



Submission of the TCFUA to the
Australian Competition & Consumer Commission

In relation to
Homeworker Code Committee (HWCC) application for
reauthorisation of revised Homeworkers Code of Conduct

(8 April 2013)

Introduction

1. The Textile, Clothing and Footwear Union of Australia ('TCFUA') welcomes the opportunity to make this submission in strong support of the application made by the Homeworkers Code Committee Incorporated (HWCC) for reauthorisation of a revised version of the Homeworkers Code of Practice ('Revised Code').¹
2. The TCFUA was a founding member of the Homeworkers Code of Practice established in 1995, is a signatory to the Code and has had active and ongoing representation on the HWCC since its inception. The TCFUA undertakes compliance activities on behalf of Ethical Clothing Australia ('ECA') which administers the Code.
3. The TCFUA endorses the extensive submissions and grounds made by the HWCC in its application to the ACCC regarding the significant public benefits arising from the existence of the current Homeworkers Code of Practice ('the Code') and how the proposed changes will enhance its operation.
4. The TCFUA also refers the ACCC to its previous submission² in support of the HWCC's application for interim authorisation, on which the union continues to rely. That submission, amongst other things, addressed five issues raised in a number of industry submissions, including:
 - The role of the TCFUA in relation to the Current Code, in particular in relation to compliance activity;
 - Compliance costs and paperwork;
 - Impact on suppliers;
 - Impact on in-house workers;
 - Numbers of outworkers

¹ Application of the Homeworkers Code of Practice Committee to the ACCC; Variation on Application for Revocation of A Non-Merger Authorisation and Substitution of a New Authorisation pursuant to section 91C of the Competition and Consumer Act 2010 (Ref A91252-A91255); (7 March 2013)

² TCFUA Submission in relation to the HWCC's application for interim authorization (ACCC Reference: A91252-A91255); (5 March 2013)

5. We adopt those submissions as part of the current HWCC application before the ACCC. Additionally, the primary intention of the TCFUA in this submission is to primarily address the terms of your correspondence to interested parties.³ However, we believe that these issues and the development of the Code also need to be considered in their historical context and in light of more recent developments. We also believe it is appropriate to expand on the TCFUA's earlier submission in respect to issues raised in a small number of industry submissions.

Proposed revised Code

6. The HWCC's application for reauthorisation includes proposed changes to the Code of Practice, summarised as follows:

- Simplification in terms of layout and language;
- Adoption of a privacy policy;
- Expanded objectives to include outcomes for businesses;
- Expanded and simplified definitions to ensure they comply with the TCF Award (including clarification that the Code covers workers as well as home workers);
- Inclusion of textile manufacture (note: footwear manufacture was adopted by the Code Committee in 2010 as it is already included in the Code of Practice as 'wearable apparel');
- Clarification of the respective roles of the Code Committee, TCFUA and ECA;
- Acknowledgment of the role of ECA in administering and promoting the Code of Practice;
- Addition of a general obligation for applicant (and existing accredited businesses) to co-operate with the accreditation process;
- Simplification of the schedules to make them easier to understand; and
- Reduction on the number of statutory declarations from 6 to 4.⁴

7. In the TCFUA's submission these amendments to the Code are sensible and will assist in the efficient operation of the Code. They implement the logical development of the Code since it was first established (e.g. inclusion of footwear

³ Dr Richard Chadwick, General Manager, Adjudication Branch (ACCC); Correspondence to Interested Parties – Homeworker Code Committee Incorporated – A91354

⁴ HWCC Application to the ACCC; op cit

and textiles, inclusion of a privacy policy), reflect explicitly the purpose and practice of the Code (e.g. obligations regarding both in-house workers and outworkers), streamline administration and paperwork required (e.g. development of simplified statutory declarations and a reduction in their number) and amendments to mirror current industrial regulation and awards.

8. The TCFUA supports the proposed changes to the current Code of Practice.

Role and experience of the TCFUA

9. The TCFUA is a registered organisation under the Fair Work (Registered Organisations) Act 2009 ('RO Act') with a national office in Melbourne and branches as follows:
 - TCFUA (Victorian Queensland Branch)
 - TCFUA (New South Wales, South Australian, Tasmanian Branch)
 - TCFUA (Western Australian Branch)
10. The status of being a federally registered organisation attracts both rights and obligations under federal legislation including the Fair Work Act 2009 ('FW Act') and the RO Act. This includes in relation to right of entry and financial and operational transparency.
11. As the primary national union which represents, and advocates for the industrial interests of workers in the TCF industry, the TCFUA is in a unique position to witness and document the working conditions of these workers, including in formal factory environments, sweatshops and at home. The union has a critical and legitimate role in ensuring that the TCF industry operates on an ethical and sustainable basis, that appropriate labour standards are observed and that unfair advantage is not gained by businesses who seek to undercut their reputable competitors by exploiting the workers who make their products with their supply chains. For many decades the

TCFUA (and its predecessor organisations) have led the community campaign to highlight the widespread existence of exploitation in the TCF industry

12. Over the last two years, the TCFUA has provided extensive written and oral submissions which outline in detail the nature of the TCF industry, in particular in the home based TCF sector, and the labour conditions under which such work is done. These include TCFUA submissions to the:

- [Jan 2012] (Senate) Education, Employment and Workplace Relations Legislation Committee Inquiry into the Fair Work (Textile, Clothing and Footwear Industry) Bill 2011;⁵
- [Jan 2012] Inquiry into the Fair Work Act 2009;⁶
- [Feb 2012] Modern Awards Review 2012 – (AM2012/93 & Ors); Review of the Textile, Clothing, Footwear and Associated Industries Award 2010 (Outwork Matters).⁷

13. Whilst the TCFUA has not attached those documents to this submission, we refer to them variously and generally recommend them to the ACCC regarding the TCFUA's on the knowledge and on the ground experience in this industry.

