



Inquiry into the Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011

Submission of Unions NSW

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Contents

Introduction.....Page 3

Background.....Page 4

Consideration.....Page 6

ConclusionPage 11

Introduction

1. On the 25th November 2011, the Senate referred to the Education, Employment and the Workplace Relations Legislation Committee (herein referred to as “the Committee”) the Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011 (herein referred to as the “TCF Bill”) for an inquiry.
2. Unions NSW welcomes the Inquiry and the opportunity to comment given recent changes made to both the New South Wales and Federal industrial relations systems.
3. Unions NSW is a State Peak Body as defined by section 215 of the *Industrial Relations Act 1996 (NSW)*. Unions NSW has over 60 affiliated unions representing members employed across a wide range of public and private sector industries including teaching, local government, retail, distribution, childcare, manufacturing, electrical, health, emergency services, agriculture, engineering, construction, administrative, the public sector, transport and the textile clothing and footwear industry (“TCF”). Collectively Unions NSW and its affiliates represent over 600,000 workers employed across NSW.
4. We note that the Textile Clothing and Footwear Union of Australia (‘TCFUA’) has provided a submission to this inquiry. Unions NSW supports the submission of the Union and adopts such submission as outlined herein.

Background

Nature of the industry

5. There is widespread acceptance that many workers in the TCF industry are particularly vulnerable to exploitation arising from chronic non compliance with minimum award and legal terms and conditions. The industry is characterised by long, complex and multi level supply chains and is structured around production being undertaken in a combination of factory and home based environments. This vulnerability to exploitation is heightened given the 'invisibility' of much of the industry's home based, predominantly Non-English speaking background ('NESB') female workforce. Outworkers and those workers employed in 'sweatshop' environments commonly labour under poor and unsafe workplace conditions, do not receive their lawful wages and entitlements and have little if any bargaining power to negotiate better working conditions.
6. Federal and state governments of (of both political persuasions) have long accepted the need for specific regulation in respect to workers in the TCF industry. Protections for outworkers have existed in relevant awards for nearly 25 years and a number of state governments have legislated in their own right (including NSW) to improve protections for outworkers in within state laws, state awards and/or codes of practice. Similarly, various industrial tribunals and courts have consistently upheld the necessity of strong legislative protections for outworkers. However, the regulatory framework is not uniform, and there are varying degrees of protection depending on which state a TCF worker is engaged.
7. In NSW, relevant laws include:
 - (i) Industrial Relations Act 1996 (NSW) as amended;
 - (ii) Industrial Relations (Ethical Clothing Trades) Act 2001 (NSW);
 - (iii) NSW Ethical Clothing Trades Extended responsibility Scheme 2005 (NSW)
i.e mandatory Code of Practice for the Clothing Industry

Current regulatory framework

The Fair Work Act 2009 ('FW Act') provides the federal regulatory framework in relation to workers in the TCF industry via the minimum safety net - National Employment Standards ('NES') and relevant modern award, Textile, Clothing, Footwear and Associated Industries Award 2010 ('TCF Award'). The TCF Award currently contains a comprehensive set of provisions in Schedule F – (Outwork and Related Provisions) which specifically regulate arrangements made by principals with other persons to have work in the TCF industry carried out on their behalf. These provisions contain a series of interdependent obligations relating to the making of such arrangements, who the work is performed by and under what conditions.

The creation of transparency between each tier of a TCF supply chain allows effective identification of where work is being undertaken in sweatshops and by home based workers/outworkers. Similar provisions have existed for many decades in the pre modern, pre-eminent federal TCF awards and in a number of state clothing awards including NSW.

Currently under the TCF Award, outworkers (whether an employee outworker or a so called 'contract outworker') are entitled to the same conditions e.g. a minimum hourly award rate of pay, hours of work, NES entitlements. In addition, the FW Act also contains provisions which enhance protections for TCF outworkers, including the scope of modern awards to contain certain outworker terms and TCF specific right of entry provisions. However, widespread non compliance with the minimum safety net remains a fundamental problem both for the TCFUA and regulators including the Fair Work Ombudsman ('FWO') and state inspectorates.

