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Department of Employment

# Post-implementation Review of the Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012

Review conducted by the  
Department of Employment

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The document must be attributed as the Post-implementation Review of the *Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012*.

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## FOREWORD – Main data sources used for this review

On 28 March 2014, the Australian Government announced the Post-implementation Review (review) of the *Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012* (TCF Act). Senator the Hon. Eric Abetz, the Minister for Employment, wrote to stakeholders seeking submissions to the review by 14 May 2014. There were 51 submissions made to the review, of which more than half were confidential. Public submissions were published on the Department of Employment's (department) website on 5 June 2014 and a list of these is at [Attachment F](#).

Submissions opposing the TCF Act and calling for its repeal (to varying degrees) were received from the Council of Textile and Fashion Industries of Australia (TFIA), employer organisations, such as the Australian Chamber of Commerce and Industry and the Australian Industry Group, and a number of businesses and contract outworkers. The pervasive view was that the intention of the legislation is to protect an unknown number of vulnerable employees working in sweatshops and in sham contracting arrangements. Sham contracting is a situation where a person working as an employee is told they are an independent contractor by employers seeking to avoid responsibility for paying legal entitlements to employees and who may be required to have an ABN and submit invoices. However, the broad application of the TCF Act has diminished the livelihood of legitimate contract outworkers and contributed to the loss of skills and damage to Australia's textile, clothing and footwear (TCF) manufacturing industry. Submissions argued that the TCF Act goes further than necessary to provide sufficient and reasonable protection for contract outworkers. They believe that there was not adequate evidence that the existing arrangements under the *Fair Work Act 2009* (Fair Work Act), including TCF specific provisions, along with the Textile, Clothing, Footwear and Associated Industries Award 2010 (TCF Award), were inadequate. Furthermore, their view is that the TCF Act is doing nothing to improve compliance but is forcing legitimate contractors out of work.

Conversely, submissions supporting the TCF Act and urging its retention to continue protecting outworkers were received from the Textile, Clothing and Footwear Union of Australia (TCFUA), worker support organisations, such as Fair Wear and Asian Women at Work and individual submissions from businesses and outworkers. In their view, the TCF Act harmonised the various outworker regulations, creating a nationally consistent minimum standard. These submissions claim that the provisions of the TCF Act that deem outworkers to be employees remove residual ambiguity about employment status, while right of entry and recovery of money provisions have made it easier to expose and remedy sham contracting and underpayment. As a result, the TCFUA and worker support organisations report that outworkers are increasingly receiving award wages and outworkers feel confident that the laws support them. The view in these submissions is that the TCF Act has only been in place for two years and has resulted in modest but appreciable improvements in the wages and conditions of outworkers. They also call for the implementation of a national mandatory code of practice, to see the TCF Act become fully effective.

## Submissions to the Post-implementation Review – views on the four main provisions of the TCF Act

Submission Type	Deeming of employees		Supply chain recovery		Right of Entry		Mandatory Code of Practice	
	In favour	Not in favour	In favour	Not in favour	In favour	Not in favour	In favour	Not in favour
Organisations (13)	8	4	6	3	5	2	6	2
Businesses (28)	3	14	0	3	0	2	3	1
Workers (10)	6	3	0	0	0	1	0	0
<b>TOTAL (51)</b>	17	21	6	6	5	5	9	3

Note: not all submissions addressed each provision, which is why none of these sections add up to the total number of submissions (51)

### Fair Work Ombudsman, Compliance and Education Activities for Outworkers in the Textile Clothing and Footwear Industry: The Fair Work Ombudsman Experience, May 2014

On 3 February 2014, the Minister for Employment, wrote to the Fair Work Ombudsman under section 685 of the Fair Work Act to request a report on compliance with outworker provisions in the Fair Work Act, in particular Part 6-4A, which was inserted by the TCF Act. The Minister asked for information about any inquiries and investigations undertaken, as well as any proceedings in the courts or the Fair Work Commission to enforce these provisions. A summary of the report's findings is below and the full report is at [Attachment D](#).

A review of the Fair Work Ombudsman's compliance data shows that education and enforcement activities in the TCF industry have been relatively low. For example:

- a total of 2 165 inquiries were made through the Fair Work Infoline relating to TCF industry for the period from July 2012 to February 2014\*; and
- of the 24 378 complaints received in the 2012-13 financial year, 79 related to the TCF industry and in the financial year to 28 February 2014, 56 related to the TCF industry; and
- there were 5 747 internet visits in the 2012-13 financial year to the outworker specific section of the web site (see [www.fairwork.gov.au/employment/outworkers](http://www.fairwork.gov.au/employment/outworkers)).

The 56 complaints to the Fair Work Ombudsman from the TCF industry from 1 July 2013 to 28 February 2014 were resolved in the following ways:

- 29 were sustained and resolved (either through voluntary resolution, mediation or through other compliance tools)
- 15 of the allegations could not be sustained
- 9 were withdrawn by the complainant
- 3 were referred as they were not within the Fair Work Ombudsman's jurisdiction.

\*The Fair Work Ombudsman's reporting system does not isolate 'outworkers' in the TCF industry category.

Prior to the TCF Act commencement, the Fair Work Ombudsman undertook a targeted education and compliance campaign with Queensland clothing manufacturers in 2011-12, in partnership with the Queensland Department of Justice and Attorney-General (with whom the Fair Work Ombudsman was contracting out services). As a result of the campaign, seven compliance notices were issued against entities that engaged outworkers and failed to comply with obligations set out in Schedule F of the TCF Award – which includes requirements for written agreements, entitlement to the National Employment Standards, minimum hours of engagement, limits for work of weekends and public holidays, payment, stand down and dispute resolution. Three of these entities worked within the one supply chain. No other compliance activities have been undertaken to date.

The Fair Work Ombudsman and parallel state bodies have all reported difficulties in identifying outworkers. The low rate of complaints to the Fair Work Ombudsman cannot be interpreted as demonstrating low rates of issues in the sector as there may be other explanations, such as a low level of awareness among outworkers of the means to seek redress.

While the Fair Work Ombudsman has not received a high volume of complaints, it recognises the vulnerable status of outworkers. As a result, the Fair Work Ombudsman is planning a dedicated TCF Industry Education Campaign in the 2014-15 financial year. This will be followed up with a National Targeted Compliance Campaign in the TCF industry in 2015-16 financial year, which may include investigating compliance up the supply chain.

Section 3.2 discusses data relevant to the industry and finds that the hidden nature of outworkers and the disagreement on exactly how many outworkers operate in the TCF industry has meant that any numerical data on this group of workers must be regarded with caution. The key data sources

from the Australian Bureau of Statistics (ABS) and the Household, Income and Labour Dynamics in Australia (HILDA) represent small sample sizes and are unable to illustrate industry sub-sectors, specifically garment making, where the majority of outworkers work.

The available data does not provide evidence on whether the TCF Act provides an effective remedy for the stated problem or that outworkers are enjoying increased protections and have greater security. The lack of data specific to outworkers, their conditions of engagement and the broader situation of the garment-making sub sector means that the department is unable to independently measure the impact of the TCF Act with any degree of certainty. Consequently, to undertake the impact analysis in section 5 and regulatory cost analysis in section 6, the department must instead rely on qualitative data provided by stakeholders who have an interest in either the retention or repeal of the TCF Act.

The regulatory cost analysis shows a cost to business of \$4.52 million which is partially offset by a savings to individuals of \$1.74 million, resulting in a net cost to business of \$2.79 million per year. However, the department cautions that these costings should be treated as a guide only, noting that it was necessary for the department to make a number of assumptions for the purposes of the costings and that those assumptions rely on the limited information provided in submissions to the review.

While it appears there is some increase in regulatory burden to business as a result of the TCF Act, there are also some minor regulatory savings for the majority of outworkers.



## 1. PURPOSE OF THE REVIEW

A Regulatory Impact Statement was required at the time of the introduction of the Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011 (TCF Bill) but the then Prime Minister, the Hon. Julia Gillard, granted an exemption on the basis of exceptional circumstances. As such, the Office of Best Practice Regulation requires the department to complete a review of the changes in accordance with the Australian Government's best practice regulation requirements.

- The timing and focus of this review is set by the Australian Government Guide to Regulation. The Guide states that a review should be completed within two years after implementation. When the review commenced on 28 March 2014, the requirement at the time was for it to begin within one to two years after the announcement of the regulatory proposal and this requirement was met as the TCF Act commenced on 1 July 2012 (*Best Practice Regulation Handbook*, July 2013).

The review examines and reports on the regulatory impact of the Fair Work Act extending rights and protections to outworkers and providing for a mandatory code of practice to be issued as a result of making the TCF Act. The Minister for Employment's media release announcing the review and the Terms of Reference are at [Attachment A](#).

## 2. OBJECTIVE OF GOVERNMENT ACTION

### 2.1 *Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012*

The previous Government introduced the TCF Bill to Parliament on 24 November 2011 and it was passed by the Parliament on 22 March 2012. The legislation received Royal Assent on 15 April 2012.

The TCF Act commenced operation on 1 July 2012 and amended the Fair Work Act to:

- extend most provisions of the Fair Work Act to contract outworkers;
- enable outworkers to recover unpaid amounts up the supply chain; and
- extend right of entry rules that apply to suspected breaches affecting outworkers to the entire TCF industry.

The TCF Act also allows for a TCF code of practice to be issued. Neither the previous government nor the current government have sought to make such a code.

**Outworker:** An outworker is an employee or contractor who performs work at a private residence or other premises that would not conventionally be regarded as being business premises. Refer to the glossary for the full legal definition.  
*Note:* under the TCF Award, Schedule F, TCF outworkers cannot be casual employees.

The Second Reading Speech of the TCF Bill on 22 March 2012 described outworkers as predominately female, performing insecure work, sometimes with poor English language skills and little understanding of workplace laws. According to the speech, the objective of the TCF Bill was to

ensure TCF outworkers are engaged under secure, safe and fair systems of work by implementing nationally consistent rights to legal redress and protections. It notes that the purpose of extending the operation of most aspects of the Fair Work Act to TCF outworkers is to ensure that outworkers in the TCF industry have the same terms and conditions as employees regardless of an outworker's status as an employee or contractor. As a consequence, a person who directly engages a TCF outworker will be treated with employer status. This approach is broadly consistent with the approach taken in a number of states.

A person who directly engages a TCF outworker (refer to the glossary for the legal definition):  
- A **direct principal** makes an arrangement for work to be done with an outworker.  
-An **indirect principal** is a person higher in the supply chain who benefits from the results of that arrangement (e.g. by being supplied with T-Shirts made by the outworker).

The second reading speech to the TCF Bill further stated that provisions for the recovery of unpaid amounts up the supply chain exist in Victoria, New South Wales, Queensland and South Australia. The provisions in the Fair Work Act allow an outworker to recover unpaid amounts from those indirectly liable in the supply chain (for example, unpaid money could be recovered from a wholesaler who engaged a manufacturer that subcontracted to an outworker for making button holes). However, these provisions do not extend to a retailer where the retailer does not control the performance of the work.

Prior to the introduction of the TCF Act, the Fair Work Act recognised the importance of right of entry in helping to enforce the rights of outworkers and provided enhanced right of entry for suspected breaches relating to their terms and conditions. The second reading speech makes clear that the TCF Bill sought to ensure that protections apply not only to outworker arrangements but also to other exploitative practices in the industry, particularly sweatshops. For this reason the TCF Act extends the specific right of entry rules that apply to suspected breaches affecting outworkers (which allow for entry without 24 hours' notice) to the industry as a whole. This includes the authorised right of entry permit holder (usually a TCFUA official) to enter a private residence where TCF work is performed by outworkers. The TCF Act includes exemptions for businesses with appropriate accreditation from entry without 24 hours' notice to their primary place of business (appropriate accreditation refers to businesses that are accredited by their state code of practice or the national voluntary Homeworkers' Code of Practice).

Finally, the TCF Act allows an outworker code of practice to be issued which could impose reporting or other requirements on persons engaged in TCF manufacture to enhance the transparency of supply chains. The second reading speech sets out that provision for a code of practice would also assist in ensuring that no economic advantage can be gained by the avoidance of responsibility for a worker's entitlements.

## 2.2 Regulatory Framework

The following chart sets out the TCF outworker provisions of the regulatory framework, specifically those in the Fair Work Act (prior to the TCF Act amendments), the TCF Act and the TCF Award, Schedule F.

**Fair Work Act 2009 prior to the TCF Amendment Act 2012**

Employment	Recovery of Money	Right of Entry	Code of Practice
<p>The Act distinguishes between employee outworkers and contract outworkers (s 12). All outworkers perform work in residential premises or other unconventional business premises.</p> <p>Contract outworkers must be performing work in the TCF industry.</p> <p>Unlike contract outworkers, the FW Act applies to employee outworkers as national system employees.</p> <p>Modern awards may contain outworker terms that apply to contract outworkers.</p>	<p>The TCF Award allows for the recovery of unpaid remuneration (see next page).</p> <p>Most general protections under Part 3-1 apply to TCF contract outworkers, including protection from termination of an outworker's contract or altering an outworker's position to their disadvantage.</p>	<p>Union officials with a permit who are entitled to represent TCF outworkers may enter workplace upon suspected breach of a modern award or an agreement, including designated outworker terms (s 483A).</p> <p>There is no requirement for a member of the union to be working at the premises. No advance notice of entry required to investigate suspected breaches in relation to outworkers and officials may access records of non-union members.</p>	<p>No provision to establish a mandatory code of practice.</p> <p>The Homeworkers Code of Practice was established in 1996. The Code is a voluntary self-regulatory scheme that provides for the accreditation of parties along the garment manufacturing and retail chain.</p> <p>The aim of the Code is to make supply chains transparent so outworker exploitation can be identified and addressed.</p>

**Fair Work Act 2009 as amended by the TCF Amendment Act 2012**

Employment	Recovery of Money	Right of Entry	Code of Practice
<p>Outworkers are deemed to be employees (for most purposes) if they perform work directly or indirectly for an "outworker entity" (s 789BB). If the entity is a constitutional corporation the work must be for the business undertaking of the corporation.</p> <p>This gives the worker access to all provisions of the Fair Work Act, including the NES, with limited exceptions.</p>	<p>Recovery process is different to the award. Any Commonwealth outworker entity in the supply chain is liable. The onus is on entities served with a recovery claim to prove they are not liable to pay (Division 3 of Part 6-4A).</p> <p>A single constitutional corporation in the supply chain may bring the entire supply chain under the Fair Work Act.</p>	<p>The special outworker entry provisions are much broader in that they apply in relation to TCF Award workers (i.e. any worker covered by the Award). A permit holder may investigate a suspected contravention of the Act or a term of a Fair Work instrument that relates to a TCF award worker without providing 24 hours' notice (s 483A).</p> <p>The principal place of business of a person accredited by a prescribed accrediting body (currently Ethical Clothing Australia) may not be accessed without notice under this section.</p>	<p>While provisions for a mandatory code were made, one has not been prescribed (Div 4 of Part 6-4A).</p> <p>The FW Act provides that the matters that may be dealt with in a code include (but are not limited to) record keeping requirements, compliance reporting and matters relating to the operation and administration of the code. However under the Act, a code must not specify wages or other entitlements.</p>

**Textile, Clothing, Footwear and Associated Industries Award 2010 - Schedule F**

Schedule F to the TCF Award applies to both employee and contract outworkers and varies the terms of the award for outworkers engaged in the textile, clothing and footwear industry.

Employing or Contracting	Recovery of Money
<p>The award requires that a person engaging an outworker must provide wages and conditions no less favourable than those listed in Schedule F.</p> <p>These provisions include: a requirement for written agreements, entitlement to the NES, minimum hours of engagement, limits for work of weekends and public holidays, payment, stand down and dispute resolution.</p>	<p>The award provides a mechanism by which unpaid remuneration can be claimed directly from principals* and also from apparent principals** (who would not otherwise be liable).</p> <p>Unpaid remuneration includes any amount payable to the worker that has not been paid, including commissions, leave and other entitlements, as well as reimbursements and compensation for expenses incurred or losses sustained.</p>

\*A **principal** is an employer or an ‘outworker entity’ within the meaning of the FW Act. They are directly liable for unpaid remuneration.

\*\*An **apparent principal** is a principal the outworker *believes* they carried out work for. They can also be liable for unpaid remuneration.

Prior to making the TCF Act, the Fair Work Act provided a minimum safety net for employees and included some specific provisions for TCF outworkers, particularly in relation to outworker terms in modern awards and right of entry. The Fair Work Act applied to all employee outworkers and their employers and most general protections applied to contract outworkers, including protection from the termination of an outworker's contract or altering an outworker's position to their disadvantage.

State legislation containing provisions specific to outworkers continues to operate in New South Wales, Queensland, South Australia, Tasmania and Victoria. Of these states, all except for Victoria and South Australia also include provisions deeming contract outworkers to be employees for the purposes of employment law within their states. The same states, except Tasmania, provide outworkers with the capacity to pursue unpaid remuneration up the supply chain. New South Wales and South Australia have legislated for mandatory codes of practice for employment in the TCF industry. Victoria has not created a code and Queensland repealed its code of practice in November 2012.

In addition, a national voluntary code has been in place since 1996 and is authorised by the Australian Competition and Consumer Commission and administered by Ethical Clothing Australia.

Further detail about the regulatory framework is in [Attachment B](#).

### **3. IDENTIFYING THE PROBLEM**

#### **3.1 Previous reports and reviews into the TCF industry**

The second reading speech to the TCF Bill declared that the legislation was being introduced to “provide overdue and enhanced workplace protections for Australia’s most vulnerable and productive workers—in particular, outworkers” (House of Representatives, Second Reading Speech, Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2012, by the then Minister for Employment and Workplace Relations, the Hon. Bill Shorten MP, on 22 March 2012). It states that the then government was committed to developing arrangements to ensure all TCF outworkers are engaged in secure, safe and fair systems of work and that this would be achieved by implementing nationally consistent rights to legal redress and protection.

