



**Department of Employment**

**Post Implementation Review into the  
Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012**

**Submission of the  
Textile, Clothing and Footwear Union of Australia  
(TCFUA)**

## **Submission to the Department of Employment**

### **Inquiry into the Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012**

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## 1 BACKGROUND TO REVIEW

- 1.1 On 28 March 2014, the Minister for Employment, Senator Eric Abetz announced a Post Implementation Review ('PI Review') into the Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012 ('TCF Act'). The provisions of the TCF Act came into effect on 1 July 2012,<sup>1</sup> having been assented on 15 April 2012.
- 1.2 The Terms of Reference for the Review<sup>2</sup> provide, amongst other things, that it will 'examine and report on the regulatory impact of the Fair Work Act extending rights and protections to outworkers and providing for a code of practice to be issued' and that such assessment will be based on evidence, 'including submissions from stakeholders affected by the amendments, consultations with key stakeholders and relevant sources of data.'<sup>3</sup>
- 1.3 As a key stakeholder, the Textile, Clothing and Footwear Union of Australia ('TCFUA') welcomes the opportunity to provide this submission to the Department of Employment in respect of the PI Review and look forward to participating in further consultation with the Department. The TCFUA makes this submission on behalf of both the national TCFUA union and each of its branches.

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<sup>1</sup> Senator the Hon. Eric Abetz (Minister for Employment); Media Release (28 March 2014). The PIR was to commence on 1 April 2014 and be completed by 1 July 2014.

<sup>2</sup> Terms of Reference for the Post-Implementation Review of the Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012 (28 March 2014)

<sup>3</sup> Ibid;

## 2 INTRODUCTION

### Why the reforms must be retained

2.1 The TCF Act amended the Fair Work Act 2009 ('FW Act') to:

- Extend most provisions of the Fair Work Act to contract outworkers;
- Enable outworkers to recover unpaid amounts up the supply chain;
- Extend right of entry rules that apply to suspected breaches affecting outworkers; and
- Allow for a textile clothing and footwear code to be issued.<sup>4</sup>

2.2 The TCFUA strongly supported the passage into law of the TCF Act. Prior to its enactment, the TCFUA submitted to the Senate Inquiry into the Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011 ('Senate Inquiry'):

*'The provisions of the TCF Bill are a logical and necessary step in the history of federal regulation of working conditions of employment in the TCF industry. In particular they address the unacceptable systemic exploitation of outworkers and workers labouring in sweatshops across Australia. The deeming and recovery of money provisions acknowledge the particular vulnerabilities of outworkers working at the bottom of long and complex TCF supply chains in which sham contracting is endemic and non payment of wages and entitlements is common. The enhanced right of entry amendments are directed at remedying an anomaly whereby there is currently no effective mechanism to investigate contraventions of minimum safety net conditions of workers employed in sweatshops. Finally, the capacity to legislate for a mandatory code of practice in the TCF industry allows for greater transparency within TCF supply chains so that the conditions under which TCF work is undertaken and by whom can be more readily identified. As a package, the TCF Bill is directed squarely at improving compliance with award and legal entitlements within the industry and ensuring that all TCF workers are engaged under safe and healthy systems of work.'*<sup>5</sup>

2.3 These reforms were long overdue given the conclusions of extensive research, reports and Senate inquiries undertaken over the last 25 years which examined the working conditions of clothing outworkers in Australia. The research consistently demonstrated that TCF outworkers as a class, endured astonishing levels of exploitation and mistreatment, invariably condemning them to entrenched poverty and income insecurity.

2.4 These workers (overwhelmingly women from a non-English speaking background) represented the hidden cost of fashion, a reality founded on wages and conditions shockingly reminiscent of third world labour standards.

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<sup>4</sup> Ibid;

<sup>5</sup> (Senate) Standing Committee on Education, Employment and Workplace Relations; Inquiry into the Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011; TCFUA Submission; p 30

Outworker exploitation thrived, fuelled by a lack of transparency within long and complex TCF supply chains and the systemic use of sham contracting. The TCFUA Submission to the Senate Inquiry described the precarious economic and social position of TCF outworkers as follows:

- 2.5 '[Outworkers] do not design or direct the production of the garment nor dictate when they are to be paid. They are commonly placed under significant pressure to complete work to urgent, unrealistic or shifting deadlines. Despite having an entitlement to the payment of overtime penalty rates under the TCF Award, many outworkers work excessively long hours both during the week and on weekends without additional compensation. Many work through injuries and illnesses sustained as a result of overwork, repetitive strain and poor working environments.

*Such vulnerability to exploitation is a product of outworkers as a class being largely hidden and operating outside of the mainstream work environment (i.e. outside of established, medium to larger factories). As a category of workers, outworkers most commonly are women from non English backgrounds (often recently arrived migrants) with limited economic resources and negligible bargaining power.'*<sup>6</sup>

- 2.6 Whilst it is important to acknowledge voluntary industry initiatives to clean up the TCF industry, (for example, the establishment of the Homeworkers Code of Practice in 1996), this is a sector that unequivocally needs strong and effective national regulation in combination with rigorous compliance strategies. This nexus cannot be overstated.
- 2.7 In relation to deeming, the TCF Act provisions are important because of the fundamental acceptance that TCF outworkers (whether employee or so called contractor) have the same rights to protection under Australian industrial law. By deeming contract outworkers to be employees for most purposes of the FW Act, the federal parliament implemented this basic, critical proposition on a national level.
- 2.8 Legislating for recovery of unpaid remuneration also acknowledged the widespread incidence of employers failing to pay money due to outworkers (even at significantly under award rates) for work undertaken and the hurdles outworkers face in recovering such amounts. Crucially, it recognises the reality and complexity of TCF supply chains, such that outworkers essentially perform work for a principal whom they may never know, but who profit from their labour.
- 2.9 The TCF Act also introduced enhanced right of entry provisions which enabled the TCFUA to more effectively investigate the conditions of workers in TCF sweatshops. The reform addressed an anomaly whereby right of entry to

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<sup>6</sup> Ibid; p 16

premises could be used to investigate breaches of outworker provisions, but not the wages, entitlements and health and safety of sweatshop workers themselves.

- 2.10 It is imperative to recall that a number of state jurisdictions had already legislated in relation to outworkers in the clothing industry, in particular, in relation to deeming, recovery of unpaid remuneration and mandatory codes of practice. What the TCF Act did, was to sensibly build on these state laws and create nationally consistent rights and obligations for outworkers in the TCF industry.
- 2.11 The TCFUA strongly supports the full retention of the provisions of the TCF Act. Any potential reduction in statutory outworker rights and conditions and/or the capacity to enforce those rights would be demonstrably counter productive to the goal of eliminating outworker exploitation in this country. It would simply give a green light to unscrupulous employers and principals to reinstate arrangements and practices which result in TCF outworkers effectively having no practical rights to a living wage, superannuation, leave, a safe workplace and other employment benefits. More fundamentally, it would remove hope for many TCF outworkers, who for the first time in their working lives can dare to imagine an existence without excessive and unrelenting work, poverty wages and social isolation.
- 2.12 It would be a highly deleterious outcome if, via the process of the PI Review, provisions of the TCF Act were removed at the very time the TCFUA is beginning to see positive changes in the working lives of TCF outworkers. The TCFUA is aware that some outworkers have already been told by their employers that 'the laws will be changing in May' and that they will revert to treating the outworkers as contactors after that. This has caused much concern and distress to outworkers who have felt for the first time in their working lives that they have enforceable rights.

## **Failure to implement the TCF Code of Practice**

- 2.13 There is one aspect of the TCF Act that has not been fully implemented. Whilst the TCF Act provides the capacity to regulate for a national TCF Code of Practice, to date this has not occurred. A TCF Code issued under the Act may prescribe a code dealing with standards of conduct and practice to be complied with by parties in a supply chain.<sup>7</sup> The key objective underpinning the development of a national TCF Code is to enhance transparency within TCF supply chains, by placing certain record keeping and reporting requirements on supply chain participants (e.g. retailers, principals, contractors and suppliers). These record keeping and reporting obligations are essential in identifying outworkers undertaking work in a particular supply chain, and the wages and conditions of those outworkers.
- 2.14 The failure to regulate for a TCF Code means that the full suite of reforms have not been as effective as they could be in ensuring that TCF outworkers receive their lawful wages and entitlements of employment. The TCFUA urges the federal government to take steps to develop a TCF Code of Practice drawing on the provisions of existing state codes.

## **The TCF Act – performing as intended, still relevant and needed**

- 2.15 In summary, (other than in relation to the failure to regulate for a TCF Code) in the the TCFUA's experience, the TCF Act is performing as intended in addressing exploitation of outworkers and workers in sweatshops. The TCFUA has observed incremental but appreciable improvements in the level of compliance with minimum award and legal wages and conditions for outworkers. This is often linked to the extent of compliance, illustrating that it is the combination of strong laws and effective compliance that lead to raised wages and labour standards in the TCF industry.
- 2.16 For example, some outworkers have reported to the TCFUA that they are now receiving annual leave and loading for the first time in their working lives. This means that they can now spend time with their partners and children, and actually have time away from their work. Other outworkers have said that by receiving award hourly rates of pay, they now do not have to take on excessive amounts of work as they once did just to pay their rent and bills. Another said that if she could be guaranteed to receive the correct hourly rate of pay for 38 hours per week, she would consider retraining to gain extra skills (such as

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<sup>7</sup> Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012; Item 61; new Part 6-4A (s789AC Objects of Part)

pattern making) which would increase her employment options within the fashion industry.

- 2.17 It is also the case that the enhanced right of entry provisions under the TCF Act has assisted the TCFUA to investigate breaches of the TCF Award, the FW Act and health and safety in sweatshops. Whilst sweatshops workers themselves had employee rights under the FW Act, they too were often treated as contractors and denied award rates of pay and conditions.
- 2.18 Nevertheless, the TCF Act reforms are still relevant and needed. Despite some improvement in industry compliance since the reforms commenced operation, change in conduct by employers is not uniform or consistent. Unfortunately, there continues to be parts of the industry that remain ignorant of the changes or who persist in refusing to acknowledge and abide by the new provisions. In many cases, when the TCFUA has investigated further, it becomes apparent that some companies have never, throughout the entire period of being in business, been compliant with minimum award and legal obligations. The backlash or resistance from these operators, is not to the TCF Act specifically, but to any system of industrial regulation applicable to engaging workers in the TCF industry.
- 2.19 In the TCFUA's experience, the level of compliance by TCF employers is also not necessarily linear and straightforward. Depending on the starting point, many TCF businesses take a significant period of time to become fully compliant, often with the intensive assistance of TCFUA compliance officers. It is also not unusual for businesses to reach full compliance, only to fall away 6 or 12 months later when the TCFUA becomes aware through information provided by affected workers, of further breaches of award and legal minimums. It illustrates the point that, for structural reasons and the widespread use of long and complex supply chains, ensuring compliance in the TCF industry requires resources and vigilance. It is not an industry, where compliance is a 'set and forget' type activity, but one requiring sustained monitoring and intervention.



### 3 ROLE OF THE TCFUA

- 3.1 The TCFUA is a registered organisation under the Fair Work (Registered Organisations) Act 2009 and an affiliate of the Australian Council of Trade Unions ('ACTU').
- 3.2 The TCFUA (and its predecessor organisations) has been proudly representing and advocating for the individual and collective rights of TCF workers for over a century. It is the pre-eminent national union which represents the industrial interests of workers (both in the formal and home based sectors) in the textile, clothing, footwear and associated industries ('TCF industry'). Its members include those at every level of complex and multi-level TCF supply chains.
- 3.3 For a number of decades, the TCFUA has been the primary organisation to undertake compliance activity in the TCF industry. Nationally, the TCFUA has initiated prosecutions of over 100 companies in respect to breaches of outworker and contracting out provisions of the relevant award.<sup>8</sup> Where these prosecutions proceeded to hearing, they resulted in substantial penalties being ordered by the Federal Court against employers in the TCF Industry.<sup>9</sup>
- 3.4 However, much of the TCFUA's compliance work involves identifying breaches and working with companies to rectify those contraventions, including remedying significant underpayments of wages, leave and superannuation owed to TCF outworkers and factory workers. The union also plays a major role in investigating cases of poor and dangerous occupational health and safety in TCF workplaces, including referring contraventions to the relevant state Work Safe authority. The TCFUA has a critical and legitimate role in ensuring that labour standards are observed in the TCF industry and that unfair advantage is not gained at the expense of reputable businesses by those who breach those standards.
- 3.5 The TCFUA is also a founding, and current member of the joint industry-union initiative, the voluntary Homeworkers Code of Practice (Ethical Clothing Australia) ('Homeworkers Code'), administered by an independent incorporated committee of management. The Homeworkers Code of Practice was established in 1996 with its key objectives including:
- ending the exploitation of homeworkers;

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<sup>8</sup> Clothing Trades Award 1982 (clause 27); Clothing Trades Award 1999 (Part 9).

<sup>9</sup> See *Clothing and Allied Trades Union of Australia v J and J Saggio* [1990] FCA 279; 34 IR 26 (August 1990), total penalties \$2,300; *TCFUA v Lotus Cove Pty Ltd* [2004] FCA 43 (2 February 2004), total penalties \$20,000; *TCFUA v Southern Cross Clothing Pty Ltd* [2006] FCA 325 (28 March 2006), total penalties \$110,000; *TCFUA v Morrison Country Clothing Australia Pty Ltd* [2008] FCA 604 (5 September 2008) and *TCFUA v Morrison Country Clothing Australia Pty Ltd (No 2)* [2008] FCA 1965 (23 December 2008), penalty of \$10,000 for contempt of orders made by the court.

- enabling homeworkers to clearly understand their employment entitlements;
- ensuring homeworkers receive their appropriate award entitlements and legislative protection;
- the establishment of a system of accreditation for manufacturers who comply with the Code, and
- assisting homeworkers by supporting community and industry education and securing compliance with the Code.<sup>10</sup>

- 3.6 Under the Homeworker's Code, accredited manufacturers commit that the TCF work being undertaken in their supply chains on their behalf (by factory workers and outworkers), will be produced in full compliance with award and legal conditions. Critical to the integrity of the ECA accreditation process, is the level of transparency of the accredited manufacturer's supply chain and the compliance role of the TCFUA.
- 3.7 Through its supply chain mapping, compliance, organising and education activities, including meeting regularly with TCF outworkers, the TCFUA is in an unparalleled position to comment on the working conditions of TCF outworkers and those employed in sweatshops. The TCFUA's submission to the PI Review is informed by this accumulated body of knowledge and the strong relationships it has with outworkers and other workers in the sector. In particular, it is reflective of the time, resources and commitment of the TCFUA to engagement with outworkers, developed over years through regular and consistent contact, language assistance, advocacy, representation and support. It is not something which is achievable quickly or through ad hoc contact.
- 3.8 A critical part of the TCFUA's submission to the PI Review includes evidence from TCF outworkers of their working conditions both before and since the passage of the TCF Act. For an outworker to provide evidence takes enormous courage, given the well researched vulnerability of this group of workers to exploitation and abuse. Their collective evidence demonstrates that the TCF Act reforms have made an appreciable difference to the level of compliance with minimum award and legal conditions of employment for some outworkers. They also show that the TCF Act still has much more practical work to do in ensuring that those gains are spread across the outworker community more broadly.
- 3.9 It is also important to acknowledge that many TCF outworkers and workers in TCF sweatshops directly affected by the legislation, either will not be aware of the PI Review, and/or are not otherwise in a position to provide a submission

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<sup>10</sup> Homeworkers Code of Practice

to the Department. Many of their voices and experiences of the TCF Act will not be heard as part of the PI Review.

- 3.10 There are many understandable reasons for this. TCF outworkers by definition, work at home and are not part of what is considered to be the mainstream, formalised workforce. The often hidden nature of the work, and the extreme time demands placed on TCF outworkers result in high levels of isolation and social exclusion. This is exacerbated by low rates of spoken English and written literacy. Further, there is widespread fear and trepidation amongst TCF outworkers to publicly tell their stories when they are so intrinsically reliant on their employers for ongoing work.
- 3.11 In a similar vein, the position of sweatshop workers is equally precarious. In the TCFUA's experience, many of the characteristics of TCF outwork apply equally to sweatshop work: for example they share a similar demographic profile and experiences of isolation, chronic underpayment of wages and other entitlements, exploitation, intimidation and fear. It is also not uncommon for TCF outworkers to move between outwork and sweatshops when home based work is reduced in order to earn enough money to support themselves and their families.
- 3.12 These factors invariably impact on the depth and quantity of direct evidence that the PI review can obtain from outworkers and sweatshop workers. In this context, the capacity of the PI Review to comprehensively capture the impact of the legislation on TCF outworkers and sweatshop workers will be limited, particularly given the relatively narrow nature and methodology of the PI Review exercise itself.

