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12 January 2008

Committee Secretary Senate Education, Employment and
Workplace Relations Committee
Department of the Senate
PO BOX 6100
Parliament House
Canberra ACT 2600

By email: eewr.sen@aph.gov.au

Dear Committee Secretary,

Please find enclosed the submission of the FairWear campaign to the Senate Education, Employment and Workplace Relations Committee Inquiry into the *Fair Work Bill 2008*.

Kind regards,

Liz Thompson

FairWear Victoria Campaign Co-ordinator
(on behalf of FairWear)

1. The FairWear campaign was launched in December 1996 in Melbourne. FairWear is a nationally incorporated body with individually auspiced state bodies. Our NSW organisation is auspiced by Asian Women at Work, NSW, and in South Australia by the Working Women's Centre, both of which have worked with clothing outworkers prior to the inception of FairWear. In Victoria the Uniting Church provides some auspicing and support and in Brisbane the FairWear committee includes representatives from Oxfam and Catholic Social Justice Council. The FairWear campaign is a coalition of churches, community organisations and unions. Over 30 organisations are involved nationally. The FairWear Campaign addresses the gross exploitation of workers who make clothing at home in our Australian community.

2. FairWear is a consumer campaign, encouraging and supporting consumers to organise for better conditions for the workers who make their clothes, and for greater consumer choice in ethical clothing. It is also a workers rights campaign, providing education, training and advocacy to clothing outworkers to help them better understand and organise for their workplace rights.

3. The ongoing necessity and relevance of our campaign was again highlighted when the Victorian Ethical Clothing Trades Council (2004) found a disturbing lack of compliance by many Victorian companies in meeting the minimum levels of lawful entitlements of clothing outworkers. Over the past twelve years the following state and federal inquiries, research papers and reports have consistently found that outworkers, who despite significant declines in recent years are still currently estimated to number in the tens of thousands, are criminally underpaid, and are not receiving their entitlements to superannuation, workers compensation for injury, or holiday leave. These include:

   Inquiries
   • Senate Inquiry into Outwork in the Garment Industry 1996
   • Industry Commission Inquiry, The Textiles, Clothing and Footwear Industries 1997
   • NSW Legislative Council Standing Committee on Law and Justice, Inquiry into Workplace Safety 1998
   • Review of Senate Inquiry into Outwork in the Garment Industry 1998
   • NSW Pay Equity Inquiry 1998
   • Full Bench AIRC Decision on Outworker Clauses in Clothing Award 1999
   • Victorian Government Inquiry into Clothing Outwork 2002
   • Family and Community Development Committee Inquiry into the Conditions of Clothing Outworkers in Victoria 2002
   Research
   • Mayhew and Quinlan, "Outsourcing and Occupational Health and Safety: A Comparative Study of Factory Based and Outworkers in the Australian TCF Industry", Sydney Industrial Relations Research Centre, University of NSW, 1998
   • Cregan Christina, "Home Sweat Home", Melbourne University, 2001

• Cregan Christina, “Outworker narratives: stories of despair” Melbourne University, 2002
• Sue Scull, “Vietnamese Outworkers in Queensland, Exploring the Issues” Boilerhouse, University of Queensland, 2004

Reports
• Hidden Cost of Fashion - Outworkers tell the real fashion story TCFUA 1995
• Homeworkers Code of Practice - an Industry wide voluntary scheme of monitoring the supply chain from the retailer to the homeworker 1996
• Behind the Label Issues Paper (NSW Government) 1999
• The story of the No Sweatshop label - Homeworkers Code Committee 2000
• 12 month Report of the NSW Ethical Clothing Trades Council 2003
• 12 month Report of the Victoria Ethical Clothing Trades Council 2004

4. FairWear has extensive knowledge not only of the workings of the Textile Clothing and Footwear (TCF) supply chain, but of the extent of community expectation of serious government action to protect the vulnerable workers within it. Our recommendations are a reflection of the concern expressed by school communities, faith communities, women’s organisations, community health networks, ethnic affairs organisations and individuals to our organisation and its networks over 12 years of campaign work on this issue at a state and national level. They are an expression of not only the obvious desire expressed at the last federal election for a fairer workplace relations system, but of the particular expectation of enforcement and compliance action to protect outworkers and vulnerable migrant workers. The Australian community expects the government to do more to protect the most vulnerable workers, and at the very least it expects that the government will not act to frustrate the work of the only consistent enforcement and compliance agency acting at a national level to protect outworkers: the Textile Clothing and Footwear Union of Australia.

