Labor Senators' Report

A worn and weary path

1.1 The policy history of the Workplace Relations Amendment (Improved Protection for Victorian Workers) Bill 2002 may be traced back to 1992 – as later sections of this Labor senators report will detail – but a more convenient starting point from which to understand the context of this bill is the Workplace Relations Amendment (More Jobs Better Pay) Bill 1999. The bill is always referred to as the MOJO Bill.[1] That bill was a comprehensive redrafting of many sections of the *Workplace Relations Act 1996*, made necessary, in the Government's view, by of omissions, oversights and anomalies which had become evident in the few years following its passage. This committee undertook a correspondingly comprehensive inquiry into the MOJO Bill which produced a report contributed to by all parties represented on the committee.

1.2 The failure of the omnibus amendment bill to pass the Senate caused the Government to change tactics, at the behest of the Australian Democrats. MOJO was broken up into its constituent parts, each forming the basis of a bill taking separate MOJO amendments and reintroduced on a piecemeal basis. The result has been little different, although some minor amendment bills have passed. Thus, this committee finds itself again on a worn and weary path, considering amendments to provisions introduced in Part XV of the *Workplace Relations Act* in regard to Victorian workers. The views of Labor senators to the 1999 MOJO Bill may be referred to in Chapter 10 of the Labor senators' report. It has been necessary to reiterate in this report most of the points made in the 1999 report.

1.3 This bill encapsulates policy that remains unchanged since MOJO and before. The committee has the advantage of a longer perspective on this policy and can now see more clearly that this bill proposes improvements to failed policies; that it proposes the consolidation of injustices; that it proposes the entrenchment of processes which inhibit efficient management of enterprises, at the same time as perpetuating inequalities in the workforce. These measures are supported in the cause of labour market flexibility. In previous reports on other amendments to the Workplace Relations Act arising out of the ashes of MOJO, Labor members of the committee have pointed to the ideological impediments which have hampered government attempts to overcome difficulties; a determination to resist measures that compromise the commitment it has to the sanctity of labour market flexibility. Better

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1 A notable characteristic of legislation emanating from the Department of Employment and Workplace Relations (and the former DEWRSB) is the provocative nature of some of the short titles given to bills. They go beyond conventional description toward sloganeering, carrying an exhortation and a challenge to those who will dispute the obvious virtue and necessity of the bill. These banner titles have resulted in little legislative success so far.

that this commitment remain unfulfilled than industrial harmony threaten the realisation of a completely deregulated labour market! These observations have been made before by Labor members on this committee. They remain relevant to the committee's consideration of this bill.

The peculiar state of Victorian industrial relations

1.4 The Government senators' report, taken as a whole, gives a clear picture of the paradox that is the Victorian industrial relations system. The evolution of that system does not need to be described again in this report, though it is only to be expected that an important aspect of the referral of powers by the Victorian government received less than its due emphasis. That is, instead of referring powers to the Commonwealth that would enable the Australian Parliament to empower the Australian Industrial Relations Commission to make common rule awards to create a truly unitary system, a short-term strategy was adopted,[2] born of political expediency and a fundamental antipathy to common rule awards. Several submissions to the committee have pointed to the absurdity of two jurisdictions together having less power to deal with problems than one jurisdiction would enjoy if it had all the powers. The Victorian Trades Hall Council had this to say in relation to a unitary system, Victoria style:

> There is no unitary system. People keep claiming that schedule 1A and the referral of the Victorian industrial relations powers represent some move to a unitary system. That is a nonsense. Even Justice Guidice, the President of the Industrial Relations Commission, in three speeches now has talked about the lack of a unitary system. He says that you have two systems under one industrial tribunal. In fact, you have more of a unitary system in most other states because, by and large, the state awards in Queensland, New South Wales and other states actually reflect the standards in federal awards—we used to call them mirror awards because they mirrored the standards set by the federal Industrial Relations Commission. So this is less of a unitary system than you have in states like New South Wales and Queensland.[3]

1.5 The Australian Industry Group (Ai Group) submission included very similar comments to those of the Victorian Trades Hall Council. Ai Group has consistently argued for the common rule award system to operate in all jurisdictions, though it would prefer there to be only one jurisdiction.