The second reading speech referred to the large number of studies, inquiries and reports published over the past 15 years that have inquired either primarily or in part into the TCF industry and have raised concerns about the situation of outworkers. In particular, the second reading speech refers to a report by the Brotherhood of St Laurence that found outworkers working in poor conditions and frequently underpaid, sometimes as little as \$2 or \$3 an hour. The second reading speech noted that a number of the other reports found that outworkers suffer from unique vulnerabilities as a result of their engagement in employment at non-business premises. For this reason, the then government recognised that outworkers require specific regulatory protections to avoid exploitation. (See [Attachment C](#) for a list of reports into the TCF industry from the past 19 years).

The Senate Education, Employment and Workplace Relations Legislation Committee Inquiry (Senate Inquiry) into the TCF Bill identified the following reports as notable examples of inquiries conducted into the TCF industry in previous years, prior to the TCF Bill’s development.

- The 2003 Productivity Commission *Review of TCF Assistance Inquiry Report* recognised the flexibility afforded to outworkers by the nature of their work and also identified the risk of exploitation. The Productivity Commission recommended encouraging compliance with the voluntary code as the means to best address the problem.
- The 2007 report by the Brotherhood of St Laurence into outworkers in the garment industry, *Ethical Threads: Corporate social responsibility in the Australian garment industry*, found limited awareness of legal obligations of businesses, particularly among small businesses, in part due to limited corporate capacity. It also found there was limited support for the voluntary code among businesses, mainly because of its close association with the TCFUA. The report recommended a range of awareness raising initiatives to address the issues.
- The 2008 report by Professor Roy Green, *Building Innovative Capability: Review of the Australian Textile, Clothing and Footwear Industries*, commissioned by the then Australian Department of Innovation, Industry, Science and Research, looked into ways of improving the viability of the Australian TCF industry. The report noted the growing consumer demand for products produced under ethical standards in relation to labour conditions, animal welfare and environmental sustainability. The report acknowledged the value of the voluntary code in supporting the viability of the industry in this regard. The report maintained that the Australian TCF industries have a promising future provided they can differentiate their products, combined with an emphasis on corporate responsibility in the application of labour and environmental standards. The report recommended a shift in the focus of the industry policy from sector-wide structural adjustment to the development of innovative and competitive capability at the enterprise level.

## 3.2 Data relevant to the industry

### 3.2.1 About workers

The scale of the problem remains difficult to determine due to the hidden nature of outworkers in the TCF industry. It is widely accepted that outworkers are predominantly female, sometimes with poor English language skills and with limited understanding of workplace laws. Consequently, obtaining reliable data on the outworker segment of the TCF sector is very difficult. Estimates of the number of outworkers in the TCF industry at the time the TCF Bill was introduced varied widely:

- In 1996, the Senate Economics Reference Committee report on *Outworkers in the Garment Industry* stated there were somewhere between 50 000 and 330 000 people in the TCF industry
- The Productivity Commission review of TCF assistance in 2003 stated that there was unlikely to be much above 25 000 outworkers in the TCF industry
- In 2007, the then Opposition industrial relations spokeswoman Julia Gillard stated the TCF industry comprised an estimated 300 000 workers, a figure used in the 1995 *The Hidden Cost of Fashion* report. (The 1995 TCFUA report was produced with the aid of grant funding under the Australian Department of Industrial Relations Workplace Reform Program. The TCFUA undertook an investigation of companies and a multi-media campaign to arrive at their figure of 329 000 outworkers. At the time, the TCFUA claimed that home based workers in the clothing industry outnumber factory based workers by about 14 to 1.)

- ABS Labour Force Data from August 2011 counted 42 000 workers in the TCF industry as a whole.

The TCF industry is diverse and covers a range of different products. As described by [ANZSIC Subdivision 13](#), the TCF industry covers all stages of production of textile and leather products, from processing of raw materials such as cotton, wool, leather and synthetics through to the production of final goods such as clothes, shoes, household linen, carpets and industrial textiles. Outworkers are predominantly found in the garment-making part of the industry, where they are engaged to complete short-run, quick turnaround or high end orders, because sourcing these types of jobs overseas is not practical.

The department has been able to source industry data from the ABS, but these data have clear limitations. For example, the Labour Force Survey data is collected monthly via household survey of approximately 52 000 individuals each month to generate employment estimates. This figure represents just 0.32 per cent of the population over 15 years. Surveys based on a sample, like the Labour Force Survey, are subject to sampling error which occurs because the data were obtained from only a small section rather than the entire population.

Attempts were made through engagement with the Fair Work Ombudsman and related state government bodies to obtain a picture of outworker experience through compliance exercises but these bodies also reported issues in obtaining detailed information about outworkers. A state official from the Office of the Employee Ombudsman South Australia advised that a compliance exercise was planned with Safe Work South Australia in 2012 but was aborted in December 2013 due to difficulties in locating TCF outworkers in South Australia.

In conducting this review, the department has used data on the TCF industry from the ABS, the Fair Work Ombudsman, the Department of Industry and the HILDA survey. Qualitative data have been sourced from submissions to the review, including those from the TFIA, TCFUA, Asian Women at Work, and individuals. Parties making submissions to the review were invited to provide quantitative data, however, little were provided.

### **3.2.2 TCF employment**

In the 10 years to 2011-12, employment within the entire TCF industry fell at an average annual rate of 7.0 per cent per year, reaching a low of 25 400 employees in August 2012. This marked a turning point in the series with the rate of decline being arrested in the December quarter 2012 (November survey), to grow at 4.3 per cent over the year, to average 32 100 employees during 2012-13 (Table 1). The rate of decline in industry value added also slowed during 2012-13 from its 10 year average, which indicates an improvement in industry performance over the period.

**Table 1: TCF employment and industry value added**

	Employment		Value added	
	Employees	Average annual growth rate (%)	Industry value added (\$million)	Average annual growth rate (%)
2001-02	62,100		9,700	
2011-12	30,000	-7.0	5,400	-5.7
2012-13	31,300	4.3	5,200	-3.7

Note: employee numbers and industry value added are fiscal year averages

Source: ABS Cat. No. 6291.0.55.003 Labour Force, Australia, Detailed, Quarterly, Feb 2014 and ABS Cat. No. 5206.0 Australian National Accounts: National Income, Expenditure and Product, March 2014

Table 2 provides a snapshot of employee earnings by method of setting pay. These data reveal that, similar to all industries, there is more than double the number of employees on individual arrangements than on award only payments. However, the gap between earnings levels for award only workers and those on individual arrangements is smaller for TCF industry workers than the average in all industries.

**Table 2: Worker average earnings by method of setting pay – TCF Industry**

2012	TCF Industry			All Industries		
	Number of employees ('000)	Average weekly ordinary time cash earnings (\$)	Average hourly ordinary time cash earnings (\$)	Number of employees ('000)	Average weekly ordinary time cash earnings (\$)	Average hourly ordinary time cash earnings (\$)
Award only	10.2*	513.10	19.10	1538	604.10	23.50
Individual arrangement (registered and unregistered)	20.8*	795.60	22.80	3221.5	1091.10	33
All methods of setting pay	30.9*	702.80	21.80	8637.3	980.80	32.20

Source: Survey of Employee Earnings and Hours, ABS Cat. No. 6306.0, May 2012, unpublished data.

Note: \* estimate has a relative standard error of 25% to 50% and should be used with caution.

Individual arrangement: includes individual contracts, letters of offer and common law contracts and may include contract outworkers and casual workers (however, the TCF Award, Schedule F does not allow for casual employment of outworkers).

The latest wave of the HILDA survey contains 46 responses from those employed within the TCF industry from a sample of about 41 500 workers. Of these, approximately 27 000 are employees and 14 500 are non-employees (contractors and employers), which aligns with the ABS Labour Force data. While this figure is generally representative of the industry as a whole, high levels of uncertainty surround the data due to the small sample size. The data become more unreliable and have to be treated with considerable caution when broken down into categories. As a result of this



uncertainty, the department was unable to use this sectoral information to conduct regulatory cost analysis of the impacts of the TCF Act.

The difficulties with using HILDA data to paint a scalable picture of the TCF industry in general and garment workers specifically include:

- The TCF industry encompasses more workplaces than just those engaged in clothing manufacture, so the industry sample could include, for example, workers in leather production or processing wool and synthetic materials, or carpet-making;
- Survey responses are completed by individuals, so non-English speaking workers may be less likely to participate; and
- The very small sample size (31 employees and 15 non-employees) combined with the description of the TCF industry means it is possible no outworkers are captured by these data.

### 3.2.3 About the industry and firms

In general, the economic performance of the TCF industry has been in decline in recent years. Until the end of 2011-12, investment, measured both in terms of Gross Fixed Capital Formation (GFCF) and the broader capital expenditure, Capex, have been trending down. However, in 2012-13 these measures showed significant improvement. Likewise, wages and salaries per employee and income per employee were also in decline before showing improvement during 2012-13.

Table 3 shows the performance of the TCF industry with reference to a number of selected variables. For additional detail, including a description for each variable, please see [Attachment E](#).

**Table 3: TCF industry performance**

Year	Share of purchases in total expenses	Labour cost share in total expenses	GFCF share of IVA	Investment rate (capex to value added)	Wages and salaries to sales and service income	Wages and salaries per employee	Sales and service income per person employed	Industry value added per person employed	Profit margin (OP to TO ration)
2000s	%	%	%	%	%	\$'000	\$'000	\$'000	%
08-09	53.5	21.4	8.3	10.1	18.6	43	203	60	4.3
09-10	53.7	21.4	7.4	11.6	17.6	41	206	65	8.4
10-11	49.4	22.2	4.5	5.1	18.2	39	188.2	64.6	10.8
11-12	52.1	22.3	5	6.7	18.4	41.3	197.8	65.5	9.1
12-13	54.1	22.4	5.9	8.3	18.6	43.9	208.6	67.9	8.6

Source: ABS Cat. No. 8155.0 - Australian Industry, 2012-13

IVA GFCF to IVA is: Gross Fixed Capital Formation to Industry Value Added, and Investment rate (capex to value added)

OP to TO ratio is: Operating profit before tax to total income ratio

The figures are calculated from ABS estimation of totals and as a result would represent the performance of the average firm. Individual firm performance will vary.

Table 4 shows the survival rates of selected TCF businesses. What stands out in this table is the increase in the rate of exit for medium and large firms during 2012-13. At the end of 2012-13, there

were 170 fewer medium sized employers in the industry than there were at the beginning, a reduction of 45.1 per cent of the existing stock of firms. The exit of large firms was also stark, with five of the largest TCF manufacturers leaving the industry in Australia in 2012-13. According to the data, there were only eight large employers left in the industry at the end of 2012-13, down from 18 two years earlier.

**Table 4: TCF businesses in operation at the end of the financial year\*\***

Year (2000s)	Non-employing	%	1-19 employees	%	20-199 employees	%	200+ employees	%	Total	%
08-09	3264		3054		417		15		6750	
09-10	3437	5.3	2870	-6	366	-12.2	18	20	6691	-0.9
10-11	3250	-5.4	2775	-3.3	368	0.5	18	0	6411	-4.2
11-12	3049	-6.2	2603	-6.2	375	1.9	13	-27.8	6040	-5.8
12-13	2810	-7.8	2519	-3.2	206	-45.1	8	-38.5	5543	-8.2

Note: Selected TCF industries \*\* includes Clothing manufacturing, knitted product manufacturing and Cut and Sewn Textile Product Manufacturing

Source: ABS Cat. No. 8615.0 Counts of Australian Businesses, including Entries and Exits, Jun 2009 to Jun 2013

Generally, the data paints a picture of an industry in decline with low wages and low performance but a slightly higher number of employees in 2012-13 than 2011-12. There are 170 fewer medium size businesses at the end of the 2012-13 financial year as compared to five years earlier.

### 3.2.4 Conclusion

The problem that the TCF Act was intended to address, as set out in the Second Reading Speech, was the need to provide outworkers with enhanced protections from exploitation in the workplace and provide outworkers with access to nationally consistent legal redress where required.

The hidden nature of outworkers and the disagreement on exactly how many outworkers operate in the TCF industry has meant that any numerical data on this group of workers must be regarded with caution. The key data sources from ABS and HILDA represent small sample sizes and are unable to illustrate industry sub-sectors, specifically garment making, where the majority of outworkers work.

The available data does not provide evidence on whether the TCF Act provides an effective remedy for the stated problem or whether outworkers are enjoying increased protections and have greater security. The lack of data specific to outworkers, their conditions of engagement and the broader situation of the garment-making sub sector means that the department is unable to independently measure the impact of the TCF Act with any degree of certainty and must instead rely on qualitative data provided by stakeholders who have an interest in either the retention or repeal of the Act.

## 4. THE CASE FOR INTERVENTION

As already set out in section 3 of this report, the then government was committed to developing arrangements to ensure all TCF outworkers were engaged in secure, safe and fair systems of work by implementing nationally consistent rights to legal redress and enhanced protections for outworkers.

Following commencement of the specific provisions for outworkers in the Fair Work Act, a 2010 Post-implementation Review of the Australian Government Procurement Statement found that the effectiveness of self-regulation in the TCF industry was limited and ‘there is little trend evidence to indicate that the industry would have self-corrected or that the market would have solved the problem within a reasonable timeframe.’ (Post-Implementation Review of the Australian Government Procurement Statement - Textile, Clothing And Footwear Provisions, September 2012. The Procurement Statement required manufacturers tendering for Australian Government Supply contracts to be accredited (or achieving accreditation) with Ethical Clothing Australia).

### 4.1 Senate Inquiry

The Senate Inquiry into the TCF Bill argued that the TCF industry had a history of underpayment and exploitation:

*These inquiries and reports demonstrate the mistreatment and exploitation TCF outworkers have endured over a period of at least 15 years. The road to justice for these vulnerable workers has been long and the achievement of equity is well overdue. The optimism expressed for voluntary codes by the Productivity Commission and others has proven misplaced. There has been bipartisan support to improve working conditions for TCF outworkers, as evidenced in previous Senate Committee reports; however, to date these attempts have failed to deliver the fair and equitable work conditions to which TCF outworkers are entitled. (The Senate Education, Employment and Workplace Relations Legislation Committee Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011 inquiry, p.9).*

The Senate Committee supported the passage of the TCF Bill with amendments intended to:

- make the provisions deeming outworkers as employees apply more broadly; and
- include a process for the recovery of unpaid amounts from indirect principal businesses further up the supply chain.

A dissenting report from the Coalition Senators included recommendations that:

- consideration of the TCF Bill be delayed until the final report of the 2012 Review of the Fair Work Act (the 2012 Review did not make findings regarding the TCF Act’s operation for outworkers);
- the TCF Bill be amended to ensure it did not disadvantage genuine independent contractors; and
- a ‘no disadvantage test’ be included to ensure no worker was worse off as a result of its implementation.

The dissenting report concludes that the 'the Coalition in Government recognised the need for additional protections in the TCF industry and provided additional protections and safeguards – including additional powers to the union movement.' Ultimately however, the dissenting report concluded that the TCF Bill should not be passed as the government had failed to identify and present sufficient evidence and justification for the TCF Bill (the Senate Education, Employment and Workplace Relations Legislative Committee, *Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012*, February 2012).

## **4.2 Other policy options considered**

A Regulatory Impact Statement was not completed at the time the TCF Bill was introduced into the Parliament, so there is no information available about other policy options considered by the previous government.

# **5. IMPACT ANALYSIS**

## **5.1 Position of submissions to the review - summary**

Of the 51 submissions to the review, the majority (28) were from businesses of which just five were supportive of retaining the TCF Act. There were eight submissions from outworkers and another two submissions from employees. Of these, five supported and five opposed the TCF Act. There were two submissions from unions and one employer organisation that supported and opposed the TCF Act respectively. Three submissions from industry organisations opposed the TCF Act, and four worker support organisations were in favour. Finally, three submissions were from interested parties not directly involved in the TCF industry; all of which supported the TCF Act. A list of parties consulted and submissions made to the review is available at [Attachment F](#).

## **5.2 Impact on business**

The TCF Act operates across the industry, so any effect on competitiveness within Australia should be limited. However, businesses may choose to offshore their operations to countries with less robust regulations to gain a competitive edge in response to the ongoing regulatory requirements in Australia. Compliance is also an issue in the sector which may provide non-compliant businesses with a price advantage over businesses that comply with the legislation. This problem predates the operation of the TCF Act, as the TCF Award also specified minimum wages for all TCF employees from 2010.

The TCF Award, Schedule F, also includes the requirement that principals who engage outworkers must register with a Board of Reference at the Fair Work Commission. Since 1 July 2012, across four states, 61 principals registered with the board of reference, employing 105 outworkers between them. Current estimates of numbers of outworkers within the sector vary between 12 000 (estimated by the TFIA in consultations with the department) and 40 000 people (which assumes the trend in ABS Cat. No. 6291.0.55.003 Labour Force, Australia, Detailed, Quarterly, Feb noted at Table 1 continued into this year). Given that this represents 0.87 to 0.26 per cent of outworkers, this suggests compliance with this TCF Award requirement is very low.

During consultations, the TFCUA and the TFIA both recognised that there has been significant confusion among employers and some outworkers about obligations under the TCF Act and by reference, the TCF Award; however they provided different explanations as to the cause of the confusion. The uncertainty has meant that employers are reportedly unwilling to engage outworkers due to the doubt surrounding their obligations. Businesses report that they live in fear of inadvertently breaking confusing and unmanageable laws, in particular in relation to the supply chain where businesses are accountable for the actions of others that they have no knowledge of and no control over.

