-tax->

the contributing partner, and the receiving partner must be earning less than \$13,800 of assessable income in the year.⁶⁰¹ The tax offset is calculated as 18% of the lesser of (a) \$3000, reduced by \$1 for every \$1 of the receiving partner's income rises above \$10,800, or (b) the total contributions made to the receiving partner's superannuation fund.⁶⁰² Unsurprisingly, it is predominantly women engaged in unremunerated domestic and caring labours receiving spousal contributions into their super funds.⁶⁰³ These women may be engaged in sporadic or part-time waged work, or may not be engaged in waged work at all. After the tax offset of \$540 annually is reached, a partner may continue to contribute annually into a partner's superannuation fund up to the maximum non-concessional cap for the year.⁶⁰⁴ This is augmented by the current allowance to bring forward two previous years' contributions caps for a maximum of \$450,000 annual non-concessional contribution before the cap imposes the higher tax of 46.5%.⁶⁰⁵ Note the high earning capacity

return/Tax-offset-questions-T3-T9/T3-Superannuation-contributions-on-behalf-of-your-spouse/>.

⁶⁰¹ *Superannuation Industry (Supervision) Regulations 1994* (Cth) div 6.7; The Australian Government, Australian Taxation Office, above n 605.

⁶⁰² *Superannuation Industry (Supervision) Regulations 1994* (Cth) div 6.7; The Australian Government, Australian Taxation Office, above n 605, 3.

⁶⁰³ See, generally, Australian Bureau of Statistics, 'Trends in Superannuation Coverage' (Australian Social Trends 4102.0, 2009) <[http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/LookupAttach/4102.0Publication25.03.098/\\$File/41020_Superannuation.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/LookupAttach/4102.0Publication25.03.098/$File/41020_Superannuation.pdf)>.

⁶⁰⁴ *Income Tax Assessment Act 1997* (Cth) s 292.85(3)-(4); *Superannuation Industry (Supervision) Regulations 1994* (Cth) div 6.7; The Australian Government, Australian Taxation Office, above n 605.

⁶⁰⁵ *Superannuation (Excess Non-Concessional Contributions Tax) Act 2007* (Cth); *Income Tax Assessment Act 1997* (Cth) ss 292.80, 292.85.

of such a household: the retirement system protects earners up to \$450,000 before a higher tax is imposed.

This approach again relies on the hetero-nuclear family form and the operation of neoliberal rationality within the family. It is structured in such a way as to keep the 'problem' of retirement within the private household, and shifts the responsibility of economic security in older age to the members of a couple. As such, it has failed to alleviate the gendered outcomes of superannuation.

Like the spousal contribution, the family law reforms fail to adequately address the gender disparity inherent in superannuation along two main points. Firstly, women are engaging in more labour hours in a relationship with children (as compared to single people) and being penalised in their superannuation balances for this. Secondly, superannuation remains based on a percentage of income earned from waged work. The persistence of Australia's gender-wage gap ensures that a contribution superannuation system reliant on wages defined as 'ordinary time earnings' will continue to disproportionately impact women's superannuation balances.

D. Women Live Longer

It is undisputed that women in Australia, on average, live longer than their male counterparts, with estimates ranging from 2-4 years

longer.⁶⁰⁶ Additionally, statistics show that women spend, on average, 24.2 years in retirement, whereas Australian men can expect to live 19.3 years in retirement.⁶⁰⁷ Women in Australia retire slightly earlier than men,⁶⁰⁸ but even if this inequity were remedied, an average worker who retires at the age of 67 will have different retirement income needs based on expected longevity. A global survey done by HSBC demonstrates that, at current projections, Australians will run out of superannuation after just 10 years in retirement⁶⁰⁹ – and this is no doubt compounded for women with about half of the superannuation balances of men.⁶¹⁰

There has been one type of approach recently introduced to alleviate this gendered disparity of superannuation. As discussed above, Rice Warner, an actuary firm, applied to the Australian Human Rights Commission for an exemption to the *Sex Discrimination Act 1984* (Cth) in 2012 in order to pay its female employees an increased Superannuation Guarantee.⁶¹¹ It cited women's increased longevity as the reasons to do

⁶⁰⁶ Australian Institute of Health and Welfare and Commonwealth of Australia, above n 495.

⁶⁰⁷ Organisation for Economic Co-operation and Development, 'Society at a Glance 2014 Highlights: Australia OECD Social Indicators' (OECD, March 2014) 2 <<https://www.oecd.org/australia/OECD-SocietyAtaGlance2014-Highlights-Australia.pdf>>.

⁶⁰⁸ Australian Bureau of Statistics, 'Retirement and Retirement Intentions, Australia, July 2014 to June 2015' (6238.0, ABS, 29 March 2016).

⁶⁰⁹ HSBC, *13-Year Shortfall in Retirement Fund* (19 January 2015) HSBC: News and Media <<http://www.about.hsbc.com.au/news-and-media/>>; see generally HSBC, 'The Future of Retirement: Choices for Later Life' (HSBC, 2015).

⁶¹⁰ See ANZ, 'ANZ Women's Report', above n 564.

⁶¹¹ Application Letter from Melissa Fuller, Deputy CEO Rice Warner Actuaries, to Elizabeth Broderick, Sex Discrimination Commissioner, 10 April 2012, 1

so.⁶¹² At the time of the application, the SG was set at 9% and Rice Warner was requesting to pay female employees 10.5% SG, rising to 13.95% when the SG rises to 12% of wages.⁶¹³

Rice Warner's application was later rescinded relying on the s 7D of the SDA allowing for 'special measures for the purpose of achieving substantive equality between men and women'.⁶¹⁴ This approach was later echoed by ANZ, who recently pledged to contribute an additional \$500 SG for every fixed term and permanent female employee each year beginning 8 January 2016.⁶¹⁵ ANZ also cited the increased life expectancy of Australian women.⁶¹⁶ Additionally, ANZ pledged to pay super contributions to all employees for any periods of paid or unpaid parental leave.⁶¹⁷

<http://www.humanrights.gov.au/sites/default/files/content/legal/exemptions/sda_exemption/exemption/rice_warner_IGA_25_9_2012_12_15_19_709.pdf>.

⁶¹² Rice Warner sought a temporary exemption from the SDA so as to 'pay an additional superannuation contribution for our female employees to compensate them for their extra longevity in retirement relative to male employees'. Application Letter from Melissa Fuller, Deputy CEO Rice Warner Actuaries, to Elizabeth Broderick, Sex Discrimination Commissioner, 10 April 2012, 1

<http://www.humanrights.gov.au/sites/default/files/content/legal/exemptions/sda_exemption/exemption/rice_warner_IGA_25_9_2012_12_15_19_709.pdf>.

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⁶¹⁵ ANZ, *We are Bridging the Super Gap*, ANZ Women
<<http://www.women.anz.com/at-anz/we-are-bridging-the-super-gap>>.

⁶¹⁶ Ibid.

⁶¹⁷ See also previous section in this chapter.

Australian Greens federal member for Parliament, Adam Bandt, proposed the Sex Discrimination Amendment (Boosting Superannuation for Women) Bill 2014 (Cth) (the 'Bill') to legislatively allow employers to provide additional superannuation contributions to women. The Bill succinctly provides an amendment to the SDA:

Nothing in Division 1 or 2 makes discrimination by an employer against a female employee unlawful if the discrimination:

- (a) is on the ground of the employee's sex; and
- (b) involves the employer making an employer superannuation contribution for the benefit of the employee that is more than that otherwise required by law.⁶¹⁸

On 16 Jun 2015, this Bill was removed from the Notice Paper with no further Parliamentary discussion.⁶¹⁹

Although this is the first reform proposal that makes explicit reference to gender, it still fails to comprehensively address the gendered nature of the Australian retirement system. Using the Bill as a guide, it still leaves it up to individual employers to voluntarily address the gendered disparity of superannuation savings. Even without the Bill, employers

⁶¹⁸ Sex Discrimination Amendment (Boosting Superannuation for Women) Bill 2014 sch 1 inserting Sex Discrimination Act 1984 (Cth) s 41C.

⁶¹⁹ Parliament of Australia, *Sex Discrimination Amendment (Boosting Superannuation for Women) Bill 2014* (2015) Parliamentary Business <www.aph.gov.au>.

such as Rice Warner and ANZ have opted to pay women additional super contributions.⁶²⁰

As a voluntary measure, the Bill operates on only the most willing employers, and fails to alleviate the fundamental problem of superannuation which is that it is based on earned income.⁶²¹ In a system where women continue to suffer an average gender-wage gap of 18%, superannuation will disproportionately impact women by its very design. This reform does nothing to address the disparity of superannuation balances based on the gender-wage gap, nor does it provide for the lack of retirement savings that accumulates during time away from waged work, or during part-time work.

It assumes that women are earning the same as men and that they work the same number of years in the same work pattern: namely, that women, as men, work full-time from the completion of training/education to the start of retirement. Should that be the case, then using actuary data to calculate women's additional longevity would indeed alleviate the gender disparity of superannuation balances. After an uninterrupted work life cycle, women would retire,

⁶²⁰ As mentioned in the above text, the AHRC and employers are operating on a presumption that a court will find the differential treatment of women's superannuation as a special measure under s 7D of the SDA. However, this is as yet untested and could act as a disincentive for a highly risk-adverse employer.

⁶²¹ Superannuation Guarantee contributions are based on 'ordinary time earnings' and are to be paid at least quarterly. *Superannuation Guarantee (Administration) Act 1992* (Cth) s 19.

just as men, and then live, on average, three years longer. By providing for additional superannuation contributions in light of this, women would be able to maintain the same level of retirement income as their male counterparts, to cover their average longer life spans.

However, the average female experience to time in waged work differs from that of the ideal male worker. As the literature on life cycles and time-use demonstrates, many women intersperse their waged working lives with periods of unpaid care labours (maternity leave, carer's leave) and part-time waged work.⁶²² Paying women an increased SG does little to alleviate the very reliance on waged work and hours to superannuation accumulation.

E. Analysis

These reforms, both the actual, implemented efforts and the proposals for reform, fail to redress women's lower superannuation balances because they fail to remedy the underlying gendering of time. Despite identifying how superannuation relies on waged work and how that reliance compounds over a lifetime to contribute to women's economic insecurity in retirement, current trajectories appear set to maintain the current superannuation system with all its gendered flaws.⁶²³ Though

⁶²² See, eg, Pocock, 'Holding up Half the Sky? Women at Work in the 21st Century', above n 527; Pocock, Skinner and Williams, above n 573; Craig, *Time to Care*, above n 591; Craig and Bittman, 'The Incremental Time Costs of Children', above n 574; Craig, Powell and Cortis, above n 553; Apps and Rees, above n 72.

⁶²³ See, eg, Scott Morrison, above n 523.

many areas for reform have been identified,⁶²⁴ none have specifically recognised how neo-maternalistic productivism and its rationality constructs and reinforces retirement inequalities. This neo-maternalistic productivism is reflected in part through law and policy promoting a waged work-based temporal dominance.

What emerges is a simultaneous operation of hegemonic, politicised time manifest in legal temporalities, and the personal experiences and constructions of time in social agents. Whereas political narratives of time craft the ideal worker's life cycle of uninterrupted waged work as the preferred time, social agents experience time differently. Rather than adhering to the externally imposed temporal life cycle of neo-maternalistic productivism, social agents craft and experience time through the habitus.⁶²⁵ We see this through the numerous ways in which people, especially parents, do not adhere to an uninterrupted waged work life cycle. Women, especially, disrupt neo-maternalistic productivism's preference for waged work and instead craft time through significant re-orderings of action and experience. This is discussed in more detail in the following chapter.

These simultaneous experiences of time for women with children point to pluralistic conceptions of time. As discussed in Chapter 1, Rita

⁶²⁴ See, eg, The Government of Australia, Senate Standing Committees on Economics, above n 86.

⁶²⁵ The relationship between the habitus and time is discussed in more detail in the Introduction and Chapter 1.

Felski's approach to time suggests multiple, undulating temporal registers in the everyday, life time, and monumental time.⁶²⁶ This plurality agitates against neo-maternalistic productivism by actively and reflexively incorporating multiple temporalities at once.

Superannuation, as we have seen with other legal frameworks and legal temporalities discussed in this thesis, does not allow for pluralistic conceptions of time. To do so would potentially threaten the ideal worker's waged work hegemony. However, an alternative system to retirement income that references multiple approaches to time and time-use would have the potential to incorporate women's experiences of time outside of neo-maternalistic productivism. Furthermore, an alternative that begins with a basic understanding of women's needs at retirement is more likely to redress the entrenched inequities than superannuation.

