

## The New South Wales Carers' Responsibilities Act Spring 2006

Enacted in 2001, the New South Wales Carers' Responsibilities Act ("CRA") prohibits discrimination against employees with caregiver responsibilities and provides access to reasonable flexible work arrangements. Under this law, employees have the right to request accommodations for their carer responsibilities, and employers have an affirmative obligation to consider and grant reasonable accommodations that do not impose an unjustifiable hardship. The affirmative accommodation requirement extends to requests for flexible working hours, working from home (telecommuting), part-time work, and job-share arrangements.

"[P]rimarily targeted at reforming working time arrangements and working conditions through flexible work practices,"<sup>1</sup> the CRA reflects the government's effort to help employees achieve a better balance between work and family life.<sup>2</sup> The initial interest in this type of legislative reform came from groups seeking to address the disparity between women's and men's participation in the workforce.<sup>3</sup> "More recently, however, the [work/family] agenda has broadened to include men and a wider range of caring responsibilities as a result of attention to our aging population, the increased participation of older workers in the labor market (particularly women), the changing pattern of work hours, and men's changing expectations about their active participation in family life."<sup>4</sup> A diverse coalition of government and non-government groups representing these broader interests spurred the development and passage of various carer responsibilities laws, including the CRA, that entitle employees to reasonable flexible work arrangements.

Although laws protecting carers exist throughout Australia, the CRA is widely considered to be the model caregiver law.<sup>5</sup> Section I of this memo reviews the substantive requirements of the CRA. Section II outlines the procedure for its enforcement through the New South Wales Anti-Discrimination Board and Administrative Decisions Tribunal. Section III analyzes how the Tribunal has interpreted and applied the CRA through the handful of decisions published since enactment of the CRA in 2001.

### I. Statutory Framework of the CRA

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In 2001, the New South Wales Parliament passed the CRA, thereby amending the Anti-Discrimination Act of 1977 to prohibit discrimination in work based on a person's responsibility to care for a child or immediate family member, which is defined to include a range of family relationships as explained in Section A, below. Adopting a disability model of discrimination<sup>6</sup> like that contained in the Americans with Disabilities Act (ADA), the CRA prohibits discrimination and obligates employers to provide reasonable accommodations to employees with carer responsibilities absent unjustifiable hardship. However, unlike the ADA, which expressly incorporates the phrase "reasonable accommodation" in its definition of discrimination,<sup>7</sup> the CRA does not contain the term "accommodation." Instead, Parliament created the obligation to accommodate by defining discrimination to include direct and indirect forms of discrimination against persons with carer responsibilities, as described in

Section B, below. It then excused employers from providing accommodations that impose an "unjustifiable hardship" as described in Section C, below.

### A. Meaning of Responsibilities as a Carer

The CRA broadly defines the relationships that qualify an employee as someone with responsibilities as a carer. In doing so, the legislature sought to include the maximum number of relationships which might reasonably give rise to carer responsibilities.<sup>8</sup>

A person qualifies as having responsibilities as a carer if he/she is responsible "to care for or support" any of the following persons in need of care or support:

- **Children** (biological, step, adoptive, foster, or others in a similar legal relationship, be they the employee's own children or grandchildren or those of their current or a former spouse or de facto spouse)<sup>9</sup>;
- **Parents** and **grandparents** (the employee's own biological or step parents and grandparents, as well as those of the employee's spouse or former spouse);
- **Siblings** (biological, half, step, adoptive or foster); and
- **Spouse** (including current or former spouse, or those who are in a de facto spousal relationship, regardless of sex, as determined by an examination of the relationship in context).<sup>10</sup>

Responsibilities as a carer can include current, perceived, or future care or support.<sup>11</sup> Thus, a person qualifies as having responsibilities as a carer if he/she has, is thought to have, had, or will have responsibilities to care or support for a child or immediate family member.

While Parliament debated the qualifying carer relationships covered by the CRA, the terms "care for or support" received little comment and were not defined.<sup>12</sup> The scope of caring responsibilities – i.e., what constitutes responsibilities and care or support – has been left to interpretation by the administrative agencies charged with enforcement of the CRA as explored further in Section III below.

### B. Meaning of Discrimination Based on Carer Responsibilities

Discrimination may be either less favorable treatment (disparate treatment), or required compliance with a work requirement or condition with which an employee cannot or does not comply because of her responsibilities as a carer (disparate impact). The CRA provides the following general definition of direct and indirect discrimination:

49T What constitutes discrimination on the ground of a person's responsibilities as a carer

(1) A person ("the perpetrator") discriminates [based on carer responsibilities if] the perpetrator:

- (a) treats the aggrieved person less favourably than in the same circumstances, or in circumstances which are not materially different, the perpetrator treats or would treat a person who does not have those responsibilities, or
- (b) requires the aggrieved person to comply with a requirement or condition with which a

substantially higher proportion of persons who do not have such responsibilities comply or are able to comply, being a requirement that 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.

Direct discrimination, captured in 49T(1)(a), prohibits intentional discrimination against persons with caregiver responsibilities. Under this provision, for example, an employer could not refuse to hire an applicant with children based on a belief that workers with childcare responsibilities work shorter hours, take more time off from work, and are less willing to travel.

Indirect discrimination, captured in 49T(1)(b), reaches facially neutral work requirements or practices – e.g., a requirement that all employees attend 8:00 a.m. meetings, work full-time, work from the same office as their supervisor, or attend team strategy dinners. These types of requirements are unlawful if they prove more difficult for persons with carer responsibilities and are “not reasonable having regard to the circumstances of the case.” For many employees, the primary issue is the ability to balance family responsibilities with work hours and schedules and the critical question then becomes whether a particular facially neutral requirement is reasonable under the circumstances.<sup>13</sup>

As discussed in Section III, the Tribunal has determined whether mandatory compliance with a particular work requirement is reasonable based, in part, on the employer’s efforts and ability to accommodate the employee by providing flexible work arrangements and by balancing the benefits and costs of any accommodations. In practice, then, the disparate impact provision imposes an *affirmative obligation* on employers to consider and make accommodations for employees with carer responsibilities.

