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Workplace Relations Amendment (Minimum
Entitlements for Victorian Workers) Bill 2001

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Workplace Relations Amendment (Minimum Entitlements
for Victorian Workers) Bill 2001

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28 August 2001

Contents

Purpose	1
Background	2
Workforce Statistics - Victoria	3
1992 Victorian Reforms	3
Commonwealth – Victoria Agreement	4
Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999	6
The Bracks Government	7
Victorian Industrial Relations Taskforce	9
Main Provisions	12
Schedule 1 – Matters concerning Victoria	12
Schedule 2 Contract Outworkers in Victoria in the textile, clothing and footwear industry	14
Concluding Comments	15
Endnotes	17
Appendix A	19
Table of Minimum Standards proposed in the Victorian Fair Employment Bill compared with the Workplace Relations Amendment (Minimum Entitlements for Victorian Workers) Bill 2001	19

Workplace Relations Amendment (Minimum Entitlements for Victorian Workers) Bill 2001

Date Introduced: 9 August 2001

House: House of Representatives

Portfolio: Employment, Workplace Relations and Small Business

Commencement: Sections 1 to 3, on receiving Royal Assent; the remaining provisions on or within 6 months of the Act receiving Royal Assent

Purpose

The purpose of the Bill is to amend sections of the *Workplace Relations Act 1996* (WR Act) under Part XV which deals with ‘matters transferred from Victoria’.

[Schedule 1A](#) of the WR Act sets out minimum entitlements provided to Victorian employees not employed under Commonwealth awards/agreements (referred to below as Schedule 1A workers) in conjunction with Part XV of the Act. As a result of complimentary State and Commonwealth legislation of 1996, the WR Act now ‘administers’ the Victorian industrial system.

The effect of this [Bill](#) will be to widen the five current minima specified in Schedule 1A which comprise:

- paid annual leave of four weeks
- five days paid sick leave
- an appropriate minimum wage
- parental leave, and
- notice of termination or compensation in lieu

to include:

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- five days of carers leave within eight days of sick leave
- two days bereavement leave paid on death of immediate family or household member
- access to the Supported Wage System for disabled workers and their employers on an industry sector basis rather than case by case
- payment for hours worked in excess of 38 hours
- detail on the calculation of annual leave and sick leave, and
- a legislative right to stand down employees where they cannot be gainfully employed.

Also, additional powers for Commonwealth workplace inspection officers will be provided. Other compliance measures will include obligations for employers to maintain time and wages records. A statutory right of intervention would be given to the Victorian Government where enterprise bargaining processes are terminated and in the setting or variation of minimum wage orders.

The Bill extends the relevant minimum wage to outworkers employed in the Victorian textile industry ‘within constitutional limitations’. This means that the provisions will apply only to the extent that the work performed is contracted by corporations or where the work to be performed is in relation to interstate, intraterritorial or international trade or commerce (see Schedule 2 of the Bill discussed below under Main Provisions). The Bill provides for specific inspection powers over the textile outworking industry.

Background

The dual nature of employment regulation in Australia under State and Commonwealth jurisdictions has meant that the employed workforce within State boundaries can be employed under either jurisdiction (but not both).

Under the Australian Constitution, Commonwealth industrial jurisdiction initially was to apply to interstate industrial disputes, the Australian Public Service and the Territories, while the States had responsibility for their public services and local businesses.

For a variety of reasons, the Commonwealth jurisdiction has expanded in the period since Federation, meaning that a large proportion of the Australian workforce is employed under Commonwealth awards and agreements. The Australian Industrial Relations Commission (AIRC) has been given specific roles and responsibilities in arbitrating disputes, making awards and overseeing agreements under Commonwealth legislation. The expansion of the Commonwealth jurisdiction has been due to the building of national if not international businesses into a national economy. State industrial jurisdictions have thus receded but

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play a very important role in industrial relations. Nevertheless, Victoria took the opportunity to refer its industrial relations powers to the Commonwealth in 1996, being the only State to have done so.

Workforce Statistics - Victoria

As at February 2001 there were approximately 1.948 million wage and salary earners in Victoria.¹ The bulk of these employees now work under Commonwealth awards and agreements.

However, there has been a movement out of the State jurisdiction's coverage over the 1990s. In 1990, the ABS reported that of Victorian employees under awards (82% of the then Victorian workforce), slightly more workers were employed under State awards (52%) than under Commonwealth awards (48%).²

In early 1993 the Keating Government amended the *Industrial Relations Act 1988* to allow the speedy transfer of Victorian award workers to the Commonwealth jurisdiction.³ It was reported in 1994 that about 400 000 employees transferred to the Commonwealth jurisdiction.⁴

As a result, the bulk of Victorian employees are covered under the Commonwealth industrial jurisdiction but approximately 560 000 employees are not covered by a Commonwealth award/agreement.⁵ Of these, according to the [Victorian Industrial Relations Taskforce](#), approximately 356 000 employees work under Schedule 1A minimum entitlements and about 235 000 work under minimum entitlements only, in conjunction with minimum wage orders, and thus may be affected directly by this Bill.⁶

In a recent AIRC decision (16 August 2001) to apply the May AIRC Safety Net Wage decision to Victorian Schedule 1A workers, Vice President Ross of a Full Bench noted that Schedule 1A workers were over-represented among low wage earners. He observed that 15 per cent of wage earners were earning less than \$10.50 per hour compared with 11 per cent of federal award employees. More than half of Victoria's 263 000 workplaces employed Schedule 1A employees, with most of those in small businesses.⁷ In summary, Schedule 1A workers mainly come from the lower paid occupations in small business.