Nine confidential submissions from employers reported a decline in their business since the introduction of the TCF Act. Gouda Pty Ltd and another confidential submission from a business advised that the TCF Act had caused their business to close. Three confidential business submissions reported that businesses they provided work to had gone offshore and two outworkers complained that they no longer received enough work since the introduction of the TCF Act. Employers argue that the regulatory burden is affecting their ability to increase productivity and compete internationally and that greater flexibility in the business model is needed if the TCF industry is to survive in Australia. Furthermore, liability for the supply chain is also a risk which has caused businesses to close or be driven offshore to avoid their legislative obligations. This picture of the industry is supported by the data in Table 4 above which shows an increase in the rate of exit for medium and large firms from the TCF industry during 2012-13 financial year, coinciding with the commencement of the TCF Act.

Three confidential submissions from businesses reported specific reductions in business annual turnover and increased operational costs as a result of the TCF Act.

- A business reported that they had seven staff in 2009. Now they have 2-3 staff and business turnover has decreased 70 per cent. They have had difficulty understanding and completing the paperwork required under the TCF Act. They have reported losing work to China and Fiji.
- One business estimated that the extra paperwork they are now required to do amounts to between \$20 000 and \$30 000 in additional costs per year.
- Another business stated that the cost to manufacturing has increased between 10 to 25 per cent taking into account increased obligations.

A consistent issue raised in submissions including from the TFIA, the Australian Chamber of Commerce and Industry, Australian Industry Group, National Retail Association, Wilderness Wear, Gouda Pty Ltd and nine confidential business submissions, is that the TCF Act does not accommodate the nature of the TCF industry. The supply chain is complex because designers contract pattern making, dyeing, cutting, sewing to different individuals or use a manufacturer to coordinate the subcontracting of these tasks. The skill set required varies depending on the item. The seasonal peaks in work (e.g. swimwear or skiwear) means there is not consistent cash flow to employ all the workers needed to cover the range of skills required to complete work.

Another impact of the employment provision specifically raised by the TFIA and in five confidential business submissions and one confidential employee submission opposing the laws has been its

contribution to the deskilling of the fashion industry in Australia. Experienced makers, pressers, dyers, cutters and other skilled workers are leaving the industry because employers are unwilling to employ them, or they do not want to work as employees. These submissions argue that the TCF Act has had a negative impact on the industry and impeded new designers from establishing businesses in Australia.

### **5.2.1 Impact on business – Extension of most provisions of the Fair Work Act**

Data from the ABS indicate that the TCF industry has been in long term decline, affecting both industry value-added and employment. In 2001-02 gross value added within the industry was worth around \$9.7 billion in original terms. By 2011-12 it had fallen at an average annual rate of 6.1 per cent each year, to be worth a little over half its former value at \$5.4 billion, without taking into account the effects of inflation.

Over the same period, the number of employees within the sector fell by 7.2 per cent each year on average, from an average for the year of around 61 900 in 2001-02, down to an average of 29 200 in 2011-12, reaching an historic low of 25 400 in the June quarter 2012. Had this trend continued, the number of employees in the industry would have fallen to around 27 000 in 2012-13.

Instead, official figures show that the number of employees within the industry grew by 10 per cent to average 32 100 during the 2012-13 fiscal year (refer to Table 1 in section 3.2.2). These figures indicate that in the year after the legislation was introduced, employment in the TCF sector increased by 6 700, possibly driven by contract outworkers being reclassified as employees.

However, despite the apparent growth in the number of employees, growth in industry value-added remained flat, averaging \$5.2 billion for 2012-13 (*Labour Force, Australia, Detailed, Quarterly, Feb 2014* (Cat. No. 6291.0.55.003) (data cubes). Note that a 4-quarter rolling average has been used. *Australian National Accounts: National Income, Expenditure and Product, Mar 2014* (Cat. No. 5206.0).

Most of the submissions from business and employer organisations raised workforce inflexibility as a specific and ongoing problem (see submissions from the TFIA, Australian Chamber of Commerce and Industry, Australian Industry Group, Wilderness Wear, Lisa Baron Pty Ltd, Gouda Pty Ltd and 13 confidential submissions from businesses including one outworker, two contractors and two employees). Other negative impacts of the changed employment arrangements cited included:

- increasing regulatory burden (e.g. payroll tax, superannuation administration, redundancy, workers compensation cover and the associated paperwork);
- being limited to employing full and part-time outworkers restricts workforce flexibility and business response to the seasonal nature of clothing manufacture; and
- having to continually hire and fire workers (again with the associated paperwork) to ensure sufficient cash flow for their business in quiet periods and then not being able to find suitable workers when orders pick up again.

The department was provided with a breakdown of one employer's approach to employing outworkers under the TCF Act, which showed an increase in compliance costs:

***Excerpt from a confidential business submission: "Cost of employing a machinist who works from home"***

These calculations are based on a machinist employed part time over a period of 10 weeks working at approx. \$600.00 per week based on 24 hours per week and observing all relevant and required legislation:

1. Time for fashion business (employer) to drive to machinist home across the other side of Melbourne. While on site inspect premises and do a safety check **@3.5 hours**
2. Employer to create documentation as per legislation. Source Schedule F. Print all documentation, explain documentation and give rough synopsis of Schedule F **@2.0 hours**
3. Employer procure TFN declaration form and assist with completing this and submitting to ATO **@1.0 hour**
4. Employer to request and receive machinist's superannuation details. Register with said Super fund as an employer and do paperwork etc **@1.0 hour**
5. Ultimately the hourly rate paid to the machinist must reflect an acceptable making price so the employer then needs to work backwards and ensure that for example a skirt which should cost no more than \$25.00 to make is indeed being charged as approximately one hours wage (approx. \$25.00 per hour ) This is a very arduous process to calculate, ensuring that the wages paid reflect a reasonable price for making. This process over the course of a 10 week period amounts to at least 4 hours extra paper work **@4.0 hours**
6. Because the hourly wage must reflect a reasonable making price the wages paid which include superannuation, sick leave, compassionate leave and holiday pay require various calculations to be made to ensure that the base hourly rate paid must also allow for all other costs and NOT extra costs **@5.0 hours**
7. Then upon termination letters have to be typed, employee meeting set up, ATO advised of termination, Super fund advised of termination **@1.5 hours**

If a business was to quantify these costs at the hourly rate based on an average manager salary of approx. \$50.00 per hour the cost of compliance for a 10 week tenure is 17.5 hours x \$50.00 = \$875.00. **This is approximately an increase in (garment making) cost of 14.5%."**

The view of the TFIA is that greater education about contractor and employee rights and increased compliance activities by the Fair Work Ombudsman is key to avoiding exploitation in the TCF industry. It was also suggested that contractors be allowed to work as independent contractors if they have undertaken a training course through TAFE for certification that they are aware of their rights and obligations working in the TCF industry.

### **5.2.2 Impact on business – Extension of right of entry rules**

Changing the right of entry conditions to encompass all workplaces (including homes) expanded access for the TCFUA across the TCF industry. The department did not receive any evidence about the number of entry visits that have occurred since the TCF Act's commencement from either the union or affected businesses, although the TCFUA asserted it "regularly exercises" the enhanced right of entry provisions. The lack of hard data makes it difficult to assess the cost to business through lost time and other factors such as benefits to workers.

Concern was raised in submissions about the expansion of powers of the TCFUA as a result of the TCF Act. Four confidential business submissions reported that outworkers are fearful of the TCFUA's ability to go into their homes and businesses and three confidential submissions from businesses say they are being treated like criminals, as they face audits several times a year. The experience reported by businesses has been of TCFUA officials using right of entry to enter retail shopfronts and threaten to damage their brand if they do not immediately speak to the union. They also reported right of entry being exercised without ever being advised of the nature of the suspected breach.

#### ***Enforcement of workplace relations laws in the TCF industry***

On 5 June 2014, the TCFUA announced initiation of proceedings in the Federal Court against 23 businesses for failing to uphold minimum standards in their supply chains.

The TCF Act provisions allow a permit holder to exercise right of entry to investigate a suspected contravention of the Fair Work Act or a term of a Fair Work instrument that relates to a TCF award worker without providing 24 hours' notice. However, Ethical Clothing Australia accredited businesses are entitled to 24 hours' notice by a permit holder before exercising right of entry to their primary business premises. Between the 2008-09 and 2012-13 financial year approximately 92 businesses were accredited by Ethical Clothing Australia (Ethical Clothing Australia's website indicates that as at 14 March 2014, there are 89 accredited brands). A small number of submissions indicated that right of entry changes influenced them to seek accreditation with Ethical Clothing Australia, which is an additional business cost. However, Ethical Clothing Australia's report to the department for July-December 2013 does not support this being the reason for seeking accreditation. In the reporting period, 13 new businesses were accredited and four applied to begin the process. The report stated that '...there has been a drop in applications in the first six months as compared to previous years. Notably there were no applications from companies bidding for government TCF procurement contracts, which (have) traditionally been a major driver of applications' (Ethical Clothing Australia Half-Year Report June-Dec 2013, p.10). This suggests that the chief reason for businesses seeking Ethical Clothing Australia accreditation was to comply with the then Commonwealth Procurement Guidelines and not to achieve a right of entry exemption.

### **5.2.3 Impact on business – Recovery of unpaid amounts up the supply chain**

Employers submitted that recovery of money up the supply chain provision is a major disincentive to manufacturing clothes in Australia. However, the department does not have any evidence that the provisions in either the TCF Act or the TCF Award have been used to enforce recovery of money up the supply chain, although they may well act as a deterrent and encourage compliance (as detailed below).



There is significant confusion in the TCF industry about obligations under the TCF Act and TCF Award and there is regulatory overlap in some instances. Businesses were particularly critical of the supply chain record-keeping they were required to comply with under the TCF Award (Schedule F). Whether they were addressing legislation or modern award concerns, the consistent complaint from parties in TCF supply chains was that the legislation was ‘unworkable and unfair’.

It is difficult for the department to determine the overall impacts of the TCF Act on businesses, given the information provided to the review is anecdotal. Impacted businesses state they are suffering from a loss of flexibility, increased regulatory burden and the emotional burden of hiring and firing workers regularly. Cue Clothing Co. and four confidential submissions from businesses, all of which are accredited by Ethical Clothing Australia, claim that they have not felt an impact on their operations from the TCF Act and are pleased that other businesses in the sector are facing the same cost of compliance with the minimum legal standards.

#### **5.2.4 Impact on business – Code of practice**

A mandatory code of practice has not been created under the TCF Act, so an analysis of the impact cannot be undertaken. Although the TCF Act includes the provision to create a mandatory national code of practice, the previous government did not implement one and the current Government has made no announcement of an intention to make a mandatory code. However, there has been a national voluntary code since 1997.

Businesses in New South Wales and South Australia are bound by state codes, although information from the New South Wales Government indicates that some businesses are unsure whether they need to comply with the state codes anymore, as there is federal legislation in place. Accreditation under the national voluntary code exempts businesses from complying with these state codes.

While most submissions did not address the matter of a code of practice, some businesses submissions, including from Cue Clothing Co., Dallrove Pty Ltd, Chung Tin Pty Ltd, Mr K Pty Ltd, another confidential business and the Committee to Protect Vietnamese Workers expressed support for a mandatory code of practice based on the South Australian or New South Wales codes. Some also noted that they were already compliant with the relevant code and did not consider it a significant administrative burden but rather that it provides the company with significant benefits in marketing and competitive advantage. They urge introduction of a mandatory code of practice, as non-compliant manufacturers are currently able to undercut legitimate and principled companies. The view of Chung Tin Pty Ltd and the Uniting Church is that a genuine level playing field can only be created with a nationally consistent system of minimum standards.

The department notes that additional regulation in the form of a mandatory code of practice may result in more complexity for employers and may undermine compliance.

### **5.3 Impact on outworkers**

The benefits of the TCF Act were reported in submissions from the TCFUA, worker support organisations such as Fair Wear Inc. and Committee to Protect Vietnamese Workers, and some individual submissions from businesses and outworkers. In their view, the TCF Act harmonised the laws, creating a nationally consistent minimum standard.

The TCFUA and other outworker representatives highlighted that the TCF Act has increased awareness and created a disincentive to businesses seeking to gain an advantage by avoiding their obligations. They submit that there is no independent research to indicate that the nature of the TCF industry has changed to such an extent that there is no longer need for the TCF Act.

Supporters of the amendments, including, the TCFUA, Office of the Employee Ombudsman South Australia, Mr K Pty Ltd, Dallrove Pty Ltd and Cue Clothing Co., refute arguments that the TCF Act has resulted in increased costs for businesses. They argue the laws have created a genuine level playing field with all businesses expected to comply with laws that existed prior to the TCF Act. Any nexus between the commencement of the TCF Act and the contraction of manufacturing in Australia is dismissed as overly simplistic.

The Law Society of New South Wales considers there is no additional regulatory impact for entities that engage TCF outworkers in New South Wales, as legislation in that state already deems outworkers to be employees, establishes a code and allows TCF outworkers to recover unpaid amounts up the supply chain.

### **5.3.1 Impact on workers – Extension of most provisions of the Fair Work Act**

There is some evidence to suggest that the combination of the TCF Award and the TCF Act has resulted in more parties in the TCF supply chain being aware of their obligations and providing TCF outworkers with their award entitlements. For example, the TCFUA has noted ‘a modest but appreciable improvement’ in conditions for outworkers since the TCF Act’s introduction.

According to the TCFUA and Fair Work Inc. submissions, the provisions deeming outworkers to be employees removed residual ambiguity as to employment status regardless of the place of work and took away key incentives for sham contracting. As a result, the TCFUA and worker support organisations, including Fair Wear Inc., Fair Wear SA, Asian Women At Work and the Uniting Church, report that outworkers are increasingly receiving award wages, being paid superannuation and have access to annual leave. Table 1 registers a 10 per cent increase in the number of employees in the TCF industry, coinciding with the commencement of the TCF Act which may account for some of these reported increases in employee entitlements.

The legislation was initially passed to protect workers who are vulnerable, with limited English and no knowledge of Australian labour laws. Five confidential submissions from outworkers submitted that they are very pleased with the improvements in their working conditions, which they attribute to the protections provided to them under the TCF Act. This sentiment was also anecdotally reflected in case studies in submissions from the TCFUA and Asian Women At Work. All of these accounts highlighted interventions by the TCFUA or worker support organisation in bringing about these improvements. Outworkers report that they want to be employees to avoid the pitfalls of being contractors such as difficulty getting loans and invoices not being paid on time. Being deemed as employees has made claims for the correct payment of entitlements easier.

Other benefits to workers mentioned in submissions from outworkers and worker support organisations (some of which incorporated outworker case studies) included:

- receiving equivalent money for many less hours work because they were paid the award rate, not an insufficient piece rate (two outworker submissions, six outworker case studies and three worker support organisation submissions);
- having access to paid leave, especially annual leave (two outworker submissions, four outworker case studies and one worker support organisation submission);
- reduced workplace injuries, because they were working a maximum of 38 hours per week (two outworker case studies);
- not having to worry about being without work, because they are paid weekly, not per piece (four outworker submissions and one outworker case study); and
- being able to get loans, because they were employees, not contractors (one outworker's submission).

Four outworker submissions and four case studies reported that these improvements occurred following TCFUA intervention. An additional six case studies in the TCFUA submission also reported improvements due to union compliance checking during Ethical Clothing Australia accreditation processes. Both scenarios suggest non-compliance by businesses continues to be an issue. Four worker support organisation submissions and three outworker submissions also reported instances of outworkers being still unsure whether they were employees or contractors, being asked to register for an ABN or being told the fashion houses will move offshore if they asked for more money.

The department received two confidential submissions from outworkers opposed to the legislation, as well as from five businesses who specifically mentioned difficulties in engaging outworkers as employees. Both outworkers reported being unhappy about losing flexibility in working hours and the impact this has had on juggling caring responsibilities. One outworker said "If I work from home I am now deemed to be an outworker and the companies that I work for must employ me for a minimum of ten hours a week. ... I could be working for 10 companies at once – I do not have 100 hours in the week. Someone might need a pattern that takes only 3 hours. I will miss out on small jobs."

Both outworkers also reported that they are now making less money as employees than they did as contractors. Data in Table 2 of this review shows that payments to employees on individual arrangements are, on average, higher than those on award only pay. One worker cited difficulties with their inability to claim business expense tax-deductions and the complexity of their personal taxation PAYG deductions, as they now had more than one employer. In consultation, one employer reported that some outworkers are working from home for cash to avoid the TCFUA.

Submissions from the outworkers and businesses (two were run by former outworkers) argued that treating all outworkers in the sector as vulnerable does not account for a non-vulnerable worker's needs or those with highly specialised skills who want to freelance. One submission said "Enjoying the benefits and freedoms associated with running my own business I was able to negotiate fair prices and could turn down work at any time without it affecting my professional relationships."

Several employer submissions highlighted that the changeover to employee status is causing some workers to leave the sector entirely. “My skilled workers refuse and are unwilling to become my employees because they earn more money as a subcontractor....Because they don’t want to be employed by me they are choosing to not work at all. I then cannot rely on skilled machinists to be available to complete varying tasks. I am losing skilled machinists and I’m losing the variety of workers that I need to operate my business.” Gouda Pty Ltd specified the reason their business closed was because they could not find any homeworkers with the required skills who would agree to be engaged as employees, so making garments was impossible.

