

Fair Work (Commonwealth Powers) Bill 2009

Introduction Print

EXPLANATORY MEMORANDUM

General

The Bill refers certain workplace relations matters to the Commonwealth Parliament under section 51(xxxvii) of the Commonwealth Constitution. This will facilitate the application to Victorian employers that are not constitutional corporations and their employees of the Fair Work Act 2009 of the Commonwealth and associated Commonwealth legislation for transition to the new federal workplace relations regime. Certain matters are excluded from the referral. The new referral will replace the present referral under the **Commonwealth Powers (Industrial Relations) Act 1996** and the Bill provides for repeal of this Act.

The Bill also repeals the **Victorian Workers' Wages Protection Act 2007** and certain provisions of the **Public Administration Act 2004** and **Parliamentary Administration Act 2005**. The Bill amends the **Long Service Leave Act 1992**, **Public Sector Employment (Award Entitlements) Act 2006**, **Outworkers (Improved Protection) Act 2003**, **Public Holidays Act 1993** and the **Occupational Health and Safety Act 2004** so that they will continue to operate according to their original schemes after the Fair Work Act 2009 and the Commonwealth's transitional legislation commence.

Clause Notes

PART 1—PRELIMINARY

Clause 1 sets out the purposes of the Bill which are to refer certain matters relating to workplace relations to the Commonwealth Parliament for the purposes of section 51(xxxvii) of the Commonwealth Constitution, to repeal the **Commonwealth Powers (Industrial Relations) Act 1996** and the **Victorian Workers' Wages Protection Act 2007**, and to consequentially amend the **Long Service Leave Act 1992**, the **Public Sector Employment (Award Entitlements) Act 2006**, the **Outworkers (Improved**

Protection) Act 2003, the Public Holidays Act 1993, the Occupational Health and Safety Act 2004, the Public Administration Act 2004 and Parliamentary Administration Act 2005.

- Clause 2 provides for the commencement of Parts 1 and 2 of the Bill on the day on which the Bill receives Royal Assent. The remaining provisions will commence on a day or days to be proclaimed. Clause 2 does not specify a default commencement date for these remaining provisions as they are intended to commence after commencement of the Fair Work Act 2009 and associated Commonwealth transitional legislation.

PART 2—REFERENCE OF MATTERS

- Clause 3 defines terms used in the Bill.

Subclause (1) includes the following definitions—

Commonwealth Fair Work Act means the Fair Work Act 2009 of the Commonwealth;

excluded subject matter means a ***State subject matter*** as defined in subclause (1) or rights or remedies incidental to a State subject matter, except to the extent that the Commonwealth Fair Work Act as originally enacted so deals with the matter (directly or indirectly), or requires or permits instruments made or given effect under that Act so to deal with the matter. This definition is used in limiting the scope of the reference under clause 4(1)(b) (the ***amendment reference***);

public sector has the meaning in the **Public Administration Act 2004** and also includes any person in the service of the State. This definition is used in specifying matters excluded from the references by clause 5;

referred subject matters is defined by listing certain subject matters dealt with in the Commonwealth Fair Work Act as enacted. This is used in defining the scope of the amendment reference;

referred transition matters means matters of the making of laws with respect to the transition from the regime provided for by the Workplace Relations Act 1996 of the Commonwealth, or a law of the State relating to workplace relations, to the regime provided for by the Commonwealth Fair Work Act. This defines the matters referred under clause 4(1)(c) (the ***transition reference***);

scheduled text means the text set out in the schedule to the Bill. This is the proposed text of a new Division 2A of Part 1-3 of the Commonwealth Fair Work Act, which would be inserted into that Act by the proposed Fair Work (State Referral and Consequential and Other Amendments) Bill 2009 of the Commonwealth. This text forms the basis of the text-based reference under clause 4(1)(a) (the *initial reference*);

State subject matters is defined by reference to the matters dealt with in a State law referred to in section 27(1A) of the Commonwealth Fair Work Act as enacted and the matters specified in section 27(2) of that Act as enacted (other than subsection 27(2)(p)). This is used in defining *excluded subject matter* in subclause (1) and so in limiting the scope of the amendment reference.

Subclause (2) provides that for the purposes of the Bill's references, the Chief Commissioner of Police under the **Police Regulation Act 1958** is taken to be the employer of any law enforcement officer, and any law enforcement officer is taken to be an employee in the public sector. This ensures that the Chief Commissioner may be treated as the employer of police and law enforcement officers may be treated as employees within the ordinary meaning, for the purposes of the Commonwealth Fair Work Act.

