



The Regulation of Outwork and the Federal Takeover of Labour Law

Michael Rawling*

This article examines how the legislative regulation of outwork has survived the federal takeover of labour law. Outwork regulation has survived both the Workplace Relations Amendment (Work Choices) Act 2005 (Cth) — the first component of this federal takeover — and also the second component, in the form of the Independent Contractors Act 2006 (Cth). The article begins by briefly examining the phenomenon of outworkers in the context of state-based regulatory schemes regulating outwork prior to these latest federal legislative developments. The article then analyses in more detail the impact of the federal takeover on legislation regulating outwork, particularly the impact on pre-existing state-based outwork statutory schemes. This analysis highlights the retention of crucial state and federal outworker protections. The preservation of legislative outworker protections is contrasted with the fate of many other forms of workplace regulation. The article concludes that the development of outwork regulation is instructive for future directions in the regulation of both outsourced work and work otherwise performed off-site.

Introduction

The Workplace Relations Amendment (Work Choices) Act 2005 (Cth) (WorkChoices)¹ breaks the tradition of evolutionary reform in industrial relations by instigating the most radical and far-reaching change to Australia's system of industrial relations since the enactment of the Conciliation and Arbitration Act 1904 (Cth).² Recent regulatory scholarship makes clear that WorkChoices does more than merely carve out a sphere of private market

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1 WorkChoices substantially amended the Workplace Relations Act 1996 (Cth) (WR Act). WorkChoices received the royal assent and became law on 14 December 2005, with the majority of the provisions of WorkChoices commencing on 27 March 2006. For excellent overviews of WorkChoices, see A Stewart and E Priest, 'The WorkChoices Legislation: An Overview', supplement to B Creighton and A Stewart, *Labour Law*, 4th ed, Federation Press, Sydney, 2005, at <<http://www.federationpress.com.au/pdf/WorkChoicesLegislation300306.pdf>> and J Riley and K Peterson, *WorkChoices: A Guide to the 2005 Changes*, Thomson, Sydney, 2006.

2 The dismantling of industrial conciliation and arbitration in Australia reinforces the importance of reassessing characterisations of labour law systems and the actual purposes of labour law. For analysis of the continuities and shifts in labour law and the multiple purposes of labour law, see R Mitchell and C Arup, 'Labour Law and Labour Market Regulation' in C Arup, P Gahan, J Howe, R Johnstone, R Mitchell and A O'Donnell (Eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships*, Federation Press, Sydney, 2006, pp 3–18; C Arup et al, 'Employment Protection and Employment Promotion: The Contested Terrain of

ordering. WorkChoices actively ‘confers additional regulatory power on the employer’ in a ‘state-centred, unilateral and legalistic fashion’.³ WorkChoices largely operates to further diminish the residue of rights and entitlements that workers enjoyed in the latter half of the twentieth century under Australian federal and state labour laws.⁴ For the purposes of this article, attention is drawn particularly to WorkChoices’ fundamental attack on worker protections under *state* laws. Yet, one area of workplace governance seems to have escaped many of the detrimental effects of WorkChoices — namely, the regulation of outwork. State outwork legislative provisions have largely survived this first wave of a regressive federal takeover of labour law, by contrast with the fate of many other types of workplace regulation. State outworker legislative provisions have also largely endured a second wave of this federal takeover, in the form of the Independent Contractors Act 2006 (Cth) (IC Act)⁵ and associated legislation.⁶ This article examines the impact that the two-pronged federal takeover of labour law has had on outworker protections established under federal and state legislation in the period prior to the enactment of WorkChoices.

Who are Outworkers?

The term ‘outworker’ originated to describe those engaged in a form of precarious work in the Australian textile clothing and footwear industries. In the aftermath of extensive post-war migration to Australia, there emerged a labour force of migrant women from non-English speaking backgrounds who performed manufacturing work outside factories at locations such as residential premises. A succession of government reports and enquiries revealed that this was one of the most exploited sectors of the workforce in Australia.⁷ These workers were termed outworkers and were often engaged in a manner designed to obscure their real employment status, in an attempt to insulate textile clothing and footwear businesses from legal liabilities towards these workers. Outworkers are usually paid a piece work rate for items sewn that is often as low as the equivalent of \$4 dollars per hour. Additionally, the work is often seasonal and therefore intermittent. Working in residential premises gives rise to unique occupational health and safety problems, problems with working conditions and almost invariably the absence of

Australian Labour Law’ in M Biagi (Ed), *From Protection Towards Proaction: The Role of Labour Law and Industrial Relations in Job Creation Policies*, Kluwer Law International, The Hague, 2000.

3 S Cooney, J Howe and J Murray, ‘Time and Money Under WorkChoices: Understanding the New Workplace Relations Act as a Scheme of Regulation’ (2006) 29 *UNSWLJ* 215 at 226, 234.

4 See R McCallum ‘The Australian Constitution and the Shaping of Our Federal and State Labour Laws’ (2005) 10 *Deakin LR* 460; R McCallum, ‘Justice at Work: Industrial Citizenship and the Corporatization of Australian Labour Law’ (2006) 48 *JIR* 131.

5 The Independent Contractors Act received Royal Assent on 11 December 2006 and commenced on 1 March 2007.

6 See Workplace Relations Amendment (Independent Contractors) Act 2006 (Cth).

7 See, eg, *Pay Equity Inquiry (NSW)*, conducted by Justice Glynn, NSWIRComm, Sydney, 1998; Senate Economics References Committee, *Outworking in the Garment Industry, Official Hansard Reports*, 10, 11, 16, 18 April, 11, 12 June 1996, Commonwealth of Australia, Canberra, 1996.

adequate workers' compensation insurance.⁸ The number of full-time outworker *jobs* was estimated in the late 1990s to be anywhere between 40,000 and 60,000. The number of *individuals* performing outwork was estimated to be over 300,000 including those who work part-time or those working intermittently to assist an outworker, such as family members or friends.⁹