1992 Victorian Reforms

In 1992 the newly elected Government in Victoria under Premier Kennett passed legislation to abolish the Victorian award system and replace it with a system of individual (and collective) employment contracts via the *Employee Relations Act 1992* (Vic). These contracts would be based on minimum conditions of employment set out in Schedule 1 to the Act. The cumulative effect of the 1992 changes were:

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- All Victorian awards ceased operation on 1 March 1993
- Employees who were in work at that time and who continued with the same employer were deemed to be governed by agreements which became known as ‘roll over’ agreements, provided they did not conclude an individual employment agreement or were not bound by a collective employment agreement
- Roll over agreements were deemed to contain the wage rate which was provided in the relevant Victorian award, and were overseen by the newly established Employee Relations Commission of Victoria (ERCV)
- the ERCV had no powers of compulsory arbitration, and could only use voluntary powers of arbitration where all of the parties agreed, and
- These changes applied equally to both the private and public sectors.⁸

A further legislative development contained provisions to enable ‘safety net wage’ increases to be accessed by Schedule 1 workers. The *Employee Relations (Amendment) Act 1994* (Vic) commenced operation on 9 May 1995. It gave the ERCV power to specify the minimum hourly wage rate for work classifications in 19 industry sectors, within certain limitations.

So, with this legislation Victorian employees coming under the State’s industrial jurisdiction could be employed under rolled over State awards, employment agreements provided for under the 1992 legislation, or under minimum wage orders. ‘New’ employees could not be employed under rolled over awards. They could be employed under minimum wage orders for the particular industry they worked in conjunction with the minimum entitlements specified under Schedule 1.

Annual Reports of the ERCV highlighted constraints and inflexibilities of the 1992 legislation. A comprehensive review of the 1992 legislation and the regulatory machinery has been undertaken by former ERCV President, Ms Susan Zeitz. Her review is attached to the report of the [Victorian Industrial Relations Taskforce](#).⁹

By the time of the agreement with the Commonwealth to refer industrial powers, the ERCV had:

proved to be a thorn in the side of the Kennett Government finding legal avenues to re-introduce arbitration powers and expired award conditions.¹⁰

Commonwealth – Victoria Agreement

In 1996 the State of Victoria and the Commonwealth entered into an agreement to confer certain industrial functions on the Commonwealth under a referral of State powers available under the Constitution [s.51(xxxvii)]. Victoria passed its [Commonwealth Powers](#)

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(Industrial Relations) Act 1996 (Vic). This Act set out the limits of this referral, including the ability for the Victorian Government to unilaterally withdraw from the arrangement at a later date.

For its part, the Commonwealth passed the *Workplace Relations and Other Legislation Amendment Act (No.2) 1996*. This Act created Part XV of the *WR Act*. The main features of the new provisions were:

- Employers with agreements under the Victorian system who wished to make new agreements (either certified agreements or Australian Workplace Agreements) would have to meet the Commonwealth's 'no disadvantage test'
- Employers who decided to have their workforces remain on employment agreements entered into under the Victorian system would have fixed time after which these could not be renewed
- Victorian employees would be covered by the Commonwealth's unfair dismissal system
- The constitutional requirements for an interstate dispute to exist as a precondition for a federal award to be made would be negated
- 'Division 2' certified agreements (a collective agreement made by a union or employees with an employer which is a corporation) and Australian Workplace Agreements could be entered into without the Commonwealth requirement that the employer be a constitutional corporation; ie these instruments would be available to non-corporate entities such as partnerships, and
- The role of adjusting minimum wage orders was assumed by the Australian Industrial Relations Commission (AIRC).