Subclause (2) also ensures that law enforcement officers are treated as employees in the public sector, persons holding office in the public sector, persons employed in the public sector and employees of a public sector body, and that the employer of law enforcement officers is treated as a public sector employer, for the purposes of the exclusions from the references under clause 5.

Clause 4 provides for the reference of matters to the Commonwealth Parliament, subject to the exclusions in clause 5.

Subclause (1)(a) (the initial reference) refers the matters to which the *initial referred provisions* set out in the scheduled text relate, but only to the extent of enabling the Commonwealth to make laws with respect to those matters by including the provisions set out in the scheduled text in the Commonwealth Fair Work Act, as originally enacted, in the terms, or substantially in the terms, set out in the scheduled text.

Subclause (1)(b) (the amendment reference) refers the referred subject matters as defined in clause 3(1), but only to the extent of making laws with respect to any such matter by making express amendments of the Commonwealth Fair Work Act.

Subclause (1)(c) (the transition reference) refers the referred transition matters as defined in clause 3(1).

Subclause (1) is not intended to refer to the Parliament of the Commonwealth matters that would involve the making of laws that would place special burdens or disabilities on the State, or the making of laws of general application that would operate to destroy or curtail or interfere with the continued existence of the State or its capacity to function as a government. Such matters were considered by the High Court in decisions including *Re Australian Education Union; Ex Parte Victoria* (1995) 184 CLR 188, *Victoria v The Commonwealth* (1996) 187 CLR 416 and *Austin v The Commonwealth* (2003) 215 CLR 185.

Subclause (2) makes clear that the references have effect only to the extent that the referred matters are not otherwise included in the legislative powers of the Commonwealth Parliament and are within the legislative powers of the State Parliament.

Subclause (3) makes clear that a reference under subclause (1) does not affect the operation of any other reference under subclause (1).

Subclause (4) makes clear that the State Parliament does not intend to impede the power of the Commonwealth Parliament to amend or otherwise alter the operation of the Commonwealth Fair Work Act using legislative powers the Commonwealth Parliament has apart from the references under clause 4(1).

Subclause (5) provides for the period during which the references have effect.

Clause 5 specifies certain matters excluded from the references under subclause 4(1).

Subclause (1) paragraphs (a) to (g) exclude certain matters from the references in respect of public sector employees, public sector employers and certain other persons. These exclusions are based upon the High Court's consideration in *Re Australian Education Union; Ex Parte Victoria* of matters that would involve the making of Commonwealth laws of general application that would operate to destroy or curtail or interfere with the continued existence of the State or its capacity to function as a government.

It is not intended that the exclusion in paragraph (b) of matters pertaining to redundancy, would prevent a federal tribunal or a court considering in a particular case whether a purported retrenchment was genuine and so whether this exclusion affects its jurisdiction.

Subclause (1) paragraph (h) excludes from the references (in addition to the matters exclude by paragraphs (a) to (g)) matters pertaining to the transfer of employees between public sector bodies or the redundancy of employees of a public sector body, as a result of a restructure by or under an Act. This is intended to preserve the operation of powers to transfer public sector employees under State laws including the **Public Administration Act 2004**.

Subclause (1) paragraph (i) excludes from the references (in addition to the matters exclude by paragraphs (a) to (h)) directions given to public sector employees under State laws relating to provision of *essential services* or to a *state of emergency* as defined in clause 3(1). Such directions might be given after a proclamation or declaration has been made under such a State law, for example, in response to industrial action affecting an essential service, or in response to a public health emergency.

Subclause (1) paragraphs (j) and (k) exclude from the references matters relating to the preservation under the **Public Sector Employment (Award Entitlements) Act 2006** of certain historical award entitlements of public sector employees, and relating to the protection of public sector employees under that Act against being disadvantaged by individual statutory agreements made under federal workplace relations laws.

The exclusions in subclause (1) paragraphs (b) to (e) and (h) to (k) apply to law enforcement officers and their employer pursuant to clause 3(2).

Subclause (2) excludes from the references certain matters in respect of law enforcement officers that are additional to the matters excluded under subclause (1).

Subclause (2) is intended to exclude the same matters in respect of law enforcement officers as the exclusion in section 5(1)(b) of the **Commonwealth Powers (Industrial Relations) Act 1996**, save for the excepted matters in subclauses (2)(b)(i) and (2)(b)(ii).

