From 'Please Sir' to 'See You in the Fair Work Commission': Requests for Reasonable Treatment and the Changing Role of the Commission

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The Fair Work regime includes various 'rights to request reasonable treatment'. These straddle four areas: flexible work arrangements, extended parental leave, conversion from casual to ongoing status, and disconnecting from work communications outside normal hours. Disputes about employer responses to such requests were recently made subject to arbitral review by the Fair Work Commission.

This article explores two related themes. First is a description of these 'rights to request', including how their jurisprudential nature varies depending on whether they are subject to review. Second is how this review jurisdiction fits within the Commission's workload. This jurisdiction fits within a longer trajectory, in which the Commission has evolved from resolving collective disputes to a focus on more legalistic, individual rights. Ultimately the article asks why individual disputes about reasonable future treatment are subject to guaranteed arbitration, when most collective bargaining disputes are not.

I Introduction

The statutory ability for an individual employee to request reasonable consideration of their employer appeared, for the first time in Australia, in the initial *Fair Work Act* (Cth) 2009 ('*FWA*'). This was in the form of requests for either extended parental leave or for flexible work. The ability to request casual conversion and, since 2024, the novel 'right to disconnect', were later also enacted. The Fair Work Commission ('the Commission') however was, until recently, given no role in enforcing the substance of these 'rights to request'.

When framed merely as a request for consideration, with an employer meant to provide cogent reasons as to what was reasonable, these were less statutory rights or obligations than exhortations to negotiate, with procedural guidelines. However, a Labor government has recently enacted legislation allowing for compulsory arbitration over not just failures to negotiate, but over the substantive outcome of such requests. This manoeuvre transforms these requests from a mere capacity for individuals to plead for different treatment, to enforceable guarantees where reasonableness may be determined by the Commission. Doing so not

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only affects the practical value of these entitlements in the workplace, it also adds a new jurisdiction to the Commission's workload.

This article explores two related questions:

(a) The nature of these rights to request. The article opens with a précis of the formal structure of the rights and their emergence over the past fifteen years. In particular, it considers the apparent paradox of statutory 'rights' that were unenforceable and how empowering the Commission to arbitrate such requests fits them within a framework of individual legal rights.

(b) How this jurisdiction fits within the evolving role of the Commission. After explaining and typifying the rights, the article explores, including through statistics, the growing number of individualised claims brought before the Commission. Ultimately, the article situates this within a longer trajectory, where the Commission's remit has shifted away from collective resolution of relatively open-ended labour disputes towards a more legalistic focus on individualised employment rights.

The article tackles these two questions in six stages. First comes a description of the four existing statutory rights to request themselves. Second is an overview of the Commission's involvement in such requests: how it was first dealt out of — then into — a role in arbitrating the reasonableness of employer treatment of employees who make such requests. This leads onto a third section, which considers the jurisprudential difference between mere 'rights to request' something and enforceable entitlements.

From there, the article pivots to consider the broader question of the evolving jurisdiction of the Commission as an arbitral body. It does so by situating rights to request reasonable treatment as future-oriented but individualistic claims, in contrast to disputes about collective conditions. This invokes a fundamental question about the individual — as compared to the collective — dimension of labour law, and how rights to request fit within a longer trend to individualisation and legalism within labour law generally and the role of the Commission in particular. In doing so, the article explores the Commission's historical and contemporary arbitral jurisdiction, including by reference to contemporary statistics on the relative preponderance of individualistic applications in its docket or workload.

Ultimately, the article concludes by noting that, since individuals can access compulsory arbitration over reasonable future treatment, it should not be heretical to ask why the Commission cannot arbitrate collective bargaining disputes generally. After all, bargaining disputes are disputes about whether requests for future work conditions are reasonable, albeit that they involve employees collectively rather than as distinct individuals.

II The Statutory Rights to Request Reasonable Treatment

There are four provisions in the *FWA* that can be categorised as giving an individual employee the right to seek reasonable treatment by an employer, with ultimate superintendence by the Commission. Of course, there are other sources of what might be dubbed a 'right' to reasonable treatment: most notably in the judge made law of negligence and its duty to take reasonable care for employees' health and safety. But our focus here is on explicitly legislated sources, which might attract Commission superintendence. Before examining the shared essence of these contemporary, statutory rights to reasonable treatment, it is important to summarise the flavour of each of them.

1. *To request flexible work arrangements.*

   This involves seeking a change in working arrangements. For example, requesting alternative work hours to accommodate certain personal circumstances, notably personal disability, pregnancy or caring responsibilities, domestic violence or advancing age (being over 55).[1] The employer is to consider the request and either grant it, or else give 'reasonable business grounds' for refusing it. This provision dates to the original, 2009 version of the Act.[2]

2. *To request a second year of (unpaid) parental leave.*

   This augments the absolute right to take one year's unpaid parental leave. Before the end of a first year of such leave, an employee can request an extension for a further year. The employer may refuse the request if, after consultation, they can assert 'reasonable business grounds'.[3]

3. *To request casual conversion.*

   Conversion involves shifting from being a long-term casual to having permanent status. A limited statutory right to seek conversion was legislated in 2021, then broadened in 2024. Employees may now notify their employer of a desire to convert. Employers must respond by either accepting the request or refusing and asserting 'fair and reasonable operational grounds'.[4] The otherwise fuzzy concept of reasonableness was given focus, in 2013, by an indicative list of factors such as cost, efficiency, customer service and capacity to accommodate the request. Reasonableness arguments may only arise where the conversion would require substantial changes to work organisation, operations or the employee's other conditions.[5]

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1 *Fair Work Act 2009* (Cth) s 65 ('*FWA*').

