Submission

to

Senate Employment, Workplace Relations and Education
Legislation Committee

Provisions of the Workplace Relations Amendment (Right of Entry) Bill 2004

Submission no: 13

Received: 4/2/2005

Submitter: Ms Michele O'Neil
State Secretary

Organisation: Textile, Clothing and Footwear Union of Australia
(Victorian Branch)

Address: Level 2, 132-138 Leicester Street
CARLTON VIC 3052

Phone: 03 9347 3377

Fax: 03 9348 1779

Email: moneil@tcfvic.org.au

Submission by the TCFUA (Victorian Branch) to the Senate, Employment, Workplace Relations and Employment Legislation Committee

Inquiry into the provisions of the Workplace Relations Amendment (Right of Entry) Bill 2004

1. EXECUTIVE SUMMARY

The *Workplace Relations Amendment (Right of Entry) Bill 2004* contains provisions that may impact on Federal and state instruments designed to prevent the exploitation of outworkers.

It is widely recognised (and has been recorded in Government and other reports) that the structure and nature of the clothing industry render outworkers especially open to exploitation. This exploitation is widespread.

The federal WRA currently recognises this situation by permitting clauses relating to outworkers to remain in Federal awards (s98A) and by providing certain minimum conditions for contract outworkers (Part XVI). The federal Clothing Trades Award 1999 also contains specific provisions in Part 9 of the award for the regulation of outwork. The Victorian *Outworkers (Improved Protection) Act 2003*, an act designed to regulate outwork, provides some minimum conditions and entitlements and allows for the enforcement of State legislation on behalf of outworkers.

Essential to the enforceability of these instruments and the integrity of the regulatory system are the rights those instruments accord the Textile, Clothing and Footwear Union of Australia to enter premises and inspect records with respect to outwork. The Bill as currently drafted may remove those rights.

The TCFUA opposes the Bill and supports and endorses the submission made by the Australian Council of Trade Unions to the Senate Committee. However, if the Bill is to be passed, then it ought to be amended to reflect the special situation of outworkers by allowing for the continued and unaffected operation of the legislative and industrial instruments referred to above.

2. INTRODUCTION – THE TCF INDUSTRY

It is estimated that across Australia approximately 60,000 employees work in the formal TCF (textile, clothing and footwear) industry. Between 50 to 55% of Australia's TCF manufacturing is located in Victoria, with approximately 30,000 employees. Of the combined TCF manufacturing in Victoria, approximately 15,000 are employed in the formal clothing sector i.e. the factory based workforce. These figures do not represent the vast numbers of outworkers working outside the formal TCF sector.

Prior to the commencement of common rule on January 1 2005 in Victoria, approximately 65 to 70% of clothing workers in the formal sector had their terms and conditions of employment governed by the federal Clothing Trades Award 1999. A handful of larger clothing manufacturers i.e. Yakka Australia are more likely to have enterprise agreements in place. In essence, however, there are sizeable pockets of the factory based clothing industry which until very recently were award free, unregulated and employing small numbers of employees within a factory environment. More commonly these workplaces engage a small factory based workforce with extensive use of other sub contractors and/or outworkers as part of production.

It has been the experience of the TCFUA that the clothing industry is particularly vulnerable to poor working conditions and exploitation of workers (predominantly female and from a non English speaking background). This reality has, in part, been acknowledged consistently by the AIRC in various decision issued by it and in many of the particular terms of the federal Clothing Trades Award 1999, in particular, the regulatory framework provided for contracting and outwork (Part 9).

The importance of fair and effective right of entry provisions in ensuring compliance with the terms and conditions of the Clothing Trades Award 1999, to which the TCFUA is a respondent and party, has been fundamental in reducing exploitation within the clothing industry. It is self evident that the efficacy of award safety net conditions is only as strong as the potential to enforce those rights. In practice, the TCFUA takes the lead in investigating breaches and enforcing award conditions on

behalf of clothing workers. This capacity could not exist unless it can act on information without fear of reprisal for employees, interview workers without intimidation, freely investigate suspected breaches of the award and the Workplace Relations Act 1996 and access (and copy if necessary) employment and outwork records. This submission focuses on the circumstances of the clothing industry in Victoria in particular, and the relationship between the federal right of entry provisions and state based legislation governing the employment of outworkers.

3. SUB CONTRACTING AND OUTWORK

The last fifteen years has seen dramatic changes in the way the clothing industry has been organised. The industry in Australia has become dependant and structured around sub contracting, outsourcing and the prolific use of outworkers or home based workers. It is estimated that the number of outworkers in Victoria has increased form approximately 30,000 in 1985 to 144,000 in the mid 1990's. Until the commencement of common rule in Victoria this significant informal clothing sector in Victoria was award and regulation free. There have been a significant number of reports and research studies which have highlighted the changing nature of the clothing industry and the employment and working conditions of home based workers. One of those reports is *'TCFUA, the Hidden Cost of fashion (Report on the National Outwork Information Campaign, March 1995).*

Because the clothing industry is characterised by long contracting chains starting with retailers, fashion houses down the chain to manufacturers, contractors, sub contractors and suppliers to outworkers, transparency in the system of clothing manufacture is absolutely fundamental in preventing exploitation of clothing workers at each level of the chain.