### C. Unlawful Discrimination Against Applicants and Employees and the “Unjustifiable Hardship” Defense

With regard to employees and applicants,<sup>14</sup> the CRA prohibits discrimination in hiring practices, terms of employment, training and opportunities for advancement, termination, or in any other way.<sup>15</sup>

While the CRA applies to most employers, it does not apply to –

- employment in a private household; or
- employers with 5 or fewer employees.<sup>16</sup>

The law recognizes that it is not unlawful to refuse to hire or to fire a person with carer responsibilities where the employee is unable to perform the “inherent requirements” of the job or who, in order to perform the inherent requirements, would require arrangements that would impose an “unjustifiable hardship” on the employer.<sup>17</sup>

“Unjustifiable hardship” is defined in the CRA as follows:

49U What constitutes unjustifiable hardship

In determining what constitutes unjustifiable hardship for the purposes of this [legislation], all relevant circumstances of the particular case are to be taken into account, including:

- (a) the nature of the benefit or detriment likely to accrue to or be suffered by any persons concerned, and
- (b) the effect of the relevant responsibilities as a carer of a person concerned, and
- (c) the financial circumstances of and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship.

"Unjustifiable hardship" is therefore determined by balancing the benefits and harms to the employer, employee, and the recipient of the employee's care.<sup>18</sup>

These factors overlap significantly with factors that the Tribunal considers in determining whether a work requirement is reasonable under the circumstances, and the Tribunal has resolved cases based on whether a requirement is reasonable or not without ever reaching the question of "unjustifiable hardship." It is possible that "unjustifiable hardship" may prove relevant where an employer takes the position that a challenged work requirement (e.g., a 9:00 starting time or on-site supervision of staff) is an "inherent requirement" of the job and not capable of alteration without imposing an "unjustifiable hardship." In any event, the Tribunal has yet to address the utility and standard for "unjustifiable hardship" under the CRA.

## II. Enforcement by the Anti-Discrimination Board and Administrative Decisions Tribunal

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The New South Wales Anti-Discrimination Board ("ADB") administers the Anti-Discrimination Act of 1977, including the CRA. As described below, the ADB handles complaints of discrimination and provides guidance, education, training, and advice regarding legal rights and responsibilities. Following investigation and efforts at conciliation, the ADB may refer an unresolved complaint to the Administrative Decisions Tribunal (Tribunal or ADT) for further consideration and resolution.

### A. The Anti-Discrimination Board

Established in the Anti-Discrimination Act, 1977 and located in the office of the Attorney General,<sup>19</sup> the ADB is an administrative body that provides guidance and handles complaints of discrimination under the Anti-Discrimination Act.<sup>20</sup> The ADB website contains the following examples of and guidance regarding reasonable accommodations for carers under the CRA:<sup>21</sup>

Carers' responsibilities discrimination – Your rights

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What are my rights in relation to getting work?

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For example, depending on the job, the employer may be able to make any of the following sorts of arrangements without it causing them unjustifiable hardship:

- allow you to work from home some or all days – this may mean that they also need to pay

for and provide you with the equipment and facilities to do this (for example, a computer and modem, payment for work phone calls);

- change your start or finish times, roster arrangements, or break times;
- allowing you to work your hours over fewer days;
- allowing you to work part-time instead of full-time, or to job-share with someone else; or
- being flexible with the amount of unpaid or paid leave you can take and when you can take it.

As long as you are the best person for the job, it is really up to you and your future employer what you negotiate. There are no set rules. The only rule is that as long as there is some way of you getting the job done properly, the employer must consider whatever arrangements are necessary – unless it would cause them unjustifiable hardship to do this.

Through general advice like this and by answering specific inquiries, the ADB seeks to prevent discrimination by providing information, training, and advice regarding legal rights and responsibilities under the CRA. The ADB also accepts complaints of discrimination and is empowered under the Anti-Discrimination Act to –

- receive complaints and determine whether they are covered by law;
- investigate complaints and dismiss or conciliate as appropriate; and
- refer cases not conciliated by the ADB to the Administrative Decisions Tribunal (ADT or Tribunal).<sup>22</sup>

The Board may dismiss a complaint for failure to state a claim covered by the Anti-Discrimination Act, or where the Board feels that the claim itself is frivolous or unfounded.<sup>23</sup> The Board also has the right to order and attempt conciliation between the parties to a complaint. While the Board may negotiate settlement through agreement of the parties, it lacks authority to impose settlement or order a remedy if the parties fail to reach agreement.<sup>24</sup>

In deciding whether to dismiss or conciliate a complaint, the Board may require the complainant and the respondent to produce documents and be interviewed by the President or staff of the Board. In some limited instances the dismissal of a complaint may be appealed by petition to the Administrative Decisions Tribunal.<sup>25</sup> Complaints that are not dismissed or conciliated successfully may be referred to the Tribunal. A flow chart setting out the ADB complaint process is included as Appendix I.

