

(SENATE)
STANDING COMMITTEE ON EDUCATION,
EMPLOYMENT AND WORKPLACE RELATIONS

Inquiry into the
Fair Work Amendment
(Textile, Clothing and Footwear Industry)
Bill 2011

**SUBMISSION OF THE
TEXTILE CLOTHING AND FOOTWEAR UNION OF
AUSTRALIA**

(11 January 2012)

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EXECUTIVE SUMMARY

- I. The TCFUA is the pre-eminent national union which represents the industrial interests of workers, including outworkers, in the textile, clothing, footwear and associated industries. The TCFUA is committed to ensuring that all workers in the TCF industry receive their lawful entitlements under safe and healthy systems of work.
- II. There is widespread recognition among all participants in the TCF industry that outworkers are the most vulnerable and heavily exploited workers. Such exploitation is systemic, widespread and endemic throughout the TCF industry. Furthermore, there has been significant bipartisan support for, and acknowledgement of the necessity of, strong and specific regulation to reduce exploitation.
- III. Currently, there are national minimum standards and various State laws and regulations that protect outworkers. However, the TCFUA is of the view that it is timely and necessary to move to a fully national system of regulation that provides nationally consistent rights and obligations within the TCF industry. The TCFUA strongly supports the passage of the TCF Bill 2011 into law in early 2012.
- IV. This submission provides context for the TCF Bill 2011 by outlining the history of regulation and summarising the current regulatory framework. This submission discusses the nature of the TCF industry, which includes formal and informal sectors. Many workers, including those in sweatshops and outworkers, do not receive the minimum safety net contained within the current regulatory framework for a number of reasons, including widespread confusion by participants and regulators about relevant rights and obligations and that complex supply and contracting chains are designed specifically to evade regulation.

- V. This submission outlines why the TCFUA believes that the amendments contained in the TCF Bill 2011 are necessary. In summary, the TCF Bill 2011 provides four key amendments:
- Deeming outworkers to be employees
 - Providing a mechanism for recovery of unpaid amounts up the supply chain
 - Allowing for a TCF outworker code to be issued
 - Amending current right of entry provisions to address sweatshop conditions
- VI. The TCFUA supports the provisions relating to deeming. Deeming outworkers to be employees is necessary to eliminate sham arrangements designed to avoid compliance with legal minimum safety net standards, and would also work to reduce confusion among participants and regulators about rights and obligations relating to outworkers. Overall, this amendment would have the result of ensuring that unscrupulous operators do not gain an unfair competitive advantage by undercutting businesses whose supply chains are legally compliant. The TCFUA is of the view, however, that amendments to the deeming provisions need to be made to ensure widespread and effective operation of these provisions.
- VII. The TCFUA supports the provisions relating to recovery of unpaid amounts. Providing an effective legal mechanism to enable outworkers to recover unpaid money up the supply chain will assist to remove the considerable barriers that an outworker faces to recover money and entitlements when they have not been paid for work performed, and reflects various similar State laws and the federal TCF Award. However, the TCFUA is of the view that amendments to these provisions are required as they are unnecessarily complex and place onerous burdens on an individual outworker seeking redress.
- VIII. The TCFUA strongly supports the provisions relating to a national outworker code of practice. Its experience with the Homeworkers Code of Practice (Ethical Clothing Australia), a joint industry-union initiative administered by an independent incorporated committee, establishes that a mandatory national code would greatly assist and improve regulatory compliance across the industry, which operates across State boundaries.
- IX. The TCFUA strongly supports the provisions relating to right of entry. The amendments address an unintended anomaly in the operation of the current TCF specific right of entry provisions in relation to investigating working conditions within sweatshops. The amendments will ensure all workers across the industry will have minimum award and legal protections.

Introduction

1. On 24 November 2011, the Federal Government introduced into the Senate the Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011 ('the TCF Bill'). On 25 November 2011, the Senate referred the TCF Bill to the Education, Employment and the Workplace Relations Legislation Committee for inquiry and report by 27 February 2011 ('Senate Inquiry').
2. The Textile, Clothing and Footwear Union of Australia ('TCFUA') is a registered organisation under the Fair Work (Registered Organisations) Act 2009 and has a National office located in Melbourne and branches as follows:
 - TCFUA (Victorian Queensland Branch)
 - TCFUA (New South Wales, South Australian, Tasmanian Branch)
 - TCFUA (Western Australian Branch)
3. The TCFUA (National Office) makes this submission to the Senate Inquiry on behalf of it and its branches.
4. The TCFUA is the pre-eminent national union which represents the industrial interests of workers (both in the formal and home based sectors) in the textile, clothing, footwear and associated industries ('TCF industry'). It has a critical role in ensuring that the TCF industry operates on an ethical and sustainable basis, that appropriate labour standards are observed and that unfair advantage is not gained by businesses that seek to undercut their competitors by exploiting workers who make their products within their supply chains. Specifically, the TCFUA's education and compliance work is directed towards ensuring that workers in the TCF industry, including outworkers, receive their lawful entitlements under safe and healthy systems of work.
5. For a number of decades, the TCFUA has been the primary organisation to undertake compliance activity in the TCF industry. Nationally, it has initiated prosecutions of over 100 companies in respect to breaches of outworker and contracting out provisions of the relevant award.¹ A number of these prosecutions have resulted in penalties (some substantial) being ordered by the Federal Court against companies in the TCF industry.²

¹ Clothing Trades Award 1982; Clothing Trades Award 1999;

² See Re: *Clothing and Allied Trades Union of Australia v J and J Saggio* [1990] FCA 279; 34 IR 26 (August 1990), total penalties \$2,300; *TCFUA v Lotus Cove Pty Ltd* [2004] FCA 43 (2 February 2004), total penalties \$20,000; *TCFUA v Southern Cross Clothing Pty Ltd* [2006] FCA 325 (28 March 2006), total penalties \$110,000; *TCFUA v Morrison Country Clothing Australia Pty Ltd* [2008] FCA 604 (5 September 2008) and *TCFUA v Morrison County Clothing Australia Pty Ltd (No 2)* [2008]FCA 1965 (23 December 2008), penalty of \$10,000 for contempt of orders made by the court.

6. The TCF Bill seeks to implement government commitments to enhance protections for workers in the TCF industry and reflect recommendations made in a number of previous Senate Inquiries³ going back to 1996/97 in respect to improving provisions for TCF outworkers. To summarise, these commitments / recommendations have included:
 - The creation of nationally consistent rights to legal redress and protection for outworkers which are of no lesser standard than those currently applying under state laws;
 - Deeming outworkers to be employees;
 - Creating a national mechanism for an outworker to seek payment of unpaid remuneration up the supply chain;
 - Capacity to regulate for a national code of practice;
 - Enhancing the right of entry framework to address exploitation in 'sweatshops' within the TCF industry.
7. Federal and state parliaments (of various political persuasions) have for many decades acknowledged the particular vulnerability of outworkers to exploitation. This has been reflected in a significant level of bipartisan support for the necessity, and introduction of specific industry regulation to reduce the potential for, and ameliorate the effects of, such exploitation. However, these provisions are not uniform and vary considerably in scope and coverage.
8. It is appropriate, timely and necessary to move to a fully national system of regulation which provides consistency of rights and obligations within the TCF industry. This is all the more pressing in an industry which increasingly operates across state boundaries and is commonly structured around complex and multilayered supply chains involving both the formalised and home based workforce.
9. The TCFUA strongly supports the reforms contained in the TCF Bill and seeks that it be passed into law in early 2012. We do believe however, that there are a small number of amendments which could be made (provisions relation to deeming and recovery of monies for outworkers) which would ensure the effective operation and application of the legislation.