V. An Alternative Proposal

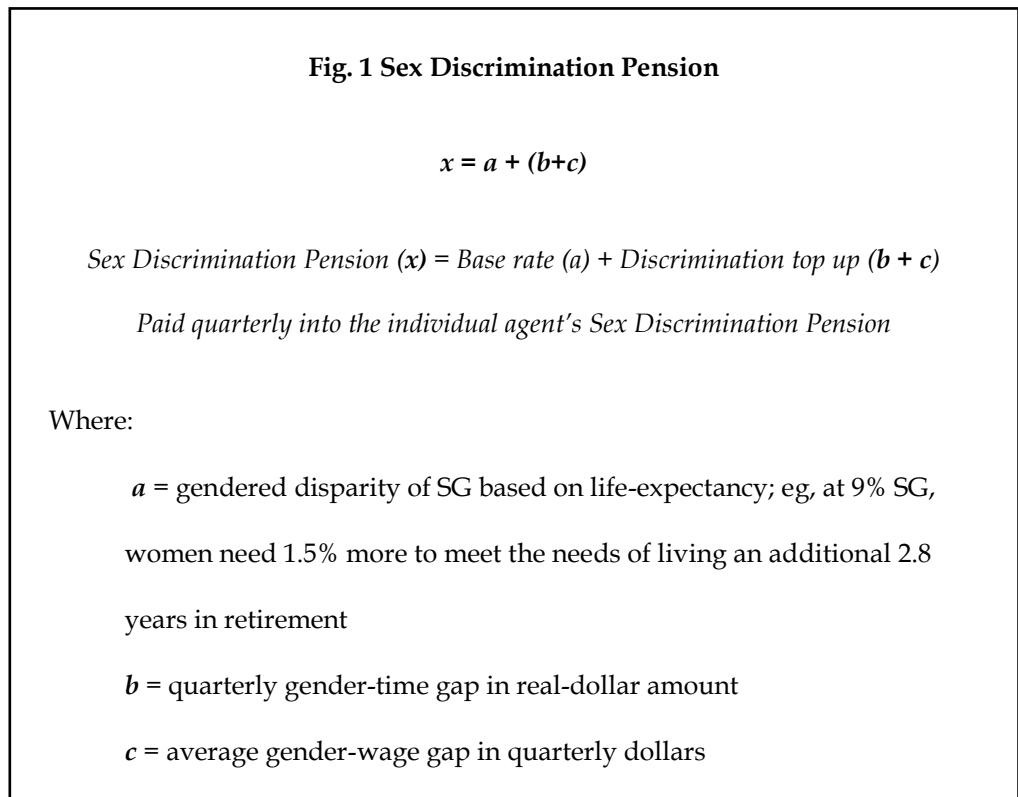
A retirement income device in the form of a 'sex discrimination pension', based on empirical, up to date, evidence of compounded discrimination and disproportionate time-use has the potential to achieve twin objectives of addressing the material needs for women in older age and provide ongoing fiscal responsibility and transparency to motivate structural change. As an additional pillar to Australia's retirement income system, a sex discrimination pension could provide

⁶²⁶ Rita Felski, *Doing Time: Feminist Theory and Postmodern Culture* (New York University Press, 2000).

the conduit to compensate women in older age for diverse experiences of time, thus broadening conceptions of time and remuneration beyond the ideal worker narrative. Established as a fund to redress the economic effects of systemic sex discrimination, it would apply to all women (so long as women remain subject to ongoing sex discrimination as described below).

One way in which such a pension could emerge would be as a two-part payment paid in addition to any prior earnings and savings. The two-part payment includes a base flat-rate based on women's longer life expectancy plus an additional 'discrimination top-up' based on the gender gap in wages and time. A sex discrimination pension based on empirical findings on the compound effects of the gender-time gap and the gender-wage gap in retirement incomes provides one opportunity to successfully remediate the disproportionately gendered impacts in older age.

Accordingly, this proposed pension would operate as a base rate based on life-expectancy plus a 'discrimination top-up' that all eligible pensioners would receive, as represented in Figure 1:



The base rate would be the superannuation gap between men's and women's average superannuation balances based on life-expectancy, providing women (so long as they continue to be the longer-living sex) with the additional monies necessary to fund the average additional life expectancy. This base rate is based on average comparisons of the Superannuation Guarantee, average full-time income or a woman's actual earned income (whichever is higher), and life expectancy. For example, it has recently been calculated that women need an additional 1.5% over the current 9% Superannuation Guarantee to meet their

material needs of longer life expectancy.⁶²⁷ The base rate would be made up of quarterly contributions calculated by the above criteria. By way of example, at current levels, this base rate would be made up of 1.5% of a women's actual earned income or the Australian average full-time earnings (whichever is higher), deposited quarterly into her sex discrimination pension. This base rate would deposit into her pension regardless of whether she was in paid labour or not.

The monies in the 'discrimination top up' would be set during the accumulation phase of the working age life-phase (20-64), with the upper age limit adjusted if the preservation age is set to increase for superannuation.⁶²⁸ The discrimination top-up payment would be made quarterly into the individual's sex discrimination pension during the working age life-phase of the pensioner, reflecting a two-part compound analysis of the gendered time-use disparity and the gender-wage gap. For example, in recent estimates, women exert just over an hour more a week doing combined paid and unpaid labour than men⁶²⁹ – which adds up. As previously calculated above, the gender-time gap produces, in conservative estimates at federal minimum wage, \$920 annually or \$230 quarterly. This gender time disparity becomes

⁶²⁷ See Rice Warner Actuaries, 'Valuing Females and Rewarding Them in Retirement' (Rice Warner, November 2012) 17
<<http://www.ricewarner.com/wp-content/uploads/2015/10/Valuing-Females-in-Retirement-Report.pdf>>.

⁶²⁸ See above note 6.

⁶²⁹ Commonwealth of Australia and Bureau of Statistics, above n 3.

part of the sex discrimination pension by way of accurate time-use surveys, and calculated as unrealised quarterly income, submitted to the individual's sex discrimination pension. Similarly, the gender-wage gap can be reflected in real dollar amounts, making up the second part of the discrimination top-up. For example, recent estimates by the Workplace Gender Equality Agency submit that women earn, on average, \$251.20 per week less than men.⁶³⁰ Using the formula previously, provided, Figure 2 calculates the quarterly pension deposits at current estimates.

⁶³⁰ Workplace Gender Equality Agency, Commonwealth of Australia, 'Australia's Gender Pay Gap Statistics' (August 2017) <<https://www.wgea.gov.au/sites/default/files/gender-pay-gap-statistics.pdf>>.

Submitting the entire average gender-wage gap amount into the

Fig. 2 Sex Discrimination Pension Sample Quarterly Contribution

$$\$131.18 + (\$230 + \$3,265.60) = \$3,626.78$$

Where:

$$a + (b+c) = x$$

a = 1.5% of quarterly federal minimum wage

b = quarterly gender-time gap calculated at federal minimum wage

c = quarterly average gender-wage gap

x = quarterly contribution paid into the individual's Sex Discrimination Pension

individual's sex discrimination pension at quarterly intervals, the discrimination top-up would fluctuate quarterly depending on the level of sex discrimination evidenced in Australian society by time, wage, and age. This two-part discrimination top-up amount would significantly alter the gendered disparity of retirement income and wealth in older age, while also partially remediating the compounding financial aspects of the gender-time gap and gender-wage gap of unrealised income.

Informed and set by rigorous empirical data, this pension would have the added impact of ensuring accurate time-use surveys and data continue to be resourced and completed. Operated by a new statutory agency working alongside similar bodies such as the Workplace Gender Equality Agency, the agency would coordinate and oversee the pension. This coordination would include ensuring the necessary data sources

are available, selecting and managing the pension researchers, and publishing rates and outcomes. Having the outcomes publicly available and informing annual rates of deposit into a sex discrimination pension would in all likelihood encourage a robust debate about time and the gender-time gap beyond academics and minority politicians. Thus, a sex discrimination pension would have the benefit of not simply providing for women's material needs at retirement while reflecting the gendered wage and time disparities, it would provide a targeted national research agenda to inform policy and legislative decision-making aimed at substantively remediating and eliminating sex and gender-based disparities.⁶³¹

As an amendment to the *Sex Discrimination Act 1984 (Cth)*, a sex discrimination pension would be directly aimed at eliminating sex- and gender-based discrimination, in furtherance of the Objects of the Act.⁶³²

⁶³¹ This also speaks directly to the value of temporal research discussed from a methodological perspective in Chapter 1.

⁶³² The Objects of the Act are: (a) to give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women and to provisions of other relevant international instruments; and (b) to eliminate, so far as is possible, discrimination against persons on the ground of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy or breastfeeding in the areas of work, accommodation, education, the provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs; and (ba) to eliminate, so far as possible, discrimination on the ground of family responsibilities in the area of work; and (c) to eliminate, so far as is possible, discrimination involving sexual harassment in the workplace, in educational institutions and in other areas of public activity; and (d) to promote recognition and acceptance within the community of the principle of the equality of men and women. *Sex Discrimination Act 1984 (Cth)* s 3. Notably, it would not need to qualify as a permanent exemption from the Act under Part II, Division 4 of the Act,

Additionally, as a formally gender-neutral pension, it would be crafted to meet the deficits of ongoing sex discrimination as demonstrated by empirical data based on gendered disparity of wages and time.

Currently, women would be the beneficiaries of such an empirically-based national pension, but should the pendulum swing the other way, men could be availed of the pension benefits.

The pension could be funded through a combination of corporate and earned income tax, reminiscent of social insurance programmes found in countries such as Germany and others.⁶³³ Because men earn, on average, much higher incomes than do women, a radically progressive taxation scheme to fund the sex discrimination pension would have the added benefit of potentially lessening the income disparity between men and women.

Importantly, to be successful such a programme would have to co-exist with additional efforts at remedying the gendered disparity of wages and time. The following chapter discusses additional potential reform. However, as currently presented, a sex discrimination pension shifts the risks of a gendered system from the individual, where it currently stands with superannuation, and back into structural and social forces that benefit from women's labour.

because it would be in furtherance of the Act as an amendment to the Sex Discrimination Act.

⁶³³ See Günther Schmid, 'Sharing Risks of Labour Market Transitions: Towards a System of Employment Insurance' (2015) 53(1) *British Journal of Industrial Relations* 70.

VI. Conclusion

Australia's superannuation system, which is premised on the individual's 'active participation' in the accumulation of her own retirement income, is one form of the neoliberal burden-shifting of retirement from the social collective of universal age pensions to the individual income earner. This shifts not just the accumulation of retirement income to each individual earner, but also the risks of a market-based fund and system. Each resident, by following the ideal worker paradigm of uninterrupted waged work, is expected to provide her own earned retirement income through a system of government mandated savings. Thus, retirement becomes merely the penultimate event in a sequence of chrono-nuclear norms – typical life-defining events encompassing birth, education, career advancement, retirement, and death – earned by achieving the preceding sequence of chrono-nuclear norms in the proper order.

The fundamental unfairness of the superannuation system results from its foundations built entirely on an ideal worker as the uninterrupted pattern of full-time, consistent paid labour until retirement and then death. The superannuation system does not account for the unwaged work that women largely do, nor does it address the undulating cycle of waged work and working time patterns frequented by women with children. Fluctuating care and other needs often necessitates a change in working time patterns (full-time to part-time, flexible work) and/or

significant time away from waged work entirely.⁶³⁴ Moreover, so long as superannuation is based on a percentage of income, retirement inequalities will be borne by those engaging in lower waged or unwaged labours, who are more likely to be women. Though progressive taxation of all contributions acknowledges the tax concessions afforded higher income earners (usually men), it fails to address the foundation of superannuation built upon earned income. The unifying paradigm underlying each factor is a basis in neo-maternalistic productivism. This does not account for the gendered life cycle of waged work and caring responsibilities. Effective superannuation reform must consider the materiality of retirement, including its ongoing gendered assumptions of care and temporalities.⁶³⁵

This chapter discussed how the work-based life cycle of the ideal worker narrative excludes women in superannuation. Because superannuation benefits are linked directly to wages earned, without reference to other, unpaid forms of labour, there remains a significant disparity in who relies on what parts of the retirement system. That disparity is starkly gendered. Women rely predominantly on the age pension, and men rely, increasingly, on superannuation and private

⁶³⁴ Australian Bureau of Statistics, 'Gender Indicators, Australia, August 2016: Economic Security', above n 484; Workplace Gender Equality Agency, Commonwealth of Australia, 'Women's Economic Security in Retirement', above n 484; see also Apps and Rees, above n 72.

