speaking loudly enough for the officer to hear her, and her words were capable of being heard by someone else. In my view, then, the quality of this act is that it is one that occurred "otherwise than in private" (see *Korczac v Commonwealth of Australia (Department of Defence)* (2000) EOC 93-056).

Conclusions

42 Accordingly, for the reasons outlined I find that the act complained of does not contravene the Act so that Mr McLeod's complaint must fail.

43 As this was in effect a "test case" brought by the Legal Fund, it is appropriate to state my view that, even if successful, this case would not have been an appropriate one for a grant of relief under s 46PO(4) of the *Human Rights and Equal Opportunity Act 1986* (Cth), which makes it discretionary to grant relief for proscribed acts of discrimination and vilification. As explained above, the Act was enacted to give effect to Australia's obligations under the ICERD, including those obligations related to eradicating acts "based on ideas or theories of superiority of one race or group" over another. The Act is not intended to shut down a conversation simply because it refers to race, but instead is clearly directed to protecting those within Australian society who are affected by harassment and fear as a result of their race, colour or national or ethnic origin.

44 I will take submissions on the issue of costs.

26

The Indirection of Sex Discrimination: *State of New South Wales v Amery*

MARGARET THORNTON

Introduction

A separation between public and private life is a central tenet of liberal legalism which has been accepted in the case of anti-discrimination legislation no less than in other instances of state regulation. This is despite the fact that inequities in the private sphere have long been recognised by feminist scholars as the primary cause of discrimination against women in public life, albeit not by judges, as is apparent from *New South Wales v Amery*.[1]

Although the last remnants of coverture, whereby a woman's persona merged with that of her husband on marriage, were removed over a century ago, the seeds of invidiousness associated with the deference of women to their male partners linger on in the contemporary social script. The question of where to live, for example, is likely to be influenced by *his* career, not hers. Women are also expected to assume the major responsibility for housework and caring for children, as well as for sick and elderly relatives.

The private location of these social practices has placed them largely beyond the limits of the law, although indirect discrimination on the ground of sex has corroded, if not eviscerated altogether, the private sphere immunity. A complaint of discrimination, however, has to arise in an area of public or quasi-public life, such as employment, and the complainant needs to establish the existence of an unbroken causal thread linking the respondent employer and the alleged discriminatory harm. Systemic discrimination buried deep within the social psyche does not suffice, as 'society' is not a suable entity; the harm must be sheeted home to an identifiable wrongdoer. Even then, it may be averred that a woman's decision to change from full-time to part-time or casual work, for example, is a matter of individual 'choice' not connected with the employer's work practices.

Given the contradictions besetting the conjunction of women, work and family in the discourse of gender equality, it is perhaps unsurprising that 'work/life balance' has become 'the topic of the 21st century for families, employers and government',[2] a manifestation of which is thrown into high relief by *Amery*.

1 (2006) 226 ALR 196 ('*Amery*').
2 Sarah Squire and Jo Tilley, *It's About Time: Women, Men, Work and Family* (Human Rights and Equal Opportunity Commission, 2007) xi.

The Facts

This case involved a group of 13 female casual high school teachers in New South Wales who alleged that they had been subjected to sex discrimination because they were paid less than permanent staff, despite performing essentially the same work. All complainants were located at the top of the casual scale and were subject to a 20 per cent differential in pay compared with those at the top of the permanent scale. There were five steps in the casual scale and 13 in the permanent scale, with the top of the casual scale equating with Level 8 of the permanent scale.

The nub of the sex discrimination complaint was that access to the higher rate of pay required the women to satisfy the permanency requirement, which involved accepting a post anywhere in the State. As intimated, relocation because of family commitments is more difficult for women than for men because of the well-entrenched norm that women give priority to the needs of their families over their own careers. This norm induced the women to opt for casual positions close to their homes rather than relocate. The statistics adduced by the complainants graphically bear out the intransigence of the gendered norms. Although 70 per cent of all teachers in the New South Wales Teaching Service were women, only 59 per cent were permanent employees, compared with 79 per cent of men. Of the casual staff, approximately 83 per cent were female.

However, disproportionality alone does not establish discrimination. The social rationale for women's lower representation among the ranks of permanent teachers also needs to be established. It is this issue that goes to the heart of substantive equality. As feminists have long recognised, cognisance must be taken of the history of exclusion, past injustices and skewed social norms; formal equality (same treatment or equality before the law), which conveniently sloughs off the historical and contextual factors, is inadequate.[3]

The Litigation

The complaint was lodged under the *Anti-Discrimination Act 1977* (NSW) ('ADA (NSW)') in 1995 but was not decided by the High Court until 11 years later. In accordance with the typical model of anti-discrimination legislation in Australia, there was an initial attempt to effect a settlement through conciliation, but this proved unsuccessful. There were then four hearings within the relevant hierarchy of tribunals and courts, which alternated between findings in favour of the complainants and the respondent.

