CHAPTER 10

VICTORIAN WORKERS

*An allegedly unitary industrial system that has such inherent contradictions as two '*safety nets*', which operate according to the form of the industrial regulatory instrument seems, at least, perverse.*

Victorian Government, November 1999

Introduction

10.1 Victorian employees are currently serving as guinea pigs in an experimental deregulation of most employment conditions. In 1995, the Kennett Government abolished all Victorian State awards. Then, from 1 January 1997, the former Victorian Government referred most of its industrial relations powers to the Commonwealth Government.

10.2 However, this referral of powers has not resulted in Victorian employees receiving the benefits of safety net standards that apply to other workers under the federal jurisdiction. Instead, a completely separate federal system has been established for those workers unable to access federal awards, the equivalent of a federal industrial relations 'ghetto':

> There was a common perception by many members of the Victorian community…that the transfer to the 'federal system' would bring with it the extended benefits associated with federal award terms and conditions…In reality, however, the handover reflected a minimalist approach with a direct incorporation of Schedule 1 of the *Employee Relations Act 1992 (Vic)*…into Schedule 1A of the *Workplace Relations Act 1996*…The incorporation of Schedule 1A in this manner had the consequence of, for those employees covered by it, enshrining in federal law, the lack of statutory entitlements in a broad range of matters, including: paid bereavement leave; jury service leave; paid overtime; penalty rates and loadings; spread of hours; allowances; accident makeup pay; severance payments on redundancy; minimum and maximum number of hours (not an exhaustive list).[1]
>
> Never forget that we do not have a state system in this state. We have, I would estimate, up to 750,000 workers who do not have much more applying to them than a minimum hourly rate of pay for 38 hours, no guarantee of overtime and certainly none of the rights and conditions that those under either a federal or a decent state award system would have. I understand it is estimated in the retail industry that a worker in this state

1 Jobwatch Inc, Submission No. 398, p. 3

> employed in a shop is 25 per cent worse off than a colleague working down the road doing the same work who is under a federal award. That is an outrageous state of affairs in a country like Australia where we think there should be a fair go for all.[2]

Impact of the Workplace Relations Act

10.3 Minimum terms and conditions for Victorian employees not covered by federal awards are now established under the WR Act – Part XV and Schedule 1A. These provisions give Victorian workers just five conditions of employment:

- four weeks paid annual leave;
- one week paid sick leave;
- a minimum wage;
- unpaid maternity and paternity leave; and
- notice of termination or compensation in lieu.

10.4 Jobwatch estimated that approximately 40% of Victorian workers are not covered by federal awards and rely on the five minimum conditions established by Schedule 1A:

> …the 1996 hand over of most industrial relations powers to the Commonwealth created a situation where not all Victorian workers were automatically covered by federal awards. We still have a number of workers who are not within the federal award system…in Victoria, 40 per cent of Victorian workers only have five rights… In Victoria there is a huge disparity in the employment conditions between those covered by federal awards and agreements and those covered by schedule 1A. It is a situation of great injustice where some Victorian workers have conditions that are so much better than others, and the ones with the worst are the ones that are the most vulnerable and the ones that are not organised—they are not in unions.[3]

10.5 The Inquiry was presented with evidence of widespread exploitation of Victorian workers who are covered by Schedule 1A conditions. For example, a Victorian hairdresser gave the Committee a brief explanation of his situation under Schedule 1A:

> I work on average between 45 to 50 hours in a given week. There is no choice on this. It would seem to me that the people who wrote the provisions for Victorian minimum standards do not understand that it is not normal for a full-time hairdresser on minimum conditions to simply work 38 hours. Shops are open for trade these days for 65 hours a week. The days

2 Leigh Hubbard, Victorian Trades Hall Council, Evidence, Melbourne, 7 October 1999, p. 64

3 Wendy Tobin, Jobwatch Inc, Evidence, Melbourne, 8 October 1999, p 176

> and times that I am expected to work include one, and sometimes two, 12-hour shifts Saturday and Sunday, all with only half an hour for lunch. These working days at times include public holidays but I am told by my employer that, if I do not work, I will not get paid for the holiday. Penalty rates and overtime simply do not exist. I cannot afford not to work. As an employee, I do not have a choice but to work these hours on a flat rate of pay.[4]