⁶³⁵ See also Wendy Loretto and Sarah Vickerstaff, 'The Domestic and Gendered Context for Retirement' (2013) 66(1) *Human Relations* 65.

savings devices.⁶³⁶ The disparity reflects the male bias of a wilfully gender-blind system that persistently fails to value the gendered distribution of unpaid caring labours in heteronormative households.⁶³⁷

As compared to men, women work more,⁶³⁸ earn less,⁶³⁹ and live longer.⁶⁴⁰ A contributory superannuation system that is predicated on waged labour, rather than on any recognition of women's lifetime labour or objective measure of women's needs at retirement, will necessarily leave women less well off than men. By accounting for the gendering of temporality, time, and the life cycle, the fundamental unfairness of a gender blind system based on waged work becomes clear. What is needed instead is an approach that accounts for the gendered labour that occurs across the life cycle, while also addressing the materiality of retirement itself – the objective needs of women approaching the next phase in their life cycles.

⁶³⁶ See Government of Australia Department of Social Services, 'Income Support Customers: A Statistical Overview 2013' (Statistical Paper 12, Department of Social Services, 2014) 13 <https://www.dss.gov.au/sites/default/files/documents/01_2015/sp12_accessible_pdf_final.pdf>; Jeff Harmer, 'Pension Review' [2008] *Background paper, Department of Families, Housing, Community Services and Indigenous Affairs, Canberra* 37–38 <http://www.security4women.org.au/wp-content/uploads/NFAW_PensionsReview.pdf>; Workplace Gender Equality Agency, Commonwealth of Australia, 'Women's Economic Security in Retirement', above n 484, 2.

⁶³⁷ See Linstead, above n 563; see also Grady, above n 542; Ginn and Arber, above n 498.

⁶³⁸ Commonwealth of Australia and Bureau of Statistics, above n 3.

⁶³⁹ Australian Bureau of Statistics, 'Gender Indicators, Australia, August 2016: Economic Security', above n 484.

⁶⁴⁰ Australian Institute of Health and Welfare and Commonwealth of Australia, above n 483.

The following chapter discusses the diverse life cycles of women with children, including the potential for subversive temporality.

Accordingly, it draws on the themes of this and preceding chapters to discuss how a theory of time as disrupted better accounts for the ways in which time is experienced and constructed by social agents.

Part II
Feminist Alternatives in Disruption

Chapter 5

Disruptive Time and Transitional Labour Markets⁶⁴¹

Introduction

This chapter continues to build a coherent model of time and temporality that is used to further discuss existing frameworks and potential legislative change. It builds on the theme of disruption woven throughout this thesis, and fully develops this into a comprehensive theory of care-based temporalities as disruptive time. The chapter more fully elaborates upon the central issues of reproduction and care in time by discussing feminist and queer literature on what I call critical temporalities. The literature identifies specific areas for critique and reform in existing social and labour relations. Drawing on the legal temporalities discussed in chapters 2 – 4, and in light of the gravity of recognising care-based temporalities to remedy a deeply gendered system, this chapter discusses the example of transitional labour markets ('TLMs') as one potential alternative approach to redress the gendered temporalities in Australia's parental leave, flexible work, and superannuation systems. Having accounted for the critiques provided by feminist and queer theorists in critical temporalities, TLMs provide a reimagination of the traditional labour market to accommodate for the multiple ways in which people weave into and out of traditional productive, waged labour. As such, TLMs provide multiple avenues,

⁶⁴¹ Portions of this chapter have been accepted for publication in a forthcoming special edition of the *Griffith Law Review* as 'Care-based Temporalities and Parental Leave in Australia'.

support, and structures for social agents to interact with their peers and society beyond traditional waged labour, including substantial social support systems. Disruptive time provides a theoretical anchor point to reframe norms of employment and labour while TLMs provide one alternative approach to transform legal and policy approaches to labour and incorporate care-based temporalities within that transformation.

Section I discusses the three legal frameworks addressed in the substantive chapters of this thesis: parental leave, flexible work, and superannuation. Each of the three preceding chapters discusses a different way in which legal temporalities are incompatible with care-based temporalities. This section summarises the conclusions to my first two research questions, 'What is the dominant conception of time underlying Australian work and parenting laws and policies?' and 'In what sense is that conception gendered, particularly as it relates to women with children?' In introducing care-based temporalities, this section lays the foundation for Section II to answer the third main research question, 'what alternative conceptions of time are possible?' by identifying those in need of care as vulnerable — that is, those who are cared for are too vulnerable to care for themselves.

Section II and the following sections more fully answer the third research question by elaborating on the relationship between caring responsibilities for children and the care-based temporalities of disruptive time. I fully develop my concept of disruptive time by expanding on my earlier introduction of the literature on critical

temporalities, and by incorporating LA Paul's concept of the transformative experience. In order to situate disruptive time as a series of potentially political acts, this section also sets out my understanding of praxis informed by Pierre Bourdieu and Hannah Arendt. Section III segues from a discussion of praxis into an alternative approach to time that more appropriately represents the temporalities of those excluded from legal temporalities. Set up in opposition to the processual and financialised time of neo-maternalistic productivism and by drawing on discussions of time as plurality, this section more fully articulates my concept of care-based temporalities in disruptive time. Given this exclusion in existing legal temporalities, this chapter then introduces the concept of transitional labour markets in more detail in Section IV, explaining what they are and how they can be developed and sustained. This section analyses TLMs where they are fully integrated within social, welfare, and labour systems and how they recognise and value multiple temporalities in a life cycle. Section V concludes.

I. Legal Temporalities

Parental leave, flexible work, and superannuation represent three chronological phases of a life-cycle that experiences child-based caring responsibilities.⁶⁴² With each phase, Australian law and policy creates a legal temporality to address that life phase, manipulating it back within

⁶⁴² However, it should be noted that these phases of the life-cycle are not always linearly progressive; for example, some carers may themselves in flexible work prior to parental leave due to other responsibilities. However, for our purposes I look specifically at the life cycle for parents with caring responsibilities.

a waged-work trajectory. The legal temporalities of each, discussed in preceding chapters, is shown here to be in disjunction with care-based temporalities of parenting.

Parental Leave

Chapter 2 discussed parental leave in Australia, focusing on statutory parental leave pay as provided by the *Paid Parental Leave Act 2010* (Cth). The sense of time discussed in Chapter 2 analysed the exclusions that occur for certain women, namely migrants and those with closely-spaced children who do not have the requisite paid labour continuity to qualify for statutory paid parental leave. The *Paid Parental Leave Act 2010* (Cth) requires a minimum of 330 hours of work in 10/13 months with no more than an 8-week gap between two consecutive working days.⁶⁴³ For the worker with continuous labour market ties, this averages out to just over 7 hours a week. However, for many workers, this continuous connection to the waged labour market is not possible. This is especially so for certain workers who have recently migrated or those who have had multiple children closely spaced together ('closely spaced' for purposes of the Act). As a result, despite ongoing labour market ties and sympathetic objectives of the Act, these women would not be eligible for statutory paid parental leave.

These women would not be eligible for statutory paid parental leave because their labour market ties have been disrupted by caring

⁶⁴³ Paid Parental Leave Act 2010 (Cth) s 32.

responsibilities. As has been mentioned, not everyone has the luxury of time, biology, or luck to space children according to the preferred timing enumerated in the *Paid Parental Leave Act 2010* (Cth). Of course, as previously discussed in Chapter 2, without significant legal leave literacy and cooperation from Human Resource departments, many waged workers may not be able to parse out their leave entitlements to qualify for subsequent paid parental leave. A legal regime that works in such a way as to exclude the very women it was targeted at fails at its enumerated aims. It also exacerbates women's economic insecurity later in life, putting pressure on individuals and couples to fulfil the neoliberal promise and provide for their own economic security throughout each phase of the life cycle, no matter how incompatible care-based temporalities are with the hetero-capitalist rationality of the ideal worker. This pressure takes no heed of the pluralities of care-based temporalities emerging at parental leave, and undulating through the remainder of the life cycle.

Flexible Work

In Australia, it is women more than men that seek flexible working patterns.⁶⁴⁴ These flexible work patterns can include anything from flexible start and stop times, to flexibility in location of work, part-time days, compressed working weeks, or various other working hour adjustments. Those with caring responsibilities have the right to request

⁶⁴⁴ Natalie Skinner and Barbara Pocock, 'Flexibility and Work-Life Interference in Australia' (2011) 53(1) *Journal of Industrial Relations* 65, 65.

flexible work.⁶⁴⁵ Employers, however, are not obliged to acquiesce to these requests, and may decline all or part of it on ‘reasonable business grounds’ with little oversight.⁶⁴⁶ Chapter 3 discussed the emergence of the rhetoric of flexibility during the Howard Government (1996-2007). Flexibility, as used in the dominant policies and public materials of the Howard Government, referred to flexibilising workplace relations – it was, in large part, an obfuscation of the Howard Government’s dismantling of the existing negotiated flexibility of previous workplace relations. The rhetoric of flexibility was used by the Howard Government to shift contractual and negotiation power in labour relations to employers and was largely accomplished through the *WorkChoices* legislation.⁶⁴⁷ Though the *Fair Work Act 2009* (Cth) repealed most of the provisions of *WorkChoices*, there remains a legacy in contemporary law, policy, and society. This is reflected in part by the ways in which the neoliberalisation of Australian law, policy, and society became accelerated during the Howard Government and entrenched in subsequent governments.

Despite empirical evidence demonstrating that providing flexible work does not negatively impact on productivity and, in fact, increases

⁶⁴⁵ *Fair Work Act 2009* (Cth) s 65, this section also allows the right to request to eligible persons without caring responsibilities, eg, those with a disability.

⁶⁴⁶ *Ibid.*

⁶⁴⁷ *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

productivity,⁶⁴⁸ there is no right to flexible work in Australia. Such a statutory right, if constructed in a way to support transitions between working patterns and phases of the life cycle, would enormously impact on the ways in which women interact with waged labour. However, this legacy of labour and flexibility, which became pivotal under *Work Choices*, disproportionately harms women and continues today without the actual working time and pattern flexibility that parents need to combine waged work with caring responsibilities. This has multiple effects, including decreasing workplace and workforce attachment and increasing women's reliance on partners or, if unpartnered, increasingly deficient public assistance. In the same way that paid parental leave fails and instead leaves disproportionate numbers of women at higher risk of poverty in older age, these same risks are compounded without an enshrined right to flexible work for all workers with caring responsibilities (and, arguably, even those without). This arises because the right to *request* flexible work is the extent of flexible work in Australia – employers are under no obligation to provide flexible work and may decline on 'reasonable business grounds' without adequate, streamlined oversight – another legacy of the Howard era's 'flexibility' regime.

⁶⁴⁸ Bores Baltes et al, 'Flexible and Compressed Workweek Schedules: A Meta-Analysis of Their Effects on Work-Related Criteria' (1999) 84(4) *Journal of Applied Psychology* 496; Paul Blyton et al, *Time, Work, and Organization* (Routledge, 1989) 106.

Superannuation

Having just discussed how earlier phases of the life cycle impact on women's lifetime earnings and attachment to the waged labour market, we see the starkest indicator of this in superannuation balances at retirement. Women have significantly lower superannuation balances than do their male counterparts, and are disproportionately reliant on the Age Pension and private or family charity. However, the Age Pension, even at its highest rate still leaves those reliant on it in older age at increased risk of poverty.⁶⁴⁹ Women suffer increased risk of poverty when compared to men in old age, despite working more labour hours over a life cycle. The superannuation system, as a savings vehicle based on a percentage of earned income, does not sufficiently provide for women or others who take time out of waged work to provide unremunerated labour. This comes as a result of a lifetime of disparate treatment of women under labour and employment law.

Each of the preceding chapters discussed the role of neo-maternalistic productivism in shaping narratives of work and labour, and the conflicts that arise in gendering temporalities. These gender roles are shaped in large part by the socio-political narratives of the ideal worker

⁶⁴⁹ The Age Pension is indexed twice-yearly, and is benchmarked to the Male Total Average Weekly Earnings ('MTAWE'). For a single rate, the Age Pension is roughly equivalent to 28% of MTAWE. National Commission of Audit, 'Towards Responsible Government: Phase One' (Australian Government, 2014) 7.1: Age Pension <<http://www.ncoa.gov.au/report/phase-one/index.html>>; Michael Klapdor, 'Pension Indexation: A Brief History' <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2014/April/Pension-indexation>.

and the intensive mother. Neo-maternalistic productivism treats women as a secondary support to the ideal (male) worker. However, as numerous other feminists have pointed out, no one is free from vulnerabilities and attachments, care and dependency.⁶⁵⁰ This goes beyond women with children, but using women as an indicator highlights their disproportionate treatment under the legal temporalities of parental leave, flexible work, and superannuation – the very legal regimes meant to support their alignment with neo-maternalistic productivism. Ultimately, what emerges from each case study is a legal disregard for a common and pluralistic time shared by these women with children – that of care-based temporalities.

