

Submission
No 4

INQUIRY INTO ETHICAL CLOTHING EXTENDED RESPONSIBILITIES SCHEME 2005 (NSW)

Organisation: NSW Industrial Relations, Premier's Department

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Premier's Department Submission to the NSW Parliament Modern Slavery Committee Inquiry into the Ethical Clothing Extended Responsibility Scheme (ECERS)

February 2024

1 Introduction

NSW Industrial Relations, Premier's Department welcomes the opportunity to contribute to the Inquiry into the Ethical Clothing Extended Responsibility Scheme 2005.

The intention of this submission is to provide the Modern Slavery Committee with information regarding the history and operation of the scheme in NSW, particularly addressing point 1(b) of the inquiry terms of reference regarding the current application of the Scheme in New South Wales.

2 Regulatory Background

The textile, clothing, and footwear industry is a particularly vulnerable sector of the labour force. It has a high proportion of female workers, many of whom are from non-English speaking background. The majority of its workers are heavily award reliant, with little or no capacity to bargain. The industry also contains outworkers who manufacture clothing products outside the employer's workshop or factory under a contract of service and are mostly engaged on a casual basis with little or no official documentation¹.

The Scheme had its origins in a campaign to address outworker exploitation conducted by the Textile Clothing and Footwear Union of Australia (TCFUA) alongside initiatives from community-based organisations including Fair Wear and Asian Women at Work.

In 1996, the TCFUA negotiated a 'Deed of Co-Operation' with at least one major fashion retailer which obliged the retailer, among other matters, to inform the TCFUA about the number, type, and price of products supplied to the retailer and to inform the TCFUA if the retailer became aware of any instances of outworker exploitation by any party at any level in that retailer's supply chain.

Public investigations such as the NSW inquiry into pay equity released in 1998² found on the evidence before it that there was 'widespread and endemic failure' to comply with pre-existing award clothing outwork provisions. Glynn J, who conducted the inquiry, stated that: 'it is important that all retailers, fashion houses, governments and government agencies become party to appropriate codes of practice/conduct. . . .If all relevant participants do not sign then consideration should be given to making the code mandatory'³

In terms of legislation, the *Industrial Relations Act 1996* (the IR Act), explicitly deems an outworker to be an employee for the purposes of the Act⁴, thereby ensuring such individuals in the NSW jurisdiction were afforded the protection of the *Clothing Trades (State) Award*.

The IR Act also contains provisions specifically designed to protect outworkers from exploitative employment practices. In 2001, new provisions were included in the IR Act to establish a system for outworkers to recover unpaid wages from their employer, through the supply chain.

¹ There appears to be a paucity of data about the actual numbers of outworkers in Australia. [A 2020 ABC article](#) quotes Ethical Clothing Australia (ECA) as stating 'the true number of [outworkers] remains unknown'. The same article states that FWO suggests that there are 35,000, while the TCFUA suggests that the number is closer to 45,000.

² *Pay Equity Inquiry Report to the Minister* Matter No IRC6320 of 1997, Industrial Relations Commission of NSW, 14 December 1998, per Glynn J at 641

³ *Ibid*, at 643

⁴ IR Act Schedule 1 Cl 1(f)

In 2006, in anticipation of the commencement of the federal government's Work Choices legislation⁵, the IR Act was amended to include additional provisions protecting outworkers who work in the federal industrial relations system. As a consequence of the amendment, conditions of employment set out in the *Clothing Trades (State) Award* in relation to outworkers became applicable by force of legislation to outworkers employed by constitutional corporations and employers.

2.1 The *Industrial Relations (Ethical Clothing Trades) Act 2002* and the Ethical Clothing Trades Extended Responsibility Scheme

To support compliance within the industry the NSW Government enacted *the Industrial Relations (Ethical Clothing Trades) Act 2002*, which established the Ethical Clothing Trades Extended Responsibility Scheme. The Scheme, which came into effect on 1 July 2005, is an initiative of the NSW Government designed to address the exploitation of clothing outworkers and was a key recommendation of the Ethical Clothing Trades Council.

The Council was established by the NSW Government as part of the Behind the Label Strategy to improve compliance with industrial law in the NSW clothing industry and advise the Government on ways to address issues facing clothing workers.

The Scheme places certain obligations on clothing retailers, suppliers, contractors, and sub-contractors about clothing goods made in Australia and sold within NSW. These obligations generally relate to keeping and exchanging information about the manufacture of clothing, and making those records open to inspection.

Under the Scheme, at least twice each year, retailers must provide to the NSW Office of Industrial Relations (now NSW Industrial Relations in the Premier's Department) details of all the suppliers that manufacture clothing in Australia for the retailer and whether any of these suppliers engage outworkers.

The Scheme also compels suppliers to provide retailers with details on agreements to supply clothing products. It must contain all details concerning where the work is being performed, if contractors are engaged and their particulars, and whether outworkers are used in the supply of clothing products.

The Scheme's requirements provide for more transparency of industry supply chains, greater capacity to protect the rights of outworkers, and promote ethical practice within the industry.

2.2 Interaction with Commonwealth legislation

This area of regulation became more complex with the advent of the Work Choices legislation in 2006. In an effort to avoid federal regulation, legislation was passed in NSW which sought to convert the relevant state award into a legislative instrument, in so far as it applied to constitutional corporations.

Both Work Choices and the *Fair Work Act 2009* (Fair Work Act) provide that state outworker laws can continue to operate, and the referral of power, which took effect on 1 January 2010, to create a national workplace relations system for the private sector explicitly excluded laws relating to outworkers.

⁵ *Workplace Relations Amendment (Work Choices) Act 2005* (Cth)

In 2009, NSW Parliament passed the *Industrial Relations (Commonwealth Powers) Act 2009* (the IR(CP) Act), which referred various powers to make industrial legislation applying to private sector employers to the Commonwealth. Relevantly, the powers so referred included the following:

‘...(b) terms and conditions under which an **outworker entity** may arrange for work to be performed for the entity (directly or indirectly), if the work is of a kind that is often performed by **outworkers**..’

And

‘...(c) rights and responsibilities of persons, including employees, employers, independent contractors, **outworkers, outworker entities**, associations of employees or associations of employers..’(emphasis added).⁶

This meant that powers to make laws regarding the foregoing outworker matters, particularly including powers to make relevant industrial instruments, formally passed to the Commonwealth.

While the NSW Code remained theoretically in effect, its utility as a vehicle to ensure that outworkers receive their entitlements became severely limited.

In 2010, Fair Work Australia (as it then was) made the *Textile, Clothing, Footwear and Associated Industries Award 2010* (TCF award). This award regulates the pay and conditions of outworkers, irrespective of the corporate or otherwise nature of the employer, and worker status of the outworker. The TCF provides an avenue for individual outworkers to enforce their rights and their employer’s obligations, with the assistance of the Fair Work Ombudsman or their union, as necessary or appropriate.

In late 2011, amendments were made to the Fair Work Act which introduced many of the same provisions as exist in State law, in particular:

- deeming textile, clothing, and footwear outworkers to be employees
- enabling recovery of unpaid entitlements up the contract chain
- providing additional capacity for effective compliance targeting and making provision for the making of a mandatory code of practice.

Such a code, if made, could perform the same function as the NSW Extended Responsibility Scheme.

While section 27 of the Fair Work Act states that ‘matters relating to outworkers’ are a non-excluded matter, and this was confirmed by the wording of both the State referral and the Commonwealth adoption of referral (Division 2B of Chapter 1 of the Fair Work Act), the Commonwealth law and the relevant modern award now deal with almost exactly the same issues in very similar terms.

It is expected that, in practice, most persons operating in the clothing trades would consider the Fair Work Act and the relevant modern award as being the source of conditions and obligations in this industry.

It should also be noted that the Ethical Clothing Australia Code of Practice (the ECA Code), is a voluntary code of practice for clothing retailers and suppliers which has operated since 2000. The ECA Code was formulated by the TCFUA, the Australian Industry Group and the NSW Business Chamber. Ethical Clothing Australia is a nonprofit organisation which is currently funded by the Commonwealth Government.

Further, NSW Extended Responsibility Scheme provides at cl 8(1)(e) that a signatory to the ECA Code will be deemed to have a reasonable excuse for failing to comply with the Scheme if the failure was due to action in compliance with the ECA Code.

⁶ IR(CP) Act 2009 Schedule 1 s30K

3 Conclusion

3.1 Ongoing utility of the NSW Scheme

As can be seen from the foregoing, regulation of NSW outworkers has progressed from initiatives advanced by unions, community groups and some retailers, through NSW legislation and the Scheme, to dominance by the modern award and Commonwealth legislation.

The *NSW Industrial Relations (Ethical Clothing Trades) Act 2002*, the 2005 Extended Responsibility Scheme, and the *Clothing Trades (State) Award* filled many of the then existing gaps in the regulation of NSW outworkers.

However, the advent of WorkChoices legislation in 2006 made enforcement of the State award problematic, and the subsequent transfer of enforcement provisions to the IR Act restricted the application of the latter to outworkers performing work for constitutional corporations.

Referral of powers in 2009, the subsequent making of the *Textile, Clothing, Footwear and Associated Industries Award 2010* and the 2011 amendments to the Fair Work Act meant that Commonwealth regulation was and is able to deliver broadly similar benefits to those earlier provided by NSW regulatory arrangements.

In particular, the *Textile, Clothing, Footwear and Associated Industries Award 2010* provides a clear and accessible means of ensuring that outworkers receive the pay and conditions to which they are entitled.

While it is true that the Extended Responsibility Scheme remains in place, its focus remains on retailers and suppliers and the reporting of relevant information by them.

From its inception, the Scheme was intended to operate in tandem with the State award which was in turn the ultimate means of enforcing outworker entitlements for individual outworkers. The latter mechanism is of course no longer available. Also, voluntary codes of practice such as the Ethical Clothing Australia Code of Practice continue to operate and provide a mechanism of accountability for retailers and suppliers. As noted above, compliance with the ECA Code is taken to be substantive compliance with the Extended Responsibility Scheme.

As such, since referral of powers and the making of the TCF award, the Scheme now appears to have very limited practical utility in terms of enforcing the pay and conditions of outworkers in the manner originally intended at its inception.

However, there may be some further ongoing utility for the Scheme as a vehicle for collecting data regarding the numbers of outworkers and other related issues, given the current scarcity of this type of data as noted above.

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