TCFUA TEXTILE CLOTHING & FOOTWEAR UNION OF AUSTRALIA

National Secretary
Michele O'Neil

National Office
359 Exhibition Street
Melbourne Victoria 3000

PO Box 441
Carlton South Victoria 3053

Phone (03) 9639 2955

Fax (03) 9639 2944

Email nationaloffice@tcfvic.org.au

Website www.tcfua.org.au

23 December 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 Textile Clothing & Footwear Union of Australia (National Office) to the Senate Education, Employment and Workplace Relations Committee Inquiry into the *Fair Work Bill 2008*.

If you have any queries in relation to this matter, please feel free to contact me on bmyers@tcfvic.org.au or (03) 9639 2955.

Yours faithfully,

Bev Myers
National Industrial Officer

enc

TEXTILE CLOTHING & FOOTWEAR UNION OF AUSTRALIA

National Secretary
Michele O'Neil

National Office
359 Exhibition Street
Melbourne Victoria 3000

PO Box 441
Carlton South Victoria 3053

Phone (03) 9639 2955

Fax (03) 9639 2944

Email nationaloffice@tcfvic.org.au

Website www.tcfua.org.au

TEXTILE, CLOTHING & FOOTWEAR UNION OF AUSTRALIA

(National Office)

Submission

to

Senate Education, Employment and Workplace Relations Committee

Inquiry into the *Fair Work Bill* 2008

Submission

to

Senate Education, Employment and Workplace Relations Committee

Inquiry into the *Fair Work Bill 2008*

Submitter:	National Office
Organisation:	Textile, Clothing and Footwear Union of Australia
Address:	359 Exhibition Street, Melbourne VIC 3000
Phone:	(03) 9639 2955
Facsimile:	(03) 9639 2944
Email:	bmyers@tcfvic.org.au
Submission authorized by:	Michele O'Neil, National Secretary

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, including outworkers.

2. The *Fair Work Bill 2008* ('the Bill') was introduced to the House of Representatives on 25 November 2008 and was referred that same day to the Senate Standing Committee on Education, Employment and Workplace Relations ('the Committee') for report by 27 February 2009.

3. The TCFUA welcomes the opportunity to make submissions to the Committee on the likely impact and operation of the Bill.

TCF Industry

4. The textile, clothing and footwear industry ('TCF industry') consists of both formal and informal sectors. It encompasses a range of products and processes including (but not limited to) carpets, technical textiles, clothing, accessories, design, footwear and allied and component products. Some parts of the industry are characterised by a small number of medium-large employers bound by union collective agreements (primarily in the textile sector). However, a great proportion of the industry consists of small to medium employers whose employees are award reliant and where the capacity to bargain is limited or in fact, non-existent.

5. The largest proportion of clothing manufacture in Australia is performed by outworkers and takes place in the informal sector. This sector is characterised by the contracting out of clothing manufacturing in long contracting chains that end with an outworker performing work at home or in a sweatshop environment. The TCFUA estimates that the proportion of outworkers in the industry accounts for approximately 70% of employment across the whole textile, clothing and footwear sector.

6. The industry can be characterised as very low paid. In the informal sector, outworkers work for sometimes as little as $2-4 an hour, often for over 10 hours a day, in some cases up to 14-15 hours a day, 7 days a week with no entitlements.[1] The formal TCF industry is largely award reliant deriving its wage rates from the relevant Australian Fair Pay and Classification Scale.

---

[1] Brotherhood of St Laurence, *Ethical Threads* (2007), 4; Cregan, C, *Home Sweat Home: Preliminary Findings of the first stage of a two-part study of outworkers in the textile industry in Melbourne, Victoria*, Department of Management, University of Melbourne, November 2001. See also Ethical Clothing Trades Council, *Outworkers Lawful Entitlements Compliance Report (November 2004)*.

7. The TCFUA has union collective agreements in many workplaces which build on and are superior to award entitlements and the wages set out in the relevant Pay Scale. However, the TCF industry is properly characterised as a low paid sector.

8. A great proportion of the industry consists of people from non English speaking backgrounds ('NESB') with low levels of English language and literacy. It is also the case that many employers in the TCF industry are from NESB. The majority of workers in the TCF industry are women. It is also an industry with chronic and severe OHS concerns and workers in the industry suffer from a range of health problems, not only due to long hours spent at machines but also due to the handling of dyes and chemicals and heavy lifting.

9. The TCFUA has for a long time been actively involved in seeking legal protections for textile, clothing and footwear workers, including outworkers who represent some of Australia's most vulnerable and exploited workers.

Work Choices

10. The *Workplace Relations Amendment (Workchoices) Bill 2005* ('WorkChoices legislation') was an extreme piece of legislation that dramatically reduced workers' rights and was a barely veiled attack on the role of trade unions. The previous Government's attempt to avoid scrutiny meant that parties were given just one week to consider the WorkChoices legislation (which comprised of a 687 page Bill and its 565 page explanatory memorandum) and make submissions to the Inquiry into the Employment and Workplace Relations Amendment (WorkChoices) Bill 2005. Notwithstanding this severely restricted timeframe, many parties highlighted the myriad of problems with the WorkChoices legislation, including its inherent unfairness, reduction of conditions and entitlements for workers, its undermining of the safety net, as well as its sheer complexity and confusing drafting.

11. The worst fears about the WorkChoices legislation were borne out as Australian workers faced one of the biggest assaults on their rights in this country's history. Millions of Australians lost their right to claim unfair dismissal. Without the protection from harsh, unjust or unreasonable termination, workers felt that they had lost their ability to raise issues of concern with their bosses, for fear of reprisals.

12. Awards, covering 1.6 million low paid workers were stripped back so that many entitlements were lost. There was a severe and widespread reduction in employee entitlements for workers under AWAs, including loss of pay; removal and reduction of penalty rates; removal and reduction of overtime pay; an increase in working hours; and a reduction and loss of meal breaks, tea breaks and rest breaks.[2]

[2] 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*

13. Despite the view of the former Minister for Employment and Workplace Relations that 18 year olds able to negotiate mobile phone contracts could easily negotiate an AWA with their employer[3] nit 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.[4]

14. Contrary to its own policy objective of allowing employees and employers to decide their own working arrangements for themselves,[5] the former Government introduced the prohibited content regime which outlined a host of matters which parties were prevented from including in their agreements, regardless of their desire to do so.[6] Not only does the law dictate that parties cannot include particular matters in their agreements, they can be fined steep penalties if they seek to do so.[7]

15. Prohibited content was a direct attack on the rights of workers to be represented by their trade unions, including elected workplace delegates, with almost all prohibited content directed at matters concerning trade union activities.[8]

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)

[3] Transcript, *Mornings with Madonna King*, 612 ABC Brisbane, 27 September 2007 (Minister Hockey)

[4] JobWatch *WorkChoices: The Victorian Experience* (October 2007); Brigid van Wanrooy et al, *Australians@Work: The Benchmark Report* (October 2007; 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).

[5] *Workplace Relations Amendment (WorkChoices) Act 2005* (Cth) section 3(d). Also see eg John Howard, 'Workplace Relations Reform: The Next Logical Step' (Address to the Sydney Institute, 11 July 2005) where he noted that the 1996 Act is in need of an 'overhaul' in part because 'third parties of all stripes can insert themselves too easily into processes to the detriment of cooperation between employers and employees'.

[6] *Workplace Relations Act 1996* (Cth) s 356; *Workplace Relations Regulations 2006,* r 8.5

[7] *Workplace Relations Act 1996* (Cth) s 357(3)

[8] For eg (a)deductions from the pay or wages of an employee bound by the agreement of trade union membership subscriptions or dues; (b) the provision of payroll deduction facilities for the subscriptions or dues referred to in paragraph (a); (c) employees bound by the agreement receiving leave to attend training (however described) provided by a trade union; (d) employees bound by the agreement receiving paid leave to attend meetings (however described) conducted by or made up of trade union members; (f) the rights of an organisation of employers or employees to participate in, or represent an employer or employee bound by the agreement in, the whole or part of a dispute settling procedure, unless the organisation is the representative of the employer's or employee's choice;(g) the rights of an official of an organisation of employers or employees to enter the premises of the employer bound by the agreement; (k) the provision of information about employees bound by the agreement to a trade union, or a member acting in a representative capacity, officer, or employee of a trade union, unless provision of that information is required or authorised by law; (l) the forgoing of paid compassionate leave for an amount of pay or other benefit otherwise than in a manner that would result in a more favourable outcome than the Standard, consistent with these Regulations; (m) the forgoing of paid personal/carer's leave credited to an employee

16. Trade unions were also prevented in performing their vital role in protecting workers' conditions and entitlements by restricting their ability to monitor workplaces. Restrictions on right of entry mean that unions can not monitor workplaces such as sweatshops, where flagrant breaches of the law occur. This means that many breaches of minimum conditions are unchecked and that workers are exploited with impunity. Restrictions on right of entry have also inhibited unions from representing their members in breach of freedom of association.

17. The WorkChoices legislation not only reduced conditions and entitlements of workers, infringed workers' rights and the rights of their representatives, it was also in breach of Australia's international human rights and labour law obligations.

18. The TCFUA thus welcomes the repeal of the WorkChoices legislation. The Bill will not however consign the WorkChoices legislation to the dustbin of history.

19. The Australian Labor Party ('ALP') when in opposition, promised to 'rip up WorkChoices'.[9] It maintains that it is opposed to AWAs and individual statutory contracts.[10] As the following submissions highlight, some of the WorkChoices legislation has however been retained and AWAs (by another name) will be a feature of the new system. It is also clear that aspects of the Bill will place Australia in breach of its international labour and human rights obligations.

20. Australia is a party to the *International Covenant on Civil and Political Rights*[11] and the *International Covenant on Economic, Social and Cultural Rights.*[12] It was also a founding member of the ILO and has ratified numerous ILO Conventions including seven of the eight Conventions considered to be the 'fundamental conventions'.[13] These instruments provide numerous labour rights, including a

---

bound by the agreement for an amount of pay or other benefit otherwise than at the written election of the employee: See section 356 *Workplace Relations Act 1996* (Cth); regulation 8.5 *Workplace Relations Regulations 2006*

[9] Kim Beazley, Speech to Australian Council of Trade Unions, 24 October 2006, reported at http://www.news.com.au/story/0,27574,20636419-1702,00.html

[10] Australian Labor Party, *Forward with Fairness: Policy Implementation Plan*, August 2007, pages 1 and 4.

[11] opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). Ratified by Australia 13 November 1980.

[12] opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976). Ratified by Australia 10 December 1975.

[13] These are: *C29 Forced Labour Convention 1930*; *C87 Freedom of Association and Protection of the Right to Organise 1948*; *C98 Right to Organise and Collective Bargaining 1949*; *C100 Equal Remuneration Convention 1951*; *C105 Abolition of Forced Labour Convention 1957*; *C111 Discrimination (Employment and Occupation) Convention 1958*; *C138 Minimum Age Convention 1973*; *C182 Worst Forms of Child Labour Convention 1999*. Of these Australia has not ratified *C138 Minimum Age Convention 1973*.

right to freedom of association. The right to freedom of association comprises of various rights, including, relevantly:

a. the right of parties to a collective agreement to freely negotiate its terms;
b. the right to strike;[14] and
c. the right of workers to access their trade union.

21. While the Bill may improve upon the WorkChoices legislation in some respects, it is important to note that the WorkChoices legislation was an aberration and has been accepted as such by the Australian public.[15] It is a system that has been in place less than 3 years and does not represent the status quo. The Bill should not be considered a victory for working people because it improves upon the WorkChoices legislation in some areas. WorkChoices is not the yardstick by which to measure a fair industrial relations system.

22. The TCFUA has examined the Bill in light of its stated objectives,[16] most particularly the objectives of:

(1) providing workplace relations laws that are fair to working Australians;
(2) taking into account Australia's international labour obligations;
(3) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions; and
(4) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum terms and conditions can longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system.

23. The TCFUA supports a number of aspects of the Bill. Nonetheless we have significant concerns with the Bill and believe it to be in breach of its stated objectives and Australia's international obligations in a number of respects. The issues that we have identified, and urge the Committee to consider, relate to:

1. Outworkers
2. Enterprise agreements
3. Good faith bargaining and the low paid stream
4. Workplace rights
5. Unfair dismissal
6. Industrial action
7. Right of Entry
8. Stand downs

---

[14] The right to strike is also enunciated as a distinct right in the *International Covenant on Economic, Social and Cultural Rights*, article 8.
[15] Australian Policy Online, *The 2007 Federal Election: Exit Poll Analysis*, September 2008, page 4 (73% of people who voted for the ALP felt that industrial relations and WorkChoices was a 'very important' issue).
[16] Section 3

9. Arbitration (Compliance and Enforcement) and
10. the Australian Building & Construction Commission.

FAIR WORK BILL

1. Outworkers

Nature of outwork

24. The TCFUA has made numerous submissions to Government over many years and in a variety of settings regarding the nature of the informal TCF industry in Australia and the conditions experienced by outworkers. It is widely accepted and acknowledged that outworkers are amongst the most vulnerable and exploited workers in this country. As referred to above, working conditions for outworkers are notoriously bad.

