ATTACHMENT B

ACCI Preliminary Response to the Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011

1. **There is no evidence-based policy rationale for the measures**: On 24 November, the then Minister for Tertiary Education, Skills, Jobs and Workplace Relations, Senator the Hon Chris Evans, introduced into the Senate the *Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011* (the Bill).

   On 26 October 2011, Senator Evans published a media release (**see box**) which, indicated *inter alia* that *"[t]he Gillard Government's Fair Work Act has improved protection for home-based workers, including enhanced workplace right"* and that *"[t]he latest Textile, Clothing and Footwear and Associated Industries Award also includes entitlements and protections for homeworkers. This includes an obligation for principals to give homeworkers entitlements equivalent to the National Employment Standards".*

'Meet your Maker' reveals faces behind the fashion

Minister for Jobs and Workplace Relations, Senator Chris Evans, today launched Ethical Clothing Australia's 'Meet your Maker' campaign in Sydney.

Senator Evans said the 'Meet your Maker' campaign is about raising consumer awareness of the faces behind fashion and ensuring workers in the industry are treated and paid fairly.

The 'Meet your Maker' campaign will highlight the issues of substandard pay and conditions experienced by some home-based workers. It will also promote accredited brands to consumers, encouraging people to support companies that treat and pay their workers properly.

"Behind the designers and the people upfront are a number of highly skilled workers who do their important work behind the scenes – the people you don't see," Senator Evans said.

"Often when we see 'Made in Australia' on the clothes we buy, we assume those people who have worked in the production have been treated fairly and paid a decent wage.

"This is not always the case, especially for home-based workers who are often paid very little per hour and don't received entitlements such as superannuation or annual leave."

"How we treat our most vulnerable, such as home-based workers is a reflection of the type of we are society.

"The Gillard Government's Fair Work Act has improved protection for home-based workers, including enhanced workplace right.

"The latest Textile, Clothing and Footwear and Associated Industries Award also includes entitlements and protections for homeworkers. This includes an obligation for principals to give homeworkers entitlements equivalent to the National Employment Standards.

Senator Evans congratulated Ethical Clothing Australia and manufacturers supporting the campaign for giving a face to these workers and recognising that they need to be treated fairly.

Ethical Clothing Australia is a joint business-union initiative that runs an accreditation and education program designed to help businesses and workers in the textile, clothing and footwear industry, particularly home workers.

"Ethical Clothing Australia is an initiative that will help Australian businesses make sure the workers making their clothing and products are working in decent conditions and being paid fairly, Senator Evans said

Consumers will also be able to look for the Ethical Clothing Australian trademark, or visit the new website www.meetyourmaker.org.au, to identify Australian-made products where everyone who has worked in production has been paid legal rates and conditions.

In 2008 the Australian Government provided a $4 million grant to expand Ethical Clothing Australia's programs. This year a further grant of $4 million was announced in the Federal Budget to support Ethical Clothing Australia's ongoing work to protect textile, clothing and footwear workers' rights.

The launch was hosted by Ginger & Smart Boutique in Paddington.

There was no public statement by the Government or relevant Minister that it would be introducing significant and new laws in the TCF industry prior to or subsequent to the 26 October media release.

The explanatory memorandum states:

> The Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011 (the Bill) will amend the Fair Work Act 2009 (FW Act) to enhance existing protections for vulnerable workers in the textile, clothing and footwear (TCF) industry.
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> Research has consistently shown that outworkers in the TCF industry suffer from unique vulnerabilities as a result of their engagement or employment in non-business premises. These vulnerabilities are often exacerbated by poor English language skills, a lack of knowledge about the Australian legal system and low levels of union membership in the industry.

Despite the existing provisions in the FW Act, the relevant modern award and in state legislation, outworkers continue to experience poor working conditions.

This Bill is intended to ensure equitable and consistent protection for these workers.

The Bill will also address a limitation that currently exists in relation to right of entry into premises in the TCF industry operating under 'sweatshop' conditions.