Although existing empirical research has focused primarily on outworkers in the clothing, textile and footwear industries, legal models of regulating outwork have developed beyond this industry specific focus. Indeed, the development of outwork statutory regulation has foreshadowed the emergence of a generic model for regulating the entirety of contractual supply chains in other vertically integrated industries involving outsourced work performed off-site.¹⁰ As part of this generic model, many existing statutory definitions of 'outworker' are no longer confined to any particular industry.¹¹

The Regulation of Outwork by State Parliaments before WorkChoices

In response to public concern about the exploitation of outworkers and a concerted campaign led by the Textile Clothing and Footwear Union of Australia (TCFUA), a number of state governments have enacted legislation regulating outwork, especially in the period since June 1999.¹² This legislation constituted a further layer of outworker protections additional to pre-existing state and federal award regulation of outworker conditions in garment manufacture.¹³ The statutory model consists of deeming provisions designed to clarify the employment status of outworkers, rights of recovery allowing outworkers to make a claim for their lawful entitlements against parties throughout the contracting chain and provisions for making mandatory codes applicable to the retail sector. These kinds of provisions were introduced by statute in New South Wales in 2001, followed by Victoria in 2003 and in 2005

8 For details, see C Mayhew and M Quinlan, 'The Effects of Outsourcing on Occupational Health and Safety: A Comparative Study of Factory-Based Workers and Outworkers in the Australian Clothing Industry' (1999) 29 *International Jnl of Health Services* 83.

9 M Webber and S Weller, *Refashioning the Rag Trade: Internationalising Australia's Textiles, Clothing and Footwear Industries*, UNSW Press, Sydney, 2001, p 183.

10 For details, see I Nossar, R Johnstone and M Quinlan, '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; I Nossar, *The Scope For Effective Cross-Jurisdictional Regulation of Commercial Contractual Arrangements Beyond the Traditional Employment Relationship: Recent Developments in Australia and Their Implications for National and Supra-National Regulatory Strategies*, TCFUA, Sydney, 2005; M Rawling, 'A Generic Model of Regulating Supply Chain Outsourcing' in C Arup et al (Eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships*, Federation Press, Sydney, 2006, pp 520–41; I Nossar, 'Cross-Jurisdictional Regulation of Commercial Contracts for Work Beyond the Traditional Relationship' in Arup et al, *ibid*, pp 202–22.

11 See, eg, the definitions of 'outworker' in the Industrial Relations Act 1999 (Qld) Sch 5; Fair Work Act 1994 (SA) s 5(1); WR Act s 513.

12 See references above n 10.

13 See, eg, outworker provisions in the Federal Clothing Trades Award 1999 and the previous provisions in the Clothing Trades (State) Award (NSW).

by both Queensland and South Australia.¹⁴ New South Wales, Queensland and South Australia included these outworker provisions in pre-existing industrial statutes. Due to Victoria's referral of most of that state's industrial relations power to the Commonwealth, the Victorian outworker provisions necessarily stand alone in two separate Acts.¹⁵ In New South Wales, the relevant legislation has established legal mechanisms (now being copied in at least three other states) that impose responsibilities on all major players in the relevant industry, including principal manufacturers and retailers, in respect of the performance of work by outworkers. The deeming provisions clarify the employment status of outworkers and also serve as the foundation for an outworker's right to recover from principal contractors, remuneration and, in some instances, other employee entitlements that are prescribed by industrial laws including industrial awards. The statutory rights of recovery are available to outworkers even in the absence of any direct employment relationship or common law contract of employment between a principal contractor and an outworker.¹⁶ Furthermore, the scope of statutory powers to regulate supply chain contracts in general, not only employment contracts, is extended under the South Australian industrial statute by additional amendments to the definition of 'industrial matter'. In that jurisdiction, 'industrial matter' is taken to include any matter involving any person who gives out work, or the process of giving out of work, where the work might possibly be performed by an outworker.¹⁷ Similarly, under the NSW statute, the definition of 'industrial matters' has been extended to include 'the mode, terms and conditions under which work is given out, whether directly or indirectly' to be performed by clothing outworkers.¹⁸ Moreover, the South Australian legislation has also extended the potential scope of full outworker protection beyond the textile clothing and footwear industries. Finally, New South Wales has a mandatory retailer code which requires retailers to reveal to the relevant trade union and government agency full details about contracts for the supply of products (including contracts between suppliers and retailers).¹⁹

Across a number of state jurisdictions, the enactment of deeming provisions along with statutory rights of recovery and (in the case of South Australia and New South Wales) the broadening of the statutory definition of industrial matter, combine with foreshadowed or existing retailer mandatory codes to shift overarching legal responsibility for outworker entitlements to businesses at or near the top of supply chains and thereby create statutory rights that empower outworkers. The regulatory model that conceptually integrates all of

14 See, in particular, Industrial Relations Act 1996 (NSW) ss 5, 129A–129J, Sch 1.1(f); Outworker (Improved Protection) Act 2003 (Vic) and Outworker (Improved Protection) Amendment Act 2005 (Vic); Industrial Relations Act 1999 (Qld) ss 5, 8C, 400A–400I and Sch 5; Fair Work Act 1994 (SA) ss 4, 5 and 99A–99J; Industrial Relations Act 1984 (Tas) s 3(1).

15 For analysis of the Outworker (Improved Protection) Act 2003 (Vic), see C Fenwick, 'Protecting Victoria's Vulnerable Workers: New Legislative Developments' (2003) 16 *AJLL* 198.