2 Andrew Stewart et al, *Creighton and Stewart's Labour Law* (Federation Press, 6th ed, 2016) [16.55]. The provision's genesis was a 2005 ACTU test case that was unsuccessful at the time.

3 *FWA* ss 76–76A.

4 *FWA* ss 66AAC(4).

5 *FWA* s 66AC(5).

4. *To seek to disconnect.*

From August 2024, most employees have been empowered to refuse to monitor, read or respond to 'unreasonable' work contact outside work hours.[6] Whilst what is 'unreasonable' is not qualified by 'business grounds', the Act does list certain necessary considerations. These include the reason for the out-of-hours contact, its method and disruption to the employee, any compensation for the disruption, the employee's role and level of responsibility, and personal circumstances, such as family or other care responsibilities.[7] In addition, the needs of defence, national security and policing operations take explicit precedence, if relevant.[8]

This right to disconnect differs from the other three rights to reasonable treatment, in its formal onus. An employee can refuse to monitor or respond to (some or all) types of contact. The ball is then in the employer's court to argue the employee's refusal is 'unreasonable'. On its face, this is a 'right to refuse' rather than a 'right to request'. But the dynamics of the employment relationship and context of the workplace tempers that. It is less a right for an employee to insist, than a chance for them to initiate a negotiation over reasonable treatment, similar to the earlier rights to request.

As legislated 'rights', the first three feature within the National Employment Standards,[9] whereas the right to disconnect sits under 'Other Terms and Conditions of Employment', alongside rules limiting pay secrecy.[10] What turns on this? They are all 'workplace rights',[11] such that any victimising retaliation for invoking them is penalisable under the adverse action regime. More broadly, they are meant to act as minima. That is, they are repeated in model award terms,[12] and can be built upon or nuanced in agreements.[13] The only difference is that the right

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6 *FWA* s 333M. 'Most', as the right was delayed until August 2025 for small business employment.

7 *FWA* s 333M(3).

8 *FWA* ss 333S–U.

9 *FWA* pt 2-2.

10 *FWA* pt 2-9.

11 'For the avoidance of doubt', the right to disconnect is a 'workplace right': *FWA* s 333M(4). That said, any benefit under a 'workplace law' is a 'workplace right', and the entire Act is a 'workplace law': ss 341(1) and 12.

12 For an example involving the 'right to disconnect', see *Determination: Aged Care Award 2010* (Fair Work Commission, PR777975). Such terms are mandatory in modern awards: *FWA* ss 149F and 12.

13 Something stressed in the *FWA*: see, eg, s 333M(6) ('for avoidance of doubt'). The Australian Council of Trade Unions advocated for the right to disconnect to be developed initially via enterprise agreements — with limited success — before it became a legislated right. On the genesis of the right, see Gabrielle Golding, 'The Right to Disconnect in Australia: Creating Space for a New Term Implied by Law' (2023) 46(2) *University of New South Wales Law Journal* 728, including at 734 and 747–8 on challenges to such a right being inaugurated via enterprise agreements.

to disconnect, whilst sold as a community ideal, will need to be nuanced in particular key industries or roles, subject to compensation.[14]

III Tribunal Involvement with Rights to Request Reasonable Treatment

When rights to request first appeared in the *FWA*, they came with no recourse to adjudication in the usual, compulsory sense.[15] The 2008 Fair Work Bill 'explicitly ruled out … "third party involvement"', with the then Minister for Small Business seeking to allay employer concerns by stressing '[t]here's no adjudication, no legal process, no union official under the bed'.[16] As Owens, Riley and Murray summarised it, there was no 'civil cause of action [over] an employer's failure to abide by the procedure for considering requests, nor [over] the merits of the employer's response'.[17]

Not only was the Commission denied a superintendence role, the courts were also largely excluded. Exceptionally, a failure to respond to a request for reasonable treatment (within 21 days, or at all) could give rise to an order against an employer.[18] But this only went to basic process, not to reviewing the reasonableness of refusals. Whilst the initial rights to request flexible work or extended unpaid parental leave were nested within the National Employment Standards, the Act explicitly removed recourse to the usual civil penalty remedies for breaches of such standards, provided the employer gave some kind of response to the employee.[19] Until mid-2023, any referral of a dispute, over these rights, to the Commission had to be consensual on both sides.[20]

This abstentionist position has now been flipped. Since June 2023, if an employer refuses a request for flexible work arrangements (or simply fails to give timely written reasons) and the dispute is not resolved by workplace discussions,

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14 The *FWA* has required the Commission to generate guidelines to adapt the right to specific awards. This includes, eg, requiring employees to connect over future casual shifts or over being recalled to work if they are paid a 'stand-by allowance'. Fair Work Commission, 'Variation of Modern Awards to Include a Right to Disconnect' (Web Page) <https://www.Commission.gov.au/hearings-decisions/major-cases/variation-modern-awards-include-right-disconnect>.