Exploitation in the industry

14. Over the last 25 or more years, there have been numerous inquiries, reports, submissions and research which collectively have found that outworkers in the TCF industry (as a class of worker) are particularly vulnerable to exploitation.⁸ The need

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http://www.apf.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=eet_ctte/completed_inquiries/2010-13/textiles_fair_work/submissions.htm

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<http://submissions.deewr.gov.au/sites/Submissions/FairWorkActReview/Documents/TextileClothingandFootwearUnionofAustralia.pdf>

⁷ http://www.fwc.gov.au/documents/awardmod/review/AM201293&ors_sub_TCFUA.pdf

⁸ See the following reports:

for specific regulation to address this vulnerability has been accepted at the level of both state and federal governments and by various industrial tribunals.

15. Exploitation in the clothing industry is not a new phenomenon but it is unfortunately a pervasive and persistent one. The widespread non-compliance with minimum award and legal conditions occurs across the spectrum of production, both in relation to in house employees and home based workers. Sham contracting for outworkers has been endemic.⁹ The growing presence of clothing sweatshops¹⁰ illustrates the multiple difficulties in both identifying and eradicating exploitation in the industry. In many respects, clothing sweatshops share similar characteristics of exploitation with the outwork sector:

'The phenomenon of sweatshops within the TCF industry is not new, but they are increasingly adaptive to the 'needs' and structure of TCF supply chains.

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- TCFUA; *'The Hidden Cost of Fashion: Report on the National Outwork Information Campaign'* (March 1995)
 - Cregan, C; *'Home Sweat Home: Preliminary Findings of the first stage of a two part study of outworkers in the textile industry in Melbourne, Victoria'*; Department of Management, University of Melbourne, November 2001
 - Productivity Commission, *'Review of TCF Assistance: Inquiry Report'*, (July 2003)
 - Ethical Clothing Trades Council; *'Outworkers' Lawful Entitlements Compliance Report'*; (Nov 2004)
 - Brotherhood of St Laurence (Diviney, E & Lilywhite, S); *'Ethical Threads – Corporate Responsibility in the Australian Garment Industry'*; (2007)
 - Senate Economics References Committee Report on *Outworkers in the garment industry* (1996)
 - Senate Economics References Committee *Review of the Inquiry into outworkers in the garment industry* (1998)
 - Senate Employment, Workplace Relations and Education Legislation Committee Report on the *Provisions of the Independent Contractors Bill 2006 and the Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006*
 - Senate Standing Committee on Education, Employment and Workplace Relations Report on the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008 [Provisions]* (2008)
 - 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 Amendment (Textile, Clothing and Footwear Industry) Bill 2011 [Provisions]* (2012)
- ⁹ (Senate) Standing Committee on Education, Employment and Workplace Relations Inquiry into the *Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011*; See TCFUA Submission (11 January 2012) pp 19-20 (section on sham contracting)
- ¹⁰ Ibid; pp10-11 (section on sweatshops)

*Sweatshops may be considered to be part of the 'formal TCF sector' in one sense, but they exist in a type of parallel economy, with extremely low levels of scrutiny and transparency of operation. Some sweatshops operate entirely on a cash-in-hand basis, others on a mix of workers 'on the books' and those who officially don't exist in time and wages records. Even where a sweatshop operates formally, many employees 'on the books' will be engaged on a casual, or on a periodic basis.... Whatever the particular sweatshop structure, the workers who work in them rarely have any say in how they are engaged as they seek to eke out a living wage from such precarious employment.'*¹¹

16. In its submission to the Senate, the TCFUA added further that whilst there was not one single definition of what a sweatshop is, they were characterized by key elements including the following:

'...groups of workers labouring, usually in isolation, under appalling physical working conditions, receiving under award rates of pay with little, if any, autonomy over the work they perform. Sweatshop workers are almost uniformly from a non English speaking background are often unaware of, or feel unable to enforce their legal rights and entitlements. Many are migrants or refugees who have had no experience of independent unions and/or the role of the government in enforcing minimum conditions of employment...

A consistent feature of sweatshops uncovered by the TCFUA is the level of control exerted by sweatshop operators including requiring workers to work to unrealistic deadlines until orders are completed, threats to job security and intimidation, harassment and bullying...

Sweatshops, and their workers, are often difficult to locate, follow and monitor, Sweatshops can operate almost anywhere where there is access to power and floor space; in traditional factory type premises, industrial estates, at the back or upstairs of painted out shop fronts, suburban shopping strips, warehouses, garages, behind roller doors, in rooms attached to unrelated businesses or in buildings... To the human eye, many such buildings appear derelict or unoccupied.

*For these reasons sweatshops in the TCF industry represent the 'perfect storm' for exploitation to flourish....*¹²

¹¹ Ibid; p10

¹² Ibid; pp10-11

17. The frequency and extent of exploitation of both outworkers and sweatshop workers is exacerbated by the complex structure of clothing supply chains, which are characterized by multiple cascading tiers of participants. These labyrinthine like clothing contracting chains typically start at the top with a fashion house/label working downwards to makers, contractors, sub-contractors with outworkers at the end of the chain undertaking the bulk of the work. Exploitation thrives when work is hidden. Without effective transparency, it is impossible to identify where work is being undertaken, by whom and under what conditions. Relevantly, outworker and related provisions¹³ in the applicable modern award, the *Textile, Clothing, Footwear and Associated Industries Award 2010* ('TCF Award') are directed to the effective mapping of TCF supply chains and transparency at each level from principal to the outworker.
18. The TCFUA has historically undertaken a variety of strategies to highlight, monitor and enhance compliance within the TCF industry. This has included education, organising and compliance activities specifically directed towards ensuring that workers, including outworkers, receive their lawful entitlements under safe and healthy systems of work. Informing and educating employers and principals about their obligations, together with educating workers about their industrial rights represents a dual focus. However, where necessary, the TCFUA has initiated formal prosecution proceedings in respect to contraventions of award outwork and related provisions. A number of these prosecutions have resulted in civil penalties (some substantial) being ordered by the Federal Court against companies in the TCF Industry.¹⁴

