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John Carter
Senate Education, Employment and Workplace Relations Committee

Dear John,

Please find attached FairWear's response to questions on notice from the Senate Committee inquiry into the Fair Work bill, Monday 16th February 2009.

Kind regards,

Liz Thompson
FairWear Victoria Campaign Co-ordinator
On behalf of FairWear

FairWear Questions on Notice – Fair Work Bill Inquiry - 23rd February 2009

1) Government Commitment regarding deeming of outworkers – when and what

The public commitment by the Government was made in Sydney on 1st June 2007 by Deputy Labor leader Julia Gillard. The then opposition promised funding for the Homeworkers Code of Practice Committee and a commitment to introduce national outworker legislation equivalent to the existing State outworker legislation. The commitment is also contained in a resolution at the ALP National Conference in May 2007 and in the National Platform and Constitution of the Australian Labor Party (Resolution 133R, ALP National Conference, May 2007, 32; Australian Labor Party, *National Platform and Constitution* (2007) Chapter 7, 109).. This state outworker legislation in Victoria, Queensland, South Australia, Tasmania and New South Wales includes deeming outworkers to be employees.

2) The definition of outworker as employee or contractor and the number of outworkers that might be contractors

FairWear regards all outworkers in TCF industries as employees. This case has been successfully argued several times over in the Australian Industrial Relations Commission (in 1988 resulting in securing award coverage for outworkers) and in the various State jurisdictions where deeming now applies (2001 in NSW and others subsequently). The amount of control employers have over the volume, price, turn around time and other aspects of the work of outworkers justifies their recognition as employees. The fact that they work alone in their home makes them look like a contractor on the surface, and some employers refuse to give work to outworkers unless the outworker has an ABN number makes them “look like” a contractor. The AIRC and the various state governments have examined the evidence and have been convinced that outworkers should be recognised as employees.

3) How long have OH&S laws given right of entry without notice?

It is FairWear’s understanding that OH&S right of entry laws without notice have existed in NSW since 1996. The rationale is that an OH&S issue must be investigated and addressed immediately, and that employers can temporarily remove a hazard or other problem if an investigation is to be notified in advance. This does not give access to wages records without notice. In the TCF industry, 24 hours notice also allows employers to remove documents, workers and their operations from the premises.

4) History of Right of Entry to residential premises

There are two points we would like to highlight about NSW access to residential premises in the TCF industry.

Firstly, access to residential premises for right of entry under NSW Industrial Relations legislation has existed since late 2001, as part of the package of outworker protections introduced under the Behind the Label outworker strategy. The specific wording allows for right of entry where the residential premises is used for work in or in connection with the clothing industry.

Such access is used by the TCFUA to allow them to investigate sweatshops that are set up on residential premises, in houses or in garages. They were not interested in using this right of entry to enter individual outworkers' homes. Such entry to individual outworkers homes only occurs with the permission of outworkers' themselves.

Secondly, the OH&S legislation in NSW requires clothing industry workplaces to register their factories. The TCF Union will then take this list of registered factories and visit them to check that these registered factories are complying with OH&S regulations. In some cases when they arrive at the addresses which have been registered, the location is a residential location. However the union proceed with their investigation on the basis that this residential premises is in fact a registered factory.

5) Number of prosecutions as a result of right of entry without notice?

While the TCFUA had WorkCover funding to do several projects over 4 years, where they entered a large number of workplaces for inspections using this right of entry, a stipulation in the funding agreement was that the union could not use this information to prosecute a company. Any outcomes for workers had to be gained by convincing the boss to fix up the issues in the workplace.

In addition, the OH&S laws in NSW do not allow a union to prosecute a company if that union does not have a member in that workplace. This has also placed limitations on the union's capacity to intervene to protect workers.

For example, a young woman rang the TCFUA concerned that her mother was working as a sewing machinist in a house that had been turned into a sweatshop. There were bars on all the windows of the house, and the doors were locked inside the house while they were working. The daughter was very fearful her mother could be burnt to death if there was a fire.

