Submission

to

Senate Employment, Workplace Relations and Education Legislation Committee

Inquiry into the provisions of the Independent Contractors Bill 2006 and Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006

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INTRODUCTION

1. The TCFUA is opposed to any legislative reform which legitimises and institutionalises the avoidance of obligations to workers. In our view the purpose and effect of the Bills are to do just this. We endorse the views expressed by the ACTU in its submission.

2. Whilst we attempt to deal also with the Bills' general effect, we have sought to focus our submission primarily on the particular issues faced by outworkers in the TCF industry and the effect of the Bill on these vulnerable workers. [1] There is an eerie familiarity about the way the government has sought to deal with outworkers in this legislation. As with *Work Choices*, again we hear the rhetoric of protection for outworkers, but again the Bills are carefully crafted to avoid any substance to match the rhetoric. Again, instead of protecting rights for outworkers, the Bills remove rights for outworkers. And, again, the Bills will need to be amended to fix this.

3. **Part 1** of our submission sets out the particular historical, social, economic, legal and public policy considerations associated with regulation of TCF outwork and protection of outworkers.

4. It is apparent that outwork is now the primary form of work in the domestic clothing industry and makes up a significant part of the domestic TCF industry.

5. Work, particularly in the clothing industry, is organised into contracting chains, where those at the top of the chain control the price of manufacture. The price is successively eroded by the involvement of "middlemen" as the work moves down the chain to the outworker.

[1] In making this submission we are restating much of the material already provided to the Department of Employment and Workplace Relations in response to its discussion paper "Proposals for legislative reforms in independent contracting and labour hire arrangements".

6. The many studies of the conditions of outworkers unanimously demonstrate that they are the lowest paid and most exploited group of workers in the country.

7. Outworkers and the giving out of work by contractors have been regulated for many decades through industrial awards.

8. Outworkers are in reality employees however the contracting structure and many other aspects of the manner in which outworkers perform work means that jurisdictional arguments are likely to arise.

9. This and other systemic problems with regulating outwork, such as the complexity of the legal structures and the invisibility of the work of outworkers, have lead to the development of a multi faceted regulatory strategy at both State and Federal level.

10. The elements of this strategy include the deeming of outworkers as employees, the imposing of minimum contract provisions, providing for the capacity for recovery of underpayment up the contractual chain, imposing registration and record keeping provisions to ensure transparency, right of entry provisions to allow inspection and enforcement and the development of mandatory codes to further facilitate these measures. Many of these developments are under threat by the Bills.

11. **Part 2** of our submission addresses particular features of the Bills, how they fail to meet the government's commitments, and why it is imperative that amendments are made.

12. During the Senate Inquiry into the *Work Choices* legislation, the federal government affirmed its commitment to maintain existing protections for outworkers, and made amendments to the *Work Choices* legislation which went some way to meeting this commitment.

13. The government has made a similar commitment in relation to the Bills which are the subject of this inquiry, but has failed to deliver. The Bills must be amended in order to make good this commitment, and to avoid overriding state laws, and undermining the *Work Choices* protections.

14. The apparent protection of state outworker protections in section 7(2)(a) of the Bill is extremely limited, practically ineffective and able to be easily overridden by regulation. It requires amendment.

15. The creation of an across the board category of "contract outworkers" in Part 4 legitimises the opting out of the very same outworker protections that the government conceded were necessary in its *Work Choices* legislation. This is a green light for unscrupulous operators in the TCF industry to avoid their legal obligations and exploit outworkers. Part 4 should be removed.

16. In addition, the failure to provide any effective penalty provision for employers who enter sham contracting arrangements with outworkers will further exacerbate the problems caused by Part 4. These provisions require substantial strengthening to protect outworkers.

17. **Part 3** of our submission addresses the likely effect of the Bills on our members and workers generally. Whilst we have proposed a number of amendments to the Bills relating to outworkers, this should not be read as any tacit acceptance of the remainder of the Bills. To the contrary, we believe the Bills are designed to allow workers to be further exploited, so that even the very minimal and inadequate protections under Work Choices can be avoided.

PART 1 – BACKGROUND RELATING TO TCF OUTWORKERS

Incidence of Outwork in Australia

18. It is well documented that employment levels in the formal TCF industry has declined dramatically since the commencement of the reduction of tariffs in the industry. For example, between 1990-91 and 2001-02, employment in the formal sector fell 35%, with employment in formal clothing and footwear production accounting for 60% of this decline.[2] Between May 1997 and May 2003 total formal TCF employment fell from 103,000 to 68,000.[3]

19. A 2003 Productivity Commission inquiry into the TCF industry estimates that formal (factory-based) employment (as at 31 July 2003) in the TCF sector in Australia was at least 58,000 and up to 70,000. However, these figures do not represent the vast numbers of outworkers working outside the formal TCF sector.[4]

20. Given the nature of home based work, it is very difficult to ascertain the precise numbers of TCF outworkers in Australia.

21. In *Re Clothing Trades Award 1982*, a 1987 decision of the Australian Industrial Relations Commission in relation to the variation of the outworker provisions in the Clothing Trades Award, Riordan DP made the following observations regarding the difficulty in estimating numbers:

> *"The number of persons engaged in this class of work is very considerable with estimates ranging from 30000 to 60000. These figures seem very high and there was no satisfactory verification of them in the proceedings. But those who have made these estimates are very experienced and their opinions must be treated with respect. Those engaged in this activity are sometimes referred to as the 'invisible industry'. Some estimates indicate that there are as many in the so called 'invisible industry' as there are in the industry regulated by the award."*[5]

22. As part of a National Outwork Information Campaign in 1994-5, the TCFUA undertook an exercise to gather numbers by investigating

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[2] Productivity Commission, *Review of TCF Assistance*, Inquiry Report No 26, 31 July 2003 at 11

[3] Victorian Ethical Clothing Trades Council, *Outworkers Lawful Entitlements Compliance Report,* November 2004, at 7.

[4] Productivity Commission, above note 1 at 7.

[5] *Re Clothing Trades Award 1982*, (1987) 19 IR 416 at 422

companies through a number of avenues, and by taking into account a percentage of the industry not organised. Following this exercise the TCFUA formed the view that outworker numbers had previously been dramatically underestimated, and came to the following estimations regarding the numbers of outworkers[6]:

Victoria	144,000
New South Wales	120,000
Queensland	25,000
South Australia	25,000
West Australia	15,000
TOTAL	**329,000**

23. A Senate Committee inquiry in 1996 found that there was somewhere between 50,000 and 330,000 people involved in outworking in the garment industry, and concluded that it is highly likely that the number of outworkers had increased considerably over the previous decade.[7]

24. Since these estimates were reached, the general contraction of the formal industry is likely to have affected the number of outworkers. On the one hand, the movement of much production offshore and "import penetration" means that there is less manufacturing generally taking place domestically.[8] However, the TCFUA believes that a significant portion of this general contraction in the formal industry is a result of the move from factory based manufacturing to home based work.

25. The Productivity Commission in July 2003 estimated that there were approximately 25,000 outworkers in Australia. The TCFUA believes based on our experience that this is a gross underestimate. However, as the Productivity Commission report notes, even based on its own estimate, outwork would account for around 40% of employment

[6] Textile, Clothing and Footwear Union of Australia, *The Hidden Cost of Fashion*, Report on the National Outwork Information Campaign, March 1995, at 5.
[7] Senate Economic Reference Committee, *Report on Outworkers in the Garment Industry,* (1996), executive summary.
[8] Productivity Commission, above note 1, at 181.

across the whole TCF sector, and exceeds factory based clothing manufacture by about 25%.[9] It is a highly prevalent form of work in the TCF industry, and in the view of the TCFUA is likely to continue to be so.

26. The extent of outwork in Australia, even as underestimated, and its nature as a primary form of work in the domestic TCF industry and *the* primary form of work in the domestic clothing industry means that the systemic exploitation of outworkers detailed below simply cannot be ignored.

The Contracting Chain

27. The last fifteen years have seen dramatic changes in the way the TCF industry has been organised. The industry in Australia, particularly the garment industry, has become dependent upon and structured around subcontracting, outsourcing and the prolific use of outworkers or home based workers.

28. The subcontracting and outsourcing referred to most commonly takes place in a standard "supply chain" structure. This chain of contracts has been described as follows:

> *"Typically, at the apex of this integrated system are major retailers that enter into arrangements with principal manufacturers for the latter to supply the retailers with clothing products. The principal manufacturer, with a substantial workforce, will give out orders for the production of clothing goods to a smaller manufacturer or offsite contractor or subcontractor. In some instances a fashion house, with a very small onsite workforce, will give out orders directly to the small manufacturer or offsite contractor. The orders for production from the principal manufacturer or the fashion house will then be successively handed down through a sequence of intervening parties, or 'middlemen' until the goods are finally produced by a small factory sweatshop, which usually passes the order for the actual production of the clothing product to an outworker working at home. The finished goods are then delivered back up*

[9] Productivity Commission, above note 1 at 182

the chain of contractual arrangements until they arrive back at the original principal manufacturers or the fashion houses."[10]

29. The 1996 Senate Committee Inquiry into Outworkers in the Garment Industry found that as many as seven parties may be involved in the chain, and notes that because the chain is so long, it has become easy for responsibility to be passed off from one element to another along the chain.[11] The growing influence of retailers further up the supply chain has concentrated TCF retailing with the effect that the retailer has the capacity to increase pressure on price and response time.[12] What in fact occurs through this process is that a price for the manufacture of the products is set at the top of the chain, which is successively eroded, often by non-productive parties, as the work moves further down the chain. What this means for TCF outworkers who actually perform the manufacturing of the products is detailed below.

The characteristics of TCF outwork

30. There have been a number of studies into the nature of outwork in Australia in recent years.[13] The results of these studies are disturbingly consistent. They are summarised in the Victorian Ethical Clothing Trades Council Compliance Report as:

    - *"low piece rates, which translate to low hourly wage rates which are contrary to industry award standards;*
    - *late payment, part payment or non payment of wages;*
    - *unreasonable and improper rejection of work by contractors/employers;*
    - *lack of basic industrial entitlements such as paid annual leave;*
    - *long working hours without appropriate penalty rates;*

[10] Nossar I, Johnstone R and Quinlan M, *Regulating Supply Chains to Address the Occupational Health and Safety Problems Associated with Precarious Employment: The Case of Home Based Clothing Workers in Australia,* (2004) 17 AJLL 137 at 145.
[11] Senate Economic Reference Committee, above note 6.
[12] Productivity Commission, above note 1, at 10.

- *impossible or unreasonable deadlines for completion of work;*
- *substandard working environments affecting occupational health and safety; and*
- *strain associated with combining work and family responsibilities"*[14]

31. The most recent such study is *"Home Sweat Home"*, the first stage of a two part study of outworkers in the textile industry in Victoria in 2001.[15] In this study, 119 outworkers took part in an administered survey and discussion. Some of the key findings set out in the report are as follows:

    - 115 of 119 of the outworkers were women;
    - 110 of the outworkers were born in Vietnam, only 2 were born in Australia;
    - Over 80% had been outworkers for over 5 years;
    - 68% of the outworkers wanted to work outside the home. Of these, the main reasons for doing outwork included that they couldn't get work outside the home, their English was not good enough, they did not understand Australian systems, they had experienced racism in outside work or in public, they could not drive or they did not have enough confidence;
    - The average hourly rate of pay for the outworkers surveyed was $3.60 per hour;
    - In 105 cases wages were only used for essential expenses;
    - Most were not usually offered regular work (89);
    - wages were not usually paid on time (99);

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[13] See for example Victorian Ethical Clothing Trades Council, above note 2, footnotes at page 9

[14] Victorian Ethical Clothing Trades Council, above note 2 at 9

- often the pay was not known before starting the job (53);
- often the pay was different from the agreed price (60);
- often pay was not received (62);
- barely any of the outworkers received sick, holiday or public holiday pay (1, 3 and 2 respectively);
- 62% spent 7 days a week sewing, and an additional 26% spent 6 days; and
- The largest group worked 10 hours per day (25) and the second largest group worked 14-15 hours per day (22).

32. In addition to industrial conditions, Outworkers report about three times the number of (both acute and chronic) injuries than their counterparts who work in factories. They are often subjected to occupational violence at the hands of middlemen in the contracting chain. Despite this higher incidence of injury and violence, studies have shown that outworkers simply do not make workers compensation claims.[16]

33. In *Re Clothing Trades Award 1982* Riordan DP made the following observations about the nature of outwork in Australia based on the evidence he had before him:

> "*[t]he evidence and material in this case discloses a very distressing situation which has no place in a society which embraces the concepts of social justice. The undisputed facts reveal the existence of widespread and grossly unfair exploitation of migrant women of non-English speaking background who are amongst the most vulnerable persons in the workforce."*[17]

34. Riordan DP went on to observe that:

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[15] Cregan, C, *Home Sweat Home: Preliminary findings of the first stage of a two-part study of outworkers in the textile industry in Melbourne, Victoria*, Department of Management, University of Melbourne, November 2001.
[16] Nossar et al, above note 10 at 146
[17] *Re Clothing Trades Award 1982*, above note 4 at 419.

> "*[t]he remuneration and treatment of tens of thousands of persons performing work in the clothing trade as "outdoor workers" is scandalous and represents a serious affront to the moral and social conscience of the community. The present situation reveals a serious failure of the system of industrial regulation to protect one of the most vulnerable and insecure sections of the community. Some are persons who have an urgent, and even desperate, need to earn whatever money is possible by the performance of this work for a relative pittance under appalling conditions. Almost all of those involved are women of migrant background. Some do not speak or understand English at all and some have only a very limited knowledge of it. Many have dependent children and have no other prospect of employment. Such persons are easy prey for those with a will to deprive them of a fair and just reward for their skills and the performance of long hours of work. It would be unconscionable to ignore the plight of these workers and refuse to intervene in this situation of grossly improper exploitation of a weak and unorganized section of the workforce."*[18]

35. The TCFUA submits that the situation in respect of outworkers and their vulnerability to exploitation has remained as demonstrably bad in recent years as it was at the time Riordan DP made those observations. As greater pressure on the industry is brought to bear by further reducing tariffs and Free Trade Agreements, the push of jobs from the formal to the informal sector will only become worse. There continues to be an overwhelmingly compelling policy basis for further regulation of outwork. There is no public policy justification for "deregulating" outwork.

Other public costs of unregulated outwork

36. The continuation of such widespread exploitative practices and the accompanying income and family pressures has often combined with hazardous occupational health and safety outcomes to impose an ongoing social cost upon the community as a whole.

[18] Ibid at 421-2.

37. As reported earlier, outworker who suffer injury as a result of these practices are in the main too scared to access the appropriate workers compensation systems. Consequently the cost of their treatment is borne by the taxpayer through the public health system.

38. Similarly, adverse family impacts which result from insecure income and the pressure of inhumane deadlines are borne first by the affected families of outworkers and second by the community through increased needs for the provision of community services.

Regulation of Outwork

39. The Victorian Ethical Clothing Trades Council report summarises what it refers to as "unique circumstances in the clothing industry" in relation to attempts to regulate the industry as follows:

    - *"lack of compliance with minimum legal employment standards by many employers of home-based clothing workers;*
    - *the hidden nature of outwork;*
    - *the ineffectiveness of existing methods of regulation to address this issue;*
    - *the preponderance of vulnerable workers, particularly south-east Asian women, with poor English language skills and education levels caught in the home-based clothing sector with adverse consequences to their income, health and wellbeing."*[19]

40. There has been regulation of outwork in Australia for many decades. Over recent years however, a number of regulatory innovations have been developed at State levels, which are directed towards and should have the effect of addressing the particular regulatory difficulties associated with the factors outlined in paragraph 23 above provided that they are not overridden by the Bills.

Industrial Awards

41. Since 1919, every Award of an industrial tribunal dealing with the clothing industry in Australia has contained some form of regulation of outworkers, and more recently, textile and footwear awards have done the same. Originally (from 1919 to 1987) Awards were primarily concerned with prohibiting outwork, and the prescription of terms and conditions for the very few categories of legally permissible outwork."[20]

42. A useful summary of the history of federal Award making in respect of outworkers from 1919 to 1987 is contained in *Re Clothing Trades Award 1982*.[21] Riordan DP observes in relation to this history that:

> *"The history of this award shows that industrial tribunals since the earliest days of conciliation and arbitration have been prepared to provide appropriate conditions to prevent the unfair exploitation of outdoor workers."*[22]

43. In 1987 the TCFUA made application to the Australian Industrial Relations Commission to vary the *Clothing Trades Award 1982* to insert provisions which would regulate the giving out of work by Respondents to the Award by limiting numbers of outworkers, ensuring minimum terms and conditions were afforded to outworkers, and create a registration and record keeping regime to allow scrutiny of the giving out of work. Riordan DP granted the "broad thrust" of the TCFUA's claim and himself proposed the inclusion of additional obligations on Award respondents.

44. Further variations to the Federal Award were sought by the TCFUA and employers by consent in 1995 in order to strengthen the existing award provisions in relation to the keeping of appropriate records by outworkers and employers and the inspection of those records by the

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[19] Victorian Ethical Clothing Trades Council, above note 2 at 9-10
[20] Nossar et al, above note 10 at 143.
[21] *Re Clothing Trades Award 1982*, above note 4 at 421 - 435
[22] *Re Clothing Trades Award 1982*, above note 4 at 420.

TCFUA and relevant authorities. In the decision in that matter, DP Williams notes that "not much appears to have changed" in respect of outworkers conditions since the decision of Riordan DP. He notes the Commission's statutory duty to apply the principles of equity and fairness in the performance of its functions, and considers that it has an important role to play in the protection of the weak and vulnerable sections of the community. He states "*[i]t would be unconscionable for the Commission to fail to provide such protection as it can to one of the most exploited sections of society*."[23]

45. Notably, the reforms to industrial relations introduced by the *Workplace Relations Act 1996*, whilst exempting a number of previously allowable matters to be contained in Awards, expressly contained as an allowable matter:

> *"* s89A(2)(t) - *pay and conditions for outworkers, but only to the extent necessary to ensure that their overall pay and conditions of employment are fair and reasonable in comparison with the pay and conditions of employment specified in a relevant award or awards for employees who perform the same kind of work at an employer's business or commercial establishment."*

46. In 1999 a full bench of the Australian Industrial Relations Commission considered the parts of the *Clothing Trades Award 1982* relating to outwork regulation in the context of an award simplification exercise. The Full Bench considered that, subject to a rewrite in plain English, the existing award provisions dealing with outworkers were allowable in their entirety as they were necessary in their entirety to ensure that outworkers overall pay and conditions of employment were fair and reasonable compared with the relevant award for those who perform such work at a commercial establishment.[24]

47. Similar provisions to protect outworkers and regulate and monitor the giving out of work by Award Respondents have also been contained in

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[23] C0037 CRA Dec 1610/95 M Print M3574, *Clothing Trades Award 1982*, Williams DP, 12 June 1995

[24] C0037CRA Dec 232/99 S Print R2749, *Clothing Trades Award 1982*, McIntyre VP, Duncan DP, Blair C, 12 March 1999.

various state Awards, detailed below, and since 1 January 2005 the Federal *Clothing Trades Award 1999* has had effect as a common rule award in Victoria by virtue of the *Clothing Trades Victorian Common Rule Award 2005.*

Employees or Independent Contractors?

48. From time to time throughout the history of Award regulation of outwork described above, the issue of whether outworkers are employees or independent contractors has been considered.

49. Since as early as 1919 in Australia, the regulation of outwork has been found to be within the definition of "industrial matter". In *Archer's Case*[25] the majority of the High Court found that a claim by the union for an Award restricting and imposing conditions upon outdoor work was an industrial matter, with Higgins J observing:

> *"As for the third matter – a claim for an order forbidding work outside the shop or factory, or else for high rates on a piece-work basis, the work to be confined to members of the union – this seems to me, whether the claim is just or unjust either in whole or in part - to come easily within the definition. Even on the narrowest view of "industrial matters" it is of vital importance to the members of the union that an employer shall not have facilities for evading the award rates and conditions, or for resorting to the individual bargaining which homework often involves, or for getting women and girls who have other aids to support to accept work at low prices."*[26]

50. Conversely, in 1968 the High Court in *Cocks' case* [27] found an award provision in the *Dry Cleaning and Dyeing Industry Award 1966* which prohibited work being done outside a workshop or factory unless the person doing the work held a permit to be invalid because it extended to the performance of work, whether by a "servant" or an "independent contractor".

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[25] *The Federated Clothing Trades of the Commonwealth of Australia v Archer and Ors ("Archers Case")*, (1919) 27 CLR 207.
[26] *Archers Case* at 217
[27] *R v Commonwealth Industrial Court Judges; Ex Parte Cocks* (1968)121 CLR 313

51. Riordan DP gave the question of whether outworkers are employees or independent contractors' comprehensive consideration in *Re Clothing Trades Award 1982.*[28] He distinguished *Cocks' Case* and made the following findings on the question:

> *"There is no significant difference in the process of making garments, whether performed by workers in the factories of manufacturers or by outdoor workers in their own homes. The difference is about how the work is handed out and the method and level of payment for the completed work.*[29]
>
> ….
>
> *"The union claims that although some outdoor workers in this industry may be independent contractors between 80 and 90 per cent are employees. The evidence in this case points to the conclusion that many of the persons engaged as outworkers are engaged in an employer-employee relationship. Usually, outdoor workers are members of a production team, although unknown to each other, with each one making up part of the garment. They are clearly part of an integrated manufacturing process. On the basis of the evidence and material presented I must conclude that the great majority of outdoor workers, who perform work as machinists, are employees and not independent contractors. Indeed, persons are performing machining work to set specifications, patterns and standards in a manner which establishes that they are part of a coordinated scheme of manufacturing garments.*[30]
>
> ….
>
> *"Outdoor workers are clearly performing work which is integrated into the business of garment manufacture. They are concerned with sewing parts of garments, which have been cut out by some other person, usually an employee, to a predetermined design and pattern. In some cases their work represents the final stage in the manufacture but in other cases it is not. In any event it is only one part of the total process of manufacturing garments. Their work is but one aspect of the several functions that must be performed to a specific plan in order to manufacture the garments concerned.*
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> *Outdoor workers working as machinists are not permitted to use personal initiative. Their work is performed to rigid specifications as to quality, quantity and style as well as the time by which it must be completed. They have no say in the design. The garments are received already cut out for sewing or the garments may be already partly sewn and require some further*

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[28] *Re Clothing Trades Award 1982*, above note 4
[29] Ibid at 419
[30] Ibid at 436

> *specialized machining. Their work is inspected and may be then passed on to some other person for the performance of an additional function such as further machining or pressing until the manufacture of the garment is complete. They are certainly subject to control and direction, their work is an integral part of the business of those for whom they work and the advertisements which many answered to obtain their jobs were in many cases for employees. This work could not be described as the work of an independent contractor within the ordinary and usually accepted meaning of that term.*
>
> *On the basis of the case law they are employees and not contractors. It follows that* Cocks' *Case does not apply. In any event* Cocks' *case is certainly no authority against a proposition to regulate the conditions of employment of the employees of a contractor nor is it authority against the regulation of outdoor workers who are employees and not independent contractors. Further,* Cocks' *case was not concerned with the protection of the award and the use of devices designed to facilitate widespread avoidance or evasion of duties and obligations imposed by the award. "*[31]

52. In the TCFUA's submission the above observations based on the current authorities would similarly lead to the conclusion that TCF outworkers are in truth employees.

53. However, the very structure of the contracting chain leading to outworkers purports to establish a series of contracts which avoid employment obligations. The work is not performed in the employers' factory. Most outworkers are required to sign sham documentation, or set up sham businesses, as a precondition to getting work. The structure of the supply chain is perfect for avoiding employment obligations and designed to mitigate against a finding that an outworker is an employee of anyone in the contracting chain, let alone those parties further up the contracting chain who have effective control of the work of outworkers.

54. Whichever way one looks at it, outworkers' conditions of work need to be secured. That is the primary issue. Outworkers are the most vulnerable, most exploited, group of workers in this country. Their

[31] Ibid at 439

capacity to independently bargain over conditions of work is non-existent. It is imperative that this disadvantaged group of workers is protected using whatever regulatory means possible. A regulatory regime must ensure that outworkers are fairly remunerated for their work and that outworkers' conditions of work are safe and commensurate with the standards workers have come to expect in Australia, rather than the third world conditions which the particular economic and social conditions promote.

55. It is for this reason that it is wholly inadequate to simply rely on an all-purpose, general test, whatever the nature of that test may be, for establishing the employment status of clothing outworkers. The test would need to be applied every single time an outworker or the TCFUA seek to protect or enforce their rights. It is for this reason that in recent years, in most state jurisdictions in Australia, legislative provisions granting outworkers automatic employee status have been introduced or strengthened.

56. The problems with regulating outworkers' conditions are notorious. In response to that, for many decades the TCFUA, often with the support of employers and employer groups in the formal industry, has developed and refined a regulatory system directed to overcoming these institutional difficulties. In addition to the "deeming" laws, which the TCFUA considers are essential for the protection of outworkers, a unique system of regulation of the contractual chain has emerged which allows transparency and enforcement where it has previously been absent.

Recent Regulatory Developments Relating to Outworkers

57. In order to deal with the problems in regulating outwork, and address the exploitation of outworkers, most states in Australia have in recent years introduced regulatory regimes designed specifically to regulate outwork and the contracting chain. These regimes were introduced prior to the introduction of the *Work Choices* legislation this year.

58. The common features of these state systems can be summarised as follows:

(a) **Minimum Terms and Conditions**: laws, regulations or other instruments which set the substantive minimum pay and conditions for employees.

(b) **Deeming Provisions**: which deem outworkers to be employees, thereby providing that they are automatically entitled to the same terms and conditions as they would be as factory based employees without needing to engage in any jurisdictional argument. In some states this extends to other laws such as OHS laws.

(c) **Minimum Contract Provisions:** which are similar to deeming provisions but which provide that outworkers are entitled to the same minimum conditions as an employee irrespective of their status of employee or contractor.

(d) **Capacity to recover payment up the contractual chain**: by providing for simplified recovery methods for underpayments, along with the capacity to claim against an "apparent" employer or other contracting parties along the contractual chain.

(e) **Transparency/Registration/Record Keeping Provisions**: which have the effect of requiring those more transparent parts of the contracting chain to have records relating to the giving out of work, which allows those less transparent parties including outworkers to be ultimately identified and their conditions to be monitored.

(f) **Right of Entry and Inspection Provisions:** which allow the TCFUA and Inspectors to monitor compliance with other parts of the regulatory scheme

(g) **Mandatory Code Provisions:** which allow State governments to encourage business best practice throughout the contracting chain. These provisions have been endorsed by representative ogranisations of the retail sector and manufacturing industry, and have been developed in conjunction with them.

59. Each of these elements must be maintained to ensure the effective and comprehensive protection of outworkers.

PART 2 – EFFECT OF THE BILLS ON OUTWORKER PROTECTIONS

Work Choices and Outworkers

60. *Work Choices* in its original form had the effect of largely decimating outworker protections. However, after submissions and evidence to the Senate Inquiry amendments to the legislation were made which are designed to facilitate the protection of state laws relating to outworkers along with federal award protections for outworkers.

61. Whilst the TCFUA believe the legislative approach taken by the Federal Government did not meet its policy objective of maintaining all existing protections for outworkers, it is clear from the legislative measures which *were* taken, and the commitments made at that time, that the government has acknowledged the need to protect these vulnerable workers and had a policy position of doing so.

62. Indications of the Government's intention in this respect can be found in a number of statements from Government Senators and Department of Employment and Workplace Relations Officials. During the Senate Inquiry into *Work Choices*, observations were made by a number of

Senators regarding the need to ensure comprehensive protections for outworkers.[32] For example, the Chair of the Committee remarked:

*" **CHAIR**—…Firstly, on the government side, I would like to assure you that we did meet with a group of outworkers yesterday. I think it would be fair to say that their general working conditions, rates of pay and economic position in the work force horrified all senators. Government senators have undertaken to discuss that extensively with the department when we meet with them tomorrow, because that is a terrible situation."*[33]

63. When questioned by Senators, various officials of the Department of Employment and Workplace Relations confirmed the policy of the Government. For example:

***Mr Pratt:** the government's policy intention here is that all existing protections which are currently available for outworkers through current arrangements will be maintained in to the future and that these protections will be read into agreements, if people are covered by agreements in the future, including AWAs. ….*

I am talking about all of the protections which currently exist for outworkers through their existing award arrangements in the states and so forth….

But can I reiterate the message I was giving before, and that is that the unique provisions that currently provide special protections for outworkers are going to be retained in the new system. What is there now will be retained in the new system. That is the policy intention, and we will be working to ensure that bill provides for that….

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[32] Transcript of that evidence is contained in Hansard, Senate - *Legislation*, EWRE72 – 79.

[33] Hansard, Senate - *Legislation*, EWRE72 – 79.

Our intention is to ensure that the government's policy that the unique protections which currently exist for outworkers continue under the new system."[34]

64. When amendments to the *Work Choices* Bill were being debated in the Senate, the government again made its intention to maintain outworker Award protections clear.[35]

65. The Federal government, in making the particular amendments to its *Work Choices* legislation, recognised that special regulation is necessary for the protection of outworkers in the TCF industry.

66. The two key elements of these amendments were firstly to maintain protections for outworkers within state systems by ensuring that state laws which deal with matters relating to outworkers were not overridden by *Work Choices*, and secondly to maintain the application of the relevant Awards to outworkers.

67. It is imperative that the government does not back away from these commitments.

68. It would be entirely disingenuous for the government to, for example, explicitly protect state laws about matters relating to outworkers in the *Work Choices* legislation and override those same laws in independent contractor legislation only months later. Nothing about the plight of outworkers has changed since 27 March 2006. Outworkers still need the protection of the law, and those people who seek to exploit outworkers need the force of the law to stop them doing so.

Problems with the Bills

[34] Hansard, Senate – *Legislation*, EWRE 44, Friday 18 November 2005.

[35] Hansard – Senate – 1 December 2005, p146 - 150

69. There is an unfortunate familiarity about the way the government has sought to deal with outworkers in this legislation. As with Work Choices, again, we hear the rhetoric of protection for outworkers, but again, the Bills are carefully crafted to avoid providing the substance to match the rhetoric. Again, instead of protecting rights for outworkers, the Bills remove rights for outworkers. And, again, the Bills will need to be amended to fix this.

70. The government's stated policy position is to maintain protections for outworkers. The Bills fails to deliver this, and undermines the protections contained in the *Workchoices* legislation.

Overriding State laws which protect outworkers

71. The Independent Contractors Bill 2006 ("the IC Bill") overrides state laws which protect outworkers, despite attempting to maintain an appearance to the contrary.

72. In order to detail why this is the case, it is necessary to look closely at the structure of section 7 of the IC Bill.

73. In summary, the general effect of the IC Bill is to provide that where a "Services Contract" (defined in section 5) exists, state and territory laws, variously defined, have no effect.

74. At subsection 7(1), the Bill sets out categories of state and territory laws which will be excluded from operation in relation to parties to a Services Contract. There are two main categories of laws. The "first category", which are excluded by subsections 7(1)(a) and 7(1)(b), are various state and territory laws which seek to regulate the parties to a services contract as though their relationship was an employment relationship. The "second category", excluded by subsection 7(1)(c), are state and territory laws which regulate the contract itself, and would

allow it to be varied, set aside or render it unenforceable on a very wide range of grounds, known as “fairness grounds”.

75. There are so-called “exceptions” to these exclusions. Subsection 7(2)(a) is the exception relevant to outworkers. It provides:

> *(2) Subsection (1) does not apply in relation to:*
>
> *(a) a law of a State or Territory, to the extent that the law:*
>
> *(i) applies to a services contract to which an outworker is a party; and*
>
> *(ii) makes provision, otherwise than as mentioned in paragraph (1)(c), in relation to such a contract.*

76. The explanatory memorandum says the following about 7(2)(a) at page 34:

> *“Paragraph 7(2)(a) would operate to preserve State and Territory laws that affect outworkers who are party to a services contract. However, these outworkers would not have access to State or Territory laws which allow a contract to be set aside or varied on the grounds that it is unfair.”*

This description of the effect of 7(2)(a) is wrong in that it both overstates the protection of state laws contained in the IC Bill, and understates the range of laws to which outworkers will not have access.

77. The exception in 7(2)(a) is deficient in four key ways.

78. Firstly, and most obviously, the Bill <u>expressly does not preserve</u> state and territory laws in the “second category” described above – namely laws which would otherwise allow the services contract to be varied, set aside or render it unenforceable on unfairness grounds. The

definition of “unfairness grounds” is found in section 9 of the IC Bill and is extremely broad. It includes state laws which make a contract with an outworker void or unenforceable on the basis that the contract seeks to avoid industrial laws, awards or other instruments.

79. Secondly, the only state outworker protection laws which the IC Bill preserves are those which regulate a Services Contract to which an outworker is a party. This means that laws which regulate services contracts between parties further up the contracting chain, such as a fashion house and a head contractor, are overridden.

80. Thirdly, and contrary to the assertion in the explanatory memorandum that the Bill will “*preserve State and Territory laws that affect outworkers who are party to a* services contract”, the Bill only preserves State and Territory laws that apply to and make provision in relation to the Service Contract. In contrast, the range of laws in the “first category” which are excluded from operation by the Bill is far broader – namely laws which affect the “rights, entitlements, obligations and liabilities of a party to a services contract”.

81. The combined effect of these three limitations, in summary, is that state and territory outworker protection laws will only apply where:
    - There is a direct Services Contract with an outworker;
    - the law in question applies to and make provision in relation to that Services Contract (as opposed to the rights and liabilities of the parties to it); and
    - insofar as the law applies and makes provision in relation to the services contract, it does not provide for the services contract to be varied, set aside or rendered unenforceable on fairness grounds, including grounds that the contract seeks to avoid industrial laws, awards or other instruments.

82. Put simply, the range of laws which are “protected” by section 7(2)(a) is such a small subset of the range of laws which are excluded by 7(1) that the effect will be to render outworker protection regimes under state laws largely ineffective.

83. Fourthly, section 10 of the Bill gives the government the capacity to override even this small subset through the use of regulations to specify other state laws which are effectively excluded in relation to parties to a Services Contract.

Provides an escape route from Federal law protections

84. Rather than exempting outworkers from its operation, to the contrary, Part 4 of the Bill creates a lawful category of “contract outworkers” who are entitled to a minimum rate of pay, and nothing else. Protections for annual leave, hours of work and overtime, redundancy pay, public holidays and many others are excluded. Contrary to the principles developed over two decades of reports, government inquiries, AIRC decisions and state law reforms which have supported and formalized the legal status of outworkers as employees, the government has expanded the operation of provisions which, against the wishes of the TCFUA, had previously been inserted into the Workplace Relations Act in relation to Victoria.

85. A so-called “contract outworker” under the Bill will not be entitled to any of the protections maintained through *Work Choices* under the federal law or federal awards, other than a basic minimum rate of pay. In states which do not have outworker laws, this will be the only protection for outworkers. In states which do have outworker laws, only a small sub-set of these laws would remain effective in any event.

86. The substantive protections contained in the relevant Federal Award would not apply if an outworker was a “contract outworker” under the

IC Bill. Neither would the provisions in the Award which apply generally to employees and accordingly also to outworkers. As well as the types of conditions listed above in paragraph 84, current clause 47 of the Clothing Trades Award 1999 in relation to registration with the board of reference, making a written agreement about hours of work, payment by minute rates, hours of work, stand-down, record keeping requirements, work on weekends and public holidays and payment of wages would not apply if an outworker is not an employee. In addition, the record-keeping, registration obligations and other regulation of the contracting chain would be to no avail if there were no substantive entitlements at the end of the chain.

87. This creates an easy legal loophole for unscrupulous companies to use to further the exploitation of outworkers. It is an easy mechanism for the many unscrupulous employers in the TCF industry to contract out of Federal protections for outworkers, by arguing that outworkers are "contract outworkers". It would then be up to the outworker to prove they are an employee in every case.

88. The introduction of these contract outworker provisions across the board means the government has not met its commitment to FairWear made during the *Work Choices* debate to maintain outworker protections in the federal system.

Does not protect against sham contract arrangements

89. There are no specific protections against sham contract arrangements for outworkers in the IC Bill.

90. Proposed amendments to the Workplace Relations Act contained in the *Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006* ("WRIC Bill") give the appearance of protecting all workers against sham contracting arrangements. However, these protections are toothless, because all that the employer needs to prove

is that they reasonably believed the contract was not a sham, and they can avoid the penalty. Coupled with the expansion of the legal myth of "contract outworker" contained in the Bill (see above) these provisions fail to provide effective protections for outworkers.

91. Amendments need to be made to the WRIC Bill to properly protect these vulnerable workers from the sham arrangements which are so rife in the TCF industry.