15 On the barrier to arbitrating a flexible work request, see Stewart et al (n 2) [16.58]–[16.59].

16 Sara Charlesworth and Iain Campbell, 'Right to Request Legislation: Two New Australian Models' (2008) 21(2) *Australian Journal of Labour Law* 116, 123.

17 Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work* (Oxford University Press, 2nd ed, 2011) 328–9.

18 See, eg, *Stanley v Service to Youth Council Inc* (2014) 225 FCR 317, 345–7 [169]–[177] (breach of duty to respond), 355–6 [233]–[243] ($4000 penalty and order to respond) (White J).

19 *FWA* s 44(2) (until June 2023). Victimising someone for making a request was unlawful: see *FWA* ss 341(2)(i), (k).

20 *FWA* s 66M (until June 2023). An indirect enforcement role could arise if an employer had agreed to replicate the statutory right, along with compulsory arbitration, in a collective agreement. For a few cases so arising, see Marilyn Pittard, 'Focussing Attention on Flexible Work: Secure Jobs, Better Pay Act' (2023) 28(3) *Employment Law Bulletin* 28, 41 n 8.

the employee can approach the Commission. The Commission is ordinarily to use non-arbitral processes first, before moving to arbitration.[21] Via arbitration, it can require a recalcitrant employer to give a reasoned response, declare an employer's refusal to be reasonable, or override the employer and order the request be granted.

Disputes about extended unpaid parental leave are subject to a similar regime. In the first instance, they should be resolved by discussions at the workplace level. Failing that, the employee can refer the request to the Commission, ultimately for an arbitrated resolution.[22] Disputes about casual conversions also now have an essentially identical trajectory.[23] Disputes over the right to disconnect are similarly to be negotiated at workplace level first. From there, either party can escalate the matter to the Commission, to seek an order to stop wrongful demands (or refusals) of out-of-hours contact.[24] Ultimately, in all the rights concerned, a failure by anyone concerned to abide by an order of the Commission risks a court awarded civil penalty.[25]

IV Mere Rights to Request, Versus Enforceable Entitlements

This section turns to consider the jurisprudential aspects of the shift in approach from 'no enforcement' to 'guaranteed avenue for arbitration'. Rights to request reasonable treatment are conceptually different from harder rights. As the very term suggests, they are not guarantees or entitlements. Rather, they are statutory processes to invite discussion and resolution of what is fair treatment in an employment relationship. A simple illustration of this lies in the contrast between the ability to *insist* on accessing a first year of parental leave, and requesting a second year of such leave. The first year is guaranteed, subject only to bright-line and easy-to-prove preconditions and formalities, such as being a national system employee covered by the Act, and having served for 12-months and given written notice of the request.[26]

Conceptually, rights to request feel more like the example — from the flip side of the relationship — of the employer's ability to require an employee to work 'reasonable' additional hours.[27] But whilst that requirement also involves contextual notions of reasonableness, the flow of power in most workplaces distinguishes it. The power that inheres in management renders this more akin to an

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21 *FWA* ss 65B–C.

22 *FWA* ss 76B–C.

23 *FWA* ss 66M–MA.

24 *FWA* ss 333N–P. On the dispute resolution paths for the right to disconnect, see Gabrielle Golding, 'Introducing Australia's New Right to Disconnect' (2024) 10(1) *Labour and Law Issues* C.1, C.14–17.

25 See, eg, *FWA* s 65C(6).

26 These pre-conditions are common: see, eg, *FWA* s 65(2) (1 year of service for flexible work arrangements) and s 65(3) (such request to be in writing).

27 *FWA* s 62.

ability to *insist* on extra hours, distinguishing it from the employee-initiated requests discussed here. (Power here flows both in a practical, day-to-day sense, as well as formally via the underlying common law obligation to obey all 'lawful and reasonable' directions.[28])

The original, abstentionist approach to enforcement of rights to request intrigued commentators to ask, in effect, 'When is a right not a right?' Pittard said that the original right to request flexible work arrangements was 'quite revolutionary at the time'.[29] This is true enough, in a substantive sense, as a policy innovation to encourage flexibility to encourage accommodation of caring, older-age or disability-based circumstances.

At the same time, as Pittard and others noted, 'employees could always [have made] that request themselves to their employer', regardless of the Act.[30] Indeed, the statutory right potentially constrained the evolution of customary practices compared to what was possible within the common law option of negotiating new informal or even contractual arrangements. Most obvious in this regard is the requirement to fit certain categories of need to justify flexible work requests and the ubiquitous 12-month minimum service required to make statutory requests.[31]

In this way, the idea of a 'right' to request available only to those who can show a 'nexus' say to caring, age or disability, can be a double-edged sword.[32] Statutory rights to request may yet even be superseded in some areas. For instance, the general right to request the flexibility of work-from-home arrangements could be out-flanked by an award variation sought by unions representing private clerical employees.[33] And the Victorian government recently claimed it would be 'making work from home a right' in that State.[34]

Academic and even law reform work in this area has focused on work flexibility requests and, generally, was critical of the lack of direct enforceability of requests. Early on, Charlesworth and Campbell predicted that an absence of grievance mechanisms meant 'these standards will be poor ones'.[35] (They

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28 There are many accounts of the origin and nature of this power. For a local and contemporary one, see Eugene Schofield-Georgeson, *Contract, Labour Law and the Realities of Working Life* (Routledge, 2025).