16 Rawling, above n 10.

17 Definition of industrial matter in the Fair Work Act 1994 (SA) s 4(1).

18 Industrial Relations Act 1996 (NSW) s 6(2)(k).

19 Ethical Clothing Trade Extended Responsibility Scheme 2005 (NSW); for analysis see Nossar, 2006, above n 10.

these legislative initiatives has become known as ‘supply chain regulation’ given the obvious scope of state outworker legislation to regulate complex contractual chains beyond the direct employment relationship.²⁰

WorkChoices and the Regulation of Outwork

General exclusionary provision and remaining state jurisdiction regarding outworkers

When the WorkChoices Bill was first tabled in parliament, the Federal Government proclaimed its continuing commitment to protecting outworkers.²¹ However, provisions in the original Bill essentially overrode certain industrial laws of the states — including state laws protecting outworkers to the extent that those laws applied to corporate employers. Additionally, the original Bill did not entrench federal outworker award protections with the effect that those award provisions could have been excluded or modified by express terms in a statutory workplace agreement.²² Following intense lobbying of individual members of parliament combined with submissions²³ made to the Inquiry into the WorkChoices Bill, the Bill was substantially amended. As now enacted, the Workplace Relations Act 1996 (Cth) (WR Act) is generally intended to operate to the exclusion of state industrial and employment laws at least in so far as those laws govern constitutional corporations.²⁴ However, the amended Act now includes a new s 16(3)(d) providing that this exclusionary Commonwealth intention does not apply to matters relating to outworkers (including trade union rights of entry for a purpose connected with outworkers). Consequently, the state parliaments retain a legislative capacity regarding outworker matters. Accordingly, the WR Act does not invalidate the statutory provisions enacted by state parliaments with respect to outworkers including deeming provisions, rights of recovery and provisions enabling the making of mandatory retailer codes.²⁵ Of course, regardless of WorkChoices, the entire existing system of supply chain regulation prescribed by state legislation continues to apply to all non-corporate employers.

²⁰ See references above n 10.

²¹ For example, in the Explanatory Memorandum to the Bill, the government claimed (somewhat inaccurately, as this article demonstrates) that the original WorkChoices Bill would protect outworker award conditions: see Explanatory Memorandum to the WorkChoices Bill, p 19.

²² Original WorkChoices Bill, Sch 1, s 101B.

²³ See, eg, submission on behalf of the governments of New South Wales, Queensland, Western Australia, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory, 9 November 2005, pp 59–60.

²⁴ WR Act s 16(1).

²⁵ See Second Reading of the WorkChoices Bill, Commonwealth *Parliamentary Debates*, Senate, 1 December 2005, pp 145–50 (Eric Abetz). Abetz discussed the amendment preserving outworker matters which eventually became subpara 16(3)(d) of the WR Act. He stated at p 148: ‘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.’ He continued to describe a long, non-exhaustive list of outworker matters that included ‘provision of certain award conditions for outworkers’ that would not be overridden.

Retained federal jurisdiction for federal awards to regulate the conditions of employee and contract outworkers

Prior to WorkChoices, the regulation of outworker conditions was an allowable award matter, as well as the subject of regulation by state legislation concerning outwork. Under the relevant federal statutory provision, federal award protections for outworkers were maintained.²⁶ Post-WorkChoices, the regulation of outworker conditions continues to be an allowable award matter.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.²⁸ Although a separate s 515(1)(g) seems to explicitly proscribe federal award regulation of independent contractors, another s 522 provides a power for federal award regulation of matters that are incidental to allowable award matters.²⁹ 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. Since the practical award regulation of employee outworker conditions essentially relies upon the effective regulatory oversight of all work given out (whether to employees or independent contractors or otherwise) then it seems that s 522(3) empowers the incidental award regulation of independent contractors in an outworker context.

Retained federal power to regulate the content of AWAs in relation to outwork

Post WorkChoices, the regulation of outworker conditions is one of 10 'protected allowable award matters'.³⁰ These 'protected allowable award matters' are then at the core of the definition of 'protected award conditions' in federal awards in force from time to time. Protected award conditions are taken to be included in a workplace agreement.³¹ Nevertheless, a workplace agreement can expressly exclude or modify those protected award conditions³² — with the sole exception of protected award conditions about outworkers. Protected award conditions about outworkers still have effect *despite* a workplace agreement that purports to provide for a less favourable outcome for the relevant worker.³³ Outworker protected award conditions are thus the only protected award conditions that *cannot* be overridden by an Australian Workplace Agreement (AWA).³⁴ This uniquely protected status for

26 See previous s 89A(2) of the WR Act.

27 WR Act s 513(1)(o). In addition in the new Pt 10 Div 7 of the amended WR Act there is provision for persons or entities which are not employers to be bound by the same outwork award obligations that currently continue to apply to employers: see WR Act ss 564–566.

28 WR Act s 513(6).

29 WR Act s 522(1).

30 WR Act s 354.

31 WR Act s 354(2).

32 WR Act s 354(2)(c).

33 WR Act s 354(3).

34 See debate during the Second Reading of the WorkChoices Bill, Commonwealth.

outworker conditions has been the outcome of almost a decade of focused, active lobbying by advocates for effective outworker protection.³⁵

Repeal of Victorian contract outworker provisions

Prior to the enactment of WorkChoices, there were a series of provisions in the WR Act regulating contract outwork in Victoria.³⁶ These provisions applied³⁷ so as to not exclude concurrent Victorian laws. The former provisions entitled Victorian contract outworkers to a minimum rate of pay as if they were employees. This minimum rate of pay was an amount equivalent to the amount to which the contract outworker would have been entitled in accordance with statutory provisions or a federal award (whichever was higher).³⁸ Post WorkChoices, these Victorian contract outworker provisions were amended and included in Pt 22 of the WR Act. WorkChoices amended these provisions so that the statutory amount owed to a contract outworker was calculated without reference to a federal award. Under Pt 22, a Victorian contract outworker was merely entitled to a minimum rate of pay in accordance with the Australian Fair Pay and Conditions Standard. Although Victoria's concurrent ability to legislate in this area was maintained,³⁹ Pt 22 provided potential opportunities for designating outworkers as contract outworkers in order to avoid more extensive legal obligations arising from federal awards. Part 22 of the WR Act was subsequently repealed following submissions to a Senate Inquiry into the new federal independent contractors legislation (as is explained in more detail below).⁴⁰

Outworker provisions in state awards

When WorkChoices came into effect, it generally extinguished the states' jurisdiction with respect to awards binding constitutional corporations. State awards, as they applied to constitutional corporations, were converted into a mass of federal system imputed agreements which were termed Notional

Parliamentary Debates, Senate, Thursday 1 December 2005, p 149 (Senator Marshall). After the recently passed Workplace Relations Amendment (A Stronger Safety Net) Act 2007 (Cth) comes into effect it will remain the case that protected award conditions about outworkers will be the *only* protected award conditions that cannot be excluded or modified by an AWA. Under the new 'fairness' test introduced by these amendments into the WR Act, employers are merely required to provide 'fair compensation' to employees on certain workplace agreements where those employees forego protected award conditions.