Many aspects of the complaint process before the ADB are similar to administrative proceedings before the Equal Employment Opportunity Commission in the United States. However, unlike EEOC proceedings where parties often are represented by counsel, parties may not be represented in proceedings before the ADB without special permission of the President.<sup>26</sup>

Since its enactment, the number of inquiries regarding legal rights under the CRA and the number of complaints that have been filed with the ADB alleging discrimination based on carer responsibilities have remained relatively constant, and constitute a small percentage of the total calls and complaints received by the ADB. Annual reports from 2001 through 2005 indicate that the number of inquiries and complaints regarding carer

responsibilities have remained at around 5% of the total calls and complaints:

2001-2002: 871 of 15,880 inquiries (5%) and 67 of 1,625 complaints (4%)<sup>27</sup>

2002-2003: 765 of 13,593 inquiries (6%) and 88 of 1,659 complaints (5%)<sup>28</sup>

2003-2004: 535 of 9,426 inquiries (6%) and 43 of 944 complaints (5%)<sup>29</sup>

2004-2005: 39 of 1,012 inquiries (4%) and 39 of 1,012 complaints (4%)<sup>30</sup>

As these reports show, complaints under the CRA remain relatively infrequent, with the overwhelming majority being resolved through conciliation or dismissal and without further referral to the Administrative Decisions Tribunal.<sup>31</sup>

### B. The Administrative Decisions Tribunal

The Administrative Decisions Tribunal (ADT or Tribunal) is an independent judicial body with the power to review and enforce various administrative actions of New South Wales.<sup>32</sup> The Equal Opportunity Division of the Tribunal has the power to –

- review complaints referred to it by the President of the ADB;<sup>33</sup>
- register a written conciliation agreement arrived at through an ADB conciliation as an order of the Tribunal, granting it the same legal force as a judgment of the Tribunal; and
- to review, in certain instances, a decision of the ADB President to terminate or dismiss a complaint.<sup>34</sup>

"[T]he referral of a complaint to the Tribunal is taken to be an application for an original decision,"<sup>35</sup> meaning that the Tribunal has the power to act as the primary decision-maker, or, put another way, is the first finder of fact with regard to the complaint.<sup>36</sup> A party may be represented by counsel before the Tribunal only at the discretion of the Tribunal.<sup>37</sup>

The Tribunal hears the case as a trial court and may dismiss the complaint (at any stage of proceedings) or sustain it and may order:

- Compensation up to a maximum of (AU) \$40,000 for loss or damage suffered;
- The person responsible for the discrimination, harassment or vilification not to continue or repeat the action;
- The person or company responsible to take certain actions, such as reinstating a person to their job if they have been dismissed;
- The person or company to publish an apology or a retraction;
- The discriminatory terms in a contract or agreement voided or altered;
- The person or company responsible to publish an apology or to implement a program to stop future discrimination.<sup>38</sup>

These are the only remedies available through the Tribunal; and each party bears its own costs.<sup>39</sup> While the forms of relief from the Tribunal are limited by law, the parties remain free to agree to additional or different relief through the Board's conciliation process where the remedies are developed by and at the discretion of the parties and constitute a private agreement between them.

### III. Carers' Responsibilities Legislation in Practice

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The ADT has published five decisions resolving complaints under the CRA since its passage in 2001.<sup>40</sup> Through these decisions, the Tribunal has interpreted key terms left undefined in the CRA, including what constitutes "responsibilities for care or support" and, in cases of indirect discrimination, how to determine whether a work requirement is "not reasonable having regard to the circumstances of the case."

In defining these terms and setting out the elements of a complaint's prima facie case, the Tribunal has firmly placed the burden of proof on employees to establish all elements of discrimination, including the unreasonableness of a neutral work requirement. In assessing whether a work requirement is reasonable, however, the Tribunal has required employers to prove good faith efforts to explore flexible work arrangements for employees with carer responsibilities, and also has balanced the relative benefits and costs of the allegedly discriminatory work requirement and proposed accommodations.

#### A. The Meaning of "Responsibilities to Care for or Support"

The first case to come before the Tribunal, *Gardiner v. NSW WorkCover Authority*, required the Tribunal to interpret the meaning of "'responsibilities to care for or support' another person."<sup>41</sup> Complainant Gardiner alleged indirect discrimination based on her employer's requirement that she relocate to its Head Office in another city further from her home. Gardiner alleged that she was unable to comply with this work requirement because the additional 3-4 hours she would spend traveling to and from work each day significantly reduced the amount of time she could spend with her children.

Her employer, WorkCover, responded that "responsibilities to care for or support" means that a person must be obligated to perform specific tasks "such as picking up children at certain times" and that the term "must equate to some obligation or specific duty."<sup>42</sup> Because Gardiner did not allege responsibility for any specific caregiver duties, she failed to show that she had carer responsibilities within the meaning of the Act.

Noting that Section 49S of the CRA "defines the relationship which must exist between the aggrieved person and the person who is being cared for, but does not define what is meant by 'the person's responsibilities to care for or support' another person," the Tribunal interpreted the phrase broadly in light of the remedial nature of the CRA.<sup>43</sup> "There is no basis, either in the [Anti-Discrimination Act] itself, or in any external materials, for confining the responsibilities to care for or support another person to particular categories of care or support such as dropping off, picking up or attending to a person who is sick."<sup>44</sup> The Tribunal agreed that Complainant had qualifying carer responsibilities because of her responsibility for the "day-to-day care" of her two children, which required her to meet their "physical, emotional and psychological needs," which varied day-to-day.<sup>45</sup>

By interpreting responsibilities broadly, the Tribunal relieved complainants of the burden of proving responsibility for a particular task in order to receive protection and accommodation under the CRA.<sup>46</sup> In practice, this reduces the employee's burden of proving a qualifying carer relationship and showing that the person being cared for is "in need of care or support," a question addressed by the Tribunal in *Spencer v. Greater Murray Area Health Service*.