However, the referral of power was a limited referral and should **not** be interpreted to mean that Victorian employees under the State jurisdiction were transferred to Commonwealth awards. This point was noted in [Bills Digest No. 66 1996–97](#)

The scope of the Bill is in large measure determined by the 'matters' formally conferred on the Commonwealth by the Victorian Parliament via the Commonwealth Powers (Industrial Relations) Bill 1996 (the Victorian Bill). The potential reach of Commonwealth law is further restricted by certain implied constitutional limitations on the capacity of the Commonwealth to pass laws which may affect functions of a State which are critical to its capacity to function as a government.¹¹

Commentators, however, observed that the agreement would mean in the long run that Victorian employers would become subject to higher (Commonwealth) minimum employment conditions, as Victorian agreements expired, and employers sought to place employees under federal enterprise agreements, a point noted by journalist Mark Davis:

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... yesterday's agreement means that most Victorian employers operating under the Kennett Government's deregulated industrial system will eventually be subject to a considerably higher safety net of minimum conditions under federal industrial law ... Employers who want to stay under the Victorian system will continue to be subject to the State's safety net of four minimum employment conditions but will not be able to renew existing State agreements.¹²

However utilising these options assumes there is a willingness to move to Commonwealth agreements, while in reality some employers may prefer to 'do nothing'. In effect, the referral of industrial relations power to the Commonwealth put a sunset on the operation of the former Victorian system of employment agreements, but not minimum wage orders which operate as a default pay arrangement in the absence of any 'superior' employment agreement. In other words, it is perfectly feasible for Schedule 1A employers and employees to remain in the old State system, and not move across to agreements under the Commonwealth jurisdiction as envisaged in 1996.

Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999

The 'More Jobs Better Pay' Bill was introduced to the House of Representatives in June 1999 and contemplated a significant re-write of the WR Act. Following a [report](#)¹³ on the Bill by the Senate Employment Legislation Committee, the 'More Jobs Better Pay' Bill failed to pass the Senate on 29 November 1999.

Schedule 15 of the 'More Jobs Better Pay' Bill addressed matters referred by Victoria, and as with the current [Bill](#), attempted to:

- clarify the operation of the Schedule 1A entitlements to annual leave and sick leave and to determine that Schedule 1A employees were entitled to payment for work performed in excess of 38 hours a week
- provide inspectors with the power to enter and inspect premises where they reasonably believe that Schedule 1A work is being performed
- provide for a power to make regulations requiring employers to keep and maintain employment records for employees covered by Schedule 1A, and employees employed under Victorian employment agreements
- provide that a breach of the Schedule 1A minima could be prosecuted under sections 178 and 179 of the WR Act, and
- provide a mechanism for the stand-down of Victorian employees who were not employed under federal awards or agreements or Victorian under employment agreements. Formal stand-down arrangements have a particular advantage of allowing employees' continuity of service to remain unbroken.

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The arguably inferior treatment of Schedule 1A workers in Victoria compared to employees under other State and Commonwealth jurisdictions was extensively detailed in the Senate Committee's Minority Report of Labor Senators.¹⁴ They concluded that there were some benefits in the 'More Jobs Better Pay' Bill in so far as hours worked in excess of 38 would have to be paid and in respect of the proposed compliance provisions. On the other hand, casual and seasonal workers might lose access to annual leave and sick pay. There was also concern that the mathematical model used in the amended Schedule for the calculation of leave which excluded time on leave resulting in lower leave entitlements than is the practice in other jurisdictions.

The Government has since presented certain schedules of the 'More Jobs Better Pay' Bill as separate Bills to Parliament.¹⁵

The Bracks Government

The election of the Bracks Labor Government in October 1999 precipitated a review of the arrangement of the transfer of industrial responsibilities to the Commonwealth. Initially the new Victorian Government expressed dissatisfaction with referral arrangement, particularly criticising the suite of the five only minimum entitlements prescribed under the Commonwealth Act to apply to Schedule 1A workers.

As noted, Schedule 1A minima essentially replicate the minimum entitlements provided under Victorian legislation at the time of the transfer. Schedule 1A minimum entitlements are less than the 20 allowable matters which Commonwealth awards can address. The Victorian minimum entitlements predicate any current individual or collective employment contract (ie the contract cannot specify lower conditions than those specified in Schedule 1A), and the minimum entitlements provide conditions in conjunction with minimum wage orders. Thus the Victorian Government believes that its 'State' workers work under inferior industrial law and have access to fewer entitlements and conditions than comparable State award employees (eg in Queensland or New South Wales).

The Commonwealth's response was that the Victorian concerns would be initially considered, as noted in an interview with the former Workplace Relations Minister, the Hon. Peter Reith in February 2000:

The Victorian Government's stated policy position is that they would like some changes but only in the event that they couldn't achieve reasonable change would they then want to establish a Victorian system. Now as to where matters go from here I think further discussions would be sensible and I would expect there will be some ongoing process. How that will exactly pan out remains to be determined but we had a sensible discussion today, it was of a preliminary nature basically.¹⁶

From this time, relations between the two governments soured over differing responses to disputes in the construction, manufacturing and power industries. The Victorian

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Government then put its request for reforms in a formal advice. In a letter to the Hon. Peter Reith, the Victorian Industrial Relations Minister, the Hon. Monica Gould requested major reforms to the WR Act (ie under Part XV) thus honouring an election commitment for a fairer deal for Victorian workers.¹⁷ Problems perceived with the arrangement included:

- The Workplace Relations Act had resulted in more than 600 000 Schedule 1A workers being disadvantaged compared to their counterparts in other states, as they are not covered by any award
- Establishing a comprehensive award system that reflects the full range of issues affecting the wages and conditions of employees
- An expanded role for the Australian Industrial Relations Commission giving it powers of compulsory conciliation and arbitration over all terms and conditions of employment for Victorian workers
- A genuine no disadvantage test that properly assesses the fairness of workplace agreements, and
- New powers for Victoria to have the right to require industrial disputes to be brought before the Commission for determination.

