FairWear Campaign

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Submission to

Senate Education, Employment and Workplace Relations Committee

Inquiry into the Fair Work Bill 2008

1. Context and focus of this submission

1.1 This submission is written on behalf of the Queensland branch of the FairWear Campaign, a community organization convened to lobby for an end to exploitation of outworkers in the Australian textile, clothing and footwear industry (TCF industry).

1.2 Our concern for outworkers has stemmed from the shameful prevalence of exploitative working conditions in this sector, and the complex arrangements through which they are employed that ensure *obscurity* of their plight, *ambiguity* of legal entitlements and *impunity* of the industry against legal recourse.

1.3 We believe that outworkers provide a litmus test for fairness in the industrial relations system. However, our concerns are not limited to those of TCF outworkers, but are for fairness, safety and dignity for all workers. While it is necessary at times to specify conditions and contexts for particular provisions, a system that accommodates TCF outworkers only by making numerous specific exceptions on their behalf risks creating opportunities for exploitation around the margins of definitions to which the exceptions apply. A system that provides entitlements but inadequately addresses the realities of monitoring and enforcement will be ineffectual, and will enable exploitation with impunity.

1.4 Increasing outsourcing in supply chains, and increasing complexity and diversity in corporate and employment arrangements within the chains, are features of our economy that need to be anticipated and accommodated in the industrial relations framework. To the extent that these arrangements represent beneficial specialization and entrepreneurship, they should not be impeded by regulation. However, it is evidently too often the case that they are used to divest responsibility of the commissioning party for either workers' entitlements and safety or for environmental impacts. A robust industrial relations system must ensure that minimum entitlements apply to all workers, regardless of their employment circumstances, and that responsibility for these entitlements is transferred through the supply chain to ensure that no economic advantage can be gained by avoidance.

2. Summary of specific concerns relating to the draft Bill

2.1 We appreciate that it is the intention of the Fair Work Bill to protect TCF outworkers. However, we have a number of concerns that *the Bill, as currently drafted, may diminish entitlements or the ability to enforce them* in ways that are not intended. It is the purpose of this submission to highlight these problems and suggest remedies.

2.2 Our concerns lie principally in the following areas, which will be expanded on below:

1. definition of outworkers and their deeming as employees;

2. applicability of the outworker provisions in modern awards to all entities in the supply chain, including those who do not directly employ outworkers and may not be aware of outworker engagement on work given out, and regardless of the operation of enterprise agreements or individual flexibility arrangements;

3. enforcement of entitlements by permitting proactive scrutiny at all points in the supply chain, which currently is only done by the relevant industrial union and requires union access.

3. Definition and deeming:

3.1 According to our reading of Section 12 of the Bill, *the definition of outworker* includes those who may be defined as independent contractors in the TCF industry, but *does not include workers outside the TCF industry*. We believe that the definition should not be limited to the TCF industry, but should reflect the full breadth of activity recognized in the ILO Convention on Home Work.

3.2 Currently South Australia and Queensland both have broader definitions of outworkers. Introduction of the Federal Fair Work Bill, unless amended, will override protection of some outworkers in those States.

3.3 We recommend a definition modeled on that used in South Australia (section 5 of the Fair Work Act 1994 (South Australia) (as amended)).

3.4 We further request that the Bill be amended to include explicit deeming of all outworkers to be employees, regardless of the type of arrangement governing their engagement. Such deeming is necessary to clarify the applicability of provisions under awards.

3.5 The Labor Party committed to federal introduction of such deeming, in the lead-up to the 2007 Federal election (Resolution 133R, ALP National Conference, May 2007, 32; Australian Labor Party, National Platform and constitution (2007) Chapter 7, 109).

3.6 The States of Queensland, South Australia, New South Wales, Tasmania and Victoria have all deemed outworkers to be employees, for the purpose of industrial relations mechanisms in the State jurisdiction.

3.7 It is our concern that the new modernized Federal Awards, which will refer to the Bill for definitions, will override State jurisdictions and may consequently limit the applicability of outworker entitlements.

