FAIR WORK AMENDMENT (TEXTILE, CLOTHING AND FOOTWEAR INDUSTRY) BILL 2011

Submission of the National Retail Association Limited

to

the Senate Education, Employment and Workplace Relations Committee

January 11, 2012

Introduction

As far as we are aware there has been no consultation with industry about the changes included in the proposed legislation. In any event there has been no consultation with the National Retail Association. This is surprising because one of the stated objectives of the Bill is to enable "a TCF outwork code to be issued". A number of NRA members, and the majority of national retail chains, are already voluntary participants in an existing code, the *National Retailers Ethical Clothing Code*.

As far as we are aware there has been no discussion with the retail sector about the effectiveness of the current code. It comes as a surprise that the need for the proposed legislation is, in part, justified by the need for the introduction of a new code.

The apparent lack of consultation is exacerbated by the limited amount of time allowed for submissions to the Senate Committee in response to the Bill.

The Bill was introduced on November 24, 2011, and referred to the Senate Education, Employment and Workplace Relations Committee on November 25, 2011. The Committee has set a deadline for submissions of January 11, 2012.

It is very difficult to adequately engage with retailers during the peak trading season and consultation with the sector about the content of the Bill and the implications arising from the Bill is accordingly limited by the deadlines set. Given the forthcoming review of the Fair Work Act, it is submitted that the prudent course would be for this Bill to be deferred and included as part of the general review.

Objectives of the Bill

According to the Explanatory Memorandum, the objectives of the Bill are to:

- *extend the operation of most provisions of the FW Act to contract outworkers in the TCF industry*
- *provide a mechanism to enable TCF outworkers to recover unpaid amounts up the supply chain*
- *extend specific right of entry rules that apply to suspected breaches affecting outworkers (which allow entry without 24 hours notice) to the industry more broadly , with an exception for the principal place of business of a person with appropriate accreditation (to which the standard right of entry rules would apply)*
- *enable a TCF outwork code to be issued.*

NRA has an interest in all of these matters. NRA opposes the Bill in its entirety. NRA submits that the Bill should be withdrawn or not proceeded with.

Current Protections

The current Bill is introduced notwithstanding the current operation of extensive provisions applicable to TCF outworkers. Current protections for outworkers are provided by the Fair

Work Act, the modern Textile Clothing and Footwear Award, and the National Retailers Ethical Clothing Code to which most of the national retail chains are signatory.

We have not sighted the evidence that establishes that the current protections are not adequate or reasonable. Nor are we convinced, given the complex and convoluted nature of the remedies proposed by the Bill, that much practical good will come as a result of the legislation if implemented.

Modern TCF Award

A new Federal Award covering the Textile, Clothing, Footwear and associated industries has been effective since 1January 2010 along with the new National Employment Standards (NES).

In addition to providing a basic safety net for factory workers, the Award has components which specifically focus on protecting the rights and entitlements of outworkers.

Fair Work Act

The Act already includes extensive provisions which provide additional protections for TCF outworkers. We question the need for further changes to be made to the Act so soon after the commencement of the new legislation.

National Retailers Ethical Clothing Code

Many retailers, particularly our national retail chains, have over many years actively supported an ethical Australian textile, clothing and footwear industry by becoming a retail signatory to the *National Retailers Ethical Clothing Code* which is administered by Ethical Clothing Australia. By participating in this Code, retailers play a key role in efforts to ensure transparency in the industry.

Under the Code retail signatories are required to provide details twice a year of their Australian textile, clothing and footwear suppliers and ensure they are complying with the relevant Award provisions and laws. In providing the details of their suppliers, retail signatories are committing to take appropriate action if they are provided with evidence from the Textile Clothing and Footwear Union of Australia that any of their suppliers are not meeting their legal obligations.

It is disappointing that, despite the existence of a long running voluntary code, there has not been any consultation with the relevant parties about this proposed legislation.