³ See Senate Economics Committee Report: Outworkers in the Garment Industry (1996); Senate Economics Committee: Review of Outworkers in the Garment Industry (1997); Senate Committee Report into the Fair Work Bill 2008 (Feb 2009)

Regulatory Framework

10. The employment of outworkers has been regulated by awards in the TCF industry for over almost 100 years. The first award made in 1919 in the clothing industry contained provisions regulating the system under which outworkers (also previously referred to as outdoor workers) could be engaged.⁴ Prior to the commencement of the modern award for the industry, each of the pre-eminent federal awards for each of the clothing⁵, textile⁶, footwear⁷ and felt hatting⁸ industries contained limitations on the giving out of work and the conditions under which such work could be undertaken. Prior to this the antecedent pre-simplified federal awards in the TCF industries contained similar provisions.⁹
11. A number of state awards (and NAPSA's) in the TCF industry contained similar outwork and contracting out protections which in many instances 'mirrored' those of the federal clothing award.¹⁰ Western Australia, which has retained jurisdiction in relation to non constitutional employers and their employees, also has a state clothing award which contains comprehensive outwork and contracting out provisions.¹¹ Various state governments have also legislated in their own right to provide protections for outworkers within the TCF industry including making provisions for deeming, recovery of unpaid remuneration to outworkers and mandatory codes of practice.¹²

⁴ *Re: Clothing Trades Award* [1982]; *op cit*; [418]

⁵ *Clothing Trades Award 1999* [AP772144CAV] (Part 9 – Outwork and related provisions);

⁶ *Textile Industry Award 2000* [AP799036] (Part 8 – Outwork)

⁷ *Footwear Industry Award 2000* [AP781127CRV] (Part 8 – Outdoor workers)

⁸ *Felt Hatting Industry Award 1999* [AP781105] (Part 8 – Outwork)

⁹ *Clothing Trades Award 1982* (clause 26 – Contract Work; clause 27 – Outworkers); *Textile Industry Award 1994* (clause 42 – Outdoor Workers); *Footwear – Manufacturing & Component – Industries Award 1979* (clause 31 – Outdoor Work)

¹⁰ *Clothing Trades (State) Award* [NSW] (clause 32 – Outworkers); *Footwear Manufacturing Industry (State) Award* [NSW] (clause 37 – Outdoor Work; Schedule E); *Textile Industry (State) Award* [NSW] (clause 48 – Outdoor Workers); *Clothing Trades Award – State (Excluding South East Queensland) 2003* [Qld] (Clause 4.4 – Outworkers); *Clothing Trades Award – Southern and Central Divisions 2003* [Qld] (clause 4.4 – Outworkers); *Boot and Shoe Award 2006* [Sth Aust] (clause 4.4 – Outdoor workers); *Clothing Trades Award* [Sth Aust] (clause 4.10 – Contract Work; clause 4.11 – Outworkers; clause 4.12 – Registration of employers); *Clothing Industry Award* [Tas] (clause 19 – Outworkers)

¹¹ *Clothing Trades Award 1973* [WA] (clause 25A – Outworkers; clause 25B – Contract Work; clause 25C – Registration of Employers)

¹² Relevant laws include:

- NSW
 - Industrial Relations Act 1996 (NSW) as amended, in particular sections 129A – 129J;
 - Industrial Relations (Ethical Clothing Trades) Act 2001 (NSW);
 - NSW Ethical Clothing Trades Extended responsibility Scheme 2005 (NSW) i.e. mandatory Code of Practice for the Clothing Industry;
- South Australia
 - Fair Work Act 1994 (SA) as amended, Chapter 3, Part 3A;

12. The Fair Work Act 2009 ('FW Act') provides the federal regulatory framework in relation to workers in the TCF industry via the minimum safety net - National Employment Standards ('NES') and relevant modern award, Textile, Clothing, Footwear and Associated Industries Award 2010 ('TCF Award'). The TCF Award currently contains a comprehensive set of provisions¹³ which specifically regulate arrangements made by principals with other persons to have work in the TCF industry carried out on their behalf. These provisions contain a series of interdependent obligations relating to the making of such arrangements, whom the work is performed by and under what conditions.

13. The creation of transparency between each tier of a TCF supply chain allows effective identification of where work is being undertaken in sweatshops and by home based workers/outworkers.

14. Currently under the TCF Award, outworkers (whether an employee outworker or a so called 'contract outworker') are entitled to the same conditions e.g. a minimum hourly award rate of pay, hours of work, NES entitlements. In addition, the FW Act also contains provisions which enhance protections for TCF outworkers, including the scope of modern awards to contain certain outworker terms and TCF specific right of entry provisions. However, widespread non compliance with the minimum safety net remains a fundamental problem both for the TCFUA and regulators including the Fair Work Ombudsman ('FWO') and state inspectorates. Furthermore, there is widespread confusion about the interaction of federal and state laws in relation to outworkers, which results in non-compliance.

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- Fair Work (Clothing Outworker Code of Practice) Regulations 2007 (SA);
 - Queensland
 - Industrial Relations Act 1999 (Qld) as amended, in particular sections 8C, 400A – 400I;
 - Mandatory Code of Practice for Outworkers in the Clothing Industry (Qld);
 - Tasmania
 - Industrial Relations Act 1984 (Tas) (as amended), in particular section 3;
 - Victoria:
 - Outworkers (Improved Protection) Act 2003 (Vic), as amended.

¹³ Schedule F (Outwork and Related Provisions) of the Textile, Clothing, Footwear and Associated Industries Award 2011

Nature of the industry

15. Despite decades long restructuring and tariff reductions, the TCF industry remains a significant sector within the Australian economy. The most recent large scale review of the TCF Industry¹⁴ found that total employment at May 2008 was approximately 48,500 in terms of direct manufacturing.¹⁵

16. Importantly, the 2008 Report, 'Building Innovative Capability' (Review of the Australian Textile, Clothing and Footwear Industries) also documented, that the traditional basis for defining the TCF industry was problematic and 'increasingly redundant in describing the current scope of activities undertaken by firms engaged in TCF –related activities'.¹⁶ The changing nature of the TCF industry (and how this impacts on attempts to define and classify the industry) was summarised as follows:

*"Over the last three decades many TCF firms have responded to increased competitive pressure arising from border protection by greatly diversifying their range of activities. For example, some firms combine manufacture with importing or concentrate on design while outsourcing manufacture to local and/or overseas firms. Some of this manufacture is outsourced to local firms that operate in the black economy by employing outworkers. Great diversity in the range of responses to a changed environment means that the relevance of the conventional definition of these industries is increasingly problematic. As Webber and Weller (2001: 344) have noted, 'the TCF industry includes not only manufacturers but also wholesalers, retailers, managers and designers...As firms change strategies....so they will shift between statistical categories'.*¹⁷

17. The TCF Review concluded that there were a number of important implications from the changing nature and scope of TCF industry activities including that:

*'It is probable that ABS estimates of the level of TCF manufacturing activity, such as employment and value added, are understated. This problem is likely to affect the TCF industries differentially, with subindustries such as clothing especially affected. It has not been possible to quantify the effect of the shifting classification of TCF firms'.*¹⁸

¹⁴ Department of Innovation, Industry, Science and Research (Cth); 'Building Innovative Capacity' (Report of Professor Roy Green) - Review of the Australian Textile, Clothing and Footwear Industries (Aug 2008)

¹⁵ Ibid; [22]

¹⁶ Ibid; [21] The Report found that reliance on the ANZSIC classification system was problematic because it identified only the 'predominant activity' of a particular business, whereas many TCF businesses had a range of economic or business activities including manufacturing, wholesaling and retailing.