1.6 In Ai Group's experience, the territories common rule award system has operated very effectively over many years. Employers and employees in the territories enjoy the only genuine unitary industrial relations systems in Australia. The territories

2 Professor Ron McCallum, 'A robust national industrial relations system for Australia', A unitary industrial relations system: unfinished business of the 20th century, BCA Conference Paper, November 2000, p. 4

3 Mr Leigh Hubbard, VTHC, *Hansard*, p. 21

industrial relations systems are far simpler then those in operation in any state, including Victoria with its dual federal award/minimum conditions system.[4]

1.7 Political circumstances favoured Victoria's preferred options for referral of its industrial relations powers in 1996. It suited the purposes of the Coalition government at the Commonwealth level to incorporate 1992 Victorian legislation as Schedule 1A in the *Workplace Relations Act*, but it has become clear that recent attempts to refer residual Victorian powers to the Commonwealth have been resisted, again because of political circumstances. This is a point made very clearly to the committee in evidence from the Ai Group which has proposed that the common rule award system which applies in the territories be extended to Victoria. This requires enabling legislation from the Victorian parliament. It would thus require amendment to the Workplace Relations Act incorporating the referral powers, specifically, amendments to sections 141 and 142 to extend the common rule award system to Victoria.[5]

1.8 The Commonwealth's failure to respond to this recommendation, or to view favourably the legislative attempts of the Victorian government to effect this referral of powers, appears inconsistent with its claimed support for a unitary system of industrial relations. Such support as it gives appears to be conditional upon whether it believes that powers that might be referred should be exercised by any jurisdiction. It is clear that the Government is opposed to the application of common rule awards in principle and therefore sees no practical use in acquiring the power to apply them. Labor senators regret the reticence of the Government in debating its policies more openly in regard to these matters, and in putting a submission to the committee which fails to fully articulate policy in regard to referral of additional powers from the states.

Schedule 1A workers

1.9 The perpetuation of the unfair and anomalous position of Victorian workers employed under conditions laid down in Schedule 1A is the first of two specific issues which the committee has dealt with in this brief inquiry. The ideological imperative which drives this amendment has already been discussed. The detail of what is proposed in the amendments to current provisions serves to elucidate this point. First, however, it is necessary to describe the relevant characteristics of the Victorian workforce and the effects of Schedule 1A on employment.

1.10 Victoria, in comparison to other states, has a disproportionately large low wage sector, with those employees concentrated in small workplaces and in particular industries. Around 356,000 employees (approximately 21 per cent of the Victorian labour force) rely almost entirely on Schedule 1A for their conditions of employment. Of this number of employees, some 235,000 receive only minimum rates of pay under industry sector orders. Another way to see this relative disadvantage of Schedule 1A

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4 Submission No. 8, Ai Group, p. 15

5 Submission No. 8, Ai Group, p. 16

employees is to note that 22 per cent of non-metropolitan Schedule 1A workers earn less then $10.50 per hour, compared to only 8 per cent of those working under federal wards. This gives credence to the observation from both unions and the large employer association Ai Group that there are two classes of workers in Victoria, and one of these is an under class.

1.11 In short, Victorian workers whose employment is regulated by Schedule 1A, are severely disadvantaged by comparison with workers under federal award or awards in other state jurisdictions. On the question of whether this bill will substantially improve conditions for Schedule 1A workers, the answer is clearly that they will not. Seven basic conditions are provided for under this bill in comparison with up to 20 allowable matters. Key matters not included in the bill are penalty rates; overtime rates and allowances; provisions in relation to hours of work; and provisions for the resolution of disputes.[6]

1.12 The government senators report suggests that schedule 1A conditions are not 'set in stone' and can be amended legislation of the kind that is now before the committee. In fact, this legislation has been before this committee for over 3 years, and in that time relativities with employees on federal and state awards have advanced considerably. An instance of employees in the mainstream world of work receiving incremental benefits has been the determination by the AIRC that long-term casual employees should have access to unpaid parental leave after 12 months continuous employment. This cannot be applied to Schedule 1A employees except through an amendment to the Workplace Relations Act.[7] Legislation is an unsuitable instrument for making incremental changes to conditions of employment.

