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Outworkers

by

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Briefing Paper No 3/02

ISSN 1325-5142
ISBN 0 7313 1706 8

March 2002

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EXECUTIVE SUMMARY

The issue of outworker exploitation is one which has periodically come under public focus and scrutiny. This is due to, in part, the concerted effort made by organisations such as *Fair Wear* and others (most notably the Textile, Clothing and Footwear Union of Australia) to highlight outworker pay and conditions. Over the years, protests organised by *Fair Wear* outside retail chains have brought media attention to an area of industry which is rapidly expanding.

Outworkers have also been the subject of many recent reports and inquiries, the majority of which conclude that some exploitation does occur (although the nature and extent of the poor working conditions are disputed). Many commentators have grappled with the difficulty of reform in this area and possible solutions to this problem. These difficulties in part stem from the largely hidden nature of the outworking industry.

Part 1 of this paper sets out a profile of outworkers and their working conditions (pp 3 –12).

Part 2 outlines the industrial legislative framework governing outworker conditions and explores how effective the award structure is in protecting outworker pay and conditions (pp 11-21).

Part 3 investigates the common law treatment of outworkers and whether or not they fall within the common law definition of employees or independent contractors (pp 21-23).

Part 4 briefly summarises 4 recent key reports and investigations in this area, particularly the Cregan Report, November 2001, and the Institute of Public Affairs Report, October 2001, which have received some media attention (pp 24-30).

Part 5 outlines the NSW Government's reform strategy (p31), whilst Part 6 lists some recent legislative changes as a result of the reform strategy (pp 32-35).

BACKGROUND

The term 'outworkers' is used in general to describe workers who perform work for others outside of business premises, generally from their home. The term is most often used in association with clothing outworkers who work from home sewing¹ clothes for clothing manufacturers or subcontractors, and who are usually paid on a piece work basis (ie paid a sum of money per piece of clothing sewn). It has been said that this has generally translated into low hourly rates of pay. A recent study has estimated that the average hourly pay rate for the outworkers involved in the study was \$3.60 per hour and that although the highest rate reported was \$10, several outworkers earned below \$1.00 per hour.²

There has been a huge increase in the number of outworkers in recent years. This has coincided with a marked decrease in the level of factory based employment of clothing workers³. Recent reports estimate that a significant proportion (if not most) of the work of sewing clothes is now done on an outwork basis⁴ - to the extent that it has been suggested that the clothing industry is structured around outworking.⁵ Overall, it is estimated that there are anywhere between 150,000⁶ and 329,000⁷ outworkers Australia wide - in the textile, clothing and footwear industries 'TCF' - and that at least one-third are working in NSW.⁸ The NSW Department of Industrial Relations has stated that, with respect to NSW, "We can...consider as a minimum estimate that the NSW clothing outworker pool amounts

¹ Although the term outworkers is used to describe not only people who sew clothes but also those who 'put together' or finish footwear or textiles, the term is most often used to refer to clothing outworkers (who are the majority of outworkers). Under schedule 1(f) of the *Industrial Relations Act 1996* an outworker is defined as "Any person (not being the occupier of a factory) who performs, outside a factory, for the occupier of a factory or a trader who sells clothing by wholesale or retail, any work in the clothing trades for which a price or rate is fixed by an industrial instrument. (In such a case, the occupier or trader is taken to be the employer.)"

² Cregan C, *Home Sweat Home: Preliminary findings of the first stage of a two-part study of outworkers in the textile industry in Melbourne Victoria January-June 2001*, Melbourne University, p 8.

³ The Parliament of the Commonwealth of Australia, Senate Economics References Committee, *Outworkers in the Garment Industry*, Report, December 1996, pp 2-3. The report notes that "The two major changes that have contributed to a reduction in factory based employment are, first, the move from Australian manufacturing production to offshore production and second, the move from factory-based employment to the use of a home-based workforce: that is, outworkers." (p 3)

⁴ NSW Department of Industrial Relations, *Behind the Label – The NSW Government Clothing Outwork Strategy Issues Paper*, December 1999, pp 22-23.

⁵ Weller S 'Clothing Outwork: Union Strategy, Labour Regulation and Labour Market Restructuring', *The Journal of the Industrial Relations*, August 1999, volume 41, no 2, p 203.

⁶ op cit. n 4, p 8.

⁷ <http://www.awatw.org.au/fairwear/> (accessed 26/11/01).

⁸ op cit. n 4, p 8.

to some 50,000 clothing outworkers, assisted by 17,000 or more unpaid family members.”⁹

For some time there has been widespread concern over the working conditions of outworkers.¹⁰ The NSW Special Minister of State and Minister for Industrial Relations, the Hon. John Della Bosca MLC has stated: “There is substantial evidence of the exploitation of outworkers and widespread non-compliance with minimum standards not only in New South Wales but, indeed, across the whole of Australia.”¹¹

This concern has translated into various forms of action including the launch of the *Fair Wear* campaign in December 1996.¹² This is a campaign by a national coalition of churches, community organisations and unions¹³ to draw attention to the exploitation of outworkers by pressuring retailers and manufacturers, and to lobby Government for change.¹⁴

The NSW Government has confirmed its support for outworkers by making a series of announcements¹⁵ outlining significant policy changes which have the aim of improving workplace conditions. The Minister for Industrial Relations has stated:

...outworkers are often treated oppressively in their ordinary working lives and are exploited in terms of payment and working conditions. The circumstances of their work are almost universally disgraceful. The New South Wales Government is committed and determined to redress this situation as soon as possible.¹⁶

⁹ op cit. n 4, p 8.

¹⁰ ‘Poor pay, long days for Aussie outworkers’, *Illawarra Mercury*, 23/11/01, p 15; ‘A fairer cut of the fabric’, *Sydney Morning Herald*, 23/5/01, p 15; ‘Outworkers in from the cold’, *Sydney Morning Herald*, 26/3/01, p 6; ‘Outworkers in protest’, *Sydney Morning Herald*, 8/3/01, p 13; ‘Safeguards for 300,000 outworkers in jeopardy’, *Sydney Morning Herald*, 11/11/00, p 11.

¹¹ Hon. John Della Bosca MLC, Special Minister for State and Minister for Industrial Relations, Answers to Questions without Notice, *NSWPD* (Legislative Council), 27/11/01, p 26 (proof)

¹² <http://www.awatw.org.au/fairwear/> (accessed 26/11/01).

¹³ For a full list of organisations involved with *Fair Wear* see <http://www.awatw.org.au/fairwear/fairwear/endorsees.html>

¹⁴ The Fair Wear web site states that “Fair Wear aims to assist homeworkers in the clothing, textile & footwear industries to achieve their rights to a living wage, to organise, and to work in a safe and healthy environment.”

¹⁵ Hon. Bob Carr MP, *Bob Carr and Labor Working for NSW*, mid term-policy speech, 25/3/01, pp 2-3; Hon. John Della Bosca MLC, Special Minister of State and Minister for Industrial Relations, ‘\$4 Million Helps Clothing Outworkers’, *Media Release*, 29/5/01; Hon. John Della Bosca MLC, Special Minister of State and Minister for Industrial Relations, ‘Government Appoints Bilingual Inspectors’, *Media Release*, 30/10/01.

¹⁶ Hon. John Della Bosca MLC, Special Minister for State and Minister for Industrial Relations, Answers to Questions without Notice, *NSWPD* (Legislative Council), 27/11/01, p 27 (proof)

On 30 November 2001, the NSW Government introduced the Industrial Relations (Ethical Clothing Trades) Bill in the Legislative Assembly. This Bill was passed on 11 December 2001¹⁷. The Act made a number of changes to the *Industrial Relations Act 1996* (NSW) and these are outlined on page 33 below.

OUTWORKER PROFILE AND CONDITIONS

How many outworkers are there?

There is no certainty as to the total number of outworkers in NSW or Australia. As noted earlier, the estimates of the total number of outworkers in Australia vary enormously – the figures usually stated are between 150,000 and 329,000. Whilst some estimates put the number of outworkers in the whole of Australia as low as 50,000¹⁸, it has been stated that this is a more appropriate figure for NSW alone¹⁹. The accuracy of figures reported is a contentious area²⁰ and there are no recent²¹ and/or reliable statistics due to a number of factors including the ‘hidden’ nature of much of the outwork industry (see below).

Some of the different Australia wide estimates have been:

- 7,000 (ABS 1991)
- 50,000 (ATO 1991)
- 23,600 (Industry Commission 1997)
- 330,000 (TCFUA/ Fair Wear 2001)

¹⁷ Act No. 128 of 2001. Assented to on 19/12/01

¹⁸ Senate Report, op. cit. n 3, p 11. The Senate Report in 1996 noted that the only ‘official’ government estimate available was from the Australian Taxation Office (ATO). This figure put the Australia wide outworker population at 50,000 (a figure based on manufacturer’s data) [p 10].

¹⁹ DIR Report, op. cit. n 4, p 8. But note: the TCFU estimates that the pool of outworkers in NSW alone is in the order of 120,000. (Source: Senate Report, op. cit. n 3, p 11; Asian Women at Work, in partnership with the Vietnamese Women’s Association of NSW, *Daring to Act: A Report on the Establishment of a Vietnamese Women Outworkers Network*, March 2000 to 2001, p 5)

²⁰ Evidence by both the Council of Textile and Fashion Industries of Australia (CTFIA) and the Retailers Council of Australia (RCA) before the Senate Inquiry disputed the 300,000 figure which has been quoted by the union. The RCA in particular stated: “...given that the whole retail industry – that is, every retailer in Australia – only employs about one million people and the clothing sector of the retail industry probably only employs about 100,000. It does seem to us that 300,000 people involved in the manufacturing process, which is a relatively small part of the manufacturing industry, is a very large number”. Quoted in the Senate Report, op. cit. n 3, p 13

²¹ The Australian Bureau of Statistics in their publication *Locations of Work*, June 2000, whilst not referring specifically to TCF outworkers does give some figures which are of interest (at p 16). Of the total number of persons employed at home, 74,200 were paid by the piece/service provided. Care should be taken not to extrapolate the total number of outworkers from this figure. It does show, however, that there is a significant number of people being paid by piece rate at home.