35 See, eg, Testimony by I Nossar to the Inquiry into the Commonwealth Workplace Relations and other Legislation Amendment Bill, Senate Economic References Committee, 16 July 1996.

36 See previous WR Act Pt XVI.

37 By virtue of the previous WR Act s 540A.

38 See previous WR Act s 541 and Sch 1A cl 1.

39 WR Act s 904.

40 Part 22 of the WR Act was repealed by Sch 2 of the Workplace Relations Legislation Amendment (Independent Contractors) Act 2006 (Cth), following the Inquiry into the provisions of the Independent Contractors Bill 2006 and the Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006 of the Commonwealth Senate Employment, Workplace Relations and Education Legislation Committee. Note further comments below under the heading 'Part 4 of the IC Bill'.

Agreements Preserving State Awards (NAPSAs).⁴¹ This had the overall effect of replacing most state award provisions with (federal jurisdiction) NAPSA provisions in relation to employees of corporate employers. For example, state award provisions in so far as they apply to clothing factory workers who are indoor employees have, in the main, been converted into provisions of federal NAPSAs. Nevertheless, it appears that state award provisions relating to outwork may not have been similarly affected. Since state parliaments have retained their legislative capacity regarding outwork,⁴² delegated legislation in the form of state outwork award provisions may not have been converted into NAPSAs.⁴³

Preserving NSW outworker state award protections

Given potential ambiguity associated with the status of outworker provisions in state awards after WorkChoices, the NSW Parliament decided that pre-emptive legislative intervention was the best course. Prior to the commencement of WorkChoices, the Industrial Relations Amendment Act 2006 (NSW) (NSW Amending Act) was passed. The Bill was moved by NSW Legislative Council cross-bench member, Fred Nile, at the request of Igor Nossar, Chief Advocate of the TCFUA.⁴⁴ In addition, the Bill was supported by the Labor Government and the Greens. Amongst other things, the NSW Amending Act inserted a new s 129B into the Industrial Relations Act 1996 (NSW) (NSW IR Act). This provision abolished outwork obligations for corporate employers arising from the relevant NSW clothing trades award⁴⁵ (to avoid the possible conversion of those state award provisions into a potentially inferior set of NAPSA provisions). The corporate employer outwork obligations previously set out in the NSW clothing trades award were simultaneously recreated within the NSW IR Act itself,⁴⁶ so that, by force of statute, the previously applicable outworker conditions remain enforceable against corporate employers. Put simply, all of the relevant provisions of the state award (in so far as they applied to outworkers employed by corporations), were incorporated by reference into statutory provisions. These incorporated provisions include provisions relating to reporting, registration and other obligations that do not deal directly with the working conditions of outworkers but which support compliance with those conditions.⁴⁷ Accordingly, outworker protections in NSW state awards as they relate to corporations are now prescribed by force of primary legislation enacted by the NSW Parliament. The Hon Fred Nile stated that these provisions do not conflict with the federal legislation, given the federal legislative recognition that the states have a continuing role in regulating outwork.⁴⁸

41 WR Act Sch 8 cl 31.

42 By virtue of WR Act s 16(3)(d).

43 For support for this view see Abetz, above n 25.

44 See speech of the Hon Fred Nile, regarding the Industrial Relations Amendment Bill and Public Sector Employment Legislation Amendment Bill, *NSW Legislative Council Hansard*, 9 March 2006.

45 NSW IR Act s 129B(1)(a).

46 NSW IR Act s 129B(1)(b).

47 Nile, above n 44.

48 Ibid.

Furthermore, after the enactment of WorkChoices, the NSW Parliament has passed the Industrial Relations Further Amendment Bill 2006 (NSW) which enacted legislative changes earlier put forward by Nossar in his original proposals for statutory regulation of supply chains in New South Wales.⁴⁹ These later amendments included provisions that clarified and expanded the application of statutory provisions regulating outwork. In addition to expanding the definition of industrial matters in the NSW IR Act, this legislation expanded the application of provisions in the NSW IR Act which impose obligations equivalent to state outwork award conditions upon corporate employers.⁵⁰ These later amendments clarify that the statutory conditions applied under s 129B include the 'giving out of work',⁵¹ so that all constitutional corporations involved in clothing supply chains (not just those corporations involved in direct employment relationships with outworkers) are thus required to comply with those statutory outwork conditions.⁵² Moreover, the amendments have clarified that corporations cannot contract out of the award replacement obligations now created by the NSW IR Act s 129B.⁵³

Other options relating to state award provisions

While New South Wales has chosen to entrench state award outwork provisions within primary legislation, it has been alternatively proposed that these state award outwork provisions could also be entrenched within mandatory codes which form an integral component of the statutory model for regulating outwork.⁵⁴ The South Australian government on 24 October 2006 released for public consultation a draft mandatory retailer code for the clothing industry that entrenches state award outwork provisions within that code.⁵⁵ This draft arose from proposals put forward earlier by Nossar.⁵⁶

Overview

To sum up the impact of WorkChoices on outwork regulation: in the federal jurisdiction, there is a retained power for industrial awards to regulate conditions for employee outworkers and independent contracting in the outwork context and a retained power to regulate the content of AWAs. These aspects of federal industrial regulation combine with the retained capacity of

49 I Nossar, *Proposals for Protection of Outworkers from Exploitation*, TCFUA, Sydney, June 1999, pp 5–7.

50 See NSW IR Act s 129B.

51 NSW IR Act s 129B(2).

52 Explanatory Notes to the Industrial Relations Further Amendment Bill, 2006. Industrial Relations Further Amendment Bill 2006, Second Reading Speech, *NSW Legislative Hansard*, 24 October 2006 (Minister David Campbell); Speech regarding Industrial Relations Further Amendment Bill 2006, *NSW Legislative Council Hansard*, 15 November 2006 (Minister John Della Bosca).