¹³ Textile, Clothing, Footwear and Associated Industries Award 2010 [MA000017]; Schedule F (Outwork and Related Provisions)

¹⁴ See *Clothing and Allied Trades Union of Australia v J and J Saggio* [1990] FCA 279; 34 IR 26 (August 1990), total penalties \$2,300; *TCFUA v Lotus Cove Pty Ltd* [2004] FCA 43 (2 Feb 2004), total penalties \$20,000; *TCFUA v Southern Cross Clothing Pty Ltd* [2006] FCA 325 (28 March 2006), total penalties \$110,000; *TCFUA v Morrison Country Clothing Australia Pty Ltd* [2008] FCA 604 (5 September 2008) and *TCFUA v Morrison Country Clothing Australia Pty Ltd (No 2)* [2008] FCA 1965 (23 December 2008), penalty of \$10,000 for contempt of orders made by the court.

Statutory and Award Framework

19. Detailed outwork and contracting out provisions have existed in federal awards in the TCF industry for over 25 years. In 1987, the landmark decision of Deputy President Riordan in *Re: Clothing Trades Award 1982*¹⁵ resulted in a variation to the *Clothing Trades Award 1982* to provide new conditions with respect to the performance of work by contractors and outdoor workers. In his decision, Deputy President Riordan acknowledged the fundamental reality of sham contracting in the industry and recognized that outworkers, whether an employee or so called contractor, were entitled to the terms and conditions of employment under the award.
20. These provisions were essentially replicated in the simplified *Clothing Trades Award 1999*¹⁶ and further consolidated in the *Textile, Clothing, Footwear and Associated Industries Award 2010*¹⁷ as part of the Part 10A Award Modernisation process.
21. A number of state awards (and NAPSA's) in the TCF industry also contained similar outwork and contracting out provisions which in many instances 'mirrored' those of the federal clothing award.
22. Schedule F of the modern TCF Award contains a comprehensive framework of provisions which address the on the ground structural reality of TCF supply chains in Australia. They are designed to mirror the movement of work within those supply chains. Critically, Schedule F governs the giving out of work by participants in the TCF industry, including by principals to suppliers, contractors, sub-contractors and the bottom of the chain, to outworkers. The result is the creation of transparency at each level of the supply chain by applying a series of cascading obligations on its participants. These obligations include, for example:

¹⁵ *Re: Clothing Trades Award 1982* (Riordan DP) 19 IR 416

¹⁶ *Clothing Trades Award 1999* (Part 9: Outwork and Related Provisions)

¹⁷ *Textile, Clothing, Footwear and Associated Industries Award 2010* (Schedule F; Outwork and Related Provisions)

- Registration by a principal with the TCF Board of Reference (FWC) when an arrangement is made to give work is given out;¹⁸
- The making and retention of work records in respect to such arrangements;¹⁹
- The making and retention of quarterly lists identifying who work is given to;²⁰
- The making of written agreements with persons with whom arrangements are made;²¹
- The provision of minimum conditions for outworkers (including applying the NES);²²
- Extended liability of principals (and apparent principals) for unpaid remuneration owed to outworkers.²³

23. These types of provisions are not new. They have existed in similar form in awards in the TCF industry for over 25 years. Despite this, some businesses in the TCF industry have consistently breached the award outworker provisions. The TCFUA regularly comes across companies who have never been compliant with the award in the entire period of their business's operation; or have only become compliant relatively recently after the TCFUA's intervention. Some participants in the TCF industry do not like what Schedule F does because it exposes the labour conditions under which their garments and products are made within their supply chains.

24. Legislation has also existed at federal and state levels for many years providing specific regulation in relation to the giving out of work and the conditions for outworkers in the TCF industry. Such legislation has been passed by governments (of both political persuasions) in recognition of the particular vulnerabilities of outworkers to exploitation. For example, the majority of states²⁴ have legislated in their own right to include outwork deeming and recovery of money provisions in their respective industrial relations laws.

¹⁸ Ibid; clauses F.2.1 & F.5

¹⁹ Ibid; clauses F.2.2 & F.3.4

²⁰ Ibid; clause F.2.3

²¹ Ibid; clauses F.2.4 & F.3

²² Ibid; clause F.4

²³ Ibid; clause F.7

²⁴ Includes NSW, South Australia, Queensland, Tasmania and Victoria.

25. At the federal level, recent amendments made to the FW Act were intended to harmonise the existing protections so that all TCF outworkers are 'employed under secure, safe and fair systems of work' ...'to be achieved by implementing nationally consistent rights to legal redress and protection that are of no lesser standard that currently apply in state laws and regulations, and the federal TCF award.'²⁵ The Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012 implemented this intention by:

- Ending the artificial distinction by deeming contract outworkers in the TCF industry to be employees, for the majority of purposes of the FW Act;
- Providing an effective mechanism to enable TCF outworkers to recover unpaid amounts up the supply chain;
- Addressing a limitation in relation to right of entry into premises in the TCF industry under sweatshop conditions; and
- Allowing for a TCF outwork code to be issued.²⁶

Homeworkers Code of Practice

26. The Code was developed as a joint union/initiative in the mid 1990's and was designed, amongst other things:

'to complement existing outwork and contracting out provisions in the former federal Clothing Trades Award 1982 (later replaced by the Clothing Trades Award 1999); and

*to encourage, in the form of a voluntary code, the development of ethical production and manufacture in the clothing and fashion industries, including by manufacturers/principals, fashion houses/labels and retailers.'*²⁷

27. Notably, much of the driving motivation behind the establishment of the Code was the desire by reputable employers and retailers to enter into a process (in co-operation with the union) whereby their supply chains were transparent and ethical.