## 4 PURPOSE OF A POST IMPLEMENTATION REVIEW

- 4.1 In general terms, the intent of a Post Implementation Review (in circumstances where a Regulatory Impact Statement was not produced at the time of the introduction of the regulation) is 'to consider whether the regulation remains appropriate, and to what extent the regulation is efficient and effective in achieving its original objectives and, where possible, its actual impacts.'<sup>11</sup> Similarly, the Terms of Reference for the PI Review into the TCF Act articulate that the purpose of a Post Implementation Review is to 'test whether the regulation is performing as intended, is still relevant and needed'.<sup>12</sup>
- 4.2 However, a PI Review and the question it poses does not and cannot operate in a vacuum.
- 4.3 The TCFUA notes that the the TCF Act has been in operation for less than two years. This represents a relatively short period of time in which to comprehensively assess the impact of any piece of amending legislation which is essentially enabling in intent. This is particularly so in context of the TCF industry which has a notorious history of systemic non-compliance with minimum award and legal conditions and the hidden nature of outwork, and outworkers.
- 4.4 In the TCFUA's experience, the level of knowledge of workplace laws amongst TCF industry employers is generally low. Many TCF employers are not members of industry associations and do not consider it a priority to obtain legal or industrial advice as part of their business operations. Commonly, many TCF industry employers are ignorant (either inadvertent or wilful) of their basic obligations under the FW Act, the relevant modern award and other workplace laws (for example, relating to superannuation, equal opportunity, workers' compensation and occupational health and safety). Unfortunately there is also a hard core group of TCF employers who intentionally and persistently breach such obligations with a view to obtaining maximum advantage over reputable competitors on the basis of labour costs alone.
- 4.5 Additionally, both prior to, and post the commencement of the TCF Act, there has been considerable misinformation circulated about the effect of the new laws by some parts of the TCF industry. The effects of the TCF provisions has been consistently misrepresented within the media (traditional and on line) and to TCF industry participants, particularly those in supply chains. This has led to unnecessary confusion and misunderstanding including by employers, suppliers, makers and outworkers themselves. As a result, a percentage of TCF

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<sup>11</sup> Department of Finance and Deregulation (Office of Best Practice Regulation); Guidance Note: Post Implementation Reviews

<sup>12</sup> Ibid;

employers have continued to breach minimum award and legal conditions in relation to both TCF outworkers and/or workers engaged in sweatshops.

- 4.6 Similarly, the level of understanding of rights and entitlements by TCF outworkers, and workers in sweatshops is commonly very poor. This is a widespread problem exacerbated by factors such as having limited English language and written skills, unfamiliarity with the Australian legal and workplace relations systems, mistrust of government and other institutions, social isolation, and the demands of working long hours. The TCFUA has implemented a variety of strategies to educate TCF outworkers and workers in sweatshops about their legal and award entitlements, and the changes resulting from the TCF Act.
- 4.7 We also note that there was no substantive, government TCF industry information and education program to assist in communicating and implementing the TCF Act reforms.

## **5 THE EXPLOITATION OF OUTWORKERS & SWEATSHOP WORKERS – A WELL DOCUMENTED PROBLEM**

### **History of research and inquiries**

- 5.1 The impetus for the reforms in the TCF Act occurred in the context of numerous inquiries, reports and research which collectively found that outworkers (or home based workers) are particularly vulnerable to exploitation and required special protective measures. It is important to revisit these reports because they form a significant body of research and consideration conducted over a long period of time about the systemic position of outworkers in the TCF industry. The research points to a series of clear conclusions regarding the changing nature of the TCF industry, reflecting the major and consistent shift from formalised factory production to the home based sector over the last 30 to 35 years. This profound economic restructuring of the TCF industry has been caused by a combination of forces including the significant reduction in tariff protection, the move to off shore production in low wage countries and the major concentration of retailers in Australia.
- 5.2 The research illustrates that one of the key consequences of this restructuring has been the increasing complexity and length of TCF supply chains, typically operating vertically and horizontally with multiple levels and participants. These supply chains are labyrinth like and commonly operate with minimal transparency as to the volume of work produced, by whom and under what labour conditions. Outworkers undertake work at the end of these supply chains most immediately for their direct engager (which may be a small maker or merely a middle person who simply passes on the work); yet this work is

ultimately undertaken on behalf of a principal (usually a major retailer or fashion house).

5.3 The research also documents the key characteristics of outwork, the profile of workers undertaking outwork and the shocking wages and conditions under which outwork is performed. It consistently illustrates that outworkers receive very low rates of pay, work excessive hours, experience social and work life isolation and have little, if any, bargaining power to negotiate for better conditions. The body of research reveals that the practice of sham contracting is endemic. The research overwhelmingly identifies that mainstream industrial regulation is inadequate to protect outworkers from exploitation and that particular measures are needed.

5.4 Industrial tribunals at both federal and state levels have acknowledged and accepted that this class of worker are in need of special regulation and protection. In the landmark case of *Re: Clothing Trades Award 1982*,<sup>13</sup> from which the federal Clothing Trades Award 1982 was varied to provide new conditions with respect to the performance of work by contractors and outdoor workers (now called outworkers or homeworkers), Senior Deputy President Riordan found:

*'The remuneration and treatment generally of tens of thousands of persons performing work in the clothing trade as "outdoor workers" is scandalous and represents a serious affront to the moral and social conscience of the community. The present situation reveals a serious failure of the system of industrial regulation to protect one of the most vulnerable and insecure sections of the community. Some are persons who have an urgent, and even desperate, need to earn whatever money is possible by the performance of work for a relative pittance under appalling conditions. Almost all of those involved are women of migrant background. Some do not speak or understand English at all and some have only a very limited knowledge of it. Many have dependent children and have no other prospect of employment. Such persons are easy prey for those with a will to deprive them of a fair and just reward for their skills and the performance of long hours of work. It would be unconscionable to ignore the plight of these workers and refuse to intervene in this situation of grossly improper exploitation of a weak and unorganised section of the workforce.'*<sup>14</sup>

5.5 Although the above decision was made in 1987, many of the features of outwork which his Honour described continues to characterise the outwork sector. Consistently, research has found that the average outworker in the TCF industry works excessive hours (both on daily and weekly basis), receives less than award rates of pay, have difficulties in receiving payment for work

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<sup>13</sup> *Re: Clothing Trades Award 1982* (Riordan DP) [1987] 19 IR 416; The decision was made in relation to an application by the Clothing and Allied Trades Union of Australia to vary the Clothing Trades Award 1982 to provide new conditions with respect to the performance of work by contractors and outdoor workers.

<sup>14</sup> *Ibid*; [421-422]

performed, do not receive accrued leave or public holidays and work in poor health and safety conditions.

5.6 In 1994 (July to November) the TCFUA conducted a National Outwork Information Campaign targeted at outworkers, their employers, and communities to gather information about the largely hidden outwork sector of the Australian workforce.<sup>15</sup> Over the 8 weeks of the campaign, bilingual workers employed by the TCFUA received a total of 3,000 calls from outworkers (an average of 375 calls per week).<sup>16</sup> The campaign found, amongst other things, that:

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

5.7 The findings of a Melbourne University study of outworkers in 2001<sup>17</sup> included:

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

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<sup>15</sup> TCFUA; *The Hidden Cost of Fashion: Report on the National Outwork Information Campaign* (March 1995)

<sup>16</sup> Ibid; [11]

<sup>17</sup> Cregan, C; *Home Sweat Home: Preliminary Findings of the first stage of a two-part study of outworkers in the textile industry in Melbourne, Victoria*; Department of Management, University of Melbourne, November 2001. 97% of the outworkers were women and 92% of these were born overseas.

- The vast majority reported that they worked routinely during the school holidays (93%), on Saturdays (91%), (Sundays (87%) and on public holidays (89%).<sup>18</sup>

5.8 In 2004, the TCFUA (Victorian Branch) conducted a compliance report for the Ethical Clothing Trades Council (Vic) as to the level of compliance within the clothing industry in relation to outworkers receiving their lawful entitlements.<sup>19</sup> The union undertook inspections in 151 workplaces and interviewed a group of outworkers. Based on inspections and interviews, the Report's key findings concluded that in the vast majority of cases:

- Outworkers were not receiving award rates of pay
- Outworkers were not receiving award entitlements such as annual leave, long service leave, overtime and public holidays
- Outworkers were being forced into sham contractor and company arrangements as a systemic method of employers avoiding legal obligations to employees
- Outworkers were not receiving superannuation
- Employees were not being identified as employees for the purposes of Work Cover
- Companies were not keeping transparent and correct work records
- Companies who give out work were not registered with the Board of Reference.<sup>20</sup>

5.9 A subsequent report by the Brotherhood of St Laurence in 2007<sup>21</sup> found that outworkers interviewed for the research indicated that conditions for outworkers had actually worsened in the previous five years:

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

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

5.10 More recently, in 2011/2012, research into the conditions of TCF outworkers has been conducted by Shelley Marshall, a Senior Lecturer in the Department

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<sup>18</sup> Ibid

<sup>19</sup> Ethical Clothing Trades Council; *Outworkers' Lawful Entitlements Compliance Report* (Nov 2004)

<sup>20</sup> Ibid; page 3

<sup>21</sup> Brotherhood of St Laurence (Diviney, E & Lillywhite, S); *Ethical Threads – Corporate Social Responsibility in the Australian Garment Industry* (2007)



of Business Law and Taxation at Monash University, Victoria. Ms Marshall is an international expert in the regulation of informal work. The preliminary findings of Ms Marshall's research were presented as part of her submission to the Senate Committee Inquiry into the Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011.<sup>22</sup> In the course of the interviews Ms Marshall conducted with outworkers, she replicated the questions used in the Cregan study in addition to the collection of narrative histories about the outworkers' lives and history of work. In broad terms, Ms Marshall's research identified the following:

- Almost all of the workers interviewed can be identified as being trapped in outwork or similar precarious work;
- Outworkers have a lack of labour market mobility;
- Outwork is very isolating. This isolation results in low English language skill development and a low level of knowledge of the broader institutional landscape in Australia.

5.11 In respect to labour conditions, Ms Marshall's research identified:

- The findings are consistent with previous studies although they relate to the experience of workers in a later stage of their working lives;
- All workers interviewed had, in the past, been told to register an ABN as a condition of receiving work;
- More recently, many had been told to incorporate Pty Ltd companies and employ someone;
- Where the research departs from previous studies is that there is evidence that some outworkers working in supply chains linked to companies that are accredited under the Homeworkers Code of Practice are receiving their entitlements, or close to their correct entitlements. This contrasted greatly with previous studies which found no evidence of compliance;
- One of the most significant findings was the difference that the change in conditions had made to interviewees' lives. Those who received higher pay reported that due to the capacity to take breaks they experienced less pain related to injuries, time to spend with family and leisure time which they had not enjoyed since commencing outwork in Australia.<sup>23</sup>

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<sup>22</sup> Shelley Marshall; Submission (Jan 2012) to the (Senate) Standing Committee on Education, Employment and Workplace Relations Inquiry into the *Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011*.

<sup>23</sup> Ibid.

## Sham contracting in the TCF industry

- 5.12 The significant body of research into exploitation of outworkers repeatedly highlights the endemic practice of sham contracting imposed on TCF outworkers, and the negative effects that arise from these arrangements. In essence, sham contracting is the key pillar on which outworker exploitation is founded because, a principal, manufacturer or sub-contractor attempts to remove an outworker from the sphere and reach of industrial laws and protection by treating an individual outworker as a ‘business’ or ‘independent contractor’. Whilst this is a legal fiction, it is designed to keep outworkers ignorant of or afraid to enforce their rights to lawful wages and entitlements consistent with their employment status.
- 5.13 The systemic problem of sham contracting was pointedly identified by DP Riordan in the case of *Re: Clothing Trades Award 1982* as reason why comprehensive outwork provisions were necessary for inclusion in the federal clothing award. It is instructive to repeat key aspects of His Honour’s judgment because they so clearly articulated the depth of the problem:

*‘There is no significant difference in the process of making garments, whether performed by workers in the factories of manufacturers or by outdoor workers in their own homes. The difference is about how the work is handed out and the method and level of payment for the completed work.’<sup>24</sup>*

...

*The evidence in this case points to the conclusion that many of the persons engaged as outworkers are engaged in an employer-employee relationship. Usually, outdoor workers are members of a production team, although unknown to each other, with each one making up part of the garment. They are clearly part of an integrated manufacturing process. On the basis of the evidence and material presented I must conclude that the great majority of outdoor workers, who perform work as machinists, are employees and not independent contractors. Indeed, persons are performing machining work to set specifications, patterns and standards in a manner which establishes that they are part of a coordinated scheme of manufacturing garments.*<sup>25</sup>

...

*Outdoor workers are clearly performing work which is integrated into the business of garment manufacture. They are concerned with sewing parts of garments, which have been cut out by some other person, usually an employee, to a predetermined design and pattern. In some cases their work represents the final stage in the manufacture but in other cases it is not. In any event it is only one part of the total process of manufacturing garments. Their work is but one aspect of several functions that must be performed to a specific plan in order to manufacture the garments concerned.*

*Outdoor workers working as machinists are not permitted to use personal initiative. Their work is performed to rigid specifications as to quality, quantity and style as well*

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<sup>24</sup> *Re Clothing Trades Award 1982* (1987) 19 IR 416, 419.

<sup>25</sup> *Re Clothing Trades Award 1982* (1987) 19 IR 416, 436.

as the time by which it must be completed. They have no say in the design. The garments are received already cut for sewing or the garments may be already partly sewn and require some further specialised machining. Their work is inspected and may be then passed on to some other person for the performance of an additional function such as further machining or pressing until the manufacture of the garment is complete. They are certainly subject to control and direction, their work is an integral part of the business of those for whom they work and the advertisements which many answered to obtain their jobs were in many cases for employees. This work could not be described as the work of an independent contractor within the ordinary and usually accepted meaning of that term.

On the basis of the case law they are employees and not contractors. It follows that Cocks' case does not apply. ... Further, Cocks' case was not concerned with the protection of the award and the use of devices designed to facilitate widespread avoidance or evasion of duties and obligations imposed by the award.<sup>26</sup> [emphasis added]

- 5.14 As the body of research referred to above illustrates, the use of sham contracting as 'a device to facilitate widespread avoidance of duties and obligations' in respect to outworkers continued to be a significant issue in the TCF industry in the period between His Honour's decision in 1987 and the passage of the TCF Act in 2012.

- 5.15 In its written submission to the Senate Inquiry, the TCFUA identified the nature and extent of sham contracting in the TCF outwork sector:

*'In the TCFUA's experience, sham contracting arrangements in the TCF industry are endemic. They are so common, that to consider such arrangements as 'isolated' or 'aberrant' is to misunderstand the systemic nature of the practice. In the context of the entrenched pattern of home based work within TCF supply chains, the distinction between an employee and a contract outworker is a legal fiction.'*<sup>27</sup>

- 5.16 The TCFUA also identified the very adaptive nature of TCF sham contracting arrangements in response to TCFUA compliance activities.

*'More recently, the TCFUA has become aware of outworkers being required by their employer or person who engages them, in addition to obtaining an ABN or ACN, to 'employ' a member of their family on a casual basis for a few hours per week in order to strengthen an argument that they are independent contractors. Part of this direction from the principal or maker is that the outworker construct time and wages records which allegedly reflect the employment of such people. ... For example, the TCFUA is aware of outworkers who, as a condition of receiving work, are required to employ their children and/or their spouse. Typically, such 'employment arrangements' are also shams...*

*Further, some outworkers are required to 'employ' each other to ensure that they continue to receive work. That is, Outworker A 'employs' Outworker B as a 'casual*

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<sup>26</sup> *Re Clothing Trades Award 1982* (1987) 19 IR 416, 439.