10.6 Not only are Victorian employees covered by Schedule 1A conditions not entitled to overtime or penalty rates, there is actually some doubt as to whether they are entitled to be paid for any hours worked over 38 hours a week, due to the 'minimalist' approach to setting wage rates. A Victorian barrister submitted:

> …I have had cases where employees in the hospitality sector in provincial towns with high rates of unemployment have been working up to 70 hours a week with no additional pay for hours worked beyond 38 hours![5]

10.7 Compounding problems for Victorian employees is the fact that in 1996 the Government overlooked the need to give federal officers the power to investigate or prosecute breaches of Schedule 1A minimum conditions:

> When the WR Act was amended by the *Workplace Relations and Other Legislation Amendment Act (No. 2) 1996*, no provision was made to allow the Department's authorised officers to enter into workplaces where the terms of employment of employees were governed by contracts of employment underpinned by the minimum conditions of employment contained in Schedule 1A. Nor was provision made for the Department's authorised officers to bring actions under sections 178 and 179 of the WR Act in respect of breaches of the Schedule 1A minimum conditions of employment.[6]

10.8 This has allowed employers in Victoria to breach even the very basic protections afforded by Schedule 1A:

> The department effectively does not prosecute employers who breach [Schedule 1A]. Our organisation decided to outline these problems because we trust that the Committee will recommend that the problems be addressed…There have been no prosecutions at all in Victoria with regard to schedule 1A workers…The Department of Employment, Workplace Relations and Small Business does not believe it has the power to prosecute—it is a matter relating to the difficulty with referral of powers.[7]

10.9 An additional problem that has been highlighted in this Inquiry relates to some employees who were excluded from the referral of industrial relations powers by

---

4 Mark Brown, Evidence, Melbourne, 8 October 1999, pp. 183-4

5 Peter Holding, Submission No. 19

6 Department of Employment, Workplace Relations and Small Business, Submission No. 329, p. 358

7 Wendy Tobin, Jobwatch Inc, Evidence, Melbourne, 8 October 1999, pp. 177 and 182

the Victorian Government. On the referral to the Commonwealth, certain matters were reserved, including matters pertaining to discipline or termination of law enforcement officers. Law enforcement officers are defined to mean a member of the police force, police reservists, police recruit or protective services officer. The effect of the current Act is to force police back into an inadequate or non-existent jurisdiction, with no rights on termination.

10.10 In effect the Commonwealth has left the extent to which it meets its obligations under the ILO Convention on Termination to Victoria. The Commonwealth has failed to meet its international obligations by abrogating its responsibility to the State of Victoria and by failing to ensure that the Victorian system with respect to 'law enforcement officers' meets the minimum standards established by the ILO Convention on termination.

10.11 The evidence demonstrates that the WR Act has failed to provide adequate protection to Victorians not working under federal awards. The new Victorian Government has expressed it serious concerns with the legislation:

> It is manifestly clear that the current Part XV/Schedule 1A 'safety net' arrangements in the WR Act are unfair to Victorian workers. Victorian workers, who are subject to these provisions, have a demonstrably inferior safety net protection compared to all other Australian workers covered by the WR Act.[8]

10.12 Over the last few years, Victorian unions have attempted to alleviate the situation by extending federal award coverage to as many Victorian employees as possible. However, in small workplaces that are not unionised, this is very difficult:

> In 1993-94 we took probably about 400,000 to 500,000 people from the state system into the federal system to protect them. The only reason we have not done more is the constraints on unionists to organise workers into roping in small employers in particular.[9]

Conclusions

10.13 40 per cent of Victorian employees have fared very badly under the WR Act. Employees working under Schedule 1A minima do not even have access to minimum federal safety net conditions:

> Contrary to the claims of the Prime Minister that no Australian worker would be worse off, the case studies presented here show that workers have been profoundly disadvantaged by the WR Act 1996. This is especially true in Victoria, where approximately 40-45% of the workforce have their minimum entitlements determined by the 5 conditions nominated by Schedule 1A of the Act. Several of the case studies show that even these

