# Submission

to

Senate Employment, Workplace Relations and Education Legislation Committee

# Inquiry into the Workplace Relations Amendment (WorkChoices) Bill 2005


**Submitter:** Industrial Relations Victoria
Deputy Secretary
Tim Lee

**Organisation:** Victorian Government

**Address:** Department of Innovation, Industry and Regional Development
Level 3, 55 Collins Street
Melbourne Vic 3000

**Phone:** (03) 9651 9791

**Fax:** (03) 9651 9043

**Email:** tim.lee@iird.vic.gov.au

# Victorian Government Submission to:

## Senate *Inquiry into the Workplace Relations Amendment (WorkChoices) Bill 2005*

November 2005


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| Contact: | Industrial Relations Victoria<br>Department of Innovation, Industry and Regional Development<br>Level 3, 55 Collins Street<br>Melbourne Vic 3000 |
| Contact name: | Tim Lee |
| Telephone: | 03 9651 9791 |
| Facsimile: | 03 9651 9043 |
| Email: | tim.lee@iird.vic.gov.au |
| Web: | www.irv.vic.gov.au |
| Date: | 9 November 2005 |


Victoria
The Place To Be

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# Preamble

The Victorian Government has consistently and unequivocally stated its support for a unitary industrial relations system that is balanced and fair. It was on this basis that in 2003 the Bracks Government referred the power to make common rule awards to the Commonwealth with the explicit objective of securing a comprehensive safety net for Victorian employees. This referral was a considered policy decision of the Government achieved through negotiation, not through unilateral imposition by the Commonwealth. In this regard, Victoria supports the States' position of determining a system that suits their economic and social needs.

This submission provides data and insight into the Kennett Government experiment, which forms the model and policy underpinnings of *WorkChoices*. The effect of the Kennett era is well represented in the Industrial Relations Taskforce findings, which in 1999 found a disproportionately large low wage sector, concentrated in small workplaces and in provincial Victoria. Additionally it found that there had been no significant increase in jobs growth levels or a decrease in unemployment levels, compared with the national average, or in relation to other states since inception of the Victorian legislation. It was in January 2005 that the door was finally closed on the last vestiges of exploitation when Schedule 1A minima were replaced with common rule federal awards. A comprehensive award safety net of minimum award wages and conditions was put in place for Victorian workers. Despite the Commonwealth's rhetoric, Victoria's experience is that the introduction of *WorkChoices* with no consultation with the States represents a return to low wages and minimal jobs growth.

The Victorian Government can demonstrate that there is no need to fear fairness. Therefore it supports an industrial relations system comprising:

- comprehensive safety-net of award protections for all workers;
- the capacity for employees and employers and their representatives to collectively bargain in good faith;
- protection against arbitrary dismissal;
- employment arrangements that recognise the need to balance work and family;
- comprehensive information, compliance and enforcement services;
- equal pay for work of equal or comparable value; and importantly
- an independent industrial tribunal with ample powers to maintain community standards and to directly intervene and settle industrial disputes.

*WorkChoices* will radically alter the values that form the framework of industrial relations. Instead of encouraging co-operation and collaboration in setting standards, and where necessary independent dispute settling procedures, the system will operate on employers' rules. In removing the protection of award wages and conditions, workers will be left with four Australian Fair Pay and Conditions Standard (unpaid parental leave, annual leave, personal/carers leave, and maximum weekly ordinary hours of work). Entitlements that have been negotiated over time such as rights to

overtime, weekend or public holiday penalty rates and similar penalties, work/family arrangements, shift allowances, higher duties allowances, skills training among others will now be the subject of 'bargaining'. Not only will workers need to bargain, they can be forced to bargain individually without any representation or support. Workers will have no recourse should employers decide to terminate agreements unilaterally and/or dismiss workers at will for operational reasons.

Victoria's evidence is that workers' wages will decrease steadily over time, as will their living standards. Work and family has been a high priority for the Victorian Government and this submission details the extent to which *WorkChoices* will impose hardship on family life. Without the award protection governing how ordinary hours of work are to be managed including minimum notice periods before changes in hours operate, notice of roster changes etc. working families will be at the mercy of their employers.

Instead of responding to the needs of the labour market, these industrial relations changes will lead to declining participation rates. Poor pay and conditions are not incentives for youth, older people capable of working, and women interested in re-entry to join the workforce. Declining wages and conditions are not incentives for workers to stay in the workforce. In a time of increasing need for workforce participation, *WorkChoices* may effectively reduce participation rates.

# Section One: A National System

## 1 Introduction

Victoria is the only State covered entirely by the federal jurisdiction. It is vital that Victoria be given every opportunity to participate in debates and provide input to policy development on the nature of the federal system.

The Victorian Government's policy since 1999 has been one of ensuring that all Victorian workers have access to fair conditions of employment. In this context, Victoria continues to support a unitary system of industrial relations. Critical to this policy is the notion that Victorian employees must have access to the standard minimum conditions of employment.

In light of the similarity, the content of *WorkChoices* is compared with the deregulation and outcomes of the Victorian employment system in the 1990s. This deregulated environment was achieved though simplification of the award and agreement process, the establishment of industry sector awards and, by default the introduction of Schedule 1A minimum entitlements. The deregulated Victorian system and *WorkChoices* emphasises workplace level bargaining over award employee entitlements as a central component.

The impact of the Victorian system of Schedule 1A entitlements on employees is highly relevant to *WorkChoices* outcomes. The submission will provide detailed information on workplace and employment outcomes under Schedule 1A, and on current workplace practices and performance.

The submission also identifies a number of issues of relevance to Victorian legislation and policy.

The structure of the submission is as follows:

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| Preamble | |
| Section One: | Introduction: A National System |
| Section Two: | The Australian Fair Pay Commission and comparison with wage and employment outcomes under Schedule 1A |
| Section Three: | The Australian Fair Pay and Commission Standard and comparison with entitlement levels under Schedule 1A |
| Section Four: | The scope and coverage of current employment agreements, satisfaction levels, and degree of workplace cooperation |
| Section Five: | Maintaining a relevant award system |
| Section Six: | The impact of *WorkChoices* on work and family balance |
| Section Seven: | Pay equity in Victoria |

## 1.1 The development of the Schedule 1A employment system

Throughout the 1990s, the Victorian labour market was largely deregulated. Awards and agreements were significantly simplified. After the referral of industrial relations powers to the Commonwealth in 1996, workers who were not covered by federal awards and agreements were left with only five minimum conditions as specified in Schedule 1A of the *Workplace Relations Act 1996* (Cth). This group was identified as Schedule 1A and it is estimated that 356 000 workers relied on the five minimum conditions.

The move towards the significant deregulation experienced in Victoria was based on a desire to facilitate enterprise level bargaining over wages and conditions.

Between 1992 and 1996, 18 industry sectors were created. These were used in place of comprehensive awards to determine minimum hourly rates of pay. These industry sectors were used as a reference point for wage determination under Schedule 1A.

Schedule 1A employees were entitled to five (seven since 1 January 2004) minimum conditions of employment, whilst other federally regulated employees had an entitlement to 20 minimum conditions. The minimum conditions of employment conditions for Schedule 1A workers comprised of the minimum hourly wage rates and casual rates for each industry sector and:

- Four weeks annual leave;
- One week sick leave;
- Unpaid parental leave together with an entitlement to work part-time after the child is born; and
- Notice upon termination of employment.

When compared to standards and employment conditions applying under federal awards, Victorian employees who relied solely upon Schedule 1A received lesser conditions and entitlements than did other employees. This meant:

- No personal and carer's leave or bereavement leave;
- No entitlement to be paid for hours worked in excess of 38 per week; and
- Lower levels of sick leave benefits than in many federal awards.

The similarity between the levels of minimum entitlements under *WorkChoices* is immediately apparent. A further detailed analysis is in Sections 2 and 3.

## 1.2 Outcomes of Schedule 1A

The operation of the Schedule 1A system proved extremely inflexible. Other than legislative amendments, there was no ability to change the levels of minimum entitlements. The AIRC only had the power to vary minimum hourly wage rates and could not determine modes of pay for work in excess of 38 hours per week or vary the number of or the composition of industry sectors. A similar wage setting process is to be adopted with the Fair Pay Commission. These limitations lead to the disadvantage of this entire group of Victorian workers.

The deregulation of the Victorian system was based on the premise that employees and employers would negotiate for wages and conditions above the minimum rate. However, the ability to negotiate over and above these minima for many workers did not occur. As a result, the Taskforce found that a large proportion of Schedule 1A employees did not have an adequate safety net of entitlements *(IR Taskforce Report p.8).*

Workplace level bargaining for Schedule 1A workers did not eventuate due to the poor bargaining position of the majority these workers. As a result, two-thirds of Schedule 1A workers were paid at minimum levels. Over time, the gap between workers in a strong bargaining position or those who were covered by the award safety net of conditions and the workers that relied on the bare minimum continued to increase.

## 1.3 Federal Awards (Uniform System) Act 2003

To overcome the disadvantage faced by Schedule 1A workers, the Victorian Government referred additional powers to the Commonwealth to enable the AIRC to make and vary common rule awards. This move highlighted the high level of confidence that the Victorian Government has in the ability of the AIRC and the current award system to maintain an effective safety net of conditions.

## 1.4 Summary

The Victorian experience with Schedule 1A workers is instructive at a number of levels. Importantly, it provides an example of how an employment system similar to that proposed in *WorkChoices* may operate mirroring the experience of Victoria between 1992 and 2004.

Essentially, Schedule 1A was designed as a minimum standard from which employees could bargain for improved conditions. Similarly, under *WorkChoices*, entitlements above the minimum standard are to be achieved through workplace bargaining.

Evidence presented by the Taskforce from the Victorian experience with Schedule 1A demonstrated that workplace bargaining over entitlements was never achieved. This was primarily because the minimum employment conditions were too low to effectively trade anything off and the bargaining position of specific groups of Schedule 1A workers was too poor.

Throughout the 1990s, a dual system of employment and minimum entitlements developed in Victoria. The workforce was divided between those reliant on minimum entitlements and those in a strong individual or collective bargaining position. This division created unfairness and inequality even between groups of workers in the same industry or occupation.

# Section Two: Australian Fair Pay Commission

## 2 The need for an effective minimum wage system

The Victorian Government supports the maintenance of an effective, relevant safety net through the continuation of periodic, reasonable increases to minimum award wages.

An integral element of *WorkChoices* is the establishment of the Australian Fair Pay Commission (FPC) to replace the safety net review cases heard by the Australian Industrial Relations Commission (AIRC). The FPC will adjust and set the federal minimum wage and award wage classifications (including rates for juniors, piece workers, and the casual loading).

The primary objective of the FPC is to 'promote the economic prosperity of the people of Australia'. In order to do this the FPC will need to consider the:

- Effect of wages on employment and competitiveness across the economy,
- Provision of minimum conditions for the low paid,
- The capacity for the unemployed and low paid to obtain and remain in employment, and
- Provision of minimum wages for juniors and employees to whom training arrangements apply and employees with disabilities to ensure that those employees remain competitive in the labour market.

The establishment and objectives of the FPC raise two key concerns:

- Wages will be limited to the maximum of 38 ordinary hours of work and additional hours will be at the ordinary rate (unless specified in agreements) and ordinary hours could be spread out over a 12 month period, and
- The clear priority of economic goals and almost complete abandonment of fairness and equity for individual workers.

The outcomes of the wage setting process under Schedule 1A provide a useful example of how the operation of the FPC could affect workers generally. Under Schedule 1A, the AIRC was unable to regulate minimum wages for work in excess of 38 hours.

### 2.1 Wage outcomes under Schedule 1A

Research presented to the Taskforce looked at the breakdown of earnings and employment benefits for Schedule 1A workplaces and federal award workplaces. The survey data found that there were just over half a million Victorian employees on workplace minimum rates of pay. In addition, forty-two per cent of all Schedule 1A

employees were in receipt of minimum rates of pay, compared to twenty-six per cent of federal award employees.[1]

The research also found that Schedule 1A employees were over-represented among low wage earners, with about 36 000 employees in receipt of minimum rates of pay under $10.50 per hour. Schedule 1A employees made up fifty-two per cent of all employees in this low wage situation. Only about eleven per cent of federal award employees were in the same low wage situation, while fifteen per cent of Schedule 1A employees were paid under $10.50 per hour.[2]

The modelling conducted for the Taskforce also showed that there were two factors, which could be cited as influential in determining whether a workplace was in a low wage category. First, the odds of being in a low wage category were three times as high for workplaces in the agricultural industry. Second, they were twice as great for Schedule 1A workplaces than they were for workplaces with federal award coverage. The research concludes that industrial coverage – where an employee is covered by Schedule 1A or a federal award or agreement – is an important factor in determining whether an employee will be subject to low minimum rates of pay.[3] Information presented in Section 2 indicated that Schedule 1A workers did not make the transition to enterprise bargaining.