<sup>27</sup> (Senate) Standing Committee on Education, Employment and Workplace Relations; Inquiry into the Fair Work Amendment (Textile, Clothing and Footwear) Industry Bill 2011; TCFUA Submission; [48]

*employee' and Outworker B employs Outworker A similarly. In one such arrangement of which the TCFUA is aware, the Principal knows directly of the sham arrangements as the Principal provides work to both Outworker A and Outworker B.'*<sup>28</sup>

- 5.17 The TCFUA also identified the range of negative consequences from sham contracting in the TCF industry, including causing confusion for outworkers about their real employment status,<sup>29</sup> and dissuading outworkers from seeking support from the union to pursue their legal entitlements and rights as an employee outworker.<sup>30</sup> The impact overall on industry compliance was significant, such that:

*'There is a direct relationship (and inter-relationship) between the level of sham contracting and the extent to which supply chains are transparent and subject to external scrutiny and compliance...sham contracting has a directly negative impact on the level of compliance by makers/suppliers/principals with legal and awards conditions for outworkers. Once entrenched as 'normal', sham contracting becomes much more difficult to 'unpack' and more resource intensive in terms of cleaning up a particular non compliant supply chain.'*<sup>31</sup>

- 5.18 Other organisations who work with outworkers, such as Fair Wear Inc, contested the employer claims that outworkers wanted to run their own business, submitting to the Senate Inquiry, that:

*'outworkers wish to be treated as employees [and] do not consider themselves to be "entrepreneurs" despite often being told they must get an ABN or incorporate a proprietary limited company in order to receive work.'*<sup>32</sup>

- 5.19 The Slater and Gordon submission to the Senate Inquiry identified that the issue of the employment status of outworkers (whether contractors or employees) had been *'the key issue which had been grappled with over the course of the development of outworkers regulation in Australia.'*<sup>33</sup> Slater and Gordon went on to state:

*'.....the regulatory response to date in this country indicates broad and widespread acceptance that outworkers should be entitled to the benefits of employment, irrespective of the arrangements under which they are engaged. It is evident from the laws examined below that most jurisdictions in Australia have put this issue beyond doubt through the use of statutory deeming provisions. Even where no deeming provisions apply, awards impose obligations on contractors that are*

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<sup>28</sup> Ibid; [51], [52]

<sup>29</sup> Ibid; [54]

<sup>30</sup> Ibid; [53]

<sup>31</sup> Ibid; [55]

<sup>32</sup> (Senate) Standing Committee on Education, Employment and Workplace Relations; Inquiry into the Fair Work Amendment (Textile, Clothing and Footwear) Industry Bill 2011; Fair Work Inc. Submission; p7

<sup>33</sup> (Senate) Standing Committee on Education, Employment and Workplace Relations; Inquiry into the Fair Work Amendment (Textile, Clothing and Footwear) Industry Bill 2011; Slater and Gordon Submission; p 5

*identical to those which apply to employers of outworkers. This approach also reflects an acceptance of the same principle.’<sup>34</sup>*

## Senate Inquiry Committee Report

5.20 The Senate Committee Report<sup>35</sup> resulting from the Inquiry into the TCF Bill, made reference to the extensive research reports and multiple Senate Inquiries which had considered (some in part) the position and treatment of outworkers within the TCF Industry. These included:

- Productivity Commission, *‘Review of TCF Assistance: Inquiry Report’* (July 2003);<sup>36</sup>
- Brotherhood of St Lawrence, *‘Ethical Thread: Corporate social responsibility in the Australian Garment Industry’* (2007);<sup>37</sup>
- Professor Roy Green, *‘Building Innovative Capability: Review of the Australian Textile, Clothing and Footwear Industries’* (Aug 2008);<sup>38</sup>
- Senate Economics Reference Committee Report on *‘Outworkers in the garment industry’* (1996);<sup>39</sup>
- Senate Economics References Committee *‘Review of the Inquiry into outworkers in the garment industry’* (1998);<sup>40</sup>
- Senate Economics Legislation Committee, *‘Provisions of the Textile, Clothing and Footwear Strategic Investment Program Amendment (Post -2005 scheme) Bill 2004 and Customs Tariff Amendment (Textile, Clothing and Footwear Post-2005 Arrangments Bill 2004’* (Aug 2004);<sup>41</sup>
- Senate Employment, Workplace Relations and Education Legislation Committee Report on the *‘Provisions of the Independent Contractors Bill 2006 and the Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006’* (Aug 2006);<sup>42</sup>
- Senate Standing Committee on Education, Employment and Workplace Relations Report on the *‘Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008 [Provisions]’* (2008);<sup>43</sup>
- Senate Standing Committee on Education, Employment and Workplace Relations Report on the *‘Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 [Provisions]’* (2009);<sup>44</sup>

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<sup>34</sup> Ibid; p8

<sup>35</sup> (Senate) Education, Employment and Workplace Relations Legislation Committee; Inquiry into the Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011; Report (Feb 2012)

<sup>36</sup> Ibid; [1.16] - [1.17]

<sup>37</sup> Ibid; [1.28] - [1.30]

<sup>38</sup> Ibid; [1.31] - [1.32]

<sup>39</sup> Ibid; [1.13] - [1.14],

<sup>40</sup> Ibid; [1.15]

<sup>41</sup> Ibid; [1.18] - [1.19]

<sup>42</sup> Ibid; [1.22] - [1.27]

<sup>43</sup> Ibid; [1.11]

<sup>44</sup> Ibid; [1.11]

- 5.21 After summarizing key elements of the above reports as they related to the position of TCF outworkers, the Committee generally concluded that:

*'[1.33] These inquiries and reports demonstrate the mistreatment and exploitation TCF outworkers have endured over a period of at least 15 years. The road to justice for these vulnerable workers has been long and the achievement of equity is long overdue. The optimism expressed for voluntary codes by the Productivity Commission and others has proven misplaced. There has been bipartisan support to improve working conditions for TCF outworkers, as evidenced in previous Senate Committee reports; however, to date these attempts have failed to deliver the fair and equitable work conditions to which TCF outworkers are entitled.'*

*[1.34] The time has come to resolve the endemic mistreatment and exploitation of outworkers in the TCF industry so that these workers can share in the rights and protections enjoyed by other Australian workers.'*<sup>45</sup>

- 5.22 On the basis of the evidence, the Senate Committee recommended in its Report that the TCF Bill 2011 be passed,<sup>46</sup> subject to a number of further proposed amendments relating to the deeming<sup>47</sup> and recovery of money provisions.<sup>48</sup>

#### **TCFUA Direct Contact with Outworkers**

- 5.23 The TCFUA's own extensive experience across the country also illustrated that exploitation of outworkers in the TCFUA industry persisted on a systemic level. Prior to the passage of the TCF Act in early 2012, the TCFUA observed an improvement in outworker conditions in some parts of the industry over the previous 2 years. Improvement has not been uniform, and primarily occurred within the supply chains of companies which are accredited under the Homeworkers Code of Practice (Ethical Clothing Australia), or are otherwise seeking accreditation.
- 5.24 Critical to the Code accreditation process is the compliance role undertaken by the TCFUA in working with applicant companies to ensure that their supply chains fully meet the minimum legal and award standards. Since 1 January 2010 the TCFUA undertook approximately 2,700 separate compliance visits across Victoria, NSW, Queensland and South Australia. As a result, over 6,000 homeworkers (of whom more than half are in accredited supply chains) either

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<sup>45</sup> Ibid; [1.33] – [1.34]

<sup>46</sup> Ibid; Recommendation 3; p vii;

<sup>47</sup> Ibid; Recommendation 1; p vii. The Committee recommended that the government 'revise the deeming provisions in the bill to ensure that these provisions apply to all outworkers in the TCF industry, including those operation under a corporate structure.'

<sup>48</sup> Ibid; Recommendation 2; p vii. The Committee recommended further changes to the recovery of money provisions in the bill to enhance access by outworkers to the recovery mechanism.

have a greater awareness of their legal entitlements or are more likely to be working under award compliant conditions.

### **Inadequate right of entry powers to investigate conditions on sweatshops**

- 5.25 The other major area of exploitation in the TCF industry which required addressing concerned the position of workers in sweatshops.
- 5.26 The previous (TCF specific) right of entry laws under the FW Act recognized the particular difficulty in monitoring compliance with outworker conditions in TCF supply chains.<sup>49</sup> Practically, it gave the TCFUA a right to enter premises, to investigate breaches of the FW Act or a Fair Work instrument, which relates to, or affects a TCF outworker and who works on the premises.<sup>50</sup> However, in exercising these powers, if the the TCFUA became aware that in-house 'sweatshop' workers were also working at the same premises it was unable to effectively investigate any suspected breaches relating to their employment. This represented an unintended anomaly and undermined compliance strategies designed to ensure that all workers with a TCF supply chain receive their lawful award and statutory entitlements.
- 5.27 It is notable that sweatshops, are often strikingly similar to the home based sector in the way they are structured, the profile of the workforce and in the substandard conditions in which they operate. Like outwork, an increasing percentage of TCF production, particularly in the clothing and fashion industries is performed by sweatshop workers. The TCFUA is aware, that there are a percentage of outworkers who work alternatively in sweatshops, when they cannot earn sufficient income working from home. These outworkers churn through one form of insecure employment and income to another, trapping them in a cycle of poverty and disadvantage.
- 5.28 In its written submission to the Senate Inquiry into the TCF Bill, the TCFUA described sweatshops from its on the ground experience:

*'The phenomenon of sweatshops within the TCF industry is not new, but they are increasingly adaptive to the 'needs' and structure of TCF supply chains. Sweatshops may be considered to be part of the 'formal TCF sector' in one sense, but they exist in a type of parallel economy, with extremely low levels of scrutiny and transparency of operation. Some sweatshops operate entirely on a cash-in-hand basis, others on a mix of workers 'on the books' and those who officially don't exist in time and wages records. Even where a sweatshop operates formally, many employees 'on the books' will be engaged on a casual, or on a periodic basis which mirror the surge or drop in orders. Whatever the particular sweatshop structure, the workers who work in them*

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<sup>49</sup> The previous TCF specific right of entry provisions (new Part 3-4, Subdivision AA – Entry to investigate suspected contraventions relating to TCF outworkers) were introduced as part of the Fair Work Act 2009.

<sup>50</sup> See previous formulation of s483AA(1)(a) FW Act.

*rarely have any say in how they are engaged as they seek to eke out a living wage from such precarious employment.*

*Whilst there is no single accepted definition of a sweatshop, there are key elements which characterise what a sweatshop is – groups of workers labouring, usually in isolation, under appalling physical workplace conditions, receiving under award rates of pay with little, if any, autonomy over the work they perform. Sweatshop workers are almost uniformly from a Non-English Speaking Background and are often unaware of, or feel unable to enforce their legal rights and entitlements. Many are migrants or refugees who have had no experience of independent unions and/or the role of government in enforcing minimum conditions of employment. Some have been subjected to imprisonment and oppression in their home countries. Fear of government and ‘authorities’ is commonplace.*

*A consistent feature of sweatshops uncovered by the TCFUA is the level of control exerted by sweatshop operators including requiring workers to work to unrealistic deadlines until orders are completed, threats to job security and intimidation, harassment and bullying. Workers are rightly fearful of retribution if they complain. Sweatshops workers know that by making an individual complaint about workplace conditions, they risk being sacked without wages, leave or other entitlements. This is not a theoretical possibility but a real and demonstrated risk.*

*The TCFUA is also aware of examples where sweatshop operators act as unofficial lenders of money to workers, creating an additional layer of economic dependence and which acts as a further disincentive for workers to raise workplace issues with their employer or the union. It is also common for sweatshop operators to mislead workers by telling them that if they involve the union they will not receive any more work from the supplier/principal above them in the supply chain.*

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

#### **Case study**

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

*The following day when the TCFUA returned to the factory, the clothing operations had literally disappeared, with no evidence of machinery or workers remaining.*

*Despite the TCFUA seeking to make inquiries of surrounding houses and businesses, it was unable to obtain any information on where the sweatshop had relocated to.*

*Sweatshops, and their workers, are often difficult to locate, follow and monitor.*

*Sweatshops can operate almost anywhere where there is access to power and floor space: in traditional factory type premises, industrial estates, at the back or upstairs of painted out shop fronts, suburban shopping strips, warehouses, garages, behind roller doors, in rooms attached to other unrelated businesses or in buildings located*



*on or near domestic premises. Commonly there is no identifying information on the external surrounds of the sweatshop premises, no buzzer or bell and no physical evidence that any activity is taking place inside the particular building. To the human eye, many such buildings appear derelict or unoccupied.*

*For these reasons sweatshops in the TCF industry represent the 'perfect storm' for exploitation to flourish. Without effective access, there is no practical way for the TCFUA to identify where sweatshop workers work, and the conditions under which their work is undertaken.<sup>51</sup>*

- 5.29 At the Senate hearing into the TCF Bill held in February 2012, the TCFUA National Secretary, Michele O'Neil,<sup>52</sup> gave evidence regarding the sweatshop sector including as follows:

*'Similarly we have seen a spread of sweatshops in the industry as TCF supply chains have adapted to a contracting-out model in which [the] price paid for goods is constantly being squeezed at every level. Sweatshops may be difficult to define, but you know one when you see one. Sweatshops are characterized by groups of workers laboring under appalling physical conditions and receiving under award rates of pay and conditions. Commonly, sweatshop workers are subject to unrealistic deadlines, intimidation, harassment and threats to their job security. Sweatshops flourish because they operate with no, or extremely low, levels of scrutiny and transparency. By their nature, sweatshops do not announce themselves ... making intervention and compliance on their behalf nearly non-existent.'<sup>53</sup>*

- 5.30 The TCFUA also tabled at the Senate hearing documentary evidence of the reality of sweatshops, including a DVD presentation and a series of photos taken of sweatshops uncovered by the union as part of its compliance activities, (as well as photos of various outworker premises). We seek to provide photographs to the PI Review during consultation.

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<sup>51</sup> TCFUA Submission to the Senate Standing Committee on Education, Employment and Workplace Relations Inquiry into the *Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011*; (11 January 2012), pp 22-28.

<sup>52</sup> Hansard; Senate (Education, Employment and Workplace Relations Legislation Committee); *Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011*; Thu, 2 February 2012, Melbourne; p15.

<sup>53</sup> Ibid;

## 6 REGULATION OF OUTWORK ARRANGEMENTS

### History of award regulation

- 6.1 It is important to acknowledge that parliaments and industrial tribunals have been considering the most effective ways of regulating outwork in the clothing industry for many decades. In fact, the employment of outworkers was first regulated by awards nearly a century ago. The first clothing award made by an industrial tribunal in 1919 regulated the system under which ‘outdoor workers’ could be engaged.<sup>54</sup> Since then, various incarnations of the federal industrial tribunal has considered at length the framework of regulation of outwork in the Australian TCF industry. Without exception, the tribunal has consistently concluded that strong regulation is required within the award system in recognition of outworkers’ particular vulnerability to low pay, exploitation and abuse. This acknowledgment was articulated in the landmark decision of *Re Clothing Trades Award [1982]*<sup>55</sup> by Deputy President Riordan previously referred to in this submission.
- 6.2 A similar framework of outwork and related provisions were subsequently included in the replacement simplified federal award, the Clothing Trades Award 1999.<sup>56</sup> The other industry national awards in the textile and footwear industries also contained limitations on the giving out of work in the TCF industry and the minimum conditions under which such work could be lawfully undertaken. Such provisions existed in both the pre-simplified, antecedent awards<sup>57</sup>, and the pre-modern awards which replaced them.<sup>58</sup>
- 6.3 It is also the case that TCF industry state awards (and including NAPSA’s subsequently made after March 2006) contained similar or ‘mirror’ outwork and contracting out provisions.<sup>59</sup> Even today, Western Australia which

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<sup>54</sup> See discussion of history or regulation in *Re: Clothing Trades Award [1982]* (1987) 19 IR 416; 421-435

<sup>55</sup> *Re: Clothing Trades Award [1982]*; op cit

<sup>56</sup> *Clothing Trades Award 1999* [AP772144CAV] (Part 9 – Outwork and Related Provisions)

<sup>57</sup> *Clothing Trades Award 1982* (clause 26 – Contract Work; clause 27 – Outworkers); *Textile Industry Award 1994* (clause 42 – Outdoor Workers); *Footwear – Manufacturing & Component – Industries Award 1979* (clause 31 – Outdoor Work)

<sup>58</sup> *Textile Industry Award 2000* [AP799036] (Part 8 – Outwork); *Footwear Industry Award 2000* [AP781127CRV] (Part 8 – Outdoor Workers); *Felt Hatting Industry Award 1999* [AP781105] Part 8 – Outwork]

<sup>59</sup> *Clothing Trades (State) Award [NSW]* (clause 32 – Outworkers); *Footwear Manufacturing Industry (State) Award [NSW]* (clause 37 – Outdoor Work; Schedule E); *Textile Industry (State) Award [NSW]* (clause 48 – Outdoor Workers); *Clothing Trades Award – State (Excluding South East Queensland) 2003* [Qld] (Clause 4.4 – Outworkers); *Clothing Trades Award – Southern and Central Divisions 2003* [Qld] (clause 4.4 – Outworkers); *Boot and Shoe Award 2006* [Sth Aust] (clause 4.4 – Outdoor workers); *Clothing Trades Award* [Sth Aust] (clause 4.10 – Contract Work; clause 4.11 – Outworkers; clause 4.12 – Registration of employers); *Clothing Industry Award [Tas]* (clause 19 – Outworkers)

maintained its jurisdiction in respect to non-constitutional employers, retains a state clothing award which includes comprehensive outwork provisions.<sup>60</sup>

### Enforcement of federal award outwork provisions

6.4 The importance of federal award outwork provisions as a form of special regulation has been confirmed consistently by the Federal Court. In a series of decisions relating to breaches of outwork provisions in the the federal clothing award, the Court has emphasised the necessity of such provisions in ameliorating exploitation for outworkers.

