

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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JULY 2006



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Mr. John Carter
Committee Secretary
Senate Employment, Workplace Relations and Education Committee
Department of the Senate
Parliament House
Canberra ACT 2600
Australia
2005

Dear Mr. Carter,

The Justice and International Mission Unit would like to thank the Committee for this opportunity to make a submission relating to the Inquiry into the provisions of the Independent Contractors Bill 2006 and Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006.

Support by the Uniting Church for the most vulnerable workers in the Australian community is not new as evidenced by our long-standing commitment to the community-group FairWear, also making recommendations to the Committee Inquiry. Because of this background this response to the Senate Inquiry will focus primarily, but not exclusively, on outworkers in the clothing industry. We endorse the FairWear recommendations to the Inquiry.

Along with the UnitingCare NSW.ACT, the Justice and International Mission Unit recognises that there are genuine contracts for services that are appropriately treated as commercial contracts and not as employment contracts.

Some workers are unjustly coerced into unfair contracting arrangements as a way of employers shifting costs onto 'contractors' - who really should be treated as employees. The main purpose of this submission is to advocate for comprehensive legislative arrangements to protect such vulnerable workers.

Before going into greater detail this submission begins by including a foundational statement of the church in relation to social justice, followed by our key criteria for changes to laws pertaining to independent contracting.

Yours faithfully,

Dr. Mark Zirnsak
Director



Foundational statement

Excerpts from Statement to the Nation - Inaugural Assembly, Uniting Church in Australia, June, 1977

- We pledge ourselves to seek the correction of injustices wherever they occur. We will work for the eradication of poverty and racism within our society and beyond. We affirm the rights of all people to equal educational opportunities, adequate health care, freedom of speech and employment (or dignity in unemployment if work is not available). We will oppose all forms of discrimination which infringe basic rights and freedoms.
- We will challenge values which emphasise acquisitiveness and greed in disregard of the needs of others and which encourage a higher standard of living for the privileged in the face of the daily widening gap between the rich and poor.
- We are concerned with the basic human rights of future generations and will urge the wise use of energy, the protection of the environment and the replenishment of the earth's resources for their use and enjoyment.
- Finally we affirm that the first allegiance of Christians is God, under whose judgment the policies and actions of all nations must pass. We realise that sometimes this allegiance may bring us into conflict with the rulers of our day. But our Uniting Church, as an institution within the nation, must constantly stress the universal values which must find expression in national policies if humanity is to survive.
- We pledge ourselves to hope and work for a nation whose goals are not guided by self-interest alone, but by concern for the welfare of all persons everywhere — the family of the One God — the God made known in Jesus of Nazareth the One who gave His life for others.
- In the spirit of His self-giving love we seek to go forward.

Principles

In general any of the proposed changes should conform to the following criteria:

- regardless of mode of employment or legal definition, all arrangements that involve payment for human labour should be subject to international human rights instruments;
- laws pertaining to independent contracting should be measured against the potential impact on those most vulnerable (those people with the least ability to bargain for decent remuneration and conditions at risk of 'sham arrangements' or unjust contracts);
- unions and employee associations are well placed to provide assistance to those challenging 'sham arrangements' or unjust contracts, and must not be prohibited from assisting those most vulnerable to secure decent remuneration and conditions;
- accessible, timely and legally enforceable processes are required to ensure that those most vulnerable are protected from coercive and unjust arrangements; and,
- Commonwealth laws should not override State laws in such a way that allows for less protection to be provided to those most vulnerable.

These principles are congruent with those also submitted to the Inquiry by UnitingCare NSW.ACT.