²⁵ Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011; Senate; Second Reading Speech (Senator Chris Evans), 24 November 2011

²⁶ Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012

²⁷ TCFUA Submission in relation to the HWCC's application for revocation of authorizations A90975 – A90978 and substitution of new authorizations A91252 – A91255; (17 November 2010)

In this way, these participants could be distinguishable from those parts of the industry which were built on the exploitation of workers who made their products. This remains a relevant consideration, not only in terms of corporate risk, but also in respect to consumer sentiment and brand loyalty to which notions of corporate and social responsibility are increasingly important.

28. The operative terms of the Code obligations were also consciously designed to complement the existing award framework, so as to ensure as far as possible, consistency in compliance obligations between the two. In this way, the administration involved for a business seeking and maintaining accreditation is intended to reflect documentation already required under the award to be made and retained.

Benefits of the Code

29. In its submission to the ACCC regarding the HWCC's application for reauthorization in 2010,²⁸ the TCFUA outlined, from its experience, how the operation of the Code had complemented and advanced compliance with minimum award and legal conditions in the TCF industry. The TCFUA submitted:

'The public benefits arising from the HCOP process are significant. On a micro level, the HWCP operates:

- *To provide for a business/principal to enter into a voluntary process whereby they make application to, and become accredited to the HCOP over a period of time;*
- *Businesses/principals are provided information, training and support to ensure they are both compliant with the HCOP and the TCF Award;*
- *With the assistance of the ECA, the process effectively requires a business/principal seeking accreditation to actively map their own supply chains in detail and thus, identify where, and under what conditions work is performed on their behalf;*

²⁸ Ibid

- *In doing so, a business/principal is then able to better determine whether the TCF Award and other minimum statutory entitlements are being provided to workers at each level of their own supply chain/s, including in relation to home workers/outworkers;*
- *As a consequence, the HCOP promotes improved health and safety for workers, particularly in relation to poor physical working environments and the combined pressures of very low rates of pay together with long and excessive working hours;*
- *To retain accreditation, a business/principal is required to provide an updated information annually regarding their supply chains, encouraging a longer term pattern of Award and legislative compliance i.e. ethical production and manufacture becomes the accepted and normalised business model of the accredited principal.*

On a macro level, the HCOP:

- *Assists in the cultural and practical shift to a sustainable, innovative and ethical domestic TCF industry;*
- *Increasingly, this is reflected in accredited businesses actively promoting themselves as ethical as a point of distinction within the market i.e. ethical business models are beginning to be seen as more 'competitive' and sustainable than those based primarily on unit price alone;*
- *Enhances the retention of a critical mass of workers skills within the TCF industry as businesses develop a growing consumer market for garments and products made and produced under ethical labour conditions;*
- *Contrary to any suggestion that the HCOP might inadvertently produce anti-competitive outcomes, in our experience, the HCOP has operated to encourage a fairer 'playing field' within the industry as it works against a low wage/skill/margin 'race to the bottom' model.*
- *It is now commonly acknowledged amongst key industry and government stakeholders that a TCF model based on ethical manufacture and production, linked to initiatives which enhance innovation, will ultimately be more sustainable into the future. The HCOP is one of a number of important mechanisms contributing to this necessary shift'.²⁹*

30. In context of the current application, in the TCFUA's submission, these benefits have been enhanced in the two and half year period since the 2011 previous Authorisation was granted by the ACCC. Between 1 July 2010 and 31 December 2012, the TCFUA undertook ECA compliance checks in 1,319 workplaces in the TCF

²⁹ Ibid; page 4

industry and had direct contact with 1,184 outworkers during the same period. The compliance checks audit each level of the supply chain of a company seeking accreditation with ECA. The contact with outworkers involves the union's compliance officers factually verifying in detail, whether the correct award wages and entitlements have been provided to the worker together with other Schedule F requirements, such as the provision of work records and work agreements. Health and safety conditions are also checked.

31. Through its regular compliance activity undertaken on behalf of ECA as part of the accreditation process, the union has seen a modest but appreciable improvement in the levels of award and legal compliance over the last 12 to 24 months. The TCFUA's recent evidence to the award review found:

*'After 20 years or so, the union is finally starting to see a difference to the working conditions of outworkers. For the first time some outworkers are receiving the correct minimum weekly award wage and superannuation is being paid for the first time in their entire time they have lived in Australia.'*³⁰

32. This change is supported by preliminary research conducted by Ms Shelley Marshall, a Senior Lecturer in the Department of Business Law and Taxation at Monash University and who is an international expert in the regulation of informal work. Ms Marshall's research involved conducting one on one interviews with outworkers, using the same question used in the *Cregan* study decade before in addition to the collection of narrative histories about the outworker's lives and history of work. The preliminary findings were presented as part of Ms Marshall's evidence to the Senate Committee Inquiry into the *Fair Work (Textile, Clothing and Footwear Industry) Bill 2011*.³¹ Whilst the research identified widespread non-compliance (consistent with

³⁰ Modern Awards Review 2012; (AM2012/93), TCF Award 2010; Exhibit #TCFUA1 Witness Statement of Michele O'Neil dated 28 February 2013

³¹ (Senate) Standing Committee on Education, Employment and Workplace Relations Inquiry into the Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011; Written submission by Shelley Marshall (Jan 2012)

the Cregan results), there was a difference in that there was evidence that some outworkers working in supply chains linked to ECA accredited companies were receiving their entitlements or close to full award entitlements.³² This contrasted markedly with previous studies which found no evidence of compliance. Marshall stated:

*'For all workers interviewed who were receiving either their full legal entitlements or close to their legal entitlements, this was a relatively new phenomenon. For all, only a year or a few months ago, they were receiving conditions close to that described by Cregan. Perhaps the most significant finding was the difference that the change in conditions had made to the interviewees' lives. Interviewees who received higher pay reported a lessening in pain related to injuries thanks to the capacity to take breaks, time to spend with family and leisure time which they had not enjoyed since arriving in Australia.'*³³

33. Evidence called by one of the TCFUA's in the 2012 award review provides a similar story of the difference receiving award conditions can make to an outworker's work and life. Mr Ky Dang To, an outworker of eight years, attested:

'Currently I am working for a sports clothing company. Before the union became involved, I had to work between 60 and 70 hours every week. I had to work on Saturday, Sunday and public holidays...

