



Productivity Commission
Review into the Workplace Relations Framework

Submission by the
Textile Clothing and Footwear Union of Australia

PRODUCTIVITY COMMISSION
REVIEW INTO THE WORKPLACE RELATIONS FRAMEWORK

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EXECUTIVE SUMMARY

The TCFUA is the primary national union which represents workers in the textile, clothing, footwear and associated industries in Australia ('TCF industry') including in both the formal and home-based sector.

The TCF industry faces significant structural challenges due to a range of complex historical and ongoing pressures. It is comprised of a traditional factory sector, and significant outwork sector and, concerningly, a growing sweatshop sector. It is characterised by widespread non-compliance with minimum legal and award conditions and systematic exploitation. The TCF industry in Australia has been contracting but the future of the TCF industry in Australia cannot be sustained by a 'race to the bottom' through diminishing minimum wages and conditions.

Workers in the TCF industry are some of the most vulnerable workers in Australia. They are typically low paid and dependent on the minimum safety net contained in the award and NES. However, widespread noncompliance results in vast numbers of TCF workers who do not have the benefit of the minimum safety net. Outworkers are systematically exploited and sweatshops workers, by definition, labour under appalling and unsafe conditions.

Outworkers in the TCF industry have long been recognised as a particularly vulnerable class of worker, who require particular and specific regulatory regimes to ensure their protection from exploitation. Laws and regulations developed over time backed by significant research and investigations effectively provide that outworkers are employees under Australian law, and should enjoy the same minimum conditions of employment and safe working environment as other TCF workers who perform similar work in traditional manufacturing environments.

A living wage is an ongoing concern for workers in the TCF industry. A large percentage of the TCF production workforce are wholly award reliant. Rates of pay in TCF enterprise agreements are often pegged to the award rates and are only modestly higher than the award. The minimum wage is currently disproportionately low when compared to the national average wage and is worryingly close to the poverty line. The minimum wage should be increased to a living wage.

Modern awards, particularly in the TCF industry, provide a relevant practical set of terms and conditions tailored to a particular industry and reflecting its work, processes and arrangements. The current minimum safety net in the TCF industry is necessary, but deficient in a number of respects, particularly in relation to arbitration of disputes, accessibility of the safety net for workers in precarious employment, and the inadequacy of flexible work arrangement provisions. The NES is currently deficient in terms of providing effective compassionate leave for all workers, but particularly for casual workers.

The minimum safety net must continue to remain relevant and to be adaptive to changing community standards and needs. This means it must continue to provide an appropriate and greater safety net and must not be diminished.

Individual Flexibility Agreements in awards and under enterprise agreements are routinely abused and current safeguards are insufficient to prevent misuse of IFAs by employers.

Penalty rates remain critical to ensuring that low paid workers have access to a living wage and adequate compensation for the intrusion of working unsociable hours into family and social life.

The bargaining framework must be amended to provide for industry-wide and supply chain bargaining and the removal of restrictions on agreement content. Current unnecessarily bureaucratic hurdles to taking industrial action should be removed, while remedies for breaches of good faith bargaining obligations must be more easily accessible.

Employee protections, in the form of the general protections provisions, FWC's anti-bullying jurisdiction and unfair dismissal laws must be available and effectively accessible for all workers. Right of entry provisions must ensure that workers may effectively access their right to freedom of association by having access to their union in their workplace.

1. BACKGROUND

- 1.1 The Textile Clothing and Footwear Union of Australia ('TCFUA') welcomes the opportunity to provide this submission to the Productivity Commission Review into the Workplace Relations Framework ('PC Review').
- 1.2 The TCFUA is a registered organisation under the *Fair Work (Registered Organisations) Act 2009*. It is the primary national union which represents workers in the textile, clothing, footwear and associated industries in Australia ('TCF industry') including in both the formal and home-based sector. The TCFUA and its predecessor organisations have been representing and advocating for the rights and entitlements of TCF workers for over 100 years.
- 1.3 The TCFUA is an affiliated union of the Australian Council of Trade Unions ('ACTU'). The TCFUA supports and adopts the comprehensive submission made by the ACTU to the PC Review.
- 1.4 As the main national union which represents and advocates for the industrial interests of workers in the TCF industry, the TCFUA is in a unique position to observe and detail the working conditions of these workers in all sectors of the industry, including both the formal and home-based sectors. The TCFUA has a daily role through the work of its officers and officials in identifying poor and dangerous labour practices and working to improve industry compliance with the minimum safety net and other workplace laws. For many decades, the TCFUA and its predecessor organisation, have led the industrial and community campaign to highlight and address the widespread existence of exploitation in certain parts of the TCF industry. On a broader level, the TCFUA advocates strongly for the need for the TCF industry to operate on an ethical and sustainable basis.
- 1.5 In this submission, the TCFUA highlights the unique nature of the TCF industry and its interaction with the workplace relations system, and identifies where the current system is working and where important improvements are required. In doing so, the TCFUA is acutely aware that the overwhelming majority of workers in the industry will not be in a position to make their own submission to the PC Review at this stage of the process. However, we would expect that further opportunities will exist in the consultation and hearing stage of the PC Review for the direct experiences of TCF workers to be heard and considered.
- 1.6 The TCFUA has reviewed the Issues Papers released by the Productivity Commission and the comprehensive and wide ranging list of matters and questions raised therein. Although it is not the TCFUA's intention to make submissions in response to each Issues Paper and or set of questions, it should not be concluded by the Productivity Commission that the absence of a direct submission on a particular question indicates

support for the contention proposed. Many of these matters have been addressed by the ACTU in its detailed submission to the PC Review, and we support and adopt the ACTU's comments.

2. NATURE OF THE TCF INDUSTRY

- 2.1 The textile, clothing, footwear and associated industries ('TCF industry') is unique in that it is structured around both traditional manufacturing workplaces and home-based outworkers. There is also a third sector, typically described as 'sweatshops', which is not a 'traditional manufacturing' workplace, nor is the work performed at home. Sweatshops are premises, which can be small factories, sheds or private residences, where workers are subject to illegal, unfair and unsafe conditions. These sectors, particularly in the clothing and apparel sub-industries, often occur within the one supply chain and provide work for the one principal fashion house/retailer at the top of the supply chain.
- 2.2 The TCF industry has been subjected to sustained restructuring over many decades, driven and accelerated by a complex combination of drivers. These factors include progressive domestic tariff reduction and trade liberalisation, the globalisation of TCF supply chains, the significant import penetration of TCF goods from low wage countries and the concentration and rationalisation of large retailers in Australia. As a result, the character and models of TCF production have changed markedly in the last 30 years. The shift from traditional factory production to longer supply chains and the growth of the home-based sector has been significant. All the above outlined factors have led to an overall reduction in the size of the domestic TCF industry, both in terms of output and employment numbers.
- 2.3 In considering the role of the workplace relations framework in regulating the work in the TCF industry, the context of contraction of the industry must be borne in mind. Commentators who pose that the future of the TCF industry in Australia must be based on a 'race to the bottom' through diminishing minimum wages and conditions, ignore the complex combination of factors that have led to the contraction of the industry over the last 25-30 years. Conversely, the future of the industry will survive and grow only through a process of distinction founded on ethical production, innovation, research and development and the creation of niche markets for well made, quality TCF goods.

- 2.4 Despite these challenges, the TCF industry remains an important part of the Australian economy. In 2008, the approximate level of employment in the TCF industry was 48,000 in terms of direct manufacturing (that is, traditional manufacturing workplaces).¹ In 2012 it was estimated that the figure was 43,400².
- 2.5 However the size and value of the TCF industry, including employment numbers remains significantly under-estimated due to the failure of ABS and Census figures to effectively capture real employment levels in the TCF outwork and sweatshop sectors and definitional and classification issues regarding what and who is included in the term 'TCF industry'.
- 2.6 The TCF industry has traditionally been seen primarily as a subset of manufacturing more generally, but this narrow approach ignores the structural changes which have impacted on the TCF industry over time. Such definitional 'slippage' was acknowledged in the most recent large scale review of the TCF industry undertaken by the former federal government in 2007. The 2008 Report resulting from the Review documented that the traditional basis for defining the TCF industry was problematic and *'increasingly redundant in describing the current scope of activities undertaken by firms engaged in TCF-related activities.'*³
- 2.7 The Report found that:
- 'It is probable that ABS estimates of the level of TCF manufacturing activity, such as employment and value added, are understated. This problem is likely to affect the TCF industries differentially, with subindustries such as clothing especially affected, it has not been possible to quantify the effect of the shifting classification of TCF firms.'*⁴
- 2.8 The formal figures for employment levels in the TCF industry also significantly underestimate the extent of work undertaken by outworkers and workers in clothing sweatshops. The TCFUA is acutely aware of the difficulties, due to long and complex supply chains, in identifying and locating outworkers and then calculating the volume of work undertaken by them.

¹ Department of Innovation, Industry, Science and Research (Cth); 'Building Innovative Capacity' (Report of Professor Roy Green) – Review of the Australian Textile, Clothing and Footwear Industries (Aug 2008) at [22]

² ABS catalogue number 6291.0.55.003 – records employment in the textile, leather, clothing and footwear manufacturing industry

³ 'Building Innovative Capacity' (Green), op cit; at [21] The Report found that reliance on the ANZSIC classification system was problematic because it only identified the 'predominant activity' of a particular business, whereas many TCF businesses had a range of economic or business activities such as manufacturing, wholesale, retail.

⁴ 'Building Innovative Capacity' (Green); op cit; at [21]

3. NATURE OF THE TCF INDUSTRY WORKFORCE

- 3.1 Workers in the TCF industry, in the formal, home based and sweatshop sectors, are some of the most vulnerable workers in Australia. Whilst the TCF industry has been subjected to significant and sustained restructuring, the key characteristics of its workforce have remained largely consistent over time.
- 3.2 These characteristics include:
- A significant percentage of the TCF production workforce are from a non-English background and do not have English as their first language;
 - High number of women workers, particularly in the outwork sector which is overwhelmingly a female workforce. Nearly two thirds are women and the TCF industry is the second largest employer of women in the manufacturing sector;
 - Significant numbers of TCF workers are low paid and award dependent (either wholly or primarily);
 - Relatively low level of formal education or trade qualifications obtained in Australia;
 - Low level of bargaining power of certain groups of TCF workers, relative to manufacturing, and as compared to many other industries;
 - A formal workforce centred around traditional manufacturing in factories and the contracting out of large volumes of work to be undertaken by outworkers at home;
 - Systematic exploitation of TCF outworkers as a class who typically receive rates of pay less than the minimum award wage and often do not receive other safety net benefits, such as leave and superannuation;
 - Existence and growth of a largely hidden and non-unionised 'sweatshop' sector in which workers labour under often appalling and unsafe conditions; and
 - Widespread non-compliance with minimum award and statutory wages and conditions by many employers in the industry which means that TCF workers regularly do not have the benefit of the safety net.
- 3.3 In addition, many of the TCFUA's members have worked in the TCF industry for the whole or significant part of their working lives and have limited economic resources other than their weekly wage. When workers in the TCF industry are retrenched, many will struggle to find permanent work again, either entering into early retirement or long periods of unemployment or underemployment.
- 3.4 The particular nature of the TCF industry has been considered in a number of recent Award Modernisation decisions. In the decision of *Award Modernisation* [2009]

AIRCFB 550,⁵ a Full Bench of the AIRC determined the list of priority awards for the Part 10A Award Modernisation process and dealt with the model IFA term to be included in modern awards. In consideration of the clothing and textile industries for inclusion in the Priority stage, the Full Bench acknowledged the TCFUA's submission that the TCF industry is generally characterised as:

- Being low paid
- As combining both formal and informal (outwork) sectors;
- As being largely award reliant;
- As having a high percentage of workers from a non-English speaking background, the majority of whom are women;
- That there is little bargaining power for employees within the sector; and
- That any award flexibility clause would have to be carefully examined as to how it would apply in a sector with vulnerable workers, with issues such as intimidation and coercion being relevant.⁶

3.5 The Full Bench went on to hold:

*'Given the characteristics of the [TCF] industry together with the fact that there is a strong support for, and no opposition to its inclusion, we will include it within the list of priority industries.'*⁷

3.6 In the development of the Exposure Drafts for the priority Stage Awards, the Full Bench stated:⁸

*'This is a sector which is highly award reliant and where the constitution of the workforce is a relevant consideration.'*⁹

*Given the nature of the industry we have added a requirement to the model award flexibility clause for translation of proposals into a person's first language so that any proposals are fully understood. In addition we have provided a period of consideration of any proposal under the clause.'*¹⁰

3.7 In the making of the modern award for the TCF industry, the Full Bench confirmed the need to specifically regulate for the particular needs of certain classes of worker in the industry. This included the insertion into the new award, a comprehensive framework of provisions about TCF outwork and related matters (Schedule F). In support of these provisions, the Full Bench observed:

⁵ *Award Modernisation* [2008] AIRCFB 550 (20 June 2008)

⁶ *Ibid*; at para [94]

⁷ *Ibid*; at para [95]

⁸ *Award Modernisation* [2008] AIRCFB 717 (12 September 2008)

⁹ *Award Modernisation* [2008] AIRCFB 717 (12 September 2008) at para [100]

¹⁰ *Ibid*; at para [103]

*'Important submissions were also made in regulation of outworkers. There has been no disagreement about the need to properly protect this class of employee.'*¹¹

- 3.8 More recently, in context of the 2012 Transitional Review of Modern Awards, a three member Full Bench of the FWC uniformly rejected employer claims to remove many of the outworker protections contained in Schedule F of the TCF Award.¹² In doing so, the Full Bench held that TCF outworkers were :

'a very vulnerable section of the workforce.'