25. For example:

- the average hourly rate of pay is $3.60 per hour;
- working hours for 21% of outworkers are 10 hours per day and for 18% of outworkers are14-15 hours a day;
- 62% spend 7 days a week sewing, and an additional 26% spend 6 days;
- 83% are not usually paid wages on time and 52% often do not receive wages at all; and
- only 3% receive holiday pay and 2% receive public holiday pay.[17]

26. 97% of the outworkers surveyed were women and 92% of these were born overseas.[18] Outworkers often face physical and verbal harassment, including blackmail, threats, coercion and bribes. Their workplaces, which are often their homes or backyard garages, are not safe work environments and outworkers often suffer from occupational injuries. Most outworkers are from non-English speaking backgrounds with poor English language skills and the stresses of their working conditions are compounded by their lack of English language skills.[19]

27. A more recent study by the Brotherhood of St Laurence has found that conditions for outworkers have worsened in the last five years, with outworkers reporting

---

[17] Cregan, C, *Home Sweat Home: Preliminary Findings of the first stage of a two-part study of outworkers in the textile industry in Melbourne, Victoria*, Department of Management, University of Melbourne, November 2001. See also Ethical Clothing Trades Council, *Outworkers Lawful Entitlements Compliance Report (November 2004).*

[18] Cregan, C, *Home Sweat Home: Preliminary Findings of the first stage of a two-part study of outworkers in the textile industry in Melbourne, Victoria*, Department of Management, University of Melbourne, November 2001. See also Ethical Clothing Trades Council, *Outworkers Lawful Entitlements Compliance Report (November 2004).*

[19] Senate Economics Reference Committee, *Report on Outworkers in the Garment Industry* (1996)

being paid an average of $2-$3 per hour.[20] Internal surveying by the TCFUA in 2008 has also found that although wages are marginally higher in some cases, these are still well below the Australian Fair Pay and Classification rates for the TCF industry ($5-$7 per hour; compared with the legal rate of $15.89 minimum) and that outworkers continue to work excessive hours (10-12 hours) six days per week without receiving any entitlements.

28. Outworkers work in a variety of settings and their presence in the supply chain is typically unacknowledged. For this reason outwork is often referred to as the 'hidden' or 'invisible' part of Australia's TCF sector. The photographs contained in Attachment A vividly portray the reality of sweatshops hidden behind suburban garages. These photographs were taken by the Victorian branch of the TCFUA in November 2008 of houses in suburban Melbourne.

Employment arrangements

29. Outworkers are engaged in a variety of ways. It is very common for outworkers to be told that it is a pre-condition for receiving work that they must organise their work arrangements via a business. Many outworkers thus register businesses or set up companies. These artificial arrangements result in outworkers being viewed not only as employees or as contractors but also as employers or as sole proprietors. In many cases the arrangement will never be specified or the outworker informed of his or her employment status.

30. A very typical arrangement, for example, is where a husband and wife team work as outworkers. One partner is told to register a business and 'employs' his or her spouse but he or she also completes the work. He or she may be viewed as an employer but the indicia of an employer- employee relationship actually exist with respect to both partners vis-à-vis the person providing the work to the 'business'. It is also very common for outworkers who work on their own to be required to set up a business as a pre-condition to receiving work. These workers, in strict legal terms are notionally sole proprietors, however again the indicia of an employer-employee relationship are present.

31. As Ms Lee, an outworker for over 20 years, noted during an inquiry of the Senate Employment, Workplace Relations and Education Committee in 2006:

> *'I had to give the boss at the factory an ABN otherwise he would not give us any work. About five years ago I worked for a different boss. He told me I could not have any work unless I had proof that I paid my own workers compensation. I got my children to help me to get the paperwork and paid $150. When I showed proof of the payment, the boss gave me work.* [21]

---

[20] Brotherhood of St Laurence, *Ethical Threads* (2007), 4.

[21] Hansard, Senate Employment, Workplace Relations and Education Legislation Committee, 4 August 2006, EWRE 56

32. In fact, in a great majority of cases where an outworker has set up a business or is told that he or she is a contractor the indicia of an employer- employee relationship are often in fact present, for example the high degree of control over the work of the outworker, including specific directions with respect to number and type of garments produced, deadlines for production and methods of production. For these reasons, the outworker should be considered an employee. In these circumstances, while an outworker is in fact an employee, he or she may not be prima facie considered to be so. The onus is thus on him or her to rebut the legal characterisation of his or her employment arrangement and prove his or her status as an employee. Sham arrangements which result in companies and individuals escaping their legal obligations are a feature of the industry.

Legislative protection

33. The situation of outworkers has long been recognised as 'scandalous', a 'serious affront to the moral and social conscience of the community'[22] which has 'no place in a society which embraces the concepts of social justice.'[23] Legislative provisions protecting outworkers have enjoyed cross-party support both Federally and in the States.

34. At the State level, various State governments have enacted laws specifically designed to protect outworkers. For example, the *Outworkers (Improved Protection) Act 2003* (Vic); the *Industrial Relations (Ethical Trades) Act 2001* (NSW); and the *Fair Work Act 1994* (SA). South Australia and New South Wales have mandatory codes of practice for the clothing industry. Queensland and Victoria have committed to introducing such codes in the near future.

35. The Howard Government also acknowledged the vulnerability of outworkers:

> *'The government recognises that outworkers are a vulnerable class of workers within Australian workplaces and deserve additional protection.* [24]

36. It signaled the importance attached to outworkers by including, for the first time, in Federal industrial legislation, protections for outworkers. In fact, all major reforms of Federal industrial law under the previous Government took account of the needs of outworkers.

37. The ALP has recognised the situation of outworkers and has committed to ensuring their fair treatment and protection.[25]

---

[22] *Re Clothing Trades Award 1982* [1987] 19 IR 416; 421
[23] *Re Clothing Trades Award 1982* [1987] 19 IR 416; 419
[24] Senate Hansard, 28 November 2006, 97 (Senator Troeth)

38. The *Textile, Clothing, Footwear and Associated Industries Award 2010* [MA000017] published on 19 December 2008 ('TCF Award') contains protections for outworkers, as awards have done since 1919.

39. The TCFUA recognises that the Government remains committed to continuing protection for this vulnerable class of worker. The Bill recognises the needs of outworkers and a number of provisions seek to ensure that these workers are protected from exploitation.

40. There are nonetheless a number of problems with the provisions of the Bill relating to outworkers, which we believe may operate to reduce protections for outworkers if they are not amended.

Deeming provisions

41. A number of the issues outlined below relate to the characterisation of outworkers and the constitutional issues that outwork raises. We submit that the best means to ensure protection for all outworkers is the deeming of all outworkers as employees.

42. The Senate Economics Committee recommended in 1996 and in its follow up report in 1997 that 'most outworkers should be considered to be employees'[26] and that the Commonwealth examine ways to deem all outworkers employees. It noted that the lack of action on this issue seemed to be a problem of 'political will.'[27]

43. In a number of State jurisdictions, including Queensland, South Australia, New South Wales, Tasmania and Victoria, outworkers covered by the State system are deemed to be employees, regardless of the type of arrangement governing their engagement.

44. The Government has committed to introducing federal national legislation that deems all outworkers employees.[28] We thus urge the Committee to recommend that the Bill be amended to include deeming provisions for outworkers.

---

[25] Letter from Julia Gillard to Michele O'Neil dated 23 July 2007; Australian Labor Party, National Conference, May 2007, Resolution 133R; Senate Hansard, 18 March 2008, 63 (Senator Wong); Australian Labor Party, *National Platform and Constitution* (2007) Chapter Seven, 109.

[26] Senate Economics Reference Committee, *Review of the Inquiry into Outworkers in the Garment Industry* (1997) 1.26, Senate Economics Reference Committee, *Report on Outworkers in the Garment Industry* (1996), executive summary

[27] Senate Economics Reference Committee, *Review of the Inquiry into Outworkers in the Garment Industry* (1997) 1.30

[28] Resolution 133R, ALP National Conference, May 2007, 32; Australian Labor Party, *National Platform and Constitution* (2007) Chapter 7, 109

Definitions- Section 12

45. In our view the definition of outworker in section 12 of the Bill covers outworkers who have incorporated because it refers to work done for the purpose of a contract for the provision of services. We note that in relation to clause 140 of the Bill, which deals with matters that may be included in a modern award, the Explanatory Memorandum at paragraph 550 states:

> *'The definition of outworker has also been expanded to cover a broader range of situations where an individual performs work in the textile, clothing or footwear industry. For example, it is designed to allow a modern award to deal with a situation where a contract is made with a company and an individual performs work in the capacity as a director of the company.'*

46. We seek clarification that the definition of outworker includes all types of outworker arrangements for all purposes.

47. In relation to the definition of 'outworker entity' in section 12 of the Bill we believe that this term is misleading as it suggests that outworkers need to be engaged by the entity. In fact, TCF Award obligations apply whenever work is given out regardless of whether an outworker is or will be engaged. We submit that, for the avoidance of doubt, the term 'outworker entity' should be amended to 'TCF entity' to make it clear that an entity operating in the TCF sector will attract obligations.

Section 27- State laws

48. Section 27 of the Bill which preserves state and territory laws relating to outworkers has the effect, because of the definition of outworker in section 12 of the Bill, of displacing the operation of the *Industrial Relations Act 1999* (Qld) and the *Fair Work Act 1994* (SA) as they pertain to non-TCF outworkers. This is because outworker is defined in the Bill in relation to performing work in the TCF industry. Therefore State laws in relation to TCF outworkers are preserved but those relating to non-TCF outworkers will be extinguished by the operation of the Bill. This will have the effect of undermining existing state protection for vulnerable workers, and cannot be countenanced. We therefore seek amendment of section 27 of the Bill to make it clear that these Acts continue to operate in respect of all outworkers as defined in those particular acts.

Covers and applies- section 46

49. Subsection 46(2) of the Bill provides that a modern award does not give a person an entitlement or imposes obligations unless the award applies to the person. The

note to section 46 refers to non-employee outworkers and notes that the subsection does not affect the question of whether these workers are affected by a contravention of award terms. Indeed, section 539(3) of the Bill gives standing to outworkers to enforce breaches of modern awards. We seek amendment of the Bill to make it clear that awards either apply to outworkers (of all types) or that the award is enforceable by the outworker in relation to outworker terms. We seek this amendment in section 46 because we believe that the way that that section reads in conjunction with the note is confusing.

Section 57 and 200: application of the award

50. Section 57 provides that a modern award does not apply to an employee where an enterprise agreement is in operation, and that it further does not apply to an employer or an employee organisation in relation to the employee in such circumstances. Section 200 provides that where an employee is an outworker and covered by an enterprise agreement, that enterprise agreement must include terms of the kind that are outworker terms of the award and that these are not detrimental to an employee when compared to the outworker terms of the modern award.

51. The effect of these provisions appears to be that where there are employees covered by an enterprise agreement that are not outworkers, the outworker sections of the TCF Award will be excluded.

52. Broadly speaking, the TCF Award has two sets of provisions- firstly it sets terms and conditions for outworkers' engagement and secondly it regulates contractual arrangements where work is given out by an enterprise. Both these sets of provisions apply to all entities. The provisions regulating contractual arrangements will, pursuant to the interaction of these sections, also appear to be excluded.

53. In so doing, the entire scheme of outworker protection and the regulation of supply chains will be undermined. It will permit an employer who does not employ outworkers, to give work out to entities that do (or may reasonably) employ outworkers without any regulation. This will mean, for example, that the employer will not be required to keep lists of its work that is given out which will mean that the transparency of supply chains will be nearly impossible to monitor. It must be prohibited for the outworker terms of the TCF Award to be excluded under any circumstance.

54. Although it is arguable that the outworker terms of the TCF Award that do not relate to employees will not be excluded and will thus continue to operate, we believe that this distinction is highly technical and confusing and is likely to be misunderstood by the industry. Indeed, section 57 on its face, appears to exclude the TCF Award where an enterprise agreement is in place, and this will be the assumption of industry. The outworker terms of the TCF Award which may

technically still be in effect in respect of an employer's contracting arrangements will be assumed not to apply and will not be adhered to.