In comparison with other states, the Taskforce research found that in Victoria, a greater proportion of the workforce are engaged in low wage jobs compared with New South Wales and the national average. About twenty-four per cent of Victorian employees earned under $12 per hour in 1999, for instance, compared with nineteen per cent in New South Wales and twenty-one per cent nationally. There were also several industries in Victoria, which were notable for their concentrations of low wage employees. In retail trade, about forty per cent of employees earned under $12 per hour. In the accommodation, cafes, and restaurants industry, forty-five per cent earned under $12 per hour and nineteen per cent earned under $10 per hour. In the personal and other services industries, thirty-two per cent earned under $12 per hour and twenty-two per cent earn under $10 per hour.[4]

Differences in smaller workplaces were also greater compared to New South Wales, and it is in this sector of the labour market that Victoria's disadvantage was most evident. While the proportion of low wage employees in Victoria declined by twenty-five per cent between 1989 and 1999, the decline in New South Wales was thirty-seven per cent and, nationally, thirty-four per cent. The research concludes that while the

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1 Australian Centre for Industrial Relations Research and Training (July 2000) University of Sydney, *Earnings, Employment Benefits & Industrial Coverage: A Report to the Victorian Industrial Relations Taskforce*, vol. 1, p.23.

2 Australian Centre for Industrial Relations Research and Training (July 2000) University of Sydney, *Earnings, Employment Benefits, & Industrial Coverage: A Report to the Victorian Industrial Relations Taskforce*, vol. 1, pp.23-24.

3 Australian Centre for Industrial Relations Research and Training (July 2000) University of Sydney, *Earnings, Employment Benefits, & Industrial Coverage: A Report to the Victorian Industrial Relations Taskforce*, vol. 1, pp.23-24.

4 Australian Centre for Industrial Relations Research and Training (July 2000) University of Sydney, *Earnings, Employment Benefits & Industrial Coverage: A Report to the Victorian Industrial Relations Taskforce*, vol. 2, p. i & p. 16.

situation for low wage employees in Victoria improved somewhat during the 1990s, the improvement was not as great as New South Wales or nationally. In relative terms, Victoria went backwards.[5]

In summary, deregulation in Victoria created a significant low wage sector particularly in small workplaces and in certain industries. While the situation occurred in other states, the situation in Victoria compared unfavourably. In addition, the research found that there was deterioration in relative terms between earnings in Victoria and the national average between 1989 and 1999.

This disadvantage to Victorian workers can be directly attributed to the minimum standards and deregulated wage-setting process for schedule 1A employees.

## 2.2 Remuneration for work in excess of thirty-eight hours

As stated earlier, the inability for the FPC to regulate minimum hourly rates of pay for work undertaken in excess of thirty-eight hours is of notable concern. There is a similarity between this limitation and the operation of Schedule 1A. Evidence presented to the Taskforce illustrated how a lack of regulation for hours in excess of standard hours can affect individual employees. The main effects were summarised into three categories:

- Employees worked in excess of thirty-eight hours in each week and did not receive any payment for such work. This category included the example of a security guard who sometimes worked an additional two or three hours per shift but received no payment for the extra hours worked.[6]
- Employees were required to work hours in excess of thirty-eight in each week on a regular and continuous basis and were only paid single time for that extra work. A number of speakers at the Taskforce's Ethnic Communities forum stated that this was their experience, in particular as outworkers or as factory workers.
- The third situation involved time in lieu arrangements and limited forms of overtime. Here employees were paid overtime but only at the standard hourly rates. Only, 42.7 per cent of Schedule 1A workplaces paid a higher rate of pay for over time worked

In addition to the absence of standard overtime entitlements, two-thirds of Schedule 1A workplaces, did not pay annual leave loadings, only one-quarter paid penalty rates for work on weekends, and six per cent of Schedule 1A workplaces paid shift allowances.[7]

Under *WorkChoices,* an employee's hours can be annualised over a period of 12 months. Evidence from the Taskforce was critical of this practice. For example, an

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5 Australian Centre for Industrial Relations Research and Training (July 2000) University of Sydney, *Earnings, Employment Benefits & Industrial Coverage: A Report to the Victorian Industrial Relations Taskforce*, vol. 2, p. i & p.28.

6 Victorian Industrial Relations Taskforce, *Ballarat forum*.

7 Watson, I. (July 2000) Australian Centre for Industrial Relations Research and Training University of Sydney, *Earnings, Employment Conditions and Industrial Coverage in Victoria: A Report to the Victorian Industrial Relations Taskforce*, vol.1, p.37. Note: the accuracy of the ACIRRT research has been raised by Taskforce member Gregory, D. Victorian Employers' Chamber of Commerce & Industry.

employee had worked between forty-five and fifty hours per week for three months, but had only been paid for a thirty-eight hour week.[8] In some cases, this was a regular occurrence, with the employee rostered to undertake such work.[9] The direct effect of this practice was to reduce the minimum hourly rate to which an employee is entitled under an industry sector order.

## 2.3 Wages and unemployment

The dual objectives of the FPC to consider the capacity for the unemployed and low paid to obtain and remain in employment and to *promote the economic prosperity of the people of Australia* raise additional concerns about the process of achieving these goals.

*WorkChoices* emphases the reduction in the rate of unemployment and encourages competitiveness. More significantly, the new FPC is to make *economically responsible minimum wage decisions*.

The wage and employment outcomes for workers under Schedule 1A minimum entitlements provide a useful example.

A comparison of jobs growth and unemployment levels in Victoria between 1990 and 2000 illustrates the effects of a highly deregulated employment system. For the bulk of this period, Victoria had been operating under minimum entitlements. It could therefore be argued jobs growth in this sector of the Victorian economy should have been higher than the national rate. However, the rate of unemployment and jobs growth throughout this time has been consistent with the national average.[10]

Consistent with the rest of Australia, Victoria experienced high unemployment rates and negative jobs growth in the early 1990s. Both Victoria and South Australia, for instance, experienced the recession of the early 1990s quite early and for a longer period than other states but made a recovery through the 1990s.

Despite the gains in employment after the recession in the early 1990s, there was no significant increase in jobs growth levels or decrease in unemployment levels in Victoria compared with the national average or in relation to other states. In contrast, New South Wales has had a higher proportion of its workforce operating under a more regulated state industrial relations system since 1996.[11] Throughout this time, New South Wales has consistently enjoyed the lowest unemployment rate of all Australian states, as well as the significant jobs growth.[12]

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8 Victorian Industrial Relations Taskforce, *Brunswick forum*.

9 See for instance Ewan Humphries, employee (Ballarat); Marc Pearson, employee (Ballarat); Michelle Salligari (Geelong); Mark Brown (Springvale); Judy O'Sullivan (Springvale).

10 Australian Bureau of Statistics, *Labour Force Survey Australia*, Catalogue No. 6203.0, ABS, Canberra. See Table 1 Unemployment in Australia 1990 to 2000; Table 2 Jobs Growth in Australia 1990 to 2000

11 State award coverage in 1990 stood at 48.8% of the New South Wales labour force compared with 26.5% federal award coverage. For the latest recorded statistics on award coverage, see Australian Bureau of Statistics (May 1990) *Award Coverage Australia*, Catalogue No. 6315.0, Table 1, p.5, ABS, Canberra. Also See Table 1 Unemployment in Australia 1990 to 2000 & Table 2 Jobs Growth in Australia 1990 to 2000 in this chapter.

12 Australian Bureau of Statistics, *Labour Force Survey Australia*, Catalogue No. 6302.0, ABS, Canberra.

The Taskforce reported that some employers argued strongly that the deregulated system operating in Victoria allowed employers operating under Schedule 1A to undercut employer's respondent to federal awards or agreements within the same industry. This undercutting of labour costs was seen as a considerable economic disadvantage to many employers covered by awards and agreements.[13] For example, an owner of a small security business in Mildura was required to compete against other employers who did not pay award rates of pay, but paid the minimum under Schedule 1A. This not only placed this firm at a competitive disadvantage, it made it extremely difficult to remain in operation when the sole basis for competition was based on wages costs.[14]

The same effect will occur between minimum entitlement employees compared to those employed under comprehensive agreements. In this situation there will be no incentive to bargain as was the situation with Schedule 1A employees. This 'race to the bottom', identified during the Schedule 1A period was motivated by the competitive pressure of business to remain competitive on labour costs.

## 2.4 The low paid in Victoria

In 2000, using unpublished ABS data,[15] the Taskforce found that nearly 330 000 Victorian workers were low paid, earning less than $12 per hour. Certain groups of workers were over-represented in the ranks of the low paid - women, both young and older workers, workers with lower qualifications, workers from non-English and non-unionised workers. Low paid workers were also more likely to work in small organisations, work within the retail or accommodation sectors, and live outside of the metropolitan area. These groups of workers were those who were less likely to be in a strong bargaining position over wages and entitlements.

They were also more likely to be covered by Schedule 1A missing basic entitlements such as overtime and bereavement leave.

An enduring outcome of the Schedule 1A wage setting process was the clustering of low paid jobs in a number of specific industries and occupations.

By 2002, the number of low paid workers had risen by 126 100 to over 450 000. Findings from the *State of Working Victoria Survey* (SWVS)[16] provide insights into where low wage sectors currently exist in Victoria and to the extent of the effect of Schedule 1A.

A significant finding was that the hospitality industry is a prominent low wage industry. This industry had the highest number of workplaces with workers paid under $12.50 an hour in both 2000 and 2002, followed by human services. In almost one-third of hospitality workplaces, the average rate of hourly pay for employees was less than

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13 Victorian Automobile Chamber of Commerce (July 2000) *Taskforce Submission*; Victorian Road Transport Association (July 2000) *Taskforce Submission*; Kamcorp Industrial Relations Consultants (July 2000) *Taskforce Submission.*

14 Mildura Industrial Relations Taskforce forum.

15 Unpublished ABS Labour Force Survey data, August 1999 (referred to in page 5, Volume 2, of the Report to the Victorian Industrial Relations Taskforce (July 2000) by Ian Watson (ACCIRT)).

16 Industrial Relations Victoria (2003) *The Low Paid in Victoria.* The State of Working Victoria Information Paper No. 2. Melbourne: Victorian Government.

$12.50 an hour. The hospitality industry is significant as labour costs form a higher percentage of total costs than in other industries. Furthermore, hospitality workplaces were far more likely to operate outside standard hours and on the weekends. Thus, the incentive to cut wages and entitlements was a strong factor for an employer to remain competitive.

Between 2000 and 2002, minimum rates of pay in Victorian workplaces have increased overall however, the dispersion has remained static. This reflects that low wage sectors under Schedule 1A have not improved the relative position.

Static measures of the low-paid, defined by their earnings at any one point, under-estimate the pool of the low-paid or working poor because of labour market churning. ABS longitudinal data in the mid-1990s found that over an 18-month period about 70 per cent of job seekers found work but two-thirds of these jobs were casual and 90 per cent were temporary.[17]

Under *WorkChoices,* there is no guarantee that vulnerable workers will be protected from low wage outcomes. The strong possibility exists that former Schedule 1A workers will once again find themselves in the same low wage employment situation as in the early 1990s. Additionally it found that there had been no significant increase in jobs growth levels or a decrease in unemployment levels, compared with the national average, or in relation to other states since inception of the Victorian legislation.

17 ABS (1997) *Australia's Employment and Unemployment Patterns 1994-1996*, Cat. No. 6286.0.

# Section Three: The Australian Fair Pay Commission Standard

## 3 Introduction

Employment conditions and entitlements generally incorporate a mixture of economic and social conditions prevailing within the community. Just as important as achieving and maintaining this balance, is the need for fair employment standards to reflect fundamental human rights and responsibilities, both at work and within our society.

The most commonly used method to determine employment standards has been industrial tribunals that have made or varied awards. In the case of federal law, since 1997 these matters have been further limited to twenty prescribed allowable award matters.

Appropriate and fair employment standards, that reflect established community standards for new industrial relations laws, must be relevant for both today's and the future workforce. They must suit the needs of both employers and employees, accommodate emerging trends in employment patterns and arrangements, and balance both economic and social needs.

A fundamental component of the Fair Pay Commission Standard (FPCS) is the prominence placed upon individual level bargaining between employees and employers. The poor bargaining experience of workers employed under Schedule 1A provides an example of the disadvantage faced by workers in a poor negotiating position (see Sections 2 and 3).