The Senate Economics References Committee *Report on Outworkers in the Garment Industry* (the Senate Report'), recognised the lack of data on outworkers and concluded that "...it is impossible to state accurately the number of people involved in home-based garment manufacture in Australia".²² The Committee subsequently recommended that the ABS conduct a comprehensive survey of the number of home-based workers in all industries.

Who are outworkers?

According to many reports in the past decade, the typical profile of an outworker is a migrant female. Further, the vast majority of outworkers are from an Asian background – mainly Vietnamese and Chinese – and the overwhelming majority of outworkers are women.²³

Interestingly, research published in the past year has challenged the notion that most outworkers are women. In the sample of workers studied it found a much higher proportion of male workers than previously acknowledged/uncovered by other studies.²⁴

Why migrants?

Webber and Weller have stated that the reason that the industry contains a disproportionate number of recently arrived migrants is that these are the most vulnerable group in society and that "...outwork exploits pre-existing gender, class and ethnic divisions in the community by taking advantage of a vulnerable labour force of machinists that have few alternative employment options."²⁵ Further, it has been suggested that changes to immigration laws, which prevent newly arrived migrants from applying for welfare benefits for up to 2 years, makes them easy targets for this area of work.

Why is there a lack of data on outworking?

The reason why there is a lack of firm data, and often conflicting data, on outworking appears to be due to many factors: the largely hidden nature of the outwork industry which makes the location of outworkers difficult; the lack of detailed statistical study and information available; and the method of gathering sources for studies. As Webber and Weller have noted:

...evidence about the extent and conditions of outwork is scant. Outworkers are often employed in the unregulated economy or on the margin of regulations, so the workers have been difficult to locate and study. Most local investigators have relied on the clothing union or established advocacy groups...to contact outworkers...Such research probably does not represent

²² Senate Report, op. cit. n 3, p 25. Notwithstanding this conclusion, the Committee received significant evidence which argued that industry figures underestimated the outworker population.

²³ Senate Report, op. cit. n 3, p 14.

²⁴ Webber M & Weller S, *Refashioning the Rag Trade: Internationalising Australia's Textiles, Clothing and Footwear Industries*, UNSW Press, Sydney, 2001, p 297.

²⁵ Webber M & Weller S, op. cit. n 24, p 291.

all outworkers. Furthermore, aggregate data from labour market surveys tends to contradict the findings of studies conducted through support agencies. In part this contradiction reflects the diversity of home-based jobs, which range from highly paid professional work to the most menial and poorly paid manual labour. Actually, existing surveys and evidence from the sample of retrenched workers both indicate that home-based work is more complex than the current theories about the gender and ethnic patterning of the labour market for outworkers recognise.²⁶

Working conditions

Recent reports have noted that the working conditions experienced by many outworkers are poor and in some cases exploitative.

These reports state that the poor working conditions experienced by some outworkers include:

- low rates of pay
- late payment
- being unpaid
- oppressive 'contracts' which include unachievable deadlines
- rejection of work
- long working hours²⁷
- no sick leave, annual leave²⁸, superannuation or workers compensation cover²⁹
- high rate of injury coupled with no OH&S protection³⁰

There are many case study examples cited in the Senate and other reports which illustrate these conditions.

In addition to the above, it has also been stated that there are many other negative direct and indirect social impacts of outworking, the most significant and undesirable being (unpaid) child labour.

The Australian Industrial Relations Commission ('the AIRC') in 1999 in its decision concerning the allowability of the outworker clauses within the *Clothing Trades Award 1982* commented that:

The position of outworkers in the clothing industry has been the subject of consideration by the Commission and its predecessors on a number of

²⁶ Webber M & Weller S, op. cit. n 25, p 292.

²⁷ Senate Report, op. cit. n 3, p 55.

²⁸ Cregan, op. cit. n 2, p 9.

²⁹ Evidence received by the Senate Committee, Senate Report, p. cit. n 3, p 35.

³⁰ Mayhew C & Quinlan M, *Outsourcing and Occupational Health & Safety: A Comparative Study of Factory-based and Outworkers in the Australian TCF Industry*, UNSW, 1998, pp 137-8; pp 43-44.

occasions. The decisions show that outworkers in the clothing industry have been exploited and unlawfully and unfairly treated...The most recent comments about the unfortunate circumstances of clothing industry outworkers by an Australian industrial tribunal appear to be those of the December 1998 report of the Industrial Relations Commission of New South Wales (Glynn J) in the Pay Equity Enquiry.

...

The unchallenged evidence before us shows that exploitation and unlawful and unfair treatment of outworkers in the clothing industry still continues. One of the results of this is that many outworkers fail to receive their entitlements under the clothing award.³¹

These comments echo those of Riordan DP in *Re Clothing Trades Award 1982* (1987) 19 IR 416 at 421:

The evidence and material in this case discloses a very distressing situation which has no place in a society which embraces the concepts of social justice. The undisputed facts reveal the existence of widespread and grossly unfair exploitation of migrant women of non-English speaking background who are amongst the most vulnerable persons in the work-force.³²

The Senate Report concluded that “While some employers do comply with award conditions, it was clear to the Committee that at least some outworkers are employed under extremely stressful circumstances.”³³

How widespread are these working conditions?

Due to the lack of data in this area, it is not only difficult to determine the exact numbers of outworkers but also the scale of the illegitimate or ‘hidden’ aspect of the outworking industry. This makes it difficult to determine what proportion of those outworkers experience the poor working conditions described above³⁴.

The conclusions reached by studies are at times conflicting (ie the scale or magnitude of the exploitation is disputed). This would support the concept, referred to by Webber and Weller, that the outworking industry is complex and multifaceted, and that while there is evidence of outworkers experiencing exploitative conditions, there is also evidence of some outworkers experiencing good conditions and showing a preference for outwork over

³¹ *Allowability of outworker clauses in Clothing Trades Award 1982* 45 AIRR ¶4-029. Print R2749, 12 March 1999, para 6.

³² *Re Clothing Trades Award 1982* (1987) 19 IR 416 at 419. This was an application to vary the federal award to include provisions which regulated the conditions of employment for outworkers.

³³ op. cit. n , p 55.

³⁴ The DIR Issues Paper notes that most recent investigations have used a qualitative approach relying on interviews and first-hand accounts by outworkers as well as submissions from industry and community organisations. (p10)

factory based employment³⁵.

Commentators who dispute the concept that the majority of outworkers are exploited

For example, some have criticised the findings of recent reports which conclude that the majority of outworkers are exploited.

Most recently, a report by the Work Reform Unit of the Institute of Public Affairs³⁶ ('the IPA Report') in October 2001 has questioned many of the findings of recent reports that the majority of outworkers are exploited. Their findings contradict those published elsewhere.³⁷

Vanthida Lao³⁸, spokesperson for the IPA in regard to this report, states that the failure to draw a distinction between legal and illegal operations has the effect of overemphasising the extent of the exploitation of outworkers and at the same time fails to recognise that there are many legitimate outworking businesses which offer good remuneration:

Two dollars per hour, \$14 per day, seven days a week. That's the lot of hapless homeworkers, according to the unions. Don't fall for it. It's not accurate and their campaign is threatening thousands of well-paying jobs as well as the fabric of many migrant communities – including mine, the Cambodian community.

If there is exploitation or illegal activity, then that should be addressed. But it's wrong, indeed insulting, to claim that all outworkers are exploited, hapless or criminals.

My mother put my brothers, sisters and me through private schools and universities and helped buy our home by earning a good income from being an outworker. I know many families in my community who did the same thing.

She goes on to say that:

³⁵ Although, interestingly Webber and Weller noted that retrenched TCF factory workers and TCF outworkers appeared to be different labour forces, based on the finding that only 12.3% of those in the study (retrenched TCF workers) continued to work in TCF industry as outworkers. (p 294)

³⁶ This Report is located on the IPA website at www.ipa.org.au/pubs/workreform/clothingtext.html (accessed 7/1/01). The IPA web site states that the "...report was prepared through a consortium of community, business and academic people under the auspices of the Work Reform Unit of the Institute of Public Affairs". Spokesperson for IPA on this project is Ms Vanthida Lao.

³⁷ The report also contains many personal stories to 'counter' those personal stories appearing in other reports which relate to exploitative conditions. These combined show a complex multi faceted industry and workforce. The report also discusses the negative impact that the *Fair Wear* campaign is having on the clothing industry in general (in that it is purportedly assisting the further decline of the TCF industry).

³⁸ 'Reap well what you can sew', *The Australian*, 3/12/01, p 13.

In September, I undertook, in conjunction with the Institute of Public Affairs, the first serious study into homeworkers' remunerations. We only studied people who operated legally. We did so for a number of reasons. First, most people in the industry operate legally. That is, they pay tax and only receive welfare assistance for which they qualify. Second, people who operate illegally are not going to tell me or anyone else the truth about income.³⁹

She further questions the methodology behind the recent report produced by Cregan in that it "...failed to distinguish between legal and illegal workers, bringing into question the accuracy and representativeness of the responses."⁴⁰

In comparison, she states that her investigation "...did not rely on memory and hearsay. We went straight to the business records showing the payments made to 58 outworkers over a three-month period covering more than 5000 hours, 13 different types of operations and 12,000 garments."

