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Submission

Fair Work Amendment (Textile, Clothing & Footwear Industry) Bill, 2011 Treatment of Outworkers

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APL FINANCIAL PTY LTD CHARTERED ACCOUNTANTS INVOLVEMENT

APL Financial is a Melbourne suburban chartered accounting firm with 8 staff servicing small business and individuals. Apl Financial Pty Ltd provides business advice, taxation services & advice and audit services to small to medium size business and individuals.

Due to our role in advising and assisting many businesses on a day to day basis we have a thorough knowledge of how particular legislation affects small business.

Our role requires us to understand the legislation and then to apply the legislation at the coal face.

Occasionally, legislation is passed which is impossible to apply and impossible to comply with. Also it is obvious that the legislation will not achieve the desired outcome.

The Fair Work Act as it relates to outworkers in the clothing industry falls into the above category and it beggars' belief that such legislation was initially passed.

In October 2011 APL Financial was asked by a client in the clothing industry to advise on the Fair Work Act and how it related to outworkers. Our client informed APL Financial that outworkers are now being classed as employees and as such holiday pay, sick leave, superannuation, payg withholding and time sheets apply.

Initially we informed our client that they must have misunderstood the legislation as treating a bona fide contractor as an employee is a nonsense and impractical.

We have now investigated the legislation and our client is correct.

The Fair Work Act as it relates to outworkers is so restrictive and draconian that it is no longer viable and administrative possible to engage outworkers.

The legislation defies logic and common sense.

CURRENT POSITION

The current interpretation of the legislation by the Commissioners of Fair Work requires outworkers to be treated as employees for purposes of the Fair Work Act only.

There are a number of test which determine whether there is an employee/employer relationship or a contractor/subcontractor relationship. These tests have been used for many years to determine employee/employer relationships for income tax purposes.

The tests are on the Fair Work Ombudsman website and are as follows:

1. Does the subcontractor complete the work away from the contractors premises?
2. Does the subcontractor use their own tools and equipment?
3. Does the subcontractor get paid for results rather than time spent doing the work?
4. Does the subcontractor have the authority to use employees and/or other contractors to complete the work?
5. Does the contractor have an ABN or a corporate structure?

The fact sheet from the Fair Work Ombudsman website details the tests.

It is our view that approximately 95% of all outworkers are subcontractors however the current interpretation of the Fair Work Act still requires these people to be treated as employees for Fair Work purposes only.

CURRENT POSITION AND THE DOCUMENTATION WHICH MUST BE KEPT

However where outworkers are used on a contract basis in the TCF industry there is a requirement for every entity and individual in the supply chain to be registered with FWA.

Also where outworkers are used the following written documentation is required to be kept for every article or groups of articles manufactured:

- A. Time & Date for commencement and completion of work
- B. A description of the nature of the work required and the garments, articles or materials to be worked on(including diagrams where available and details of the type of garment or article, seam type, fabric type, manner of construction and finishing)
- C. The number of garments
- D. The sewing time for the work required on each garment, article or material
- E. The price to be paid for each garment article or material
- F. Whether the principal will provide the worker with full time or part time work
- G. Where work is less than 15 hours per week the consent of the Union is required

In order to comply with the legislation the contractor using an outworker is now required to establish a detailed standard costing time sheet system per garment (which will need to include every button, seam, lining, pocket, hem etc), instruct the outworker to record his/her time, review each standard costing time sheet actual v standard.

The whole process is unworkable and small businesses will not comply with it.

A detailed costly unworkable standard costing time sheet system for what in many situations are low cost articles, short run productions with very low margins is ridiculous.

The contractor sub-contractor arrangement works because it provides flexibility to both parties.

The requirement to provide outworkers at least 15 hours per week work when they are paid on results is a nonsense.

The idea that small and micro businesses are going to obtain Union approval prior to providing less than 15 hours per week work is a nonsense.

This legislation is a major reason for the decline of the clothing industry in Australia.

If this legislation is not repealed and the TCFU enforces this legislation then small and micro business will leave the clothing industry.

The damage such legislation will and is already having on the fragile clothing industry cannot be overestimated.

The small business owner knows that this legislation is an attack on his independence, honesty, flexibility and profitability. Small business owners who have borrowed against the family home, currently working 6 days a week to create work and opportunities for others, will say "Why should I bother. What is the point of continuing on when the government keeps pushing more risk and costs on to my business. And why is the government doing this? Because they think I am exploiting outworkers".

Contrary to the view of the TCF Union most small business do not exploit outworkers and employees. Small business's rely on outworkers and employees to get the work done, it is not in their interest to exploit them.

The legislation assumes outworkers wish to be treated as employees. Where is the evidence?

Outworkers may prefer the contractor/subcontractor relationship as it provides them with increased flexibility, the ability to work from home (saving on travel and child minding fees).