This section will examine the statutory conditions that Victorian workers employed under Schedule 1A received, in comparison with workers under federal awards and agreements. These are contrasted with the current *WorkChoices* proposal.

### 3.1 How do Schedule 1A employment conditions compare with *WorkChoices*?

The Schedule 1A minimum terms and conditions of employment have been contrasted with the FPCS as outlined in *WorkChoices*, in Table 1 below:

Table 1: Comparison of Schedule 1A and Fair Pay and Conditions Standard

| Schedule 1A Entitlements | Fair Pay and Conditions Standard |
|---|---|
| • Four weeks' paid annual leave, which accrues on a pro-rata basis and is cumulative. | • Four weeks' paid annual leave, which accrues on a pro-rata – opportunity to cash out 2 weeks leave. |
| • One week's paid sick leave per annum which accrues on a pro-rata basis and is cumulative. | • Two week's paid personal/carer's leave per annum, which accrues on a pro-rata basis and is cumulative and two days unpaid leave. |
| • Twelve months unpaid parental leave, together with an entitlement to work part-time upon the birth or adoption of a child. | • Twelve months unpaid parental leave. |
| • Notice upon termination of employment. | • Maximum ordinary hours per week of 38 |
| • A minimum hourly rate of pay. | • A minimum hourly rate of pay |

As can be seen from the above table, there are a number of similarities between Schedule 1A entitlements and the FPCS. For instance, annual leave entitlements of 4 weeks per year are the same. The FPCS adds an extra week to sick leave as part of the personal/carers leave but does not appear to include the provision for part-time work after taking unpaid paternity leave. In addition, both levels of entitlement specified a minimum hourly rate of pay although neither specifies standard rates for overtime.

Generally, it appears that the intent of the FPCS and Schedule 1A is the same.

### 3.2 The effect of Schedule 1A entitlements in Victoria

In order to estimate how the FPCS might affect workers and employers again the experience of Victorian workers under Schedule 1A entitlements is informative. The comparison is made between awards and Schedule 1A entitlements. This comparison is particularly relevant as awards and agreements will continue to operate under the *WorkChoices* system. The FPCS will allow an agreement to expressly abolish or alter the entitlement as set in an award, but if the agreement is silent, the award terms on these subject matters apply. These matters are:

- Penalty rates for shift work and overtime;
- Public holidays;
- Rest breaks;
- Incentive based payments and bonuses;
- Annual leave loadings; and
- Allowances (but note that many salary type allowances will be abolished from awards).

Furthermore, there is specific mention made of 'preserving award entitlements' that are superior to the FPCS, but only in respect of:

- Annual leave;
- Personal/carer's leave; and
- Parental leave.

The entitlements in awards reflects community standards on the level and type of employment conditions. Furthermore, award entitlements are adjusted on a periodic basis whereas those of the FPCS are set by legislation. Entitlements set by the FPCS form the base level of entitlements. Those preserved entitlements for existing employees can be negotiated away.

The bargaining position of individuals is essential to the operation of the system. Those in a strong bargaining position may be able to negotiate and keep their entitlements while those in a weak position, even doing the identical job, may be reduced to the minimum standards. *WorkChoices* includes an example about a job seeker accepting an employment contract with conditions well below comparable award employees (page 15).

As stated earlier, Schedule 1A employees were not entitled to many of the terms and conditions of employment available to federal award and agreement employees. The

wage outcomes identified in the previous Section identified that some employers operating under Schedule 1A were able to undercut employers respondent to federal awards or agreements within the same industry. In some industries, the lower wage costs initiated a race to the bottom for employers to remain competitive.

In addition to low wages, Victorian Schedule 1A employees in receipt of only minimum wages and entitlements under regulation were not entitled to penalty rates, overtime provisions, hours of work arrangements, rest breaks, rosters, allowances, personal/carer's leave, higher duties, accident make-up pay, annual leave loadings and dispute resolution procedures.[18]

A submission to the Taskforce by the Workplace Studies Centre at Victoria University[19] found that, in the majority of cases examined, employees suffered substantial economic loss under Victorian employment agreements.[20]

## 3.3 Schedule 1A entitlement outcomes

A substantial piece of research into the entitlements of Schedule 1A workers was the ACIRRT Victorian Employers' Survey (AVES). The AVES was conducted during the middle of June 2000.

Detailed analysis from the AVES highlighted a considerable polarisation between low and high wage workplaces under schedule 1A. Just over 10 per cent of workplaces with federal coverage had minimum rates of under $10.50 per hour, in contrast to 18 per cent of workplaces under schedule 1A. For higher rates, only 4 per cent of federal workplaces had wages above $18 per hour in contrast to 16 per cent of Schedule 1A workplaces.

In addition to the hourly rate of pay, the other key dimension to employee remuneration is the payment of various employment benefits in the form of 'loadings'. In particular:

- Higher rates of pay for overtime;
- Penalty rates for working weekends;
- Shift allowances; and
- Annual leave loadings.

The results from the AVES found that the availability of these entitlements to employees with Schedule 1A coverage was extremely limited. Across all industries, only 41 per cent paid a higher rate for overtime. In terms of other entitlements, less than one quarter of Schedule 1A workplaces paid penalty rates for working on weekends. Shift allowances were the least common form of benefit paid by Schedule 1A workplaces. Only 6 per cent of such workplaces paid their employees shift allowances. Finally, annual leave loading was paid in just over one third of Schedule 1A workplaces.

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18 Australian Liquor, Hospitality and Miscellaneous Workers Union, Victorian Branch (July 2000) *Taskforce Submission.*

19 Workplace Studies Centre, Victoria University (July 2000) *Taskforce Submission*.

20 Now Schedule 1A agreements under the *Workplace Relations Act 1996* (Cth).

There was considerable diversity of entitlements by industry sector. For instance 65 per cent of Schedule 1A workplaces in wholesale retail trade paid overtime compared to only 19 per cent in hospitality. Shift allowances were more common in manufacturing (14 per cent), wholesale/retail (14 per cent), and mining/construction (11 per cent).

A notable finding was the poor position of entitlements for workers in hospitality. Hospitality workplaces were the most likely to be low wage workplaces and offer the lowest levels of entitlements to workers.

## 3.4 Trading off of entitlements

Under *WorkChoices*, an employee can agree to 'trade off' part or all of their entitlements (subject to the FPCS) for a higher hourly rate of pay. Indeed this bargaining was also encouraged under Schedule 1A.

Under this scenario, the polarisation of wage outcomes between workplaces could be the result of trading off of entitlements. Under this scenario Schedule 1A workplaces which do not pay benefits could be paying higher minimum rates as a form of compensation to their employees. In other words, employees in these workplaces have 'traded off' their benefits in return for higher hourly rates (as is encouraged by *WorkChoices*).

An alternative explanation for the dispersion in minimum wages might be that Schedule 1A workplaces paying low hourly minimum rates are also not extending benefits to their employees, thereby compounding their financial disadvantage. These workplaces are making savings in labour cost from not only paying the minimum wage allowed but also by not paying any additional entitlements.

Findings from the AVES indicated that the trading off of entitlements was not reflected in minimum hourly rates paid at the workplace. Employees who rely solely upon Schedule 1A received fewer conditions and entitlements than other employees did. Furthermore Schedule 1A workplaces that had low hourly rates of pay (at or below the minimum hourly rate) were also less likely to include any additional employment benefits. In contrast, workplaces at the higher end of the wage distribution were more likely to include non-wage entitlements. This relationship was found in particular with hospitality workplaces that were both low wage workplaces and had the lowest level of additional entitlements.

## 3.5 The ability to genuinely bargain

A fundamental concern with *WorkChoices* is the reliance on a high level of individual negotiation and bargaining by individual workers. In order to achieve this there has to be 'genuine bargaining' between the parties. Survey information gathered by the Victorian Government provides information on both instrument coverage and the method of setting pay at the workplace. A detailed analysis of this data was provided in the Victorian Governments submission to the Senate Inquiry on Industrial

Agreements.[21] This analysis was focused on the level of genuine bargaining at the workplace. For just over 46 per cent of workers, the level of pay is determined on a market rate. For the others, wages could be determined by either a contractual rate, direct negotiation, employer decision or other method. The focus of this section is to compare those workers whose pay is set by methods that provide a proxy or bargaining ability.

A number of workplace specific factors were judged to determine the level of bargaining activity and the method of setting pay at the workplace. For instance, the level of union density at the workplace was found to be a significant factor. Workplaces predominantly covered by awards, EBAs or a mixture of instruments, have a considerably higher proportion of union members in the workplace. In contrast unionisation levels are considerably lower in workplaces covered by non-comprehensive agreements (own arrangements or AWAs).

The relationship between union density and ability to bargain is also reflected in the method of setting pay. Workplaces with a low union density are more likely to have pay determined by employer decision while high density workplaces are more likely to engage in negotiated outcomes. In *WorkChoices*, the role of unions in the workplaces and in the negotiation process is greatly reduced. This diminished role of unions will further contribute to the poor bargaining position of low paid workers.

The method of pay determination also varied considerably by size of the workplace and industry. Small workplaces (less than 20 employees) were far more likely to use employer determination of wages than by negotiated outcomes. In addition, workplaces in hospitality were notable as having a high proportion of workplaces that used employer determination in contrast to, manufacturing, finance, construction and human services that had a high proportion setting pay at market rates.

The Victorian Governments Industrial Agreements submission also provided information on share of employment type in the workplace. This information allows an assessment of the bargaining position of casual, part-time, and female workers where these workers make up the majority of employees in the workplace.

For instance, in workplaces with more than 50 per cent of employees working part-time, they are more likely to have pay determined by market rates than workplaces that do not have such high part-time density. However, a significant proportion of part-time workers in these workplaces (22 per cent) have pay determined by employer decision. Furthermore, contract negotiation is far less likely to occur in workplaces with a high proportion of part time workers.

For workplaces with a high proportion of casual employees, pay is far more likely to be determined by employer decision than workplaces with a lower proportion of casual employees. Indeed the proportion of workplaces that determine wages at market rates is much lower than all other workplaces.

Workplaces with a high proportion of female workers have the lowest proportion of wages determined by market rates (less than a quarter) and almost 41 per cent

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21 See the Victorian Government's submission to the Senate Inquiry on Industrial Agreements. Accessed from: http://www.aph.gov.au/Senate/committee/eet_ctte/indust_agreements/submissions/sub046.pdf.

determined by employer decision. Significantly, pay determined by direct negotiation is less than half the average of all other workplaces.

The method of setting pay is also reflected in the actual hourly wage rates paid at the workplace. Workplaces with a high proportion of wages determined by contract negotiation tend to have higher average wage rates for the largest occupational group within the workplace. Workplaces where wage determination is based on market rates and, more significantly, employer decision, average hourly pay is at the lower end of the wage distribution. It is possible to surmise that, as a high proportion of the groups identified in the terms of reference (female, casual, and part-time workers) have wages determined significantly by employer decision, these workers would have a lower level of income. In contrast, wages determined by contract negotiation have, on average, higher levels of hourly pay. All of the vulnerable groups of workers identified in this section have low levels of wages determined by contract negotiation.

Table 2: Method of setting pay and average wage rates (percentage)

| | In house method of setting pay | | | | |
|---|---|---|---|---|---|
| Wages per hour | Market rates | Contract | Negotiation | Employer Decision | Other |
| Under $12.50 | 58.3 | 9.2 | 6.5 | 16.2 | 9.8 |
| $12.50 to $17.99 | 42.7 | 20.5 | 11.1 | 9.9 | 15.8 |
| $18 or more | 50.7 | 26.4 | 2.0 | 2.3 | 18.5 |
| Total | 46.1 | 19.8 | 9.1 | 9.7 | 15.4 |

Source: State of Working Victoria Survey 2002

## 3.6 Workplace entitlements and industrial instrument coverage

The distribution of current entitlements available at the workplace also reflects the bargaining position of workers. The access to entitlements in those is not uniform across workplaces; rather it varies according to the type of business, industry, and industrial coverage. A comprehensive analysis of workplace entitlements and instrument coverage was detailed in the Victorian Governments Industrial Agreements submission.[22]

Workplaces covered by awards and EBAs are far more likely to have RDOs than those operating under AWAs and own arrangements. In contrast, workplaces covered by AWAs are more likely to offer banking of hours worked

While the majority of workplaces do not offer higher rates of pay for work on the weekends, workplaces covered by awards are the most likely to pay penalty rates compared to those on EBAs, AWAs and a combination of entitlements.