Consideration

The TCF Bill aims to harmonise the existing protections so that all TCF outworkers are 'employed under secure, safe and fair systems of work'... 'to be achieved by implementing nationally consistent rights to legal address and protection that are of no lesser standard than currently apply in state laws and regulations, and the federal TCF award'.¹ This is implemented by:

- 'ending the artificial distinction by deeming contract outworkers in the TCF industry to be employees, by extending the operation of most provisions of the FW Act;
- providing an effective mechanism to enable TCF outworkers to recover unpaid amounts up the supply chain;
- addressing a limitation that currently exists in relation to right of entry into premises in the TCF industry operating under 'sweatshop' conditions; and
- allowing for a TCF outworker code to be issued.'²

In addition to strengthening current TCF right of entry provisions (Part 3-4, Subdivision AA), the TCF Bill introduces into the FW Act a new Part 6-4A (Special Provisions about TCF Outworkers). The new Part 6-4A contains the main operative provisions in relation to (i) deeming;³ (ii) recovery of money⁴ and (iii) the prescription of a mandatory code of practice.⁵ In addition the TCF Bill makes necessary amendments to various definitions in the FW Act, provides for miscellaneous provisions⁶ and includes a new Schedule.⁷

¹ TCF Bill 2011; Senate, Second Reading Speech (Senator Chris Evans) 24 November 2011

² Ibid;

³ See Part 6-4A, Division 2 (TCF contract outworkers taken to be employees in certain circumstances)

⁴ See Part 6-4A, Division 3 (Recovery of unpaid amounts)

⁵ See Part 6-4A, Division 4 (Code of Practice relating to TCF outwork)

⁶ See Part 6-4A, Division 5 (Miscellaneous)

⁷ See Schedule 1 (Application, saving and transitional provisions relating to amendments of this Act)

Why the amendments are necessary

Deeming contract outworkers to be employees

The commonality of sham contracting arrangements in the TCF industry and the negative impact this has on ensuring compliance with legal and award minimums has been used to consistently frustrate previous attempts at reform. Deeming contract outworkers to be employees for certain purposes recognizes that outworkers as a class have little, if any control over the conditions under which they are engaged and have minimal bargaining power to negotiate improvement to those conditions.

In summary, the effect of the deeming provisions in the TCF Bill is to ensure that for most parts of the FW Act:

- all outworkers in the TCF industry, however described or categorized, have the same terms and conditions and other entitlements irrespective of their employee or contractor status;
- that the person who directly engages an outworker will have corresponding obligations as their employer;
- that contract outworkers are considered to have the same rights and responsibilities as employees in the same position;⁸ and
- allows for regulations to be made address technical modifications and clarifications to ensure that the application of particular provisions to contract outworkers is effective.⁹

It is important to note that at a state level deeming provisions currently exist under state legislation in NSW.

Recovery of unpaid amounts

⁸ Section 789BB

⁹ Section 789BC. However, a regulation made pursuant to s789BC must further the objective in s789BB(4) that is, that a TCF contract outworker who is taken to be an employee in relation to TCF work should have the same rights and obligations in relation to the work as an employee would have if employed by the person to do the work

Currently, there are considerable barriers to outworkers successfully recovering unpaid monies and entitlements which accrue as a result of their performance of work. These include, outworkers not being aware of their rights, threats to ongoing work if they pursue their entitlements, difficulties in identifying who their 'direct employer' is, the person or entity who engaged them 'disappearing' without payment and employers refusing to pay based on spurious claims such as 'poor quality'.

