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Submission to the Productivity Commission's Draft Report on Childcare and Early Childhood Learning

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- 1. This submission relates to the Draft Report's recommendations on in-home care.**
2. Work performed in the private home has recently been the subject of sustained scrutiny in various national settings¹ and within the International Labour Organisation (ILO).²
3. Domestic workers in the private home present some unique challenges to the maintenance of decent work of a kind acceptable in a civilized state.³ This submission identifies a number of issues central to this challenge. It is submitted that the changes proposed in the regulatory environment to encourage and facilitate in-home child care should not proceed because of these risks or, if they do proceed, a closely aligned regulatory strategy to support decent work for the workforce will be initiated at the same time.
4. First, the labour process and the kinds of workers likely to be undertaking it make it difficult to ensure that appropriate working standards are maintained.⁴ Where the worker lives with the family, empirical evidence suggests that extreme exploitation may arise in relation to the boundaries between work and rest for the domestic worker.⁵ Cases of near-slavery,

¹ See for example South Africa's Sectoral Determination 7: Domestic Worker Sector (binding as of September 2002) made under the Basic Conditions of Service Act. For a complete list of national legislative provisions on domestic work see ILO, *Effective Protection for Domestic Workers; A Guide to Designing Labour Law*, International Labour Office, Geneva, 2012.

² D McCann and J Murray, 'Prompting Formalization through Labour Market Regulation: a "Framed Flexibility" Model for Domestic Work' (2014) 43(3) *Industrial Law Journal* 319.

³ ILO, Decent Work for Domestic Workers, Report No IV(1) at the International Labour Conference, 99th Session, 2010, Fourth Item on the Agenda, International Labour Office, Geneva, 2010.

⁴ N Ghosheh, 'Protecting the Housekeeper: Legal Agreements Applicable to International Migrant Domestic Workers' (2009) 25(30) *International Journal of Comparative Labour Law and Industrial Relations* 301.

⁵ D McCann and J Murray, 'The Legal Regulation of Working Time in Domestic Work', Conditions of Work and Employment Series No 27, International Labour Organisation, Geneva, 2010.

where every waking hour of the worker is consumed by their domestic tasks, have been identified and, in some countries, prosecuted under civil and statutory codes.⁶ The home setting also means that there are risks of violence and harassment that may be difficult to detect and police. In part, these problems are exacerbated by the intensely personal relationship between the worker and the family engaging their services. Migrant workers would be especially vulnerable.

5. The second problem is that the definition of appropriate labour standards in pay, working time, leave, collective voice etc may be under-developed (and 'under-imagined') compared to those applying in traditional workplaces. The importation of migrant labour to fill in-home child care jobs risks the creation of an underclass of nannies who are excluded from the minimum standards applying to other workers in Australia. The particular problems of live-in workers mean that non-traditional labour standards need to be considered, including issues to do with access to private space, telephone and internet access and defined time away from the family. Migrant in-home workers may require access to the recognized necessities of such international labour, including assistance with repatriation of funds if this is required, information on migration rights and working rights and obligations in language suitable to the worker. All domestic workers are vulnerable to breaches of fundamental human rights and liberties in ways not often evident in traditional workplaces.
6. The third problem is that even if an appropriate catalogue of minimum labour standards is identified and legally enacted, knowledge of these standards and the monitoring and enforcement of compliance are particularly difficult to ensure for workers whose workplaces are private homes. Even fundamental issues like record keeping of hours and wages and other entitlements will be difficult to establish to a suitable standard in the household setting. Private families are not organized into employer associations, and the only emergent intermediary bodies in civil society are those businesses aiming to provide 'nanny agency'-type services. The family home is traditionally hidden to the kind of labour inspection systems designed around the public workplaces like offices and factories. Traditional systems of worker representation are difficult to foster where the workers are isolated and perhaps from non-English speaking backgrounds. This means that the traditional concept of collective bargaining, which is still the central means of access to appropriate working conditions under the Fair Work Act, is unlikely to be a reality for in-home workers. The need to foster effective collective voice and networking opportunities amongst an in-home workforce could be addressed through innovative regulatory forms utilized

⁶ V Mantouvalou, 'Servitude and Forced Labour in the 21st Century: the Human Rights of Domestic Workers' (2006) 35(4) *Industrial Law Journal* 395. See for example *Mustaji v Tjin* 25 BCLR 220; (1996) CanLii 1907 (BC CA).

by the European Union, which should be considered if the Commission's proposals are accepted by Government.

7. A number of the issues raised above are addressed in terms of minimum standards by the International Labour Organisation's Convention on Domestic Work (Convention No 198), created in 2011. The Australian Government has indicated it will not ratify the Convention. This decision, if it remains current, cannot be sustained is a major recalibration of the child care system is engineered to foster in-home care of the kind provided by workers which this Convention seeks to protect.