In contrast, the majority of workplaces do provide for paid overtime. Workplaces operating under EBAs had the highest proportion of paid overtime with award dominant workplaces second and then those operating under AWAs. Less than one-third of workplaces covered by own arrangements offered paid overtime.

22 Victorian Government Submission to Senate Inquiry in Industrial Agreements: http://www.aph.gov.au/Senate/committee/eet_ctte/indust_agreements/submissions/sub046.pdf

In summary, workers covered by non-comprehensive agreements are notably worse off than those currently under awards or enterprise bargaining agreements. *WorkChoices* will encourage a move to individual agreements. Those workers currently with the most to lose from this system are most reliant on the protection afforded by awards and comprehensive agreements.

## 3.7 Summary

The Taskforce identified a number of groups of Schedule 1A workers had wages and/or workplace entitlements at or near the minimum levels. In particular, these were workers in hospitality, casual, part-time, and female workers. The analysis outlined above reinforces the concerns for the bargaining ability for these vulnerable workers. In addition, the evidence identified other groups such as, those without union representation and those in small workplaces.

A wide range of methods already determines wages in Victorian workplaces. In light of this, there can be no suggestion that current industrial instruments are causing a lack of wage flexibility at Victorian workplaces. Furthermore, a significant proportion of Victorian workers already negotiates and bargains over their level of wages.

However, where reliance is on individual bargaining to retain entitlements in excess of the FPCS, the experience of Schedule 1A illustrated that anticipated individual level bargaining did not eventuate. Indeed workers in a poor bargaining position found their situation deteriorate. In light of this, any changes to the operation of the federal industrial relations system needs to ensure that vulnerable workers in a poor bargaining position are not disadvantaged.

# Section Four: *WorkChoices* and Agreements

## 4 Introduction

Workplace level bargaining is a central element of *WorkChoices*. The Victorian Government recognises the need for a fair and co-operative workplace bargaining environment.

There are a number of significant concerns within the *WorkChoices* proposal. As detailed in Section 3, the level of entitlements for the FPCS is comparable to the serious disadvantage faced by employees under Schedule 1A and below those award entitlements identified in Section 5. AWAs or enterprise agreements must only meet the FPCS as opposed to the current (and more comprehensive) no-disadvantage test. In addition, there is scope for an employer to terminate current agreements unilaterally and revert to the minimum conditions of the FPCS.

The *WorkChoices* proposal is surrounded by the rhetoric of 'choice', specifically the choice for employers and employees to determine the workplace agreements system that best suits their needs. In order to encourage this 'choice', *WorkChoices* actively promotes only one form of agreement making at the expense of all others, namely individual agreements. In addition, the current agreement system is claimed to be 'holding back' the economy.

The promotion of this one 'choice' of agreements is based more on assumption than evidence. Indeed, results from a 2004 survey of Victorian workplaces (detailed in the Senate Inquiry on Industrial Agreements,[23] indicated that almost two-thirds of Victorian workplaces are already satisfied that their chosen industrial instrument meets their business needs either most or some of the time.

Results from the State of Working Victoria project in 2002 indicated that awards were not found to affect the level of employment, profitability, or productivity of the individual workplace. In contrast, workplaces with co-operative employment practices were found to perform better, have higher turnover and profits and were more likely to invest.[24]

Finally, *WorkChoices* asserts that there is a not enough choice available under the present system. Currently in Victoria, considerable diversity and choice is already available under the federal system. Significantly, a large proportion of Victorian workplaces operate on more than one form of industrial instrument depending on individual workplace characteristics. Furthermore, almost one-third of workers are already covered by individual or workplace specific arrangements.

The information in this section addresses these fundamental shortcomings with *WorkChoices*. Firstly, the nature and diversity of workplace instruments already operating in Victoria is summarised. This is followed by an assessment of how well

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23 The Victorian Government's submission to the Senate Inquiry in Industrial Agreements can be accessed from:
http://www.aph.gov.au/Senate/committee/eet_ctte/indust_agreements/submissions/sub046.pdf.

24 Industrial Relations Victoria (IRV) (2003) *Towards High Performance Workplaces*. The State of Working Victoria Project Information Paper No. 7. Melbourne: Victorian Government.

current instruments meet business needs. Finally, summary information is presented on the level of co-operation already present in workplaces.

## 4.1 Industrial coverage in Victoria

A wide range of industrial instruments are operating in Victoria. In 2004, approximately 43 per cent of Victorian workplaces were covered by federal awards alone (the highest proportion of workplaces covered by a single instrument) with almost 23 per cent covered by 'own arrangements'. The proportion of workplaces covered by enterprise bargaining agreements (EBAs) was 9 per cent. The own arrangements category covers a wide range of instruments outside registered EBAs, Australian Workplace Agreements (AWAs) and federal awards. This category can also include unregistered collective agreements and common law type employment contracts.

Almost 26 per cent of Victorian workplaces operated a combination of industrial instruments to suit their operations and type of workforce. This diversity in instrument coverage is significant as it indicates that no specific type of agreement will suit all workplaces.

In terms of numbers of employees, just over 900 000 were covered by federal awards. Registered enterprise agreements covered 635 000 and own arrangements 305 602. These numbers indicate that registered agreements are far more prevalent in larger workplaces as 12.2 per cent of workplaces covered by this form of instrument represent almost 30 per cent of workers. In contrast, own arrangements cover almost a quarter of all workplaces but only represent 14 per cent of workers

## 4.2 Summary of research into the diversity of industrial agreements

A significant finding in the Victorian Governments Industrial Agreement's submission (from 2002 data) is that a large proportion of workplaces operate on more than one form of industrial instrument depending on individual workplace characteristics. Furthermore, almost one-third of workers are already covered by individual or workplace specific arrangements.

The diversity of workplace agreements was identified by an analysis of workplace types. In terms of industry distribution, a high proportion of award-covered employees were found in hospitality and human services. EBA coverage was prominent in government, construction, and finance and business while approximately one-third of employees in finance and business were regulated by own arrangements. Australian Workplace Agreements, while covering only 1.1 per cent of employees overall covered 2.1 per cent in manufacturing, 3.2 per cent in hospitality and 2 per cent in finance and business. In terms of the diversity of industrial coverage a considerable range of industries that have a combination of types of agreements. For example, in the infrastructure industry group the majority of workers are covered by a combination of instruments.

Workplace adoption of different forms of agreement also varied significantly by workplace size. Almost half of small workplaces had fewer than 20 employees are covered by awards and a further 25 per cent by own arrangements. Enterprise bargaining agreements are more common in larger workplaces and the proportion of workers covered by EBAs rises, as workplaces get larger

The distribution of coverage by major occupational groups provided an insight into how coverage relates to skills of workers. Workplaces employing professionals, tradespersons, and sales people are overrepresented in terms of award coverage while coverage by EBAs covered a diverse range of occupations. The coverage by non-comprehensive agreements such as AWAs and own arrangements is interesting. High skilled workers are more likely to be covered by 'own arrangements' in contrast AWAs the proportion of manager and high skilled workers is covered by AWAs is extremely small, in contrast proportion of sales, machinery and labourers is surprisingly high indicating a preference by workplaces to engage these workers on AWAs.

The overwhelming majority of Victorian workers are covered by comprehensive agreements (either the award system or EBAs). The type of instrument used by workplaces and the coverage of workers varies considerably between type of workplace, size, industry and the dominant occupational group.

Despite the high level of award and EBA coverage, a significant proportion of the Victorian workforce is outside the scope of comprehensive agreements. Furthermore, a small but significant proportion of workplaces operate a combination of different instruments to meet their needs. These results indicate it is unrealistic to assume that one form of industrial instrument will suit all workplaces.

### 4.3 The satisfaction with industrial agreements and industrial climate

A significant finding in the workplace agreements submission was presented in terms of the effectiveness of current industrial arrangements. The submission found that, there is no evidence to suggest the need for a comprehensive overhaul of industrial instruments. Survey results indicated that almost two-thirds of Victorian workplaces are satisfied that their chosen industrial instrument meets their business needs either most or some of the time.

Furthermore, satisfaction with comprehensive arrangements is considerably high and varies across industries, with small and regional workplaces the most satisfied. A significant finding is that workplaces that did not have comprehensive arrangements expressed the most dissatisfaction with how well their chosen instrument met business performance.

However, there was considerable diversity in the responses. For instance, those workplaces without comprehensive industrial instruments were the highest reported reporting that the instrument met their needs both most of the time and hardly ever.

The submission also highlighted some unexpected results. For instance, workplaces with more than 50 per cent casual employees were far more likely to indicate that their form of agreement did not meet business needs than compared with workplaces with a low casual density.

In addition, for those workplaces that have intentionally reduced staff over 80 per cent were satisfied with how the chosen industrial instrument met business needs either most of the time or some of the time. Workplaces with non-comprehensive instruments were the least satisfied with how their instrument met business needs.

For workplaces that have recruited staff over 70 per cent were satisfied with how the chosen industrial instrument met business needs either most of the time or some of the

time. Workplaces that were the most satisfied were those with mixed coverage or awards and the least satisfied were those with non-comprehensive instruments.

In light of this analysis, there is nothing to suggest that the current, and in particular, the award system is failing business needs. Workplaces with predominantly award coverage had consistently high or the highest levels of satisfaction with how well the instrument suited the needs of that business. This was particularly the case for businesses operating outside of the metropolitan area.

Furthermore, this analysis strongly indicates that:

- Businesses are satisfied with operating within the current industrial relations framework,
- There is no demonstrated need to change the current system on the basis of business needs, and
- The proposed changes have no evidence to support their application.

## 4.4 Industrial climate and management attitudes

Over the last two decades, there has been a downward trend in industrial disputes across Australia. Victoria's total of working days lost per 1000 employees dropped from 122 in April 2000 to 57 in April 2001 and was only 42 in the 12 months ending April 2003 (ABS 6321.0 2003).

Only 17 per cent of unionised workplaces had experienced some form of industrial action (strikes or picketing, stop work meetings, overtime bans and/or other bans) in the year before and that industrial action was concentrated in large workplaces with less than 10 per cent of unionised workplaces experiencing strike action.

In terms of the relationship with unions, the majority of workplace managers (54 per cent) believed that unions and management respected each other, with only 26 per cent having a negative view on this item. Managers in large workplaces were most likely (72 per cent) to agree that unions and management respected each other, perhaps reflecting the likelihood that management union interaction is more common in larger workplaces. Responses also varied considerably by industry (although in all cases more than half of all managers were positive).

In terms of industrial coverage, the most positive responses were found for workplaces covered by EBAs, awards and a combination of instruments and for all workplaces over 80 per cent of managers believed that workplaces IR climate had either improved or stayed the same over the last 5 years.

Table 3: Relationship between management, unions, and predominant form of coverage

| | Relationship between management and unions | | | | | |
|---|---|---|---|---|---|---|
| Predominant form of coverage | Very good | Good | Neither | Bad | Very bad | Total |
| EBA | 15.68 | 45.53 | 30.54 | 6.50 | 1.75 | 100.00 |
| AWA | 8.21 | 8.342 | 75.24 | 8.21 | 0.00 | 100.00 |
| Award | 16.11 | 39.28 | 42.71 | 1.53 | 0.36 | 99.99 |

| | Relationship between management and unions | | | | | |
|---|---|---|---|---|---|---|
| Predominant form of coverage | Very good | Good | Neither | Bad | Very bad | Total |
| None | 13.96 | 18.65 | 58.90 | 8.49 | 0.00 | 100.00 |
| Mixed | 11.22 | 38.85 | 39.43 | 7.56 | 2.94 | 100.00 |
| Total | 14.35 | 38.76 | 40.03 | 5.42 | 1.43 | 99.99 |

Source: State of Working Victoria Survey 2002

## 4.5 Summary

The federal government's proposal to replace the current industrial relations system is based on the premise that by encouraging workplace level bargaining over conditions of employment will better suit the needs of that workplace. This situation is available now. The submission demonstrates that considerable diversity exists in industrial instrument coverage and, this diversity is the preferred option by employers. Reducing the choice of instruments available contradicts the objective to encourage workplaces to adopt forms of industrial coverage that best reflect their business needs

# Section Five: Awards

## 5 *WorkChoices* and awards

The comprehensive neutering of the award system and the replacement of the award safety net is a matter for significant concern. Once again, the Victorian experience with Schedule 1A provides a number of insights into the operation of similar changes. Under *WorkChoices* a significant matter removed from the safety net are 'salary based allowances'. As described earlier, the loss of allowances was a considerable contributing factor for the disadvantage faced by Schedule 1A workers.