TABLE OF CONTENTS

- Introduction
(Pg. 5)
- The position and actions of the Uniting Church in Australia and other denominations
(Pg. 5-7)
- The FairWear campaign and the impact of proposed legislative change on Outworkers
(Pg. 7-8)
- The impact of proposed legislative change generally
(Pg. 8)
- Conclusion
(Pg. 8)

- Bibliography
(Pg. 9)
- Appendix 1 - ILO Convention concerning Home Work
(Pg.10)
- Appendix 2 - Synod of Victoria & Tasmania resolution on FairWear
(Pg. 11)

Introduction

The Uniting Church in Victoria and Tasmania seeks to be a living Christian faith community across Victoria and Tasmania; faithful to God, seeking ways of love, peace and justice for all people. The Synod of Victoria and Tasmania of the Uniting Church in Australia oversees 748 individual churches. After government, the Victorian wing of the church is the largest community services employer in the state. Nationally, the Uniting Church in Australia employs over 70,000 people working in contexts ranging from kindergartens to aged care.

Because this earth comes from God, and because all human beings are equally valuable, everyone has the right to the basic necessities of life. The Uniting Church in Australia believes that a nation will only function well when it is based on both human rights, and the responsibility of all to respect those human rights.

This submission recommends that industrial reform in the area of independent contracting should promote human dignity. Minimum standards for work should be in place so that people are not exploited. Government policy should be in line with The United Nations Universal Declaration of Human Rights, which states:

Article 23

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. Everyone, without any discrimination, has the right to equal pay for equal work.
3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
4. Everyone has the right to form and to join trade unions for the protection of his [or her] interests¹.

Through the United Nations system, governments have developed a number of 'human rights instruments'. In addition, there is the International Labour Organisation (ILO), to which Australia belongs. It is tripartite in the sense that employers, workers (unions) and governments attend meetings and participate in decision-making. The ILO sets international labour standards in the form of conventions on particular matters. Particularly relevant here is the *ILO Convention concerning Home Work* (Appendix 1).

International human rights instruments are not perfect, but they are the closest thing the world has to natural law, i.e. an understanding that is common to people regardless of nation, race, culture or religion. Work is the primary way in which people provide for their basic survival needs. The human rights instruments include very clear statements about the rights of workers to decent wages and working conditions, and to the right to organise to obtain these. All employers have a responsibility to respect those rights in their employment practices.

The position and actions of the Uniting Church in Australia and other denominations

This Judeo-Christian tradition calls for the respect of the dignity of each person and to defend the most vulnerable in our society. Work needs to consist of decent conditions and adequate remuneration to allow an individual to comfortably live and to fully support any family dependents. Biblical basis for such an opinion can be found in Malachi 3:5, where the Lord speaks against those who oppress the hired workers in their wages. Similarly, in the Letter of James 1-6, those who make profit through the exploitation of workers are severely condemned.

¹ United Nations, 1948, *Universal Declaration of Human Rights*, General Assembly resolution 217 A (III) 10 December, [online], available from: <http://www.un.org/Overview/rights.html> [15 August 2005]

The position and actions of the Uniting Church in Australia and other denominations (continued)

The drive to exploit is not new, as the Executive Director of the Commission for Mission, Uniting Church Minister the Reverend David Pargeter, outlined in a recent speech:

Exploitation is as old as the relationship between power and labour. The ancient story of Moses and the Hebrew people escaping from Egypt, is as much about freedom of association and the right to strike and withdraw labour, as it is about responding to God. This is what the First Testament says "And Pharaoh gave this command to the over-seers. Until now you have provided these people with straw for brick-making. Do so no longer. Let them go and gather straw for themselves. And what is more, you are to get from them the same number of bricks as before – there will be no reduction in quantity"².

This ancient Biblical story is a startlingly apt description of current-day independent contracting at its worst – the 'employer' (Pharaoh) expects the 'labourers' (the Hebrew people) to maintain productivity while at the same time burdening them with unjust demands.

In 2003, the Seventh Assembly of the Uniting Church in Australia adopted a resolution - *A Call for Justice Concerning Employment*³. The resolution states that moves towards modes of more flexible employment need to be made in a framework that ensures an adequate income and decent, safe working conditions. Business has a responsibility to choose options, which minimise negative social impacts. When business abandons this responsibility, employees or 'contractors' can suffer.

