Chapter Two

Consideration of evidence

The bill in the context of workplace relations policy

1.1 Evidence received in written and oral submission to the inquiry has focused debate on the merits of Schedule 1A as a safety net for employee conditions and as a flexible mechanism for ensuring labour market stability. It has also highlighted constitutional and legislative difficulties in the regulation of outworkers in the textile, clothing and footwear industry; problems which offer no easy solution in spite of concern indicated on all sides of the debate.

1.2 There can be no dispute as to the determination of the Government to legislate for improvements in some workplace conditions for Schedule 1A workers, an intention signalled in the Workplace Relations Amendment (More Jobs Better Pay) Bill 1999. The responsibility for delay in implementing what all now agree is necessary protection for Schedule 1A employees lies with non-government parties in the Senate. It is remarkable that the Secretary of the Victorian Trades Hall Council, when asked if this bill should be passed, indicated his ambivalent view of the question. It was not the legislation he wanted, but it was better than nothing. He acknowledged that it would be an improvement for Schedule 1A employees. That is often the way it goes in the legislative process, but it has taken a number of years for the realities of government reform to workplace relations to impress themselves upon all stakeholders in this process.

1.3 In this report, Government party senators restate the way provisions of this legislation form part of coherent policy on workplace relations. The essence of government policy is to provide for a basic minimum rate of pay and conditions for employees who are not covered by other agreements, like agreements or Australian Workplace Agreements. Workplace negotiation is consistent with the Government's long term aim of moving the focus of agreements back to individuals and workplace teams. This ensures that there will be an equilibrium between production and output, on the one hand, and remuneration and conditions of employment on the other. It is an equilibrium which should work to the advantage of both employers and employees.

1.4 The award structure, however, because of its reach across a vast number of industries operating at varying rates of output and performance, and employing a diversity of employees with varying capacities, can be seen to offer a cruder and less sensitive mechanism for setting rates of pay and conditions.

1.5 It remains, nonetheless, the responsibility of Government to ensure that an appropriate safety net of working conditions is set as a floor upon which higher wages and better conditions can be negotiated. To this end, the amendments contained in this bill provide for increase employment conditions improved compliance and

enforcement arrangements for employees in order to ensure the safety net of Schedule 1A employees.

Deeming outworkers to be employees

1.6 The committee majority recognises that the plight of outworkers is a matter of concern to governments, to industry and to unions. This legislation attempts to redress many of the grievances of outworkers and to protect them from exploitation. Descriptions of the problems of outworkers, as recounted in two reports (1996 and 1998) of the Senate Economics References Committee, may be regarded as authoritative evidence of serious challenge occurring in this industry sector. The problem, as always, is to address the problem in a way which is likely to achieve the best results. This is more difficult than critics of the Government would admit.

1.7 The 1996 report stated that the Economics Committee had received compelling evidence of the confused status of outworkers: that some awards indicated that outworkers were employees, and others gave rise to the belief that outworkers were contractors. The committee took the view that all outworkers should be regarded as employees and recommended that the Government examine ways to clarify the status of outworkers in the garment industry.

1.8 The Government responded to the committee's report on 3 September 1997, noting its recommendations and stating that:

- clarification is complicated by constitutional limitations on the Commonwealth, ie. conciliation and arbitration power is limited to 'employees'. Any Commonwealth legislation seeking to alter the employment status of persons would need to depend on other constitutional power;

- despite the referral, there is no greater power for the Commonwealth to legislate in relation to non-employee outworkers in Victoria than in other States;

- due to these limitations, issues related to clarification need to be considered in a coordinated way by both Commonwealth and State governments. It was noted that some State legislation exists which deems certain outworkers to be employees;

- the progression of the issue needs to be handled carefully so as not to constrain flexible working arrangements. Some outworkers do not wish to be employees and contractual arrangements can provide appropriate options for these workers.

The Government undertook to bring the issue of clarification to the attention of relevant state ministers.[1]

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1 Submission No. 7, DEWR, p. 13

1.9 In its 1998 report the Economics Committee reiterated its concern about the employment status of outworkers, and again urged the government to take action to protect outworkers from further exploitation. In response, a working party of Commonwealth and state officials reported on options to clarify the employment status of outworkers. No consensus was reached. This largely reflected the different views in relation to the issue of choice between employment and independent contracting. The Commonwealth, in its consultations with state officials, identified the following issues of concern: the practicability of coordinated legislation; the lack of empirical evidence of the extent to which outworker employees are in fact coerced into disadvantageous contractual arrangements; constitutional impediments to unilateral legislation of the employment status of workers; and, the necessity to establish a consistent approach by all states, establishing a uniform resolution to the current definitional problems.[2]

1.10 Some states have legislated so that outworkers are deemed to be employees for the purposes of industrial regulation, but advice to the committee is that this path presents difficulties for the Commonwealth:

> While the deeming approach is open to the State Parliaments, the Commonwealth Parliament is not constitutionally free to comprehensively and directly legislate for the terms and conditions of engagement for employees or contractors, under the conciliation and arbitration power. Apart from constraints on the Commonwealth's power, the Commonwealth is unconvinced that the deeming of outworkers as employees is appropriate in the federal sphere. The Commonwealth supports providing outworkers in the TCF industry with a safety net entitlement to minimum remuneration, but considers the regulation of other terms and conditions is not appropriate in the context of contractual relationships entered into on a commercial basis.[3]

1.11 In summary, the committee majority does not regard deeming provisions to be consistent with the philosophy which underpins the Government's policy in regard to workplace relations reform. Central to this philosophy is the sanctity of agreements freely entered into by employers and employees: a principle which ensures maximum flexibility in working arrangements, and is necessary to suit the needs of a variety of businesses and their workforces. To deem all outworkers in the textile, clothing and footwear (TCF) industry to be employees on the assumption that there can be no genuine agreement based on mutual benefit would place unjustified constraints on the industry and its workforce.

Constitutional limitations

1.12 This bill, like other parts of the *Workplace Relations Act* draws upon a number of constitutional powers, most obviously section 51(xxxv), the conciliation

2 Submission No. 7, DEWR, p. 15

3 Submission No. 7, DEWR, p. 17

and arbitration powers, which supports the system of dispute resolution, as well as the corporations power (section 51 [xx]) and the trade power (section 51[i]). The referral of power from the Victorian Parliament in 1996 was not complete. There is, for instance, no provision within the referred powers to provide an entitlement to the statutory amount for outworkers not engaged by corporations, or not engaged in the relevant trade and commerce. The Victorian government recently offered to refer additional powers to the Commonwealth, as provided for in the Federal Awards (Uniform Systems) Bill 2002, which would have allowed the Commonwealth the power to legislate to allow the AIRC to order that federal awards apply as common rules in Victoria. This offer has been made on the basis of the Commonwealth deeming outworkers as employees; an approach which the Commonwealth, for reasons stated above, does not favour.

1.13 The committee majority notes that the Australian Industry Group (AiG) has been urging the use of common rules, a matter to which the Commonwealth is unlikely to respond to, because of the potential for these measures to increase unemployment in Victoria. Neither the Victorian Employers' Chamber of Commerce and Industry (VECCI) nor the Australian Chamber of Commerce and Industry (ACCI) have joined the agitation for the application of the common rule to workplaces across Victoria or anywhere else in Australia. The Victorian legislation was voted down by the opposition in the upper house.

Argument over Schedule 1A

1.14 Unions and other critics of the legislation argue that awards are to be preferred to Schedule 1A. The committee majority supports the view put to it that awards are complex documents frequently not understood either by employees or employers. As the Australian Chamber of Commerce and Industry (ACCI) pointed out:

> There is also the challenge of federal award proliferation, which is particularly marked for employers in Victoria. There are many hundreds, perhaps over 1000 of federal awards applying in Victoria, with often dozens potentially applying to one workplace or particular employee. Each award in turn contains many dozens of employment requirements, which may differ materially from those in awards with slightly different coverage.
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> By contrast, Schedule 1A provides a uniform, easy to understand approach to minimum terms and conditions of employment.[4]

1.15 Mention has been made of the reasons why the Government wishes to maintain Schedule 1A with an enhanced protection role. The evidence points to the flexibility of Schedule 1A that has had an obvious benefit to the Victorian economy. The committee heard evidence from the Victorian Employers' Chamber of Commerce and Industry (VECCI) of the advantage of maintaining Schedule 1A, albeit more up-to-date in its protective provisions:

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4 Submission No. 9, ACCI, p. 3

> We have also been supportive of the framework now contained in part XV and schedule 1A of the Workplace Relations Act. We believe that it has provided particular benefits for small business in Victoria—it is small business that is predominantly regulated by that framework—and we believe that those benefits have been particularly attractive in areas such as property and business services; retailing; businesses in the cultural and recreational services areas, particularly hospitality and tourism; small areas of manufacturing; and the printing, publishing and IT industries. We also believe that it has had a particular benefit in regional Victoria, where a greater proportion of businesses are covered by that framework.
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> Our members tell us that the resulting benefits include greater flexibility, increased employment creation, enhanced relationships with employees, improved profitability, improved productivity and greater competitiveness. At the same time, we understand that the framework is a dynamic one and we are supportive of appropriate changes to deal with particular issues that may arise from time to time.[5]

1.16 Reference has already been made to the support for common rules by the AiG. The submission from the Victorian Farmers Federation (VFF) is instructive in regard to the more flexible schedule 1A non-award arrangements. The VFF makes the point that:

> …a highly regulated industrial relations system advantages large employers relative to small business. Large companies have the economies of scale to engage industrial relations expertise and work within a complex regulated industrial relations system. Farmers and other small businesses don't have this luxury and complex employment regulations are a major impediment to employment in this sector.[6]