The Proposed Changes

The changes proposed in the Bill are very complex, difficult to understand and further complicate existing provisions which extend and distort traditional industrial relations concepts of “employer”, “employee”, and “independent contractor”.

Small retail businesses in particular will find it extremely difficult to comprehend the expanded outworker laws. The Bill proposes to make already complex legislation more

complex and probably will make already unworkable legislation more unworkable. The bill will when read in conjunction with the existing legislation include a potpourri of industrial principles and concepts jumbled together randomly to create a myriad of new legal concepts and principles associated with employment arrangements. This would suggest that costly litigation is inevitable if enforcement proceedings are instituted.

New employment arrangements embodied in the proposed law:

The proposed new law will result in:

- award workers deemed as either employees or independent contractors, (Section 483A, Section 789BB, Section 789BC)
- independent contractors will be deemed employees (Section 789BB)
- new concepts of "deemed employers" and "deemed employees" (Section 789BC)

The propose new law would also institute new meanings or new "labels" for employment arrangements and for employers:

- We have the concept of work being performed "directly" or "indirectly" for "deemed employers" or "outworker entities"
- We have work being performed for "responsible persons"
- We have work being performed for "indirectly responsible entities"

Additionally the proposed laws purport to regulate the arrangements between one employer and another employer. This is illustrated in a number of areas including in section 789CE where *"indirectly responsible entities may recover underpayments from responsible persons"*, and is an inherent and underlying aspect associated with the convoluted supply chain legislation.

NRA is opposed to the Bill because:

- It purports to establish a prohibition on all forms of legitimate "independent contracting" in the TCF industry.
- It wants to allow retailers to be sued for breaches of the law committed by unrelated entities.
- Wthout consultation or developed reasons, it wants to introduce a new mandatory code which will replace an existing voluntary code
- It wants to allow unions to enter the premises of bone fide independent contractors without notice.
- The proposed amendments are expressed in vague, convoluted and confusing language.

- There is no compelling evidence justifying the need for the radical changes proposed.

- Many of the proposed provisions may be extremely difficult or incapable of enforcement and will enforcement activity will inevitably give rise to very costly litigation.

Retailers May be Sued for Breaches Committed by Unrelated Entities

A number of new and radical provisions are included in the Bill for the purpose of establishing a retailer's liability for breaches of the TCF Award or the Fair Work Act that are committed by entities unrelated to the retailer. In order to try to get someone to pay for alleged underpayments of outworkers, the Bill in an almost capricious manner, casts a net over the entire supply chain and lays responsibility for outworker underpayments on literally everyone involved in the supply chain, including the retailer.

The explanatory memorandum in dealing with the proposed new section 17A states as follows:

18. The effect of the item is that, in circumstances where there is a chain or series of two or more arrangements for the supply or production of goods produced by TCF work, a person performs work directly for the person who employs or engages the person to perform work. A person performs work indirectly for every other person who is a party to any of the arrangements in the chain or series of arrangements that led to the performance of the work (whether that person is one, two or more arrangements removed from the performance of the work).

The use of such convoluted language in the explanatory memorandum underscores the difficulties that will be experienced by everyone in comprehending, rationalising and interpreting the proposed new legislation.

Section 789CA(5) of the Bill attempts to clarify the exposure of retailers to be responsible for the errors, omissions, or breaches of others in the supply chain. This section says:

> *Retailer of goods not an indirectly responsible entity in certain circumstances*
>
> *(5)If:*
>
> *(a) a Commonwealth outworker entity, as a retailer, sells goods produced by the TCF work; and*
> *(b) the entity does not have any right to supervise or otherwise control the performance of the work before the goods are delivered to the entity;*
>
> *the entity is not an **indirectly responsible entity** in relation to the TCF work.*

It is a matter of serious concern to NRA that this proposed section provides only limited protection for retailers. The section deems retailers not to be the "indirectly responsible entity" only in certain circumstances.