This year, the Synod of Victoria and Tasmania resolved to ensure contracting arrangements entered into by the Church are just by ensuring that "in relation to all UCA Workplace contract specification documents (relating to such matters as independent contracting and labour hire arrangements), standard clauses that promote secure employment and decent remuneration and conditions⁴" are inserted that are consistent with the employer principles of the church.

The Uniting Church in Australia position on industrial relations is consistent with that of other churches. Roman Catholic Social Teaching, for example, has, for over 100 years, recognised the importance of preventing exploitation of workers. In the 19th century, Pope Leo XIII was already aware of the dangers of contracting arrangements due to the unequal power relations between employer and employee, when he stated that, "If through necessity or fear of a worse evil the workman accept harder conditions because an employer or contractor will afford him no better, he is made the victim of force and injustice"⁵. In 1991 Australian Catholic Bishops made a statement about unemployment which challenged the "view that reduces human labour to a commodity, to be bought or sold - or not - merely according to the laws of supply and demand"⁶.

In 2005, the Anglican Primate, Archbishop Phillip Aspinall has spoken about the Christian commitment to the poor, "the key principle the church would want to defend is proper protection for the weakest and most vulnerable in our community ... that is a prime value of the Judeo-Christian tradition, one that rings through the prophets and the Gospel"⁷.

² Pargeter, D. [Rev.], 2006, *Church, Community and Unions*, transcript of Melbourne Town Hall Speech [unpublished], 7 June

³ National Assembly of the Uniting Church in Australia [Seventh Assembly], 1994, *A Call For Justice Concerning Employment*, [online], available from: <http://nat.uca.org.au/unitingjustice/transformingsociety/economicsforpeople/> [15 August 2005]

⁴ Uniting Church in Australia, Synod of Victoria and Tasmania, 2006, *Industrial Relations – Church as Employer: A Statement of Principles*

⁵ Leo XIII [Pope], 1891, *Rerum Novarum - On Capital and Labor*, [encyclical], [online], available from: <http://www.catholic-forum.com/saints/pope0256e.htm> [15 August 2005]

⁶ Australian Catholic Bishops Conference, 1991, *Statement about unemployment* cited in National Council of Churches in Australia Social Justice Network, 2005, *A Briefing Paper, Workplace Relations Policy*, [online], available from: http://www.ncca.org.au/departments/social_justice_network/documents_and_statements/workplace_relations_-_briefing_document_2005 [15 August 2005]

⁷ West, A., 2005, *Anglican leader joins the IR fight*, *The Australian*, July 11, available from: http://www.theaustralian.news.com.au/common/story_page/0,5744,15887124%255E2702,00.html [15 August 2005]

The position and actions of the Uniting Church in Australia and other denominations (continued)

Also in 2005 Pope Benedict XVI affirmed the Encyclical of Pope John Paul II⁸, *Laborem Exercens*, as a work that should be read by young people so as to inform the advancement of conditions for workers consistent with the principle of respect for human dignity. *Laborem Exercens* sets out strong arguments for an industrial relations system which places priority on “worker's rights, since the rights of the human person are the key element in the whole of the social moral order”⁹.

Members of the World Council of Churches including the Uniting Church in Australia, Anglican, Catholic and Orthodox churches, and the churches of the Methodist and Reformed traditions, support the international human rights instruments in relation to industrial relations.

Unjust working arrangements can force people to work longer hours, or to have a second worker in the family simply to make ends meet. The Uniting Church believes that it is not appropriate or necessary that Australian competitiveness be based on low wages, poor working conditions and insecure employment.

The FairWear campaign and the effect of proposed legislative change on Outworkers

The Uniting Church in Australia Synod of Victoria and Tasmania has a long standing commitment to the rights of vulnerable workers in the clothing industry. In particular, the church has focussed on the situation for outworkers in Australia. The FairWear campaign, involving Uniting Church members, was active in 1998 to defend award conditions for homebased workers against changes intended by the Federal Government at that time. The Industrial Relations Commission upheld that the outworker clauses in the Federal Clothing Award should be kept intact. Campaigners saw this as a victory for vulnerable workers.

