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TEXTILE CLOTHING & FOOTWEAR UNION OF AUSTRALIA

Submission

to

Senate Education, Employment and Workplace Relations Committee

Inquiry into the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008

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Introduction

1. The Textile Clothing & Footwear Union of Australia (TCFUA) is an organisation of employees registered pursuant to the *Workplace Relations Act 1996* ('the Act'). Our membership consists of workers employed in the textile, clothing and footwear industry in Australia.

2. The *Workplace Relations Amendment (Transition to Forward with Fairness) Bill* ('Transition Bill') was referred to the Senate Employment, Workplace Relations and Education Committee ('Senate Committee') by Senator Ellison on 14 February 2008. Notwithstanding that the TCFUA believe that the motive of the referral to the Senate Committee was purely to delay the passage of the Transition Bill, the TCFUA welcomes the opportunity to make a submission to the Senate Committee.

3. The TCFUA supports the repeal of the Act as amended by the *Workplace Relations Amendment (Workchoices) Bill 2005* ('WorkChoices legislation'). Our submission to the Senate Committee in relation to the WorkChoices legislation ('Workchoices Inquiry') dated 9 November 2005, outlined our concerns with the Workchoices legislation. Due to the severely restricted timeframe of the WorkChoices Inquiry- the 687 page Bill and its 565 page explanatory memorandum were introduced to Parliament on 2 November 2005, submissions to the Workchoices Inquiry closed just one week later on 9 November 2005- the TCFUA could not comprehensively outline its concerns with the Workchoices legislation at that time. However, nearly two years of representing members under the Workchoices legislation, has confirmed our analysis about the negative impact of the Workchoices legislation on the rights, entitlements and protections of workers, and on the ability of trade unions to effectively represent and protect workers.

4. In addition, the complexity, red tape and poor drafting of the Workchoices legislation has not only led to workers being unclear about their rights, it has drained the resources of unions, businesses, industry bodies, tribunals and Courts.

5. We therefore welcome the repeal of the Workchoices legislation and support the first stage of the restoration of balance, fairness and respect for our members to the Australian system of industrial relations.

6. The TCFUA thus supports the majority of the provisions of the Transition Bill and seeks its prompt passage by Parliament.

7. Notwithstanding the above, the TCFUA raises the following concerns with the Transition Bill:

   a. the creation of ITEAs and the continuation of provisions with respect to AWAs, particularly sections 348(2) and 400(6) of the Act;

   b. the absence of provisions retrospectively abolishing AWAs;

   c. the failure to restore entitlements for workers already locked into AWAs;

   d. the absence of provisions which would ensure that the Australian Fair Pay and Conditions Standard applies to all types of agreements, including pre-reform agreements;

   e. the absence of provisions that ensure improved union right of entry;

   f. the failure to repeal subdivision B of Part 8, Division 7 and Division 7.1 of the *Workplace Relations Regulations 2006* (prohibited content);

g. the failure to restore unfair dismissal rights to all Australians; and

h. the limitations in relation to industrial action in relation to the variation and extension of pre-reform agreements.

Creation of ITEAs and the continuation of the AWA provisions of the Act

8. The TCFUA opposes the continuation of individual statutory contracts in the Australian industrial relations system. The continuation of the AWA provisions of the Act with respect to ITEAs means that ITEAs are, in fact, AWAs by another name (with some improved protective standards applied).

9. The negative effects of AWAs and the damage that these employment arrangements have caused to Australian workers has been well documented, including by the former Government: see for example, Mark Davis, 'Revealed: how AWAs strip work rights' *Sydney Morning Herald*, 17 April 2007 (figures leaked to the *Sydney Morning Herald*, recently confirmed by the current Government); Hansard 29 May 2006, Jude Elton et al, *Women and WorkChoices: Impacts on the Low Pay Sector* (2007)); JobWatch, *WorkChoices: The Victorian Experience* (October 2007); Bradon Ellen, *More Work Less Choice: The Impact of National Labour Re-Regulation on Low-Paid Women Workers in the Australian Capital Territory* (2007); Jude Elton and Barbara Pocock, *Not fair, No choice: The Impact of WorkChoices on twenty South Australian workers and their households* (July 2007); Brigid van Wanrooy et al, *Australians@Work: The Benchmark Report* (October 2007), David Peetz, *Assessing the Impact of 'WorkChoices' One Year On* (March 2007)

10. These studies indicate severe and widespread reduction in employee entitlements for workers under AWAs, including:

- loss of pay
- removal or reduction of penalty rates
- removal or reduction of overtime pay
- increase in working hours; and
- reduction or loss of meal breaks, tea breaks and rest breaks.