55. In contrast, under the current Act, section 349 specifically preserves the outworker provisions of current awards by stating that terms of an award that would apply but for a workplace agreement in place have effect to the extent that they are about outworker conditions. Section 57 of the Bill therefore represents a diminishment in the protection of outworkers.

56. We therefore seek amendment of section 57 of the Bill to provide that it is not possible to exclude outworker terms of a modern award in any circumstance.

57. We further seek the removal of section 200 of the Bill. If the union is not a party to the enterprise agreement, we have grave concerns about the enforcement of the enterprise agreement outworker terms. It is also consistent with the amendments suggested to section 57 of the Bill, that it be prohibited to exclude the outworker terms of a modern award regardless of the type of agreement that applies. In circumstances where an outworker is covered by an enterprise agreement, the outworker terms of the modern award will continue to apply, therefore section 200 of the Bill is not necessary.

58. We urge the Committee to recommend the removal of section 200 and the amendment of section 57 to provide that the outworker terms of the modern award may not be excluded from operation in any circumstance. The entire scheme of outworker protection will be compromised if the outworker terms of the TCF Award are capable of being excluded.

Terms included in a modern award- section 140

59. Section 140 of the Bill provides that a modern award may include:

    a. *terms relating to the conditions under which an employer may employ employees who are outworkers; and*
    b. *terms relating to the conditions under which an outworker entity may arrange for work to be performed for the entity (either directly or indirectly), if the work is, or is reasonably likely to be, performed by outworkers.*

60. As noted above, the outworker provisions of the TCF Award relate not only to the minimum terms and conditions of employment but also regulate the giving out of work and the contractual arrangements of the employer. Section 140 of the Bill is problematic firstly because its application is confusing for employers. Employers are in fact bound in respect of both sections 140(1)(a) and 140(1)(b) of the Bill where they meet the definition of outworker entity. However, given the differing terminology used this may not be clear. We therefore submit that section 140 of

the Bill should be redrafted to make it clear that an employer is bound in respect of both its employees and its contracting arrangements.

61. A further, more fundamental issue with section 140 of the Bill is the reference in s 140(1)(b) of the Bill to 'reasonably likely'. This permits of an argument by a particular entity that it is not reasonably likely to engage outworkers and that, therefore, that the outworker provisions of the TCF Award do not apply. The entire scheme of outworker protection in the TCF Award rests upon ensuring the transparency of the supply chain by regulating the giving out of work regardless of who will actually perform the work. This system enables the TCFUA to track the giving out of work along a supply chain and hence locate outworkers.

62. If a business is able to deny the applicability of the TCF Award on the basis of what it is 'reasonably' likely to do, this would require the TCFUA to first find the outworker and then trace the work back up along the supply chain in order to enforce the TCF Award. This would be a near impossible task given the invisible nature of much of the work performed by outworkers and the fact that companies in the industry very rarely admit to using outworkers.[29] The ability of the TCFUA to track the giving out of all work regardless of who it may be done by is vital for the protection of outworkers. This is because it ensures a level of transparency in contracting in the TCF industry and therefore the ability to ascertain where and by whom outworkers are being exploited and TCF Award breaches are occurring.

Boards of reference

63. The TCF Award provides at clause D.2.1 that a Principal who gives work out must be registered with a Board of Reference. Clause D.5 of the TCF Award provides for the establishment and powers of the Boards of Reference. Provisions providing for the establishment of Boards of Reference have not been allowed for expressly in modern awards (cf section 524 of the Act). In our view Boards of Reference are allowable in the TCF Award because they are incidental to the operation of outworker terms of the TCF Award and are essential for the operation of the outworker terms (section 142 of the Bill). Indeed, the system of outworker protection rests upon the registration of companies with the Boards of Reference, and the Boards of Reference are a crucial part of ensuring the transparency of the supply chain through the registration system. We seek however that the matter be put beyond doubt by express inclusion in the Bill that modern awards may include terms establishing Boards of Reference.

[29] For eg, a survey of 847 workplaces conducted by the NSW\SA\TAS Branch of the TCFUA during its participation in a project of WorkCover NSW in 2007 -2008 revealed that of the workplaces surveyed only 47 admitted to the use of outworkers when asked: WorkCover NSW, TCF Advice and Audit Supply Chain Project, 2007-2008.

NES

64. The National Employment Standards ('NES') are expressed to apply only to national system employees (sections 60 and 61). The NES do not therefore apply to outworkers who are not employees. This is in contrast to the TCF Award which provides at clause D.4.1:q

> *'A principal must apply the NES to the worker as though the worker is an employee, whether or not the principal is an employer or the worker is an employee'.*

65. The NES should apply to all workers and particularly workers who, it is widely acknowledged, are disadvantaged and exploited. We seek amendment of the Bill to provide that non-employee outworkers may be covered by the NES.

2. Enterprise Agreements

Agreement content

66. A fundamental principle of freedom of association at international law is that parties to a collective agreement must be free to negotiate its terms. For this reason the Committee on Freedom of Association at the ILO has found that legislative provisions which prohibit the inclusion in collective agreements of clauses such as those with respect to working time, secondary boycott action and collection of union dues violate the principle of freedom of association.[30]

67. Prohibited content was nothing other than an attack on the legitimate role of trade unions and their delegates and members. It represents one of the most extreme examples of government interference in matters effecting employees, employers and their representatives. The TCFUA thus welcomes the repeal of the majority of content in section 356 of the Act and regulation 8.5 of the *Workplace Relations Regulations 2006*.

68. However, although the Bill removes many of the restrictions on parties' freedom to contract, the Bill nonetheless retains restrictions that should not be a feature of the new industrial relations system. In particular, pursuant to section 172 of the Bill, it requires that matters pertain to the relationship between employers and employees or employers and employee organisations.

---

[30] International Labour Organization— Committee on Freedom of Association, *Complaint against the Government of Portugal presented by the Workers' Union of the Southern and Islands Insurance Companies, Report No 248, Case(s) No(s):1370* at 224 (working time); International Labour Organization— Committee on Freedom of Association *Complaint against the Government of Canada (British Columbia) presented by the Canadian Labour Congress (CLC) Report No 256 Case(s) No(s) 1430*, at 195(g) (secondary boycott action) and International Labour Organization— Committee on Freedom of Association, *Complaint against the Government of Côte d'Ivoire presented by the World Confederation of Labour (WCL) Report No. 289, Case No. 1594*, at 24 (union dues).

69. The TCFUA absolutely oppose the prohibition, on the grounds of matters pertaining, against the inclusion in enterprise agreements of clauses requiring an employer to source Australian made products (Explanatory Memorandum, paragraph 673). While for our members such a clause can be linked to job security, the prohibition against the inclusion of such a clause in other workers' enterprise agreements shows a staggering lack of Government support for local industry and is contrary to the ALP Platform.[31] Parties who wish to include such clauses should be free to do so.

70. In addition, the Bill provides that unlawful terms must not be included in an enterprise agreement. Pursuant to section 186(4) of the Bill if unlawful terms are included in an agreement it will not be approved. Section 194 of the Bill sets out what constitutes an unlawful term. In relation to this the TCFUA object to the prohibition on including terms relating to unfair dismissal or right of entry, both of which represent important rights for workers, particularly in the TCF industry. The prohibition on the inclusion of such matters also directly contradicts the 'matters pertaining' principle. Nothing could pertain more directly to the employment relationship than termination of it.

71. The TCFUA furthers submit that the above restrictions on agreement content are unnecessary fetters on the freedom of the parties to agree to the terms of their enterprise agreements. It further represents a breach of freedom of association at international law and thus a breach of Australia's international human and labour law obligations. The TCFUA submits that parties to an enterprise agreement should be entitled to determine the terms and conditions of their agreements without restrictions.

Flexibility term

72. The TCFUA has grave concerns about the requirement in section 202 of the Bill that each enterprise agreement include a flexibility term, in particular, the operation of such a term, its effect on the remaining terms of the enterprise agreement and its capacity to undermine the enterprise agreement. While a trade union may be able to negotiate safeguards around the use of individual flexibility arrangements in agreements to ensure that existing terms and conditions of employment are not undermined, employees who are not represented by a union may not be able to do so.

73. There is, indeed, a substantial risk that individual flexibility arrangements could operate to undermine collective bargaining as well as workers' entitlements. We fail to see how an individual flexibility arrangement is not an AWA by another name and it should not be a feature of the system. In actual fact, aspects of the individual flexibility arrangement scheme could be worse than the AWA system

[31] Australian Labor Party, *National Platform and Constitution* (2007) Chapter 5.

because unlike AWAs and ITEAs, these individual arrangements will not be monitored even in a minimalist way.

74. The Explanatory Memorandum notes that the employer must *'ensure that any individual flexibility arrangement must result in the employee being better off overall than if there was no individual flexibility arrangement.'* So what you have, therefore, is the person who may be seeking to impose disadvantage, assessing that very disadvantage. In our submission that it is a manifestly inadequate safeguard. The Explanatory Memorandum at pages 137-138 sets out a range of scenarios and discusses whether in each case the employee would be better off overall. It is clear from these examples that the matter is far from straightforward, as paragraph 868 states:

> *'...it is less likely that an employee would be better off overall where the employer has initiated a request to agree an individual flexibility arrangement under which the employee gives up a monetary benefit in exchange for a non-monetary benefit. Similarly, it is less likely that an individual flexibility arrangement would result in an employee being better off overall where the monetary benefit given up by the employee had a substantial value, or if the value of the monetary benefit was, in the view of a reasonable person, disproportionate to the non-monetary benefit for which it was exchanged.'*

75. While the Explanatory Memorandum provides useful commentary, the fundamental fact is that no external body will check the contents of the individual flexibility arrangement. The employee thus has no real protection against disadvantage and may only initiate proceedings for breach of agreement[32] after he or she has already suffered damage.

76. In addition, section 203 of the Bill sets out the requirements that must be met by an individual flexibility term in an agreement, including a requirement for genuine consent, that the employee be better off overall and a capacity for termination of the individual flexibility arrangement. Section 204 of the Bill, however, makes a mockery of section 203 of the Bill, by providing that an individual flexibility arrangement that does not meet the requirements set out in section 203, will nonetheless have effect. Section 203 of the Bill thus has no work to do and the safeguards for workers set out in that section may be easily ignored. This is an untenable circumstance and must be rejected by the Committee.

77. The excesses of AWAs have been well documented.[33] Accordingly, providing for individual agreements that do not need to be registered, be externally assessed as

---

[32] Explanatory Memorandum 861

[33] 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*

having met the Better Off Overall Test, or even meet the very requirements of the Bill, must not be permitted. In addition, existing AWAs and ITEAs should not be permitted to continue once the expiry date has passed.

78. In our submission, individual flexibility arrangements (in agreements and awards) and the continuation of AWAs and ITEAs is not only contrary to Government policy, it is also contrary to the objects of the Bill. Section 3(c) of the Bill states that an object of the Bill is:

> *'ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system.'*

79. Accordingly, the requirement that individual flexibility arrangements must be a term of enterprise agreements (and awards) should be removed from the Bill. AWAs and ITEAs must also not be permitted to continue in the new system.

Dispute Resolution

80. Section 186(6) of the Bill provides that in order to gain approval by Fair Work Australia ('FWA'), an enterprise agreement must include a term allowing for dispute settlement. This dispute settlement procedure can involve a person other than FWA. The TCFUA opposes allowing dispute resolution to be conducted by a service provider other than FWA. We have seen a number of AWAs where workers are forced to bear the costs of the dispute settlement procedure where a private mediator is used. Dispute resolution clauses are crucial because without an effective and accessible means to enforce the terms of the agreement, the rights under the agreement may be breached with impunity. In this way, dispute resolution clauses can be used to deny workers their rights under the agreement. The Bill should provide that only FWA may be used in order to guard against the undermining of agreements.

Consultation

81. The TCFUA welcomes section 205 of the Bill and the requirement that enterprise agreements must include terms relating to consultation. The disregard that some employers show their workforce when implementing major changes that impact upon employees mandates the inclusion of such a term. For example, in December 2008, 150 workers were made redundant by Huyck Wagner Australia.

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)

The workers discovered that they had lost their jobs when one of them happened to see a notice detailing the closure of the site on the American parent company's website.

Approval of agreements

82. The TCFUA is also concerned that the access period for a proposed enterprise agreement is too short to ensure that genuine agreement with employees has been reached. The seven day access period prescribed in section 184 of the Bill may not be sufficient, particularly in cases where employees are from a non-English speaking background and may have difficulty understanding the agreement and any additional material incorporated into the agreement. For manufacturing sites operating multiple shifts, or with numerous staggered meal times, seven days is insufficient time to advise workers of the content of the proposed enterprise agreement.

