



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

Submission from:

Council of Textile and Fashion Industries of Australia Ltd (TFIA)

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Declaration of Interest:

As the peak representative body for the textile, clothing and fashion industries of Australia the TFIA represents the collective business interests of its members, which consist of companies engaged in design, manufacturing, distribution and retail activities in this sector of industry.

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Executive Summary

The Council of Textile & Fashion Industries of Australia (TFIA) has serious concerns regarding unworkable aspects of the Bill, its introduction to the Senate and the consultation process leading up to its introduction and during the brief inquiry.

The TFIA believes the proposed amendments on 'outworker definitions', right of entry and liability are excessive and unnecessary. Having worked with the Fair Work legislation for 2 years the amendments compound aspects of the current TCF regime that are already proving to be unworkable and impact on clothing manufacturers under considerable competitive pressure.

The TCF regime is unique in its prescriptive and bias towards one model of doing business i.e. it removes the incentive to operate a home based family business and locks the supply chain into permanent full time and part time employer-employee relationships. This has a negative impact on the competitive advantages of the local clothing industry which must compete with an average imported FOB \$4.06 per unit cost.

Because of the broad definitions of an 'outworker' and 'TCF work' those that are not vulnerable i.e. those with qualifications, knowledge and skills are also treated in the same way. For example a designer with a University degree wanting to set up a home based business would be treated the same as a person with poor English language skills and little knowledge of the Australian legal system.

The arguments for introducing the legislation are based on research conducted nearly 5 years ago not current evidence and fail to acknowledge the gains made in the 10 years of existing legislation and the 4 years of investment by the Federal Government in Ethical Clothing Australia.

Passing the proposed amendments would anoint the Australian TCF regime as one of the most rigid globally. It would be the toughest legislative framework the sector has ever had to endure and certainly harsher than that imposed on any other sector in the Australian community.

Many of Australia's most enduring brands e.g. Country Road, Billabong etc started as home based businesses. If the TCF regime is not adjusted to allow for the provision of contractor arrangements in which designers and entrepreneurs can incur an income (other than a wage) then the question must be asked "How do we grow the Australian TCF industry, how do we grow the number of TCF businesses and in turn the number of employees?"

Introduction

TFIA welcomes the opportunity make a submission to the Senate Committee on the changes to the Fair Work Act (“FWA”) as proposed by the Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011 (the Bill) introduced into the Parliament on 24th November 2011.

We understand that on 25 November 2011 the Senate referred the Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011 for inquiry and report on 27th February 2011.

The Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011 (the Bill) seeks to amend the Fair Work Act 1999 as it applies to certain workers in the Australian Textile, Clothing and Footwear (TCF) industry.

The Bill would further tighten the TCF regime that is much more onerous and prescriptive than legislation applied to any other Australian sector which contracts work and employs outworkers. The Bill would also change right of entry rules to entry without notice which would extend Union powers beyond Australian Law enforcement agencies.

The Bill makes 64 amendments further adding to the confusion in the sector that already grapples with a Modern Award M000017 and 7 Schedules, the one causing the most issues being Schedule F Outwork and Related Provisions (14 pages).

The purpose of this submission is to advise of serious concerns that the Council of Textile & Fashion Industries of Australia (TFIA) has regarding unworkable aspects of the Bill, its introduction to the Senate and the consultation process leading up to its introduction and that during the inquiry.

About the TFIA

The TFIA is a national not for profit organisation representing businesses and individuals in TCF industry. Relevant to this submission is the TFIA membership of the International Apparel Federation and Board and Committee positions including Manufacturing Skills Australia and Ethical Clothing Australia respectively. The TFIA (and its affiliates) has approximately 1,800 members representing 22,000 workers.

TFIA consults widely with industry, retailers, researchers, educators and Government agencies. Many of the TFIA's members have expressed concerns about regulation of the TCF industry including in relation to matters dealt with in the Bill. Some members have stated that they believe it may be necessary to look at options other than manufacturing in

Australia¹ in order to maintain the commercial viability of their businesses. Others have had their productivity adversely impacted in demonstrating compliance to the current TCF regime.

The TFIA has also received feedback from home based workers² who are concerned at the impact regulation is having on their businesses and some elements of the Bill may potentially exacerbate this issue.

About the Australian Clothing Sector

The competitive advantages offered by the local clothing industry are flexibility, sampling, and closeness to market, short turnaround times, innovation, smaller quantities, ethical supply and a quality product particularly for high end design.

The TFIA AGM Nov 2011 Statistical Report based on 2009 ABS data states that there were 1,701 clothing manufacturing businesses in Australia turning over \$200K or more. Of these 286 or 16.8% turned over more than \$2mil.

According to TFIA sources the largest clothing manufacturers are generally providers to Government procurement agencies e.g. Defence, Law Enforcement, Emergency Services.

The majority of clothing businesses (84%) are small to medium companies (SMEs) with an average of 4.1 employees per management unit. Victoria (36%) and New South Wales (35%) followed by Queensland (16%) are home to the majority of employers.

As at Dec 2011, an estimated 38,500³ people were employed in Australia's TCF industries, a 20% decline from 48,000 people identified in the 2008 Federal Review into the TCF sector. Clothing manufacturing remains the highest employer with close to half of those employed. The majority of employees were females employed full-time (21,000). Women accounted for nearly 60% of the workforce with a quarter of women employed part-time⁴.

The TFIA has identified the current economic climate is extremely competitive i.e. Australian dollar above parity, low tariffs, falling demand in favour of offshore online purchasing and yet to be felt the full impact of ASEAN Australia New Zealand Free Trade Agreement in which over 300 tariff lines will be going to zero by 2013.

¹ TCF manufacturing has been contracting and since 2001 experienced a 42%, an accelerating trend in tough economic conditions.

² See Appendix 4 Transcript of interview regarding impacts on outworkers

³ Department of Innovation, Industry, Science, Research and Tertiary Education Manufacturing Data Card Dec 2011 Update

⁴ Manufacturing Skills Australia Sept 2011 Textile Clothing and Footwear in Australia

In 2010 / 2011 there were 1,234,764,547 units of apparel imported into Australia for a total FOB value of \$5,011,304,131 and a customs value of \$457,837,836. Australian clothing manufacturers have to compete with an average landed price per unit of \$4.06. They are most exposed to labour costs and any small changes to Australian legislation can have an amplified impact on the sector.

In general terms the industry has a low barrier to entry and is highly fragmented. Whilst this fosters diversity and opportunity it also makes communication difficult, especially for those with language difficulties.

The TFIA values the work performed and contribution made by the migrant community, most recently the Vietnamese community, in constructing apparel for the local market. It is important that this contribution is recognised, many of whom are women working from home as they raise and educate their families⁵ and now look after aging family members.

As the Australian manufacturing sector has declined, so has the need for work to be performed in the home. Again the TFIA believes it is also important to acknowledge that since 'outworker provisions' were introduced into legislation in the late 90s gains have been made in the working conditions and remuneration of home based workers.

In 2008 the Federal Government also funded approx. \$1mil pa for 4 years to Ethical Clothing Australia to provide education and accreditation to over 50 Australian brands using local makers. As at July 2011 assistance has been provided to nearly 6000 homeworkers of which more than 3,000 are in accredited supply chains. Approx. 1400 compliance checks have been performed by the TCFUA involving 570 suppliers. Further funding has been granted by the Federal Government to extend period for another 3 years.

The TFIA believes that assuming the investment has had an impact and based on information about the TCF sector aforementioned i.e. the rapid rate of decline in employment and business numbers, the increasing competitive environment, the gains made over more than 10 years of existing legislation and the improved conditions evident in the testimonials of home based workers, two questions must be asked;

1. Where is the current evidence and data of widespread abuse of vulnerable workers?
2. Why is there a need to further tighten home based worker provisions compounding the risk of an unworkable TCF regime that incentivises companies to take production offshore?

⁵ ABS since 1989 home based workers have been on the increase. Women, who were owner managers of unincorporated enterprises, were most likely to work at their home (47%) followed by a workplace (43%). In comparison, men, who were owner managers of unincorporated enterprises, were more likely to work at a workplace (46%), compared with their home (21%)

Consultation process regarding the Bill

The TFIA is concerned that the views of the TCF industry have not been properly canvassed in relation to the Bill. The TFIA has taken every opportunity provided to it to ensure that Australia has an effective and efficient TCF regime that reflects the appropriate rights of both employers and employees.

Recent developments, however, indicate that the TFIA's role is considered by the Government to be subordinate to that of the Textile, Clothing and Footwear Industry Union of Australia's role.

We refer, in particular, to the Government's acknowledgment that its proposed changes to the Fair Work Act TCF regime are deficient in certain, as yet to be specified, areas. These areas of unintended consequences and areas that lend themselves to possible improvements have been identified through consultations between the Union and the Government, but not between the Government and the broader TCF industry. As stated in the Bill's Second Reading Speech, these consultations with the Union are ongoing.

We urge the Government to consult more widely on the proposed changes to the TCF regime in the interests of getting the legislation right and avoiding unintended consequences.

Despite the TCF industry's continuing concerns about the proposed regime changes, which have been drawn to the Government's attention on innumerable occasions, Australia's TCF industry has been denied the opportunity to input directly into the development of appropriate protections for TCF workers, including home based workers.

The TFIA has always been a strong advocate of open and honest consultations.

It is in this spirit that the TFIA is continuing to engage in discussions with the Textile, Clothing and Fashion Union of Australia in an attempt to reach consensus on a number of matters relating to the changes proposed by the Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011.

Indications to date, however, suggest that consensus may not be reached, at least in the foreseeable future, whatever the merits of the argument.

The TFIA has sought the opportunity to have further input to outline members' concern. However aside from a brief meeting, the TFIA (along with other stakeholders) on 13 October 2011 this has not eventuated. We note that COIL (Committee on Industrial Legislation) is

the normal process of review which has previously been useful in preparation of the Fair Work Act but in this instance was by passed.

Current regulatory framework

The TFIA acknowledges that historically some Australians working from home⁶ have been and continue to be in a vulnerable position and that appropriate legislation is required to protect such Australian workers.

However, home based workers are already afforded comprehensive protection under the Fair Work Act 2009 and the Textile, Clothing, Footwear and Associated Industries Award 2010 (the TCF Award), together with State legislation, beyond that afforded to employees and contractors in other industries.

The TFIA submits that the existing regulatory framework is more than sufficiently protective of home based workers which are acknowledged by the Government in its preparedness to fund an accreditation body Ethical Clothing Australia (ECA) to the amount of \$1mil per annum whose work is underpinned by the Fair Work Act.

The TFIA also understands that a number of matters dealt with in the Bill were not adopted in the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 despite being considered at that time following opposition.

The TFIA's experience is that whilst there are undoubtedly some vulnerable home based workers in the TCF sector; most participants in the TCF industry do not fit that category. The TFIA is concerned to ensure that the Bill does not impose further inflexible regulations on the TCF industry generally. Any enhancement of protections for home based workers should be specifically defined so as to avoid unintended consequences for other participants in the TCF industry.

Preliminary Comments

The Bill has been referred to the Senate Education, Employment and Workplace Relations Legislation Committee for reporting on 27 February 2012 which gives a little time before debate on the Bill resumes. (Referral to a committee during a Bill's second reading is normal practice.)

⁶ TFIA estimates a maximum of 20,000 TCF outworkers in Australia based on number of businesses engaging an average of 11 outworkers. Given 84% of clothing businesses gross less than \$2mil the average is more likely to be 5 outworkers or less. NB outworkers can work for 1 or more companies. Supply chains tend to overlap.

Firstly, and importantly, the concept of what is the 'TCF industry' today remains poorly understood. According to the Second Reading Speech, the objective of the Bill is to implement "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" for TCF home based workers. However, the Bill is inconsistent in the way it treats the 'TCF industry' which leads to confusion and risks adversely affecting the policy outcome.

This is because the TCF Award (which is called up in the FWA through the definition of "TCF award" and regulation 1.08) is exceptionally broad and open-ended in scope and extends to activities that would not normally be considered to be part of the TCF industry for mainstream government purposes, such as industry assistance measures and trade negotiations. It seems that the meaning of the 'TCF industry' in the TCF Award would apply to some of the new provisions but not all of them, principally due to the proposed change of the definition of "TCF outworker" (amending Item 20) in conjunction with the introduction of the concepts of "TCF work" (amending Item 21) and "TCF award worker" (amending Item 45, with numerous consequential changes).

The reading of the Bill suggests that the 'TCF industry' as defined by the scope of the TCF Award would be subject to the broader right-of-entry provisions (amending Items 38–53) but not necessarily to the extension of the FWA to contract home based workers and other 'improved' protection measures as proposed by the new Part 6–4A (amending Item 61—the employee/employer deeming provisions, recovery of unpaid amounts facility and the TCF outworker code). This is because, presumably, these provisions would apply to the "TCF manufacturing industries" as described in the Second Reading Speech, which comprises "all stages of production of TCF products, from the processing of raw materials through to the production of final goods" which differs from the 'TCF industry' covered by the TCF Award.

If this proves to be the case, activities such as cotton ginning and wool scouring would be covered by the new home based worker protection measures but design for manufacture (that is, designing without actual manufacturing) would not be covered. Each of these activities, however, would be subject to the new right-of-entry provisions. In contrast, ginning and scouring would not normally be considered part of the 'TCF industry' for the 2010 TCF assistance package (including the TCF Structural Adjustment Program which, inter alia, provides support to retrenched TCF workers), but designing would. This could be considered confusing and inconsistent which one would expect is unintended.

Put another way, whilst the improved protection for TCF home based workers (that is, new Part 6–4A) is meant to "provide consistent workplace rights and protections for workers in the TCF industry" (see paragraph 41 of the Explanatory Memorandum), it could be argued

that the reach of the other FWA provisions such as the right-of-entry provisions, is greater than that for the improved protection for TCF home based workers. If it is, then the stated goal of consistency is not met.

Ultimately, however, it comes down to the relevancy of these provisions. It would appear that the issue of home-based manufacture is limited to the clothing sector of the TCF industry. If this proves to be the case, then the application of the provisions to the textile and footwear sectors is unnecessary and risks other unintended consequences (particularly in regards to the proposed deeming provisions of the new Part 6–4A).

Turning to other details, the proposed right-of-entry exception (amending Item 46), limitation on the use of flexibility terms in enterprise agreements (amending Item 29) and liability for unpaid amounts (new subsection 789CA(4) of amending Item 61) warrant closer attention and perhaps clarification.

Right-of-entry exception (Item 46—new subsections 483A (6) & (7))

The existing right-of-entry without notice (normally, 24 hours notice is required) applies to suspected breaches relating to home-based work. The proposed amendments of the Bill (principally, amending Item 45) would have the effect of extending this right-of-entry to business premises in an attempt to capture ‘sweatshops’.

To balance this extended right, new subsection 483A(6) will provide for exceptions for principal places of business of persons who are “accredited”. The accreditation will be by “a person or body specified by name in the regulations” and must be “in writing” and “in force”.

Before being named in the regulations as an accreditor, the Minister must be satisfied that the accreditor’s aims are consistent with the objectives set out in proposed section 789AC (new subsection 483A(7)).

This raises the question of what would be required by the Minister in order for him/her to be satisfied. For instance, is it intended that the Minister would need to exercise his/her judgement on the basis of the person’s/body’s constitution (for example, its articles of incorporation or association)? If so, which of the industry associations would qualify, if any?

However, even if the Minister is satisfied about the person’s/body’s aims, new subsection 483A(7) also requires endorsement of the person/body from at least one employee organisation and at least one employer organisation.

No grounds for endorsement are specified which raises questions such as what needs to be taken into account in deciding whether or not to endorse the person/body and how vexatious

refusals to endorse are to be dealt with. Other questions arise such as whether it is intended that a person/body who has satisfied the Minister of its aims can be denied accreditation through the inability to obtain a timely endorsement from a relevant employee or employer organisation, for whatever reason, and will it be possible to endorse oneself (for example, if one was an employee organisation)?

As already mentioned, the accreditation is to be by “a person or body specified by name in the regulations” and must be “in writing” and “in force”.

This raises questions about the status of persons who are seeking accreditation or whose accreditation may no longer be in force (for whatever reason). (Note that similar questions arise in relation to the Government’s procurement framework requirements relating to the Homeworkers Code of Practice although those requirements at least refer to being accredited as well as seeking accreditation.)

Limitation on the use of flexibility terms in enterprise agreements (Item 29—new subsection 203 (2A))

Subsection 202(1) of the FWA requires enterprise agreements to include a flexibility term that enables individual flexibility arrangements to be made which “meet the genuine needs of the employee and employer”, subject to complying with certain requirements. One of the requirements is that the employee must be better off overall under the flexibility arrangement (subsection 202(4)). However, new subsection 203(2A) would seem to deny access to such arrangements for outworkers whether they be in the TCF industry or not as “the flexibility term must not allow the effect of those outworker terms to be varied” [emphasis added]. This is despite section 200 which ensures that enterprise agreements cannot undercut outworker terms.

On its face, therefore, employees may be able to benefit from individual flexibility terms that would be denied to outworkers even though TCF contract outworkers are treated as employees in the new Part 6–4A, which extends the operation of most provisions of the FWA (including sections 202 and 203) to contract outworkers in the TCF industry.

If this proves to be the case, the intention to provide “nationally consistent rights...for those outworkers, regardless of whether they are employees or contractors” (see paragraph 44 of the Explanatory Memorandum) may not be achieved.

Liability for unpaid amounts (Item 61—new subsection 789CA (4))

New Division 3 of Part 6-4A (of which new subsection 789CA (4) is part) is meant to “provide TCF outworkers with a mechanism to recover an unpaid amount from an indirectly

responsible entity further up the supply chain in circumstances where the person who is responsible for doing so has not paid the outworker” (see paragraph 61 of the Explanatory Memorandum).

The amount owed by the responsible person is expressed to “be an amount of any of the following kinds that relates to (or is attributable to) the TCF work...” (new subsection 789CA(2)—emphasis added). In contrast, the amount owed by an indirectly responsible entity is expressed as “so much only of the amount referred to [above] as is attributable to that part of the TCF work” (new subsection 789CA(4)—emphasis added).

Whilst new subsection 789CA(4) is focussed on ensuring the indirectly responsible entity is liable to pay for the TCF work performed indirectly for it and not for other TCF work performed by the outworker, the different language used in the two subsections deserves questioning. For instance, is the difference in language intended to limit the kinds of amounts owed indirectly, perhaps by excluding amounts payable by way of leave or contributions to a superannuation fund (see new paragraphs 78CA(2)(a)–(d) for the kinds of amounts)?

One would expect the answer to be in the negative as there would seem to be at least one other instance of inconsistent language being used to describe the amounts owed by indirectly responsible entities.

One such inconsistency can be found in new subparagraph 789CC(2)(b)(i) which refers to “the TCF work to which the unpaid amount [of the indirectly responsible entity] relates” (but is not necessarily attributable—emphasis added).

TCF outwork code (new Division 4 of part 6–4A)

Whilst the language used in new Division 4 seems largely to derive from existing text in the FWA, in the context of the proposed TCF outwork code it seems to be used loosely in places. For example, the TCF outwork code is able to deal with standards of conduct and practice to be complied with in relation to “the sale of goods produced by TCF work” (see new paragraph 789DA (c)), and in relation to “arranging for TCF work to be performed, if the work...is of a kind that is often performed by TCF outworkers” (see new subparagraphs 789DA(b)(ii), 789DC(3)(c)(ii) and 789DC(4)(b)(ii)).

However, one would expect that the divisional heading, “Code of practice relating to TCF outwork”, would be sufficient to read down the otherwise broad meaning of some of the language used.

It is noted also that new section 789DC, which deals with the persons on whom the TCF outworker code may impose obligations, is broad in scope. It covers national system employers, Commonwealth outworker entities, constitutional corporations that sell goods produced by TCF work and persons who arrange for the TCF outworker work to be performed.

In regards to the latter category, it may be that its legislative head of power is questionable in the light of *Pape vs. Commissioner of Taxation* as it seems that the corporations power is being relied on for the rest of the Bill which may not be applicable to 'persons' who are not Commonwealth outworker entities (for example, sole traders or partnerships).

Issues with Current Definitions

The current FWA definitions of an outworker, an outworker entity are broad and capture a much greater proportion of the TCF sector than previous legislation. This includes for example designers, garment technologists, entrepreneurs and embroiderers working from home who would not normally be regarded as outworkers. It also captures those with a qualification for example, a Diploma or Degree.

The FWA definition is also inconsistent with global definitions of outworkers i.e. OECD ILO definition states *"Outworkers are workers who hold explicit or implicit contracts of employment under which they agree to work for a particular enterprise, or to supply a certain quantity of goods or services to a particular enterprise, by prior arrangement or contract with that enterprise, but; whose place of work is not within any of the establishments which make up that enterprise."*

Definition under the current FW Act

In 2009 the existing definition of "outworker" in the Fair Work Act 2009 (Cth) (the FW Act) came into operation.

The definition of an outworker under s12 of the FW Act is:

- (a) an employee who, for the purposes of the business of his or her employer, performs work at residential premises or at other premises that would not conventionally be regarded as being business premises; or
- (b) an individual who, for the purpose of a contract for the provision of services, performs work:
 - (i) in the textile, clothing or footwear industry; and

(ii) at residential premises or at other premises that would not conventionally be regarded as being business premises.

Why is the definition relevant?

Under the FW Act, there are a number of implications arising from the definition of outworker, including those set out below.

First, independent contractors are still outworkers if they otherwise meet the definition. In other industries, independent contractors are mainly not covered by the FW Act.

Second, Fair Work Australia (FWA) can make awards that include "outworker terms".

Without this section, FWA would not have had power to regulate arrangements between a TCF business and independent contractor. As you are aware, FWA has made the Textile, Clothing, Footwear and Associated Industries Award 2010 (the TCF Award) which contains detailed outworker terms in Schedule F.

What was the previous definition?

Before the FW Act commenced on 1 July 2009, the Workplace Relations Act 1996 (the WR Act) applied.

From 2008, s576K of the WR Act contained a narrower definition of outworker. Relevantly, the WR Act defined an outworker as:

(b) an individual **who is a party to a contract for services**, and who, for the purposes of the contract, performs work:

(i) in the textile, clothing or footwear industry; and

(ii) at private residential premises or at other premises that are not business or commercial premises of the other party to the contract.

The critical difference is that under the WR Act an outworker that was a corporate entity was generally not covered, as the individual working for the corporate entity was not a party to the contract for services. The Explanatory Memorandum to the FW Act states as follows in this regard:

550. The definition of outworker has also been expanded to cover a broader range of situations ... For example, it is designed to allow a modern award to deal with a situation where a contract is made with a company and an individual performs services as a director of the company.

This would seem to be an important change in at least some cases. Previously, outworkers operating through a corporate entity may not have been caught by the legislation and the predecessor award in many cases whereas now they are.

It is important to note that there have been Federal and State awards in place for many years which regulate outworkers even if they are independent contractors. Hence, the above change in definition will often not be material.

However the largest clothing production state Victoria referred its industrial relations powers to the Commonwealth in 1996 (no other State did so until recently). This meant Victorian employers were covered by Federal awards by respondentship from that date, or from 1 January 2005 by "common rule" (e.g. by industry or occupation rather than just to respondent employers).

In considering the history of regulation in this area an important decision of the Australian Conciliation & Arbitration Commission was made in 1987. This decision provided the framework for existing award regulation of outworkers and is still often referred to in union and government publications on the issue. It contains helpful insight into the history and reasoning for current regulation.

Recommendations of the TFIA

Recommendation 1: The Bill should allow outworkers to operate as independent contractors and not deem them to be employees.

The TFIA understands that the Bill intends to deem home based workers to be employees for "most of the provisions of the Fair Work Act".

The TFIA requests clarification on what provisions of the Fair Work Act 2009 are to apply to home based workers and in what respects the intended amendment differs from Schedule F of the TCF Award. It is inappropriate for all outworkers to be subject to many of the provisions of the Fair Work Act 2009 regardless of their circumstances and the nature of their businesses. Further, many outworkers operate legitimately as independent contractors and there are prudent tax and business reasons why they might wish to continue to operate in this way.

Many outworkers run successful businesses and have done so for many years. The current regulatory framework is proving inflexible and does not cater for those home based businesses that are successful and profitable. In some cases, the need for those home

based businesses to begin receiving employment-like benefits poses a risk to the continuing operation of their businesses.

Any sham contracting arrangements with home based workers would be caught by Division 6 of Part 3 of the Fair Work Act 2009.

Recommendation 2: The Bill should exclude a special class of independent contractor home based workers from employment-like protections.

Taking into account our comments above, there needs to be some flexibility in the regulatory framework to cater for home based businesses that are compensated fairly for their services.

Providing employment-like conditions is not the only way to ensure home based workers are protected. The TFIA submits that the Bill should create an exception or exclusion for a special class of home based businesses that can be paid a flat rate for goods and services as with businesses in other industries.

The TFIA requests an opportunity for parties to make submissions on how to define such a special class of home based workers running businesses (e.g. by reference to annual revenue of the business or possession by those managing the business of a Certificate III or higher qualification in Clothing Production) and the protections that would be afforded to them.

Recommendation 3: Right of entry not be extended to TCF industry generally

The TFIA understands that the Bill intends to ensure right of entry is available for "sweatshops". The TFIA submits that this objective should be achieved more specifically than extending special right of entry arrangements to the TCF industry generally.

Part 3-4 of the Fair Work Act 2009 already contains special right of entry arrangements for premises where home based workers perform work. Other businesses in the TCF industry are caught by the general right of entry arrangements in the Fair Work Act 2009. These protections have worked fairly for relevant stakeholders for some time and the TFIA sees no need for change.

Conclusion

In regards to future consultations, we draw your attention to the (extraordinary) comments in the Second Reading Speech foreshadowing further (unspecified) changes to be made when debate on the Bill is resumed. Such an occurrence would not allow for proper consultation to ensure that the legislation is workable and achieves its intended aims. This also

increases the risk of creating amendments that make operating a clothing business in Australia so rigid that it creates further disincentives to manufacture here.

In the following Appendices are examples of the correspondence, emails and transcripts of interviews TFIA has conducted over the last 3 months. These are indicative of the level of concern and issues facing those at the cold face having to endure the consequences of legislation that even with the best of intention, has resulted in unforeseen and unworkable aspects.

Good legislation is based on sound reason and provides incentives for work. It should not attempt to dictate to markets, restrict trade, be biased against a segment or reduce the TCF industry to one method of employee engagement or making contractual arrangements.

Appendix 1: Letter from SME regarding hourly rates.

Author: [name withheld]

Company: **Uniforms Made Here For You**

Products: Uniforms

Case Study -Re: Fair Work Amendment (Textile, Clothing and Footwear Industry)Bill 2011- Outworkers.

People want to work from home for various reasons. Most businesses, ours included, started off as a work from home 'cottage industry' which grew and we have been employing people for 24 years.

The clothing industry, which is female dominated, would have a large 'work from home' preference for child raising issues and these people have set themselves up as a business with a business name and ABN Number, supply tax invoices, have the right to negotiate their payment, have their own machines and equipment and pay GST.

The statement that Homeworkers earn only \$4.00 per hour – I have been told by one of my contractors that this happens only when someone is learning to sew i.e. instead of taking say 20 minutes to make a shirt they take say, 2 hours. Also they can refuse to work for this amount. "...buyer & seller agreement....(16.12.11 *Fashion & Textile publication*).

Having everyone working from home 'cottage industry' and putting a clause in the award to cover these contractors would prevent the outworker clause in the Award being misinterpreted.

The TCF Fair Work Amendment Bill tabled in parliament (1/12/11 *Fashion & Textile publication*) outlines that everyone working from home is an employee. Therefore, is it discrimination if other home workers such as hairdressers & accountants are not included? In such case, if they have been paid unfairly they can recover unpaid amounts up the supply chain which raises the question as to why they work for an unfair amount in the first place?

In my opinion, the ideal situation would be that 'employees' be considered people that work on the premises of the employer and everyone not working on employers premises should be 'contractors' as there is no way an employer can control how and when the work is done.

I'm beginning to think that a Textile Industry is not wanted in Australia and that it is being taken apart bit by bit. With all these unfair rules and regulations businesses will definitely go overseas or just shut down.

Appendix 2: Letter from SME regarding inconsistencies in paperwork

Author: [name withheld]

Company: **Tatyana Ariyan Design**

Products: Ladies wear

Case Study – Re: BOR Application Process

I went through the BOR application process and found out 2 important things;

Firstly, the "Chicken and egg" problem –before application for BOR can be submitted, a designer must have to have all agreements with suppliers in place. Before agreements can be signed, the BOR number needs to be put on a form. BOR number is not allocated until BOR application is successful. I checked this with the Union, and they wanted agreements first.

Secondly, trying out a supplier - in August I tried a new embroidery service. It is an embroidery shop in Kew. Obviously they have to go into my quarterly list. The problem here is this: total price of the work was \$20, I will never use these people again (I didn't like their style). There is not ongoing relationship between our two companies, but according to union, I still have to have an agreement.

This completely limits business ability to "try out" a supplier. Perhaps it could be suggested that some sort of volume/value limit, after which a company obviously having a "relationship" with a supplier and need to have an agreement be put in place. It seems a bit unnecessary to set up an agreement for \$20 of work.

Appendix 3: Communications from Home based workers

Author: [name withheld]

Company: **SKOLA**

Products:

Case Study – Re: Wages and conditions

I [name withheld] is a contracted outworker for SKOLA and also a member of the Textile Clothing and Footwear Union of Australia.

I have been informed that my working position from a contracted outworker is to be changed to full time/part time/ casual. What I don't understand is why I am being hassled by the Fair Work Trade all the time. I am a member of the union, I pay every week to be protected from constantly being hassled, I follow everything that is required under the law and I fill out the forms.

This makes the business difficult as you are making them drive out of business in Australia. There will be no job opportunities in Australia and everything will be shipped overseas. I have 2 children and a family to support. I try to provide my family with everything that they need. If there is no work for me I am unable to provide for my family.

In the circumstances of the way I get payed by SKOLA is a standard award wage plus supper. I am more than happy to get payed at this rate. What concerns me is, I always get hassled and it makes it difficult. I believe I do everything right of what is required. But, there are workers out there who are getting paid by the duration to make the garment and they are not having a difficult time with the union. My working obligations with SKOLA at this point I am more than happy to continue to work with them as a contracted outworker.

I am unable to see myself, working as a contracted outworker, to be a full time/part time/casual worker. I find that it will not work and it will be unfair for both parties. The work is not constantly available all the time, it's available only seasonally.

I strongly state you view this letter as my concern and opinion of what the situation matter between myself and the union.

Emails

Hi [name withheld],

One of our outworkers just complained to us about the Union visiting her. They were asking her personal questions like when she arrived in Australia, how many kids she have etc she didn't want to answer them but she felt bullied into giving answers.

Fair enough that we as the employer put up with this behaviour but to harass our employees is uncalled for. Is there anything we can do?

Thanks

[name withheld]

Appendix 4: Transcript of telephone interview with home based worker

Date: 7th December 2011

Transcript : Interviewee:: Jo [name withheld but works for Victorian clothing principal]
Interviewer :: Paula Rogers TFIA

Duration of interview : 10minutes 25 seconds

PAULA: I want to let you know Jo that we are recording this conversation and just to confirm that you are working within the clothing industry in Australia and that you've been working – can you tell me how many years you've been working in the garment industry?

JO: I work nearly 15 year with sewing

PAULA: And the company that you are doing contracting for at the moment how long have you been working for them?

JO: About 2 years

PAULA: Maybe if you tell me a little bit about you. How long have you been, in Australia, how long have you been living here?

JO: About 25 years

PAULA: And what country did you come from?

JO: Vietnam

PAULA: And how many Children do you have, jo?

JO: I have Three.

PAULA: And can you tell me how old are they?

Jo: The big one is 21, the second is 20 and another one is 17.

PAULA: And what do like about working as a contractor from home?

JO: I like to works as a contractor at home, because my husband and children can help me.

PAULA: And do you have any challenges working from home?

Jo: Sorry, I misunderstand

Paula; Do you have any difficulties working from home?

JO: No, everything fine, it's very good for me

PAULA: Do you have any one else at home to take care of at home apart from your children?

JO: I can look after my children and I can work from home that is why I work at Home, I can look after my children and look after my father, he is 85 years old already- I can cooking, go to the doctor and do everything

PAULA: OK so you can fit everything in, so that you can take care of your children your father ..

JO: Yes, yes ..that's right

PAULA: And for the company that you are doing the contracting for at the moment, do they pay you well?

JO: Yes, they pay very good, and everything very good now

PAULA: And do you have enough work from them

JO: Yes, very good

PAULA: And if you had a problem with them do you think you would be able to talk with them about whether or not you are uncomfortable with the work you are doing?

Jo: Yes, we are look like friendly, if it is difficult we can discuss something

Paula; And what do think of the laws at the moment that make it difficult for you to work more flexibly from home?

JO: I think they are no good, I work and I know how hard or how easy I do, so that this is my job and my business, because if it is no good I can find another job or find another company, you know. I can I can do this one, do this one ... this is a freedom country

PAULA: So you have the choice to negotiate the price?

JO: Pardon

PAULA: You can negotiate the price?

JO: Negotiate, what is this?

PAULA: You agree with the price with the company you contract for?

JO: They give me the good price, just right by the time do, that's why it is good for me now

PAULA: And if you are not happy with the price you can discuss?

JO: Yes, if I am not happy with the price I can discuss with them, if they ..If they don't agree, I can find another job, that is easy

PAULA: And do you have any concern about the involvement of the union , on the work that you do?

JO: They talk with me, they want me to do the outworker, but because I can't do the outworker, I want to be a contract, because sometimes I am busy and I want to work less, and sometimes I am free, I can work more hours, every week I can't do 38 hours.

PAULA: So it's difficult for you to work 38 hours a week, sometimes you want to work more sometimes you want to work less?

Jo: Yes, that's right

PAULA: OK. And when you talk about working more or working less, how many hours is that?

JO: How many what?

PAULA: How many hours is that? Could you work 60 hours a week, or is it less than that?

JO: sometimes I work 20 hours a week, sometimes I work 40, 45 hours a week, if I am busy.

PAULA: OK.

JO: My father helps me a lot, I can say how many hours I work a well ..very hard to say that.

PAULA: But you like the way that you work at the moment?

JO: Yes, I like the work now because the price suits for me. I can work more or less ..I do myself, you know.

PAULA: And have you ever been offered 3 or 4 dollars an hour for the work that you do?

JO: Never, I think that is a stupid question you know because we are know what how much ..they pay me, if they pay 3 dollar, 4 dollar I don't work for them, I can say no. They can ??...me, if they pay 3 dollar 4 dollar I don't know what they don't say no with the boss. I feel funny, it someone say something like that why you can choose yourself *...more but difficult to understand*

PAULA: Do you know anyone who has ever been offered that kind of money?

JO: Sorry

PAULA: Do you know anyone who has been asked to do work for 3 or 4 dollars an hour?

JO: No, never, I never hear, I just hear this one from the union.

PAULA: OK, Is there anything that you would like to add Jo in our conversation?

JO: I just like to tell the union "please, we already do the good job now, now everyone knows it is very hard to get the job, because they [union] do too much and after we loose the job who will feed my family, who will pay me, very hard to get the job now if we go to Centrelink - the Union say no ..everyone must look for find job to get unemployment – everyone knows it is hard to find a job now. So just please I feel very very happy now, don't draw too much [attention] to my business, I want everything OK, I don't want to loose the job. If I loose the job who will pay me, if the Union can guarantee then OK, no worries, they will guarantee the job for me OK ...I hear them, I will work with them ..and join the union and do everything, but if they can't guarantee the job for me, please do draw too much to my business. Leave me, my boss and my company. OK?

PAULA: Thanks Jo,

Paula advises Jo to call if she needs any further help and if Jo no longer wishes to have the recording, I can delete.

Appendix 5: Letter from home based SME

Submitted on: Friday, 9 December 2011

Company: Pyn

Products: Ladies wear

Case Study – Re: Very small business and the Textile Clothing Footwear and Associated Industries Award 2010' (the Award) and the National Employment Standards (nes)

I am 28 years old and I have been running my own business for 3 years, I am a sole trader and I have no employees in short I am a very small business. I have worked in the Textiles, Clothing and Footwear industry for 4 years prior to starting my business and before that I studied clothing production and design for 2 years.

Luckily during my time working for others I was able to forge relationships with manufactures which has helped me in starting my own label. These relationships helped me as the aforementioned makers let me start small with low minimums.

After working with this maker for a couple of years I received a call saying that they were closing their factory because of fears of the Union. This left me in a tailspin as I now had to find new makers and fast. I went to the Ethical Clothing Australia website to start my research, I called all of the accredited companies on the list and found that many of them were not interested in working with me because of the small quantities that I get produced, or that they had enough work on as they could only employ a limited amount of staff as they had to give people full time work. How is the TCF manufacturing industry in Australia going to grow in this limiting environment?

Based on the way that things are going, the Textile Clothing Footwear and Associated Industries Award 2010 (the Award) and the National Employment Standards (NES) is going to put more and more people out of work, if people in the TCF industry are unable to employ people on an independent contractor basis, in turn the TCF manufacturing industry will be forced completely off-shore.

Our work flow is seasonal; it is very hard to be able to guarantee full-time hours for machinists. I don't know how new labels are going to function, how will they be able to start off small as I did. Furthermore, how will they even be able to get their garments produced here in Australia?

The other side to this is that of the machinists themselves, many who have families who require flexible work hours from home. Many people in different industries are afforded the right to work from home as independent contractors and have the privacy to do so without being visited by Unions.

I do not want anyone to be exploited; quite the opposite I want people to be educated of their rights and for them to be able to make an informed decision on their fair pay in terms that suit them.

Appendix 6: Copy of Maker Survey conducted Oct/ Nov 2011 and results

Participant Name/Company _____ Email _____ Phone _____

1. Will you attend the Maker's Meeting on _____?

Yes No

2a. How would you define your place in the local TCF supply chain (pls tick)?

Principal #1 Principal #2/ Independent Contractor (working from domestic premises) Principal #2/ Independent Contractor (working from commercial premises)

Outworker Technical/ Product Development Contractor Other (pls advise)

2b. If you define yourself as an independent contractor/outworker, how do you receive payment?

Invoice Paid as employee Other (pls advise)

3a. Do you engage any of the following within your local TCF business/supply chain (pls tick)?

Principal #2/Independent Contractor (working from domestic premises) Principal #2/Independent Contractor (working from commercial premises)

Outworker Technical/Product Development Contractor Other (pls advise)

4. Please tick the box below which closest relates to how you feel.

Complete your understanding of the following statements;	Extremely Confident	Confident	Somewhat Confident	Neutral	Not Confident
When you completed Question 3, how confident were you that you were defining those business relationships accurately from a legal perspective.					
How confident are you that you understand your obligations and responsibilities, in regards to engaging the following, as outlined by Fair Work Act 1999 & the TCFAI Award 2010;					
<ul style="list-style-type: none"> • Independent Contractors • In-house employees • Outworkers 					
I understand my responsibilities regarding OH&S					

Using the scale of 1-5 (1=Poor, 3=Average, 5=Excellent)

5. Do you believe our industry needs stronger clarification around our obligations when engaging independent contractors, employees & outworkers?

6. Do you believe our industry needs a stronger voice and better representation when new legislation affecting it is being developed/reviewed?

1
2
3
4
5

7. Who should represent our industry when new legislation is being developed/reviewed?

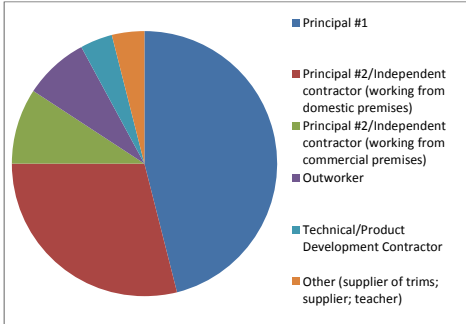
TFIA Australian Industry Group Other (pls advise)

TCF INDUSTRY RESEARCH SURVEY 2011

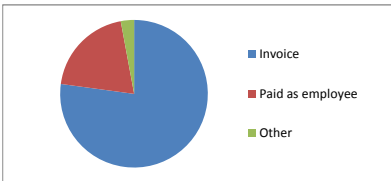
RESULTS SUMMARY

The survey was handed out at meetings held by TFIA in Melbourne on 16 September and 21 October, and also distributed by email - 76 responses were received.

1 - How would you define your place in the local TCF supply chain?

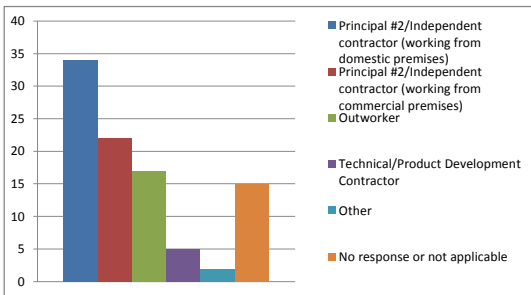


2 - If you define yourself as an independent contractor/outworker, how do you receive payment?

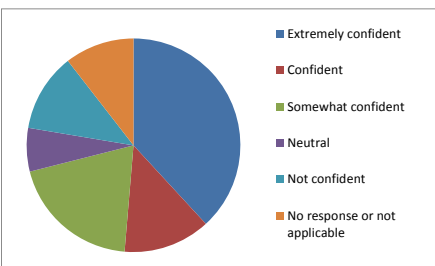


3 - Do you engage any of the following within your local TCF business/supply chain?

Of the 76 respondents, 61 engaged a total of 95 people, as per the categories below:

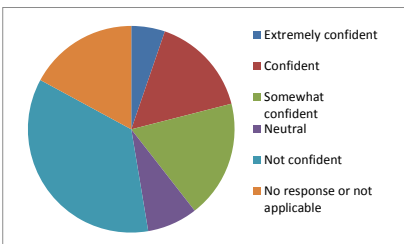


4 - When you completed Question 3, how confident were you that you were defining those business relationships accurately from a legal perspective?

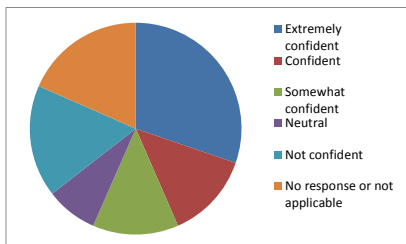


How confident are you that you understand your obligations & responsibilities, in regards to engaging the following, as outlined by Fair Work Act 1999 & The TCFAI Award 2010? -

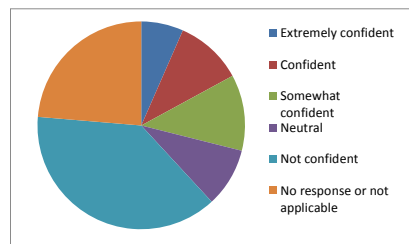
INDEPENDENT CONTRACTORS:



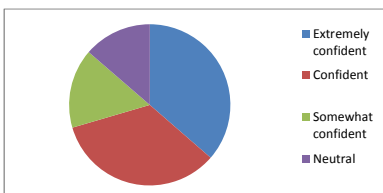
IN-HOUSE EMPLOYEES:



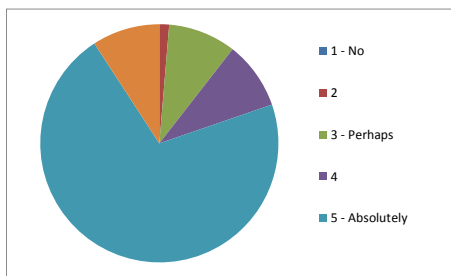
OUTWORKERS



I understand my responsibilities regarding OH&S:



5 - Do you believe our industry needs stronger clarification around our obligations when engaging independent contractors, employees & outworkers?



6 - Do you believe our industry needs a stronger voice and better representation when new legislation affecting it is being developed/reviewed?