11. Despite the former Minister for Employment and Workplace Relations, Joe Hockey's view that 18 year olds able to negotiate mobile phone contracts could easily negotiate an AWA with their employer (Transcript, *Mornings with Madonna King*, 612 ABC Brisbane, 27 September 2007), it is clear that under the WorkChoices legislation, the majority of Australians experienced no genuine negotiation with their employer and most workers felt that their bargaining position was weakened. For example, nearly two thirds of Victorians surveyed disagreed or strongly disagreed that under the WorkChoices legislation, they had more capacity to negotiate with employers (JobWatch *WorkChoices: The Victorian Experience* (October 2007)); and 46% of employees covered by an AWA felt that they did not have the ability to negotiate their pay with their employer (Brigid van Wanrooy et al, *Australians@Work: The Benchmark Report* (October 2007). See also, for example, Jude Elton et al, *Women and WorkChoices: Impacts on the Low Pay Sector* (2007)); Jude Elton and Barbara Pocock, *Not fair, No choice: The Impact of WorkChoices on twenty South Australian workers and their households* (July 2007).

12. The impact of WorkChoices and AWAs on women and the low paid in particular has also been well documented: Jude Elton et al, *Women and WorkChoices: Impacts on the Low Pay Sector* (2007)); Bradon Ellen, *More Work Less Choice: The Impact of National Labour Re-Regulation on Low-Paid Women Workers in the Australian Capital Territory* (2007); Sarah Charlesworth and Fiona MacDonald, *Going to Far: WorkChoices and the Experience of 30 Victorian Workers in the Minimum Wage Sectors* (July 2007); Brigid van Wanrooy et al,

Australians@Work: The Benchmark Report (October 2007); Barbara Pocock and H Masterman-Smith, 'WorkChoices and Women Workers' (2006) 56 *Journal of Australian Political Economy* 126. The TCFUA represents some of the lowest paid workers in the country, many of our members are women and are from non-English speaking backgrounds. We have witnessed first hand the negative effects of WorkChoices and AWAs on our members. For example, AWAs offered by a regional employer in our industry were found by the Victorian Workplace Rights Advocate ('the Advocate') to reduce conditions for workers in a number of respects, including a loss of award conditions, reduction in penalty rates and shift loadings, and a loss of certain allowances. The Advocate also held concerns with the fairness of the process of the company in offering AWAs.

13. As recently as last week, it was revealed that employers are still trying to reduce workers entitlements by offering AWAs that cut entitlements. In a sample of AWAs that failed the Fairness Test, 45% sought to reduce entitlements by up to $49 a week, 50% purported o cut entitlements by $50-$199 a week and 5% reduced entitlements by $200 and $499 a week (*Senate Standing Committee on Education, Employment and Workplace Relations*, 21 February 2008, EEWR 68).

14. The introduction of ITEAs cannot be justified by reference to the need for transitional arrangements in circumstances where the Transition Bill allows an employer with <u>one</u> employee on an AWA as at 1 December 2007 to offer ITEAs to new workers or workers on AWAs. Such an employer does not face 'confusion' and will not face 'unnecessary disruption' to its business by the abolition of AWAs. In fact, the creation of ITEAs promotes uncertainty, disruption and confusion. For example, how do industrial parties and new workers know whether an AWA was in place as at 1 December 2007 in an employer's business? If an ITEA is made and is not approved on the grounds that section 326(2) (of the Transitional Bill) was not met, a new employee will be left in a situation where he or she does not know what his or her terms of employment are.