83. For example, at Bruck Textiles there are 12 lunch rooms at two sites and staggered lunch times. Huyck Wagner Australia has 4 shifts operating around the clock. In both instances it takes several days and multiple visits in order to speak with all workers.

84. It may also not be enough time in circumstances where an employer has breached good faith bargaining orders or has failed to notify employees of their right to representation in the negotiation of the proposed enterprise agreement. If, for example, a trade union was made aware of a proposed enterprise agreement part way through the seven day access period there may be insufficient time for an application to be made to FWA and for orders to be made in relation to the vote and in relation to the making of the agreement.

85. The TCFUA therefore submits that the seven day period for approval of enterprise agreements should be extended to a 14 day period to ensure that other provisions of the Bill can be enforced and upheld and that employees have sufficient time to adequately consider and understand the contents of a proposed enterprise agreement.

Coverage of agreements

86. In addition, the operation of section 183 of the Bill is problematic which respect to the rights of workers to be represented by their trade union. Section 183 of the Bill provides that a trade union that was a bargaining representative for a proposed enterprise agreement, may, after the enterprise agreement is made, apply to FWA in order to have the enterprise agreement cover it. In circumstances where an employer has failed to notify employees of their entitlement to have their trade union act as a bargaining agent for a proposed enterprise agreement, the trade union will have no right to be covered by the enterprise agreement. It is also not uncommon for workers to notify the union only when a document has

been distributed by their employer for the vote. In this case the union will also be unable to be covered by the enterprise agreement because it has not acted as a bargaining representative.

87. The coverage of a trade union by an enterprise agreement is important for the enforcement of its terms, particularly where individual workers do not wish to commence enforcement action in their own names. This is a common occurrence in an industry such as TCF where workers fear reprisals for raising issues with their employers. In circumstances where a trade union has a right to act as a bargaining agent for workers, and does not do so due to the failure of the employer to notify it of the proposed enterprise agreement, or where it is otherwise unaware of the proposed enterprise agreement during the bargaining period, the trade union should not be precluded from coverage of the agreement when it has been made. The TCFUA thus urges the Committee to recommend the amendment of section 183 to remove the requirement that the employee organisation have acted as a bargaining representative in order to be covered by the enterprise agreement in these circumstances.

Variation of agreements

88. The scheme relating to variation of agreements is extremely problematic, nonsensical and contrary to the basic principles of contract law. Section 207 of the Bill provides that only employees and employers may make variations to an enterprise agreement. A trade union that is covered by the enterprise agreement may not therefore vary its terms. Notwithstanding this, it must, pursuant to the terms of section 210(1) of the Bill apply for the approval of the variation. Section 211(c) of the Bill further provides that FWA must only approve the variation if it considers it appropriate to do so after taking into account the views of any employee organisation covered by the agreement. Under this scheme therefore even where a trade union objects to the terms of the variation:

    - it must apply for its approval; and
    - may present its objections to the variation(s) to FWA which must take these into account.

89. The TCFUA submits that this scheme is illogical and in fact diminishes current protections relating to variations of agreements. Under the current Act, in the case of union collective agreements, the variation must be made between the trade union and the employer and then submitted for approval. Pursuant to the Bill, the variation must be made without the trade union and the trade union may only object to its terms after it has been made. This removes protections for workers who traditionally rely on their union to advise them of the impact of any proposed variation(s).

90. Indeed, providing that variations may only be made by employees and employers removes safeguards that prevent undue pressure being placed on employees to

change the terms of their agreement. In the TCF industry, it is, for example, a common circumstance for workers to be told that their jobs are at stake and for employers to seek reductions in redundancy payments under an enterprise agreement. We fear that workers will feel pressured to accept variations to their enterprise agreements and that the only capacity for any objection will need to be made after the variation has been made, and need only be 'taken into account' by FWA.

91. The provisions are also completely at odds with the fundamentals of contract law, permitting employees and employers to agree to impose obligations on, or reduce entitlements of, a trade union without its consent. The Explanatory Memorandum notes that if the proposed variation imposes obligations on a trade union that it does not want to agree to, this may be an example of a circumstance in which FWA may not approve a variation.[34] FWA is obligated to do no more than 'take into account' the views of a trade union covered by the agreement. It may well approve the variation regardless of the trade union's opposition leading to an untenable circumstance that undermines existing protections in the Act.

92. We urge the Committee to recommend that all persons covered by an agreement be required to agree to make a variation. This will guard against undue pressure being placed upon employees to accept variations to their enterprise agreements. It also accords with the scheme relating to variations by providing that an organisation covered by the enterprise agreement that must seek to have the variation approved will need to make the variation.

3. Good faith bargaining

93. The TCFUA welcomes the requirement in section 228 of the Bill that parties to proposed enterprise agreements negotiate in good faith. All too often under the Workchoices legislation employers were able to frustrate the wishes of employees in negotiating a union collective agreement by refusing to meet with the union, ignoring union proposals and by placing their employees under pressure to accept non-union agreements.

94. For example, Cash's Australia Pty Ltd ('Cash's'), was, for many years prior to WorkChoices, a site with high union membership and successive union collective agreements. When, in November 2007, the time came to renegotiate their agreement, the overwhelming majority of employees supported negotiations for a new union collective agreement. The company refused to negotiate with the TCFUA and ignored its proposals. It put out three non-union collective agreements (withdrawing the first two in order to make amendments to the draft). Employees voted down the non-union agreement that was put up for a vote in November 2007. Following the rejection of the non-union agreement, the company claimed to be 'considering its options' and again refused to meet with the TCFUA or respond to union proposals. From September 2007 and throughout

[34] Paragraph 901

2008, the company made disparaging remarks about union members and their role in representing workers. It relocated the union delegate's office on a number of occasions and at one stage removed her office door. In August 2008, the company made six workers redundant, all of whom were union members. On 3 December 2008, Cash's once again put a non-union agreement to the workforce. It was accepted by the workers, even though it reduces many of their current conditions. At the time of the vote, the workers had not had a pay rise for two years due to the company's refusal to negotiate with the TCFUA.

95. It appears to be no coincidence that the latest non-union agreement was offered to employees one week after the introduction of the Bill. Indeed, Cash's actions would violate the provisions of the Bill and the Bill would allow a remedy to its workers for such conduct. The TCFUA believes that good faith bargaining should be a feature of the system and should be enshrined in legislation in order to prevent companies like Cash's manipulating the law to deny workers their right to an agreement of their choice.

96. The TCFUA further welcome the capacity for FWA to arbitrate disputes where good faith bargaining orders have been breached.[35] Without such a power the good faith bargaining regime will be ineffectual as parties will have no incentive to comply with the orders of FWA. In the above example, the TCFUA lodged a dispute with the Australian Industrial Relations Commission ('the Commission'). However, the Commission had no power to resolve it. Cash's were clear in telling the union that they were under no obligation to rectify their conduct and that, accordingly, they would not do so. Indeed, without the possibility of arbitration, we fear that many companies will continue to negotiate in bad faith and deny the wishes of their workforce.

Low paid stream

97. The TCFUA welcomes the introduction of a bargaining stream for the low paid. In a low paid industry such as the TCF where workers are often exploited, this will provide the opportunity for workers to negotiate agreements which will improve their working conditions in a way that has not previously been possible. Again, we welcome the capacity for FWA to arbitrate in relation to the low paid bargaining stream.[36] Without such a mechanism many employers will refuse to participate in bargaining and workers' conditions and entitlements will not be improved in accordance with the objects of the Bill.

98. We are concerned however with the prohibition in section 263(3) of the Bill that where an employer has previously been covered by an enterprise agreement or a workplace determination it will not be possible for a further workplace determination to be made. This assumes that in the period of the first enterprise agreement or workplace determination that is made workers will have gained

[35] Section 269
[36] Sections 261 and 262

enough bargaining strength to sufficiently negotiate an enterprise agreement on their own without the assistance of FWA and without the possibility of arbitration as a last resort.

99. This misconceives of the reality for workers in low paid and precarious employment and in our view 4 years (which could be less, depending on the terms of the enterprise agreement or workplace determination) may not be sufficient time for workers to gain bargaining strength. Workers in low paid, small and medium enterprises, in some cases, will never have separate, sufficient bargaining capacity and, it may well be that under these provisions, workers in this stream will access one agreement and one agreement only.

100. The TCFUA thus urges the Government to remove the requirement in section 263(3) of the Bill that prohibits further workplace determinations being made in relation to the low paid bargaining stream.

4. Workplace Rights

101. The TCFUA welcomes the protection of union delegates and union members from victimization, harassment and discrimination on account of their union activity and/or membership.

102. Section 340 of the Bill provides that a person must not take adverse action against another person in relation to his or her workplace rights. Workplace right is defined in section 341 of the Bill and includes a '*process or proceedings under a workplace law or workplace instrument*'.

103. This is, in turn defined in section 341(2) of the Bill. The TCFUA submits that included in this definition must be the following:

    (a) refusing to make an individual flexibility arrangement under a modern award or enterprise agreement;
    (b) refusing to cash out paid annual leave or paid personal/carer's leave.

104. At present the Bill provides that these matters are only considered in the positive, that is that a process or proceeding under a workplace law or workplace instrument will include making or terminating an individual flexibility arrangement under a modern award or enterprise agreement or agreeing to cash out paid annual leave or paid personal/carer's leave.

105. In our experience it is often the case that adverse action is taken against workers when they refuse to accede to an employer's demands and accordingly we believe that the Bill should be amended to include circumstances whereby workers refuse to enter into agreements or arrangements with their employers around cashing out of leave or individual flexibility arrangements.

106. The TCFUA notes sections 343 and 344 of the Bill. Section 343 of the Bill provides that a person must not coerce another person to exercise or not exercise a workplace right. Section 344 of the Bill specifically deals with individual flexibility arrangements and provides that an employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to agree to, or terminate, an individual flexibility arrangement. Section 344 of the Bill therefore also does not deal with the circumstance where an employee refuses to make an individual flexibility arrangement. While section 343 may do so, it relates only to actual coercion, which is a high bar to prove. As the Explanatory Memorandum notes at paragraph 1396, *'Under [sic] influence or pressure is a lower threshold than coercion.'*

107. It therefore appears that in relation to a refusal to make an individual flexibility arrangement or cash out leave, the Bill will only protect workers against coercion. This is inconsistent and does not provide adequate protection for workers. The Explanatory Memorandum at paragraph 1396 recognises that there are higher obligations on an employer when it enters into arrangements with employees that modify conditions under the safety net. These higher obligations should apply whenever an employer seeks to enter into such arrangements and not just when it actually does. The TCFUA thus seek the amendment of section 341(2) of the Bill as outlined above. We also seek the amendment of section 344 to cover the circumstance of a refusal to enter into an individual flexibility arrangement.

108. In relation to protections in the Bill around a person engaging in industrial activity as outlined in sections 346 and 347 of the Bill, the TCFUA submits that the definition of industrial activity should include representing or advancing the claims of individual workers or a group of workers. At present the definition relates to representing or advancing the views, claims of interests of an industrial association, however it may not, on the face of it, cover the more common circumstance of delegates who represent workers day to day in an enterprise and who often face severe discrimination in carrying out their representative duties.

5. Unfair Dismissal

Small business employees

109. The TCFUA oppose absolutely the differing regimes for small business employees as compared to employees of other businesses. The system is entirely discriminatory and diminishes the rights of vast numbers of employees who work for small businesses. In the TCF Industry, it is estimated that 93% of businesses are comprised of 20 employees or less.[37]

110. Indeed, the distinction will disproportionately impact on industries defined by large numbers of small businesses. Many of these, including TCF, hospitality and the community sector, have a highly gendered workforce. This is nowhere more

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

profound than in the clothing industry, of which we estimate, 90-95% of shop floor workers are female. The informal outworker sector is almost uniformly women. The unfair dismissal regime thus works against the objects of the Bill, and in particular section 3(e) and the object of *'protecting against unfair treatment and discrimination'*.

111. The TCFUA submits that all workers should become entitled to access the unfair dismissal regime upon completing any probationary period of employment, where this is less than the minimum employment period set out in the Bill.[38]

112. In relation to the minimum employment period, the TCFUA urges the Committee to recommend that small business employees be entitled to access unfair dismissal protections after completing a period of 6 months which is in accordance with the minimum employment period required of all other employees.[39] In addition, the TCFUA urges the committee to recommend the removal of the Fair Dismissal Code from the industrial relations system.