*Recently, the Company agreed to engage me to be a full time outworker under Ethical Clothing Australia program. I am paid by the hour and the work is regular every week. I do not need to worry about finding a job at other places. I am paid \$17.65 per hour plus the same entitlements as workers in factories. I have worked less time than before but I can make as much as before. I am very happy with these recent working conditions'.*³⁴

34. In subsequent oral testimony, Mr To detailed the positive impact on his life now that he had a guaranteed 38 hours work per week at award rates as follows:

³² Ibid;

³³ Ibid;

³⁴ Modern Awards Review 2012; (AM2012/93), TCF Award 2010; Exhibit #TCFUA3 Witness Statement of Ky Dang To; dated 28 February 2013

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

THE WITNESS: 38 hours. I got time with my kids. I take them to play. You know, I take them to the park and something like – weekend, I can take my son and go to Sunday market or something. I can go around with my son.

MS WILES: And you've got four children?

THE WITNESS: Four children, yes.³⁵

35. In the TCFUA's experience, the ECA Code has made a practical difference to the lives of outworkers who perform work in accredited supply chains. The process of accreditation, founded on detailed compliance auditing at each level of the contracting chain, has meant that outworkers are beginning to receive their minimum award safety net of terms and conditions, many for the first time. This is a significant breakthrough given the well documented difficulties of achieving compliance within the industry. The clear public benefit of this pivotal shift for one of the most vulnerable class of workers in Australia cannot not be underestimated.

Industry submissions to the ACCC – opposing authorisation

36. The TCFUA has reviewed the submissions previously made to the ACCC made by a small number of industry/employer parties, including the TFIA³⁶, Jenny Bannister³⁷, William Stanley (MarkIt Apparel)³⁸ and Phillip Endersbee (Wilderness Wear).³⁹ We are also aware that a number of confidential submissions have been made but the union is obviously not privy to their specific contents. The TCFUA did provide a preliminary response to the issues raised in its earlier submission regarding the HWCC's application for interim authorisation. We provide the following additional comments in context of the current application by the HWCC.

³⁵ Ibid; Hearing (7 March 2013) Transcript [PN1145] – [Pn1148]

³⁶ Submission to the ACCC by the Council of Textiles & Fashion Industries of Australia Ltd; 1 March 2013

³⁷ Submission to the ACCC by Jenny Bannister; 3 March 2013

³⁸ Submission to the ACCC by William Stanley, Markit Apparel Online; 4 March 2013

³⁹ Submission to the ACCC by Phillip Endersbee, Wilderness Wear; 4 March 2013

37. In general terms, the submissions suffer from conflating a range of issues which are, in the TCFUA's respectful view, irrelevant to the HWCC's application/s to the ACCC seeking reauthorisation of the Code. Large parts of the submissions are not even directed to the substance of the proposed changes to the Revised Code sought by the HWCC.
38. Secondly, a number of the submissions demonstrate a significant misunderstanding about key aspects of the industrial relations framework currently applying in Australia and draw incorrect conclusions as a result.
39. Thirdly, there appears to be a level of confusion regarding the TCFUA's current statutory right of entry powers under the FW Act and its separate compliance role as part of the ECA accreditation process.
40. Fourthly, the submissions fail to acknowledge that the ECA accreditation process is a voluntary one that a TCF business has the option to enter into or not.
41. In relation to Ms Bannister's submission, she states that she has not operated a business in the TCF industry since 2009, which is prior to the previous ACCC authorisation and prior to the commencement of the modern TCF Award in January 2010. The TCFUA's previous submission to the ACCC (regarding interim authorisation) included a response to other assertions made by Ms Bannister regarding the TCFUA.
42. In relation to the submissions of the TFIA, Wilderness Wear and Markt Apparel each is on the public record as opposing certain outwork provisions of the TCF Award and the TCF industry amendments made in 2012 to the FW Act.⁴⁰ In respect to the TCF

⁴⁰ Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012

Award, the TFIA as part of the 2012 Review of Modern Awards, has filed an application with FWC to vary Schedule F of the TCF Award.⁴¹ The effect of the TFIA's proposed variations, if accepted by the FWC, would result in a significant diminution of the current minimum safety net conditions for outworkers in the industry. Both Phillip Endersbee (Wilderness Wear)⁴² and William Stanley (MarkIt Apparel)⁴³ are witnesses for TFIA as part of the proceedings currently (part heard) before a Full Bench of the FWC.⁴⁴ Mr Endersbee's submission to the ACCC, in substance, is in identical terms to his witness statement filed in respect the FWC review of the TCF Award.

43. The ACCC's correspondence (as part of the interested party consultation) makes reference to a number of submissions received which raise issues regarding:

- Changes in the Australian TCF industry since the Code was initially developed which have lead to a reduction in the number of homeworkers in the industry; and
- That alternative methods exist to reduce the exploitation of homeworkers and workers such as the Fair Work Ombudsman, Fair Work Australia and the TCFUA (powers under legislation and the award).⁴⁵

44. In the TCFUA's submission, these arguments are flawed and do not support a conclusion that Code is no longer relevant or otherwise does not provide a public benefits from its operation.