In *Spencer*, the complainant alleged indirect discrimination based on her carer responsibilities after her employer required her to return to a five-day workweek. Her employer previously had allowed Spencer to compress her forty-hour workweek into four days so that she could care for her aging parents and sister, who was recovering from a stroke.<sup>47</sup> Following her transfer to a different position, the employer required her to return to a five-day workweek so that she would be present to supervise her staff every day.<sup>48</sup> The employer responded that, among other things, Spencer was not entitled to protection as a carer because her sister and parents were no longer in need of care or support: Spencer's sister had recovered to the point that she returned to work full-time and her parents were able to perform critical tasks (shopping, cooking, driving to the doctor) for themselves.<sup>49</sup>

While agreeing that Spencer "overstated the extent to which her family were in need of her care," the Tribunal still found that Spencer qualified as a person with carer responsibilities:

"Ms. Spencer need not establish that her parents and sister could not survive or function without her care or support. The hurdle placed by [Section] 49S (1) is not set that high. It is enough that she establish that her parents and/or sister were in need of care or support."<sup>50</sup>

Even though her parents could perform general household tasks, the fact that doing so was increasingly difficult as they aged was sufficient. "While theoretically [Spencer's parents] may have been able to 'get by' without their daughter's support, their quality of life would have been significantly compromised had they been forced to do so," making them "persons in need of 'care and support' ".<sup>51</sup> Similarly, while Spencer's sister had recovered significantly, her reliance on Spencer for emotional support and "assistance in the more demanding activities of everyday living" qualified her as a person in need of care or support.<sup>52</sup>

Through *Gardiner* and *Spencer*, the Tribunal has interpreted the scope of protection under the CRA broadly, including any person with a qualifying relationship (e.g., parent-child, sister-brother, spouse/partner – spouse/partner) who provides emotional, physical, or psychological care as needed by the other person in that relationship.

## **B. Indirect Discrimination: The Prima Facie Case and Determining Whether A Work Requirement is Reasonable Under the Circumstances.**

Through its published decisions, the Tribunal has set out the elements of prima facie case for indirect discrimination and placed the burden of proving each element squarely on the complainant.<sup>53</sup> The CRA defines indirect discrimination as --

"requir[ing] the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons who do not have such responsibilities comply or are able to comply, being a requirement that 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."<sup>54</sup>

The Tribunal has translated this into the following elements of a prima facie case, thus requiring complainants to prove

- 1) responsibilities as a carer;<sup>55</sup>
- 2) the existence of a mandatory work requirement;
- 3) inability to comply with the mandatory requirement;
- 4) the ability of a substantial proportion of persons without carer responsibilities to comply with that work requirement; and
- 5) that the requirement is not reasonable, considering all circumstances of the case.<sup>56</sup>

While employers may challenge the plaintiff's proof at each stage of the prima facie case,<sup>57</sup> and a failure to prove any element will result in dismissal of the complaint,<sup>58</sup> the primary issue often becomes whether a work requirement is reasonable under the circumstances.

In considering this final element of the complainant's prima facie case, the Tribunal has found that, to be "reasonable," a work requirement must fall somewhere between mere convenience and absolute necessity to the proper conduct of a business: "A requirement or condition is not to be regarded as 'reasonable' merely because it is convenient . . . On the other hand, it [goes] too far to say that a requirement or condition is reasonable only where it is shown to be necessary or essential for the proper conduct of the respondent's business or affairs."<sup>59</sup> In determining whether a requirement falls in the acceptable mid-range on this spectrum, the Tribunal has balanced the employer's need for the requirement against its discriminatory effect by considering:

- the reasons for the requirement, including business benefit and costs incurred if the requirement is removed or adapted;
- whether the requirement is "appropriate and adapted" to meet its purpose (e.g., is a five-day workweek for supervisors appropriate and adapted to adequate supervision of staff); and
- whether less discriminatory options exist, "including any accommodation of the needs of the aggrieved person and the possibility of alternative action which would achieve the object of the condition and be less discriminatory."<sup>60</sup>

The final factor forces employees and employers to consider and discuss possible flexible work arrangements and places an affirmative obligation on employers to make reasonable accommodation efforts. Thus, and despite its inclusion as part of the complainant's prima facie case, it is the employer's effort to accommodate employees' carer responsibilities that has proved critical in determining whether a requirement is reasonable under the circumstances.

In *Gardiner*, for example, the complaint was dismissed where the employer had engaged in "considerable efforts to accommodate" the complainant's carer responsibilities.<sup>61</sup> After requiring Gardiner to relocate to its Head Office, her employer offered to: (1) help move her family closer to the Head Office; (2) help her find another job; (3) change her core hours to allow a later start time; (4) set later start times for meetings that Gardiner needed to attend; (5) coordinate meetings with her attendance at various offices; and (6) limit the number of days spent in the Head Office to 5 days every 2 weeks.<sup>62</sup> While agreeing that WorkCover made "a serious attempt" to accommodate her carer responsibilities,<sup>63</sup> Gardiner complained that these alternatives still resulted in a significant reduction in the time that she could spend caring for her children.<sup>64</sup>

Balancing this detriment to Gardiner and her children against the benefit obtained by WorkCover in having its managers at the Head Office on "a regular, albeit flexible basis each week" in order to coordinate work between managers and their staff, the Tribunal found WorkCover's relocation requirement reasonable under the circumstances.<sup>65</sup>

In contrast to WorkCover's considerable efforts, the employers in *Reddy* and *Tleyji* failed to demonstrate reasonable efforts to accommodate their employees with carer responsibilities.<sup>66</sup> In *Reddy*, the complainant requested a part-time schedule following her return from maternity leave. Reddy sought to work three days a week from 7:30 a.m. to 4:00 p.m. rather than returning to her previous Monday to Friday, 8:30 a.m. to 5:30 p.m. schedule.<sup>67</sup> To handle any emergencies that might come up on her days off, Reddy also offered to be available by phone to handle urgent matters.<sup>68</sup> Reddy's employer rejected her request, citing a need to have managers at work "all the time."<sup>69</sup> In ruling that this full-time work requirement was not reasonable under the circumstances, the Tribunal noted that the employer did not consider "a job-sharing arrangement or other arrangement" and did not discuss possible variations of her proposal with her.<sup>70</sup> While the employer listed the difficulties and costs of allowing Reddy to work part-time, it failed to consider the cost savings of accepting her proposal, including the resulting reduction in Reddy's salary, and the costs spent in rejecting her proposal, including the high cost of replacing her.<sup>71</sup> "Not only did the company apparently fail to consider its own best interests, even less consideration appears to have been given to the adverse effects on Mrs. Reddy by requiring her to work full-time."<sup>72</sup> As a result, the Tribunal found that the full-time work requirement was not reasonable under the circumstances.