- 3.9 These decision illustrate that successive Full Benches of the Commission have accepted that the nature of the TCF industry and its workforce is a relevant consideration to the establishment and maintenance of the award safety net for the TCF industry.

4. OUTWORK

Corrections to the Productivity Commission's Issues Papers

- 4.1 A number of statements are made in the Productivity Commission's Issues Papers in relation to outworkers which on their face, appear to be incorrect or otherwise misleading when isolated from their context.

- 4.2 The first of the statements occurs in Issues Paper 1 (at para 1.4) where it is stated:

'Moreover, some unions and other commentators have their own concerns about aspects of the current framework, including that it:

- *Lacks a safety net for workers not classified as employees, such as outworkers and contractors (ACTU 2012)...'*¹³[our emphasis]

- 4.3 Read literally, this statement implies that contract outworkers (in the TCF industry) have no current rights to minimum wages and conditions under the statutory safety net of modern awards and the NES. This is incorrect.

¹¹ *Award Modernisation* [2008] AIRCFB 1000 (19 December 2008) at para 50

¹² *Transitional Review of Modern Awards* [2013] FWCFB 5729 (4 October 2013)

¹³ Australian Government – Productivity Commission, (Issues Paper 1): The Workplace Relations Framework: The Inquiry in Context (January 2015)

4.4 Under the TCF Award, contract outworkers have relevantly identical rights and conditions as those of employee outworkers in the TCF industry.¹⁴ Under Schedule F (Outwork and Related Provisions) of the TCF Award, outworkers (whether employees or not) are entitled to certain minimum conditions of engagement,¹⁵ including the NES, such that:

‘A principal must apply the NES to the worker as though the worker is an employee, whether or not the principal is an employer or the worker is an employee.’

4.5 The Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012 (‘TCF Industry Amendment Act 2012’)¹⁶ also extended the rights and protections to outworkers including:

- Extending most provisions of the Fair Work Act 2009 to contract outworkers (i.e. deeming provisions);¹⁷ and
- Enabling outworkers to recover unpaid amounts up the supply chain.¹⁸

4.6 A key object of the TCF Industry Amendment Act 2012 was to provide nationally consistent rights and protections for outworkers, regardless of whether they are employees or contractors. The effect of the amendments is that contract outworkers have relevantly identical rights and conditions under the FW Act to employee outworkers for the majority of purposes under the Act.

4.7 The second reference to TCF outworkers is contained at Issues Paper 5¹⁹ (at para 5.6 – Alternative forms of employment) where it is stated:

‘These groups capture most workers who are not ongoing and permanent employees. There are also other forms of employment where the appropriate employee status of workers is not clear (such as textile and footwear outworkers).’²⁰ [our emphasis]

4.8 In the TCFUA’s submission the prevalence of systemic sham contracting in the TCF industry, whereby outworkers are typically required to have an ABN or ACN in order to receive work, does not disguise the true legal status of the overwhelming majority of outworkers as employees under common law. As outlined above, the FW Act

¹⁴ See TCF Award 2010 – clause 4 (Coverage) which provides that the award covers all outwork entities who are covered by the terms of the award in respect to Schedule F – Outwork and Related Provisions; clause 17 (Outwork and Related Provisions) and Schedule F (Outwork and Related Provisions)

¹⁵ Textile Clothing Footwear and Associated Industries Award 2010; Schedule F, clause F.5

¹⁶ Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012; Royal assent 15 April 2012, with a commencement of 1 July 2012

¹⁷ Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012 – Part 6-4A, Division 2

¹⁸ Ibid; - Part 6-4A, Division 3

¹⁹ Australian Government – Productivity Commission, (Issues Paper 5): Workplace Relations Framework: Other Workplace Relations Issues (January 2015)

²⁰ Ibid; page 9

deems so called contract outworkers to be employee outworkers for the majority of purposes of the Act. Similarly, under the TCF Award, contract outworkers have relevantly the same entitlements as employee outworkers in respect to minimum wages and conditions, including the NES. That is, the outworker provisions of the TCF Award in combination with the outworker provisions of the FW Act ensure that clarity now exists in relation to the status of outworkers in the TCF industry and their entitlement to the benefits of the safety net.

Outwork – a vulnerable class of worker in the TCF industry

4.9 The TCFUA has written extensively, and made detailed submissions on the nature and impact of outwork in the TCF industry.²¹ Further, over the last three decades there has been numerous inquiries, reports, studies and research which have consistently found that TCF outworkers are particularly vulnerable to exploitation given their position in long and complex TCF supply chains.²²

²¹ See for example:

- Department of Employment, *Post Implementation Review into the Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012*; Submission of the TCFUA (16 May 2014).
- (AM2014/93 & Ors) *Transitional Review of Modern Awards (2012)*; Submission of the TCFUA (28 February 2013)
- *Senate Standing Committee on Education, Employment and Workplace Relations, Inquiry into the Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011*; Submission of the TCFUA (11 January 2012)

²² See:

- Cregan, C and Johnston, P: *‘Wages and Conditions of outworkers in the clothing industry in Melbourne, Victoria (Part 1)’*; Department of Management, University of Melbourne (June 2014).
- Submission by Shelley Marshall to the *Senate Standing Committee on Education, Employment and Workplace Relations Inquiry into the Fair Work Amendment (Textile, Clothing and Industry) Bill 2011* (January 2012).
- *Senate Standing Committee on Education, Employment and Workplace Relations Report on the Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011 [Provisions]* (February 2012).
- *Senate Standing Committee on Education, Employment and Workplace Relations Report on the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 [Provisions]* (2009)
- *Senate Standing Committee on Education, Employment and Workplace Relations Report on the Fair Work Bill 2008* (2009).
- *Senate Standing Committee on Education, Employment and Workplace Relations Report on the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008 [Provisions]* (2008)
- Brotherhood of St Laurence, Diviney, E & Lilywhite, S, *‘Ethical Thread – Corporate Responsibility in the Australian Garment Industry’* (2007).
- *Senate Employment, Workplace Relations and Education Legislation Committee Report on the Provision of the Independent Contractors Bill 2006 and the Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006*.
- Ethical Clothing Trades Council of Victoria, Report conducted pursuant to *the Outworker (Improved Protection) Act 2003 (Vic)* tabled in the Victorian Parliament by the Minister for Industrial Relations, (2005).
- Ethical Clothing Trades Council, *‘Outworkers’ Lawful Entitlements Compliance Report*, (November 2004).
- NSW Ethical Clothing Trades Council, *‘Twelve Monthly Report’* (2003).
- Productivity Commission, *‘Review of TCF Assistance: Inquiry Report’*, (July 2003).

- 4.10 The need for particular regulatory frameworks to address the specific nature of the TCF industry and work undertaken by outworkers has also been consistently recognised by courts and tribunals,²³ and by both state²⁴ and federal governments.²⁵
- 4.11 Awards in the TCF industry have historically contained provisions relating to the giving out of work and which provided for the minimum terms and conditions of engagement for outworkers. The need for this type of regulation was accepted as part of the Part 10A Award Modernisation process, resulting in the inclusion of Schedule F, (Outwork and Related provisions).
- 4.12 At the federal level, the provisions of the TCF Industry Amendment Act 2012²⁶ have now been in effect for nearly 3 years. In the TCFUA's submission, these reforms were long overdue and necessary to address systemic sham contracting in the home based sector and to ensure that outworkers have nationally consistent rights and conditions. In the TCFUA'S experience, the amendments are beginning to have real and positive effects for outworkers in terms of their rights to receive the minimum safety net of wages and conditions.

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- Parliament of Victoria, Family and Community Development Committee, *'Inquiry into the Conditions of Clothing Outworkers in Victoria,'* (Sep 2002).
 - Cregan, C, *'Tales of Despair: Outworker Narratives,'* Department of Management, University of Melbourne.
 - Cregan, C, *'Home Sweat Home: Preliminary Findings of the first stage of two part study of outworkers in the textile industry in Melbourne, Victoria,'* Department of Management, University of Melbourne (November 2001).
 - Mayhew, C and Quinlan M; *'Outsourcing and Occupational Health and Safety: A Comparative Study of factory-based and outworkers in the Australian TCF industry,'* (1998) 40 UNSW Studies in Industrial Relations.
 - Senate Economics References Committee, *'Review of the Inquiry into outworkers in the garment industry' (1998).*
 - Senate Economics References Committee, *'Report on Outworkers in the garment industry' (1996)*
 - TCFUA, *'The Hidden Cost of Fashion: Report on the National Outwork Information Campaign.'* (March 1995).

²³ See for example:

- *Re Clothing Trades Award 1982* (1987) 19 IR 416
- M Print M3574, *Clothing Trades Award 1982*, (12 June 1995)
- S Print R2749, *Clothing Trades Award 1982*, (12 March 1999)
- *Re Clothing and Allied Trades' Union of Australia v J and J Saggio Clothing Manufacturers Pty Ltd* [1990] FCA 279
- *TCFUA v Lotus Cove Pty Ltd* [2004] FCA 279; 34 IR 26
- *TCFUA v Southern Cross Clothing Pty Ltd* [2006] FCA 325
- *TCFUA v Morrison Country Clothing Australia Pty Ltd* [2008] FCA 604
- *TCFUA v Morrison Country Clothing Australia Pty Ltd (No 2)* [2008] FCA 1965

²⁴ See the Submission by Slater & Gordon Lawyers to the *Senate Inquiry into the Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011* (11 January 2013) which provides a comprehensive analysis of the regulation of outwork at the state and federal level.

²⁵ See for example, the Fair Work Act 2009 – Part 6-4A

- 4.13 For the reasons outlined above, the TCFUA strongly supports the retention of the 2012 TCF industry amendments.²⁶

5. THE STATUTORY SAFETY NET – MINIMUM WAGES

- 5.1 The Productivity Commission raises a series of issues and questions for consideration regarding the Minimum Wage as one component of the statutory safety net.²⁷ The TCFUA strongly rejects proposals that would have the effect of abolishing the principle of minimum wage rates for award dependent workers or the removal from the FWC of its important role in setting and adjustment minimum wage rates in Australia. The impact of such proposals on workers in the TCF industry, who are already some of the most vulnerable workers in the country, would be devastating and entirely inconsistent with the objectives of the FW Act which aims to '*promote national economic prosperity and social inclusion for all Australians.*' On the contrary, the TCFUA submits that in order to achieve a guaranteed 'fair, relevant and enforceable safety net', it is critical at a policy and industrial level, to recast the 'minimum wage' as a 'living wage'.
- 5.2 As outlined previously, a large percentage of the TCF production workforce is solely, or wholly award dependent, including in relation to their hourly rate of pay. In the TCFUA's experience even where workers receive over award payments, these are typically very small, for example, an extra 10 or 20 cents per hour.
- 5.3 In terms of enterprise bargaining, agreements will usually provide rates modestly higher than the award, but not always. The TCFUA is aware of enterprise agreements in the industry where the hourly rates of pay are pegged to the rates in the TCF Award as adjusted by the Annual Wage Review decision. Under the Work Choices legislation, enterprise agreements existed in the TCF industry which over time saw rates of pay eroded and eventually provided for rates of pay lower than the minimum rates of pay under the relevant pre-reform, *Textile Industry Award 2000*.²⁸ That is, the minimum award rates of pay in the TCF Award have an impact beyond setting the minimum safety net for award dependent employees in the TCF industry. They also affect bargaining at the enterprise level as well.