⁴¹ Modern Awards Review 2012; Textile, Clothing, Footwear and Associated Industries Award 2010; TFIA Application to vary (9 March 2012)

⁴² (AM2012/248) Witness Statement of Phillip Endersbee, Wilderness Wear (filed 6 March 2013 as part of TFIA's Amended Application)

⁴³ Ibid; Witness Statement of William Stanley, MarkIt Apparel (filed 5 March 2013)

⁴⁴ (AM2012/93 and Ors); Textile, Clothing, Footwear and Associated Industries Award 2010; Outwork Full Bench; Hearing (7 March 2013) – Part Heard

⁴⁵ Op cit; page 1

Outwork numbers

45. Outwork has been a feature of the clothing manufacture in Australia since the establishment of the industry in the nineteenth century. Notably, awards made pursuant to federal industrial relations statutes regulated outwork as early as 1919.⁴⁶ However, outwork by its very nature, is often hidden existing as it does outside of the more formalised factory environment at the bottom of long and complex supply chains. It is work overwhelming undertaken by women from a non English background who commonly have limited English and literacy skills and have little if any power to negotiate in relation to the work they undertake. Although they may know of the label they work for, for most, the only dealings they have with the supply chain is the person that delivers the work, or from whom they pick up the work (these are often so called 'middle men' whose only role in the chain is the physical distribution of the work). Social and work isolation is a significant feature of the lives of TCF outworkers. Increasingly, outworkers move between outwork and work in sweatshops in order to try and earn a living. Many outworkers report that the volume and regularity of work is extremely precarious including periods of time when they receive no work at all.

46. The TCF industry has always been a volatile industry both structurally and economically in which labour standards have typically been poor and difficult to enforce. For example, although there is a requirement under Schedule of the TCF Award for a principal to be registered with the Board of Reference (FWC) when they enter into an arrangement to give work out, there is significant non-compliance with this obligation in the industry. Without registration (and conformity with the cascading obligations which follow, such as written agreements and work records), a clothing supply chain is not transparent. Without transparency, it is virtually impossible to find where outworkers are and check whether they are being provided their correct legal and award conditions.

⁴⁶ Modern Awards Review 2012; (AM2012/93 and Ors); Textile, Clothing, Footwear and Associated Industries Award 2010 (Outwork Full Bench); TCFUA Submission (28 February 2013) [para 6.2]

47. Clothing supply chains are also not static, changing as new contractors, makers and outworkers are brought into a particular chain and others are removed.

48. For these and other reasons in the TCFUA's long experience, it is extremely difficult to calculate with exact precision the extent of outwork in this country. However, based on its knowledge of the industry and its compliance and education work, the TCFUA estimates that the ratio of factory based workers to outworkers within the clothing industry currently varies between a ratio of 1:4 and 1:10 depending on the particular supply chain.⁴⁷ The approximate ratio in a particular supply can be ascertained from a review of the value, volume and types of work which is contracted at each level from which it can be calculated the number of workers necessary to complete the work in the timeframe provided.

49. Even on the basis of ECA compliance activity alone, it is apparent that outwork numbers are extensive. In its submission to the Senate Inquiry into the *Fair Work Amendment (Textile, Clothing and Footwear) Industry Bill 2011*,⁴⁸ the TCFUA confirmed (as part of ECA compliance):

'Since 2008 the TCFUA has undertaken approximately 1400 separate compliance visits across Victoria, NSW, Queensland and South Australia. As a result nearly 6,000 (5870) homeworkers (of whom 3,336 are in accredited supply chains) now either have a greater awareness of their legal entitlements or are more likely to be working under award compliant conditions.'

50. The TCFUA is also aware of examples where as part of the ECA compliance checks, a particular fashion house believed it was across its supply chain, only to discover that there were significantly more levels and participants involved in making their garments. Some were not even aware, and were shocked to learn, that outworkers

⁴⁷ Ibid; [para 5.5]

⁴⁸ Op cit; [para 69] quoting Ethical Clothing Australia (Homeworker Code Committee Inc); Business Plan 2011/12; [3], [10]

and/or sweatshops were being used to undertake their work. These were not rogue operators but large and reputable labels with a public commitment to ethical productions.

51. Evidence given by Ms O'Neil for the TCFUA in the recent award review proceedings is illustrative of this point:

'Your Honour, when we talk to a company about their supply chain, an example recently was that we worked with a company who wanted to make sure their whole supply chain was ethical and meeting labour standards. They thought that within their supply chain there were 87 workers that at different points in the supply chain were doing their work. After approximately 12 months of work working through supply chain the union uncovered 400 workers that were doing that work. A second example was a company that recently contacted us who thought they were giving work to eight factories. So it's a principal company. They said, "We give work to eight factories. That's where we think our work is being done". Upon the union's investigation of that supply chain we identified an additional 15 factories; we found another 15 on top of the eight, and then 58 outworkers...'⁴⁹

52. This problem of identification has been acknowledged broadly including as part of various Senate Inquiries and the national review of the TCF industries undertaken in 2008.⁵⁰ In respect to the latter the Report, prepared by Professor Roy Green (Dean of Macquarie Graduate School of Management) ('Green Report') found that total TCF employment at May 2008 was approximately 48,500 in terms of direct manufacturing.⁵¹ However, Green also found that this figure was an underestimation of the real extent of economic activity in the TCF sector. 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*

⁴⁹ (AM2012/93 and Ors); Textile, Clothing, Footwear and Associated Industries Award 2010; Outwork Full Bench; Hearing (7 March 2013); Transcript [PN439]

⁵⁰ Green, R; Building Innovative Capability: Review of the Australian Textile, Clothing and Footwear Industries; Commonwealth of Australia, 2008

⁵¹ Ibid; p 22

activities'.⁵² The TCF Review concluded that there were a number of important implications from this including:

*'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 effect the TCF industries differentially, with subindustries such as clothing especially affected.'*⁵³

53. In terms of outwork, the Green Report acknowledged that *'the number of people engaged as outworkers is considerable, although estimates are fraught with methodological problems'*⁵⁴ and that there *'similar problems in estimating the value of outworker production, as there may be little correspondence between the labour cost involved and the wholesale or retail price of the product'*.⁵⁵

54. The fact is, the great majority of clothing production in Australia is still performed by outworkers at home. Whilst it is not possible to state with precision the numbers of outworkers in the TCF industry, the extent of outwork within domestic TCF manufacturing and production remains significant. These workers remain acutely vulnerable to exploitation in the form of low rates of pay, long and excessive hours, unrealistic timelines for the completion of work, the absence of leave entitlements and other benefits including holidays, superannuation and poor health and safety. As outlined previously, the phenomenon of clothing sweatshops also appears to be increasing as margins within clothing supply chains tighten.

