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Dear Secretary

Submission to Inquiry into the Fair Work Bill 2008

I attach a yet-to-be-published article as a submission to the abovementioned inquiry.

Amongst other things, the article deals with how the Fair Work Bill will, if enacted without the necessary amendments, abolish legislative protections for certain exploited vulnerable outworkers. The article also sets out the minimum steps required to prevent the unjust abolition of existing legal protections for these vulnerable workers.

Yours faithfully

A handwritten signature in black ink that reads "MJ Rawling". The signature is written in a cursive, slightly slanted style.

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‘Will The Rudd Federal Labor Government Abolish Key Legal Protections For Certain Exploited Vulnerable Workers?’

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[Abstract: This article examines the potential loss of legal protections for certain outworkers as a result of recently enacted (or foreshadowed) federal legislative provisions. The article begins with an overview of existing legal protections under State and Territory laws for independent contractor outworkers labouring in industries outside the textile clothing and footwear sector - protections which survived the Howard government’s federal takeover of labour law. The article then examines how the proposed further centralization of labour law under the Rudd federal Labor government may lead to the abolition of these existing legal protections. In particular, the article focuses upon the threats posed by provisions of the Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008 (Cth) and the Fair Work Bill 2008 (Cth). The article concludes by setting out the necessary steps to avoid the unjust obliteration of key legal protections for these exploited vulnerable workers.]

Introduction

This article examines the potential fate of a range of existing legal protections for specific categories of exploited workers engaged in precarious work at various locations around Australia. The last decade has seen the enactment by State and Territory legislatures of wide-ranging legal rights and protections for the contingent and informal workforce operating in the context of supply chain outsourcing. In a number of States and Territories (such as South Australia and Queensland and the ACT), the potential beneficiaries of the relevant legislative provisions are not restricted to any particular industry or sector of work.

* College of Law, The Australian National University. An earlier version of part of this article was originally presented as a conference paper titled ‘Will The Rudd Federal Labor Government Abolish Key Legal Protections For Certain Exploited Vulnerable Workers?’ to the Australian Labour Law Association Fourth Biennial Conference “Labour Law under a Labor Government: A New Balance in the Workplace?” (Rydges Hotel, Melbourne, 14-15 November 2008). Thanks to Terry Carney for his comments on a draft of that conference paper. Any errors are my own.

By contrast with the Howard government's federal takeover of labour law (which preserved state jurisdiction legislative outworker protections), the Rudd federal Labor government's legislative program in relation to federal labour law potentially poses a significant threat to those protections. Under the Rudd federal Labor government, the *Workplace Relations Act 1996* (Cth) ("WR Act") has been amended in order to facilitate a new round of award modernisation.¹ These recent amendments² have sought to restrict protections for non-employee outworkers to a narrower range of industries than were the subject of statutory protections for employee outworkers enacted as part of the Howard government's Work Choices amendments to the WR Act. Furthermore, the current federal government is actively seeking to establish the most extensive possible degree of national uniformity in the legislative regulation of working life. It appears that certain legal protections for outworkers are to be sacrificed in the imminent push for this national uniformity. In particular, the new federal Fair Work Bill recently introduced into federal parliament will considerably reduce the scope of legal protection currently available to outworkers in various parts of Australia. If the outworker provisions set out in the Fair Work Bill at the time of writing are enacted by Parliament without the necessary amendments, these provisions will result in the extinguishment of certain specific legal rights and protections which currently apply within particular State and Territory jurisdictions to a wide range of vulnerable workers, regardless of the industry within which those vulnerable workers labour.

This article first examines the generic application of State and Territory legislation currently protecting certain vulnerable workers regardless of the industry in which they are engaged. In particular, the article analyses the extent to which State legislation in South Australia and Queensland protects a broad range of outworkers who are not employees at common law. The article also examines the generic application of ACT statutory provisions regarding the criminal liability (for work-related deaths) of parties well removed from the direct engagement of fatally affected workers. The article then

¹ *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Cth).