¹⁷ Ibid; [21]

¹⁸ Ibid; [21]

18. In this context, the TCF Review took *'an expanded view of the industries, which accommodates the increased porosity across industrial boundaries'*¹⁹ and included TCF design, wholesaling, retailing and manufacturing, finding that:

*'The Centre of Excellence for Creative Industries estimated that there were 2,600 fashion designers employed in 2006 based on ABS Census data (Higgs 2008). TCF wholesaling employed 27,900 people and generated \$2.5 billion in value added. TCF retailing employed 130,600 people and generated \$4.97 billion in value added. In total, wholesaling and retailing employed 158,600 people – more than three times the number employed in TCF manufacturing.. .'*²⁰

19. The figure of 48,500 is also not indicative of the significant numbers of additional workers engaged as outworkers within the clothing industry. Given the acknowledged difficulty of finding outworkers within TCF supply chains (and then quantifying the volume of work they produce) it is impossible to state with precision an accurate total number of persons employed or engaged in the TCF industry. However, based on its knowledge of the industry and its compliance and education work, the TCFUA estimates that the ratio of factory based workers to outworkers within the clothing industry currently varies between a ratio 1:4 and 1:10 depending on the particular supply chain.
20. Exploitation has been a persistent feature of the TCF industry for many decades. Workers in the TCF industry, both in the formal and home based sectors are some of the most vulnerable workers in Australia. A significant percentage of TCF workers are from a Non English Speaking Background and have poor English language and literacy skills. Many have worked in the TCF industry for the whole, or a significant part of their working life and have limited economic resources other than their weekly wage.
21. In the formal, factory based sector, the great majority of workers are dependent on the minimum safety net (modern award and NES) and have limited economic power to negotiate enhanced conditions through enterprise bargaining. Even within the formal TCF sector, non compliance with award and other legal obligations is widespread and many factories operate under substandard health and safety conditions.

¹⁹ Ibid; [21]

²⁰ Ibid; [21]

The phenomenon of sweatshops

22. The phenomenon of sweatshops within the TCF industry is not new, but they are increasingly adaptive to the 'needs' and structure of TCF supply chains. Sweatshops may be considered to be part of the 'formal TCF sector' in one sense, but they exist in a type of parallel economy, with extremely low levels of scrutiny and transparency of operation. Some sweatshops operate entirely on a cash-in-hand basis, others on a mix of workers 'on the books' and those who officially don't exist in time and wages records. Even where a sweatshop operates formally, many employees 'on the books' will be engaged on a casual, or on a periodic basis which mirror the surge or drop in orders. Whatever the particular sweatshop structure, the workers who work in them rarely have any say in how they are engaged as they seek to eke out a living wage from such precarious employment.
23. Whilst there is no single accepted definition of a sweatshop, there are key elements which characterise what a sweatshop is – groups of workers labouring, usually in isolation, under appalling physical workplace conditions, receiving under award rates of pay with little, if any, autonomy over the work they perform. Sweatshop workers are almost uniformly from a Non-English Speaking Background and are often unaware of, or feel unable to enforce their legal rights and entitlements. Many are migrants or refugees who have had no experience of independent unions and/or the role of government in enforcing minimum conditions of employment. Some have been subjected to imprisonment and oppression in their home countries. Fear of government and 'authorities' is commonplace.
24. A consistent feature of sweatshops uncovered by the TCFUA is the level of control exerted by sweatshop operators including requiring workers to work to unrealistic deadlines until orders are completed, threats to job security and intimidation, harassment and bullying. Workers are rightly fearful of retribution if they complain. Sweatshops workers know that by making an individual complaint about workplace conditions, they risk being sacked without wages, leave or other entitlements. This is not a theoretical possibility but a real and demonstrated risk.
25. The TCFUA is also aware of examples where sweatshop operators act as unofficial lenders of money to workers, creating an additional layer of economic dependence and which acts as a further disincentive for workers to raise workplace issues with their employer or the union. It is also common for sweatshop operators to mislead workers by telling them that if they involve the union they will not receive any more work from the supplier/principal above them in the supply chain.

26. Sweatshops tend to be more mobile than many other businesses as they often simply contain the bare minimum of machinery to operate. Capital investment in plant, equipment and other infrastructure is negligible. For example, a smaller size sweatshop might only have a dozen or fewer sewing machines, a pressing machine, a few worktables and chairs and not much else. In such a case, it is quite easy for the sweatshop to pack up operations quickly and move to another location.

Case study

As part of following a particular clothing supply chain for a major fashion house, a TCFUA organiser became aware of the existence of a small factory sweatshop in St Albans, Victoria. The organiser sought to enter with the employer's/occupier's agreement in order to meet with the workers. However, permission was refused and the TCFUA left the premises as requested. The TCFUA subsequently provided to the occupier/employer an Entry Notice under the general Right of Entry provisions of the FW Act, which required a minimum of 24 hours notice.

The following day when the TCFUA returned to the factory, the clothing operations had literally disappeared, with no evidence of machinery or workers remaining. Despite the TCFUA seeking to make inquiries of surrounding houses and businesses, it was unable to obtain any information on where the sweatshop had relocated to.

27. Sweatshops, and their workers, are often difficult to locate, follow and monitor. Sweatshops can operate almost anywhere where there is access to power and floor space: in traditional factory type premises, industrial estates, at the back or upstairs of painted out shop fronts, suburban shopping strips, warehouses, garages, behind roller doors, in rooms attached to other unrelated businesses or in buildings located on or near domestic premises. Commonly there is no identifying information on the external surrounds of the sweatshop premises, no buzzer or bell and no physical evidence that any activity is taking place inside the particular building. To the human eye, many such buildings appear derelict or unoccupied.
28. For these reasons sweatshops in the TCF industry represent the 'perfect storm' for exploitation to flourish. Without effective access, there is no practical way for the TCFUA to identify where sweatshop workers work, and the conditions under which their work is undertaken.

Outwork

29. There have been numerous inquiries, reports and research which collectively have found that outworkers (or home based workers) are particularly vulnerable to exploitation. Industrial tribunals at both federal and state levels similarly have acknowledged and accepted that this class of worker are in need of special regulation and protection. In the landmark case of *Re: Clothing Trades Award 1982*,²¹ from which the federal *Clothing Trades Award 1982* was varied to provide new conditions with respect to the performance of work by contractors and outdoor workers, Senior Deputy President Riordan found:

'The remuneration and treatment generally of tens of thousands of persons performing work in the clothing trade as "outdoor workers" is scandalous and represents a serious affront to the moral and social conscience of the community. The present situation reveals a serious failure of the system of industrial regulation to protect one of the most vulnerable and insecure sections of the community. Some are persons who have an urgent, and even desperate, need to earn whatever money is possible by the performance of work for a relative pittance under appalling conditions. Almost all of those involved are women of migrant background. Some do not speak or understand English at all and some have only a very limited knowledge of it. Many have dependent children and have no other prospect of employment.

*Such persons are easy prey for those with a will to deprive them of a fair and just reward for their skills and the performance of long hours of work. It would be unconscionable to ignore the plight of these workers and refuse to intervene in this situation of grossly improper exploitation of a weak and unorganised section of the workforce.'*²²

30. Although the above decision was made in 1987, many of the features of outwork which his Honour described continued to characterise the outwork sector over the next 23 years. Consistently, research has found that the average outworker in the TCF industry works excessive hours (both on daily and weekly basis), receives less than award rates of pay, have difficulties in receiving payment for work performed, do not receive accrued leave or public holidays and work in poor health and safety conditions.