However, this care is not simply care hoisted upon those who do not need it. Rather, it is care for the deeply vulnerable – for infants and children who are unable to care for themselves and whose care needs are not and cannot be set by a clock or scheduled roster. Feeding, changing, and meeting the educational and emotional needs of young children cannot be time disciplined. That is, a baby cannot be left unattended while her parents are engaged as ideal workers in full-time waged labour five days in the week.⁶⁵¹ This vulnerability is such that it

⁶⁵⁰ See, eg, Martha Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) *Yale Journal of Law & Feminism* 8; see also Williams, 'From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition', above n 487; Iris Marion Young, 'The Ideal of Community and the Politics of Difference' [1995] *Feminism and community* 233.

⁶⁵¹ Of course, that same baby can be taken to a child care centre, or cared for by a grandparent or other individual or crèche, but her needs cannot be safely met

necessarily makes a care demand that cuts across normative working time patterns and other temporalities of the ideal worker. This relational aspect is also seen in care for the elderly, frail, severely ill, and those with a significant disability.

II. Maternity and Critical Temporalities

It is this relational aspect of vulnerability that I refer to in terms of conceptualising care-based temporalities. As a project centring on the outcomes for women with children, this thesis has focused on maternity as a relational position of care. This section expands on key feminist and queer literature on what I called 'critical temporalities' in Chapter 1, by which I mean the critical theorisation of time and temporality. The literature discussed below focuses on the relational aspects ignored by mainstream approaches to time. It begins by discussing Julia Kristeva's influential essay, 'Women's Time'⁶⁵² which is Kristeva's attempt to create a gendered model of time that prioritises maternal experience, and which I use to begin analysing work and care norms in Australia. It is with this nexus of maternity and time that I explore the additional research on critical temporalities in queer and feminist literature. This section then incorporates the work of Judith/Jack Halberstam, Lee Edelman, and Elizabeth Freeman who each further reveal the ways in which a mainstream approach to time in fact reflects a dominant

or paused while her care providers attend to other chrono-norms such as full-time waged labour.

⁶⁵² Kristeva, above n 174.

heteronormativity, a critical approach that I use in this thesis to show that law and government policy are themselves dependent on an invisible heteronormativity in ways that undermine women's use and experience of time and temporalities. I then link these theorists to the concepts of transformative experience and praxis in conceptualising a politics of time.

Julia Kristeva's Women's Time

Julia Kristeva's article on 'Women's Time' seeks to theorise the increasing participation of women, and mothers, in the workforce.⁶⁵³ Kristeva suggests that women's time is not incompatible with what she calls 'masculine' values, and the time of history. She describes this 'masculine' time as one of project and teleology, as 'departure, progression, and arrival'. In building a conception of time, Kristeva contributes to the feminist project by suggesting that time as 'cyclical and monumental' is not simply aligned with female subjectivity as it relates to maternity but is the foundational conception of sacred time across civilisations and experiences.⁶⁵⁴

Kristeva constructs her argument of women's time on a reification of maternity. In doing so, Kristeva argues that motherhood, rejected by the older generation of feminists in the seventies, as she was writing, has been re-examined by younger feminists who conclude that

⁶⁵³ Ibid.

⁶⁵⁴ Ibid 17.

maternity is compatible with both a professional life and their feminist sensibilities.⁶⁵⁵ However, Kristeva contextualises this change in attitudes by relating it to changing societal structures and scaffolds of care, noting that attitudes change as child care moves beyond maternal care.⁶⁵⁶ Thus, Kristeva cautions against 'the refusal of maternity'⁶⁵⁷ in feminist ideologies, and instead appeals to an expanded understanding of time within the dominant hegemonic approaches to time.

Kristeva's reification of maternity is deeply embedded in reconciling maternal temporalities with productivistic and capitalist-based conceptions of time. Her underlying logic seems to be an appeal to situating 'women's time' with the linear teleology of capitalist labour. However, another reading of it highlights the subversiveness of such a suggestion; how can hegemonic conceptions of linear time as history seamlessly incorporate cyclical and monumental forms of women's time? By simply stating that women and, more specifically feminists, are increasingly viewing both the experience of maternity and the sacred time of maternity as compatible with the linear project of hegemonic time, Kristeva is suggesting either that women are folding seamlessly into the rank and file of capitalist temporal orderings with the outsourcing of child care and the flexibilities of productive-output

⁶⁵⁵ Ibid 30.

⁶⁵⁶ Ibid.

⁶⁵⁷ Ibid 31.

based employment, or she is suggesting something far more radical: that societal constructions of time itself are shifting.

What follows, then, in Kristeva's argument is a shift from a singular monolithic conception of time as project and teleology toward multiple conceptions of time. These multiple conceptions of time exist either separately or simultaneously. This suggests that time is either a temporal manifestation of 'separate but equal', or that the dominant societal conception of time expands from a singular view of time towards a plurality of time. This plurality of time might then encompass a spectrum of time and temporalities that are simultaneously embodied, experienced, and conceptualised as multiple relations to time, each temporality falling within the umbrella conception of time in the same way that categories like 'cake' or 'car' describe multiple varieties of foods or vehicles. Thus, time becomes a category by which society understands the manifestation and conceptualisation of different times and temporalities as co-existing simultaneously. In the same way that Kathi Weeks' shorter hour work week acts as a provocation to capitalism's hegemony,⁶⁵⁸ a pluralistic conception of time emerges as a radical provocation to a hegemonic time which constructs time in a singular normativity.

⁶⁵⁸ See Weeks, above n 169. See also Chapter 1 of this thesis for a brief discussion of Weeks' approach to labour and time.

Rita Felski draws out this pluralistic approach to time in her three temporal registers.⁶⁵⁹ She conceptualises time as a plurality across the everyday, the life scale and larger scale expansions. Everyday time, Felski argues, is the phenomenological sense of time as we experience it on a day-to-day basis.⁶⁶⁰ Though the unit is delimited to a 'day', everyday time goes beyond a unit-based conception of time to include the real, lived experiences of practice, habit, and surprise. This includes the minutiae and vicissitudes of daily life. Life time expands beyond the everyday to include life as a temporal project that connects the 'random segments of daily experience' into an ongoing creation of the subject self.⁶⁶¹ Large-scale time, then, expands the relevance of life time to incorporate a reference to the long-term processes of time.⁶⁶² In a sense, large-scale time collectivises the everyday and life time toward a monumental time that allows for the linear as well as cyclical nature of large-scale processes and movements. I understand this to connect the everyday and life time to the collective unit, as temporalities coalesce to inform and shape large-scale projects and units. This three-level understanding of time views multiple temporalities as existing simultaneously across all three registers, so that an act that occurs ripples through everyday time, life time, and large-scale time.

⁶⁵⁹ Felski, above n 199, 17.

⁶⁶⁰ Ibid.

⁶⁶¹ Ibid.

⁶⁶² Ibid 18.

In much the same way that Kristeva is suggesting that time be reimagined through a feminist lens of relational care, Felski's argument for pluralities of time refers to this same sense of relationality and sociality. This can be most evidently seen in her understanding of large-scale time, which directly collectivises multiple experience to shape social movements. Therefore, Felski's temporal registers rejects the monolithic, singular concept of hegemonic time in favour of multiple temporalities reflecting relationality, connection, and experience. We see these same themes reflected by the following queer theorists in building their counter narratives of time.

Queer Time

Both Elizabeth Freeman and Judith/Jack Halberstam map a critique of hegemonic time by providing counter narratives to heteronormative historicism. The heteronormative family becomes the fulcrum of their arguments. For Freeman, the heteronormativity of the family is captured in the nation-state's official time line of marriages, births, and deaths.⁶⁶³ Instead, Freeman suggests counter-histories emerging out of queer traumas; but instead of remaining despondent and melancholic, Freeman orientates these queer counter-histories toward 'positive affect'. Rather than accepting history as the nation-state's prioritisation of heteronormative life events, Freeman looks to alternative narratives in brief moments of relationality and affective connection such as 'erotic

⁶⁶³ See Freeman, above n 71; Freeman, above n 318.

scenes, utopias, and memories of touch' to illustrate queer counter-histories.⁶⁶⁴ Similarly, Halberstam establishes 'queer time' as a resistance against historicism and postmodernity's heteronormative family time. Using 'failure' as a device to account for queer histories and orientations, Halberstam rejects conventions of hegemonic time situated in heteronormative 'family time'.⁶⁶⁵ Failure, instead, becomes a tool with which to 'queer' normative trajectories of time, accomplishment, and relations.

Family time, according to Halberstam, refers to the historicism of reproduction and the family, best expressed through inheritance.⁶⁶⁶ Inheritance is what links the family to the historicism of the nation-state, tethering its participants to generational time within a process of nation-state building.⁶⁶⁷ Intergenerational transfers provide the temporal vehicle to orientate individuals to the capitalistic, productivistic state-building project; inheritance connects the family to the past as well as the future of both familial stability and national stability.⁶⁶⁸ Rejecting these conventions, Halberstam instead privileges the transgender body and subcultural spaces,⁶⁶⁹ offering 'disqualified and anti-canonical

⁶⁶⁴ Freeman, above n 318, 66.

⁶⁶⁵ See Halberstam, above n 178.

⁶⁶⁶ Halberstam, *In a Queer Time and Place*, above n 178, 6.

⁶⁶⁷ *Ibid* 5.

⁶⁶⁸ *Ibid*.

⁶⁶⁹ Dinshaw et al, above n 179, 182.

knowledges of queer practices' as alternative temporalities.⁶⁷⁰ These anti-canonical knowledges as alternative temporalities suggest a relational and bodily connection beyond the historicist devices of the heteronormative nation-state.

Queer time directly addresses the intersection of gender and time through reference to the family in critiquing chrono-normativity.

Halberstam argued that the reproduction of the family relates intimately with the reproduction of the nation-state through the hegemonic use of historicism.⁶⁷¹ Lee Edelman, too, challenged 'futurity's time to come'⁶⁷² as co-articulated through the image of the child. Edelman poses that the image of the Child regulates American public discourse and prescribes just what counts as public discourse.⁶⁷³ Thus, American politics, Edelman argues, manifests a 'reproductive futurism' that relies on the image of the child to moralise politics and public engagement. Instead, the queer, proposes Edelman, represents the 'negativity opposed to every form of social viability'.⁶⁷⁴ Edelman lays claim, in a sense, to immediate relationality based on body rather than a future-oriented connection based on reproduction. Edelman positions the queer as the

⁶⁷⁰ Ibid.

⁶⁷¹ Halberstam, *In a Queer Time and Place*, above n 178, 5.

⁶⁷² Robert L Caserio et al, 'The Antisocial Thesis in Queer Theory' (2006) 121(3) *PMLA* 819, 822.

⁶⁷³ Lee Edelman, *No Future: Queer Theory and the Death Drive* (Duke University Press, 2004) 11.

⁶⁷⁴ Ibid 9.

opposite binary of reproductive futurity. This polarity of Future/No Future, which gives his book its title, is actually demonstrated to be the binary of Child/No Child. While seeking to resist the dualism, Edelman's account ultimately operates within the child-centred reproductive/non-reproductive (Future/No Future) binary while simultaneously critiquing the reification and co-optation of the child for political ends. Like Edelman, my own project critiques and resists the co-optation of the child for hegemonic political ends by shifting the political emphasis from reproduction to the agitation of care-based temporalities against hegemonic time. This allows for a philosophically pragmatic approach to the question of time and temporality in Australia.⁶⁷⁵

These conceptions of and engagements with queer time reject heteronormative reproduction as naturally desirable and instead are, according to Halberstam, 'about the potentiality of a life unscripted by the conventions of family, inheritance, and child rearing.'⁶⁷⁶ Queer time, by this reading, positions itself in opposition to reproductive futurism, instead emphasising the relational aspects of queer counter narratives.

⁶⁷⁵ I approach time from the same 'philosophical pragmatism' that Joan C Williams does in her 'femme' and 'tomboy' proposals for redressing work and family conflicts. In doing so, Williams proposes to restructure market entitlements in combination with restructuring family entitlements, thus appealing to both maternalists and equal parenting advocates. Williams, 'From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition', above n 487 In the same vein, my own proposal for TLM and social insurance with a women's pension meets both interests without getting into the same/difference feminist debate. .