In 2000 the Synod passed a resolution to support the FairWear campaign (Appendix 2). The church called for all apparel and footwear manufacturers to *comply with a code of practice, require all their contractors and subcontractors pay their employees a living wage, and respect the right of all employees to join a trade union.*

The FairWear campaign has been successful in persuading some Australian manufacturers and retailers to sign the Homeworkers Code of Practice. The Victorian Government in 2003 introduced the *Victorian Outworkers (Improved Protection) Act* which has provided for more protections for these vulnerable workers. When outworkers are coerced into being ‘independent contractors’, manufacturers can pay them below the minimum wage because the worker becomes his or her own ‘business’. Even though it has been difficult to enforce, the Victorian Outworkers Act ensures outworkers are regarded as employees, with full entitlements to award wages and conditions, whatever an employer calls them. Despite this, the Ethical Clothing Trades Council¹⁰ found a disturbing lack of compliance by some Victorian companies in meeting the minimum levels of lawful entitlements of clothing outworkers as set out in the Act. In response, in June 2005, the Victorian Government announced their intention to implement a *mandatory code of practice* similar to regulations already in place in NSW.

⁸ Benedict XVI [Pope], 2005, [statement], REGINA CAELI St Peter's Square 6th Sunday of Easter, 1 May cited in National Council of Churches in Australia Social Justice Network, 2005, *A Briefing Paper, Workplace Relations Policy*, [online], available from:

http://www.ncca.org.au/departments/social_justice_network/documents_and_statements/workplace_relations_-_briefing_document_2005 [15 August 2005]

⁹ John Paul II [Pope], 1981, *Laborem Exercens* – On Human Work, [encyclical], 14 September, [online], available from:

<http://www.ewtn.com/library/ENCYC/JP2LABOR.HTM> [15 August 2005]

¹⁰ Ethical Clothing Trades Council of Victoria, 2004, *12 Month Report*, [online], available from:

[http://www.irv.vic.gov.au/CA256EF9000EB8A3/WebObj/332BC39C68F5407CCA256FCE0016683F/\\$File/Ethical-Clothing-Trades-Council-Report-final.pdf](http://www.irv.vic.gov.au/CA256EF9000EB8A3/WebObj/332BC39C68F5407CCA256FCE0016683F/$File/Ethical-Clothing-Trades-Council-Report-final.pdf) [15 August 2005]

The FairWear campaign and the effect of proposed legislative change on Outworkers (continued)

FairWear uncovers experiences of outworkers, many of whom make clothes at home for an average hourly rate of \$3.60 and work up to 7 days per week¹¹.

In keeping with the stated policy commitment of the Commonwealth Government, the clauses of the Federal Clothing Award (1999) that cover outworkers should not be able to be undermined and requirements for employers to register with the industrial relations commission to provide records of where they send work to, and what they are actually paying outworkers must be comprehensively safeguarded in the proposed legislation. Similarly the legislation, in all cases, should not be able to override state 'deeming provisions' that make it more difficult for employers to enter into 'sham' arrangements with their employees by inappropriately and unjustly treating them as 'independent contractors'. FairWear has stated that these protections could be at risk if the necessary amendments are not made (these are outlined in their submission to the Inquiry). We concur with the analysis of FairWear that the creation of the category "contract outworker" in the draft legislation would create a legal fiction that would lead to further exploitation in the industry. The whole basis of the FairWear campaign has been to ensure that outworkers are treated as employees, and that their pay *and conditions* entitlements are comprehensively protected.

The Justice and International Mission Unit is hopeful that the Commonwealth Government will hear the voices of outworkers and ensure adequate safeguards are in place.