3.1 The federal Clothing Trades Award 1999 (Part 9 - Outworker and Related Provisions)

The regulatory framework in the federal award is designed to ensure such transparency. The award contains a Part 9 (Outwork and Related Provisions) which provides for a detailed regulatory framework for home based workers/outworkers.

This framework involves an interconnecting series of obligations which aim to make each step in the clothing contracting chain transparent. Such transparency allows the TCFUA to be able to identify at each step in the chain whether employers are abiding by their award obligations in regards to both factory based or home based workers. These obligations broadly involve:

- Mandated registration with the Clothing Trades Board for any employer, who is a respondent to the award ("an employer") and who gives work out;
- The provision of work records by an employer who gives work out;
- The preparation and filing of lists by an employer who gives work out which identify to whom the work has been given out to;
- The requirement if an employer who gives work out to enter into work contracts with a sub contractor or supplier re: provision to provide terms and conditions of employment no less than the award;
- Provision of written information by an employer to an outworker in respect to their rights under an award; and
- Provisions relating to the specific employment of outworkers eg written agreement about hours, payment, stand down, leave etc.

There have been a series of significant decisions[1] of the Commission and Federal Court relating to the Clothing Trades Award 1999 and its predecessor, the Clothing Trades Award 1982. These decisions have collectively reinforced the importance of the outworker provisions/framework in the award in preventing exploitation of workers in the clothing industry.

In the *Lotus Cove* case, Justice Merkel stated in his decision:

---

[1] See:

- *Re: Clothing Trades Award 1982. Riordan DP, (1987) 19 IR 416*
- *CATU v J & J Saggio Clothing Manufacturers Pty Ltd, (1990) 34 IR 26 (Gray, J)*
- *Application by the TCFUA, Item 51 of Schedule 5, Clothing Trades Award 1982, AIRC, Full Bench (12 March 1999), Print F1647*
- *TCFUA v Lotus Cove Pty Ltd t/as Yambla. FCA 43 (2 February 2004) (Merkel, J)*

'that the breaches of the award regime are serious' and *'That the regime is addressed at preventing abuses which are causing considerable social and economic problems in the community. As Gray J stated in Saggio (at 37):*

> *"In an industry in which the use of outworkers offers plenty of opportunity for exploitation of workers, failure to participate in a scheme designed to prevent such exploitation is a serious matter.*

Employers in the industry should be aware that future breaches of the kind that have occurred in the present case are a serious matter and can result in substantial penalties. Employers should also be aware that the factors that I have taken into account in mitigation in the present case may be less compelling in the future if they are aware of their award obligations and continue to disregard them.[2]

The Respondent in the *Lotus Cove* case was one of thirty clothing manufacturers against whom the TCFUA initiated legal proceedings in 2002 for breaches of the Clothing Trades Award 1999. This represented the fifth round of prosecutions the TCFUA had commenced against dozens of clothing manufacturers for widespread breaches over the previous 10 to 12 years. In *Lotus Cove*, Justice Merkel imposed penalties on Lotus Cove to the total of $20,000 for multiple breaches of Part 9 of the Clothing Trades Award 1999. As a party to the *Clothing Trades Award 1999,* the TCFUA is the key organisation which monitors, investigates and prosecutes compliance with the award, which contains a framework of outworker and contractor obligations particular to the industry. This type of framework is rarely found in other industrial instruments, and is illustrative of (i) the particular potential for, and reality of exploitation of workers in the clothing industry and (ii) the importance of enhancing compliance with the award via the interconnecting obligations re: records; agreements' registration etc in Part 9.

4. POSITION IN VICTORIA

[2] TCFUA v Lotus Cove FCA 43, p14

The state of Victoria does not have a state industrial relations system since the referral of powers by the Victorian government to the federal government in 1996. However, since the advent of common rule (effective in most industries from 1 January 2005), all workers in the TCF industry are now entitled to federal award terms and conditions of employment (subject to any limitations in the particular Declarations of Common Rule). As a general rule, unlike other states, unions in Victoria are not state registered but federally registered.