The primary hearing was before the NSW Administrative Decisions Tribunal (ADT), which found in favour of the complainants and awarded them damages of $250,000.[4] In the second instance, this decision was overturned by the ADT Appeals Panel in favour of the respondent.[5] Thirdly, the NSW Court of Appeal reinstated the decision of the ADT in favour

[3] Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990).

[4] *Amery v New South Wales* (2001) EOC ¶93-130.

[5] *New South Wales v Amery* (2003) 129 IR 300.

of the complainants in a 2:1 decision.[6] Finally, the High Court in *Amery* upheld the respondent's appeal in a 6:1 decision.

Underscoring the adjudicative volatility are the leeways of choice open to judges in their interpretative role.[7] Normally, they would have an array of binding precedents and persuasive decisions from which to choose. However, when the legal issues are novel, judges invariably fall back on their own normative universe to create meaning.[8] The element of judicial subjectivity determines whether they will look to the past in order to uphold the status quo, or look to the future to create a more imaginative and beneficent interpretation of the legislation. This dichotomy is sharply depicted in the *Amery* judgments.

The Jurisprudence

In common with most Australian anti-discrimination legislation, the ADA (NSW) distinguishes between direct and indirect discrimination. Direct discrimination sets out to deal with the simplest manifestation of discrimination, such as treating another person differently by virtue of (inter alia) sex when in the same or similar circumstances. Indirect discrimination attempts to go further by considering a practice that appears neutral on its face but disproportionately impacts on a group by virtue of sex. While well intentioned, the inclusion of indirect discrimination in anti-discrimination legislation resulted in a complex test that has become more convoluted with the aid of powerful and well-resourced respondents, such as State governments, as was the case in *Amery*. In addition, the neoliberal turn, which was very much in evidence during the period of the Howard Coalition Government (1996–2007), was reflected in conservative judicial appointments, the revival of employer prerogative in labour relations[9] and a preference for a strict equal treatment approach in discrimination jurisprudence.[10] *Amery* stands in stark contrast to the landmark indirect sex discrimination decision of *Australian Iron & Steel Pty Ltd v Banovic* in 1989,[11] a decision of the Mason Court (1987–95) when social liberalism was in the ascendancy and there was a greater willingness to endow remedial legislation with a beneficent interpretation.

The four-part test for indirect discrimination under the ADA (NSW) involves addressing: (i) the relevant requirement or condition; (ii) its disproportionate effect on the ground of sex; (iii) the reasonableness of the requirement or condition; and (iv) the ability of the complainants to comply with the requirement or condition. The probative burden on complainants is onerous under the ADA (NSW), as they have to prove that the requirement or condition is not reasonable. This contrasts with other Australian legislation where the burden rests with the respondent to prove the reasonableness of the requirement or condition.

Despite the complex constellation of issues that emerged in the case, the condition of permanency was accepted by the ADT and both appellate bodies as the relevant requirement or condition with which the complainants had to comply, but this was overruled by the High

[6] *Amery v Director-General, Department of Education and Training (NSW)* [2004] NSWCA 404 (15 November 2004).

[7] Julius Stone, *Precedent and Law: Dynamics of Common Law Growth* (Butterworths, 1985) 4, 109 *et passim*.

[8] Robert Cover, 'Nomos and Narrative' (1983) 97 *Harvard Law Review* 4.

[9] As reflected in the body of legislation known as 'WorkChoices' incorporated in the *Workplace Relations Act 1996* (Cth) and *Workplace Relations Regulations 2006* (Cth).

[10] Margaret Thornton, 'Sex Discrimination, Courts and Corporate Power' (2008) 36 *Federal Law Review* 31.

[11] (1989) 168 CLR 165. Cf *Waters v Public Transport Corporation* (1991) 173 CLR 349.

Court. The majority (Gummow, Hayne and Crennan JJ (Callinan J agreeing)) held that the terms or conditions of employment offered by the employer referred to the 'actual employment' in which the complainants were engaged,[12] that is, their employment as casual teachers, not their employment as teachers more generally. The bifurcation between casual and permanent employees meant that the terms and conditions of employment could apply to only one category of employee at a time, not both. The majority regarded the conflation of the casual and permanent categories as an error of law bordering on the incongruous.[13]

The narrow construction of the requirement or condition meant that the High Court had no need to progress to the second issue of reasonableness, which is frequently the sticking point in indirect discrimination litigation. It was discussed only by Gleeson CJ (Callinan and Heydon JJ agreeing), who was of the view that it had not been established by the complainants that it was unreasonable to pay casual and permanent staff at different rates.[14] The technocratic approach adopted by the majority, which treated the casual and permanent classifications as discrete, accords with the formal equality model. It meant that the overarching legislative aim of effecting equality between men and women in public life was accorded short shrift.

