COALITION SENATORS' DISSENTING REPORT

Introduction

1.1 Faced with convincing evidence of endemic and inappropriate conduct in workplaces in a specific industry, Coalition Senators are willing to consider industry-specific legislation to address that inappropriate conduct. It was on this basis that the Coalition maintained protections for outworkers in the textile, clothing and footwear industry in the various iterations of workplace relations legislation between 1996 and 2007. It was on this same basis that the Coalition implemented workplace legislation specific to the building and construction industry.

1.2 We note that there continues to be specific provisions in the Fair Work Act to protect outworkers, as well as varying equivalent provisions in state and territory legislation.

Inquiry processes

1.3 This inquiry has not been assisted by the fact that a key stakeholder and representative body – the Council of Textile & Fashion Industries of Australia – was refused permission to appear at the Committee's public hearing.

Evidence

1.4 The majority report suggests that the Committee was ‘struck’ by comments made in 1987 by a Deputy President of the Australian Conciliation and Arbitration Commission. Coalition Senators consider this suggestion is disingenuous given that these comments were made 25 years ago.

1.5 The Government's justification for this Bill in 2011, as proposed by then Minister Chris Evans was based on a reference to a 2007 report by the Brotherhood of St Lawrence and a 1996 Senate Economics References Committee inquiry.

1.6 Coalition Senators note that both reports had been completed prior to the passage of the Fair Work Bill. If these reports constitute such a strong case for this proposed Bill, then why has the Government waited until now to act? Why didn’t the Government address those concerns as soon as it had the first legislative opportunity to do so, namely the introduction and subsequent passage of the Fair Work Act?

1.7 Coalition Senators note concerns expressed by industry participants throughout the TCF supply chain in relation to the proposed Bill:

[1 Senator the Hon. Chris Evans, Minister for Tertiary Education, Skills, Jobs and Workplace Relations Media Release "Australian workers protected from exploitation" 24 November 2011.]
1.8  The Australian Chamber of Commerce and Industry in its submission expressed concern about the evidence supporting this legislation:

Apart from references in the Minister’s second reading speech to a November 2011 Channel 9 story in a Melbourne TCF "sweatshop" and a July 2011 Sunday Herald Sun report on "sweatshops and outworkers producing school uniforms for Victorian families for as little as $7 an hour", there are no examples provided in the extraneous materials as to the precise deficiencies of the existing legal framework, what recommendations these proposals are based on (such as from the Productivity Commission or a dedicated independent inquiry by the Federal Government) and how the proposed measures will reduce possible exploitation of workers in the TCF industry.2

1.9  The Council of Textile and Fashion Industries of Australia expressed similar concern:

The arguments for introducing the legislation are based on research conducted nearly 5 years ago, not current evidence, and fail to acknowledge the gains made in the 10 years of existing legislation and the 4 years of investment by the Federal Government in Ethical Clothing Australia.3

1.10 Indeed, the then Minister for Education, Employment and Workplace Relations, and now Prime Minister Julia Gillard, said at the time 'I believe the Fair Work system is right...We worked hard to get the balance right and I believe the Fair Work Act is right.'4

1.11 If there is such a strong case for change, clearly the balance was not right and Ms Gillard's comments were not accurate.

1.12 Coalition Senators received advice from textile suppliers expressing concern at the loss of business and jobs if garment construction continues to disappear offshore and textiles and accessories are sourced in the locations where the work is undertaken.

1.13 Coalition Senators suspect that the Government's motivation for this amendment is more about appeasing the trade union movement in the lead-up to the next federal election. In any event, Coalition Senators note that a review of the Fair Work Act is currently underway. The provisions of this Bill should only be considered as part of that review, and along with any other changes proposed in any final and publicly available report resulting from that review.

2  ACCI, Submission 3, Attachment 1, p. 3.
3  Council of Textile and Fashion Industries of Australia (TFIA), Submission 16, p. 3.
4  The Australian newspaper, 21 July 2010.
Recommendation 1

1.14 Coalition senators recommend that this bill not be considered by the Senate before the release of the final report of the 2012 Review of the Fair Work Act.

Scope and status of workers

1.15 Coalition Senators are concerned by evidence that the definition of 'outworker' and 'TCF work' in this Bill will have far broader reach than current provisions, to cover many more workers, including designers with university degrees.

1.16 The Council of Textile and Fashion Industries of Australia have made this point in their submission:

Because of the broad definitions of an ‘outworker’ and ‘TCF work’ those that are not vulnerable i.e. those with qualifications, knowledge and skills are also treated in the same way. For example a designer with a University degree wanting to set up a home based business would be treated the same as a person with poor English language skills and little knowledge of the Australian legal system.5

1.17 Coalition Senators are concerned that genuine independent contractors or others, such as those in the TFIA’s example, could be unjustifiably covered and disadvantaged by this Bill.