²⁶ See Department of Employment, *Post Implementation Review into the Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012*; Submission of the TCFUA (16 May 2014)

²⁷ Australian Government – Productivity Commission, (Issues Paper 2): Workplace Relations Framework: Safety Nets (January 2015) – see section 2.2 (The Federal Minimum Wage), pp1-9

²⁸ See Bruck Textiles Pty Ltd Wangaratta Enterprise Agreement 2002

- 5.4 The TCF Award 2010 contains a 6 level general skill level classification structure: Trainee, Skill Level 1, Skill Level 2, Skill Level 3, Skill Level 4 and Skill Level 5.²⁹ There are also a number of specific classifications for particular job roles, but the rates of pay for the majority of these roles are determined by reference to the General Skill Level Classifications.³⁰
- 5.5 In the TCFUA's experience, the great majority of TCF workers are classified as skill level 2 under the TCF Award, with a lower number classified as skill levels 1 and 3. A much lower number are classified at skill level 4 (the trade or equivalent classification) and a much smaller number again under Skill Level 5. This is often the case under enterprise agreements where it is common that the classification structure under the TCF Award is incorporated into the enterprise agreement.
- 5.6 The current award wage rates for the General Skill Level Classification structure in the TCF Award are reproduced as follows:

Classification/Skill Level	Minimum weekly wage - \$
Trainee	\$640.90*
Skill Level 1	\$659.40
Skill Level 2	\$684.70
Skill Level 3	\$708.20
Skill Level 4	\$746.20
Skill Level 5 and thereafter	\$793.00

*This is also the rate of the National Minimum Wage at July 2014

- 5.7 These rates of pay are for full time workers, and many workers in the TCF industry do not receive anywhere near a full time wage, as they are employed part time or casually.
- 5.8 The average weekly ordinary time earnings (AWOTE) of full time adults in Australia as at December 2014 is \$1,477.00.³¹ It is clear that the minimum rates of pay under the TCF Award is significantly less than the AWOTE. As a result, there is a significant and growing wage disparity between award dependent workers relative to other workers in the economy.

²⁹ Textile, Clothing, Footwear and Associated Industries Award 2010; clause 20.1

³⁰ Ibid; see for example classifications - storeworker (20.3), forklift driver and tow motor rates of pay (20.4), High rise stacker (20.5), Pedestrian fork-lift operator (20.6), Warehouse employees – rates of pay (20.7)

³¹ Productivity Commission Review:

- 5.9 The Fair Work Commission Research Report ³²on award reliance and business size demonstrated that award-reliant workers tend to be female, part-time and casual employees.³³ Award reliant workers are more likely to have experienced unemployment, to concurrently work multiple part-time jobs, and wish to have more hours of work.³⁴
- 5.10 The Fair Work Commission takes into account relative living standards and the needs of the low-paid (among other considerations) each year during the minimum wage review. Despite this, the gap between the minimum wage and the average wage of the rest of the nation's workforce has increased at an alarming rate over the past decades. The current ratio of the minimum wage to the national average is one of the lowest on record. The minimum wage is worryingly close to the poverty line.
- 5.11 The TCFUA strongly believes that the minimum wage should not be a poverty wage, but a living wage.³⁵
- 5.12 The Fair Work Commission, observed in its 2012/2013 Annual Wage Review that:
- 'It is apparent that while real earnings have generally increased over the past decades, earnings inequality is increasing. Changes in the overall levels of earnings inequality show that real weekly earnings of full-time workers have become progressively less equal in the past decade... If not addressed, these trends may have broader implications both for our economy and for the maintenance of social cohesion in Australia.'*³⁶
- 5.13 For most award-reliant workers, their wage does not even amount to the minimum weekly wage under the relevant award or NES. Approximately two-thirds of workers who rely on the minimum wage work part-time.³⁷

³² Kevin Yuen, David Rozenbes and Samantha Farmarkis-Gammoni, 'Award reliance and business size: a data profile using the Australian Workplace Relations Study' (Research Report 1/2015, fair Work Commission, February 2015)

³³ Ibid; at 64-65

³⁴ Ibid; at ii

³⁵ *Annual Wage Review 2012-13*, [2013] FWCFB 4000, 111.

³⁶ Ibid, 14.

³⁷ *Annual Wage Review 2012-13* [2013] FWCFB 4000, 99.

- 5.14 Part-time employment rates in Australia are relatively high in comparison to other OECD countries.³⁸ In 2013, part-time employment constituted 29.9% of total employment in Australia.³⁹ The average rate of part-time employment for all OECD countries is 16.5%.⁴⁰ In 2013, women constituted 72% of all part-time employees.⁴¹ Researchers have noted that:

'The over-representation of women in non-standard employment, that is in non-full time ongoing employment, is a key indicator of gender disadvantage as it is associated with reduced income and more limited access to job and working time security... Further, underemployment, that is the proportion of those who work part time, want to work more hours and are available to do so, remains much higher for women than for men. Women also make up 55% of casual employees, with 26% of all female employees being employed on a casual basis'.⁴²

- 5.15 Research suggests that part-time work opportunities are clustered in certain low-paid industries and occupations.⁴³ Researchers, Preston and Yu, contend that there are 'significant financial penalties' associated with part-time work, and warn 'against a benign view' of the growing trend towards part-time employment in Australia.⁴⁴ They conclude that:

'We further caution against an uncritical promotion of part-time work in Australia... From a public policy perspective, policies to further expand part-time work must be accompanied by arrangements that ensure fair and equitable treatment of all part-timers relative to full-timers, otherwise wage gaps will continue to grow and greater inequality will result'.⁴⁵

The Relationship between the Minimum Wage and Unemployment

- 5.16 The proposition that higher minimum wages negatively affect employment is not supported by empirical evidence. Despite the submissions of employer groups to the contrary during minimum wage reviews, the Fair Work Commission has repeatedly found 'that a modest increase in minimum wages has a very small, or even zero, effect

³⁸ Alison Preston and Serena Yu, 'Is there a part-time/full-time pay differential in Australia?' (2015) 57(1) *Journal of Industrial Relations* 24, 24.

³⁹ Alison Preston and Serena Yu, 'Is there a part-time/full-time pay differential in Australia?' (2015) 57(1) *Journal of Industrial Relations* 24, 24.

⁴⁰ Preston and Yu, above n 7, 25.

⁴¹ Sara Charlesworth and Fiona Macdonald, 'Women, Work and Industrial Relations in Australia in 2013' (2013) 56(3) *Journal of Industrial Relations* 381, 383.

⁴² Charlesworth and Macdonald, above n 10, 383.

⁴³ Preston and Yu, above n 7, 38.

⁴⁴ Preston and Yum above n 7, 44

⁴⁵ Preston and Yu, above n 7, 44.

on employment'.⁴⁶ The TCFUA also supports the detailed submission of the ACTU on this question.

- 5.17 Moreover, studies have shown that the effect of low-pay and underutilisation of skills can be scarring on workers, and can lead to negative effects on future employment prospects. Mavromaras, Sloane and Wei write that:

*'We find that both male and female low paid workers are significantly more likely to be unemployed in the next period relative to high paid workers. Similarly, skills under-utilized workers are significantly more likely to be unemployed in the next period relative to skills well-matched workers... Combining these results suggests that there are scarring effects, not only of unemployment, but also of low pay and skills under-utilization on future employment probabilities'*⁴⁷

- 5.18 Our submission that the current level of minimum wages are inadequate and have led to increasing wage inequality over time, does not lead to the conclusion that an appropriate policy response is the abolition of a guaranteed minimum wage. On the contrary, the challenge is how to effectively ensure that the concept of a 'minimum wage' does not become a 'poverty wage' which entrenches socio-economic disadvantage and thus limits national economic prosperity and social inclusion.

RECOMMENDATION

- ***Award reliant workers should receive a living wage, not a poverty wage.***
 - ***Award rates of pay must be significantly increased.***

⁴⁶ *Annual Wage Review 2012-13* [2013] FWCFB 4000, 124.

⁴⁷ Kostas Mavromaras, Peter Sloane and Zhang Wei, 'The Scarring Effects of Unemployment, Low Pay and Skills Under-Utilization in Australia Compared' (2015) 47 *Applied Economics* 2413, 2427.

TCF Industry Case Studies

When TCFUA member Lisa Erskine's husband was injured in a traumatic workplace accident, she became the couple's sole breadwinner. Lisa, from Dereel in central Victoria, works a 30-hour week and spends an hour driving each way from home, mainly along narrow country roads, to get to work. The distance travelled to and from work adds up to about 500 km a week, meaning that petrol is a major expense. While finances had always been tight, the couple now relied on Lisa's base rate of \$547.20 to get by. She relies on Saturday penalty rates to make up for her low pay, without which she says she could not afford to travel the distance to work. Lisa wonders if her two adult sons will ever be able to afford to buy a house and worries about the direction Australia is going. "Australia is a good place to live", she told the Union, "but I can see the times ahead are only going to get more difficult".⁴⁸

A Vietnamese couple work as home-based outworkers, manufacturing clothes for a company supplying a high-end Australian fashion label. For many years with their employer, they were paid a piece rate which added up to less than eight dollars an hour. They worked around 12-14 hours a day. The employer would regularly not pay them at all for work completed, and they would have to chase up their pay. When the label became accredited with Ethical Clothing Australia, the TCFUA were able to inspect their workplace at home and check their pay and entitlements. Since then, the workers are paid the minimum wage under the TCF award. They are permanent part-time, and each work only 20 hours per week, but they are earning the same as they used to working 14 hour days. These workers rely so much on the award conditions and worry that if these minimum conditions are stripped, they will be forced to return to the working conditions they had before.

⁴⁸ 'Fight begins to increase the Minimum Wage', *Textile, Clothing and Footwear Union Journal* (Autumn 2014), 7-9.

6. THE STATUTORY SAFETY NET – AWARDS AND THE NES

6.1 Issues relating to the statutory safety net (awards and the NES) and jurisdiction of the FWC in relation to the safety net are raised by the Productivity Commission in Issues Paper 2⁴⁹ and Issues Paper 5.⁵⁰

6.2 The Object of the Fair Work Act 2009 ('FW Act') includes, in part, as follows:

Section 3 – Object of this Act

The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

(b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and

(c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and

(d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; ⁵¹[our emphasis]

6.3 In essence, the statutory minimum safety net for the TCF industry constitutes the National Employment Standards ('NES'), the national minimum wage and the relevant modern award, primarily the Textile, Clothing, Footwear and Associated Industries Award 2010 ('TCF Award').⁵² The TCFUA also has members, and covers workers in other related industries including the dry-cleaning and laundry industry, which is covered by the Dry Cleaning and Laundry Industry Award 2010 ('Dr Cleaning Award').⁵³

⁴⁹ Productivity Commission: Workplace Relations Framework – Issues Paper 2 (Safety Nets) at sections 2.3 and 2.4

⁵⁰ Productivity Commission: Workplace Relations Framework – Issues Paper 5 (Other Workplace Relations Issues) at section 5.2

⁵¹ Fair Work Act 2009, section 3

⁵² Textile, Clothing, Footwear and Associated Industries Award 2010 [MA000017]

⁵³ Dry Cleaning and Laundry Industry Award 2010 [MA000096]

- 6.4 The TCFUA rejects suggestions that the award system is no longer relevant to a modern workplace relations system. Modern awards provide a set of practical terms and conditions of employment tailored to an industry or occupation, and which reflect work, processes and arrangements particular to that industry or occupation. For example, in the TCF industry, the TCF Award contains a comprehensive framework of 'Outwork and Related Provisions' (Schedule F)⁵⁴ which seek to mirror the way work is undertaken at each level in TCF supply chains by imposing a series of cascading obligations. These provisions in similar form have existed in predecessor awards in the clothing industry since 1987⁵⁵ and are necessary to ensure that transparency exists, such that the extent of TCF work and the conditions under which it is performed can be identified at each level.
- 6.5 The TCFUA is concerned that the minimum safety net for the TCF industry (as currently provided for under the FW Act) is deficient in a number of respects and fails to meet key objects of the Act as outlined above. These criticisms include:
- (a) The absence of mandatory arbitration in dispute resolution processes, results in limited practical enforcement mechanisms for breaches of modern award and NES obligations;
 - (b) The limited applicability of minimum safety net entitlements to workers in precarious employment, such as casuals;
 - (c) The capacity of the minimum safety net to remain relevant and adaptive to reflect changing community attitudes, standards and need; and
 - (d) The inadequacy of the current minimum safety net provisions to actually provide for flexible working arrangements, so that employees can successfully accommodate both their work and family/carer responsibilities.

