

# Chapter 10

## Outworkers

10.1 The government recognises that outworkers are a vulnerable sector of the workforce requiring special protection. In the second reading speech the Minister stated:

The government is aware that outworkers are an acutely at-risk sector of the Australian workforce and require special protections, so the bill ensures that awards may include special provisions dealing with outworkers...<sup>1</sup>

10.2 While recognising that the government is committed to protection for outworkers and welcoming the provisions to protect these workers from exploitation, submissions raised a number of issues which require clarification.

### Deeming provisions

10.3 Regarding the constitutional issues that outwork raises, the TCFUA noted the government's commitment to introduce legislation that deems all outworkers as employees and urged the government to include these deeming provisions in the bill.<sup>2</sup> It was suggested that some of the issues raised around the definition of outwork and lack of clarity could be resolved by deeming outworkers to be employees.<sup>3</sup>

10.4 FairWear Victoria told the committee that outworkers were subject to continued exploitation:

...often starting with OH&S or Award breaches in a small or large factory, and continuing further down the supply chain, with the abuses and pay often becoming worse as the chain lengthens.<sup>4</sup>

10.5 Drawing the committee's attention to clauses 12, 57 and 200, FairWear Victoria pointed out that the wording will undermine supply chain transparency, providing cover for exploitation. Opting out of the outworker terms of the award was opposed.<sup>5</sup>

10.6 It was pointed out that the term 'outworker entity' may be used to limit application of outworker terms of awards to those entities which directly employ

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1 Hon Julia Gillard MP. Minister for Workplace Relations, *House of Representative Hansard*, 25 November 2008, p. 11191.

2 TCFUA, *Submission 11*, p.11. Also advocated by FairWear Qld, *Submission 49*, p. 2.

3 FairWear Victoria, *Submission 90*, p. 6.

4 Ibid.

5 Ibid.

outworkers, or where work given out 'is reasonably likely to be performed by outworkers'. FairWear Victoria and Queensland argued that TCF Award obligations apply whenever work is given out regardless of whether an outworker is engaged and suggested the use of the term 'entity giving out work'.<sup>6</sup>

10.7 The TCFUA also suggested the term 'outworker entity' in section 12 is misleading because it suggests that outworkers need to be engaged by the entity. They recommended amending the term 'outworker entity' to 'TCF entity' to clarify that an entity operating in the TCF sector will attract obligations.<sup>7</sup>

### **Non-TCF outworkers**

10.8 The TCFUA noted the definition of outworker in section 12 and asked whether this included all types of outworker arrangements for all purposes.<sup>8</sup> FairWear Queensland regarded the definition in clause 12 as including those defined as independent contractors in the TCF industry, but not workers outside the industry. It submitted that the definition should reflect the breadth of activity recognised in the ILO convention on Home Work.<sup>9</sup>

10.9 Submissions sought clarity about whether clause 27 may inadvertently remove current protections in state law from non-TCF outworkers.<sup>10</sup> The TCFUA explained that clause 27 preserves state and territory laws relating to outworkers but has the effect, because of the definition of outworker in section 12, of displacing the operation of the *Industrial Relations Act 1999* (Qld) and the *Fair Work Act 1994* (SA) as they apply to non-TCF outworkers. This means that 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.<sup>11</sup> It was recommended that clause 27 be amended to ensure these state protections for non-TCF outworkers are maintained. Alternatively FairWear Queensland suggested that the definition of outworkers be equal to the broadest currently used in any state or territory.<sup>12</sup>

10.10 DEEWR told the committee that their current discussions with the TCFUA are focussed on TCF outworkers as they are particularly vulnerable and regulated differently. The regulation of other outworkers is a newer area, reflecting an emerging area of work.<sup>13</sup>

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6 Ibid.

