

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

Name: Debbie Carstens 0409 841 208
Daisy Gardener 0432 895 589

Organisation: FairWear

Address: PO Box 253, Bankstown 1885

Phone: Sydney - 02 9793 9062
Melbourne - 03 9251 5270

Fax: Sydney - 02 9793 9106
Melbourne - 03 9654 2136

Email: fairwear@awatw.org.au
fairwear@fairwear.org.au

Date: 21st July 2006

To -

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

Phone: +61 2 6277 3521
Fax: +61 2 6277 5706
Email: eet.sen@aph.gov.au

FairWear is a national coalition of church, community groups, women's organisations, students and unions, which has been working to eliminate the exploitation of homeworkers and end sweatshop conditions in the garment industry since 1996.

There are an estimated 329,000 homeworkers in the garment industry in Australia¹. Homeworkers are amongst the most disadvantaged workers, earning an average hourly rate of \$3.60 and working up to 7 days per week.²

Promises not Fulfilled

In Minister Andrews announcement of the Independent Contractors Bill on 3rd May 2006 he said "the Bill will maintain the status of Textile Clothing and Footwear outworkers as employees under State legislation."

In letters to some 50 outworkers on behalf of Minister Andrews, Jeff Woodgate (Acting Director, Conditions Policy and Research, DEWR) said "the new federal workplace relations legislation will maintain existing federal and State protections for outworkers".

Despite the Government's public announcement regarding the Independent Contractor Bill, and **written assurances to outworkers**, FairWear, and to members of FairWear that the employment status and associated existing protections for outworkers in State laws would be maintained, we are disturbed to find on reading the Independent Contractor Bills that this is not the case.

The Independent Contractors Bills provide various loopholes for employers to utilise to treat outworkers as independent contractors and which undermine the industry wide monitoring established to bring an end to the exploitation of outworkers.

Outworkers Reality – The Primary Reference Point

Outworker story 1

"You mean I am not an independent contractor? I've worked as an outworker for 20 years and my boss says I am an independent contractor, and these are the conditions under which I am contracted."...an outworker finding out for the first time that the State law is clear that she is an employee. She often misses English class because of the short turnaround times in which she must complete work. She wants to claim back from her boss the money she is owed after receiving under award pay and conditions for so long.

¹ Textile, Clothing & Footwear Union of Australia, Hidden Cost of Fashion, Sydney, 1996

² Christina Cregan, Home Sweat Home report on outworkers in the textile industry in Melbourne, Department of Management, University of Melbourne, Victoria, 2001.

¹ Textile, Clothing & Footwear Union of Australia, Hidden Cost of Fashion, Sydney, 1996

² Christina Cregan, Home Sweat Home report on outworkers in the textile industry in Melbourne, Department of Management, University of Melbourne, Victoria, 2001.

Outworker story 2

Kim was told by her employer that she was an independent contractor in 1992 when she started working as an outworker. When the GST was introduced Kim was told by her employer she had to get an ABN or she wouldn't get any more work. In 2003, after the laws were passed that deemed outworkers to be employees in NSW Kim was told by her employer that she needed to register as a company if she wanted to continue getting work. Kim wanted the protection of being an employee and did not want to register as a company.

Throughout this time Kim was paid \$12 to \$18 a garment, which worked out to about \$8 an hour. She also covered the cost of her own electricity and cottons. She was expected to complete work in unrealistic turn around times and often had to work long hours for many days in a row to complete orders.

At one stage Kim got a group of Korean outworkers together at her house to try to do something about it but the others were too scared to take action.

Outworker story 3

A Chinese outworker is well paid for sewing a well known label that is accredited under the Homeworkers Code of Practice. She receives above award payments of \$15 an hour for high skilled work, and is given sufficient time to complete work. She has superannuation and workers compensation cover.

In the past she has worked for \$4 an hour and is scared of going back to that. She is very concerned that if employers were allowed to call her an independent contractor they would immediately reduce her pay and conditions. She is fearful that if she was asked to sign a contract by her employer she would find it difficult to say no as she needs the work.

Outworker Story 4

A Vietnamese outworker has never heard anyone refer to an independent contractor. She only knows that her boss pays her what he likes, when he likes and fines her when she doesn't complete work by the deadline he has set. She is forced to work long hours and is in increasing pain.

These stories paint the picture of how employers in the clothing industry continue to use independent contracting as a means for maintaining the exploitation of outworkers.

Employers in the clothing industry need a strong message from the Federal Government that exploitation will not be tolerated. They need to be given a clear message that they can't escape award obligations by calling outworkers independent contractors.

A series of protections and mechanisms to monitor the implementation of minimum standards and conditions have been introduced into State and Federal awards and State and Federal legislation over the last 10 years, some of them very recently. The operation of these protections and mechanisms is now being threatened by opening up the legal possibility for outworkers to be regarded as independent contractors.

Undermining Existing Outworker Protections

There are two categories that make up the package of Outworker Protections. These are a) Outworker Entitlements and b) Mechanisms for Monitoring to enforce those entitlements.

If the employment status of outworkers is not clear it undermines BOTH forms of outworker protections.

Outworker Protections - Entitlements

The relevant Federal and State awards, State legislation, the voluntary Homeworkers Code of Practice, and the mandatory Ethical Clothing Trades Extended Responsibility Scheme all outline the wages and conditions to which outworkers are entitled. These include a current minimum rate of pay of \$13.78 an hour, regular payment for work undertaken, annual leave, superannuation, workers compensation, the ability to claim unpaid wages from the principle contractor in the supply chain and so on.

If outworkers are no longer clearly identified as employees then they lose access to these protections. (NB the Contract Outworker provisions proposed ONLY address the rate of pay.)

Outworker Protections – Monitoring Mechanisms

Monitoring mechanisms allow Government workplace inspectors and the Textile Clothing and Footwear Union of Australia access to records and contracts for work that is given out to sub-contractors in the clothing industry. This allows inspectors from the Government or the TCFUA to pursue the clothing supply chain from the top down and identify where responsibility for the exploitation of outworkers lies in any one supply chain. (eg is there enough money in the contract, what is the volume of work compared to the number of workers declared to produce that work, if the volume is too high then where are the other workers, is the turn around time realistic, what evidence is there that all the workers are covered by workers compensation insurance and superannuation.)

It should be noted that the categories of records that may be required to be kept and made available for inspection under the Contract Outworker section of the proposed Independent Contractors Bill are different to that required by the existing monitoring mechanism, which will cause confusion and undermine the operation of existing mechanisms.

It is very difficult to have an industry wide monitoring scheme when there is no clear standard for wages **and conditions** of outworkers at the bottom of the supply chain.

Without clear standards for wages **and conditions** the Homeworkers Code of Practice will be undermined, which the Federal Government promoted and funded. The Code

has been established and agreed to by the industry as a mechanism for addressing the exploitation of outworkers.

Without an industry wide monitoring system the TCF Union of Australia would be forced back to case by case responses to individual outworkers who are brave enough to seek assistance. This would require having to prove each outworker is an employee. Migrant women outworkers with limited English skills and limited financial resources have demonstrated repeatedly that they are fearful, reluctant or unable to take such steps.

Problems with the Independent Contractors Bill

1. Part 2 Section 7 Retaining of Deeming for Outworkers

Section 7 overrides a wide range of legislation that protects outworkers but only exempts a narrower range of legislation where outworkers are a direct party, and only where the legislation applies to the contract as opposed to the parties to it.

In addition the maintenance of the deeming provisions for outworkers is qualified, providing for circumstances in which these protections do not apply. Our experience with outworker employers is that they are very adept at finding the exception and using it. Also, a lack of legal clarity will only serve the interests of those exploiting people in this industry.

Section 7 must be amended so there is no qualification of the retention of State protection for outworkers as employees and explicitly retain the full range of laws protecting outworkers.

2. Part 2 Section 10 Regulations

Those State protections for outworkers employee status which are retained by the Bill, can be undermined by the Regulations.

Section 10 should be amended to exempt the State laws protecting outworkers from those pieces of legislation which can be undermined by regulations.

3. Part 4 Contract Outworkers

a) FairWear believes all outworkers are employees. As employees they are able to access above award payments and conditions, while retaining the protections built up over years of campaigning to protect the majority who are exploited.

By legislating into existence the concept of a Contract Outworker the message to employers about their responsibilities is weakened and it creates loopholes that can be exploited by the many unscrupulous bosses in this industry.

Part 4 of the legislation only serves to make outworkers more vulnerable by suggesting they can have a status other than employee with all its incumbent protections.

Outworker employers have demonstrated time and time again their capacity to utilise all loopholes available to exploit outworkers. In 2004 the Victoria branch of the TCFUA conducted inspections of 151 companies to check compliance with award minimum award pay and conditions. This investigation found that only one company was fully compliant with their legal obligations to outworkers. This means that less than 1% of this group of Victorian clothing companies were complying with their legal obligations. If such non-compliance did not exist, we would not be faced with such a chronic problem of exploitation in this country.

Similar levels of non-compliance have been found in investigations in other States as well.

b) Only pay is protected for so called “contract outworkers”. They do not get access to superannuation, workers compensation, overtime pay, reasonable hours of work and many of the other entitlements outworkers have as employees.

c) The Bill contains no clear record keeping requirements. That is left to the regulations. The categories of records which the regulations may require to be kept under the “contract outworker” section are different to that required under other monitoring mechanisms established to address the exploitation of outworkers. This undermines the capacity of the other mechanisms to work, as the access to information is interrupted. There is also a suggestion that so called “contract outworkers” may themselves be required to keep records and could be penalised if they don’t keep them.

d) Only the Federal Inspectorate has jurisdiction to investigate breaches. The exclusion of the TCF Union of Australia has the potential to provide a barrier to the union in accessing important supply chain information in contracting chains where “contract outworkers” exist which will interrupt the capacity to protect employee outworkers in that supply chain from ongoing exploitation.

e) This section includes the capacity for inspectors to enter outworkers homes. Outworkers are extremely fearful about these provisions, in that they include the capacity for Workplace Inspectors to enter their homes and ask to see documents. The appearance of a Government official at their home is a major event for outworkers. Many have had poor experiences of Government officials in their country of origin. Some have had bad experiences with government officials in their migration experience to Australia. There are issues about women being at home alone or with small children. And there is the obvious significant issue of low levels of English language for women who have been working alone at home for long hours over many years.

All these issues support the position that legislating for “contract outworkers” is counter productive to addressing the exploitation of outworkers. It, in fact, makes outworkers more vulnerable rather than protecting outworkers.

Part 4 should be removed in its entirety.

4. Part 5 – Transition Arrangements

What is there to prevent an employer of outworkers from asking outworkers to sign an agreement to “opt in” to the Federal Independent Contractor system and avoid the State legislation that protects their employee status?

Part 5 should be amended to clarify that employers can not ask outworkers to sign an agreement to “opt-in” to the new legislation.

Problems with Workplace Relations Legislation Amendment (Independent Contractors) Bill

1. Part 22 Section Sham Arrangements

The Sham contracts provisions are good and the capacity for penalties is excellent.

However they fail to deliver protections for outworkers in two ways –

- a) there is no specific provision making it clear that outworkers can not be called independent contractors and penalties can apply;
- b) the provisions which allow employers to avoid a penalty are far too weak.

Outworkers tell us of their fear that they will be asked to sign an agreement that says they are an independent contractor. They want to remain within the award and legislated protections by remaining employees. However, they are fearful of their employers and regard it as extremely difficult to refuse to sign anything that is given to them as a condition of receiving work.

Outworker employers need a clearly legislated message that independent contracting of outworkers is not acceptable.

FairWear will be interested to see how quickly unscrupulous employers become aware of the “I didn’t know they were employees” excuse as a way to avoid penalties. When it comes to ways of avoiding laws and penalties these employers seem to be able to educate themselves very well.

It is very interesting that the practices of unscrupulous employers across the clothing industry are very similar. The information networks for employers of outworkers and the employer’s accountants seem to operate very effectively.

So why is it not possible to educate these same employers about their responsibilities in relation to their employees with regard to the Independent Contractors Bill, and not provide a more stringent expectation of them complying with the law.

Also in the case of the clothing industry there are well advised and regulated retailers who are capable of being very involved in educating their suppliers and sub-contractors about their obligations to their employees.

We are confident it would only take one or two cases of prosecution under these new laws and the community of sub-contractors who employ outworkers will all know about their obligations to outworkers.

FairWear's Frustration

FairWear is frustrated to have spent many hours during the WorkChoices debate and since trying to help the Government understand the issues for outworkers and what is needed to truly protect them.

Despite all these efforts the Government has fallen short of their own commitments, and worse still, has made outworkers more vulnerable with this Bill.

FairWear simply asked for three things. The Government has fallen short on all three.

1. Fully maintain State deeming laws for outworkers.

The protection of state deeming provisions from the overriding of legislation is undermined in three ways

- a) The range of laws preserved for outworkers is narrower than the range of laws overridden;
- b) Exceptions are provided for when the protections do not apply;
- c) Regulations can undermine the protected laws.

2. Provide penalties where an employer tries to avoid paying award entitlements to an outworker by calling them independent contractors.

Specific penalties in relation to outworkers were not introduced, and the good provisions regarding sham arrangements can be simply avoided by claims of “not knowing”.

3. Ensure the remainder of the Independent Contractor legislation does not apply to outworkers

A whole new section has been created with legislates the existence of “contract outworkers”, protects only their pay, and undermines the monitoring mechanisms by providing a different record keeping regime.

Good News?

The situation is redeemable with amendments.

We call on the Senate to demand amendments to these Bills so that they truly reflect the promises made of protecting the employment status of outworkers.

We want to see an end to the exploitation of outworkers in this country, and seek your support for this goal.

Outworkers and FairWear would like to speak to the Senate Inquiry further about our concerns regarding these Bills. We look forward to the opportunity to meet you in Canberra.

APPENDIX ONE

INQUIRIES, RESEARCH AND REPORTS

A wide range of inquiries, reports, and research which have occurred over the last ten years have documented the situation of outworkers and have concluded the need for comprehensive protections to end the levels of exploitation of outworkers. These include:

Inquiries

Senate Inquiry into Outwork in the Garment Industry 1996

Review of Senate Inquiry into Outwork in the Garment Industry 1998

NSW Pay Equity Inquiry 1998

Industrial Relations Commission of NSW (Glynn J) 1998, Pay Equity Inquiry, Report to the Minister Volume 1 and Volume 2

Full Report

<http://www.workandfamily.nsw.gov.au/payequity/report/default.html>

Chapter Regarding Outworkers

<http://www.workandfamily.nsw.gov.au/payequity/report/industries/outworkers.html>

Under Conclusions and Findings, at number 18 Justice Glynn makes reference for the need for deeming provisions to clarify the employment status of outworkers.

Full Bench AIRC Decision on Outworker Clauses in Clothing Award 1999

Victorian Government Inquiry into Clothing Outwork 2002

Research

Mayhew and Quinlan 1998, Outsourcing and Occupational Health and Safety:

A Comparative Study of Factory Based and Outworkers in the Australian TCF Industry, Sydney Industrial Relations Research Centre, University of NSW.

Cregan Christina, 2001 'Home Sweat Home', Melbourne University

Cregan Christina, 2002 'Outworker narratives: stories of despair' Melbourne University

www.ecom.unimelb.edu.au/mgtwww/

Vietnamese Outworkers in Queensland, Exploring the Issues 2004, Sue Scull, UQ

Boilerhouse, University of Queensland

Reports

Hidden Cost of Fashion - Outworkers tell the real fashion story TCFUA 1995

Homeworkers Code of Practice - an Industry wide voluntary scheme of monitoring the supply chain from the retailer to the homeworker 1996

The story of the No Sweatshop label - Homeworkers Code Committee 2000

www.nosweatshoplabel.com

Behind the Label Issues Paper (NSW Government) 1999

12 month Report of the NSW Ethical Clothing Trades Council 2003

12 month Report of the Victoria Ethical Clothing Trades Council 2004

http://www.business.vic.gov.au/BUSVIC.196780/STANDARD//PC_50608.html