² s576K(1)(b) of the WR Act.

briefly notes the provisions of the WR Act as amended by Work Choices and the provisions of the *Independent Contractors Act 2006* (Cth), both of which preserved these State laws regulating outwork in a broad range of industries and which also retained a continued capacity for the federal award regulation of outwork, whether performed by employee outworkers or otherwise. The article then compares the (narrow) scope of the most recently amended provisions in the WR Act regarding award modernisation, particularly provisions concerning outworkers ostensibly party to a contract for services, with the previously mentioned (broad) State and Territory legislative protections. Adequately regulating the terms and conditions of vulnerable workers purportedly engaged as ‘independent contractors’ is crucial. In many situations, parties who directly engage vulnerable workers (such as outworkers) artificially structure the arrangement to define these workers as ‘independent contractors’ in an attempt to deny the affected worker ‘employee’ status and access to the full range of labour law entitlements usually owed to employees.³ The article then analyses how the Fair Work Bill will, if enacted without the necessary amendments, abolish legislative protections for independent contractor outworkers labouring in industries outside the TCF sector under State and Territory laws. The article concludes by examining the minimum steps required to prevent the unjust abolition of existing legal protections for these vulnerable workers.

Legislation currently protecting vulnerable workers outside the TCF industry

In a number of States and Territories, legislatures have enacted a number of potentially far-reaching measures to regulate the industrial conditions of vulnerable workers working in the context of supply chain outsourcing. These legislative provisions are not restricted to any particular industry or sector. More specifically, the State legislatures of South Australia and Queensland have created such legal rights for individuals working away from factory or business premises. The generic application of these legislative provisions is crucial given that the phenomenon of outworker exploitation is not confined to the

³ A Stewart, ‘Redefining Employment? Meeting the Challenge of Contract and Agency Labour’ (2002) 15 *AJLL* 235; A Stewart *Stewart’s Guide to Employment Law*, Federation Press, Sydney, 2008, at pp50-52; M Rawling ‘A Generic Model of Regulating Supply Chain Outsourcing’ in C Arup, et al (eds) *Labour Law and Labour Market Regulation*, Federation Press, Sydney, 2006, pp520-541, at p525.

textile, clothing and footwear (“TCF”) sector.⁴ In addition, the Parliament of the Australian Capital Territory has enacted criminal statutory provisions which extend criminal liability for work-related death to parties well removed from the direct engagement of workers, whether or not those workers are employees and regardless of the industry within which those workers labour. Furthermore, even after the Howard government’s federal takeover of labour law, the federal jurisdiction retained a capacity for federal award regulation of outwork across all industries.

South Australian legislative protections

In South Australia, existing legislation regulates outwork in the context of supply chain outsourcing. Key components of this legislation have broad application extending beyond the TCF sector. In this sense, the South Australian legislation is a *generic* model of regulating supply chain outsourcing for the purpose of protecting vulnerable workers.⁵

In this legislative model, the definition of ‘outworker’ is of primary importance for the scope of protection. Under the South Australian industrial statute, this definition no longer confines protections for outwork to the TCF industry.⁶ An outworker includes a person who works on, processes, cleans or packs articles or materials or a person who carries out clerical work at a private residence or other premises not conventionally regarded as a place where business or commercial activities are carried out.⁷ This definition explicitly nominates the additional callings of cleaning and clerical work which may be completely separate from work within the TCF sector. In addition, the definition is drafted broadly in order to include persons drawn from all kinds of industries who

⁴ See G Lafferty et al, ‘Homeworking in Australia: An Assessment of Current Trends (1997) 23 *Australian Bulletin of Labour* 143; J Tassie, ‘Home Based Workers at Risk: Outworkers and Occupational Health and Safety’ (1997) 25 *Safety Science* 179; *Locations of Work Australia* 6275.0 (Australian Bureau of Statistics, 2006).

⁵ See further Rawling, above n 3; I Nossar ‘Cross-Jurisdictional Regulation of Commercial Contracts for Work Beyond the Traditional Relationship’ in et al Christopher Arup (ed), *Labour Law and Labour Market Regulation*, Federation Press, Sydney, 2006 pp202-222.

⁶ There is no specific reference to the TCF industry in the South Australian definition of outworker (although clearly the definition encompasses TCF outworkers).

⁷ *Fair Work Act 1994* (SA) s5(1).

conduct various kinds of work offsite.⁸ Furthermore, the worker does not necessarily have to be engaged pursuant to an employment contract in order for the definition of outworker to apply. The definition extends relevant statutory protections to encompass those outworkers engaged by way of an ostensible contract for services.

