2002

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

WORKPLACE RELATIONS AMENDMENT (IMPROVED PROTECTION FOR VICTORIAN WORKERS) BILL 2002

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Employment and Workplace Relations, the Honourable Tony Abbott MP)

WORKPLACE RELATIONS AMENDMENT (IMPROVED PROTECTION FOR VICTORIAN WORKERS) BILL 2002

OUTLINE

This Bill will amend the *Workplace Relations Act 1996* (WR Act) to improve the workplace relations arrangements in Victorian workplaces covered by Schedule 1A of the WR Act.

Victorian employees not covered by a Federal award or agreement are presently covered by a safety net of five minimum terms and conditions contained in Part XV and Schedule 1A of the WR Act. These minimum conditions are largely a continuation of the safety net of provisions that applied to these employees under Victorian law immediately prior to the 1996 referral by the State of most of its industrial relations powers. In addition, these employees are also governed by the more general provisions of the WR Act, for example, termination of employment and freedom of association.

The measures proposed in this Bill will ensure that the safety net is updated in line with changing community values, whilst protecting the single system of regulation applying in Victoria.

Specifically, this Bill will amend the WR Act to:

- give Schedule 1A employees an entitlement to payment for work performed in excess of 38 hours a week;

- give Schedule 1A employees an entitlement to eight days personal leave – which can be taken as sick leave, with up to five of the eight days available to be taken as carer's leave;

- give Schedule 1A employees an entitlement to two days bereavement leave for the death of a member of their family or of their household; and

- give the Australian Industrial Relations Commission power to include supported wage arrangements in industry sector orders.

To enhance the enforcement of the entitlements in Schedule 1A, the Bill will:

- give inspectors the right to enter Schedule 1A workplaces to investigate alleged breaches, and to demand documents from an employer without the need to have first visited the workplace;

- provide for a power to make regulations requiring employers to keep and maintain employment records for employees who are not employed under federal awards, certified agreements or AWAs; and

- provide that a breach of Schedule 1A conditions can be prosecuted under sections 178 and 179 of the WR Act.

In addition, the Bill will provide the Victorian Government with a right to intervene in proceedings before the Australian Industrial Relations Commission in relation to:

- proceedings under section 501 of the WR Act concerning the adjustment of minimum wages applying to Schedule 1A employees; and

- applications for suspension or termination of a bargaining period under section 170MW of the WR Act, if one or more of the employees to be covered by the proposed agreement is an employee in Victoria.

The Bill will insert a mechanism for the stand-down of Schedule 1A employees, where, due to circumstances beyond the employer's control, they cannot be usefully employed.

The Bill will also amend the WR Act so as to provide an entitlement for persons performing work as outworkers for the textile, clothing and footwear industry in Victoria, under contracts for services, to be paid at least the amounts they would have been required to be paid for the work because of Part XV of the WR Act (that is, because of Schedule 1A, or section 509 where applicable) if they had performed it as employees.

- For constitutional reasons, the obligation and entitlement proposed by the Schedule will apply, on enactment, only to the extent of contracts for services entered into by constitutional corporations, or where work is contracted to be performed under a contract for services in the course of, or in relation to, interstate or international trade or commerce.

- The amendments will also provide for enforcement of this entitlement, and enable the making of regulations in relation to the keeping and inspection of records concerning contract outwork as required for the enforceability of the new entitlement.

FINANCIAL IMPACT STATEMENT

The measures in this Bill will have no significant impact on Commonwealth expenditure.

REGULATION IMPACT STATEMENT

Minimum Rates of Pay for Contract Outworkers in the Victorian Textiles, Clothing and Footwear Industry

Problem:

Outworkers[1] engaged within the textiles, clothing and footwear (TCF) industry within Australia (estimated in 1996 to number between 50,000 and 329,000[2]) are generally considered to be in a disadvantaged industrial position. It is generally considered that outworkers within the TCF industry often receive payment and work under conditions which are inferior to those applicable to factory workers doing comparable work. Contract outworkers[3] are often in a particularly difficult situation due to a lack of clarity concerning their rights and entitlements.

2. The situation appears to be a particular issue in the TCF industry, particularly the clothing industry. Under pressures for greater international competitiveness, the TCF industry has undergone major restructuring associated with reductions in tariffs and bounties. This has resulted in high-volume manufacturing in the industry tending to move off-shore. At the same time Australian manufacturing in the clothing industry, in particular, appears to have shifted from a factory-based workforce to one centred around outworkers.[4]

3. The Senate Economics References Committee's (SERC's) Inquiry into Outworkers in the Garment Industry in 1996, and its subsequent review in 1998, highlighted the fact that outwork is performed predominantly in Victoria, New South Wales and South Australia.

4. The upper limit of 329,000 outworkers nationwide, mentioned above, equates to an estimated upper limit of 144,000 outworkers in Victoria.[5] It is difficult, if not impossible, to estimate how many of these are contract outworkers, as opposed to employee outworkers.

Current Situation:

5. Currently, outworkers in the TCF industry in Victoria fall in one of the following categories:

(a) employee covered by an award under the *Workplace Relations Act 1996* (WR Act), most likely the *Clothing Trades Award 1999*;[6]

---

1 An outworker is a person who performs work for another person, other than in any premises of the second person – typically, though not necessarily, in domestic premises.

2 Senate Economics References Committee, *Outworkers in the Garment Industry*, December 1996. Figures quoted in Chapter 2 – 'Outworkers and Garment Production', with estimates varying between those of the Australian Taxation Office (50,000) and those of the Textile, Clothing and Footwear Union of Australia (329,000).

3 An employee outworker is one engaged under a contract of service. A contract outworker is one engaged under a contract for services.

4 The Senate Economics References Committee (op. cit.) concluded that outworking "is now so prevalent that it is not just a characteristic of the [clothing] industry, the entire industry is structured around it".

5 Textile, Clothing and Footwear Union of Australia, *The Hidden Cost of Fashion, Report on the National Outwork Information Campaign*, March 1995.

6 It is conceivable that some employee outworkers could be covered by a certified agreement or Australian Workplace Agreement under the WR Act; such regulation, above the safety net, may be presumed to be at least as beneficial for the employee as the underpinning award, so does not require further consideration.

(b) employee not covered by a federal award but covered by Schedule 1A of the WR Act (which provides specific minimum conditions for employment in Victoria, following the referral by Victoria of powers in respect of industrial relations matters in 1996);

(c) independent contractor working under a contract affected by the Clothing Trades Award (as explained below); or

(d) independent contractor working under a contract not affected by the Clothing Trades Award.[7]

6. The *Clothing Trades Award 1999* principally provides terms and conditions of employment, but also sets standards for and in relation to contracts for services. Consequently, the Award has the potential to effectively regulate contract outwork in addition to employment (by imposing obligations on principals, though without directly providing entitlements for contractors). However, whether a contract for services is affected by the Award depends on whether the manufacturer (at the top of the chain of contracting) or any intervening contractor (ie a 'middleman') is a respondent[8] to the award. Many manufacturers and contractors would not be respondents to the Award, so the Award will not affect the outworkers who perform work for them. The question whether an outworker's contract is affected by the Award is typically quite unclear: outworkers' relationships with manufacturers are typically mediated by sub-contractors or 'middlemen', and outworkers commonly do not know the identity of parties higher in the chain of contracting than the individuals they deal with directly. Consequently, many outworkers do not benefit from restrictions imposed by the Award with respect to the contracting out of work.

7. Currently in Victoria, there are approximately 500 manufacturers who are respondent to the award. It is difficult to estimate the number of manufacturers or middlemen who are not respondent to the award. It is also difficult to estimate the number of outworkers per respondent and/or non-respondent. A report on the National Outwork Information Campaign[9] states that, based on investigations by union organisers:

> [approximately] one third of all companies which are respondent to the award employ less than 10 'inside' [factory] workers ... the union estimates that up to three quarters of companies in the industry have the majority of their production performed in private homes. Commonly employing around four or five 'inside' workers, around 50 per cent of these companies use at least 10 outworkers, with the remainder using at least 50 outworkers ... In a number of cases, companies employing around six factory workers each employed over 200 outworkers. Some of these outside workers are contractors themselves, who engage others to work for them. The longer the contracting chain, the greater the number of outworkers.

8. For those manufacturers who are respondent to the Clothing Trades Award, clauses 45-49 of the Award impose restrictions with respect to the contracting out of work and engagement of

---

7 Independent contractors working under a contract not affected by the Clothing Trades Award presently have some remedies against harsh or unfair contracts, or unconscionable conduct, as set out under Option 1 below.

8 A respondent is any person or organisation bound by an award. Federal awards are generally limited in their binding force to persons, organisations, and members of organisations which the Commission has identified formally as being parties to the relevant industrial dispute. (This is different from the situation of State awards, which may be common rule awards, binding all employers and employees in a particular industry.)