### **5.3.2 Impact on workers – Extension of right of entry rules**

The TCFUA submitted that the extended right of entry provisions increase their success in exposing sham contracting and encourage compliance from entered businesses. Submissions in support from the TCFUA, Fair Wear Inc. and Asian Women At Work argue that right of entry provisions have bolstered compliance and are essential to respond to the exploitation and powerlessness experienced in this sector and ensure employers are acting lawfully. The TCFUA report that, prior to the TCF Act, they could not investigate a breach in relation to wages and entitlements for contractor outworkers. Furthermore, the TCFUA submitted that the requirement to provide 24 hours’ notice before entering a suspected sweatshop gave owners time to hinder or delay access and in some instances intimidate employees against speaking to the union, remove employees or vacate the premises entirely.

### **5.3.3 Impact on workers – Recovery of unpaid amounts up the supply chain**

As discussed above, no evidence of recovery activity was provided to the review, either anecdotally or through the provisions of numbers of successful claims. In its submission, the TCFUA stated that the existence of the laws meant that business owners were more aware of outworker rights and entitlements. As a result, if the union brought issues of underpayment to brands or retailers, these were more likely to exert pressure on the directly liable party to meet their obligations.

Industry organisations report that some retailers and fashion houses can have 400-500 participants in their supply chain, so strong legal protections are required to ensure exploitation is eliminated. The TCFUA indicated that its compliance activities usually take place over the course of several months as they work with businesses to improve their practices. The union, however, could not provide data on the number of right of entry visits they undertook, how many Ethical Clothing Australia compliance checks were undertaken or the number of sweatshops that were uncovered through their activities.

### **5.3.4 Impact on workers – code of practice**

Submissions from the TCFUA, many outworkers and other representative organisations call for the full implementation of the TCF Act through the creation of a national mandatory code of practice, which they argue will improve conditions for outworkers by further enhancing supply chain transparency and reducing complexity for businesses that work across various Australian jurisdictions.

The TCFUA argues that the intent of the TCF Act will only be fully implemented and effective once a mandatory code of practice is introduced, as many of the issues relate to issues of transparency of business practices and compliance with the existing laws, in particular Schedule F of the TCF Award. Submissions from Chung Tin Pty Ltd, Mr K Pty Ltd, Dallrove Pty Ltd and another confidential submission from a business supported the implementation of a mandatory code of practice modelled on the New South Wales or South Australian codes as it would create a genuine level playing field for businesses to operate. A contractor opposed the implementation of a code of practice claiming that the industrial relations system is already too complicated. While the experience of Gouda Pty Ltd is that 60 per cent of business went offshore following the Ethical Clothing Australia accreditation process. Other businesses and workers did not comment on the merits or otherwise of a mandatory code of practice.

#### **5.4 Impact on the government**

The impacts on the government relates to the cost of compliance activities conducted by the Fair Work Ombudsman. The foreword sets out the outworker specific compliance activities undertaken and planned by the Fair Work Ombudsman. In the case of outworkers, compliance activities are high cost due to the challenges in identifying outworkers and results in limited benefit to the government in terms of increased tax revenue.

#### **5.5 Impact on the economy**

The economic impacts arise from the contraction of the Australian manufacturing industry. Section 3.2.3 of this review discusses the rate of exit of TCF businesses from the industry, in particular the rate of exit of medium and large sized employers in the industry. Section 5.2 of this review discusses the impact of the TCF Act on businesses, including through offshoring of TCF manufacturing and the decline in business within the Australian TCF industry.

The Australian Chamber of Commerce and Industry, the Australian Industry Group, the National Retail Association, along with seven confidential business submissions, submitted that the TCF Act is contributing to the decline and offshoring of TCF business and as a consequence has reduced the employment opportunities in the industry. A further ten confidential businesses submissions raised concerns about decline in the industry. Gouda Pty Ltd reported a loss of 60 per cent of their major clients who moved their operations offshore. Two confidential business submissions reported a 60 per cent downturn in business as a result of the TCF Act. A further confidential business submission reported that their businesses turnover had reduced by 70 per cent. They also reported that they had reduced their employee numbers from 7 to 2-3 since 2009. Three other confidential business submissions reported reductions in employee numbers following the commencement of the TCF Act; one reported a reduction of 20 employees to 10, another reported 50 employees reducing to 30 and another reported shrinking from 200 employees prior to 2008 to none in 2014.

As TCF businesses move their operations offshore, this has a flow on cost to jobs among those directly and indirectly employed in these businesses and their supply chain.

## 6. REGULATORY COST ANALYSIS

As discussed in sections 3 and 5 of the review, there are limited data on the TCF industry, making it challenging to conduct a meaningful regulatory cost analysis. As a result, the department has again had to rely on anecdotes from submissions to the review in order to form a view on the operation to the TCF industry and the potential cost impact of the TCF Act.

For the purpose of the costing, the department has assumed that businesses have a constitutional corporation in their supply chain and are therefore all in scope of the TCF Act.

As a mandatory code of practice has not been created at this stage, there is no cost impact of this provision of the TCF Act.

### 6.1 Deeming of employees

As set out in section 2.1, the TCF Act requires that a person engaging an outworker must engage them as an employee, providing wages and conditions no less favourable than those in Schedule F of the TCF Award. Under Schedule F (F.3, F.4 and F.5), principals were also subject to several different record-keeping requirements which applied whether the outworker was engaged as a contractor or an employee. The department has not costed the administrative time taken to complete these requirements as it applies equally before and after the introduction of the TCF Act.

Data in section 3.2.2 of this review shows an additional 6 700 employees in the TCF industry immediately following the commencement of the TCF Act. These 6 700 workers previously absorbed their own administrative expenses but since the TCF Act these costs are now transferred to business. For the purpose of this review, the department has assumed that these workers have been impacted by the deeming arrangements.

In order to determine the cost to business in the sector of engaging these new workers as employees, the department used the material provided through consultation, specifically the confidential example of costs provided in section 5.2.1 of this review. In the example, a business claimed that the total amount of time for an employer to engage an outworker as an employee under the TCF Act is 17.5 hours, with a total cost of \$875 for each outworker.

However, a number of the tasks identified appear to be requirements of Schedule F of the TCF Award, which have not changed with the TCF Act, including the documentation requirements and the process for calculating acceptable prices were requirements under schedule F, which applied to engaging an outworker as an employee or a contractor. This is not a new cost as a result of the TCF Act. This leaves the Work Health and Safety (WHS) assessment and the administrative tasks for engaging and terminating employees, which is a total of 7 hours of additional work per employee.

We assume that this additional 7 hours of work is carried out by a manager at a rate of \$48.26 (\$41.60 per hour plus 16 per cent on-cost), which is consistent with the hourly rate of \$50 identified in the business cost example.

**Time estimates associated with Deeming of Employees**

	First Engagement	Subsequent engagements over the year
Conducting WHS assessment of outworkers' premises (including travel time)	3 hours	1 hour
Completing Schedule F documentation: not costs as status quo	0 hours	0 hours
Administration associated with taking on new employee	2 hours	0.67 hours
Determining the required number of hours for the employee to complete the making task (using calculations made in Schedule F documentation), and calculating on-costs	0.5 hours	0.16 hours
Administration associated with terminating the employment relationship	1.5 hours	0.5 hours
<b>TOTAL</b>	<b>7 hours</b>	<b>2.33</b>

The department then assumes that most principals engaging outworkers are small businesses, as medium and large TCF businesses operate from business premises such as a factory and are therefore unlikely to engage outworkers.

According to our data, there are 2 519 small TCF businesses in 2012-13. As we have no information on principals engaging outworkers, we assume all 6 700 outworkers are engaged by businesses four times per year to assist with seasonal peaks in workload. We assume that the 6 700 outworkers were employed equally between the 2 519 small businesses, that equates to each businesses employing 2.7 outworkers.

For the first time each year that a business engages an outworker, we estimate it takes a manager (at a wage of \$48.26 per hour) the equivalent of seven hours of burden associated with deeming of employees.

$$\$48.26 \times 7 \text{ hrs} \times 6\,700 \text{ outworkers} = \$2,263,394.00$$

We have assumed that once principals have established relationships with outworkers, they are likely to re-engage the same few outworkers throughout the year. We assume that as principals have established relationships they would save a third of the time relative to the burden associated with the first engagement. Total time for subsequent engagements has therefore been calculated at 2.33 hours.

$\$48.26 \times 2.33 \text{ hrs} \times 6700 \times 3 \text{ engagements} = \$2,260,160.58$

**Total cost to small business is:  $\$2,263,394.00 + \$2,260,160.58 = \$4,523,554.58$**

As the business and not the outworker is now carrying out the administration associated with outwork, costs for the outworker are assumed to be reduced and there is a cost saving for this group. Costs associated with seeking work as a contractor or employee would be no different. Outworkers would still need to maintain their own WHS responsibilities. The main change for outworkers would be no longer issuing invoices for work.

As businesses are usually required under the TCF Award to provide no less than 15 hours of work to an outworker per week, we assume all outworkers work full time during periods of high demand for their labour and that there is not excessive overtime. We also assume that the same pattern of engagement has not changed, that is, that outworkers are engaged on average four times a year during peak work periods. Therefore, outworkers save on invoicing three businesses four times a year as required by the TCF Award. We assume it takes an outworker one hour to complete invoices for each business. This takes into account time spent keeping records of work for the purpose of invoicing, time spent chasing unpaid invoices and other costs associated with being an independent contractor. That equates to 6700 outworkers completing 12 hours of invoicing per year at the minimum hourly rate for a certificate III qualified outworkers of \$21.62 (18.64 per hour plus 16 per cent on-cost).

**$\$21.62 \times 12 \text{ hrs} \times 6700 = \$1,738,248.00$  in total savings to outworkers**

## **6.2 Cost of recovery of unpaid amounts up the supply chain**

As set out in section 2.1, prior to the TCF Act, the Fair Work Act was silent on recovery of money. However, workers covered by the TCF Award could access a mechanism by which unpaid remuneration can be claimed directly from principals and from apparent principals. The TCF Act brought all outworkers within scope of the TCF Award and therefore enabled all outworkers to recover money up the supply chain.

The following section sets out the estimated costs to business and savings for outworkers of the recovery provisions. However, for the purposes of the regulatory burden cost estimate table, the regulatory cost analysis of this provision is not included as it pertains to enforcement.



As outlined in section 5.2.3, the TCFUA advised in consultation that the provisions have enabled them to approach the apparent principal (usually the clothing label) for assistance in identifying the principal responsible for the underpayment. Once the principal is identified, the TCFUA reported that the principal generally remedies the outstanding employment entitlements or puts pressure on the relevant principal to pay. The cost of the supply chain provisions to the apparent principal would be the cost of one person identifying the contact details of the principal and advising them of an underpayment or other obligation has not been met. There is no cost to the principal for calculating and paying the entitlements already due to the employee.

The department also has very limited evidence about the frequency with which an apparent principal would be called on to undertake this task. However, the TCFUA claims that incidences of outworkers going unpaid are a widespread and persistent problem. According to the Fair Work Ombudsman data in the foreword to this review, there were 79 complaints in 2012-13 and 56 complaints in the 2013-14 financial year to 28 February 2014. Of the 56 complaints, a little over half (29) were sustained and resolved. It is reasonable to assume between March and the end of June 2014, a similar number of complaints were made as the previous financial year. Assuming all of the complaints are from outworkers relating to their employee entitlements, that is approximately 40 instances of an apparent principal being asked to provide contact details for a principal.

However, due to the prevalence of underreporting of incidences of entitlements not being met, the department assumes that the Fair Work Ombudsman is not the only avenue used by outworkers to redress underpayments. If we assume the organisations that assist outworkers support a number of them to follow up on their entitlements, we could assume this represents approximately 200 incidences of recovering unpaid amounts up the supply chain. We assume this takes a manager or equivalent at the apparent principal business at a rate of \$48.26 (\$41.60 plus 16 per cent on-cost) per hour, one hour to provide the contact details of the principal.

As set out in section 5.3.3, the provisions provide a saving to the TCFUA and outworkers as it is now easier to recover money. Previously, it may have taken two hours a week for six weeks to follow up on unpaid money with no guarantee of success and it may now take four hours in one week to liaise with the union or other support person to successfully secure payment.

### **6.3 Right of entry**

Prior to the TCF Act, under the Fair Work Act a permit holder was entitled to enter a workplace upon suspected breach of a modern award, agreement or designated outworker term without advanced notice. The TCF Act broadened the right of entry without notice to include any worker covered by the TCF Award in any workplace. The only exception applying to the principal place of business of a person accredited by Ethical Clothing Australia who is entitled to notice prior to right of entry being exercised.

As outlined in section 5.2.2, neither business nor the TCFUA provided data in relation to the cost of right of entry without notice. Right of entry is a normal business expense, although the TCF Act broadened the scope of those that would be entered without notice. However, the same record keeping and work health and safety obligations apply. Therefore, the TCF Act has not created any additional expense in relation to responding to right of entry.

There is potentially a saving to business, as they may no longer incur legal costs determining whether right of entry applies to them. Likewise, the TCFUA would experience a saving as they would no longer expend resources on preparing for and chasing sweatshops. However, these would be incidental savings and are not costed as these activities are not required by the legislation.

There is no cost or saving to outworkers as outworkers do not exercise right of entry.

#### Regulatory burden cost estimate – average annual compliance costs

	Business	Community Organisation	Individuals	Total Cost
Total by Sector	\$4.52 m	\$0 m	\$-1.74 m	\$2.79 m

The total cost-benefit of the TCF Act should be used as a guide only and be treated with caution. These calculations have been reached using limited information available to the department through the consultation process. As a result, the regulatory cost analysis is built around a number of assumptions which may not be reliable.

## 7. CONSULTATION

### 7.1 Consultation process

In March 2014, the Minister for Employment and the department wrote to TCF stakeholders, including employer and employee associations, businesses, industry bodies and state and territory governments to advise them of the consultation process for the review and to invite them to make submissions. A media release was issued and a short news item was published on the department's website advising the commencement of the review.

Senior workplace relations officials in the state and territory governments were also notified that the review of the TCF Act was commencing. Submissions were received from South Australia and New South Wales only.

The submission process was open for six weeks, closing on 14 May 2014.

A total of 51 submissions were received; of these, 29 asked to remain confidential. Department officials conducted follow up discussions with some parties to obtain further data. Refer to [Attachment F](#) for a list of stakeholders consulted and submissions received.

Submissions were received from a full range of stakeholders, including associations, industry bodies, businesses and some outworkers. There were fewer submissions from outworkers, which was expected due to the hidden nature of this workforce. However, a number of submissions included case studies of outworker experiences.

## 7.2 Views raised in consultation

The majority of submissions acknowledged that exploitation of workers is unacceptable and wished to ensure that the TCF industry was free of such practices. Three confidential submissions claimed that there was no evidence of exploitation in the TCF industry.

The submissions yielded little quantitative data in relation to the cost impact to businesses or numbers of TCF workers whose circumstances have been improved as a result of the TCF Act. Submissions relied heavily on anecdotal evidence, much of which did not distinguish between the historically prevalent view of the TCF industry and any changes since the commencement of the TCF Act. Furthermore, many did not distinguish between the effects of the TCF Act as distinct from the TCF Award. This made it difficult to gain a clear picture of the extent of the impact, if any, positive or negative, of the TCF Act.

A summary of the views put forward in submissions is provided in the foreword to this review. Further analysis of views in submissions is set out in the impact analysis of this review.

## 8. CONCLUSION

Undertaking a robust regulatory cost analysis of the TCF Act has not been possible as a result of limited reliable data on the TCF industry. In particular, the hidden nature of outworkers has meant the department has had to make a number of assumptions that are difficult to substantiate about the numbers of outworkers prior to 1 July 2012 and how their situation has changed since the implementation of the legislation. Consequently,, the assessment of the extent to which the TCF Act has been effective in achieving its objective and any net benefit of the regulation for the community relies heavily on the views put forward in submissions.

The analysis and consultation sections of this report highlight that there have been incremental improvements for outworkers' pay and conditions, usually coming to light and being resolved as a result of compliance checks; while businesses have experienced significant confusion regarding their obligations and they claim the regulatory burden is hindering productivity and the ability to compete internationally.

The TCF Act appears to have disadvantaged some independent contractors. Those outworkers preferring to operate as contractors state that the TCF Act has reduced their earning capacity, taken away their flexibility and treats them as vulnerable, rather than skilled workers. It has also reduced flexibility for manufacturers who rely on contractors to complete short runs and specialist tasks. On the other hand, The TCFUA believes there are no contractors in the industry and the TCF Act is necessary to deter sham contracting of outworkers in their homes or in sweatshops and is important for recognising outworkers' status as employees.

Non-compliance with workplace laws is still reported as the pervasive issue in the industry and complicated and confusing regulation does not appear to be proving effective in rectifying this according to submissions received. Consideration could be given to the potential of a code to provide a means of industry based regulation. However, the introduction of any mandatory code must focus on providing a mechanism for simplifying regulation in the industry. Consideration should also be given to the capacity of a code to carve out genuine contractors without reducing protections for employee outworkers.

Views put by proponents of the TCF Act consider it to have been effective in achieving its objectives and have called for it to remain in place. The department also finds that any reduction in instances of unpaid money and 'sweatshop' conditions is a net benefit to the community. While most parties acknowledge that there is a need to protect outworkers, the department highlights that consideration needs to be given to how this can be balanced with easing regulatory burdens to allow the industry to grow. As there are diverse views on the effectiveness of the TCF Act in protecting vulnerable outworkers, combined with the complex environment in which this segment of the industry operates, the department's recommendation is that the regulatory framework for the TCF industry remains in place and is reconsidered as part of any further reviews of the Fair Work framework.

In light of the concerns the department has identified in relation to the limited reliable data available about outworkers, it would be beneficial to work towards establishing an evidence base to improve the quality of any further analysis of the TCF Act and other regulations that apply to the TCF industry. To this end, the department recommends industry regulators establish a working group and invite interested parties to advise on an audit of available information that will assist in providing advice on development of an effective regulatory framework for the industry. The working group could look at ways to assist the Fair Work Ombudsman collect relevant information in preparation for its planned education and compliance activities in the TCF industry, to be undertaken during the 2014-15 and 2015-16 financial years.