1.13 While it cannot be denied that provisions in this bill will bring marginal improvements to conditions of employment for those working under Schedule 1A, Labor members of the committee are most reluctant to give support to measures that do not advance the cause of employees, and which are really intended to maintain their current status as low wage fodder for exploitive employers.

The question of economic benefits of Schedule 1A

1.14 The majority report accepts uncritically the assertions of the Victorian Employers Chamber of Commerce and Industry (VECCI) and the Minister for Employment and Workplace Relations that employment growth and the general prosperity of Victoria can be directly attributed to the existence and operation of Schedule 1A.[8] The Minister has estimated that as many as 500,000 workers are employed under Schedule 1A conditions. The Australian Chamber of Commerce and

6 Submission No.2, Victorian Government, p. 9

7 ibid.

8 Submission No.9, ACCI, p. 4

Industry (ACCI) raised, but did not answer, the question as what proportion of these jobs may be attributed to the functioning of the operation of Schedule 1A.

1.15 The answer to that question is that while Victoria operated under a significantly deregulated labour market after 1992, there has been no significant increase in jobs growth level or reductions in unemployment levels, compared with the national average, or with other states.[9] The committee heard evidence from the Victorian Trades Hall Council to the effect that the Kennett government's job figures where 'fairly appalling' in terms of job creation.

1.16 Unemployment figures did not come down, as you would expect if you were deregulating up to 40 per cent of the work force at that time. So I think there is a lot of nonsense going around about the benefits of deregulation. Indeed, the strong parts of the Victorian economy are highly regulated—the manufacturing sectors and others, where they are in fact unionised, are in fact paying under federal awards and agreements, and in fact face overseas competition. The last time I heard of a local sandwich bar facing export or import competition was probably out in the North West Shelf. It is nonsense to suggest that these small and medium enterprises face the kind of competition that many much more regulated industries and employers face.[10]

1.17 The committee heard disputed evidence of the Government's claims about the adverse effects of instituting federal awards or common rule awards in place of Schedule 1A. Some wild figures were aired. ACCI commissioned research claimed up to 40,000 job losses. These are irresponsible claims, based on estimates of lay-offs by employers averaging 2 per cent across key sectors. The details are included in the ACCI research. This is like claiming that a major recession will result from small increases in wages and other employment costs. It assumes that a large number of businesses would either fail or go into voluntary closure as a result of a small wage increase. Labor senators refuse to give much credence to surveys predicting the onset of a recession of the basis of introducing common rule awards such as are now enjoyed by over half the Victorian workforce, with no indication of mass unemployment.

1.18 Labor senators note that opposition to improved wages and conditions is the normally expected reaction from many employers and some employer associations. On this basis we would never have agreed to equal pay, and employers would have refused to negotiate the wages and conditions that they have in fact generally agreed to.

1.19 The committee received evidence of the link between Schedule 1A and increasing casualisation of the workforce:

> At the introduction of the Workplace Relations Act in Victoria we saw a vast movement of workers off awards and into Schedule 1A employment.

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9 Submission No. 2, Victorian Government, p. 6

10 Mr Leigh Hubbard, VTHC, *Hansard*, p. 22

> This has been to the great detriment of those workers because it does not provide a reasonable set of conditions. This is an opportunity to install a real and proper set of conditions, this legislation will not do that in any way, shape or form, and consequently should not be supported.[11]

1.20 Labor senators see this as further evidence of the fact that Schedule 1A is being used to drag down the conditions of employment generally, with increasing casualisation one manifestation of this trend. For this reason, Labor senators will be recommending that amendments be drafted to allow for the Commonwealth to apply the common rule awards in place of Schedule 1A conditions of employment to all those currently employed under this arrangement. Legislation should be drafted to ensure that the AIRC determine appropriate award rates and conditions of employment. This will also require a recommendation that the Government request the Victorian government for a referral of powers to allow for this matter to proceed.