113. Section 385(c) of the Bill suggests that if an employer follows the Fair Dismissal Code, a dismissal will be deemed fair. It is however crucial that the merits of the dismissal itself be examined. The Fair Dismissal Code provides that for a dismissal to be deemed fair it will be sufficient if an allegation of theft, fraud or violence has been reported to the police by the employer. It is foreseeable that this could be used by employers to summarily dismiss employees where there is no evidence of theft, fraud or violence or without having conducted any investigation into an allegation of such behavior.

114. A false report to police or what will perhaps be more common, a report to police based on spurious grounds, will if discovered sometime after the dismissal, be of no assistance to an employee who will have unfairly lost his or her job.

115. In relation to other types of dismissal the Fair Dismissal Code states that employees must be warned either verbally, or, 'preferably', in writing about his or her risks of being dismissed if there is no improvement to his or her performance. In the TCF industry where there are high numbers of employees from non English speaking backgrounds providing warnings verbally is not sufficient as they may well be misunderstood. In addition, without a requirement for warnings to be written, a circumstance may arise whereby an employer alleges that he or she has given a warning and an employee alleges that he or she did not receive the warning. This is likely to lead to more complicated unfair dismissal applications and does little to protect employees' rights to know when their job is potentially at risk.

[38] Section 383
[39] Section 383

Transfer of business

116. The TCFUA also strongly objects to section 384(b)(iii) of the Bill which provides what where an employee transfers to a new employer through a transfer of a business and the new employer provides the employee notice in writing that his or her period of service with the old employer will not be recognized, his or her period of service with the old employer will not count as part of the employees period of employment with the new employer. This provides that an employee who has already completed the minimum employment period, and in fact may have worked for his or her old employer for decades, will be required to serve another minimum of employment period for the purposes of accessing unfair dismissal protection.

117. This is an extremely concerning provision and disentitles people to protections from unfair dismissal for longer periods. In fact, it acts as a double jeopardy for workers. There is further no protection around sham transfers. In circumstances where a business transfers to another employer, who, for example has the same directors or assets (but does not meet the definition of 'associated entity'), then it is completely unacceptable that an employee should have to serve a new minimum employment period. This provision will only encourage sham transferring arrangements, which are in fact, already a feature of the TCF industry. It is not uncommon, for example, for a business to close one day and re-open the next under a different name but operating out of the same premises, with the same directors and performing the same work.

Meaning of genuine redundancy

118. The meaning of genuine redundancy in section 389 of the Bill provides that where a person's dismissal meets the definition of 'genuine redundancy' his or her dismissal will not be found to have been unfair. The definition of 'genuine redundancy' is simply that the employer:

    (a) no longer requires the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and
    (b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

119. This definition should also recognise that modern awards (for eg, the TCF Award) and enterprise agreements will contain provisions relating to severance pay and that it is not sufficient to simply consult about the redundancy but that these entitlements must also be met. The definition for example does not permit an employee in the following common scenario to challenge his or her termination where he or she receives no severance pay:

- when an employer transmits its business to the purchaser and an employee is offered employment with the purchaser on inferior conditions, and the employee rejects the offer because it does not constitute acceptable alternative employment. Under the definition in section 389 of the Bill, the employer has satisfied the obligations of a genuine redundancy simply by consulting with the employee about the inferior offer of employment.

120. It has been long accepted in unfair dismissal authority that a failure of an employer to pay severance entitlements may be considered a harsh, unjust or unreasonable termination – this should be maintained.

121. The unfair dismissal regime also provides that an employee is unable to contest the real genuineness of selection for redundancy. An employer should have to have clear and objective selection criteria as a guarantee against capricious or malicious selection of employees. It must be possible for workers to challenge their selection for redundancy in order for the unfair dismissal regime to have comprehensive application.

Remedy – compensation

122. Pursuant to section 392(2)(a) of the Bill, FWA has to take into account 'the effect of the order [for compensation] on the viability of the employer's enterprise'. Every employer in the TCF sector is likely to raise this as justification to having an order of compensation reduced. Questions of business viability are not straightforward and would require both FWA and the employee's representative examining detailed financial records of the employer. There is further no necessity for the inclusion in section 392(3) of the Bill of the reference to 'misconduct' which will reduce the amount. In our submission, such facts can go generally to FWA's discretion regarding remedy under the banner of section 392(2)(g) of the Bill 'any other matter that FWA considers relevant'.

123. Section 392(4) of the Bill provides no compensation for shock, distress etc. Given the personal impact of an unfair termination in some cases and the conduct of an employer which can be humiliating and devastating to an employee, the TCFUA submits that there is no logical or sound policy basis for not allowing FWA to include a component for shock, distress etc as it acts as a disincentive to employers to engage in conduct humiliating to workers.

Monetary orders may be installments

124. Section 393 of the Bill provides that FWA may order that an employer can pay any monetary compensation in installments. The TCFUA submits that no policy grounds exist to justify why an employer found to have terminated an employee harshly etc (and having thus caused significant economic impact on the

employee) should get the benefit of being allowed to pay the compensation in installments.

125. To allow installments effectively compounds the harshness for the employee and means that the employee (who was not at fault) wears the greater economic burden of the impact of the termination.

Period for lodgment

126. In relation to the unfair dismissal provisions of the Bill, the TCFUA are extremely concerned that the reduction of the period in which a claim may be lodged to 7 days,[40] will impede the quick resolution of unfair dismissal disputes, which most commonly occur between the parties prior to the lodgment of unfair dismissal applications. With a 7 day period in which to lodge applications, employees will simply be encouraged to lodge applications regardless of the merits of their claim, in order to preserve their rights. In our experience, once an employee has lodged an unfair dismissal claim, it is far more difficult to dissuade him or her from proceeding with the claim, than in circumstances where a formal application has not been lodged but discussions are under way with his or her employer.

127. The TCFUA often settles unfair dismissal disputes in the period prior to an application having to be lodged. However, where this period is reduced to 7 days, we will be forced to lodge applications in order to preserve our members' rights. A 7 day notice period, is also extremely concerning in view of non English speaking background employees who may not have sufficient time to understand their rights. Indeed, if a right of protection from unfair dismissal is to be guaranteed, sufficient time must be permitted for that right to be exercised or it risks becoming an illusory right.

Procedural Matters

128. Division 5 of the Bill grants significant discretion to FWA to decide whether an employee can take the matter further after a conciliation in order to have the matter determined. Section 399(1) of the Bill is particularly problematic. This section provides that in deciding whether to hold a hearing FWA has to take into account (a) the views of the parties to the matter; and (b) whether a hearing would be the most effective and efficient way to resolve the matter.

129. In the TCFUA's submission, an employer's views on whether a hearing should be held have no relevance and should not be considered at all, particularly if the employer has unfairly terminated the employee. It is difficult to imagine circumstances where an employer would not oppose a hearing. In contrast, FWA is not permitted to consider the views of a union official accused of breaching the right of entry provisions of the Bill in relation to whether he or she would like a hearing into his or her conduct.

---

[40] Section 394(2)

130. Further, a process for determining the rights and remedies for an unfair termination should not be dependent on a determination of whether a hearing is the most efficient and effective way to resolve the matter. After a conciliation, there appears to be no other mechanism to resolve a claim for unfair dismissal. The Department of Education, Employment and Workplace Relations ('DEEWR') has noted that there is a 'slight bias [in the Bill] against hearings'.[41] This is completely unacceptable. It leaves workers without effective unfair dismissal protection.

131. Section 399(2) of the Bill provides that FWA may decide not to hold a hearing in relation to parts of the matter but no guidelines are provided as to the exercise of that discretion. It is unclear whether this would allow for parts of a matter to be decided on the papers, or aspects simply dismissed or not considered. There is no clear basis upon which any of this would be decided.

132. Section 399 of the Bill is nonsensical and should be removed from the Bill.

Appeal Rights

133. Appeal rights in relation to unfair dismissal applications under the Bill are limited when compared with the current Act. This is because pursuant to section 400 of the Bill for an appeal on a question of fact, it must be a 'significant error of fact'. This does not appear to be a current requirement and has the effect of limiting workers' rights to appeal decisions. On this basis we urge the Committee to recommend the removal of the reference to 'significant' error of fact in section 400 of the Bill.

134. The TCFUA submits that if the Government is serious about the restoration of unfair dismissal rights to all Australians it must:

    (a) remove the Fair Dismissal Code;
    (b) provide small business employees with the same minimum employment period for the purpose of qualifying for unfair dismissal protection as all other employees;
    (c) remove the ability of an employer to impose another qualifying period on an employee;
    (d) permit sufficient time for the right to unfair dismissal to be exercised by extending the period in which claims can be lodged;
    (e) amend the definition of genuine redundancy and permit workers to contest the genuineness of their redundancy;

[41] Senate Standing Committee on Education, Employment and Workplace Relations, Hansard, 11 December 2008, EEWR 39.

(f) allow for compensation for shock, distress etc and remove the requirement for FWA to consider the viability of the order for compensation on the employer's business;
(g) remove the ability of the employer to pay compensation installments;
(h) provide for a hearing as a matter of course (without regard to the views of the employer); and
(i) ensure appeal rights.

6. Industrial Action

135. The right to strike is enshrined in Article 8(1)(d) of the *International Covenant on Economic, Social and Cultural Rights.* In addition, while the right to strike is not referred to in any ILO instruments, the ILO's Committee on Freedom of Association ('CFA') and the ILO's Committee of Experts on the Application of Conventions and Recommendations have consistently held that the right to strike is protected by *Freedom of Association and Protection of the Right to Organize Convention 1948 (No 87),*[42] the *Right to Organize and Collective Bargaining Convention 1949 (No 98)*[43] and the ILO Constitution.[44] For example, in 1996 the CFA noted that it had always regarded the right to strike 'as constituting a fundamental right of workers,'[45] while most recently in 2005 in a case concerning Australia, it emphasised that the right to strike was one of the 'essential means' for workers to promote and defend their interests.[46]

136. International human rights law guarantees workers the right to strike. Therefore, the CFA has held that where the law treats practically all industrial action as a breach of contract, makes trade unions that organise a strike liable for any losses incurred by the employer; and enables an employer to obtain an injunction to prevent or stop the strike, this will breach freedom of association.[47] This is because the effect could be to 'deprive workers of the capacity to take strike action to promote and defend their economic and social interests.'[48]

---

[42] Ratified by Australia on 28 February 1973.
[43] Ratified by Australia on 28 February 1973.
[44] Breen Creighton, 'Freedom of Association' in R Blanpain and C Engels (eds) *Comparative Labour Law and Industrial Relations in Industrialised Market Economies* (1993, 5th ed) 104.
[45] International Labour Organization, *Committee on Freedom of Association Digest of Decisions* (1996), 473.
[46] International Labour Organization— Committee on Freedom of Association, 338th Report of the Committee on Freedom of Association, GB.294/7/1, 294th Session (November 2005), *Case No 2326 (Australia)* 106.
[47] International Labour Organization— Committee on Freedom of Association, *Complaint against the Government of Australia presented by the International Federation of Air Line Pilots Associations (IFALPA) Report No. 277, Case No. 1511*, 236.
[48] International Labour Organization— Committee on Freedom of Association, *Complaint against the Government of Australia presented by the International Federation of Air Line Pilots Associations (IFALPA) Report No. 277, Case No. 1511*, 236.

137. Whereas international law provides that strikes are legal and may only be limited in certain circumstances, the Bill provides essentially the reverse, that is, strikes are *prima facie* illegal and are only allowed in certain instances. Pursuant to the Bill, industrial action will only be protected industrial action in certain circumstances, including where an enterprise agreement has expired, it is not part of pattern bargaining, is not in the pursuit of unlawful terms and is authorised by a protected action ballot.[49] Pursuant to the Bill, protected industrial action may also be suspended or terminated in certain instances.[50]

138. Although the right to strike at international law is not absolute, in the TCFUA's submission the provisions of the Bill relating to industrial action, which in large measure replicate the current Act, place unnecessary restrictions on the right to strike and should be amended to ensure compliance with Australia's international legal obligations.

Pattern bargaining

139. Pursuant to section 409(4) of the Bill industrial action will not be protected industrial action if a bargaining representative is engaging in pattern bargaining. The ILO has held that the bargaining level, that is whether the agreement applies to a single employer, a number of businesses or even industry wide, is a matter to be left to the parties.[51] To prohibit industrial action in relation to the circumstance where common terms are sought across a number of enterprises is thus a breach of international law and a further limit on workers' right to strike.

140. Pattern bargaining has been used historically to improve the conditions of low paid workers systematically, for example, through seeking an industry standard in relation to severance pay. It is an important mechanism to prevent the establishment of two classes of workers in an industry- those able to bargain in individual workplaces with better terms and conditions and those with weak bargaining power and inferior conditions.