Based on the information available and the short time that the TCF Act has been in place, it appears to have been positive for vulnerable workers. However, the department understands business concerns that the TCF Act appears to have impacted growth of the TCF sector and created some additional cost for their operations, resulting in some businesses going out of business or offshore. While not wanting to add to the regulatory burden of businesses, the department believes that the regulation should remain in place until a proper analysis of the whole framework is undertaken with a rigorous evidence base.

## GLOSSARY AND LIST OF ABBREVIATIONS

**ABS** – the Australian Bureau of Statistics

**Department** – Department of Employment, unless otherwise specified

**Directly and indirectly (in relation to TCF work)** – the Fair Work Act states that if there is a chain or series of two or more arrangements for the supply or production of goods produced by TCF work performed by a person (the worker), the following provisions have effect:

- (a) the work is taken to be performed directly for the person (the direct principal) who employed or engaged the worker (and the direct principal is taken to have arranged for the work to be performed directly for the direct principal);
- (b) the work is taken to be performed indirectly for each other person (an indirect principal) who is a party to any of the arrangements in the chain or series (and each indirect principal is taken to have arranged for the work to be performed indirectly for the indirect principal)

**Ethical Clothing Australia** – administers both the Homeworkers' Code of Practice accreditation scheme and the Ethical Clothing trademark that businesses can use following accreditation. Between 2008 and 2014, Ethical Clothing Australia received an annual grant of \$1 million from the Commonwealth. About \$400 000 per annum was passed on to the TCFUA to undertake compliance work.

**Fair Work Act** – the *Fair Work Act 2009*

**Fair Work Ombudsman** - is an agency, established by the Fair Work Act, responsible for education and enforcement of the Commonwealth workplace relations system

**Outworker/homeworker** – under section 12 of the Fair Work Act 2009, two different types of outworkers are recognised: employee outworkers and contract outworkers. **Outworker** means:

- a) an **employee** who, for the purpose of the business of his or her employer, performs work at residential premises or at other premises that would not conventionally be regarded as being business premises; or
- b) an **individual** who, for the purpose of a **contract** for the provision of services, performs work:
  - i. in the textile, clothing or footwear industry; and
  - ii. at residential premises or at other premises that would not conventionally be regarded as being business premises

**Outworker entity** – means any of the following entities, other than in the entity's capacity as a national system employer:

- (a) a constitutional corporation;
- (b) the Commonwealth;
- (c) a Commonwealth authority;
- (d) a body corporate incorporated in a Territory;
- (e) a person so far as:
  - (i) the person arranges for work to be performed for the person (either directly or indirectly); and
  - (ii) the work is of a kind that is often performed by outworkers; and
  - (iii) the arrangement is connected with a Territory

**Principal** – under schedule F, this is (a) an employer; or (b) an outworker entity within the meaning of the Fair Work Act

**Right of Entry** – the rights of officials of organisations who hold entry permits to enter premises for purposes related to their representative role under the Fair Work Act and under state and territory work health and safety laws

**Schedule F** – a schedule of the Textile, Clothing, Footwear and Associated Industries Award 2010, containing specific provisions for outworkers in that industry

**Sham contracting** – is a situation where a person working as an employee is told they are an independent contractor by employers seeking to avoid responsibility for paying legal entitlements to employees and who may be required to have an ABN and submit invoices

**Sweatshop** – from Macquarie Dictionary: a workshop, or the like, employing workers at low wages during overlong hours, under insanitary or otherwise unfavourable conditions

**TCF** – Textile, Clothing and Footwear

**TCF Act/TCF Amendments** – the *Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012*

**TCF Award** – the Textile, Clothing, Footwear and Associated Industries Award 2010

**TCF Bill** – the Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011

**TCF industry** – a subsection of the manufacturing industry, including all stages of production of textile and leather products, from processing of raw materials such as cotton, wool, leather and synthetics through to the production of final goods such as clothes, shoes, household linen, carpets and industrial textiles

**TCFUA** – the Textile, Clothing and Footwear Union of Australia

**TFIA** – the Council of Textile and Fashion Industries of Australia Limited

**Voluntary code** – refers to the national voluntary Homeworkers' Code of Practice, established in 1997, to ensure textile, clothing and footwear workers and homeworkers receive lawful pay and entitlements under the TCF Award and relevant legislation

## Attachments

**Attachment A** Announcement of the Post-implementation review

**Attachment B** Regulatory framework for TCF outworker prior to the TCF Act

**Attachment C** Studies, inquiries and reports published about the TCF industry

**Attachment D** *Compliance and Education Activities for Outworkers in the textile, Clothing and Footwear Industry: The Fair Work Ombudsman Experience*

**Attachment E** Performance measures for Australia's TCF industry

**Attachment F** Consultation

## Attachment A

### Announcement of the Post-implementation Review

#### Media Release, 28 March 2014

Minister for Employment, Senator Eric Abetz, announced the post-implementation review of the *Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012* on 28 March 2014.

The review is required as a Regulatory Impact Statement and was not undertaken by the former Labor Government when they introduced the Bill into the Parliament.

“This is an opportunity to ensure that the Act is effective and efficient – providing this dynamic sector both the required levels of protection for workers and a reasonable regulatory framework for business,” Senator Abetz said.

The Act extends the operation of most aspects of the Fair Work Act to textile, clothing and footwear contract outworkers, and includes a mechanism to enable outworkers to recover unpaid amounts up the supply chain.

The review of the Act that came into effect on 1 July 2012 will examine and report on the regulatory impact of the Fair Work Act extending rights and protections to outworkers and providing for a code to be issued.

#### Terms of reference for the Post-implementation Review

The *Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012* commenced operation on 1 July 2012 and amended the Fair Work Act 2009 (Fair Work Act) to:

- extend most provisions of the Fair Work Act to contract outworkers;
- enable outworkers to recover unpaid amounts up the supply chain;
- extend right of entry rules that apply to suspected breaches affecting outworkers; and
- allow for a textile clothing and footwear code to be issued.

A Regulation Impact Statement was not prepared for the legislation so the Department of Employment must conduct a Post-implementation Review of the changes in accordance with the Australian Government’s best practice regulation requirements.

The Post-implementation Review will examine and report on the regulatory impact of the Fair Work Act extending rights and protections to outworkers and providing for a code of practice to be issued.

The review will undertake this assessment on the basis of evidence, including:

- submissions from stakeholders affected by the amendments;
- consultations with key stakeholders; and
- relevant sources of data.



## Attachment B

### Regulatory framework for TCF outworkers prior to TCF Act

#### Fair Work Act 2009

The Fair Work Act provides a minimum safety net for workers in the national workplace relations system and includes some specific provisions for TCF outworkers particularly in relation to outworker terms in modern awards and right of entry. Prior to the TCF Act, the Fair Work Act applied to all employee outworkers and their employers and most general protections applied to contract outworkers, including protection from the termination of an outworker's contract or altering an outworker's position to their disadvantage.

The Fair Work Act included right of entry rules specifically for outworkers – both employees and contractor outworkers. A permit holder (usually a union official) could enter a workplace on the condition that there had been a suspected breach of a modern award, an agreement or another instrument with designated outworker terms without providing 24 hours' notice. The term must relate to or affect a TCF outworker whose industrial interests the permit holder was entitled to represent and who performed work on the premises. No advance notice of entry was required to enter most premises, and officials could access the records of non-union members.

With the introduction of the TCF Act all of these conditions remained in place, but some were extended or new provisions created.

#### Textile, Clothing, Footwear and Associated Industries Award 2010

The Fair Work Act also sets out the modern award terms relating to outworkers as follows:

##### **s.140 Outworker terms**

(1) A modern award may include either or both of the following:

(a) terms relating to the conditions under which an employer may employ employees who are outworkers;

(b) terms relating to the conditions under which an outworker entity may arrange for work to be performed for the entity (either directly or indirectly), if the work is of a kind that is often performed by outworkers.

Note: A person who is an employer may also be an outworker entity (see the definition of outworker entity in section 12).

(2) Without limiting subsection (1), terms referred to in that subsection may include terms relating to the pay or conditions of outworkers.

(3) The following terms of a modern award are outworker terms:

- (a) terms referred to in subsection (1);
- (b) terms that are incidental to terms referred to in subsection (1), included in the modern award under subsection 142(1);
- (c) machinery terms in relation to terms referred to in subsection (1), included in the modern award under subsection 142(2).<sup>1</sup>

In particular, a modern award can include terms relating to the conditions under which an employer may employ employees who are outworkers; and terms relating to the conditions under which an outworker entity may arrange for work to be performed for the entity (either directly or indirectly) by outworkers.

The Textile, Clothing, Footwear and Associated Industries Award 2010 (TCF Award), made under the Fair Work Act, commenced on 1 January 2010. The TCF Award establishes the minimum terms and conditions applicable to workers, including contract and employee outworkers in the textile, clothing and footwear industry.

Before the establishment of the TCF Award, these minimum terms and conditions of employment were established by legislation and State and Federal Awards covering particular sections of the industry (e.g. the Clothing Trades Award 1999 (Cth)). In the Federal jurisdiction, minimum terms and conditions were also provided by the *Workplace Relations Act 1996* and outworker terms have been allowable matters under legislation since 1997.

### **Two yearly review**

In the Fair Work Commission's decision for the TCF Award in the Two Yearly Review of Modern Awards, the Full Bench noted that:

*“Special provisions for outworkers have existed in federal awards for decades. The current scheme broadly owes its origins to a 1987 decision by Deputy President Riordan.”*

*“Deputy President Riordan was particularly concerned with the use of complex contractual arrangements in a way that facilitated widespread avoidance or evasion of duties and obligations imposed by the award. The Deputy President inserted a set of provisions specific to outworkers into the Clothing Trades Award 1982 which, in modified form, continues to exist until the creation of the modern award. These included provisions with regard to record keeping and specific enforcement mechanisms. They also included detailed provisions aimed at ensuring regularity of hours and minimum levels of income.”<sup>1</sup>*

Within the TCF Award, Schedule F sets out specific provisions dealing with the unique conditions of engagement of outworkers in the TCF industry. In summary Schedule F:

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<sup>1</sup> [2013] FWCFB 5729 [19-20]

- extends minimum wages and conditions for outworkers, such as an entitlement to the National Employment Standards, to contract outworkers;
- applies most terms of the award to outworkers as though they are an employee, whether or not the principal is an employer;
- provides for the recovery of unpaid remuneration against ‘principals’ and ‘apparent principals’;
- sets out record keeping requirements;
- sets the general requirements for engaging outworkers;
- limits the number and type of arrangements entered into with outworkers and requires records to be kept of the terms of those arrangements; and
- includes additional requirements for making arrangements with outworkers, such as information that must be provided to outworkers about their entitlements under the TCF Award.

Under the TCF Award, the principal-outworker relationship can be contractual or employer-employee. Regardless of the nature of the legal relationship, the award requires that the principal must provide minimum wages, apply the national employment standards to outworkers and must provide them with full time work or part time work, subject to certain conditions.

Schedule F also includes the requirement that a principal must register with the board of reference prior to entering into any arrangements with outworkers. The board of reference is maintained by the Fair Work Commission.<sup>2</sup>

### **State regulatory frameworks**

The TCF Act amendments prevail over state and territory laws to the extent that they are inconsistent with the Fair Work Act. Where the State laws are not inconsistent, both laws operate side by side. For example, state arrangements for the recovery of unpaid amounts that are able to operate concurrently with the Fair Work Act are not affected. State laws will also continue to operate in relation to outworkers and those that engage them where they fall outside the coverage of the provisions of the Fair Work Act, for example where there is no connection with a Commonwealth outworker entity or a constitutional corporation.

State legislation containing provisions specific to outworkers continues to operate in New South Wales, Queensland, South Australia, Tasmania and Victoria. Of these states, New South Wales, Queensland and Tasmania’s frameworks also include provisions deeming contract outworkers to be employees for the purposes of employment law within their states.

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<sup>2</sup> Principal registration lasts for 12 months and the board has discretion to determine any conditions attached to each registration period. Principals must, at the time of registration and on every anniversary, publish in a metropolitan newspaper details including the principal’s name, ABN and board of reference registration number and the location at which all relevant work records may be inspected by the TCFUA (unless an exemption is issued by the union). Principals must also make and retain a list of each outworker with whom it has given out work and the dates this occurred. A copy of the list is to be provided quarterly to the Fair Work Commission and the state branch of the TCFUA. Giving out work to more than 10 workers at any one time requires the consent of the TCFUA or the board of reference.

The same states, except Tasmania, provide outworkers with the capacity to pursue unpaid remuneration up the supply chain and New South Wales and South Australia have legislated for mandatory codes of practice for employment in the TCF industry. However, Victoria is yet to create a code and Queensland repealed its code of practice in November 2012.

Western Australia does not have any outworker-specific legislation and the territories are covered by the Fair Work Act. A summary of the legislative provisions in operation in each state is available at [Attachment B1](#).

### **The Homeworkers' Code of Practice and Ethical Clothing Australia**

The Homeworkers' Code of Practice (the code) is a voluntary code established in 1997 following a Senate Economics Reference Committee inquiry into outworkers in the garment industry<sup>3</sup>.

Ethical Clothing Australia administers both an accreditation scheme against the code and the Ethical Clothing trademark that accredited businesses can use following accreditation.

- The Australian Competition and Consumer Commission (ACCC) first authorised the code in 2000 and in 2013 re-authorised it until 2018. Authorisation is necessary to ensure the code's anti-competitive aspects are not inconsistent with provisions in the *Competition and Consumer Act 2010*.
- In 2013, the ACCC found some public detriment is likely to arise from increased business costs but these are outweighed by the benefits. According to the ACCC, the public benefits include providing businesses with a means to efficiently ensure that they and their supply chains are compliant with relevant Awards and workplace laws, and a means to efficiently signal this compliance. The ACCC also considered that public benefits are likely to arise from reduced incidence of unlawful treatment of workers<sup>4</sup>.

As well as the initial accreditation process, accredited businesses undergo annual compliance auditing (including of their outsourced supply chains) by the TCFUA, which relies on its existing powers under the Fair Work Act to enter businesses and access records.

As at 31 December 2013, there were approximately 85 manufacturers accredited under the Code, representing approximately 495 suppliers (includes factories, contractors and outworkers) in the TCF supply chain.

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<sup>3</sup> The terms of the code were negotiated between the Council of Textile and Fashion Industries of Australia (TFIA), the TCFUA, the Australian Industry Group, the NSW Business Chamber and the Australian Retailers' Association.

<sup>5</sup> See following link for more details - <http://registers.accc.gov.au/content/index.phtml/itemId/1103934/fromItemId/401858>.

**Extract from Ethical Clothing Australia Website**

Ethical Clothing Australia accreditation is a voluntary system designed to help businesses and designers navigate the various mandatory legal obligations. It is effectively the process of 'mapping' the applicant's supply chain and verifying that all workers within it are receiving their legal entitlements. It provides practical mechanisms, in the form of formal agreements, for the applicant business to stay in control and to ensure that it is able to set the conditions and arrangements throughout its supply chain. (Ethical Clothing Australia) accreditation has three core characteristics:

- a multi-stakeholder approach to provide balance
- an independent audit carried out annually to ensure ethical standards are being up kept
- a commitment to ensuring transparency throughout the supply chain.

## Attachment B1

### State Legislation provisions for TCF outworkers

	NSW	QLD	SA	VIC	TAS
Applicable legislation	<i>Industrial Relations Act 1996 (NSW)</i>	<i>Industrial Relations Act 1999 (Qld)</i>	<i>Fair Work Act 1994 (SA)</i>	<i>Outworkers (Improved Protection) Act 2003 (Vic)</i>	<i>The Industrial Relations Act 1984 (Tas)</i>
Deems outworkers to be employees	Yes	Yes	Yes  If covered by an outworker provision in an award or enterprise agreement.	Yes  For long service leave, WHS, public holidays; minimum entitlements apply 'as if' employees.	Yes
Provisions for recovery of unpaid remuneration up the supply chain	Yes  Outworker may claim unpaid remuneration from person they believe is their employer within six months.	Yes  Outworker may claim unpaid remuneration from person they believe is their employer within six months.	Yes  Outworker may claim unpaid remuneration from person they believe is their employer within six months.	Yes  Outworker may claim unpaid remuneration from person they believe is their employer within six months.	No  However, there is a capacity to recover money under general employment law.

	NSW	QLD	SA	VIC	TAS
Mandatory Code of Practice	<p>Yes</p> <p>The <i>Ethical Clothing Trades Extended Responsibility Scheme</i> puts obligations on retailers, suppliers and contractors to ensure supply chain transparency and appropriate conditions for outworkers.</p> <p>Stakeholders exempt from state code if accredited by Ethical Clothing Australia.</p>	<p>No</p> <p>Mandatory code of practice established in 2011, but repealed in November 2012. The Queensland Government cited other existing protections as reason for repeal without impacting negatively on outworkers.</p>	<p>Yes</p> <p>The <i>Clothing Outworker Code of Practice</i> obliges retailers, suppliers and contractors to make and supply records demonstrating how clothing is produced and supplied in South Australia.</p> <p>Stakeholders exempt from state code if accredited by Ethical Clothing Australia.</p>	<p>No</p> <p>However, the power to establish a code of practice exists.</p>	<p>No</p>
“Ethical Clothing” body	<p>Yes</p> <p>The Ethical Clothing Trades Council is made up of union, employer and outworker advocate members who monitor compliance and report to the Minister.</p>	<p>No</p>	<p>No</p>	<p>Yes</p> <p>The Ethical Clothing Trades Council has representatives from unions, employers and outworker advocates who monitor compliance with the Act.</p>	<p>No</p>

Note: the majority of outwork is based in Queensland, New South Wales and Victoria.