29 Pittard (n 20) 28.

30 Ibid.

31 In contrast, the UK regime was recently amended so that statutory requests can be made from day one of an employment relationship: 'Flexible Working', *GOV.UK* (Web Page) <https://www.gov.uk/flexible-working/print>.

32 See further Amanda Selvarajah, 'Proving the Right to Request Flexible Work: The Concerning Consequences of Comments in *Quirke v BSR*' (2024) 37(3) *Australian Journal of Labour Law* 295.

33 Bronwyn Herbert, 'Fair Work Commission Reviewing Award that Would Allow More Aussies to Work from Home', *ABC News* (online, 13 November 2024) <https://www.abc.net.au/news/2024-09-13/work-from-home-laws-changing-workers-rights/104343392>.

34 Premier of Victoria, 'Work from Home Works for Families' (Media Release, 2 August 2025) <https://www.premier.vic.gov.au/work-home-works-families>. (Constitutionally, they can probably only guarantee this to state public servants.)

35 Charlesworth and Campbell (n 16) 124

believed this contrasted unfavourably with the Victorian anti-discrimination regime, where a right to have parental and carer responsibilities reasonably accommodated was ultimately enforceable within that State's Civil and Administrative Tribunal.[36]) Chapman was more optimistic, suggesting that the obligation to give a timely and reasoned response to a request should at least generate some administrative rationality within HRM consideration of such issues.[37]

Stewart and others noted — critically — that, in 2015, the Productivity Commission recommended against making the work flexibility right enforceable, lest that 'unwittingly lead to employment discrimination' against carers.[38] In contrast, the Australian Human Rights Commission recommended, a year earlier, requests for flexible hours be enforceable — and available to new staff as well.[39] A Victorian Government submission on the issue stated, tellingly, that 'a right must be capable of vindication … otherwise it is not a right at all but a guideline'.[40]

Australian law is familiar with incomplete obligations that might best be described as exhortatory. One familiar example is voting. When Australians vote, the national electoral law and ballot papers formally say that an elector 'must' rank all the candidates on offer for their House of Representatives' division, yet there is no means to enforce such choice.[41] Not dissimilarly, when rights to request reasonable workplace treatment were unenforceable, they were seen by most commentators as an expression of an ideal; a prompt to habituate better behaviour. But even the voting analogy is only partial, as electoral rules require a voter to go through a process (picking up the ballot, retiring to a voting compartment, and depositing the ballot). Whereas rights to request were such that an employer was 'not [even] under an obligation to meet with the employee to discuss the application'.[42]

This contrasted with UK law at the time, where there was an enforceable obligation to meet, as well as the option for an employee to appeal a decision or refer

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36 Ibid.

37 Anna Chapman, 'Is the Right to Request Flexibility under the Fair Work Act Enforceable?' (2013) 26(2) *Australian Journal of Labour Law* 118. Chapman tempered her optimism by noting that the Explanatory Memorandum only mentioned business focused considerations, and that the wider context of mechanisms for 'individual flexibility' at the time were deregulatory and employer oriented. Case studies of two large employers around the same time found that while detailed corporate policies existed, requests were usually handled informally: Rae Cooper and Marian Baird, 'Bringing the "Right to Request" Flexible Working Arrangements to Life: From Policies to Practice' (2014) 37(5) *Employee Relations* 568. This is on a par with US findings that 'rights to request' policies in the mid-2000s were 'decentralized', with supervisors using their discretion to accede to requests as a reward for 'superior performance': Erin L Kelly and Alexandra Kalev, 'Managing Flexible Work Arrangements in US Organizations: Formalized Discretion or a "Right to Ask"' (2006) 4(3) *Socio-Economic Review* 379, 406.

38 Stewart et al (n 2) [16.59].

39 Ibid.

40 Cited in Charlesworth and Campbell (n 16) 130.

41 Graeme Orr, *The Law of Politics* (Federation Press, 2nd ed, 2019) 60–1.

42 Stewart et al (n 2) [16.58].

the matter to an industrial tribunal.[43] European laws also, by comparison, offered a 'more rigorous approach to the duty of employers to seriously consider requests' including 'explicit complaint processes and enforcement machinery'.[44] From 2015, the *FWA* was amended so that employers could be forced to meet to discuss requests, but only in relation to extended parental leave.[45] That dispensation, it should be noted, was legislated by a conservative Coalition government.

The ultimate flip in the abstentionist position came under the Labor government elected in 2022. The first steps in this were contained in its hefty, if sloganistically titled, 'Secure Jobs, Better Pay' Bill.[46] Flexible work requests (already subject to a Senate Select Committee on Work and Care report recommendation), along with casual conversion, were the primary focus at this point. The Senate employment affairs committee report into the Bill recommended that arbitration of disputes about such requests be preceded by mandatory conciliation.[47] For their part, Australian Greens' senators called for enforcement to be extended to the right to request extended parental leave.[48] The government initially accepted only the former recommendation, but ultimately accepted amendments proposed by a Greens' senator — and emeritus professor in the field of work and employment — Barbara Pocock.[49] The right to disconnect then arrived, in 2024, newly born with a built-in enforcement role for the Commission.[50]

V Individualised Rights Claims, and the Struggle over the Collective Dimension of Labour Law

We have just seen how rights to request reasonable treatment have evolved in terms of their 'stickiness'. They began life as, essentially, exhortations for an employer to give each request fair consideration. Now they have evolved into truly enforceable rights, with the Commission able to gainsay employer refusals. Roping in the Commission into a new realm of arbitration, as we shall see shortly, raises an inevitable question about the Commission's overall role. But before

43 Ibid [16.59]

44 Charlesworth and Campbell (n 16) 126–7.

45 *FWA* s 76(5A). This is now superseded by the broader ability to involve the Commission.