Minister Gould said the proposed reforms were also aimed at providing protection for those 600 000 Schedule 1A workers who do not have basic entitlements:

These workers only have access to five minimum working conditions ... They do not have overtime, shift allowances, penalty rates, meal breaks, bereavement leave - there aren't any limits on rostering of hours, or any requirements on employers to notify changes in the workplace. There needs to be a greater safety net in place to improve the working conditions of these workers. Mr Reith needs to act to bring their working conditions in line with their counterparts in other states.¹⁸

The question then became to what extent would the Commonwealth agree to bring working conditions in line with the standards of other States? Additionally, the Victorian Government was particularly concerned that formal avenues to intervene in enterprise bargaining disputes were not available to the Victorian Government, as Minister Gould explained to *The Age*:

Following the referral of Victoria's industrial relations powers to the Commonwealth in 1996, the Bracks Government has only a few limited options available to it ...

Termination of a bargaining period under the (WR) Act, which then sparks compulsory conciliation and arbitration, can be ordered only by the (Australian) Industrial Relations Commission on its own initiative, or on application by a negotiating party, or by (Minister) Reith himself. The State Government can seek to intervene only after one of these parties has called the matter before the IRC.¹⁹

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The WR Act allows the AIRC to grant intervention in matters before the AIRC (s.43). State governments are major industrial players and it would be rare for their applications for intervention to be refused, particularly over major disputes within their State. Where a State Government or its authority was party to a Commonwealth award it would have access to a superior right of intervention.

Nevertheless, the Commonwealth responded to these overtures in a strident criticism of the Victorian Government and, in passing, criticised the award and arbitration systems operating in some of the States, as reflected in statement by the Hon. Peter Reith:

Re-creating a state system is not only unnecessary, but a costly duplication of resources, as well as a detrimental re-introduction of the legal complexities which result from dual systems.

Steve Bracks' justification for a new IR system is completely undermined by his support in 1996 for the referral. He supported it then because it was good for Victoria, he opposes it now because he is looking for a scapegoat for his own leadership. Other Australian states have retained their state systems. To varying degrees, this results in:

- a) Different arbitration and conciliation outcomes, depending upon whether a matter is before a state or federal forum. This gives impressions of unequal treatment, and lessens confidence in the overall system
- b) A multiplicity of state and federal awards means confusion, complexity, and varying standards
- c) Duplication of costs
- d) Encouragement of 'forum shopping'
- e) Confusion and uncertainty about the rights and obligations of employers and employees, and some unions and employer organisation
- f) Exacerbated demarcation disputes.²⁰

Minister Reith correctly observed that the re-introduction of Victorian industrial legislation and formal machinery processes would not give the Victorian Government a statutory right to intervene in industrial disputes under the **Commonwealth** jurisdiction. He also observed that State Governments have been recognised by the AIRC as major stakeholders in major disputes within the particular State, without the need for a statutory right of intervention.²¹

Victorian Industrial Relations Taskforce

Having been rebuffed at its request for reforms to the WR Act, the Victorian Government proposed an inquiry by a taskforce into the Victorian industrial relations system on 4 April

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2000. Terms of reference were then prepared.²² According to Minister Gould, the setting up of the taskforce implemented a key recommendation from the "Growing Victoria Together" summit which was convened in early 2000 with business and unions to review the handling of some major disputes:

It (the Taskforce) will make recommendations to the Government on how the industrial relations system might be better framed to share growth with all Victorians. The abolition of Victoria's awards in 1992 was done without public consultation by the Kennett Government.

The Bracks Government believes it is now time to review the effectiveness of these industrial relations arrangements through a taskforce which has consultation with, and input from, the community, as a paramount consideration. Community and stakeholders would be invited to make submissions to the taskforce on the effectiveness of the current industrial relations system, and about whether it meets the needs of Victoria heading into the new millennium.

An Issues Paper was released in May 2000 calling on written submissions from the public. This was to be followed by consultations in urban and regional areas of Victoria.