⁶⁷⁶ Halberstam, *In a Queer Time and Place*, above n 178, 2.

And though Kathi Weeks' shorter-hours work week⁶⁷⁷ confronts the temporal norms implicated in the constructed work-family dichotomy, this understanding of queer time does what Kristeva originally sought: a relational time outside of the processual, monolithic, and singular hegemonic time. Accordingly, this project seeks to reconcile a reference to the maternal and its relational care, while critiquing the temporal norms of neo-maternalistic productivism.

III. Care and Disruptive time

The temporal ideology of neo-maternalistic productivism fails at accurately capturing the multiple experiences of relationality in maternity. The preceding section outlined specific scholarly critiques to the hetero-capitalist hegemonic time; by emphasising the care-based temporalities of maternity this section now weaves the relationality found in those critiques into a theory of time as disruptive time. Like the critiques found in the preceding section, it takes as a starting point the subversive and radical politics of praxis to disrupt established hegemonic orderings. In so doing, such a conceptualisation of time requires a relational account of the individual and social constructions of agency while also appreciating the political project of a life of action as an agent with the capacity to change.

⁶⁷⁷ Weeks, above n 169 see also Chapter 1 of this thesis for a short discussion of Weeks.

By reference to 'disruption' I am directly referencing the material as well as praxeological ways in which child care disrupts individual and collective routines and established orderings. Care disrupts the life course of the ideal worker, it disrupts the everyday, the life time, and large-scale time. Disruptive time accounts for the disruptive qualities of maternity. However, it is important to note that this approach treats 'disruption' not as pejorative, but as an opportunity to understand the subversive elements of disruptive temporalities in terms of a larger political picture, while also acknowledging the jarring difficulties of disruptive temporalities to the hegemonic or social agent's preferred orderings of routine, habit, and everyday social and individual practices. That is, this theory seeks to recognise the political potential in everyday practices of care without erasing the difficulties that women face in the daily struggle of care and motherhood. Therefore, my theoretical approach seeks not simply to construct a vision of time as radical disruption disembedded from the difficulties of disrupted routines, but to instead recognise both the soothing qualities of everyday routine and the jarring difficulties associated with disrupted routines. A theoretical solution to the proposed problem of the gender-time gap must take into account a daily schedule constantly experiencing unpredictable life necessities. These unpredictable life necessities embedded in care-based temporalities include the temporality of vulnerability, sickness, and frailty, as well as the unpredictable and not always linear or progressional temporalities of

child development.⁶⁷⁸ That life is not and cannot be entirely scheduled and regimented, much less the life of an infant, child, or young adult seems the very kernel of any theory that successfully addresses gender and time from a maternal perspective. As a political critique, this thesis addresses the problem of the gendered division of labour in Australia through a theoretical framework that accounts for the gendering of temporality, time, and time-use with specific reference to the material outcomes of maternity.

Disruptive time

Disruptive time cuts across everyday time, life time, and large-scale time, but also acts as a disruption to hegemonic temporality. Disruptive time goes beyond a mere interruption. An interruption acts as a bracket in an otherwise standardised flow or experience of time; the interruption removes the agent from that which she was otherwise doing and being, but eventually the interruption ceases and the agent returns to the original practice. A disruption interrupts and *changes*. This means that any trajectory is permanently altered and speaks directly to the unknowability and unimaginability of disruptive time.

Working within the philosophical tradition, LA Paul theorises 'transformative experiences' as those which are both epistemically and personally transformative but lacking in foreseeability; the ways in which these transformations manifest are unknowable and

⁶⁷⁸ See William E Connolly, *A World of Becoming* (Duke University Press, 2011).

unpredictable.⁶⁷⁹ Paul categorises having children as just one of these transformative experiences.⁶⁸⁰ As such, it radically changes a parent in ways that are unimaginable beforehand.⁶⁸¹ I am directly referencing this sort of unimaginable transformation that comes with maternity: the routine flow of habits, practices, and trajectories becomes permanently changed after the birth or adoption of a child in unimaginable ways, across multiple temporalities.

Rita Felski's multiple temporalities of the everyday, lifetime, and monumental time become meaningful markers in understanding how this transformation unfolds across temporalities for parents. Everyday time is disrupted and shifts into new temporalities with the birth or adoption of a child. Where previously a parent might have worked full-time or longer hour days, this daily practice of waged work becomes disrupted with a new child. Most parents take some leave from waged work in the early days of having or adopting a new child.⁶⁸² However, the current construction of the *Paid Parental Leave Act 2010* (Cth) does not encourage both parents being equally involved in the early life of a

⁶⁷⁹ Paul, above n 249.

⁶⁸⁰ Ibid; Laurie Ann Paul, 'What You Can't Expect When You're Expecting' (2015) 92(2) *Res Philosophica* 149.

⁶⁸¹ Arguably, this is also because capitalism in Australia separates us from any communal acts of child rearing, so that having children becomes 'strange' in ways it may not in cultures where children are communally raised. I thank Dr Karen O'Connell for raising this important point.

⁶⁸² Commonwealth of Australia, above n 259; Commonwealth of Australia, Department of Social Services, above n 256, s 7.

new child; after the two weeks of 'Dad and Partner Leave' ends, the scheme only pays for one parent to be take leave from waged work – not both. Though unpaid parental leave as provided by the *Fair Work Act 2009* (Cth) may be used by either parent, it may only be used concurrently by both parents for up to 8 weeks, and in Australia women take the clear majority of unpaid leave.⁶⁸³ Fathers, if they take any leave, tend to do so in the first two months of the child's birth or adoption.⁶⁸⁴ So it is women's day-to-day lives that continue to transform in unimaginable ways even moreso than men's. And it is not just waged work that changes – sleep patterns, eating patterns, relationships, finances, bodies, and the daily experience outside of waged work will all change for parents after the birth or adoption of a child.⁶⁸⁵ The transformative experience of parenthood is totalising. Regardless of a parent's position in the parental leave transition, the everyday time of a parent will be transformed into something unimaginable and largely unpredictable.

Life times, too, are permanently disrupted and changed in unimaginable ways with a new child. As women continue to be more involved than their male counterparts in care work, their life times are

⁶⁸³ Note, also, that the eight weeks of concurrent leave will be deducted from the 12 months of total leave available, *Fair Work Act 2009* (Cth) s 72; Commonwealth of Australia, above n 259; Commonwealth of Australia, Department of Social Services, above n 256.

⁶⁸⁴ Commonwealth of Australia, Department of Social Services, above n 256, s 7.

⁶⁸⁵ Although the degree of change is likely to be gendered.

especially altered in ways that are specifically unforeseeable. The lifelong economic consequences of having children can be predicted,⁶⁸⁶ but the ways in which children change the experience of lifetime cannot.

This disruptive time also radically shifts large-scale time. Though having children can be seen to perpetuate a hetero-capitalistic time as we have seen with the longer hours culture of working fathers in Australia (and elsewhere), having children also provides a temporality largely at odds with this hegemonic time. This cluster of care-based temporalities disrupts the ideal worker narrative, providing egress into a more egalitarian sharing of care and time between genders. Across monumental temporalities, disruptive time provides the potential for collectivising disrupted temporalities and thus incrementally breaking with the hegemony of male-centred legal temporalities and chrono-normativity. The disruption to large-scale time speaks directly to my interest in politicising acts and the large-scale, praxeological impact of collective experiences of temporalities. I conceptualise the gendered parent as a temporal agent, engaging in political acts of disruption and creation.

Praxis provides a conduit between everyday time, life time, and large-scale time and demonstrates the power inherent in disruption. Praxis, as it relates to the everyday, becomes especially salient for carers as it imbues the present moment of disrupted temporalities with the

⁶⁸⁶ See, for example, Chapter 4.

potentiality of subversion and resistance, multiplying across one life time, and then multiple lifetimes through collective experiences of disruption through care. Bourdieu elegantly constructs praxis as a temporal activity through his theory of the habitus.⁶⁸⁷ Praxis, explains Lois McNay, is ‘the living through of the embodied potentialities of the habitus’.⁶⁸⁸ It is this embodiment as inseparable from social practice that leads Bourdieu to write about ‘social agents’ rather than ‘subjects’.⁶⁸⁹ Accordingly, I also predominantly use ‘agents’ when discussing individuals for the same reasons as Bourdieu – that is, as an indication of the praxeological sense of agency and self, set within the confines of a social context of practice.

Hannah Arendt, too, relies on praxis in her theory of action.⁶⁹⁰ In constructing her theory of action (and praxis), Arendt relies on her concept of ‘natality’ to situate actual and metaphorical birth as a radical departure from the automatism of hegemonic processes.⁶⁹¹ She understands birth as the starting moment for a ‘meaningful human life’.⁶⁹² Arendt’s ‘natality’ views birth as an actual and symbolic representation for new action; her entire theory of action rests upon the

⁶⁸⁷ McNay, above n 194, 101; Bourdieu, above n 2, 138.

⁶⁸⁸ McNay, above n 194, 101.

⁶⁸⁹ Ibid.

⁶⁹⁰ See Hannah Arendt, *The Human Condition* (University of Chicago Press, 2013).

⁶⁹¹ Ibid.

⁶⁹² Ibid; Hodges, above n 491, 43.

foundation of 'natality' which treats each new act into the world as birth as a radical departure and opportunity for change. Disruptive time is a beautiful relation to this, treating birth (or adoption) as an actual and symbolic new temporality, as a radical departure and opportunity for change from the established hegemonic orderings.

Although I would argue that Arendt's natality does not account for the disparate experience of time and temporality between men, women, and the fluidity of gender, it was not meant to. The central position of birth in Arendt's theory is compelling, perhaps moreso because of the self-avowedly ungendered position that Arendt attempts. Natality, for Arendt, is the ontological foundation for her theory of action. As such, birth is not just the starting moment of humanity but, more importantly to Arendt's theory of action, it marks the radical departure from the automatism of processes and it arises each time an individual introduces some new action into the world.⁶⁹³ In this sense, Arendt's theory takes the standpoint of the child. The child born into the world is engaging in a radical new act; this break from the status quo arises repeatedly throughout an individual's life so as to fill the time between life and death with what Arendt calls a 'meaningful human life' through action for radical change and new beginnings.

Arendt's theory of natality, while constructing a reference to the individual equipped with agency for change and renewal, fails to

⁶⁹³ Arendt, above n 649; See also Hodges, above n 491, 43.

appreciate the gendering of time.⁶⁹⁴ Accordingly, I shift the focus from the child as 'born' and thus renewed, to the parent as a social agent engaging in a political act of disruption through the actual and symbolic creation – temporal creation and life-giving creation. In conceptualising disruptive time, I, too, conceptualise birth as a radical departure from the automatism of established hegemonic processes, however I conceptualise this in temporal terms, from the perspective of the parent rather than the child and by emphasis on care-based temporalities as a radical departure from the hegemonic time of neo-maternalistic productivism. As previously discussed, Bourdieu's concept of *allodoxia* describes his understanding of agents' orientation to the imminent forthcoming. Having and raising children expresses this orientation materially and temporally. The material orientation includes the quantifiable and qualifiable experience captured in the empirical evidence discussed in preceding chapters. Temporally, parenthood provides a radical break from dominant productivistic temporal orderings. But because 'parenting' in this present moment and specific location in Australia remains highly gendered, my empirically-informed model of time provides a focus on the mother as a social agent engaging in a political act of change, creation, and potentially radical and subversive acts in the everyday, through temporal acts in domesticity, care, labour.

⁶⁹⁴ I reserve my argument that her theory fails to account for the reflexivity of the habitus constraining individual agency for change and renewal for another venue.

Birth or adoption and the related care-based temporalities of caring for the vulnerable are indisputably radical disruptions to hegemonic time and waged-labour based political economy. For example, the disruptive time of child care agitates against the chrono-normativity of the ideal worker. We see this in the ways in which many primary carers establish fragmented relationships with full-time waged labour. My theory of disruption addresses the gendered disparities in Australia that emerge with the birth or adoption of a child, but avoids the pitfalls of reifying the child, so appropriately cautioned against by Edelman, and eschews Arendt's generalisation of birth as a metaphor. Instead, my theory of disruption takes the maternal viewpoint of a female parent to best account for the gendered temporality of care that emerges. It does relate to action, though, in the sense that it captures the same radicality of disruption and change that I see Arendt's natality doing. But unlike Edelman's argument of reproductive futurism, my theory shifts from the child as symbolic of any sort of futurism, to the radical acts of unpaid labour and disrupted times from the perspective of maternal care. This approach to time as disruption seeks to more fully account for the disparately gendered experience of temporality embodied in the habitus.