8 Victorian Government, Submission No. 542 p. 4

9 Leigh Hubbard, Victorian Trades Hall Council, Evidence, Melbourne, 7 October 199, p. 68

> minimum conditions are breached, and the absence of effective remedies leaves workers powerless to enforce their nominal rights under the legislation.[10]

10.14 Unions have managed to improve the situation for many Victorian employees, by extending federal award coverage as far as possible. However, the employment conditions for non-unionised Victorian employees are unfair and inequitable: it is not acceptable that some Victorian employees are not protected by the minimum safety net standards, while others performing exactly the same types of work enjoy award conditions.

10.15 The Labor Senators believe that the Government must take urgent action to rectify the position, by making available federal award coverage to all employees. Alternatively, the Australian Catholic Commission for Employment Relations suggested that former Victorian State awards could be recreated:

> The ACCER does not believe that these statutory minimum conditions are sufficient to provide workers with fair and just standards of employment. Therefore it is believed that such statutory provisions should be supplemented by a safety net of comprehensive terms and conditions of employment based on the previous state awards.[11]

Amendments proposed in the Bill

Amendments to Schedule 1A

10.16 Schedule 15 of the Bill proposes some limited improvements to Part XV of the WR Act to allow inspectors authorised under the WR Act to enter and inspect premises where employees are employed on conditions set under Schedule 1A and to enforce any breaches of these minimum terms and conditions, and to ensure that employees who work more than 38 hours a week are entitled to be paid for these additional hours of work.

10.17 These amendments, which in reality provide a long overdue fix for technical drafting problems within the Act, were widely supported:

> Schedule 15 is the only schedule which contains any amendments which are of benefit to workers.[12]

10.18 However, as the Victorian Government submitted, the Bill does little else to improve the lot of Victorian workers:

> While there are minor changes which would assist some employees in Victoria, these are relatively minimal and do not address the concerns of the

---

10 Victorian Trades Hall Council, Submission No. 413, p. 4

11 Australian Catholic Commission for Employment Relations, Submission No. 167 , p. 32

12 Lloyd Freeburn, National Union of Workers, Evidence, Melbourne, 7 October 1999, p. 73

> Victorian Government to provide a fair, safe, secure and more productive working environment for all Victorians.[13]

10.19 The present conditions in Schedule 1A do not even provide some of the most basic employment entitlements. As one witness pointed out:

> In Victoria, you have no legal entitlement to attend the funeral of your own child. It is not in schedule 1A, so you do not have it. It is probably the most basic of safety nets that is seen in the whole of Australia.[14]

10.20 The Bill does not contain any amendments to allow Victorian employees access to additional conditions, such as bereavement leave, or other 'allowable award matters' as set out in section 89A(2) of the WR Act, to which all other employees covered by the federal jurisdiction are entitled.

10.21 The Bill would actually further disadvantage Victorians working under Schedule 1A conditions, as it proposes amendments to:

- ensure that employers can stand down employees employed under contracts underpinned by Schedule 1A minimum terms and conditions; and
- exempt some types of employees from the entitlements to annual leave and sick leave.

10.22 The amendments to annual leave and sick leave attracted particular criticism:

> Some other proposed changes in this schedule will actually compound existing inequities Victorian employees covered by Schedule 1A currently experience. Two of the changes that will have a detrimental effect on these employees are those proposed in the new subsections (3) and (5) of Clause 1 of Schedule 1A, which relate to the calculation of annual leave and sick leave. These clauses rely on a mathematical model which excludes the time an employee is on leave from the calculation equation. The impact this will have, especially in relation to the accrual of annual leave, gives Victorian employees less annual leave over time than those covered by other state laws or federal awards, which include time taken as leave in the calculation of leave entitlements.[15]
>
> As poor and as substandard as the existing minimum conditions of employment are, the Federal and [former] Victorian Governments have determined to further reduce and cut the essential minimum conditions of Victorian employees…The proposed changes to Clause 1 of Schedule 1A will see that casual and seasonal workers who are currently entitled to