Following submissions and consultations, the Taskforce made its [report](#) in August 2000. Key points of the report canvassed:

- The structure, functions and powers of an industrial tribunal (the Fair Employment Tribunal) which would be required to administer a Victorian industrial relations system where the recommendations contained within this report could not be accommodated in federal law
- One system of industrial regulation which could be achieved for all Victorian workplaces would be in respect of federal unfair termination laws, agreement making, and the pursuit of a harmonised Victorian compliance and enforcement system to apply to all Victorian workplaces
- For other matters there would be a fair employment statute, which would specify and review terms and conditions of employment for all Victorian employees, to the extent that these matters are not covered by federal awards, federal certified agreements or Australian workplace agreements. These terms and conditions of employment would include: annual leave; annual leave loadings; public holidays; long service leave; sick leave; cultural leave; personal carer's leave; bereavement leave; jury service leave; parental leave (maternity, paternity, adoption and part-time work provisions); and specifications on full-time, part-time and casual employment
- Other fair employment standards to be applied in specific industry sectors, would be determined and administered by the Fair Employment Tribunal. These industry sector terms and conditions of employment would include:
 - rates of remuneration

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- work classifications
 - allowances
 - hours of employment (varying hours of work provisions, including ordinary hours of work, rostering arrangements, meal breaks, and rest pauses)
 - remuneration or compensation for overtime arrangements
 - penalty rates; recompense or time in lieu or substitution days for work undertaken on a public holiday, and
 - redundancy and severance pay arrangements.
- The Fair Employment Tribunal would also be given a power of inquiry into industrial matters. The Fair Employment statute should provide a mechanism for promptly resolving employee grievances, for example in respect of rostering arrangements
 - The Fair Employment Tribunal should publish a code of practice specifying steps for promptly resolving employee grievances within places of work. Employees who have failed to resolve a grievance in accordance with the code of practice at the place of work, may apply to the Tribunal for assistance in resolving the grievance
 - The Fair Employment statute would contain a definition of ‘employee’ which would cover outworkers in the clothing industry
 - The Fair Employment Tribunal would have the power to review independent contractor arrangements in cases where those contractors were persons who performed work in an industry, as well as to register multi-contractor arrangements, such as owner-drivers in the transport and forestry industries in order to bring stability to these types of work arrangements.
 - The Fair Employment Tribunal would also provide an education and advisory service to employers, employees and the community, and
 - The Fair Employment Tribunal would possess power to settle small claims relating to wages and to allowances, to ensure compliance.

A Fair Employment Bill was introduced to the Victorian Parliament on 25 October 2000 implementing many of the Taskforce’s proposals, although with some amendments from its original form after discussions with key parties (see its **main provisions in the appendix** to this Digest).

The Bill failed to pass the Victorian Upper House on 4 April 2001. In rejecting the Fair Employment Bill, Dr Denis Naphine, Leader of the Opposition, claimed that the Bill was anti-small business, would cost 40 000 jobs and was not in the interests of Victoria. He

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also claimed the Bill was unnecessary after the Howard Government's decision to amend the WR Act to address the needs of Victoria's lowest-paid workers.²³

The Workplace Relations Minister, the Hon. Tony Abbott formally advised the Victorian Government of his intention to amend WR Act provisions addressing Schedule 1A workers on 14 March 2001. ([media release](#))

Premier Bracks then challenged the Commonwealth to bring Schedule 1A workers under Commonwealth awards:

We'll refer all relevant IR powers if they (the Commonwealth) agree that a quarter of a million Victorians are entitled to the same basic employment conditions as other Australians. These conditions are available to workers under their Workplace Relations Act in all other states and territories in Australia. Under the Bracks Government's plan, Victoria will allow the Commonwealth to give the Australian Industrial Relations Commission the power to make federal awards apply as common law across Victoria ... We are asking two simple things: federal awards to apply to all Victorian workers and outworkers to be protected as employees.²⁴

The question is, will the provisions of the current [Bill](#) satisfy the Victorian Government's demands? A comparison of the Commonwealth's offer on Victorian demands for industrial legislation (represented by provisions of this Bill) with the provisions of the Victorian Fair Employment Bill are attached as an appendix to this Digest.

Main Provisions

Schedule 1 – Matters concerning Victoria

Item 1 inserts a **new subsection 45(3A)** into the WR Act allowing the Victorian Government to intervene in an appeal before a Full Bench of the AIRC in respect of termination of a bargaining period concerning Victorian employee/s and in relation to an appeal concerning minimum wage orders. (See also **Item 7**). The Full Bench must grant the application. (Note section 43 of the WR Act provides the AIRC with a general power to grant applications to intervene in proceedings).

Item 2 repeals and replaces subsection 86(1) which deals with the role of workplace inspectors visiting businesses for the purpose, inter alia, of ascertaining whether an award or other instrument has been breached. A **new subsection 86(1A)(c)** would require a person (employer) to produce documents to the inspector under notice. (see also **Item 6**).

Item 5 adds provisions to subsection 86(4) which concern giving formal notice to a person to produce documents under subsection 86(1A)(c). They will also provide that

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documentation so produced will not be admissible as evidence in any criminal proceedings against the individual, except in the case of obstruction.

Item 6 inserts **new subsections 86(6) and 86(7)** to allow inspectors to enter workplaces which employ Schedule 1A workers and thus for such workers to make complaints or seek advice about possible employment breaches.

Item 7 adds **new subsection 170MW(1A)** which requires the AIRC to grant intervention to a Victorian Minister in respect of the termination of bargaining involving Victorian employees.