The majority judgment stands in sharp contrast with that of Kirby J, the sole dissenting judge. He lambasted the majority judges for their 'narrow and antagonistic' stance in light of the beneficial and purposive approach mandated by the legislation. He was even more censorious of the majority's deference to the historic and gendered categorisations, which he asserted had the effect of defining the discrimination complaint 'out of existence'.[15]

Amery was greeted with dismay by feminists, who felt that the High Court had frustrated the potential for claims of indirect discrimination in the same way that it had dealt a major blow to direct discrimination in *Purvis v New South Wales (Department of Education and Training)*[16] shortly before.[17] It was apparent that indirect discrimination could not be relied upon to address entrenched gender inequities in the workplace associated with pay, casualisation and family responsibilities.[18] The neoliberal turn with its favouring of employer prerogative, has resulted in technocratic judgments that pose a daunting challenge for heroic complainants in the future.

The Feminist Judgment

Beth Gaze carefully considers the arguments of the State of NSW relating to the characterisation of the requirement or condition, particularly the contention that there were two

[12] *Amery* (2006) 226 ALR 196, 213–14.
[13] Ibid 214.
[14] Ibid 203.
[15] Ibid 230.
[16] (2003) 217 CLR 92.
[17] K Lee Adams, 'Defining Away Discrimination' (2006) 19 *Australian Journal of Labour Law* 263, 278; Belinda Smith, 'Rethinking the *Sex Discrimination Act*: Does Canada's Experience Suggest We Should Give Our Judges a Greater Role' in Margaret Thornton (ed), *Sex Discrimination in Uncertain Times* (ANU EPress, 2010) 254.
[18] Beth Gaze, 'The *Sex Discrimination Act* at 25: Reflections on the Past, Present and Future' in Thornton (ed), ibid 120; Belinda Smith, 'What Kind of Equality Can We Expect from the Fair Work Act?' (2011) 35 *Melbourne University Law Review* 545; Fiona MacDonald and Sara Charlesworth, 'Equal Pay under the *Fair Work Act 2009* (Cth): Mainstreamed or Marginalised?' (2013) 36 *University of New South Wales Law Journal* 563, 568.

different jobs – casual teacher on the one hand, and permanent teacher on the other. She argues that to support the State's view would privilege form over substance. Furthermore, she suggests that the interpretation of the requirement or condition in the ADA (NSW) to refer to 'a particular kind of employee', viz, permanent *or* casual, would involve reading words into the Act. She rejects the technocratic interpretation of the majority judges of the High Court in favour of the liberal construction of the Court of Appeal.

Hence, unlike the majority judges of the High Court, Beth Gaze was compelled to consider the second prong of the indirect discrimination test – that of the reasonableness of the requirement or condition. She accords short shrift to the State's decidedly specious arguments, which included the contention that casual employment was a matter of individual 'choice' and that acceding to the women's claims would create an industrial problem by disturbing the settled expectations of (male) teachers. She therefore concluded that the imposition of the requirement or condition was not reasonable, and found for the complainants.

In common with the dissenting judgment of Kirby J, Beth Gaze evinces a willingness to move beyond the narrow interpretation of the ADA (NSW) adopted by the majority judges to pay attention to the context in accordance with the intention of the legislature. However, whereas Kirby J was primarily concerned with the deleterious impact of *Amery* on anti-discrimination legislation generally, Gaze's judgment is sensitively attuned to the ongoing workplace disadvantages experienced by women, particularly those with family responsibilities. Both judgments highlight Julius Stone's thesis that the leeways of choice are always open to judges; there is never just one right answer.

Postscript

One positive outcome to emerge from *Amery* is that supply casuals (temporary teachers) under the NSW Teaching Award are now paid at the same rate as permanent staff, and it is only relief casuals who are paid according to the casual award.[19] It is notable that this change was effected in January 2001 prior to the initial hearing before the ADT, but it was too late to alter the course of the litigation.

[19] Industrial Relations Commission of New South Wales, *Crown Employees (Teachers in Schools and Related Employees) Salaries and Conditions Award*, IRC 1027 (7 December 2012) ss 22–3.