The TCFUA went to the house and used the OH&S right of entry provisions to try to enter. It was clear from the outside that there were a number of machines inside. One of the workers called the employer, who came to the house but would not allow the union to enter. The employer called the police to remove the TCFUA officials. When the TCFUA explained why they were there the police entered the house and agreed that the premises was indeed a factory. The police then escorted the TCFUA through the house to inspect the premises.

The TCFUA were able to talk to the employer about the fact that he needed to register his factory, and about a variety of serious OH&S concerns that needed to be addressed. But the union was not able to prosecute the employer for the significant breeches because they did not have a union member in the workplace. They also were not able to access the time and wages records to establish if the workers were being paid correctly.

These limitations on right of entry prevented the union making a more significant difference for the outworkers and sweatshop workers who are working for employers who are flaunting the law in this way and endangering the lives of workers.

5) Numerical Data on TCFUA right of entry in NSW – and its impact on outworkers.

“Right of entry without notice” has been combined with a number of other outworker protections and TCF industry monitoring mechanisms to make significant changes for outworkers. But the impact of right of entry provisions alone cannot be measured separately because the mechanisms have been used together to bring about these outcomes.

We are still in the early days of combining all the mechanisms available to bring about real change for workers on the ground. The following is a table of figures that represent a snapshot of 24 months worth of compliance work as undertaken by the NSW Textile Clothing and Footwear Union. This is not an exhaustive set of figures, but rather provides evidence from real supply chains that give an example of what the comprehensive package of measures that make up the legislative

framework in NSW, which includes factory registration measures, OH&S right of entry without 24 hours notice, and the mandatory retailers code actually can do. These figures are from real supply chains, the detail of which is available from TCFUA NSW.

COMPANY	NUMBER WORKERS BEFORE INVESTIGATION	OF NUMBER WORKERS INVESTIGATION	OF PREVIOUSLY AFTER HIDDEN WORKERS
COMPANY A	5	43	38
COMPANY B	20	70	50
COMPANY C	87	362	275
COMPANY D	10	26	16
COMPANY E	15	74	59
COMPANY F	50	208	158
TOTAL	187	783	596

FairWear also relies on the information presented in the 12 month compliance reports from both the NSW and Victoria Ethical Clothing Trades Council. These are attached. We would also refer to evidence presented by the TCFUA in this Senate committee on Monday 16th February 2009, in particular the evidence from Beth Macpherson, about the difficulties presented to organisers in gaining entry to premises where breaches of the award and OH&S legislation are evident, but right of entry restrictions prevent the union from acting on them.

In relation to Occupational Health and Safety rights of entry, attached is a decision and order in relation to a hearing (TWU vs Fletcher Insulation) that highlights restrictions on union right of entry even with OH&S powers. This case highlights the OH&S problems inherent in this industry and the problems faced by unions trying to investigate breaches.

FairWear submits, once again, that it is difficult to provide hard empirical data about the benefits of the different regime in NSW in relation to specifics such as right of entry. The restrictions on prosecutions placed on the TCFUA in regards to its work with Workcover NSW make it difficult to provide this kind of data to the committee. What we can say however is that the compliance and supply chain auditing work undertaken by the TCFUA in NSW, in collaboration with companies, is complex, and involves working through intersecting legislative regimes, state and federal, and that we are concerned that nothing in the Fair Work bill should be able to undermine or interfere with work that is only just beginning to bear fruit in terms of finding hidden workers and ensuring that they are receiving their wages and entitlements.

Re-iterating what FairWear is seeking in relation to these matters above:

FairWear wants those employers who are using sweatshop workers to produce their garments to be forced to comply with the law, even when they are using a residential premises to “house” those workers. Consequently, we want the TCFUA to have access to residential premises for their investigations.

FairWear wants right of entry without notice for the TCFUA to allow them to access workplaces, workers and information before anything can be changed in the workplace to hide breaches.

FairWear wants the TCFUA to be able to assist exploited workers regardless of their status as a union member or otherwise, to prevent employers avoiding the consequences of their exploitation of workers.

FairWear wants to protect the existing NSW and Qld rights of entry without notice for OH&S purposes.

FairWear wants a national system of factory registrations for TCF factories to assist the compliance activity of the TCFUA.

FairWear wants a national system of deeming outworkers to be employees, not contractors. Our submission to the Independent Contractors Senate Inquiry is attached for further information.