9 Textile, Clothing and Footwear Union of Australia, *The Hidden Cost of Fashion*, March 1995.

outworkers. These restrictions protect the interests of factory employees covered by the award, and also provide minimum standards for outworkers. The key clauses:

- prohibit a manufacturer respondent to the Award from employing outworkers on terms less favourable than those prescribed under the Award in respect of the manufacturer's factory employees (clause 47); and

- prohibit a manufacturer respondent to the Award from giving out work (ie to contractors) unless:
  - the contract provides terms and conditions no less favourable than those prescribed under the Award for outworkers (clause 46);
  - the contract binds the contractor to include such a term, if they in turn contract out the work (clause 46); and
  - both the manufacturer and the contractor are registered by a Board of Reference under the award (clause 48).

Objective:

9. At one level, the objective of the proposed legislation is to improve the situation for contract outworkers in the TCF industry in Victoria, in keeping with accepted norms for employees in the industry. The proposed legislation will give contract outworkers in the TCF industry in Victoria access to enforceable minimum rates of pay and improve compliance and enforcement arrangements for those workers. The legislation aims to improve compliance by authorising federal workplace inspectors to enter premises where such work is performed or where there are relevant documents and empower inspectors to enforce the minimum rates of pay in the courts.

10. At another more macro level, it is also anticipated that the proposed legislation will assist in preserving the unitary workplace relations system in Victoria, thereby preventing a broader layer of unnecessary and inappropriately burdensome regulation which would otherwise be established by Victorian legislation such as the Fair Employment Bill 2000 (Fair Employment Bill).

11. In 1996 the Victorian Parliament referred a broad range of workplace relations matters to the Commonwealth, giving the Commonwealth power to legislate on those matters. The effect of the referral and associated Commonwealth legislation was to create a unitary workplace relations system in Victoria. The Commonwealth now has the power to legislate on workplace relations matters. As a result, Victorian businesses no longer face the time consuming and costly exercise of working with two different workplace relations tribunals or systems and it is easier for employees and employers to identify their respective rights and responsibilities.

12. To date, no other States have followed suit and referred the bulk of their industrial relations powers to the Commonwealth. However, the Commonwealth Government is currently exploring the possibility of moving towards a simpler unified national workplace relations system based primarily on the corporations power of the Constitution. Preliminary research has highlighted considerable advantages of a unified system and a number of problems with multiple jurisdictions. For example, in States other than Victoria, federal and State awards often cover different categories of employees at the same workplace causing confusion and complexity.

13. Following the Victorian Government's referral, Victorian employees not governed by federal awards or federal agreements have been covered by Schedule 1A of the WR Act.

14. In 2000, the Victorian Government sought passage of the Fair Employment Bill in order to partially reintroduce a separate layer of workplace relations regulation in Victoria. If this had eventuated, there would have been considerable scope for jurisdictional overlap between the Federal system and the proposed Victorian system, thereby leading to uncertainty and confusion for employers and employees in Victoria as to their rights and obligations. In 2001, the Fair Employment Bill was rejected by the Victorian Parliament, however, the Bill could be re-introduced at any time, as it apparently continues to represent the policy of the Victorian Government.

15. The legislation proposed by the Federal Government (the Workplace Relations Amendment (Improved Protection for Victorian Workers) Bill 2002) is aimed at improving legislated safety net entitlements for Victorian workers covered by Schedule 1A of the WR Act, and introducing a new entitlement for contract outworkers in the TCF industry.

16. The Federal Government's proposed legislation is acknowledgement that the position of outworkers in the TCF industry justifies some additional safety net measures. Their separation from business premises and the fact that many are migrants, poorly educated, from low income groups or have few English language skills often means that they have inadequate information about, and difficulty in enforcing, their rights, and are not able to bargain as effectively as other workers.

Options:

17. A number of options were considered by the Government, including the following.

Option 1 – No Legislative Action

18. The status quo option would be to leave contract outworkers to bargain for themselves.

19. If this option is followed, contract outworkers would have no clear minimum rate of pay. Contract outworkers would, however, be able to seek remedies under section 127A of the WR Act or section 51AC of the *Trade Practices Act 1974*.

20. Section 127A of the WR Act enables an independent contractor (such as a contract outworker) to apply to the Federal Court seeking a remedy on the basis that the contract between the principal and the contract outworkers was unfair or harsh. This remedy is only available where the principal is a corporation (or the Commonwealth or a Commonwealth authority), the contract relates to work in interstate or overseas trade or commerce, or the contract affects matters in or connected with a Territory.

21. Section 51AC of the *Trade Practices Act 1974* prohibits unconscionable conduct by a person or corporation (other than a listed public company), in trade or commerce, in connection with the supply, possible supply, acquisition or possible acquisition of goods or services to or by another person or corporation (other than a listed public company). This section only applies where at least one party is a corporation (other than a listed public company), and only where the price of the supply or acquisition is less than $3 million. A remedy for a breach of this section can be sought by a person (such as a contract outworker) alleging unconscionable conduct against them, or by the Australian Competition and Consumer Commission.

22. Employee outworkers have better access to better remedies.

Option 2 – Legislation such as the Victorian Fair Employment Bill

23. Through its Fair Employment Bill, the Victorian Government sought to re-establish a separate workplace relations system in Victoria, ostensibly to improve the statutory minimum entitlements available to those employees currently covered by Schedule 1A of the Workplace Relations Act.

24. The Fair Employment Bill specified a range of minimum entitlements for general application to all Victorian employees. In addition, the Bill would have established an independent State industrial tribunal that would be able to regulate additional conditions of employment, by industry sector order, for Schedule 1A workers.

25. In addition, under the Fair Employment Bill outworkers in the TCF industry would have been deemed to be employees for the purposes of the Bill. This differs from the legislation proposed by the Federal Government, which does not deem contract outworkers in the TCF industry in Victorian to be employees. Rather, it provides them with an entitlement to receive at least the minimum hourly Schedule 1A rate of pay applicable to TCF employees.

Option 3 – Deeming All Outworkers in the Victorian TCF Industry to be Employees

26. The problems arising from confusion about the employment status between outworkers and employees were highlighted in the SERC initial inquiry into outworkers in the garment industry in 1996, and its subsequent review in 1998. The Committee stated that it was vital that the employment status of outworkers be resolved and deeming outworkers as employees was suggested by certain Committee members as one available option for clarifying the employment status of TCF outworkers.

27. The Government has considered the option of deeming all outworkers within the TCF industry to be employees for the purposes of the WR Act, regardless of whether they were actually engaged as employees or independent contractors.

Option 4 – Minimum Rates of Pay for Contract Outworkers in the Victorian TCF Industry

28. This option consists of legislation to enforce, through the existing unitary workplace relations system, an entitlement for contract outworkers in the TCF industry in Victoria to receive at least the minimum hourly Schedule 1A rate of pay applicable to TCF employees. It also provides a legislated right for federal workplace inspectors to enter premises where such work is performed and to empower inspectors to enforce the minimum rate of pay and associated enforcement provisions (including record keeping obligations). The proposed legislation will also permit the seeking of remedies in the courts on behalf of the contract TCF outworkers where non-payment or underpayment has been identified.

29. This option is part of a broader legislative agenda aimed at retaining a unitary system of workplace relations law in Victoria

Impact analysis (costs and benefits) of each of the four options:

Option 1 – No Legislative Action

30. The remedies presently available under the WR Act and Trade Practices Act for the protection of contract outworkers (remedies against unfair contracts and unconscionable conduct) appear to have had limited utility for or impact on contract outworkers. It is considered that this may be because contract outworkers are unaware of the remedies, or they do not value the remedies because the outcomes of applications are uncertain, or they lack the resources necessary to seek such remedies, or they are intimidated against assertion of their rights, or a combination of these factors.

31. If this option was pursued, legislation like the Victorian Fair Employment Bill (with all its associated costs – refer Option 2) would have greater likelihood of being passed by the Victorian Parliament. Option 1, though it does not have direct costs to business, thus needs to be considered to be as costly as Option 2.

Option 2 – Legislation such as the Victorian Fair Employment Bill

32. If passed, the Fair Employment Bill would have partially reintroduced a separate State system of industrial relations in Victoria, ostensibly to improve the statutory minimum entitlements available to those employees currently covered by Schedule 1A of the Workplace Relations Act. Under the Fair Employment Bill, it was proposed that outworkers in the TCF industry be deemed to be employees, regardless of whether they have been engaged as employees or independent contractors.