4.1 Outworkers (Improved Protection) Act 2003

In 2003 the Victorian Parliament enacted the *Outworkers (Improved Protection) Act 2003.* ("the OIPAct").The main purposes of the Act were to:

(a) to improve the protection of outworkers in the clothing industry;

(b) to establish an Ethical Clothing Trades Council of Victoria;

In summary, the six main enhancements provided by the OIPAct were to:

(i) extends employment protection to outworkers by defining them to be employees; [3]

(ii) provides for a simple, accessible system for recovery of unpaid wages;

(iii) ensure liability for unpaid remuneration throughout the contracting chain;

(iv) establishes an Ethical Clothing Trades Council of Victoria; and

(v) provides for powers of entry for information services officers; and

(v) provides power of entry and inspection for authorised union officials.[4]

4.2 Right of Entry under the Outworkers (Improved Protection) Act 2003

[3] This deeming of outworkers as employees is for the purpose of the Long Service leave Act 1992 (Vic), the Occupational Health and safety Act 1985 (Vic), the Public Holidays Act 1993 (Vic) and the Federal Awards (Uniform System) Act 2003

[4] Source: Industrial relations Victoria; Outworkers (Improved Protection) Act – Fact Sheet, 2003

Part 4 of the OIP Act 2003 deals with Compliance and outlines the rights and functions of Information Services Officers ("ISO's")(Division 1) and Entry and Inspection by Union Officials (Division 2).

Right of entry powers conferred on ISO's[5] include:

- The capacity to enter premises, without force, where there are reasonable grounds for believing that outwork is being, or has been, performed;
- The capacity to enter premises, without force, where there are reasonable grounds for believing that there are outwork documents that are relevant to the purpose of determining compliance with relevant industrial legislation;
- Upon exercising right of entry the capacity to:
  (a) inspect any work, material, machinery, appliance, article, facility or other thing;
  (b) takes samples of any goods or substances in accordance with the regulations;
  (c) interview any outworker or employee;
  (d) require person(s) having custody of, or access to an outwork document relevant to the purpose of determining compliance with relevant industrial legislation to produce that document;
  (e) inspect, and/or take copies of any document provided to them.[6]

Division 2 of the OIP Act 2003 sets the framework for the entry and inspection by union officials. The provisions illustrate that it was commonly accepted that the relevant union (in this case the TCFUA) had a significant role to play in ensuring that outworkers received award terms and conditions of employment.

> *Outworkers are often reluctant to take individual action against their employer for fear of reprisal, so they rely more heavily on the ability of the union to investigate and prosecute employers for breach of their award.*[7]

[5] See sections 30 to 30 of the Outwork (Improved Protection) Act 2003
[6] See section 36
[7] Industrial Relations Victoria, Outworkers (Improved Protection) Act – Fact Sheet, 2003.

In order to exercise right of entry, union officials must hold a valid permit (issued by the Magistrate's Court). Where the authorised union officer suspects that a contravention of the OIP Act has occurred or is occurring, for the purpose of investigating the suspected breach, they may enter, during working hours, any premises-

> *(a) occupied by an employer or contractor who is bound by a federal award (or a common rule order that is based on a federal award) that relates to outwork; or*
>
> *(b) where outworkers work who are, or are eligible to become, members of the Union.*[8]

Once they have entered premises the authorised union office may, for the purposes of investigating the suspected breach:

- Inspect, and make copies, of certain documents held on the premises including time sheets, pay sheets, any other documents (other than an AWA);
- During working hours, inspect or view any work, material, machinery, or appliance, relevant to the suspected contravention;
- During working hours, interview any employees or outworkers who are members of the union or eligible to be members of the union about the suspected contravention.[9]

There is also a right of entry to residential premises where the occupier gives consent.

The union's right of entry powers also extends to the capacity to enter premises where outworkers (who are, or are eligible to be a member of the union) for the purpose of having discussions during meal times and other breaks.[10]

Where an authorised union office enters premises either for the purpose of investigating s suspected contravention of the OIP Act or to hold discussions with

---

[8] See section 41.
[9] See section 41.
[10] See section 42.

employees, at least 24 hours notice must be provided to the occupier of the premises.[11] The only exception to this is in circumstances where the Magistrates Court, upon an ex parte application, waives the requirement for giving 24 hours notice where it is satisfied that that the giving of such notice *would defeat the purpose for which the power is intended to be exercised.*[12]

5. WORKPLACE RELATIONS AMENDMENT (RIGHT OF ENTRY) BILL 2004

The Second Reading speech for the *Workplace Relations Amendment (Right of Entry) Bill 2004* ("the Bill") stated:

> *The Bill will amend the Workplace Relations Act 1996 to expand the Commonwealth system for union right of entry and override State systems within constitutional limits. Where the relevant employer is a constitutional corporation or the premises are in a are in a Territory or Commonwealth place, a union will only be able to exercise a right of entry under the WR Act provisions. It will not prevent a State union from entering premises for purposes relating to State industrial laws. The scheme will allow for unions to continue to exercise existing rights under State Occupational, Health and Safety legislation.*[13]