1.21 Labor senators sought advice from departmental officials as to ways in which the conditions of workers employed under Schedule 1A could be brought in line with federal and state awards. They were advised that while section 5 of the referral of powers legislation expressly excludes common rule, there appeared to be no legal impediment to amending Schedule 1A to include a longer list of allowable matters than the seven currently provided for.[12] Labor senators will be proposing that there be a transitional approach to common rule awards by way of amendments to Schedule 1A providing for 20 allowable matters, in line with the provisions of section 89A of the Workplace Relations Act.

Outworkers

1.22 The second of the two most highly contentious issues in this inquiry has centred on the plight of contract outworkers and outwork employees. There is general agreement about the inadequacy of the bill to achieve either fair wages or job security for these workers. The textile, clothing and footwear industry has long been known for its exploitive work practices, a consequence of the practice of multi-layered sub contracting work involving the labour of the most vulnerable classes of workers, mostly women. Many of these are recent migrants with little education or limited proficiency in English and are in desperate need of employment. Many are in such weak bargaining positions that they often need to supply their own sewing machines. Homeworkers at the bottom of the contract chain may work for as little as $1.00 per hour, typically over a 12-18 hour day, up to seven days a week. The committee is always stuck by a recitation of these details. While the Government may express concern about these practices it sees little it can do about it, beyond setting up inadequate processes through which exploited workers may, if they are extremely lucky and have good advice and contacts, secure some redress from their employer.

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11 Submission No. 1, SMARTcasual, p. 1

12 Mr David Bohn, *Hansard*, p. 48

1.23 The Government proposes to do something about the rights and conditions of outworkers by providing enforcement of the minimum rates of pay. Federal workplace inspectors will be given additional powers to enter work premises and enforce them in the courts. Labor senators regard these measures as inadequate. More fundamentally, the legislation fails to reflect any of the recommendations which have been made in a number of reports into the plight of outworkers. This calls into question whether the Government is seriously interested in addressing the problem. There is also some doubt as to whether the Government really understands the nature of the problem it is legislating for. The Textile, Clothing and Footwear Union of Australia (TCFUA) makes the plausible claim that the Government, in its determination to avoid deeming outworkers as employees, has created the notion of the contract outworker, a category of worker hitherto largely unknown, and who is now to be protected by this bill. As one witness explained to the committee:

> It is the Textile, Clothing and Footwear Union's view that the category of contract outworker—if it exists—covers perhaps five per cent of the outworkers in Victoria, a very small group of workers. It covers those workers that can do the whole job. They would start with the cutting, they would do the pressing, they would perhaps give some work to other people and they would fit this category of contract outworkers.
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> More than 95 per cent of the outworkers that we deal with and are in contact with do not fit this category. They are workers that receive cut goods. They then make up the cut goods and deliver those made-up products or have those products picked up from them. It is not the case that this bill would deal with those 95 per cent of outworkers, the ones who are grossly exploited under the current conditions here in Victoria. It avoids the question of deeming these workers as employees and in fact it muddies the water by creating the notion that somehow these contract outworkers need these provisions. It is not the case that they need these provisions. The federal clothing trades award already has within it provisions at clause 46 which deal with the issues of contractors not being able to be paid any less than employees. So it is completely unnecessary for the contract outworker to require this type of amendment in a bill, and the federal clothing trades award already provides for a minimum condition to apply to these people.[13]

1.24 A number of submissions deal with the inadequacy of provisions to allow textile, clothing and footwear workers to recover wages in the event that they have been able to make demands for restitution. The Ai Group referred to this deficiency in its submission. It noted that Victorian employees covered by Schedule 1A may pursue payment due to them in court, although there did not appear to be any effective mechanism in place to assist employees to pursue genuine claims. The Labor members of the committee took this issue up with departmental officials, without receiving any satisfaction that the reality of the task facing an NESB migrant worker would be anything less than daunting. Subsequently, the committee has been advised

13 Ms Michelle O'Neil, TCFUA, *Hansard*, pp. 30-31

by DEWR that magistrates courts would be the most appropriate place for plaintiffs to lodge demands for outstanding wages owing to them.