⁵⁴ Textile Clothing Footwear and Associated Industries Award 2010; Schedule F (Outwork and Related Provisions)

⁵⁵ See Re: *Clothing Trades Award 1982* (1987) 19 IR 416

Dispute resolution and enforceability – no timely or accessible remedy

- 6.6 Modern awards must include a term that provides for a procedure for settling disputes about:
- (a) any matters arising under the award; and
 - (b) in relation to the NES.⁵⁶
- 6.7 The jurisdiction of the Fair Work Commission ('FWC') to deal with a dispute by arbitration must be expressly authorised under, or in accordance with another provision of the FW Act.⁵⁷
- 6.8 The TCF Award contains the model dispute resolution clause which was inserted into all modern awards by the Part 10A Award Modernisation Full Bench.⁵⁸ The effect of the model award dispute resolution clause and the relevant provisions of the FW Act mean that:
- The FWC may only deal with a dispute (as it considers appropriate) arising under the award and/or in relation to the NES by way of conciliation, mediation, making a recommendation or by expressing an opinion;⁵⁹ or
 - Where the parties to the dispute agree on the process to be utilised by the FWC, including mediation, conciliation and consent arbitration.⁶⁰ [our emphasis]
- 6.9 The non-availability of arbitration in the FWC (other than by parties' consent) to determine award and NES disputes represents a serious limitation on the access to timely and accessible justice for award dependent workers in the TCF industry. As indicated above, the TCF workforce is characterised by being low paid and highly award dependent. Therefore a significant majority of workers in the industry do not have any effective remedy available to them (either individually or through their union) in order to have common, day to day disputes about wages and conditions resolved.

⁵⁶ Fair Work Act 2009 – section 146. However, the FWC is unable to settle a dispute about whether an employer has reasonable business grounds under ss65(5) or 76(4) i.e. the Request for Flexible Working Arrangements provisions (see Note to section 146)

⁵⁷ Fair Work Act 2009 – section 595(3)

⁵⁸ *Award Modernisation* [2008] AIRCFB 1000 (19 December 2008)

⁵⁹ Fair Work Act 2009 –section 595(2)

⁶⁰ Textile Clothing Footwear and Associated Industries Award 2010; clause 10.3

- 6.10 The absence of compulsory arbitration for minimum safety matters was also the position under the previous Work Choices' legislation, but not under the *Workplace Relations Act 1996* ('WR Act') prior to 27 March 2006 when so called 'section 99' disputes were regularly and quickly brought before the AIRC for conciliation and arbitration. In the TCFUA's experience, under the framework of s99 disputes, the mere possibility of arbitration was often sufficient for a dispute to be resolved at the level of conciliation or mediation and regularly led to consent outcomes.
- 6.11 In its written submission to the Fair Work Act Post Implementation Review (2012), the TCFUA outlined the virtual impossibility of obtaining employer consent to arbitration for award/NES disputes :
- '.....Once notified of a dispute, it has been the TCFUA's consistent experience that employers will not agree to the FWA determining the matter by consent arbitration. Since the commencement of the Work Choices legislation the TCFUA has not been successful in one case in having an employer agree to consent arbitration in relation to a matter arising under an award.*
- In many instances, the TCFUA (and FWA) has difficulty even getting employers to participate in conciliation before FWA. In any event, even where an employer attends a conciliation, their participation is often token as they have been clearly advised that the worker and the union may not, in reality, have any timely or accessible remedy.'*⁶¹
- 6.12 Since the commencement of the FW Act this position has not changed. The TCFUA is not aware, based on the experiences of its organising and industrial staff, of a single occasion where an employer in the TCF industry has agreed to consent arbitration regarding a dispute arising under the TCF Award or in relation to the NES.
- 6.13 An examination of the number and types of disputes lodged with the FWC during 2013/14, identify that 2,366 disputes were filed under section 739 of the FW Act.⁶² Section 739 has application where a term referred to in section 738 requires or allows the FWC to deal with a dispute. Section 738 makes reference to such terms contained in a modern award, enterprise agreement, contract of employment or a determination under the Public Service Act.

⁶¹ Fair Work Act 2009 Post Implementation Review; TCFUA Submission (17 February 2012) at paras [18] & [19]

⁶² Fair Work Commission, Annual Report 2013-14 at p34

- 6.14 In the FWC's Annual Report 2013/14, there is no further breakdown of the types of disputes included in the total of 2,366 (for example whether under a modern award or enterprise agreement term). Similarly there is no information provided as to the number of consent arbitrations under a modern award heard and determined by the FWC.
- 6.15 In the TCFUA's submission there is no sound or compelling industrial or public policy reason why the FWC should not have express jurisdiction to resolve, by arbitration, disputes of this kind.
- 6.16 We note that the FWC is required to perform its functions and exercise its powers in a manner that is *'fair and just'*, is *'quick, informal and avoids unnecessary technicalities'*, is *'open and transparent'* and *'promotes harmonious and cooperative workplace relations'*.⁶³ It is also able to *'except as provided by this Act, inform itself in relation to any matter before it in such manner as it considers appropriate.'*⁶⁴ It is this very approach, which would be most conducive to the FWC effectively settling by arbitration, if necessary, the types of disputes which typically arise under an award or in relation to the NES.
- 6.17 Common and typical disputes arising under the TCF Award can be categorised broadly as:
- disputes relating to non-payment or underpayment of monetary entitlements (e.g. wages, overtime, loadings, higher duties, allowances, annual leave and loading, personal/carer's leave, superannuation, notice and redundancy);
 - disputes relating to qualification for a particular monetary entitlement (e.g. skill level classification disputes, certain types of leave as above);
 - disputes relating to hours of work and shift arrangements;
 - disputes relating to mandated processes and obligations and/or the giving of required notice (e.g. consultation regarding major workplace change, or changes to rosters or ordinary hours of work, IFA's, facilitative provisions (individual and majority agreement), casual conversion, the taking of breaks.

⁶³ Fair Work Act 2009, section 577

⁶⁴ Fair Work Act 2009, section 590

- 6.18 The non-payment or underpayment of minimum award/NES monetary entitlements self-evidently has a negative and disproportionate impact on the income security of award dependent employees in the TCF industry. Such financial disadvantage can compound over time, such as that which results from the chronic non-payment of employer superannuation over extended periods of time. Amounts may even be lost altogether if an employing company eventually is placed into liquidation with the non-payment being essentially forgone altogether where there is no money left in the liquidated company.

TCFUA case-study – monetary entitlements - superannuation

The TCFUA represented members at a company where there was a long-running dispute about unpaid superannuation, including salary sacrifice. As the TCFUA could not request the Fair Work Commission to arbitrate without the employer's consent, the dispute remained unresolved for an extended period of time. The company eventually went into administration, and the business was bought the next day by a new company with the same owner and directors, with the same work being performed at the same site. The obligation to pay the unpaid superannuation and salary sacrifice amounts however remained with the insolvent company. Had the Fair Work Commission been able to arbitrate the dispute at an earlier date, this situation might have been avoided, or at least ameliorated.

- 6.19 Disputes regarding the correct skill level classification under the TCF Award are also common in the TCF industry. These type of disputes involve both process issues (i.e. the procedure for determining an appropriate classification, including inspection of work) and potential monetary entitlements (i.e. in the case of reclassification, increased wage rates attached to higher skill levels and back pay amounts).

TCFUA case-study – skill level disputes

In 2013, the TCFUA represented a member who worked for a company making Ugg Boots. The work involved complex skills to create the familiar Australian footwear. The TCFUA lodged a dispute in the FWC when it became clear the member was being paid at a rate for a lower skill level than the work she performed. A conference was held at the FWC in January 2014. The Commission member recommended that he visit the company for a site inspection to resolve the issue. The company (represented by VECCI) refused to allow the Commission member's visit and inspection of the member's work, and indicated that it would not consent to arbitration. The Commission member made a recommendation for a site inspection and further conference, but as the company had refused arbitration, the recommendation was not binding. The FWC was unable to take any further action to resolve the skill level dispute.

The TCFUA attempted to raise another skill level dispute for members at a curtain manufacturing company, also represented by VECCI. The dispute could not proceed further than the workplace level because the FWC had no power to arbitrate without the employer's consent.

- 6.20 Many of the types of disputes in the third and fourth categories above do not relate to a monetary entitlement as such, but are nevertheless important award obligations and rights. In the TCFUA's experience they are regularly breached in the TCF industry.
- 6.21 Similarly in relation to the NES, disputes about the taking and timing of leave and evidence requirements are also typical. Breaches of non-monetary entitlements under the award or the NES can have serious and detrimental impacts on the working and family life of award dependent employees.
- 6.22 It seems incongruous that the pre-eminent national industrial tribunal is so heavily constrained in the resolution of disputes affecting such a significant percentage of the Australian workforce.⁶⁵ The absence of express power by FWC exacerbates the vulnerable position of many workers in the TCF industry where non-compliance is widespread and the potential for enterprise bargaining is non-existent or extremely limited. On the one hand, the legislature has sought to reflect the seriousness of such contraventions (by making them civil penalty provisions in the FW Act) but on the other hand, has not provided any effective mechanism for such disputes to be resolved prior to litigation being initiated.
- 6.23 The fact that an affected employee or their union has standing to initiate proceedings in a relevant court in regard to a breach/s of award or NES terms does not mitigate the absence of arbitration powers for the FWC under the FW Act. The theoretical availability of court proceedings is illusory for most employees given the combination of the following factors:
- The prohibitive cost and complexity involved in initiating proceedings in either the Federal Court, the Federal Circuit Court or state courts;
 - The length of time between the date of initiating proceedings and the determination of the matter;
 - The cost/benefit of initiating proceedings in relation to a relatively small wage or leave claim or in respect to process type breaches (for example, consultation obligations);
 - The fear of retribution which many workers hold about individually raising workplace issues or disputes to formal authorities;
 - The potential of court proceedings to irreparably damage the employment relationship between an employee/s and their employer.

⁶⁵ It is estimated that approximately 1.8 million workers are dependent or primarily dependent on a modern award for their terms and conditions of employment

6.24 In the TCFUA's experience, TCF workers will rarely, if ever, have the financial capacity to initiate court proceedings for a breach of the award or the NES. The Federal Court considered such a factor in a penalty hearing, *CPSU v Telstra Corporation*,⁶⁶ regarding multiple breaches of section 298K of the WR Act. Justice Finkelstein in his decision observed that:

*'It cannot be doubted that employer and employee organisations play a legitimate and important role in seeing that there is compliance with the provisions of the Workplace Relations Act. For example, an individual employee will rarely have the ability to fund a proceeding for a contravention. If unions do not bring such proceedings, contraventions will go unpublished.'*⁶⁷
[our emphasis]

RECOMMENDATION

- ***Amend the FW Act to provide express jurisdiction for FWC to arbitrate disputes arising under a modern award or the NES.***

⁶⁶ *CPSU v Telstra Corporation* (2001) 108 IR 228

⁶⁷ *Ibid*; at para [25] per Finkelstein, J

Limited Safety Net Entitlements for Workers in Precarious Employment

- 6.25 The TCFUA is concerned that workers in precarious employment (such as casuals and those on fixed term contracts) have limited entitlements and conditions under the statutory minimum safety net, and indeed under the FW Act more generally.
- 6.26 Approximately 4 million workers (including casuals, workers on short term contracts, labour hire employees and ‘independent contractors’) are engaged in precarious or insecure work.⁶⁸ In the TCF industry, due to the nature of the industry and the demographic profile of its workforce, women are more likely to be in insecure and precarious work, particularly those engaged in the home based and sweatshop sectors.
- 6.27 Precarious work leads to a number of detrimental outcomes including entrenched income and job insecurity, negative health impacts, consequences for housing availability and affordability and reduced capacity for retraining and education. The *Report of the Independent Inquiry into Insecure Work in Australia* released in 2012 summarised these impacts as follows:

‘Insecure jobs invariably mean lower pay and less rights and entitlements. The fear, vulnerability and powerlessness experienced by workers engaged in insecure work mean they are also less likely to raise health and safety concerns, accept poor conditions and exploitation, and face greater risks of injuries and illness. Training and career development opportunities are much less likely to be available.

However, the impacts on workers, their families and communities go far beyond the workplace itself.

The lack of income security that insecure work offers can have severe impacts on workers’ living standards and financial independence. Throughout our inquiry we heard countless inquiries of individual workers who were unable to secure a home loan or car loan because of their lack of job security...

Similarly, many insecure workers struggle to find accommodation in the private rental market with the secure income that ongoing employment would offer...