Item 10 inserts **new subsection 501(2A)** which entitles the Victorian Government to intervene in AIRC proceedings concerning the setting or variation of minimum wage orders. The AIRC must grant the application. (This provision might be compared to section 44 of the WR Act which stipulates the intervention rights of the Commonwealth Minister).

Item 11 inserts **new section 501A – Supported Wage System (SWS)**. The provision would allow the AIRC to order that the Supported Wage System applies to Schedule 1A employment in a particular work classification in a declared industry sector. Currently the AIRC may approve a SWS arrangement on a case by case basis in Schedule 1A workplaces by exempting them from the relevant minimum wage order in respect of certain employees.

Item 15 repeals and replaces subsection 506(2) and adds **new subsection 506(3)**. These provisions will allow Schedule 1A workers to bring actions under section 178 in respect a penalty for breach and under section 179 in respect of underpayment. Inspectors will also be able to bring such actions. **Item 20** adds **new subsection 533(4)** which prevents an action for an order re a breach being made under section 533, if an action has commenced under section 506.

Item 16 inserts **new section 509A** which will allow Schedule 1A employees to be stood down in circumstances where an employer cannot provide work due to strikes, machinery breakdowns or other stoppages for which the employer cannot be held responsible. The employee's employment contract would be deemed to contain the model stand down clause prescribed in this section.

Item 18 repeals and replaces existing section 514 with a new section under which regulations to the Act may prescribe the making and retention by employers of employment records and time and wages records of employees and allow for the inspection of these.

Item 21 repeals and replaces paragraphs 1(1)(a) and (b) of Schedule 1A which refer to (a) paid annual leave and (b) paid sick leave. The new provisions exclude casual and seasonal workers from paid annual leave. Sick leave is replaced with the term personal leave and casual and seasonal workers are excluded from it. A **new paragraph 1(1)(ba)** introduces

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paid bereavement leave to the minimum entitlements. **Item 26** adds new provisions to the end of Part 1 of the Schedule which set out how these entitlements are to be calculated. Note: personal leave credits are to be cumulative, however unlike the Commonwealth award standard bereavement leave is not to be included in the determination of personal leave. This results in fewer days personal leave than the Commonwealth award standard.

Item 24 inserts **new paragraph 1(1)(f)** into Schedule 1A which will ensure that those working under employment contracts underpinned by Schedule 1A provisions must be paid for hours worked in excess of 38.

Item 25 adds **new subsection 1(3)** which provides for Schedule 1A workers to be paid for hours worked in excess of 38.

Items 27 to 36 are items dealing with application of the new provisions of this Schedule and ensure that new entitlements do not accrue for the employment period prior to the new Act coming into effect.

Schedule 2 Contract Outworkers in Victoria in the textile, clothing and footwear industry

Item 3 inserts a **new Part XVI** after Part XV in the Act.

New section 539 determines that the new Part will apply where a party to a relevant contract for services is a constitutional corporation.

New Section 540 determines that Part XVI also applies where the work contracted to be performed is in the course of international, interstate or intraterritorial trade.

New subsection 541(3) provides that the minimum statutory amount to be paid to an outworker in the textile industry employed under a contract for service must be the amount the worker would be entitled to be paid if he or she had performed the work as a Schedule 1A employee in Victoria.

New section 542 provides certain powers to inspectors to ensure compliance in the outwork textile industry with the new minimum wage provisions.

New sections 543 to 548 deal with the imposition of penalties and recovery of pay.

New section 549 parallels section 353A of the Act allowing regulations to be made requiring records of contracts with outworkers to be made and retained and made available for inspection.

Note: another potential source of constitutional power for the Commonwealth to regulate the textile outworking industry could be the External Affairs power (s.51 xxix of the Constitution). In 1996 the ILO adopted Convention 177 on [Home Work](#). This Convention

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came into force in 2000. Australia to date has not ratified the Convention, and only Ireland and Finland have done so. Nevertheless, the Senate Economics References Committee 1998 report into the garment outworking industry noted that the Government was undertaking necessary consultations before determining whether Convention 177 should be ratified by Australia.²⁵ The *Federal Clothing Trades Award 1999* has application to Victorian textile outworkers (see Part 9) but not in respect of Schedule 1A workers.

Item 4 proposes that the above provisions will come into effect after their commencement irrespective of whether a contract for service has been entered into before (or after) that commencement.

Concluding Comments

Discussion of improving minimum employment conditions and of extending the Commonwealth award system to Victorian Schedule 1A workers reflects the change of the balance of power in Australia's Federation brought about the elections of ALP governments in Victoria, Queensland and Western Australia over the past eighteen months.

Upper Houses in Victoria and Western Australia have restrained the respective Government's industrial agendas. In the case of Victoria, the legislative referral of powers in 1996 now reveals the Commonwealth's control over the pace of regulatory reform over the Victorian employment system. The Victorian Government is disappointed with the concessions offered in this **Bill** as it believes it continues the inferior treatment of Schedule 1A workers in Victoria and prefers Commonwealth awards to be common rule awards across Victoria (thereby displacing any reference to Schedule 1A workers), as noted by Minister Gould:

Legislation introduced today (9/8/2001) by the Howard Government would entrench the blatant discrimination against Victoria's lowest paid workers ... the amendments were totally inadequate and failed to provide a fair deal for Victoria's low paid workers ...