Disruptive time establishes motherhood as a site of the everyday as a collection of temporally predictable and unpredictable life necessities. Domestic and care labours remain intricately part of daily maternal orderings: the incessant cycles of feed, change, wash, prepare, sleep,

punctuated by unpredictable moments of affect, affection, and physicality. These labours remain largely unrecognised in the public financial systems and unremunerated. Existing in their own temporalities, domesticity and care are outside and irreverent of the hegemonic temporality of financialised labour and individualised consumption. As such, maternal care radically rejects as impossible the neoliberal fixation on the atomistic self. Within the everyday are these collections of temporal fragments: disruption and habit. Habits emerge as simultaneously soothing and disembodied, becoming routine without conscious intention or predilection. The balm of habit smooths the fibres of parenting's unpredictability, while the qualities of habit allow for feedings and nappy changings through the delirium of sleeplessness. Then these habits shift, disrupted and changing with children as they grow, age, fall ill, or experience disability. Disruptive time captures these multiple qualities of maternal temporalities in the habit of the everyday while also acknowledging the personal is political.

The immediacy of care needs operates outside the dominant normative time of productivism and financialised processes. The temporality of the everyday prioritises the present as a multitude of potentially subversive opportunities as each act operates independently of financialised outputs or incentivised clock-time. The child in need of soothing, food, napping, or changing does not adhere to a regimented schedule, but demands instead the undulated unpredictability of the presently-situated body in change. Care needs are not easily absorbed

into the time-discipline of waged labour hours and clock-time. This orientation to the present, as seen from the body of the child, is demanding and immediate; from the perspective of the carer it can be simultaneously disruptive and transformative. The act of caring for a child disrupts the worker, ideal or otherwise, and transforms that worker into an agent of reproductive and unremunerated labour, in opposition to productive and waged labour. Dedicated and extended time to care, being outside of the scriptures of neo-maternalistic productivism, thus becomes a radical act in itself.

And though I understand disruptive time as radical, this is to try and avoid the pitfalls of categorising it as entirely one thing or another; as either positive or negative, subversive or normative – instead, it is both. I take Arendt's approach that the very act of reproduction is radical (both in its potential and in its very act), but that the experience of disruptive time is thus of value in and of itself, in each individual and collective act, experience, and embodiment. As opposed to the legal temporalities found in Australia's parental leave, flexible work, and superannuation schemes, disruptive time is the temporality for finding value in the unwaged practices of the everyday. It appreciates the everyday as both a contrast to disrupted temporalities found in the habit while also being the site of disruptive time. That is, the everyday can and often does become a site of comfort through emerging habits and repeated practices; the everyday of rhythm and routine can develop in brief, undulating contrast to the constant disruptions of disruptive time.

However, this sense of the everyday is often fleeting, transitory, and impermanent. By its very existence, though, disruptive time becomes all the more disruptive, and so any perceived sense of calm or habit can instantly dissolve into the unpredictability of care-based temporalities, only to emerge again days, weeks, or months later. This cycle of disruption and calm also becomes manifest in disruptive time, materially and symbolically, and so I want to be sure to give this temporal undulation credence in this theory as well.

Disruptive time views time as existing simultaneously in social agents and the collective. However, this leaves a gap between the legal temporalities – which treats and shapes time as an instrument in a hegemonic paradigm – and care-based temporalities. Care-based temporalities require flexibility and security – flexibility to transition between various working statuses (whether paid or unpaid), and financial and social security to successfully make those transitions throughout the life course and experience the undulations of care in unpredictable ways. Transitional labour markets seek to provide a labour regime that provides both flexibility and security to all workers and their transitions.

IV. Transitional Labour Markets

This section draws on the concepts discussed above to analyse one possible legislative response to disruptive time. Given disruptive time as the most common experience of time across the life cycle, this section explores whether transitional labour markets ('TLMs') provide a

sufficient political effort to shift the dominance of the paid labour market. Drawing on the legal temporalities and care-based temporalities discussed in preceding sections and chapters, this section turns to the role of TLMs in remedying a deeply gendered labour system through fostering relationality and transition. Using this concept of disruptive time to pose the question of appropriate approaches to labour and employment, the benefits and pitfalls of a robust transitional labour market are discussed in more detail.

Introduction

Acknowledging and accounting for disruptive time requires an approach that fosters relationality and care-based temporalities, and supports fluid movement between waged work and unwaged care. Transitional labour markets, a concept and policy-based approach to employment and social integration developed by Günther Schmid, provides one such approach. According to Schmid, TLMs do not take waged labour as the main and only focus, but instead incorporates social networks, family connections and labour, cultural activities, education, and volunteer work.⁶⁹⁵ As such, it takes the transition throughout the life cycle as the starting point, and develops a system that supports those transitions and social agents in transition. 'Transition' used to refer only to transitions between employment statuses – that is, full-time to part-time, or from unemployment to

⁶⁹⁵ Gazier and Schmid, above n 22, 6.

employment. However, Schmid includes a reference to a range of flexible employment careers and the various stages of ‘preparation, encounter, adjustment, stabilisation, and renewed preparation for a new job or task’.⁶⁹⁶ In developing TLMs, Schmid worked from the standpoint of five main transitions in the life cycle, that between:

1. training or education and waged work;
2. working-time regimes or employment statuses;
3. unwaged domestic and labour market work;
4. employment and unemployment; and
5. waged work and retirement.⁶⁹⁷

Schmid’s transitional labour markets provide the necessary ‘bridges’ to move through these critical transitions.⁶⁹⁸

The ideal worker narrative presumes that the only transitions occur from school, education, or training to the waged workforce and then to retirement.⁶⁹⁹ In reality, all workers will likely experience multiple labour transitions throughout their working lives. Parents occupy a space outside of the ideal worker-narrative by taking time off for infant and maternal health and wellbeing. Based on labour force statistics, women remain more likely to take longer leave from waged labour for

⁶⁹⁶ Ibid.

⁶⁹⁷ See Günther Schmid, ‘Transitional Labour Markets and the European Social Model: Towards a New Employment Compact Index’ in *The Dynamics of Full Employment: Social Integration through Transitional Labour Markets* (Elgar, 2002).

⁶⁹⁸ Gazier and Schmid, above n 22, 11.

⁶⁹⁹ Williams (2001).

care related activities.⁷⁰⁰ Parental leave, by definition, is followed by a transition back to the waged workforce. This transition marks a temporal shift from one set of labours to another, marking it as ‘parental labour transitions’; parents on leave from waged labour to care for young children are largely engaging in unpaid care and domestic labours, and when they return to waged work they are transitioning back to paid labour often in a reduced or flexible working arrangement. In a well-coordinated TLM, employee-set flexible working would be fully integrated and supported.

TLMs foster mobility through several strategies to support and promote continuous opportunities for education and training, multiple employment relationships, combining self-employment with dependent employment, and risk management.⁷⁰¹ To accomplish this, employment relationships must be re-imagined, but also income structures and leave provisions must be more supportive and integrative. This will be discussed in more detail in the following section. Writing from a European context, Schmid and Gazier suggest that the emphasis on full

⁷⁰⁰ See, eg, Australian Bureau of Statistics, ‘Time Use Survey’ <http://www.abs.gov.au/ausstats/abs@.nsf/dossbytitle/0A95B1782162EA4ACA256BD000279391?OpenDocument>, 6 June 2002; Australian Bureau of Statistics, ‘4102.0 Australian Social Trends’ <http://www.abs.gov.au/AUSSTATS/abs@.nsf/allprimarymainfeatures/5849F483A2C5646ECA257C9E00177D59?opendocument>, 20 November 2013; The Australian Government, Australian Bureau of Statistics, ‘Pregnancy and Employment Transitions’ (4913.0, Australian Bureau of Statistics, November 2011) <[http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/5BAE2DE90539240DCA257AB700100F6A/\\$File/49130_nov%202011.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/5BAE2DE90539240DCA257AB700100F6A/$File/49130_nov%202011.pdf)>.

⁷⁰¹ Ibid 10–11.

employment move to an emphasis in ‘fluid equilibrium’ described as the average 30-hour work week over a life course, with room for substantial increase and decrease to this working status⁷⁰² – which better reflects the ways in which social agents (to use Bourdieu’s phrase) adjust to a variety of factors including family status, health, needs, preferences, expectations and opportunities.

It follows, then, that the understanding of ‘employment’ shifts from the traditional definition of ‘the act of employing a person, the state of being employed, or a person’s regular occupation or business’ to a more fluid understanding that denotes long-term employability over a life course.⁷⁰³ Taking transitions as universal, it reconstructs employment as an undulating state over the life course, subject to ongoing training, education, developments, and entry and exit points.⁷⁰⁴ This requires a system that provides both flexibility and security for social agents to have legitimised, protected, and socially integrated options to transition between and among various employment statuses and relationships.⁷⁰⁵ A fully integrated system recognises and remedies the risks associated with traditional labour markets and will be discussed in more detail in the following section.

⁷⁰² This emphasis on waged work hours becomes the fulcrum to my critique in the following sections.

⁷⁰³ Ibid 7–8.

⁷⁰⁴ See *ibid* 8.

⁷⁰⁵ *Ibid* 11.

Fully Integrated TLMs

Transitional labour markets are both a social enterprise and a financial issue. As a social enterprise, transitions between employment, unpaid work, education, training, and other opportunities are socially accepted in the community and in the labour market social context. In that sense, labour is treated as a tool for social integration – without being focused solely on waged work. Financially, TLMs seek to ensure that social agents earn enough to allow and support transitions through different phases of the life cycle. To achieve this end, there needs to be wholesale protections and support across all transitions, rather than a piecemeal approach providing limited support or applying only to one transition. For example, rather than the current parental leave system provided under both the *Fair Work Act 2009* (Cth) and the *Paid Parental Leave Act 2010* (Cth), which focuses on parental leave as a singular issue spanning the maximum time allotted under the statutes, a wholesale approach would fully integrate transitional labour markets across all transitions whilst recognising that specific leave types requires specific supports (eg Keeping in Touch Days during a period of parental leave). So, too, with flexible work including part-time work: workers would have an enforceable right to employee-set work pattern flexibility without detriment. Any lost income from diminished hours is protected under the system. Thus, transitions are wholly supported, fostered, and protected socially and financially regardless of the specific transition occurring.

Disruptive time reframes the norms of employment and TLMs provide a vehicle to do so within labour systems. A system that incorporates supports and structures for robust, maintenance-based transitional labour markets better facilitates the ways in which agents weave into and out of waged labour. For Schmid, this means a labour policy aimed at achieving both security and flexibility from the perspective of employers and employees.⁷⁰⁶ Under such an approach, employees have the flexibility to transition into and out of various employment relationships throughout the various working stages in their life cycles, while maintaining a sense of income security.⁷⁰⁷ Employers, on the other hand, maintain a negotiated flexibility of their workforce while appreciating the security that comes with employee loyalty and reliability.⁷⁰⁸ Robust TLMs acknowledge the delicate relationship between waged and unpaid labour, without necessarily privileging the normative time of waged labour, thus acknowledging the personal and political value of other temporalities and life cycle phases.

As mentioned, constructing a robust, high quality TLM requires a whole scale approach, but Schmid adds that this can only begin with setting a solid foundation based in the following principles:

- freedom of choice through empowerment

⁷⁰⁶ Günther Schmid, *Full Employment in Europe: Managing Labour Market Transitions and Risks* (Edward Elgar Publishing, 2008) 283.

⁷⁰⁷ *Ibid* 284, 315–16.

⁷⁰⁸ Schmid, above n 662 esp Chapter 8.

- solidarity through joint risk sharing
- effectiveness through a combination of cooperation and competition
- efficiency through decentralisation; and
- monitoring and evaluation of quality standards.⁷⁰⁹

Coming from an employment perspective advising on a European full-employment policy, Schmid's language and approach remains highly managerial. Furthermore, it continues to emphasise waged employment as the standard by which to measure transitions, despite avowing a shift away from 'dependent labour'. As a political strategy, Schmid is careful to suggest that a shift in traditional, neoliberal labour and employment strategies toward a robust TLM requires a series of formal and informal agreements between the state (for example, occurring at all levels of Commonwealth, state/territory, and local), social partners, employers, and employees.⁷¹⁰ These stakeholders have three key features: the assumption of more entrepreneurial functions, including a risk management strategy to support TLMs, and the continuous promotion and support of sustainable employability through lifelong learning, and acceptance of responsibility for the disadvantaged through the provision of meaningful jobs for all and responsible, sustainable, risk management.⁷¹¹

⁷⁰⁹ Gazier and Schmid, above n 22, 17; see also Schmid, 'Transitional Labour Markets and the European Social Model: Towards a New Employment Compact Index', above n 656.