15. In relation to new workers, there is no 'transition period' to speak of as these people are not covered by any industrial instrument in the business prior to their engagement.

16. Section 400(6) of the Act provides that it is not duress to offer employment on the condition of an AWA. The Bill will provide that it will not be considered duress to offer employment on condition of an ITEA (Item 84). This will allow workers to continue to be forced to sign individual statutory contracts in order to gain employment.

17. The continuation of individual statutory contracts negatively impacts upon the right of workers to collectively bargain. In particular the continuation of section 348 of the Act (Item 45) ensures that workers on ITEAs cannot be covered by a collective agreement. An employer can thus offer employment conditional upon the signing of an ITEA and continue individual contracts for existing AWA workers in order to weaken the collective bargaining strength of its workers. This has been the TCFUA's experience in recent collective agreement negotiations with an employer who, since 2006 has made employment conditional on the signing of an AWA.

18. The creation of ITEAs also allows for workers who work alongside one another to be employed on different conditions for the same work. As the evidence, noted above, has borne out, those workers on individual statutory contracts are likely to be on much lesser conditions. This fuels disharmony in the workplace and also impacts on the ability for workers to mobilize as a collective.

19. As stated above, ITEAs are AWAs by another name. Although the application of the no-disadvantage test (proposed Division 5A of the Transition Bill) goes some way to mitigate the stripping of workers' entitlements under individual statutory contracts, we maintain that, given the potential to negatively impact upon

employee's entitlements all forms of statutory individual contracts should be abolished.

Abolition of AWAs

20. The Australian Labor Party's ('ALP') policy on the abolition of AWAs has been on the public record for over a year. It was made abundantly clear prior to the election of the ALP to Government on 24 November 2007. While the TCFUA welcomes the abolition of AWAs, we believe that these should be abolished retrospectively from 25 November 2007. The most recent figures from the Workplace Authority show that over 38,000 AWAs were made in November 2007 alone (Workplace Authority, *Key Workplace Agreement Data* (November 2007)). In December 2007, one of the largest employers in our industry offered AWAs to its entire workforce (approximately 220 employees). Retrospective abolition of AWAs would prevent employers exploiting the dying days of the Workchoices legislation in circumstances where they have been well informed about the ALP policy. This would also remove the temptation for the use of stalling tactics in the Parliament to allow more and more workers to be forced onto AWAs prior to the implementation of the Transition Bill.

Failure to provide relief for AWA workers

21. As noted above the negative effects of AWAs on workers are well documented. In addition workers on AWAs lose the opportunity to participate in collective processes or access the benefits of collective improved standards or conditions. The TCFUA is concerned that the Transition Bill does nothing to alleviate the effects of the WorkChoices legislation for workers on AWAs, including those who signed AWAs prior to the introduction of the Fairness Test. It entrenches two classes of workers in workplaces. At a minimum, the Transition Bill should provide that where a worker wishes to terminate his or her AWA prior to its nominal expiry date, he or she should be permitted to do so without requiring the

consent of his or her employer. This will enable workers to receive the benefit of superior industrial instruments that apply in their workplace.

Failure to ensure that the AFPCS applies

22. The failure of the Transition Bill to ensure that the Australian Fair Pay and Conditions Standard applies to all types of agreements means that workers will continue to receive wages below the national minimum wages in their industry. Workers on pre-reform certified agreements which either, due to the terms of the pre-reform agreement, or due to an erroneous interpretation of the terms of the pre-reform agreement by unscrupulous employers, earn less than the minimum wage. This has been the experience of many of our members working at a factory in regional Victoria and who currently earn less than the minimum wage set out in the Textile Pay Scale.

23. The TCFUA submits that it is contrary to public policy to allow for the continuation of such a situation, particularly where the Government has recognised the importance of maintaining minimum standards for all workers with the introduction of the National Employment Standards and the no- disadvantage test.

24. The TCFUA urges the Senate Committee to recommend the amendment of section 172(2) of the Act to include reference to pre-reform certified agreements.