5. FairWear recognises that the Federal Labor Government is giving particular attention to the problem of protecting vulnerable TCF workers, but nonetheless has concerns about certain provisions of the Bill and their capacity to substantially undermine this goal in practice.

6. FairWear supports specific protections for workers in the Textile Clothing and Footwear industry, in recognition of their particular vulnerability as predominantly migrant women workers, as flagged by the Minister. Numerous Senate inquiries, Federal reviews, and Australian Industrial Relations Commission and Federal Court decisions have recognised the particular exploitation that takes place in the complex web of interconnected subcontracting relationships that characterise the organisation of work in this area.

7. The distinction between exploitative and non-exploitative forms of work in TCF is not to be drawn in regards to where work is performed in the industry – as if only outwork in the home is exploitative. This is an industry in which Award breaches

are the norm, not the exception. Exploitation exists in a continuum. The more useful distinction to be drawn is between the organised and unorganised sections of the workforce. At the least exploitative end is where there is higher risk of compliance action and enforcement, at the other end is the most hidden sections of the industry.

8. Large sections of the industry organise production in ways which systematically disempower employees and prevent any collective organisation of workers in defence of even supposedly basic entitlements, which restrict as much as possible the capacity of the TCFUA to represent and defend such workers, and which make extremely difficult any effective enforcement of entitlements, even in cases where employers have explicitly entered into agreements to abide by the relevant Award. The use of particularly vulnerable people as outworkers is only one of the strategies deployed by many TCF employers to create a controllable, exploitable, easily disposable ("flexible") workforce.

9. In her Second Reading speech, the Hon. Julia Gillard MP recognised that the specific nature of the industrial practices common within the TCF industry warrants a series of measures particular to these employment situations: "The Government is aware that outworkers are an acutely at-risk sector of the Australian workforce and require special protections, so the Bill ensures that Awards may include special provisions dealing with outworkers. I also flag the Government's intention to carefully examine the provisions of the Bill concerning right of entry to investigate breaches of entitlements to ensure the Bill provides an effective compliance regime for at-risk workers in the textile, clothing and footwear industry. The Government will seek necessary refinements to the Bill concerning this matter through the Senate processes."[1]

Non-TCF outworkers

10. Whilst this submission will be predominantly concerned with TCF workers, FairWear is concerned that the drafting of Section 27 of the Bill may inadvertently strip existing protections in state law from non-TCF outworkers.

11. It is crucial that non-TCF outworker remain protected by the operation of the Industrial Relations Act 1999 (Qld) and the Fair Work Act (1994) SA. When in Opposition, the ALP made a commitment to, in government, accede to the ILO Homework Convention, C-177[2], the aim of which is to provide a national framework for governments to enact special measure to protect vulnerable

[1] Fair Work Bill 2008, Second Reading Speech, The Hon Julia Gillard MP Minister For Employment and Workplace Relations, pg 5 http://www.workplaceauthority.gov.au/docs/forwardwithfairness/FairWorkBillSecondreading.pdf

[2] ALP National Platform and Constitution, 2007, Outworkers, pg. 109 http://www.alp.org.au/download/now/2007_national_platform.pdf

homeworkers. It cannot be the case, therefore, that the government seeks deliberately to extinguish the protections for non-TCF homeworkers enshrined in these state laws. FairWear recommends that Section 27 of the Bill be amended to ensure that these state protections for non-TCF outworkers are maintained as a matter of priority.

Outworker terms and their application/exclusion

12. It would be a mistake to see outworkers as a discrete section of the TCF workforce characterised by exploitative practices which can be easily separated out from workers in factories and sweatshops. Outwork exists in a continuum of exploitation, often starting with OH&S or Award breaches in a small or large factory, and continuing further down the supply chain, with the abuses and pay often becoming worse as the chain lengthens. A key to any effective compliance regime is transparency and full disclosure of documentation.