46 *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth).

47 Senate Education and Employment Legislation Committee, Parliament of Australia, *Fair Work Legislation (Secure Jobs, Better Pay) Bill 2022 [Provisions]* (Report, November 2022) 61 [2.166].

48 Ibid 98.

49 Australian Government, 'Australian Government Response to the Education and Employment Legislation Committee Report: *Fair Work Legislation (Secure Jobs, Better Pay) Bill 2022* [Provisions]' (March 2023) <https://www.dewr.gov.au/about-department/resources/australian-government-response-agr>.

50 *Fair Work Legislation (Closing Loopholes No 2) Act 2024* (Cth). The underlying right was subject to an earlier, private member's bill from an Australian Greens senator: Fair Work Amendment (Right to Disconnect) Bill 2023 (Cth).

turning to that question, what of the nature of these rights in terms of their scope of application?

Rights to request are future oriented, as opposed to individual complaints about past conduct (eg anti-bullying claims). That is one thing they share with traditional arbitration of disputes over claims for future wages and conditions. But they are not collective claims, in either the procedural sense of who initiates them, nor in the substantive sense of who benefits.

The vesting of power in the Commission to conciliate and arbitrate the substance of disputes over rights to reasonable treatment is not completely novel. It has two things in common with the Commission's decades long — and much busier — unfair dismissal regime. First, each type of dispute is individualised in the sense of being focused on a specific relationship, between one employer and one employee. Second, the substance of both rights to request and fairness in dismissal invoke the contextualised concept of 'reasonable' treatment of employees who have served a minimum period of service.

That said, these distinct individual rights regimes are not directly mappable. The 'fair go all round' ideal is meant to pervade unfair dismissal.[51] As a result, poor process can render unfair a dismissal that was otherwise reasonable, in a purely business sense. This speaks to the idea that, whilst employees are not guaranteed job security, losing a job may be traumatic. As a result, dignity — and perhaps rationality — deserves a decent procedure.

In contrast, rights to request relate to ongoing, not terminated relationships. Fairness in dismissal can range over an almost endless set of potential troubles and misfortunes in an employment relationship; the rights to reasonable treatment discussed here are more constricted. They also tend to be specific to particular personal needs (such as disability, caring duties or recent birth or adoption). It is rare for an otherwise reasonable and procedurally sensitive dismissal to be 'harsh' simply because of its personal impact.

Taken together, however, unfair dismissal rights and rights to request reasonable treatment form an important part of the modern set of parliament-endorsed, individual employment conditions. Since the 1990s, such statutory provisions have become a *central* feature of labour law in Australia. Unlike other, legislated guarantees however — notably minimum wages and leave entitlements — they are not absolute. Instead, they are relative to reasonableness in a particular employment relationship and its context.

The other side of labour law to the individual employment relationship, of course, is the realm of collective industrial relations. In that terrain lays the heart of the historical role of the Commission's predecessors. To borrow from Dabscheck, a (perhaps *the*) 'struggle for Australian industrial relations' emerged during the 1980s and 1990s.[52] It manifested in a shift away from the industry-wide

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[51] *FWA* s 381(2).

[52] Braham Dabscheck, *The Struggle for Australian Industrial Relations* (Oxford University Press, 1995).

setting of conditions and resolution of disputes, within which Australian industrial commissions had long played a mandatory and final arbitral role. Anderson and Quinlan, for their part, date the emergence of this struggle to the 1970s; in any case, they label the 'arbitration era' as having emerged between 1890 and 1916 and having lasted until the late 1980s.[53]

A key element of this shift was the relegation of the Commission from an essential umpire to a role on the sidelines. From a socio-economic regulator to more of a back-up adjudicator in certain edge-cases (such as strikes threatening economic order) or else where the parties (especially employers) consented to arbitration. Just as union density declined through the 1990s and onwards, the intermediate option between industry-wide and individually set conditions — namely enterprise-level bargaining — has now also declined. It has declined to the point where, by the early 2020s, enterprise bargaining was widely declared to be moribund or in crisis.[54]

This simple sketch, it must be said, risks obscuring the fact that many collective instruments nominate the Commission as the forum for resolving disputes over the implementation of conditions or obligations set in those industrial instruments. That is, the Commission did not flip from being the all-seeing chair of a collective 'industrial relations club' into just being a kind of Magistrates Court for enforcement of individual claims.[55]

Ultimately, rights to request reasonable treatment — and, for that matter, individualised claims involving unfair dismissal, adverse action, bullying or harassment — represent a distinctive species of formal workplace grievances. They involve the arbitration of individual complaints, distinct from the arbitration of collective conditions or even disputes about the application of collective instruments. Whilst reasonable treatment requests are forward-looking, they are narrow in scope and reminiscent of narrow, administrative decisions. In contrast, the setting of future collective conditions via arbitration is a form of legislation, fixing generalised rules governing the future of numerous employees, including some yet to be hired.