33. Consequently the Fair Employment Bill would have, amongst other things, increased the minimum rate of remuneration for contract outworkers in the TCF industry to the minimum rates applicable to employee outworkers (addressing the problem which this Statement is concerned with). Options 3 and 4 would also have this effect (but would not have the other effects of the Fair Employment Bill, which are addressed in the following paragraphs).

34. This increased remuneration for contract outworkers has the potential to raise the costs of activity in the TCF industry in Victoria, which could result in decreased economic opportunities for contract outworkers. It is not possible to quantify this impact, due to the absence of adequate statistical evidence, however, some observations can be made about the nature of the impact. Because this impact is common to Options 2, 3 and 4, it is addressed in an Appendix to this Statement.

35. Option 2 is the most costly option, because the overall effect of legislation such as the Victorian Fair Employment Bill would be to recreate a new system of State industrial laws, regulations, tribunal and bureaucracy. Legislation such as the Fair Employment Bill, if reintroduced and passed would give rise to uncertainty, confusion and potentially dual regulatory obligations for employers and employees in Victoria covered by Federal awards. There is also the possibility that the independent State industrial tribunal which was proposed to be established under the Fair Employment Bill, would regulate additional conditions of employment, by industry sector order, for Schedule 1A workers, thereby imposing additional costs.

36. In addition to the significant direct costs of setting up a separate industrial tribunal and compliance mechanisms, such a new system of industrial regulation would significantly increase

the cost of employment in Victoria and threaten jobs. Estimates of job losses over the long term range from 1,900 jobs in the Victorian Government sponsored study by the National Institute of Economics and Industry Research (NIEIR) to an estimate of 40,000 jobs over three years by the Victorian Employers Chamber of Commerce and Industry (VECCI). Meanwhile, a survey of employers operating under Schedule 1A conducted by the Victorian Employers Chamber of Commerce and Industry (VECCI) found that an estimated 22,000 employers suggest they would have to reduce their workforce as a result of the introduction of a State based system such as this.

37. It is considered that the true adverse employment impact would be at least somewhat greater than that predicted by NIEIR, given flaws in their research approach. For example, NIEIR's estimate of the number of permanent employees likely to benefit from improved minimum conditions is considerably lower than that suggested by Australian Centre for Industrial Relations Research and Training (ACIRRT) survey results which form the basis of other parts of NIEIR's modelling. In addition, NIEIR's modelling takes no account of the possible flow on implications of non-Schedule 1A employees seeking to maintain relativities or the proposed Fair Employment Tribunal increasing conditions or making industry wide orders on other conditions.

Option 3 – Deeming All Outworkers in the Victorian TCF Industry to be Employees

38. Deeming outworkers to be employees under the Workplace Relations Act would result in increased remuneration for contract outworkers, as would be the case under legislation such as the Victorian Fair Employment Bill. As noted above, this increased remuneration has the potential to raise the costs of activity in the TCF industry in Victoria, which could result in decreased economic opportunities for contract outworkers: this impact is addressed in an Appendix to this Statement.

39. The Government has additional reservations about deeming provisions as they effectively preclude people from being able to choose whether to be employees or independent contractors. This could set a precedent for other industries for which contracting provides significant benefits in terms of flexibility and efficiency (eg information technology). To deem all outworkers to be employees on the assumption that there is never genuine choice would seem to place an unjustifiable constraint on the TCF industry, especially given the lack of data about the extent of forced contracting arrangements.

Option 4 – Minimum Rates of Pay for Contract Outworkers in the Victorian TCF Industry

40. This option is one element of an effective response to the position of contract outworkers in the Victorian TCF industry. It is also one element of an effective response to the Victorian Government's attempt to reintroduce a workplace relations system characterised by unnecessary and inappropriately burdensome regulation.

41. The Workplace Relations Amendment (Improved Protection for Victorian Workers) Bill 2002 can be justified in terms of both the retention of a unitary system of workplace relations laws in Victoria and the improvement of safety net conditions for the Schedule 1A workforce. More specifically, that part of the proposed legislation dealing with contract outworkers in the TCF industry in Victoria can be justified in terms of improving the situation for these workers. It is not without potential costs, but these costs would be lower than the costs arising from Options 2 or 3.

(e) Effect on Contract Outworkers in the TCF Industry

42. The proposed legislation will provide an entitlement for contract outworkers in the TCF industry in Victoria to receive at least the minimum rates of pay applicable to employed TCF employees generally. It will also provide a legislated right for federal workplace inspectors to enter relevant premises and empower inspectors to enforce the minimum rates of pay and seek remedies in the courts on behalf of contract TCF outworkers where non-payment or underpayment is identified.

43. This increased remuneration for contract outworkers has the potential to raise the costs of activity in the TCF industry in Victoria, which could result in decreased economic opportunities for contract outworkers. It is not possible to quantify this impact, due to the absence of adequate statistical evidence, however, some observations can be made about the nature of the impact. Because this impact is common to Options 2, 3 and 4, it is addressed in an Appendix to this Statement.

44. The adoption of this option would assist to redress the issue of inferior remuneration received by TCF contract outworkers for the work they perform. However, it has the advantage over Options 2 and 3 of not precluding people from being able to choose whether to be employees or independent contractors and not constraining the flexible working arrangements that may flow from independent contract arrangements.

(b) Effect on Employees in the TCF Industry

45. The proposed legislation will level the playing field for all workers in the Victorian TCF industry. It will ensure that contract outworkers are required to be engaged at a pay rate at least equal to the minimum amount payable to factory employees. Consequently, the proposed legislation will remove an element of the competition which TCF employees face from contract outworkers which could be considered unfair competition (that is, to the extent that the price advantage of work performed by contract outworkers depends on the outworkers being paid at rates below the minimum rates the Government considers they should be paid at).

(c) Effect on Businesses engaging Contract Outworkers

46. It is acknowledged that the proposed legislation is likely to have a compliance effect on certain businesses in the Victorian TCF industry, resulting from both increased administration including increased record-keeping requirements, and increased costs of production (stemming from potentially greater remuneration for contract outworkers). However, it is emphasised that the proposed Federal legislation is likely to have a lesser impact on the Victorian TCF industry and the Victorian economy generally than legislation such as the Victorian Fair Employment Bill would have (refer above under Option 2).

47. In addition, the proposed legislation levels the playing field for those TCF businesses abiding by the rules, further complementing award provisions in the *Clothing Trades Award 1999* and those in the *Homeworkers Code of Practice*[10], which each impose restrictions on TCF manufacturers in terms of the manner in which they engage outworkers and contractors.

[10] The *Homeworkers Code of Practice* is a voluntary self-regulatory scheme that provides for the accreditation of parties along the garment manufacturing and retail chain. It is designed to supplement the outworker provisions of the Clothing Trades Award and was negotiated by industry participants in 1997.

(d) Effect on Consumers

48. The proposed legislation may have an impact on prices of TCF products made in Victoria, stemming from the greater remuneration of contract outworkers. However, it is not possible to estimate meaningfully the extent of this impact because of lack of data on labour costs as a proportion of production costs generally, and comparative costs as between contract outworkers and employee outworkers. Some observations about the parameters which would be relevant to estimating price impacts are contained in an Appendix to this Statement.

(e) Effect on Victorian Economy

49. In the event of any increased costs for TCF businesses or the potential loss of jobs for unskilled workers in the Victorian TCF industry, there may be a small localised effect on the Victorian economy. However, this needs to be weighed against greater benefits both in terms of Victoria retaining a unitary workplace relations system and in terms of the social and individual benefits associated with improving the situation for contract outworkers. The maintenance of a single unitary system in Victoria is good for the Victorian economy and for the Australian economy. (As noted above, the unitary system means that Victorian businesses no longer face the time consuming and costly exercise of working with two different workplace relations tribunals or systems and it is easier for employees and employers to identify their respective rights and responsibilities.)

50. Generally, Option 4 needs to be assessed in terms of its effects on the aforementioned groups in comparison with the impact of legislation such as the proposed Victorian Fair Employment Bill on Victorian businesses and the Victorian economy.

Consultation:

51. There has been broad discussion in recent years concerning the problems of outworkers in the TCF industry and the arguments for and against deeming outworkers to be employees.

52. In its response to the SERC Report the Commonwealth Government undertook to bring the issue of clarification of the employment status of outworkers in the garment industry to the attention of the relevant State Ministers. The Workplace Relations Ministers Council (WRMC) agreed to establish a Working Party to examine the issue and provide a Report to WRMC. The Working Party met in October 1999 and considered both legislative and non-legislative options and canvassed coordinated action as well as the option of leaving individual jurisdictions to pursue their own approaches. The options considered can be summarised as follows:

- Option 1 – Non-legislative methods (coordinated action);
- Option 2 – Non-legislative methods – individual jurisdictions continuing with and/or developing their own non-legislative approaches to address the issues;
- Option 3A – Deem all outworkers to be employees for the purposes of the WR Act;
- Option 3B – Establish deeming arrangements which also allow for genuine contractors;
- Option 3C – Reverse the onus of proof;
- Option 4 – Leave individual jurisdictions to pursue their own approaches to clarifying the status of clothing outworkers which suit that jurisdiction.