3.8 Section 27 of the Bill, which preserves State and Territory laws relating to outworkers, is limited by the Bill's own definition of outworkers, and thus fails to preserve the full breadth of protections currently existing in State and Territory jurisdictions. This may be corrected by an amendment to Section 27, to ensure that State and Territory Acts continue to operate in respect of all outworkers, as defined in those particular Acts. Or it may be resolved by ensuring that the definition of outworkers in the Bill is at least as broad as the broadest currently used in any State or Territory.

3.9 We further object to the definition of an 'outworker entity' in Section 12 of the Bill, which may be used to limit application of outworker terms of awards to those entities which directly employ outworkers, or where work given out 'is reasonably likely to be performed by outworkers' (Section 140(1)(b)). In fact, TCF Award obligations apply (and should continue to apply) whenever work is given out, regardless of whether an outworker is engaged. The use of the term 'outworker entity' should be removed from the Bill, and where necessary, replaced by 'entity giving out work'.

4. Applicability of outworker provisions throughout the supply chain.

4.1 To emphasize the importance of this issue, two points need to be made:

a) Outworkers, particularly those in the TCF industry, are most commonly paid on a piecework basis, rather than for their time. Consequently, to determine whether their terms of employment are comparable to those of salaried employees doing similar work (which is the intention of the award), consistent and complete documentation is required of workloads over time.

   Documentation held by direct employers can only be verified by reference to documentation from the entities contracting the work to them. Likewise, the existence and location of outwork activity can only be determined if the contracting chain can be traced from the top down. Without such transparency throughout the contracting chain, neither award compliance nor OHS compliance can be monitored.

b) The driving force generating exploitative and abusive employment conditions is the impunity available to entities by separating themselves from those who actually employ the workers. The economic advantage gained by entities that divest themselves of employer obligations penalizes their more ethical competitors, and drags standards down across the industry. This situation can only be remedied if responsibility for employment conditions is explicitly preserved in the contracting out of work.

   The Codes of Practice which have evolved in the TCF industry (the voluntary Homeworkers' Code of Practice operating nationally, and mandatory codes now in force in NSW and South Australia, and being introduced in Queensland) require parties to exercise this responsibility through the obligation to keep appropriate records of work given out, to provide them for scrutiny, and to take remedial action against a supplier if they are shown to have breached their obligations.

4.2 For the reasons given above, the outworker terms of the TCF award specify not only the entitlements of outworkers, but also the obligations of their employers, and of those giving out work to their employers, to keep and provide appropriate records.

Responsibility for employment is recognized through the facility for outworkers to claim unpaid dues up the supply chain.

4.3 The operation of these mechanisms for outworker protection relies on industrial relations law to ensure transparency of the supply chain by regulating the giving out of work, regardless of who will actually perform the work.

4.4 *We are concerned that the Bill, as currently drafted, may break transparency by allowing certain entities within the supply to be excluded from operation of outworker terms under awards*. Firstly, if an award does not apply to an employer where an enterprise agreement is in operation (Section 57), it is not clear whether outworker terms of the award can be applied to that employer for work given out. Secondly, where an entity is giving out work but does not consider this work to be 'reasonably likely to be performed by outworkers' (Section 140(1)(b)), it would appear that the outworker terms of the award do not apply, regardless of whether the work is actually carried out by outworkers or not.

4.5 Finally, the TCF Award stipulates that a Principal who gives out work must be registered with a Board of Reference (Clause D.2.1), and provides for the establishment and powers of the Boards of Reference (Clause D.5). Registration of entities is an important measure to ensure that obligations are understood and monitoring is enabled. However, the ability of awards to prescribe the establishment and operation of Boards of Reference is not explicitly given in the Fair Work Bill, and it would be preferable if this capacity were explicitly included to put the issue beyond doubt.

5. Enforcement of obligations requiring union right of entry.

5.1 The draft Bill describes and limits union right of entry to workplaces, for the purpose of meeting with workers and for the purpose of investigating possible breaches of law, in relation to employment entitlements and OHS. The Workplace Relations Amendment Bill 2005 (Workchoices legislation) limited union right of entry in a number of ways. Despite the Government's pledge to 'rip up Workchoices', the Fair Work Bill does not restore pre-existing access.

5.2 *We argue that the limited right of entry provisions completely emasculate the Bill's capacity to protect outworkers, and severely limit protection of other TCF workers*.

