

9 January 2011

Committee Secretary
Senate Education, Employment and Workplace Relations Committees
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

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

Submission to Commonwealth Senate Inquiry into the *Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011* (Commonwealth)

Dear Committee Secretary,

1. I am currently a lecturer at the Faculty of Law, University of Technology, Sydney with over 10 years experience in teaching or research in the university sector. I am a recognized academic expert in the legal regulation of outwork in Australia with a track record of research and publication on regulating supply chains to protect vulnerable workers including outworkers.¹
2. A succession of government reports and inquiries, industrial tribunal decisions and research reports have revealed that textile clothing and footwear outworkers are one of the most exploited sectors of the workforce in Australia.² Because outwork is carried out at locations such as residential premises and largely occurs in the sometimes unregulated informal economy, it gives rise to a unique set of problems with enforcing adequate pay, working

¹ See, for example:

- Michael Rawling, 'The Impact of Federal Legislation upon the Scope of State Jurisdictions to Regulate Outwork', (2009) 22 *Australian Journal of Labour Law*, pp. 147-160;
- Michael Rawling 'The Regulation of Outwork and the Federal Takeover of Labour Law', (2007) 20 *Australian Journal of Labour Law* pp. 189-206.
- Michael Rawling, *Supply Chain Regulation: Work and Regulation Beyond the Employment Relationship* (Doctoral Thesis, University of Sydney, 2010);
- Michael Rawling 'A Generic Model of Regulating Supply Chain Outsourcing' in Christopher Arup, et al (eds), *Labour Law and Labour Market Regulation*, (The Federation Press, Sydney, 2006) pp. 520-541.

² See for example, Australian Senate Economics References Committee (1998) *Inquiry into Garment Industry Outworking Review*, (Canberra) ; Australian Senate Economic References Committee (1996) *Inquiry into Garment Industry Outworking*, (Canberra); Senate Economics References Committee (1996) *Outworking in the Garment Industry*, Senate Economics References Committee, *Official Hansard Reports*, April 10, 11, 16, 18; June 11, 12, 1996 (Commonwealth of Australia, Canberra); Industrial Relations Commission of NSW (1998) *Pay Equity Inquiry (NSW)* conducted by Justice Glynn, (NSWIRComm, Sydney) p523-647; *Re Clothing Textile and Footwear Award* (1987) 19 IR 416; Textile Clothing and Footwear Union of Australia (1995) *The Hidden Cost of Fashion: Report on the National Outwork Information Campaign* (Textile Clothing Footwear Union of Australia); Emer Diviney & Serena Lillywhite *Ethical Threads Corporate social responsibility in the Australian garment industry* (Brotherhood of St Laurence, 2007).

conditions and occupational health and safety. The pay is often a piece work rate paid for each garment sewn and is often as low as the equivalent of between \$2 and \$3 an hour.³

The government accepts “that outworkers in the TCF industry suffer from unique vulnerabilities as a result of their employment in non-business premises. These vulnerabilities are made worse by the fact that outworkers are often migrants with poor English language skills, a lack of knowledge about the Australian legal system and low levels of union membership.”⁴

Due to the unique social and economic problems associated with outworker exploitation in the Australian TCF sector, a special legislative regime is required to ensure clear access to, and enforcement of, minimum entitlements for outworkers.⁵

3. I therefore welcome the Federal government’s introduction of the *Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011* (Commonwealth)(“**the current Bill**”). Subject to the following qualifications, the enactment of the current Bill will appropriately strengthen the legislative protection of vulnerable exploited outworkers.
4. This submission focuses upon two apparent loopholes in the current Bill and examines potential solutions to address both of these identified problems.
5. The government intentions for this current Bill are clear:

“The government’s intention is to . . . [implement] nationally consistent rights to legal redress and protection that are of no lesser standard than currently apply in state laws and regulations, and the federal TCF award.”⁶

“The government is also considering what changes need to be made to ensure the greatest possible reach of the deeming provisions so that no outworker is inadvertently beyond their reach by operation of the corporate veil.”⁷
6. In relation to the issue of statutory deeming provisions, it is first necessary to correct the government’s assertion that “more limited deeming applies . . . in South Australia” by comparison with the three other state jurisdiction statutory outworker protection regimes.⁸

³ Emer Diviney & Serena Lillywhite *Ethical Threads Corporate social responsibility in the Australian garment industry* (Brotherhood of St Laurence, 2007) p4; Claire Mayhew and Michael Quinlan, (1999) ‘The Effects of Outsourcing on Occupational Health and Safety: A Comparative Study of Factory-Based Workers and Outworkers in the Australian Clothing Industry’ 29 *International Journal of Health Services* 83, p98; Commonwealth of Australia *Parliamentary Debates*, Senate, 24 November 2011, p23 (Senator Ludwig).