Those circumstances are where the retailer does not have any right to supervise or otherwise control the performance of the work before the goods are delivered to the retailer. However neither the legislation or the explanatory memorandum provides any guidance about how the terms "supervise" or "control the performance of the work" should be read in the context of the proposed law. We refer in particular to the attempt to cover the entire supply chain in searching for an indirectly responsible entity and the failure of the proposed legislation to comprehend the range of commercial arrangements and conditions in place which regulate the supply chain and ensure that the goods supplied meet all the relevant specifications.

The legislation does not deal with circumstances where the TCF work is performed under strict specifications from the retailer. It may be that the articulation or documentation of these specifications may be considered to amount to a "control over the performance of the work".

It is submitted that the legislation should completely exclude retailers from liability. This is particularly relevant for retailers who have voluntarily agreed to comply with the current outworkers code under which they commit to a range of outcomes in terms of the operation of the supply chain and the performance of work by outworkers.

The contents of the bill are explained by the explanatory memorandum in the following terms:

New Division 3 – Recovery of unpaid amounts

61. New Division 3 will provide TCF outworkers with a mechanism to recover an unpaid amount from an indirectly responsible entity further up the supply chain in circumstances where the person who is responsible for doing so has not paid the outworker.

62. A TCF outworker may recover the unpaid amount if the TCF work was performed indirectly for a Commonwealth outworker entity and, if the entity is a constitutional corporation, for the purposes of a business undertaking of that corporation.

63. As long as the entity is in a chain or series of arrangements for the supply or production of the goods and the relevant TCF work has the requisite connection to the Commonwealth outworker entity, the entity will be an indirectly responsible entity. There can be more than one indirectly responsible entity in relation to a particular unpaid amount.

The creation of an obligation in these terms is unacceptable in our view. The proposition that liability is created by a retailers participation "in a chain or series of arrangements for the supply or production of goods" is in our view completely untenable.

The Explanatory Memorandum suggests that the intention is to provide a mechanism up the supply chain to recover underpayments *"in circumstances where the person who is responsible for doing so has not paid the outworker".*

This in our submission is where the obligation should end.

However as the Explanatory Memorandum says the Bill allows an outworker to recover underpayments from an entity as long as the entity is in a chain or series of arrangements for the supply or production of goods and there is a connection to the retailer.

Further the legislation facilitates the direct targeting of the retailer by the outworker by stipulating that the claim can be made against the retailer as long as the outworker "has taken reasonable steps to get the responsible person to pay the unpaid amount". The explanatory memorandum deals with the matter in the following terms:

64. The primary liability to pay the TCF outworker remains with the person (the responsible person) who employed or engaged them. However, if the TCF outworker has taken reasonable steps to recover the unpaid amount from that person without success, they may initiate proceedings in reliance on these new provisions.

The Act does not indicate what "reasonable steps" amounts to but the Explanatory Memorandum indicates:

Further the proposed legislation provides that:

> *75. However, new subsection 789CB(2) provides that the indirectly responsible entity is not liable to pay the unpaid amount to the TCF outworker unless the outworker has taken reasonable steps to recover the unpaid amount from the responsible person. Whether steps taken will be considered reasonable will depend on the particular circumstances, including the circumstances of the TCF outworker (including language or other difficulties they may face) and whether there are any difficulties in locating the responsible entity.*

The explanatory memorandum's attempt to clarify the operation of the proposed act provision appears quite inadequate. On one particular view, if the outworker believes they have been underpaid, but has poor English language skills and therefore has some difficulty in locating the responsible entity, the outworker is entitled to make a claim against the retailer.

But how is the retailer in any position to deal with the matter. How does the retailer know what the outworker was paid, how many hours were worked, whether the alleged breach is genuine or contrived.

NRA submits that the proposed legislation is flawed and may be incapable of enforcement. It attempts to impose completely unacceptable burdens on retailers and should be rejected.

The fact that the legislation allows the retailer to try to recover the underpayment from the "responsible person" offers little comfort. The prospects of the retailer successfully recovering in circumstances where the outworker has failed are considered low, but in any event the cost of recovery will be significant.