Subclause (2)(b)(i) is intended to allow the Commonwealth Fair Work Act and instruments made under that Act to deal with the payment of allowances or reimbursement of expenses for law enforcement officers, and with notice of termination of employment and payment in lieu of notice for law enforcement officers, to the same extent (and subject to the same exclusions under subclause (1)) as they may deal with these matters in respect of public sector employees who are not law enforcement officers.

Subclause (2)(b)(ii) is intended to allow the unlawful termination provisions in Divisions 1 and 2 of Part 6-4 the Commonwealth Fair Work Act as enacted, to apply to law enforcement officers to the same extent (and subject to the same exclusions under subclause (1)) as they may apply to public sector employees who are not law enforcement officers.

Insofar as a matter excluded from the references under clause 4(1) by clause 5 does not fall within the terms of the references, the matter is excluded for the avoidance of doubt.

- Clause 6 provides for termination of the references. All of the references, or the amendment reference or transition reference separately, terminate on a day fixed by the Governor in Council by proclamation.
- Clause 7 provides that termination of the amendment reference or transition reference before the initial reference does not affect laws already in place. Clause 7 will operate subject to contrary provision in clause 30B(6) of the proposed Division 2A of Part 1-3 of the Commonwealth Fair Work Act.

PART 3—REPEAL OF THE COMMONWEALTH POWERS (INDUSTRIAL RELATIONS) ACT 1996

- Clause 8 repeals the **Commonwealth Powers (Industrial Relations) Act 1996**. The references under the Bill are to replace the references under that Act, once the new references are given effect by amendment of the Commonwealth Fair Work Act and associated Commonwealth transitional legislation.

PART 4—AMENDMENT OF THE LONG SERVICE LEAVE ACT 1992

- Clause 9 amends definitions in section 4 of the **Long Service Leave Act 1992** (the "LSL Act") and inserts further definitions. These changes will be required after the Commonwealth Fair Work Act and associated Commonwealth transitional legislation commence.
- Clause 10 amends section 62(2)(ca) of the LSL Act to provide that an employee's employment is to be regarded as continuous in the additional circumstances of the taking of any period of adoption, maternity or paternity leave exceeding 12 months to which an employee is entitled under the National Employment Standards or the Australian Fair Pay and Conditions Standard (insofar as it has continuing transitional operation under Commonwealth transitional legislation).

- Clause 11 amends section 79(3) of the LSL Act to extend the exclusion from the term *employment agreement* to certain instruments made under the Commonwealth Fair Work Act and certain instruments given continuing effect by associated Commonwealth transitional legislation.
- Clause 12 amends section 159(2) of the LSL Act to extend the exclusion from the term *employment agreement* to certain instruments made under the Commonwealth Fair Work Act and certain instruments given continuing effect by associated Commonwealth transitional legislation.
- Clause 13 amends section 160 of the LSL Act to extend the exclusion from the term *employment agreement* to certain instruments made under the Commonwealth Fair Work Act and certain instruments given continuing effect by associated Commonwealth transitional legislation, and to replace the definition of *organisation* with that in the Commonwealth Fair Work Act.

**PART 5—AMENDMENT OF THE PUBLIC SECTOR
EMPLOYMENT (AWARD ENTITLEMENTS) ACT 2006**

- Clause 14 amends definitions in section 3(1) of the **Public Sector Employment (Award Entitlements) Act 2006** (the "PSE(AE) Act") and inserts further definitions. These changes will be required after the Commonwealth Fair Work Act and associated Commonwealth transitional legislation commence.
- Clause 15 amends section 5(2) of the PSE(AE) Act so that this section will operate according to its original scheme in respect of instruments made under the Commonwealth Fair Work Act.
- Clause 16 amends section 9 of the PSE(AE) Act so that this section will continue to operate according to its original scheme after the Commonwealth Fair Work Act and associated Commonwealth transitional legislation commence.
- Clause 17 amends section 10(2) of the PSE(AE) Act so that this section will operate according to its original scheme in respect of instruments made under the Commonwealth Fair Work Act.
- Clause 18 amends definitions in section 15A of the PSE(AE) Act to include reference to certain instruments and arrangements made under the Commonwealth Fair Work Act.