Today's proposal could give them another couple (minimum standards) – but this still leaves them way behind every other worker in the country and provides no regulation at all for hours of work ...

Providing for federal awards to have common application throughout Victoria would ensure that the State's 250,000 vulnerable workers, not currently covered by federal awards, would have the same rights as those enjoyed by workers in all others states and territories.²⁶

Premier Bracks has proposed to re-introduce the Fair Employment Bill following its failure to pass the Victorian Parliament in April 2001. The Victorian Government is

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reluctant to withdraw from the 1996 referral arrangement without being able to put in place an alternative legislative system.

The Victorian Trades Hall Council is also critical of this Bill.²⁷ Nevertheless, this Bill improves the minimum entitlements and protections available to Schedule 1A workers in Victoria. In many respects the need for a Bill such as this, highlights the limits of employer/employee agreements acting as a full and systematic substitute for awards and agreements determined under the auspices of principles developed and enforced under Commonwealth industrial law.

Other key players have favourably reviewed this Bill, as noted in comments of Senator Murray from the Australian Democrats:

... any improvement to the current level of inadequate protection of Victorian workers on employee entitlements should be welcomed and the Democrats will certainly be considering this bill very favourably.²⁸

The matter of divergent minimum employment standards was recently alluded to by AIRC President Guidice in an address to the Bar Association of Queensland Industrial and Employment Law Conference, where he said:

There is an important related issue concerning minimum standards - referred to in Federal industrial legislation as the award safety net. A great deal has been done in the last 20 years or so to coordinate many basic entitlements through the State and federal industrial award systems. But there are still differences in the nature and level of entitlements. Where those differences have no rational basis but are accidents of industrial or political history they advantage some citizens and disadvantage others. This too is a lack of equality and it undermines our society in a significant way.²⁹

In this light, the extension of a few key Commonwealth industry awards to Victorian Schedule 1A workers as common rule awards would be a more sure-footed way of resolving the 'lack of equality'. For example in the case of the textile industry and Victorian outworkers, the *Federal Clothing Trades Award 1999* could be used as a suitable instrument. It was the subject of an award simplification process in the Australian Industrial Relations Commission and retains its special application to outworkers following award simplification.³⁰ Note however that such an option is specifically excluded by the Victorian referral legislation.³¹

Nevertheless, the Bill improves the position of most Schedule 1A employees. As well, providing a statutory right to the Victorian Government of intervention in major Victorian enterprise bargaining disputes before the AIRC is a right not provided to other States.

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Endnotes

- 1 ABS *Wage and Salary Earners*, (Catalogue No. 6248.0).
- 2 ABS, *Award Coverage Survey 1990*, (Catalogue No. 6315.0).
- 3 *Industrial Relations Amendment Act (No.2) 1992* amending s.111 of the *Industrial Relations Act 1988*.
- 4 ‘Vic IR system nears end, warns solicitor’, *The Australian Financial Review*, 10 March 1994.
- 5 The Hon Monica Gould, ‘Bracks Government seeks Industrial Relations Reforms’, *Media Release*, 28 February 2000.
- 6 Independent Report of the Victorian Industrial Relations Taskforce, (August 2000) p. 8
<http://www.vic.gov.au/irtaskforce> (23/08/01)
- 7 AIRC Print PR 907793 16/8/01 and *WorkplaceInfo* 17/8/2001 at:
<http://www.workplaceinfo.com.au/alert/2001/01186.htm> (23/08/01)
- 8 Independent Report of the Victorian Industrial Relations Taskforce, (August 2000) p. 31.
- 9 Cited in endnote 6.
- 10 ‘Kennett to scrap IR system’, *The Australian Financial Review*, 12 June 1996.
- 11 Bills Digest 66 1996–97 at: <http://www.aph.gov.au/library/pubs/bd/1996-97/97bd066.htm>
- 12 ‘Victoria leads way on IR reform’, *The Australian Financial Review*, 12 November 1996.
- 13 Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, *Consideration of the Provisions of the Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999*, November 1999
- 14 *Ibid.*, pp. 364–367.
- 15 These Bills are listed under Legislation in the DEWRSB website
<http://www.dewrsb.gov.au/workplaceRelations/legislation/default.asp>.
- 16 The Hon. Peter Reith MP, transcript of doorstep interview, 3 February 2000.
- 17 The Hon. Monica Gould, ‘Bracks Government seeks Industrial Relations Reforms’, *Media Release*, 28 February 2000.
- 18 *Ibid.*
- 19 ‘Why the system is not up to the job’, *The Age*, 9 February 2000.
- 20 The Hon. Peter Reith, ‘Bracks and Yallourn – six myths exposed’, *Media Release*, 13 February 2000.
- 21 *Ibid.*
- 22 The Hon Monica Gould, ‘Gould establishes IR Taskforce’ *Media Release*, 12 April 2000.

