Department of Innovation, Industry and Regional Development

Industrial Relations Victoria

Level 33
121 Exhibition Street
Melbourne, Victoria 3000
GPO Box 4509
Melbourne, Victoria 3001
Australia
Telephone: (03) 9651 9200
Facsimile: (03) 9651 9333
www.irv.vic.gov.au
DX 210074

5 March 2008

Mr John Carter
Committee Secretary
Senate Education, Employment and Workplace Relations Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Mr Carter

Inquiry into the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill* 2008

I refer to the above Senate Inquiry.

I enclose the Victorian Government's submission to the Inquiry.

I confirm that the Committee is holding public hearings in Melbourne on 7 March 2008 and that the Committee has allocated 4pm on that day to the Victorian Government. The Victorian Government will be represented by Ms Bernadette O'Neill, Director Business Partnerships and Legislative Development, and Ms Sam Mikkelsen, Senior Policy Adviser.

Please contact me if you have any queries.

Yours faithfully

TIM LEE
Deputy Secretary
Industrial Relations Victoria

Victoria
The Place To Be

Victorian Government Submission to the Senate Standing Committee on Education, Employment and Workplace Relations

Inquiry into the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill* 2008

A. The *Workplace Relations Amendment (Transition to Forward with Fairness) Bill* and the Victorian *Workplace Rights Standard*

1. The Victorian Government supports a unitary industrial relations system, provided it is fair. The *Workplace Relations Amendment (Transition to Forward with Fairness) Bill* 2008 ("the Bill") will begin the process of restoring fairness to the *Workplace Relations Act* 1996 ("the Act"). Accordingly, the Victorian Government supports the Bill, subject to the resolution of the technical issue set out below in paragraphs 8 through to 12.

2. In response to the unfairness of the Work Choices amendments to the Act, the Victorian Government adopted the *Workplace Rights Standard*. It sets out 7 principles that the Victorian Government considers should underpin a fair industrial relations system. It is attached to this submission.

3. The first and third *Workplace Rights Standard* principles are especially relevant to the Bill. The first principle requires that a fair industrial system maintain a comprehensive safety net of wages and conditions. More specifically:

- "A comprehensive, fair and relevant safety net of minimum wages and conditions to protect the weakest in the workplace and to form the basis of a no-disadvantage test for all new agreements.
- The safety net should include protections for public holidays; overtime payments; hours of work, annual leave, classifications of employees and skill-based career paths; ordinary time hours of work and the times within which they are performed, rest breaks, notice periods, and variations to working hours; rates of pay generally; and incentive-based payments, piece rates and bonuses.
- The safety net should also protect: annual leave and leave loadings; long service leave; personal/carer's leave, cultural leave and other like forms of leave; parental leave; public holidays; allowances; loadings for overtime, casual or shift work; penalty rates; redundancy and termination; stand-down provisions; dispute settling procedures; jury service; type of employment; superannuation; and pay and conditions for outworkers.

- Minimum rates of pay set and adjusted by an independent umpire applying a fair and open process."

4. The proposed subject matter of the Australian Government's Federal safety net meets the first principle. In the context of the Bill, the type of employment conditions proposed for modern awards will, together with the National Employment Standards, deliver an appropriate safety net for Victorian employees. To that end, it is appropriate and consistent with the *Workplace Rights Standard* that the development of modern awards be subject to an Australian Industrial Relations Commission ("AIRC") managed process. It is essential the process involve employers, employees and unions.

5. The third *Workplace Rights Standard* principle emphasises the importance of collective bargaining between employers and employees, and their representatives. The position of the Victorian Government is that collective bargaining, supported by mutual obligations of good faith, is the preferred form of agreement making in the Federal system. It offers the best chance of achieving mutually beneficial and effective industrial agreements. That is recognised in the Bill by the provisions that would end Australian Workplace Agreements, transitioning the Federal system to one that relies on collective processes in agreement making.

6. It is true the Bill will for a time replace AWAs with a new individual instrument, the "Individual Transitional Employment Agreement" ("ITEA"). However, proper transitional arrangements, of which the ITEA is an example, are understandable. In any event, ITEAs must pass the proposed no disadvantage test. The Victorian Government strongly supports that test, both in its application to ITEAs and collective agreements.

7. As recognised by the *Workplace Rights Standard*, the no disadvantage test is an indispensable element of a fair industrial relations system. Its abolition by the former Government facilitated the dismantling of the existing award safety net, leaving award dependent employees vulnerable and worse off. It led Victoria to enact its own no disadvantage test in the *Public Sector Employment (Award Entitlements) Act* 2006 to protect public sector employees from the effects of Work Choices. Its restoration is welcome.

B. Modern Awards and Victorian Excluded Employers

8. By Schedule 2 of the Transition Bill, the AIRC will be empowered to make modern awards upon receiving an award modernisation request from the Minister.

9. It is plain that a modern award is not a variant of the forms of award created and continued in effect by Work Choices. It is new. Further, the subject matter of the modernisation process carried out by the AIRC will be a matter for the Minister to identify and describe. Plainly, a modern award may or may not be based on or derived from an award recognised by the current or previous iteration of the Act. However, the wide discretion of the Minister to

determine the number, nature and content of modern awards is not reflected in the provisions which will govern who they touch.

10. By proposed s. 576V(1), a modern award binds the "employers, employees, organisations and eligible entities that it is expressed to bind". A modern award must be expressed to bind specified employers and employees: s. 576V(2); and may bind specified classes of employer, employee and organisation: s. 576V(7). All these proposed provisions rely on the defined terms "employee" and "employer" in s. 5(1) and s. 6(1) of the Act. The Bill does not amend the definitions or Schedule 2 of the Act; nor does it apply the extended definitions of "employee" and "employer" available under Victoria's *Commonwealth Powers (Industrial Relations) Act 1996 (Vic)*[1].