THE STATE OF NEW SOUTH WALES............ APPELLANT;
DEFENDANT,

AND

AMERY AND OTHERS........................ RESPONDENTS.
PLAINTIFFS,

[2006] HCA 14

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES

HC of A 2005-6

Nov 15,16 2005

April 13 2006

Gaze J

211 GAZE J. This appeal is brought by the State of New South Wales (the State) against a decision of the New South Wales (NSW) Court of Appeal in favour of thirteen women who claimed that the NSW Department of School Education (the Department) had indirectly discriminated against them on the basis of sex. All the women held appointments as permanent teachers in the Department earlier in their careers but resigned their positions, most (but not all) for reasons of family responsibilities, when they had children. All sought to rejoin the Department as teachers, but because of their family commitments to children and partners they had limitations on the areas in which they could work. Because they could not move as the Department directed, they were offered only casual teacher positions.

212 The salary scale for casual teachers was substantially lower than that for permanent teachers. Its maximum rate was the equivalent of level 8 of the 13-point permanent teachers' salary scale. Maximum pay for a permanent teacher was $50,000 at 1 January 1999 while for a casual teacher it was $40,576, a difference of almost 20 per cent. A senior casual teacher could be paid 20 per cent less than a permanent teacher with the same experience and responsibilities working in the next classroom.

213 The Department employed casual teachers in two categories: "relief casuals" were short term casual staff employed on a daily or hourly basis to cover absences by other teachers due to illness or other commitments, and "supply casuals" were casual staff employed on a long term basis (for at least eight weeks) to cover longer absences such as maternity leave or long service leave, or even sometimes as part of the regular staffing complement of a school. The women respondents were all supply casuals, who generally took the same responsibilities in a school as the permanent teachers they were replacing.

214 The situation facing the women in this case is not unusual for women who want to retain and pursue their careers while also taking primary responsibility for care of children. Social convention, and women's generally lower pay mean that women's jobs are often regarded as secondary to their husband's job, and that once children arrive, it is the mother who is likely to work part time or take some years out of the workforce to accommodate child care responsibilities, while the man takes over as main breadwinner and his career advances. As his employment is given priority, the

family is more likely to move to accommodate his employment than hers. A man whose wife is not working, working part time or has returned after a career break has mobility that a woman with a working husband does not (174), giving him an advantage where an employer requires mobility.

215 Women combining employment with care responsibilities seek work compatible with their care obligations. Although the teaching workforce is predominantly female, the Department's employment practices make no allowance for teachers during, or seeking to return after, taking responsibility for family care. Experienced teachers who seek to return and whose partner is not able to move are offered employment only as casual teachers, which is both insecure and lower paid. The Department benefits through access to a pool of cheaper but experienced employees who have few other options. These structural constraints on teachers who are mothers reinforce their workforce marginalisation.

The appeal

216 The appeal to this Court is an appeal in the strict sense, so to succeed the appellant must establish that the Court of Appeal made an error of law. This is not a merits review that would enable the court to substitute its own view without identifying an error made by the Court of Appeal. The legislative context of indirect sex discrimination is defined in s 24 of the *Anti-Discrimination Act 1977* (NSW) (the ADA) as follows:

> "(1) A person (the perpetrator) discriminates against another person (the aggrieved person) on the ground of sex if, on the ground of the aggrieved person's sex or the sex of a relative or associate of the aggrieved person, the perpetrator:
>
> . . .
>
> (b) requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons of the opposite sex . . . comply or are able to comply, being a requirement which is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply."

All four elements mentioned in s 24(1)(b) must be established by the plaintiff to make out a case of indirect discrimination.

217 By s 5, the ADA binds the Crown. Section 25 specifies the areas of activity in which discrimination is unlawful:

> . . .
>
> "(2) It is unlawful for an employer to discriminate against an employee on the ground of sex:
>
> (a) in the terms or conditions of employment which the employer affords the employee."

218 When the ADA was adopted in 1977, s 54(1)(e) expressly excluded from its scope:

> "anything done by a person if it was necessary for the person to do it in order to comply with a requirement of . . . an order or award of a court or tribunal having power to fix minimum wages and other terms and conditions of employment."

(174) Joan Williams, *Unbending Gender* (Oxford University Press, 2000); Sandra Berns, *Women Going Backwards* (Ashgate, 2002); Barbara Pocock, *The Work-Life Collision* (Federation Press, 2003).