She concludes that the findings contradicted those of other reports:

What we found was a great deal of diversity, but not exploitation. The payment per garment ranged from \$2.80 to \$12, and the average hourly remuneration ranged from \$9 to \$21.80. The average remuneration per outworker surveyed was \$14.41 per hour. In comparison, the award wage for level-two clothing workers is about \$13.50 per hour.

The bottom line is that outworkers we surveyed made a good wage, comparable to what they would make under an award in a factory. Moreover, outworkers had a pleasanter work environment and more control over it.

Reports which argue that exploitation is widespread

In contrast, the NSW Department of Industrial Relations Issues Paper states:

...the scale of clothing outwork is disputed but by any estimate it is not insignificant. In addition to the number of people affected, it is the severity of the industrial and welfare problems faced by outworkers that has prompted the NSW Government's concern and the *Behind the Label* initiative...Exploitation of home-based workers in the clothing industry is considered by the NSW Government to be one of the state's most serious labour problems.

³⁹ 'Reap well what you can sew', *The Australian*, 3/12/01, p 13.

⁴⁰ She also questions the reliability of the data given that the "study was based on interviews with people selected by friends of the ACTU. Given the reluctance of most outworkers to have anything to do with unions, this is unlikely to be a representative sample". Interestingly Webber and Weller also state that "Studies based on the experiences of workers located through the union are unlikely to be representative of all outworkers because of low rates of union membership in the outworker labour force" (Webber and Weller, op. cit. n 25, p 309)

Further, the Government considers that the clothing industry's use of this low paid, fragmented, dispersed and super-flexible workforce represents simply one (albeit large-scale) case of the tendency towards insecure and peripheral forms of employment apparent in the contemporary labour force as a whole. The ideas generated by the *Behind the Label* project may well form a basis for innovative strategies to address the negative aspects of the 'new flexibility' in other industries and occupations.⁴¹

Further:

While there are some areas of disagreement concerning the precise conditions of the work, in general there is consensus that it is characterised by endemic abuse of the rights and entitlements of the workers who perform it.⁴²

With respect to the question of whether or not some outworkers enjoy the flexible conditions of their work (or prefer outwork to factory based employment), the NSW Department of Industrial Relations Issues Paper states:

The only conclusion that can be drawn from the weight of the evidence is that, although some outworkers enjoy aspects of working at home and welcome the flexibility it sometimes offers, the vast majority regard clothing outwork as highly exploitative and are keenly aware of the destructive effects it has on their lives and the lives of their families.⁴³

In sum, there is evidence to suggest that there are 'legitimate' outworkers, either working as independent contractors or employees, who benefit from outworking through flexible working conditions and above average remuneration.⁴⁴ Notwithstanding this, the majority of recent reports conclude that many outworkers (who for all intents and purposes can only be described as employees due to the lack of control over their work) work under very poor conditions and do not receive their award entitlements⁴⁵. It is this latter category which has been the focus of public debate.

⁴¹ DIR Issues Paper, op. cit. n 4, p 10.

⁴² DIR Issues Paper, op. cit. n 4, p 11.

⁴³ DIR Issues Paper, op. cit. n 4, p 18.

⁴⁴ Webber and Weller, whilst finding that much of clothing outwork is characterised by poor and exploitative working conditions, point out that not all outworkers can: "...simply be regarded as the exploited victims of unscrupulous employers. In some situations, outworkers may be working in co-operative family ventures that constitute new ways of constructing the relations between work and home. Until recently in Australia work has meant full-time paid work outside the home, performed mainly by men...Rather than marginalising workers from standard forms of work, outwork may be a sign of new ways of organising work." Webber M & Weller S, op. cit. n 25, pp 293-294.

⁴⁵ This has been confirmed repeatedly by both the Australian Industrial Relations Commission and the NSW Industrial Relations Commission in various cases (cited above).

Other issues

Taxation

Another issue often raised in the context of outworkers and their working conditions is one of the declaration of income tax and concurrent receipt of unemployment benefits.

It is not an uncommon practice for people who work in seasonal or irregular employment to receive unemployment benefits. The benefits are reduced according to the level of income received and cut out after a threshold limit of 'allowable' income is reached.⁴⁶

Anecdotal evidence, described in various reports, suggests that some outworkers do not declare income at all (for the purpose of paying income tax) and also 'double dip' by claiming unemployment benefits.

There are various reasons given for such conduct. Some commentators state that it done knowingly and purposefully. Others, however, suggest that the reason for such illegal activity is that outworkers are ill-informed of their rights/ and or tricked into such activity:

Employers contribute to the problem by deliberately misinforming outworkers. The most obvious area of misinformation is convincing outworkers that they are individual contractors (rather than employees entitled to the award) if they have a business name.

Despite their legal status as employees, it is common current practice in the clothing industry that employers do not pay income tax payments on behalf of their outworker employees. Due to the low income and informal nature of their employment relationship, many outworkers in turn do not declare their income to the tax office. In addition, some employers won't give work to outworkers if they are not in receipt of social security benefits. Again, the outworkers concerned do not generally declare their income to Centrelink.⁴⁷

The Senate Report discussed this practice, and offered a practical explanation for the practice of income tax avoidance:

Taxation is a major issue for outworkers, particularly as there is considerable confusion as to whether they are employees or self-employed. If outworkers are employed under a contract of service, their employer is required by law to deduct PAYE tax from wages earned. Because the chain from retailer through manufacturer to contractor and on to outworkers is often complicated, identifying the party responsible for tax deduction and payment is also difficult.⁴⁸

⁴⁶ Webber M & Weller S, op. cit. n 25, p 309 (note 7).

⁴⁷ Asian Women at Work in partnership with the Vietnamese Women's Association, *Daring to Act, A Report on the Establishment of a Vietnamese Women Outworkers Network*, March 2000 to March 2001, p 10.

⁴⁸ op. cit., n 3, p 60. The Senate Report discusses the two issues of taxation and social security separately. Note: the Senate Report discusses the Department of Social Security amnesty for garment industry outworkers, which operated from 1 December 1996 to 31 May 1996.

Child labour

Another significant and serious problem raised with respect to outworking is that of children being utilised to assist with the manufacture of clothing.

The Senate Committee report stated:

Evidence shows that children are involved in outworking and the Committee concludes that there is sufficient evidence to suggest that some children are involved to an unreasonable extent. The Committee believes that the situation endured by exploited children will only be ameliorated through an improvement in the employment conditions experienced by their parents. Having regard to Australia's international and national obligations to protect children from exploitation, the Committee suggests that Government consideration of this matter is warranted.⁴⁹

INDUSTRIAL LEGISLATIVE FRAMEWORK

The working conditions of clothing outworkers are 'regulated' by legislation and industrial instruments such as awards (both at a federal and state level). The following section outlines these specific areas.

In practice, the current legislative framework does little to protect the employment conditions of outworkers. This is because such protection relies on many factors including: the categorisation of outworkers as employees, the cooperation of 'employers', and trying to ascertain who exactly is an employer in the context of long manufacturing supply chains.

The 1996 ILO Convention on Homework

On 28 June 1996 the International Labour Organisation (ILO) adopted a convention on homework.⁵⁰ The Convention sets out minimum standards which should be addressed by countries who are signatories. The Convention requires that signatories adopt national policies in relation to setting such standards, and then implement and periodically review them.⁵¹ The policies should be implemented by way of legislation, legislative instruments (such as awards), and collective agreements where appropriate.⁵²

The amnesty was intended as a means of re-assessing benefit levels received, without the outworkers incurring a penalty. According to evidence received by the Committee from the Department, only 33 people had applied for the amnesty: op. cit. n 3, p 65. The Committee recommended a reinstatement of the amnesty (p 72).

⁴⁹ op. cit. n 3, p 55.

⁵⁰ Convention No. 177 on Homeworking. Available at:
<http://www.austlii.edu.au/au/other/dfat/seldoc/1996/4411.html> or
http://www.ilo.org/public/english/employment/gems/eo/eu/rec_ilo.htm

⁵¹ Article 3

⁵² Article 5

Australia has not ratified the convention. The DIR Issues Paper outlines some of the reasons put forward by the Federal Government in not ratifying the convention:

- the use in Article 1 of the criterion of economic independence to distinguish an employee from an independent worker (the latter not being covered by the Convention) is contrary to Australian law, which uses criteria other than economic independence to distinguish the two categories of worker. Thus a person may be characterised as an independent contractor under Australian law, but be treated as a home worker under the Convention.
- the common law control tests used in Australian law to determine whether an employment relationship exists do not sit comfortably with the Article 1 definition of an employer as a person who gives out work, either directly or through an intermediary.
- no jurisdiction indicated that it has adopted policies to improve the situation of home workers, as required by Article 3.⁵³

Many organisations and individuals have supported or urged Australia's ratification of the Convention, including: the ACTU⁵⁴; the Textile, Clothing and Footwear Union of Australia ('the TCFUA'); and Penfold⁵⁵.

Workplace Relations Act 1996 (Cth)

Under section 89A of the *Workplace Relations Act 1996* (Cth) outwork is included as one of 20 allowable award matters⁵⁶. Section 89A states (with only relevant portions listed and highlights added):

Industrial dispute normally limited to allowable award matters

(1) For the following purposes, an industrial dispute is taken to include only matters covered by subsections (2) and (3):

- (a) dealing with an industrial dispute by arbitration;
- (b) preventing or settling an industrial dispute by making an award or order;
- (c) maintaining the settlement of an industrial dispute by varying an award or order.