This definition of outwork beyond the TCF industries then flows on to other provisions in the *Fair Work Act 1994* (SA) (“FW Act (SA)”). Accordingly, where certain other provisions of the FW Act (SA) refer to “outworker”, this reference applies to outworkers in a range of industries – not just the TCF industry.⁹ In particular, the South Australian provisions deeming an “outworker” to be an employee “even though the contract would not be recognised at common law as a contract of employment”¹⁰ refer to a meaning of outworker which is not confined to any particular industry. Moreover, the definition of ‘industrial matter’ has been extended to the giving out of work “which is to be performed . . . directly or indirectly, by an outworker”¹¹ and is thus also connected to this definition of outworker from s5 of the FW Act. This expansion in the definition of ‘industrial matter’ underpins current provisions in the FW Act (SA) which regulate outwork and provides the South Australian Parliament with further capacity to legislate with respect to outwork across a broad range of industries.

Under the FW Act (SA), an outworker may make a claim for unpaid remuneration against a person whom the outworker reasonably believes to be a responsible contractor.¹² In other words, even if such an outworker is an independent contractor, that outworker is entitled to all of the legal minimum industrial entitlements owed to employees working in the same industry as the outworker. In addition, such an outworker may potentially recover any such unpaid legal minimum entitlements from virtually any business party in the relevant supply chain (except for the ultimate retailer of the goods or services supplied). Finally, such an outworker does not bear the burden

⁸ Rawling, above n 3, at 534.

⁹ Ibid.

¹⁰ See definition of “contract of employment in the FW Act (SA) s4(1).

¹¹ Definition of “industrial matter” in the FW Act (SA) s4(1).

¹² FW Act (SA) s 99D(1).

of proving her employment status – indeed, the burden of proof is reversed by statutory means so that the business party in the supply chain against whom the outworker is claiming recovery must pay that outworker’s claim, unless the party receiving the claim can prove that the outworker did not in fact perform the work upon which the claim is based.

This right of recovery applies to outworkers if “a provision of an award or enterprise agreement relates to outworkers.”¹³ Accordingly, this provision incorporates mechanisms to extend the scope of the right of recovery to a range of industries beyond the TCF sector. The right could be extended to a broad variety of outworkers by any application to make or vary an award that successfully includes an award provision that relates to outworkers.¹⁴ The full rights of recovery could also automatically be extended to new categories of outworkers by including a provision relating to outworkers in a statutory enterprise agreement. Furthermore, the right of recovery can also be extended to any person defined as an outworker (under the generic s5 definition of outworker) by making “a regulation”¹⁵ to that effect.

Queensland legislative protections

A number of statutory provisions in Queensland protect outworkers engaged as ‘independent contractors’ in industries outside the TCF sector. Of crucial importance is the foundational statutory definition of outworker. The relevant Queensland industrial statute provides the following definition of outworker:

“outworker means a person engaged, for someone else’s calling or business, in or about a private residence or other premises that are not necessarily business or commercial premises, to—
(a) pack, process, or work on articles or material; or

¹³ FW Act (SA) s 5(4).

¹⁴ Rawling above n 3, at 536.

(b) carry out clerical work.”¹⁶

This definition has broad coverage of all industries. It also clearly includes outworkers engaged ostensibly as independent contractors. This broad definition of outworker is then used in the statutory provision which deems an outworker to be an employee.¹⁷ Therefore, a broad range of Queensland workers engaged by someone else to carry out clerical work offsite, or to pack, process or work on articles or materials offsite, are deemed to be employees. Moreover, under the Queensland statute, the pay and conditions of outworkers (including those outworkers purportedly engaged as ‘independent contractors’) who are not covered by a federal or State award must be “fair and reasonable” compared with the pay and conditions of *employees* who perform the same kind of work under a State or federal award.¹⁸ In other words, within the Queensland State industrial jurisdiction, any workers performing manufacturing or clerical work away from the business or commercial premises of the party which engages those workers no longer bear the burden of proving that they are owed employee entitlements by the party which engages those offsite workers. Furthermore, the range of employee legal minimum industrial entitlements owed must be comparable to the legal minimum award entitlements already owed to comparable factory workers.

ACT legislative protections

The South Australian and Queensland provisions in industrial statutes regulating outwork discussed above were enacted as part of a package of legislative reforms designed to regulate entire supply chains in order to protect exploited outworkers performing work at the base of those chains. One key feature of addressing worker exploitation in the context of supply chain outsourcing has been the imposition of legal responsibilities upon commercial parties who effectively control those supply chains. Running parallel to these developments in the regulation of supply chains under industrial statute have been

¹⁵ FW Act (SA) s 5(4).

¹⁶ Definition of “outworker”, in the *Industrial Relations Act 1999* (QLD) (“IR Act (Qld)”) Schedule 5.

¹⁷ IR Act (Qld) s 5(1)(g).

developments in statutory occupational health and safety laws in the Australian Capital Territory. In particular, employers and senior employer officers may be held criminally liable under statutory industrial manslaughter offences for workplace death or serious injury.¹⁹ These offences relate to the death or serious injury of “a worker” which is expansively defined to mean an employee, independent contractor, outworker, apprentice, trainee or volunteer.²⁰ Most notably, the definition of outworker is not confined to outworkers in a particular industry. Outworker means an individual engaged under a contract for services to “treat or manufacture articles or materials, or to perform other services” offsite.²¹ An “employer” who may be held liable for industrial manslaughter is also expansively defined. A person is an employer if they engage the relevant worker or if their agent engages the relevant worker or if an agent of the person’s agent engages the relevant worker.²² Accordingly, those in effective commercial control of a supply chain may be held criminally liable under these ACT statutory provisions for the workplace death or serious injury of workers working in a broad range of ACT industries, even though the workers who have been killed or injured are in no way directly engaged by the effective business controllers of the supply chain.²³

Federal statutory provisions which pre-date Rudd Labor government amendments

The enactment of particular federal statutory savings provisions²⁴ ensured that the Howard government’s federal takeover of labour law did not invalidate statutory provisions enacted by State parliaments with respect to outworkers, including the wide

¹⁸ IR Act (Qld) s 8C.

¹⁹ Ss49C, 49D *Crimes Act 1900* (ACT). The industrial manslaughter statutory provisions were inserted into the *Crimes Act (ACT)* by the Crimes (Industrial Manslaughter) Amendment Act 2003 (ACT).

²⁰ Definition of “worker” *Crimes Act* (ACT) s49A.

²¹ Definition of “outworker” *Crimes Act* (ACT) s49A.

²² Definition of “employer” and “agent” *Crimes Act* (ACT) s 49A.

²³ I Nossar, *Submission for the National Review into Model Occupational Health and Safety Laws In Relation to Occupational Health and Safety Within the Context of Contract Networks (such as Supply Chains)*, TCFUA (NSW/SA/Tas Branch) 2008, 11-12, in particular at paragraphs 33 to 34 available at <http://www.nationalohsreview.gov.au/NR/rdonlyres/7754B182-CA90-4DAF-B8CE-CC6A9E19B9AE/0/211TextilesClothingandFootwearUnionofAustralia.pdf> (accessed 8 January 2008).

²⁴ WR Act s 16(3)(d); *Independent Contractors Act 2006* (Cth) s7(2)(a). For further details, see Rawling 'The Regulation of Outwork and the Federal Takeover of Labour Law' (2007) 20(2) *AJLL* 189.

definitions of outworker without reference to any specific industry, deeming provisions for employment status and outworker rights of recovery discussed earlier in this article. This outcome was confirmed by Senator Eric Abetz in his second reading speech regarding the Work Choices Bill. In that speech, Abetz discussed the amendment preserving State jurisdiction concerning outworker matters which eventually became subpara 16(3)(d) of the WR Act. He stated: ‘The amendment will ensure that state legislation prescribing protection for outworkers will not be overridden by the “covering of the field” provisions in the bill.’²⁵ He continued his remarks by describing a long, non-exhaustive list of outworker matters including the ‘provision of certain award conditions for outworkers’ that would not be overridden.²⁶ Therefore, even after the Howard government’s federal takeover of labour law, the future legislative capacity of State parliaments to regulate outworker matters was retained. In addition to this retained legislative capacity of State parliaments, post-Work Choices, the regulation of outworker conditions continued to be an allowable award matter in the federal jurisdiction.²⁷ For the purpose of interpreting this allowable award matter provision, s 513(6) of the WR Act essentially defines an ‘outworker’ as any employee who performs work off-site. Although this is a broad definition which clearly extends well beyond the TCF sector, it did use the restrictive term “employee” to describe outworkers. However, since the practical award regulation of employee outworker conditions essentially requires the effective regulatory oversight of all work given out (whether to employees or independent contractors or otherwise), then it seems that the provisions of s522(3) of the WR Act have empowered the incidental award regulation of independent contractors in an outworker context.²⁸ Consequently, following the Howard government’s federal