**WA** – no specific legislative provisions for TCF outworkers exist

**ACT/NT** – covered by the *Fair Work Act 2009*

## Attachment C

### Studies, inquiries and reports published about the TCF industry

- 1995 – Textile, Clothing and Footwear Union of Australia *The Hidden Cost of Fashion: Report on the National Outwork Information Campaign*
  - 1996 – Senate Economics References Committee report on *Outworkers in the Garment Industry*
  - 1998 – Senate Economics References Committee *Review of the Inquiry into outworkers in the garment industry*
  - 2001 – Cregan, C. *Home Sweat Home*
  - 2003 – Productivity Commission, *Review of TCF Assistance 2003*
  - 2004 – Ethical Clothing Trades Council, *Outworkers' Lawful Entitlements Compliance Report*
  - 2004 – Senate Economics Legislation Committee reports into the *Textile, Clothing and Footwear Strategic Investment Program Amendment (Post-2005 scheme) Bill 2004* and the *Customs Tariff Amendment (Textile, Clothing and Footwear Post-2005 Arrangements) Bill 2004*
  - 2006 – 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*
  - 2007 – Brotherhood of St Lawrence (Diviney, E and Lillywhite, S), *Ethical Threads: Corporate social responsibility in the Australian garment industry*
  - 2007 – Harpur, P. *Occupational Health and Safety Duties to Protect Outworkers: The Failure of Regulatory Intervention and Calls for Reform*
  - 2008 – Green, R. *Building Innovative Capability: Review of the Australian Textile, Clothing and Footwear Industries*
  - 2008 - Senate Employment, Workplace Relations and Education Legislation Committee report on the provisions of the *Workplace Relations Amendment (Transitional Provisions and Consequential Amendments) Bill 2008*
  - 2009 – Senate Standing Committee on Education, Employment and Workplace Relations report on the provisions of the *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009*
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## Attachment D



### Compliance and Education Activities for Outworkers in the Textile, Clothing and Footwear Industry

The Fair Work Ombudsman Experience

May 2014

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# Compliance and Education Activities for Outworkers in the Textile Clothing and Footwear Industry

## The Fair Work Ombudsman Experience

May 2014

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## Compliance and Education Activities for Outworkers in the Textile Clothing and Footwear Industry

### The Fair Work Ombudsman Experience

May 2014

#### **1 - Background**

The *Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012* (TCF Amendment Act) began operation on 1 July 2012 and made a number of amendments to the *Fair Work Act 2009*.

In addition to extending the definition of 'outworker' to include contract outworkers in the textile, clothing and footwear (TCF) industry, the TCF Amendment Act also inserted '**Part 6-4A - Special provisions about TCF outworkers**' into the *Fair Work Act 2009*.

Part 6-4A provides for contract outworkers in the TCF industry to be treated, in certain circumstances, as employees for the purposes of the *Fair Work Act 2009*. Part 6-4A also provides a mechanism to enable TCF outworkers, whether employees or contractors, to recover an unpaid amount from an entity further up the supply chain that is indirectly responsible for the work performed by the outworker. Part 6-4A also enables a TCF Outworker Code to be prescribed by regulation.

The TCF Amendment Act also extended the outworker-specific rules of union right of entry to the TCF industry more broadly and inserted a deeming provision concerning the supply chain in relation to goods produced by a person performing TCF work.

#### **2 - The FWO Experience**

The Fair Work Ombudsman is an agency, established by the *Fair Work Act 2009*, responsible for providing education, assistance and advice about the Commonwealth workplace relations system. The Fair Work Ombudsman is also responsible for impartially enforcing compliance with the Act and fair work instruments.

The Fair Work Ombudsman is committed to assisting all participants in TCF workplaces and the Agency recognises the industry as a vulnerable employee sector and an area which should be monitored by the Fair Work Ombudsman. In the Agency's experience, the TCF industry has a high proportion of female workers from diverse cultural backgrounds with limited English skills and limited understanding of workplace law.

Please find included in this report information which details the Fair Work Ombudsman's current and planned activities relating to:

- Education, advice and assistance provided to employers, employees, outworkers entities and organisations on the outworker provisions contained in the *Fair Work Act 2009*; and
- Compliance with the outworker provisions contained in the *Fair Work Act 2009* including the amendments made by the TCF Amendment Act



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While the Fair Work Ombudsman is committed to assisting all participants in TCF workplaces, this reports demonstrates that work in response to direct enquiries and complaints from this industry has comprised only a very small proportion of FWO activities.

## **3 – Education, Advice and Assistance**

### **3.1 Fair Work Ombudsman Tools and Resources for Outworkers**

The FWO's website at [www.fairwork.gov.au](http://www.fairwork.gov.au) provides a range of information, tools and resources designed to assist workplace participants understand rights and obligations under the *Fair Work Act 2009*.

The website has a dedicated section devoted to issues around the engagement and protection of 'Outworkers' at [www.fairwork.gov.au/employment/outworkers](http://www.fairwork.gov.au/employment/outworkers) which received **5747 visits** in the 2012-13 financial year. The section contains dedicated pages on 'Outworkers and award conditions', 'outworkers and enterprise agreement conditions', and 'Outworkers in the clothing, textile and footwear industry'. There is also a dedicated page on union right of entry to TCF industry workplaces ('Entering a textile, clothing or footwear industry workplace').

The Fair Work Ombudsman currently offers 10 in-language resources, predominantly in PDF, RTF and YouTube video formats, available in up to 28 different languages. These resources mostly contain information about workplace rights and obligations and how to get assistance. Some contain more specific information, such as translated copies of the Fair Work Information Statement, information for fruit and vegetable pickers and information for working parents.

Most of the resources are targeted directly at employees and/or employers who speak a first language other than English. Each of these resources is accessible through the FWO's language assistance page at [www.fairwork.gov.au/languages/language-assistance](http://www.fairwork.gov.au/languages/language-assistance) or the YouTube channel at [www.youtube.com/user/FairWorkGovAu](http://www.youtube.com/user/FairWorkGovAu).

The Fair Work Ombudsman also offers seven English-language resources targeted at migrant workers, in PDF, HTML and YouTube video formats.

### **3.2 - Planned Education Campaign in the TCF industry**

In addition to the Fair Work Ombudsman's compliance activities, the Agency also undertakes dedicated communication and education campaigns to promote awareness of workplace rights and responsibilities. Generally these education campaigns are focused on a particular sub-set of employers (based on geographic or industry specific information) or on employees who have vulnerabilities in the workplace.

The Fair Work Ombudsman has committed to delivering a TCF Industry Education Campaign to be run during the 2014-15 financial year. The campaign will:

- Build upon the FWO's existing suite of free online educational materials– with new materials targeted specifically at the TCF industry and outworkers in particular. Importantly, this process will build upon the FWO's existing suite of culturally and linguistically diverse (CALD)



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# Fair Work

## OMBUDSMAN

resources, including developing industry specific information in relevant community languages;

- Initiate a dedicated social media campaign designed to reach outworkers and their intermediaries to inform them about minimum rights and entitlements in the workplace; and
- Work with community organisations and the CALD community to raise awareness about workplace rights and responsibilities, and encourage outworkers and their employers to engage with the FWO for advice and assistance.

#### **4 – Compliance Activities**

##### **4.1 - Summary of High Level compliance data**

The Fair Work Ombudsman’s reporting systems do not specifically identify data on Fair Work Infoline inquiries, complaints and investigations concerning ‘outworkers’ in isolation. However, the Agency does collect data into complaints investigated and inquiries made relating to the broader TCF industry.

The Fair Work Ombudsman has recorded a total of **2165 inquiries** through the Fair Work Infoline relating to the Textile, Leather, Clothing and Footwear Manufacturing Industry for the period from July 2012 to February 2014.

Of the 24 378 workplace complaints the Fair Work Ombudsman received in the 2012-13 financial year, **79 complaints** related to the TCF industry.

In the current financial year, to 28 February 2014, the Fair Work Ombudsman has received **56 complaints** in the TCF industry.

Detailed complaints data on the TCF industry by financial year is set out in [Attachment A](#).

The Fair Work Ombudsman has not commenced any legal proceedings specifically concerning outworkers.

##### **4.2 - Fair Work Ombudsman Targeted Compliance Campaign: Queensland Clothing Manufacturing Audit Program 2011-12**

The FWO’s National Targeting Team undertakes a program of proactive education and compliance campaigns in specific industries and geographical locations.

Targeted campaigns are a mechanism for providing information, assistance and advice to workplace participants and include a comprehensive industry wide communication strategy. Such campaigns enable the Fair Work Ombudsman to work with industry bodies and employers to both promote and monitor compliance with the *Fair Work Act 2009* and fair work instruments, and to address issues in various industries or locations. Campaigns monitor compliance within a sample of the industry and deliberately work closely with employers to rectify any identified non-compliance with workplace laws



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The Fair Work Ombudsman launched the Queensland Clothing Manufacturing Audit Program 2011-12 (the QCMA program) in September 2011, in partnership with the Queensland state Department of Justice and Attorney-General with whom the Fair Work Ombudsman was contracting out services.

It followed 1010 education visits made by Queensland state inspectors to clothing retailers, suppliers and manufacturers earlier in 2011.

The aim of the QCMA program was to educate employers on the *Textile, Clothing and Footwear and Associated Industries Award 2010* (the TCF Modern Award) and assess compliance with workplace laws.

A further aim of the QCMA program was to obtain information on the prevalence of clothing industry outworkers in Queensland and to source information which might assist in planning a future national clothing outworker campaign.

In designing and executing the program, the FWO consulted the Queensland Working Women's Centre, Asian Women at Work, the Council of Textile and Fashion Industries of Australia and the Textile Clothing and Footwear Union of Australia.

As the TCF Amendment Act came into effect in 2012, Fair Work Inspectors were able to educate audit participants about the TCF amendments. However, they did not assess compliance with the legislative changes specifically.

- In April 2013, the Final Report of the QCMA program was published (included at Attachment B).
- Of the 171 businesses that were audited, 121 (71 per cent) were found to be compliant and 50 (29 per cent) were in contravention of workplace laws. The contraventions found included issues such as underpayment of wages and record keeping/pay slip errors. A total of \$50 526 was recovered for 84 employees.

While only a small number of the businesses audited were found to have engaged outworkers (11 business or 6 per cent of the total number), the majority of those were in contravention of workplace laws.

Seven of the eleven businesses (64 per cent) were found to have contravened Schedule F of the TCF Modern Award:

- Five businesses had not made records of the outworkers they engaged, the articles of clothing the outworkers made and the rates the outworkers had been paid.
- Two businesses had not registered as principals and had not made records specifying the details of their outworkers and the work that their outworkers performed.

As a result of the Queensland Clothing Manufacturing Audit, seven Compliance Notices were issued to entities which engaged outworkers and had failed to comply with Schedule F obligations. The compliance notices directed the entities to comply with schedule F of the TCF Modern Award. Three of the seven notices were issued to entities working within the one supply chain.

### 4.3 - Planned National Targeted Compliance Campaign in the TCF Industry

Utilising the information harnessed through the educative campaign described above, the FWO will also plan a National Targeted Compliance Campaign in the TCF industry in 2015 / 16

The Campaign will focus on regions with high proportions of TCF outworkers and will aim to promote fair and compliant workplaces. The campaign may involve various points of the supply-chain as part of its methodology.

### **5- Conclusion**

At all times, the Fair Work Ombudsman seeks to direct its resources to areas where regulation is most required and which add maximum public value. As the Fair Work Ombudsman has not identified any significant number of complaints or inquiries from outworkers, the Agency is yet to devote a significant amount of resources to activities regarding the outworker provisions contained in the *Fair Work Act 2009* and TCF Modern Award.

The Fair Work Ombudsman recognises, however, that the TCF industry is a vulnerable employee sector which warrants attention. The industry has a high proportion of female workers from diverse cultural backgrounds with limited English skills and, potentially, limited understanding of workplace law. Accordingly, the planned education and targeted compliance campaigns will be designed to target and assist this group in the most effective manner.

Information from the education and targeted compliance campaigns will be used to inform future Fair Work Ombudsman education and compliance activity in this industry.

**For questions regarding this report, please contact Mr Tom O'Shea, Fair Work Ombudsman Executive Director, on [tom.o'shea@fwo.gov.au](mailto:tom.o'shea@fwo.gov.au) or 03 9954 2639**

ANZSIC Subdivision, Group and Class	21 -								Total
	Under 21	25	26 - 30	31 - 40	41 - 50	51 - 60	61 - 70	No DOB	
<b>Complaint Investigation</b>	<b>8</b>	<b>26</b>	<b>19</b>	<b>26</b>	<b>51</b>	<b>70</b>	<b>25</b>	<b>13</b>	<b>238</b>
<b>Textile, Clothing and Footwear Manufacturing</b>	<b>8</b>	<b>26</b>	<b>19</b>	<b>26</b>	<b>51</b>	<b>70</b>	<b>25</b>	<b>13</b>	<b>238</b>
Clothing and Footwear Manufacturing	5	19	11	13	26	33	19	11	137
Clothing Manufacturing	5	18	10	12	24	31	15	11	126
Footwear Manufacturing		1	1	1	2	2	4		11
Knitted Product Manufacturing				3	1				4
Knitted Product Manufacturing				3	1				4
Textile Manufacturing	1			1		2	2		6
Natural Textile Manufacturing						2	1		3
Synthetic Textile Manufacturing	1			1					2
Wool Scouring							1		1
Textile Product Manufacturing	2	7	8	9	24	35	4	2	91
Cut and Sewn Textile Product Manufacturing	1	5	4	7	14	25	3	1	60
Rope, Cordage and Twine Manufacturing	1				1				2
Textile Finishing and Other Textile Product Manufacturing		1	4	2	7	7	1	1	23
Textile Floor Covering Manufacturing		1			2	3			6
<b>Targeted Audit</b>								<b>170</b>	<b>170</b>
<b>Textile, Clothing and Footwear Manufacturing</b>								<b>170</b>	<b>170</b>
Clothing and Footwear Manufacturing								164	164
Clothing Manufacturing								164	164
Knitted Product Manufacturing								1	1
Knitted Product Manufacturing								1	1
Textile Product Manufacturing								5	5
Cut and Sewn Textile Product Manufacturing								2	2
Textile Finishing and Other Textile Product Manufacturing								3	3





ANZSIC Subdivision, Group and Class	Under 21	21 - 25	26 - 30	31 - 40	41 - 50	51 - 60	61 - 70	No DOB	Total
<b>Targeted Educational Visit</b>								<b>2</b>	<b>2</b>
<b>Textile, Clothing and Footwear Manufacturing</b>								<b>2</b>	<b>2</b>
Clothing and Footwear Manufacturing								2	2
Clothing Manufacturing								2	2
<b>Grand Total</b>	<b>8</b>	<b>26</b>	<b>19</b>	<b>26</b>	<b>51</b>	<b>70</b>	<b>25</b>	<b>185</b>	<b>410</b>

# **Queensland Clothing Manufacturing Audit Program**

**2011-2012**

**Final report – April 2013**

A report by the Fair Work Ombudsman under the Fair Work Act 2009

Date of Publication - April 2013

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## Summary

In recent years the clothing manufacturing industry (the industry) has been subject to increased international competition and significant changes to workplace laws, including the introduction of the *Textile, Clothing and Footwear and Associated Industries Award 2010* (Modern Award).

Some industry workers are considered to be vulnerable and there have been allegations of exploitation. For these reasons, the Fair Work Ombudsman (FWO) considered it important to run a pilot audit program in the industry.

The aim of the program was to educate employers on the Modern Award and assess compliance with workplace laws. Further, to gain intelligence on the number of industry outworkers and source information to aid the planning of a future national clothing outworker campaign.

Of the 171 businesses audited, we found 121 (71%) were compliant and 50 (29%) were in contravention of workplace laws.

Of the businesses in contravention:

- 30 (60%) had underpayment contraventions
- 17 (34%) had record-keeping/pay slip contraventions
- 3 (6%) had both underpayment and record-keeping/pay slip contraventions
- \$50,526 was recovered for 84 employees

Only 11 (6%) of the businesses audited were found to have engaged outworkers, of which 7 (64%) had contravened the Modern Award. However we readily acknowledge that the actual number of Australian clothing manufacturing outworkers is unknown. The complex and unclear supply chain structures which exist mean that outworkers are sometimes hidden workers.

The program provided valuable insight into the industry. It also provided a greater awareness of the strategy FWO needs to design and deliver in a future clothing outworker campaign.

## Introduction

Since the 1970s, the clothing manufacturing industry has seen major changes through increased international competition, industry restructuring and changes to legislation including, more recently, the introduction of the *Fair Work Act 2009* (the Act), *Fair Work Regulations 2009* (the Regulations) and the Modern Award.

Industry workers are believed to be mainly female and many are from diverse cultural backgrounds with poor English skills and limited understanding of Australian workplace laws. The nature of the working conditions therefore makes them vulnerable to possible exploitation.

The FWO was concerned the level of non-compliance in the industry was not accurately represented by the number of complaints we receive and we had not undertaken a previous audit program/campaign in this industry. Moreover, we were aware Queensland state government inspectors had recently conducted over 1000 education visits to promote their Mandatory Code of Practice for Clothing Outworkers (later repealed on 9 November 2012). Finally, we sought to gain intelligence from the program that would help us shape a future national campaign.

Through the program we sought to determine the level of compliance with Commonwealth workplace relations laws within the industry and the extent to which outworkers form part of the workforce. We also sought to educate employers on the obligations of the Modern Award.