Allowable award matters

⁵³ DIR Issues Paper, op. cit. n 4, p 27. The paper also notes that whilst the ACTU voted in favour of adoption, the Government and employers' representatives abstained from the vote.

⁵⁴ Ibid.

⁵⁵ Penfold C, "Fighting outworker exploitation", *Alternative Law Journal*, Vol. 24, No. 2, April 1999, pp 87-88.

⁵⁶ As noted by Penfold C, *ibid.* at n 55, p86: outwork was not included in the original Workplace Relations Bill as an allowable award matter. Its inclusion in the resulting Act followed negotiation.

(2) **For the purposes of subsection (1) the matters are as follows:**

...

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

(3) **The Commission's power to make an award dealing with matters covered by subsection (2) is limited to making a minimum rates award.**

Also, an outworker is defined broadly under the same Act⁵⁷ as "...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."

The effect of outwork being included as one of the 20 allowable matters, is that awards can be made which regulate the pay and conditions of outworkers.

Industrial Relations Act 1996 (NSW)

Under Section 5(1) of the *Industrial Relations Act 1996* ('the Act') an employee is defined as a "...person employed in any industry, whether on salary or wages or piece-work rates". Under Section 5(2) a person is not prevented from being an employee for the purposes of the Act only because they are an outworker. The Act further deems outworkers to be employees⁵⁸ and thereby removes any uncertainty as to whether or not they could be classed as independent contractors for the purposes of the Act (and consequently not be covered by the Act). This has the effect of bringing outworkers and outworker entitlement disputes within the jurisdiction of the NSW Industrial Commission so that they can seek appropriate remedies (or attempt to enforce their award entitlements).

It should be noted that outworkers are deemed employees for the purposes of the Act only and therefore it does not automatically follow that they would be found to be employees in some other context (eg under the common law) or for some other purpose (eg for taxation purposes).⁵⁹

It has been noted that there is some uncertainty as to whether, under the common law, outworkers are considered to be employees irrespective of deeming provisions within legislation. This is discussed further below.

⁵⁷ Section 89A(9) of the *Workplace Relations Act 1996* (Cth)

⁵⁸ Section 5(3) and Schedule 1 of the Act.

⁵⁹ AILR, vol 45, ¶ 71-910

Section 5 of the Act states (highlight added):

(1) General definition

In this Act, **employee means a person employed in any industry, whether on salary or wages or piece-work rates.**

(2) **A person is not prevented from being an employee only because:**

- (a) the person is working under a contract for labour only, or substantially for labour only, or
- (b) the person works part-time or on a casual basis, or
- (c) the person is the lessee of any tools or other implements of production, or
- (d) **the person is an outworker**, or
- (e) the person is paid wholly or partly by commission (such as a person working in the capacity of salesperson, commercial traveller or insurance agent).

(3) **Deemed employees**

The persons described in Schedule 1 are taken to be employees for the purposes of this Act. Any person described in that Schedule as the employer of such an employee is taken to be the employer.

(4) Exclusion A person employed or engaged by his or her spouse or parent is not an employee for the purposes of this Act.

Under Section 5(3) and schedule 1 of the Act certain types of workers are deemed to be employees. As per schedule 1(f) deemed employees include:

Outworkers in clothing trade. Any person (not being the occupier of a factory) who performs, outside a factory, for the occupier of a factory or a trader who sells clothing by wholesale or retail, any work in the clothing trades for which a price or rate is fixed by an industrial instrument. (In such a case, the occupier or trader is taken to be the employer.)

Federal and state awards

Outworkers are covered by federal and state awards - the federal *Clothing Trades Award 1982*⁶⁰ and the NSW *Clothing Trades (State) Consolidated Award*, respectively. The key provisions with respect to outworkers in the NSW Award virtually mirror their federal counterparts. The provisions under the *Clothing Trades Award 1982* relating to outwork were held to be allowable award matters under the *Workplace Relations Act 1996* (Cth).⁶¹

⁶⁰ The current provisions in the federal award, relating to the regulation of working conditions of outworkers, were added in 1987: *Re Clothing Trades Award 1982* (1987) 19 IR 416. Clauses: 26 – Contract work; 27 – Outworkers; 27A – Registration of respondents

⁶¹ *Allowability of outworker clauses in Clothing Trades Award 1982* (1999) 45 AILR ¶14-029. This is through the process of award simplification. Award simplification refers to the process by which all federal awards are being reviewed and simplified due to industrial changes at the federal level where allowable award matters were reduced to a total number of 20 matters.

The federal award applies to those companies listed in that award as respondents, whilst the NSW award applies to all other relevant businesses within NSW. As the provisions are virtually the same there is no practical difference in their application or how businesses need to observe them. This means that businesses, contractors and employees and others need not be confused about which particular award they fall under as the effect of observing one is the same as observing the other ie the rules are the same.

The only significant difference between the clauses is that the federal award covers common law employees, whilst the state award covers outworkers irrespective of whether they are employees at common law or not.⁶²

The implications of this difference are that outworkers who fall within the federal jurisdiction must be able to satisfy the common law tests/requirements before they are able to enforce their entitlements under the award.

What do the awards cover?

The awards cover various employee entitlements such as pay, overtime, sick pay and annual leave. They also contain clauses which regulate employers' conduct. These clauses contain fairly extensive registration and reporting requirements.

The relevant clauses are attached in full at Appendix A. A brief summary of the clauses are outlined below. Some portions have been highlighted for clarity.

Reporting requirements

Clause 26 – This concerns the relationship between parties. It stipulates that employers who contract with employers of outworkers (either on⁶³ or off their premises), must provide a list of those second parties to the Industrial Registrar. It further stipulates that those second parties (employers of outworkers) must obtain registration if they employ (or intend to employ) outworkers (in accordance with clause 27A). The clause is quite broad in that there is a requirement for employers who contract with other employers, to provide information about those other employers to the Industrial Registrar. This is so even if the other employers do not employ outworkers.⁶⁴ Presumably this is so that any effort to circumvent the award is able to be detected by checking through the lists and conducting appropriate site inspections.

⁶² DIR report, op. cit. n 4, p 38.

⁶³ cl 26(a)

⁶⁴ cl 26(b)

Clause 26 states⁶⁵:

- (a) **contract work may only be undertaken subject to the following conditions:**
- (i) **An employer may give out work to another employer provided that**, where the employer undertaking such work causes some or all of such work to be performed outside a factory or workshop ... **the employer to whom work is given shall be a registered employer of outworkers pursuant to clause 27A**, Registration of Employers.
 - (ii) **An employer giving out work to other employers shall...file with the Industrial Registrar...in New South Wales, a list of the employers to whom work is given**, and a copy of such list shall be forwarded to the Textile Clothing and Footwear Union of New South Wales.
- (b) Employer giving out work to another employer when the other employer does not employ outworkers:
- (i) An employer to this award may give out work to another employer, to be carried out in the other employer's workshop or factory registered in accordance with the appropriate State Acts and Regulations.
 - (ii) An employer giving out work pursuant to this subclause shall...file with the Industrial Registrar...in New South Wales, a list of the other employers to whom work has been given in each preceding three-month period, and a copy of such list shall be forwarded to the Textile Clothing and Footwear Union of New South Wales...
- ...
- (c) Employer contracting with a person who alone will perform work – Employer giving out work to another employer or another person where the other employer or other person employs others outside a factory or workshop:
- ...
 - (ii) An employer shall:
 - (1) not contract with any person pursuant to this subclause unless that employer is registered pursuant to clause 27A...
 - ...

The reporting obligations are further detailed under clause 26(c)(iii)(2) which enumerates

⁶⁵

The clauses quoted are from the state award. It should be noted that as with all law within the Australian jurisdiction, where state legislation (or a legislative instrument such as an award) is inconsistent with a federal law (or award) then section 109 of the Australian Constitution operates to remove that inconsistency by invalidating the (provision within the) state law to the extent of (and duration of) the inconsistency. For cases which set out the tests used for determining when an inconsistency arises see: *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 at 478; *Colvin v Bradley Bros Pty Ltd* (1943) 68 CLR 151; *Dao v Australian Postal Commission* (1987) 162 CLR 317. For specific cases which deal with the paramountcy of federal awards over state law see: *Ex parte McLean* (1930) 43 CLR 472; *Metal Trades Employers Industry Association of Australia v The Amalgamated Metal Workers' and Shipwrights' Union* (1983) 153 CLR 632.

the reporting obligations of employers under clause 26(c). This clause is fairly detailed; it lists 11 provisions. It requires that employers keep records of names and addresses of the other party to whom work is given as well as the address of where work will be performed. In addition, it sets out the requirement to record dates of when work is given out and when work is to be completed as well as a description of the type of work to be performed - to mention a few of the areas.

Clause 26(c) (iii) (2) states:

26 (c) (iii) (1) An employer contracting with a person who alone will perform work shall contract to provide and shall provide terms and conditions no less favourable than those prescribed by this award for persons engaged under a contract of service pursuant to clause 27, Outworkers.

(2) An employer contracting with another employer, or with another person who gives out the work, or with a person who alone will perform work shall make a record in writing of the following details:

(i) ...name...

(ii)...address..

(iv)...address(es) where the work is to be performed...

(v)...date of giving out the work and the date for completion of the work...

(vi)...A description of the nature of the work to be performed...

...

(ix) The sewing time allowed for each type of garment or article to be done...

(x) The price to be paid for each garment or article...

...

Obligation to inform outworkers of their rights

Clause 26(d) – This sets out the obligations of an employer (when they contract with a person who alone will perform work) to provide that person with information as to their entitlements. This information is set out in Schedule J⁶⁶ (of the state award) and Schedule M (of the federal award).