In summary, the TCF Bill provides for the recovery of unpaid amounts up the supply chain by providing that:

- that the person who directly engages the outworker is the 'responsible person' (either as an employee or under a contract of provision of services);¹⁰
- provides a definition of an 'indirectly responsible entity' in relation to the TCF work;¹¹
- broadly defines what is captured by the term 'unpaid amount';¹²
- provides a remedy in circumstances where the responsible person fails to pay the unpaid amount to the outworker, the outworker has taken reasonable steps to seek the money from the responsible person¹³ and there are one or more indirectly responsible entities in relation to the TCF work;
- provides that where there are two or more indirectly responsible entities, those entities are jointly and severally liable for the payment of the unpaid amount;¹⁴ and allows for an indirectly responsible entity to recover the amount from the responsible person.¹⁵

The mechanism for recovery up the supply chain however does not extend to a retailer who sells goods produced by, or of a kind often produced by outworkers,

¹⁰ Section 789CA

¹¹ Section 789CA(3)

¹² Section 789CA(1)(c) & 789CA(2)

¹³ Section 789CB(2)

¹⁴ Section 789CB(3)

¹⁵ Section 789CE

if the retailer does not have a right to supervise or otherwise control the performance of the work.¹⁶

The creation of a remedy in the FW Act to allow outworkers to claim recovery of unpaid amounts up the supply chain, reflects at the national level, similar provisions which exist under state laws in Victoria, NSW, Queensland and South Australia and the TCF Award. The Minister has made clear that the national provisions are designed to ‘supplement existing arrangements’ and ‘do not limit any action than an outworker might otherwise have in relation to unpaid money, including remedies available under state law’.¹⁷

Code of Practice

Currently mandatory codes of practice in the clothing industry exist at the state level in NSW through the ¹ (NSW) Ethical Clothing Trades Extended Responsibility Scheme made under Part 3 of the Industrial Relations (Ethical Clothing Trades) Act 2001 (NSW)

In essence mandatory codes enhance transparency within TCF supply chains by placing obligations on certain participants in the supply chain (e.g. retailers, suppliers, contractors) in relation to record keeping and reporting requirements.

The TCF Bill provides for a mandatory Code to be issued at the national level for the purpose of furthering the objects of Part 6-4A and which deals with standards of conduct and practice in the TCF industry. In summary, the TCF Bill provides:

- that a TCF outwork Code can include (but is not limited to) record keeping requirements, reporting on compliance with the requirements of the code and general matters under the Code;¹⁸
- defines the categories of persons to be covered by the Code;¹⁹

¹⁶ Section 789CA(3), 789CA(5)

¹⁷ Second Reading Speech; op cit; and section 789CF

¹⁸ Section 789DB

¹⁹ Section 789DC and s789DD

- allows for the best of the provisions of the state codes to be incorporated into the federal code as appropriate; and
- confirms that the provisions of the TCF Award cannot be undermined.²⁰

Right of Entry

The FW Act currently contains, in addition to general right of entry, TCF specific right of entry provisions²¹ which recognize the particular difficulty in monitoring compliance of outworker conditions within TCF supply chains.

The TCF Bill extends these protections by addressing the current ineffective right of entry mechanisms to investigate exploitation more broadly within the TCF industry, particularly in ‘sweatshop’ type environments. These parts of the industry are typically difficult to locate, often non-unionised, have extremely poor health and safety conditions and engage workers on less than minimum safety net conditions. In summary, the TCF Bill:

- extends the current right of entry provisions which allow entry (without 24 hours notice) to investigate breaches affecting outworkers, to the industry more generally; and
- provides an exception for a principal place of business of a person who has appropriate ethical accreditation.

²⁰ (Senate) Second Reading Speech; op cit; and Section 789DE

²¹ Part 3-4, Subdivision AA

Conclusion

Unions NSW supports the Fair Work Amendment (Textile Clothing and Footwear Industry) Bill 2011. In particular, such amendments will allow for a set of nationally consistent rights for the protection of outworkers.