> *79. A note to this section alerts readers to the fact that the indirectly responsible entity has a right to recover an equivalent amount from the responsible person under new section 789CE.*

It is we submit completely untenable that a retailer should be responsible at law for the errors or omissions or mistakes of unrelated entities along the supply chain.

Proposed TCF Outwork Code

In addition to endeavouring to make retailers liable for breaches committed by unrelated entities, the Bill foreshadows the implementation of a Code that may impose additional obligations on retailers.

Further, it is proposed that the Code have the force of law and it will prevail over, in the event of inconsistency, an enterprise agreement, a workplace determination and an agreement based transitional instrument.

Hence, the Bill proposes that, for the TCF sector, regulation of the industry may emerge in a multiplicity of ways – it may occur through the operation of the TCF Award, it may operate via the terms of an enterprise agreement, it may arise under the Fair Work Act because of the vague connection through the supply chain series or arrangements, or it may arise as a result of the operation of a new "code". In our submission this regime imposes completely unnecessary layers of regulation which will cause considerable difficulty and add significantly to costs of compliance.

The Bill is vague in terms of what content might be included in the code. Section 789DB says that the code might include but not be limited to the following:

- *record keeping requirements*
- *reporting on compliance with record keeping requirements or on compliance with other requirements of the code*
- *general matters relating to the operation and administration of the code.*

The Bill also says that the Code must not specify wages or other entitlements for the TCF outworkers.

Based on the terms of the Bill and the explanatory memorandum it is difficult to envisage what the Code may cover other than matters relating to record keeping requirements.

Given the operation of the current voluntary code and the failure of the Bill to identify any compelling need for legislation, NRA questions the need for new regulation in this area.

Some states have converted the voluntary code which applies to major retailers to mandatory prescriptions under state law. This we submit has been an inappropriate approach. It is not appropriate to take a series of obligations which have been voluntarily imposed by large businesses and presume that they should be imposed on small businesses. Small businesses simply do not have the resources to manage such obligations. Our submission to the current review of the mandatory Queensland Outworkers Code is relevant. A copy of this submission is attached.

The Queensland Code in our view imposes excessive and unsustainable obligations, particularly on smaller retailers. It would be a matter of grave concern if this state code, and other similar state codes, were to be relied upon to support the introduction of a mandatory national code.

Right of Entry

The Bill seeks to expand the current right of entry provisions applicable to TCF outworkers. The Bill wants right of entry provisions extended to *"individuals who, for the purpose of a contract for the provision of services, performs work that is covered by a TCF award*".

The effect of this change, if implemented, would be to allow union officials to enter the premises of a bone fide independent contractor, without providing any notice, and allow the union official to interview any person, inspect any work, and read and make copies of records and documents that are relevant to the suspected breach. NRA opposes the granting of rights to union officials to enter the premises of bone fide independent contractors.

The Explanatory Memorandum suggests that the amendments are necessary "to enable effective entry rights in relation to sweatshop premises in the TCF industry". The paragraph of the Explanatory Memorandum is set out below:

23. Items 38-53 make amendments to the right of entry provisions of the FW Act. These amendments are designed to enable effective entry rights in relation to sweatshop premises in the TCF industry.

But there is no definition of what is meant by "sweatshop" premises in the act. Nor is there any substantive attempt to differentiate between "sweatshop" operations and legitimate, fair and productive independent contract arrangements.

In what is considered a very convoluted process, the bill does purport to limit the right of entry in respect to "accredited persons". In order for a person to be accredited an application will have to be made to a particular "person or body" and the applicant will have to secure the endorsement of a union and an employer organisation.

NRA is opposed to the establishment of convoluted and elaborate processes requiring bone fide independent contractors to secure an accreditation and union endorsement in order to operate their businesses.

Finally NRA notes that there does not appear to have been any attempt to examine existing genuine independent contract arrangements and to evaluate the impact of the proposed legislation on existing arrangements.

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