1.18 Coalition Senators have received representation from many young and upcoming designers concerned about this Bill. The following communication is from just one student who wrote to Coalition Senators:

I am an emerging Australian Fashion Designer starting a label from home. I would like to draw your attention to the Fair Work Act and the Textile, Clothing, Footwear and Associated Industries 2010 (the TCFAI Award) Modern Award regime which defines me as an outworker, despite my 4 year degree in fashion from Ultimo TAFE. The current TCFAI Modern Award definition has a” catch all” definition where anyone working from home in the fashion industry is an OUTWORKER ...yes, I can be considered an OUTWORKER if I sell to a boutique or department store, because of the deeming provisions of the award.

Most graduating & emerging Australian Fashion Designers starting out, establish a trading relationship with a fashion boutiques on “indent”. In the eyes of the law, MA000017- Schedule F that would mean boutique owners are required to pay me as an employee, including all benefits and entitlements under the National Employment Standards and unfair dismissal laws. This is unfair and an unworkable regime that disadvantages me and other graduating & emerging Australian Fashion Designers, and is making

5 Submission 16, p. 3.
it very difficult starting up a new business, as no boutique owner will agree to employ me, and I don’t want to be employed by them either.

Beyond that as a fashion student/designer, if I hand out work to a “maker/outworker” to sample a design I am obligated by law to employ them with full benefits and entitlements, and that is against the law for me to employ them casually. Further I am aware that in the final form of the Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011 (the Bill) currently before parliament, deems all outworkers to be employees for most purposes of the Fair Work Act 2009 (Clth) (the FW Act) including the National Employment Standards, Superannuation and unfair dismissal laws. As a start-up business, in the beginning it will be challenging to pay myself, never mind employ a ‘maker/outworker’ on a regular basis, and pay all these entitlements. Again this is unworkable and in trading in such an environment, I face prosecution in breach of the TCFAI Modern Award 2010. The risks are too great.

I would like you and your government to consider this letter and make the necessary changes to allow me and other graduating & emerging Australian Fashion Designers making samples and small orders (with business turnover over less than $100,000 per year) to apply for exemption to this onerous and impractical regime, as part of the Modern Awards Review 2012.

Recommendation 2

1.19 Coalition senators recommend that the Bill be amended to ensure that genuine independent contractors – those who have traditionally worked as independent contractors – are neither covered by, nor disadvantaged as a result of this legislation.

1.20 The Fair Work Act allows for Individual Flexibility Arrangements (IFA) to be made which 'meet the genuine needs of the employee and employer'\(^6\), subject to complying with certain requirements. These include that the employee must be better off overall under the IFA.

1.21 This Bill appears to deny access to IFAs for outworkers, whether they be in the TCF industry or not as 'the flexibility term must not allow the effect of those outworker terms to be varied'.

1.22 This is also despite the ‘better off overall test’ which ensures that IFAs cannot undercut outworker terms.

1.23 The TFIA points out in its submission:

On its face, therefore, employees may be able to benefit from individual flexibility terms that would be denied to outworkers even though TCF contract outworkers are treated as employees in the new Part 6–4A, which

\(^6\) Fair Work Act.
extends the operation of most provisions of the FWA (including sections 202 and 203) to contract outworkers in the TCF industry.

If this proves to be the case, the intention to provide “nationally consistent rights...for those outworkers, regardless of whether they are employees or contractors” (see paragraph 44 of the Explanatory Memorandum) may not be achieved.\(^7\)

1.24 Coalition Senators are concerned that this could leave many workers worse off, absent any need or justification for coverage by the Bill.

Recommendation 3

1.25 Coalition senators recommend that the Bill be amended to incorporate the ‘No disadvantage Test’ and ensure that no worker will be worse off as a result of its implementation.

The State Systems

1.26 This Bill will replicate in the Fair Work Act many provisions in current state and territory legislation as well as the relevant Federal Modern Award.

1.27 This is despite the absence of adequate evidence as to whether these protections have worked at a state or territory level, or in the relevant modern award. Coalition Senators have yet to see any evidence that showed these provisions worked where they have been in place for some time.

1.28 It defies good policy sense for the government at a federal level to, in effect, harmonise these laws in the absence of proof that they have delivered results at a state and/or territory level.

1.29 There is a confusing message. It is asserted that problems still exist in the textile, clothing and footwear industry, despite already having very similar protections in various states and territories. How replicating these provisions which are apparently ineffective will assist has not been adequately explained.

Conclusion

1.30 The Coalition in Government recognised the need for additional protections in the TCF industry and provided additional protections and safeguards – including additional powers to the union movement. At the same time, the Coalition also recognised the need for protections in the building and construction sector leading to the establishment of the Australian Building and Construction Commission.

\(^7\) Submission 16, p. 11.
1.31 At present, one of the core arguments of the Government in abolishing the ABCC is that it discriminates against certain workers and that the industrial relations regime should take a 'one size fits all' approach. This Bill clearly defies Labor's view in relation to the ABCC.

1.32 The Government has failed to identify and present sufficient evidence and justification let alone consistency for this Bill. Without that, this Bill should not be passed.

Recommendation 4

1.33 Coalition senators recommend that notwithstanding earlier recommendations, this Bill should be opposed until adequate evidence and justification is presented by the Government.

Senator Chris Back                      Senator the Hon Eric Abetz  
Deputy Chair

Senator Bridget McKenzie                Senator Sue Boyce

Senator Mary Jo Fisher