²⁵Second Reading of the WorkChoices Bill, Commonwealth *Parliamentary Debates*, Senate, 1 December 2005, at p 148 (Eric Abetz).

²⁶ Second Reading of the WorkChoices Bill, Commonwealth *Parliamentary Debates*, Senate, 1 December 2005, pp 145–50 (Eric Abetz).

²⁷ WR Act s513(1)(o).

²⁸ Although a separate s515(1)(g) of the WR Act seems to explicitly proscribe federal award regulation of independent contractors, another section – s522 of the WR Act - provides a power for federal award regulation of matters that are incidental to allowable award matters. In other words, s 522(3) explicitly reduces the exclusionary scope of s 515(1)(g) in regard to the award regulation of outwork, in so far as s 522(3) explicitly states that s 515(1)(g) does not preclude the award regulation of independent contractors where such regulation is incidental to (and essential for) the practical award regulation of outwork: see Rawling above n. 24, at 194.

takeover of labour law, federal awards apparently retained the capacity to regulate the conditions of outworkers across a variety of industries, whether those workers were employees at common law or otherwise.

**Federal jurisdiction provisions regarding outwork enacted following the
election of the Rudd Labor government: the Transition Act**

So far this article has highlighted a number of State, Territory and federal statutory provisions which protect vulnerable workers (including outworkers) which are not specifically confined to any particular industry such as the TCF sector. These generic provisions contrast with the provisions enacted by the federal parliament (following the election of the Rudd Labor government) regarding matters which may be included in a modern award relating to outworkers engaged on a contract for services.

Within the first few months of the Rudd federal Labor government being elected to office, the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Cth) (“the Transition Act”) was enacted and commenced.²⁹ Amongst other things, this Act introduced a framework to enable the Australian Industrial Relations Commission to create ‘modern awards.’ This award modernization framework is a transitional measure introduced prior to more substantive changes to the workplace relations system predicted to commence by 1 January 2010. The statutory provisions on award modernization cover terms that may be included in modern awards. In particular, s576K covers terms providing for outworkers that may be included in modern awards. Included in this section is the following definition of outworker:

“(1) . . . ‘*outworker*’ means:

²⁹ The Transition Act commenced on 28 March 2008. For insightful commentary on all of the major aspects of the Transition Act including the re-introduction of a no-disadvantage test, the abolition of Australian Workplace Agreements and award modernisation, see C Sutherland ‘First Steps Forward (with Fairness): A Preliminary Examination of the Transition Legislation’ (2008) 21 *AJLL* 137.

(a) an employee who, for the purposes of the business of the employer, performs work at private residential premises or at other premises that are not business or commercial premises of the employer; or

(b) an individual who is a party to a contract for services, and who, for the purposes of the contract, performs work:

(i) in the textile, clothing or footwear industry; and

(ii) at private residential premises or at other premises that are not business or commercial premises of the other party to the contract or (if there are 2 or more other parties to the contract) of any of the other parties to the contract.”

The definition of a non-employee outworker party to a contract for services in s576K(1)(b) is problematic in that it only includes outworkers in the TCF industry. The State or Territory provisions previously discussed in this article are not similarly confined to the TCF industry, but rather have far broader coverage of non-employee outworkers in a range of industries. Indeed, the definition of employee outworker in s576K(1)(a) is also a generic definition not confined to any particular industry.