55. The purpose of the Code in addressing these conditions remains just as important as it did at the time of the Code's establishment nearly two decades ago. The benefits of the operation Code (as part of a system of voluntary accreditation) work in conjunction with other mechanisms and strategies (education, outreach, normal

⁵² Ibid; p 21

⁵³ Ibid;

⁵⁴ Ibid; p 34

⁵⁵ Ibid;

compliance activity, prosecutions) in efforts to ensure compliance with minimum legal and award obligations in the industry.

Alternative methods to reduce exploitation

56. In response to the second issue, the concerns raised by industry illustrate a level of confusion as regards the respective roles of the industrial tribunal, the statutory regulator and the TCFUA in regards to compliance. It also demonstrates a fundamental misunderstanding regarding the purpose and obligations of the Code (into which a business enters voluntarily) and the legal requirements on a TCF company via the TCF Award, the FW Act and other legislation. Whilst checking compliance with the award and legal minimums is critical to the integrity of the Code and its success, it is not, nor is it intended to be, a substitute for normal compliance activity conducted by either the TCFUA or the national regulator.

57. The Fair Work Commission ('FWC') (formerly named Fair Work Australia) is the independent national workplace relations tribunal. The FWC in one form or another has existed in the Australian industrial landscape for over 100 years.⁵⁶ The current FWC has a multiplicity of roles, including for example, the making and variation of awards, implementing the framework for enterprise bargaining, setting minimum award wages and determining unfair dismissal complaints. Whilst it has traditionally, and continues to have a role in dispute resolution it is not a regulator, in the sense of enforcing rights under industrial instruments. It exercises arbitral not judicial power.

58. Additionally, in respect to its dispute resolution powers, it is worth noting that the FWC has no jurisdiction to arbitrate or otherwise determine a dispute about an award term, including any purported contraventions. It's role in relation to award disputes is limited to conciliation and mediation, making a recommendation or

⁵⁶ See the Conciliation and Arbitration Act 1904

expressing an opinion.⁵⁷ As a result, if an award dispute cannot be settled, a breach can only be pursued by initiating proceedings in a relevant court with the associated costs and time delays. For the great majority of award dependent workers and outworkers, it is overwhelmingly prohibitive to commence and pursue such proceedings.

59. The Fair Work Ombudsman (FWO) is an independent statutory agency with a role in education, investigation and enforcement. The FWO does not act on behalf of either employees or employers and is essentially complaint driven. The FWO statutory responsibilities range across all industries and sectors in Australia. In the TCFUA's experience, neither the FWO or its predecessor organisations (including the former Workplace Ombudsman) have taken an active role in ensuring compliance with award and legal minimums in the TCF industry.

60. The union also has concerns regarding the level of knowledge and expertise within FWO regarding the award and legal framework applicable to the giving out of work in the TCF industry and minimum conditions for outworkers. As part of the 2012 Review of Modern Awards, evidence was recently given by Ms Michele O'Neil (TCFUA National Secretary) in respect to the review of the outworker provisions of the TCF Award. In response to a question from the FWC Full Bench regarding the inclusion of the FWO (as a contact) in the information required to be given to outworkers under the TCF Award, Ms O'Neil stated:

'Our experience, Commissioner, in relation to that is that this is a particularly unique set of provisions and as I'm sure you are aware, it's often the case in terms of the Fair Work Ombudsman, and instead of being directed to the provisions of both the Act and the award that deal with outworkers in the TCF industry, they've been directed to the Fair Work Ombudsman information about contractors and sham contracting generally. So you would appreciate that that's quite different sets of information. So I would say that if we were confident that

⁵⁷ See section 595, Fair Work Act 2009

*there was high degree of expertise and understanding of the provisions within that office, that would make sense, but today I'm not confident of that myself.*⁵⁸

61. In relation to the TCFUA, the union has a critical role to play in monitoring and enhancing compliance in the TCF industry. The TCFUA was a respondent to the pre-reform awards applying in the TCF industry, and is currently named as the union with certain rights and obligations under Schedule F (Outwork and Related provisions) of the TCF Award. As indicated previously, the TCFUA as a registered employee organisation also has rights and obligations under the FW Act in relation to right of entry to hold discussions with workers and to investigate contraventions of the TCF Award, the FW Act and other relevant industrial instruments.

62. However, the level and extent of exploitation in the TCF industry goes beyond the resources and capacity of any one organisation. Remedying breaches and maximizing compliance involves a variety of strategies with the ultimate aim of having an ethical and sustainable TCF industry. The compliance undertaken as part of the ECA accreditation process is separate and distinct from the TCFUA's general compliance activities. The TCFUA's role in compliance was outlined as part of Ms O'Neil's evidence in the review of the TCF Award as follows:

'The union has a multiple approach to compliance. There's the general work that we do every day where organizers and officials of our union visit many thousands of workplaces around the country where we check on the wages and conditions of workers, we advocate on their behalf and we try and address any standards that we find where workers are not receiving the basic minimum terms and conditions or where there's any problem in terms of safety in the workplace. But in addition to that we also, in response to that have two different approaches: one approach is where we see that it's a company that is genuinely committed to working to improve and quickly rectify any breaches of minimum standards or award or safety net conditions, we'll work with them to try and ensure that they are fixed and that workers receive their minimum conditions, and if there's anything owed to people, that it's paid to them; if there's any urgent safety matters, that they're immediately rectified; and we go through a process of

⁵⁸ Modern Awards Review 2012; Textile, Clothing, Footwear and Associated Industries Award 2010; AM2012/93 & Ors); Outwork Full Bench; Transcript (Hearing 7 March 2013) [PN469]

trying to ensure that there is a quick fix so that the workers receive what is their legal entitlements, that the workplace is safe, and that people can get on with business.