The Bill will:

- extend the operation of most provisions of the FW Act to contract outworkers in the TCF industry

- provide a mechanism to enable TCF outworkers to recover unpaid amounts up the supply chain

- extend specific right of entry rules that apply to suspected breaches affecting outworkers (which allow entry without 24 hours notice) to the industry more broadly , with an exception for the principal place of business of a person with appropriate accreditation (to which the standard right of entry rules would apply)

- enable a TCF outwork code to be issued.

These changes will promote fairness and ensure a consistent approach to workplace entitlements and protections for a class of workers that is widely recognised as being highly vulnerable to exploitation.

ACCI has reviewed the explanatory memorandum and second reading speech in an attempt to identify why the Government has introduced the Bill into the Parliament. 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. In any event the two examples quoted are already covered by existing laws and prosecution of contraventions can already be undertaken by the appropriate regulators. These proposals do not address those two examples.

The Second reading speech refers to two reports being a Brotherhood of St Laurence 2007 report and a Productivity Commission report in 2003. Significantly, these reports were available well before the *Fair Work Act 2009* commenced in July 2009 (and in full, on 1 December 2010), which created a new safety-net for TCF outworkers and allowed existing state / territory laws to continue to operate for TCF outworkers.

It is also unclear what is meant by the term "exploitation" in the explanatory materials, when there are already existing legal obligations which may result in civil pecuniary penalties of up to $33,000 per contravention under the *Fair Work Act 2009* and back-pay can be ordered by the courts. In any event, the proposals are seeking to extend most non-safety-net provisions of the *Fair Work Act 2009* which currently apply to employees, to TCF outworkers (who are not employees). These provisions provide many new legal rights to employees, which are above the safety-net of minimum wages and conditions (as provided by the NES and modern awards), and include a suite of rights and capacities to obtain higher wages and conditions. Many of these provisions are not without controversy, with some new rights and capacities already having a real and negative impact on many businesses. Those provisions which are not working as intended will be communicated more fully by industry as part of the PIR of the *Fair Work Act 2009*. These non-safety net provisions include the ability for employees to:

- Pursue bargaining with their employer;
- Take protected industrial action;
- Apply for majority support determinations which compel bargaining, despite the wishes of the employer;
- Apply for low paid bargaining orders which compel bargaining and may lead to arbitration;
- Apply for good faith bargaining orders which may lead to arbitration and penalties for serious breaches;
- Apply under unfair dismissal provisions for reinstatement and compensation;
- Apply for equal remuneration orders for gender related undervaluation;

It is therefore misleading for the extraneous materials to suggest that the extension of provisions under the *Fair Work Act 2009* will address apparent "exploitation" in the TCF industry when the modern award and NES already apply to TCF outworkers – this is the same safety-net that applies to employees in the TCF sector. Therefore any alleged cases of "exploitation" can be addressed by existing mechanisms including investigation and enforcement action by unions or the industrial regulator, the Fair Work Ombudsman, where a breach of the safety-net has occurred. Breaches of Occupational Health and Safety (OH&S), can also be addressed by the relevant state/territory OH&S regulator, and breaches of superannuation guarantee legislation can be be addressed by the appropriate regulator, the Australian Taxation Office (in addition to the FWO where it relates to an industrial instrument). For anyone to assert that the measures are doing no more than simply providing a nationally consistent framework based on existing state or territory laws would also be equally inaccurate. This is because the existing laws applying to TCF outworkers at state or territory level are not consistent. In any event, there are already comprehensive rights and protections for TCF outworkers given that the Fair Work laws allow these state or territory laws to continue to operate (in addition with the safety-net protections under the *Fair Work Act 2009*).

ACCI understands that there was no consultation between the Government and the peak industry association, the Council of Textile & Fashion Industries of Australia Ltd prior to convening a (confidential) meeting to discuss a draft version of the Bill, which ACCI also attended. The Government consulted with the relevant trade union prior to providing stakeholders with a draft at the meeting. In order for policy reform measures to have a positive policy outcome, particularly in a sector which lends itself to shared goals and concerns over its future, it would have been far more preferable for the measures to have the support (full or partial) of key industry stakeholders who will be affected by the measures.