The impact of proposed legislative change generally

Sometimes, employers seek exemption from normal labour standards by inappropriately converting existing employees into being 'independent contractors' or by hiring new employees on this basis. When faced with such dilemmas it is important for employees to have the free choice to refuse work on such a basis. For this to happen, the Government needs to put in place strong protections for such vulnerable workers. There should also be full recognition to the role of trade unions to address power imbalances when conflict arises.

The Justice and International Mission Unit is aware of the work being undertaken by the Australian Liquor, Hospitality and Miscellaneous Workers' Union (LHMU) with regard to assisting those engaged in cleaning work. We urge the Committee to take into account the particular vulnerability of this group of workers.

Along with the UnitingCare NSW.ACT, the Justice and International Mission Unit is concerned that it appears that unions might be constrained in their ability to act on the behalf of some vulnerable workers engaged in inappropriately defined 'contracting work', and unions will not be able to intervene unilaterally, even if it knows that workers are being exploited and living in poverty.

Conclusion

The Justice and International Mission Unit is concerned about upholding the dignity and wellbeing of all people. It supports a legislative framework that restrains parties from engaging in exploitative and unethical behaviour, whether they are employers, employees or contractors.

The Justice and International Mission Unit is concerned that the proposed changes to independent contracting arrangements will unfairly disadvantage those most vulnerable, leaving them open to exploitation unless necessary amendments are made in line with FairWear recommendations to the Inquiry and more generally with the principles set out at the start of this submission.

¹¹ Cregan, C., 2001, *Home Sweat Home report on outworkers in the textile industry in Melbourne*, Department of Management, University of Melbourne, Victoria

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Appendix 1 - ILO Convention concerning Home Work

Key excerpts from the International Labour Organisation - C177 Home Work Convention, 1996, Convention concerning Home Work

Article 4

The national policy on home work shall promote, as far as possible, equality of treatment between homeworkers and other wage earners, taking into account the special characteristics of home work and, where appropriate, conditions applicable to the same or a similar type of work carried out in an enterprise.

Equality of treatment shall be promoted, in particular, in relation to:

- the homeworkers' right to establish or join organizations of their own choosing and to participate in the activities of such organizations;
- protection against discrimination in employment and occupation;
- protection in the field of occupational safety and health;
- remuneration;
- statutory social security protection;
- access to training;
- minimum age for admission to employment or work; and
- maternity protection.

Article 7

National laws and regulations on safety and health at work shall apply to home work, taking account of its special characteristics, and shall establish conditions under which certain types of work and the use of certain substances may be prohibited in home work for reasons of safety and health.

Article 10

This Convention does not affect more favourable provisions applicable to homeworkers under other international labour Conventions.

Date of entry into force: 22/04/2000

4 ratifications: Albania, Finland, Ireland and Netherlands

Appendix 2 – Synod of Victoria & Tasmania resolution on FairWear

In 2000 the Standing Committee of Synod passed a resolution to support the FairWear campaign. The church called for all apparel and footwear manufacturers to comply with a code of practice, require all their contractors and subcontractors pay their employees a living wage, and respect the right of all employees to join a trade union.

9.3 FairWear

To express its support for the FairWear campaign to eliminate exploitation of home-based workers in the apparel and footwear manufacturing industry in Australia

To call on all apparel and footwear manufacturers and retailers in Australia:

(i) to sign and comply with the Homeworkers Code of Practice, endorsed by the Textile, Clothing and Footwear Union of Australia, including accreditation and display of *No Sweat* labels, to ensure that their products are not made through exploitation;

(ii) to require that all their global contractors and subcontractors pay their employees a 'living wage';

(iii) to respect the right of all employees to form and join trade unions, in compliance with international human rights standards, and to allow these right to be guaranteed by independent and transparent monitoring.

(b) To encourage Synod of Victoria agencies, congregations, members and schools to consider, wherever possible, not purchasing apparel and footwear from manufacturers and retailers that are known to be in violation of this resolution.