7 TCFUA, *Submission 11*, p. 12.

8 Ibid.

9 FairWear Qld, *Submission 49*, p. 2.

10 FairWear Victoria, *Submission 90*, p. 4.

11 TCFUA, *Submission 11*, p. 12.

12 FairWear Qld, *Submission 49*, p. 3.

13 Ms Natalie James, DEEWR, *Committee Hansard*, 19 February 2009, p. 65.

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## NES

10.11 The TCFUA noted that the NES are expressed to apply only to national system employees, not outworkers. It suggested an amendment to provide that non-employee outworkers may be covered by the NES.<sup>14</sup>

### Award issues

10.12 The Textile, Clothing and Footwear Union of Australia was concerned about the exclusion of outworker terms of the TCF award, specifically that clause 57 of the bill does not compare well with section 349 of the WRA. The TCFUA pointed out that the clause appears to exclude the TCF Award where an enterprise agreement exists, representing a diminution in the protection of outworkers. It recommended an amendment of clause 57 to provide that outworker terms of a modern award will be included in all circumstances.<sup>15</sup>

10.13 The TCFUA also recommended the removal of clause 200 of the bill and argued:

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...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.<sup>16</sup>

10.14 TCFU also suggested redrafting clause 140, which details what a modern award may include, to ensure that an employer is bound in respect of both its employee and its contracting arrangements.<sup>17</sup> An additional concern was the reference in clause 140(1)9B) to 'reasonably likely'. This would permit the argument that it is not reasonably likely to engage outworkers and therefore the outworker provisions in the TCF Award do not apply. The TCFUA pointed out that:

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.<sup>18</sup>

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14 TCFUA, *Submission 11*, p. 16.

15 TCFUA, *Submission 11*, pp. 13-14.

16 Ibid.

17 Ibid., pp. 14-15.

18 Ibid.

10.15 As provisions for the establishment of Boards of Reference have not been allowed for in modern awards, the TCFUA also suggested the bill state that modern awards may include terms establishing Boards of Reference. It argued that:

...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.<sup>19</sup>

10.16 The committee majority notes that clause 140 allows a modern award to include pay and conditions that apply specifically to outworkers. It is intended to give FWA scope to include terms in modern awards dealing with outworkers, in particular terms dealing with the chain of contract arrangements, registration of employers, employer records keeping and inspection.<sup>20</sup>

### **Agreements**

10.17 FairWear wanted to ensure that there is no scope for employers to opt out of outworker provisions. It feared that the legislation may allow enterprise agreements to displace outworker terms as outwork is not a discrete section of the TCF workforce. It believed it may be too easy for employers to just say the provisions do not apply to them as they have no outworkers.<sup>21</sup>

### **Right of entry - 24 hour notice and the special circumstances of the TFC industry**

10.18 The TCFUA argued that the 24 hour notice requirement undermines current protection for workers in NSW and QLD where no notice is required to investigate suspected breaches of OHS legislation. It submitted that the TCF industry should receive an exemption from this requirement.

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.<sup>22</sup>

10.19 This claim was supported by Associate Professor Lucy Taska and Dr Anne Juror from the School of Organisation and Management at UNSW who agreed that right of entry without notice is necessary to protect workers in the TCF industry.<sup>23</sup> Citing cases where the notice period has been used to frustrate the purpose of the right

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19 Ibid.

20 EM, p. 91.

21 Ms Liz Thompson, Victoria FairWear, *Committee Hansard*, 16 February 2009, pp. 4-6.

22 TCFUA, *Submission 11*, pp. 44-45. See also Ms Liz Thompson, Campaign Coordinator, Victoria FairWear, *Committee Hansard*, 16 February 2009, p. 3.

23 School of Organisation and Management, UNSW, *Submission 143*, p.2.

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of entry, FairWear Qld advocated the removal of the requirement for 24 hours' notice of entry for the TCF sector.<sup>24</sup>

10.20 The committee majority notes the intention for the Minister to provide specific amendments to deal with the right of entry provisions as they apply to outworkers.

### ***Access to employee records***

10.21 TCFUA and FairWear Victoria said that access to employee records is essential to trace work in a complex supply chain for outworkers. FairWear Victoria explained:

A majority of the work in TCF takes place in the informal sector, and it is often the case that only through complex calculations of the value and volume of work produced by a particularly label can the hidden workers – often outworkers or small scale sweatshop workers – actually be uncovered. This painstaking work is undertaken in most jurisdictions by the Textile, Clothing and Footwear Union, given the lack of any other inspectorate with the necessary powers.<sup>25</sup>

### **Multi-purpose premises**

10.22 The right of entry provisions specify that permit holders may not enter any part of premises used mainly for residential purposes but will allow permit holders to enter premises used for mixed purposes, where appropriate.<sup>26</sup>