Thus, although research indicates that the phenomenon of outworker exploitation in Australia is widespread in a range of industries beyond the TCF sector,³⁰ non-employee outworkers working in industries outside the TCF industry will apparently not be covered by the definition of outworker in s576K(1)(b) of the WR Act. As discussed earlier in this article, non-employee statutory definitions of ‘outworker’ should be broad given the important protections they provide. When combined with deeming provisions, these definitions guard against attempts to artificially designate outworkers as independent contractors in order to deny those outworkers the full rights and entitlements that employee status usually entails.

³⁰ The available evidence indicates that there are tens of thousands of exploited outworkers labouring in industries other than the TCF sector: see references above note 4.

As further discussed earlier in this article, there are satisfactory statutory provisions in place in three Australian State and Territory jurisdictions which already extend protections to non-TCF outworkers who are not employees at common law. Yet the federal legislative provisions in s576K(1)(b) of the WR Act may now potentially enable a court to decide that the federal parliament has evinced an intention to ‘cover the field’ relating to outwork performed by independent contractors. In other words, s576K(1)(b) could be held to be a complete statement of the law on that topic. Consequently, State law operating in the same field as this Commonwealth law (particularly State law concerning independent contractor outworkers beyond the TCF industries) may be inconsistent with that Commonwealth law, in which case such State law ceases to operate whilst that Commonwealth law is effective.³¹

More specifically, the Ministerial Second Reading speech in relation to the Transitional Act dealt with a draft version of the provisions which became s576K of the WR Act. This Ministerial Second Reading speech (delivered last year) failed to express any assurances that the Commonwealth was not seeking to ‘cover the field’ by way of the recently legislated provisions concerning outworkers. The absence of any such assurance in last year’s relevant second reading speech contrasts markedly with the explicit remarks of Senator Abetz in his Second Reading speech regarding the Work Choices Bill (to the effect that the Work Choices amendments were *not* an attempt by the Commonwealth to cover the field).³² The absence of any parallel assurances in the most recent Ministerial Second Reading speech delivered last year in relation to the Transitional Act could only lend support to the likelihood of a judicial decision holding that the relevant State jurisdiction outwork protections have now been overridden by the enactment of s576K(1)(b).

³¹ See discussion of ‘the tests of inconsistency’ in Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials*, 4th Edition, Federation Press, Sydney, 2006, at p 376.

³² See discussion above (in this article at pX) of comments in Eric Abetz’s Second Reading speech regarding the Work Choices Bill.

At this point, attention is also drawn to the foreshadowed national harmonization of OHS laws across Australian jurisdictions.³³ This OHS harmonization process potentially poses parallel concerns about federal jurisdictional displacement – most specifically in relation to the relevant ACT provisions discussed in this article.

Threats to Legal Protections for Outworkers under the Fair Work Bill

The introduction of the Fair Work Bill potentially poses even greater problems for the legal protection of outworkers in Australia than the problems already demonstrated in this article regarding the threats to outworker protections since the introduction of the Transition Act.

The abovementioned savings provision in section 16(3)(d) of the WR Act ensures that these existing legal protections under State laws for independent contractor outworkers who work outside the TCF industry are protected against the exclusionary operation of s16(1) of the WR Act. Currently, the WR Act does not define the word ‘outworkers’ in relation to the phrase “matters relating to outworkers”. The definition of ‘outworker’ in section 513(1)(o) of the WR Act does not restrict the scope of the term ‘outworker’ as it appears in the phrase ‘matters relating to outworkers’ which is found in section 16(3)(d) of the WR Act.

By contrast, unfortunately, the Fair Work Bill includes a definition of ‘outworker’ which exhibits the dual disadvantages of unnecessarily restricting the scope of ‘outworkers’ protected by the provisions of the Fair Work Bill and simultaneously applies this new, more restrictive definition of the term ‘outworker’ to the crucial phrase ‘matters relating to outworkers’ which now appears in s27(2)(d) of the Fair Work Bill. The unfortunate implications of this radical change under the Fair Work Bill are detailed below.