In *Tleyji*, the employer similarly rejected the complainant's request to work part-time without considering a possible job-share with other part-time employees or discussing the possibility of additional hours with the complainant.<sup>73</sup> The employer offered Tleyji a different part-time position at another office but that job change would have resulted in less money and a longer commute.<sup>74</sup> In finding the full-time work requirement unreasonable, the Tribunal faulted the employer for not "travelling Ms. Tleyji's proposal to test if, as feared, business might be compromised if the office was left with only one full timer" or structuring another arrangement (job-share or temporary reassignment to another position) to accommodate her responsibilities as carer.<sup>75</sup> "It is not necessary for the Tribunal to satisfy itself that no stone had been left unturned by a respondent in their evaluation of alternatives. Reasonable efforts however need to be shown."<sup>76</sup>

These cases demonstrate that, although the CRA does not expressly require an interactive process between employers and their employees with carer responsibilities, a key factor in the reasonableness analysis is the willingness of the employer to be thoughtful, flexible, and innovative in negotiations with the employee. By reprimanding employers who reject employee proposals "out of hand"<sup>77</sup> and fail to try employee proposals before dismissing them,<sup>78</sup> the Tribunal has made it clear that employers cannot rely on past practice or traditional notions of how work gets done. Moreover, employer assertions regarding the necessity of work requirements like full-time employment, daily presence at a work site, or inflexible working hours will be tested and rejected if not adequately supported by the evidence.

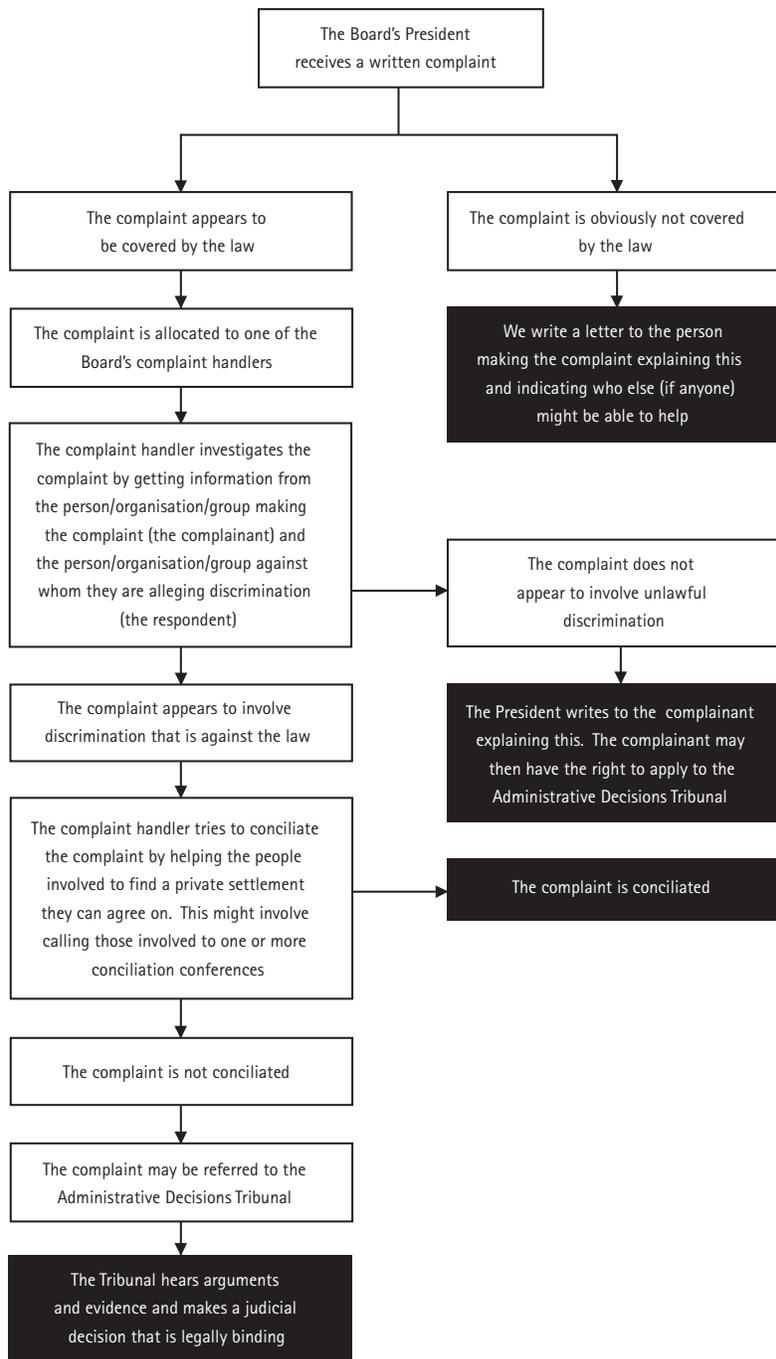
### Conclusion

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The New South Wales Carers' Responsibilities Act increases access to and usage of flexible work arrangements for employees with carer responsibilities. The strength of the affirmative accommodation obligation, as interpreted thus far by the Tribunal, provides employees with a strong "right to request" and receive reasonable flexible work arrangements. By forcing employers and employees to consider and discuss different ways of working and by pushing employers to be flexible, innovative, and creative in implementing flexible work practices, the CRA has the potential to achieve its broader goal of reforming traditional work practices.