#### **What we did**

In mid-2011, we launched the program by writing to industry stakeholders to inform them about the program and to seek their help to promote it. Stakeholders included:

- the Textile, Clothing and Footwear Union of Australia (TCFUA)
- the Queensland Working Women's Service
- Asian Women at Work
- the Council of Textile and Fashion Industries (TFIA)
- Fairwear

In August 2011, we wrote to the 730 Queensland clothing manufacturing businesses listed on the Australian Business Register to notify them of the program and their selection for audit. The letter also detailed the type of records employers had to prepare for the assessment and mentioned that Inspectors may conduct a field visit during the assessment period.

The assessment undertaken included compliance with record-keeping, pay slip and hourly rate of pay obligations. Businesses were also required to supply details for any outworkers they engaged. Where the business engaged outworkers, Inspectors assessed if the business complied with Schedule F of the Modern Award (for details see the section below on 'Schedule F'). During the site visit, Inspectors provided further information on employer obligations.

Employers found to be compliant were notified of the outcome. Where employers were identified as potentially being in contravention, we sought further information and in some cases used our statutory powers to obtain additional documents. Where no or limited records were provided in relation to an outworker, we visited and spoke with the outworkers.

Where we identified a contravention, we detailed our findings in writing and requested the employer rectify the contravention. Employers with serious contraventions, such as the failure to meet the majority of the obligations imposed by Schedule F, were issued with a Compliance Notice.

#### **The Impact of Compliance Notices**

One of the enforcement tools introduced by the Fair Work Act 2009 was the power of Fair Work Inspectors to issue a 'Compliance Notice'.

Compliance notices are similar to the Improvement Notice used by OHS inspectorates in Australia. They may be issued where an inspector reasonably believes that a person has contravened 'an entitlement provision'. They may require a person to either take specified action to remedy the effects of the contravention, and/or produce reasonable evidence of the person's compliance with the notice within the time specified in the notice (often between 14 – 28 days).

In this audit program, Compliance Notices were issued for a contravention of Schedule F of the Modern Award.

Failure to comply with a Compliance Notice is a contravention of the civil remedy provisions of the Act. As a result the FWO may commence proceedings seeking remedies and penalties for the contravention of the entitlement provision and penalties for the failure to comply with the Compliance Notice.

At the time of the program, the maximum penalty for failure to comply with a Compliance Notice was \$6,600 for an individual and \$33, 000 for a body corporate.

For an example of a Compliance Notice – see Appendix A.

### **Australia's Clothing Manufacturing Industry**

The complexion of the industry has drastically changed since its beginnings in Australia.

In earlier years, it was a large industry that employed numerous factory workers, many of whom were migrant women, with minimal formal education. The Australian Government's trade policies shielded the industry from competing imports. It required overseas firms wanting to access the Australian market to set up manufacturing facilities in Australia (Weller 2007).

According to Weller, in the 1970s, the industry began to restructure amid concerns that Australia's economic growth was lagging behind other nations. By the late 1980s the tariff and quota provisions began to be phased out opening the industry to the global market and competition.

'The opening of markets to imports and the reduction of trade quotas and tariffs created the emergence of a business model based on outsourcing production through global supply chains that require low-cost and flexible labour' (Ramworth 2004, Brotherhood of St Laurence 2007).

With many businesses moving their manufacturing offshore, retailers purchasing a greater number of imported clothing and the impact of Australia's 1991-1993 recession, a number of clothing manufacturing businesses either restructured or went out of business.

In an attempt to reduce operating costs, some businesses contracted out their work to outworkers as opposed to employing workers. In 1986/87 it was estimated that there was 62,900 factory clothing workers. This estimate was reduced to 34,000 by September 1994 (Senate Economics Reference Committee, 1996) and it was clear outsourcing work had become common place.

### **Outworkers**

Clothing outworkers are individuals who sew, cut and make garments from their home or another premise which would not be considered a business premise. They may source work from various businesses and individuals within the industry, including manufacturers, suppliers and retailers. It is not unusual for clothing outworkers to also receive work from other outworkers, especially when they do not have the skills or equipment to complete all tasks required for the construction of a garment.

Outworkers have long featured in the Australian industry. However, as stated by Weller (2007), 'there were various attempts to outlaw it'.

In the 1990s, some redundant factory employees found work with overseas owned firms, working as outworkers.

Today, the actual number of Australian clothing manufacturing outworkers is unknown, as the supply chain structures which exist mean that outworkers are sometimes hidden workers.

#### Allegations of outworker exploitation

It is generally considered the characteristics of the working conditions of outworkers make them vulnerable to exploitation (Shorten, 2012). Indeed, the non-transparent, fragmented and complex supply chain structure means that some outworkers may not know who their employer is or of their workplace rights.

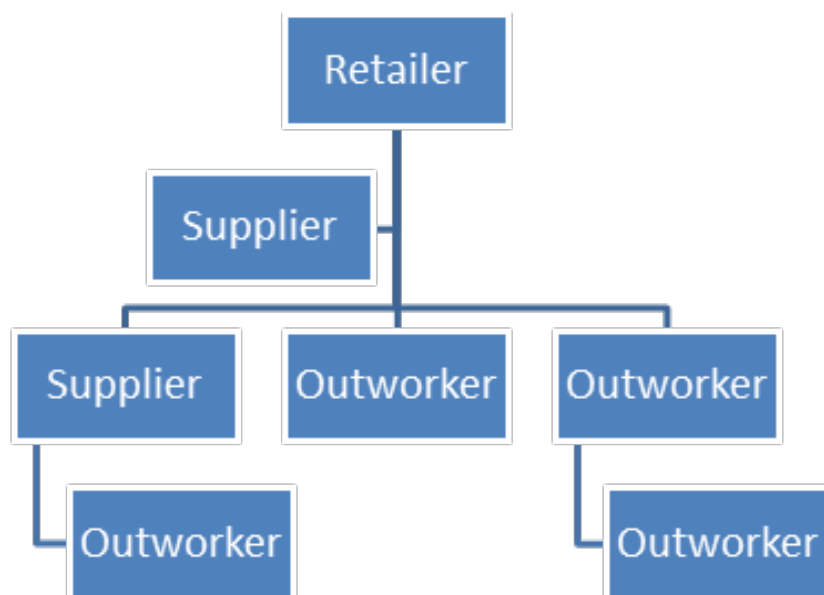
Research conducted by Christine Cregan (2001), found the average rate of pay of the outworkers who participated in her study, was \$3.60 per hour.

More recently, on 18 August 2011, Jack Morel of the Textile Clothing Footwear Union (TCFUA) appeared on the Australian Broadcasting Corporation's *7:30 Report* advising that some outworkers are being paid \$10 to \$11 per hour.

On the other hand there are some outworkers who claim that they are being paid well above the minimum entitlements and that their working arrangements allow them to work flexible hours, manage their own business and care for their young children (Institute of Public Affairs).

The FWO found limited information or research on the public record in relation to the industry.

As outworkers are typically located at the bottom of the supply chain (see diagram below) and pressures exists for low cost manufacturing, FWO is concerned that some outworkers aren't receiving their lawful entitlements.



As stated above, one of the reasons outworkers are considered vulnerable to exploitation is the structure and fragmentation of the supply chain which means some outworkers may not know who their employer is. For instance, it is not uncommon for delivery drivers to drop off and collect goods, acting as an intermediary between the employer and outworker. In these cases it would be difficult for the outworker to know who to approach if they wanted to query their entitlements.

FWO acknowledges that there may be outworkers who aren't willing to query their employment conditions either because they are not aware of their entitlements, speak limited English and/or fear they will lose orders. It is also FWO's experience that some workers from culturally and linguistically diverse backgrounds are reluctant to contact government departments based on their interactions with government in their country of origin.

Many manufacturers who produce fixed style garments moved overseas to take advantage of lower labour costs. Some of the work completed by Australian clothing outworkers is for local designers who have seasonal lines which require a short turnaround time to manufacture (Senate Economics Reference Paper 1996). Quite often, these lines can be detailed and require a considerable amount of work. 'The urgency of orders sometimes means that the outworker's family, even young children must give assistance' (International Employment Relations Association 2002). Outworkers, who participated in Christine Cregan's study, reported that due to the amount and fluctuation of work available, their power to negotiate pay had diminished (Brotherhood of St Laurence 2007).

Further, outworkers have also complained that they may not be paid for an order until several months later and even then, they may not receive their full entitlement if the supplier rejects their work (Senate Economics Reference Committee 1996).

It is understood, exploitation can also occur through contractors underquoting jobs and in turn outworkers not being paid correctly. Compounding the issue further is when the employer and the outworker have only minimal employment records such as a simple invoice or receipt. As will be detailed in this report, FWO's program found some businesses made and kept limited records making it a challenge for Fair Work Inspectors to assess compliance with workplace laws.

### **Minimum Entitlements**

In recent years changes to workplace relations legislation has seen two significant changes impact the industry; the *Fair Work (Textile, Clothing and Footwear) Amendment Act 2012* and the Modern Award.

#### **The Amendment Act**

On 15 April 2012, the *Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012* (Amendment Act) began operation. The Amendment Act extends most provisions of the *Fair Work Act 2009* to contract outworkers in the industry and deems them to be employees for the purposes of some parts of the *Fair Work Act*.

The Amendment Act also provides a mechanism to enable clothing outworkers to recover unpaid amounts, including from contractors along the supply chain. Further, it extends right of entry rules. As the changes introduced by the Amendment Act occurred during the course of the program, Inspectors were able to educate audit participants about these changes but they didn't assess compliance levels in relation to the changes introduced.

#### **The Modern Award**

Prior to the Modern Award taking effect on 1 January 2010, several pre modern awards provided the minimum entitlements for various industry workers across the nation.

The Modern Award aimed to create one award to cover the majority of industry workers and to provide those workers with minimum entitlements which were no less than what



they were currently receiving. Also, the Modern Award sought to provide extra safeguards to a group of workers considered to be especially vulnerable.

Specifically, the Modern Award covers;

4.1 'employers throughout Australia in the textile industry, bag making industry, button making industry and allied manufacturing and fabricating industries and their employees engaged in duties covered by the classifications in this award.

4.2 'all outworker entities who are covered by the terms of this award in respect to Schedule F – Outworker and Related Provisions.'

It provides specific employment terms and conditions and is the only modern award to contain outworker related provisions.

#### **The requirements of 'Schedule F' of the Modern Award**

Schedule F of the Modern Award imposes a number of obligations on principals. Principals, as per the Modern Award, are people or businesses that enter into arrangements with any person (legal or natural) to have work carried out for them. As well as being required to register with the Board of Reference, they also have other obligations.

Registration with the Board of Reference must be completed annually and businesses must keep a list of the businesses, contractors and/or individuals they have given work to in the previous 3 months. The lists need to be submitted to the Board of Reference within 7 days of the last working day of February, May, August and November. Principals cannot contract work to an unregistered principal.

Importantly, in addition to registering with the Board of Reference, a principal must obtain the consent from the Board of Reference or the TCFUA to make one or more arrangements covered by Schedule F, with more than 10 workers at any one time.

Schedule F also specifies minimum conditions for workers. For instance, a principal must apply the National Employment Standards (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.

In addition to the NES, Schedule F also provides for:

- Hours of work
- Work on weekends and public holidays
- Time standards and payment
- Stand down

For each arrangement, a principal is required to make and keep a written record which contains the:

- principal's name, address, ABN/ACN and/or registered business number
- principal's Board of Reference registration number
- name and address of the person to whom the arrangement applies
- address/es where work is to be performed
- time and date for commencement and completion of the work and
- number of garments, articles or materials of each type
- sewing time for the work required on each garment, article or material and
- price to be paid for each garment, article or material

- time and date for the garments to be provided, the time standard applied, the number of working hours, and hours and days within a week, that will be necessary to complete the work, and the amount to be paid to the worker, and
- a description of the work required and garments/articles/material to be worked on

A copy of a work record must be given to the person they have made the arrangement with prior to them commencing the work.

In this audit program we found five businesses that had not made records of the outworkers they engaged, the articles of clothing the outworkers worked on and the rates the outworkers had been paid. A further two businesses had not registered as principals as required by the Modern Award and had not made records specifying the details of their outworkers and the work that their outworkers performed.

#### **How we assessed rates of pay and determined levels of compliance**

A constant difficulty for a regulator such as FWO has been estimating how long it takes an outworker to make certain garments and whether the remuneration for that work meets the minimum pay rates.

In this audit program the lack or incompleteness of records by principals made the assessment of outworker wages difficult. Where we were able to contact the contractor/outworker<sup>5</sup> we asked about the items they worked on, the time spent and payment received. Using this information we then conducted a basic assessment.

The many variables which impact on the amount of time it takes to make a garment have been highlighted by industry players and, over time, various 'time standard' reports have been developed to assist manufacturers price labour. Some variables include the complexity of the work, fabric type, the skill level of the worker, machinery used and whether the worker needs to perform tasks, such as sorting prior to making the garment.

During the program, we engaged industry experts Meriel Chamberlin, Jaimie Langton and Fleur Richardson to jointly undertake an independent review of time standards on behalf of FWO. The report, '*A TCF Industry Independent Review of Standard Time Information and Variables*' (the Review) provides details of the time involved to complete each component in the manufacture of a garment.

The Review highlighted the fact that it is not possible to establish a definite standard time for the manufacture of any garment, without specifying every component, construction method, machine used and production. Consequently, each garment must be assessed individually to determine its unique 'standard minutes.'

The Review referred to the methodology contained in a paper published by Ethical Clothing Australia, entitled, '*Guide to the Textile, Clothing, Footwear and Associated Industries Award- Helping you meet your legal obligations*' (the Guide)'.

To derive a worker's remuneration the Guide explains an employer, first needs to classify the worker at the correct award skill level, determine the wage rate for the particular skill level and then work out the ordinary minute rate.

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<sup>5</sup> These terms are often used interchangeably in the sector

Next, they need to calculate the minutes taken to perform the work based on the 'time standard', recording any work performed on Saturday, Sunday, public holidays and work performed in excess of the number of weekly hours.

Other factors employers need to consider are whether there is a public holiday during the time they have engaged a worker, and if the outworker does not work on that day, they are to be paid the equivalent of one day's pay with pro-rata payments for part-time workers. Using the above formula, employers are able to calculate a worker's remuneration.

While Fair Work Inspectors were able to use the Review and the Guide to calculate a worker's remuneration, the challenges of determining rates of pay were made difficult by poor record-keeping practices.

For instance, when the Fair Work Inspectors were presented with copies of invoices by contractors/outworkers, it was difficult for them to determine either how many hours it had taken to produce certain garments or how many workers had been engaged in their production.

The case study below highlights how several workers undertake various tasks to complete one garment. It can therefore be difficult for a Fair Work Inspector to determine who is responsible for what part of the production of a garment.

The lack of documentation, such as failure to provide payslips, meant the Fair Work Inspector was unable to determine with any certainty the number of hours worked, the worker's status of employment or classification level.

This audit therefore confirmed the rationale behind the insertion of provisions such as Schedule F in the Modern Award.

#### **Case Study: Contravention chain reaction**

*ABCD Pty Ltd\* is a large clothing company which manufactures sport uniforms, employs over 70 employees and contracts various parts of the manufacturing process to other entities.*

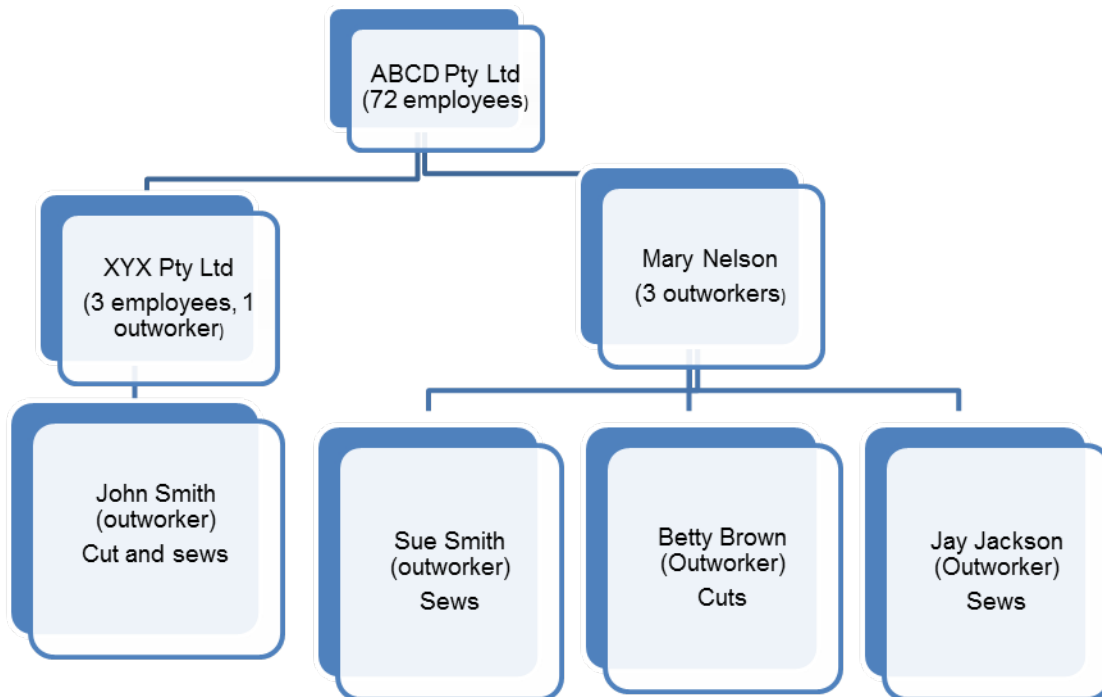
*XYX Pty Ltd\* is engaged by ABCD Pty Ltd to complete cutting and sewing work. XYX Pty Ltd has three employees to perform the work and also outsources work to one outworker.*

*ABCD Pty Ltd also outsources work to outworker, Mary Nelson\*, who in turns outsources the work to three other workers.*

*As part of the audit of ABCD Pty Ltd, we also audited XYX Pty Ltd and Mary Nelson. As the businesses kept minimal records for the outworkers the Inspectors interviewed the outworkers themselves to establish whether they were being paid correctly.*

*The outworkers provided invoices and annual earnings for 2010/2011. Although the Inspectors examined these records and had discussions with the outworkers there was insufficient evidence to determine whether the workers had been paid their lawful entitlements.*

*In response to poor record keeping by ABCD Pty Ltd, XYX Pty Ltd and Mary Nelson, the Fair Work Inspectors issued all three Compliance Notices (see Appendix A).*



*\*Pseudonyms have been used in this case study*

#### **The Audit Results**

In September 2011, we selected 730 industry employers for an audit assessment, however 559 were unable to be audited. The majority (28%) of these had either ceased trading, were unable to be located or contacted (20%) or no longer employed any workers (13 %).