In August 1995 this provision was amended to expressly remove the exclusion of such orders or awards. As a result, a claim such as this became possible, and this claim was lodged in November 1995. The claim was upheld by the NSW Administrative Decisions Tribunal (the ADT) (175), overturned on appeal by the ADT Appeal Panel (the Appeal Panel) (176), and restored by the NSW Court of Appeal by a 2-1 majority (177). The only disagreements to this point have been on whether the onus of proof of "not reasonable" has been correctly applied.

Background: employment practices and salary scales

219 The *Teaching Services Act 1980* (NSW) (the TSA) authorises the Department to employ teachers in two categories: permanent teachers, known as "officers" and casual teachers, who are paid by the hour. The different salary scales for permanent and casual teachers are set by the teachers' award (178). The pay differential can be traced to a 1983 Industrial Commission decision (179) that treated all non-permanent staff the same, despite recognising that the value of long term "supply" casual teachers' work was closer to that of permanent teachers, since they took on after hours commitments corresponding with their longer term appointments, such as camps, parent teacher interviews and curriculum development (180).

220 The value of the work of long term casuals was the subject of evidence in the ADT, which found that it was equivalent to that of a permanent teacher (181).

221 The disproportionate impact on female teachers was addressed by evidence from the Department about staffing numbers for the period relevant to this case:

Classification	Male	Female	Total
Permanent	18,125	32,692	50,817
Casual	4,828	23,182	28,010
Total	22,953	55,874	78,827

Although 70 per cent of teachers were women, only 59 per cent of women teachers held a permanent position, compared with 79 per cent of men,

(175) *Amery v New South Wales* (2001) EOC ¶93–130. In *Amery v New South Wales (No 2)* [2001] NSWADT 187 (13 November 2001), the complainants' application for costs was denied, with the opinion of the judicial member on a question of law prevailing over the two dissenting non-judicial members.
(176) *New South Wales v Amery* (2003) 129 IR 300.
(177) *Amery v State of New South Wales* (2004) EOC ¶93–352 per Beazley JA and Cripps AJA, Hodgson JA dissenting.
(178) *Crown Employees (Teachers and Related Employees) Salaries and Conditions Award* made under the *Industrial Relations Act 1996* (NSW) from August 1996. Before then pay scales were in the Teachers and Related Employees Enterprise Agreement made under the *Industrial Relations Act 1991* (NSW).
(179) [1983] AR 672.
(180) *Amery v New South Wales* (2001) EOC ¶93-130, 75,283 at [32]–[33].
(181) (2001) EOC ¶93–130, 75,287 at [35].

leaving 41 per cent of women but only 21 per cent of men employed as casuals. Of casual teachers, 83 per cent were female and only 17 per cent male. Men held more permanent positions because they could more readily agree to move than women. Women were much more likely than men to be casuals and limited to the lower pay scale. There is a clear and substantial disproportion in the type of position held and hence pay rates according to the sex of the teacher.

The State's arguments

222 The State put two main arguments to this court. First, it argued there was no requirement or condition, because two different job categories were involved rather than one job with a requirement or condition attached to access the higher pay scale. Secondly it argued that if there was a requirement or condition, it was reasonable in all the circumstances. The State argued that the Court of Appeal had erred in law in finding that there was a requirement or condition, and that it was not reasonable.

The requirement or condition

223 Identifying the "requirement or condition" claimed to be discriminatory is central to an indirect discrimination case, as it determines the formulation of the other elements that must be proved by the complainant, such as ability to comply, disproportionate impact, and assessment of whether or not the requirement or condition is reasonable. In the ADT and the Appeal Panel the requirement or condition was loosely referred to as a requirement to have permanent status to access the higher pay scales. The Court of Appeal noted that the requirement to hold a permanent position to access the higher pay scale was not imposed by any law but resulted from the Department's practice of not making over award payments (182). This practice primarily affected supply casual teachers whose work was of the same value as permanent teachers.

224 Neither the TSA nor the teachers' award requires the Department to follow a policy or practice of not making over-award payments. Neither the TSA nor the award determined the requirement or condition involved, which was the Department's decision not to make over-award payments to provide equal pay for equal work.

225 In this court the appellant argued that there was no requirement or condition, even if it was formulated as a practice of not making over award payments to supply casuals. It said there are simply two different jobs, permanent teacher and casual teacher, not a single job of teacher to which people are appointed as permanent or casual staff. Since the difference between the jobs is part of their nature, it could not be separately identified as a requirement or condition.