In brief, it informs the person to whom it is given that if they work at home or outside a factory sewing garments that they may be an outworker, and if so they have various rights and entitlements. These include:

- Entitlement to the same wages and conditions as employees in a clothing factory
- The person can only be employed full-time (38 hours per week) or part-time (at least 15 hours per week), and these hours must be agreed to in advance. The effect of this is that the person is guaranteed the same pay each week (unless they are stood down) irrespective of the amount of work undertaken, so that if no work is forthcoming for one week and the person is on a full-time or part-time wage then they are entitled to that wage.
- The worker cannot be compelled or required to work on Saturdays, Sundays or public

⁶⁶

See Appendix B

holidays, but can agree to work on those days and if so should be paid overtime.

- The worker is only required to work 7 hours and 36 minutes each day. Any work outside of these hours should be paid at an overtime rate.
- If the worker is paid by the piece, they cannot receive less than the hourly award rate of pay.
- As at 29 June 1998 the usual weekly wage for 38 hours is \$412.60 and the hourly rate is \$10.85.
- The worker is entitled to annual leave (20 days paid leave per year, plus 17.5% leave loading, for full-time workers).
- Superannuation.
- Workers' Compensation.
- The employer is required to deliver and pick up all work at no cost to the worker.

Registration requirements

Clause 27A sets out other employer obligations - the key obligation being the requirement to register.

Clause 27A provides that employers who have work or propose to have work performed away from their own factory should apply for registration. The Employer is then given a registration number (27A(c)). The Industrial Registrar maintains a record of all registered employers under this clause (27A(d)). Note, employers are required to advertise their registration by placing a public notice in a metropolitan daily newspaper.

Pay and conditions

Clause 27 sets out all provisions which relate to the pay and conditions of employment. It is fairly lengthy:

- (b) Employers bound by this award shall –
 - (i) not employ any person to perform work covered by this award...unless that respondent employer is a registered employer of outworkers...
 - (ii) when desirous of employing outworkers, make application to the Industrial Committee for registration in accordance with clause 27A...
 - (iii) not employ a person to perform work covered by this clause outside the workshop or factory unless prior agreement in writing has been reached between that respondent and the person as to whether that person is to be employed on a full-time or part-time basis and if on a part-time basis, the agreed number of hours...
 - (iv) not employ more than 10 outworkers at any one time...[without consent of the Union or Industrial Committee]...
 - (v) pay any outworkers employed at the rates prescribed by clauses 7, Rates of Pay, and 20, Payment by Results...
 - (vi) ...[details the minute rate for outwork]
- etc.

Under clause 27(g) any dispute arising out of the award may be referred to the NSW Industrial Relations Commission.

How successful are the awards in 'protecting' outworkers?

It has been stated that the awards have had very little success in terms of protecting outworkers. The problems with the existing awards are both from a compliance and an enforcement point of view. Many factors have been put forward as being responsible for this:

- determining who is an employer
- complexity of the chain of production
- complexity of the award leading to difficulty in interpretation
- enforcement difficulties due to the hidden nature of the industry

Whilst clothing outworkers do have award 'protection', this does not necessarily translate into such workers receiving award wages and conditions. As noted by the Senate Report, there are:

...a number of impediments to outworkers receiving award rates and conditions. The most significant of these is the complex chain of production which sees work passed from retailer to manufacturer to contractor to subcontractor to workers. With this system, the exact employer is difficult to define. Thus it allows everyone in the chain above the outworkers to avoid meeting any obligation that they may have under the Award.⁶⁷

Others have added that the long supply chain further compounds the problem as middlemen can take significant margins at various stages, leaving very little at the end to pay to the outworker:

The problem, as leading firms saw it, was not award-sanctioned outworker wage levels but rather the structure of the outworker-based production system that allowed subcontractors or 'middlemen' to take margins at each stage in the production process. This left only a small fraction of the price being paid for the garment going to outworkers' wages.⁶⁸

In addition to the above, problems with compliance and enforcement have in part been attributed to the complexity of the award itself which raises problems with interpretation and understanding of the document.⁶⁹

⁶⁷ The Parliament of the Commonwealth of Australia, Senate Economics References Committee, *Outworkers in the Garment Industry*, December 1996, pp 28-29.

⁶⁸ Weller S, op cit. n 5, p 210

⁶⁹ The DIR issues paper also notes that the (NSW state) award is complex which can lead to employers not understanding their obligations: "the complexity of the document, with difficult and wordy clauses setting out conditions for outworkers...[can present difficulties for compliance and enforcement]. Given that industrial inspectors sometimes have difficulty interpreting and applying the award, it is likely that small employers, without legal advice, would have difficulty in understanding their obligations and, similarly, that outworkers would find the award clauses opaque without external assistance. (But note that the equivalent federal award provisions are undergoing redrafting to make them easier to understand, and,

Criticisms of the award

In addition, the award has been criticised by industry as being inflexible, too prescriptive and requiring an extremely high level of record keeping. The IPA has made the following criticisms:

A high casual loading of 33% which thereby makes casuals too expensive to use when demand fluctuates. This forces manufacturers to outsource significant production.

...highly prescriptive of the skills people must have for different tasks and the pay levels to be applied. Prevents firms tailoring pay and work to accommodate the varying demands of customers.

...highly prescriptive on wages (eg) ‘an employee who is the head of a table or bench of machines in charge of 4 or more employees must be paid as follows... \$12.25 above their skill level.’...

Describes in detail how machines are to be operated...(eg) Describes how scissors are to be used and pay rates to apply.

...

Stipulates the recording of every detail of production and that records are to be made available for inspection by the union. The cost of managing such records is significant.

Defines outworkers as people who are employed and not working on the premises of the employer. Requires retention of records of all work. Very significant record-keeping required. A business must be registered to be allowed to employ outworkers. The requirements of outworkers are near mirror-images of the requirements for full-time employees on the site of the business (eg) annual leave to be paid to outworkers.

Makes outworkers full time employees. ‘An employer may stand down an outworker without pay where no work can be offered...’ BUT ‘An employer may only stand-down an outworker for a maximum of 10 days per year, and no more than 2 days in any consecutive four-week period.’

The IPA has said that :

The impact of the award is that it effectively turns outworkers into wage-slave employees, enforces factory-style sweatshop production as the only method of production allowed, ignores the reality of the need to respond to peaks and troughs in consumer demand, prohibits the development of creative responses to niche markets and denies people the right to run their own clothing production business at home.⁷⁰

However, it has been stated that work is underway to simplify the language in the award which should assist with compliance and enforcement.⁷¹

Occupational Health and Safety Act 2000 (NSW)

Section 8(1) states that “an employer must ensure the health, safety and welfare at work of

after this has occurred, equivalent ‘plain English’ provisions may be adopted in the state award)”. DIR, op. cit. n 4, at p 37.

⁷⁰ IPA Report, op. cit. n 36, p 20 (of 25 printed out).

⁷¹ DIR issues paper, op. cit. n 4, p 21.

all the employees of the employer” and that the duty extends to ensuring that “any premises controlled by the employer where the employees work...are safe and without risks to health”⁷² As noted by the DIR Issues Paper, the provision in the former Act (1983) was limited to non-domestic premises. The Issues Paper further noted that “...definitions of ‘employer’ and ‘employee’...[in 1983]...in the NSW OHS Act do not allow for OHS obligations in situations of extended subcontracting relations, such as outworking.”⁷³ These problems appear to be remedied, in part, by the current Act. For example, the current Act is not limited to non-domestic premises (and there appears to be no reference to ‘domestic’ or ‘non-domestic premises’ within the Act).

Workers Compensation Act 1987 (NSW)

Outworkers are deemed to be employees under section 3 of the *Workers Compensation Act 1996* (NSW) and section 5 and schedule 1 (2) of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW). However, as noted in the Senate Report and elsewhere, most employers of outworkers do not provide workers' compensation insurance⁷⁴, which effectively negates the benefit of having the legal entitlement.

COMMON LAW

Distinction between independent contractors and employees – common law tests

The categorisation of working relationships is important for the purposes of industrial law in that it determines the extent to which (if any) people fall within the jurisdiction of various industrial instruments (both state and federal). A distinction is generally drawn between independent contractors and employees. The former assume the status of being self employed and independent and they therefore rely on their contractual rights, whereas the latter (employees) assume a dependent status and are therefore protected and can rely on a variety of industrial instruments.⁷⁵

This distinction is, however, not always clear. Courts apply various tests (either individually or concurrently) to determine whether or not someone is an employee or an independent contractor. The key test is the control test.

In the case of *Stevens v Brodribb Sawmilling Co Pty Ltd* the High Court held that whilst the control test was not the only determinate of whether a contract of employment existed, it

⁷² Section 8(1)(a) *Occupational Health and Safety Act 1983* (NSW)

⁷³ DIR Issues Paper, op. cit. n 4, p 34.

⁷⁴ Senate Report, op. cit. n 3, p 40. As noted by the Senate Report, the cost of workplace injury for outworkers, in such instances, is ultimately borne by the public sector in that “If injuries occur, outworkers often have no alternative but to resort to social security benefits.”

⁷⁵ Traditionally, under the common law the expression ‘master and servant’ was used to describe the employer/ employee relationship: *R v Foster; Ex parte Commonwealth Life Assurances Ltd* (1952) 85 CLR 138. This encapsulates the notion of dependency of the employee. Note: the issue of expressions used “contract of service” versus “a contract for service”. A contract **of** service in general refers to an employment relationship (that of employer and employee), whereas a contract **for** service refers to a contract undertaken by one party for another (independent contractor).

was the appropriate test to initially be applied in that “...it remains the surest guide to whether a person is contracting independently or serving as an employee”⁷⁶.

Put simply, the control test refers to the question of how much detailed control can the principal exert over the other party (worker) in terms of direction over their work and employment conditions⁷⁷. It does not matter whether the worker works full-time⁷⁸ nor does it matter what label is attached to describe the working relationship⁷⁹ (ie just because someone is called an independent contractor does not necessarily mean that they will be found to be such).

Factors the courts will look at include how much autonomy and discretion the workers have in rejection or acceptance of work and whether they work/ ‘contract’ with only one party. As Creighton and Stewart note, in addition to the question of control other factors which are relevant include:

- (i) whether the worker supplies their own tools or equipment;
- (ii) whether the worker is free during the engagement to perform similar work for other “employers”;
- (iii) whether the nature of the worker’s involvement is such as to carry a risk of financial loss or, by the same token, an opportunity to make a profit from the work; and
- (iv) whether the worker charges for their services by supplying an invoice, rather than receiving regular wages.⁸⁰

⁷⁶ (1986) 160 CLR 16 at 36. The recent High Court case of *Hollis v Vabu Pty Ltd* [2001] HCA 44, 9 August 2001, reaffirmed the control test as a key test. In this case the High Court held that a courier was an employee and not an independent contractor, overturning the Court of Appeal decision. The Court found that the bicycle couriers in question exercised little control in the way in which they performed their work and that the Court of Appeal: “In classifying the bicycle couriers as independent contractors...fell into error in making too much of the circumstances that the bicycle couriers owned their own bicycles, bore the expenses of running them and supplied many of their own accessories. Viewed as a practical matter, the bicycle couriers were not running their own business or enterprise, nor did they have independence in the conduct of their operations. A different conclusion might, for example, be appropriate where the investment in capital equipment was more significant, and greater skill and training were required to operate it” (para 47). In determining that the couriers were employees the Court referred to five key factors including: that the work required no special skill or qualification; the couriers exercised little control over their work; the couriers were required to be dressed in attire which bore the company logo of the courier company; and the company oversaw the couriers’ finances.

⁷⁷ *Performing Right Society Ltd v Mitchell and Booker (Palais De Danse) Ltd* [1924] 1 KB 762. Justice McCardie stated “The final test, if there is to be a final test, and certainly the test to be generally applied, lies in the nature and degree of detailed control over the person alleged to be a servant”.

⁷⁸ *FCT v J Walter Thompson (Australia) Pty Ltd* (1944) 69 CLR 227.

⁷⁹ *Transport Workers Union of Australia v Glynburn Contractors (Salisbury) Pty Ltd* (1990) 34 IR 138.

⁸⁰ Creighton B & Stewart A, *Labour Law: an introduction*, 3rd ed., The Federation Press, 2000, p 209.

The intention of the parties is also relevant in determining whether a contract of employment exists.

Another test used is the ‘integration’ or ‘organisation’ test in which the court will ask whether or not the worker is ‘part and parcel of the organisation’.⁸¹

Are outworkers independent contractors under the common law?

Under the common law, there have been cases in which outworkers in the TCF industries have been held not to be independent contractors but employees.⁸²

In ascertaining whether an outworker would fall within the common law description/ category of employee it would need to be established, on a case by case basis, the degree of autonomy exercised by the worker over their working environment as well as the extent of control exercised/ or exercisable by the principal manufacturer/ or contractor.⁸³

In previous cases concerning the federal award, outwork has been described as work which is so directed and controlled that it is impossible to characterise it as work of an independent contractor. In the decision *Re Clothing Trades Award 1982* (1987) 19 IR 416, Riordan DP stated:

There is no significant difference in the process of making garments whether performed by workers in the factories of manufacturers or by outdoor workers in their own homes. The difference is about how the work is handed out and the method and level of payment for completed work.

The workers, whether in factories or homes, must complete the work in a satisfactory manner and in due time. The method of sewing is the subject of direction. Outdoor workers are not paid for work which is not of the specified standard and unsatisfactory work must be taken apart and sewn up again. In certain cases they could be denied further work from the particular maker-up.

The material is either picked up by the outdoor workers at the premises nominated by the principal manufacturer or the maker-up and returned when completed, or, alternatively the material is delivered to the worker’s home and the completed work is later collected at the appointed time.⁸⁴

The issue in this case as Riordan DP saw it was:

⁸¹ *Australian Timber Workers Union v Monaro Sawmills Pty Ltd* (1980) 29 ALR 322. Justices Sweeney and Evatt found in this case that the worker “...was not in any sense carrying on a business of his own. The work which he performed was not peripheral, but was an integral part of the organisation”.

⁸² *Airfix Footwear Ltd v Cope* (1978) ICR 1210.

⁸³ For further detail on contracts and outworkers see CCH, *Australian Labour Law Reporter*, volume 4, title Outworkers, ¶71-700-¶71-740.

⁸⁴ *ibid.* at p 419.

...not whether there should be some prohibition or restriction on a respondent engaging a contractor to perform certain classes of work, which for whatever managerial reason may be necessary or desirable, but rather it is an issue concerned with the capacity of a respondent to enter into an arrangement with a person or persons to have work performed by individual workers away from the workplace at substantially lower wages and conditions than those provided by the award.

There is a sharp contrast in reality between a situation where an employer respondent to this award might have such a temporary demand for garments that the capacity of his plant and availability of employees is insufficient to meet it...compared with the situation disclosed by the evidence in this case where work normally and properly done by employees is contracted out so that persons, who may well be employees of some other person are engaged to perform the work away from the workplace under sub-standard conditions.⁸⁵

RECENT REPORTS

There have been several significant reports on the outworker industry released in the past several years. Three of these will be outlined briefly below.

Cregan Report – University of Melbourne – November 2001⁸⁶

This most recent report into textile outworkers in Victoria contained several significant findings.

Scope of research

Cregan surveyed 119 outworkers (110 of whom were born in Vietnam). Of the 119 outworkers 114 were females and 5 males.

The study involved an interview process which lasted approximately 3 hours with each outworker surveyed.⁸⁷

Findings

The findings paint a vivid and depressing picture about the pay and work conditions of those outworkers studied.

With respect to pay, the outworkers studied were paid by piece-rate. Cregan states that the outworkers were paid between \$0.20 to \$5.35 per garment sewn and the garments took between 3 minutes and 90 minutes to sew. Based on the information received, Cregan estimates that the average hourly rate for the workers was \$3.60 per hour and that although

⁸⁵ *ibid.* at p 421.

⁸⁶ Cregan, *op cit.* n 2.

⁸⁷ Cregan, *op cit.* n 2, p 2.

the highest rate reported was \$10, that several outworkers earned below \$1.00 per hour.⁸⁸

Further, 88 outworkers reported not having their wages paid on time and 54 stated that they have been unpaid for their work. Almost all of the outworkers surveyed reported that they did not receive paid holidays, sick pay or paid public holidays.

With respect to work conditions, Cregan states that 62% of the outworkers worked every day (7 days per week) with 26% working 6 days per week. The amount of time per day spent sewing ranged from 3 to 19 hours with the largest group (25) working 10 hours per day (21%), followed by 22 workers who worked 15 hours per day (18%) and 22 workers who worked 14 hours per day (18%) - 36% of those surveyed worked between 14-15 hours per day. Overall, the majority worked 10 hours or more per day.

On top of work performed sewing clothes, three-quarters of the workers spent an additional period each day on household duties (between 2 and 4 hours per day).⁸⁹

Cregan concludes that the “The work consumed their lives”.⁹⁰

She also states:

This empirical study gives weight and substance to the claims of the TCFUA and outworker groups who have reported that these workers are among the most disadvantaged in the Australian labour market. The preliminary findings demonstrate unequivocally that outworkers in the clothing industry do not own a business. These are low-income earners. because they are not classified as ‘employees’, they fall outside the award system and are particularly vulnerable to exploitation. An outstanding characteristic of this investigation was the fear of the outworkers. Even though their wages are so low and their hours of work so long, they were frightened that they would lose their job if they talked about it. Many more were contacted but refused to talk.⁹¹

Cregan argues that:

The clear policy implication from these findings is that state and federal governments should intervene to ensure that outworkers will be covered by awards and legislation in state and federal jurisdictions. Moreover, Australian women consumers should have deep concerns about the female ‘sweated’ labour that makes their clothes.⁹²

⁸⁸ Cregan, op cit. n 2, p 8.

⁸⁹ Cregan, op cit. n 86, p 10

⁹⁰ Cregan, op cit. n 2, p 12.

⁹¹ Cregan, op cit. n 2, pp 14-15.

⁹² Cregan, op cit. n 2, p 15.

Institute of Public Affairs – Inaugural publication of the IPA Work Reform Unit October 2001⁹³

In September 2001 the Work Reform Unit of the Institute of Public Affairs conducted a study into the decline of the clothing manufacturing industry generally, as well as researching the remuneration and working conditions of outworkers.

The report questions the assumptions/findings of reports which suggest that most or the majority of outworkers are exploited and paid poorly for their work.

The report also criticises the work of *Fair Wear* and others:

What is worse is the emergence of an anti-industry coalition of government, union, church and community groups, which has assaulted the industry in co-ordinated campaigns of intimidation and harassment. These attacks have been directed at business people and workers who fled the factories to find new systems of production. These well-executed, well-funded and professional campaigns denigrate people as ‘immoral’, ‘unethical’, ‘exploitative’ and ‘inhuman’ if they dare to work outside the conservative *status quo* of factory production. The anti-industry campaigners have targeted the core commercial values upon which the industry depends, and have induced a climate of uncertainty and fear amongst industry decision-makers.