141. The TCFUA thus seeks the removal of section 409(4) of the Bill.

Termination of protected industrial action

142. While these provisions replicate the Act, the Bill also provides an additional ground for suspending or terminating protected industrial action. Pursuant to section 423 of the Bill, FWA may suspend or terminate protected industrial action where it is satisfied that the action is causing, or threatening to cause significant

[49] Sections 408, 409, 413, 417
[50] Sections 423-426
[51] International Labour Organization, *Committee on Freedom of Association Digest of Decisions* (1996), 851; 853

economic harm to the employer and any of the employees who will be covered by the proposed enterprise agreement. Industrial action is a key means by which workers can protect their interests because it can impact significantly on an employer's undertaking. Significant economic harm is often the reason for industrial action, and the only means available to workers to further their claims. This ground is untenable as it goes to the very point of industrial action and threatens to deny workers what is already a severely restricted right to strike in Australia. Accordingly, the TCFUA urges the Committee to recommend the removal of section 423 of the Bill.

143. In addition, the TCFUA strongly objects to the retention of the capacity of the Minister to make a declaration terminating protected industrial action.[52] Pursuant to international law, responsibility for declaring that industrial action should not occur should lie with an independent body and not the government[53] and where the right to strike is restricted, workers should be compensated for the limitation placed on their exercise of freedom of association.[54]

144. More fundamentally, denying workers engaged in bargaining in the low paid stream, the right to strike at all cannot be accepted. [55] It is in clear breach of Australia's international obligations and discriminates against a class of workers. Withdrawal of labour is often the only means by which workers can advance their claims in agreement negotiations. It is recognised in the Bill that workers in the low paid stream have a weak bargaining position which mandates the involvement of FWA and arbitration if necessary. Denying these workers the right to strike, entrenches their weak bargaining position and institutes a hierarchy of rights in the Bill. The TCFUA strongly urges the Committee to recommend amendments to the Bill to permit workers in the low paid stream to take industrial action.

Payments for industrial action

145. The TCFUA further submits that section 474 of the Bill which provides for the docking of four hours' pay where unprotected industrial action is taken, regardless of whether the action took place for less than four hours, does nothing but encourage workers to take unprotected industrial action for the full four hours. This is completely counter to productivity, efficiency or the resolution of disputes in the workplace. This section has implications not only for workers' pay but also

---

[52] Section 431

[53] International Labour Organization— Committee on Freedom of Association, *Complaint against the Government of Peru presented by the World Confederation of Organisations of the Teaching Profession (WCOTP) Report No. 281, Case No. 1598*, at 477 International Labour Organization, *Committee on Freedom of Association Digest of Decisions* (1996), 522.

[54] International Labour Organization, *Committee on Freedom of Association Digest of Decisions* (1996), 546; International Labour Organization *Freedom of Association and Collective Bargaining General Survey 1994* (1994) 164.

[55] Section 413(2)

for the employer's business. It also allows for manifest unfairness in circumstances, common in the TCF industry, where workers have just found out that they have been made redundant and seek to meet and discuss the implications. In the most recent case of redundancies had the Huyck Wagner workers stopped to discuss the loss of their jobs, they would have lost four hours' pay. It was also used by Felex Carpets in November 2006 (while the company was in receivership) to deny workers four hours' pay when returning from their tea-break several minutes late. Section 474 should be removed from the Bill.

146. Section 471 of the Bill and the payments relating to partial work bans are also extremely problematic. Section 471 of the Bill provides an employer with the choice over whether to pay or not pay an employee for protected industrial action that is a partial work ban. In the circumstances where the employer elects not to pay the worker, the worker will be required to work for no payment, in violation of the common law principle of wages for work bargain, for he or she will still be performing some duties at the workplace. Where the industrial action that has been authorised by a protected action ballot and/or notified to the employer is only in respect of partial work bans (rather than work stoppages), the worker will take unprotected industrial action if he or she refuses to work at all upon notification that he or she will not be paid. This circumstance cannot be countenanced and the operation of this section will only encourage workers not to engage in partial work bans but to take protracted industrial action in the form of stoppages and strikes.

Protected action ballot

147. In relation to the requirement that industrial action be authorized pursuant to a protected action ballot the TCFUA submit that this is an unnecessary restriction which in practice operates to restrict workers' right to strike. We note that the ALP voted against a protected action ballot scheme on no less than 3 occasions prior to its introduction, including in relation to the WorkChoices legislation.[56] The Government, when in opposition thus appears to have recognised that protected action ballots are nothing other than a time consuming process designed to trip unions up in their quest to take industrial action.

148. In fact, the current Act provisions dealing with protected action ballots are convoluted and complicated and have been used to delay industrial action on many occasions. The decision to take industrial action is one that lies purely with workers. The protected action ballot scheme however, permits employers to weigh in on the process and frustrate the right of workers to take industrial action.

149. In contrast, employer industrial action such as the locking out of workers does not need to be authorised by a vote of shareholders or by the board of directors of the

[56] *Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2000*; *Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002*; *Workplace Relations Amendment (WorkChoices) Bill 2005*

company. Democracy lies at the heart of trade unions, with unions and their affairs regulated comprehensively by the Act. No such democratic requirements are imposed on companies and yet there are no requirements for their industrial action to be democratically supported.

150. The decision to take industrial action is not done lightly. The TCFUA discusses the implications with its members and all options are considered. Industrial action is engaged in as a last resort only. Prior to WorkChoices, the TCFUA ensured that workers supported the industrial action. The union met with members and discussed openly the pros and cons of taking industrial action. Interpreters were often available to assist and only after a thorough ventilation of issues, workers voted by a show of hands. Industrial action was never taken against the wishes of the majority of workers in a workplace.

151. The TCFUA is concerned that protected action ballots impose additional difficulties for workers from non English speaking backgrounds and may discourage workers from non English speaking backgrounds from voting due to the complexity of the process. The TCFUA submit that protected action ballots should not be required for protected industrial action.

152. The TCFUA urges the Committee to reject the continuation of the protected action ballot regime. The Government has previously rejected it, has made no justification for advancing it as its own policy and should reject it again.

153. The TCFUA notes section 437(6) of the Bill which refers to the application for a protected action ballot order and notes that documents and other information will be prescribed by the regulations. Without viewing the regulations it is difficult for the TCFUA to comment on this aspect of the protected action ballot scheme. However, the TCFUA submits that the current Act provisions relating to protected ballot applications and the documents that must accompany the application should not be replicated. The current Act requires a range of unnecessary documents and allows for applications to be denied due to technical oversight.[57]

154. The TCFUA also notes with some concern section 464 of the Bill juxtaposed with section 465 of the Bill. Section 464 of the Bill provides that the cost of the protected action ballot, if conducted by the Australian Electoral Commission, will be born by the Commonwealth. In contrast section 465 of the Bill provides that where the Australian Electoral Commission does not conduct the protected action ballot the cost shall be born by the applicants for the protected action ballot.

155. In the TCF industry, as noted above, many workers are from non English speaking backgrounds, it is therefore foreseeable that the TCFUA may seek to engage a ballot agent that is better equipped to deal with the needs of non English speaking background workers and in these circumstances it cannot be countenanced that the union should be liable for costs of the protected action

[57] Sections 452-453

ballot. Where the Government provides that a ballot agent other than the Australian Electoral Commission can conduct the ballot, the Government should also be liable for the costs of the second or other agent. Indeed, where the Government requires parties to conduct a ballot it should, in all circumstances, be liable for the costs associated with the ballot.

7. Right of Entry

156. The right to join a trade union provided for at international law in the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* provide the right for workers to join a trade union.[58] This right cannot be effectively exercised where that trade union is restricted in its ability to promote and protect workers' interests. Implicit in this right, and recognised at international law, is specifically the right for individuals to access their unions. Indeed, without a worker being entitled to access his or her union the right to join a trade union is in fact an illusory right. It is imperative therefore, that trade unions be allowed to meet with their members as well as prospective members and access them at the workplace. This is because union officials cannot easily locate members or prospective members outside of their place of work.

157. As Dethridge J has noted, trade union officials cannot 'intercept... employees in the street nor can they visit them at their homes'.[59] The ILO has also determined that freedom of association includes the right of trade union officers to have access to places of work and to communicate with management.[60]

158. At international law, the right of union officials to enter the workplace is not limited to meeting with existing union members. Rather, the right extends to communication with all workers 'in order to appraise them of the potential advantages of unionization'.[61] Indeed freedom of association can only have real meaning for non-union members if they are not inhibited from making contact with the union so that they are able to make an informed choice about joining or otherwise accessing union services.

159. It is often a union that is responsible for coordinating collective bargaining and right of entry to workplaces is therefore important for the exercise of other rights provided for in the Bill. This is particularly the case as non-union members may

---

[58] ICCPR, article 22(1); ICESR 8(1)

[59] *Timber Merchants and Sawmillers Association and Ors v the Australian Timber Workers Union* (1935) 35 CAR 126, 131

[60] International Labour Organization *Freedom of Association and Collective Bargaining General Survey 1994* (1994), 128

[61] International Labour Organization— Committee on Freedom of Association, *Complaint against the Government of the United States presented by the United Food and Commercial Workers International Union (UFCW), the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and the International Federation of Commercial, Clerical, Professional and Technical Employees (FIET) Report No. 284, Case No. 1523* at 195

be covered by an agreement which a union is also covered by, or, as in the case of the TCF industry, may be eligible for Government assistance which the TCFUA has information about. It is therefore imperative that the right of entry regime in the Bill provide the right for union officials to visit workplaces without being unnecessarily impeded in the exercise of these rights.

160. Under the WorkChoices legislation unions face severe difficulties in accessing their members or potential members, in investigating breaches of minimum entitlements and in performing the vital role of ensuring that these minimum entitlements were not breached. The right of entry provisions of the Act have been repeatedly used by employers to frustrate the objects of the Act and deny unions access to their members and prospective members.

161. For example:

- at Domestic Textiles in early 2008, after many years of meeting employees in the lunch rooms, the TCFUA was, in early 2008, directed to meet employees in a room adjacent to management, in clear view of numerous managers. Employees felt intimidated and many did not meet with the union. The room also did not have adequate facilities for employees to eat their lunch, and the union was directed only to meet with employees at lunch. This meant that those employees that did meet with the union did so for only a short amount of time, so that they still had time to eat their lunch.
- at a country textile factory, the TCFUA had always had access to tea rooms. In 2006, the company directed the union to meet with employees in a room that was part of the office management block, separate from the factory, and in some cases a 5 minutes walk each way for employees during a 20 minute break. During night shift the pathway to this room was not lit. In one case an employee fell on route to meet with the union and broke both his wrists. As part of the settlement of an unrelated Court matter, the company agreed to allow the union to once again meet in the tea rooms.
- at Feltex Carpets, in mid-2008, a union organiser was directed to meet with workers in the women's toilet area. The organiser was forced to stand in the doorway to the toilet, with female workers in the toilet area, and the male workers just outside.
- in the case of *TCFUA v Feltex Carpets Pty Ltd* (PR983799, 1 October 2008) SDP Kaufman found that it was a reasonable request of the employer to direct employees to meet with their union in another building. This involves a 10 minute round-trip for workers from their workstations in circumstances where some workers only have 20 minutes break. It involves walking along and crossing a public road, frequented by both domestic and commercial vehicles. He also held that it was reasonable for

the company to direct workers to meet with their union in a room in the HR/Admin building, approximately two meters from the HR manager's office with no lunch or tea facilities.

Reasonable room and route

162. The TCFUA welcomes amendments to the right of entry regime that go someway to mitigating the worst effects of the WorkChoices legislation. In particular, the TCFUA welcomes section 492(2) of the Bill which outlines criteria for determining when a room or area may be unreasonable for the purposes of meeting with employees. As the case studies above indicate the provision under the current Act which allows an employer to pick the room that a trade union must use in order to meet with employees without any restriction has been used repeatedly to deny workers their right to meet with their union and to deny workers the full exercise of the right to freedom of association.

163. The TCFUA however objects to the fact that the Bill provides (as does the Act) that the employer may still select the route that the union official must take to the room. This provision has been used by employers to ensure that no worker is aware that the union is on site, by making union officials walk through parts of the site where he or she will not be seen. In this way this provision is also used to frustrate the objects of right of entry and deny workers their right to meet with their union. We submit that section 492(2) of the Bill must apply to section 492(1)(b) of the Bill as well.

164. In relation to the remaining provisions of the right of entry regime, set out in division 2 of Part 3 – 4 of Chapter 3 of the Bill the TCFUA has significant concerns in relation to restrictions around entry to investigate a suspected contravention of the Act or a fair work instrument, in relation to entry for the purposes of discussions with employees, and in relation to the requirement for 24 hours notice to be given to employers.