6.5 In *Re Clothing and Allied Trades' Union of Australia v J and J Saggio Clothing Manufacturers Pty Ltd*, Gray J observed:

*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.*<sup>61</sup>

6.6 In *TCFUA v Lotus Cove*, Merkel J observed:

*[T]he breaches of the award regime concerning outworkers in the present matter are serious. That regime is addressed at preventing abuses which are causing considerable social and economic problems in the community. ...*

*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.*<sup>62</sup>

6.7 In *TCFUA v Southern Cross Marshall*, J observed:

*Outworkers in the clothing industry in Australia are some of the most exploited people in the Australian workforce. They perform garment making work often at absurdly low rates in locations outside their employer's premises. This frequently occurs in the homes of outworkers.*

*To help alleviate this blatant exploitation the Australian Industrial Relations Commission has sought to regulate the provision of outwork in the clothing industry.*<sup>63</sup>

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<sup>60</sup> *Clothing Trades Award 1973* [WA] (clause 25A – Outworkers; clause 25B – Contract Work; clause 25C – Registration of Employers)

<sup>61</sup> [1990] FCA 279, [35].

<sup>62</sup> [2004] FCA 43, [53].

<sup>63</sup> [2006] FCA 325, [1]–[2].

6.8 In *TCFUA v Morrison Country Clothing (No 2)*, Tracey J observed:

*In the principal proceeding, the applicant sought the imposition of penalties against Morrison Clothing pursuant to s 719 of the Workplace Relations Act 1996 (Cth) ("the WR Act") for breaches of clauses 46 and 48 of the Clothing Trades Award 1999. Clauses 46 and 48 regulate the terms and conditions of outworkers. The Award is intended to regulate the use of outworkers in the clothing industry to ensure that outworkers receive their minimum entitlements. The relevant provisions of the Award were specifically designed to remedy the exploitation of this vulnerable group of workers: see Clothing Trades Award 1982 Print R2749 and cf the observations of Marshall J in Textile Clothing and Footwear Union of Australia v Southern Cross Clothing Pty Ltd [2006] FCA 325.*

*The applicant claimed, inter alia, that Morrison Clothing had utilised outworkers but had not provided the minimum wages and conditions provided for in the Award or kept all of the requisite work records. The work records of Morrison Clothing are essential for the applicant to prove its case. The failure of Mr Morrison to provide discovery of the work records has severely limited the ability of the applicant to continue the proceedings. As the applicant submits, if Mr Morrison is permitted to ignore the Order he is able to circumvent the outworkers' regulatory regime. In those circumstances, and particularly in light of the objectives of that regime, the amount of the penalty should be sufficient to deter Mr Morrison and others from conduct designed to circumvent the legislative protections which are provided for outworkers.<sup>64</sup>*

6.9 These decisions, consistent with the extensive body of outwork research and reports acknowledge that outworkers as a class of worker require special award and legislative protection.

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<sup>64</sup> (No 2) [2008] FCA 1965, [12]-[13].

## State Legislation

- 6.10 Various state governments have also passed specific outwork laws in NSW,<sup>65</sup> South Australia,<sup>66</sup> Queensland,<sup>67</sup> Tasmania<sup>68</sup> and Victoria<sup>69</sup> in relation to deeming<sup>70</sup>, recovery of unpaid remuneration owed to outworkers<sup>71</sup> mandatory codes of practice.<sup>72</sup>

## Federal regulatory framework

- 6.11 At a federal level, the National Employment Standards (NES) under the FW Act and the relevant modern award, the TCF Award, constitute the minimum safety net for TCF outworkers in Australia. The FW Act provides that modern awards may include outworker terms including terms:
- Relating to the conditions under which an employee may employ employees who are outworkers;
  - Relating to the conditions under which an outworker entity may arrange for work to be performed for the entity (either directly or indirectly), if the work is of a kind that is often performed by outworkers (includes terms relating to the pay and conditions<sup>73</sup> of outworkers); and
  - Any machinery or incidental terms.<sup>74</sup>
- 6.12 Schedule F of the TCF Award contains a comprehensive framework of outwork and related provisions, which specifically regulate the arrangements made by principals with others to have TCF work undertaken on their behalf. The Schedule is designed to ensure transparency at each level of the supply chain from the principal through each stage at which the work is given out. It does this by a series of interdependent and cascading obligations on supply chain participants. In essence, the Schedule is structured to follow the work and

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<sup>65</sup>[NSW]: Industrial Relations Act 1996 (NSW); Industrial Relations (Ethical Clothing Trades) Act 2001 (NSW); NSW Ethical Clothing Extended Responsibility Scheme

<sup>66</sup> [South Australia]: Fair Work Act 1994 (SA); Fair Work (Clothing Outworker Code of Practice) Regulation 2007 (SA)

<sup>67</sup> [Queensland]: Industrial Relations Act 1999 (Qld)

<sup>68</sup> [Tasmania]: Industrial Relations Act 1984 (Tas);

<sup>69</sup> [Victoria]: Outworkers (Improved Protection) Act 2003 (Vic)

<sup>70</sup> States which have outworker deeming laws include Qld, SA, Victoria, NSW and Tasmania.

<sup>71</sup> States which have recovery of money laws include Qld, SA, Victoria and NSW.

<sup>72</sup> States which have mandatory codes of practice include SA and NSW. Qld previously had a Code of Practice which was repealed in November 2012. Victorian retains the capacity to make a Code.

<sup>73</sup> A Full Bench of the FWC has recently confirmed the broad scope of the word 'conditions' finding that 'conditions' should be given 'its ordinary meaning having regard its industrial relations usage'; see *The Ark Clothing Company and Ors; Textile, Clothing, Footwear and Associated Industries Award 2010*; [2013] FWCFB 5729 (4 Oct 2013); [40]

<sup>74</sup> FW Act; s140

facilitate identification of the workers at each level. It is intended to mirror the nature of TCF contracting chains themselves.

- 6.13 The fundamental importance of the Schedule F provisions was illustrated by TCFUA evidence provided to the FWC (Outwork) Full Bench review of the TCF Award as part of the 2012 Award Review (Transitional).<sup>75</sup>

*'Without these obligations, there is no transparency. Without transparency, there is no capacity to locate outworkers and/or uncover the conditions under which they undertake work for the principal/s. This is confirmed by the union's experience nationally in undertaking compliance activities in the industry. If the union can't find where an outworker is, it is unable to assist them to enforce their rights to the minimum safety net terms of the award. It is this basic, but this critical. In this sense, transparency is the foundation which gives effect to the other rights afforded to outworkers under the award.'*<sup>76</sup>

- 6.14 Under the TCF Award, TCF outworkers (whether an employee outworker or contact outworker) are entitled to the same wages and conditions, including in relation to rates of pay, hours of work, leave and NES entitlements. That is, the TCF Award practically provides employment type benefits to outworkers irrespective of their employment, or purported employment, status. No distinction is made. These provisions have applied since the commencement of the TCF Award on 1 January 2010, but reflect broadly similar outworker provisions applying under the previous Clothing Trades Award 1999 and Clothing Trades Award 1982.
- 6.15 The history of outwork regulation (award and legislative) prior to the passage of the TCF Act, illustrates that both federal and state governments (of varying political persuasions) and industrial tribunals had for many decades acknowledged the particular vulnerability of outworkers to very low pay, exploitation and abuse. This was demonstrated by the significant level of bipartisan support for the introduction of essential specific industry regulation to reduce the potential for, and to ameliorate the impacts of such exploitation.
- 6.16 However, these provisions are not uniform, and vary in scope and coverage. The reality is some outworkers have more rights under a particular piece of legislation than others doing the same type of work at home. In some states there is no specific outworker legislation or regulation at all. The TCF industry increasingly operates across state boundaries, with multiple complex supply chains structured around both a formalised and home based workforce. Widespread non compliance with the minimum safety net in the industry remains a key problem for both the TCFUA and industrial regulators (including

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<sup>75</sup> 2012 Transitional Review of Modern Awards; Textile, Clothing, Footwear and Associated Industries Award 2010 (Outwork Full Bench); The Ark Clothing Company (AM2012/93 & Ors); Witness Statement of Michele O'Neil

<sup>76</sup> Ibid; Witness Statement of Michele O'Neil [19]

FWO and state inspectorates). In this context, it was appropriate and timely for the parliament to legislate for a fully national system of regulation which unambiguously provided consistency of rights to outworkers in the TCF industry.

## 7 RATIONALE FOR THE TCF ACT

### Purpose and objects

- 7.1 One of the principal overarching aims of the TCF Bill, as expressed by the then Minister for Workplace Relations (Senator Chris Evans) was to harmonise existing protections so that all TCF outworkers are *'employed under secure, safe and fair systems of work'...* *'to be achieved by implementing nationally consistent rights to legal redress and protection that are of no lesser standard than currently apply in state laws and regulations, and the federal TCF award.'*<sup>77</sup>
- 7.2 The Explanatory Memorandum provided that the TCF Bill's purpose was broadly *'enhancing existing protections for vulnerable workers in the textile, clothing and footwear industry'* and to *'ensure equitable and consistent protection for these workers'*<sup>78</sup> The existing system of regulation relating to TCF outworkers and other TCF workers in place at the time, was acknowledged but the Explanatory Memorandum stated that *'Despite the existing provisions in the FW Act, the relevant modern award and in state legislation, outworkers continue to experience poor working conditions.'* The TCF Bill was also intended *'to address a limitation that currently exists in relation to right of entry into premises in the TCF industry operating under ssweatshop' conditions.'*<sup>79</sup>
- 7.3 In relation to the position of outworkers, the TCF Bill was necessary because:
- 'Research has consistently shown that outworkers in the TCF industry suffer from unique vulnerabilities as a result of their engagement or employment in non-business premises. These vulnerabilities are often exacerbated by poor English skills, a lack of knowledge about the Australian legal system and low levels of union membership in the industry.'*<sup>80</sup>

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<sup>77</sup> Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011; Second Reading Speech (Senator Chris Evans) 24 November 2011.

<sup>78</sup> Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011; (Senate) Explanatory Memorandum; p1

<sup>79</sup> Ibid; p1

<sup>80</sup> Ibid; p1

7.4 The Explanatory Memorandum provided that the objects of the TCF Bill would be implemented specifically by:

- *‘Extend[ing] the operation of most provisions of the FW Act to contract outworkers in the TCF industry;*
- *Provide[ing] a mechanism to enable TCF outworkers to recover unpaid amounts up the supply chain;*
- *Extend[ing] specific right of entry rule that apply to suspected breaches affecting outworkers (which allow entry without 24 hours notice) to the industry more broadly, with an exception for the principal place of business of a person with appropriate accreditation (to which the standard right of entry rules would apply;*
- *Enable[ing] a TCF outwork code to be issued.’<sup>81</sup>*

7.5 It is relevant to the purpose of the PI Review that when the TCF Bill was debated in Parliament, the then Labor government expressly considered the collective body of research which documented the nature of outwork and the low wages and poor conditions for TCF outworkers who performed that work.

*‘There have been any number of reviews over the last 15 years that have raised concerns about the situation of outworkers in the TCF industry.*

*Recently a report by the Brotherhood of St Laurence found that outworkers experience poor working conditions and are frequently underpaid, sometimes as little as \$2 or \$3 an hour.*

*These reviews have found, and the government accepts, that outworkers in the TCF industry suffer from unique vulnerabilities ....*

*It is because of those vulnerabilities that the government recognises that the TCF outworkers require specific regulatory protection in order to control the proven exploitative conditions under which too many find themselves engaged.’<sup>82</sup>*

7.6 Importantly too, the government concluded that existing regulation in respect to TCF outwork was inadequate to effectively ameliorate the effects of those vulnerabilities. In his Second Reading Speech, the Minister directly addressed this issue:

*‘The government’s Fair Work Act already contains a number of important protections for TCF outworkers – including scope for awards to include targeted ‘outworker’ terms, and enhanced right of entry arrangements.*

*Additional entitlements and protections for outworkers are contained in the Textile, Clothing, Footwear and Associated Industries Award.*

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<sup>81</sup> Ibid; p1

<sup>82</sup>(Hansard) Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2012; (House of Representatives); Second Reading Speech; Minister for Employment and Workplace Relations, Hon Bill Shorten, MP (22 March 2012); p3972



*Where outworkers are entitled to fair minimum conditions, they can have difficult accessing them.*

*Even our Fair Work Ombudsman faces difficulties in identifying and assisting outworkers because outwork, is by definition, not performed in traditional workplaces and it can be difficult to identify for whom the work is being performed’.*<sup>83</sup>

- 7.7 The traditional bipartisan approach of government to the regulation of outwork was noted by the Minister such *‘that governments of all persuasions and at all levels have recognized the importance of this issue.’*<sup>84</sup> It was also acknowledged that there was a range of existing legislation dealing with the giving out of work in the industry and outworker protection. This included state legislation which deemed contract outworkers as employees (NSW, Queensland, South Australia, with more limited deeming in Victoria); various sets of provisions which allowed for recovery of money up the supply chain owed to outworkers (in most by not all states) and the existence of mandatory codes of practice in the clothing industry (NSW, South Australia and Queensland).<sup>85</sup>
- 7.8 This important but incomplete set of specific regulation relating to outwork, resulted in there being *‘no single uniform approach to regulation across our nation’* and that *‘outworkers have inconsistent levels of protection across Australia’*. The need to develop *‘nationally consistent rights to legal redress and protection’* by implementing the TCF Bill would *‘ensure that all outworkers are engaged under secure, safe and fair systems of work’*.<sup>86</sup>

### **Evidence of labour conditions for outworkers and sweatshop workers**

- 7.9 The TCFUA, together with a broad range of faith, community, union organisations and outworkers strongly supported the objectives of the TCF Bill and its passage into law. The depth of these views were demonstrated by the extent of evidence provided to the Senate Inquiry by such organizations and individuals illustrating the level of exploitation of outworkers and sweatshops in the TCF industry. Apart from the TCFUA, those organisations and individuals who made written submissions supporting the provisions of the TCF Bill included:

- Australian Immigrant and Refugee Women’s Alliance<sup>87</sup>
- Australian Council of Trade Unions<sup>88</sup>

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<sup>83</sup> Ibid; p 3971

<sup>84</sup> Ibid; p 3972

<sup>85</sup> Ibid; p 3972

<sup>86</sup> Ibid; p 3872

<sup>87</sup> Senate Inquiry into the TCF Bill; op cit; Submission 9

<sup>88</sup> Ibid; Submission 19

- Catholic Justice and Peace Commission – Peter Arndt<sup>89</sup>
- DEEWR<sup>90</sup>
- Dr Michael Rawling<sup>91</sup>
- Fair Wear<sup>92</sup>
- Fair Wear SA<sup>93</sup>
- Immigrant Women’s Speak Out Association NSW<sup>94</sup>
- Justice and International Mission – Uniting Church<sup>95</sup>
- Oxfam<sup>96</sup>
- Safe Work SA<sup>97</sup>
- Shelley Marshall<sup>98</sup>
- Slater and Gordon Lawyers<sup>99</sup>
- Unions WA<sup>100</sup>
- Unions ACT<sup>101</sup>
- Unions NSW<sup>102</sup>
- Working Women’s Centre SA<sup>103</sup>

7.10 The TCFUA provided both a comprehensive written submission to the Senate Inquiry and appeared at the Senate hearing.

7.11 Importantly, the Senate Inquiry also heard direct evidence from TCF outworkers themselves, both through their stories being incorporated into a number of the written submissions and through oral evidence being provided at the subsequent Senate. It cannot be underestimated how difficult it is for outworkers, often with limited language and written skills, to giving evidence (either in written or oral form) in formal settings such as Senate Inquiries. Apart from the practical issues of language, outworkers hold serious fears about being identified as someone who has disclosed the reality of their wages and conditions. They believe (rightly in many cases) that such exposure will be discovered by their employers, and they will not receive further work. In this context, when outworkers do take the courageous step to give evidence of

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<sup>89</sup> Ibid; Submission 4

<sup>90</sup> Ibid; Submission 27

<sup>91</sup> Ibid; Submission 7

<sup>92</sup> Ibid; Submission 26

<sup>93</sup> Ibid; Submission 5

<sup>94</sup> Ibid; Submission 20

<sup>95</sup> Ibid; Submission 25

<sup>96</sup> Ibid; Submission 18

<sup>97</sup> Ibid; Submission 10

<sup>98</sup> Ibid; Submission 17

<sup>99</sup> Ibid; Submission 11

<sup>100</sup> Ibid; Submission 13

<sup>101</sup> Ibid; Submission 14

<sup>102</sup> Ibid; Submission 24

<sup>103</sup> Ibid; Submission 6

their personal circumstances such evidence should be accorded significant weight.

- 7.12 A long term outworker Nguyet appeared with Fair Wear at the Senate Inquiry hearing in February 2012.<sup>104</sup> Her evidence, given in Vietnamese and translated, illustrates that despite her high skills in the clothing industry making expensive fashion garments, she was unable to negotiate better wages and conditions. A life of outwork had also left her with poverty wages and injuries from excessive work. Nguyet told the Senate Committee:

*'I have been working as an outworker for 21 years. I make a range of different ladies fashion dresses for several different labels from the high end of the clothing market. The garments I make are complex with different colours of material needing to be sewn together, so it takes me around one hour to finish a garment. I have a lot of experience working from home as an outworker, but my pay is very low, around \$5 or \$6 per hour, without other benefits. That is the reason why, sometimes, I refused an order, because of the very complex garments, with too many colours to match up – I felt too much pressure. This pressure comes from the short time I am given to complete such order.*

*It is common for me to be given 100 garments to complete in one week. That is 100 hours work on complex garments. I have now told my employer that I can only handle 50 garments a week. This means my income is very low, but my body is tired and one of my legs is very sore, so I cannot handle the heavy workload any more.'*<sup>105</sup>

- 7.13 Nguyet concluded her testimony with a plea to government for change. Nguyet said:

*'My hopes for the future are the same as my friends – others who are working at home like me. All of us would like to get fair wages and conditions. We want the government to have good laws to protect us and improve our conditions of work so that we can keep working and contributing to Australian society.'*<sup>106</sup>

- 7.14 The TCF Act answered Nguyet's plea, because it unequivocally confirmed that she, and thousands of outworkers like her, are entitled to the benefits, entitlements and dignity of employment under Australian law.

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<sup>104</sup> (Hansard) Senate Education, Employment and Workplace Relations Legislation Committee; Inquiry into the Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011; Hearing 2 February 2012

<sup>105</sup> Ibid; p 8

<sup>106</sup> Ibid; p 8

## 8 IMPACTS OF THE TCF ACT

- 8.1 In assessing the impacts of the TCF Act since its commencement, it is relevant to revisit the Objects of Part 6-4A (Special provisions about TCF outworkers). Apart from the enhanced right of entry provisions, Part 6-4A contained the majority of provisions relating to deeming, recovery of money and the capacity to regulate a TCF Code of Practice. Section 789AC provides:

***S789AC Objects of this Part***

*The objects of this Part are to eliminate exploitation of outworkers in the textile, clothing and footwear industry, and to ensure that those outworkers are employed or engaged under secure, safe and fair systems of work, by:*  
*providing nationally consistent rights and protections for those outworkers, regardless of whether they are employees or contractors; and*  
*establishing an effective mechanism by which those outworkers can recover amounts owing to them in relation to their work from other parties in a supply chain; and*  
*providing for a code dealing with standards of conduct and practice to be complied with by parties in a supply chain.*<sup>107</sup>

- 8.2 It is readily apparent, that the objects of Part 6.4A are enabling in intent, ambitiously so. The intention is to expressly eliminate the exploitation of outworkers and to ensure that they work under secure, safe and fair systems of work. These objectives are supported by the statements made in both the Explanatory Memorandum to the TCF Bill and the Second Reading Speeches (both in the Senate and House of Representatives). There is no equivocation as to what the legislation was intending to achieve. It is directed to ameliorating the economic and social position of TCF outworkers as a class of worker. It is the critical purpose of the regulation and the terms of the PI Review should be considered in that context.
- 8.3 The PI Review examination of the effects of the TCF Act must, in the TCFUA's submission, principally consider the beneficial effects for outworkers and the union's capacity to investigate labour conditions in sweatshops in light of the enhanced right of entry provisions. The impacts on the TCF industry more broadly is also relevant, but in the TCFUA's submission, is less so given the clear enabling purpose of the regulation directed to eliminating outworker exploitation. On the TCFUA's analysis, there has been no appreciable negative change to the TCF industry which can be directly attributed to the commencement of the TCF Act on 1 July 2012.
- 8.4 We reiterate, that in many cases, the public comments made by some TCF businesses and industry representatives have demonstrated an alarming level of confusion and/or deliberate misrepresentation regarding the provisions of

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<sup>107</sup> S789 Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012

the TCF Act, the modern award and state outworker regulation. It may also be the case that individual businesses consider that the TCF Act has impacted on them 'negatively' because, in conjunction with effective compliance, they are now having to pay award and legal wages and conditions for outworkers for the first time. In such cases, any 'costs' as articulated by these employers are simply the costs of complying with the law, as it existed prior to the TCF Act.

## Impacts on outworkers

- 8.5 We reiterate a concern outlined earlier in this submission, that the methodology of the PI Review into the TCF Act is necessarily constrained by the difficulties of accessing and speaking with outworkers impacted by the changes. In the TCFUA's experience, engagement with outworkers, due to their isolation and fear, is a slow and complex process. Gaining trust, providing confidentiality, language and cultural support is critical if the stories of outworkers are to see the light of day. By implication, the process of the PI Review is limited in its capacity to engage, and consult with outworkers directly. This is not the case with the TCFUA or with other community based or not for profit organisations, such as Asian Women at Work and Fair Wear Inc, all of whom have consistent, personal contact with TCF outworkers.
- 8.6 For example, evidence given in 2013 by Ms Bich Thuy Pham (Vietnamese Community Worker with Asian Women at Work) to the Fair Work Commission as part of the 2012 Transitional Review of the TCF Award<sup>108</sup> illustrates this deep level of engagement with the outwork community:

*'I have been a Vietnamese Community Worker with Asian Women at Work since November 2001. Prior to that I spent 10 years as an outworker in the clothing industry in Melbourne and Sydney....Through this work I have met some 400 Vietnamese outworkers. Many of these women have let me into their homes and their lives. I have shared in their celebrations as well as their difficulties. They call on me for support with family and personal issues, and share with me their stories and struggles at work and in their lives. So I feel privileged to be deeply trusted by these outworkers....*

*All of these Vietnamese outworkers speak Vietnamese as their first language. Most of them started with very little English and have improved through Asian Women at Work English classes and through joining in our activities. Many of them continue to have limited English and require an interpreter for any formal communication.*

*I currently have contact with about 100 current outworkers.'*<sup>109</sup>

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<sup>108</sup> 2012 Transitional Review of Modern Awards; Textile, Clothing, Footwear and Associated Industries Award 2010 (Outwork Full Bench); Matters AM2012/93 & Ors. Witness Statement of Bich Thuy Pham (Appendix 4 to Submission of Fair Wear Inc)

<sup>109</sup> Ibid; p 26

- 8.7 Similarly, the TCFUA has almost daily contact with TCF outworkers, and employs officers whose specific role it is to provide outworker liaison, support and education. In the 2012 Review of the TCF Award, the TCFUA National Secretary gave evidence that:

*'The systemic exploitation of outworkers in the TCF industry has been a significant, long term issue for the TCFUA...it has been a central focus of the union's resources, efforts and commitment over many years. It is core business for our union....The TCFUA position has been directly informed by the practical compliance, education and organising activities undertaken by our officers, and the stories told by hundreds of outworkers to the union. Daily, our union nationally uncovers endemic exploitation, including gross underpayment of wages, the absence of leave and other entitlements, including superannuation and serious risks to health and safety.'*<sup>110</sup> [emphasis added]

- 8.8 The TCFUA and community organisations that work with outworkers, have a clear capacity and legitimacy to reliably comment on the position of TCF outworkers, both prior to the passage of the TCF Act and since its commencement.

### **Deeming contract outworkers as employees**

- 8.9 The key deeming provisions of the TCF Act are contained in Division 2111 of Part 6-4A of the TCF Act. In the Minister's Second Reading Speech, the intention of the deeming provisions was described as:

*'ending the artificial distinction by deeming contract outworkers in the TCF industry to be employees, by extending the operations of most provisions of the Fair Work Act....*

*This ensures that outworkers in the TCF industry have the same terms and conditions, as well as other rights and entitlements, as other workers regardless of their status as employees or contractors. This is the approach that has been taken in many states.*

*Under the changes proposed in this bill the person who directly engages an outwork will be treated as their employer.*

*The objective of these amendments –clearly stated in the bill-is to ensure that contract outworkers are taken to have the same rights and responsibilities as employees in the same position.'*<sup>112</sup>

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<sup>110</sup> 2012 Transitional Review of Modern Awards; Textile, Clothing, Footwear and Associated Industries Award 2010 (Outwork Full Bench); Matters AM2012/93 & Ors: Witness Statement of Michele O'Neil (TCFUA) (28 February 2013); [8]

<sup>111</sup> Part 6-4A, Division 2 (TCF contract outworkers taken to be employees in certain circumstances)

<sup>112</sup> (Hansard) House of Representatives; Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2012; Second Reading Speech, 22 March 2012; p 3972

- 8.10 The TCFUA have long argued that the distinction between employee outworkers and so called contract outworkers was essentially a legal fiction and simply created a system of widespread sham contracting in the TCF industry. As the body of evidence and research illustrates this has been a standard practice in relation to the engagement of outworkers for decades. An outworker's capacity to say no to these arrangements is universally illusory. As the TCFUA submitted to the Senate Inquiry:

*'The capacity of unscrupulous parts of the TCF industry to employ sham contracting arrangements (with increasing inventiveness) to avoid obligations under the TCF Award, FW Act and under state laws is a critical driver in why the distinction between employee and 'contract' outworkers needs to be practically removed. The existence of sham contracting pressed on outworkers by makers and suppliers seriously undermines the public policy objectives underpinning the minimum safety net for the industry.'*<sup>113</sup>

- 8.11 It is important to note that the TCF Act deeming provisions only have application to so called 'contract TCF outworkers'. That is, employee outworkers already have the same rights and obligations as other national system employees under the FW Act (and under common law), such that the position of employee outworkers was unchanged by the legislation. This is relevant because much of the concerns raised by the industry misunderstood this legal position. Some of the industry complaints about the legislation essentially went to the fact that outworkers had rights at all, whether they were employees or contractors. It is also the case that some industry participants were not aware that contract outworkers had employee type rights under the TCF Award and various state laws, and that this had been the case for decades. It became quickly apparent to the TCFUA, that significant numbers of TCF employers were in breach of existing award and legislative requirements and had been for long periods of time.
- 8.12 Law reform of any kind takes time to have a real practical implementation as industry participants gradually become aware of the changes. However, in the experience of the TCFUA, even in the short time since the commencement of the TCF Act, the impact of the deeming provisions on outworkers' terms and conditions has been positive. The union has witnessed a modest but appreciable improvement in the wages and conditions of outworkers.
- 8.13 Whilst the TCFUA had generally observed the beginnings of increased compliance within the industry over the last 3-4 years, the great majority of these examples were in respect to outworkers working within ECA accredited supply chains. That is, through the process of accreditation, principals had voluntarily committed to their supply chains reaching full compliance, including

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<sup>113</sup> Senate Standing Committee on Education, Employment and Workplace Relations Inquiry into the *Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011*; TCFUA Submission (11 January 2012), [47]

in relation to outworkers. This included agreeing to have the TCFUA undertake comprehensive supply chain audits to ensure that all workers within the principal's chain are receiving minimum award wages and conditions.

- 8.14 By contrast, with the commencement of the TCF Act, the national system of deeming provisions is founded on mandatory regulation which demolishes the legal fiction of sham contracting in the TCF industry. All outworkers now have clear and unambiguous rights to equivalent wages, conditions and rights under the award and for the majority of purposes under the FW Act. This applies whatever the outworker is called, or whether they have been required, as a condition of receiving work, to establish an ABN or to incorporate. The deeming laws not only operate to determine outworkers rights expressly (by removing any residual ambiguity as to employment status), but they address the key incentive for sham contracting – the belief incorrectly held by many who engage outworkers that there will be no liability for award wages, leave entitlements, superannuation and workers compensation.
- 8.15 The effects of this legal clarity for outworkers cannot be overstated. Importantly too, as a result of the TCFUA's compliance and education activities, increased numbers of outworkers are now aware that they have unambiguous rights to, for example, award wages, annual leave, personal/carer's leave, notice and redundancy and other protections of the FW Act. Once armed with this information, in the TCFUA's experience, outworkers are slowly becoming more confident in asserting their rights and seeking the assistance of the TCFUA in doing so. For outworkers who have been consistently told, and treated as contractors (and believed this to be the case) deeming rights can represent a critical shift in the perception of their own working lives and self worth.
- 8.16 Evidence presented by the TCFUA to the FWC Outwork Full Bench Award Review proceedings in 2013<sup>114</sup> illustrates this point. Mr Ky Dang To, who has been a Vietnamese outworker in Melbourne for over 8 years since gave evidence<sup>115</sup> of how his working and family life has changed since he was no longer treated as a contractor by his employer.

*'[4] I have a wife and four children: 6 year old son, 5 year old daughter, 3 year old daughter and eight month old daughter...*

*[8] I can do sewing, pressing and finishing from home.*

*[9] I used to work for fashion labels, school uniforms and sportswear. At the moment I am working for a sportswear label.*

*[10] I got paid per piece. I estimate that I got paid about \$7 per hour without working entitlements such as superannuation or paid holidays,...*

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<sup>114</sup> 2012 Transitional Review of Modern Awards; Textile, Clothing, Footwear and Associated Industries Award 2010 (Outwork Full Bench); The Ark Clothing Company (AM2012/93 & Ors).

<sup>115</sup> Ibid; Witness Statement of Mr Ky Dang To (Submission of the TCFUA); 28 February 2013.