**PART 6—CONSEQUENTIAL AMENDMENTS TO OTHER
ACTS**

**Division 1—Amendments to the Outworkers (Improved
Protection) Act 2003**

- Clause 19 amends and repeals definitions in section 3 of the **Outworkers (Improved Protection) Act 2003** (the "O(IP) Act") and inserts further definitions. These changes will be required after the Commonwealth Fair Work Act and associated Commonwealth transitional legislation commence.
- Clause 20 amends section 4(2) of the O(IP) Act to remove references relating to the former **Federal Awards (Uniform System) Act 2003** (the "FAUS Act"), which has been repealed, and to the **Victorian Workers' Wages Protection Act 2007**, which is repealed by the Bill.
- Clause 21 amends section 11(1) of the O(IP) Act in consequence of the repeal of the **Federal Awards (Uniform System) Act 2003**.
- Clause 22 amends section 14(2) of the O(IP) Act in consequence of the repeal of the FAUS Act.
- Clause 23 amends section 14A of the O(IP) Act so that it will continue to operate according to its original scheme after the Commonwealth Fair Work Act and associated Commonwealth transitional legislation commence.
- Clause 24 amends section 25(2) of the O(IP) Act in consequence of the repeal of the FAUS Act.
- Clause 25 amends section 40 of the O(IP) Act to remove reference to provisions of the Workplace Relations Act 1996 of the Commonwealth which will cease to operate after the Commonwealth Fair Work Act and associated Commonwealth transitional legislation commence.
- Clause 26 amends section 41 of the O(IP) Act in consequence of the repeal of the FAUS Act and to remove reference to provisions of the Workplace Relations Act 1996 of the Commonwealth which will cease to operate after the Commonwealth Fair Work Act and associated Commonwealth transitional legislation commence.

- Clause 27 amends section 42 of the O(IP) Act to remove provisions based upon provisions of the Workplace Relations Act 1996 of the Commonwealth which will cease to operate after the Commonwealth Fair Work Act and associated Commonwealth transitional legislation commence.
- Clause 28 amends section 46(1) of the O(IP) Act to adopt the new definition of *organisation* in section 3.
- Clause 29 amends section 49(1) of the O(IP) Act to adopt the new definition of *organisation* in section 3.
- Clause 30 amends section 50(1) of the O(IP) Act to adopt the new definition of *organisation* in section 3.
- Clause 31 repeals section 57 of the O(IP) Act in consequence of the repeal of the FAUS Act.
- Clause 32 amends section 62 of the O(IP) Act to adopt the new definition of *organisation* in section 3.

Division 2—Amendments to the Public Holidays Act 1993

- Clause 33 amends section 10 of the **Public Holidays Act 1993** so that this section will operate according to its original scheme in respect of instruments made under the Commonwealth Fair Work Act and instruments given continuing effect by associated Commonwealth transitional legislation.

Division 3—Amendments to Occupational Health and Safety Act 2004

- Clause 34 amends definitions in section 79 of the **Occupational Health and Safety Act 2004** and inserts further definitions. These changes will be required after the Commonwealth Fair Work Act and associated Commonwealth transitional legislation commence.
- Clause 35 amends section 87 of the **Occupational Health and Safety Act 2004** so that that this section will operate according to its original scheme in respect of instruments made under the Commonwealth Fair Work Act and instruments given continuing effect by associated Commonwealth transitional legislation.

PART 7—REPEAL OF OTHER ACTS

- Clause 36 repeals the **Victorian Workers' Wages Protection Act 2007**. It is intended that Victorian workers will have the benefit of the wage protection arrangements under the Commonwealth Fair Work Act.
- Clause 37 repeals provisions of the **Public Administration Act 2004** that provide remedies for unfair dismissal to certain public sector employees, and makes consequential amendments to this Act. It is intended that these public sector employees will have the benefit of remedies for unfair dismissal under the Commonwealth Fair Work Act.
- Clause 38 ensures that applications begun but not completed under the repealed provisions of the **Public Administration Act 2004** may be continued and completed as if the provisions had not been repealed.
- Clause 39 repeals provisions of the **Parliamentary Administration Act 2005** that provide remedies for unfair dismissal to certain Parliamentary officers. It is intended that these Parliamentary officers will have the benefit of remedies for unfair dismissal under the Commonwealth Fair Work Act.
- Clause 40 ensures that applications begun but not completed under the repealed provisions of the **Parliamentary Administration Act 2005** may be continued and completed as if the provisions had not been repealed.

PART 8—REPEAL OF CERTAIN PARTS OF THIS ACT

- Clause 41 provides for repeal of Parts 4 to 7 of the Bill on the first anniversary of its commencement. This repeal does not affect the continuing operation of the amendments made by these Parts of the Bill.

SCHEDULE

The schedule contains the proposed text of a new Division 2A of Part 1-3 of the Commonwealth Fair Work Act. This text would be inserted into that Act by the proposed Fair Work (State Referral and Consequential and Other Amendments) Bill 2009 of the Commonwealth, with the support of the initial reference under the Bill.