Investigation of breach

165. Trade unions have long played a crucial role in the enforcement of minimum entitlements and industry compliance. For example, the TCFUA has for many years sought to proactively enforce award entitlements, most recently in *TCFUA v Morrison Country Clothing Pty Ltd* [2008] FCA 604 (5 September 2008). Our role has been crucial to maintaining the safety net, particularly with respect to outworkers, see for example: *TCFUA v Southern Cross Clothing Pty Ltd* [2006] FCA 325 (28 March 2006); *TCFUA v Lotus Cove Pty Ltd* [2004] FCA 43 (2 February 2004); *Clothing and Allied Trades' Union of Australia v J J Saggio Clothing Manufacturing Pty Ltd* [1990] 34 IR 26 and more generally in *TCFUA v Givoni Pty Ltd* [2002] FCA 1406 (15 November 2002).

166. In a great majority of cases, the TCFUA also uses right of entry provisions to ensure that workers receive their minimum entitlements by resolving the matter prior to proceedings being lodged. For example:

- after the TCFUA inspected the wage records of D & S Clothing Manufacturer Pty Ltd in May 2008, it was discovered that employees were not paid the correct rate. The union held discussions with the employer and now the workers have been put on the correct rate of pay and back paid for what they were owed.
- inspection of time and wages records at a Melbourne factory in July 2008 revealed that a recently terminated member had been underpaid in relation to wages, superannuation and overtime. It also revealed that workers at the factory receive no tea breaks and no shift penalties in breach of the *Textile Industry Award 2000* and that workers are not provided with payslips. The union is currently in discussions with the company in order to resolve the issues and ensure that no other workers have been underpaid.
- At MP Textiles the TCFUA found that workers were receiving incorrect superannuation payments or were not receiving any payments at all. The company is now paying correct superannuation.
- In the case of redundancies, workers in the TCF sector are eligible for special Government assistance. The TCFUA frequently attends workplaces where workers are about to be retrenched and informs them of the assistance available to them. The union speaks to both members and non-members. Without the union attending these workplaces, these workers would not be informed about the assistance available to them for retraining and job search.

167. Unfortunately, however, for every example of where the TCFUA has been able to use right of entry provisions under the Act to enforce entitlements, there are numerous other examples of workplaces where we have been prevented by the Act from assisting workers.

168. Pursuant to section 747 of the Act, a permit holder may enter premises for the purpose of investigating suspected contravention of the Act or a term of an industrial instrument where a permit holder's organisation has a member working at the premises. This has prevented the TCFUA from assisting workers by:

(a) requiring the identification of a member;
(b) requiring that the member be working at the premises;
(c) placing the onus on the union to prove reasonable grounds for suspecting the breach.

169. Section 481 of the Bill outlines these same requirements.

Identification of member

170. The need to have to identify a worker undermines the protection of employees' rights as many union members are fearful of identifying as union members and will therefore ask the union not to enter the workplace. Without entry into the workplace the union cannot adequately investigate a suspected contravention of minimum entitlements and access evidence needed to prosecute a breach where such contravention has occurred.

171. The TCFUA has a number of silent members and a large number of workplaces where union membership is not apparent. Discrimination, victimization and harassment of union members is common place in our industry. Workers often hear their bosses speak disparagingly of the union and warn workers against calling the union in. In fact, a worker was terminated as recently as 19 December 2008, a few days after the TCFUA visited his workplace and he was seen speaking to its officials, and the same day that a right of entry notice was served on the company.

172. In addition, many workers in the TCF Industry are migrants, including some who come from countries where unions are banned or suppressed by the government and where union members face very real threats to their lives.

173. Due to these factors, there are a great number of workplaces in the TCF industry where there are either silent members and therefore no visible union membership or where in fact there is no union membership. Coupled with this is the fact that the TCF industry is one with well documented cases of serious breaches of award and statutory entitlements. These occur in the informal sector with outworkers earning far below minimum wage, working excessive hours and receiving no entitlements,[62] as well as in the formal sector, including in sweatshops. We are aware of a number of factories which operate in breach of the relevant award and where workers plead with us to fix the problem but refuse to let us act if it means we have to name them as union members.

174. Under the right of entry provisions in both the current Act and those proposed in the Bill, the TCFUA will continue to be unable to assist exploited workers. A recent example of a factory in Melbourne amplifies the problem. In June 2008, we received an anonymous letter from a worker outlining an array of illegal and exploitative employment practices, including:

- no breaks
- 12-14 hour shifts
- no overtime or penalty payments
- no allowances

[62] see above, at paragraphs 25- 28

- weekend and public holiday work without penalties
- $14-$16 per hour (which is the incorrect rate for a number of workers)
- payment in cash
- no safety equipment
- operation of forklifts without licenses
- bad lighting and unhygienic conditions
- no pay slips
- superannuation not paid on time; and
- verbal abuse.

175. The worker asked the union:

> *'can you explain to me how to keep confidential as a silent member? If I say I'm under paid will you talk to my boss to raise my wage? Then, of course he will know my name. I just can't understand how it works.'*

176. He went on to state:

> *'I don't think workers will consider union membership....the reason is still the same. The fear....you know, [we] are not as comfortable as Westerners to embrace democracy. There are always punishments in their countries if they speak up against bosses.'*
>
> *'...please don't mention my working hours because there are only 2 warehouse workers who start from 8am...otherwise it will be easier to narrow the targets.'*
>
> *'I'm sorry to write to you in anonymity. I, like others, are afraid of my job security.'*

177. The level of fear that workers in this factory feel in identifying as union members means that we are unable to even name the factory, despite the actions of the company.

178. Prior to legislative restrictions requiring the presence of a member in order to investigate breaches, the TCFUA performed an important community role in checking and inspecting sweatshops where no members performed work. These workplaces are some of the most exploitative in the country and the TCFUA is the only organisation to have monitored them. Without the ability to inspect such places, exploitation can continue with impunity. It is therefore vital that the requirement of having a member on the premises is removed in relation to the TCF sector.

Worker on the premises

179. In relation to the TCF sector, the requirement that a worker perform 'work on the premises' in order for a union to enter to investigate a breach, also prevents the union from adequately investigating suspected breaches of minimum entitlements. Outwork is recognised as a sizeable part of the industry and many workers work offsite, and at premises where documents relating to their engagement are not kept. In order to investigate breaches of minimum entitlements, the TCFUA must be capable of entering premises where documents relating to work that is being performed are kept. If the Bill is not amended, we fear that employers engaging in exploitative practices, may continue to be insulated from scrutiny because their records are not kept at the premises where any workers perform work.

Onus

180. Pursuant to section 754 of the Act, the permit holder holds the burden of proving reasonable grounds for suspecting a breach in order to gain entry. This is continued in section 481(3) of the Bill. The TCFUA submits that the onus should be reversed- that is the employer should bear the onus of proving that reasonable grounds do not exist in order to prevent entry. If an employer is in compliance with the law and its industrial instruments, it is straightforward for it to produce evidence of such to the permit holder. In contrast, without access to the documents held by the employer, it is far more difficult for a permit holder to prove that a breach is occurring.

Access to records

181. In relation to the rights that may be exercised while on the premises, the TCFUA welcomes the removal of the prohibition on a union official inspecting non-member records for the purposes of determining whether or not a breach of minimum conditions has in fact occurred. This reflects the position prior to the introduction of the WorkChoices legislation. As DEEWR has stated there has been no noted abuse or misuse of non-member records when these were available to union officials.[63]

182. Without the ability to inspect non-member records, a union official must name the union member's/s' records that he or she requires for the purposes of investigating the breach. For the reasons annunciated above, this is extremely problematic, for even where a union official may be allowed entry into the workplace where an employer is aware that there are a number of union members, the employer may not know who all the union members are, and the requirement to name the union member for the purpose of inspecting the records means that the union member will need to be identified.

---

[63] Senate Standing Committee on Education, Employment and Workplace Relations, Hansard, 11 December 2008, EEWR 29-30

183. Forcing workers to reveal their union membership is both a breach of their privacy and is contrary to the principle of freedom of association. It is particularly objectionable that a worker's union membership must be revealed as a pre-requisite to the enforcement of his or her minimum entitlements which should be accorded without invading his or her privacy.

184. Preventing the union from checking non-member records also leads to the perverse result that union members may have underpayments corrected but non-union members will continue to be exploited, contrary to the objectives of the Bill. For example:

- at Look Smart Alterations, workers were being underpaid in relation to their normal rate and no overtime was paid. An underpayment of over $6000 was identified for a TCFUA member in November 2008. All workers were being underpaid but the union could not ascertain the amounts for non-members.

- at Beaver Sale Pty Ltd, in December 2008, the TCFUA discovered underpayments for two members in relation to severance pay, public holiday pay, long service leave and leave loading. Another worker who is not a member is still owed money.

Discussions with employees

185. In relation to section 484 of the Bill which provides entry for permit holders to hold discussions with workers, the TCFUA is concerned with the format of section 484(c) of the Bill which provides that discussions may only be held with persons who wish to participate in those discussions. While the intent of that provision may be to guard against potential harassment of workers who do not in fact wish to speak to a union representative, the section could be used by employers to prevent a union official from entering the workplace.

186. For example, upon arrival at the workplace by a union official an employer will be able to say that he or she cannot enter the workplace because the employer has checked and none of the employees present wish to participate in discussions with the union official. This section could therefore be used by employers to intimidate workers from not speaking to their union by asking workers whether they wish to or not and thereby intimidating them from meeting with their union officials. This in fact already occurs in the TCF sector and the TCFUA fears that such instances will be compounded if the Bill is not amended. The TCFUA therefore urges the Committee to recommend that section 484(c) of the Bill be amended to take account of this concern.

187. The TCFUA rejects the suggestion that trade union officials seek to 'overbear non-union members in workplaces'[64] and force them to attend discussions. Given that the Opposition believed that employees were capable of negotiating, on equal footing with their employers, their terms and conditions of employment in an AWA, it seems a curious view that these same employees are not capable of telling a person they may never have met that they do not wish to speak to them.

Residential premises

188. The TCFUA is gravely concerned that section 493 of the Bill will inhibit investigations of sweatshops and other premises where outworkers are located. This section provides that a permit holder must not enter any part of premises that is used mainly for residential purposes. It is not clear who bears the onus of proving that that part of the premises is in fact used for residential purposes. Where an employer makes the assertion, the union will need to lodge a dispute. It is, however, extremely common in our industry for premises to be altered in a matter of hours such that upon return to the very same premises at the time of the hearing of the dispute, they will in fact be used solely for residential purposes and the factory that was previously located in that part of the premises will have been removed.

189. In this regard we note section 12 and the definition of outworker for the purposes of the Bill which recognises that an outworker may perform work at *'residential premises or at other premises that would not conventionally be regarded as being business premises'*.

190. The TCFUA urges the Committee to recommend the amendment of section 493 of the Bill to ensure access for the union to premises where workers may in fact be performing work.

24 hour notice of entry

191. Section 495 of the Bill provides that a permit holder must not exercise a right of entry pursuant to a State law unless he or she has given the employer 24 hours written notice. This undermines existing protection for workers in New South Wales and Queensland where no notice is required in order to enter premises to investigate a suspected breach of OHS legislation.[65]

192. It cannot be countenanced that the Bill overrides this important right and we urge the Committee to recommend the amendment of the Bill accordingly.

---

[64] Senate Standing Committee on Education, Employment and Workplace Relations, Hansard, 11 December 2008, EEWR 26

[65] *Occupational Health & Safety Act 2000* (NSW), section 78; *Workplace Health & Safety Act 1995* (Qld), section 90K

193. In relation to the 24 hour notice requirement more generally, the TCFUA submit that in the case of the TCF sector, this requirement should be removed in all cases of right of entry. The notice requirement is frequently used by employers in the sector to frustrate the purposes of right of entry- records or evidence are frequently removed or the workforce is dramatically reduced in 24 hours so that we are unable to speak to the majority of workers. For example:

- at a small clothing factory in Melbourne, three machinists and two cutters were present during the TCFUA's first visit in November 2008 which was unannounced. When the union returned a week later with an interpreter at a time arranged with the employer, only one machinist was in the factory.

194. For many years, the NSW\SA\TAS Branch of the TCFUA during its participation in a project of WorkCover NSW has relied on the *Occupational Health & Safety Act 2000* (NSW) in order to gain entry to thousands of workplaces without giving 24 hours notice. During this entire time, not a single complaint has been registered with WorkCover NSW about the conduct of the TCFUA.