Section 280M of the Bill outlines the circumstances in which a permit holder for either a state or Commonwealth union may enter premises for the purposes of *investigating a suspected breach* of an industrial law or instrument. Section 280W of the Bill sets out the circumstances in which a permit holder for a state or Commonwealth registered union may enter premises for the purpose of *holding discussions with employees.*

---

[11] See section 43.
[12] See sections 44
[13] Second Reading Speech, p1

Sections 280U and 281D then go on to limit the rights of state based unions in relation to investigating breaches (s280U) and having discussions with employees (s281D) by restricting the authorised permit holder, such as,

> *the person has no right under any other industrial law (other than an OH&S law), or any State industrial instrument, to enter those premises*
>
> *to investigate that suspected breach or to do those other things for the purpose of investigating the suspected breach* [s280U] or
>
> *to hold those discussions with those employees.* [s281D]

That is, the Bill carves out a singular exception (OH&S law) to the creation of a unitary right of entry framework. As a primary principle, the TCFUA does not support the effective removal from state based unions the right to effectively exercise right of entry pursuant to a State industrial law or state industrial instrument. Victoria also stands alone amongst all other states in Australia in that it does not have a state industrial system. Yet it has both state OH&S legislation, the *Occupational Health & Safety Act 2004)* and specific legislation relating to the engagement of outworkers in the clothing industry, the *Outwork (Improved Protection) Act 2003*.

In the TCFUA's submission, there are sound and compelling reasons why any amendments to the *Workplace Relations Act 1996* as regards right of entry must consider the specific situation of Victoria, and in particular, the position of clothing workers in Victoria.

The Victorian Government has recognised that clothing outwork is deserving of special legal protection with the passing of the OIP Act. The outwork industry is characterised by very low wages, long working hours, poor conditions of employment/engagement and OH&S. In 2002, the Preliminary findings were released of a Melbourne University study of outworkers in the clothing industry in

Melbourne.[14] The three year project, which commenced in 1998, involved intensive interviews of, and completion of questionnaires by 119 clothing outworkers. Of the 119 workers 115 were female. The investigation and interviews were conducted in either Vietnamese or English and involved outworkers of Vietnamese, Cambodian or Australian nationalities.[15] A copy of both the Preliminary Findings and a further report, Tales of Despair[16] from the study are attached to this Submission.

The preliminary results from the study demonstrate the extremely poor working conditions experienced y many outworkers in the industry. They included the following:

- Outworkers reported earning an average hourly rate of pay of $3.60
- The highest rate was $10.00 – one individual. Lowest rates were less than 50 cents.
- Three quarters said they had experience of wages not being paid on time, nearly half (46%) of unpaid wages.
- The vast majority – 89% - said the family could not manage without their wages.
- The average number of hours worked per day was more than 12 hours.
- About three quarters (74%) reported working in the range of 12 to 19 hours a day.
- Well over half (62%) reported working 7 days per week with a further 26% working 6 days per week. Only a minority (12%) worked less than this.
- About two thirds of outworkers (65%) said they did not like their work. Most of these were resigned to working because "I have just have to do it". The next largest group, 22%, stated "I neither like it nor dislike it" and the smallest group, 13% said they liked their work.

[14] Cregan, Christina, Department of Management, Melbourne University; 'Home Sweat Home': Preliminary Findings of the first stage of a two – part study of outworkers in the textile industry in Melbourne Victoria (January – June 2001), 22 November 2001
[15] Summary of Research Findings, 'Home sweat Home', Ibid
[16] Cregan, C, Department of Management, University of Melbourne; Tales of Despair: Outworker Narratives, 2002

- The main reasons that were given for doing this work was that they could not get a job outside the home (70%) and that their English was not good enough to get other work (63%).
- About two-thirds (68%) reported relying on other family members to help. In 54% of cases, this was the husband/partner. I 31% of cases, the children assisted. Sometimes, neighbours and friends helped.
- The vast majority reported that they worked routinely during school holidays (93%), on Saturdays (91%), Sunday (87%) and on public holidays.[17]

In this context, attempts to regulate the industry and the work performed become all the more crucial. Part 9 of the *Clothing Trades Award 1999* is fundamental in this respect because it seeks to create transparency at each level of the contracting chain. Part of this transparency is the mandatory provision of lists to be provided by clothing manufacturers and sub contractors as to where work is given out. This allows the TCFUA to accurately follow the contracting chain in order to identify whether there is compliance with the terms and conditions of the award.