The measures appear to be a unilateral response by the Government to issues pressed by the relevant trade union, the Textile Clothing and Footwear Union of Australia (TCFUA). The union seems to be pursuing these changes without any regard for their impact on an industry already struggling to maintain a presence in Australia. As the Productivity Commission's 2003 report on the TCF sector should remind stakeholders:[1]

> **The nature of local TCF activity has changed**
>
> The interplay of global and local forces has profoundly affected the structure of the sector. In clothing and footwear, many firms have reorganised their supply systems by relocating part, or all, of their manufacturing processes offshore to reduce labour costs.

Furthermore, the PC provided a frank assessment for the TCF sector and how difficult it is for local industry to compete with overseas firms:[2]

> **Labour cost disadvantages mean that other firms are unlikely to survive**
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> For some firms, even raising productivity to world's best practice levels would not enable them to overcome their labour cost disadvantages with developing country competitors. Wage rates in developing countries are a fraction of those in Australia (see chapter 3). While low productivity levels overseas have previously reduced total unit labour cost differentials, recent evidence suggests that the productivity of firms in countries such as China (the dominant source of Australia's clothing and footwear imports) often matches or comes close to best-practice developed country standards. Hence, in the standardised product and labour intensive parts of the Australian TCF sector, restructuring and rationalisation will continue regardless of the future assistance regime.

The Minister in his second reading speech concludes by stating that: *"This Bill reflects the future of the sector where consumers are confident that goods are produced ethically, with workers receiving fair wages and decent conditions."* It would be a sad outcome for the TCF sector and more broadly for consumers, if local jobs and

[1] Productivity Commission Review of TCF Assistance, Inquiry Report No. 26 (31 July 2003), p.9
[2] Ibid, at p.16.

business were off-shored to countries with low wage and sub-standard working conditions clearly something which the Government and unions would not desire.

The *Fair Work Act 2009* is *"An Act relating to workplace relations, and for related purposes".* It is a framework for workplace relations, predominantly between employees and employers. The only provisions to extend to independent contractors generally are some provisions of the General Protections provisions (Chapter 3, Part 3-1), and to TCF outworkers specifically, including modern award provisions (Chapter 2, Part 2-3) and right of entry (Chapter 3, Part 3-4).

The Australian Industrial Relations Commission (now Fair Work Australia) created a dedicated modern award for the industry, titled the Textile, Clothing, Footwear and Associated Industries Award 2010.[3] The modern award imposes onerous obligations on principals and also extends the National Employment Standards to TCF outworkers, via the modern award.

There are no other provisions, apart from those limited exceptions stated above, within the *Fair Work Act 2009*, which apply to independent contractors generally or the TCF industry.

The explanatory memorandum indicates the scope of the proposed extensions:

> IMPROVED PROTECTION FOR TCF OUTWORKERS
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> Item 61 – After Part 6-4
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> 39. This item inserts new Part 6-4A into the FW Act to make special provisions about TCF outworkers.
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> 40. Part 6-4A includes a range of measures to address the unique vulnerabilities of outworkers in the TCF industry. The new part addresses these issues by:
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> · extending the operation of most provisions of the FW Act to contract outworkers in the TCF industry (Division 2 of new Part 6-4A)
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> · providing a mechanism to enable outworkers to recover amounts owing up the supply chain (Division 3 of new Part 6-4A)
>
> · enabling regulations to be made prescribing a TCF outwork code (Division 4 of new Part 6-4A).
>
> 41. These amendments will provide consistent workplace rights and protections for workers in the TCF industry regardless of whether they are employees or contractors, and provide enhanced enforcement of unpaid entitlements and monitoring of supply chain arrangements.