13. **Sections 12, 57 and Section 200 of the Bill.** FairWear is gravely concerned that the wording of sections 57 and 200 of the Bill will undermine supply chain transparency and provide a cover for exploitation. The wording of these sections seems to suggest that an employer who does not employ outworkers directly will not be covered by the outworker terms of the Award, thereby undermining all the supply chain transparency mechanisms built into the Award that are there to protect outworkers by enabling the tracing of work. FairWear recommends the same solution to this problem that received bipartisan support as part of the current Workchoices framework: that at *no* stage and for *no* reason can the outworker provisions of the Award be opted out of. Anything less than this will not allow for enforcement, which the Minister has recognised as being key to providing proper protections for TCF outworkers. Effective compliance action cannot be undertaken when employers can opt out of the outworker terms.

14. FairWear is concerned about the definition of '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'.

15. **Section 140:** Outworkers are often found at the very end of supply chains that start in factories, so to stipulate things like the application of outworker terms in an Award only in the case where it is "reasonably likely" outwork is taking place could provide an easy out for employers seeking to avoid transparency, or to deny that this section of the Award applies to them. Surely it cannot be the intention of the drafters of the Bill to expect that any inspectorate or duly authorised industrial

officer must first find the outworker in the supply chain and then trace the chain back up? Only in very very few cases, through community organisations like FairWear or Asian Women at Work, is the exploitation of outworkers discovered in this way, and even then, without the power to access documentation and records, an outworker's claim of abuse and exploitation cannot be proven or properly investigated. The vast majority of the time it is the TCFUA that uncovers exploitation through following the supply chain through to outworkers from a factory or other principal, through the various parts of their supply chain.

16. In Victoria, and in other jurisdictions those who have been seeking to address the situation of the most exploited employees within the TCF industry – most notably, the TCFUA - have found it necessary to trace the various links in the supply chains which make up the processes of TCF production. This work often begins with company information registered with Boards of Reference.

17. In 1990, in a judgement against a company found in breach of the Clothing Trades Award (1982) Justice Gray acknowledged the role of registration with the Board of Reference as being fundamental to the prevention of outworker exploitation:
"The positive act of employing an outworker without being registered is a breach of clause 27(B)(i). The omission to apply for registration is a breach of clause 27A(a). Although breaches of separate terms of the Award are involved, the fundamental nature of the allegation is that of omission to apply for and secure registration….For those reasons, a single penalty should be imposed for breach of clause 27(B)(i) of the Award, and no penalty should be imposed for breach of clause 27A(a). **The penalty should reflect the seriousness of the breach. In an industry in which the use of outworkers offers plenty of opportunity for exploitation of workers, failure to participate in a scheme designed to prevent such exploitation is a serious matter**."[emphasis added][3]

18. FairWear submits that to remove any potential ambiguity about the operation of modern Awards, it is crucial that it be made explicit within the current Bill that Awards may contain terms establishing Boards of Reference.

Deeming Provisions

19. Some of the above issues around definitions of outwork, and lack of clarity, could be resolved by simply deeming outworkers to be employees. This would ensure that the range of employment relationships outworkers find themselves in would be covered by the protections provided in the manner intended.

20. The wide range of employment relationships outworkers experience are due to considerable efforts made by their employers to avoid responsibility for providing fair wages and conditions for those outworkers. It is typically the employer that

3 Justice Gray, Judgement Section 35, Re Clothing and Allied Trades' Union of Australia v J and J Saggio Clothing Manufacturers Pty Ltd [1990] FCA 279; 34 IR 26 (9 August 1990) , FEDERAL COURT OF AUSTRALIA

http://www.austlii.edu.au/au/cases/cth/FCA/1990/279.html

requires an outworker to set themselves up in a particular way so as to avoid the appearance of an employment relationship.

21. The relevance and usefulness of deeming provisions for outworkers have been established through the extensive research and debates in the course of developing State legislation to protect outworkers, and deeming laws are already in a majority of State industrial relations laws. Those states are New South Wales, Victoria, Queensland, South Australia and Tasmania.