Scope of Research

The Work Reform Unit looked at the work of 58 outworkers and found that the average hourly rate of pay was much higher than other reports had indicated. The report states that the average hourly rate was above award at \$14.41 per hour.

Personal stories

The report contains several personal stories, from manufacturers, wholesalers and outworkers. With respect to outworkers, the report notes the potential benefits of outwork in that outworkers can be flexible in their working hours and save on child care costs. The report contains several personal stories:

Mrs C’s life has revolved around her children. Having escaped a communist regime in Cambodia, she always wanted the best for her children. They went to private schools. They have the latest model computers, accessories, games and books. Her eldest children have their own cars.

...

Mrs C showed us her workplace where she has a television and video, set up in front of the sewing machine. On the wall there was a phone and a certificate of her business registration. She has 5 machines in a large room. She sometimes uses her Honda Legend to deliver or pick up accessories. She said that this is a typical set-up. She mentioned that all her relatives are in the clothing industry. Some are manufacturers and most are working

⁹³

op. cit. n 36.

from home like her. They all live in the Clayton area and there are ten families.

...

Being at home, Mrs C can look after her children. She said that she is financially better off then working in a factory. She does not have to pay childcare...She is a successful outworker. She has high skills of garment construction and she has never run out of work.

Findings

The report concludes by stating that the current union and government strategy is misplaced or misdirected and is detrimental to the TCF industries, not because it is focussed on introducing award conditions (in terms of pay) but because the award is unworkable in many respects and onerous from a business point of view as well as an outworker point of view. This criticism primarily relates to the level of reporting requirements, but also refers to the inability of the award to allow for the flexibility required in an industry which follows seasonal trends and therefore has seasonal (namely summer and winter) fluctuations in the level of product required to be manufactured. On this basis, it ignores the manufacturers needs in achieving a quick turn around time to compete with overseas product coming onto the market. The report concludes:

The industry should be in a positive change process in preparation for 2010, when the prospect of the removal of TCF tariffs and quotas worldwide is real. What the industry needs is an environment where people working in the industry can be creative, flexible, niche-market-oriented and dynamic. For this they need to feel secure. It is doubtful that this can be achieved in an atmosphere of coordinated, well funded and strategic aggression.

NSW Department of Industrial Relations Issues Paper – December 1999

The NSW Department of Industrial Relations released an issues paper in December 1999, which details the situation of outworkers under the present system and the NSW Government strategy for reform and compliance.

It deals at length with the problem, and severity, of outworker exploitation as well as the implementation of the NSW Government policy in this area.

The Issues Paper states that there is abundant evidence that outworkers do not receive minimum award pay and conditions and that “Instead, the outworker workforce (mainly women from non-English speaking backgrounds) suffers erratic and insecure employment contracts, work demands that are unreasonable and harmful to their health, and a high rate of workplace violence and intimidation.”⁹⁴

It further states that the objectives of the NSW Government Clothing outwork strategy “...reflect the Government’s belief that commercially viable clothing production in NSW can be compatible with the payment of decent wages to employees and with an ethic of respect

⁹⁴ DIR Issues Paper, op. cit. n 4, p 1.

for employee interests.”⁹⁵

The Issues Paper lists 20 proposals for reform. These include:

- Altering the definition of outworker under the *Industrial Relations Act 1996* (NSW) to include other types of work, including: production, clerical and administrative work (where pay rates are governed by an award)
- Insertion of a new s127 in the *Industrial Relations Act 1996* (NSW) to assist in the recovery of outstanding monies from principal contractors that is owing to outworkers.
- Consideration of the award being extended to make provision for casual penalty rates, sick leave and provision of tools.
- Amending the *Industrial Relations Act 1996* (NSW) so that inspectors have a right of access to parts of domestic premises where work is performed.

Further proposals relate to regulation of retailers' and suppliers' conduct.

Following publication of issues paper, the NSW Government invited submissions and responses from stakeholders. The Minister for Industrial Relations stated in March 2001: “After extensive consultation with manufacturers, unions, workers, consumers, retailers and community groups, we have a plan that we believe will end the days of chronic disregard for outworkers’ safety and the industrial laws of this State in this previously ignored component of the clothing and textile industry”.⁹⁶ The Government's initiatives are detailed below on page 31.

The Parliament of the Commonwealth of Australia, Senate Economics References Committee, Outworkers in the Garment Industry, December 1996.

The Senate Economics References Committee undertook an inquiry into outworkers following a resolution of the Senate on 31 August 1995. The Committee was required, following the terms of reference, to inquire into the extent to which outworking imposes conditions on outworkers and their families which “...do not meet accepted standards of fairness and equity, particularly with regard to:...remuneration...[and]...working conditions”. The Committee received 40 submissions including 4 from peak industry groups and 11 from community organisations.

The Committee identified changes in the textile, clothing and footwear (‘TCF’) industries, which has lead to an increase in the pool of outworkers, as follows:

...in parallel with the reduction in factory-based employment, and stimulated to a large extent by decreased industry protection and increased import competition, there has been an increasing trend towards transient and informal employment relationships in TCF industries. That is, there has been a large increase in the use of outworkers to sew clothes. By doing

⁹⁵ *ibid.*

⁹⁶ Special Minister of State and Minister for Industrial Relations, *NSWPD* (Legislative Council), 27/3/01, p 12536.

this, companies have been able to shift some of the costs associated with a fixed labour force onto contractors, or onto the workers themselves. High numbers of both redundant factory workers and new migrants willing to sew clothes at home has meant that there is a ready and large pool of outworkers.⁹⁷

The Committee further stated that irrespective of the exact numbers of outworkers that there was a sufficient quantity of people involved for “...concern about them to be warranted.”⁹⁸

The Senate Report dealt extensively with many areas of outworking based garment production including: the reasons for the increase in outworking, the scale of outworking, the employment status of outworkers and the chain of garment production (including the role of retail pricing policy). It also dealt at length with: the employment conditions of outworkers; government involvement, with respect to award compliance, taxation and social security benefits; industry co-operation and union action in the area; as well as options for future regulation.

The Committee made 11 recommendations and 7 conclusions. The key recommendations are reproduced below:

- The Committee recommends that the Government examine ways to clarify the employment status of outworkers in the garment industry.
- The Committee recommends that the Government consider reinstating...[a social security]...amnesty for outworkers for a period to allow community groups sufficient time to communicate with outworkers and to persuade them of its benefits....
- The Committee recommends that the Government consider extending the cut-off date for prior employment of the Labour Adjustment Program⁹⁹ to a date in the future to be determined in consultation with the Union.
- The Committee recommends to the Government that in evaluating proposals for expenditure from the TCF 2000 Development Package, consideration be given to the need for outworker projects similar to those carried out recently by the Union.¹⁰⁰
- The Committee recommends that an industry ‘Homeworkers Code of Practice’ should be adopted by all participants in the garment retailing and manufacturing process...

⁹⁷ op. cit. n 3, p 4.

⁹⁸ op. cit. n 3, p xi.

⁹⁹ The Labour Adjustment Program (‘LAP’) provided for assistance for workers following retrenchment (such as assistance in finding alternative employment). There are various industries to which the Labour Adjustment Program applied (including the TCF industry – referred to as the ‘TCF LAP’). The program only applies to those employed prior to 1 July 1994, and the program ceased on 31 August 1996. For the federal response to this recommendation see: *CPD (Senate)*, 3/9/97, p 6357.

¹⁰⁰ Such projects included: promoting deeds of cooperation between retailers and suppliers to protect outworkers (such as the *Target Australia Pty Ltd* Deed of Cooperation with the TCFUA); agreements between the union (TCFUA) and *Country Road* and *Australia Post* and others.

- The Committee recommends that the Government investigate the concept of a National Outwork Committee which would have responsibility...for the initiation and allocation of funding for projects relating to outwork.
- The Committee recommends that the Australian Bureau of Statistics conduct a comprehensive survey of the number of home-based workers across all industries. The ABS should carry out this survey in conjunction with the ATO and information gained from the Reportable Payments System on the number of outworkers.¹⁰¹

Other Recent Publications and Inquiries relating to outwork¹⁰²

- Webber M & Weller S, *Refashioning the Rag Trade: Internationalising Australia's Textiles, Clothing and Footwear Industries*, UNSW Press, Sydney, 2001.
- Evatt Foundation, for the NSW Minister for Public Works and Services, *Reforming Homework: A Statistical Profile and The NSW Code of Practice*, May, Sydney, 1998.
- Mayhew C & Quinlan M, *Outsourcing and Occupational Health & Safety: A Comparative Study of Factory-based and Outworkers in the Australian TCF Industry*, UNSW, 1998.
- Industry Commission, *The Textiles, Clothing and Footwear Industries: Vol 1 Report* Canberra, Report No. 59, September 1997.
- Industry Commission, *The Textiles, Clothing and Footwear Industries: Vol 2 Appendices* Canberra: Report No. 59, September 1997.
- Textile, Clothing & Footwear Union, *The Hidden Cost of Fashion, Report on the National Outwork Information Campaign*, 16 March 1995.
- Textile, Clothing and Footwear Union of Australia, *Outwork: TCFUA report to the Senate Economics Reference Enquiry*, Sydney, 1996.

¹⁰¹ For the Federal Government response to the recommendations see: *CPD (Senate)*, 3/9/97, p 6356.