[3] http://www.fwa.gov.au/documents/modern_awards/award/ma000017/default.htm

This Committee should recognise that these legislative proposals are a significant extension of the existing laws, which is unprecedented both at the federal and state / territory levels. ACCI has publicly supported consideration of additional protections for workers in the TCF industry. However, this should not be interpreted as industry providing a blank policy cheque and ACCI strongly opposes the extensions which are proposed, particularly when they have appeared without any previous announcement or election promise articulated by the Government. Each extension of employee rights to independent contractors needs to be considered in its own right.

ACCI believes that the modern award and NES provisions, coupled with new and expanded right of entry provisions, need time to be understood and assessed. It is entirely premature to embark on an en masse regulation of the TCF industry, prior to the recently announced Post Implementation Review of the *Fair Work Act 2009.* The TCFUA have acknowledged that the new measures are working, with the Union's National and Victorian secretary stating as recently as 14 December that:[4]

> These protections are finally beginning to work, with increasing numbers of outworkers receiving the minimum legal award wages and conditions they are entitled to. For many years, some companies have gotten away with shamelessly exploiting workers in the production of their products. Cutting wages and conditions doesn't lead to improved productivity or more jobs. It just leads to unscrupulous companies making greater profits. It is time for the whole of the industry to get on board and do the right thing.

If there are instances of breaches of the modern award or *Fair Work Act 2009*, then the appropriate response is for the unions to investigate and launch legal proceedings or for the matter to be referred to the Fair Work Ombudsman. Furthermore, it appears that more education and resources could be provided to inform participants of existing legal obligations under various laws, in addition to the *Fair Work Act 2009.*

The Government should consider providing dedicated funding as part of the Shared Industry Assistance Partnership (SIAP) grant program which was announced on 1 October 2010.[5] The Fair Work Ombudsman offered $2.5 million in grants to a number of employer organisations to produce educative resources to assist employers with the transition to modern awards. 15 employer organisations were offered a total of 25 grants up to a maximum value of $104,000 per grant, however, the Textile, Clothing, Footwear and Associated Industries Award 2010 was not part of the SIAP program. It appears to be an oversight that the TCF award was not considered as a priority award for dedicated resources to be developed, however, before significant reforms are considered, there should be further work with the

[4] TCFUA media release, "Outworker Laws Attacked Because They Work" (14 December, 2011). http://tcfua.org.au/AnnouncementRetrieve.aspx?ID=58964

[5] Background information on the SIAP grant program can be found here: http://www.fairwork.gov.au/media-centre/latest-news/2011/03/Pages/20110328-New-modern-award-resources.aspx

industry, union and workers, including consideration of further dedicated education resources developed in conjunction by the industry for the industry.

RECOMMENDATION: Given that there has been no Federal Government inquiry into TCF outworkers which justifies these proposals and there is no Regulation Impact Statement accompanying the measures, the Committee should recommend:

a) **That an independent inquiry should be conducted prior to the Government pursuing these significant changes to the regulation of work in the TCF sector. The Productivity Commission has conducted inquiries into the TCF sector (quoted in the Second Reading speech) and appears to be best placed to conduct a new inquiry. It would be able to receive submissions and evidence and report to Government on recommendations. Any possible recommendations to address issues should be subject to a cost/benefit and Regulation Impact Statement process;**

b) **That the proposed Bill not be progressed until the review of the *Fair Work Act 2009* is complete.**

c) **If the proposed Bill is progressed, it should be subject to a robust Regulation Impact Statement which identifies the costs and benefits of the measures.**

2. **Unintended Consequences**: ACCI has within the limited time available identified a number of issues which requires further consideration by the Government prior to implementation. For example, extending unfair dismissal laws (which currently only apply to employees) to independent contractors is a significant and new development under federal industrial laws. This will be the first time that independent contractors will be able to sue a principal for "unfair dismissal" and possibly seek compensation and reinstatement. However, the scheme which applies to employees, should not be extended to contractors by legislative fiat, without seriously considering the practical difficulties with this proposition.