PART 3 – EFFECT OF THE BILLS ON WORKERS GENERALLY

92. Whilst we have proposed a number of amendments to the Bills relating to outworkers, this should not be read as any tacit acceptance of the remainder of the Bills. To the contrary, we believe the Bills are designed to allow workers to be further exploited, so that even the very minimal and inadequate protections under Work Choices can be avoided.

Reform Opt-in Agreements

93. A key feature of this scheme is found in the transitional provisions in the IC Bill providing the capacity for parties to a Services Contract to make a "reform opt-in agreement". Whilst the purported effect of these provisions is to allow parties to choose to exclude state laws during the three year transitional period in which those laws would otherwise continue to operate, it in fact will create a presumption that a worker is an independent contractor, irrespective of their actual status.

94. In the TCF industry there are many workers who have no bargaining power at all, and would sign such a document out of fear for their job, even if they were at law an employee. However, the signing of such a document involves on its face agreeing that the worker is an independent contractor. Such a document cannot be varied or revoked

and will be said to create a presumption that the worker is an independent contractor irrespective of their actual status.

The myth of the happy contractor

95. Proponents of the Bills promote an idealised image of independent contractors as happy, independent workers, with equal bargaining power to those who engage them, free from the shackles of pesky industrial regulation and able to be their own boss.

96. In the TCF industry, the reality couldn't be more different from the myth. Workers are forced to sign independent contracts and obtain ABN numbers or they will not be given any work. They work for whatever rate the employer decides to pay them. They perform the work entirely to the specification of the employer. They perform the volume of work given to them by the employer, in the time frame set by the employer.

97. It is not only outworkers who are treated in this manner, but workers such as sewing machinists along with finishers (performing pressing, ticketing and clipping cotton off otherwise finished garments) where these workers perform their work at the employer's own premises, are also treated this way. The case study set out below is one of many in our industry. These workers absolutely need the protection of the law. The IC Bill will facilitate, if not legalise, their current treatment.

Case Study

98. It is not just outworkers in our industry who are treated as independent contractors. Even workers who perform work at the employer's premises are vulnerable to this treatment.

99. For example, two of our members perform pressing work at the employer's premises in an affluent suburb of a capital city. All of the

work is done out of a domestic residence (sweat shop). They iron garments for the pressing service and are treated as independent contractors.

100. When they commenced work they were presented with a contract to sign. They were not provided with a copy of the contract. It purported to make them “subcontractors”. Their terms of engagement are as follows:

- They may work whatever hours they choose, however they are required to complete all of the work that the Employer requires to be done in the timeframe specified by the Employer, which in fact requires them to work whenever the Employer needs them
- They work at the Employer’s premises
- They are paid piece rates of between 50c and $1 per item – in the case of standard items the rate was increased from 75c to $1 approximately a year ago on the basis that the workers agreed to obtain their own ABN;
- They are responsible for paying for any garments that get damaged;
- If a customer of the Employer believes a garment requires re-ironing, they will not be paid for doing the work;
- They are required to provide their equipment
- They are paid each Friday however the Employer reserves the right to withhold payment for work for 30 days.

101. In order to make a living out of the work, the members work 14-16 hour days. They regularly commence work at 3am, and sometimes start as early as 1am, in order to get through the workload, and to work enough hours to survive. At the end of a week of 16 hour days, the most one worker would receive would be $600, and $375 for the other. They are not paid superannuation, they have no workcover insurance. They cannot afford to arrange these things for themselves. At the end

of the week both of our members say they need to sleep all weekend as they are so exhausted.

102. They perform work in two very cramped rooms in what appears to be designed to be a domestic residence. Two or three workers work in each room. The rooms have poor ventilation, and have extremely slippery floors due to the use of starch. Another worker slipped and was injured on the floor of one of the room. There is not free access to and from the building, and the one exit is often obscured by a delivery van. In the event of a fire, the capacity to exit the area is limited. There is also an uncovered fishpond on the premises which another worker once fell into and injured themselves.

103. A health and safety inspector attended the premises approximately 18 months ago and identified a number of hazards required to be fixed. They have not been fixed by the Employer. The Employer required our members to sign a piece of paper saying that they had had fire drill training. The training never occurred.

104. Office staff have been instructed by the owner not to “associate with the ironing scum out the back”.

105. Despite these conditions, our members are terrified that they will lose their jobs, and accordingly do not wish to be identified.

CONCLUSION

106. The TCFUA reiterates its opposition to the Bill as a whole.

107. In the case of outworkers in the TCF industry, the Bills fails to provide protections consistent with the government’s policy position expressed during *Work Choices*.

108. The IC Bill overrides state protections for outworkers, creates a category of contract outworkers which would disentitle outworkers to the overwhelming majority of their current protections under federal law, and the WRA Bill fails to properly protect outworkers from the sham contracting arrangements so common in the TCF industry.

109. The laws being overridden were developed in response to the particular regulatory needs of outworkers and the TCF industry, taking into account all of the issues raised in Part 1 of our submission. Vulnerable outworkers are losing the protections that are vital to addressing their systemic exploitation.

110. It is not only outworkers who are vulnerable to the effect of these Bills. All workers risk being treated as contractors through the easy "opt-in" mechanism provided in the Bill. The myth of independent contracting, where a worker has equal bargaining power and can be their own boss in a commercial relationship is entirely different to the reality for workers in the TCF industry, who rely entirely on minimum protections under industrial laws for their conditions and cannot negotiate more.

111. The Bills should not be passed, but if they are, they require amendment to deliver on the government's commitment to protect outworkers.