5.3 Previous Government inquiries have acknowledged that a grievance-based system for enforcement cannot work for outworkers, as these workers generally lack knowledge of their entitlements and avenues for complaint, and are often fearful of authorities or intimidated by employers. Only proactive monitoring will bring breaches of their entitlements to justice.

5.4 The Federal Government must acknowledge that it does not provide, and has shown no intention of providing, any mechanism for proactive monitoring of this industry. While some State Government authorities have made some efforts in this regard, almost all effective monitoring to date has been implemented by the TCFUA. This work is a community service, not limited to members of the union – indeed very few outworkers are union members. Without the proactive work of the TCFUA, those measures which have been taken by various levels of government for the protection of outworkers are unlikely to have been initiated.

5.5 By maintaining many of the right of entry restrictions introduced by Workchoices, the Government is affirming the Howard Government's view, that unions act principally to frustrate the interests of employers. This is contrary to the evidence, that unions play a vital role in enforcing the Australian industrial relations system, and that restrictions on unions introduced under Workchoices have directly prevented the enforcement of legal instruments. The Bill falls short of Australia's international obligations under ILO conventions, including freedom of association and rights of workers to access their industrial union.

5.6 We applaud the restored provision, under the Bill, for union representatives to inspect records of non-union members. This is absolutely essential for monitoring TCF supply chains.

5.7 We object strongly to the following restrictions on union representatives to exercise permits to enter premises:

5.7.1 That a permit-holder may only enter premises for the purpose of investigating suspected legal breaches where a member of that union is working at the premises.

- The requirement for union members to identify themselves as such to their employer is a breach of their privacy. Reprisals against such employees by their employer have been documented and constitute a real and considerable threat. It is unconscionable that vulnerable workers in precarious employment must be identified to their employer as a complainant in order for their allegations to be investigated.

- Documents concerning the employment of workers are not always kept at the place of their employment. This is particularly so in relation to outworkers. Indeed, there may be no employees, or no potential members of the union, at the premises at all. As mentioned above, monitoring requires inspection of records of all entities in the supply chain. It is not possible to monitor the supply chain, if access is limited to those sites where a union member may be identified as working.

- The union often receives anonymous reports of breaches and requests for assistance, where it is not possible to determine whether the requester is a member or not.

5.7.2 That a permit-holder may not enter any part of premises that is used mainly for residential purposes.

- Outwork is frequently carried out in rooms or garages that are part of residential premises (as acknowledged in the definition of outworker in Section 12 of the Bill). The union is only interested in entering the part of the premises which is used for work purposes, but this may be difficult to ascertain before entry.

- Also, on many occasions the TCFUA have found residential dwellings that have been turned entirely into factories which are running as sweatshops, as well as extensive operations being set up in garages of residential premises.

- It is relatively easy for operators to move work locations within premises in order to frustrate the right of entry provision.

5.7.3 That a permit-holder must give 24 hours written notice before exercising a right of entry.

- Under State legislation in NSW and Queensland, no notice is required to enter premises to investigate a suspected breach of OHS legislation. The Bill would undermine this existing protection.

- The TCFUA has documented many cases where the notice period has been used to frustrate the purpose of right of entry, by removing records, removing items in breach of OHS requirements, absenting workers, or transforming the area into one that is apparently used for residential purposes. In contrast, among the thousands of instances where TCFUA has used right of entry without notice, no complaint has been raised about their conduct.

- It is unclear why 24 hours notice should be required in any instance, other than to allow proprietors to avoid legitimate scrutiny of their operation.

5.8 We note the comments of the Minister for Workplace Relations, during her speech at the second reading of the Bill, indicating that the Government may consider widening right of entry provisions in the TCF industry. The special consideration given to this sector indicates recognition of the serious breaches of employment and OHS standards that prevail across the industry, not only in relation to outworkers but in factory and sweatshop environments, and the vital role played by the TCFUA in addressing these breaches. We welcome this acknowledgment, and entreat the Government to act on it.

5.9 We request that, at least for the TCF sector, there be

a) no requirement for a member of the union, nor a worker who is a potential member, to be present at the premises;

b) no restriction on entry to premises that are 'mainly for residential purposes';

c) no requirement for 24 hours notice of entry.

We thank the Committee for the opportunity to express our concerns about the Fair Work Bill, and trust that these concerns will be addressed as the Bill is debated and amended.

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