²¹ *Re: Clothing Trades Award 1982* (Riordan DP) [1987] 19 IR 416; The decision was made in relation to an application by the Clothing and Allied Trades Union of Australia to vary the Clothing Trades Award 1982 to provide new conditions with respect to the performance of work by contractors and outdoor workers.

²² *Ibid*; [421-422]

31. In 1994 (July to November) the TCFUA conducted a National Outwork Information Campaign targeted at outworkers, their employers, and ethnic communities to gather information about the largely hidden outwork sector of the Australian workforce.²³ Over the 8 weeks of the campaign, bilingual workers employed by the TCFUA received a total of 3,000 calls from outworkers (an average of 375 calls per week).²⁴ The campaign found, amongst other things, that:

- That the numbers of outworkers in the clothing industry was much larger than the union had realised;
- Outworkers' working conditions had deteriorated;
- When outworkers do get work a typical working week involved 12 – 18 hours per day, 7 days per week at about one third of the award rate of pay;
- Outworkers had virtually no access to the minimum conditions enjoyed by factory workers;
- Intimidation, abuse and harassment from employers is widespread and have become daily occurrences in some outworkers lives.

32. The findings of a Melbourne University study of outworkers in 2001²⁵ included:

- Outworkers reported earning an average hourly rate of pay of \$3.60
- 75% said they had experienced not receiving wages on time, whilst 46% have experienced not receiving wages at all for work performed
- 89% said that their family could not manage without their wages
- The average number of hours worked per day was more than 12 hours
- 74% reported working in the range of 12 – 19 hours per day
- 62% reported working 7 days per week with a further 26% working 6 days per week. Only a small minority worked less than this
- 65% said that they did not like their work. Most were resigned to working because "I just have to do it"
- The main reasons that were given for doing this type of work was that they could not get a job outside the home (70%) and that their English was not good enough to get other work (63%)
- 68% reported relying on family members to help complete work/orders
- The vast majority reported that they worked routinely during the school holidays (93%), on Saturdays (91%), (Sundays (87%) and on public holidays (89%)²⁶

²³ TCFUA; *The Hidden Cost of Fashion: Report on the National Outwork Information Campaign* (March 1995)

²⁴ Ibid; [11]

²⁵ Cregan, C; *Home Sweat Home: Preliminary Findings of the first stage of a two-part study of outworkers in the textile industry in Melbourne, Victoria*; Department of Management, University of Melbourne, November 2001. 97% of the outworkers were women and 92% of these were born overseas.

²⁶ Ibid

33. In 2004, the TCFUA (Victorian Branch) conducted a compliance report for the Ethical Clothing Trades Council (Vic) as to the level of compliance within the clothing industry in relation to outworkers receiving their lawful entitlements.²⁷ The union undertook inspections in 151 workplaces and interviewed a group of outworkers. The Report's key findings concluded, based on the inspections and interviews, that in the vast majority of cases:

- Outworkers are not receiving award rates of pay
- Outworkers are not receiving award entitlements such as annual leave, long service leave, overtime and public holidays
- Outworkers are being forced into sham contractor and company arrangements as a systemic method of employers avoiding legal obligations to employees
- Outworkers are not receiving superannuation
- Employees are not being identified as employees for the purposes of Work Cover
- Companies are not keeping transparent and correct work records
- Companies who give out work are not registered with the Board of Reference²⁸

34. A subsequent report by the Brotherhood of St Laurence in 2007²⁹ found that outworkers interviewed for the research indicated that conditions for outworkers had actually worsened in the previous five years:

'A shortage of work had left them with very little bargaining power with contractors. One group said that they were paid \$2.50 for a detailed shirt which took one hour to sew. Another group said they were paid between \$2 and \$3 an hour. When asked about hours worked, most indicated that they often went weeks without a job but when the work was available they worked long hours'

'These outworkers also said that compared with ten years ago, companies increasingly demanded quicker turnaround times. The scarcity of work and precarious nature of employment leave outworkers with little choice but to accept the job'.

²⁷ Ethical Clothing Trades Council; *Outworkers' Lawful Entitlements Compliance Report* (Nov 2004)

²⁸ *Ibid*; page 3

²⁹ Brotherhood of St Laurence (Diviney, E & Lillywhite, S); *Ethical Threads – Corporate Social Responsibility in the Australian Garment Industry* (2007)

35. The experience of the TCFUA across the country is that exploitation of outworkers in the TCFUA industry persists on a systemic level. Although the TCFUA has observed an improvement in outworker conditions over the last 6 to 12 months this has not been uniform and has primarily occurred within the supply chains of companies which are ECA accredited, or otherwise seeking accreditation.

Complex contracting chains

36. The TCF industry, particularly the clothing and fashion industry, is characterised by long and multilayered supply chains commonly involving a minimum of 3-4 contracting levels but regularly involving several more. Typically the chain starts with a retailer/fashion house who enter into arrangements to source and have TCF work/products made on their behalf. Some retailers/fashion houses are also manufacturers in their own right, including having in house brands and labels. These supply chains operate both vertically and horizontally with multiple participants, including second, third and fourth tier makers and commonly end with a group of outworkers/home based workers at the bottom of the chain.
37. The phenomenon of outwork is intrinsic to the structure of the Australian TCF industry. Whilst this class of worker is now protected via the minimum safety net of the modern award (Textile, Clothing, Footwear and Associated Industries Award 2010) ('TCF Award') and the National Employment Standards ('NES') together with legislation in some states (NSW, Qld, South Australia, Victoria), widespread non compliance remains endemic.
38. It is not uncommon for a large retailer/fashion house to have up to 400 – 500 participants in their supply chains making products on their behalf. However, most will not have comprehensive knowledge of the extent of their supply chains, and often do not inquire beyond the level of first or second tier makers. The longer and wider the supply chain, the greater the difficulty in accurately mapping the chain and identifying the number of workers involved and the conditions under which the work is done.
39. Within contracting chains, it is usual to find a combination of makers/suppliers who (i) do all their work in house i.e. within a factory or commercial environment (ii) both operate in house operations (often small to medium size factories), and give work out down along the chain or (iii) have no in-house operations and simply give work out. There are also participants within supply chains who have no role other than transporting work from one level to another or who otherwise act as an agent to distribute the work (i.e. there is no value adding, just value extracting).

40. It is often the case that the retailer/fashion house effectively determines the price for the products to be sourced/manufactured. At each level of the contracting chain industry participants take their cut/profit from the 'make price', even where a participant has done nothing more than act as an 'agent' to distribute the work further down the chain. The unacceptable consequence of such extended and multifaceted supply chains are a significant group of workers (outworkers) at the bottom at risk of widespread exploitation.
41. Outworkers often work in precarious circumstances, with little if any control over the work they perform. They do not design or direct the production of the garment nor dictate when they are to be paid. They are commonly placed under significant pressure to complete work to urgent, unrealistic or shifting deadlines. Despite having an entitlement to the payment of overtime penalty rates under the TCF Award, many outworkers work excessively long hours both during the week and on weekends without additional compensation. Many work through injuries and illnesses sustained as a result of overwork, repetitive strain and poor working environments.

Case-study

Several outworkers were producing work for a well known high end fashion label. On one occasion the outworkers were required to work and deliver samples to the maker at 3am. On another occasion they were required to make dresses and were paid as little as \$7.00 per hour, despite an individual dress retailing for approximately \$400 per garment. The outworkers received no accrued entitlements (annual leave and sick leave) or employer superannuation. Out of the \$7.00 per hour they received for the work they paid their own work related expenses such as electricity, gas and water etc.

42. Such vulnerability to exploitation is a product of outworkers as a class being largely hidden and operating outside of the mainstream work environment (i.e. outside of established, medium to larger size factories). As a category of workers, outworkers most commonly are women from Non English Speaking Backgrounds, (often recently arrived migrants) with limited economic resources and negligible bargaining power.

Summary of the TCF Bill

43. The TCF Bill aims to harmonise existing protections so that all TCF outworkers are 'employed under secure, safe and fair systems of work'... 'to be achieved by implementing nationally consistent rights to legal redress and protection that are of no lesser standard than currently apply in state laws and regulations, and the federal TCF award'.³⁰ This is implemented by:

- 'ending the artificial distinction by deeming contract outworkers in the TCF industry to be employees, through extending the operation of most provisions of the FW Act;
- providing an effective mechanism to enable TCF outworkers to recover unpaid amounts up the supply chain;
- addressing a limitation that currently exists in relation to right of entry into premises in the TCF industry operating under 'sweatshop' conditions; and
- allowing for a TCF outworker code to be issued.'³¹

44. In addition to strengthening current TCF right of entry provisions (Part 3-4, Subdivision AA), the TCF Bill introduces into the FW Act a new Part 6-4A (Special Provisions about TCF Outworkers). The new Part 6-4A contains the main operative provisions in relation to (i) deeming;³² (ii) recovery of money³³ and (iii) the prescription of a mandatory code of practice.³⁴ In addition the TCF Bill makes necessary amendments to various definitions in the FW Act, provides for miscellaneous provisions³⁵ and includes a new Schedule.³⁶

WHY THE AMENDMENTS ARE NECESSARY

Deeming contract outworkers to be employees

45. The TCFUA strongly supports the deeming provisions contained in the TCF Bill which seek to ensure that all outworkers are treated the same in terms of the working conditions and entitlement which apply to them. The TCFUA believes that as far as possible, the provisions (which are enabling in intent) should have the widest possible application. However, it remains concerned that some outworkers within the TCF industry may not be captured by the legislation and therefore will not be entitled to the same protections as other outworkers. In particular, these

³⁰ TCF Bill 2011; Senate, Second Reading Speech (Senator Chris Evans) 24 November 2011

³¹ Ibid;

³² See Part 6-4A, Division 2 (TCF contract outworkers taken to be employees in certain circumstances)

³³ See Part 6-4A, Division 3 (Recovery of unpaid amounts)

³⁴ See Part 6-4A, Division 4 (Code of Practice relating to TCF outwork)

³⁵ See Part 6-4A, Division 5 (Miscellaneous)

³⁶ See Schedule 1 (Application, saving and transitional provisions relating to amendments of this Act)

concerns go to both the complexity of the provisions themselves and the potential for deeming not to apply where an outworker's connection or nexus to a corporation within the supply chain cannot be sufficiently established. In the TCFUA's view, such an outcome would undermine the clear policy objective behind the provisions to legislate protections for outworkers as a class of worker.

46. The prevalence of sham contracting within the industry persists despite provisions existing in Schedule F of the TCF Award, which extends protections for employee outworkers to contract outworkers. Some five states (NSW, Queensland, South Australia, Tasmania and Victoria) currently have state laws which contain deeming provisions. What the deeming provisions in the TCF Bill will achieve is national consistency in relation to the deeming of outworkers as employees for the majority of purposes of the federal industrial law.
47. The capacity of the unscrupulous parts of the TCF industry to employ sham contracting arrangements (with increasing inventiveness) to avoid obligations under the TCF Award, FW Act and under state laws is a critical driver in why the distinction between employee and 'contract' outworkers needs to be practically removed. The existence of sham contracting pressed on outworkers by makers and suppliers seriously undermines the public policy objectives underpinning the minimum safety net for the industry.
48. In the TCFUA's experience, sham contracting arrangements in the TCF industry are endemic. They are so common, that to consider such arrangements as 'isolated' or 'aberrant' is to misunderstand the systemic nature of the practice. In the context of the entrenched pattern of home based work within TCF supply chains, the distinction between an employee outworker and a contract outworker is a legal fiction.
49. Sham contracting in the TCF industry is characterized by a standard requirement that in order for an outworker to receive work from a maker/supplier/principal they must obtain either a business name (ABN) or establish a corporate structure (ACN). If an outworker refuses then it is highly probable that they will not get work at all or lose the work in the future.
50. This requirement is linked to the widespread belief and perception within the industry that by treating the outworker as a so called 'independent contractor' this relieves those who engage them from providing the commonly understood benefits of employment (i.e. minimum wage and safety net award and legal conditions; superannuation; Work Cover protection). Such belief is sometimes perpetuated by wrong or misleading advice given to makers/suppliers by accountants, advisers and principals themselves.

51. More recently, the TCFUA has become aware of outworkers being required by their employer or person who engages them, in addition to obtaining an ABN or ACN, to 'employ' a member of their family on a casual basis for a few hours per week in order to strengthen an argument that they are 'independent contractors'. Part of this direction from the principal or maker is that the outworker construct time and wage records which allegedly reflect the employment of such people. Often there is insufficient full time work for one person but the outworker will comply and 'employ' family members in order to receive any work. For example, the TCFUA is aware of outworkers who, as a condition of receiving work, are required to employ their children and/or their spouse. Typically, such 'employment arrangements' are also shams, as the actual individuals who are named in time and wage records may not in reality be performing any work at all.
52. Further, some outworkers are required to 'employ' each other to ensure that they continue to receive work. That is, Outworker A 'employs' Outworker B as a 'casual employee' and Outworker B employs Outworker A similarly. In one such arrangement of which the TCFUA is aware, the Principal knows directly of the sham arrangements as the Principal provides work to both Outworker A and Outworker B.
53. The TCFUA believes that the development of this strategy has been implemented in response to the TCFUA's compliance activities. That is, the maker or principal believes that requiring the outworker to 'employ' another person(s) will bolster their position in treating the outworker as a commercial business/independent contractor and seeks to abrogate their obligations to provide the benefits of employment under the TCF Award and the FW Act. The strategy similarly functions to dissuade the outworker from seeking support from the union to pursue their legal entitlements and rights as an employee outworker.
54. Sham contracting also causes confusion for many outworkers. If an outworker is told by a maker that they are an 'independent contractor' and to receive work they must be treated as such, then the outworker then considers themselves to be an independent contractor and not entitled to the standards under the TCF Award and the NES. Despite many decades of outworker awareness, education and information initiatives instituted by the TCFUA and others (e.g. Asian Women at Work, Fair Wear, various state governments, the current federal government) many outworkers are still not cognizant of their industrial and legal rights. This is reinforced (incorrectly) when an outworker is told that they have no such rights because they are an 'independent contractor', are not entitled to a minimum award hourly rate and are responsible for making provision for their own leave entitlements, superannuation contributions and Work Cover premiums.

55. In the TCFUA's experience, there is a direct relationship (and inter-relationship) between the level of sham contracting and the extent to which supply chains are transparent and subject to external scrutiny and compliance. For the reasons outlined above, sham contracting has a directly negative impact on the level of compliance by makers/suppliers/principals with legal and award conditions for outworkers. Once entrenched as 'normal', sham contracting becomes much more difficult to 'unpack' and more resource intensive in terms of cleaning up a particular non compliant supply chain.
56. National legislation which deems contract outworkers to be employees (for most of the provisions of the FW Act) would regulate protections for outworkers as a class and would essentially mirror similar provisions operating in a number of state jurisdictions. Such reform recognizes, correctly in the TCFUA's view, that outworkers as a group of workers have little, if any, control over the conditions under which they are engaged and have minimal bargaining power to negotiate improvement to those conditions. National deeming provisions would remove the incentive for unscrupulous businesses to employ sham contracting arrangements to avoid compliance with legal and award requirements applying to outworkers. It would also work against the unfair competitive advantage being gained by certain businesses who undercut others in the industry who have their products made within legally compliant supply chains.

Recovery of unpaid monies up the supply chain

57. The TCFUA strongly supports the provisions addressing unpaid monies owed to outworkers contained in the TCF Bill. In summary, the TCF Bill allows for the recovery of unpaid amounts owed to outworkers up the supply chain. However, the TCFUA retains concerns in relation to the unnecessary degree of complexity of the provisions and the onerous burden they place on an individual outworker seeking redress. Further amendments addressing these limitations would make the provisions both more workable in practice and consistent with recovery remedies available under some state laws.
58. The creation of a remedy in the FW Act to allow outworkers to claim recovery of unpaid amounts up the supply chain, reflects at the national level, similar provisions which exist under state laws in Victoria³⁷, NSW³⁸, Queensland³⁹, South Australia⁴⁰ and the TCF Award⁴¹. The Minister has made clear that the national provisions are designed to 'supplement existing arrangements' and 'do not limit

³⁷ Outworker (Improved Protection) Act 2003 (Vic); Part 2, Division 2

³⁸ Industrial Relations Act 1996 (NSW); Chapter 2, Part 11, Div 3 (ss129D – 129H)

³⁹ Industrial Relations Act 1999 (Qld); Chapter 11, Division 3A (ss400A – 400I)

⁴⁰ Fair Work Act 1994 (SA); Chapter 3, Part 3A, Division 3 (ss99A – 99J)

⁴¹ TCF Award 2010; clause F.7

any action that an outworker might otherwise have in relation to unpaid money, including remedies available under state law'.⁴²

59. Under the TCF Bill, the mechanism for recovery up the supply chain however does not extend to a retailer who sells goods produced by, or of a kind often produced by outworkers, if the retailer does not have a right to supervise or otherwise control the performance of the work.⁴³
60. Outworkers often do not get paid once they have completed work for the maker/principal, or do not get paid in a timely manner. Currently, there are considerable barriers to outworkers successfully recovering unpaid monies and entitlements which accrue as a result of their performance of work. These include, outworkers not being aware of their rights, threats to ongoing work if they pursue their entitlements, difficulties in identifying who their 'direct employer' is, the person or entity who engaged them 'disappearing' without payment and employers refusing to pay based on spurious claims such as 'poor quality' or the goods being delivered late to the maker/principal.
61. The TCFUA is aware of numerous examples of outworkers, many of whom work on garments for well known, high end fashion labels who have experienced extensive delays in receiving payment for completed work. Such delays vary from a number of weeks to up to a year in some cases. There are also cases where outworkers have not received any payment at all for work undertaken. There are other examples of where makers do not advise the outworker of the rates they will be paid or when. Outworkers are often too afraid of losing the work they have to directly challenge these practices.
62. The TCFUA is also aware of makers who have simply 'disappeared' or are otherwise very difficult to locate. In such a case, all the information the outworker is left with is the label on the garments they have worked on. Some makers also have become insolvent leaving the outworker with no remuneration for wages and other entitlements and no prospect for recovery.

Code of Practice

63. The TCFUA strongly supports the development of a national TCF outwork code as contemplated by the TCF Bill. It is anticipated that the creation of a national code will build upon the states codes which currently operate in NSW, South Australia and Queensland and the national voluntary code which has operated since 1995.

⁴² Second Reading Speech; op cit; and section 789CF

⁴³ Section 789CA(3), 789CA(5)

64. Currently, mandatory codes of practice in the clothing industry exist at the state level in NSW⁴⁴, South Australia⁴⁵ and Queensland. The Queensland Code⁴⁶ is the most recent, having commenced operation on 1 January 2011. Victoria retains the legislative capacity to enact a mandatory code⁴⁷ but to date has not done so. In essence mandatory codes enhance transparency within TCF supply chains by placing obligations on certain participants in the supply chain (e.g. retailers, suppliers, contractors) in relation to record keeping and reporting requirements.
65. The national voluntary code currently in operation is the Homeworkers Code of Practice (Ethical Clothing Australia), a joint industry-union initiative administered by an independent incorporated committee.⁴⁸ The Code has two parts: Part 1, the National Retailers Ethical Code ('Retailers Code') and Part 2, the Homeworkers Code of Practice (Manufacturers, Wholesalers, Warehouses and Fashion Houses Agreement) ('Homeworkers Code').
66. The Retailers Code is a tripartite agreement between the TCFUA, the Australian Retailers Association (ARA) and individual retail signatories.⁴⁹ The key objective of the Retailers Code is to ensure that employees and contractors to Suppliers are engaged upon award and legal conditions. This is achieved by creating transparency within the Retailer's contracting chains including obligations on the Retailer signatory to:
- Provide to the TCFUA twice yearly information listing its Australian TCF suppliers over the proceeding 6 months;
 - Retain information of all contracts entered into with their suppliers;
 - To make it clear to their suppliers the obligations under the Retailers Code including the inclusion of certain terms in the contracts between them;
 - To take appropriate and timely action if the TCFUA provides evidence that a particular supplier is not meeting their award and legal obligations.⁵⁰

⁴⁴ (NSW) Ethical Clothing Trades Extended Responsibility Scheme made under Part 3 of the Industrial Relations (Ethical Clothing Trades) Act 2001 (NSW) ('NSW Code')

⁴⁵ (SA) Fair Work (Clothing Outworker Code of Practice) Regulations made pursuant to the Fair Work Act 1994 (Sth Aust) ('Sth Australian Code')

⁴⁶ (Qld) Mandatory Code of Practice for Outworkers in the Clothing Industry made pursuant to section 4001 of the Industrial Relations Act 1999 (Qld) ('Qld Code')

⁴⁷ Outworker (Improved Protection) Act 2003 (Vic); Part 3, Division 2

⁴⁸ Homeworker Code Committee Inc

⁴⁹ As at 1 October 2011, there were a total of 142 individual signatories to the Retailers Code including many well known retailers such as Country Road, Cue & Co, David Jones, Esprit, K-Mart, Myer, RM Williams, Roger David, Sportsgirl, Sussan Corp, Target, The Just Group, Webster Group (Jigsaw, David Lawrence)

⁵⁰ Retailers Code; clauses 1, 3, 4,6

67. The Homeworkers Code (Part 2) is a joint union/industry accreditation initiative administered by the Homeworker Code Committee which has representatives from the TCFUA, TFIA, AIG, NSW Business Chamber and TCF companies.⁵¹ The objectives of the Homeworkers Code are:

- To end exploitation of Homeworkers;
- To enable Homeworkers to clearly understand their employment entitlements
- To ensure Homeworkers receive their appropriate award entitlements and legislative protection
- To establish a system of accreditation for manufacturers who comply with this Agreement; and
- To assist Homeworkers by supporting, consistent with this Agreement, community and industry education securing compliance with this Agreement and promoting its purpose.⁵²

68. Manufacturers accredited to the Homeworkers Code commit their companies to ensuring transparency and compliance within their Australian supply chains, including complying with certain record and reporting requirements regarding their suppliers/contractors. The accreditation process aims to identify the full extent of a particular manufacturers supply chain(s), where the work is being performed, by whom and under what conditions. Critically, accredited companies commit that the work being performed in their supply chains on their behalf will be undertaken in full compliance with award and legal conditions.

69. Critical to the accreditation process is the compliance role undertaken by the TCFUA in working with applicant companies to ensure that their supply chains fully meet the minimum legal and award standards. Since 2008 the TCFUA has undertaken approximately 1400 separate compliance visits across Victoria, NSW, Queensland and South Australia. As a result, nearly 6,000 (5870) homeworkers (of whom 3,136 are in accredited supply chains) now either have a greater awareness of their legal entitlements or are more likely to be working under award compliant conditions.⁵³ More recently, compliance activity under the Code has commenced in Western Australia, as knowledge of, and interest in the Code becomes more prevalent.

⁵¹ As at 1 July 2011, there were a total of 63 companies accredited with the Homeworkers Code of Practice, including brands such as Bardot, Can't Tear Em, Collette Dinnigan, Cue/Veronika Maine, Ginger and Smart, Jets, Liso Ho, Puma, Rossi Boots, Tuffa and Yakka

⁵² Homeworkers Code; clause 3

⁵³ Ethical Clothing Australia (Homeworker Code Committee Inc); Business Plan 2011/12 [3], [10]

70. The accreditation process under the voluntary code has had clear and tangible benefits for companies, workers within supply chain and the industry as a whole. The ripple effect is significant. Ethical Clothing Australia has reported that compliance activities has resulted in:

‘TCFUA [negotiating] for thousands of dollars of back pay for garment workers who had not been paid overtime, holiday pay, or long service leave, or for work completed. Through program activities, workplaces have been improved, including repairs to toilets, installation of heating and cooling systems, and improvements made to tea rooms and work stations. Through outworker outreach activities, program staff have conducted over 1000 meetings with homeworkers, organized homemaker networking events and developed resources for homeworkers.

The development of networks in the homemaker community has also assisted the TCFUA compliance work. Through homemaker meetings, the TCFUA and ECA have uncovered information that has greatly assisted with compliance work’.⁵⁴

71. When the accreditation process is completed, and accreditation is given to a manufacturer, the manufacturer is entitled to be considered as an ‘Accredited Manufacturer’ and is accordingly licensed. An Accredited Manufacturer is also entitled to use the Ethical Clothing Australia label on their garments produced in Australia.⁵⁵
72. The success of the Retailers Code and the Homeworkers Code of Practice illustrate that significant parts of the TCF industry have already moved to ethical and sustainable production.
73. In each of the State codes there is an exemption for a retailer/ supplier/ or contractor from the mandatory code if they are accredited with a prescribed voluntary code. In the NSW, South Australian and Queensland Codes the prescribed voluntary code is the national Home Workers Code of Practice⁵⁶, administered by Ethical Clothing Australia (formerly the Home Workers Code of Practice Inc.).

⁵⁴ Ibid; [24]

⁵⁵ ECA Accreditation Kit; op cit [7],

⁵⁶ See NSW Code (Section 8 (1)(e)); Sth Australian Code (Reg 8(e)); Qld Code (Section 8(2)) – each of the exemptions applies when the person (who would otherwise be covered by the particular mandatory code) is a signatory to, or accredited under the Home Workers Code of Practice.

74. Similarly, the TCF Bill provides a capacity for the national TCF outwork code to carve out exemptions for persons who would otherwise be covered by the code⁵⁷, such that,

‘compliance with a specified term of an instrument or other writing as in force or existing form time to is taken to satisfy a particular requirement of the code... and may ... include, but are not limited to, the TCF Award or a code dealing with matters relating to outworkers that is made under a law or territory.’⁵⁸

76. The exemption in effect, provides an incentive to retailers and suppliers to embrace the voluntary code process rather than be bound by the mandatory national TCF outwork code.

77. A mandatory TCF outwork code is consistent with the transition to a national industrial relations system, and the reality that the retail sector more commonly than not operates across state and territory boundaries. In Australia, a significant proportion of domestic TCF production is made for sale by large retailers such as Myer, David Jones and the Just Group which operate widely across the country. Commonly, the large retailers also have their own in-house brands which are made exclusively for sale in their own stores. Many well known fashion houses are also retailers in their own right or a combined retailer/manufacturer.

78. As indicated previously, TCF supply chains are typically long, multilayered and complex (operating vertically and horizontally) using a combination of factory and home-based workers. From the TCFUA’s experience, mapping TCF supply chains is time and resource intensive and only accurate at a particular point in time. Unless a TCF supply chain can be effectively mapped it is difficult to otherwise find outworkers within the chain, and the conditions under which they are performing the work. It is not unusual for a large supply chain to have 5 or 6 tiers (retailer/fashion house to suppliers, contractors, sub contractors to outworkers) requiring anywhere between 200 – 500 workers involved in the production of a particular brand or label.

⁵⁷ TCF Bill; s789DE(3),(4),(5)

⁵⁸ Explanatory Memorandum; op cit; para 114

79. The TCF Bill provides for the capacity for a mandatory Code to be issued (by way of Regulations) at the national level for the purpose of furthering the objects of Part 6-4A⁵⁹ and which deals with standards of conduct and practice in the TCF industry⁶⁰.

80. The TCF Bill expressly provides that a prescribed code cannot deal with wages and other entitlements of TCF outworkers,⁶¹ as it is not the purpose of the code to deal with such matters.⁶² Whilst a TCF Award will prevail over a TCF outwork code prescribed pursuant to these provisions, a TCF outwork code will prevail over an enterprise agreement, workplace determination or agreement based transitional instrument, to the extent of any inconsistency.⁶³ The legislative rationale underpinning these provisions is gleaned from the Explanatory Memorandum as ensuring:

‘...that in the hierarchy of subordinate legislation to which the code and the award belong, the award prevails. This ensures that terms developed by the independent industrial body will remain the benchmark for any new arrangements.’⁶⁴

81. Mandatory codes in the state jurisdictions essentially operate on a ‘chain of responsibility’ model and are reflective of the reality that TCF supply chains start from a retailer/fashion house at the top of the chain through to the supplier(s) and through to contractor(s) engaged in the work being done of for, or on behalf of the retailer. The States’ codes acknowledge in a real and practical sense, that retailers/fashion houses exert considerable influence and economic power within TCF supply chains, including the volume, and unit cost of goods to be produced.

82. The record keeping and reporting requirements are the critical underpinnings of the States’ codes. The purpose of these interlinking and cascading obligations is to effect transparency through each tier of the supply chain. A direct outcome is the capacity to identify where an outworker is performing work for the purposes of an agreement/arrangement and to check whether they are receiving their legal and award entitlements. The provisions of the TCF Bill mirror in essence the state codes ‘chain of responsibility’ model.

⁵⁹ TCF Bill; the objects ‘of the Part’ [6.4A] ‘are to eliminate exploitation of outworkers in the textile, clothing and footwear industry, and to ensure that those outworkers are employed or engaged under secure, safe and fair systems of work’

⁶⁰ TCF Bill; s789DA specifically provides that a code may be prescribed dealing with standards of conduct and practice to be complied with in relation to any of, (a) the employment or engagement of outworkers; (b) arranging for TCF work to be performed, if the work is to be performed by TCF outworkers or is of a kind that if often performed by outworkers; or (c) the sale of goods produced by TCF work

⁶¹ TCF Bill; s789DB(2)

⁶² (Senate) Explanatory Memorandum; para 101

⁶³ TCF Bill; s789DE(2)

⁶⁴ Op cit; para 112

83. The capacity for the TCF outwork code to incorporate terms by reference to other instruments (including the TCF Award and other state codes which deal with matters relating to outworkers), also enhances the capacity to harmonise the respective obligations at a national level. This is acknowledged in the Explanatory Memorandum, which states:

‘The capacity to incorporate terms...by reference... is designed to enable maximum flexibility in the way in which the code is designed, given the extent to which multiple arrangements already operate in this area.’⁶⁵

‘These amendments will enable, for example, obligations in a state code of practice or another instrument to be incorporated into a new TCF outwork code, allowing the code to limit the extent to which a person will need to comply with multiple obligations directed to the same end as a result of the operation of a new TCF outwork code’.⁶⁶

Right of Entry

84. The TCFUA strongly supports the right of entry provisions contained in the TCF Bill.

85. The FW Act currently contains, in addition to general right of entry⁶⁷, TCF specific right of entry provisions⁶⁸ which recognize the particular difficulty in monitoring compliance of outworker conditions within TCF supply chains.

86. However, since the commencement of the TCF right of entry provisions in 2009, the TCFUA has identified an unintended anomaly relating to the capacity of the union to investigate contraventions relating to the working conditions of workers in sweatshop type environments. Typically, these parts of the industry are often difficult to locate and monitor, have extremely poor health and safety conditions, commonly engage workers on less than the minimum safety net terms and conditions and are un-unionised. Further, sweatshop workers are routinely threatened by their employers against raising complaints to the union about their conditions of employment. Such threats include losing shifts, hours or their ongoing employment.

87. In practice, under the current TCF right of entry provisions, the TCFUA can enter premises to investigate contraventions of the FW Act or a Fair Work instrument which relates to, or affects a TCF outworker. If after entering, however, the TCFUA

⁶⁵ Ibid; para 115

⁶⁶ Ibid; para 116

⁶⁷ FW Act; Chapter 3, Part 3-4

⁶⁸ Ibid; Part 3-4, Subdivision AA (Entry to Investigate suspected contravention relating to TCF outworkers)

identifies in-house workers working at the same premises it is unable to effectively investigate suspected breaches relating to the pay and conditions of those workers.

88. Such an outcome is demonstrably counterproductive to effective transparency of TCF supply chains in relation to where work is performed, by whom and under what conditions. Critically, it undermines across the industry, effective compliance with minimum award and legal protections.
89. The TCF Bill provisions appropriately recognise that exploitation is not limited to home based work but also exists in sweatshop factory environments as well.

Case-study – sweatshop

In late October 2011, a TCFUA organiser observed a shop front in a suburban shopping strip area that had a blacked out window, however the organiser could hear the sound of sewing machines inside. The TCFUA organiser knocked on the door and was invited into the factory by the occupier/employer. There were about 16 workers in a room, all working at sewing machines in close proximity and in appalling physical conditions. The workers were surrounded by filth, with boxes and other items blocking paths to exits. There were exposed and dangerous electrical cables with frayed ends. There was one small, dirty kitchen with a table pushed up against the sink and one chair. There was one, dirty toilet available to all the workers. The workplace was by any commonly accepted definition a sweatshop.

The TCFUA organiser asked the employer what label the factory was sewing for. The label belonged to a large, well-known and well-respected company, with whom the TCFUA had good working relations. On contacting the principal company, the TCFUA was advised that they had no knowledge that their garments were being produced at the sweatshop or under what conditions. The principal company committed to, and quickly acted to remedy the situation.

The TCFUA organiser did not enter under the right of entry provisions under the FW Act 2009. Unusually, the factory occupier invited the organiser in after she identified herself. However, if consent had not been given by the occupier/employer of the sweatshop, the TCFUA could not have used the general right of entry provisions (to investigate contraventions) under the FW Act as the union had no member at the workplace. Similarly, the TCFUA could not have entered under the TCF specific right of entry provisions as there was no suspected contravention relating to, or affecting an outworker working on the premises nor of a designated outworker term.

All the information that the organiser obtained was given voluntarily. The organiser had no right to request records (nor did she do so) and no right to formally inspect conditions at the workplace, except for the invitation to enter, which could have been withdrawn at any stage. Even had she not been invited to enter, her first sight of the factory left her in no doubt that it was at least non-compliant with OHS laws and possibly non-compliant with minimum wages and entitlements.

Case-study - sweatshop

The TCFUA was mapping the extended the apparel supply chains of a major sporting organisation. It identified that authorised merchandise of the organisation was being finished in a medium size factory by a workforce of predominantly Vietnamese and Chinese workers. Around the same time, the union received a number of confidential written complaints by a number of workers (in their first language) about the working conditions at the factory.

The complaints were numerous including:

- non payment, or underpayment of superannuation;
- underpayment on ordinary hours (at least \$2 less than award rate) – workers paid same rate whatever shift or hours they worked;
- non payment of award overtime rates (\$10 cash in hand) for weekend work and penalty rates for shift work;
- afternoon shift workers essentially treated as casuals (although worked same regular hours per week for many years) but received no shift penalty or accrued entitlements (annual and sick leave or superannuation);
- very poor health and safety conditions including the presence of toxic fumes without adequate ventilation or extraction.

Whilst the workers wanted the union to intervene, they did not want to be personally identified at any cost. Using multilingual organisers, the union commenced meeting with a group of workers after hours and off site. Eventually a number of the workers joined the union as silent members. The union also made contact with the employer outlining in general terms that it was aware of the workplace issues and that there appeared to be multiple breaches of the TCF Award, the FWAct and OH&S laws.

After the intervention of the union, the employer increased the hourly ordinary rate (still lower than the correct award classification). The employer

then constructed 2 sets of clock cards and employee records – the ‘fake’ clock cards recorded higher rates of any and less working hours; the ‘real’ clock cards were destroyed at the conclusion of each weekend. The employer by this time also suspected which of the employees had joined the union and threatened them with their ongoing employment.

The union notified right of entry in order to meet with the employees on the afternoon shift and to investigate contraventions of the TCF Award and the FW Act. The employer’s response was to abolish the afternoon shift altogether (before the union could enter the premises) and shifted the work to the weekends to be performed by student workers on temporary visas. The silent members subsequently lost their jobs and/or if they remained were reluctant to pursue their entitlements for fear of losing work/obtaining alternative work within the industry.

Conclusion

90. The provisions of the TCF Bill are a logical and necessary step in the history of federal regulation of working conditions of employment in the TCF industry. In particular they address the unacceptable systemic exploitation of outworkers and workers labouring in sweatshops across Australia. The deeming and recovery of money provisions acknowledge the particular vulnerabilities of outworkers working at the bottom of long and complex TCF supply chains in which sham contracting is endemic and non payment of wages and entitlements is common. The enhanced right of entry amendments are directed at remedying an anomaly whereby there is currently no effective mechanism to investigate contraventions of minimum safety net conditions of workers employed in sweatshops. Finally, the capacity to legislate for a mandatory code of practice in the TCF industry allows for greater levels of transparency within TCF supply chains so that the conditions under which TCF work is undertaken and by whom can be more readily identified. As a package, the TCF Bill is directed squarely at improving compliance with award and legal entitlements within the industry and ensuring that all TCF workers are engaged under safe and healthy systems of work.

91. The TCFUA strongly supports the passage of the TCF Bill into law in early 2012.

**Textile, Clothing and Footwear Union of Australia
(National Office)**

11 January 2011