53 See new reference to NSW IR Act s 406 in the now amended NSW IR Act s 129C.

54 I Nossar, *Suggested State Jurisdiction Legislative Strategies in Response to the Newly Enacted Amendments of the Federal IR Legislation*, TCFUA, Sydney, 5 December 2005.

55 Draft Outworker (Clothing Industry) Protection Code, especially cl 28, at <http://www.safework.sa.gov.au/uploaded_files/outworker_code.pdf> (accessed 10 May 2007).

56 I Nossar, *Proposals for Protection of Outworkers in South Australia*, TCFUA, Sydney, 2002.

state parliaments to regulate outwork, so that there is a residual power in both the federal and state jurisdictions to fully regulate the conditions of work off-site. One qualification to this in the federal jurisdiction may be that the retained power to regulate the conditions off-site does not extend to the imposition of obligations upon a host employer in relation to a worker engaged by a labour hire agency.⁵⁷ However, this potential qualification apparently does not restrict state legislative capacity to fully regulate the obligations of the labour hire agency in relation to the performance of work off-site by their workers (for example, at the factory site of the host employer). Indeed, there is also some doubt as to whether the new federal laws restrict the capacity of states to regulate the contracting practices of labour hire agencies in relation to host employers.

Second Wave of the Federal Takeover: The Independent Contractors Act 2006 (Cth)

The federal takeover of labour law included a crucial second regulatory strategy in addition to WorkChoices. This second strategy has sought to limit and reverse the extension of employment protection to categories of dependent workers in quasi-employment arrangements. The *Making it Work* report⁵⁸ disclosed a Federal Government agenda to override state legislative initiatives which had earlier extended the protections of employment laws to a range of contract workers.⁵⁹ This federal agenda aimed to override state legislation 'deeming' certain categories of workers to have 'employee' status. This second strategy posed serious difficulties for the satisfactory regulation of outwork, given that business operators who directly engage outworkers within clothing supply chains often seek to cast outworkers as 'independent contractors' in order to evade labour law liabilities and obligations. Thus, state jurisdiction provisions deeming outworkers as employees are a crucial component of satisfactory outworker protection. However, it was precisely this type of deeming provision that the Federal Government targeted for dismantling.

It therefore appeared to be a very promising development when the Federal Minister's office indicated (prior to the release of the Independent Contractors Bill) that outworker protections would be maintained. The Minister stated:

the legislation will maintain the status of textiles, clothing and footwear outworkers who are deemed by various state legislation to be employees. That status as

⁵⁷ See WR Act ss 515(1) and (4).

⁵⁸ *Making it Work: Inquiry into Independent Contracting and Labour Hire Arrangements*, The Parliament of the Commonwealth of Australia, House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, Canberra, August 2005, pp 14–17.

⁵⁹ J Riley, 'A Fair Deal for the Entrepreneurial Worker? Self-Employment and Independent Contracting Post WorkChoices' (2006) 19 *AJLL* 246 at 249–50. For further analysis of the *Making it Work* report, see E Underhill, 'Labour Hire and Independent Contracting in Australia: Two Inquiries, How Much Change?' (2006) 19 *AJLL* 306 at 308–12.

employees of outworkers will be maintained in this legislation, which is consistent with our approach to outworkers in the WorkChoices legislation.⁶⁰

However, once the Independent Contractors Bill 2006 (IC Bill) was first tabled in parliament, these assurances seemed hollow. As the submission by the Victorian Government to the Federal Parliamentary inquiry into the Bill stated:

Whilst the Explanatory Memorandum accompanying the IC Bill states that the exclusion provisions operate to *preserve* state and territory laws that affect outworkers who are party to a services agreement, the provisions of the IC Bill do *not* achieve that end.⁶¹

As with WorkChoices, the Federal Minister's public undertaking to preserve vital outworker protections would only be honoured after intense lobbying in favour of crucial amendments. Although the original IC Bill made specific provision for outworker matters, these original provisions did not adequately exempt existing state outworker protection laws from this second wave of regressive change. Only after further amendments to the Bill has the enacted legislation satisfactorily retained outworker protections.

Which outworkers are covered by the Independent Contractors Act?

Section 5 of the Independent Contractors Act 2006 (Cth) (IC Act) defines the scope of application of the Act's provisions. The IC Act applies to workers who are engaged under a contract for services (ie, the IC Act applies to workers who are not employees) where one of the parties to the contract is a constitutional corporation. So, for present purposes, it is relevant to note that the Act restricts the scope of application of the Act's provisions to contracts with outworkers who are not employees and where one of the parties to that contract is a constitutional corporation.

Clause 7(1) of the original IC Bill: The second general exclusionary provision

The structure of cl 7 in the original IC Bill was reminiscent of s 16 of the WR Act in the following sense. Clause 7(1) aimed to exclude state jurisdiction in regard to a broad range of workplace relations matters and then the following savings subcl 7(2) provided that this exclusion of state laws would not occur in relation to certain specified matters. Clause 7(1) of the original IC Bill provided that the rights, entitlements, obligations and liabilities of a party to a services contract were not affected by state laws that:

- deem a party to be an employer or employee;⁶²

60 K Andrews, Minister for Employment and Workplace Relations, 'New Protections in Independent Contractors Bill', Media Release, 3 May 2006.

61 Submission by the Victorian Minister for Industrial Relations to the Inquiry into the provisions of the Independent Contractors Bill 2006 and the Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006 of the Commonwealth Senate Employment, Workplace Relations and Education Legislation Committee, p 4.

62 IC Bill cl 7(1)(a).

- provide that a services contract may be unenforceable on an unfairness ground;⁶³ or
- generally confer or impose rights, entitlements, obligations or liabilities on a party to a services contract regarding workplace relations matters.⁶⁴

Clause 7(2) of the original IC Bill: The deficiencies of the 'savings' provision

Clause 7(2)(a) of the original IC Bill was purportedly a provision that 'saved' existing state outworker laws from the general exclusionary provision in cl 7(1). Clause 7(2)(a) provided that cl 7(1) (designed to override certain state laws) did not apply in relation to:

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 . . . (emphasis added)

This provision did not adequately maintain existing outworker protections under state laws for the following three main reasons.