⁴ Commonwealth of Australia *Parliamentary Debates*, Senate, 24 November 2011, p23 (Senator Ludwig).

⁵ See, Industrial Relations Commission of NSW (1998) *Pay Equity Inquiry (NSW)* conducted by Justice Glynn, (NSWIRComm, Sydney) p644.

⁶ Commonwealth of Australia *Parliamentary Debates*, Senate, 24 November 2011, p24 (Senator Ludwig).

⁷ Commonwealth of Australia *Parliamentary Debates*, Senate, 24 November 2011, p26 (Senator Ludwig).

7. In point of fact, the South Australian state jurisdiction has the broadest deeming approach of all the state jurisdiction statutory outworker protection regimes. (The only other state jurisdiction legislative provisions analogous in breadth to this South Australian deeming approach are contained in the corresponding portions of Queensland outworker protection legislation, which appear to have been partly inspired by the South Australian statutory provisions.) Most relevant to this particular analysis is the fact that the South Australian state jurisdiction deeming approach is the only state jurisdiction deeming regime which is explicitly designed to ensure that “no outworker is inadvertently beyond their reach by operation of the corporate veil.”

The current relevant South Australian state jurisdiction statutory provisions referred to are:

“(1) A person is an outworker if . . .

(b) a body corporate of which the person is an officer or employee and for which the person personally performs all or a substantial part of the work undertaken by the body corporate is engaged, for the purposes of the trade or business of another (the *employer*) to—

- (i) work on, process, clean or pack articles or materials; or
- (ii) carry out clerical work,

and the work is carried out in or about a private residence or other premises that would not conventionally be regarded as being a place where business or commercial activities are carried out”.⁹

“(2) A person is also an outworker if . . .

(b) a body corporate of which the person is an officer or employee and for which the person personally performs all or a substantial part of the work undertaken by the body corporate is engaged, for the purposes of the trade or business of another (the *employer*) to—

- (i) negotiate or arrange for the performance of work by outworkers;
- (ii) distribute work to, or collect work from, other outworkers.”¹⁰

8. Accordingly, the current Bill should be amended to include these particular features of the preferred South Australian state jurisdiction model referred to above.
9. The suggested amendment of the current Bill to take into account this particular issue in relation to deeming provisions could appropriately be drafted in the following form (by way of an additional sub-section 789BB(2A) to be inserted into the current federal Act):

789BB TCF contract outworkers taken to be employees in certain circumstances

. . .

⁸ Commonwealth of Australia *Parliamentary Debates*, Senate, 24 November 2011, p23 (Senator Ludwig).

⁹ *Fair Work Act 1994* (South Australia) sub-section 5(1)(b).

¹⁰ *Fair Work Act 1994* (South Australia) sub-section 5(2)(b).

“(2A) An individual is also a TCF contract outworker if a body corporate of which the individual is an officer or employee and for which the individual personally performs all or a substantial part of the work undertaken by the body corporate is engaged, for the purposes of the trade or business of another, to perform work:

- i) in the textile, clothing and footwear industry; and
- ii) at residential premises or at other premises that would not conventionally be regarded as being business premises.”

OR

“(2A) A *TCF contract outworker* is a TCF outworker who personally performs all or a substantial part of the work undertaken by a body corporate of which the TCF outworker is an officer or employee where that body corporate is engaged, for the purposes of the trade or business of another, to perform work:

- i) in the textile, clothing and footwear industry; and
- ii) at residential premises or at other premises that would not conventionally be regarded as being business premises.”

10. Finally, attention must be drawn to a presumably inadvertent loophole in the provisions of the current Bill regarding “Recovery of unpaid amounts”.

11. At present, there are recovery provisions in all existing state and federal jurisdiction outworker protection regimes.

12. All of these protection regimes have a number of common features. One feature of all of the commonly expressed existing protection regimes is the reversal of the onus of proof (accompanied by important clarifications and procedural protections) during the relevant recovery proceedings. This has been a feature of all of the commonly expressed existing protection regimes during the preceding quarter of a century.