Disputes under collective instruments also have, obviously, a collective dimension. In these types of arbitration, the underlying assumption is of collective representation of employee interests, potentially through trade unions. Whereas the grievance in an individual complaint, whether it involves a request for reasonable treatment or, say, a dismissal or adverse action claim, is primarily personal rather than collective. Any union involvement, even if the grievance has an

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53 Gordon Anderson and Michael Quinlan, 'The Changing Role of the State: Regulating Work in Australia and New Zealand 1788-2007' (2008) 95 (November) *Labour History* 111, 119–27.

54 In response, the Labor Government has introduced some measures to try to shore up or extend collective agreement-making: see, eg, text to nn 70–1 below.

55 If nothing else, High Court rulings on the constitutional separation of judicial power prevent the Commission from ever being a tribunal to award damages or issue injunctions. See text to nn 65–7 below.

element of a test case,[56] will be in the background. More like a lawyer assisting an aggrieved client than an industrial relations strategy of negotiate-then-arbitrate. This procedural element, as we shall now see, raises questions of legalism.

VI Rights Claims, Legalism and the Evolving Role of the Commission

We have just seen how rights to request reasonable treatment fit within an individualised rather than collective approach to labour law. But how does the move to empower the Commission to oversee such rights fit within the longer-term picture of the Commission's role: both as an arbitral body of some socio-economic significance and as a labour relations tribunal navigating the shoals of legalism?

If the Commission's docket is measured by the number of applications received annually, the individual rights sphere has come to numerically dominate its workload. The table in the Appendix demonstrates this for recent years. Within those individualistic complaints, unfair dismissal and 'general protections' (mostly adverse action) applications overwhelmingly predominate. Whilst it is early days in the life of the enforcement of reasonable treatment requests, it is unlikely they will form a significant element of the Commission's day-to-day role.

Instead, it is the shadow or potential for Commission arbitration of rights to request reasonable treatment that is likely to affect workplace culture. That is, the knowledge that an employee could take a request to the Commission for arbitration (or, in the case of the right to disconnect, that an employer insisting on out-of-hours communication could find that practice under Commission scrutiny) may encourage fairer or more rational consideration. Similarly, especially in larger firms with HRM departments or legal advisors, the issuing of occasional arbitral reasons by the Commission may have an educative effect.

Conversely, it must be said, litigation can have unintended consequences, even in the conciliate-then-arbitrate form it takes before the Commission. Selvarajah, in a commentary on recent Commission decisions involving flexible work requests, has noted a legalistic approach to the formalities and evidence expected of employees, at the stage of their initial request.[57] This may be unfortunate for applicants who are, typically, legally naïve. Yet such legalism is an inherent risk of moving from a loose framework — originally designed to encourage employees to request, and employers to reasonably negotiate, individual arrangements — to

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[56] A test case involving the right to flexible work in the private school sector in 2024 was settled, in favour of the individual employee (but without setting a clear precedent). It involved a primary school teacher seeking to move to part-time status to accommodate caring duties and a school that resisted on the grounds that each class deserved a single, full-time teacher. See *Tattersall v King's Christian College Ltd* (Fair Work Commission, C2024-6391).

[57] Selvarajah (n 32).

one that assigns the Commission power to supplant its view of what is reasonable for an employer's.

Put simply, some 'juridification' is a by-product of putting guidelines for fair conduct into black-letter law. Indeed, a certain legal formalism is an inevitable element of a Commission whose most numerous (if not most onerous) work now involves, in effect, litigation over individual rights. This is not to imagine that the Commission was ever entirely free of forms of legalism. Such tendencies have existed since the birth of the first such national body in 1904, most obviously in questions of jurisdiction.[58] But when Commissioners act as mini-judges, day to day, in individual rights claims, the tendency to legalism is exacerbated.

Ultimately, the emergence of enforceable rights to request reasonable treatment is a new jurisdiction for the Commission. To create any new jurisdiction is to invite consideration of the Commission's power and role. What are the key functions of the Commission and what do they say about its power and role as an institution?

In the mid-20th century, it was possible for the Commission's forbear (the then Commonwealth Court of Conciliation and Arbitration) to describe its evolution

> from an industrial tribunal limited to the particular task in each case, to an institution having in effect wide legislative powers ... The legislative power is so great indeed as to occupy a field from which the Federal Parliament is excluded and so vital as to make law for Australians in that realm that touches them most closely.[59]

Hancock and Richardson put this in more colloquial language, when they spoke of 'the [Commission's] historic role of enforcing a fair day's pay for a fair day's work'.[60] As was noted in the previous section of this article, much of that exalted role was stripped away from the Commission in the 1990s-2000s — leaving two important remnants, in superintendence of industrial awards and of minimum wages. As Howe argued, this was less a matter of 'deregulation' than a move to '"re-regulate" labour relations to, among other things, reduce the social and regulatory power of the [Commission] and trade unions'.[61] From that re-orientation, there has been no real turning back — even when, intriguingly, the Labor

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58 For example, in pre-WorkChoices days (2005), at the intersection of Commonwealth and State law and constitutional power. But continuing at the intersection of judicial and other power, thanks to the *Boilermakers' Case* and its ancestors: *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

59 *Standard Hours Inquiry* (1947) CAR 581, 588 ('*40-Hour Week Case*').