⁷¹⁰ Gazier and Schmid, above n 22, 18.

⁷¹¹ Ibid.

This risk management is key to robust TLMs and, as I have already suggested in Chapter 4, can be achieved with social insurance-like provisions. Rather than relegate risk to either employers, employees, or the public entirely, a social-insurance like provision manages the risks inherent in each transition and provides publicly-supported insurance or income protection. Schmid suggests a 'work-life insurance' based on three pillars: 1) a universal guarantee of a basic income that ensures a life without persistent poverty; 2) expansion of unemployment insurance into *employment* insurance which also covers employability and to some extent volatile income risks such as that borne by entrepreneurs and the self-employed; and 3) privately or collectively bargained insurance systems designed especially to cover life course risks related to the knowledge and care economy such as additional training and education or extended caring responsibilities.⁷¹² Schmid also notes that decisions 'to reduce the amount he or she works, to indulge one's preferences (exotic or not) or to enter a particular occupation' should be covered by this work-life insurance.⁷¹³ However, as a 'work-life insurance' based on these established pillars, the insurance would potentially only cover those sufficiently involved in the waged work economy, and so the same problems facing many women with Australia's current paid parental leave system would plague such a 'privately or collectively bargained insurance system'.

⁷¹² Schmid, above n 662, 284.

⁷¹³ Ibid 284–85.

That is, women who are recently arrived, making a transition out of training or education, or have multiple children closely spaced together may not have entered the waged labour market sufficiently to have such a 'work-life insurance'. Unless, of course, this sort of model is not actually one that is 'privately or collectively bargained' but is instead one based on social insurance.

Social insurance is a public institution based on universal risk sharing.⁷¹⁴ As a public institution, it recognises that a universal insurance administered by the public sector is the only one equipped to handle the complex and interrelated risks of multiple transitions over a life course.⁷¹⁵ As such, it would cover the financial aspects of multiple and interdependence risks over a life course, including protecting against the 'randomness of career opportunities and nature's lottery of innate abilities'.⁷¹⁶ Social insurance, then, acts as the modern equivalent of 'traditional institutions such as the extended family, neighbourhoods, the hinterland of small farms providing economic subsistence, and the communities or trade unions organising mutual self-help'⁷¹⁷ which seem to continuously erode in globalised, neoliberal societies such as Australia. Where neoliberal rationality shifts risks to the individual, social insurance spreads that risk back to the collective as a public

⁷¹⁴ Ibid 233.

⁷¹⁵ Ibid.

⁷¹⁶ Ibid.

⁷¹⁷ Ibid 234.

institution of protection and support. By interpreting Schmid's risk sharing pillar as a collective, public encounter of risk, the managerial-like principles of Schmid's approach soften to become more flexible and responsive to care and relationality.

It is this sort of integrative approach that a robust TLM requires to adequately incorporate disruptive time within a politicised system – both the social supports of legally protecting transitions throughout the life course, and the economic protection against risk inherent in transitions. However, as TLMs are subject to the same waged-labour basis of the existing system, TLMs are not the simple solution one hopes for. Nevertheless, TLMs demonstrate that time experienced in care labours and other unwaged labours, as well as other experiences of time in education, training, community involvement, or illness, are part of the ordinary and valuable life cycle and should be protected, supported, and promoted socially and financially. As such, TLMs have the potential to accept disruptive time as the universal experience of the life course – that social agents transition into and out of waged work over a life course and what they do during these periods of leave are not tangential, irrelevant, or unnecessary.

Understanding that disruptive time is the transitions of a social agent through the life course, TLMs provide one comprehensive approach to the exclusion evident in the existing, piece-meal system. Combined with an empirical-gap based women's pension as a component to compensate for the gender-time gap and gender-wealth gap, TLMs have

the potential to pave the path for care to become un-gendered as just another transition in the life course, fully protected and supported. Though it would not decouple the hegemony of waged work from influencing legal temporalities, TLMs would allow men to also partake in care to a similar degree as women without the economic and social disadvantage currently besetting the Australian system.

The existing hegemonic construction of legal time is largely about confining risk to one model of time and temporality: anything outside of it is excluded from legal recognition by the system. For example, the legal temporality of paid parental leave is based on a singular vision of time as 'genuine' connections to the labour market, and flexible work is similarly constructed around the waged work privileged model. When the legal temporality of superannuation legislates time as 'ordinary time earnings' accrued as a percentage of earned income over the life course, concurrent experiences of time that undulate into and out of waged work disadvantage those in older age. As discussed in previous chapters, these exclusions compound over a lifetime, leaving women disproportionately disadvantaged later in life as well as vulnerable in the early stages of caring for a young infant or child.

V. Conclusion

Enshrined in contemporary legal temporalities, hegemonic time does not account for relational, care-based experiences of time. This chapter and those preceding have demonstrated that the dominant conception of time in Australian legal temporalities in parental leave, flexible work,

and superannuation is heavily gendered. Without accounting for care-based temporalities, this gendering of time significantly shapes the disproportionate outcomes borne by women over a life course.

Informed by feminist and queer critiques of hegemonic time, disruptive time provides relational counter temporalities to hegemonic times.

Disruptive time takes disruption not as pejorative, but instead as transformative. As a transformative experience, the care of children has the potential to transform experiences of time beyond that which is imaginable. Acknowledging this new relationality that emerges in care-based temporalities is pivotal to addressing the gender-time and gender-wage gaps discussed in the preceding chapter. Transitional labour markets provide one possible opportunity to account for this relationality in disruptive time through a comprehensive overhaul of social, welfare, and labour systems. The aim of such an approach would be twofold: to normalise care and relationality in the labour market and society, as well as protect carers from the economic burdens plaguing the current system. In combination with the remedial suggestions in the preceding chapter, as well as an increased emphasis on public risk-sharing in social insurance, TLMs provide potential as a political option but do not provide the vehicle to fully transform social and individual relationships with waged labour, de-prioritise dependent labour, or allow total egress from an ideal worker-based narrative.

Building on my themes from Chapters 1 and 2, the critique of neo-maternalistic productivism lies not just in policy reforms outlined

above, but in an ongoing critical discourse on time and temporality. Recognising and acknowledging the dominant conception of time in Australia's parental leave, flexible work, and superannuation regimes provides only one part of the project; analysing and appreciating how that conception is gendered and then suggesting alternative conceptions of time and legal temporalities provides the other significant parts of this project on time. As the next chapter demonstrates in conclusion, disruptive time and the other arguments covered in this and preceding chapters, draws together the key themes and methods of this thesis to sustain a critical analysis of legal temporalities.

Chapter 6

Conclusion

Introduction

This chapter concludes the thesis by returning to my research questions and main themes. As a final section, it recalls my key findings from the preceding chapters and recaps the ideological analyses within those arguments. Finally, it finishes by looking forward to the future and ends with brief, concluding comments on work and creating meaning in contemporary life.

This thesis has uncovered the construction of time in Australia's parental leave, flexible work, and superannuation law and policy. By analysing each legal framework, I have identified dominant temporal narratives as well as diverse experiences of time and uncovered how legal temporalities exclude women. Through an exploration of the laws and policies involved in Australia's parental leave, flexible work, and superannuation systems, I had drawn on Bourdieu and others to develop an understanding of time in the social agent who is reflexively constructed by the habitus along collective and individual settings. I have identified the gender-time gap and how it impacts on working women with children, and further articulated how the gender-time and gender-wage gaps compound over multiple phases of the life and work cycle. Finally, this thesis has addressed alternative conceptions of time and investigated how a concept of time as constantly disrupted provides a link to a new, more inclusive, gender sensitive system.

The Enduring Ideology of the Ideal Worker and Intensive Mother

In addressing my first two research questions, 'What is the dominant conception of time underlying Australian work and parenting laws and policies?' and 'In what sense is that conception gendered, particularly as it relates to women with children?' I have uncovered how each of the laws and policies around parental leave, flexible work, and superannuation perpetuate neo-maternalistic productivism, a hegemonic view of time. Using neo-maternalistic productivism as the only conception of time in crafting worker-mother laws and policies has created legal temporalities that are neoliberal, sexist, and hetero-capitalistic governmentalities. There is a clear preference and reward for the heteronormative family and a gendered division of labour. Despite the ostensible policy focus on women's economic security in parental leave, flexible work, and superannuation, this preference for neo-maternalistic productivism still prevails. However, this preference disproportionately harms women, and most especially women with children.

In fact, each of the laws and policies informing Australia's parental leave, flexible work, and superannuation systems preserves a hegemonic view of time that reflects enduring ideologies of the ideal worker and intensive mother. This, in turn, perpetuates the gender-time gap. We see this quite evidently in the legal temporalities of parental leave in Australia. Though the objective of parental leave pay was to allow a parent the opportunity to provide a child with primary care for

the first six months of a child's life, the legislation only provides federal statutory minimum wage for 18 weeks. This limits longer periods of parental leave to privileged families who can 'co-fund' the gap between the 18 weeks of federal statutory parental leave pay and this six-month time period. Furthermore, the eligibility criteria exclude certain groups of women without the sufficiently 'genuine' ties to the workforce – these women generally fall into one of two groups: those with closely spaced children, and those who labour outside of the traditional labour market or in non-standard ways. Despite being engaged in work, these women do not qualify for parental leave pay. Finally, the legal temporalities of parental leave are deeply gendered and preclude longer-term, simultaneous leave by both parents, installing a gender-time gap from the first weeks of a new child.

This gender-time gap is evident in the structuring of the legislation – the legislation assumes that the birth mother is the lower earner and treats her as the 'primary claimant' for paid parental leave purposes regardless of whether she intends to share some of her leave with her partner. This explicit preferencing of the mother as primary claimant and sole carer constructs an ideal of a mother based on heteronormative families and typifies the imprint of the ideal worker/intensive mother narrative in neo-maternalistic productivism and legal temporalities. Preserving it in legislation and legal temporalities detrimentally affects both men and women who are subject to these normative legal structures: women's economic insecurity compounds over a lifetime,

increasing her risk of poverty in older age, and men never develop the capacity for deep care that comes by experiencing sustained, high quality, care of children.

We see this reference to the ideal worker/intensive mother in the legal temporalities of flexible work as well. Under the Howard Government, 'flexibility' was used to convey a flexibility of industrial relations and labour regulations with an aim toward employer interests and neoliberal values. Flexibility then, in the Howard Government, was changing the mechanism by which labour regulations were made, shifting it from a negotiated approach to a constrained voluntarist approach. The result was a disempowering of union-based collective bargaining and industrial tribunals in favour of individualised Australian Workplace Agreements and employer mandated standards and conditions. This outcome is about giving *structure*, through laws and regulations, to the ideal worker narrative.

The ideal worker narrative emerges through the primacy of waged work and the neoliberal values of productivism and capital. As an ideological narrative of flexible employment relations and flexible working time patterns, the ideal worker narrative belies a central reference to the gendered division of labour. With its close connection to hetero-capitalism, neo-maternalistic productivism relies heavily on employer and industry concerns, rather than on the impact of working time patterns and employment relationships on workers and their families and communities. Accordingly, this question of flexibility is

better understood as a question of time, and more specifically, chrononormativity, implicating and revolving around questions of working time, time spent in other relations and activities, and *who* controls these constructions and lived experiences of time.

While working hours declined in many countries, they continued to grow in Australia during the Howard Government, increasing to become a 'long hours' culture amongst international standards, averaging 41.3 hours per week in 2001.⁷¹⁸ Given this shift in working time and organisational culture, one can see the obvious conflict with existing practices and norms of intensive mothering. Indeed, the spread of hours between women and men lengthened during the Howard Government: men were working longer hours, while women were increasingly taking up shorter hours, part-time, and precarious waged work in an attempt to maintain 'flexible' constructions of time so as to meet their intensive care responsibilities. This legacy of 'flexibility' as manifesting the ideal worker/intensive mother narratives reverberates through Australian law and policy today, where the right to flexible work remains as only a right to *request* flexible work, without any additional reformation of neo-maternalistic productivism or the gender-time gap. Furthermore, we see the outcome of the legacy of the ideal worker and intensive mother over a life cycle in women's vulnerability to economic insecurity in older age.

⁷¹⁸ Pocock, 'Work/Care Regimes', above n 114, 35.

Superannuation, too, reflects enduring ideologies of the ideal worker/intensive mother dichotomy. As Australia's last 'pillar' of retirement income, superannuation is a government-mandated savings programme meant to provide the medium for individuals to save for their own retirement. However, the gendered ways in which neo-maternalistic productivism's financialisation compounds in retirement is most starkly demonstrated in superannuation. Each Australian resident, by following the ideal worker paradigm of uninterrupted waged work, is expected to provide her own earned retirement income through a system of government-mandated savings. But so long as there exists a gender-wage gap and gender-time gap, then a superannuation system that is calculated on a percentage of income will continue to disadvantage women. Legal reform efforts have failed to rectify the underlying problem of time in superannuation.