Right of entry

25. The TCFUA made a submission to the Senate Committee inquiry in relation to the *Workplace Relations (Right of Entry) Bill 2004* ('ROE Bill'). In that submission we opposed the ROE Bill in its entirety. Our experience working under the right of entry provisions of the Act (which partially reflect the ROE

Bill) is one where employers have hampered our ability to represent and protect some of the most vulnerable workers in Australia. Underpayment is a common feature of our industry, with many employers paying below minimum wages and some workers earning as little as $4 an hour. For our union to inspect time and wages books in factories we must identify who our members are and may have to name the worker who has contacted us for assistance [sections 747(2); 748(4), (5) of the Act]. In an industry where bullying and intimidation is rife, many workers do not want their employer to know that they are union members. The right of entry laws thus also breach freedom of association.

26. Under the right of entry provisions of the Act, which the Transition Bill does not amend, employers can continue to determine where union members may meet with their union [section 751(3) of the Act]. In our experience, this has allowed employers to obstruct union access to factories and premises and deter workers from meeting with us. On one extreme our officials have been forced to sit in temperatures of -8 in rooms 10 minutes away from workers; on the other, we have had to meet with workers in offices adjacent to, and in full view of, management.

27. For example, at Domestic Textiles, where after many years of meeting with workers in the tea rooms the TCFUA were recently directed to meet with workers in a room located next to management. The room was in clear view of management. In addition, the company only allowed the TCFUA to meet with workers during their lunch hour and the room did not have adequate facilities for workers to eat their lunch. Many workers thus did not meet with their union and for those that did, the meetings were extremely brief.

28. Most recently, Feltex Carpets which has also for long time provided the TCFUA with access to tea rooms has begun insisting that a corridor is an appropriate meeting place for union meetings to be held.

29. All of these measures inhibit the capacity of workers to meet with their representatives. In addition, the current laws encourage unsafe practices. For example, one of our members was badly injured, when under the right of entry laws of the Act, his employer forced him to walk, in the dark during a nightshift to a room 10 minutes away from his work station to meet with us. He fell and broke both his hands and has not returned to work since.

30. In addition, the Act severely restricts the ability of the TCFUA to protect outworkers in the clothing industry. This is despite strong bi-partisan recognition of the special circumstances of outworkers (see, for example, Australian Labor Party, National Conference, May 2007, Resolution 133R; Senate Hansard, 28 November 2006, 97 (Senator Troeth); conditions for outworkers are allowable award matters pursuant to section 513 of the Act but section 354(3) of the Act provides that, unlike other 'protected Award conditions', outworker conditions could not be excluded from a workplace agreement. There is also various State legislation protecting outworkers, for example: *Outworkers (Improved Protection) Act 2003* (Vic); *Industrial Relations (Ethical Trades) Act 2001* (NSW) and *Fair Work Act 1994* (SA)). In both our submission to the inquiry on the ROE Bill, and in our submission to the Senate Committee inquiry into the Workchoices Bill, we noted the special circumstances of outworkers and submitted that amendments ought to be made to reflect this special situation. The TCFUA submissions on right of entry were not taken up by the Senate Committee in either instance.

31. The right of entry laws of the Act also override State laws that provide right of entry in relation to occupational health and safety issues. Given the complexity and difficulty that unions have in exercising their right of entry under the Act, this raises serious concerns for the safety and well being of Australian workers.

32. We believe that the Transition Bill should amend the right of entry provisions of the Act to prevent employers exploiting the law to deny workers the chance to

meet with their representatives, to allow unions to protect workers and to recognise the special circumstances of outworkers in the clothing industry.

Prohibited content

33. One of the principal objects of the Act is to ensure that:

'as far as possible, the primary responsibility for determining matters affecting the relationship rests with the employer and employees at the workplace or enterprise level.'

34. Despite this, the Act is highly prescriptive in terms of the content of workplace agreements. It not only prohibits certain matters from being included in a workplace agreement, regardless of the wishes of employees and employers, but it exposes parties to substantial fines if such content is included.

35. Pursuant to subdivision B of Part 8, Division 7 of the Act and Division 7.1 of the *Workplace Relations Regulations 2006*, prohibited content includes matters such as:

- terms that restrict the employer's use of independent contractors or labour hire firms;
- terms that provide for trade union training leave, paid union meetings, deduction of union dues or bargaining agent fees;
- provisions that mandate union involvement in dispute resolution or provide for renegotiation of an agreement
- terms that provide protection from unfair dismissal; and
- provisions with respect to the renegotiation of an agreement.

36. Prohibiting such content is not only a limitation on the parties' freedom of choice but also a means of restricting trade unions from promoting and defending their members' interests. This is in clear breach of the principle of freedom of association, and contradicts the objectives of the Act and Government policy (both former and current) of allowing employees and employers to decide their own working arrangements for themselves.

37. Prohibiting specific content from workplace agreements also allows companies to refuse to protect matters constituting prohibited content via other legal means and offer collective agreements on a take it or leave it basis. Cash's Australia Pty Ltd adopted this strategy in late 2007, offering a non-union collective agreement which was ultimately rejected by workers in November 2007. Prohibited content matters can not be the subject of protected industrial action and are thus impossible to retain in such circumstances.

38. The TCFUA thus urges the repeal of subdivision B of Part 8, Division 7 of the Act and Division 7.1 of the *Workplace Relations Regulations 2006.*

Unfair dismissal

39. The TCFUA is disappointed that the Transition Bill does not restore unfair dismissal rights to all Australian workers. Protection from unfair dismissal is a right that insects with, and underpins, all other employment rights. For example, a right to 'negotiate' an ITEA is meaningless if an employee feels that he or she will be dismissed for doing, or not doing, so. It is no answer to suggest that such a dismissal would be prohibited under section 659(2)(g) of the Act, when an employer, in a workplace of under 100 employees, can dismiss a worker without giving any reason at all.

40. Since the commencement of Work Choices in March 2006, the Victorian branch of the TCFUA has only initiated unfair dismissal proceedings in approximately 3 - 4 matters. In contrast, in the period prior to the WorkChoices legislation, an

unfair dismissal dispute occured at least every 2 to 3 weeks and over the course of a year, our Victorian branch would file anywhere between 25 to 50 unfair dismissal applications. The textile, clothing and footwear industry is defined by a small number of employers with 100 or more employees and a large swathe of small to medium employers with much less than that. The great bulk of employees in the smaller to medium workplaces have been disenfranchised from any right to contest arbitrary or capricious termination of employment.

Further limitations on industrial action

41. The Workchoices legislation severely hampered the ability of unions and workers to take industrial action.

42. Proposed section 2A(2)(b) of schedule 5 provides that before making an order varying the terms of a pre-reform certified agreement or extending its nominal expiry date, the Australian Industrial Relations Commission ('AIRC') must be satisfied that *'all parties bound by the agreement genuinely agree to the extension or variation'*.

43. The application to extend or vary the pre-reform certified agreement is therefore by consent. Industrial action, or the threat of such industrial action, by either party, leading to the giving of such consent should be irrelevant.

44. The limitation on the organising, engaging, or threatening to organise or engage in industrial action in relation to the variation or extension of a pre-reform certified agreement is completely unwarranted and is an unnecessary fetter on the ability of unions and workers to collectively bargain. Nor does the Transition Bill confine itself to circumstances where industrial action is organised, engaged in or threatened. Parties are precluded from making an application to vary or extend a pre-reform certified agreement where they have applied for a protected action

ballot under section 451 of the Act. It thus prevents an application to vary or extend a pre-reform certified agreement even in circumstances where the ballot was not conducted and even where the protected action ballot application was withdrawn or defeated.

45. Without the ability to organise, engage in or threaten industrial action, employers can simply refuse the request of a union or workers to vary or extend a pre-reform certified agreement. In such circumstances a WorkChoices agreement will be forced on a party as the only alternative. Workers who have been protected from the arbitrary and unfair nature of the exclusion of prohibited content matters may be forced during this transition period to accept reduced conditions and protections in their agreements.

46. The TCFUA supports the ability of parties to extend the life of, and vary, pre-reform certified agreements. It therefore supports the retention of section 2A(1) but submits that, for the reasons outlined above, section 2A(2)(b) be removed.