In addition, the operation of the new award system is unclear. It would appear that after the review by the Award Review Taskforce there will be no more new awards. Furthermore, the ability for the AIRC to rope new employers into existing awards appears non-existent. The significance of the operational issues is apparent in comparison with the Schedule 1A system. Under this system, existing Victorian awards were rationalised into 18 industry sector orders and these sector orders could not be changed or amended. One of the disadvantages of the Schedule 1A system was a lack of flexibility.[25] The inherent inflexibility in this system (in addition to an absence of workplace bargaining) lead to the establishment of Victorian common rule awards (see Section 2 of this submission).

### 5.1 The relevance of awards and the safety net

The Victorian Government supports the retention of a relevant and effective award system. The proposal under *WorkChoices* does not appear to meet these objectives. *WorkChoices* portrays the award system as a complex and dated piece of industrial relations machinery. However, the strengths of the current system are ignored. The development of award entitlement for employment reflect general community standard over what is fair and reasonable for employers to provide for their workforce. Moreover, the standards in the award system have developed and evolved over a number of decades and are subject to review. The process of review is equally relevant as both employers and employees (or their representatives) make submissions to the AIRC as to what the standards should be. The FPCS does not have the inherent review process that exists in the award system and there is a danger that the FPCS will become dated as community attitudes change.

In the haste to replace the award system with the FPCS, no consideration has been made as to whether the new 'standard' will be an improvement on the system that has been replaced. In terms of standard entitlements the FPCS is already behind those standards set in the award process. A key example is the difference between the FPCS of parental leave and the current standard set by the AIRC in the 2005 Work and Family Provisions Test Case. The standard in the test case provides for an extended period, unpaid leave not extending twelve months, and the right to request part-time work on re-employment. In this case, employees engaged under FPCS

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25 Victorian Industrial Relations Taskforce (2000) *Independent report of the Victorian Industrial Relations Taskforce – Part 1: Report and Recommendations.* Melbourne.

minimum entitlements will be worse off than they would have been as award employees (even those previously employed on Schedule 1A).

Another significant example is the removal of skill based career paths from awards, which has consequences for advancing pay equity (see Section 7). In addition, if skill based career paths are removed, there is a critical loss of career pathways and guides for skilling of Australian workers

As stated earlier, entitlements that were previously award standards will now have to be negotiated individually. While this disadvantage to employees has already been described in this submission, the impact on employers is ignored. One of the strengths of the award system is that it alleviated the need to negotiate will all individual workers. The standard entitlements based on occupational groupings enable employment systems to benefit from economies of scale. Any system that introduces more complexity into the negotiation process will increase costs. Finally, the outcome of competitive pressures to reduce costs for business was described for Schedule 1A. The advantage of the award process enables employers to compete on a level playing field with respect to labour cost, as individual firms know what their competitors are paying for labour.

## 5.2 The threat to award system and workers

*WorkChoices* stresses that the entitlements for existing employees and the award system itself will be maintained. However, these assurances need to be considered in relation to the *WorkChoices* proposal as a whole.

While the award system is preserved for *existing employees*, in any given year, approximately 23 per cent of employees will be job mobile. The majority of workers move from job to job (either within a firm or between firms) the remaining few change between unemployment and not in the labour force. Female workers are more likely to re-enter the labour market after a period of unemployment or not being in the labour force while male workers are more likely to change jobs. For these workers, unless their employer agrees to maintain or apply award conditions, they will be frozen out of the award system.

Table 4: Rate of job mobility in Australia – 1994 to 2004

| Job status | Years and Percentage Change | | | |
|---|---|---|---|---|
| Male Workers | 1994 | 1998 | 2002 | 2004 |
| Less than 1 year in current job | 21.4 | 20.8 | 21.7 | 22 |
| No previous job (enter labour market) | 7.3 | 7 | 7.2 | 7.4 |
| Had previous job | 14.1 | 13.8 | 14.5 | 14.6 |
| Female Workers | | | | |
| Less than 1 year in current job | 23.7 | 23.1 | 24.3 | 23.9 |
| No previous job (enter labour market) | 10.3 | 9.5 | 9.7 | 10.5 |
| Had previous job | 13.4 | 13.6 | 14.6 | 13.4 |
| All Workers | | | | |
| Less than 1 year in current job | 22.4 | 21.8 | 22.9 | 22.8 |
| No previous job (enter labour market) | 8.6 | 8.1 | 8.3 | 8.8 |
| Had previous job | 13.8 | 13.7 | 14.5 | 14 |

Source: ABS Cat No. 6209 *Labour Mobility*, 2004,

As outlined in Section 2, much of the discussion in *WorkChoices* centres on employment creation by reducing the level of unemployment by making the unemployed more 'competitive' or attractive to employers through bargaining by virtue of low labour costs.

Under *WorkChoices*, a considerable proportion of the 8 per cent of workers entering the labour market could (be offered jobs that undercut standard award entitlements. These employees would be in the same situation as the example of 'Billy' (*WorkChoices*: 14). That is, they will be offered jobs that meet the FPCS but are inferior to current award conditions for other employers of that business.

However, the potential proportion of workers that may have to give up award and other entitlements is not just limited to those moving from unemployment to work. This is because 14 per cent of workers change jobs that are already in employment and thus could be offered conditions that remove award entitlements. This situation would even be the same for workers that remain with the same employer who are offered promotion on the condition of taking an AWA.

A group of workers that is particularly vulnerable are young workers. This is because young workers are most likely to be job mobile. Almost 26 per cent of females aged 20 to 24 and nearly 24 per cent of males aged 20 to 24, change jobs each year. However, the true mobility is much higher as these workers are far more likely to move into and out of the labour market.

Table 5: Job mobility and age (percentage)

| | Job mobility – percentage | | |
|---|---|---|---|
| Age | Males | Females | Persons |
| 15-19 years | 19.2 | 18 | 18.6 |
| 20-24 years | 23.5 | 25.6 | 24.5 |
| 25-34 years | 19.5 | 17.6 | 18.6 |
| 35-44 years | 14.7 | 10.8 | 13 |
| 45-54 years | 9.8 | 7.8 | 8.9 |
| 55-69 years | 7.2 | 5.2 | 6.4 |
| All | 15 | 13.5 | 14.3 |

Source: Labour Mobility, 2004, ABS Cat No. 6209

Evidence from the Taskforce was that young workers are more likely to be in a poor bargaining position than other workers are as they often lack the experience to negotiate for themselves.

Other groups of workers can also be identified, for instance female workers are more likely to be re-entering the labour market compared with male workers. Thus, female workers may are more likely to be in a 'take it or leave it' situation when it comes to taking an initial job. Males in contrast are more likely to change jobs, thus more likely to be subject to being offered AWAs for promotion.

The effect of *WorkChoices* is even more apparent when taken into context with the reforms to the welfare system. Sole-parents currently receiving assistance are required to find at least 15 hours of paid work when their youngest child turns six. Similarly, the influx of new workers previously on disability benefits or assistance will not be offered the protection of the award system. These workers will face the additional disadvantage of having wages set below FPCS by virtue of their impairment. This system will not take into account the ability of workers with disabilities to participate fully in the workforce, and to be paid fairly for doing so.

*WorkChoices* states that 'federal awards will not be abolished. Employees not covered by a workplace agreement will continue to work under their awards' (*WorkChoices:* 31). However, the relevance of the award system will be considerably eroded over a short period by a combination of the considerable rate of labour mobility present in Australia, the effective dismantling of the award system and the active encouragement of employers by *WorkChoices* to offer AWAs that exclude award entitlements to workers.

Experience in Victoria with Schedule 1A demonstrated that a considerable proportion of workers were made worse off with the introduction of a minimalist employment system in 1992. However, the total effect could have been a lot worse if it was not for the existence of the federal award system. After the initial introduction of Victorian minimum standards in 1992, a considerable proportion of Victorian workers transferred to federal awards. More recently, the creation of common rule awards in Victoria allowed the remaining workers to be protected.

## 5.3 Summary

What needs to be stressed is that once a worker has shifted out of the award system there is no going back. The Victorian experience demonstrated that an effective award system could safeguard workers' entitlements even under a minimalist system. The effective dismantling of awards foreshadowed by *WorkChoices* will remove this protection.

# Section Six: Work and Family Issues

## 6 Introduction

The Victorian Government has demonstrated its intentions to deliver significant and lasting improvements to work and family balance though its *Action Agenda for Work and Family Balance*[26] and through the *Better Work and Family Balance Grants* program. The strength of the commitment is grounded in the government's vision of a State and a community where Victorians can:

- be involved in paid work;
- participate in family and community life;
- work in safe, fair, innovative and productive workplaces; and
- feel that Victoria is a great place to live, work and raise a family.

The means to achieve this vision is through a partnership model based on cooperation between employers, employees and their representatives. Successful outcomes include the development of quality part-time work guidelines in the retail, hospitality, health, law, and local government industries as well past and present recipients of the three rounds of work and family grants.

In contrast to the Victorian approach, the federal government announced the changes to the industrial relations system without any consultation with the community and inadequate opportunity for analysis, particularly on the impact for working families.

Further, the grounds upon which these changes have been justified, namely fostering growth and productivity, giving choice and flexibility, improving fairness and a 'better balance' between employers and employees, and simplifying the industrial system[27] can only partially contribute to the vision advanced by the Victorian Government. Of even greater concern is that the effect of these changes may actually diminish the vision of State and community that is the Victorian Government's policy framework. The alternative advanced is a poor substitute and a regressive step to achieving the necessary balance.

### 6.1 The impact of *WorkChoices* on Australian working families

The Victorian Government has commissioned Associate Professor Barbara Pocock to write *The Impact of WorkChoices on Australian Working Families* in order that a comprehensive analysis is available for proper examination. The major findings are presented as follows:

- *WorkChoices* will significantly reshape the terms of employment in Australia, affecting the growing proportion of employees who have responsibility for both work and care. Part of the Commonwealth Government's rationale for these

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26 Office of Women's Policy, Department for Victorian Communities (2003) *Action Agenda for Work & Family Balance – November 2003*. Melbourne: Victorian Government. Accessed from: http://www.business.vic.gov.au/busvicwr/_assets/main/lib60072/180_actionagendawfb(24pp).pdf.

27 Australian Government 12 October 2005; Prime Minister, ABC *Four Corners*: 26 September 2005

changes relies on its creation of 'greater opportunities to balance work and family' although detailed evidence in support of this proposition is lacking.

- These changes are occurring against the background of changes in the welfare system requiring sole-parents whose youngest children turn six to find at least 15 hours paid work. These workers will enter a more minimalist, individualistic system with significant care responsibilities and weak bargaining power. Their work and family protections will be minimal.
- Workers with family responsibilities need a secure living wage; adequate, predictable common family time (including social work time and holidays); flexibilities that meet their needs, including the opportunity for leave and to work part-time; protection for excessive hours; and quality, accessible affordable childcare.
- Australia lags behind the industrialised world already on several of these measures, with high levels of insecure work, long average hours of work, a growing proportion who works excessive hours, a poor leave regime, and a high proportion of workers – especially those with families – who work unsocial hours. Industrial relations reform should remediate these challenges. Unfortunately, *WorkChoices* will exacerbate them.
- Australia's female participation rate lags behind that in many trading partners (contributing to an impending labour shortage) because of backward work/family arrangements. While many countries are improving their work and family arrangements, *WorkChoices* swims in the opposite direction.
- The five components of the *Fair pay and conditions standard* represent a retreat on national work and family standards by incorporating only basic family leave provisions and failing to incorporate the right for parents to request extended parental leave, part-time work or more shared parental leave.
- The right to 'sell' two weeks annual leave will reduce common family time, with negative effects on children and parents. This effect may well compound disadvantage in lower income households.
- The capacity to set aside key award conditions in AWAs (public holidays, rest breaks, annual leave loadings, allowances, and penalty, shift, and overtime loadings) will be especially disadvantageous for families. This is a pernicious change, which will see both long and unsocial working hours increase. The international evidence about the negative effects of these work practices for workers and children is extensive and robust.
- Working carers have limited bargaining power. Like unemployed 'Billy' in *WorkChoices*, there will be many 'Beths' – mothers returning to work – who will lack effective capacity to refuse terms which are, by any test, family unfriendly. The employment standards of many women and carers will only be as strong as prevailing minimum legal standards and no stronger. This will advantage the 'careless' worker.