*[11] Therefore, in order to make enough money for living, I have to work very long hours. On average, I have to work 12 hours per day. Sometimes I have to work 16 hours per day.*

*[12] I do not have enough time for myself and my family. Neither do I have time for my friends and social activities.*

*[13] Currently I am working for a sports clothing company. Before the Union became involved, I had to work 60-70 hours per every week. I had to work on Saturday, Sunday and public holidays to cover for a period that I did not have work. It normally lasts for one month. During this time I have to find work from other factories. This factory asked me to have an ABN so they did not pay me by hour rate and lawful working conditions such as WorkCover, sick leave, public holiday.*

*[14] Fortunately, I have never got injured while working. Otherwise, I had to stay home without pay.*

*[15] Recently, the Company agreed to engage me to be a full time outworker under Ethical Clothing Australia program. I am paid by hour rate and the work is regular every week. I do not need to worry about finding a job at other places. I am paid at \$17.65 per hour plus the same entitlements as workers in factories. I have worked less time than before but I can make as much as before. I am very happy with these recent working conditions.*

*[16] However, my employer keeps giving me a hard time and says he wants me to become subcontractor. For example, he complained about the quality of my work...he gives me more difficult work than before, one small order with different colours and sizes. He intends to make me resign from work.*

*[17] I hope the government had stronger law for the employer not to exploit outworkers. I want the government to have laws to protect outworkers.'*

- 8.17 In oral evidence to the Full Bench, Mr To elaborated as to how having employment rights had improved not only his working situation and financial security, but his family life as well:

*'THE WITNESS: I just work less hours – 38 hours and the same money. Before I work like 20 hours – like all the time, I work.*

*MS WILES: And now that you're getting the guarantee of 38 hours for the same money or better, how has this impacted on your life?*

*THE WITNESS: 38 hours. I got time with my kids. I take them to play. You know, I take them to a park and something like – weekend, I can take my son and go to Sunday market or something. I can go around with my son.'*<sup>116</sup>

- 8.18 More broadly, the clarity brought about by deeming also greatly assists in working towards a system of effective compliance across the industry. Although the TCF Award already provided employment type wages and conditions to contract outworkers, the deeming laws have worked to reinforce this legal position. In conjunction with having outworkers better informed about their legal rights, deeming reduces the potential for disputation arising over contested employment status. Prior to the commencement of the TCF Act, employers would consistently argue to the TCFUA that that a particular

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<sup>116</sup> Ibid; Transcript (7 March 2013) [PN1144] – [PN1146]

outworker was a 'contractor' or 'independent contractor' or a 'business'; whilst this conduct still persists, it is reducing.

8.19 Since the commencement of the TCF Act, the TCFUA has observed a range of circumstances where outworkers' working conditions have significantly improved as a result of the deeming provisions. For many, this represents the first time during their working lives as outworkers that they are receiving award and legal conditions. Examples of improvements include:

- Outworkers receiving minimum hourly rates of pay paid at the correct skill level classification;
- Outworkers having guaranteed number of weekly hours of work (either full time or part time);
- Outworkers receiving annual leave and loading;
- Outworkers receiving notice and redundancy pay when their job is made redundant;
- Enhanced capacity to recover underpayments of wages and other entitlements; and
- Outworkers' employers taking out workers compensation insurance and making superannuation contributions on their behalf.

8.20 Michele O'Neil, National Secretary of the TCFUA, gave evidence to the FWC (Outwork) Full Bench review of the TCF Award that confirmed this improvement.

*'[20] The TCFUA collects extensive data on the level of compliance in the industry. In addition to its daily organising work and general contact with thousands of workers and workplaces, between 1 July 2010 and 31 December 2012, the TCFUA undertook compliance checks in 1,319 workplaces in the TCF industry and had direct contact with 1,184 outworkers during this same period. The union's assertions in relation to the experience of outworkers are evidence based and grounded in direct and intensive contact with these workers.'*

*'[21] The TCFUA has observed a small but not insignificant change in the levels of compliance with the minimum award conditions over the last 12 months to 2 years. After 20 years or so, the union is finally starting to see a difference to the working conditions of outworkers. For the first time some outworkers are receiving the correct minimum weekly award wage and superannuation is being paid on their behalf for the first time in their entire time they have lived and worked in Australia.'*<sup>117</sup>

8.21 This was confirmed in oral evidence by Ms O'Neil;

*'So what we have put into evidence and in our submissions...is the direct intervention [of the union] ...And then the capacity to advocate on those workers' behalf to*

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<sup>117</sup> 2012 Transitional Review of Modern Awards; Textile, Clothing, Footwear and Associated Industries Award 2010 (Outwork Full Bench); The Ark Clothing Company (AM2012/93 & Ors); Witness Statement of Michele O'Neil (TCFUA Submission) [21] – [22]

*ensure that the minimum is paid has started to make a result. So I'm really pleased to say that after a very long time of this work and in this industry, that I have noticed over the last 18 months to two years some significant change. Just in the last fortnight I've spoken to to outworkers who have said for the first time in their life after working more than 18, 20 years in the the industry, last Christmas they got paid annual leave...*<sup>118</sup>

#### **The story of Lien (\*name changed\*)**

Lien came to Australia from Viet Nam in 2009, when she was 55 years old. Her family sponsored her to come to Australia and she now lives in NSW. In Viet Nam, Lien had worked as a teacher. When she came to Australia, she had very little English. She could not get Centrelink benefits because of the type of visa that she arrived on.

A neighbour introduced her to sewing work. Lien borrowed her neighbour's sewing machine and began to do sewing work. Initially, she sewed uncomplicated garments, but she quickly developed a high level of skill and started sewing for a high end fashion label. She sewed evening dresses which were sold for about \$600 - \$700 dollars each. Lien received about \$10 per garment, and it took her at least an hour and a half, sometimes two hours, to complete the garment depending upon its complexity. She thought that she got maybe \$5 - \$7 an hour for this work. Lien was grateful for the work, and that her neighbour was helping her. She did not feel that she could question the price. In order to make enough money, Lien sometimes worked 50 – 60 hours per week. Some weeks, she had no work. Whenever she did have work, it was because deadlines were very tight and the work was always urgent. She would have to work all night to finish the orders she had been given. She would do this work in order to make money to live on, and because she felt she had no other choice. She would do the orders whenever they came in because she did not know when the next one would be.

Lien was making for a label that was registered with the Board of Reference. But the person who gave the work to Lien, and the sub-contractor who gave that person the work was not registered with the Board of Reference. It was only by chance that the union found out about Lien, through its outreach services. Lien was not aware that she had rights as an employee. The sub-contractor accepts that it really employs Lien, and now directly employs her. Lien receives 20 hours per week and is paid the rate of \$18.10. She is receiving superannuation. Recently, Lien's mother became unwell and died, and she was able to take paid annual leave to travel back to Viet Nam to be with her mother and family, and for the funeral. Lien was relieved that she could do that, and she would not have been able to if she had remained hidden in the supply chain. Without having employee rights and the intervention of the union, Lien would have continued to be exploited. Instead, she is currently 60 years old, highly skilled and productive. She intends to work for as long as she can, but is happy to know that she will have some savings in superannuation for her retirement.

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<sup>118</sup> Ibid; [PN448]

**VINH AND PHUONG'S STORY: (names changed)**

We are husband and wife. We left Vietnam, together with our two young children in 1990 and spent two years in a refugee camp in the Philippines. In 1992, we came to Australia as refugees. We now have 3 grown up children, who all still live at home.

In Vietnam, we were traders. It was difficult to have other work as we were prevented from studying beyond finishing high school.

In 1994, we began to take in sewing work at home. We started doing this work because we knew of other people doing this work. We could learn how to do it quickly, and we did not have to know English in order to do the work. We both studied English in Vietnam, and when we first arrived in Australia. However, although I can read and write some English, I do not speak or understand spoken English very well. My wife does not speak or understand very much English at all.

Initially, we borrowed sewing machines and then we bought some from the bosses, whom we paid by instalments. It took us about three years to pay for the machines. We also had to pay for electricity.

Before we start work, we were asked to provide a business name and show our ABN. Every label we have worked for ask us to show our ABN and business licenses before giving us any work.

When we first started sewing in about 1994, we sewed children's casual and sportswear and mainly did overlocking. We were paid very little: 50c for the children's track suits and \$1 for children's tops. The tops were more complicated to make as they involved a lot of banding at the neck, sleeve cuffs and hem. We earned about \$5 - \$6 per hour.

It was very difficult to refuse this work because we were told to do it for that price and that if we did not do it, someone else would. Even if we tried to negotiate just a little bit of increase in price, the boss would say no, someone else will do the work for this price or cheaper. There was always lots of pressure to do the work cheap. It was like there was an auction for the work and always the lowest bidder gets the work.

If we worked very hard, long hours, everyday, we could make enough money to live on. As we had experienced hardship in Vietnam, we felt we could put up with this hardship in Australia, too.

After about 7/8 years, we began to sew for a women's fashion wear label, making simple knitwear items such as strappy tops. Again we were paid very little per piece although the prices changed depending on the item. I remember that we received around 50c for a strappy top. Together, if we worked hard, 14 hours a day and up to 7 days a week, we could make about \$6 - \$7 an hour, which was just enough to live on. It was only because there were two of us doing the work that we could make enough money to live on.

We have never received any Centrelink payments.

We had no control over how much work we did or when we did it. If there was work, we did it and had to return it by a certain time, in order to make money. Sometimes there would be no work at all, and so we had to try to find work from wherever we could. This work was also very cheap but if we did not do the work, there would be no money. We also got some work when other sub-contractors did not have enough sewers to do work. Then the work would have very short deadlines.

With the work for this label and the casual sportswear label, we were never paid on time. Payments were always 2 - 3 weeks late and we always had to remind, chase and ask the bosses for our payment.

We also always had to collect and deliver the items and were never paid for this time.

We worked for this women's fashion wear label for about 9 years, until they were taken over by another label and the work stopped. We did not receive any redundancy payments.

Over the time that we worked for this women's fashion wear label, the price per garment did not increase by much. Sometimes, the price even went down. There was always pressure to do the work, and we were always told that if we did not do the work, someone else would do it, or it would go overseas. We work out that at the end of the time we sewed for this label that we were receiving maybe \$7 per hour.

After the women's fashion wear label, we worked for another factory who made all different kinds of fashion.

We started working for the current label about 5 or 6 years ago. For this label, we are sewing high end fashion garments. We are in the supply chain of a company that applied to be accredited with Ethical Clothing Australia in about 2010. We did not know anything about them, and the boss did not tell us anything. The union visited the boss, and still he did not tell us anything. After that, the union visit us and talk to us about our situation and towards the end of 2011, things began to change.

We now have regular hours of work and we do not have to worry about whether we will have work or not. We are both working 20 hours per week and we are getting paid \$18.10 per hour. We would like more work, but this gives us enough to live on.

We have taken holidays for the first time in our working life in Australia. If we wanted holidays before, we would not have any money. We thought that we would just have to work and work to have money to live on, until we die. Last year, we took two weeks holidays in the middle of the year, which is the quiet time for the label. We have taken holidays at other times too, and we just have to ask and then we can have holidays and still be paid. We also get paid the 17.5% leave loading for the holidays.

For the first time, we have started to receive superannuation.

Since we have become employees and receive regular work hours, we feel our life has improved. We don't feel as much pressure. We don't have to worry about finding work or if there will be enough work and we don't feel we are competing with other people for cheap work.

When we first came to Australia and started doing sewing work in our home, we did not know anything about our rights or the laws or the union. We only learned about the union in 2010 – 2011, and even then did not really understand what they did because the bosses gave us wrong information. However, over time and talking directly with Vietnamese speaking officers of the union, we now understand. We understand that there are laws that protect us and our working rights to be employees because we have no control over the work, to have regular hours and other things like holidays and superannuation. We feel that these laws are very important and we do not want the government to take them away.

If the laws were to change, we think it would be very difficult to go back to life before we became employees. We are afraid there would be even more pressure and bad treatment. Also, if there are no laws that protect outworkers, than the bosses would put even more pressure on outworkers to sew for very little money.

## 9 RECOVERY OF UNPAID REMUNERATION

- 9.1 The Second Reading Speech to the TCF Bill 2012<sup>119</sup> outlined the purpose and public policy context for the inclusion of national recovery of money provisions in the FW Act.

*'The bill provides a mechanism to enable outworkers to recover unpaid amounts up the supply chain.*

*The Productivity Commission's Review of TCF Assistance (in 2003) reported the findings that outworkers are often not paid for the work that they do and that, because the supply chain consists of numerous subcontractors, outworkers may often find it difficult to pursue any unpaid moneys or entitlements.*

*Provision for the recovery of unpaid amounts up the supply chain is a feature already of outworker protection legislation in Victoria, New South Wales, Queensland and South Australia, and recognizes the fact that TCF outworkers are engaged at the end of a sometimes long and confusing supply chain.*

*Under the government's bill:*

*an outworker may recover an unpaid amount from another entity in the supply chain for whom work is done indirectly;*

*the amounts that may be recovered under these provisions include wage or commission as well as other amounts owing in relation to particular work; where an outworker reasonably believes an entity to be indirectly liable for an unpaid amount, the outworker can initiate a claim for payment against the entity;*

*the entity will then be liable for that payment unless the entity has proved that it is not liable under the provisions to pay the amount claimed, or the amount unpaid is less than that alleged to be owing; and*

*if an entity pays an unpaid amount in reliance on the outworker's claim, the entity will be able to recover the payment from the person who was responsible for the payment, plus interest, or offset it against other amounts that they, in turn, may be owed.*

*These arrangements are designed to supplement existing arrangements – these new provisions do not limit any action that an outworker might otherwise have in relation to unpaid money, including remedies available under state law.*

*...this provision does not extend to include retailers who sell goods produced by, or of a kind often produced by outworkers, where the retailer does not have a right to supervise or otherwise control the performance of the work.'*<sup>120</sup>

- 9.2 The TCFUA strongly supports the inclusion of effective recovery of money provisions in federal industrial law. The persistent problem of outworkers not being paid for work undertaken was common and difficult to address. This was exacerbated by outworkers working at the end of complex, multi level supply chains so that typically outworkers only had any direct relationship with the

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<sup>119</sup> (Hansard) (House of Representatives); Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2012; Second Reading Speech (22 March 2012)

<sup>120</sup> Ibid; p 3973

person who has given them the work. This person, often delivered the work to the outworker and subsequently picked it up once the work was completed. The outworker often knew very little about their employer. Similarly, the most an outworker may have known about the principal company for whom they undertook the work may have been limited to the label they sewed into the garments.

- 9.3 The TCFUA's submission to the Senate Inquiry<sup>121</sup> illustrated the multiple barriers to outworkers successfully recovering unpaid remuneration which accrue as a result of the performance of their work, including:

*'[60].... outworkers not being aware of their rights, threats to ongoing work if they pursue their entitlements, difficulties in identifying who their 'direct employer' is, the person or entity who engaged them 'disappearing' without payment and employers refusing to pay based on spurious claims such as 'poor quality' or the goods being delivered later to the maker/principal.*

*[61] The TCFUA is aware of numerous examples of outworkers, many of whom work on garments for well known, high end fashion labels who have experienced extensive delays in receiving payment of completed work...or have not received payment at all for work undertaken. ...*

*[62] The TCFUA is also aware of makers who have simply 'disappeared' or are otherwise very difficult to locate...'122*

- 9.4 The difficulties of recovery of monies owed to outworkers, and the necessity for national recovery provisions was supported by a broad range of other submissions to the Senate Inquiry.<sup>123</sup> For example, Fair Wear submitted that:

*'The recovery of money provisions ensures that outworkers can recover the money owed to them directly from the principal contractor in the supply chain (usually the Fashion House) who gave out the work to the first layer of sub-contractors. The principal contractor can in turn seek to recover this money from the sub-contractor who failed to pay the outworker correctly in the first place.'*<sup>124</sup>

- 9.5 The submission of DEEWR to the Senate Inquiry also suggested that the effect of the proposed recovery provisions would have a positive effect more generally in terms of compliance within TCF supply chains:

*'entities further up supply chains may choose to contract with more reputable suppliers and could also shortened supply chains to limit exposure to claims of this*

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<sup>121</sup> Senate Standing Committee on Education, Employment and Workplace Relations Inquiry into the *Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011*; TCFUA Submission (11 January 2012)

<sup>122</sup> Ibid; [60] – [62]

<sup>123</sup> Ibid; See submissions of: Catholic Justice and Peace Commission of the Archdiocese of Brisbane; Fair Wea SA; Australian Immigrant and Refugee Women's Alliance; Slater and Gordon Lawyers; Oxfam Australia; Asian Women at Work; Fair Wear Inc.

<sup>124</sup> Ibid; Submission of Fair Wear; p9

*nature. This would be a desirable outcome for outworkers as it is likely to result in the reduced risk of businesses defaulting on their obligation to pay outworkers.*<sup>125</sup>

9.6 The Senate Committee ultimately supported:

*‘the introduction of the recovery...provisions in the bill as a mechanism to assist TCF outworkers to obtain money they are due from others in the supply chain. Given the complexity of the supply chains involved in the TCF industry, and TCF outworkers’ limited contact with and/or knowledge of each entity in the supply chain, it is appropriate to afford outworkers the ability to recover unpaid monies from indirectly responsible entities.*<sup>126</sup>

9.7 The Senate Committee further recommended that further amendments be made to the recovery provisions to ensure that outworkers are able to use the provisions in respect to the identification of the indirectly responsible entity in the supply chain.<sup>127</sup>

9.8 The legislation of recovery provisions for outworkers under the TCF Act, have effectively harmonised similar existing provisions under state legislation, and extended the recovery framework nationally. They are important provisions because they expressly provide an effective mechanism for outworkers, and the union on their behalf, to recover money owed from entities for whom the work was performed. The provisions essentially allocate appropriate responsibility to those in the supply chain who benefit from the labour of the outworker, but which goes unremunerated by their direct engager. As enabling legislation, the provisions (correctly in the TCFUA’s view) redistribute the ‘risk’ of negative impacts of outwork from the individual outworker to the responsible entities in the chain who profit from the work undertaken on their behalf. Ensuring outworkers get paid for their work, is a key element in eliminating the exploitation of outworkers, an express object of the TCF Act provisions.

9.9 In very basic terms, the beneficial impacts of the recovery provisions mean that outworkers across Australia now have a clear remedy in order to recover unpaid wages and other entitlements owed to them. From the TCFUA’s direct experience, the national recovery provisions also significantly aid general compliance activity because, principals and others who benefit from an outworkers’ labour are now aware of their collective responsibility to ensure that outworkers in their supply chains get paid. The TCFUA has observed that this acknowledgement alone generally results in disputes about the payment of

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<sup>125</sup> Ibid; Submission of DEEWR’ p13

<sup>126</sup> (Senate) Education, Employment and Workplace Relations Legislation Committee; Inquiry into the Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2012; Report (February 2012); [2.47]

<sup>127</sup> Ibid; [2.48] [2.49]



outworkers' wages and conditions being able to be resolved relatively quickly with the assistance and advocacy of the union.

**LINH'S STORY (name changed)**

I was born in Viet Nam in 1967. I arrived in Australia in 1981. I learnt English and completed a Travel Agent course. I worked in this field for five years.

I was married and have two sons. Unfortunately, my children were diagnosed with Autism, so I have to work at home to look after them. My husband left my family because he could not put up with our difficult children and the financial pressure.

I became an outworker in 2006, after my first son was diagnosed with autism and I had to stay at home to look after him. Since then, I have worked for different factories from fashion labels to uniforms.

I do the sewing part and deliver finished garments to the employers. They pay me per piece. I estimate that it is about \$4 - \$5 per hour and I do not receive other entitlements, such as superannuation, WorkCover, sick leave, public holiday leave and annual leave.

I normally work 16 hours per day to make enough money to live. I also work on weekends and public holiday but I get paid as if I worked a normal day.

If there is no work, I have to find another job elsewhere because I do not get paid for this period.

When the employer has no work anymore for me, he does not pay me redundancy entitlements.

In terms of pricing, the employer normally set the price. If the price is low, I cannot negotiate to have more money. If I do not agree, he will give that order to other people to do.

I am often under pressure because of the deadline for an order. They always say the work is urgent, I have to complete in a short time. If I deliver the order late, a penalty of 5% of the total payment will be deducted. Therefore, sometimes I have to work day and night to meet the deadline.

The clothing company tells me that I must have ABN or ACN Pty Ltd to work with them. If not, it is very difficult to get work.

For the last 3 years I worked, doing school uniforms via a subcontractor. I have to pick up and deliver the work. All these expenses, I have to pay from my own money. However, the work ended because they did not have enough work and, with the union's help, I received redundancy pay.

Recently, I have started sewing ladies fashions. However, I have not yet been paid for this work and am owed \$1,404.

I believe company are greedy. They do not care about the workers lives. They do everything they can to get lowest price and just give the work to someone else. I want all outworkers to be treated the same as people who work inside the factory sewing these garments. I would like to have superannuation for when I retire. I believe these laws protect outworkers rights and protect people in difficult situations like me. Our family is very thankful for these laws and we do not want them to change.

## Right of entry provisions

- 9.10 The Second Reading Speech<sup>128</sup> outlined the purpose of the enhanced TCF specific, right of entry provisions as follows:

*'The Fair Work Act already recognizes the importance of right of entry to workplaces in securing fair working arrangements, and provides enhanced right of entry rights in relation to outworkers.*

*This bill seeks to ensure that protection applies not only to outworker arrangements, but also other exploitative practices in the industry, and in particular sweatshops.*

*At present, entry to such premises generally requires 24 hours notice of intention to enter. The nature of sweatshop operations, and the ease with which they can relocate, mean that the current requirements can be easily circumvented.*

*This bill will extend specific right of entry rules that apply to suspected breaches affecting outworkers (which allow entry without 24 hours notice) to the industry more generally, with an exception for the principal place of business of a person with appropriate ethical standards accreditation.'*

*This proposal recognizes that poor practices in the TCF industry are not confined to work in people's homes but also take place in conventional workplaces under sweatshop conditions. ...*

*Enhanced right of entry will assist in locating, identifying, remedying and stamping out these exploitative practices.'*<sup>129</sup>

- 9.11 The TCFUA strongly supports the inclusion of enhanced right of entry provisions in the TCF Act in order to address an identified practical issue in investigating labour conditions in sweatshop type environments. It submitted to the Senate Inquiry:<sup>130</sup>

*'[87] In practice, under the current TCF right of entry provisions, the TCFUA can enter premises to investigate contraventions of the FW Act or a Fair Work instrument which relates to, or affects a TCF outworker. If after entering, however, the TCFUA identifies in-house workers working at the same premises it is unable to effectively investigate suspected breaches relating to the pay and conditions of those workers.*

*[88] Such an outcome is demonstrably counterproductive to effective transparency of TCF supply chains in relation to where work is performed, by whom and under what conditions. Critically, it undermines across the industry, effective compliance with minimum award and legal protections.*

*The TCF Bill provisions appropriately recognize that exploitation is not limited to home based work but also exists in sweatshop factory environments as well.'*<sup>131</sup>

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<sup>128</sup> (Hansard) (House of Representatives); Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2012; Second Reading Speech (22 March 2012)

<sup>129</sup> Ibid; pp 3973-3974

<sup>130</sup> Senate Standing Committee on Education, Employment and Workplace Relations Inquiry into the *Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011*; TCFUA Submission (11 January 2012)

<sup>131</sup> Ibid; [87] – [88]

9.12 The TCFUA, as part of its submission, also included a number of recent detailed case studies which illustrated the need for enhanced provisions.<sup>132</sup>

9.13 The Fair Wear submission to the Senate Inquiry,<sup>133</sup> also made the point about the broader relationship between outwork and sweatshop exploitation in the context of complex TCF supply chains:

*'Outworkers' wages and conditions may be improved, but the supply of work to award compliant outworkers may be undermined by the increased flow of work to the sweatshop workers in the same supply chain.*

*The additional special right of entry provisions are vital to the efforts to address the exploitation of sweatshop workers and outworkers in the TCF industry.'*<sup>134</sup>

9.14 The Senate Committee accepted the right of entry provisions without any proposed amendments.

9.15 Since the commencement of the provisions, the TCFUA has regularly exercised the enhanced right of entry provisions to enter premises to investigate suspected breaches of the TCF award and other workplace laws. The reforms have directly benefited the union's capacity in this regard because it is able to enter workplaces before occupiers have notice of the union's arrival. This is critical because it means that sweatshop owners have minimal time to hinder or delay access to the union in exercising its rights under the FW Act. This represents a much reduced opportunity for such employers to destroy or hide records, to ensure that workers are not in the workplace when the union arrive or otherwise intimidate workers into not speaking with union officers about their wages and conditions. It also allows the union to observe OH&S conditions at the time of the entry, and so gives a more accurate picture of the real situation at the workplace.

9.16 Through the improvement in the right of entry capacity of the TCFUA, the wages and conditions of workers in sweatshops has been more readily identified and remedied through the TCFUA's normal compliance processes. What has been shocking, however, is that the more right of entry visits the union undertakes, the clearer the picture of the extent of sweatshop operations within the TCF industry. In illustration of this point, the TCFUA seeks to provide photographs of sweatshops taken since the commencement of the

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<sup>132</sup> Ibid; pp 28-30

<sup>133</sup> Senate Standing Committee on Education, Employment and Workplace Relations Inquiry into the *Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011*; Fair Wear Submission (16 January 2012)

<sup>134</sup> Ibid; pp11-12

TCF Act in 2012 in Attachment A. This further evidence indicates the absolute necessity of the retention of the enhanced right of provisions in the Act.

- 9.17 The TCFUA also notes the clear policy commitment made by the Coalition Opposition prior to the 2013 election<sup>135</sup> that any proposed changes to right of entry laws would not:

*‘affect the right of entry provisions for unions to investigate breaches affecting their members, representing a member in a dispute under an award or agreement, investigating health and safety breaches, or the special provisions for outworkers in the textile, clothing and footwear sector. Those rules will remain the same to ensure that unions can act in their lawfully authorised representative roles.’<sup>136</sup> and that ‘Special entry rules for the outworkers in the textile, clothing and footwear industry will remain as they are.’<sup>137</sup> and*

*‘The details of the Coalition’s Policy to Improve the Fair Work Laws are spelled out clearly in this document. Based on the laws as they stand now, the Coalition has no plans to make any other changes to the Fair Work laws.’<sup>138</sup>*

## **TCF Code of Practice**

- 9.18 The Second Reading Speech to the TCF Bill<sup>139</sup> described the purpose of including TCF Code provisions in the FW Act as follows:

*‘This bill allows an outwork code of practice to be issued dealing with standards of conduct and practice in the TCF industry.*

*The Code may impose reporting or other requirements on employers or other persons engaged in the TCF industry to enhance the transparency of supply chains that result in outwork being performed.*

*An outwork code will enable arrangements for the performance of TCF work through the supply chain to be monitored.*

*Provision for a code will assist in ensuring that no economic advantage can be gained by the avoidance of responsibility for a worker’s entitlements.’<sup>140</sup>*

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<sup>135</sup> ‘Real Solutions for all Australians’; The Coalition’s Policy to improve the Fair Work Laws (May 2013)

<sup>136</sup> Ibid; p16

<sup>137</sup> Ibid; p19

<sup>138</sup> Ibid; p11

<sup>139</sup> (Hansard) (House of Representatives); Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2012; Second Reading Speech (22 March 2012)

<sup>140</sup> Ibid; p 3973

- 9.19 The TCFUA provided detailed submissions to the Senate Inquiry regarding the necessity for a national TCF Code of Practice<sup>141</sup> including:

*'A mandatory TCF outwork code is consistent with the transition to a national industrial relations system, and the reality that the retail sector more commonly than not operates across state and territory boundaries. In Australia, a significant proportion of domestic TCF production is made for sale by large retailers... which operate widely across the country. ... Many well known fashion houses are also retailers in their own right or a combined retailer/manufacturer.'*<sup>142</sup>

- 9.20 The TCFUA also highlighted the existence of state mandatory codes of practice (NSW, SA and Qld) and their interaction with the national voluntary code, the Homeworkers' Code of Practice. Specifically, the TCFUA highlighted that in each of the state codes, there is an exemption for a retailer/supplier or contractor from the mandatory code, if the particular business is accredited with a prescribed voluntary code. In each of the states that had, at the time of the TCF Bill, a mandatory code, the prescribed voluntary code was the Home Workers Code of Practice.<sup>143</sup>

- 9.21 The TCFUA submitted in relation to the proposal in the TCF Bill, that it equally provided 'a capacity for the national TCF outwork code to carve out exemptions for persons who would otherwise be covered by the code'<sup>144</sup> and that 'the exemption in effect, provides an incentive to retailers and suppliers to embrace the voluntary code process rather than be bound by the mandatory national code process.'<sup>145</sup>

- 9.22 The Senate Committee supported the inclusion of provisions in the TCF Bill allowing for the capacity to regulate for a TCF mandatory code of practice.<sup>146</sup>

- 9.23 To date, however, the parliament has not regulated for a national TCF Code of Practice. In a practical sense, this means that the PI Review is not in a realistic position to consider the effects of this particular aspect of the regulation. However, in the TCFUA's submission this failure to implement a critical aspect of the TCF Act means that all of the enabling provisions of the legislation have not been fully implemented. This is extremely disappointing and will work

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<sup>141</sup> Senate Standing Committee on Education, Employment and Workplace Relations Inquiry into the *Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011*; TCFUA Submission (11 January 2012); [63-83]

<sup>142</sup> Ibid; [77]

<sup>143</sup> Ibid; [73]

<sup>144</sup> Ibid; [74]

<sup>145</sup> Ibid; [76]

<sup>146</sup> <sup>146</sup> (Senate) Education, Employment and Workplace Relations Legislation Committee; Inquiry into the *Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2012*; Report (February 2012); see [2.56] – [2.60]

against the beneficial impacts contemplated by the reforms. The potential for full transparency of TCF supply chains, including in relation to retailers, is diminished by the absence of an effective TCF Code of practice to apply across Australia.

## 10 ECONOMIC IMPACTS ON THE INDUSTRY

- 10.1 The TCFUA expects that some in the TCF industry will make submissions to the PI Review regarding purported negative economic impacts of the TCF Act on the TCF industry. We expect this will be the case on the basis of previous public statements made by some industry participants and through submissions made in 2013 to the Outwork Full Bench proceedings as part of the 2012 Award Review (Transitional).
- 10.2 The TCFUA categorically rejects any alleged nexus between the commencement of the TCF Act provisions on 1 July 2012 and the economic 'health' of the TCF industry. To accept such contentions at face value, would be to ignore the comprehensively documented complexity of factors which have led to the contraction of the Australian TCF industry. These factors were considered at length in the Review of the Australian TCF Industry undertaken in 2008 by Professor Roy Green, Dean of Macquarie Graduate School of Management for the federal government. Relevantly, the Green Report accepted that the development of global supply chains is 'both a cause and effect of intensifying competition for TCF products and services. The Report identified further, that 'the largest contributor by far to the decline in overall industry output and employment has been the rising share of imports in total Australian sales of TCF products.'
- 10.3 In her evidence to the Senate Inquiry into the TCF Bill, Dr Shelley Marshall, a Victorian based academic specialising in informal work, summarised these trends as follows:

*'When we look at global trends it is clear that Australia's labour laws are not the primary cause of the contraction of manufacturing. The fact is, regardless of the nature of the labour laws of industrialised countries, whether it is the US, Canada, the UK, wherever we look production has been moving to developing countries. This is for a number of economic reasons. One is trade liberalisation, and that happened 20 years ago and we saw the effects of that. Another is improvements in transportation which mean that it is much easier now to import goods from Asia. A third one, and I think is very important for the industry to consider, is the fact that production quality and speed of production has increased greatly in developing countries....the example of the incredible investment that has been made in China to reduce the speed with which production occurs and that it can be put on a ship and transported anywhere in the world. I contrast that to what I have seen in Australia during my research, which is exactly the opposite trend. What we see in Australia is longer and longer supply chains.'*

10.4 In its comprehensive submission in relation to the Outwork Full Bench proceedings in 2013, the TCFUA set out a detailed response to these assertions, including providing key economic data and analysis. This data was essentially unchallenged. It is important to recognise that Australian TCF supply chains are part of the globalised production of TCF goods, with many domestic manufacturers having both a local and offshore components to their business model.