---

13 Victorian Government, Submission No. 542, pp. 2-3

14 Wendy Tobin, Jobwatch Inc, Evidence, Melbourne, 8 October 1999, p. 176

15 Jobwatch Inc, Submission No. 398

> minimum conditions of employment in respect of annual leave and sick leave, will lose those entitlements.[16]

10.23 The Government has justified the amendment on the grounds that the Department of Employment, Workplace Relations and Small Business had received numerous requests from Victorian employers unsure as to whether casual employees are entitled to be paid annual leave or sick leave, and that casual employees already receive a loading in lieu of these entitlements.[17]

10.24 However, the Government has not addressed potential problems that will occur if casual or seasonal workers no longer have access to these two minimum entitlements, due to a lack of regulation as to when employees can be employed as casuals:

> One outcome of the proposed amendments is that if an employer designates an employee as a casual employee, (or as a seasonal employee), then that employee will not be entitled to either paid annual leave or paid sick leave. An additional potential concern is the lack of an adequate definition as to what constitutes a casual or seasonal worker.[18]

> What makes these amendments even more worrying is that there is no clear definition as to what constitutes a casual or seasonal worker…The Commission, in Award Simplification decisions, has given effect to the legislative process by ensuring that where workers are genuinely engaged on a regular and systematic basis for less than 38 hours per week, that they are employed as regular part time employees under an appropriate award and are entitled to full pro-rata award entitlements. However, in the case of Victorian employees…, employers are given carte blanche in terms of employing any worker as a casual or seasonal worker. The real effect of the proposed amendment to Clause 1 of Schedule 1A is that wherever an employer designates an employee as a casual employee, or a seasonal employee, then the employee will not be entitled to either paid annual leave or paid sick leave.[19]

10.25 The Committee received evidence from 'casual' Victorian employees, who were clearly working full time hours:

> I started working for [Data Connection], and on average I worked in excess of 60 hours a week which is not exactly what you would call part time. I kept this up for a fair while because I am working to pay for my coffin. That is not being melodramatic; that is a fact...I was told that perhaps I could think of alternative employment because they were not going to be offering me hours in the near future. I said, 'Are you firing me? What did I do

16 Shop Distributive and Allied Employees' Association, Submission No. 414, pp. 126-7

17 Department of Employment, Workplace Relations and Small Business, Submission No. 329, p. 359

18 Victorian Government, Submission No. 542, p. 6

19 Shop Distributive and Allied Employees' Association, Submission No. 414, p. 127

> wrong?' He said, 'No, I am not firing you.' I said, 'Then why won't you let me work?'...I went to see a solicitor about basically being fired because I have got cancer. Come on here! This is Australia—you don't do stuff like this. But it got done and the bottom line is they terminated me and there was jack all I could do about it…I cannot get a bank loan because I am a casual employee. I cannot provide a future for my children because I am a casual employee.[20]

10.26 It therefore seems that in Victoria employees are already being inaccurately designated as casuals so that employers can avoid unfair dismissal claims. The Shop Distributive and Allied Employees' Association was concerned that amending Schedule 1A to remove entitlements to annual leave and sick leave for casuals would only exacerbate the problem:

> …there is nothing in either the minimum wage orders or in Part XV of the Act which defines a casual employee. What this means is that even though a casual employee has to be paid a loading on their base hourly rate, there is no prohibition on an employer employing all employees as casuals…The Workplace Relations Act encourages the introduction and utilisation of regular part time employment in an award situation, but there is no such encouragement within the context of workers in Victoria…It is clear that the changes to Schedule 1A have been made with the view of allowing employers in Victoria to convert all permanent employees over to casual or seasonal status, so as to avoid paying employees in Victoria paid annual leave and paid sick leave.[21]

10.27 Seasonal workers are not paid a loading in lieu of annual leave and sick leave entitlements, so it is even more inappropriate to remove these employees' entitlements.