We also heard from a number of workers who suffered serious health impacts after extended periods in insecure work. The evidence we received reaffirmed existing findings of international bodies such as the OECD and WHO – that insecure work in all its forms has negative impacts on the safety of workers in

⁶⁸ *Lives on Hold – Unlocking the Potential of Australia’s Workforce: Independent Inquiry into Insecure Work* (2012) at p4

*the short term, and the uncertainty and anxiety associated with experiencing insecure work damages the health of workers in the long term.*⁶⁹

- 6.28 Significant numbers of award dependent workers are excluded from most aspects of the minimum safety net. This is an unacceptable circumstance in Australia, where the acceptance of the need for the minimum safety net is enshrined in legislation.

RECOMMENDATION

- ***The FW Act must be amended to ensure that workers in insecure or precarious employment can effectively access the minimum safety net.***

⁶⁹ *Lives on Hold – Unlocking the Potential of Australia’s Workforce: Independent Inquiry into Insecure Work* (2012) at p 20

Relevance of the Minimum Safety Net to Community Attitudes, Standards and Needs

- 6.29 The Productivity Commission in Issues Paper 2 (at section 2.3), indicates that it generally ‘does not intend to undertake the same holistic analysis of the NES’ and ‘the primary policy interest appears to lie with specific aspects of the NES’. ⁷⁰
- 6.30 The statutory safety net of modern awards, the NES and the minimum wage has now been in operation for just over 5 years. Despite this, the level of NES supplementation in modern awards has to date been modest at best, and enhancements to the NES minimal, other than the expansion of circumstances in the Right to Request Flexible Working Arrangements provisions. ⁷¹
- 6.31 The TCFUA submits that the adequacy of the NES is an important matter going to the effectiveness of the statutory safety net in reflecting and meeting community needs and standards. In its written submission to the Fair Work Post Implementation Review in 2012,⁷² the TCFUA stated:
- ‘The appropriateness and relevance of the current NES (as one half of the safety net) raises significant issues for workers, unions, employers and the community at large. In general terms, the TCFUA believes that the NES must be responsive to changing community views and standards, lest the provisions become fossilized in time and fail to reflect commonly understood expectations of the modern workplace. There is no doubt that serious and ongoing policy questions, regarding for example, family/work balance and the accommodation of caring responsibilities are informing the public debate in relation to these matters.’⁷³*

RECOMMENDATION

- ***Awards and the NES must remain relevant and adaptive to community attitudes, standards and needs. The NES must therefore provide a greater safety net, particularly for workers experiencing precarious employment, and must not be diminished.***

⁷⁰ Productivity Commission: Workplace Relations Framework – Issues Paper 2 (Safety Nets) at section 2.3, p9

⁷¹ See amendments to s65 made as part of the Fair Work Amendment Act 2013

⁷² Fair Work Act Post Implementation Review (2012); TCFUA Submission (17 February 2012)

⁷³ Ibid; at para [31]

NES – Compassionate Leave

- 6.32 The TCFUA has significant concerns regarding the adequacy of the NES with respect to compassionate leave. Compassionate leave under the NES does not provide for sufficient quantum of paid leave and it is not available to casual employees.
- 6.33 The NES entitlement to compassionate leave provides for two days of paid leave to non-casual employees (for each occasion) in circumstances when a member of the employee's immediate family, or a member of the employee's household:
- contracts or develops a personal illness that poses a serious threat to his or her life; or
 - sustains a personal injury that poses a serious threat to his or her life; or
 - dies.⁷⁴
- 6.34 The quantum of two days of paid leave for compassionate reasons is manifestly inadequate to provide an appropriate level of support for workers in relevant circumstances. In a practical sense, two days paid leave is barely sufficient to cover the day when a family member dies and the day of the funeral for that person. The entitlement does not address the complex emotional, financial, familial and logistical consequences for a worker dealing with a bereavement or caring for someone with a serious personal injury or illness. It also does not recognise overlaying cultural and community expectations and obligations for many workers regarding bereavement.
- 6.35 As many workers in the TCF industry are from a non-English speaking background, the process and time required for dealing with bereavement is complicated when the deceased family member resided in the worker's country of origin. This results in additional stress and invariably requires the worker to request further paid or unpaid leave from their employer in order to make and attend funeral arrangements. In the TCFUA's experience, these circumstances commonly lead to disputes regarding the granting or refusal of additional leave. In some cases, the dispute has led to the worker being forced to resign or otherwise being terminated.

⁷⁴ Fair Work Act 2009 – Part 2-2, Division 7 (Personal/Carer's Leave and Compassionate Leave); ss 104 - 106

TCFUA case-study – compassionate leave

A TCFUA member at a textile screen-printing business had an immediate family member suddenly pass away. As a permanent employee he was entitled to two days compassionate leave. However, he was from India, and his family lived in a remote village which was quite a distance away from any accessible, international airport. Two days' leave was patently inadequate. His employer told him 'not to worry about it' and to 'just go'. The member was away for around two weeks. Despite the employer's express agreement, it later treated the member's absence as abandonment of employment. As a result, the member lost his employment.

- 6.36 Although more beneficial compassionate leave entitlements can be sought as part of the statutory bargaining framework, this is not available for many TCF workers who have low bargaining power.
- 6.37 The second area of concern regarding compassionate leave relates to the express exclusion of casual employee from paid compassionate leave.⁷⁵ That is, casual employees are entitled to compassionate leave under the NES but there is no equivalent obligation on their employer to make payment to the employee 'for their ordinary hours of work in the period.' In its submission to the Fair Work Post Implementation Review (2012) the TCFUA stated:

*'The blanket exclusion of casual employees from paid compassionate leave (particularly in respect to a death of a member of the employee's immediate family or household) compounds the insecure nature of casual employment for many workers. We believe that it is a commonly accepted reality that casual workers have equivalent sets of familial and community obligations when dealing with bereavement or caring for someone with a serious illness or injury. Yet to undertake these commitments, a casual worker (who may already be in a precarious financial position) is subjected to further financial disadvantage.'*⁷⁶

⁷⁵ Fair Work Act 2009 – section 106

⁷⁶ Fair Work Act Post Implementation Review (2012); TCFUA Submission (17 February 2012) at para [38]

6.38 Consistent with its submission above relating to the position of employees in precarious employment, the application of an NES entitlement based on an employee's employment status raises serious public policy questions of fairness and equity, and social inclusion. For these reasons, the TCFUA does not consider that the current exclusion of casual employees from the paid compassionate leave entitlement is justifiable.

RECOMMENDATION

- *The quantum of paid compassionate leave should be increased to 5 days, with provision for additional leave in relevant circumstances.*
 - *Paid compassionate leave should be available to casual employees.*

Current Flexible Working Arrangements are Inadequate

- 6.39 The Right to Request provisions in the FW Act (s65-66)⁷⁷ do not provide for an effective, enforceable mechanism for workers to successfully accommodate their work and family or caring responsibilities.
- 6.40 In the TCFUA's experience, the general knowledge amongst its members as to the existence of the right to request provisions is low. Further, in cases where requests have been made these have usually been refused and there is no recourse to a third party to examine the refusal.
- 6.41 The TCFUA supported amendments in 2013 which provided for an expansion of circumstances in which an employee may request a change in working arrangements.⁷⁸ However, the amendments did not provide for an effective remedy to contest a decision of an employer to refuse a request on 'reasonable business grounds'.⁷⁹
- 6.42 While the 2013 amendments provided additional direction in the FW Act as to what constitutes 'reasonable business grounds', the fundamental problem of the FWC's lack of jurisdiction (absent express provision in enterprise agreements) to determine such disputes means that the reform is not as effective as it should be. As a result, one of the objects of the FW Act, to assist '*employees to balance their work and family responsibilities by providing for flexible working arrangements*' is undermined.

RECOMMENDATION

- ***Amend the FW Act to provide a clear right of appeal in relation to an employer's refusal of an employee's request for flexible working arrangements.***

⁷⁷ Fair Work ACT 2009 – Part 2-2, Division 4, ss65-66

⁷⁸ Fair Work Amendment Act 2013. See TCFUA Submission (15 April 2013) to the Senate Standing Committee on Education, Employment and Workplace Relations, Inquiry into the Fair Work Amendment Bill 2013

⁷⁹ Fair Work Act 2009 – ss 65 (5) and 65 (5A)

Awards Must Always Provide the 'Floor of Conditions'

- 6.43 The modern award can be expressly displaced by the operation of an enterprise agreement. Currently under the FW Act, a modern award does not apply to an employee in relation to particular employment at a time when an enterprise agreement applies to the employee in relation to that employment.⁸⁰ In such circumstances, a modern award would also not apply to the employer, or an employee organisation, in relation to the employee.⁸¹
- 6.44 While the modern award is displaced by the enterprise agreement, it continues to have relevance for the determination of the Better Off Overall Test (BOOT) at the time of the approval of the agreement.⁸² The BOOT is a global test applied against the relevant modern award, but not on a line by line comparison. The BOOT requires that each employee (or prospective employee) must be better off *overall* under the agreement i.e. the advantages overall outweigh the disadvantages.
- 6.45 The effect of these provisions is that an enterprise agreement can be made and approved under the FW Act that contains provisions which are less beneficial than those applying under the award safety net. That is, the award provisions (in their totality) effectively has ceased to be the traditional 'floor' of conditions below which the enterprise agreement would not be permitted to fall.
- 6.46 In the TCFUA's submission, this framework directly undermines the notion and reality of modern awards, together with the NES, constituting a fair and relevant safety net of terms and conditions. As discussed further in this submission (see section 9 below), enterprise agreements in the TCF industry contain a modest increase to wage rates and a small number of other improvements. In some cases, the agreement rates are pegged expressly to the award minimum rates of pay.
- 6.47 The nature and content of awards have changed significantly since enterprise bargaining was introduced into the workplace relations systems. Awards have been simplified and then modernised. Thousands of pre-reform award instruments were consolidated into 122 modern awards. Relative to their historic origins, modern awards are not comprehensive and their content is heavily constrained by the content rules in the FW Act. As an award safety net, modern awards are minimalist in scope.

⁸⁰ Fair Work Act 2009 – subsection 57(1)

⁸¹ Ibid; subsection 57(2)

⁸² Fair Work Act – see section 186(2)(d) which requires that the agreement must pass the BOOT

6.48 In this context, the importance of modern awards (together with the NES and the minimum wage) as the absolute 'floor' of conditions in the workplace relations system is critical in ensuring that basic wages and conditions cannot be contracted out of, or otherwise bargained away.

RECOMMENDATION

- ***Amend the FW Act so that enterprise agreements made and approved under the FW Act cannot provide for terms and conditions that are less than the relevant award.***
- ***Amend the FW Act so that enterprise agreements cannot displace the relevant award.***

7. THE STATUTORY SAFETY NET: AWARD FLEXIBILITY (IFA's)

- 7.1 Section 144(1) of the FW Act requires that a modern award must include a flexibility term enabling an employee and their employer to agree on an Individual Flexibility Arrangement (IFA), varying the effect of the award in relation to the employee and employer, in order to meet the genuine needs of the employee and employer.
- 7.2 As a general principle, the TCFUA did not support the inclusion of IFA award term requirements in the FW Act. This remains the TCFUA's view. The risk of abuse from IFA's in award dependent workplaces, most notably in the TCF industry, has greatly informed the TCFUA's position. Nonetheless, flexibility terms in awards are mandated under the current workplace relations framework.
- 7.3 The TCFUA seriously questions the appropriateness and utility of IFA terms as part of the award safety net generally, but specifically for the TCF industry. Key deficiencies in the current regulatory framework for award flexibility terms include that:
- Absent any statutory requirement for the lodgement of IFA's to the FWC or other body, there is no systematic way of assessing the numbers of IFA's entered into in a particular industry and whether the award flexibility clause terms have been complied with;
 - There is no testing by any authority or body as to whether workers have 'genuinely agreed' to an IFA absent any duress or coercion;
 - There is no third party scrutiny or review in terms of lodgement and approval of IFA's;
- 7.4 In the development of the model IFA term included in modern awards as part of the Award Modernisation process, the TCFUA made detailed submissions regarding the development of the model term and its application in the TCF industry.
- 7.5 In respect to the Exposure Drafts (September 2008) published by the AIRC for the Priority Stage industries, the distinctive nature of the TCF industry was recognised by the AIRC Full Bench as being relevant to the inclusion of an amended model IFA clause for the TCF Award. In its Statement⁸³ issued in conjunction with the Exposure Drafts, the Full Bench stated:

'With one exception we have not found it necessary to modify the substance of the model award flexibility clause in any of the drafts...The draft award flexibility clause in the exposure draft for the textile, clothing, footwear and associated industries contains some modifications directed to the nature of employment in that industry. They deal with translation and time for consideration of proposed agreements.'