¹⁰² For a detailed list of other references and resources in relation to outworkers see: <http://www.dir.nsw.gov.au/outworkers/references/>

NSW GOVERNMENT'S REFORM STRATEGY

On 25 March 2001, the Premier announced that the NSW Government will tackle the problem of exploitation of outworkers by implementing a \$4 million dollar plan which includes:

- legislating a code of conduct for the clothing industry (with compliance with the code being made compulsory after 12 months). The code is to be based on the voluntary code of conduct agreed between the TCFUA and the retailers Target and Country Road.
- establishing an Ethical Clothing Trades Council, with representatives from unions, manufacturers, retailers and consumers. The Council will be responsible for reporting on compliance.
- amending the *Industrial Relations Act 1996* to allow the recovery of unpaid wages.¹⁰³

On 29 May 2001, the Special Minister of State and Minister for Industrial Relations confirmed that the NSW budget contained an allocation of \$4 million dollars to implement the outworker plan. The Minister outlined further areas of reform in which the Government would:

- Establish an education program to provide a skilled workforce for the clothing industry and retraining alternatives for outworkers who wish to exit the industry. (\$1.5m over three years)
- Establish an Ethical Clothing Trades Council which will oversee the implementation of mandatory codes of practice by fashion retailers and manufacturers (\$900,000 over three years)
- Enhance the investigative skills of Department of Industrial Relations (DIR) inspectors to deal more effectively with the clothing industry's complex supply chains
- Double the number of bi-lingual inspectors in the DIR's Multilingual Clothing Industry Unit to increase compliance in the clothing industry (\$1.5m over three years)
- Sponsor an industry project to identify ways of reducing the length of the supply chain between the outworker and the retailer. (\$300,000 over three years).¹⁰⁴

¹⁰³ Hon. Bob Carr MP, *Bob Carr and Labor Working for NSW*, mid term-policy speech, 25/3/01, pp 2-3.

¹⁰⁴ Hon. John Della Bosca MLC, Special Minister of State and Minister for Industrial Relations, '\$4 Million Helps Clothing Outworkers', *Media Release*, 29/5/01. The NSW Department of Industrial Relations website and fact sheets outline the Government's reform strategy in detail.

LEGISLATIVE CHANGES

There have been a number of recent legislative changes in NSW in the area of outworkers' employment conditions. The most recent legislation, introduced and passed in December 2001 followed announcements by Premier Carr in March 2001.

Industrial Relations Amendment (Independent Contractors) Bill 2000

This bill was split from the Industrial Relations Amendment Bill 2000 in the Legislative Council on 28 June 2000 – it formed part of the original bill as Part 9A. It has not as yet been passed due to considerable opposition from members of the opposition and cross-bench in the Legislative Council¹⁰⁵.

This bill attempted to introduce changes which strengthened provisions in the Act that allow contractors (outworkers) to be declared to be employees by the Industrial Relations Commission and thereby be able to access their legal industrial entitlements.

The Minister for Industrial Relations at the time stated:

Probably the most significant matter dealt with in the bill is the proposal to adopt the approach of the new Queensland Industrial Relations Act 1999 in giving the Industrial Relations Commission the power to declare that workers who at common law would be held to be independent contractors are employees. This proposal recognises and responds to the growing incidence of work performed outside of the traditional employment relationship of employee and employer. It is essential that a modern system of industrial relations takes account of this emerging employment trend to ensure that the industrial relations system continues to be relevant to, and protects, workers and employers. In particular, this proposal will enable a response to the problem of workers being engaged as independent contractors through various artificial arrangements designed to circumvent the protection and benefits which are justly available to workers who have the status of employees.

The position at present is that unless workers can be categorised as employees rather than independent contractors they are not entitled to the range of industrial entitlements and protection provided to employees under the Industrial Relations Act. However, this sometimes artificial division at law between an employee and other workers whom the law categorises as an independent contractor can often be vague and uncertain in its applications. Under the provisions set out in the bill a Full Bench of the Industrial Relations Commission of New South Wales will be able to make an order declaring a class of persons who perform work as independent

¹⁰⁵ This opposition was in part due to the lack of time to consider the Part in question, as well as due to lobbying by industry groups. *NSWPD* (Legislative Council), 23/6/00, p 7628; *NSWPD* (Legislative Council), 28/6/00, pp 7679 & 7739.

contractors to be employees...An order can only be made on the application of the Minister, a State peak council or an industrial organisation.¹⁰⁶

The Industrial Relations (Ethical Clothing Trades) Act 2001

The *Industrial Relations (Ethical Clothing Trades) Act 2001 (NSW)* was passed on 14 December 2001.¹⁰⁷ Changes essentially target the issue of enforcement/ compliance with the *Industrial Relations Act 1996* in that because of the structure of the industry outworkers are 'invisible' and the chain of employment is not transparent. This lack of transparency makes enforcement almost impossible.

The Minister for Industrial Relations in his second reading speech, identified the current issues facing outworkers and the objectives of the legislation:

The Industrial Relations (Ethical Clothing Trades) Bill is the central element of a package of initiatives that the Government is introducing for clothing outworkers. The objectives of this package are to ensure that clothing outworkers receive all the lawful entitlements that other workers enjoy while generally enhancing the long term viability of the New South Wales clothing industry.

...

The Industrial Relations Act contains a provision deeming outworkers in the clothing trades, however contracted, to be employees. This should be sufficient to ensure that they receive their award entitlements. However, the definition is lacking in legal clarity and its perceived weaknesses are being shamelessly abused.

It is proving extremely difficult to achieve improvements because of the nature of the industry itself. Retailers frequently dictate time and financial constraints that affect the whole supply chain down to the outworkers. Multiple layers of subcontracting often make it difficult to identify who is the employer...The entitlements themselves are contained in a complex matrix of Federal and State award provisions.¹⁰⁸

¹⁰⁶ Hon. Jeff Shaw MLC (the then Attorney General and Minister for Industrial Relations), *NSWPD* (Legislative Council), 2nd Reading Speech, 23/6/00, p 7628. Note: The Australian Industry Group criticised similar provisions within the Queensland jurisdiction. They state: "A particularly disturbing element of the new Queensland laws relates to a provision allowing the State Industrial Relations Commission to declare contractors to be employees and subject to award conditions. Ai Group represented members in a test case relating to this provision. At the same time, Ai Group was successful in securing the deferral of a similar provision from the NSW bill". (Australian Industry Group website: <http://www.aigroup.asn.au/AiGroupAnnualReport/industrial.html#ContractorsStatus>)

¹⁰⁷ Assented to on 19 December 2001. Act No. 128 of 2001.

¹⁰⁸ Hon. John Della Bosca, *NSWPD* (Legislative Council), 11/12/01, p 19959. 2nd Reading Speech.

What the Act does:

Establishment of an Ethical Clothing Trades Council.¹⁰⁹

Under the Act the ECTC is to consist of 7 part-time members appointed by the Minister, which will include one person from each one of several groups nominated by the following organisations: Australian Retailers Association (NSW Division); Australian Business Limited; The Australian Industry Group (NSW Branch); Labor Council of New South Wales; The Textile Clothing and Footwear Union of New South Wales (TCFU); and a consumer or community group. It will also include 1 person nominated by the Minister as Chairperson of the ECTC.¹¹⁰

Functions of the Ethical Clothing Trades Council¹¹¹

- To advise and make recommendations on the clothing industry and outwork practices.
- To promote the Homeworkers Code, the Target Code or any other Code made under the Act.
- To facilitate consultation between industry retailers and industrial organisations with respect to the making and implementation of voluntary industry agreements such as the Target Code of practice.
- To conduct education programs.

Mandatory code of practice

The Act provides that the Minister will be able to implement a mandatory code of practice¹¹² to govern industry conduct in this area, should attempts to implement a voluntary code fail.

The Act also provides for penalties for non compliance with the mandatory code. The penalty is 100 penalty units¹¹³ which is current equal to \$11000.

Amendments to the Industrial Relations Act 1996 (NSW)

The Act makes amendments to the *Industrial Relations Act 1996* (NSW) that change the definition of employee. The new definition is:

(1) General definition

In this Act, employee means:

¹⁰⁹ Section 5 constitutes the Ethical Clothing Trades Council of New South Wales ('the ECTC').

¹¹⁰ Section 6.

¹¹¹ Section 7.

¹¹² Part 3, Sections 11 and 12.

¹¹³ Section 13.

- (a) a person employed in any industry, whether on salary or wages or piece-work rates, or
- (b) any person taken to be an employee by subsection (3).

Omit clause 1(f) of Schedule 1 and insert new definition:

- (f) Outworkers in clothing trades. Any person (not being the occupier of a factory) who performs outside a factory any work in the clothing trades or the manufacture of clothing products, whether directly or indirectly, for the occupier of a factory or a trader who sells clothing by wholesale or retail. (In such a case, the occupier or trader is taken to be the employer).

That Act further makes amendments to the *Industrial Relations Act 1996* (NSW) by inserting sections 127B-127G which relate to claims by outworkers in clothing trades for unpaid remuneration. These sections are intended to assist outworkers in obtaining money owed to them by principals. Section 127B outlines when and how claims can be made; section 127C outlines the liability of an apparent employer for unpaid remuneration; section 127D outlines the liability for actual employer for unpaid remuneration; and section 127E refers to the recovery of moneys owed.

CONCLUSION

There have been consistent efforts made over the past decade to raise public and media awareness of the problem of outworker working conditions. The problem has been recognised and is continuing to be addressed by a variety of stakeholders (including the TCFUA, retailers, manufacturers, *Fair Wear* and others) and legislators. Attempts to solve the problem have been difficult and these have largely stemmed from outwork existing on the fringes of the formal economy. Legislative attempts to address the working conditions of outworkers have been limited, and as noted by Penfold currently “*legal* protection is insufficient in these circumstances, and more is needed if a practical protection is to be afforded. It is necessary, therefore, to look beyond the legal framework for ways to address the problems of outworker exploitation”.¹¹⁴

¹¹⁴

op. cit., n 55, p 86.