22. In pre-election promises the ALP committed to introducing deeming provisions for outworkers.

23. FairWear calls on the Government to implement their election promise at this time, and deem outworkers to be employees.

Right of entry

24. **Section 481:** The lack of clarity in the reference to premises is a concern, as outworkers are often not on the premises where the records of employment/ outsourcing/ supply chain etc are kept. This aspect of right of entry will limit any permit holder's capacity to trace the supply chain, and to represent outworkers in any industry because they may not perform work on the premises in which the records necessary to establish all links in the supply chain are held. Access to all levels of the chain is essential to find the outworkers, and some of these levels will not employ any TCF workers or outworkers on those premises.

25. The requirement to have a member of the permit holder's organisation on the premises is a problem when one considers the mechanisms through which outworkers are denied both their Award entitlements, and the crucial information that they are actually allowed to be members of a trade union.

26. The organisation of work in the industry is such that many outworkers have reported being forced to register ABNs in order to receive work. These outworkers often (falsely) believe that having an ABN prevents them from being represented by the union – in fact this misconception is often played upon by those who give work out to outworkers, with the subsequent isolation from industrial advice and representation one of the ways in which TCF employers maintain the remarkable levels of exploitation common throughout the industry. One such example is provided in the Victorian Ethical Clothing Trades Council 2004 compliance report: "P says that the company was outraged that she had involved the union. "They got really annoyed. 'How can an outworker be in the union?' they said. "That's not right." I never even left the union, I stayed with them. **You see, the outworkers don't even know that they're entitled to be in the union when they're an**

outworker. They chose the wrong person to dismiss because I had back up. They think I'm a trouble maker now.""[4] [emphasis added]

27. Both state and federal legislation now recognise that outworkers require protection from sham contractor arrangements that deprive them of Award wages and entitlements and that such arrangements are rife in the industry.[5] If the legislation as it governs right of entry requires that a workplace have at least one union member, it is unclear how outworkers, who are often unaware that they are allowed to be union members, will be protected. In the context of the appalling industrial practices rife throughout the TCF industry, it is important that the ability of unions – in particular the TCFUA – to enter workplaces and related premises be entrenched and expanded rather than further restricted.

28. For this reason, FairWear recommends that right of entry and access to records in TCF be formulated in the Bill to include the right to talk to workers, as well as access time and wages records, without the requirement to have a member in the workplace

29. **493 Residential premises** – FairWear is concerned that the reference to restrictions on right of entry to residential premises ignores the reality that this is in fact where much work in TCF is being performed. It is not infrequent for union inspections to lead them to garages or back rooms of houses, in which case an employer can refuse entry because that room is part of a residence. It seems the burden of proof in this case would lie with the union. The intention of this restriction seems contrary to the definition of an outworker as contained in the Bill, which in fact recognises residential premises as being a place where outworkers are often found at work. FairWear recommends the amendment of Section 493 to ensure that there are no barriers to permit holder access to residential premises.

Notice periods for right of entry

30. **Section 495** FairWear submits that specific TCF right of entry powers must be granted to allow the tracing of work in the supply chain. Evidence from inspections conducted with Occupational Health and Safety powers in some state jurisdictions indicates that unannounced visits from union officials and inspectorates tend to uncover egregious abuses that employers have time to try to superficially cover when given notice, including through efforts to pressure employees to remain silent.

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[4] "Appendix E: Outworkers Lawful Entitlements Compliance Report" *Ethical Clothing Trades Council of Victoria 12 Month report*, 2004, pg 26

[5] TCFUA, *Submission to Senate Employment, Workplace Relations and Education Legislation Committee Inquiry into the provisions of the Independent Contractors Bill 2006 and Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006*, Sections 57 - 63

31. The nature of TCF homework is that it is highly mobile. A TCF worksite that is a small scale sweatshop or home-based premises can literally be "disappeared" in a matter of hours. Evidence from the 2004 Victorian Ethical Clothing Trades Council 12 month report provides further detail on this, detailing the practice of companies literally locking workplaces to prevent access by union representatives, and clear evidence of falsification of records presented, reluctantly, to union officials. Often work is traced from a factory, outwards to a small sweatshop in a garage. Work on premises like this would take a matter of hours to pack up and "disappear". 24 hours notice gives plenty of time for employers to falsify records, a situation encountered and documented by authorised industrial officers in both NSW and Victoria:

    "An inspection at a small dye house in Marrickville in November 2002 discovered a workplace where four persons (were) employed without wage records. When required to produce wage records the employer produced an A4 piece of paper which purported to record that employees were paid $10.00 per hour for a forty hour week. The employer later conceded that he had drafted the document after the TCFU had given him 24 hours to produce the records. The employer did not pay his employees superannuation nor did he have a current workers compensation policy. Employees were being paid less than the Award rate of pay and there was apparently no record of hours of work, apart from the documentation produced in response to the TCFU notification."[6]

32. FairWear wishes to emphasise that while it would like to see nationally consistent protections for outworkers, any provisions in this Bill must not override superior protections in state legislation. FairWear is concerned that the Bill as currently drafted appears to override state Occupational Health and Safety provisions as regards right of entry. FairWear submits that a number of state jurisdictions provide superior protections to outworkers through state based Occupational Health and Safety legislation and that this legislation should be left wholly intact. Overriding right of entry provisions in state Occupational Health and Safety legislation will deleteriously impact on the effective operation and enforcement of many of the protections contained within this legislation. The Textile Clothing and Footwear industry is recognised as one in which a high level of exploitation occurs – immediate right of entry to workplaces is necessary to properly investigate breaches of occupational health and safety, and the Award.

33. FairWear submits that access to non-member work records is essential to tracing work in a complex supply chain. A majority of the work in TCF takes place in the informal sector, and it is often the case that only through complex calculations of the value and volume of work produced by a particular label can the hidden workers – often outworkers or small scale sweatshop workers – actually be uncovered. This painstaking work is undertaken in most jurisdictions by the Textile Clothing and Footwear Union, given the lack of any other inspectorate with the

[6] *New South Wales Ethical, Clothing Trades Council Twelve Month Report to the Minister for Industrial Relations*, 2003, pg 66

necessary powers. FairWear supports the continuing role of the TCFUA in tracing and monitoring the complex TCF supply chain.

34. Examples from union attempts to conduct inspections of premises for the specific purpose of finding outworkers highlight the difficulties inherent in inspections without full access to records.

    "In a number of instances the documents and records produced by company representatives had clearly been altered and/or falsely created for the inspection. Examples of this included records that had been clearly printed recently on clean white paper that were supposedly from four years ago and invoice books with pages ripped out. A large number of employers followed the practice of keeping entirely separate invoice books for each outworker. This made it easy for employers to choose which records they wished to provide and hence which outworkers they wished to acknowledge they employed. This became apparent in several instances when comparisons were made between work records provided and records of payments recorded in cheque books."[7]

35. This example demonstrates the limitations of providing access only to the records of members. Establishing an accurate understanding of both the value and volume of work being undertaken or given out, by a particular company is painstaking, and involves cross-referencing numerous records. This work is made much more difficult without access to non-member records.

Unfair dismissal

36. **394 Application for unfair dismissal remedy:** The proposed change to the lodgement period for unfair dismissal applications from 21 days to 7 days will heavily disadvantage TCF workers, who are predominantly migrant women workers, or workers with a lower level of formal education. Migrant women workers in particular need greater assistance with accessing information about their rights either in their own language, or accessing translators as well as advocates.

37. **Section 388: The Small Business Fair Dismissal Code**. FairWear is greatly concerned about the Small Business Fair Dismissal Code, as its diminished rights will disproportionately impact on TCF workers, who are predominantly employed in small businesses, of 20 employees or less. In the TCF industry it is estimated that over 90% of businesses have 20 employees or less. [8]

38. Particularly for migrant workers whose English language comprehension may be an unknown quantity, it is essential that written warnings are provided, and the onus is on employers to ensure the workers understand those warnings. It is not

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[7] "Appendix E: Outworkers Lawful Entitlements Compliance Report" *Ethical Clothing Trades Council of Victoria 12 Month report*, 2004, pg 20

[8] Australian Bureau of Statistics, 8165.0 *Counts of Australian Businesses* (14 December 2007)

sufficient to rely on the sometimes minimal English language skills required for survival in a TCF workplace. Such workers will have great difficulty in proving that they were provided with, and received, adequate warning prior to dismissal.