6. PART XVI – WORKPLACE RELATIONS ACT 1996 (CONTRACT OUTWORKERS IN VICTORIA IN THE TEXTILE, CLOTHING & FOOTWEAR INDUSTRY)

The federal Coalition government itself recognised the special circumstances of contract outworkers with the introduction of Part XI (Contract outworkers in Victoria in the textile, clothing and footwear industry) into the *Workplace Relations Act 1996.* 2003. The object of Part XI is:

> *The object of this Part is to ensure that an individual who is an outworker other than an employee performing work in Victoria in the textile, clothing or footwear industry is paid not less than the amount he or she would have been entitled to be paid for performing the same work as an employee.*[18]

A contract outworker is defined as *an individual who:*

---

[17] Ibid.
[18] Workplace Relations Act 1996, s537

(a) is a party to a contract of services; and

(b) performs work under it for another party or parties to the contract.[19]

In essence, with the declaration of common rule in Victoria in the TCF industries, effective 1 January 2005, the provisions[20] relating to the payment of a minimum rate of pay to contract outworkers ensure that any contract outworkers receive no less than the minimum rate of pay provided by the relevant federal TCF award[21] to the work being performed.

Part XI also provides for specific right of entry for Inspectors[22] *for the purpose of ascertaining whether section 541* [Minimum Rate of Pay] *is being, or has been observed.*[23] An inspector has a broad range of powers to enter premises, without force, including:

(i) to inspect any work, material, machinery, appliance, article or facility; and

(ii) as prescribed, to take any samples of any goods or substances; and

(iii) to interview any person; and

(iv) to require a person having the custody of, or access to, a document relevant to that purpose to produce the document to the inspector within a specified period; and

(v) to inspect, and make copies of or take extracts from, a document produced to him or her.[24]

Further, inspectors have the capacity to exercise these powers *at any time during ordinary working hours or at any other time at which it is necessary to do so for the*

---

[19] Ibid; s538

[20] Ibid; see Sub Division B – Minimum Rate of Pay, s541

[21] The 3 main federal awards in the TCF industry are the *Clothing Trades Award 1999,* the *Textile Industry Award 2000* and the *Footwear Industries Award 2000.*

[22] Inspector is defined in s4 of WRA as *(a) a person appointed as an inspector under subsection 84(2); or (b) an officer of the Public Service of a state or territory to whom an arrangement referred to in subsection 84(3) applies.*

[23] WRA, ss542(1)

[24] Ibid, ss542(2)

purpose set out in subsection (1). [25] That is, for the purpose of ascertaining whether the requirement for contract outworkers to receive no less than the award minimum rate of pay is being observed at a particular workplace. The concept of 'observance' of compliance with the award, as it applies to contract outworkers is accepted here as a valid function of the federal government inspectorate. There is no requirement on an inspector to have a suspicion on reasonable *grounds* that a breach of s541 is occurring, nor in having an additional legal burden of proving the *existence* of those reasonable grounds.

If it is considered valid for the government inspectorate to have a general observance role in respect to the certain conditions for employment for contract outworkers, then it is equally valid for the TCFUA to have a similar role in ensuring compliance with the Act and relevant TCF awards to which they are party principal. This role is in fact. accepted by the Victorian government in the right of entry regime in the OIP Act 2003.

Part XI is also expressed as having concurrent operation with Victorian legislation as s540A expressly provides that:

> *This Part is not intended to exclude or limit the operation of a law of Victoria that is capable of operating concurrently with this Part.*

6.1 Allowable Matters (s89A WRA)

The special circumstances relating to the position of outworkers in the clothing industry is also recognised in the WRA in that it is included as a specific allowable matter and therefore confers express jurisdiction with the Commission to prevent and settle industrial disputes in relation to the pay and conditions of outworkers within the following limitation:

> ***Section 89A(2) Allowable award matters***

[25] Ibid, ss542(3)

For the purpose s of subsection (1) the matters are as follows:

(t) pay and conditions for outworkers, but only to the extent necessary to ensure that their overall pay and conditions of employment are fair and reasonable in comparison with the pay and conditions of employment specified in a relevant award or awards for employees who perform the same kind of work at an employer's business or commercial premises.

7. EXEMPTION OF STATE OUTWORK LEGISLATION FROM FEDERAL BILL

In the TCFUA's submission if the substance of the proposed amendments proceed as currently drafted (i.e to override state industrial laws and industrial instruments), then at a minimum, any amendment should be explicit in exempting state legislation relating to outwork from the proposed right of entry regime.

The current s280U of the federal Bill exempts OH&S law from the proposed federal unitary framework for right of entry. In the TCFUA's submission the exemption provided in s280U should be expanded as follows:

*'...then the person has no right under any other industrial law (other than OH&S law or **any law relating to the regulation of outwork**, or any other State industrial instrument, to enter those premises to investigate that suspected breach or to do those other things for the purpose of investigating the suspected breach.*

This extension of the exemptions is, in the TCFUA's submission, clearly justified on the basis of the particular potential for exploitation in the outwork industry evidenced by a host or reports produced over the last 15 years and the consistent view taken by the AIRC and the Federal Court in this area.