- Where margins are tight, employers who would like to offer more family friendly provisions, will be forced into a race to the bottom, so that even good employers cut conditions and the legal standard becomes both maxima and minima.
- The AIRC has been the source and forum for all recent general advances on work and family standards. Under *WorkChoices,* it will lose this role. It is hard to see where future general advances on work and family provisions will now come from. This will especially affect those outside collective agreements and the most vulnerable in the labour market, who are least able to win advances alone.
- Further, the loss of the arbitral power of the AIRC will reduce the capacity of employees to contest their employer's application of work and family provisions. This has been an active function of the AIRC in recent years. Finally, the AIRC's past role of taking account of family responsibilities in industrial regulation will be lost.
- A secure, living wage is vital to family well being. The primary weight placed on economic objectives in the work of the Fair Pay Commission is likely to see falls in real wages, which will especially affect those on low pay. It will also fostering further income dispersion and inequality in Australia. International research shows that inequality has significant negative effects on social well being.
- *WorkChoices* will see an expansion in individual agreements. Existing evidence shows that non-managerial employees on AWAs, relative to those on collective agreements, face lower pay rates, lower pay rises, longer, unsocial hours, and less time autonomy. Women fare especially badly as do part-timers and casuals, who have disproportionate responsibility for families.
- AWAs are less family friendly. They have less access to annual leave, long service leave, and sick leave. These are fundamental requirements of working carers. Only 12 per cent of AWAs registered between 1995 and 2000 had any work and family provisions. Only small proportions of AWAs in 2002 and 2003 had family or carer's leave (25 per cent), paid maternity leave (8 per cent), or paid parental leave (5 per cent).
- Those who need such provisions have least access. Only 51 per cent of women on AWAs had access to annual leave (62 per cent men) in 2002 and 2003. Fourteen per cent less women than men had access to any general work and family provisions.
- *WorkChoices* will foster growth in unsocial and long hours, given that loadings for overtime and unsocial hours are not protected. Control of working time, avoidance of unsocial hours and protection of common family time are key issues for families. *WorkChoices* further compromises each of these in a situation where almost two-thirds of Australians already work sometimes or often at unsocial times. International evidence of negative effects on marital stability, and on workers' and children's well being, is compelling.

- Many other countries are taking a different road in response to the challenges of international competition, rising dependency ratios, labour shortages and falling birth rates. They are increasing support for working carers, ensuring that their workforce participation is underpinned by fair standards, and providing essential infrastructure like paid leave, holidays, and rights to family-friendly flexibility. Equitable, family-friendly industrial conditions have not been seen as necessary trade-offs for economic growth, but as achievable joint objectives, the one supporting the other.
- For example, some countries have increased paid leave of various kinds, some have worked to reduce the proportion of workers working excessive or unsocial working hours, and several have introduced rights for employees to request more flexible leave and hours arrangements.
- The success of these approaches, which have been extensively reviewed, provide a more promising alternative direction for industrial reform in Australia, one which would improve the stability and well being of Australia's workers and their children and other dependents.

## 6.2 Work and family: Conclusion

These findings demonstrate the potentially devastating effect that *WorkChoices* may have on working families and therefore the community at large. They also demonstrate alternative '*WorkChoices*' that have been implemented successfully in other countries where both productivity and flexibility also matter. The Victorian Government is opposed to changes that will detrimentally affect working families.

# Section Seven: Pay Equity in Victoria

## 7 Pay equity in Victoria

The Victorian Government is committed to 'continuing action to close the continuing earnings gap between men and women.'[28] It is of considerable concern that, when the scope of the proposed changes in *WorkChoices* is considered, there is a clear weakening of the capacity to apply the pay equity principle. The corollary of this new wage determination system is that the means to advance pay equity determinations is also diminished.

An Award Review Taskforce (ART) will be established, to rationalise award wage and classification structures (including adult classification wages), and broadly, rationalise federal awards. However, the question of pay equity and skill based career paths is not expressly stated in the ART's Terms of Reference.

It is imperative that skill-based career paths be retained as an express component of the classification structures. The retention of career pathways and guides for the skilling of Australian workers is a crucial component of any strategy to address the broadening and deepening of Australia's skills base, addressing skills shortages and addressing pay equity for women. While it appears there is some intention of retaining career paths in broad-banded classifications, the removal of this well-established industrial concept from the federal industrial relations system, which has served both employers and workers well, would be a retrograde step.

The ability of the Australian Industrial Relations Commission to apply the pay equity principle remains. However, over time, the ability to make, amend or review awards, make orders, and arbitrate industrial disputes about equal remuneration will become obsolete. In addition, the AIRC must act 'consistently' with a decision of the FPC (however that decision is reached).

While FPC can consider the pay equity principle when setting wages rates, there is no obligation to do so. Further, decisions of the FPC cannot be appealed. With the FPC only dealing with five minimum standards, and coupled with the exclusion of skill based career classifications from awards, there is no opportunity for pay equity to be addressed.

There is no retention of the existing requirement that employers must offer AWA's in the same terms to comparable employees (unless the employer does not act unfairly or unreasonably in doing so). This has a significant implication for pay equity and for fair treatment of workers.

Pay inequity, under *WorkChoices*, will be exacerbated because of the intent to diminish the active role of trade unions in the workplace wage determination. The importance of unions in wage determination was discussed in Section 4 of this submission.

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[28] 'Labor: Listens then Acts: Labor's Plan for Building a Stronger and Fairer Community in Victoria', Chapter 10, Fairness and Safety at Work, 2002 Platform of the Australian Labor Party: available from: http://www.vic.alp.org.au/policy/platform.html

## 7.1 Background

Victoria is unique among the Australian states in having transferred its industrial relations powers to the Commonwealth. In doing so, its capacity to replicate the advances in other State jurisdictions is limited to its reliance on the Federal *Workplace Relations Act 1996* ('WRA'). *Part VIA – Minimum Entitlements of Employees*, *Division 2 – Equal remuneration for work of equal value* of the WRA.

The Victorian Government established an Inquiry into Gender Pay Equity in Victoria on 25 March 2004, in order to determine the status of pay equity and to identify action, which might be taken.[29] To assist with its deliberations, the Inquiry initiated research into pay equity in Victoria, including national and international comparisons, and some comment on the implications of different legal initiatives.

The critical issue for women arises from their greater reliance on award earnings and lower participation in workplace bargaining. Women are more likely to depend on minimum wage regulation. Nearly a third of women in the private sector rely on award movements to determine their wage rates as compared to 17 per cent of private sector men.

## 7.2 What causes the gap? – Contributing factors

One of the issues for women is the intersection of the domestic division of labour and undervaluing of work that is seen to be an extension of domestic or women's work (childcare, for example). The critical gender pay equity issues for women in low paying feminised occupations (dental nursing, for example) and industries (retail, for example) arise from the lower rates of pay that attend female dominated work compared to those in male dominated areas.

Case studies conducted for the New South Wales (NSW) Pay Equity Inquiry provided a cogent illustration on how the undervaluation of women's work is perpetuated. This was evident through:

- The absence of appropriate classification structures;
- Poor recognition of qualifications;
- The absence of previous and detailed assessments of the work;
- Gendered characterisations of the work undertaken by women; and
- Inadequate application of previous equal pay measures.

It is reasonable to conclude that the situation in Victoria would not be vastly different from that in other states and that many feminised occupations are also undervalued. With the removal of skill based career paths from Awards as intended in *WorkChoices*, there is a significant loss of opportunity to address the critical issue of the undervaluation of women's work.

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29 The final report of the Victorian Pay Equity Inquiry can be accessed from: http://www.business.vic.gov.au/busvicwr/_assets/main/lib60047/85_pay-equity-final-4-3-2005.pdf URCOT's research report can be accessed from: http://www.business.vic.gov.au/busvicwr/_assets/main/lib60047/04_payequityurcot.pdf.

## 7.3 Methods of wage fixing

Recent research has examined the influence of wage structure and wage setting on earnings differences. Generally, the research indicates that pay compression favours women. Greater income dispersion may also mean that improvements in the gender pay equity ratio may arise because of a relative fall in men's earnings. That is, the narrowing of the gap may be caused by a reduction in earnings for men and not an increase in women's earnings, which does not represent a positive outcome for men or women.

Four dimensions of the collective bargaining system are said to shape earnings differences between men and women:

- Weaknesses in the collective bargaining system arise not only from women's lower representation within collective bargaining agreements but also from the level of wages negotiated and the content of collective bargaining.
- Generally, the evidence suggests that the greater the degree of decentralisation the wider the gender pay gap.
- Gendered norms and valuations concerning masculinised and feminised work remain embedded in minimum wage systems, collective bargaining systems, and job gradings at an individual workplace.
- A range of forces that include the influence of more individualised and performance related systems and their promotion in female dominated industries.

In Section 4 of this submission, it was been established, amongst other things, that workers in low union density, smaller workplaces, and in particular industries such as hospitality, have their pay determined by employer discretion. Women work predominantly in such workplaces. *WorkChoices*, with its championing of individualised arrangements, will therefore exacerbate the unacceptably wide gap in men and women's pay, and does little or nothing to ameliorate the current state of pay *in*equity.

## 7.4 Award dependency

Men are therefore doing better out of enterprise bargaining than women, but there is also an issue about whether women are gaining access to the benefits of this sort of bargaining at the same rate as men. This difference in access is most apparent for women employed on a part-time basis and women employed in the private sector. Workplaces in accommodation, cafes and restaurants, and property and business services have been slower to embrace enterprise bargaining and, while the rate of bargaining in feminised sectors has improved since the early years of enterprise bargaining, workplaces in these sectors have not experienced multiple rounds of enterprise bargaining, as have sectors in construction and manufacturing.

There are large-scale differences in pay according to the form of industrial agreement – awards, registered collective agreements, and individual agreements. Award earnings are lower than those available through collective and individual agreements, and consequently the gap in earnings between men and women is lower among award-covered employees. The pay equity outcomes for women in Victoria under award regulation differ from those evident in New South Wales and other states and territories. This may reflect the impact of Schedule 1A arrangements.

## 7.5 Regulatory measures

The research undertaken for the Victorian Pay Equity Inquiry has established that there is a pay gap. It has outlined at least part of the cause, and has considered possible interventions. There is some consensus both in Australia and overseas that regulatory measures are needed to improve pay equity.

Drawing on experience in a range of pay equity regulatory regimes in place internationally, their distinguishing characteristics include:

- Whether they are located through industrial/employment based tribunals or human rights type frameworks;
- Whether they are complainant based or proactive in nature, and if the latter, whether they are voluntary or mandatory;
- Whether the remedies are limited to an individual, or group of individual complainants, a single workplace or employer, or industry and occupation;
- Whether the remedies are capable of providing retrospective relief;
- Their capacity to examine disparate areas of work; and
- Their capacity to examine market rates of pay.

## 7.6 Conclusion

A regulatory framework is a necessary component if pay equity is to be addressed. Opportunity to raise the issue, have it properly investigated and determined must be available, regardless of workplace arrangements. There is unsatisfactory indication in *WorkChoices* as to whether a mechanism will be in place and how it will operate. Such an oversight has the potential to disadvantage increasing numbers of women workers.

# Section Eight: Outworkers

The Victorian Government emphasises its concerns about the potential detrimental impact of *WorkChoices* on Victorian outworkers as a particularly vulnerable group of workers.

## 8 Outworkers as vulnerable workers

In 1996, the fundamental disadvantages facing outworkers were summarised by the Senate Economics Reference Committee30. At that time, the Committee stated that common problems experienced by outworkers included 'low piece rates which translate to low hourly rates; impossible deadlines for completion of work; late payment, underpayment, non-payment for completed work; rejection of work and reimbursed expenses; physical and verbal harassment from intermediaries (blackmail, threats, coercion and bribes); substandard working environments; and worries associated with combining work with family responsibilities. These stresses are compounded by the lack of English language skills and inadequate training'.

In 2000, the Taskforce identified the vulnerable nature of work for Victorian outworkers and in particular home-based workers.

The Taskforce found that outworkers were engaged under complex contractual arrangements and are paid according to the number of articles they produced. Most outworkers were identified as migrant women with children working from home to produce goods for the textile, clothing, and footwear industries. It was not uncommon for all members of the family, including young children, to work long hours for minimal (and below award) rates of pay.

In addition, outworkers were often encouraged or pressured into operating as 'non-employees' or independent contractors by their employer as a means to avoid entitlements required for employees (for example, leave entitlements, superannuation) and in the case of home based outworkers, OH and S requirements.