This thesis suggests a sex discrimination pension as one possible additional pillar to Australia's retirement system as a way of focusing on the problems caused by the existing system's ignorance of the gender wage and gender-time gaps. Based on carefully assessed empirical research documenting the gender-wage gap and the gender-time gap, the pension would directly address the enduring narratives of the ideal worker and intensive mother by calculating and providing quarterly contributions into an eligible agent's pension. In a hetero-capitalistic society such as contemporary Australia, this financialisation of discrimination has the potential to both show and address the

devaluation of women's work through the superannuation system. It further redistributes wealth from those that continue to benefit from women's unwaged work. It provides one effort, in combination with others, to address some of the key effects of a waged-work based and superannuation-focused system.

Throughout these three legal frameworks, we see how reliance on the narratives of the ideal worker and intensive mother perpetuate the gender-time gap, compounding over a lifetime to disproportionately impact on women, especially women with children. A gender-time gap has the potential of being innocuous to economic security, however in a system like Australia's that systematically privileges and rewards waged work over unwaged work, it leaves those performing a disproportionate share of the unwaged work in more precarious economic positions. Though it is women who complete more total labour hours over a life cycle, the current legal temporalities reward those with minimal caring responsibilities, mostly men, with significantly higher chances of economic security throughout every phase of the adult life cycle.

The foregoing analysis of the dominant conception of time in parental leave, flexible work, and superannuation addressed the first two research questions, demonstrating that the hegemonic conception of time is particularly gendered, especially as it relates to women with children. The third main research question, 'what alternative conceptions of time are possible?' was answered by careful analysis and

interpretation of social indicators used to discuss my first two research questions as well as sociological, critical temporal, and feminist research. By reference to the empirical data available around gendered work and time in Australia, I imagined alternative conceptions of time that reflects women's demonstrated experiences. In answering this research question, my conception of disruptive time provides a more accurate and inclusive representation than that of neo-maternalistic productivism.

Disrupting Neo-maternalistic Productivism

Disruptive time challenges neo-maternalistic productivism's normativity and instead views time as multiple and undulating, uniquely experienced rather than uniformly imposed. Relying on the twin pillars of transformation and plurality,⁷¹⁹ disruptive time uses 'disruption' not as pejorative, but as a provocation to neo-maternalistic productivism, while simultaneously accounting for the actual disruptions experienced in care-based temporalities. Neo-maternalistic productivism fails to accurately represent the experience of social agents, while disruptive time accounts for the multiple experiences of care-based temporalities.

Having outlined the theory of disruptive time in Chapter 5, it became clear that disruptive time is not compatible with the existing legal

⁷¹⁹ See Paul, above n 639; Felski, above n 199, respectively, and discussion of transformative experience and multiple registers of temporal experience in Chapter 5.

temporalities of parental leave, flexible work, and superannuation. The existing legal temporalities rely on a conception of time enshrined and imposed by the legal and political regimes and exemplified in neoliberal workplace relations.

The legal temporalities of parental leave, flexible work, and superannuation further reflect hegemonic temporal objectives by constructing its logic on a future-orientation of the past. Pierre Bourdieu provides an interpretive framework to understand this future-orientation. Bourdieu's concept of the habitus relies on a temporal embodiment of past, present, and future. Through a 'practical relation to the forth-coming', time is generated, mediated as it is by power and the objective chances it enables.⁷²⁰ As individuals within social settings, Bourdieu conceptualised the person as the social agent, with the social agent constantly anticipating and adjusting their place amongst the social. But it is this anticipation that can be 'overdetermined' by power relations through 'the shaping of the agent expectations and orientation toward the future'.⁷²¹ In other words, agents are constantly adjusting their actions, preferences, and attitudes through the conscious and unconscious reflexive references to future, past, and present power relations and anticipatory group expectations and identities. This reference to relations of power and objective chances depends upon the material relations of class for any given social agent. One example

⁷²⁰ Bourdieu, above n 2, 231.

⁷²¹ McNay, above n 181, 150 interpreting Bourdieu.

identified by this thesis is the co-funding of parental leave. This co-funding expectation relies on existing relations of power imprinted within the gender-wage gap that allows one parent, normally the father, to continue working in waged labour while the lower-earning partner, normally the mother, provides sole care. But it also relies on a certain level of material conditions in class and income, evidenced by the expectation to use home equity to make up for any income shortfall experienced by having one earner provide unremunerated care-work. Long before a couple has or adopts a child, they must prepare (future-orientation) by amassing sufficient resources in the way of home equity and savings to 'co-fund' a period of extended parental leave.

Superannuation, too, reflects this explicit future orientation through a system of waged work-based contributions.

This mandate for future orientation is also seen in the requirement for a genuine attachment to the workforce and the primacy of waged work over care. In order to be eligible for both paid and unpaid parental leave, there must be 'genuine' attachment to the waged workforce reflected through ongoing remuneration for work by a single employer.⁷²² This 'genuine' attachment reflects a future-orientation to waged work – that through a temporal series of payments from employment for at least 10-12 months, the worker demonstrates an

⁷²² Although one is eligible for parental leave pay even if she has worked for multiple employers, the work test for unpaid parental leave remains orientated toward a single employer over a 12-month period. *Fair Work Act 2009* (Cth) Ch 67-70.

attachment suggesting ongoing waged engagement after the period of parental leave is taken. The applicant's past relationship to waged work is taken as an ongoing, future-orientation to waged work.⁷²³ The period of parental leave is at most a short interruption, but certainly not a *disruption* to the primacy of waged work in a carer's lifetime. This reflects the same future-orientation of *Work Choices*, which over emphasised the demands of waged work over any other considerations such as care, gender equality, pay equity, or class relations. Instead, the Howard Government's chrono-normative approach to waged work and care relied on an approach to 'flexibility' that disproportionately burdened women with children.

This is echoed in successive legal regimes in Australia. The Howard Government failed in two main ways: by failing to acknowledge and resolve conflicts arising in women's lives and spheres of social action (otherwise understood as the *habitus*), and by failing to rectify women's resulting economic insecurity arising from their policies. However, subsequent Governments' legislation did not rectify these resounding problems. Instead, we see the longer-term consequences of such legal temporalities outlined in the previous discussion on retirement income and superannuation.

Waged Work and Care for the Two-Parent

Chrono-normative Family over the Life Course

⁷²³ This is perhaps even more starkly borne out by certain workplace programmes offering significant time or payments for parental leave, but conditional on a 'return to work' for a certain duration and number of hours.

Fathers: Education/Training → FT work → Retirement

**Mothers: Education/Training → FT labour → Children: No Paid Labour
(transition from non-employment while on leave to unemployment after
leave was exhausted and she did not return to her waged work) →
unemployment → school-age children; PT labour → ? → retirement**

This figure was originally presented in Chapter 3's discussion of flexible work, but its relevance to parental leave and superannuation is also evident. It pointedly illustrates the flow of gendered work transitions constructed by the legal temporalities of the parental leave and superannuation regulatory frameworks. In a system where law constructs and supports exclusionary transitions, women and men have very different trajectories of waged work and care over a lifetime.

The underlying conception of time informing the legal regimes maintains, reinforces, and reflexively constructs the primacy of waged labour in an economic structure that marginalises social reproduction. Neo-maternalistic productivism is reflected in the legislations' disregard of disruptive temporalities of care and the life phases of care, relying instead on the chrono-norms of the ideal family composed of the ideal worker and ideal mother in a one-and-a-half income earning family.

These terms reflect the objects of economic productivism through an emphasis on women's workforce participation. This conception of time and labour prioritises finance and capital accumulation through increased and sustained workforce participation. This view of time is in

line with neoliberalised labour relations which treat the individual worker or family unit as largely responsible for their own economic security, set within the confines of a policy and welfare regime providing increasingly deficient public supports. However, this neoliberal rationality is inimical to the goals of justice, fairness, or gender equality.

Given this incompatibility, this thesis has instead suggested an approach to labour and law that analyses and accounts for pluralistic experiences of time. Disruptive time more accurately reflects the ways in which Australians move through the life cycle, moving into and out of waged work and unwaged care at multiple points in their life phases, while also accounting for other responsibilities and experiences that social agents have instead of full-time waged work. An emphasis on transitional labour markets was suggested as one way to incorporate disruptive time within socio-legal doctrines of labour relations. Changing the time orientation of existing worker-mother provisions would be extremely profound and would signal a thorough change in how policy makers and legislators understand the work and life cycle.

Conclusion

As a socio-legal thesis, this project has uncovered and analysed the dominant conception of time underlying Australian work and parenting laws and policies. I have identified the dominant conception of time informing the legal temporalities of parental leave, flexible work, and superannuation. This thesis has also investigated the disproportionately

gendered outcomes associated with the established legal temporalities in these frameworks and suggested a more accurate, inclusive understanding of time as multiple and undulating.

My approach re-theorises maternal time as 'disruptive time' to better account for the disruptions inherent in child care and care-based temporalities.⁷²⁴ This thesis theorises maternity as a disruption to neo-maternalistic productivism and practices (actions), thereby providing an opportunity to challenge the dominant norms and ideologies of gendered time and time-use. Rather than pejorative, 'disruption' refers to the opportunity to subvert and disrupt hegemonic temporalities within a larger political and social context. By providing a new referent that accounts for the disruptive temporalities of gendered care norms, law and politics can then build a more gender-sensitive approach.

In answering the first two research questions, this thesis has looked to statutory interpretation, policy evaluation, sociological and legal critique, and empirical social indicators. Addressing these findings of neo-maternalistic productivism and the gender-time gap, this thesis also suggested an alternative conception of time as disruptive time that reflects the experience of social agents with caring responsibilities.

Disruptive time most appropriately reflects Australians' actual experiences of time – no person emerges onto the waged labour market without a transition from education, training, or another non-wage-

⁷²⁴ See Chapter 5 for an in-depth discussion of disruptive time.

earning activity. Furthermore, social agents go on to have multiple transitions in a life cycle – from education or training, to work, to care, disability, travel, higher education, or other conditions and experiences. This concept of disruptive time led to a further investigation of transitional labour markets as one potential approach to address these transitions throughout the life cycle. These transitions have the potential to pose serious disruptions to the existing hegemony of time. Rightfully so, transitional labour markets foresee the end of ‘purely dependent labour’ – where the worker is entirely dependent on waged work for all forms of identity and integration – and suggest a more inclusive approach to labour in all of its forms.⁷²⁵

Together, the answers to these research questions suggest how time impacts on gender relations in Australia, and provide an evaluation, analysis, and an alternative to the neoliberal hetero-capitalistic legal temporalities. This project approached time from a feminist perspective and uncovered how the existing legal temporalities of parental leave, flexible work, and superannuation systematically leave women with children worse off. Having discussed the disproportionate outcomes experienced by women, this thesis provides an alternative conception of time in disruptive time.

But this project is also about sharing the vicissitudes of work – whether

⁷²⁵ Even if waged labour remains the dominant standard, Gazier and Schmid, above n 22, 6.

that work be waged or unwaged, care-based or intellectual, emotional or domestic. This is not to exalt care, but to recognise what women are actually doing while also acknowledging that work comes in many forms and should be shared by those benefitting from it – for example, all parties in a parental relationship. It is to reject the ideology of intensive mothering and the ideal worker, and shift instead to a system that values, facilitates, and promotes sharing waged and unwaged labour in the undulating ways of care-based temporalities across the life cycle. When there are young children in the home, the state must recognise that more resources are needed for their care, as well as the labour of the household, whereas as they age and become increasingly independent, resources can shift from the home to other labours and endeavours – but with the caveat that care-based temporalities are often not linear, and that the care needs of children spike, plateau, and dip at different points in their early life stages.

Joan Williams warned that ‘The sacralization of household work has turned into the sacralization of childrearing as the key source of meaning creation in a human life’.⁷²⁶ I am not arguing in support of this shift toward intensive mothering, but instead toward a shift away from waged work as the dominant marker of meaning creation. My argument against the ideal worker as the central source of meaning creation in a human life does not turn, instead, to children or care as the

⁷²⁶ Williams, ‘From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition’, above n 487, 1450.

dominant marker of meaning creation. Rather, I seek to dispel the myth of family *versus* work – and instead demonstrate that time experienced as family, domestic, child care and other unwaged labours is part of the normal life course and should be supported by legal frameworks and legal temporalities.

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