⁸³ Award Modernisation, [2008] AIRCFB 717 (12 September 2008),

This is a sector which is highly award reliant and where the constitution of the workforce is a relevant consideration.

[103] Given the nature of the industry we have added a requirement to the model award flexibility clause for the translation of proposals into a person's first language so that any proposals are fully understood. In addition we have provided a period for consideration of any proposal under the clause.⁸⁴

7.6 It is worth noting that in the final determination of the modern award for the TCF industry, the Full Bench's model clause was adapted in the TCF Award⁸⁵ flexibility clause⁸⁶ to include additional safeguards, including:

- That an individual flexibility agreement could not be made so as to affect the provisions of Schedule D – Outworkers;⁸⁷ and
- That the employer must give the employee up to seven working days to enable to the employee to seek advice, where appropriate, from the employee's union.⁸⁸

7.7 While these adaptations to the TCF Award were supported by the TCFUA, in the union's view they did not extend far enough in ensuring that individual employees were not disadvantaged by the operation of the flexibility clause in the TCF industry. In particular, the TCFUA submitted that the form of the flexibility clause:

- Provided no right to representation in any discussions that might take place about the individual flexibility arrangement in contrast to the facilitative provisions;⁸⁹ and
- That there is no recognition of the real pressure and duress that workers in the TCF industry face in relation to changes to their working conditions (including the very real prospect of contraction and closures of factories being frequently used by employers to threaten and pressure workers to agree to accept inferior conditions).⁹⁰

⁸⁴ *Award Modernisation*, [2008] AIRCFB 717 (12 September 2008), 18-19.

⁸⁵ Textile, Clothing, Footwear and Associated Industries Award 2010 [MA000017]; *Award Modernisation* [2008] AIRCFB 1000 (19 December 2008).

⁸⁶ *Ibid*; clause 7 (Award flexibility).

⁸⁷ *Ibid*; sub-clause 7.4.

⁸⁸ *Ibid*; sub-clause 7.9.

⁸⁹ (AM2012/8); TCFUA Submission (10 October 2008) [44].

⁹⁰ *Ibid*; [45].

- 7.8 Under the TCF Award 2010, clause 7.2 states that, '*[t]he employer and employee must have genuinely made the agreement without coercion or duress*'. The TCFUA is of the view that this requirement cannot be considered in and of itself, an adequate safeguard against employees being forced into agreeing to individual agreements. The reality, experienced by TCF workers each day, is a subtle pressure to agree with the demands of their employer, however unreasonable. In this context, statutory coercion provisions as a potential remedy, represent a high bar and are notoriously difficult to apply in practice.
- 7.9 Since the commencement of the TCF Award in 2010, TCFUA officers and organisers have regularly come across circumstances where employers have exerted pressure on workers to accept inferior conditions, or have simply implemented changes to workplace operations without consultation or agreement. Such practices occur in the context of an industry that is highly award dependent and is under sustained contraction and restructuring resulting in significant job loss. The capacity of a worker to effectively contest 'individual arrangements' 'suggested' or imposed by their employer is very limited, and in most respects, illusory.
- 7.10 In the TCFUA's experience, in many cases, the employer simply imposes the arrangement without even resorting to the process of formally entering into an IFA with a worker. Even where an arrangement is recorded, it invariably does not comply with the terms of an IFA as required by clause 7 of the TCF Award. Commonly too, what is purported to be an IFA with an 'individual' worker is in fact a template arrangement that is imposed on groups of workers in particular sections, or in fact the entire production workforce.
- 7.11 Such observations are supported by evidence from the General Manager of Fair Work Australia's Report published in 2012, which found a low rate of compliance with IFA safeguards and requirements. The report found that over half of the employers who used multiple IFAs in their business admitted that they required all employees to sign IFA documents in order to commence or continue their employment,⁹¹ in breach of the requirement that IFAs can only be entered into after the employee has commenced employment.⁹²

⁹¹ Bernadette O'Neill, General Manager's Report into the extent to which individual flexibility arrangements are agreed to and the content of those agreements 2009 – 2012, *Fair Work Australia* (November 2012) 46.

⁹² Textile, Clothing, Footwear and Associated Industries Award 2010 [MA000017], clause 7.2.

- 7.12 The current safeguards contained in the flexibility clause are not adequate to prevent abuse of the provision. The Fair Work Ombudsman (FWO) has publicly stated that *'It is the employer's responsibility to ensure that an employee has genuinely agreed to an IFA...and that the IFA is made correctly and meets all the requirements of the FW Act'*.⁹³ However, in practical terms, *'If an IFA is not made properly, the terms of an IFA still continue to govern the employee's terms of employment as if it was made properly'*.⁹⁴
- 7.13 The fact that an employee may be able to seek compensation and penalties if they are disadvantaged by an IFA, is likely to be of little assistance to an award dependent worker fearful of losing their job if they complain to the union, let alone if they (or the union on their behalf) initiate proceedings against their employer.
- 7.14 For these reasons, the TCFUA is of the view that it is detrimental for IFAs to be used in the TCF sector. The TCF Award provides a safety net underpinning employee conditions and entitlements in the context of an industry characterised by low pay and a vulnerable workforce. Minimum award entitlements should not be able to be eroded through the use of IFAs.

RECOMMENDATION

- ***Amend the FW Act to remove the requirement that a modern award must include a flexibility term.***
 - ***Amend the FW Act to provide that individual flexibility arrangements are not enforceable where the flexibility term requirements have not been met***
 - ***Amend the FW Act to provide that individual flexibility arrangements are not enforceable where they are template arrangements***

⁹³ Fair Work Ombudsman, 'Best Practice Guide – Use of individual flexibility arrangements' (accessed 13 March 2013).

⁹⁴ Ibid; 5.

8. THE STATUTORY SAFETY NET: PENALTY RATES

- 8.1 The Productivity Commission raises the issues of Penalty rates as part of the Safety Net in its Issues Paper 2 (section 2.5).⁹⁵
- 8.2 Penalty rates are an essential element of the Australian industrial relations system. They provide important compensation for workers working untimely and unsociable hours. Despite claims by some of a 24/7 economy, it is still the case that most Australian employees work between 8am to 6pm on weekdays.⁹⁶ Only a minority of Australian employees work unsociable hours after-hours and on weekends, and bear the high degree of work-life interference this entails.
- 8.3 The TCF workforce is also characterised by a high proportion of female employees, many of whom are primary care givers and are required to balance a job with care responsibilities. Penalty rates recognise the deleterious effect that weekend, and in particular Sunday, work has on families. It was accepted by the AIRC that weekend work, and in particular Sunday work, significantly reduces the amount of time parents spend with their children. Moreover, the time lost with family by working on Sundays is not recovered by time-off on other days of the week.⁹⁷
- 8.4 The South Australian Industrial Relations Commission recognised that the changing demographics of the workforce – such as the greater workforce participation of women who tend to have caring responsibilities for younger children—meant that for employees with families there are significant disabilities associated with Sunday work.⁹⁸
- 8.5 As discussed above, TCF workers are some of the most vulnerable workers in the community. The TCF workforce is characterised by a high degree of award-reliance, low pay, and job insecurity. For many TCF workers who are struggling to make ends meet on an award wage, penalty rates provide much needed income. This is in particular the case for women, and workers in regional/rural areas. As TCFUA member Lisa Erskine has said (see case study), if it were not for Saturday penalty rates, she could not afford the time or money to drive long distances to work.

⁹⁵ Productivity Commission: Workplace Relations Framework – Issues Paper 2 (Safety Nets) at section 2.5, p13-16

⁹⁶ Natalie Skinner and Barbara Pocock, 'The Persistent Challenge: Living, Working and Caring in Australia in 2014', *The Australian Work and Life Index* (University of South Australia, 2014) 6.

⁹⁷ *Shop Distributive and Allied Employees Association v \$2 and Under* (2003) 135 IR 1, 17 at [93]-[95].

⁹⁸ *Retail Industry (SA) Award – Variation* [2014] 136 IR 186, 227 at [202].

- 8.6 The TCFUA opposes any proposal to diminish penalty rates under modern awards, including the TCF Award and the Dry Cleaning Award. In our submission, a reduction in penalty rates would have detrimental and disproportionate impacts on female workers in these industries.

RECOMMENDATION

- ***Penalty rates should not be diminished.***

9. THE BARGAINING FRAMEWORK

- 9.1 The Productivity Commission deals with enterprise bargaining matters in its Issues Paper (3).⁹⁹

Capacity for Industry Wide and Supply Chain Bargaining

- 9.2 As outlined previously in this submission, the TCF industry is low paid and highly award dependent. The nature of the TCF industry, including the existence of typically complex and long supply chains and the relatively low level of bargaining power mean that enterprise bargaining agreements are much less common than in many other industries. For some groups of workers in the TCF industry, bargaining under the current framework is simply unobtainable.
- 9.3 For these reasons, the TCFUA supports a statutory framework which allows for, and facilitates industry wide and supply chain bargaining.
- 9.4 The current bargaining framework under the FW Act gives primacy to single enterprise agreements and secondly to multi-enterprise agreements (in certain circumstances). Thirdly, there is provision for the making of greenfields agreements for new operations in which employees have yet to be engaged.
- 9.5 However, the current legislative schema is not conducive to enterprise bargaining, for example within, down and across supply chains which typically characterises clothing production in the TCF industry.
- 9.6 The TCFUA acknowledges that the FW Act also makes provision for a Low Paid Bargaining stream¹⁰⁰ in which the FWC has jurisdiction to make Low Paid Authorisations, and Low-Paid Determinations if the bargaining representatives for a proposed enterprise agreement in relation to which a low-paid authorisation is in operation are unable to reach agreement.¹⁰¹ We supported their inclusion into the FW Act.
- 9.7 However, while the objects¹⁰² of the Low-Paid bargaining stream are an important recognition of the difficulties of groups of low paid employees to bargain at the

⁹⁹ Productivity Commission: Workplace Relations Framework – Issues Paper 3 (The Bargaining Framework)

¹⁰⁰ Fair Work Act 2009 – Part 2-4, Div 9 (ss 241-246)

¹⁰¹ Fair Work Act 2009 – Part 2-5, Div 2 (ss 260-265)

¹⁰² Fair Work Act 2009 – s.241. The objects include: (a) to assist and encourage low-paid employees and their employers, who have not historically had the benefits of collective bargaining, to make an enterprise agreement that meets their needs; and (b) to assist low-paid employees and their employers to identify improvements to productivity and service delivery through bargaining for an enterprise agreement that covers 2 or more employers, while taking into account the specific needs of individual enterprises; and (c) to address constraints on the ability of low-paid employees and their employers to bargain at the enterprise level, including constraints relating to a lack of skills, resources, bargaining strength or previous bargaining

enterprise level, the embedded hurdles in the provisions are significant for unions and workers to achieve successful outcomes.¹⁰³ Similarly, the process requires the significant allocation of resources from unions. We note that there are been few successful applications for low paid authorisations under s242 since the commencement of the provisions.¹⁰⁴

RECOMMENDATION

- ***Amend the FW Act to provide for industry wide and supply chain bargaining within the system.***

experience; and (d) to enable the FWC to provide assistance to low-paid employees and their employers to facilitate bargaining for enterprise agreements.

¹⁰³ Fair Work Act 2009 – see the requirements in s.243 for which the FWC must be satisfied before making a low-paid authorisation

¹⁰⁴ See generally decisions of *United Voice* (B2010/2957), *The Australian Workers' Union of Employees, Queensland* (B2010/3116), [2011] FWAFB 2633; *Australian Nursing Federation v IPN Medical Centres Pty Ltd and Others*, [2013] FWC 511; and *United Voice*, [2014] FWC 6441.

Restrictions on Agreement Content

9.8 Currently, the FW Act places restrictions on the matters which can be included in an enterprise agreement, both in the form of the section 172 requirements ('permitted matters') and s194 exclusions (unlawful terms).