53. There was no consensus reached with respect to future legislative action and there appeared to be little opportunity for reaching consensus at the national level. On the issue of choice

between employment and independent contracting there was a lack of consensus – with NSW, Queensland and Victoria opposing the promotion of choice.

54. Whilst not explicitly canvassed, the particular option which is the subject of the proposed legislation falls under the heading of Option 4 – whereby individual jurisdictions pursue their own approaches to clarify the status and entitlements of outworkers in a way which is judged to best suit each jurisdiction.

55. The Minister for Employment and Workplace Relations met with representatives from industry and certain community organisations who are involved in or concerned with the engagement of outworkers for general discussions regarding the Fair Employment Bill, including the more specific issue of improving compliance and enforcement arrangements for Victorian TCF outworkers.

56. Consultation on the draft legislation has occurred with members of the National Labour Consultative Council's Committee on Industrial Legislation and communication has occurred with the Victorian Government.

Conclusion and recommended option:

57. The following is a summary of the discussion above, on the impacts of each option.

- Option 1 (No Legislative Action) does not have direct costs to business, but needs to be considered to be as costly as Option 2, as it would make the occurrence of Option 2 more likely.

- Option 2 (Legislation such as the Victorian Fair Employment Bill) is the most costly option, as it would impose the costs of an additional regulatory system, and the prospect of more burdensome conditions of employment for employees in Victoria generally, as well as the costs in relation to contract outworkers which would be imposed by Option 3.

- Option 3 (Deeming All Outworkers in the Victorian TCF Industry to be Employees) is not preferred because, in addition to the cost of Option 4 (the cost of raising minimum payments to contract outworkers to the level applicable to employees), deeming would place unjustifiable constraints on the TCF industry and could set an inappropriate precedent for other industries.

- Option 4 (Minimum Rates of Pay for Contract Outworkers in the Victorian TCF Industry) is the most practical and lowest cost option for ensuring that contract outworkers in Victoria receive a minimum entitlement, whilst ensuring the preservation of a unitary workplace relations system in Victoria and thereby preventing a workplace relations system characterised by unnecessary and inappropriately burdensome regulation.

Implementation and review:

58. Amendments are required to the WR Act in order to permit and require the provision of minimum pay for contract outworkers in the Victorian TCF industry.

59. On passage of the legislative amendments, the Department of Employment and Workplace Relations will provide a team of inspectors to educate and investigate workplaces in Victoria

where outworkers are engaged in the TCF industry. The inspectorate will be required to report to the Minister within three months of passage of the legislative amendments on levels of compliance and non-compliance identified in relation to outworkers engaged in the TCF industry throughout Victoria. The effectiveness of the amendments will be kept under review by the Department.

APPENDIX

Economic Effect of Increasing the Minimum Rate of Remuneration for Contract Outworkers to the Minimum Wage Applicable to Employee Outworkers

1. Requiring that contract outworkers in the Victorian TCF industry be paid not less than the minimum amounts payable to employee outworkers (Option 4) would affect the TCF labour market. Deeming all outworkers in the Victorian TCF industry to be employees (Option 3) would impose the same minimum rates of pay, and also potentially create other impacts beyond the rate of payment, going to conditions of 'employment' and regulation of the manner of performance of work: these additional impacts would have further effects on the TCF labour market. Legislation such as the Fair Employment Bill (Option 2) would have all the impacts of Option 3, and also, through changes to the regulation of employment generally, have impacts on Victorian labour markets generally.

2. This appendix addresses parameters which are relevant in assessing the economic impact of the minimum pay aspect of these options, which is common to all three. However, it is not possible to quantify the impact in any meaningful way, due to the absence of adequate statistical evidence on current conditions, as follows.

- There is no reliable data as to the total number of outworkers in either Australia or Victoria. It is notoriously difficult to obtain reliable data on the number or employment trends of homeworkers, a problem noted by the International Labour Organisation as common to many countries.[11]

  - The Textile, Clothing and Footwear Union of Australia,[12] reports a figure of 329,000 total outworkers in Australia, and 144,000 outworkers in Victoria.

  - The ATO provides a national figure for the number of individual homeworkers of 50,000 (no breakdown by State is given). As at May 1996, the ATO had identified (for taxation purposes only), 20,561 payees, or individual subcontractors and homeworkers.[13]

  - The ABS[14] gives a total TCF employment figure of 88,105, and a total of 7,021 (or 7.9%) for those that work at home. [It should be noted that the ABS regards this figure as a significant underestimate due to the casual nature of the work causing fluctuations in

[11] International Labour Organisation, *Globalisation of the Footwear, Textiles and Clothing Industries – Report for discussion at the Tripartite Meeting on the Globalisation of the Footwear, Textiles and Clothing Industries: Effects on Unemployment and Working Conditions*, ILO, Geneva, 1996.

[12] Textile, Clothing and Footwear Union of Australia *The Hidden Cost of Fashion, Report on the National Outwork Information Campaign*, March 1995.

[13] Australian Taxation Office, *Estimates of Activity in the Clothing Industry*, 1990-1991, noted in the Industry Commission Report, *Op. cit*., p. D.10.

[14] Australian Bureau of Statistics, *1991 Census of Population and Housing*, unpublished data, noted in the Industry Commission Report, *Ibid.*

employment, and the informal, underground aspects of homework which may cause homeworkers to be reluctant to identify themselves in Government surveys.]

- Compounding the problems associated with lack of data in relation to the number of outworkers is the additional problem of not being able to estimate how many of the total number of outworkers are contract outworkers as opposed to employee outworkers. An additional complexity relates to the difficulty in assessing to what extent contract outworkers are covered by the Clothing Trade Award (ie whether or not the manufacturers or middlemen for whom contract outworkers perform work are respondents to the Award).

- There is no reliable data relating to the wages paid to employee outworkers or the remuneration received by contract outworkers. Given the significant possibility of non-compliance with existing award provisions, it is difficult to isolate the effects of the proposals encompassed in either legislation such as the Victorian Fair Employment Bill or the legislation proposed by the Federal Government (the Workplace Relations Amendment (Improved Protection for Victorian Workers) Bill 2002). It would be unrealistic to assume 100 per cent compliance with existing legislation or award provisions for employee outworkers, however, there is no reliable data on which to make an assumption as to the current level of compliance.

  - Anecdotal evidence[15] indicates that some outworkers may be paid at a rate as low as $2.00 per hour (no indication is given as to what proportion of outworkers might be receiving this rate of pay).

  - The Industry Commission commented: "This is consistent with the view of the TCFUA and relevant community and welfare groups which believe that the majority of TCF homeworkers do not receive full award entitlements. In addition they have reported long delays in payment for work completed as well as under-payment and non-payment of agreed amounts. While piece rate payments equivalent to as low as $2 an hour have been reported ... it is thought that typical piece rates are currently equivalent to around $7 per hour for proficient workers, which is still well below the minimum award rate of $10.60 per hour."[16]

- There is no reliable data which enables any accurate estimate of the number of hours worked by either contract outworkers or employee outworkers.

  - Working from data supplied to its inquiry into TCF industries by TCF companies which use homeworkers, the Industry Commission estimated that the extent of homeworking in the clothing industry was equivalent to around 23,000 full time participants, and concluded: "… given the majority of homeworkers are thought to be working intermittently rather than full time, it is not possible to calculate the total number of people performing TCF homework from these figures." [17]

  - Another study, based on interviews with a sample of 100 outworkers in both NSW and Victoria, indicated that 92% of factory based workers considered themselves to be full-time, while 78% of outworkers considered themselves to be full-time. In the same survey, 6% of outworkers said they were part-time, 1% said they were casual, 5%

[15] Reported by the Senate Economic References Committee, *Outworkers in the Garment Industry*, December 1996.
[16] Industry Commission Report, *Op. cit*., p. 122-123
[17] ***Ibid***., p. 122.

answered 'other' and 10% had 'no response'. [It should also be noted that the same study indicated that the majority of those interviewed in fact worked for more than one 'employer'.[18]]

Adverse impacts on contract outworkers

3. It can be safely assumed that any increase in minimum rates of remuneration would be expected to lead to some loss of employment opportunities for contract outworkers otherwise engaged in the Victorian TCF industry, particularly in those parts of the TCF labour market where remuneration is currently lowest. The employment or engagement of outworkers may well be particularly sensitive to real wage levels. While there has only been a limited number of studies in Australia that have analysed the relationship between wages and employment for unskilled workers, the international evidence[19] suggests that the employment of unskilled workers is more sensitive to wage rises than the employment of skilled workers. The typical estimate of the elasticity of labour demand at the aggregate level in Australia is around –0.8 (ie. a 1 per cent rise in real wages will lead to a 0.8 per cent decline in employment): the elasticity of labour demand for outworkers may well be somewhat greater than this, possibly in the order of –1.3.