### Appendix I: Anti-Discrimination Board Complaint Process<sup>79</sup>

#### HOW WE HANDLE COMPLAINTS



### ENDNOTES

- <sup>1</sup> Juliet Bourke, *Using the Law to Support Work/Life Issues: The Australian Experience*, 12 J. GENDER SOC. POL'Y & L. 19, at 21. Juliet Bourke was also one of the authors of the CRA and uniquely positioned to comment on its development.
- <sup>2</sup> Bourke, *supra* note 1 at 22.
- <sup>3</sup> See AUSTRALIAN BUREAU OF STATISTICS, AUSTRALIAN SOCIAL TRENDS 2002, INTERNATIONAL COMPARISONS – WORK 218 (2002), available at <http://www.abs.gov.au/ausstats/abs%40.nsf/94713ad445ff1425ca25682000192af2/549f30e9815d261eca256bcd00827318!OpenDocument>, noted in Bourke, *supra* note 1, at 22 (“As of 2001, the rate of participation for women aged fifteen to sixty-four in Australia was 63.9% (compared to 70.8% in the United States in 2000) and the rate of participation of men aged fifteen to sixty-four was 82.1% (compared to 83.9% in the United States in 2000).”).
- <sup>4</sup> Bourke, *supra* note 1, at 23–24.
- <sup>5</sup> Id. at 20. Similar acts have been passed at the federal level and in all but one other Australian state. These acts generally prohibit discrimination based on ‘parental status,’ ‘family responsibilities,’ or ‘carer responsibilities’ and may define qualifying relationship more narrowly (e.g., focusing primarily on parent-child relationships) or, like the New South Wales CRA, by including additional qualifying relationships. See, e.g., Equal Opportunity Act 1995 (Victoria) § 6(ea) (prohibiting discrimination based on parental status or status as a “carer”) and § 4(1) (defining “carer” as “a person on who another person is wholly or substantially dependent for ongoing care and attention . . .”) Due to the interaction between anti-discrimination law and industrial legislation (setting out terms and conditions of work across workplaces), and because state and federal courts and tribunals look to each other’s decisions when interpreting anti-discrimination law, these carer responsibilities laws have the potential to “produce systemic and proactive changes by employers.” See Bourke, *supra* note 1, at 36–38 (explaining the interplay between state and federal anti-discrimination law and industrial legislation across jurisdictions, and noting that this approach has “pushed the boundaries on acceptable workplace practices in relation to part-time work/job-sharing at senior levels, working from home, and varying work hours, although cases may not have arisen on the same issue in each jurisdiction.”)
- <sup>6</sup> Bourke, *supra* note 1, at 33 (“The most innovative aspect of the legislation is its adoption of the “disability” model of discrimination, namely its use of concepts such as reasonable accommodation and unjustifiable hardship.”)
- <sup>7</sup> See, e.g., 42 U.S.C. §12112(b)(5)(A) (discrimination under the ADA includes the failure to provide a “reasonable accommodation” to an otherwise qualified individual with a disability) and 42 U.S.C. §12111(8) (defining a qualified individual with a disability as someone “who, with or without reasonable accommodation, can perform the essential functions” of the job).
- <sup>8</sup> Bourke, *supra* note 1, at 29–31.
- <sup>9</sup> Anti-Discrimination Act, 1977 (N.S.W.) §49S(1). Children who are “wholly or substantially dependent on the person” need not also be in need of care or support.
- <sup>10</sup> Anti-Discrimination Act, 1977 (N.S.W.) §49S(1) (referring to the PROPERTY (RELATIONSHIPS) ACT 1984, § 4 for the definition of “de facto” spouse or relationship). De facto spouse, or de facto relationship, includes individuals (same or opposite sex) who live together as a couple, and are not married to one another (i.e., common law marriage).
- <sup>11</sup> Anti-Discrimination Act, 1977 (N.S.W.) §49S(2) (defining responsibility as a carer to include responsibilities that a person currently has, is thought to have (whether or not they do), had in the past (whether or not they did), or will have or are that it is thought they will have (whether or not they will)).
- <sup>12</sup> Bourke, *supra* note 1, at 31.
- <sup>13</sup> Bourke, *supra* note 1, at 35 (“For many complainants the main issue will be one of indirect discrimination, namely whether a facially neutral condition which has a disparate impact on employees with caring responsibilities (e.g., that all employees attend 8 a.m. meetings, attend training on a weekend, or work full-time to qualify for management) is reasonable in the circumstances.”)