195. For the reasons above, we submit that the 24 hour notice requirement should not pertain to right of entry in the TCF sector.

Revocation etc of permits

196. Provisions of the Bill which allow the revocation, suspension or imposition of conditions on all or some permits granted to a particular union or the banning of the issue of entry permits in relation to a union[66] cannot be justified and amount to collective punishment. The acts of an individual should not be used to punish all union officials and thereby deprive employees of their right to meet and confer with union representatives.

197. As DEEWR has recognised, if a union was to lose all of its permits it would 'remove the capacity of that union to visit any of its members at the workplace' and would be a 'significant limitation in terms of their organisation's capacity to service its members' interests.'[67] By analogy, employer organisations should be prevented from signing up new members where existing members breach industrial instruments and laws.

TCF specific provisions

198. The TCFUA notes the comments of the Minister in her second reading speech wherein she flagged the Government's intention to examine the right of entry provisions of the Bill in order to ensure that the Bill provides an effective

[66] Section 508
[67] Senate Standing Committee on Education, Employment and Workplace Relations, Hansard, 11 December 2008, EEWR 33

compliance regime in the textile clothing and footwear sector. In relation to those amendments the TCFUA seeks, for the reasons outlined above, that in the TCF sector there be:

(a) no requirement for a member of the TCFUA to be present in the workplace;
(b) no requirement for a worker to be present at the premises,
(c) no requirement for 24 hours notice of entry; and
(d) no prohibition on entry to residential premises

in order for the TCFUA to gain access.

199. Insofar as the compliance regime relates to outworkers, it is important to note that exploitative and illegal practices occur across the TCF sector, not just in relation to outworkers, but also in relation to basic and substandard factory environments such as sweatshops.

200. Further, any right of entry regime that applies specifically to the TCF sector cannot be predicated on the need to identify the presence of an outworker in order to gain access. This is because it is extremely rare in the industry for an employer to admit to his or her use of outworkers. In fact, a survey of 847 workplaces conducted by the NSW\SA\TAS Branch of the TCFUA during its participation in a project of WorkCover NSW in 2007 -2008 revealed that of the workplaces surveyed only 47 admitted to the use of outworkers when asked.[68] Further investigation by the union down the supply chain revealed that in fact outworkers were used in a far greater number of workplaces than were indicated by employers.

201. Other investigations of supply chains by the TCFUA have revealed a similar story. For example, investigation of the supply chain for The Cue Company revealed that contrary to the company's belief that approximately 87 outworkers were engaged by its suppliers, in actual fact as at September 2008, 362 were engaged. The union was able to ascertain this due to the extensive co-operation of the company who regularly give the TCFUA information which shows the amount of garments issued to contractors and the amount of money given to the contractors for the work performed. From this information, the union is able to work with the company to ensure that outworkers in its supply chain are being engaged in accordance with legal minima.

202. As the above examples indicate, predicating a right of entry regime on the presence of outworkers will be ineffectual, unworkable and will provide no additional ability for the enforcement of minimum entitlements in a sector with

[68] WorkCover NSW, TCF Advice and Audit Supply Chain Project, 2007-2008

well documented abuses and exploitative behavior. Exploitative behavior that has been found by this very Committee.[69]

8. Stand downs

203. Section 22 of the Bill contains the meanings of 'service' and 'continuous service'. Section 524 of the Bill outlines the circumstances in which an employer may stand employees down. In relation to this we note that section 691A(4) of the Act has not been replicated in the Bill. This section provides that a period in which an employee is stood down counts as service for all purposes. In contrast, section 22 provides the opposite- that is an excluded period (which relevantly includes a period of stand down) does not count toward the length of a worker's continuous service.

204. The TCFUA submit that it is crucial that periods of stand down do count toward the length of a worker's continuous service.

205. In an industry such as TCF, stand downs are a common feature and accordingly we fear that without such provisions employees' continuity of service will be impacted and workers will be denied entitlements because the time in which they were stood down cannot be counted toward accrual of entitlements. A stand down is a matter that is out of a worker's control and he or she should not be doubly punished by having that period effectively stop the clock on the accrual of his or her entitlements. By analogy, in the circumstances of a five month lock out of employees (initiated by the employer and not in response to industrial action) the Commission held that the time of the lock out counted toward the length of the workers' continuous service.[70]

206. The Bill thus diminishes workers' rights and will effectively punish workers who are unable to work for reasons beyond their control. This is contrary to the objects of the Bill in 'providing workplace relations laws that are fair to working Australians.'[71] We therefore urge the Committee to recommend that section 691A(4) of the current Act be retained in the Bill.

9. Arbitration (Compliance & Enforcement)

207. In relation to arbitration, it is disingenuous for the Opposition to claim that the ability of FWA to make workplace determinations goes beyond the Government's mandate on account of having not being put to the electorate.[72] The entire Workchoices legislation was not put to the electorate prior its introduction. Importantly, prior to Workchoices, arbitration was the default position and a

---

[69] Senate Economics Reference Committee, *Review of the Inquiry into Outworkers in the Garment Industry* (1997), Senate Economics Reference Committee, *Report on Outworkers in the Garment Industry* (1996)
[70] *TCFUA v Geelong Wool Combing* ([PR940004] 29 October 2003)
[71] Section 3(a)
[72] Michael Keenan MP, Speech to the Australian Industry Group PIR, 9 December 2008, 2.

feature of Australian industrial relations law. In this regard, Workchoices represents an aberration (as it does in many respects) and it should not be looked to as the marker of what is in fact the status of arbitration, or in fact, many other matters.

208. The TCFUA remains concerned that arbitration has not been introduced in the Bill as it was prior to the advent of Workchoices. In fact, arbitration is only available in limited circumstances and in many instances access to arbitration will prove extremely difficult to achieve. For example, section 262 of the Bill provides that in relation to low paid bargaining disputes an applicant must prove, among other matters, that arbitration will promote future bargaining, be in the public interest, and that arbitration will promote productivity and efficiency in the workplace.[73] Similarly, pursuant to section 269 access to arbitration for bargaining disputes requires serious and sustained breaches of good faith orders, and an exhaustion of all other reasonable options to reach agreement. The TCFUA submits that arbitration should be available by FWA to settle all types of disputes and that access to arbitration must not be inhibited by requiring applicants to meet a set of onerous requirements before they may access it.

209. In the circumstances where, as noted above, Australian workers are denied a general right to strike in accordance with international law, and cannot take protected industrial action during the life of an agreement, arbitration of disputes by FWA should be upon request of one of the parties covered by the enterprise agreement or award (or their representatives).

210. In relation to the divisions of the Federal Court and the Federal Magistrates Court which will be set up to deal with breaches of the Act including the NES and awards, the TCFUA remains concerned that the process adopted in the courts will not be conducive to the settlement of disputes and will inhibit employees from bringing actions. The TCFUA notes that a small claims jurisdiction will be provided and that the court will not be bound by the rules of evidence and may act in an informal manner.[74] Notwithstanding this, the TCFUA believes that a great many workers will be dissuaded from lodging claims because this will need to be done through the court system rather than through a specialist industrial body as has been the case for over a century.

211. In addition, the TCFUA opposes the prohibition in section 44 of the Bill on orders being made with respect to contravention of sections 65(5) and 76(4) of the Bill. Section 65 relates to requests for flexible working arrangements. Section 65(5) of the Bill provides that an employer may refuse the request on reasonable business grounds. Section 76 of the Bill provides that an employee may request an additional 12 months unpaid parental leave. Similarly, section 76(5) of the Bill provides that an employer may refuse the request on reasonable business grounds.

---

[73] Section 262
[74] Section 548(3)

212. Section 44 of the Bill however, insulates both such refusals from scrutiny and thus renders the right to request flexible working arrangements and the right to request an extension of parental leave to be illusory. The inability of the courts to verify the merits of an employer's decision in relation to both these matters is likely to disproportionately impact upon women, who more commonly are primary givers and require flexible working arrangements or additional leave. Section 44 of the Bill is thus discriminatory in its effects. It is further completely illogical to carve out these two matters from the scrutiny of the courts. More fundamentally, it is contrary to the objects of the Bill, both in terms of protecting workers from unfair treatment and discrimination (section 3(e)) and in relation to ensuring enforceable minimum terms and conditions (section 3(b)).

213. The TCFUA submits that there is no policy basis for such an exclusion, and urge the Committee to recommend the removal of section 44 from the Bill.

214. The TCFUA urges the Committee to recommend that FWA be provided with the power to settle all types of disputes and that access to arbitration be a matter of course for all disputes.

10. ABCC

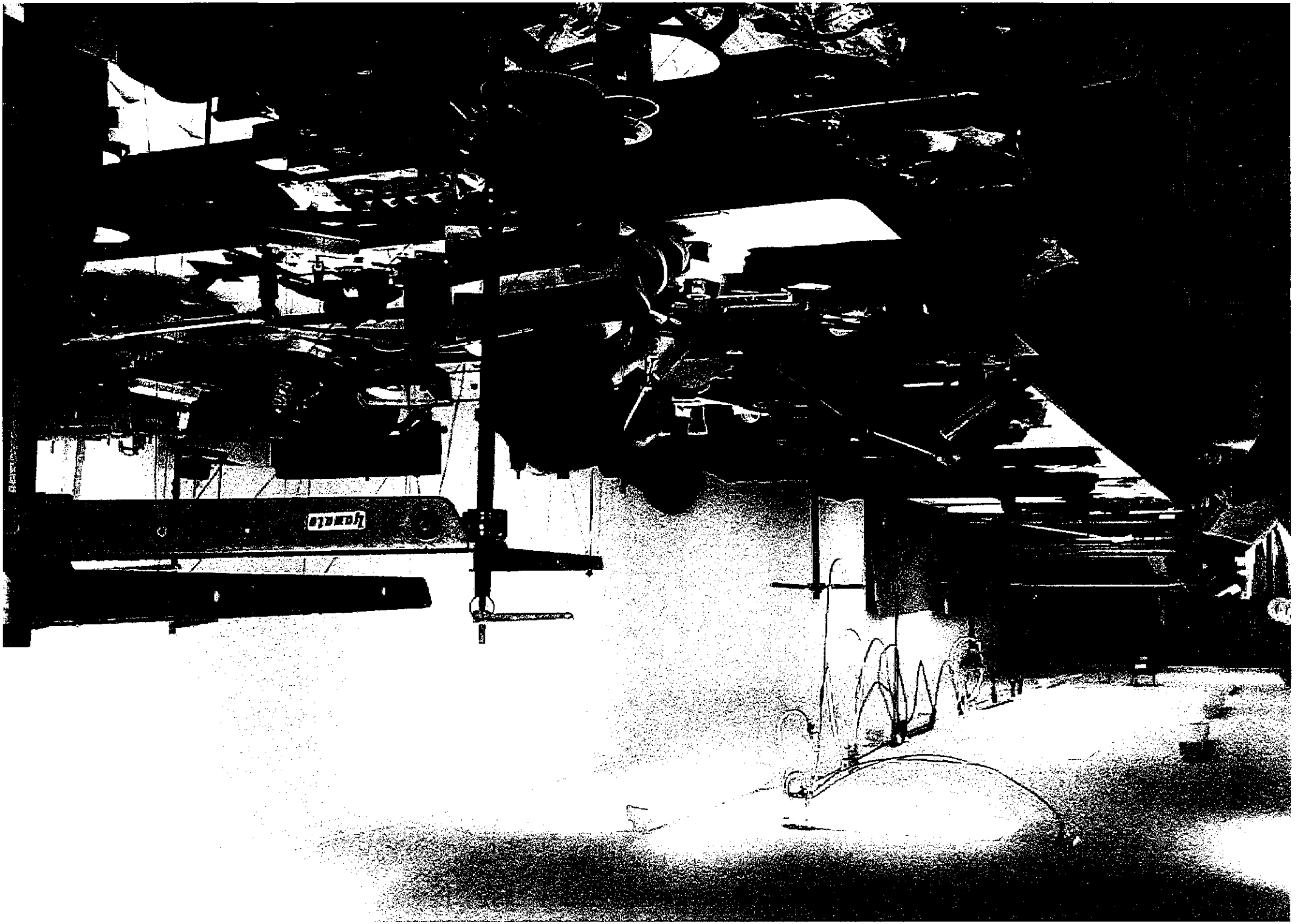
215. Lastly, the TCFUA opposes the continued operation of the Australian Building & Construction Commission and the *Implementation Guidelines for the National Code of Practice for the Construction Industry*.We submit that the *Building & Construction Industry Improvement Act 2005* should be repealed with immediate effect.

Textile Clothing & Footwear Union of Australia

23 December 2008

APPENDIX A

2.4 GFI
TOYOTA


Humalo