Amendments to section 111AAA

10.28 The Bill proposes amendments to the principal object of the Act and section 111AAA, to strengthen the presumption in favour of State employment regulation, including by legislative minimum conditions. If passed, the Bill would effectively prevent any more Victorian employees from transferring from inadequate Schedule 1A minimum conditions to the federal award safety net:

> ….there is a particular clause in the bill which says that the commission would be precluded from making an award for workers where it is shown that a state employment agreement exists in a workplace. So a Kennett style contract, a schedule 1A contract with a minimum hourly rate of pay and a few conditions, would preclude the commission finding a dispute and then going on to make an award in settlement of that dispute. As you would well know, that is normally the roping of that employer into the federal award.

---

20 Elizabeth-Anne Calder, Evidence, Melbourne, 7 October 1999, p. 66

21 Shop Distributive and Allied Employees' Association, Submission No. 414, p. 128

> That would be stopped. So those 750,000 workers who are currently out there, vulnerable and with no standards, would have no hope of finding refuge or safety under a federal award system—or whatever is left of it—if this legislation goes through.[22]

10.29 The Victorian Government also opposed this amendment due to its potential impact on Victorian employees:

> The Government is opposed to these proposals. This submission has previously objected to any additional limitations on the AIRC's capacity to undertake its independent role. Limiting the AIRC's role, as proposed in the Bill, will affect its capacity to help resolve disputes and its flexibility to consider providing basic award coverage for employees. This issue has particular significance in respect of a major private sector application, in the Victorian retail industry.[23]

Conclusions

10.30 There are some benefits for Victorian employees in Schedule 15 of the Bill. If passed, Victorian employers would no longer be able to force their employees to work 70 hours a week for 38 hours pay, and the Department would at least have powers to prosecute breaches of the minimum conditions. However, this is clearly not enough.

10.31 It is unfair and inequitable that some Victorian employees have to work under Schedule 1A conditions, while others (generally union members) have access to the federal award safety net. The Government ignores this injustice at its own peril, because it is clear that Victorian employees are fed up. The Committee received approximately 300 submissions from private citizens opposed to the Bill. More than half of these submissions were from Victorians. For instance:

> I am an employee of a Melbourne based retail computer company, who have little or no time for their staff, but it is a job. We are underpaid, and constantly pressured to produce more and more from less and less. Those same employers pay minimal rates, and make their staff work a 46 hour, six day week and expect us to work every public holiday. Should you refuse, they have told us they will replace us. Please do not allow the situation to become worse by supporting the new industrial relations legislation.[24]

10.32 It is disappointing that the Government is now attempting to make matters even worse for Victorian employees not covered by federal awards, by exempting casuals and seasonal workers from annual leave and sick leave entitlements. In the absence of any regulation of casual employment, this will only encourage employers to artificially move their employees into insecure forms of employment.

---

22 Leigh Hubbard, Victorian Trades and Labour Council, Evidence, Melbourne, 7 October 1999, p. 64

23 Victorian Government, Submission No. 542, p. 7

24 Roger McDermid, Submission No. 16

10.33 The Labor Senators also note that under the terms of the Agreement between the State of Victoria and Commonwealth of Australia[25], 'the parties will with adequate notice consult with each other in a spirit of cooperation and understanding about matters of relevance and concern to either of them in connection with the Victorian Act and the Commonwealth Act and the matters referred by the Victorian Act.'[26]

10.34 It is not clear what consultations the federal Government had with the former Victorian Government prior to the introduction of this Bill, but it is abundantly clear that the current provisions of the WR Act and the proposed amendments set out in the Bill are of extreme concern to the new Victorian Government.

10.35 The Labor Senators believe that there is little point in making further amendments to 'fix' Part XV and Schedule 1A to the WR Act, and maintain separate federal regulation of Victorian employment conditions. All of the benefits of federal jurisdiction should be available to Victorian employees, including access to the award safety net. The Victorian Government concurs:

> Victoria is especially concerned to ensure that Victorian employees who have not had coverage of a comprehensive award – ie those presently subject to the minima in Schedule 1A of the WR Act – are, in future, fully protected. Victoria considers that the Bill must be amended to provide that the AIRC be given powers to make comprehensive awards with respect to these employees so that they will have terms and conditions of employment which are appropriate for their industry and at least in accordance with community standards.[27]

25 30 May 1997

26 Clause 3

27 Victorian Government, Submission No. 542, p. 12