1 Facilitating avoidance of state laws

The first problem which cl 7(2)(a) of the original IC Bill posed for existing state outworker protections originated in the words 'otherwise than as mentioned in paragraph (1)(c)' in cl 7(2)(a)(ii). When these words were read in conjunction with the original cl 7(1)(c), state laws which rendered services contracts unenforceable on unfairness grounds would no longer have applied to protect outworkers who fell within the scope of the Bill's application. In the IC Bill, the definition of an unfairness ground included a ground for invalidating a contract that is 'designed to avoid, or does avoid, the provisions of' a state industrial law, award, agreement or other instrument.⁶⁵ Therefore, state laws which protect outworkers could not have rendered unenforceable a clause in a services contract (with an outworker) designed to avoid (or actually avoiding) those very state laws. In other words, a services contract with an outworker might have been explicitly permitted to contain provisions which

63 Original IC Bill cl 7(1)(c). Note that the IC Act establishes unfair contracts review by the Federal Court or Federal Magistrate's Court: IC Act ss 11–17. These provisions essentially relocate the federal unfair contracts jurisdiction in former ss 127A–127C of the pre-reform WR Act and WR Act ss 832–834. The Workplace Relations Amendment (Independent Contractors) Bill 2006 (Cth) s 7 repealed ss 832–834 of the WR Act. Accordingly, it appears the main effect of the IC Act in relation to unfair contracts is to exclude state jurisdictions such as the jurisdiction of the NSW Industrial Relations Commission in Court Session under the NSW IR Act s 106.

64 IC Bill s 7(1)(b). Note however, as Riley, above n 59, at 251–2 highlights, the exclusion of state workplace relations laws does not mean that engagers of workers can ignore *all* laws governing workers at work. On the contrary, the definition of workplace relations matters specifically does *not* include a long list of matters (such as superannuation and workers' compensation), so that engagers of workers will still have to comply with state laws regulating this list of matters.

65 IC Bill cl 9(1)(e).

effectively avoid the operation of state laws protecting outworkers.⁶⁶ Thus the inclusion of the reference to para (1)(c), together with the original wording of that paragraph, would have apparently invalidated state legislative anti-avoidance provisions which prevent contracts being entered into to avoid legal obligations arising from state laws.⁶⁷ So, for example, given the problem identified here with the original cl 7(2)(a)(ii), a services contract engaging an outworker might have included a provision that the outworker agreed not to initiate any proceedings under state outworker protection laws. Alternatively, if an outworker initiated proceedings, (for example, under the state jurisdiction's statutory right of recovery to recover money owed to the outworker), the contract might provide that any money recovered by the outworker must be refunded to the party from whom it is recovered.⁶⁸ While the contract could not effectively invalidate any state laws, the contract *could avoid* the operation of state outworker protection laws.⁶⁹ Such a significant loophole would have opened the door to wholesale undermining of state outworker protections.

Following intervention by the TCFUA and Fairwear,⁷⁰ the Final Senate Report into the IC Bill was released on 25 August 2006. This report explicitly recommended that the Bill would have to be amended (or a legislative note or an entry be included in the Explanatory Memorandum) to preserve state anti-avoidance provisions. In particular, it was unanimously recommended that state anti-avoidance laws be protected.⁷¹ This was followed by a public statement by the Minister in which he urged the government to accept this recommendation.⁷²

Subsequently the government amended the Bill to intentionally redress the apparent anti-avoidance loophole. Firstly, the original cl 7(2)(a) was omitted

66 I Nossar, *Key Problem and Associated Concerns in draft (Federal) Independent Contractors Bill*, TCFUA, Sydney, 22 June 2006. The general issue of avoiding protective laws by the use of contract was discussed in relation to employment law in A Stewart, 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (2002) 15 *AJLL* 235.

67 For these anti-avoidance provisions, see, eg, Industrial Relations Act 1996 (NSW) s 406; Industrial Relations Act 1999 (Qld) s 135; Fair Work Act 1994 (SA) ss 69–72B; Nossar, above n 66.

68 Testimony by I Nossar, to the Inquiry into the Impact of the Commonwealth Workchoices Legislation, Standing Committee on Social Issues, NSW Legislative Council, 28 July 2006.

69 Ibid.

70 Fairwear is a national coalition of women's and other community groups working to eliminate the exploitation of homeworkers in the garment industry. For some examples of relevant political interventions by the TCFUA and Fairwear see TCFUA, *Submission to the Inquiry into the provisions of the Independent Contractors Bill 2006 and the Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006 of the Commonwealth Senate Employment, Workplace Relations and Education Legislation Committee*; Fairwear, *Submission to the Inquiry into the provisions of the Independent Contractors Bill 2006 and the Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006 of the Commonwealth Senate Employment, Workplace Relations and Education Legislation Committee*. Note that a further private hearing was held by the relevant Senate Committee on 17 August 2006 to hear further representations by the TCFUA and Fairwear.

71 Report of the Commonwealth Senate Employment, Workplace Relations and Education Legislation Committee into the provisions of the Independent Contractors Bill 2006 and the Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006, p 4.

72 'Andrews Backs Safeguards for Textile Outworkers', *ABC Online*, 6.18 am, 29 August 2006.

and substituted with a new provision. The now enacted provision saves from the general exclusion:

a law of a State or Territory, to the extent that the law deals with matters relating to outworkers (including entry of a representative of a trade union to premises for a purpose connected with outworkers), other than matters mentioned in paragraph (1)(c).