60 Keith Hancock and Sue Richardson, 'Economic and Social Effects' in Joe Isaac and Stuart Macintyre (eds), *The New Province for Law and Order: 100 Years of Australian Industrial Conciliation and Arbitration* (Cambridge University Press, 2004) 139.

61 John Howe, '"Deregulation" of Labour Relations in Australia: Towards a More "Centred" Command and Control Model' in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (Federation Press, 2006) 147, 147.

government in 2022 also legislated to permit the Commission to intervene and arbitrate resolutions of certain 'intractable' enterprise bargaining disputes.[62]

Even in 1972, Sykes and Glasbeek described the Commission as 'primarily a settler of collective industrial disputes rather than an economic tribunal'.[63] The second or negative part of that claim contrasts obviously with the quote just given, from the tribunal itself, about 'wide legislative powers'. As we have seen, the first or positive part of Sykes and Glasbeek's claim — that the Commission is primarily a settler of collective disputes — has been eroded significantly since the 1990s.

To repeat, as the table in the Appendix shows, the bulk of the Commission's contemporary workload, as measured by numbers of applications, concerns individual employment law disputes.[64] If one were looking forward at this, from the mid-20th century, it would seem curious to say the least, especially following the *Boilermakers' Case*.[65] That case likely put a nail in the coffin of any pragmatic hopes that any federal tribunal could act as a one-stop shop for labour disputes and grievances.[66] Under the High Court's reading of the *Australian Constitution*, no national industrial relations commission can make orders for damages or injunctions, nor award penalties for breaches of the Act, industrial instruments or contracts, let alone for breaches of its own orders.[67] Yet, as we have seen, the Commission which sets minimum wages and industry awards, has evolved into a body that is also heavily involved in arbitrating individual employment disputes.

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62 Legislated in the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth): see now *FWA* ss 234–5A, 269–71. Although intended as a protective (as well as efficiency) measure, as argued by Forsyth and McCrystal, this measure alone will not necessarily enhance outcomes for employees, let alone union power: Andrew Forsyth and Shae McCrystal, 'Reforming Australian Bargaining and Strike Laws to Maximise Worker Power' (2023) 46(4) *University of New South Wales Law Journal* 1105, 1130–1.

63 EI Sykes and HJ Glasbeek, *Labour Law in Australia* (Butterworths, 1972) 611.

64 The table does not count 'supported wage agreements' as individual claims. If they were, the relative figures would be even starker. (Supported wage agreements involve an employer seeking authorisation to pay a lower award rate to an employee with a serious productivity-affecting disability. They are not employee-driven claims and are effectively an aspect of award oversight.)

65 *Boilermakers' Case* (n 58).

66 For a contemporary proposal for the Commission to be such a one-stop shop, see Paul Munro and David Peetz, 'Transition' in James Fleming (ed), A *New Work Relations Architecture: The AIER Model for the Future of Work* (Hardie Grant Books, 2022) ch 11.

67 Whilst the High Court's caselaw on the separation of judicial power is generally strict, it has hinted at allowing some wriggle room to allow bodies like industrial commissions to arbitrate individual claims for unfair dismissal remedies (but not, say, claims for wages owed) by characterising reinstatement (if not compensation) as the creation of a new legal right rather than the enforcement of any existing entitlement. See *Re Cram; Ex parte Wallsend Coal Pty Ltd* (1987) 163 CLR 140, 148–9 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ); *Ranger Uranium Mine Pty Ltd; Ex Parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656, 663–7 (The Court).

VII Conclusion: The Scope of Arbitration

My ultimate concern is not to interrogate the distinction between individual employment and collective labour law. The contrasts between individual and collective, and between existing rights and future conditions, are deeply etched, even if they are not complete dichotomies. Rather, I wish to conclude by reflecting on why some parts of the Australian labour law scheme, as legislated today, are subject to binding arbitration and not others.

A formal answer could point to procedural and conceptual path-dependency. As discussed earlier, 'rights', to be worthy of that label, should ultimately be enforceable. It is cheaper and more rational to have employment experts in the Commission resolve disputes over rights to request reasonable treatment (or for that matter hear unfair dismissal claims) than it is to vest that power in a generalist court. In addition, the very language of 'rights', in liberal legal orders, is associated more with claims for individual treatment rather than collective relations.[68]

That is a formal response. The substantive question remains: why is it that disputes over reasonable or fair treatment in the setting of actual wages and conditions, in collective agreements, are not generally arbitrable? When disputes over reasonable or fair treatment in individual employment relationships are increasingly arbitrable.

A pragmatic explanation might be that collectively won conditions assume, almost literally, collective involvement. Given the decline in unionism, that involvement is now absent in many workplaces and even large parts of some industries.[69] In contrast, the move to legislate individual protections has been accompanied by a government-funded Fair Work Ombudsman to assist employees, almost as an alternative to joining unions as a form of personal insurance. But this empirical explanation on its own cannot do. If unions are historically weak, why not assign a greater role for the Commission as an intermediary in collective affairs?

Regulation of collective negotiations since the 1990s carried a logic about containing union power where it was strong and confining the Commission to a support role in the procedural aspects of bargaining. That containment denied a role for industry-wide agreements, whilst using the Commission to police the boundaries of industrial action. The aim was to ensure the Commission was not reinvented, by the backdoor, as a compulsory 'knocker-togetherer' of heads. Instead, its role in enterprise bargaining was to superintend process. Examples of this are majority support

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68 This much can be seen in the predominance, in human rights law, of rights' vesting in individuals rather than collectives (especially covering property, civil or political interests and discrimination against individuals) rather than norms about group relations or more multi-faceted socio-economic interests.