39. Reports from members of the FairWear network in NSW have reported employers using the changes to unfair dismissal regulations to threaten and intimidate workers. Many women are too scared to complain about working conditions, Award breaches, and unsafe machinery, or even to ask to go to the toilet, as they feel they easily be fired for making "trouble".

40. FairWear recommends that the Small Business Fair Dismissal Code include mandated written warnings, a formal meeting to give the warning with the opportunity to bring a support person, onus on the employer to ensure the worker has understood the warning and more than one warning. FairWear supports wholeheartedly the submissions of Asian Women at Work in this regard and urges the committee to pay particular attention to the concerns about unfair dismissal contained in the Asian Women at Work submission to this inquiry. These concerns reflect the daily reality of how difficult it is for these workers to deal with employers in situations of potential conflict.

Low-paid bargaining stream

41. FairWear wishes to reiterate that not only does the community clearly have a strong expectation that the government will step in to protect vulnerable workers, but these workers themselves have expressed this desire to government.
"I should also get overtime pay, reasonable working hours, superannuation and workers compensation cover. I want to have all these things, just like other working people. I want to be treated fairly but my bosses ignore the law and do what they want at the moment. I want the government to have strong laws that make it clear to my bosses that they must pay me Award rates and conditions as a minimum. **I want the government to have the law allow the union and the government inspector to chase up the bosses and make them treat us fairly**." [emphasis added][9]

42. The above statement illustrates a strong desire on the part of outworkers to have the ongoing support of union and government to not only be made aware of their rights, but to enforce them.

43. FairWear congratulates the government for recognising that low-paid workers require special assistance and protection with bargaining.

44. **Section 263** For this reason, FairWear is concerned about the "once only" nature of the low-paid workplace determination, contained in Section 263 (3) of the Bill. This does not recognise the ongoing and persistent vulnerability of TCF workers

[9] Ms Rose Nguyen, Hansard, Senate Employment, Workplace Relations and Education Legislation Committee, 4th August, 2006

that is the reason FairWear continues to exist. The problem has not gone away, and one round of arbitration will not substantially change the bargaining position of TCF workers. Such a limitation flies in the face of even very recent evidence[10] that the vulnerability of these workers is ongoing, and inherent to the organisation of work in TCF, and that until the economy itself is transformed, for example through the vertical reintegration of the supply chain under the actual and legal control of the principal, or the government organises and funds an ongoing compliance regime or inspectorate, this situation is able to be ameliorated, but not fundamentally changed.

45. FairWear therefore recommends that section 263 (3) of the Bill be removed. Low-paid workers, in TCF and elsewhere, must always have access to arbitration and assistance with bargaining.

46. FairWear is broadly concerned that arbitration has not been re-introduced as part of the commitment to dismantling WorkChoices.

47. In conclusion, FairWear broadly supports the submission of the Textile Clothing and Footwear Union of Australia, and Asian Women at Work in relation to concerns about this Bill. The TCFUA has been the only consistent enforcement and compliance body available to protect vulnerable TCF workers. FairWear submits that the Bill should do nothing to hinder the TCFUA in this important work, and that it is our experience that there is strong and ongoing community support for the TCFUA's role in protecting outworkers and other TCF workers.

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[10] For example, Diviney & S Lillywhite, "Ethical Threads: Corporate Social Responsibility in the Australian Garment Industry, Brotherhood of St Laurence, 2007 Available at http://www.bsl.org.au/pdfs/Diviney&Lillywhite_ethical_threads.pdf
and
Asian Women at Work, *Submission Re Award Modernisation – Priority Awards Protecting Vulnerable Migrant Women Workers,* 14th October 2008
Available at
http://www.airc.gov.au/awardmod/databases/textile/Submissions/AWatW_submission_ED.doc