1.25 The TCFUA explained another aspect of this problem.

> The third issue—and the reason we reject this bill—is that it provides no capacity, no tool, to deal with the real problem that faces outworkers today. The real problem is that there is an incapacity to recover money up the contracting chain. This is a difficult and complex area. If workers make up the work, having done a hard day's work and a hard night's work, and are not paid correctly for it—or in some cases are not paid at all—they should have mechanisms within law to be able to recover that money through the contracting chain. This is not dealt with in the bill before you. It has been dealt with comprehensively, as you have heard earlier today, in the ethical clothing act in New South Wales, and it is also dealt with comprehensively in the Victorian government bill that is currently before the Victorian parliament.[14]

1.26 These are matters which Commonwealth legislation should be dealing effectively with. The plight of outworkers should not be left to the vagaries of conflicting jurisdictional responsibilities resulting from incomplete referral of powers.

1.27 Finally, on this matter, Labor senators note the added complication in regard to outworkers is the effect of the use of 'sweated labour' on companies following normal workplace practices as laid down in relevant awards. The committee heard evidence from Ai Group that in so far as its members paid award rates, they were adversely affected by unfair competition from sweatshops. Labor members of the committee believe that responsible local industry has suffered more than sufficient hardship as a result of cheaply imported clothing and footwear. Labor members of the committee believe that the move to off-shore production by established firms may to some extent be attributed to tolerance of third world conditions of employment common in the TCF industry. To this extent the issue becomes wider than a simple industrial relations problem. Therefore the inaction of government policy makers in regard to outworkers is made even less easy to understand.

1.28 Labor members of the committee recommend that amendments to the bill take account of the concerns it raises in this regard.

Constitutional issues

1.29 The terms of reference suggested by the Selection of Bills Committee have this matter included, although there is very little scope within this report to discuss this matter properly, much less make recommendations. Central to the matter is whether it is desirable to alter the status of industrial relations from that of a

14 Ms Michelle O'Neil, TCFUA, *Hansard*, p. 31

concurrent power in the Constitution to that which is reserved to the Commonwealth Parliament alone. In expressing its extreme doubts as to the likelihood of there evolving a national or unitary industrial relations system, Labor senators are only reflecting the common view that has been expressed by experts and practitioners in a number of forums.

1.30 Labor senators note that securing agreement to alter the Constitution is a major, perhaps almost insurmountable barrier. Short of that lies a possibility of identifying an existing head of power, such as the corporations power (section 51 (xx)). Experts are divided over whether this would not create as many difficulties as it is intended to overcome. It is also agreed that the only other alternative, referral of powers from the states is politically problematic, not least because of the Victorian experience described earlier in this report. As Professor Ron McCallum has noted in relation to the Victorian experience, politics has got in the way of policy.[15] There is evidence, apart from that given to this inquiry, that the Ai Group, in particular, has had its patience sorely tried by what it may see as political failures in regard to this issue.

1.31 Evidence to the committee makes it clear that the Commonwealth does not have the power it requires to establish common rule awards in Victoria, and that these were neither granted nor sought when the 'unitary' system was being negotiated. There is a vast area of doubt about the constitutional position of both Commonwealth and state positions in regard to legislation from both jurisdictions in what must be the most legally muddled attempt at making a 'unitary' system of anything in the whole history of the Commonwealth. The committee has received ambivalent advice from DEWR as to the constitutional position. This is understandable in view of the speculative nature of anticipating judicial reaction to hypothetical litigation.