11. Accordingly, as presently drafted, a modern award cannot attach to non-constitutional corporation employers in the Victorian public sector or other excluded employers and employees in the private sector, even if the modern award conforms to the award modernisation process. This appears to be inadvertent as it is inconsistent with the policy objective of the Bill and the Forward with Fairness policy of providing a unitary national system for the private sector including a safety net of modern awards and National Employment Standards. The Bill, in its current form, does not achieve this objective in respect of excluded Victorian employers and employees.

12. By the *Commonwealth Powers (Industrial Relations) Act 1996* (Vic) Victoria has done what it can to ensure that the Federal system will apply to most Victorians. So much is consistent with Victoria's support for a unitary system. It is especially important that modern awards, which will comprise one half of the proposed Federal safety net, apply as widely as the combination of Commonwealth and Victorian legislative power permits, and apply uniformly to employment that falls within power.. Continued exclusive reliance on s. 5(1) and s. 6(1) will prevent many Victorian public sector employees, such as teachers, nurses and public servants, from obtaining the benefit of modern awards once they come into effect on 1 January 2010. The same is true of private sector employees employed by Victorian excluded employers, a category that includes many unincorporated small business employers whose employees are often award reliant. It also extends to employers incorporated under Victorian law, such as the *Associations Incorporations Act 1981* (Vic), that do not engage in substantial trading and financial activities, meaning they are not constitutional corporations[2]. Accordingly, the Bill should be amended so

---

1 Although by proposed s. 576B(2) the AIRC must, in carrying out its award modernisation functions, have regard to rates of pay in transitional awards. For that purpose, the proposed section expressly calls up the definition of transitional award in Schedule 6, a form of award that is enforceable against excluded Victorian employers and employees by reason of the referral.

2 That is true, for instance, of many respondents to the *Social and Community Services (SACS) Award*, which continues to operate in Victoria as a common rule award. Indeed, the 2006 Employee Earnings Survey prepared by the Australian Bureau of Statistics shows that 27.8% of Victorian non-farm employees were employed by persons or entities that were not constitutional corporations. Unsurprisingly, most are employed in the retail, health and

that, in relation to modern awards, it utilises the legislative capacity conferred on the Commonwealth by the *Commonwealth Powers (Industrial Relations) Act 1996* (Vic).

---

community services and property and business services sectors. If Victorian public sector and local government employees are included the proportion of Victorian employment outside s. 5(1) and s. 6(1) of the *Workplace Relations Act* rises to 36.5%.

Attachment – Victorian Workplace Rights Standard

The Workplace Rights Standard

~ a fair go for all Victorians

The Victorian Government supports a unitary industrial relations system provided that it is fair. This Workplace Rights Standard provides the seven principles that the Victorian Government believes should underpin a fair industrial relations system.

1. Comprehensive Safety Net of Wages and Conditions

- A comprehensive, fair and relevant safety net of minimum wages and conditions to protect the weakest in the workplace and to form the basis of a no-disadvantage test for all new agreements;
- The safety net should include protections for public holidays; overtime payments; hours of work, annual leave, classifications of employees and skill-based career paths; ordinary time hours of work and the times within which they are performed, rest breaks, notice periods, and variations to working hours; rates of pay generally; and incentive-based payments, piece rates and bonuses;
- The net should also protect: annual leave and leave loadings; long service leave; personal/carer's leave, cultural leave and other like forms of leave; parental leave; public holidays; allowances; loadings for overtime, casual or shift work; penalty rates; redundancy and termination; stand-down provisions; dispute settling procedures; jury service; type of employment; superannuation; and pay and conditions for outworkers;
- Minimum rates of pay set and adjusted by an independent umpire applying a fair and open process.

2. The Australian Industrial Relations Commission as Independent Umpire

- The AIRC should act as an independent umpire performing the following roles:
  - Assist employers and unions to settle disputes by conciliation and, where necessary, by arbitration;
  - Provide a means for employers to seek relief when appropriate from industrial action;
  - Provide a forum to assist employers and unions engage in good faith bargaining;
  - Maintain a comprehensive fair and relevant safety net of minimum wages and conditions.

3. Collective Bargaining and Industrial Action

- Rights to collective enterprise bargaining need to properly balance a right for employees to take industrial action in pursuit of collective agreements against the rights of employers to secure relief when appropriate from industrial action;
- The AIRC should play a key role in conciliation and if necessary arbitration of intractable disputes that may impact on levels of employment or service delivery in key sectors affecting the economy or welfare of the community;
- Collective bargaining should encourage and enhance productivity and efficiency in the workplace;
- If a majority of employees in a workplace vote to endorse a negotiated collective agreement this should not be displaced by individual agreements. Employers and unions should be required to bargain in good faith to ensure these choices are respected;
- Employees and employers should be properly informed of their rights when entering into agreements.

4. Freedom of Association

- Freedom to join or not join a union and to be properly represented in the workplace.

5. Unfair Dismissal

- Employees should have the right to a hearing by an independent umpire if unfairly dismissed;
- Employers should be protected from claims from employees for unfair dismissal that are vexatious or without merit;
- The test for determining the fairness of a dismissal should be a "fair go all round".

6. Equal Pay for Work of Equal Value

- There should be continued protection of the principle of equal remuneration for work of equal value, enforced by the AIRC as an independent umpire.

7. Protection of Work and Family

- Maintain test case standards including the Work and Family test case;
- Access to and support of employment arrangements that help to reconcile work and family responsibilities.

For Further Information

Go to the *Industrial Relations Victoria* website at
www.irv.vic.gov.au
or the *Workplace Rights Advocate* website at
www.workplacerights.vic.gov.au

Victoria
The Place To Be