   A number of questions are not adequately addressed in the explanatory materials, including:

   - How will a person running its own business and contracting its services to a principal be able to be "reinstated" to his or her position if they are able to successfully challenge their contractual arrangements being terminated (recalling that a TCF outworker is not an employee engaged on an employment contract, but rather, is an independent contractor engaged on a commercial basis)? The unfair dismissal provisions of the *Fair Work Act 2009* refer to different types of employees (ie. casuals, as defined), as this has implications for exemptions and limitations on making an unfair dismissal application. If "employee" is intended to be read as "TCF outworker" there is ambiguity in terms of which particular provisions would be applicable to the TCF outworker as multiple employee-definitions could apply.

- How will this affect commercial contractual arrangements which will be overridden by the *Fair Work Act 2009*, as a result of these measures applying those provisions to independent contractors in the TCF industry?

- How would independent contractors that have no relationship to one another practically bargain for an enterprise agreement?

- What is the policy justification for allowing different and unrelated contractors to take protected industrial action and cease fulfilling commercial undertakings? How does taking protected or unprotected industrial action not breach the prohibitions of secondary boycotts under the *Competition and Consumer Act 2010 (CCA)?*

- How does bargaining under the *Fair Work Act 2009* not breach the prohibition of collective bargaining of businesses under the *Competition and Consumer Act 2010*? Under the CCA, collective bargaining refers to an arrangement under which two or more competitors in an industry come together to negotiate terms and conditions (which can include price) with a supplier or a customer (often referred to as "the target"). Behaviour of this type will ordinarily raise concerns under the competition provisions of the CCA, which requires the authorisation of the ACCC. Authorisation allows businesses to obtain protection for arrangements that may breach the competition provisions of the Act, including collective bargaining arrangements. Authorisation is available for arrangements that are demonstrated to be of net benefit to the public. The assessment process for an authorisation application would ordinarily take about six months to complete. The Bill should therefore remove the ability to bargain for an enterprise agreement, considering that the CCA already deals with bargaining by small businesses.

3. **Creating Uncertainty for Industry Participants:** Proposed definitions of "directly" and "indirectly" within the Bill are complex and appear to be creating an artificial construct within commercial relationships between principals and TCF contractors (proposed clause 23). It does not clearly delineate who within the supply chain, the new legal obligations are attached to and whether multiple principals have joint and/or severable legal liability. Once again, there are a range of consequences which do not appear to be fully thought through, as a result of simply extended the majority of employee provisions within the *Fair Work Act 2009* to TCF contractors.

4. **TCF Code**: The Bill would allow regulations to prescribe a TCF Code as follows:

   Division 4--Code of practice relating to TCF outwork

   789DA Regulations may provide for a code

*For the purpose of furthering the objects of this Part, the regulations may prescribe a code (the **TCF outwork code**) dealing with standards of conduct and practice to be complied with in relation to any of the following:*

(a) the employment or engagement of TCF outworkers;

(b) arranging for TCF work to be performed, if the work:

(i) is to be performed by TCF outworkers; or

(ii) is of a kind that is often performed by TCF outworkers;

(c) the sale of goods produced by TCF work.

There are complex interaction rules between the TCF Code and other industrial:

789DE Relationship between the TCF outwork code and other instruments

(1) A TCF award prevails over the TCF outwork code, to the extent of any inconsistency.

(2) The TCF outwork code prevails over any of the following, to the extent of any inconsistency:

(a) an enterprise agreement;

(b) a workplace determination;

(c) an agreement-based transitional instrument, as continued in existence by Schedule 3 to the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009.

It is unclear what matters a TCF Code will contain and it is impossible to provide constructive feedback on the impact of a future Code. However, the matters which the TCF Code may deal with extend beyond employment and working arrangements to *"(c) the sale of goods produced by TCF work".* These matters should not as a general principle be dealt with in the *Fair Work Act 2009* which is directed to regulating the employment relationship. There is nothing contained in the explanatory materials to indicate how will the proposed TCF Code will interact with laws arising from the *Competition and Consumer Act 2010* regarding the sale of goods?

There is no obligation for the Government to consult with the industry in relation to the TCF Code. At a minimum, this should be required by the legislation to ensure that industry is able to provide input into the development of the TCF Code.