In 2001, a comprehensive study of Victorian outworkers 31 found that:

- outworkers were paid an average rate of $3.60 per hour and as little as 50 cents per hour;
- 88 per cent advised they relied on these wages for essential household expenses;
- most averaged more than 12 hours work per day with 62 per cent working 7 days per week and a further 26 per cent working 6 days per week;
- 74 per cent did not have their wages paid on time and 52 per cent had experienced non-payment of wages for work performed;
- 95 per cent did not get holiday leave, sick leave or public holiday pay;

30 Senate Economics Reference Committee Inquiry (1996), *Outworkers in the Garment Industry*, pp xi-xii.
31 Dr Christina Cregan (2001), *Home Sweat Home*, Melbourne University

- 75 per cent could not depend on a regular supply of work; and
- family members helped out in 70 per cent of households with 31 per cent of outworkers relying on their children to complete the work.

## 8.1 Victoria's commitment to fair outcomes for outworkers

In 2003, the Victorian Government passed the Outworkers (Improved Protection) Act 2003 (the Act) as a means to alleviate the disadvantage faced by outworkers and to ensure fair employment outcomes. This Act established the Ethical Clothing Trades Council of Victoria as a consultative forum representing employers, unions and consumer interests. The Council was established to evaluate the level of compliance with outworkers' entitlements in the clothing industry. In light of the often-complex contractual arrangements, the Act was amended in 2005 to ensure that all outworkers, including those who are required to establish themselves as a business to obtain work in the clothing industry, received wages and conditions equivalent to employees covered by the federal award.

Despite the efforts of the Act, low levels of compliance were reflected by information gathered by Industrial Relations Victoria's Information Service Officers and in the Council's report to the Minister of Industrial Relations in 2004. Outworkers were reported to be receiving between $5 and $7 per hour, depending on the complexity of the garment, which was improvement on previously reported rates but was still significantly less than the award rate.

The report undertaken by the Council identified that fundamental levels of disadvantage still exist for Victorian outworkers. However, through the operation of the current industrial relations system some of the symptoms have been have been alleviated.

In order to ensure fairness for Victorian outworkers, the Victorian Government has announced the development of a mandatory code in June 2005. The code, being developed in consultation with industry participants, will contain obligations to further reduce the disadvantage faced by outworkers.

## 8.2 *WorkChoices* and Outworkers

Clothing outworkers constitute one of the most marginalised segments of the Victorian workforce.

Under *WorkChoices*, outworkers' pay will be removed from awards and set and reviewed by the Fair Pay Commission. All outworker provisions that do no relate to pay (including chain of contract arrangements, registration of employers, employer record keeping, and inspection) will remain in awards as allowable matters.

*WorkChoices* also states that specific provisions for contract outworkers in the Victorian TCF industry will be maintained. Part XVI of the WR Act provides entitlements for contract outworkers to be paid for performing at the equivalent standard to that of an employee performing the same work. This section is integral to the operation of the Victorian Act.

*WorkChoices* does also provide that the relevant award outworker provisions form the minimum for agreements between an employer and an outworker i.e. the relevant

award outwork provisions will be read into agreements. However, there is nothing to prevent an employer engaging an outworker on an AWA that specifically excludes the award provisions. Given the negotiating position already of outworkers identified, this is a significant concern.

Furthermore, the multitude of definitions in *WorkChoices* makes it unclear as to whether *WorkChoices* is distinguishing employee outworkers from contract outworkers.

This is another significant concern as contractors form the largest proportion of outworkers and are the most difficult group to ensure compliance. In addition, the Council's report indicated that working condition of contract outworkers has improved significantly because of the application of employee award entitlements. Furthermore, the interaction of *WorkChoices* and the proposed federal Independent Contractor Act remains to be seen.

Another significant concern is the ability for the TCFUA to enforce the Victorian Act or even hold discussions with outworkers. This is primarily due to changes in the right of entry provisions under *WorkChoices* and in particular, the new restrictions only allowing the union to investigate records of union members unless an AIRC order is issued.

The immediate implication of the right of entry provisions is that the majority of outworkers are non-unionised. These workers are most reliant on union enforcement and protection to improve working conditions. In 2005 alone, the current right of entry provisions enabled the TCFUA to launch federal court proceeding against 29 companies for under payment of outworkers. Of the 29 companies, some were only paying between $2 and $3 per hour.

The operation of the current industrial relations system (the awards, AIRC and state Acts) has enabled a degree of protection outworkers to be offered to Victorian outworkers regardless of whether they are independent contractors or employees. It is disappointing that *WorkChoices* does not clearly offer the same flexibility or protection and, in some cases, will lead to the detriment of outworker employment condition.

# Section Nine: Impact on the Victorian Government as Employer

## 9 Introduction

The Victorian Government is committed to workplace relations based on consultation and cooperation. This commitment to a partnership approach to the management of workplace relations is a central and guiding plank of the Victorian Government's industrial relations framework. It is underpinned by access to an independent Australian Industrial Relations Commission, has contributed to productive public sector service delivery and sustainable wage growth, as well as fostering an open and co-operative relationship between the Government and Victorian public sector employees.

The Victorian Government intends to enact legislation to ensure that public sector employees continue to have access to existing award conditions. It will also introduce policy measures to provide proper protections for these workers where they are disadvantaged by the new federal legislation.

Listed below are some of the likely impacts of the legislative changes on the Victorian Government as a major employer in the Federal system. Given the length and complexity of the Bill, a more comprehensive response will be developed once the Victorian Government has had an opportunity to analyse all the proposed changes.

### 9.1 Partnership approach

The Bill has the potential to severely limit and constrain the ability of the Victorian Government to manage its workplace relations in accordance with its own industrial relations policy framework, a framework based on cooperation and partnership. While the Victorian Government is supportive of a fair unitary industrial relations system, it is not supportive of any attempt by the Commonwealth to curtail the ability of the Victorian Government to manage its affairs as a major employer in accordance with its own industrial relations policy.

Communication and consultation with employees and their unions has been integral in achieving sustainable agreements that have delivered a skilled and motivated workforce producing high quality and efficient services to the public. The removal of representational rights of unions and prohibiting provisions such as trade union training leave can only harm the culture that has developed as a result of this partnership approach.

### 9.2 Uncertainty and cost

The proposed changes are lengthy, complex and a radical departure from the current industrial relations system, which will result in years of uncertainty until the ramifications of the legislation are fully comprehended by public sector employers.

This uncertainty will translate into considerable costs for the Victorian Government, public resources that could be more productively engaged in the delivery of essential public sector services to the community.

### 9.3 Undermining of the role of Australian Industrial Relations Commission

The status and role of the Australian Industrial Relations Commission (the AIRC) as an independent umpire is valued and respected by the Victorian Government. The AIRC plays a vital role in assisting Victorian public sector employers to resolve disputes with public sector employees and their unions. The powers of the AIRC to conciliate, arbitrate and issue orders has been instrumental to avoiding industrial action and disruption to vital services to the community.

The proposed changes in the Bill to the role, powers and independence of the AIRC will severely limit its ability to settle industrial disputes.

The ability to seek the assistance of the AIRC to resolve disputes is an integral part of dispute settlement procedures throughout the whole of the Victorian public sector, with current Victorian Government policy requiring all public sector agreements to refer any unresolved disputes to the AIRC for conciliation and arbitration.

The AIRC, for example, has assisted in the resolution of a dispute with Victorian ambulance employees earlier this year. Under the current provisions of the WRA 1996, the matter was conciliated and then proceeded to arbitration by a Full Bench of the AIRC. The decision handed down by the AIRC provided a fair resolution to the major areas of dispute, avoiding escalation of industrial action and disruption to essential services. Equally important, because of the AIRC's current status in the community as a fair and independent umpire, the decision was accepted as a final settlement by all parties.

The removal of the ability to notify disputes under s. 99 and the limits placed on dispute resolution under agreements will significantly curtail the AIRC's role in resolving industrial issues. Instead, disputes will simmer unresolved with the resulting impact on morale and service delivery.

### 9.4 Public Sector Awards

The Victorian Government supports comprehensive awards that provide a real safety net for employees not covered by enterprise bargaining agreements.

The current award system provides a fair safety net to public sector employees not covered by an enterprise bargaining agreement. The proposed changes will have an immediate inequitable impact on these employees. For example, under the proposed Bill there is not expected to be a 'safety net' adjustment to awards until late 2006. Employees currently relying on these adjustments will fall further behind other public sector employees who receive regular pay adjustments under collective agreements.

Furthermore, any new award will not be as comprehensive as an award made under the current system – even though the Victorian Government as employer actively consents, in its industrial relations policy, to fair and comprehensive awards.

The Victorian Government, for example, reached agreement earlier this year for a new award to apply to over 25,000 Victorian public service staff, the Victorian Public Service Award 2005. The award is consistent with the Government's desire to maintain a comprehensive safety net to underpin agreements. The AIRC assisted the parties to come to an agreed career and classification structure in the award that provides the foundation for a modern and responsive public service whose work is appropriately

rewarded. The Victorian Government is opposed to any moves to dismantle that structure under the proposed Review.

## 9.5 Public Sector Agreements

The Victorian Government is committed to comprehensive enterprise agreements, and opposes any attempt to restrict the matters than can be included in agreements. It is fundamentally inconsistent for the Federal Government to argue, on the one hand, in favour of parties agreeing to regulate their own conditions through agreements and then on the other to preclude certain matters from being dealt with in those agreements.

The Bill proposes that clauses that prohibit AWAs, restrict the use of contractors, provide for trade union training leave, bargaining fees, paid union meetings, mandate union involvement in dispute settlement, provide for future union agreements or provide a remedy for unfair dismissal cannot be included in agreements. Victorian public sector agreements currently deal with a number of these matters.

The changes proposed in the Bill will impose artificial restrictions on the Victorian Government as employer to reach agreement with its employees, by limiting the terms and conditions that be included in consensual agreements.

Currently there are hundreds of public sector agreements that have been negotiated with employees and their unions that provide for flexible work practices. These have led to a diverse, skilled, and motivated workforce that delivers quality and efficient services to the community – as well as complying with the Victorian Government's broad policy position on wages. This flexibility has been based on a culture that supports the meeting of customer expectations whilst also assisting employees to balance their work, life, and family needs in a genuine way without needing to trade away existing conditions.

Attempts by the Government to limit the Victorian Government's ability to reach consensual agreements will lead to disquiet and disruption to an agreement making process that until now has helped deliver sustainable wages and conditions to employees and quality service delivery to the community.

## 9.6 Termination of employment

Victorian Government industrial relations policy recognises the role of an independent industrial tribunal as well as the inclusion of disputes and grievance clauses in public sector agreements that allow unresolved matters to be referred by either party to the AIRC for resolution by conciliation and, if necessary, arbitration. Access to an independent tribunal, which is able to decide independently on the merits whether a decision to terminate was unfair, is an integral part of the process.

Public sector employees working in agencies employing less than 100 employees will be denied access to a reasonable avenue of redress against unfair dismissals once the proposed federal IR reforms are legislated.

# Section Ten: Right of Entry

## 10 Occupational health and safety – right of entry

The Victorian Government opposes provisions in Division 5, Part IX of the *Workplace Relations Amendment* (WorkChoices) Bill 2005, which link state occupational health and safety right of entry laws with federal industrial relations right of entry provisions.

### 10.1 Responsibility for OHS Regulation should rest with States and Territories

Responsibility for occupational health and safety regulation rests with the states and territories, and this includes right of entry for occupational health and safety purposes.

The Victorian Occupational Health and Safety Act 2004 which took effect on 1 July 2005 provides an efficacious occupational health and safety (OHS) framework to improve health and safety by fostering a culture of cooperation at the workplace, including providing right of entry for authorised representatives of registered employee organisations (ARREOs) to enquire into suspected breaches of the OHS Act 2004 or regulations under the Act.

These right of entry provisions are considered to be integral to overall efficacy of Victoria's OHS framework, as they recognise the positive role that authorised representatives of registered employee organisations can play in supporting employees and employers in resolving workplace health and safety issues, and in creating a cooperative and proactive culture of risk prevention.

The imposition of additional requirements on OHS right of entry will undermine the positive outcomes that the OHS Act 2004 is seeking to achieve.

### 10.2 Proposed changes create duplication and greater regulatory burden

The proposed right of entry changes will create a dual system for obtaining entry permits for OHS right of entry; for addressing disputes about OHS right of entry and for imposing sanctions for misuse of OHS right of entry provisions. This dual system will create unnecessary jurisdictional complexity and make it more difficult to administer state OHS laws, especially those related to OHS right of entry.

It will also create confusion and uncertainty for employers and unions about the interaction between the federal and state right of entry requirements and how these operate in practice. Two sets of rules and their interplay will need to be understood, creating potential for increased disputation around not only industrial right of entry procedures, but also around OHS right of entry procedures and issues.