226 The Department supported this argument by pointing to several provisions in the TSA that treat "officers" (permanent teachers) and casual teachers differently. As noted above, "officers" can be directed to work in

(182) (2004) EOC ¶93-352 at [11]–[12].

a particular location and be dismissed if they refuse; there is power to ensure the salary of an officer matches the duties performed: s 73(1); an officer who becomes ill can be retired or transferred: s 76; officers have an entitlement to leave: s 79; and may not engage in certain commercial activities without consent: s 89. Only officers can seek promotion to leadership positions in schools. In reality, however, these differences have little practical effect. Casual teachers are only offered specific work for a limited time and accrue no leave, so there is no practical need for the powers like those in the ADA.

227 To accept the State's argument that there are simply two different jobs would privilege form over substance. The focus of indirect discrimination law is on the effects of practices, not their form. The fact that supply casual teachers actually carry out the work of permanent teachers for more than eight weeks at a time and in some cases longer, strongly suggests that the jobs are regarded in practice as the same.

228 In further support of its argument, the state contended that the reference in ADA s 25(2)(a) to prohibiting discrimination in the "terms and conditions of employment" must refer to employment *as a particular kind of employee*, which had to be either permanent or casual, and therefore under the ADA there are two different kinds of employment rather than a requirement or condition. This argument rests on reading words into the ADA that are not present, requiring a "particular kind of employment", and interpreting that employment in a very narrow, formalistic way. If accepted, it would preclude any inquiry into whether the Department's practice regarding casual teacher pay is "not reasonable".

229 The ADA's prohibitions on employment discrimination are not formulated in terms of specific jobs. Instead, the formulation of "employment" used throughout s 25 is quite general and refers to the general nature of the relationship between the parties. The reference to "terms and conditions" suggests that varying terms and conditions of work such as full or part time, casual or permanent, categories were intended to be covered. Nothing in the ADA indicates that only a specific and narrowly defined job category was intended, which would protect differential treatment of employees engaged in the same work from challenge. To the contrary, the 1995 amendment of s 54 that opened industrial awards to challenge for discrimination suggests that Parliament's intention was to expose all aspects of employment relationships to scrutiny under the ADA, to better serve the ADA's aim of preventing and remedying discrimination.

230 The authorities indicate that it is not appropriate to take a narrow approach to identifying the requirement or condition, and a broad interpretation should be given. In *Australian Iron and Steel v Banovic* (183), this court approved the comments of Browne-Wilkinson J in *Clarke v Eley (IMI) Kynoch Ltd* (184) on the correct approach to interpreting the words "requirement or condition". Dawson J said of the NSW ADA that (185):

(183) (1989) 168 CLR 165.
(184) (1983) ICR 165.
(185) *Banovic* (1989) 168 CLR 165 at 185.

> "[Section 24(1)(b)], which defines indirect discrimination, has a much wider application [than the provision which defines direct discrimination] and covers discrimination which is revealed by the different impact upon the sexes of a requirement or condition. The starting point with [s 24(1)(b)] must be the identification of the requirement or condition. Upon principle and having regard to the objects of the Act, it is clear that the words 'requirement or condition' should be construed broadly so as to cover any form of qualification or prerequisite demanded by an employer of his employees: *Clarke v. Eley (IMI) Kynoch Ltd.* (1983) ICR 165, at pp 170–171. Nevertheless, it is necessary in each particular instance to formulate the actual requirement or condition with some precision".

231 McHugh J also approved the comments of Browne-Wilkinson J, noting that in *Clarke*, an employer retrenching part time workers first in a redundancy situation was held to be applying a requirement or condition (186):

> "[in *Clarke* the] Employment Appeal Tribunal rejected the submission that 'requirement' meant something which calls for or demands something of the person to whom it is applied and that 'condition', while including a qualification for holding a position, did not include a qualification for immunity from a disadvantage. Browne-Wilkinson J., giving the judgment of the Tribunal, said (187):
>
> > 'In our view it is not right to give these words a narrow construction. The purpose of the legislature in introducing the concept of indirect discrimination into the Act of 1975 and the *Race Relations Act 1976* was to seek to eliminate those practices which had a disproportionate impact on women or ethnic minorities and were not justifiable for other reasons. The concept was derived from that developed in the law of the United States which held to be unlawful practices which had a disproportionate impact on black workers as opposed to white workers: see *Griggs v. Duke Power Co.* [1971] USSC 46; (1971) 401 US 424. If the elimination of such practices is the policy lying behind the Act, although such policy cannot be used to give the words any wider meaning than they naturally bear it is in our view a powerful argument against giving the words a narrower meaning thereby excluding cases which fall within the mischief which the Act was meant to deal with.'"

232 In *Home Office v Holmes* (188), a challenge was brought to a requirement to work full time, and in defence it was argued that the nature of the work was full time, not part time work, so there was no requirement or condition. The defence argued that the employment should be characterised as incorporating the requirement, so that it was simply the nature of the employment rather than a separate requirement, and the indirect discrimination claim must fail. The United Kingdom Employment Tribunal rejected this approach, holding that full and part time work were not different work; the legislative words were

> "plain clear words of wide import fully capable of including any obligation of service whether for full time or for part time, and we see no basis for giving them a restrictive interpretation in the light of the policy underlying the Act" (189).

233 The style of argument put unsuccessfully by the defence in *Holmes* was also rejected by this court in *Waters v Public Transport Corporation* (190),

(186) *Clarke* (1983) ICR 165 at 196.
(187) (1983) ICR 165 at 171.
(188) (1994) ICR 678.
(189) (1994) ICR 678 at 682-3.
(190) (1992) 173 CLR 349.

a challenge to the removal of conductors from the Melbourne tram system. The plaintiffs claimed that the service in question was a public tram service on which a requirement for commuters to use it without the assistance of conductors was being imposed, which would have a disproportionate effect on people with a disability. The Corporation's argument that the service provided was simply a tram service without conductors, and no requirement or condition was involved, was rejected by the majority of the High Court (5-2). Dawson and Toohey JJ cited with approval Dawson J's comment in *Banovic* and continued (191):

> "It is true that for something to be a requirement or condition in relation to a matter it must be separate from that matter. However, whether such a requirement or condition is in fact separate from the matter to which it relates will clearly depend upon how the matter is described and how the requirement or condition is characterized. Given that the legislation should receive a generous construction, we do not think that the respondent can evade the implications of s. 17(5) by defining the service which it provides so as to incorporate as part of that service what would otherwise be a requirement or condition of the provision of that service".

234 McHugh J reiterated that "the phrase 'requirement or condition' [should] be given a broad interpretation to enable the objectives of the Act to be fulfilled" (192) and continued (193):

> "In the context of providing goods or services, a person should be regarded as imposing a requirement or condition when that person intimates, expressly or inferentially, that some stipulation or set of circumstances must be obeyed or endured if those goods or services are to be acquired, used or enjoyed".

235 In both *Banovic* and *Waters* this Court has held that a broad approach should be taken to interpreting "requirement or condition" in accordance with the objectives of the legislation. In *Waters* where it was argued that the alleged requirement or condition was part of the nature of the service or employment, this Court specifically warned against determining the service so as to exclude cases that fall within the mischief the Act is intended to deal with. By analogy, the same should apply to identifying the employment concerned, as *Holmes* illustrates.

236 The State has not convincingly argued that these precedents are not applicable or are no longer authoritative. Its argument would undermine the purpose of the ADA and the concept of indirect discrimination, and would prevent consideration of the very issues that Parliament has specified as relevant to assessing whether indirect discrimination has occurred. This Court should follow the approach adopted in *Banovic* and *Waters*. No error has been shown in the Court of Appeal's decision identifying the requirement or condition.

Was the requirement or condition "not reasonable"?

237 Two other elements of the indirect discrimination claim are clearly established. The disproportionate impact of the requirement is clear from

(191) (1992) 173 CLR 349 at 394.
(192) (1992) 173 CLR 349 at 406.
(193) (1992) 173 CLR 349 at 407.

the Department's data. The inability of the complainants to comply with either the requirement to be available for relocation in order to qualify for permanent status, or to be paid over-award by the Department, is not contested.

238 The State argued that the requirement or condition had not been shown to be "not reasonable", pointing to a range of factors that were said to make it reasonable. The assessment of reasonableness is a question of fact, although determining what factors are relevant to assessing it is a question of law: *Waters* (194). The Court of Appeal's decision cannot be set aside merely because of disagreement with its assessment and weighting of the factors considered. It can be overturned only if legal error can be shown.

239 The State made a number of arguments in support of its claim that the requirement or condition had not been shown to be not reasonable. To show error of law by the Court of Appeal, the State would have to establish that the factors were relevant and were not considered by the ADT in making its assessment. The Court of Appeal did not undertake its own assessment of reasonableness. Instead, in setting aside the Appeal Panel's determination that the ADT erred in law, and rejecting all other arguments, it restored the ADT's decision. First, the State said, it was the respondents' own choice to limit the area in which they could work and hence they limited their own ability to access the higher pay scale. Further, a finding of indirect discrimination would be unreasonable because it would disturb existing industrial relativities in pay, and finally, it would benefit only the plaintiffs in this action, not all other women or employees who were supply casuals.

240 *Choice:* It was argued that it was the respondents' own choice to restrict their geographical availability that was the reason for their casual status and lower pay. However, as Beazley JA held, the subjective preferences of the respondents were not a relevant factor in assessing reasonableness (195). The issue is the reasonableness of the requirement or condition that the Department not make over-award payments to supply casuals. The choices made by individuals to impose limitations on their job applications that prevent them from obtaining a permanent position are not relevant to this requirement or condition, as they do not influence it in any way. No error of law has been shown.

241 In practice the respondents had little choice. If they wanted to return to professional work using their qualifications and experience, and could not undertake to move their family as the Department required, their only option was to accept casual work. The essence of the disadvantage of indirect discrimination in this situation is that the employer's practices constrained long term casual teachers to "choices" that disproportionately disadvantaged them on the basis of sex. Such a "choice" is not a defence to a discrimination claim.

(194) (1992) 173 CLR 349 at 378 per Brennan J; at 396 per Dawson and Toohey JJ. The Victorian Supreme Court had held that excluding the financial situation of the Public Transport Corporation from assessment of reasonableness amounted to error of law: *Public Transport Corporation v Waters* [1992] 1 VR 151.
(195) [2004] NSWCA 404 at [81]–[86].

242 *Industrial relativities*: The State argued that relativities in the industrial relations system would be disturbed if it made over award payments to the respondents. However, this argument could apply to all indirect discrimination cases that affected payment practices, as any remedy would disturb existing pay practices and therefore relativities. This argument would negate the 1995 amendments to the ADA by which Parliament indicated that a discriminatory industrial instrument was no longer to be an automatic defence to a discrimination claim. It cannot be accepted.

243 The State further argued that it would not be reasonable to pay every potentially affected teacher on the permanent salary scale because it would be too costly. It was recognised in *Waters* that the cost to the employer of compliance is a relevant factor, and in *Waters* it was decisive (196). But the context is different when considering pay inequity than the reduction or variation of government services for budgetary reasons. While both can seriously affect individuals in protected groups, the ongoing personal injustice of pay inequity makes it more difficult to regard it as reasonable.

244 The 1995 amendment of the ADA that brought industrial awards and agreements within the scope of the ADA's prohibitions on discrimination was a major change. It shows a clear legislative policy to remove discrimination in or arising from awards or agreements. This change exposed to scrutiny longstanding and widespread practices that had developed in an environment protected from challenge for discrimination.

245 Of its nature, indirect discrimination poses a challenge to existing ways of doing things and is likely to disrupt some settled practices (197). As a result, decisions on indirect discrimination claims can be controversial and unfamiliar. With the large scale movement of women into the workforce since the 1960s, employment practices designed for the paradigm "unencumbered" worker (198) who can readily move at his employer's direction can operate unfairly to them. Indirect discrimination law provides a means for this to be addressed.

246 The lower pay rate for casual teachers originated in 1983 when awards were protected from challenge for discrimination, but the State seeks to continue this approach despite its discriminatory effect. To allow this would fail to give due weight to the injustice experienced by the respondents, and to Parliament's 1995 decision not to continue to protect industrial practices from challenge for discrimination.

247 Lower pay for work of equal value is a serious, substantial, and ongoing injustice. Lower pay for a work category dominated by women where the work is of the same value is both intrinsically unjust, and also contributes to the reinforcing cycle of women's disadvantage at work. In particular it positions mothers as a cheaper, reserve labour force.

248 The challenge facing the Department in resolving any industrial relations issues that might be caused by remedying this injustice is a factor that deserves consideration. But if it were to outweigh the injustice identified

(196) (1992) 173 CLR 349.
(197) Hunter, *Indirect Discrimination in the Workplace* (Federation Press, 1992).
(198) Williams, above n 1.

here, gendered pay inequity could never be resolved through a discrimination claim. This cannot have been the intention of Parliament in adopting the 1995 amendment.

Remedy would benefit only these claimants: The 13 women who brought this claim should not be denied a remedy for proven discrimination against them because others in a similar position may also have experienced discrimination. Speculation about possible consequences of this decision cannot be a reason to refuse a remedy where a breach of the law has been established.

249 The test of reasonableness provides a mechanism for moderating the impact of indirect discrimination law and allowing change to occur while ensuring that other interests are also considered, but not for halting it altogether. It should not be a means for condoning a serious and ongoing discriminatory injustice. Courts must be careful, in weighing up the circumstances, not to devalue the disadvantage suffered by the complainants in the existing system merely because it is familiar and longstanding. The State has not succeeded in showing that any error was made by the ADT in its assessment that the requirement was not reasonable, or by the Court of Appeal in upholding that decision.

250 I would reject the appeal and uphold the decision of the Court of Appeal.