The other approach is that we often come across companies that despite having operated in the industry for years and years, claim ignorance of the requirements of the award or the Occupational Health and Safety Act. Where we know that the company has in fact had plenty of opportunity to know what their legal requirements are, then we sometimes take steps to prosecute those companies; we sometimes bring companies to this commission in an attempt to try and see if through conciliation we're able to get matters rectified; and we frequently over the years have prosecuted companies in the Federal Court for breaches, in particular, of the outworker provisions in the award.

*The other role we have as far as compliance is that we also have a very specific role as part of what's called Ethical Clothing Australia, which is a voluntary scheme. So if companies want to volunteer to become accredited as an ethical company then part of what they volunteer to do is to have their whole supply chain checked for compliance with the minimum standards in Australia. Our union has the role of checking right through that supply chain. So every step, whether it be a factory, a sweat shop or workers working at home, we ensure that everyone in that supply chain is receiving their minimum legal entitlements. It's on that basis that companies are deemed to be compliant with the provisions of ECA and granted accreditation.'*⁵⁹

Detriments of the Code

63. Contentions made by some of the industry submissions in opposition to the reauthorisation go to the 'costs of compliance' with the Code. These arguments are not articulated in any detailed way making it difficult for the TCFUA to respond with any degree of specificity. Generally however, we make the following comments.

64. As participants in the manufacture of TCF goods, it is clear that companies who seek accreditation with the Code already have obligations under the TCF Award and other legislation. As outlined previously in this submission, a principal who gives out work already has obligations under Schedule F of the TCF Award regarding registration, written agreements, work records and the provision of minimum award conditions to outworkers. More generally, TCF businesses have award obligations in relation to

⁵⁹ Ibid; [PN425]

their in-house workers. Consequently, it cannot be said that the Code imposes additional costs in relation to complying with the TCF Award.

65. Relevantly, it is already the case that the TCFUA under its statutory right of entry powers, is able to conduct inspections of TCF businesses to ensure that these and other requirements are being adhered to. As part of its normal union activities, the TCFUA undertakes day to day compliance and organising work. Outside of its ECA compliance, the union regularly conducts time and wage book inspections and health and safety audits in TCF workplaces. In conducting compliance for the Code accreditation process, the TCFUA does not have any additional powers than it currently has under statutory right of entry under the FW Act.

66. Similarly, an accredited TCF business (or seeking accreditation) has statutory obligations regarding a range of other laws, in particular under state OH&S legislation. Again, compliance with these laws is not an additional compliance cost under the Code accreditation process.

67. The TCFUA acknowledges that some entities within a principal's supply chain may not have even been compliant with the TCF Award and other legislation and resent having their non-compliance being brought to the attention of the TCFUA. The 'costs' to such a business in becoming compliant is not additional; it is the minimum required to ensure that workers, including home based workers, receive their lawful wages and entitlements.

68. The statutory declarations required to be completed under the Code have been a feature of the accreditation process since the Code's inception. The proposed revised Code both simplifies the terms of the statutory declarations and reduces their number from 6 – 4. The statutory declarations are designed to complement the

obligations already contained in Schedule F of the TCF Award and mirror the categories of information already required to be made and retained.

69. There are clear and identifiable benefits to a business arising from the compliance activities undertaken by the TCFUA as part of the ECA Code accreditation process. If the business is identified as not being compliant, it is given considerable assistance by the TCFUA compliance officer to put steps in place to reach compliance. This is information, education and support that a business would ordinarily need to engage at its own cost.
70. In respect to a number of the specific changes proposed to the Code, we note that the inclusion of textile manufacturers within its scope was a decision supported unanimously by the HWCC. The TCFUA is perplexed why this proposed change would cause concern given that the push for inclusion was pressed by the textile industry itself. We again reiterate, the Code is a voluntary process. Textile manufacturers are not required to enter into the ECA accreditation process. Relevantly, Schedule F of the TCF Award covers the giving out of work in relation to each of the textile, clothing and footwear industries. In this context, the proposed inclusion of textile manufacturing in the Code is consistent with the applicable industrial regulation.
71. In the TCFUA's experience, (with a small number of exceptions) the great majority of textile manufacturing in Australia is founded on a model of formalised factory production with a predominantly in-house workforce. In the absence of a complex supply chain (as is the norm in the clothing industry), because there are fewer levels, a textile business seeking accreditation, should involve a more straightforward compliance process. In the TCFUA's submission, rather than constituting a 'detriment' the inclusion of textile manufacturing within the scope of the Code constitutes a clear benefit for those parts of the textile industry who wish to

participate in the accreditation process and promote their companies as being sustainable and ethical.

72. The proposed revised Code seeks to explicitly acknowledge that the Code covers both in-house workers and outworkers. This change simply makes plain what has been the intention and operation of the current Code. The creation of transparent and ethical supply chains, underpinned by genuine compliance auditing, is the fundamental core purpose of the Code. By implication, a business seeking accreditation cannot consider itself ethical if there are workers in their supply chain who are not receiving their award and legal pay and conditions. To conclude otherwise would undermine the legitimacy of the Code and the confidence of both the industry and the consumer in the ECA accreditation system.

Conclusion

73. The TCFUA emphasizes its strong support for the reauthorization of the Code as sought in the HWCC application. The changes to the revised Code are well considered and are beneficial in intent and scope. This is consistent with the Code's core purpose. It is well documented that exploitation unfortunately continues to be a feature of the TCF industry, particularly in the outwork and sweatshop sectors of the clothing industry. The benefits of the Code's operation have gathered momentum over the last 2 years, resulting in outworkers beginning to receive award and legal entitlements, many for the first time in their working lives. Public and consumer awareness of ECA and the Code is increasing and the demands for an ethical and sustainable industry are growing. Ongoing ACCC authorisation is critical to consolidating the current gains and building its ongoing success.

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