8. FEAR OF COMPLAINT

The potential for, and reality of exploitation in the outwork industry, and in significant parts of the clothing industry more generally) is conducive to working environments were fear of complaint is common place amongst workers. Clothing workers are some of the most vulnerable within manufacturing and within the general workforce. This widespread fear encompasses a reluctance to complain about low wages, poor conditions, underpayments, poor OH&S, workplace injuries, bullying and intimidation. In respect to the capacity of outworkers to 'negotiate' better conditions the Creegan study findings found:

> *Resistance was low. Fewer than 10% had ever kept back work to ensure pay. One said she did this 'when I began outworking'. Only a fifth had ever tried to negotiate the price of the job, and in most cases the negotiation was carried out by the woman herself.*
>
> *Pay was delivered in 20% of cases by the employer. It was more likely to be picked up by the husband than the wife, maybe to guarantee payment.*[26]

Despite needing information, advocacy and support, many workers are fearful of joining a union or being seen to have joined a union by their employer lest they be arbitrarily dismissed or stop receiving work. This is a not uncommon occurrence and for many workers their fear is well founded. The Creegan study concluded they:

> *An outstanding characteristic of this investigation was the fear of the outworkers. Even though there wages are so low and their hours of work so long, they were frightened that they would lose their job if they talked about it. Many more contacted refused to talk.*
>
> *The clear policy implication form these findings is that state and federal government should intervene to ensure that outworkers will be covered by awards and legislation in state and federal jurisdictions.*[27]

[26] Ibid; Preliminary Findings, p 10
[27] Ibid; pp14-15

Regularly, the TCFUA is contacted by workers (factory based and outworkers) existing members and non members alike, seeking assistance from the union but on the basis that their confidentiality will be preserved. Typically, these workers will complain of a wide range of non compliance with the award and wish for the union to visit the site but without identifying who has made the complaint. Given the working environment previously described this is a perfectly understandable and reasonable request.

9. PROPOSED REQUIREMENT FOR RIGHT OF ENTRY FOR INVESTIGATION OF SUSPECTED BREACHES

The federal Bill proposes that right of entry by a permit holder for the purposes of *investigating suspected breaches* (s280M(1)) requires that-

> *(c) Work is being carried out on the premises by one ore more employees who are members of the permit holder's union; and*
>
> *(d) the suspected breach relates to, or affects, that work or any of those employees.*

These requirements are oppressive and will only serve to diminish the TCFUA's capacity to ensure compliance with the *Clothing Trades Award 1999* across the clothing and allied industries, particularly in relation to the employment of outworkers. There are clear public policy reasons why it is the interests of all clothing workers for the union to be able to inspect employment records and investigate breaches of the award at *any* clothing workplace, whether it has a member there or not. That is, where the union can so act, the incentive for clothing manufacturers to underpay workers and not provide other award conditions, is reduced.

In an industry where there is significant pressures from imports the maintenance of a level playing field in respect to minimum award conditions is crucial to both clothing manufacturers employers and clothing workers.

9.1 Freedom of Association

The proposed nexus between right of entry and a union having one or more members at the particular workplace, raises serious issues in relation to freedom of association. It is very common in the TCF industry for members to insist on being 'silent members' and who join the TCFUA on the condition that their identity as a union member is not revealed to their employer. This is particularly the case in smaller workplaces where the employer may well believe that there are no union members at the site at all.

The federal Bill's proposal will effectively require the TCFUA to divulge to the employer the name (s) of the worker(s) making the complaint and seeking the assistance of the union. This raises major ethical issues as to the rights of a worker to join a union without fear of intimidation or retribution and to have their complaint dealt with in a confidential manner if requested.

The second part of the proposal that *'the suspected breach relates to, or affects, that work or any of those employees'* merely compounds the problem. For example, the practical effect of the proposal will mean that (i) the employee(s) making the complaint will need to be named and (2) the details of the suspected breach must [28]relate to that employee or their work. Many workers have not ever seen an award or are even aware what terms and conditions of employment actually cover them. i.e. They may have a belief that they are receiving a low rate of pay, or less than another worker in the same factory, but have no actual knowledge of whether their employer has breached an award or industrial legislation.

Further, the Bill shifts the burden of proof in respect to proving there are reasonable grounds for suspecting a breach to *'the person asserting the existence of those grounds'*. Again there is no body of evidence which supports an amendment of this kind. As indicated previously, many workers are not conversant with the award terms and conditions which cover their employment; this may particularly be the case in workplaces with low or no union membership and/or where the employer is not a

[28] See section 280U

member of registered industry association. A worker's capacity, in these type of circumstances, to provide specific details of breaches may be very limited.