- <sup>14</sup> The CRA defines unlawful discrimination in a variety of contexts and for a variety of work relationships including employers and applicants/employees (49V), principals and commission agents (49W), principals and contract workers (49X), and partners (49Y). The CRA also prohibits discrimination by: local government councilors against other council members (49Z); industrial organizations against members and non-members (49ZA); qualifying bodies [professional licensing groups] (49ZB); and employment agencies (49ZC). See Anti-Discrimination Act, 1977 (N.S.W.) §§49V-49ZC.
- <sup>15</sup> Anti-Discrimination Act, 1977 (N.S.W.) §49V.
- <sup>16</sup> Anti-Discrimination Act, 1977 (N.S.W.) §49(V)(3).
- <sup>17</sup> Anti-Discrimination Act, 1977 (N.S.W.) §49V(4)(b).
- <sup>18</sup> Anti-Discrimination Act, 1977 (N.S.W.) §49U.
- <sup>19</sup> Anti-Discrimination Act, 1977 (N.S.W.) §§70-102.
- <sup>20</sup> ANTI-DISCRIMINATION BOARD, NEW SOUTH WALES, *What We Do*, available at [http://www.lawlink.nsw.gov.au/lawlink/adb/ll\\_adb.nsf/pages/adb\\_what\\_we\\_do](http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/pages/adb_what_we_do).
- <sup>21</sup> ANTI-DISCRIMINATION BOARD, NEW SOUTH WALES, *Carers' responsibilities discrimination – Your rights*, available at [http://www.lawlink.nsw.gov.au/lawlink/adb/ll\\_adb.nsf/pages/adb\\_carers\\_responsibilities](http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/pages/adb_carers_responsibilities)
- <sup>22</sup> The Board is responsible for administering the entire Anti-Discrimination Act, 1977, which prohibits discrimination on a number of grounds including race, sex, disability, carer responsibilities, and other grounds enumerated in the Act.
- <sup>23</sup> Anti-Discrimination Act, 1977 (N.S.W.) § 89(B)2.
- <sup>24</sup> Anti-Discrimination Act, 1977 (N.S.W.) §§119-121 (these sections outline the general functions of the Board, including receiving and investigating complaints, advising other state bodies, reviewing legislation, and holding public inquiries).
- <sup>25</sup> Anti-Discrimination Act, 1977 (N.S.W.) §§ 87(B)4, 92, 93(A)1.
- <sup>26</sup> Anti-Discrimination Act, 1977 (N.S.W.) §91B.
- <sup>27</sup> ANTI-DISCRIMINATION BOARD, NEW SOUTH WALES, ANNUAL REPORT 2001-2002, available at [http://www.lawlink.nsw.gov.au/lawlink/adb/ll\\_adb.nsf/pages/adb\\_annual\\_report\\_2001\\_2002](http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/pages/adb_annual_report_2001_2002) (inquiries generally involve questions about rights under the law, requests for advice on handling discrimination, and help in creating policies or procedures).
- <sup>28</sup> ANTI-DISCRIMINATION BOARD, NEW SOUTH WALES, ANNUAL REPORT 2002-2003, available at [http://www.lawlink.nsw.gov.au/lawlink/adb/ll\\_adb.nsf/pages/adb\\_adb\\_annual\\_report\\_2002\\_2003](http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/pages/adb_adb_annual_report_2002_2003).
- <sup>29</sup> ANTI-DISCRIMINATION BOARD, NEW SOUTH WALES, ANNUAL REPORT 2004-2005, available at [http://www.lawlink.nsw.gov.au/lawlink/adb/ll\\_adb.nsf/pages/adb\\_annual\\_report\\_2003\\_2004](http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/pages/adb_annual_report_2003_2004).
- <sup>30</sup> ANTI-DISCRIMINATION BOARD, NEW SOUTH WALES, ANNUAL REPORT 2004-2005, available at [http://www.lawlink.nsw.gov.au/lawlink/adb/ll\\_adb.nsf/pages/adb\\_annual\\_report\\_2004\\_2005](http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/pages/adb_annual_report_2004_2005).
- <sup>31</sup> The ADB Annual Reports contain summaries of conciliated claims and are available at the websites identified in notes 27-30, *supra*.
- <sup>32</sup> Administrative Decisions Tribunal Act, 1997 (N.S.W.) §3.
- <sup>33</sup> Anti-Discrimination Act, 1977 (N.S.W.) §93B-93C.
- <sup>34</sup> Anti-Discrimination Act, 1977 (N.S.W.) §93A.
- <sup>35</sup> Anti-Discrimination Act, 1977 (N.S.W.) §95(3). In considering whether to allow a party to be represented, the Tribunal weighs several factors, including the complexity and importance of the proceedings (to the parties and to the public interest), and the likely cost of representation as compared to the benefit of the relief sought.
- <sup>36</sup> Administrative Decisions Tribunal Act, 1997 (N.S.W.) §7.
- <sup>37</sup> Anti-Discrimination Act, 1977 (N.S.W.) §98(2).
- <sup>38</sup> Reproduced from ADMINISTRATIVE DECISIONS TRIBUNAL: EQUAL OPPORTUNITY DIVISION, *What Kinds of Decisions Can the ADT Make*, available at [http://www.lawlink.nsw.gov.au/lawlink/adt/ll\\_adt.nsf/pages/adt\\_equal\\_opportunity\\_division#what%20can%20I%20do](http://www.lawlink.nsw.gov.au/lawlink/adt/ll_adt.nsf/pages/adt_equal_opportunity_division#what%20can%20I%20do). See also Anti-Discrimination Act, 1977 (N.S.W.) §108.
- <sup>39</sup> Anti-Discrimination Act, 1977 (N.S.W.) §110 (The Tribunal may, however, order payment of costs if justified by the circumstances of a particular case.).