Those outworkers who do not prefer the contractor/subcontractor relationship are free to leave the industry.

As the cost and administrative time of using outworkers will be much greater than using employees overtime the effect of the legislation will be to eliminate outworkers from the clothing industry.

WHY IT IS IMPOSSIBLE TO COMPLY WITH THE FAIR WORK ACT & THE INCOME TAX ACT & THE CONTRACTORS ACT

For Fair Work Act purposes the outworker is deemed to be an employee.

For Income Tax Act purposes for Contractor Act purposes the outworker is a subcontractor.

As an employee/employer relationship does not exist for income tax purposes the contractor cannot ask for the tax file number and cannot record the tax file number of the subcontractor and cannot deduct payg withholding.

However, according to the Fair Work Act he/she has to be treated as an employee.

What is the contractor to do if a tax file number is provided and the outworker provides and invoice with an ABN on it.

Under taxation law the contractor must accept the invoice, pay the invoice and not deduct tax.

Under the Fair Work Act the outworker is deemed to be an employee and therefore payg withholding tax is to be deducted, superannuation is required to be paid, annual leave and sick leave must be provided for and paid.

The outworker may be operating as a partnership or a company which makes it impossible to comply with the Fair Work Act.

By treating outworkers as employees the direct cost of labour used by small business will increase by the following :

Payroll Tax 4%
Workcover 3%

Current interpretation of the Fair Work Act will cause payments made to outworkers to be treated as salary and wages and therefore such payments will attract payroll tax and workcover levys. As a guide the cost of using an outworker will increase by at least an additional 7%.

ARE OUT WORKERS BEING EXPLOITED

The prima facie purpose of the original section in the Fair Work Act relating to outworkers is to protect outworkers in the clothing industry from exploitation.

This argument has been run by the TCFU and it is obvious that the recent amendments were also proposed by the TCFU as the amendments also refer to increasing the right of entry for union officials to family homes belonging to out outworkers.

Are out workers being exploited? Of course in any industry there is a small section of workers who are exploited by disreputable business owners.

Is the clothing industry worse than other industries?

No one knows how many outworkers there are in Australia. Professor Roy Greens report on the clothing industry in 2008 and earlier reports published back in the 1990's clearly state the above. A search in the Internet does not reveal any recent reports to clarify the issue.

A letter and an email were forwarded to the Minister of Workplace Relations on the 28th December 2011 requesting any information on the number of outworkers and the exploitation levels in Australia. No acknowledgement or reply has been received.

The ATO may have information on the size and number of contractors in the clothing industry? Information required to be included on annual taxation returns being industry group and type and the size of the operation would provide reliable information.

The Fair Work Ombudsman website has particular sections dealing with the treatment of workers in the cleaning industry and the hairdressing industry but nothing specific in regard to outworkers in the clothing industry which suggest that the policy area of the Fair Work does not consider the exploitation of outworkers to be a major issue.

The Fair Work Ombudsman has advised by phone that since the introduction of the Fair Work Act in 2009 no company, individual or partnership has been prosecuted for exploiting outworkers. The Fair Work Ombudsman will not put this statement in writing.

The policy section of Fair Work also advised that as far as they were aware no company, individual or partnership was currently being investigated for the exploitation of outworkers.

Therefore it is reasonable to assume that legislation has been passed without the knowledge of the size of the issue and whether an issue even exists.

The Fair Work Ombudsman released a report (Attachment A) in April 2013 on the Queensland Clothing Industry. The report shows exploitation is not wide spread.

TEXTILE CLOTHING FOOTWEAR UNION (TCFU) INVOLVEMENT

How did the above situation arise?

By looking at the major proponents of the legislation and following the money trail interesting facts are revealed.

The major proponent of the legislation is the TCFU.

By reviewing the audited financial statements of the TCFU over the previous 5 years the following information is revealed:

TEXTILE CLOTHING FOOTWEAR UNION AUSTRALIA				
Summary				
Year Ended	Dec 2010	Dec 2004	Change	% Change
Victorian Branch				
No. of Members	2,617	5,031	- 2,414	-48%
No of full time employees	15	14	1	7%
Membership Subs. Income	\$ 606,514	\$ 1,227,842	-\$ 621,328	-51%
Grants Funds & Other Income	\$ 1,158,381	\$ 451,066	\$ 707,315	157%
Net Assets	\$ 4,066,940	\$ 4,566,812	-\$ 499,872	-11%

Source audited financial statements lodged with Fair Work

In summary the above information shows that the TCFU as a relevant player in the clothing industry is reducing rapidly and yet it has the ability to push through idiotic and stupid legislation to solve issues which may not exist.

Although the financial statements do not state that that funding has been supplied by the government there appears to be no other source for such large amounts of money.