9.9 In summary, section 172 provides that an enterprise agreement may be made about permitted matters, which includes:

- Matters pertaining to the relationship between an employer that will be covered by the agreement and that employer's employees who will be covered by agreement;¹⁰⁵
- Matter pertaining to the relationship between the employer/s and the employee organisation/s, that will be covered by the agreement;¹⁰⁶
- Deductions from wages for any purpose authorised by an employee who will be covered by the agreement;¹⁰⁷ and
- How the agreement will operate.¹⁰⁸

9.10 In summary, section 194 provides a list of what constitutes an *unlawful term* in an enterprise agreement, as follows:

- a discriminatory term;¹⁰⁹
- an objectionable term;¹¹⁰
- a term that provides a method by which an employer or employer may elect (unilaterally or otherwise) not be covered by the agreement;¹¹¹
- a term that confers a right or remedy in relation to a termination of the employee's employment that is unfair before the employee reaches the minimum qualifying period for eligibility;¹¹²
- a term that excludes or modifies the application of Part 3-3 of the Act (Unfair Dismissal) which is detrimental to a person;¹¹³
- a term inconsistent with Part 3-3 (industrial action);¹¹⁴
- a term that provides for right of entry to premises for purposes under s.481 and s.484, other than in accordance with Part 3-4;¹¹⁵
- a term that provides for the exercise of a State or Territory OH&S right other than in accordance with Part 3-4;¹¹⁶

¹⁰⁵ Fair Work Act 2009 – ss 172 (a)

¹⁰⁶ Ibid; ss 172 (b)

¹⁰⁷ Ibid; ss 172 (c)

¹⁰⁸ Ibid; ss 172 (d)

¹⁰⁹ Ibid; ss 194 (a)

¹¹⁰ Ibid; ss 194 (b)

¹¹¹ Ibid; ss 194 (ba)

¹¹² Ibid; ss 194 (c)

¹¹³ Ibid; ss 194 (d)

¹¹⁴ Ibid; ss 194 (e)

¹¹⁵ Ibid; ss 194 (f)

¹¹⁶ Ibid; ss 194 (g)

- a term that has the effect of requiring contributions to a default superannuation fund (where the default fund does not satisfy certain requirements e.g. My Super product).¹¹⁷

9.11 The TCFUA does not support the current restrictions under the FW Act in relation to agreement content. In the TCFUA's submission groups of employees, their union/s and the employer/s should be free to negotiate terms and conditions of relevance and importance to them under an enterprise agreement.

9.12 In relation to the s172(1)(a) '*matters pertaining to the relationship between and employer and employee*' ground, in the TCFUA's submission, this concept is largely irrelevant since the transition to a national workplace relations system and the FW Act not being primarily grounded on the conciliation and arbitration power under the Constitution.

9.13 Commentators have suggested that based on the legislation, the Explanatory Memorandum and the jurisprudence, 'permitted matters' would *not* include:

- Terms which contain a general prohibition on the employer engaging labour hire employees or contractors (as distinct from a term relating to conditions or requirements about employing casual employees or engaging labour hire or contractors, which sufficiently relate to employees' job security such as a term which provided that contractors must not be engaged on terms and conditions that would undercut the enterprise agreement which would be permitted);
- Terms restricting or qualifying the employer's right to use independent contractors.¹¹⁸

9.14 However, it is accepted that that 'it is not easy to reconcile the authorities' and the distinctions outlined above may 'seem somewhat elusive'.¹¹⁹

9.15 In relation to the meaning of permitted matters in 172(1)(b) it is contended that such a term would need to relate to a union's 'legitimate role in representing the employers to be covered by the agreement'.¹²⁰

¹¹⁷ Ibid; ss 194 (h)

¹¹⁸ See Catanzariti, J (ed); Workplace Law Fair Work; Volume 1, LexisNexis [80,103] – [80,104]

¹¹⁹ Ibid;

¹²⁰ Ibid; see Explanatory Memorandum to the Fair Work Bill 2008 at [675]

- 9.16 Sections 172 and 194 currently operates to place an unwarranted set of restrictions on bargaining parties in pursuit of a workplace enterprise agreement. For example, in the TCFUA's submission terms about industry procurement and ethical accreditation schemes (of particular relevance to the TCF industry) should be able to be pursued and bargained for as part of the bargaining process.
- 9.17 The current framework for bargaining content is the source of disputation in many industries, including in the TCF sector, with consequences that bargaining usually becomes more resource intensive of all parties, lengthier and protracted.

RECOMMENDATION

- ***Amend the FW Act to remove current restrictions in relation to agreement content.***

Productivity Requirements

- 9.18 The Productivity Commission raises the questions of whether it should be mandatory that enterprise agreements contain '*productivity clauses linking improvements in wages and conditions to improvements in productivity*'.¹²¹
- 9.19 We note that proposals of this type are currently contained in the government's Fair Work Amendment (Bargaining Process) Bill 2014 ('FW Bargaining Bill')
- 9.20 The TCFUA does not support the introduction of mandated 'productivity clauses' in enterprise agreements, and consistently, opposes the provisions of the FW Bargaining Bill. We oppose the proposals on a number of grounds and believe any move to introduce mandatory clauses of this nature would have a profoundly detrimental effect on the level and success of enterprise bargaining in the TCF industry.
- 9.21 As outlined earlier in this submission, the TCF industry has a relatively low rate of bargaining compared to many other sectors. Where enterprise bargaining does exist, the level of wages and conditions above the minimum safety net is often very modest. Many employees in the TCF industry covered by enterprise agreements are still low paid and receive wage rates well below the average weekly earnings in Australia. In many cases, wage increases under agreements in the industry are generally in line with, or close to the level of inflation in the economy i.e. they are not excessive or unsustainable.
- 9.22 Nevertheless, it is not unusual for TCF industry enterprise agreements to currently (and historically) contain clauses which deal with productivity measures. Putting aside complex definitional issues regarding what constitutes 'productivity', there is an inherent limit to productivity improvements possible in an industry with a relatively poor history of investment in new technology, innovation, research and development, training and reskilling.
- 9.23 In our submission, mandated productivity clauses in enterprise agreements, would result in more contentious negotiations in the TCF industry, and push down the level of wages and conditions for those groups of workers who have some modest capacity to bargain over and above the award safety net. The balance of bargaining, would in our submission, invariably shift in favour of employers to the detriment of low paid TCF workers.

RECOMMENDATION

- ***The TCFUA opposes any mandated requirement to bargain in relation to productivity.***

¹²¹ Productivity Commission: Workplace Relations Framework – Issues Paper 3 (The Bargaining Framework); p5

Good Faith Bargaining Requirements

- 9.24 The TCFUA supported the inclusion of Good Faith Bargaining (GFB) obligations into the FW Act¹²² and continue to support their retention. We acknowledge that the jurisprudence of the extent and scope of the GFB obligations is in some respects still being settled, and determined partially on the contextual circumstances of each bargaining dispute.¹²³
- 9.25 In the TCFUA's experience, whilst the GFB and related provisions (e.g. Majority Support Determinations) have been relatively effective in bringing some employers to the bargaining table, the existence of GFB obligations do not of themselves prevent employers engaging in, for example, 'surface bargaining' or capricious or unfair conduct.
- 9.26 Whilst there is capacity for a bargaining representative to bring an application for a bargaining order¹²⁴ in the FWC, this is a relatively resource intensive and lengthy process in context of enterprise bargaining negotiations. In our experience, obtaining a GFB Order is a relatively high bar.

RECOMMENDATION

- ***Amend the FW Act to provide for a simpler enforcement mechanism with respect to Good Faith Bargaining Obligations***

¹²² Fair Work Act 2009 – section 228

¹²³ See *Endeavour Coal Pty Ltd v Association of Professional Engineers, Scientists and Managers, Australia* (2012) 290 ALR 326; [2012] FCA 764 where J. Flick stated 'It is neither possible or prudent to attempt to any exhaustive statement as to what will constitute compliance with the "good faith bargaining requirements" in the present statutory context. Clearly enough, whatever the reach of s228 (1), any "requirements" imposed by that provision are limited in scope by the matters contained in s228 (2).'

¹²⁴ Fair Work Act 2009 – section 229

Individual Flexibility Arrangements

9.27 Currently, the FW Act requires that all enterprise agreements must include a flexibility term, and which complies with certain requirements¹²⁵ and in the absence of an agreed term, the model flexibility term is taken to apply.¹²⁶

9.28 The TCFUA reiterates its long standing opposition to the mandated inclusion of flexibility terms in enterprise agreements. Mandatory IFA's represent an unwarranted limitation on the rights of parties to negotiate an agreement tailored to suit the needs of a particular enterprise and its workforce, with the minimum safety net as the floor of conditions. IFA's essentially represent an 'individual agreement' carved out from a collectively negotiated set of terms and conditions of employment.

9.29 More fundamentally, IFA terms in agreements are extremely problematic because:

- of the broad range of matters about which an IFA can be made;¹²⁷
- the absence of a requirement that employees requested to enter into an IFA receive any independent advice from their union or other representative;
- the absence of any requirement for a proposal put by an employer to be provided to an employee in a language they can understand e.g. translated information;
- the processes by which employees and employers enter into IFA's are largely invisible to external scrutiny i.e. no mandated third party review;
- there is no process as how the 'genuine needs of the employee and the employer' and 'genuine agreement' is assessed, and by whom;
- the lack of a requirement for IFA's to be lodged with the FWC or any other authority.

9.30 We note, that even under the Work Choices legislation, AWA's were required to be lodged with a formal authority, the Office of the Employee Advocate together with a Declaration from the employee attesting to certain things.

¹²⁵ Fair Work Act 2009 – section 202. The flexibility term must comply with section 203

¹²⁶ Ibid; section 202(4)

¹²⁷ Fair Work Act 2009 – ss203 and 204. If no IFA is contained in an enterprise agreement, the model clause is deemed to apply. Under the model clause, an IFA can be made (where the agreement deals with these matters) about (i) arrangements about when work is performed; (ii) overtime rates; (iii) penalty rates; (iv) allowances; (v) leave loading.

- 9.31 We submit that IFA terms in both agreements (and awards) encourage, and facilitate the trading off of important monetary entitlements for non-monetary conditions, such as flexible working arrangements e.g. changes to starting and finishing times. Invariably, this trade- off impacts more significantly on women workers who have primary responsibility for children or other caring responsibilities. We have indicated previously that in the TCF industry, a majority of workers are women.
- 9.32 The inadequacy of the current right to request provisions under the FW Act are not 'fixed' by the existence of a flexibility term in an enterprise agreement. We submit that the priority public policy objective should be to ensure that the right to request provisions have practical utility (including a statutory right for an employee to appeal an employer's refusal), rather than facilitating workers (usually women) having to give up wages and other conditions in order to accommodate their family and/or carer responsibilities.
- 9.33 IFA's also potentially undermine the characterisation of agreements as being collectively negotiated between a group of workers, their union and the employer. We note that in the TCF industry, comprehensive facilitative provisions (which provide for both individual and majority facilitation) already exist in the TCF Award and in many enterprise agreements which are heavily based on the award.

RECOMMENDATION

- ***Amend the FW Act to remove the requirement that an enterprise agreement must include a flexibility term.***

Protected Industrial Action

- 9.34 The TCFUA has a number of major concerns regarding the framework for the taking of protected industrial action. Central to its concerns, is that the procedure for initiating protected action is overly legalistic, lengthy and unnecessarily bureaucratic. These procedures are not conducive to efficient bargaining and simply result in extended negotiations for a new or replacement agreement.
- 9.35 In the TCFUA's submission, the necessity of obtaining a Protected Action Ballot (PAB) Order¹²⁸ is unwarranted given its experience of how PAB's have operated in practice in the TCF industry. PAB's are regularly granted on the papers by the FWC. Where PAB's are contested by employers necessitating a hearing, this is commonly done for the sake of appearances, or to seek to delay the commencement of industrial action. As one employer manager told the TCFUA recently, the employer was contesting the TCFUA's PAB application so as '*to be seen to be flying the flag for the company*'. There has been no instance when the FWC has refused to make a PAB Order in which the TCFUA was involved as bargaining representative.
- 9.36 Further, the current framework also contains a perverse incentive for employees to take protected industrial action more quickly than they might otherwise. This arises from the requirement that employees take industrial action within 30 days of the declaration of the result of the vote (or within a further 30 days if the period is extended, where such extension may only be granted once).

RECOMMENDATION

- ***Amend the FW Act so that there is no requirement to obtain a PAB Order prior to a vote by employees to take industrial action.***
 - ***Amend the FW Act to provide for a simplified process for voting to approve protected industrial action.***
- ***Amend the FW Act to remove the requirement to take industrial action within 30 days of the declaration of vote results.***

¹²⁸ Fair Work Act 2009 – section 437

10. EMPLOYEE PROTECTIONS: UNFAIR DISMISSAL, GENERAL PROTECTIONS AND ANTI-BULLYING JURISDICTION

- 10.1 The Productivity Commission deals with Employee Protections in its Issues Paper (4).¹²⁹
- 10.2 The TCFUA supports the retention of the current framework of employee protections under the FW Act. However, it submits that the framework could be improved in a number of respects.