10. PROPOSED REQUIREMENTS FOR RIGHT OF ENTRY FOR DISCUSSIONS WITH EMPLOYEES

The federal Bill proposes that right of entry for the purposes of a permit holder *holding discussions with any eligible employees who wish to participate in those discussions* is dependent on there being *any employee who:*

> *(a) on the premises, carries out work that is covered by an award, or certified agreement, that is binding on the permit holder's union; and*
>
> *(b) is a member of the permit holder's union or is eligible to become a member of that union.*

In respect to right of entry in relation to holding discussions with employees, there is no requirement for there to be a member at the workplace of the permit holder's union. The TCFUA contends that there is no logical reason why there is such a distinction between right of entry for investigating a breach and right of entry for holding discussions. Both are important in ensuring that workers have access to information, advise and advocacy and to having complaints of award breaches investigated.

10.1 Venue for Discussions

The federal Bill seeks to further restrict the venue in which the union can hold discussions with employees or who are eligible to be members. Sub section 281B(3) provides that:

> *(3) This Division does not authorise a permit holder to enter, or remain on, premises if:*
>
> *(a) an effected employer or the occupier of the premises asks the permit holder to do either or both of the following:*

(i) to hold discussions in a particular room or area of the premises;

(ii) to take a particular rout tor each a particular room or area of the premises; and

(b) the request is a reasonable request; and

(c) the permit holder fails to comply with the request.

Note: The Commission may make an order under section 281K if the request is unreasonable.

(4) For the purposes of sub section (3), if an affected employer or the occupier requests the permit holder to hold discussions in a particular room or area, or to take a particular route to reach a particular room or area, the request is not unreasonable only because it is not the room, area or route that the permit holder would have chosen.[29]

This proposed restriction is both unnecessary and without justification. In the TCF industry it is not an uncommon practice for employers/occupiers of premises to seek to control the venue where discussions between the union and employees take place. For example, employers may (and have) attempted to have the discussions held in a room which is part of the administration or management area of the business, thereby forcing employees to walk some distance from their normal meal areas to a place where they know management can survey who attends the meeting. This creates two problems – (i) the time taken for an employee to reach the venue for the discussions, thereby limiting the time available for the actual discussions and (ii) makes it obvious to the company who are the union members and who are not. In both respects, the impact is to restrict the freedom of association of workers to meet and discuss issues of concern with their union.

[29] See Section 281B

In the TCFUA's experience, many employees prefer to have the discussion in the normal canteen or meal areas because they are not forced to identify themselves as union members because all of the employees are present.

There have been several decisions in he TCF industry on the very issue of venue for discussions. In *TCFUA v Goodlooking Shirts t/as Sari BulBul*, [30]the TCFUA filed a dispute notification in the Commission on the basis that the company would was preventing the union to meet with employees in the canteen area. The company asserted that it was reasonable in providing the Production Manager's office as the meeting location. This was despite the fact the TCUA had a long standing practice of meeting with workers in the canteen meal area. Goodlooking Shirts had ceased the practice despite the discussion taking place in a context where there had been a series of disputes in relation to working conditions and around the negotiation of an enterprise agreement.

Commissioner Merriman in *Goodlooking Shirts* found that:

> *The Commission is clear in its view that the past practice should continue at this workplace and that Union meeting should take place in the meal room.*
>
> *The Commission is convinced that the production Manager's office does not give reasonable privacy and it is easily understood that some employees would fear being identified in circumstances which prevail at this workplace, particularly when they would need to walk to this office in full view of anybody who wished to observe. On the other hand, all employees go to the meal room and whether they take place in a meeting with the Union organiser is a matter for each employee in the meal room without being identified by management. It might be reasonable, given the very small number of employees objecting, for these employees to use the Production Manager's office for their lunch if the Union meeting disturbs them or if they do not wish to attend.*[31]

[30] TCFUA v Goodlooking Shirts, AIRC, Print P1979 (17 June 1997) (Merriman, C)
[31] Ibid, p2 of decision

It is important to note that in this case, the company had failed to provide any evidence that any employees had raised a objection to the Union holding discussions with employees in the canteen area.

In another decision, *TCFUA v Leading Synthetics*,[32] the dispute again centred on the appropriate venue for the union to hold discussions with employees under the current s285C of the *Workplace Relations Act 1996*. Historically, the TCFUA had held meetings with employees in the lunch room. Leading Synthetics refused saying that union meetings would now be held firstly, in the administration block and when this was rejected, the training room.

The TCFUA argued, amongst other things, that both venues were inappropriate because of distance form the work areas and because employees were apprehensive about being seen to be union members by the employer and the positive act of attending a meeting in a room other than the lunch room, would highlight their interest in, and/or membership of the union.[33].