### 10.3 Victoria's OHS right of entry provisions are rigorous

Part 8 of the OHS Act 2004 contains a range of 'checks and balances' which ensure that both unions and employers act responsibly in relation to right of entry under the OHS Act 2004. These include:

- entry permits being issued by the Magistrates' Court for a fixed term after specific requirements are met, including that the prospective permit holder has

satisfactorily completed a course of training approved by the Victorian WorkCover Authority;

- a requirement that an ARREO provide a written notice describing the suspected contravention/s of the Act or regulations that the ARREO is enquiring into;
- ARREOs only being able to enquire into the suspected contravention/s through inspecting, observing, and consult with employees (with their consent), health and safety representatives, and the employer about health and safety issues arising from the suspected contravention/s.

All of these conditions reinforce the fact that right of entry under the OHS Act can only be exercised for OHS purposes and that is must not be used interchangeably with right of entry for industrial purposes. By linking federal IR right of entry with state OHS right of entry, WorkChoices blurs the distinction between right of entry for industrial and OHS purposes, thereby making it more difficult to administer the OHS Act 2004.

A stringent operational framework that clearly defines the powers of the workplace parties as well as the sanctions that are to apply if these powers are abused governs the right of entry arrangements in the OHS Act 2004. Sanctions for misuse of the right of entry apply including revocation of permits, disqualification of permit holders for up to 5 years and criminal offences. Compensation for loss and damage suffered because of misuse of the right of entry may be claimed from the relevant registered employee organisation. By linking the federal IR and state OHS laws, WorkChoices creates another system for dealing with disputes about OHS right of entry and for imposing sanctions for misuse of OHS right of entry powers.

### 10.4 Victoria's OHS right of entry provisions are working in practice

Implementation of Part 8 of the OHS Act 2004 has proceeded smoothly. Indeed, of the 20,000 or so OHS inquires received by the VWA since 1 July, only 109 have concerned right of entry provisions. WorkSafe continues to work closely with employers and unions to ensure that right of entry provisions for OHS purposes are clearly understood. Comprehensive guidance material has been produced and information sessions have been conducted.

The federal changes will create unnecessary confusion and uncertainty for employers and unions about their rights and obligations in terms of right of entry for OHS purposes.

### 10.5 Proposed changes are not efficient or effective

The Victorian Government supports the principle of a more consistent national approach to occupational health and safety. However, it is imperative that such an objective is not pursued at the expense of workplace health and safety for Victorian workers. The additional requirements proposed by the Commonwealth in relation to OHS right of entry will clearly undermine the tripartite approach adopted by Victoria to optimise workplace safety outcomes and are strongly opposed.

# Appendix: Issues of Significant Concern – Workplace Relations (WorkChoices) Bill 2005

## 11 Introduction

While Victoria's Submission to the Committee makes clear its opposition to the overall policy approach of the Bill, Victoria has identified a number of particular issues where the Bill is of relevance to Victorian legislation and policy.

The issues identified below are not put forward as being comprehensive either in relation to Victorian legislation or the proposed federal legislative drafting. Victoria will continue its examination of the Bill and may seek to raise further issues during any appearance before the Committee.

### 11.1 Jury duty

#### Termination or prejudicial conduct by an employer against an employee called to serve on a jury

Whilst the proposed section 7D of the Bill preserves "attendance to serve on a jury" as a matter able to be the subject of State laws, section 170 HC, (the definition of "State or Territory industrial law") appear to exclude any State laws providing a remedy for unlawful termination of employment, other than a remedy for unpaid entitlements (eg notice, leave).

Victoria's *Juries Act* 2000 (the Juries Act) provides that it is an offence for an employer to terminate or prejudice an employee because the employee is, was or will be absent from employment on jury service. The provision also allows a Judge to order that an employee so dismissed be reinstated, or if impractical to do so, be paid money in compensation. This scheme is crucial to the integrity of Victoria's justice system and to ensure that employees are able to perform this vital public service serve on juries free of the threat of losing their livelihoods.

The Bill as currently drafted is unclear on whether this provision in the Juries Act would be overridden.

> Victoria urges that section 7C(3) of the Bill be amended to make it clear that state laws providing remedies for termination for the reason that an employee is unavailable for work due to Jury service are not excluded. Further, the Bill should be amended to provide that provisions in State Acts cannot be overridden by an agreement made under the Act.

### 11.2 Long service leave

#### Termination to avoid long service leave entitlements

Similarly, the removal of unfair dismissal rights for employees of businesses with less than 100 employees leaves employees of smaller businesses without any remedy if they are dismissed by employers attempting to avoid long service leave entitlements.

Under Victoria's *Long Service Leave Act* 1992, an employer can be prosecuted and fined for so terminating an employee to avoid paying long service leave, and the amounts of any unpaid leave awarded to the employee. However, the employee is not compensated for the loss of their employment, and cannot seek reinstatement.

> Victoria submits that it is essential to provide a remedy for all employees (regardless of the size of the employer) who may be dismissed by an employer in order to avoid an obligation under state long service long service leave legislation, the Bill should be amended to include as a prohibited ground for the termination of employment (unlawful termination) that an employee is, or may become, entitled to long service leave or the payment in lieu of long service leave under either a State Act, an award or an agreement.
>
> Further, section 7C (3) should be amended to make clear that State laws allowing for employers to be prosecuted in these circumstances are not excluded, and also amended to provide that such laws cannot be overridden by an agreement made under the Act.

### 11.3 Accident make-up pay

The Australian Industrial Relations Commission has determined that accident make-up pay is an allowance for the purposes of the Workplace Relations Act. Victoria notes that accident make-up pay does not appear to be mentioned anywhere in the Bill or associated documents. The Commonwealth had not advised that it is intended to be removed from awards. However, accident make-up pay now seems to fall outside the description of "allowances" provided in the list of allowable matters in proposed new section 116 and in the Explanatory Memorandum.. This appears to be an unintended removal of this benefit.

Accident make-up pay is a requirement on employers to pay an allowance that "tops up" an employee's pay to the level of employee's usual weekly earnings (not including overtime or shift loadings). The payment is made where the employee is injured at work and is in receipt of worker's compensation insurance payments (usually 90 or 80 per cent of pre-injury ordinary time earnings). The top up payment is usually payable for a maximum period of 6 months. If accident make-up pay is removed from awards it will have a significant financial effect on vulnerable injured workers and their families.

> Victoria submits that to avoid any doubt, accident make-up pay should be specifically included as an allowance within the matters allowed in awards.

## 11.4 Long service leave

### 11.4.1 Agreements prevailing over State long service leave laws

The provisions in the Bill describing the relationship between the new federal Act, federal awards, federal agreements, and the State long service leave laws are confusing.

*Current Laws*

Under the current *Workplace Relations Act 1996*, long service leave applies to all Victorian employees who are not subject to any agreement, either through the award itself, or through the Victorian *Long Service Leave Act 1992* (the LSL Act). Under the WR Act, an agreement can override award or LSL Act entitlements to the extent of any inconsistency. Many current agreements are silent concerning long service leave, or expressly call up long service leave as per the State Act.

Under the current laws, an agreement can modify or abolish long service leave under the current Act, but there are restrictions. Long service leave laws currently form part of the "no-disadvantage test in section 170X of the WR Act. While long service leave (either the award or the legislated standard) can be modified, traded away, or improved upon, the condition must be taken into account in an assessment of the offered agreement by the OEA or the AIRC against the basket of current award and statutory entitlements.

*Avoidance of long service leave*

It is crucial in considering the issue of long service leave to appreciate its nature as a long term, accrued benefit. Many employees make decisions about their working lives based on a long-term expectation of receiving their long service leave. For example, they may forgo taking jobs with other employees and stay with their current employer for many more years (perhaps losing higher wages) in an expectation of receiving long service leave.

It is also important to note that once long service leave is accrued, or is close to being accrued, it represents a financial liability to a business. Standard national accounting principles dictate that employers commence to account for long service leave entitlements as a contingent liability in the business' accounts once an employee has served for five years.

Unfortunately a small number of employers who are either financially mismanaged or unscrupulous can, and do, look for ways to rid themselves of employees who will shortly be entitled to long service and become a financial liability. This issue was alluded to earlier in this Section in relation to the suggestions for providing unlawful dismissal rights for employees who are dismissed for the purpose of avoiding long service leave.

Of significant concern to Victoria is the fact that under this Bill, an unscrupulous employer can now also use the agreement making provisions to avoid their obligations.

Under *WorkChoices*, long service leave is no longer part of the no disadvantage test and is not part of the protected conditions in the Fair Pay and Conditions Standard. This means that a current employee can be offered an AWA that abolishes long

service leave, including the rights to existing accrued (or accruing) leave. When coupled with the pressures that can now be lawfully imposed on employees to enter agreements (for example, the threat of termination of agreements, transmission of business, the lack of unfair dismissal rights), it can be expected that there will be significant pressure on employees to "sign away" long service leave rights, including the right to existing accrued leave.

Under *WorkChoices* as presently drafted, an employee who is currently, (or who in years to come) is on an AWA that includes long service leave, and who for example has nine years of service already accrued, could be told that they must enter a new AWA with no long service leave benefit. This could be under threat of notice to terminate the current AWA and revert to the five minima only. Such an employee could lose the entitlement they had worked in good faith in the expectation of receiving, with no effective remedy.

The LSL Act provides it is an offence for an employer to terminate an employee in an endeavour to avoid long service leave. However, on current drafting it is unclear whether this offence is intended to be overridden.

> Victoria submits that the Bill should make clear that it does not override any provision of the *Long Service Leave Act* 1992 (Vic), including offences.

### 11.5 Family Provisions Decision

The Fair Pay and Conditions Standard should reflect the Family Provisions Decision (August 2005) increased standard of 104 weeks, including the right to request part-time work on return from parental leave until the child reaches school age

Victoria regrets that this significant new award standard is not included within the Fair Pay and Conditions Standard. This is a significant lost opportunity for Australian employers and employees. Our industrial relations system ought to be providing for better work-life balance for Australian workers, and must encourage an increase the labour force participation rates of women at a time of pending labour shortages. The decision of the AIRC represents a careful, balanced, and exhaustively researched outcome taking into account the needs of all groups in our society and the well-being of society as a whole.

> Victoria submits that the Australian Industrial Relations Commission Family leave test case standard on parental leave, including the right to request part-time work, should be included in the Fair Pay and Conditions Standard.

### 11.6 38 hour maximum ordinary hours

Clause 91C states that an employer must not require an employee to work more than an average of 38 hours per week over (agreed cycle or 12 months) "and reasonable additional hours" based on certain criteria.

Clause 90F guarantees that if the employee is covered by the Australian Pay and Classification Scales (APCS) and they are not a piece-rate employee, they must be paid a basic rate of pay for each hour worked.

However, clause 90G states that the hours to be counted for the purposes of clause 90F are those hours "that the employee worked and that he or she was required to work". In what seems an unintended piece of drafting, it may be argued that an employer can withhold payment for hours worked on the basis that they did not "require" those additional hours to be worked, even if they "requested" the hours be worked.

> Victoria submits that this matter should be clarified by providing that the Fair pay and conditions entitlement to be paid for work applies to all hours *actually* worked. We note that this is the current requirement contained within Schedule 1A in respect of Victorian employees, and has worked effectively.

### 11.7 Offence of publishing false allegation of misconduct

Victoria provides a balanced enforcement regime in the legislation outlined in this Appendix. However, the proposed new offence set out in Schedule 1, new section 196(5) is contrary to the usual principles of criminal liability. A person is guilty of an offence, with the penalty of imprisonment of 12 months, for:

- Publishing a statement;
- That expressly or impliedly states there was "misconduct" by a Commission member in relation to the performance of functions of powers, and
- There was not such misconduct as implied or stated; and
- The publication is likely to have a significant adverse effect on the public confidence that the Commission is properly exercising its functions.

The provision is drafted as a strict liability offence; the statement made need only be found objectively to be false. The offence does not require any intention to publish a false statement. This means a person could make a statement (for example, an allegation that a Commission member had a conflict of interest) in the genuine belief that the statement was true, but if found not to be true, could be liable to 12 months in prison.

There is no definition of "misconduct" and the scope of allegations caught by the provisions is most uncertain. For example, "misconduct" is often used in legal terms to mean a misapplication of the Act or law. On one view, this new provision could make it an offence to file an unsuccessful notice of appeal alleging failure to comply with the provisions of an Act, or make it an offence to make in good faith an unsuccessful application for disqualification of then member on the ground of conflict of interest or bias.

This proposed new offence goes far beyond what is necessary to protect the integrity of the Commission, and goes far beyond the very long-standing common law concept of contempt.

Victoria urges the Parliament to remove this proposed new offence and retain the usual and well-tested principles of contempt as provided in the current Act.