1.32 Labor senators are concerned about the constitutional implications of the bill for alternative legislative approaches to outworkers at the state level. In its submission, the Department of Employment and Workplace Relations stated that the bill is not intended to 'cover the field': the implication being that Victorian legislation affecting outworkers would operate to potentially provide terms and conditions of employment in excess of the entitlement to the statutory amount provided for in the bill.

1.33 However, the department's view about the potential for a 'direct inconsistency' between the bill and the Victorian Outworkers (Improved Protection) Bill was less clear. In its submission, the department noted that were the Victorian bills to become law:

> …there would arguably be no need for the outworker specific provisions of the Commonwealth Bill as minimum remuneration standards would be put in place by the State system. On the other hand, the State system would also

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15 McCallum, op.cit., p. 4

> impose requirements regarding conditions of work and work practices which would arguably be inappropriate to contract outworkers.[16]

1.34 The potential for a direct inconsistency under section 109 of the Constitution was put to the department at the hearing: specifically in regard to whether the Victorian Outworkers Bill would remove a right, privilege or entitlement to engage an outworker under a contract of service, which is a right, privilege or entitlement recognised by the Commonwealth. If that were the case, would not there be a direct inconsistency between the Commonwealth bill and the Victorian bill?

1.35 The response from the department was that the Victorian bill would not actually remove the right to engage a person as a contractor, but it would treat the contractor, for the purposes of the Victorian legislation, as though they were an employee and then impose additional obligations on the principal as though the principal were an employer. Those obligations are potentially sitting on top of obligations that would apply under the Commonwealth bill. They would be contrary in a sense, directed at different policy outcomes. They would be confusing for the employer, but not necessarily directly inconsistent.

1.36 The department provided additional information in an answer to a question taken on notice. Labor senators note the more circumspect tone to the considered advice offered to the committee.

> Whether there is a direct inconsistency between a law of a State and a law of the Commonwealth is a matter than can ultimately only be determined by a court. In making such a determination a court would make findings about exactly what 'matter' is addressed by the federal law and whether this is the same 'matter' which is dealt with by the State law. To the extent that a State law is addressing the same 'matter' as the Commonwealth law, this could be considered to give rise to direct inconsistency. In the event of any inconsistency, the Commonwealth law would prevail over the State law.[17]

1.37 Additional advice added weight to the Government's argument that in a contest with Victorian legislation it would win its day in court.

> The Victorian Outworkers (Improved Protection) Bill 2002 would not make provisions for the application of a minimum rate of pay for outworkers. Instead, it would deem outworkers to be employees for the purposes of the Federal Awards (Uniform System) Act (sic) 2002. This would allow the making of a common rule order covering outworkers, if the Federal Awards (Uniform System) Act 2002 (rejected by the Victorian Legislative Council) were reintroduced and became law. If this were the case, and a common rule order was made which dealt with a minimum rate of pay, a court could consider that direct inconsistency arose between the relevant pay rates under

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16 Submission No.7, DEWR, p. 21

17 Additional information, tabled papers

> the Victorian legislation and under the Commonwealth's Bill. In such a case, the Commonwealth law would prevail to the extent of the inconsistency.[18]

1.38 The message in all this is that the Government is confident that it controls the only legislative way forward to improving the lot of Schedule 1A employees and outworkers alike. Labor senators acknowledge that this is an area of untested law, no doubt the reason for the ambivalence of the department's answers on this issue, and a degree of obfuscation. This is to be expected in the context of the Government's doctrinaire approach to industrial relations and its antipathy towards the Victorian Government's legislative program.

1.39 This bill continues to ignore the strong body of evidence that exists of the significant exploitation of outworkers and Labor senators see this legislation as flawed and inadequate. Labor will continue to work toward a system that provides both fairness to employees and more stable and efficient processes for both employers and employees.

George Campbell
Deputy Chair

Kim Carr

18 ibid.