Section 26(3) of the Fair Work Bill, if enacted, would abolish almost the whole of IR Act (Qld) and the FW Act (SA). In relation to outworkers, the Fair Work Bill only saves those parts of the IR Act (Qld) and the FW Act (SA) which deal with ‘matters relating to

³³ For details see <http://www.nationalohsreview.gov.au> (accessed 9 January 2009)

outworkers' (which apparently now does not include preserving rights of entry in relation to outwork under State laws).³⁴ Furthermore, if the narrow definition of 'outworker' in section 12 of the Fair Work Bill and section 27(2)(d) of the Fair Work Bill were enacted, these provisions would combine to abolish State industrial laws which protect independent contractor outworkers who work outside the TCF industry.³⁵

More specifically, subsection (b)(i) of the definition of 'outworker' in section 12 of the Fair Work Bill narrowly defines the scope of independent contractor outworkers protected by the Bill as being limited to only those outworkers who work in the TCF industry. This narrow definition then generally applies to use of the term 'outworker' in the Fair Work Bill. In particular, this narrow section 12 definition of independent contractor outworkers applies to the use of the term 'outworkers' in section 27(2)(d) of the Fair Work Bill.³⁶

Additionally, the new modernised federal award for the TCF industry will prevail over any outworker protections applicable to independent contractor outworkers in State jurisdictions to the extent of any inconsistency.³⁷

Necessary Steps to Avoid Obliteration of Key legal protections for certain vulnerable workers

Given the potential problems identified above in this article regarding the Fair Work Bill and s576K(1)(b) of the WR Act, it becomes necessary to guard against the inadvertent extinguishment of key state jurisdiction legal protections for vulnerable workers, especially those State jurisdiction statutory protections of non-employee outworkers in industries other than TCF.

³⁴ See Fair Work Bill s 27(2)(d).

³⁵ I Nossar, 'Abolition of Existing Outworker Legal Protections as a Result of the Forthcoming Enactment of Sections 27 and 29 of the Federal Fair Work Bill 2008' (TCFUA, Sydney, 8 December 2008).

³⁶ Ibid.

³⁷ Fair Work Bill s 29(1) and (2)(c); Ibid.

One option could be the explicit retention of full legislative jurisdiction for State and Territory legislatures to maintain and create protections for independent contractor outworkers outside the TCF sector. Arguments in favour of a uniform national industrial relations regime appear to be common sense. However, the acceptance of such arguments in general need not justify the acceptance of every single aspect of the centralization of industrial relations regulation. The underlying rationales for national uniformity need to be considered. As Justice Boland has pointed out, arguments in favour of national uniformity of industrial relations systems tend to focus not so much on building a better system than that which currently exists in the States but building a nationally uniform system which is less costly to business.³⁸ For similar reasons, Professor McCallum has also indicated that the States should exercise caution when considering whether to refer their powers to regulate industrial relations to the Commonwealth. Such comments bolster the plausibility of the argument for retaining State industrial laws on the basis that those laws offer superior protection to vulnerable workers. As this article has highlighted, Queensland, South Australian and ACT laws protecting independent contractor outworkers outside the TCF sector offer illustrative examples of such State and Territory laws providing superior worker protections.

These State laws might be preserved by enacting a broad Commonwealth statutory savings provision designed to preserve State jurisdiction sufficient to maintain both the existence and future operation (including further extension) of all current legal protections for outworkers under State and Territory laws. Such a provision could specify that it is the intention of the federal parliament that the States and Territories continue to be able to exercise a legislative power regarding the regulation of supply chains (including the performance of work by outworkers) as that power had existed immediately prior to the enactment of the Transitional Act amendments which commenced on 28 March 2008. In the absence of governmental support for this kind of broad savings provision, an alternative Commonwealth statutory savings provision might be considered to be inserted into the Fair Work Bill to the effect of the following:

³⁸ 'Don't Jettison NSW system unless there is a better one, says Boland' Workplace Express, 21 August 2008

“Nothing in this Act shall operate (or is intended to operate) to cover the field (or otherwise displace, or reduce the scope of, jurisdiction) occupied or exercised (immediately prior to the commencement of the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Cth) on 28 March 2008) by State legislative regulation of any party which enters into any arrangement for the performance of work outside the business or commercial premises of the party (including, but not limited to, arrangements for the performance of work, either directly or indirectly, for the party by outworkers).