On current forecasts TCFU membership will reduce to zero by 2015.

As annual membership income reduces it is being replaced by government funding.

For the year ended 31 December 2010 the government gave the union \$1.1 million which is equivalent to 65% of its total annual income. On current trends by 2015 the government will be giving the TCFU 100% of its annual income which will equal \$1.7million.

The TCFU is fighting for its survival.

Is the exploitation of outworkers issue a ruse so the previous government had a reason to continue to fund the operations of the TCFU?

By demanding that outworkers be classed as employees the TCFU is complicit in the clothing industry moving off shore for the sake 14 full time jobs at the TCFU.

If the TCFU is genuine in its endeavour to assist the clothing industry it would embrace small and micro businesses rather than promote legislation that fines small businesses up to \$30,000 per event where outworkers are exploited up to three or four links down the supply chain.

The government funding currently being received by the TCFU is equivalent to 8,000 standard working hours pa. This level of funding has been received for over 2 years therefore total funded working received by the TCFU is greater than 16,000 standard working hours.

With 16,000 standard working hours surely it is reasonable to expect an organization to be able to discover how many outworkers there are in Australia and the level of exploitation.

Over a 2 year period the TCFU has received funding to the equivalent of 16,000 standard working hours. In that period not one individual or company has been prosecuted for the exploitation of outworkers.

Constant media releases by the TCFU state that outworkers are being paid \$3.00 per hour.

The TCFU under the Fair Work Act already has incredible right of entry powers yet it cannot locate and report operators who are exploiting the outworkers.

FAIR WORK COMMISSIONERS HAMBERGER, SMITH & LEE ARE WRONG DO NOT UNDERSTAND THE FAIR WORK ACT

Section 789BC(3) (Attachment B) of the Fair Work Act copy attached does not allow regulations that imposes an obligation which creates an offence.

As a contractor is not an employee under the Income Tax Act (Attachment C) it is an offence under the Income Tax Act to ask a contractor for their tax file number.

Therefore under Section 789BC(3) of the Fair Work Act a clothing outworker cannot be treated as an employee.

Because of Section 789BC (3) clothing outworker cannot be deemed to be an employee and therefore there is no requirement to comply with Schedule F. Therefore there is no requirement to comply with the record keeping and reporting requirements.

This information was provided to Commissioners Hamberger, Smith & Lee in May 2013 and their ruling is set out in (2013) FWCFB 5729 Fair Work Commission Decision (Attachment D) paragraph 64 where they incorrectly conclude that they must not vary the modern award to exclude certain types of outworkers.

The award is not being varied, compliance and clarification of Section 789BC(3) of the Fair Work Act is all that is required.

FAIRWORK AND OTHER ORGANISATIONS INVOLVED

Letters and emails have been sent to The Fairwork Ombudsman requesting clarification and advice on the above issues. The policy department of the Fairwork office replied to our correspondence but was not prepared to provide either specific or general advice even though it is "responsible for providing education, assistance and advice about the Commonwealth workplace relations systems"

The Fairwork Ombudsman recommended that we seek our own independent legal advice.

What is the point of having a policy department if they are not prepared to provide either specific or general advice.

An email was sent to Ethical Clothing Australia on the 18th October 2011. No reply was received.

On the 16th November 2011 a further email was forwarded to the National Manager of Ethical Clothing Mr Simon McRae. No reply was received.

Ark Clothing a member of Ethical Clothing Australia requested a copy of the annual financial statements, Ethical Clothing Australia advised that the annual financial statements were private and not available to members.

In meetings with our client it was obvious that they are fearful of the TCFU. Therefore on our behalf a colleague wrote to the TCF union on December 5, 2011 requesting clarification of the treatment of outworkers. No correspondence has been received from the TCF union.

Also the TCFU is threatening small businesses with the threat of large penalties and fines.

A separate submission has been made to Fair Work in relation to the TCFU threatening small businesses in the clothing industry. Fair Work has decided to take no action.

CONCLUSION

Advice, clarification and action to fix the issues relating to clothing outworkers has been requested from

- The Department of Education, Employment & Workplace Relations – no reply
- Ethical clothing Australia is receiving \$4 million annual funding - no reply
- TCF Union is receiving \$1.15 million of annual funding – no reply
- The Fair Work Ombudsman – replied but no advice provided
- Fair Work Commissioners; Hamburger, Smith & Lee - do not even understand the Fair Work Act
- Small businesses are being threatened by the TCFU and Fair Work Australia refuses to take action

With all the major manufactures having moved to Asia the clothing industry in Australia is evolving into a cottage industry.

The issues raised in the report need to be addressed as soon as possible so small business can once again operate profitably without the TCFU threatening to fine and penalise honest ethical operators.



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6th May 2014