General Protections

- 10.3 Currently under Part 3-1 of the FW Act, General Protections matters (not involving dismissal) may only be conciliated by the FWC on consent of the parties. Additionally, the FWC does not have jurisdiction to arbitrate this category of General Protections, leaving an applicant or their union to initiate court proceedings in order to have a claim determined.
- 10.4 This absence of jurisdiction is a gap in the General Protections framework. In our view, the FWC should have the power to conduct a conciliation and arbitration of a General Protections (not involving dismissal) claim. It is generally accepted that court proceedings by their nature are more expensive, as well as taking a longer period of time from filing to final determination. These factors make initiating court proceedings prohibitive for low paid workers in the TCF industry.

RECOMMENDATION

- ***Amend the FW Act to provide an avenue of conciliation and arbitration for General Protections matters (not involving dismissal).***

¹²⁹ Productivity Commission: Workplace Relations Framework – Issues Paper 4 (Employee Protections); section 4.2 (Unfair Dismissal), Section 4.3 (Anti-bullying laws) and Section 4.4 (General Protections and ‘adverse action’)

Anti-Bullying Jurisdiction

- 10.5 The TCFUA supported the introduction of the FWC's anti-bullying jurisdiction as part of the Fair Work Amendment Act 2013 and supports its retention. The TCFUA notes that the anti-bullying provisions¹³⁰ only commenced operation on 1 January 2014, and in that sense, is in its early days as regards a major reform in the workplace relations system.
- 10.6 The TCFUA's experience with the anti-bullying jurisdiction has been generally positive. For example, the TCFUA represented a member to the conciliation stage which resulted in an agreed set of outcomes (including training of all management and other employees and ongoing processes for ensuring that any complaints of bullying are dealt with in a timely and appropriate manner). In this instance, the process not only provided a quick and effective remedy to the individual applicant (including the preservation of the employee/employer working relationship) but has also had broader benefits in the ongoing education of management and changing the workplace culture in respect to these issues.

RECOMMENDATION

- ***Retain FWC's current anti-bullying jurisdiction within the FW Act.***

¹³⁰ Fair Work Act 2009 – Part 6-4

Unfair dismissal protections

- 10.7 The reinstitution of unfair dismissal rights under the FW Act was important for a significant number of Australian workers. Under the previous Work Choices legislation, the TCFUA had numerous examples of where employees, many of whom were long serving, were effectively denied the right to contest an unfair and capricious termination.
- 10.8 The majority of the TCFUA's members are women. In our experience, the restrictive access to unfair dismissal remedies under WorkChoices had a particularly harmful effect for low paid, female workers employed by businesses with fewer than 100 employees (the overwhelming majority of workplaces in the TCF industry), many of whom were fearful of being driven into homelessness if dismissed.
- 10.9 During the period of WorkChoices legislation, TCFUA organisers noticed a significant spike in contact from TCF workers who were low-paid, women in their 40s and 50s. Many were single mothers or women living on their own. These workers were greatly distressed about their job security. They relayed being told by their employers that if they complained about conditions at work, they could be sacked at a moment's notice, with no redress under workplace laws. Most of these women were living close to the poverty line, earning just enough to cover their rent and basic expenses. They had genuine fears of homelessness if they lost their jobs. Our organisers were concerned that these workers were excluded from protection under unfair dismissal laws.
- 10.10 In the TCFUA's submission, there is no compelling evidence or arguments which would justify a return to the position under Work Choices in relation to unfair dismissal laws, or which would otherwise support any diminution of current unfair dismissal rights under the FW Act.
- 10.11 The current system could be improved to ensure that access is not arbitrarily limited and to more directly take into account the needs of particular groups of applicants and potential applicants.
- 10.12 The TCF industry is dominated by small and medium-sized enterprises (SMEs). As a result, the operation of the Small Business Dismissal Code ('SBDC') has a disproportionate impact on TCF workers, with little real advantage to small business owners. It is the TCFUA's opinion that the inclusion of the SBDC is not justifiable and should be removed from the unfair dismissal jurisdiction.

10.13 The qualifying periods of 6 months and 12 months (for small business employers) also operate in an arbitrary fashion unrelated to the merits of the particular circumstances surrounding the dismissal. If there is to be a minimum qualifying period, in the TCFUA's submission this should be a period of 3 months. Additionally, there should be no differential treatment based on the size of the enterprise.

10.14 As Forsyth and Stewart have noted:

'...case studies have shown that while there is a strong degree of opposition on the part of small business owners to the idea of employees being protected against unfair dismissal, few of those surveyed had actually experienced any claims – and those that had were generally satisfied with the process and outcome'.¹³¹

10.15 The 21 time limit for lodging unfair dismissal applications is an improvement to the previous 14 days, but the timeframe still remains too short. Many employees in the TCF industry are from a non-English speaking background and have limited English language or literacy skills. Many do not have familiarity with the Australian legal system or its concepts and some sectors are largely un-unionised. The time limit should be extended to at least 28 days, to give workers sufficient time and capacity to obtain legal advice and assistance.

10.16 Additionally, the 'exceptional circumstances' under s 394(3) of the *Fair Work Act*, which the Fair Work Commission may take into account when granting an extension for lodgement of unfair dismissal applications, should include a consideration of vulnerable employees, such as those from non-English speaking backgrounds with limited English language and literacy skills, and limited capacity to obtain legal advice.

10.17 The TCFUA is critical of the use of telephone conferences as the default model for resolving unfair dismissal disputes. Whilst telephone conferences may be suitable and effective in a range of matters, for some circumstances they are not appropriate. In the TCFUA's experience, face to face conferences are much more effective in resolving matters at an early stage. As such, face to face conference should be available as a default, unless there are persuasive and reasonable grounds for not holding one (for example, location of the parties and cost of travel to suitable venue for conference).

¹³¹ Andrew Forsyth and Andrew Stewart, *Submission to the Fair Work Act Review* (February 2012), 28.

RECOMMENDATION

- *There should be no reduction to the availability of unfair dismissal remedies.*
 - *Remove the Small Business Dismissal Code*
- *Decrease the qualifying period for unfair dismissal to 3 months, with no distinction based on the size of the enterprise*
 - *Extend the time limit for lodging unfair dismissal applications to 28 days*
 - *Amend s394(3) of the FW Act to provide for consideration of factors such as employee's vulnerability, NESB, literacy and limited capacity to obtain legal advice*
 - *Provide for face to face conciliation conferences as the default*

11. OTHER WORKPLACE ISSUES: RIGHT OF ENTRY

- 11.1 The Productivity Commission raises issues regarding the statutory right of entry framework in its Issues Paper 5 (section 5.7).¹³²
- 11.2 Right of entry is an important element of the principle of freedom of association and should be enshrined as a right of a worker to access their union. Right of entry laws should reflect the substantive rights of workers to be represented by their union in their place of work. In the TCFUA's experience, right of entry is regularly frustrated by a combination of strategies used by employers seeking to keep the union out of their workplace.
- 11.3 The TCFUA strongly supported the 2013 amendments to s 492 of the FW Act regarding venue for discussion purposes. In its submission to the Senate Inquiry into the Fair Work Amendment Bill 2013,¹³³ the TCFUA outlined in detail, including multiple actual cases studies, the systemic difficulties in effectively exercising right of entry in the TCF industry.¹³⁴
- 11.4 Prior to these amendments, unions wishing to hold discussions with members at the workplace were required to comply with 'any reasonable request by the occupier of the premises to hold discussions in a particular room or area...or take a particular route to reach a particular room or area of the premises'.¹³⁵ A number of case studies below demonstrates the TCFUA's experience of employers consistently refusing to allow the union to meet employees in areas that would best facilitate those discussions or interviews occurring.

TCFUA case study – Intimidation by Management

In one case, a senior member of management simply stood and ate his lunch in the corridor between the meals area and the room allocated for right of entry. Given the location of the room for right of entry, in reality there was no other reason for a production employee to be in the other area (except to speak to the union). The senior manager's presence alone was sufficient to persuade the bulk of employees to from participating in the discussions with the union.

¹³² Productivity Commission: Workplace Relations Framework – Issues Paper 5 (Other Workplace Relations Issues) at section 5.7, p15

¹³³ The Senate Standing Committee on Education, Employment and Workplace Relations, Inquiry into the Fair Work Amendment Bill 2013; TCFUA Submission (15 April 2013)

¹³⁴ Ibid; at paras [16] – [44]

¹³⁵ Ibid; section 492 (repealed)

TCFUA case Study – No Facilities

A TCFUA organiser visiting a company in Ballarat was escorted to a meeting room where there were no facilities for workers to prepare their meals, and no tea making facilities. There was no plumbing and therefore no drinking water and no sink to wash up. There was also only one table and ten chairs for 40 workers. At a different site, the same company escorted the TCFUA organiser to a semi-enclosed area which was exposed to the elements. It was 32.1 degrees outside, and considerably hotter inside the structure. The majority of the area was in the direct sun without shade, and there was a hot, strong wind blowing through the area. There were only three tables and 12 chairs for 70 workers, which were in the direct sunlight. The organiser had to stand in the heat at the venue for 45 minutes, with no access to drinking water. These conditions made it extremely difficult, even intimidating, for workers to participate in the meetings.

TCFUA case study – Made to Meet in the Toilets

In an infamous case at Feltex Carpets (formerly part of the Godfrey Hirst group of companies) in 2008, a TCFUA organiser was made to meet with workers in the women's toilets area. The organiser was forced to stand in the doorway to the toilet, with female workers standing in the toilet area, and the male workers standing outside.

- 11.5 Despite the amendments to Section 492 in 2013, which reduced the scope of employers to frustrate the union's right of entry under the FW Act, the TCFUA still continues to experience problems in exercising right of entry.
- 11.6 For example, some employers use the strategy of allocating a meal room for right of entry in part of the factory which is not a common area for production employees and/or which is located close to, or in view of members of management. In our experience employees are often reluctant to be seen openly speaking with union officers one on one (as opposed to be part of a larger group of employees) due to the risk of being subsequently targeted and victimised. This is not a theoretical concern. Many of the TCFUA's members are 'silent' members such that their employer does not have knowledge of, or is unsure of the worker's membership.

TCFUA case study

A company ran its premises in an enormous shed with thin, plywood walls. Only one room was sealed off and sound proof, but was infrequently used. The lunch room was next door to the administration office. Everything that was going on in the lunch room could easily be heard in the adjoining office. During union meetings, the company's boss would sit in the adjoining office and the workers were aware that he could hear everything that was said.

- 11.7 Additionally, circumstances also occur where the union exercises its right of entry in such rooms/areas, but the majority of employees will not even be aware that a representative of the union is on site. This is despite efforts by the union to inform its membership and other employees of an impending visit including the distribution and posting of written notices which are subsequently removed.
- 11.8 The TCFUA also has examples where employers deliberately delay the union's permit holders from reaching the meal and rest areas where employees are gathering during their meal breaks. Such delay can be caused by the employer not having a relevant person from management readily available to direct/accompany the union officer to the meal areas at the time the union presents. The loss of 5 or 10 minutes may appear insubstantial but such delay needs to be considered in context of the relatively short rest and meal breaks typical in the TCF industry (for example 10 minutes for rest breaks, 30 minutes for meal breaks or 20 minutes for crib breaks in the textile industry).
- 11.9 Furthermore, the TCFUA has also experienced employers attempting to frustrate right of entry by refusing to provide, or providing incorrect information, concerning the timing of meal and rest breaks for groups of workers.
- 11.10 A clear right for unions to meet with employees in their meal room, tea room, or canteen areas (however described) should be maintained. Meal rooms allocated for right of entry meetings should be the meal room commonly used by production workers, and should be out of view and earshot of management. There should also be requirements on employers to facilitate right of entry, for example, by placing notices on boards notifying workers of the Union's visit and to ensure that union permit holders have sufficient time from point of presentment to reach the relevant meals/rest breaks areas.

RECOMMENDATION

- *Amend the FW Act to provide for an express right of unions to visit workers in the meal, tea and canteen area.*
- *Amend the FW Act to require employers and occupiers to facilitate right of entry, such as by placing notices on boards, providing relevant information and making available staff members to ensure permit holders access meeting areas in a timely manner.*
- *Amend the FW Act to provide that members of management may not be present in or near areas where right of entry visits are taking place*

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