In particular, nothing in this Act shall operate (or is intended to operate) to reduce the scope of application (immediately prior to the commencement of the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Cth) on 28 March 2008) of the following State legislative instruments and provisions:

Ss4,5 and 99A to 99J (inclusive) of the *Fair Work Act 1994* (SA) (as amended) and all of the provisions of the *Fair Work Act 1994* (SA) necessary or incidental to the operation of those provisions; and

Schedule 5 definition of ‘outworker’, ss5 and 8C of the *Industrial Relations Act 1999* (Qld)(as amended) and all of the provisions of the *Industrial Relations Act 1999* (Qld)(as amended) necessary or incidental to the operation of that Schedule and those provisions”

Following submissions³⁹ to the Australian Industrial Relations Commission regarding the modernization of TCF industry awards, a savings provision of precisely this kind was inserted into the TCF sector award⁴⁰ in order to ensure that the award did not operate to displace existing legal protections under State and Territory laws for outworkers (including those outworkers labouring outside the TCF industries). In particular, the savings provision now inserted into the modernized TCF sector award apparently ensures that this federal award will not displace (or otherwise override) existing State and Territory protections for outworkers – most notably, the innovative statutory rights of

³⁹ Submission of the TCFUA to Australian Industrial Relations Commission in Matter AM2008/12, 10 October 2008; and Submission of the Fair Wear Campaign to Australian Industrial Relations Commission in Matter AM2008/12, 10 October 2008 Submission of Asian Women at Work Inc to Australian Industrial Relations Commission in Matter AM2008/12, 14 October 2008; see also Michael Rawling ‘Will The Rudd Federal Labor Government Abolish Key Legal Protections For Certain Exploited Vulnerable Workers?’ Conference Proceedings for Australian Labour Law Association Fourth Biennial Conference “Labour Law under a Labor Government: A New Balance in the Workplace?” (Melbourne, November 2008) 47-57, 56-57.

⁴⁰ Clauses 17.2 and 17.3 of the Textile, Clothing, Footwear and Associated Industries Award 2010 (MA000017) which commences on 1 January 2010.

recovery for outworkers against almost all supply chain business parties, as well as the crucial mandatory retailer codes which currently impose world leading legal obligations upon the most powerful TCF supply chain participants – namely, the major retailers of TCF products.⁴¹ It makes equal sense to adopt parallel, separate savings provisions within the Fair Work Bill along the lines of the draft savings provisions set out in this article, precisely in order to retain valuable State jurisdiction laws protecting vulnerable independent contractor outworkers labouring in industries beyond the TCF sector. (After all, the savings provisions inserted into the modernized TCF sector award cannot overcome the threat posed to outworker protections by primary federal legislation in the form of the Transition Act and the Fair Work Bill. Only amendments to this primary legislation – for example, amendments to introduce parallel savings provisions into the Fair Work Bill – can validly overcome the threats identified by this article.)

Parallel savings provisions specifically in respect of the ACT legislation identified above should also be included within any national OHS legislation which arises from the OHS national harmonization process discussed earlier in this article.

Conclusion

This article has examined the superiority of State and Territory laws protecting outworkers outside the TCF industries, most notably outworkers who are not employees at common law. The superiority of these State and Territory legislative protections contrast markedly with the apparent lack of protection offered to these outworkers under the Rudd Labor government's Fair Work Bill and that government's earlier award modernization amendments to the WR Act. If the Fair Work Bill is not appropriately amended, the further centralization of Australian labour laws under the Rudd Labor government will lead to the abolition of adequate protections for independent contractor

41 For analysis of these world leading regulatory measures, see I Nossar "The Scope for Appropriate Cross-Jurisdictional Regulation of International Contract Networks (Such as Supply Chains): Recent Developments in Australia and their Supra-National Implications" (Keynote Presentation to ILO Workshop in Toronto, Canada) available (as a paper annexed to a submission) at <http://www.nationalohsreview.gov.au/NR/rdonlyres/7754B182-CA90-4DAF-B8CE-CC6A9E19B9AE/0/211TextilesClothingandFootwearUnionofAustralia.pdf>. (accessed on 8 January 2009)

outworkers working outside the TCF industries. Such an injustice would be particularly ironic given that the Howard government's previous federal takeover of labour law preserved these State jurisdiction outworker protections. The article has concluded by canvassing some necessary steps to avoid such an injustice. It is argued that there is simply no excuse for failing to prevent such an unnecessary extinguishment of vital legislative protections for outworkers, who are already exposed to unjustifiable exploitation and an increased risk of injury.