This provision is reminiscent of s 16(3)(d) of the WR Act. Although it retains the words 'other than matters mentioned in paragraph (1)(c)', the original wording of s 7(1)(c) was also itself amended. Section 7(1)(c) of the IC Act now effectively provides that state laws are only excluded from affecting the rights, entitlements, obligations and liabilities of a party to a services contract if those state laws *expressly provide for a court, commission or tribunal to make an order or determination* which amends, varies, sets aside, or declares to be void or otherwise unenforceable, part or all of a services contract on an unfairness ground. In other words, an unfairness ground (as defined in s 9 of the Act) only invalidates the operation of state laws to the extent that the unfairness ground forms the basis of a court order or determination pursuant to those state laws. This narrows the characterisation of state laws intended to be excluded by the Act.⁷³ State laws which expressly provide for a court, commission or tribunal to make orders or determinations on an unfairness ground with respect to a services contract may be excluded to the extent that those laws affect the rights, entitlements, obligations and liabilities of parties to a services contract. However, state laws which, of themselves, have the effect of allowing a services contract to be rendered unenforceable on an unfairness ground are *not* excluded by s 7(1)(c).⁷⁴ So, for example, anti-avoidance provisions such as the NSW IR Act s 406(2) along with parallel statutory anti-avoidance provisions in other state industrial statutes and similar provisions in mandatory codes and other legislative instruments are now *not* excluded by the revised s 7(1)(c) of the IC Act.⁷⁵

2 Regulating contracts to which an outworker is not a party

In addition to this problem of facilitating the avoidance of existing state jurisdiction outworker protections, the original wording of cl 7(2)(a) also posed the following potential problem for the full maintenance of all these protections. Clause 7(2)(a)(i) of the original IC Bill only operated to retain state legislative jurisdiction to regulate services contracts 'to which an outworker is a party'. By only retaining a state parliament's power to regulate services contracts to which an outworker is a party, this original wording apparently restricted the operation of certain state outwork laws which regulate multiple arrangements within complex contractual chains of supply. For example, these provisions of the Bill may have invalidated state outworker laws imposing obligations and liabilities upon a constitutional corporation being a party to a contract for services, which engages a contractor (where that contractor is not an outworker doing the work but rather

⁷³ Supplementary Explanatory Memorandum to the Independent Contractors Bill 2006.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

a commercial party which further gives out the work). In other words, in relation to situations where one or more contractual parties have been interposed between a constitutional corporation and an outworker engaged on a services contract, then this may have restricted the scope of the savings provisions of the IC Bill leading to the potential invalidation of state laws regulating much of the supply chain.⁷⁶ The Bill required amendments to address this potential invalidation of state laws.

In its submission to the Senate Inquiry on this point, the Victorian Government suggested that cl 7(2)(a) jeopardised the right of an outworker to make a claim for unpaid remuneration under Victorian legislation against a party that is not the other party to a services contract with the outworker.⁷⁷ This submission also indicated concern about the potential invalidation of Victorian legislative provisions imposing a liability upon a ‘principal contractor’ for payment of remuneration owed by a ‘sub-contractor’ to an outworker.⁷⁸ Indeed, as previously indicated, on the face of the federal legislation, the original IC Bill may *not* have retained state jurisdiction over a services contract *unless* an outworker was one of the parties to the contract. Even then, relevant High Court jurisprudence indicates that the Commonwealth may only use the corporations power to regulate contracts to which a constitutional corporation is a party.⁷⁹ In *Re Dingjan: Ex Parte Wagner*, Dawson J indicated that the Federal Parliament could not use the corporations power to regulate ‘matters far removed from the subject matter of constitutional corporations — for example a contract between a contractor and a subcontractor to provide services for a constitutional corporation . . .’.⁸⁰ Accordingly, even if the original Bill had not been amended, state outworker laws may still have been able to regulate contracts within supply chains to which only unincorporated entities and/or natural persons are a party (whether or not those contracts directly involve an outworker).

There was a further feature of the drafting in the original Bill which made the scope of the general exclusionary provision broader than the scope of the ‘savings’ provision.⁸¹ The savings provision originally retained jurisdiction only with respect to particular *contracts*⁸² while state jurisdiction regarding

⁷⁶ Nossar, above n 66.

⁷⁷ Above n 61, p 5.

⁷⁸ *Ibid.*

⁷⁹ *Re Dingjan: Ex Parte Wagner* (1995) 183 CLR 323; 128 ALR 81. I am thankful to Ron McCallum for drawing this aspect of *Re Dingjan* to my attention. In *Re Dingjan* a majority of the High Court held that s 127C(1)(b) of what was then the Industrial Relations Act 1988 (Cth) was invalid. That section provided that an independent contractor may challenge the fairness of their contract if the contract was ‘a contract relating to the business of a constitutional corporation’.

⁸⁰ *Re Dingjan* (1995) 183 CLR 323 at 347; 128 ALR 81.

⁸¹ As the TCFUA submission, to the Parliamentary Inquiry, above n 69 put it, ‘the range of laws which are “protected” by s 7(2)(a) is . . . a small subset of the range of laws which are excluded by s 7(1)’.

⁸² See original IC Bill cl 7(2)(a).

the rights, entitlements, obligations or liabilities of a *party*⁸³ was apparently excluded.⁸⁴

As noted above, the savings provision in s 7(2)(a) as enacted is an entirely new provision reminiscent of the provision in the WR Act which saves state outworker laws from exclusion. This newly enacted IC Act provision retains the entire system of current (and any future) state laws regulating outwork, including deeming provisions, rights of recovery, laws regulating the giving out of work by parties in the contracting chain and mandatory retailer codes such as the NSW Ethical Clothing Trades Extended Responsibility Scheme.

3 Federal Minister's regulation making powers

The third major concern about the original 'savings' provision in the initial cl 7(2)(a) arose from the Federal Minister's apparently unfettered power to proclaim regulations which could at any time radically compromise the legal safeguards of that savings provision. Under the IC Bill the Minister could at his or her discretion proclaim a regulation in order to exclude any state law that affects a services contract.⁸⁵ Subsequently, however, the Supplementary Explanatory Memorandum to the IC Bill made it clear that the making of regulations under s 10 was not intended to be used to override existing state and territory outworker protections retained by virtue of s 7(2)(a).