- <sup>40</sup> *Anne Gardiner v. New South Wales WorkCover Authority* (2004) NSWADT 184, WL 213980 [2004] NSWADTAP 1; *Evelina Reddy v. International Cargo Express*, (2005) ALMD 1785, 55 AILR 200-127, (2004P) NSWADT 218, WL 2252711; *Wendy Spencer v Greater Murray Area Health Service* (2005) NSWADT 138, WL 1463460; *Pascale Tleyji v. The TravelSpirit Group Pty Ltd* (2005) NSWADT 294, WL 3418313; *Yolanda Dubow v Attorney-General's Department* (2005) NSWADT 231, WL 2671588.
- <sup>41</sup> *Gardiner*, ¶ 19.
- <sup>42</sup> *Id.*, ¶ 37.
- <sup>43</sup> *Id.*, ¶ 39.
- <sup>44</sup> *Id.*
- <sup>45</sup> While agreeing that *Gardiner* sufficiently alleged carer responsibilities, and after finding that the relocation requirement was discriminatory because it reduced the amount of time *Gardiner* could spend with her children, the Tribunal ultimately concluded that the requirement was reasonable. See Section III.B, below.
- <sup>46</sup> See, e.g., *Spencer*, ¶¶ 39-42 (rejecting employer's argument that tasks performed by complainant were not responsibilities as a carer where assisting her aging parents and sister "with the tasks of daily living fell largely to" complainant).
- <sup>47</sup> *Id.*, ¶ 1.
- <sup>48</sup> *Id.*, ¶ 81.
- <sup>49</sup> *Id.*, ¶¶ 25, 33.
- <sup>50</sup> *Spencer*, ¶ 34.
- <sup>51</sup> *Id.*, ¶¶ 35-36.
- <sup>52</sup> *Id.*, ¶ 37. *Spencer* ultimately lost, however, because she was unable to prove another element of her prima facie case, i.e., that a substantial proportion of persons without carer responsibilities could comply with the five-day workweek requirement.
- <sup>53</sup> See, e.g., *Gardiner*, ¶¶ 46, 12; *Reddy*, ¶ 24.
- <sup>54</sup> Anti-Discrimination Act, 1977 (N.S.W.) §49T(1)(b).
- <sup>55</sup> This first element also is required for direct discrimination claims along with proof that: (1) persons with carer responsibilities have been treated less favorably than those without carer responsibilities and (2) this discriminatory treatment was based on employees' carer responsibilities. See, e.g., *Spencer*, ¶¶ 72, 118-119 (complainant failed to establish that any difference in treatment was based on her carer responsibilities); see also *Dubow*, ¶¶ 139, 143 (dismissing claim of direct discrimination where all employees were subject to the same working hours, existing flextime arrangements afforded flexibility to employees with carer responsibilities, and her employer accommodate the scheduling preferences that she identified).
- <sup>56</sup> See, e.g., *Gardiner*, ¶ 45; *Reddy*, ¶ 51; *Spencer*, ¶ 17.
- <sup>57</sup> See, e.g., *Reddy*, ¶¶ 54-56 (rejecting challenge to complainant's proof that the relevant requirement was working full-time), and ¶¶ 59-61 (rejecting argument that complainant could comply with the work requirement by hiring someone to care for her child). In determining whether a complainant has proven an inability to comply with a work requirement, the Tribunal has adopted a "practical, not theoretical" approach. *Id.*, ¶ 59. Thus, an employee need not show that he/she is the only person available to care for a child or family member and also cannot be forced to arrange for someone else to provide any necessary care or support. *Id.* Rather, a person has established an inability to comply with the work requirement if doing so would require an employee to choose between work and carer responsibilities. *Id.*
- <sup>58</sup> See, e.g., *Spencer*, ¶¶ 60-61 (ruling against complainant who failed to prove that a substantially higher proportion of persons without carer responsibilities could comply with the five-day workweek requirement); *Dubow*, ¶¶ 146-47, 152 (dismissing complaint for failure to state a claim of direct or indirect discrimination based on carer responsibilities where the employer accommodated the scheduling preferences identified by the employee).
- <sup>59</sup> *Gardiner*, ¶ 63 (citation omitted).
- <sup>60</sup> *Id.*, ¶ 65.
- <sup>61</sup> *Id.*, ¶ 69.

<sup>62</sup> *Id.* ¶¶ 23-24, 26. Gardiner also could vary her start/end times at work under the industrial award governing employment in her industry – the Crown Employees (Work Cover Authority – Inspectors) Award. The Award required employees in that industry to work a 38-hour week from Monday to Friday during the hours of 7 a.m. and 6 p.m., with flexibility in exact start and end times. Core hours (where all employees must be at work) under the Award were 9:30 a.m. to 3:30 p.m. *Id.*, ¶ 31. An “industrial award” is a collectively bargained agreement between employers and employees at a particular work site or across an entire industry. These agreements are ratified by the Industrial Relations Commission, an administrative body established to oversee such awards and their enforcement, and are themselves considered to be legislative determinations of rights and obligations of the employers and employees covered by the award. *Waterside Workers Federation v. Frazer* (1924) 43 NZLR 708-09, *quoted in* BRIAN BROOKS, *LABOUR LAW IN AUSTRALIA* 34 (2003).

<sup>63</sup> *Id.* ¶ 24.

<sup>64</sup> *Id.* ¶¶ 25, 67.

<sup>65</sup> *Id.* ¶ 70.

<sup>66</sup> *Tleyji*, ¶ 105 (requiring that “reasonable efforts [to accommodate] need to be shown” by an employer); *Reddy*, ¶ 84 (“No effort at accommodation was made or even seriously considered”).

<sup>67</sup> *Reddy*, ¶ 3.

<sup>68</sup> *Reddy*, ¶¶ 7, 9, 13.

<sup>69</sup> *Id.* ¶ 31.

<sup>70</sup> *Id.* ¶¶ 78-79.

<sup>71</sup> *Id.* ¶¶ 73, 82.

<sup>72</sup> *Id.* ¶¶ 79-80.

<sup>73</sup> *Tleyji*, ¶¶ 72, 93-95.

<sup>74</sup> *Id.* ¶¶ 102-03.

<sup>75</sup> *Id.* ¶¶ 103-05.

<sup>76</sup> *Id.* ¶ 105.

<sup>77</sup> *Reddy*, ¶ 84.

<sup>78</sup> As in *Tleyji*, the Tribunal also faulted the employer for failing to consider a trial of Mrs. Reddy’s proposed flexible work arrangement. “While the [employer’s] managers may each have held the honest belief that Mrs. Reddy’s proposition would lead to chaos, loss of business or added costs it is difficult to accept that that would have been the case without some testing of the scheme or at the very least a detailed and thorough assessment and costing of the proposal.” *Id.* ¶ 81.

<sup>79</sup> ANTI-DISCRIMINATION BOARD, NEW SOUTH WALES, *ANNUAL REPORT 2004-2005*, *available at* [http://www.lawlink.nsw.gov.au/lawlink/adb/ll\\_adb.nsf/pages/adb\\_annual\\_report\\_2004\\_2005](http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/pages/adb_annual_report_2004_2005).