4. This observation that increased remuneration could be expected to lead to loss of economic opportunities is consistent with the Industry Commission conclusion that, whilst it was not able to make a firm judgement regarding the proportion of homeworking which would be likely to remain under a system in which homeworkers were part of the formal economy, there would be a significant decline in the number of homeworkers if award conditions were observed.[20]

5. However, this needs to be balanced against the observation of the TCFUA and others that TCF outwork is largely concentrated in the fashion apparel sector, which is not immediately suited to overseas production due to the short production runs and quick demand responses required by customers. The TCFUA view is that the fashion apparel sector may be better able than some other sectors to sustain any retail price rises consequent on rises in the cost of labour, due to greater product differentiation and closely targeted markets. "The local advantages for some forms of clothing manufacturing … imply that a proportion of the clothing currently produced by homeworkers would continue to be manufactured by them even if they were to be paid award rates."[21]

6. In addition, employment effects will be dependent on the level of compliance with the new system.

Beneficial impacts on contract outworkers

7. Raising the minimum rates of remuneration for contract outworkers to match the minimum rates for employee outworkers would have financial and social benefits for individual outworkers. (For the reasons noted above, it is not possible to estimate meaningfully how much

---

[18] UNSW Studies in Australian Industrial Relations, Mayhew, C. and Quinlan, M., *Outsourcing and Occupational Health & Safety: A Comparative Study of Factory-based and Outworkers in the Australian TCF Industry*, Industrial Relations Research Centre, 1998.

[19] See for example Hamermesh, D., *Labor Demand*, Princeton University Press, 1993.

[20] Industry Commission Report (No. 59), *The Textiles, Clothing and Footwear Industries*, 9 September 1997, p. 123-124

[21] *Ibid.*

rates of remuneration would be increased.) Social and occupational health and safety effects could also be anticipated, as a result of increasing outworkers' pay. It may be possible for some outworkers to decrease their hours of work, reduce the incidence of repetitive strain, and improve their family arrangements, while retaining the flexibility inherent in outwork.

8. Options 2, 3 and 4 would all provide contract outworkers with easier access to a remedy than is presently available, where they have been paid less than employee outworkers. Currently, a contract outworker would need to bring a Federal Court action under section 127A of the Workplace Relations Act, demonstrating that the contract is unfair or harsh, with a view to securing an order for any difference in pay compared to that received by an employee outworker. Under the proposed option, contract outworkers would only need to show that they were not receiving the correct amount of pay as specified under the Act, which would be a much easier case to argue than the unfairness of the contract. Also, contract outworkers would be able to bring such a claim in any court of competent jurisdiction (such as a Magistrate's Court), which could be less expensive than the Federal Court.

NOTES ON CLAUSES

Clause 1 – Short title

This is a formal provision specifying the short title of the Act.

Clause 2 – Commencement

This clause specifies when various provisions of the Act are proposed to commence. Section 1 to 3 and anything in the Act not elsewhere covered by the table will commence on the day on which the Act receives the Royal Assent. The amendments set out in Schedules 1 and 2 will commence on a single day to be fixed by proclamation, subject to subsection (3).

Subclause 2(3) has the effect that if a provision of this Act does not commence within six months of the day on which the Act receives the Royal Assent, it will commence on the day following the end of that six month period.

Clause 3 – Schedule(s)

Clause 3 provides that each Act specified in a Schedule to this Act is amended or repealed as set out in the Schedule, and that any other item in a Schedule operates according to its terms.

SCHEDULE 1 – MATTERS CONCERNING VICTORIA

Part 1 – Amendment of the Workplace Relations Act 1996

Item 1 – After subsection 45(3)

1.1 Item 1 proposes to insert new subsection 45(3A), which would entitle the Victorian Government to intervene in certain appeals before the Full Bench of the Australian Industrial Relations Commission ('the Commission'). (Items 7, 10 and 13 would give the Victorian Government rights of intervention in such matters at first instance.)

1.2 The Victorian Government would have a right to intervene in appeals in two circumstances. The first of these is an appeal against a decision regarding the suspension or termination of a bargaining period under section 170MW of the Act, where one or more employees in Victoria were to be covered by the proposed agreement. The second is in relation to appeals under section 501 of the Act setting or varying a minimum wage applicable to Victorian employees.

1.3 Where a Minister of the Victorian Government applies to intervene in these proceedings on behalf of the Government of Victoria, the Commission must grant leave to intervene.

Item 2 – Subsection 86(1)

1.4 Item 2 proposes a revision of subsection 86(1) of the Act, and the insertion of new subsection 86(1A). Section 86 sets out the powers of authorised inspectors to enter into and inspect workplaces for the purpose of ascertaining compliance with the requirements of the Act, and of certain industrial instruments made pursuant to it. New subsection 86(1) would set out the general purposes for which inspectors may exercise their powers.

1.5 Item 2 also proposes the insertion of new paragraph 86(1A)(c), which would permit an inspector to require a person to produce a document relevant to the purpose of ascertaining compliance with the Act or an award or agreement (other than an Australian Workplace Agreement) made under it, without first having to enter and inspect the premises of the employer. At present, an inspector may only compel a person to provide information in the course of an inspection of premises. That power to obtain documents would remain – proposed subparagraph 86(1A)(b)(iv).

Item 3 – Subsection 86(2)
Item 4 – Subsection 86(3)

1.6 The amendments proposed by items 3 and 4 are consequential upon the restructure of section 86.

Item 5 – After subsection 86(4)

1.7 Item 5 proposes to insert new subsections 86(4A), (4B) and (4C), which would apply where an inspector requests information from a person pursuant to a notice issued under paragraph 86(1A)(c). New subsection 86(4A) proposes the formal requirements for the notice. Proposed subsection 86(4B) would statutorily abrogate the privilege against self-incrimination;

however, subsection 86(4C) would provide that any information obtained as a result of a document produced under paragraph 86(1A)(c) would not be admissible in any criminal proceedings against that individual, unless it is a prosecution for hindering or obstructing an inspector in the exercise of his or her powers. These provisions are consistent with Commonwealth criminal law policy.

Item 6 – At the end of section 86

1.8 Item 6 proposes to insert new subsections 86(6) and (7), which would permit inspectors from the Department of Employment and Workplace Relations to enter into and inspect workplaces in Victoria where the terms and conditions of employment of the employees concerned are determined by a contract of employment other than a Victorian employment agreement.

1.9 The inclusion of these subsections would ensure that complaints of breaches of such contracts of employment, and in particular, of the minimum conditions of employment contained in Schedule 1A to the Act, would be able to be efficiently and effectively investigated and resolved. In addition, the amendments would ensure consistency with the regime which existed under the former *Employee Relations Act 1992* (Vic), sections 148 and 149 of which conferred power on authorised inspectors to enter premises and inspect documents for the purpose of ensuring compliance with that Act.

Item 7 – After subsection 170MW(1)

1.10 Item 7 proposes to insert new subsection 170MW(1A) into the Act. This would entitle the Victorian Government to intervene in an application for the suspension or termination of a bargaining period for a certified agreement under section 170MW if one or more of the employees who would be subject to the proposed certified agreement is an employee in Victoria.

1.11 Where a Minister of the Victorian Government applies to intervene in these proceedings on behalf of the Government of Victoria, the Commission must grant leave to intervene.

Item 8 – Section 305

1.12 The amendment to section 305 proposed by item 8 is consequential upon the amendments made by item 2.

Item 9 – At the end of subsection 501(1)

1.13 This item proposes to insert a legislative note at the end of subsection 501(1), to alert readers to the fact that new section 501A also contains provisions relevant to the minimum wage.

Item 10 – After subsection 501(2)

1.14 Item 10 proposes to insert a new subsection (2A) into section 501 which would entitle the Victorian Government to intervene in proceedings under section 501(1) relating to the setting or adjusting of a minimum rate of pay for employment within a declared industry sector.

1.15 To exercise this right, a Minister of the Victorian Government must apply for leave to intervene, which the Commission must grant.

Item 11 – After section 501

New section 501A – Supported Wage System – minimum wage

1.16 Item 11 proposes to insert a new section 501A into the Act. This provision would enable the Commission to order that the Supported Wage System (SWS) applies to Schedule 1A employment in a particular work classification in a declared industry sector (as defined in section 489 of the Act).

1.17 The SWS is a Commonwealth program to assist people with disabilities to obtain employment in the open labour market. It includes arrangements for calculating a pro-rata wage based on an assessment of an employee's productive capacity. The workplace relations arrangements that set out the principles and procedures for establishing a pro rata wage and other employment conditions are contained in a model clause which has been endorsed by a Full Bench of the Commission.

1.18 At present (unlike employees under federal awards and agreements that contain the SWS model clause) Schedule 1A employees do not have direct access to the SWS, but must instead make individual applications to the Commission under section 509 to obtain a certificate of exemption from the relevant minimum wage set under section 501.

1.19 The effect of a section 501A order would be to enable the SWS calculation of the minimum wage to apply to those employees employed under the SWS, instead of the minimum wage that would otherwise apply under paragraph 1(1)(c) of Schedule 1A of the Act.

1.20 Before the Commission can make such an order there must be an application by an eligible employee (or employees) within the relevant work classification, an employer of such employees, the Commonwealth Minister, or an organisation entitled to represent either the employers or the employees.

Item 12 – Subsection 502(1)

1.21 Item 12 would amend subsection 502(1) to enable a section 501A proceeding to be referred to the Full Bench of the Commission where the President is of the opinion that the public interest warrants such a referral. (This reflects equivalent arrangements for section 501 proceedings in relation to minimum wages generally.)

Item 13 – After subsection 502(5)

1.22 Item 13 proposes to insert a new subsection (5A) into section 502 of the Act.

1.23 Proposed subsection (5A) would enable the Victorian Government to intervene in any section 501 proceeding that is referred under section 502 of the Act to the Full Bench of the Commission.

1.24 The Commission must grant leave upon such an application being made by a Minister of the Victorian Government.

Item 14 – Section 503

1.25 Item 14 proposes an amendment to section 503 to enable the modified application of section 143 of the Act in relation to Commission orders under new section 501A.

Item 15 – Subsection 506(2)

1.26 Item 15 proposes the repeal of existing subsection 506(2) of the Act, and the insertion of new subsections 506(2) and 506(3). New subsection 506(2) would permit proceedings to be brought for a penalty (under section 178 of the Act) or a recovery of underpayments (under section 179) in the case where a contract of employment, other than a Victorian employment agreement, does not comply with a minimum term or condition set out in Schedule 1A to the Act.

1.27 Although section 533 allows an employee to seek a penalty in respect of a breach of a minimum term or condition in Schedule 1A, the section does not provide for the recovery of an amount of underpayment. In addition, an inspector is unable to bring an action under section 533 on behalf of an employee. Accordingly, the amendment proposed by this item would facilitate enforcement of Schedule 1A entitlements by permitting inspectors to bring actions under sections 178 and 179 on behalf of employees to whom those entitlements apply. Item 20 would amend section 533 to ensure that an action for a penalty for a breach of a Schedule 1A entitlement could not be instituted under both that section and section 178.

1.28 New subsection 506(3) would make clear that the amendment to subsection 506(2) is not intended to prevent a person from taking action at common law in respect of such breaches.

Item 16 – At the end of Subdivision B of Division 3 of Part XV

New section 509A – Stand down provisions in a contract of employment (other than an employment agreement)

1.29 Item 16 proposes the insertion of new section 509A, which would provide an employer with a statutory entitlement to stand down a Schedule 1A employee in certain circumstances.

1.30 Where a contract of employment of a Schedule 1A employee does not provide for the standing-down of that employee when that employee cannot be usefully employed because of any strike, breakdown of machinery or stoppage of work for any cause for which the employer cannot reasonably be held responsible, the contract of employment would be deemed to contain the model stand-down provision set out in subsection 509A(2). The model stand-down provision is in the same terms as the provision deemed to be included in Victorian employment agreements by virtue of section 519 of the Act.

1.31 This amendment is intended to address uncertainty amongst employers and employees in Victoria as to the right of employers to stand down employees to whom it was not possible to provide work.

Item 17 – Heading to Subdivision D of Division 3 of Part XV

1.32 Item 17 proposes the repeal of the existing heading to the Subdivision and its replacement with a new heading, to reflect the changes proposed to Subdivision D by item 18.

Item 18 – Section 514

1.33 Item 18 proposes the repeal of existing section 514, which currently provides that the *Workplace Relations Regulations 1996* (the Regulations) may require employers of employees in Victoria to issue pay slips to those employees, and its replacement with a new provision.

New section 514 - Making and retaining employment records

1.34 Proposed section 514 would provide for a power to make regulations:

- requiring employers to keep and maintain employment records for employees employed under Victorian employment agreements, or pursuant to a contract of employment underpinned by the Schedule 1A minimum conditions;
- in relation to the inspection of such records; and
- requiring employers to issue pay slips to those employees, as prescribed by the Regulations.

Item 19 – Section 532

1.35 Item 19 proposes the repeal of section 532. Section 532 provides that regulations under section 353A in relation to employment records and pay slips may be made in respect of employees employed under Victorian employment agreements. As the power to make regulations would be contained in new section 514, section 532 would no longer be necessary.

Item 20 – At the end of section 533

1.36 Item 20 proposes the insertion of new subsection 533(4). Section 533 provides for the recovery of penalties in respect of a contravention of a 'penalty' provision. This allows a person to seek a penalty for contravention of subsection 500(1), which provides that the minimum conditions of employment of employees in Victoria are contained in Schedule 1A.

1.37 New subsection 533(4) would prevent a person from applying for a penalty under section 533 for breach of a minimum term or condition of employment applicable to the employment under section 500(1) if the person has already sought a penalty under section 178 in respect of that breach. (See also item 15.)

Item 21 – Paragraphs 1(1)(a) and (b) of Schedule 1A

1.38 Item 21 proposes to replace current paragraphs 1(1)(a) and (b) with new paragraphs. In particular, paragraph (b) is to be redrafted so as to substitute the references to 'sick leave' with references to 'personal leave'. The amendments would also make clear that casual employees are not entitled to paid annual leave and paid personal leave.

1.39 Paid personal leave is a consolidation of paid sick leave (with respect to personal illness and injury) and carer's leave (with respect to a member of the employee's immediate family or household who requires the employee's care and support – see also item 26).

1.40 Item 21 also proposes the inclusion of a new paragraph (ba) to provide an additional entitlement to bereavement leave.

Item 22 – Paragraph 1(1)(c) of Schedule 1A

1.41 Item 22 proposes to amend paragraph (1)(1)(c) to include a reference to paragraph (1)(1)(ca), which is to be inserted by item 23.

Item 23 – At the end of paragraph 1(1)(c) of Schedule 1A

1.42 Item 23 proposes to amend paragraph (1)(1)(ca), which provides that where an employee's wage is set in accordance with the SWS, the wage rate calculated under the SWS is the employee's minimum wage.

Item 24 – At the end of subclause 1(1) of Schedule 1A
Item 25 – At the end of clause 1 of Schedule 1A

1.43 Item 24 proposes to insert new paragraph 1(1)(f). This amendment would clarify that an employee whose terms and conditions of employment are governed by a contract of employment underpinned by the Schedule 1A minima is entitled to payment for work performed in excess of 38 hours a week.

1.44 Item 25 would amend Schedule 1A to provide that hours worked in a week that are in excess of 38 are to be paid at the same hourly rate of pay as that applicable to the employee for his or her work classification as determined by the Commission under section 501 or 501A, unless the employer and employee agree to a higher hourly rate.

Item 26 – At the end of Part 1 of Schedule 1A

1.45 Item 26 proposes a series of amendments concerning the calculation of the entitlements to annual leave, personal leave and bereavement leave, and the requirements for taking such leave.

1.46 The amendments remedy an uncertainty generated by the current calculus which is based on the number of ordinary hours worked in a particular period (depending on the type of leave). This formula has led to uncertainty where the ordinary hours that the employee is required to work vary from week to week.

New clause 1A – Annual leave

1.47 Currently, part (a) of paragraph 1(1) of Schedule 1A makes provision for the calculation of minimum entitlements to paid annual leave on the basis of the number of ordinary hours worked in *any* four week period in a year. The new paragraph simplifies the pro-rata calculus of annual leave entitlements.

1.48 Item 26 also proposes to clarify matters associated with the annual leave entitlement, including that it counts as service for all purposes, is to be paid at the time the employee takes annual leave or leaves his or her employment, and that annual leave must be taken within 12 months after the end of the year in which it accrued unless agreed otherwise. In addition, the rules about annual leave empower the employer to direct the employee to take annual leave when the business is shut down for a period (eg a Christmas close down, or seasonal shut down).

New clause 1B – Personal leave

1.49 Currently, paragraph (b) of subclause 1(1) of Schedule 1A makes provision for the calculation of minimum entitlements to paid sick leave. The new paragraph would provide for a broader entitlement to paid personal leave (which as noted is a consolidation of sick and carer's leave). The amendments to Schedule 1A proposed by item 26 would detail when personal leave may be used, and how the entitlement is to be calculated.

1.50 Personal leave must be paid when an employee takes personal leave. An employee accrues personal leave depending upon the length of service with the employer as follows:

- an employee who has worked for the employer for less than 12 months accrues one day of personal leave for each completed 6 weeks;
- an employee who has worked for the employer for 12 months or more is entitled to 8 days personal leave each year;
- part-time employees accrue personal leave on a pro-rata basis.

1.51 At the end of each year of employment, unused personal leave will accumulate at a maximum rate of eight days per year

1.52 The use of paid personal leave is subject to the conditions attaching to, respectively, sick leave and carer's leave (below).

New clause 1C – Sick leave

1.53 This provision details the conditions surrounding the entitlement to paid sick leave.

1.54 After five months with the one employer, an employee is entitled to be reimbursed for up to four days unpaid sick leave which he or she may have taken during that five-month period in circumstances where the entitlement to paid sick leave had not accrued due to insufficient service. This would apply, for example, if the employee had taken four days off work due to the flu during the first month of service, when no sick leave at all had yet accrued.

1.55 An employee is not entitled to paid sick leave if he or she is receiving concurrent payments under any workers' compensation scheme.

1.56 The entitlement to paid sick leave is conditional on the employee's prompt notification to the employer. The employer is entitled to request a medical certificate from the employee.

New clause ID – Carer's leave

1.57 An employee is entitled to up to five days' paid leave each year to care for and support sick members of his or her immediate family or household.

1.58 An employee cannot take paid carer's leave if another person has also taken leave to support the same family or household member at the same time.

1.59 The entitlement to paid carer's leave is conditional on the employee's prompt notification to the employer. The employer is entitled to ask the employee, by way of a medical certificate or statutory declaration, to establish the nature of the illness of the person cared for, and the need of that person for care and support by another person.

New clause 1E – Bereavement leave

1.60 Item 26 also proposes a new entitlement to bereavement leave in the event of the death of an immediate family or household member. The entitlement is a maximum 2 days paid leave for each death. For example, if there is an event resulting in multiple fatalities in the employee's immediate family or household the employee is entitled to 2 days' paid bereavement leave for each death.

1.61 This entitlement is non-cumulative.

New clause 1F – Definitions

1.62 Item 26 also proposes definitions of 'immediate family' and 'de facto spouse' for the purposes of the entitlements to carer's leave and bereavement leave.

Part 2 – Application and saving provisions

Item 27 – Definition

1.63 Item 27 would provide that references to 'Principal Act' in this Part are to the *Workplace Relations Act 1996*.

Item 28 – Application of item 1

1.64 Item 28 would provide that the Victorian Government may intervene in appeals to the Full Bench against decisions under section 170MW and section 501:

- where the appeal was instituted, but not determined, before the commencement of item 1; and

- appeals to the Full Bench instituted on or after the commencement of that item.

Item 29 – Application of item 7

1.65 Item 29 would provide that the Victorian Government may intervene in applications under section 170MW to suspend or terminate a bargaining period in the following circumstances:

- where the section 170MW application was instituted, but not determined, before the commencement of item 7; and

- section 170MW applications made on or after the commencement of that item.

Item 30 – Application of item 10

1.66 Item 30 would provide that the Victorian Government may intervene in applications for minimum wage orders under section 501 of the Act in the following circumstances:

- where the section 501 application was instituted, but not determined, before the commencement of item 10; and

- section 501 applications made on or after the commencement of that item.

Item 31 – Application of item 13

1.67 This item would provide that the Victorian Government may intervene in proceedings referred to a Full Bench of the Commission under section 502 of the Act in the following circumstances:

- where a section 501 proceeding was referred to a Full Bench under section 502, but it had not been determined, before the commencement of item 13; and

- proceedings referred to a Full Bench under section 502 after the commencement of item 13.

Item 32 – Application of item 15

1.68 Item 32 proposes that a person would only be able to institute proceedings under sections 178 and 179 of the Act in respect of a breach of a minimum condition of employment set out in Schedule 1A that occurs on or after the commencement of item 15 of this Schedule.

Item 33 – Saving provision in relation to certain regulations made for the purposes of sections 353A and 514 of the Principal Act

1.69 Item 33 would provide for the preservation of regulations made under sections 353A that prescribe record-keeping requirements in respect of employees covered by a Victorian employment agreement. On commencement of items 17, 18 and 19 of this Schedule, the regulations would be taken to have been made under proposed subsection 514(2).

1.70 In addition, item 33 would provide for the preservation of regulations made in relation to pay slips under section 514 of the WR Act. On commencement of item 18, the regulations would be taken to have been made under proposed subsection 514(3).

Item 34 – Application of items 21 and 26 – annual leave

1.71 Item 34 would provide that the amendments to Schedule 1A relating to the annual leave entitlement would apply in respect of the first year of the employee's employment that commences on or after the commencement of items 21 and 26 of this Schedule and each subsequent year of employment.

1.72 This item would also deal with the case where an employee was employed before the date of commencement of the items, and continues in employment after commencement. The amendments would apply in respect of such an employee in respect of the year beginning on the (next) anniversary of the employee's engagement, and each subsequent year of the employee's employment.

Item 35 – Application of items 21 and 26 – personal leave

1.73 Item 35 would provide that the amendments to Schedule 1A relating to the personal leave entitlement would apply in respect of the first year of the employee's employment that commences on or after the commencement of items 21 and 26 of this Schedule and each subsequent year of employment. In addition, the amendments relating to personal leave apply in respect of personal leave taken on or after the day of their commencement.

1.74 Item 35 would also provide that, from the date of commencement of items 21 and 26, any sick leave accumulated by an employee under paragraph (1)(1)(b) of Schedule 1A as in force immediately before the day of commencement will be taken to be personal leave.

Item 36 – Bereavement leave

1.75 Item 36 would provide that the entitlement to bereavement leave applies in relation to deaths occurring on or after the commencement of item 26.

SCHEDULE 2 – CONTRACT OUTWORKERS IN VICTORIA IN THE TEXTILE, CLOTHING AND FOOTWEAR INDUSTRY

2.1 This Schedule proposes amendments of the *Workplace Relations Act 1996* (the Act) so as to provide an entitlement for persons performing work as outworkers for the textile, clothing and footwear (TCF) industry in Victoria, under contracts for services, to be paid at least the amounts they would have been required to be paid for the work because of Part XV of the Act (that is, because of Schedule 1A, or section 509 where applicable) if they had performed it as employees.

2.2 The amendments will also provide for enforcement of this entitlement, and enable the making of regulations in relation to the keeping and inspection of records concerning contract outwork, as required for the enforceability of the new entitlement.

2.3 For constitutional reasons, the core obligation and entitlement proposed by the Schedule will apply, on enactment, only to the extent of contracts for services entered into by constitutional corporations, or where work is contracted to performed under a contract for services in the course of, or in relation to, interstate or international trade or commerce.

Part 1 – Amendment of the Workplace Relations Act 1996

2.4 This Part contains the principal item (item 3), which proposes the insertion of a new Part into the Act, and two other items proposing consequential amendments. (Part 2 of this Schedule contains the transitional provision.)

Item 1 – Subsection 86(1)

2.5 This item proposes a consequential amendment to section 86, which provides for the powers of inspectors appointed under the Act, for the purpose of ascertaining whether awards, certified agreements and the Act generally are being complied with. New section 542, proposed by item 3, will provide for powers of inspectors in respect of compliance with new section 541 (which will impose the core obligation certainly owed to persons working as outworkers under contracts for services). Accordingly, this amendment establishes that inspectors' powers under section 86 apply in respect of compliance with the Act, other than section 541, so that the powers under sections 86 and 542 will not overlap.

Item 2 – Section 305

2.6 This item proposes a consequential amendment to section 305, which establishes the offence of obstructing an inspector. One limb of the prohibition presently refers to requirements made by an inspector under section 86; a corresponding reference to requirements made by an inspector under new section 542 is required, and this item provides such a reference.

Item 3 – After Part XV

2.7 This is the principal item of this Schedule, which proposes the insertion of the operative provisions, particularly the core obligation towards persons working as outworkers under contracts for services in the TCF industry.

New Part XVI – Contract outworkers in Victoria in the textile, clothing and footwear industry

2.8 This new Part would come at the end of the Act, after Part XV, 'Matters referred by Victoria'.

New Division 1 – Preliminary

New section 537 – Object of Part

2.9 This section will set out the object of the new Part.

New section 538 – Definitions

2.10 This section will define terms to be used by provisions in the new Part.

2.11 'Contract outworker' is defined as an individual (which means a natural person, by the *Acts Interpretation Act 1901*) who is a party to a contract for services performs work under the contract for another party or parties to the contract. (The scope of the core obligation is defined by reference to the contract under which a contract outworker works, although it is not only owed to persons who are parties to the contract; this is explained in relation to new section 541, below.)

2.12 'Court of competent jurisdiction' is defined for the purposes of enforcement under this Part, in the same way as the term is defined in section 177A for the purposes of enforcement under Part VI.

2.13 'Employee' is defined to have the same meaning as in Part XV, 'Matters referred by Victoria', so that there is no gap between the safety net provided for employee outworkers in the TCF industry in Victoria and the safety net to be provided for contract outworkers by the new Part.

New Division 2 – New Commonwealth provisions

New Subdivision A – General

2.14 This Subdivision sets out the extent to which the core obligation will apply. This is not universal, because of limits on the Commonwealth's legislative power under the Constitution.

New section 539 – Constitutional corporations

2.15 This section will provide that the Part applies where a party to a relevant contract for services is a constitutional corporation. 'Constitutional corporation' is defined broadly in section 4 of the Act.

New section 540 – Interstate trade or commerce etc.

2.16 This section will provide that the Part also applies where work is contracted to be performed under a contract for services in the course of, or in relation to, international, interstate or intraterritorial trade or commerce.

New Subdivision B – Minimum rate of pay

New section 541 – Minimum rate of pay

2.17 This section will impose the core obligation which the rest of the Part supports. Subsection (1) sets up the framework of the core obligation; the elements of the subsection, which are explained below, are as follows. It refers to work which is 'performed under and in accordance with a contract for services', and is 'performed by the contract outworker or one or more other individuals who are not parties to the contract', and 'satisfies the criteria in subsection (2)', then obliges 'a person who is obliged under the contract to pay for the work performed' to pay the persons 'not less than the statutory amount' for their work. These elements are explained below.

2.18 As noted above, the core obligation is not only owed to the outworker who entered into the contract, but also to other persons working as outworkers under the contract. There are a number of limitations on this breadth.

- Where a contract outworker subcontracts all or part of the work, which is then performed by other outworkers, the core obligation will be owed to those other outworkers by the first contract outworker (who will be the principal for the purposes of the subcontract), as the work will be regarded as having been performed under the subcontract, rather than under the primary contract; this is made clear by subsection (7).

- Where a contract outworker employs other persons to assist in the performance of a contract for services, those persons will have at least the minimum entitlements of employees under Schedule 1A of the Act.

- It will remain open to a principal to stipulate in a contract that the personal services of a particular person, such as the contract outworker, are required, and in this case any work undertaken by any other person would not be work performed 'in accordance with' the contract.

2.19 This leaves the case where work is undertaken by a group of outworkers, not under any contractual arrangement as between themselves (typically members of a family working together), under and for the purposes of a contract which did not specify how the services contracted for were to be performed. In such a case, the safety net established by the core obligation extends to all of the persons performing work, leaving no scope for evasion on the basis of uncertainty as to contractual arrangements.

2.20 The criteria in subsection (2), which work has to satisfy if it is to be covered by the core obligation, are that the work is performed in Victoria, the work is for the textile, clothing and footwear industry (this is broadly defined), and the work is performed in private residential premises or premises that are not business or commercial premises of a principal to the contract.

2.21 The core obligation is imposed upon 'a person who is obliged under the contract to pay for the work performed' to cover cases where there may be more than two parties to the contract.

2.22 The 'statutory amount' is identified by subsection (3), with subsection (4), for the general case, and by subsection (5), for the special case of a person holding a certificate under section 509 of the Act.

2.23 Subsection (3) provides that the statutory amount (the minimum amount which must be paid) is the amount which the person would have been entitled to be paid, because of clause 1 of Schedule 1A to the Act, for the work in question, if he or she had performed it as an employee in Victoria. The statutory amount will be worked out in the way the amount would have been worked out under Schedule 1A. For example, if a contract outworker's contract provided for payment on a piece-rate basis, and the work to be performed was work for which an employee could be engaged on a piece-rate basis under the applicable minimum wage order in force under section 501 of the Act (as is presently provided under the Manufacturing Industry Sector Minimum Wage Order – Victoria 1997), then the principal would have to make payments in accordance with a piece-rate not less than the minimum piece-rate specified under the order.

2.24 Subsection (4) provides that, for the purposes of subsection (3), provisions of clause 1 that deal with paid leave are to be disregarded. This makes clear that the minimum payment does not include any payments that would have had to be made for periods in which the outworker was unable to work and would, if an employee, have been eligible for paid leave; it only includes payments in respect of the work actually performed.

2.25 Subsection (5) applies where a person holds a certificate under section 509. The Australian Industrial Relations Commission can give an employee a certificate, which has the effect that the relevant minimum rate of pay otherwise applicable under Schedule 1A does not apply to the employee, if the Commission is satisfied that, because of the person's age, infirmity or slowness, the person is unable to obtain work at the relevant minimum rate otherwise applicable. In such a case, the minimum rate of pay specified in the certificate applies instead. Where a person working as an outworker holds such a certificate, the statutory amount for the purposes of new section 541 is to be worked out by reference to the minimum rate of pay specified in the person's certificate.

New Subdivision C – Inspectors

New section 542 – Powers of inspectors

2.26 This new section will provide the powers necessary for investigation of compliance with the core obligation in new section 541. It is supplemented by the enforcement powers to be provided in the following Subdivision. New section 542 closely parallels section 86 of the Act (as it is proposed to be amended by items 2 to 6 of Schedule 1 to the Bill), with the appropriate changes to reflect the nature of the core obligation. It will authorise inspectors (appointed under section 84 of the Act), for the purpose of ascertaining whether the core obligation is being (or has been) observed:

- to enter premises where relevant work is performed or a place of business where there are relevant documents;

- to inspect, take samples, interview persons, require production of documents and inspect, make copies of or take extracts from documents; and

- to require production of a document (subject to a limited use immunity).

New Subdivision D – Enforcement of minimum rate of pay

New section 543 – Imposition and recovery of penalties

2.27 This new section will provide for imposition of civil penalties for breaches of new section 541, on application by an inspector or a person to whom the core obligation was relevantly owed. It closely parallels section 178 of the Act, with the appropriate changes. On an application for a penalty, a court may also order payment of the amount of any underpayment.

New section 544 – Recovery of pay

2.28 This new section will provide for actions for recovery of payments owed under new section 541. It closely parallels section 179 of the Act, with the appropriate changes.

New section 545 – Interest up to judgment
New section 546 – Interest on judgment

2.29 These new sections will provide for interest on amounts owed under new section 541, up to and after any judgment under new sections 543 or 544. They closely parallel sections 179A and 179B of the Act, with the appropriate changes.

New section 547 – Plaintiffs may choose small claims procedure in magistrates' courts

2.30 This new section will enable a person pursuing an action for recovery of a payment owed under new section 541, in a magistrate's court, to elect for a small claims procedure to apply. It closely parallels sections 179C and 179D of the Act, with the appropriate changes.

New section 548 – Enforcement of penalties etc.

2.31 This new section will provide for enforcement of penalties ordered in proceedings under new section 543. It closely parallels section 357 of the Act, with the appropriate changes.

New section 549 – Records relating to contracts for services with contract outworkers

2.32 This new section, which will parallel section 353A of the WR Act, will enable the regulations to make provision in relation to:

- the making of outworker records (records relating to contracts for services, to the extent that work to be performed under the contracts meets the criteria in new subsection 541(2)), by persons subject to the obligation under new subsection 541(1) and by persons to whom the obligation is owed;

- the inspection of outworker records;

- the giving of outworker records by a party to the contract to another party; and

- the retention of outworker records.

2.33 It is envisaged that the regulations will require records to be made, exchanged and retained by principals and by contract outworkers. The records, which would partly fulfil the

function of employer time and wage records, and partly fulfil the function of employee payslips, are likely to be required to include information on matters such as the work performed, the hours worked, the payments made in respect of the work performed and the basis on which the payments were calculated. It is anticipated that the regulations will be informed by current regulations 131A to 131U of the Workplace Relations Regulations. The regulations would be subject to prior consultation, and possible disallowance, in the normal manner.

Part 2 – Application

2.34 This Part proposes the transitional provision to apply in relation to the amendments proposed by Part 1 of this Schedule.

Item 4 – Application of amendments made by Part 1

2.35 This item proposes that the new provisions proposed by Part 1 are to apply to all work performed after their commencement (which will occur on a date to be proclaimed), regardless of whether the contract under which the work is performed was entered into before or after that commencement. This is to provide the earliest possible application of the safety net proposed by Part 1, for the benefit of contract outworkers.