Part 4 of the IC Bill

Part 4 of the original Bill essentially provided that an outworker who performs work under a services contract⁸⁶ was merely entitled to a statutory amount for wages set by the Australian Fair Pay and Conditions Standard in the WR Act Pt 7 Div 2.⁸⁷ This effectively extended throughout Australia what had originally been the Victorian contract outworker provisions found in Pt 22 of the WR Act. Indeed the legislative package including the IC Bill was intended to replace Pt 22 of the WR Act with Pt 4 of the IC Bill.⁸⁸ Part 4 of the original IC Bill expanded the category of contract outworkers who would have been only legally entitled to a minimum rate of pay and little if anything else.⁸⁹ Contract outworkers who would have fallen within the definition of Pt 4 would not have been entitled to any of the protections (other than a minimum rate of pay) provided by, for example, federal awards (such as annual leave, hours of work and overtime, redundancy pay, public holidays etc). In addition, a contract outworker might have been excluded (in some jurisdictions) from any entitlement to workers' compensation or superannuation. Moreover, it

83 See original IC Bill cl 7(1)(b)

84 Nossar above n 66; but see comments on *Re Dingjan*, above n 79 and accompanying text, regarding constitutional limits on the Commonwealth's ability to regulate using the corporations power.

85 IC Bill cl 10.

86 See definition of 'services contract' in IC Bill cl 5.

87 See in particular definition of contract outworker in cl 19 and cl 20(3) of the original IC Bill cll 19 and 20(3).

88 Explanatory Memorandum to the IC Bill, at [88].

89 Submission by Unions WA to the Inquiry into the provisions of the Independent Contractors Bill 2006 and the Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006 of the Commonwealth Senate Employment, Workplace Relations and Education Legislation Committee, 21 July 2006; TCFUA, Submission, above n 70, at [84].

appeared that provisions of the Federal Clothing Trades Award which provide for registration, record keeping requirements and payment of wages would also not have necessarily applied where the worker was designated as a contract outworker rather than an employee.⁹⁰ Opening up the opportunity to designate an outworker as a contract outworker would thus have created a loophole for recalcitrant operators wanting to avoid more extensive legal obligations arising from federal awards. Part 4 was surely an incentive for corporate employers who engaged outworkers as employees to instead engage them on services contracts so as to bring them under Pt 4.⁹¹

While the ‘Contract Outworkers in Victoria’ provisions in the WR Act slated for repeal had apparently preserved the concurrent operation of Victorian laws,⁹² no parallel provision appeared in Pt 4 of the original IC Bill. Therefore, it was not clear whether Pt 4 allowed outworkers on services contracts with federal system corporations to continue to have access to outworker protection under state laws. Indeed, in states which do not have outworker protection statutes, Pt 4 would have contained the only statutory provisions concerning the treatment of outworkers with potentially dire implications for the valid operation of state award protections in those states.⁹³

After intervention by the TCFUA and Fairwear, the Final Senate Report into the Bill included a unanimous committee recommendation to remove Pt 4 of the Bill and to retain the repeal of Pt 22 of the WR Act.⁹⁴ In particular, the report explicitly recommended that Pt 4 of the Bill should be omitted.⁹⁵ At a political level, the Minister publicly stated that he urged the government to accept the committee’s recommendation.⁹⁶ Accordingly, in the IC Act Pt 4 has been omitted, while Pt 22 of the WR Act has also been repealed by associated legislation.

Future Regulation of Outwork

In contrast to the general diminution of rights and entitlements for many workers as a result of WorkChoices and the IC Act, outworker protections seem to have been retained — for the time being. The states have retained a crucial legislative capacity to regulate with respect to outwork. One of the factors in preserving outworker protections from the federal takeover of labour law has been the ability of advocates for outworkers, within a neo-conservative political context, to couch outworker exploitation as an issue of social justice upon which there should be a social consensus that spans political parties.⁹⁷

Particularly in light of the states’ retained legislative capacity with respect

90 See the Federal Clothing Trades Award 1999 cl 47; for comment see TCFUA submission above n 70, at [86]; Unions WA Submission, *ibid*.

91 *Submission by Western Australian Minister for Employment Protection to the Inquiry into the provisions of the Independent Contractors Bill 2006 and the Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006*, at [31].

92 See WR Act s 904.

93 TCFUA submission, above n 70, at [85].

94 Senate Committee Report, August 2006, above n 71, at 2.

95 *Ibid*, at 4.

96 ‘Andrews Backs Safeguards for Textile Outworkers’, above n 72.

97 Testimony by Nossar to NSW Inquiry, above n 68.

to outworkers, the issue of inconsistency between a federal and state law⁹⁸ does not necessarily preclude new or improved state legislative developments that might regulate outwork.⁹⁹ Although the Federal Government has extensive powers to make regulations overriding state laws both under WorkChoices and the IC Act, the Federal Government has given public assurances that outworker protections will be maintained. The TCFUA and Fairwear campaign around the federal takeover of labour law has so far succeeded in forcing Federal Government adherence to public commitments concerning the protection of outworkers.

The path now seems clear for state jurisdictions to extend the full range of outworker protections beyond the textile, clothing and footwear industries. State governments might consider innovative measures to protectively regulate all processes involved in the performance of off-site manufacturing, processing or clerical work whether this takes place in the textile, clothing and footwear industries or in other industries. Furthermore, the application of supply chain regulation to other sectors of vertically-integrated industry that involve the performance of work off-site by vulnerable workers might also be considered in the context of a change in the Federal Government at the next election. Supply chain regulation has in the main survived WorkChoices and the IC Act. Given that the supply chain statutory provisions survived this neo-conservative onslaught, there is considerable merit in examining more extensive application of supply chain regulation under a future Federal Labor Government.

⁹⁸ Under s 109 of the Commonwealth Constitution, where there is an inconsistency between a state and federal law, the federal law prevails and the state law will be invalid to the extent of the inconsistency. There are different categories of s 109 inconsistencies including direct and indirect inconsistencies. On indirect inconsistencies see *Telstra v Worthing* (1999) 197 CLR 61; 161 ALR 489.

⁹⁹ See Supplementary Explanatory Memorandum to the IC Bill, at [14].