13. This feature of the reversal of onus of proof became a legislative obligation enshrined in the relevant federal award provisions created in 1987 and 1988.¹¹

¹¹ *Re Clothing Trades Award 1982* (1987) 19 IR 416; Clothing Trades Award 1982 (Commonwealth) clauses 26 and 27.

14. Since that time, this same feature of the reversal of the onus of proof has been adopted in all commonly expressed state award outworker recovery provisions in all of the relevant state awards.¹²
15. Furthermore, this very same feature of the reversal of onus of proof has been incorporated into all of the commonly expressed state jurisdiction statutory outworker protection regimes.¹³
16. Most recently, this same (commonly expressed) feature of reversal of onus of proof has been also incorporated into the current parallel provisions of the current federal textile, clothing and footwear award.¹⁴
17. I have yet to be informed of one single instance of formal complaint about the operation of this legislative reversal of onus of proof for outworker recovery proceedings in relation to any of the relevant state awards or any of the state jurisdiction statutory outworker protection regimes or any of the successive relevant federal awards.
18. Yet the current Bill provisions purporting to deal with “Recovery for unpaid amounts” for exploited outworkers fail to reflect this crucial reversal of onus component of provisions regulating recovery proceedings for outworkers in all of the existing commonly expressed outworker protective regimes – whether state or federal, whether award or statutory.
19. Accordingly, the current Bill will fail “to achieve . . . nationally consistent rights to legal redress and protection that are of no lesser standard than currently apply in state laws and regulations, and the federal TCF award”¹⁵ unless this loophole of the current Bill is appropriately corrected.

¹² E.g. Clothing Trades (State) Award (New South Wales) clause 32; Clothing Trades Award (South Australia) Schedule 3, Schedule 4; Clothing Trades Award (Western Australia) clause 25B; Clothing Trades Award - Southern And Central Divisions 2003 (Queensland) clause 4.5; Clothing Trades Award - State (Excluding South-East Queensland) 2003 (Queensland) clause 4.4, clause 4.5.

¹³ E.g. *Industrial Relations Act 1996* (New South Wales), section 129G; *Outworker (Improved Protection) Act 2003* (Victoria), section 9; *Industrial Relations Act 1999* (Queensland), section 400C; *Fair Work Act 1994* (South Australia), section 99G.

¹⁴ Textile, Clothing, Footwear and Associated Industries Award 2010 (Commonwealth), Award No MA000017, Schedule F.

¹⁵ Commonwealth of Australia *Parliamentary Debates*, Senate, 24 November 2011, p24 (Senator Ludwig).

20. In particular, the current Bill must be amended to include the feature of the (appropriately drafted) reversal of onus of proof which is to be found in every one of the commonly expressed existing legislative outworker protection regimes (both in federal and state jurisdictions – and in statutory and award form).

21. The suggested amendment of the current Bill to take into account this particular issue regarding reversal of onus of proof could appropriately be drafted in the following form [by way of amending the existing sub-section 789CD(4) and also by way an additional sub-section 789CD(4A)]:

“789CD Proceedings against indirectly responsible entity for payment of unpaid amount . . .

Omit s789CD sub-section (4), substitute:

“4. The court must make an order requiring the entity to pay the unpaid amount (or so much of it as is still owing) to the TCF outworker, or to another person on the outworker’s behalf, unless the indirectly responsible entity satisfies the court that the TCF work (specified in the demand for payment pursuant to section 789CC) was not performed by the outworker or that the unpaid amount (as specified in the demand for payment) for the TCF work is not the correct amount in respect of the TCF work (so specified).”

Add new sub-section 789CD(4A):

“4A. To avoid any doubt, the burden of proof in proceedings (under this section) against an indirectly responsible entity for an unpaid amount is on the indirectly responsible entity to prove that:

- (a) the TCF work specified in the demand for payment pursuant to section 789CC was not performed by the outworker; or
- (b) the unpaid amount specified in the demand for payment is not the correct amount in respect of the TCF work specified in the demand for payment.”

22. In conclusion, I strongly urge the prompt enactment of the current Bill (as amended in accordance with the above proposals) so as to appropriately protect vulnerable exploited outworkers.

Yours faithfully

Dr Michael Rawling

Faculty of Law
University of Technology, Sydney

Ph:
Email: