Submission

to

Senate Employment, Workplace Relations and Education References Committee

Inquiry into Workplace Agreements

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SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION REFERENCES COMMITTEE INQUIRY INTO WORKPLACE AGREEMENTS

SUBMISSION OF THE TEXTILE CLOTHING AND FOOTWEAR UNION OF AUSTRALIA

17 AUGUST 2005

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A. Introduction and Summary of Submission

1. The Textile Clothing and Footwear Union of Australia (TCFUA) welcomes the opportunity to make this submission to the Senate Employment, Workplace Relations and Education References Committee regarding the changed dynamics of workplace agreement making likely to occur with a radical overhaul of the Workplace Relations Act.

2. The TCFUA is an organisation of employees registered pursuant to the *Workplace Relations Act 1996*. Our membership consists of workers employed in or in connection with the textile, clothing and footwear industry in Australia.

3. In order to put our views about the particular terms of reference of this inquiry into context, we believe it is necessary to provide the Committee with some information about the nature of our industry and our members, which we have set out first. We then address the terms of reference of the inquiry.

4. Our fundamental position is that the effectiveness of agreement-making as a means for setting fair wages and conditions for workers is entirely determined by the relative bargaining power of the worker in relation to the employer.

5. We believe that in the TCF industry, no individual employee will genuinely have equal bargaining power with an employer. It is almost impossible to imagine an individual TCF worker having the capacity to genuinely bargain with the company that employs him or her about the terms and conditions of the employment relationship in an equal way.

6. Our experience has demonstrated that the best way a worker to increase his or her bargaining power in a negotiation about terms and conditions of employment is to act *collectively* through the negotiation of a collective union agreement. In those

workplaces where our members have done so, an agreement containing fair terms and conditions of employment is more likely to result.

7. However, our experience has also demonstrated that there are many other factors which limit an employee's capacity to negotiate, such as levels of education, ethnicity, gender, language issues, size of the workplace, fear of discrimination and insecurity about employment in an ever contracting industry. The case of a clothing outworker is possibly the most graphic example of these factors, which all relate fundamentally to an employee's bargaining power relative to an employer. For these and other reasons, a large proportion of our members currently depend on industry-wide minimum terms and conditions of employment through the Award system.

8. For an agreement-making regime to be fair it is absolutely imperative that a comprehensive set of minimum terms and conditions of employment underpin that regime, either by legislation or through industry-wide awards. A comprehensive set of minimum conditions is necessary both to protect those employees who will never be in a position to genuinely bargain, and to provide an effective comparator to ensure that terms and conditions of employment in agreements meet or exceed those fundamental minimums.

9. The TCFUA endorses the submission to the Inquiry made by *Fairwear.*

B. Snapshot of our industry

Contraction of the Industry and Reduction in Employment

10. In 2003 the Productivity Commission conducted a review of government assistance to the Textile, Clothing and Footwear industry, and in reporting its findings, made the following observations about the nature of the industry and the transitions which have taken place in it:

The TCF sector in Australia today is very different from that of the past. Traditionally, local activity was characterized by a series of manufacturing processes, with firms along the supply chain purchasing inputs from (mainly local) upstream suppliers and selling outputs to (mainly local) downstream customers. High tariffs and quota protection ensured the continued viability of firms along the chain, restricted the ability to source from competing offshore suppliers and reduced the incentive to find new (export) markets. Retailers played a largely passive role in selling final products designed and supplied by manufacturers with limited direct contribution to purchasing or production decisions….

In recent years, however, competition from emerging low-wage production centres, slowing growth in domestic consumer demand, large reductions in domestic assistance and increased concentration in retailing have collectively placed new pressures on local TCF manufacturers. Many firms have left the sector, while others have rationalized, merged and pursued new sourcing strategies to survive. As a result, aggregate domestic TCF manufacturing activity has contracted and import penetration has risen sharply….[1]

11. The report notes that the effect of these changes has been a reduction in aggregate output and employment in the sector:

"Industry restructuring and rationalisation, in combination with a sharp rise in import penetation to more than 50% of the total TCF market, have resulted in contractions in overall TCF manufacturing output and employment…. The sector's aggregate value added fell by more than 30% in real terms between 1990-01 and 2001-02, while employment was approximately 35% lower.

At the TCF industry level, clothing and footwear production has contracted the most with employment losses in these two industries accounting for 60% of the decline in total sectoral employment since 1991 (although there may have

[1] Productivity Commission, *Review of TCF Assistance Inquiry Report*, Report no 26, 31 July 2003, p9.

been some offsetting increase in the number of outworkers...). This experience has coincided with a surge in imports of clothing and footwear, with China the main source. It supplied nearly 70% of all Australia's imports of clothing and footwear in 2001-02."[2]

12. As far as jobs in the industry are concerned, in 1986 there were 116,000 workers in the Textile, Clothing and Footwear industries in Australia[3]. Fifteen years later, by 2000/2001, employment in the TCF industry had fallen to 57,800[4] or less than half that number. Four years on, tariffs have dropped further, imports have increased and we believe due to constant factory closures and redundancies, employment levels are lower than ever.

Types of Workplaces in the Industry

13. The most recent figures on the size of TCF companies and breakdown of employment in the industry are from 2000/01, however they are thought by the TFIA to apply similarly to the current environment. These figures are as follows[5]:

Percentage Share of Manufacturing Units in Industry by Number of Employees

	0-9 Employees	10-99 Employees	100+ Employees
Textile	79.3%	18.4%	2.3%
Clothing	81.5%	17.5%	1%
Footwear	65.3%	30.8%	3.8%

Percentage Share of Employment in the Industry by Size of Manufacturing Unit

	0-9 Employees	10-99 Employees	100+ Employees
Textile	21.8%	35.2%	43%
Clothing	28.1%	43.9%	28.1%
Footwear	9.5%	46.3%	44.2%

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[2] Productivity Commission, above note 1, p11
[3] ABS. TCFL Employment. ANZIC 4d by Financial Year.
[4] TFIA, *The Australian TCF Industry – A Profile*, http://www.tfia.com.au. n.b. includes leather
[5] TFIA, above note 4.

14. These figures demonstrate that the predominant manufacturing unit in each sector of the industry is a very small business, and in each sector less than half of the employees (and just over a quarter in the case of clothing) are employed in large businesses.

Outworkers in the Clothing Industry

15. All of the material above is directed to describing the formal sector of the Textile, Clothing and Footwear industry. What is often overlooked is a vast informal sector in the Australian clothing sector, namely the large numbers of outworkers performing home based clothing manufacturing work. In order to get a complete picture of the state of the TCF industry it is necessary to understand that the predominant form of manufacturing work in the clothing industry in Australia takes place in the "informal sector" and is performed by clothing outworkers.

16. There is controversy over the number of outworkers, which given the invisible nature of the work, is hard to determine. Estimates have ranged between 25,000[6], which the TCFUA considers to be a gross underestimate, to 330,000, an estimate made in 1995 by the TCFUA[7] and reflected in a Senate Committee Inquiry in 1996[8].

17. Even based on the most conservative estimate, outwork accounts for around 40% of employment across the whole TCF sector, and exceeds factory based clothing manufacture by about 25%.[9]

18. Outworkers' conditions of work are notoriously bad. The most recent study of 119 outworkers found:

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[6] Productivity Commission, above note 1 at 182
[7] Textile, Clothing and Footwear Union of Australia, *The Hidden Cost of Fashion*, Report on the National Outwork Information Campaign, March 1995, at 5.
[8] Senate Economic Reference Committee, *Report on Outworkers in the Garment Industry,* (1996), executive summary
[9] Productivity Commission, above note 1 at 182

- 97% were women;
- 92% were born in Vietnam, only 2 were born in Australia;
- Over 80% had been outworkers for over 5 years;
- The average hourly rate of pay for the outworkers surveyed was $3.60 per hour;
- In 88% of cases wages were only used for essential expenses;
- 75% were not usually offered regular work;
- 83% were not usually paid wages on time and 52% often did not receive wages at all;
- 45% did not know the pay before starting the job, or got paid a different amount from the agreed price;
- barely any of the outworkers received holiday pay (3%) or public holiday pay (2%);
- 62% spent 7 days a week sewing, and an additional 26% spent 6 days; and
- The largest group worked 10 hours per day (21%) and the second largest group worked 14-15 hours per day (18%).

19. Since the above estimates were reached, the general contraction of the formal clothing industry is likely to have affected the number of outworkers. On the one hand, the movement of much production offshore and "import penetration" means that there is less manufacturing generally taking place domestically.[10] However, the TCFUA believes that a significant portion of this general contraction in the formal industry is a result of the move from factory based manufacturing to home based work.

[10] Productivity Commission, above note 1, at 181.

Retrenchments and Job Losses

20. In addition, there are large numbers of TCF workers who have lost their jobs and been unable to find other work, or comparable work.

21. A study of over 300 displaced TCF workers in August 2003 by the Centre for Work and Change in the Global Era WAGE[11] found that, where the average time since retrenchment was over three years:
Only 54% of those surveyed had found work and only one in five had found work broadly commensurate with their former TCF job in terms of hours, pay and conditions.

- Mean weekly earnings of all respondents before retrenchment was $409.44. At the time of the survey, post-retrenchment, it was $360.24, with the upper income range truncated.

- Although 96% had worked full-time before retrenchment, only 21% now work full-time, with the mean number of hours worked per week after retrenchment being 27. One-fifth of the sample has found only casual employment after their jobs – approximately the same number as have found full-time employment.

- Eighty-one percent had received no instrumental assistance from their past employer, the Government or any agency since retrenchment.

22. It is fair to say that in light of the contraction and job loss in the industry, the current organisation of the industry into very small manufacturing units, the prevalence of home based outworkers in the clothing industry, the vast numbers of TCF workers who have not found comparative employment and the Government's current

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[11] Monash University, WAGE, Centre for Work and Society in the Global Era, *The Long Goodbye, TCF workers, unemployment and tariff deregulation*, August 2003.

preoccupation with further tariff reduction and free trade agreements with developing countries, our members, rightly, often do not feel secure in their employment.

C. Snapshot of our membership and employent conditions

23. Most of our members are based in Victoria and New South Wales, followed by Queensland and South Australia. The vast majority of our members work in textiles and clothing with only a small proportion working in the footwear industry.

24. The majority of our members are engaged in or in connection with manufacturing work. Formal Australian qualification levels in the TCF workforce generally are deemed low, with 74% of the TCF workforce having no formal qualification.[12]

25. We have a very high proportion of members from a non English speaking background. In the clothing industry, we estimate this to be as high as 80% of our members, and in the textile and footwear industries we estimate that up to approximately 60-70% of our members are from a non English speaking background.

26. The typical workplaces our members work in can be categorised as follows:

- Textile:
    - Most commonly, medium sized textile factories, usually with between 40 – 100 employees.
    - A smaller number of large textile factories, with 100 – 300 employees.
    - A smaller number of small textile factories with less than 40 employees.

[12] ABS. 1996 Census Data

- Clothing:
    - Most commonly, small clothing companies of less than 20 employees;
    - A small number of medium sized clothing companies with approximately 20 – 60 employees;
    - A very small number of larger clothing companies of over 100 employees;
    - Home-based clothing outworkers mainly performing work for small clothing companies.

- Footwear:
    - A majority of small companies of less than 40 employees;
    - A small number of large companies with more than 40 employees.

27. A large proportion of our membership including, we estimate, more than half of clothing workers but less than half of textile workers, are reliant on either Federal or State Awards to determine their terms and conditions of employment. The relevant full-time basic Award pay rates that apply to these members pursuant to the federal *Textile Award 2000*, the *Clothing Trades Award 1999* and the *Footwear Manufacturing and Components Industries Award 2000* ranges between approximately $26,057 and $32,235 per annum, with the vast majority at skill level 2, the salary for which is $27,272 per annum.

28. Further, those of our members who are clothing outworkers rely on the relevant State or Federal *Clothing Trades Award* in combination with State legislation in Victoria, South Australia, New South Wales and Queensland which deem Outworkers to be employees, deem various contracting parties for whom outworkers perform work to be employers, and provide that the minimum Award rates and conditions apply.

29. Collective union agreements are the other predominant form of industrial regulation of our members. These are primarily in operation in medium and large textile workplaces and larger clothing workplaces.

30. There are very few non-union collective agreements which apply to our members, or in our industry generally. Where these exist they generally have less favourable conditions than union agreements.

31. Very few of our members are covered by AWAs however there are examples of them within the industry, and there are also examples of our members, prior to their involvement with the Union, having been covered by an AWA with less favourable conditions than the relevant Award.

32. There is also a huge prevalence of sham arrangements and illegal below-award pay and conditions in our industry afforded to outworkers and in clothing sweatshops, which unscrupulous employers often claim to be by agreement with employees.

D. Response to the Inquiry Terms of Reference

The scope and coverage of agreements, including the extent to which employees are covered by non-comprehensive agreements

33. Where our members are covered by collective union agreements, the vast majority are comprehensive agreements, registered pursuant to section 170LJ of the *Workplace Relations Act 1996* in the federal sphere, or under equivalent provisions for the registration of collective union agreements in the various State industrial relations legislation.

34. This has been a direct result of the Union adopting a practice of ensuring that all conditions which were previously protected by industry Awards are protected or enhanced through our agreement-making, by attaching Awards, incorporating their clauses or referring to them in agreements, along with our members at a particular

work-site having the strength of bargaining power to negotiate such agreements. We have occasionally entered subject-specific registered agreements, in particular in relation to redundancy, which usually supplement a more comprehensive agreement.

35. We have also overcome the limitations of certified agreement making which resulted from the High Court's interpretation of Division provision *Electrolux* decision by reaching agreements with employers about subject matters which could fall foul of the *Electrolux* principles and enshrining those agreements using common law Deeds. A common example of this type of agreement is to deal with the protection of employee entitlements.

36. The current Federal law and laws in most States have a number of features which provide underlying protections for their collective agreement-making regimes. These include:

- Provision for a "no disadvantage test" or other similar tests which provide for a comparison between Award terms and conditions of employment and the proposed collective agreement prior to, and as a condition of, its registration;[13] and

- Provision for the continued operation of Awards and legislation where the collective agreement does not deal with a matter in the Award or legislation and provisions to prevent the contracting out of Awards;[14]

37. The situation already differs in respect of Australian Workplace Agreements. Although the approval process for AWAs requires a "no disadvantage test" comparison, it is administered entirely by the Employment Advocate in a private way

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[13] For Example, Federal *WRA* Part VIE, Queensland *Industrial Relations Act 1999* s160, New South Wales *Industrial Relations Act 1996* s35, South Australian *Fair Work Act 1994* s79(1)(e).
[14] For Example, Federal *WRA* ss170LY and 170LZ, Queensland *Industrial Relations Act 1999* s165 and s135, New South Wales *Industrial Relations Act 1996* s41, South Australian *Fair Work Act 1994* s81 and s94.

which is not subject to intervention from affected parties, or challenge through the industrial relations system.

38. Further, once an AWA is in place, it is effectively a means to completely contract out any State or Federal Award that would otherwise apply, most State laws that would otherwise apply and some Certified Agreements which would otherwise apply.[15] Accordingly, an AWA does not need to be comprehensive in order to exclude the operation of the comprehensive terms and conditions contained in Awards, especially non-simplified State Awards.

39. Under the foreshadowed Government reforms, certified agreements will also be subject to an approval process by the Employment Advocate, and the relevant "no disadvantage test" for both certified agreements and AWAs will be a bare handful of conditions and have no relationship with the broader content of Awards.

40. Where AWAs are used in our industry, they are often "sold" to employees on the basis that they meet the no disadvantage test and accordingly in theory should contain comparable conditions to Awards. Assuming that AWAs will continue to override Awards, the only current incentive for employers to promote AWAs which provide for comprehensive terms and conditions of employment, the no disadvantage test, will be lost.

The capacity for employers and employees to choose the form of agreement-making which best suits their needs.

41. This term of reference seems to assume that employers and employees will seek to make the same choice of "form of agreement making" and that the same "form of agreement making" will "best suit" both their needs.

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[15] *WRA sections 170VQ, 170VR*

42. As far as our members are concerned, the most suitable form of industrial regulation is either a comprehensive Award or a union collective Agreement. What might suit an employer is likely to differ from what will suit them.

43. Many of our members will never be in a position to bargain equally with an employer and for these employees, no "form of agreement-making" based at the individual or workplace level will ever best suit their needs. These workers need the protection of a comprehensive set of minimum terms and conditions of employment, either by legislation or through industry-wide awards. A comprehensive set of minimum conditions is necessary to protect those employees who will never be in a position to genuinely bargain. There is currently a capacity for the Union and employers in the industry to reach agreements which can apply on an industry-wide basis as an Award, however in the Federal sphere, this is curtailed by the effect of section 89A of the *WRA*, and the foreshadowed further reduction in allowable matters along with the foreshadowed overriding of State Awards will much more severely curtail this capacity.

44. We often see, usually by pursuing Award underpayment claims, what happens when our members are left to negotiate individually with their employer. For example, a clothing worker who had worked for her employer for over 10 years, both in a factory and later home-based work, had individually "negotiated" terms and conditions of employment which provided for below-Award wage rates, stand-downs at the employer's discretion, no public holidays, no annual leave, no sick leave, no superannuation, no long service leave accrual, no minimum guaranteed hours. Given that it is currently not possible to contract out of the operation of an Award, that worker through the assistance of the Union is now being afforded the minimum conditions in the Federal *Clothing Trades Award 1999*. It is worth noting that had this arrangement been enshrined in an AWA, the worker concerned would have had no capacity to argue that the Award conditions should apply.

45. In our experience, employees in our industry have better terms and conditions of employment when they collectively bargain, as a union, with their employer. It is this form of agreement making which gets the best results for our members.

46. However, one clear deficiency with the existing Federal law is that workers do not have the right to choose to have a collective, union agreement. There is no obligation on an employer to respect that choice of workers, and employers have wide discretion to offer superior terms and conditions of employment to employees, conditional upon the employer using a form of agreement other than a collective union agreement, such as an AWA or a section 170LK agreement. It seems likely that despite all of the Government's rhetoric about choice and flexibility, the foreshadowed industrial relations reforms will in fact introduce further barriers to workers' choice to be represented by their union and enter a collective union agreement, such as changes to rights of entry laws and additional impediments to the taking of collective action in support of bargaining claims.

The parties' ability to genuinely bargain, focusing on groups such as women, youth and casual employees

47. There are a number of factors which impact on our members' and TCF employees' capacity to genuinely bargain.

48. We have given an outline of the characteristics of our industry above. There are a number of features of our membership which affect their ability to *individually* genuinely bargain with an employer. These factors include levels of education, including simply the capacity to read and write in English, language difficulties, the effect of the contraction of the industry and fears about job security and fears about discrimination in the workplace for speaking out. These fears are often worse amongst those with the least secure forms of employment such as casual employees.

49. Many of our members have overcome these factors by collectively bargaining, as a union, for a union agreement. In our experience this has been most common at larger workplaces, which, given the breakdown of our membership, are much more likely to be in the textile industry. It may also not be coincidental that the textile industry has suffered less from tariff reduction and import penetration in recent years. Further, there is a higher proportion of male employees in the textile industry, and a lower proportion of workers with a non-english speaking background. Where our members act collectively they are often able to negotiate above-Award conditions, especially in areas which are important in our industry such as redundancy entitlements and protection of accrued entitlements. Density of union membership at a workplace is also a key factor to obtaining better outcomes from the negotiations.

50. There are others of our members, most of whom work at smaller workplaces, who are so fearful of discrimination, or losing their livelihood that they do not even wish to disclose to their employer that they are a union member, let alone have the capacity to bargain collectively or individually their terms and conditions of employment. In our experience, the number of members who do not want to disclose their union membership to their employer has been increasing. These workers are often women, and usually from a Non English Speaking Background.

51. Workers in regional areas often also suffer from a particular imbalance of bargaining power. They often live in areas with high unemployment and very few other job opportunities. The economic power of regional companies, and the often constant threats of closure or downsizing, often detrimentally effects their capacity to bargain fairly.

52. The case of clothing outworkers is a case in point about the effect of the characteristics listed above, which all relate fundamentally to an employee's bargaining power relative to an employer. Examples of what happens when an employer "individually bargains" terms and conditions of employment with outworkers are set out in case studies annexed to the Victorian Ethical Clothing

Council – Outworkers Lawful Entitlements Compliance Report, November 2004. They are attached. This material leads to the inescapable conclusion that individual contracts will rarely, if ever, be a feasible option for a great number of our members.

53. There is currently no requirement in Federal legislation that agreements, or negotiations, be translated or interpreted into the language of the worker concerned prior to their approval of the agreement. The Union is regularly able to perform this role for our members who negotiate collective union agreements to redress this disadvantage.

The social objectives, including addressing the gender pay gap and enabling employees to better balance their work and family responsibilities;

54. It is apparent that addressing particular social issues related to work, such as work/family balance, and pay inequities, could not be further from the objectives of the government in implementing its proposed industrial relations agenda. Instead the rhetoric associated with these reforms is about choice, productivity, high employment, a strong economy.

55. Governments and tribunals who implement measures to meet social objectives, such as helping workers balance work and family responsibilities, recognise that these objectives may well come at a cost to productivity or choice, but that the social benefits of doing so and redressing disadvantage outweigh any cost. The government, in implementing its proposed reforms, is apparently not concerned with elevating any such social objective above an employer's flexibility.

56. Whether or not a particular agreement will meet social objectives such as addressing the gender pay gap or better balancing work and family responsibilities, as with other conditions of employment, will depend on the relative bargaining strength of the parties. However unless there are mandatory requirements in agreement-making legislation, any such developments will occur on an ad-hoc basis. There is no

capacity for a "flow on" effect from such agreements into Awards to create more general standards. This also means there is no level playing field for companies in the industry. A lack of transparency of the content of Agreements can lead to the undercutting of those companies whose agreements do aim to meet such social objectives by those who don't.

57. Certainly in some circumstances in our industry, women employees do not have the same negotiating capacity as male employees. A collective agreement, or industry wide Award, allows this imbalance to be neutralised. In one instance in our industry, a company with a union certified agreement has organised its workforce so that the majority of women employees are classified at a lower rate than a majority of male employees. The certified agreement, along with the relevant Award, allows for an independent review of this classification structure by the AIRC and accordingly this imbalance can be challenged, along with the same percentage pay increases and other conditions. There is no guarantee that if each of these employees were on individual agreements, that there would be pay equity in the first place, or the capacity to scrutinise and correct any unfair gender imbalance.

58. The recent AIRC test case decision regarding family provisions illustrates how new community standards can be developed which address social objectives, based on consideration of evidence from both employer and employee groups and a balancing of interests. These across the board measures will not be possible in a system which promotes regulation at the individual level to the exclusion of across the board standards.

The capacity of the agreement to contribute to productivity improvements, efficiency, competitiveness, flexibility, fairness and growing living standards; and

59. Deregulation of labour conditions will always provide for increased flexibility for employers. If employers are no longer required to enter agreements which meet a comprehensive set of minimum standards, it makes sense that it is likely to cost

employers less and provide less restrictions on the manner in which they can require their employees to perform work. Some examples of such "flexibilities" could be:

- The capacity to require an employee to work at any time of the day or night, or on the weekend without shift allowances or overtime payments;
- The capacity to require an employee to work any number of hours without limit;
- The capacity not to allow public holidays;
- The capacity not to allow meal breaks;
- The capacity to require an employee not to work, without pay, when work is not available;
- The capacity to pay a lower minimum wage
- The capacity to dismiss an employee at will;
- The capacity for trading off sick leave;
- The capacity for trading off annual leave for one off pay increases;
- The capacity not to pay overtime or penalty rates; or
- The capacity to direct an employee to do any job at all;

60. Where there are few or no minimum protections in place, given that there is almost always an imbalance of bargaining power between an individual employee and an employer, it is likely that these increased flexibilities will come at a cost to the employee, both financial and in terms of his or her working life and work/life balance. The theory that profits which arise from productivity improvements will be passed on fairly to employees based on the goodwill of employers is simply untenable. In order to be competitive, those employers who seek to offer fairer conditions will be pressured to reduce conditions because of those employers who do reduce workers' conditions.

61. Productivity improvements should not be made at a personal cost to workers. Any agreement-making regime should ensure that productivity improvements attained through an agreement are coupled with improvements to working conditions. For example, in a number of our collective union agreements there are measures to improve productivity, but these do not come at a cost to workers. This is in a context

where a safety-net of conditions applies, and where our members act collectively and are strong.

62. An agreement-making regime which promotes individual agreements and prescribes scant minimum conditions may well allow an employer to make more money from its business, but it will inevitably do so at the expense of the workers who will be worse off as a result.

63. Further. individual agreements do not allow for any scrutiny as to their fairness and as such, are likely to promote suspicion and division between employees.

Australia's International Obligations

64. There are a number of international obligations which Australia must meet by virtue of its membership of the International Labor Organisation and ratification of International Labor Organisation conventions.

65. The *ILO Declaration on Fundamental Principles and Rights At Work* includes a commitment to freedom of association and the effective recognition of the right to collective bargaining. This means:

"All workers and all employers have the right freely to form and join groups for the promotion and defence of their occupational interests. This basic human right goes together with freedom of expression. It is the basis of democratic representation and governance. Those concerned need to be able to exercise their right to influence matters that directly concern them. In other words, their voice needs to be heard and taken into account.

Workers and employers can set up, join and run their own organisations without interference from the State or one another. Of course, they have to respect the law of the land - but the law of the land, in turn, must respect the principles of freedom of association. These principles cannot be set aside for any sector of activities or group of workers.

The right freely to run their own activities means that workers' and employers' organisations can independently determine how they best wish to promote and defend their occupational interests. This covers both long-term strategies and action

in specific circumstances, including recourse to strike and lock out. They can independently affiliate to international organisations and cooperate within them.

If the collective bargaining system does not produce an acceptable result and strike action is taken, certain limited categories of workers can be excluded from such action to ensure the basic safety of the population and essential functioning of the State.

Voluntary collective bargaining is a process through which employers - or their organisations - and trade unions or, in their absence, representatives freely designated by the workers discuss and negotiate their relations, in particular terms and conditions of work. Such bargaining in good faith aims at reaching mutually acceptable collective agreements.

The collective bargaining process also covers the phase before actual negotiations - information sharing, consultation, joint assessments - as well as the implementation of collective agreements. Where agreement is not reached, dispute settlement procedures ranging from conciliation through mediation to arbitration may be used.

To realise the principle of freedom of association and the right to collective bargaining in practice requires, among other things, a legal basis which guarantees that these rights are enforced; an enabling institutional framework, which can be tripartite, between the employers' and workers' organisations, or combinations of both; absence of discrimination against individuals who wish to exercise their rights to have their voice heard; and acceptance by employers' and workers' organisations as partners for solving joint problems and dealing with mutual challenges.[16]

66. Australia has also ratified the *C98 Right to Organise and Collective Bargaining Convention, 1949*. It provides, amongst other things:

> *"Article 4: Measures appropriate to national conditions shall be taken, where necessary to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employer's organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements."*

67. The promotion of collective negotiation with workers' organisations is aimed at redressing the inequality of bargaining power of employees compared to employers.

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16 http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=ISSUESFREEDOM

The promotion of a regime which favours individual contracts over collective agreements with workers' organisations is clearly in contravention of these obligations.

68. There are also a number of international labour standards set by the ILO which Australia has failed to ratify. Notably this includes the *C77 Homeworkers Convention 1996*. This convention sets out measures to ensure equality of treatment between homeworkers and other wage earners, in respect of remuneration, protection against discrimination, occupational health and safety, the right to join organisations, maternity protection, access to training and minimum age of work. The TCFUA submits that Australia should ratify this convention and that an important aspect of any workplace agreement-making regime should be to ensure that it allows these measures to be implemented.

E. Recommendations

69. The TCFUA believe that any agreement making regime, in order to be fair and equitable and properly address imbalance of bargaining power, should have the following features:

- A comprehensive Award system to apply to employees without agreements;
- A comprehensive benchmark based on the Award system to measure agreements against prior to approval;
- The capacity for employees to choose to have collective union agreements;
- A proper process of scrutiny of agreements in the AIRC;

- A statutory requirement for employers to translate any proposed agreement into the language of each employee prior to approval, and consideration of other statutory requirements to address other categories of disadvantaged workers;

- Compliance with international obligations.

6 Case Studies

* indicates where names have been changed to retain anonymity

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CASE STUDY ONE: Outworker Case study

P had been working at X for 8 years as a sewing machinist, when she decided that she would like to start a family. She made arrangements with X to set up some machines at home so that she could work from home. X agreed to keep her on the pay roll. "I was wrapt," says P, "Tax was still coming out and I'd get super depending on how much I earned, and they'd provide machines for me."

"I was worried about my long service leave, but they assured me that I wouldn't lose my long service leave," she says "but I didn't know that I was entitled to annual leave and public holidays, I didn't think I had any rights." X told her that people who work from home had to provide for their own holidays and other entitlements.

P was paid on a price per garment basis, not on an hourly rate. She discovered that the factory set the price and there was no possibility of negotiation. "If you asked for a little bit more money they'd tell you to bring it back," she says.

P was also expected to pick up and deliver orders herself, no matter how big, or how small. "They'd ring me and say "We've got quite a bit of work for you, come and collect it now." So I'd pack up everything, rush the kids out into the car and go down there, all the way, about a half hours drive to find they only had ten garments – ten basic little garments! I mean what can you do? You've got to take it and then run it back to them straight away. So sometimes I'd do trips twice a week down there."

Other times the factory would dump huge orders on P, and demand that they be finished by tight deadlines. "They'd say, "We need this pushed" and you'd know that you'd have to push it through the night. They didn't care. That meant working late hours, and through the weekends. They knew and they weren't prepared to give you anything extra."

Part of the problem was the piece rate. Sometimes P would go weeks without work, and then only small orders earning her $50 or less. So when big orders were offered, she would just accept them to make up for the weeks and months of no income. "I'd have to work until one or two in the morning, sometimes three o'clock. Starting after tea time, I'd get the children settled and then get back on the machine again. You don't care how many hours you work, so you're just breaking yourself down really. You're getting exhausted by pushing a lot of work through and working late hours can mean you have a lot of accidents too because you can hardly keep you're eyes open, and you go blurry."

Eventually, worn out with sustained pressure and long hours on the machine, P started thinking about accessing her long service leave, so she made a phone call to the union. The union told her that she was entitled to annual leave and public holidays as well. "The union told me to take it up with my boss, well, that scared me. I thought, I'm not strong enough for that and then they'll start telling me I've got no work and I'll be out of a job, so I wasn't ready for any trouble with them."

"Then it was last September that I received a phone call, at about quarter to three on a Friday. They'd left it to the very last minute. And the boss said to me, "Sorry P, but X has been sold. Someone might come around and pick up the machines so be prepared for someone to come around.' And I said 'What do you mean, I'm out of a job?" and she said 'Yes, you are'

P was devastated. Her boss told her that the factory would be gone by the following Wednesday. The boss could give her no answers when she asked about her entitlements.

"I rang the union straight away at nine o'clock on the Monday morning, and I told the organiser and he was straight in there making sure all the girls (in the factory) were getting all of their entitlements and of course he came with me to speak to the boss, but she said "Well I'm no longer going to be with the company so if you have any queries you're going to have to take it up with the secretary."

P rang the secretary and was told that she didn't have any entitlements at all. P kept pushing for her long service leave entitlement, but since the union had got involved the factory had changed tack. They were now saying that she had not actually been dismissed. When P asked for the company to draw up a contract that complied with the award, they refused. They would only agree to include long service leave, and they would not agree to provide her with a regular amount of work. "They wrote up two contracts but they were all rubbish. They wanted me to work piece work, but I said I'm fed up with not being paid when you don't give me work, I want to know that I'll still be paid when there's no work available and he [the owner] laughed as if it was a joke, and said 'Well, you know, I can't help you in that department.'"

P with the assistance of the union had a contract drawn up that conformed to the minimum conditions for outworkers as set out in the *Clothing Trades Award 1999*. The company has now agreed to abide by it. However, they have not signed the agreement.

P says that the company was outraged that she had involved the union. "They got really annoyed. 'How can an outworker be in the union?' they said. "That's not right." I never even left the union, I stayed with them. You see, the outworkers don't even know that they're entitled to be in the union when they're an outworker. They chose the wrong person to dismiss because I had back up. They think I'm a trouble maker now."

CASE STUDY TWO: OUTWORKERS CASE STUDY

My name is Trinh*. I have been an outworker for 20 years. I used to work 12 hours a day, 7 days a week until a year ago.

I did everything that my employer gave me: for example jackets, pants, shirts, skirts and dresses. The labels were: Jacqui E., Syndicate, Maestro, Target, Sportsgirl, Sportsman, Pierre Cuttin, Miss Shop, Country Road, My Size, Brown Sugar, Blazer and others.

I got paid $3 to $4 an hour. Sometimes I had to work at night and on the weekend to finish an order. I didn't get holiday pay, superannuation, sick pay, WorkCover or any other entitlements.

Now I can't do much outwork anymore. I have a sore back and sore shoulders. I can't do much outwork and I don't want to do outwork anymore.

I was happy to have a new law last year but my employers are not following the law and I still get only $3 - $4 an hour and nothing else. Last week the boss gave me a job for $1.60 an hour.

CASE SUDY THREE: OUTWORKER CASE STUDY

I'm Diep*. I worked 5 years as an outworker. Now I don't do a lot of outwork because so much sewing has made my eyes very sore. Before I made T-shirts for children with Target and Kmart labels. They paid me a price per piece and I sewed more than 10 hours a day. Sometimes they needed the order quickly and I had to sew all night and on the weekend to finish the order, but the boss did not pay me more. I have never had superannuation, holiday pay or sick days. I used to work very hard.

Last year I learnt about the new law for outworkers. I asked my friends who still did outwork: "Now, is the new law good for you?" You know they answered me:" It's not good because the employers are not following the law. If you disagree with them and say anything about the new law, you loose your job." That's true. I think in my mind that this new law will not change anything for outworkers because the big companies are not following it and what does the government think?