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- 23 The plan to amend the Workplace Relations Act in respect of Victorian workers was revealed in March 2001: see 'Abbott to amend workplace laws for Victorians', *The Age*, 15 March 2001
- 24 Premier Steve Bracks, 'Howard Government must provide genuine IR system for all', *Media Release*, 5 April 2001.
- 25 Senate Economic References Committee, *Review of the Inquiry into Outworkers in the Garment Industry*, July 1998, p. 12.
- 26 The Hon. Monica Gould, 'Howard Government continues to deny fair go for Victoria's low paid workers', *Media Release*, 9 August 2001.
- 27 'Abbot's dirty deal is destined to backfire', *The Age*, 19 March 2001.
- 28 Senator Andrew Murray, *Press Release*, 13 March 2001
- 29 AIRC, 20 April 2001 at <http://www.airc.gov.au/research/speeches/speeches/Giudice0401.htm>
- 30 AIRC, *Print R 2749*, 12 March 1999.
- 31 Section 5(1) of the *Commonwealth Powers (Industrial Relations) Act 1996* (Vic).

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Appendix A

Table of Minimum Standards proposed in the Victorian Fair Employment Bill compared with the Workplace Relations Amendment (Minimum Entitlements for Victorian Workers) Bill 2001

Fair Employment Bill	Commonwealth Proposals and Schedule 1A
Up to 5 days paid carers leave, to be taken out of existing sick leave	Up to 5 days paid carers leave to be taken out of existing sick leave
Up to 8 days sick leave	Up to 8 days sick leave
Up to 2 days bereavement leave	Up to 2 days bereavement leave
Unpaid bereavement leave for long term casuals	No provision
Long service leave available for long term casual employees	Long Service Leave is in the <i>Long Service Leave Act 1992 (Vic)</i> The Act is silent in respect of casual employees
Parental leave available for long term casual employees	No provision
Employees to be paid for hours worked beyond 38 hours per week	Legislate for payment for hours beyond 38 per week
Employees entitled to minimum 30-minute break every 5 hours, and 10 minutes after 4 hours.	No provision
Fair Employment Tribunal may tailor industry order to provide penalty payments for work performed in excess of 38 hours per week, or outside ordinary hours, or on weekends	AIRC still prevented from determining penalty rates or overtime rates

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Fair Employment Bill	Commonwealth Proposals and Schedule 1A
Employees who work on public holidays are entitled to payment for that day, had they worked on that day if not for the fact it was a public holiday.	No provision for payment for public holidays
If an employee works on a public holiday, they are entitled to any additional rate determined in an industry order	No provision for penalty payments for public holidays
A Full Bench of the Tribunal may review minimum conditions, and vary, substitute, or add conditions.	No provision
Tribunal may determine industry sector orders, and tailor them for each sector	No provision
Principle of equal remuneration for work of equal or comparative value	No provision
Tribunal may add or vary industry sectors to suit the needs of the parties	Industry sectors remain fixed
Principal contractors to be made liable, in certain circumstances, for payment of subcontractors	No provision
Provisions guaranteeing continuity of service and employment	No provisions
Outworkers deemed to be employees	No provision. Textile industry outworkers to be entitled to minimum rates of pay only, and still treated as contractors
Establishment of a low cost, properly resourced tribunal, allowing easy access to employers and employees so that grievances may be resolved	With the exception of unfair dismissal hearings, AIRC still irrelevant for Schedule 1A employers and employees
Fair Employment Tribunal to mediate disputes	AIRC still no power to do this

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Fair Employment Bill	Commonwealth Proposals and Schedule 1A
Tribunal to hear claims for repayment of entitlements up to \$20,000 for employees and independent contractors	Only available forum is Magistrates Court
Re-establishment of Victorian Wageline	Continue to rely on federal Wageline. Under-resourced, and many complaints from users about long waiting times. Complaints, from employers and employees, relating to accuracy of information and advice.
Information Service Officers to assist employers and employees, and help enforce the legislation	Promise that federal inspectors will now be able to enter Schedule 1A workplaces, inspect records, and enforce Act. Also new service for outworkers. But no commitment to increased resources. Current inspectorate under-resourced. No real service outside metropolitan Melbourne, with only Bendigo and Geelong offices still open
Limited right of entry for authorised union officials, in exactly same terms as Workplace Relations Act	No provision for union officials to enter Schedule 1A workplaces
Tribunal has power to review unfair contracts for security guards, owner-drivers, cleaners and child care workers	No provision
Tribunal may, subject to certain tests being satisfied, declare certain classes of persons to be employees	No provision
	Victorian Government to be granted limited right to intervene in certain matters only before the AIRC
Time and wage records to be kept	Time and wage records to be kept

(Source: *IR Update Newsletter*,
<http://www.business.channel.vic.gov.au/bc/irnews/irnews.nsf>)

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