10.5 The union's national secretary, Michele O'Neil (with over 24 years' experience of the TCF industry in Australia, as well as internationally) gave further evidence regarding the multiple forces which have, and continue to impact on the TCF industry. Ms O'Neil said:

*'My international work together with my experience of the significant restructuring of the Australian TCF industry since the late 1980's has also informed my understanding of the complex interaction of factors which impacts on the global production of clothing and textile products. For example, the progressive reduction in tariff protection for the Australian TCF industry has greatly accelerated the shift from the formalised workforce to the outwork sector. Since I commenced with the union, the tariffs on clothing and finished textiles have decreased from 55% in 1990 to 10% in 2010. In my experience and belief this, combined more recently with the slow recovery from the GFC and the high Australian dollar, has been the most significant driver of the long term decline in local TCF manufacturing and cause of loss of job loss and retrenchment in the local industry. These have allowed a massive increase in cheap imports from low wage countries where labour standards are often non – existent. As a result, the domestic TCF industry's market share has declined relative to imported product over two decades. In addition, the concentration of the major retailers has also driven to move to offshore production (in order to maximise profits for shareholders) as well as squeezing the margins on their local supply chains. Other documented factors have also contributed. These include the long term low level of investment by the TCF sector in R&D and innovation compared to countries internationally (e.g. China, Germany) and the poor management structures, education and training relative to other OECD countries.'*

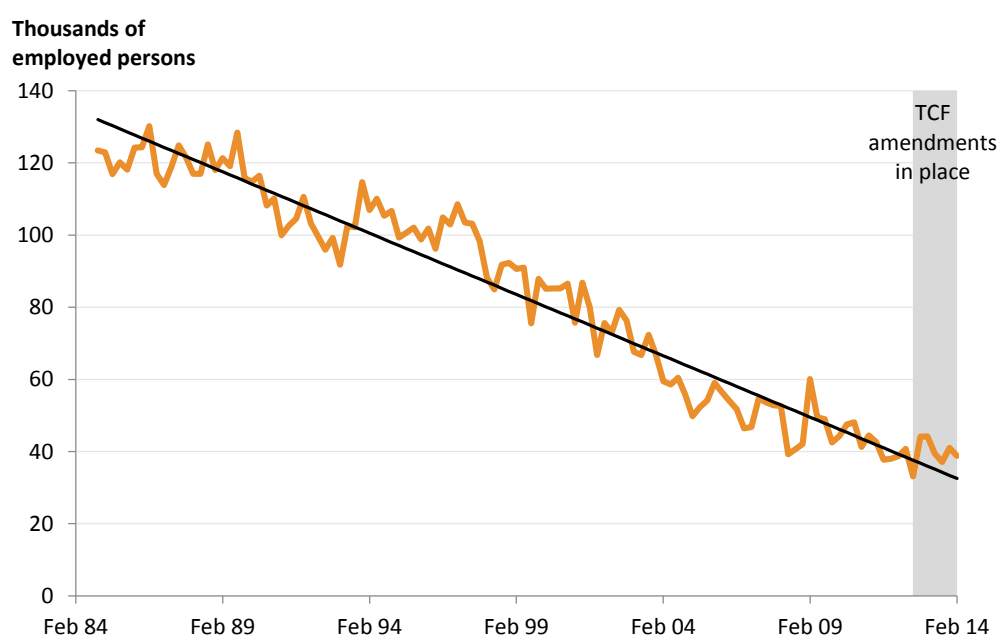
10.6 In respect to the economic impact of the TCF Bill, the evidence of DEEWR to the Senate Inquiry was that it did not consider there to be a negative effect on the TCF industry and that other factors had, in all likelihood, already resulted in 'low end...short run manufacturing moving off shore and therefore it did not expect to see significant changes in local manufacturing as a consequence of the bill.'

10.7 An analysis of economic data since the commencement of the TCF Act confirms that there has been no identifiable impact of the legislation, outside of the normal expected trajectory of the industry. The data broadly shows that since 1

July 2012, trends in employment, sales, and profits in the industry have been broadly unchanged relative to trends in the pre-TCF amendment period.

- 10.8 As indicated previously, employment in the industry has been declining steadily for over three decades since the first significant tariff cuts were implemented. The pace of decline in employment from November 1984 (when the ABS time series begins) and the May 2012 quarter (prior to the TCF amendments) is remarkably consistent.
- 10.9 Since the TCF amendments, the number of people employed in the industry has continued to fall. However, this fall has been slightly less rapid than was typical in the pre-TCF amendment period. Between 1984 and May 2012, the compound annual growth rate of employment in the industry was -4.0%. Between May 2012 and February 2014 it was -2.7%.
- 10.10 Employment in the industry is shown in Figure 1. There is no evidence to suggest that the commencement of the TCF amendments in any way caused a deterioration in employment in the industry. It is clear that the fall in employment since the TCF amendments took effect is in line with historical experience and if anything is a little better than past trends.

**Figure 1: Employment in the textile, leather, clothing and footwear manufacturing industry sub-division**



Source: ABS 2014, *Labour Force, Australia, Detailed, Quarterly*, Table 6, Catalogue number 6291.0.55.003 and ACTU calculations.

- 10.11 Similarly, sales revenue in the industry has been steadily declining for the past two decades. There has been a modest increase in sales revenue in the TCF



industry since the TCF amendments took effect, but this increase is relatively small and is in line with past fluctuations around the trend.

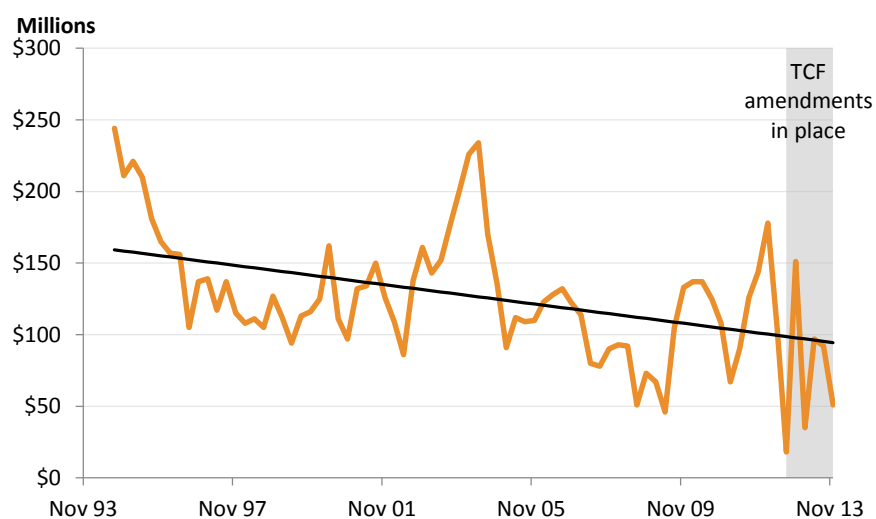
**Figure 2: Nominal sales revenue in the textile, leather, clothing and footwear manufacturing industry subdivision**



Source: ABS 2014, *Business Indicators, Australia, December 2013*, Table 25, Catalogue number 5676.0 and ACTU calculations.

10.12 Company gross operating profit has declined since the commencement of the TCF amendments, but this decline is more or less in line with the existing trend.

**Figure 3: Company gross operating profit in the textile, leather, clothing and footwear manufacturing industry subdivision**



Source: ABS 2014, *Business Indicators, Australia, December 2013*, Table 29, Catalogue number 5676.0 and ACTU calculations.

## 11 CONCLUSION

- 11.1 In this submission, the TCFUA has demonstrated that TCF outworkers as a class of worker have a particular vulnerability to exploitation. This has historically been the case, and despite strong regulation at both state and federal level and through the award system, continues to be so in significant parts of the TCF industry. So much is evident from the collective body of research and reports examining the position of outworkers within the Australian labour market.
- 11.2 These reports are not easy reading: the reality of TCF outwork has been characterised by very low pay (and non-payment), excessive hours of work, lack of income and job security, social isolation and an absence of workplace rights and conditions and rights that most other people in the community take for granted. This system of exploitation has been built around complex, multi-level supply chains, and an endemic practice of sham contract arrangements. The fact that such a system could exist, and flourish in 21st century Australia, is without equivocation, utterly unacceptable.
- 11.3 The testimony of outworkers labouring under these conditions (some of them for decades) provided to the PI Review, is often given at risk of loss of work or other retribution by their employers. The courage of these outworkers should not be under-estimated. They desperately want the government to understand their daily reality of outwork, the impacts it has on them personally and on their families. Just as importantly though, they want the government to understand why it is they want, and need strong and effective laws which protect them.
- 11.4 The position of workers in clothing sweatshops, though less well documented, is equally as shocking in respect to the conditions under which they labour. In the TCFUA's experience, sweatshops are a growing sector in the TCF industry. Sometimes outworkers move between outwork and sweatshop work in order to earn enough money to support themselves and their families. The capacity of the union to investigate the wages and conditions of workers in sweatshops is equally as critical as the ensuring outworkers receive their lawful pay and award entitlements. Without this dual approach there is a real risk that unscrupulous employers or principals will transfer work away from the home based sector to sweatshops, in the hope that they will avoid scrutiny.
- 11.5 It is important to acknowledge that prior to the passage of the TCF Act in early 2012, there has been a significant degree of bipartisan acknowledgment of, and support for special regulatory measures to protect outworkers. This included significant progress in the form of state outwork legislation and codes, and the inclusion of comprehensive frameworks of outwork provisions in federal TCF awards. However until the commencement of the TCF Act, there was no system of 'nationally consistent rights to legal redress and protection' in relation to the regulation of outwork. This was a key primary objective of the

legislation. Other than in the failure to regulate for a TCF Code of Practice, this objective has been achieved.

- 11.6 The PI Review asks stakeholders to consider whether the provisions of the TCF Act are performing as intended, and are still relevant and needed. Based on the TCFUA's extensive experience and knowledge of the TCF industry, and its deep engagement with outworkers, the answer is yes. The express purpose of the TCF Act amendments was to eliminate the exploitation of outworkers and ensure that they are employed under secure, safe and fair systems of work. The beneficial effects of the TCF Act amendments have started to flow through the industry, resulting in a greater number of outworkers and sweatshop workers receiving their lawful wages and conditions. This is no small thing, given the entrenched practice of sham contracting in the sector. But there is more work to do, and the gains that have been made often occur in combination with effective compliance strategies undertaken by the TCFUA. Strong laws and rigorous compliance are the key to eliminating exploitation in this industry. In the long and difficult history of the regulation of TCF outwork, this is not the point to wind back protections for outworkers and workers in sweatshops.
- 11.7 In conclusion, the TCFUA strongly urges the government to retain all provisions of the TCF Act and to take steps to implement a national code of practice for the TCF industry.

**TCFUA**

**(16 May 2014)**

## OUTWORKER CASE STUDIES

(\*names of outworkers have been changed to protect their identity)

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### **Case study 1: Mai - Payment of annual leave & other entitlements**

Mai works as an outworker for a company accredited with Ethical Clothing Australia. For the first time in her working life as an outworker, in December 2012, Mai received annual leave and loading from her employer. On receiving her annual leave Mai told the union 'it was like a dream come true'. Mai was identified as an outworker, as part of the union undertaking a compliance audit of the company's supply chain for the ECA accreditation process. As well as the annual leave, there were a range of other issues which the union helped Mai to fix, including provision of pay slips, underpayment of wages, accrual of annual leave and personal/carers' leave, superannuation and Work Cover. These entitlements are also now properly recorded in the employer wage records.

### **Case study 2: Binh - Sham contracting**

Binh, an outworker, who does work in a school wear supply chain contacted the union about a number of issues he had with the company. Binh told the union that the company continued to treat him as a contractor even though he wanted to be an employee. The owner of the company initially refused to sign a written agreement with the outworker (the agreement is required under the award and sets out the details of employment i.e. full time or part time, number of hours work per week etc.). Binh also complained of other issues including his low wages (\$7 - \$8 per hour) and that he had not received a wage increase for many years. He also complained that he was not getting regular work from his employer. As part of the compliance audit, the union discovered that Binh also had not been receiving any holiday pay or personal/carer's leave or superannuation. In addition, his employer had not taken out any Work Cover insurance for him. After the involvement of the union, a written agreement was finally signed by the company with Binh and he is now receiving award rates of pay, leave and other employee entitlements.

### **Case study 3: Ly - Sham contracting, underpayment of wages, leave and super**

Ly is a highly skilled outwork machinist, who has worked for a clothing manufacturer for over 10 years. Despite her high skill she was receiving wages significantly under the award minimum (this varied between \$10 - \$12 per hour). Because of her family situation, Ly needed to work from home as her son has a disability. Ly's employer sought ECA accreditation. In conducting the compliance audit, the union met Ly who raised a number of work problems she had with the company. A key issue was the company attempting to pressure Ly to agree to be paid as a 'contractor' rather than an employee and not receive any other employment related benefits. The union intervened on behalf of Ly. However, the company then said that she could work in-house as a 'casual' without any other guarantees. This was rejected by Ly. Eventually, with the support of the union, Ly secured full time hours (38 per week) as an outworker and now receives above award rates of pay (commensurate with her very high skill base). Ly also now has leave entitlements, superannuation paid on her behalf and Work Cover insurance taken out.

#### **Case study 4: Group of outworkers**

Under the TCF award, businesses which give work out in the TCF industry must be registered with the TCF Board of Reference (Fair Work Commission) and provides lists of where and who they give that work to (including to outworkers). Through the ECA accreditation program, the union in NSW identified a group of outworkers who previously had not been listed in the company's Board of Registration (Fair Work Commission) documents. After meeting with each of the outworkers, the union approached both the principal fashion house and the contractor who directly employed the outworkers about multiple issues of concern, including sham contracting. As a result, the group of outworkers are now receiving their correct wages and conditions as employees.

#### **Case study 5: Xingjuan – low wages and no entitlements**

The Union advocated on behalf of an outworker Xingjuan who told the union that the minute rate she was receiving to sew garments was very low (on average \$6 per hour). This is a common problem in the sector and leads to outworkers often having to work excessive hours to try and make a living wage. Under the TCF Award, the time standard (how long the work will take to perform) must be fair and reasonable and the minute rate must be no less than the equivalent award hourly rate of pay. With the assistance of the union, the issue was fixed and the outworker now has enough time to reasonably complete the work in the time allocated by her employer. She also now receives the award rate of pay for the work performed and all other lawful entitlements (leave, superannuation).

#### **Case study 6: Hong and Thanh**

As part of undertaking ECA compliance, the union located and identified 2 outworkers (Hong and Thanh, a married couple) who had irregular hours of work and income per week. As the outworkers were treated as 'contractors' they also received no leave, award rates of pay, workers compensation protection or superannuation. The union successfully negotiated for them to enter into formal written agreements with their employer (which secured guaranteed part time work and hours per week) and for them to receive their lawful leave and other entitlements.

#### **Case study 7: Phuong - Payment of redundancy**

(first person case study)

I worked as an outworker for a clothing company in Victoria for over 16 years. It is a hard life being an outworker, the hours were often very long and there were always deadlines to meet. There was always so much pressure to complete orders on time, then other times there would be no work for weeks. Your children and family really suffer.

In 2011, the work started to slow down more and eventually I received no work at all. I tried to speak with my employer about when I would get work again. He couldn't tell me. It was very difficult dealing with him and having no income to support myself and my family. I didn't know what I could do or whether I was entitled to anything.

I heard about the union through a Picnic day which I attended. I told the union workers who were there about my situation. The union contacted my employer and spoke with them about me not getting any more work. The boss told the union that he had lost an order. The union said

to me that I had been made redundant and that I was entitled to redundancy pay. I had no idea that I had these rights.

Eventually, after the union became involved, My employer agreed to pay my redundancy. I received about \$5,000 in redundancy. I was so relieved that I was entitled to some money to get me through the next period without a job.'

#### **Case study 8: Factory based workers – Poor and dangerous OH&S**

The Union, as part of completing a supply chain audit for ECA, was arranging a final compliance visit to a manufacturer, when it found that the company had relocated to smaller premises in the same block of factories. On entering the new premises the union compliance officer observed a number of very obvious health and safety issues. These included all the sewing machinists working upstairs under a tin roof with no insulation, cooling or air conditioning. It was in the middle of summer and the area upstairs was extremely hot and uncomfortable. The dining facilities were also unhygienic and substandard. After the intervention of the union, within two weeks an air conditioner has been installed, and in the interim, the workers took additional breaks and fans were provided. In addition, the dining facilities were rectified, partitions installed and chairs provided.

#### **Case study 9: Factory based workers & outworkers**

The Union conducted ECA compliance in respect of the supply chain of a prominent local fashion label. There were 5 factory based workers (3 full time and 2 casuals) and several outworkers. The audit identified that none of the workers were receiving their correct award and legal entitlements. For example, the casual workers were not being paid a casual loading and no superannuation had been paid on behalf of any employee. The outworkers were not being paid correctly under the award and were not receiving other award conditions. In addition, the workplace had serious OH&S issues – inadequate amenities, blocked walkways, extremely untidy and hazardous work areas. The workplace was also a high fire risk yet had no fire extinguishers on-site.

After the compliance visits from the union, the factory relocated to new premises. The union ensured the new premises were compliant with appropriate OH&S standards. The underpayments of workers' entitlements was also addressed, for both the factory based workers and the outworkers.