In the consideration of the purpose of s285 of the Act, Commissioner Smith observed that:

> *Section 285C of the Act provides a right of consultation between the union, its members and person eligible to be members. What may constitute effective consultation is largely a matter for the union to decide. It is ordinarily not a matter for the employer to determine what is, or what is not, appropriate consultation. This is particularly so against the background of the legislative regime in which representatives of employee bodies must operate. The Act ensures that the employer's business processes are not disturbed because a union is only permitted to consult during meal times and other breaks.*
>
> *However, this is not to say that the decision of the union as to where consultation should take place is automatically binding upon the employer. Although the scheme of the Act tightly controls a union's right of entry,*

[32] TCFUA v Leading Synthetics, AIRC, Print R5518 (3 June 1999) (Smith, C)
[33] Ibid, para 14, Written submissions

probably means that weight should be given to how the union believes it can most effectively exercise the consultative right that it has.

Where the employer takes a contrary view on the location for consultation, then the question could be asked: "is the action of the employer such as to place unreasonable restrictions upon the right of entry of a union official so as to render the concept of consultation nugatory?".[34]

Commissioner Smith found that the lunch room was the appropriate venue concluding that:

The Act gives registered employee organisations a right of consultation, and therefore the view of the union should be given appropriate weight.[35]

There have been a consistent number of other cases where the TCFUA has notified disputes in relation to right of entry; many of these have been settled in Conciliation by the Commission and resulted in consent orders reaffirming the rights of the union under both 285B and 285C. That is, it is most often the scenario where the union is forced to notify disputes to the Commission over right of entry and not vice versa. Very few cases have been notified by employers in the industry complaining of contraventions of Part IX (Entry and Inspections by Organisations).

The reported cases cited above, and various other decisions not involving the TCFUA illustrate the important supervisory role played by the Commission in considering right of entry disputes brought under the current Act. This supervisory function as expressed in the current section 285G (Powers of the Commission) allows and encourages the Commission to take an active role in preventing and settling right of entry disputes.

On this basis, and given the TCFUA's experience as regards right of entry on a day to day level, the current right of entry regime is sufficiently robust and flexible to deal

[34] Ibid, paras 11-13
[35] Ibid, para 21

with a range of circumstances and disputes, and the Commission sufficiently empowered to deal with them in an appropriate way.

10.2 Right of Entry for the purposes of union recruitment (limited to twice per year)

In relation to the right of entry for the purposes the Bill seeks to dramatically reduce the capacity of unions to meet with employees for the purpose of recruitment. The Bill proposes:

> *(2)This Division does not authorise entry to premises, or subsequent conduct on the premises, if:*
>
> > *(a) the conduct is for the purposes of recruitment, but the entry notice does not specify recruitment as a purpose of entry; or*
> > *(b)the conduct is for the purposes of recruitment and a permit holder for the union entered the premises in the preceding 6 months for that purpose.*
> >
> > ***recruitment** means encouraging employees to become members of the permit holder's union.*[36]

In the TCFUA's submission this provision is oppressive and if passed, would go to the heart of the TCFUA's capacity to inform, represent and advocate on behalf of workers in the clothing, outwork and related TCF industries. Again, there is no demonstrable evidence supporting the government's claim that:

> *Repeated union entry to the workplace to recruit new members can result in non members suffering unfair pressure and harassment. Accordingly the Bill limits entry for recruitment discussions to once every 6 months.*[37]

---

[36] Bill, ss280Z(2)
[37] Bill, Second Reading Speech, op cit, p 3

On the contrary, it has been the TCFUA's experience that in the TCF industry, and most particularly within the clothing and outwork industries, pressure is more likely to be exerted by employers on workers who are known or believed to be members of the union.

Further, the provision is in effect unworkable. There are host of possible scenarios where workers may seek from the union, as part of general discussions under s285C, information about the TCFUA and its services. If a union official responded to such an inquiry would it be said, under the provisions of the Bill, that this constituted encouraging employees to become members of the permit holder's union. It is obvious that an employer may exercise its right to join a registered employer organisation at any time; yet the proposal restricts not only the union in its capacity to recruit new members but also unnecessarily diminishes the opportunities for employees to consider membership of the union.

In the TCFUA's submission it sees no objective or practical reasons for the proposed amendments as regards right of entry for the purposes of investigating breaches or holding discussion with employees.

11. CONCLUSION

The TCFUA opposes the Bill.

If the Bill is to be passed, the TCFUA seek amendments to ensure that the regulation of outwork remains treated as a 'special case'.

Accordingly, the Bill should be amended so that the existing provisions under:

- The Federal Clothing Trades Award 1999 (or any similar subsequent award);
- The Victorian Outworkers (Improved Protection) Act 2003 (as amended from time to time) or any other similar legislation operating in other states or territories. and
- The Workplace Relations Act 1996

are not affected and may have continuing operation.