10.23 FairWear Victoria claimed there is a lack of clarity in clause 481 in the reference to 'premises'. Outworkers are often not on the premises where the records of employment/outsourcing/supply chain are kept. It was submitted that access to all levels of the work chain is essential. It also noted that the requirement to have a member of the permit holder's organisation on the premises also creates difficulties. Outworkers are often unaware that they are allowed to be union members. It argued that for the TCF industry, right of entry and access to records should not be conditional on the requirement to have a union member in the workplace. FairWear Victoria also advocated an amendment to clause 493 to ensure there are no barriers to access premises where work is being performed,<sup>27</sup> which was supported by the TCFUA.<sup>28</sup>

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24 FairWear Qld, *Submission 49*, p. 6.

25 FairWear Victoria, *Submission 90*, pp. 9-10. See also Ms Liz Thompson, Campaign Coordinator, Victoria FairWear, *Committee Hansard*, 16 February 2009, p. 2-3.

26 DEEWR, *Submission 63*, p. 41.

27 FairWear Victoria, *Submission 90*, p. 8. See also Ms Liz Thompson, Campaign Coordinator, Victoria FairWear, *Committee Hansard*, 16 February 2009, p. 3.

28 TCFUA, *Submission 11*, p. 44.

10.24 The TCFUA claimed to be the only body regularly investigating compliance with legal minimums, regardless of whether it had members. If the TCFUA was unable to investigate breaches, despite the absence of members, then nobody else would.<sup>29</sup> In summary, the TCFUA submitted that in the TCF sector there should be:

- no requirement for a member of the TCFUA to be present in the workplace;
- no requirement for a worker to be present at the premises;
- no requirement of 24 hours' notice of entry; and
- no prohibition on entry to residential premises.<sup>30</sup>

10.25 Ms Liz Thompson, Campaign Coordinator, Victoria FairWear told the committee of the mandatory code in NSW which binds retailers to:

...actually knowing what is going on in their supply chain. It provides the incentive for them to be honest and transparent about where the work is going, to track exactly where the work is going, because if something is going wrong at the very bottom end that can be held liable at the top.<sup>31</sup>

10.26 The committee has a long-standing interest in the condition of workers employed in the TCF industry. Even in the acrimonious circumstances of the WorkChoices inquiry, when the committee was sharply divided on nearly all issues, there was agreement that the conditions of workers in the TCF industry required special consideration, including remedial action against exploitation. The problem continues, despite the good intentions of successive governments. There is now more confidence that the matters will be seriously addressed through amendments to this bill.

10.27 The committee notes the Minister's second reading speech:

I also flag the government's intention to carefully examine the provisions of the bill concerning the right of entry to investigate breaches of entitlements to ensure the bill provides an effective compliance regime for at-risk workers in the textile, clothing and footwear industry. The government will seek necessary refinements to the bill concerning this matter through the Senate process.<sup>32</sup>

10.28 The committee supports the government's commitment to ensure an effective right of entry regime for workers in the TCF industry. It notes that work is underway to develop draft provisions to address these issues and others raised with the

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29 Ms Michele O'Neil, National Secretary, TCFUA, *Committee Hansard*, 16 February 2009, pp. 57-58.

30 *Ibid.*, p. 46.

31 Ms Liz Thompson, Campaign Coordinator, Victoria FairWear, *Committee Hansard*, 16 February 2009, p. 5.

32 The Hon Julia Gillard MP. Minister for Workplace Relations, Second Reading Speech, *House of Representative Hansard*, 25 November 2008, p. 11191.

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committee as well.<sup>33</sup> It looks forward to these amendments being debated in the Senate concurrently with the bill.

### *Committee view*

10.29 The committee majority notes that the outworkers in the textile, clothing and footwear trade are a particularly vulnerable category of workers. Many are female, from non-English speaking backgrounds, working long hours on low piece rates. The committee heard stories of intimidation and harassment of these employees by employers. There is also a low rate of union membership among these workers. The committee majority is concerned to see that the particular needs of the workers in this industry are addressed.

### **Recommendation 11**

**10.30 The committee majority recommends the government accepts the suggestions in this chapter regarding outworkers and implements them as amendments to ensure appropriate protections are in place that recognise the special vulnerability of these workers.**

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33 Ms Natalie James, DEEWR, *Committee Hansard*, 19 February 2009, p. 64.