1.17 The Victorian Farmers Federation went on to state that:

> The VFF believes Victoria's flexible employment arrangements have strengthened the State's economy and contributes to increased employment, particularly in the agricultural industry. As a result, the priority for further industrial relations reform should be in introducing greater flexibility for the federal system, not dragging Victoria's system backwards to mirror federal awards.[7]

Job losses

1.18 The Government's determination to retain Schedule 1A in amended form as the legislated safety net of minimum provisions for Victorian workers finds added justification in relation to employment costs. The additional costs of having industry comply with award rates has already been discussed. These objections apply equally

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5 Mr David Gregory, VECCI, *Hansard*, p. 1

6 Submission No. 12, VFF, p. 1

7 ibid.

to the provisions of legislation defeated in the Victorian parliament, but which may yet be re-introduced. In relation to this legislation, Minister Abbott stated:

> The Victorian Fair Employment Bill was flawed in both concept and content. A new system of state industrial laws, regulations, tribunals and bureaucracy would have come at a significant cost to Victorian workplaces and the Victorian taxpayer. It would have increased the cost of employment in schedule 1A workplaces and threatened jobs in urban and regional areas of the state. Its implementation would have cost Victoria 40,000 jobs over three years. In short, it would have been a regressive move, not in the interests of employers, employees nor the public.
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> This Commonwealth bill avoids the problems associated with the Victorian government's approach. It enhances, in a sensible way, the legislated safety net of minimum conditions of schedule 1A employees (without negatively impacting on employment) and does so within the framework of a unitary system.[8]

1.19 The committee heard evidence from interested parties in relation to the employment consequences of actions aimed at re-introducing award structures in place of Schedule 1A. The committee majority accepts that estimates of job losses need to be viewed conservatively, but they are generally reliable indicators of likely trends. Business in the TCF industry, in particular, as well as in the rural and service sectors, are highly price sensitive in relation to labour costs. The Government's view is that policies which maintain employment levels are preferable to those which see the jobs of less well-off sectors of the workforce placed in jeopardy.

1.20 The Victorian Employers' Chamber of Commerce and Industry (VECCI) commissioned research into the effects of the Victorian Fair Employment Bill. This was carried out by ACIL Consulting, in association with Econtech. Economic modelling was carried out on the basis that the Fair Employment Tribunal would be established and possible decisions of the Tribunal relating to leave loading, penalty and overtime rates were factored into the modelling. The modelling was designed to be conservative in its construction. The ACIL Consulting report to VECCI was summarised thus:

> The Econtech modelling indicated that job losses under the different scenarios would range from 21,000 to 42,000 over the medium term (three year) period, depending on the particular scenario. ACIL estimated that, based on national experience with participation rates, these job losses would raise Victoria's unemployment rate from 6.1 per cent (seasonally adjusted) in December 2000, to 6.5 per cent and 6.9 per cent respectively in the medium term.
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> Whilst the modelling included the effects on jobs, output and consumption of the loss of Victorian competitiveness, it did not take account of job losses that would occur as a result of the increase in uncertainty in the Victorian

8 *Second Reading Speech*, Minister Tony Abbott, 21 March 2002, p. 2

> business climate resulting from the establishment of the Tribunal. Similarly, it did not include job losses flowing from the reduced investment capability of businesses resulting from the reduced profitability that would accompany the labour cost increases. Nor did it model the implications of the proposed new contractor deeming provisions. The results, therefore, are considered to be conservative on this account as well as because of the scenarios themselves being conservative.[9]

1.21 The research showed that job loses would extend across all businesses and in all regions. About 16,000 jobs would be lost in Melbourne; with around 1,000 job losses to be experienced in each of the five non-metropolitan regions. The industry sectors most affected would be in accommodation, cafes and restaurants, in communications services and in transport and storage.[10]

1.22 The committee majority notes the views of opponents of the bill that economic modelling cannot produce reliable indications of employment trends. Government party senators reject this view, believing that survey results have produced accurate indications of employer sentiments and business intentions. The Government is concerned that a reverse multiplier effect may result from any radical departure from broad policies implemented in Victoria since 1992 and enshrined in Schedule 1A.

Conclusion

1.23 Government party senators believe that the provisions of this bill offer the most orderly and reliable means of ensuring that improved protection of conditions of employees under Schedule 1A can be achieved without threat to job security. The committee majority regards this measure as likely to secure the best legislative outcome for both employer and employees. The flexibility of Schedule 1A ensures that it must retain its central place in the Victorian industrial relations system: the lynch pin of the unitary system which marks Victoria as the leading state in workplace relations reform.

1.24 The committee majority commends this bill to the Senate and urges that it be supported.

Senator John Tierney
Chair

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9 *An Economic Assessment of the Victorian Fair Em ployment Bill 2000,* A Report Prepared for the VECCI, ACIL Consulting, 8 February 2001, p. iv

10 *An Economic Assessment of the Victorian Fair Employment Bill 2000,* A Report Prepared for the VECCI, ACIL Consulting, 8 February 2001, p. 12