69 On enterprise bargains made without union involvement in Australia, see Shae McCrystal and Mark Bray, 'Non-Union Collective Agreement-Making in Comparative and Historical Perspective' (2019) 41(3) *Comparative Labor Law and Policy Journal* 753; Mark Bray, Shae McCrystal and Leslee Spiess, 'Why Doesn't Anyone Talk About Non-Union Collective Agreements' (2020) 62(5) *Journal of Industrial Relations* 784.

determinations before an employer would be forced to bargain, good faith bargaining orders if one side was misbehaving, and ballots and notice periods for industrial action taken by employees.

Mapped onto rights to request reasonable treatment, such logic would not have seen the Commission denied any role involving such requests, as was initially the case. But nor would the Commission have been given an ultimate role to arbitrate the request, as it has been assigned today. Rather, it would have had an intermediate role, to arbitrate process, as in the UK. That this is not now the case, in Australia, is worth reflecting on.

In parallel with providing for arbitration of requests for reasonable treatment, the Labor government's copious reforms to the Act across 2023 and 2024 have contained an element of re-invigorating the Commission's role in collective disputes and condition-setting. Perhaps partly as a result, the Commission's workload increased significantly in 2024 and again in 2025 as the table in the appendix demonstrates. This increase is seen across both individual applications and across all types of matters. However, after a relative dip in 2023 and 2024, the proportion of individual claims returned to about 60 per cent of all matters brought to the Commission.

To the chagrin of much of the business lobby, enterprise bargaining has been augmented by wider access to multi-employer and even industry-wide bargaining. The Commission has also been empowered to arbitrate reasonable conditions for two sizeable classes of common law contractors, namely 'digital platform workers' in the gig economy and 'road transport contractors'.[70] In addition, as noted earlier, the Commission can now arbitrate, without consent of all parties involved, reasonable conditions to resolve 'intractable' bargaining disputes.[71]

Even in the era of de-regulation during the 1990s–2000s, when the Commission was losing much of its power as a centrepiece of socio-economic regulation, the Act itself was becoming longer and more detailed. Part of this increasing legislative complexity involved placing restraints on industrial associations, especially on unions and strike action. As an offset, a floor of legislated conditions and rights was offered by Parliament, to employees as individuals, via the National Employment Standards and other legislative provisions. That floor has now extended to things like rights to request reasonable treatment.

After that period of de-regulatory trimming, the Commission's workload in the 2020s is increasing on both individual and collective fronts. It has, however, been remade in modern times. From its original status as a key economic agency, through being primarily a settler of collective disputes, and into its contemporary role as primarily a settler of individual grievances (albeit with some important collective

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[70] For an overview, see Andrew Stewart, 'Supplement for Stewart's Guide to Employment Law: Seventh Edition', (Federation Press, July 2025) 6–9 <https://federationpress.com.au/wp-content/uploads/2025/07/ELG7-Supp-Jul25_FINAL.pdf>

[71] As of February 2025, it had agreed to consider nine such disputes and arbitrated an outcome in two of those: Mark Bray and Alison Preston, *Secure Jobs, Better Pay Review* (Report, Department of Employment and Workplace Relations, 2025) 142–3, tables 13 and 14.

oversight of safety-net awards and intractable enterprise-level disputes). Into this mix, it has a new jurisdiction, to arbitrate requests for reasonable treatment: provided the requests are from individuals, not employees as a whole.

APPENDIX

Table 1: Annual Number of Fair Work Commission Applications[72]

Claim Type	2021-22	2022-23	2023-24	2024-25
Flexible Work[73]	47	42	236	379
Extended Parental Leave	0	1	6	3
Casual Conversion	31	21	33	44
Right to Disconnect	n/a	n/a	n/a	7
Bullying or Sexual Harassment[74]	631	730	987	1 220
Unfair Dismissal[75]	13,096	11,012	14,772	16,646
General Protections/Other Dismissal[76]	6,325	6,111	6,709	8,084
TOTAL APPLICATIONS — ALL TYPES	34,122	31,523	40,190	44,075
'Rights to Request' as a Share of Individual / All Applications	0.4/0.2%	0.3/0.2%	1.2/0.7%	1.6/1.0%
Individual Claims as a Share of All Applications[77]	59%	56.8%	56.6%	59.9%

* Claim types in bold are reasonable treatment requests

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72 The data is derived from Fair Work Commission Annual Reports: see 'Annual Reports', *Fair Work Commission* (Web Page) <https://www.fwc.gov.au/about-us/reporting-and-publications/annual-reports>

73 Until 2023, these were all claims about procedure. Substantive claims appeared from 2023 onwards.

74 Most of these involve bullying (*FWA* s 789FC). Since 2021-22, sexual harassment claims have been available under either that section or s 527F.

75 From 2025, these include a (limited) number of 'gig economy' unfair deactivation or termination claims (*FWA* s 536LU).

76 Most of these are general protections claims involving dismissal; around 20% involve action short of dismissal. A small share are unlawful termination claims involving non-national system employees.

77 This includes the handful of Covid-era claims over the application of 'Jobkeeper' arrangements to individual employees.