Of the 171 businesses audited we found that 121 (71%) were compliant and 50 (29%) were in contravention of workplace laws. We recovered \$50,526 for 84 employees.

Chart 1: Contravention types

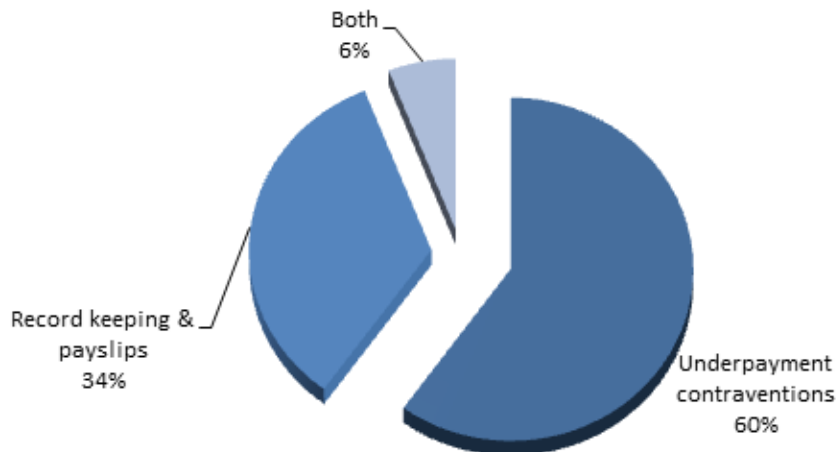


Chart 1 shows that of the businesses found to be in contravention, 30 (60%) had underpayment contraventions, 17 (34%) had record-keeping/pay slip contraventions and 3 (6%) had both underpayment and record-keeping/pay slip contraventions.

In total, 53 individual contraventions were identified. A map detailing the locations where contraventions were identified can be found at Appendix B.

Surprisingly, only 11 (6%) of the businesses audited engaged outworkers. Inspectors found 7 (64%) of the 11 to have contravened Schedule F of the Modern Award. Specifically, five businesses had not made records of the outworkers they engaged, the articles of clothing the outworkers made and the rates the outworkers had been paid.

A further two businesses had not registered as principals and did not have records for their outworkers. To ensure future compliance, Inspectors assisted the principals to complete the relevant Fair Work Commission registration form in addition to issuing them with Compliance Notices.

As previously mentioned, due to a lack of complete records, Inspectors were unable to conduct a comprehensive assessment of outworkers' remuneration.

#### **Other Findings**

Several interesting findings emerged from the program.

We found that contraventions identified in businesses not engaging outworkers occurred as a result of one of the following:

- the employer missing the pay increase therefore underpaying employees
- the employer using a superseded award, or
- the employer classifying the employee at the wrong level

Inspectors noted that in some cases, language barriers contributed to employers not understanding their obligations.

Inspectors also found the businesses mainly employed middle aged employees. However, the number of employees from culturally and linguistically diverse backgrounds was not as significant as anticipated. Only a few clothing manufacturers were located outside the metropolitan area and most produced women's clothing, sportswear or uniforms.

Although we expected to find some businesses to either be no longer trading or employing staff, we were surprised to find a significant number could not be located. This possibly reflects the mobile and changing nature of the industry. We assume these businesses had either moved premises and not updated their contact details on Australian Business Register, or simply left the industry.

Based on the estimated numbers of outworkers, we were surprised to find only a small number of businesses engaged outworkers. However, we strongly suspect we may not have identified all outworkers. As acknowledged earlier, outworkers can be a hidden workforce and some manufacturing businesses may not know if outworkers are being used further down in their supply chain. Of the businesses using outworkers, many were not familiar with Schedule F obligations. It was not only small business that were non-compliant, but also the larger enterprises.

One of the businesses audited, advised that while it formerly engaged outworkers, due to the reporting requirements, the business had made a decision to engage their outworkers as employees instead.

#### **Concluding remarks**

The program has provided a valuable insight into the industry. The complexity of the supply chain and the seasonality of workflow challenged standard FWO audit methodologies.

The record-keeping and arrangement making requirements for businesses that engage outworkers play a critical role in determining whether outworkers are being paid correctly. Without these records, our ability to assess rates of pay is limited. For instance, where our Fair Work Inspectors visited a particular contractor at a particular site, it was difficult to obtain evidence to show whether the work was being conducted on-site or off site. While there may have been machinery in place that would assist cutting, it was unclear as to whether hemming, for example, was occurring on site. Based on the program findings, further compliance intervention is needed in the industry, including conducting records of interview with the accountants and lawyers of the manufacturers.

Considering the types and causes of the contraventions found, we believe a targeted education strategy could greatly reduce the contravention rate. Therefore prior to undertaking a national outworker's campaign, FWO will develop an industry specific education strategy to inform industry participants of their rights and obligations. Consideration will also be given to developing educational materials in languages other than English. We are also strongly of the view that we need to work closely with other government regulators such as the Australian Taxation Office (superannuation as well as cash in hand concerns) and the Department of Immigration and Citizenship (visa work right concerns).

To ensure the success of a future national campaign in the industry, FWO also recognises the need to work closely with the employee and employer organisations in order to obtain factual and detailed intelligence and also work with the Fair Work Commission, to identify principals and their outworkers.

## **About the Fair Work Ombudsman**

The Fair Work Ombudsman is an independent agency created by the Fair Work Act 2009 on 1 July 2009.

Our vision is fair Australian workplaces, and our mission is to work with Australians to educate, promote fairness and ensure justice in the workplace.

Our education and compliance campaigns target specific industries to assist them achieve compliance with national workplace laws. Our focus is usually industries that need assistance with compliance and employ vulnerable workers.

We like to work with relevant industry associations and unions to deliver our campaigns. We rely upon their 'real world' knowledge and communication channels to design and deliver our education activities and products.

This report covers the background, method and findings of the Queensland Clothing Manufacturing Audit Program 2011-2012.

For further information and media enquiries please contact Ryan Pedler (ryan.pedler@fwo.gov.au).

If you would like further information about the Fair Work Ombudsman's targeted campaigns please contact, Steve Ronson, Executive Director - Dispute Resolution and Compliance (steven.ronson@fwo.gov.au).

## Appendix A – Compliance Notice

### COMPLIANCE NOTICE

**(ISSUED UNDER SECTION 716 OF THE FAIR WORK ACT 2009)**

Date of Issue: 30 August 2012

Name of Employer: X

ABN/ACN: X

Director: X

I, Y, being a duly appointed Fair Work Inspector and having conducted an investigation into alleged contravention(s) of Commonwealth workplace laws, have determined that:

- X, is both an employer and an outworker entity within the jurisdiction of the Fair Work Act 2009 (the Act);
- As an employer and an outworker entity, X, is also a principal as defined in Clause F.1.4(a) of Schedule F of the Textile, Clothing, Footwear and Associated Industries Award 2010 (the Modern Award);
- As at 1 January 201 X had already entered into arrangements with the four outworkers to perform work
- The terms and conditions applying to the arrangement between X and each of the four outworkers for the performance of work as outworkers was governed by the Modern Award; and
- Schedule F of the Modern Award imposes, on a principal, obligations in relation to making and retaining written records, and to provide copies of documents, when entering into an arrangement with a person to perform work as an outworker.

I have further determined that X has, in relation to the arrangements entered into with each of the four outworkers, contravened section 45 of the Act by not complying with the terms of the Modern Award. The specific breaches of the Modern Award are as follows:

- Clause F.2.2(a) of Schedule F of the Modern Award by reason of failing to make and retain a written record (called a “work record”) consisting of:
  - (i) The principal's name, address, ABN/ACN and/or registered business number;
  - (ii) The principal's board of reference registration number;
  - (iii) The name and address of the person to whom the arrangement applies;
  - (iv) The address(es) where work is to be performed;
  - (v) The time and date for commencement and completion of the work;
  - (vi) A description of the nature of the work required and the garments, articles or material to be worked on (including diagrams where available and details of the type of garment or article, seam type, fabric type, manner of construction and finishing);
  - (vii) The number of garments, articles or materials of each type;
  - (viii) The sewing time for the work required on each garment, article or material; and
  - (ix) The price to be paid for each garment, article or material;
- Clause F.3.4 of Schedule F of the Modern Award by reason of failing to include in the work record additional information consisting of:



(a) The time and date for the garments, articles or materials to be provided to and picked up from the worker to facilitate commencement and completion of work in accordance with F.2.2(a)(v);

(b) Details of the time standard applied in accordance with clause F.4.4(a) in order to determine the appropriate sewing time for the purposes of clause F.2.2(a)(viii);

(c) The number of working hours that will be necessary to complete the work, calculated by multiplying the number of garments at clause F.2.2(a)(vii) by the sewing time per garment, article or material at clause F.2.2(a)(viii); and

(d) The number of hours and days within the ordinary working week that will be necessary to complete the work in order to determine the appropriate time and date of commencement and completion at clause F.2.2(a)(v), and

(e) The total amount to be paid to the worker for the hours and days at clause F.3.4(c), applying the appropriate rates of pay set out at clause F.4.4(b).

- Clause F.2.2(b) of Schedule F of the Modern Award by reason of failing to provide a copy of the work record under Clause F.2.2(a) to each of the four outworkers; and
- Clause F.3.5 of Schedule F of the Modern Award by reason of failing to provide a copy of Schedule F of the Modern Award to each of the four outworkers, in a language appropriate to each person.

In accordance with the Section 716(2) of the Act, X is now required, within 14 days of the date of this Compliance Notice, to ensure that in all new arrangements that it enters into with any person to perform work as a outworker:

1. X makes and retains a work record that shows:
  - The principal's name, address, ABN/ACN and/or registered business number;
  - The principal's board of reference registration number;
  - The name and address of the person to whom the arrangement applies;
  - The address(es) where work is to be performed;
  - The time and date for commencement and completion of the work;
  - A description of the nature of the work required and the garments, articles or material to be worked on (including diagrams where available and details of the type of garment or article, seam type, fabric type, manner of construction and finishing);
  - The number of garments, articles or materials of each type;
  - The sewing time for the work required on each garment, article or material;
  - The price to be paid for each garment, article or material;
  - The time and date for the garments, articles or materials to be provided to and picked up from the worker to facilitate commencement and completion of work in accordance with F.2.2(a)(v);
  - Details of the time standard applied in accordance with clause F.4.4(a) in order to determine the appropriate sewing time for the purposes of clause F.2.2(a)(viii);
  - The number of working hours that will be necessary to complete the work, calculated by multiplying the number of garments at clause F.2.2(a)(vii) by the sewing time per garment, article or material at clause F.2.2(a)(viii);
  - The number of hours and days within the ordinary working week that will be necessary to complete the work in order to determine the appropriate

- time and date of commencement and completion at clause F.2.2(a)(v);  
and
- The total amount to be paid to the worker for the hours and days at clause F.3.4(c), applying the appropriate rates of pay set out at clause F.4.4(b);  
and
- 2. X provides a copy of the relevant work record to the outworker; and
- 3. X provides a copy of Schedule F of the Modern Award to the outworker, in a language that is appropriate to that person.

Failure to comply with this Notice may contravene a civil remedy provision. If you do not take action to comply with this Notice, the Fair Work Ombudsman may commence legal action to seek civil penalties for non-compliance with this Notice.

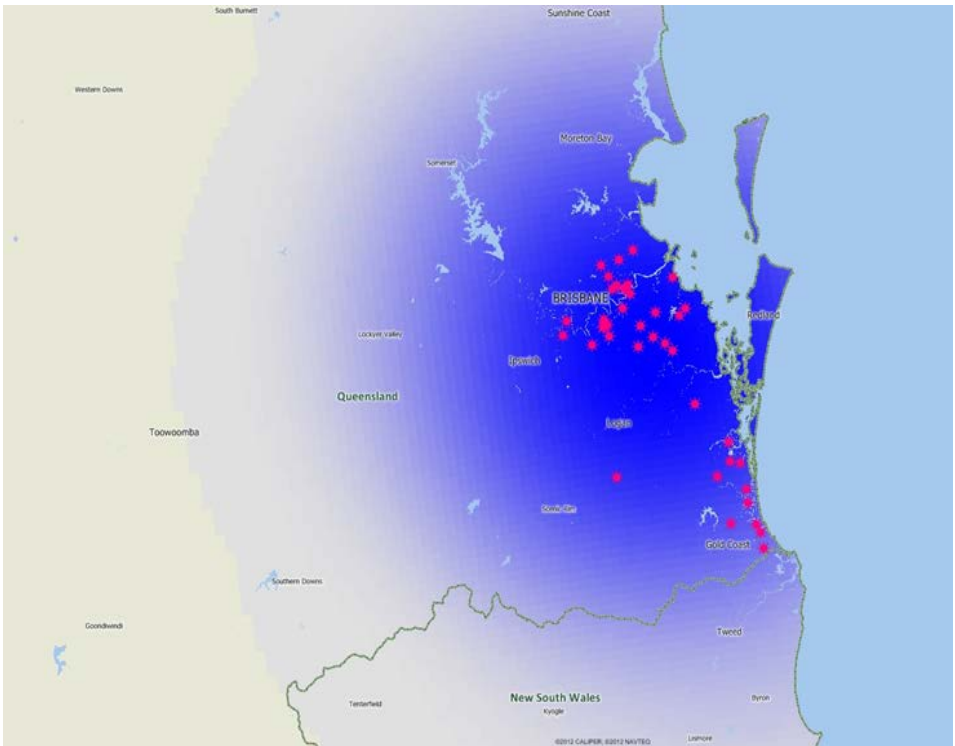
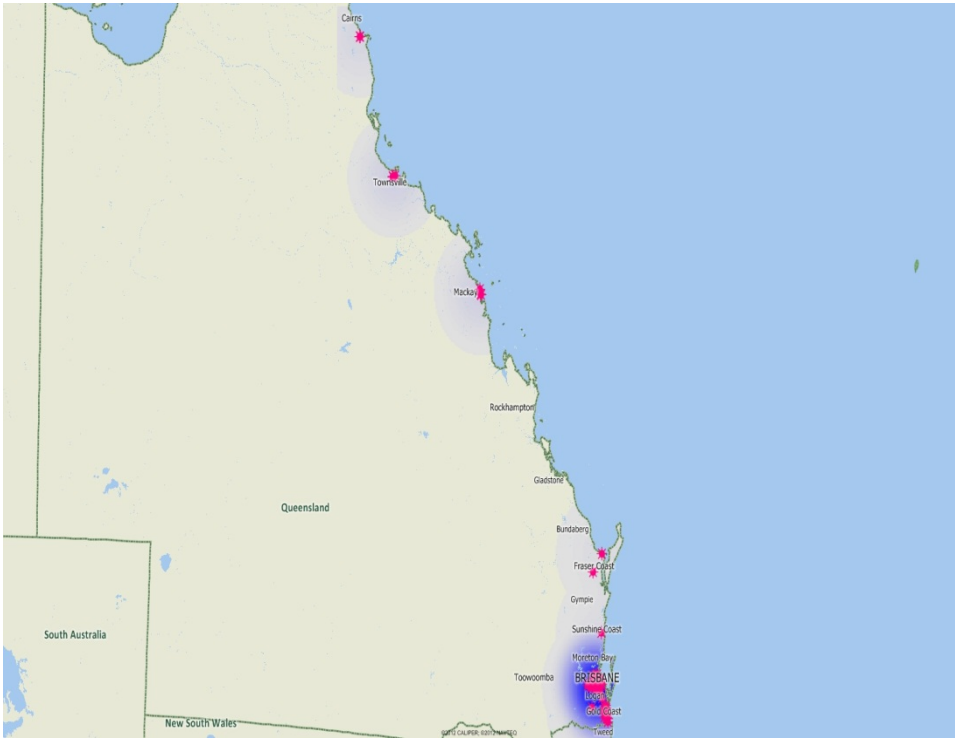
You may apply to the Federal Court, Federal Magistrates Court or eligible State or Territory Court for a review of this Notice if:


- a) you dispute that you have committed the contravention(s) referred to above;  
and/or
- b) you dispute that this Notice complies with subsections 716(2) or 716(3) of the Act.

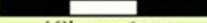
Fair Work Inspector

Fair Work Ombudsman

# Appendix B – Contravention Maps



 **Contravention locations (50)**

0 50 100 150  
  
Kilometers

## References

Australian Broadcasting Corporation (18 August 2011) 'The Campaign For Outworkers', The 7:30 Report, Australian Broadcasting Association

Asian Women at Work (2012) website, <http://www.awatw.org.au/>, visited 7 January 2013

Chamberlin M, Richardson F, Langton J (2012) 'A TCF Industry Independent Review of Standard Time Information and Variables, unpublished.

Council of Textile and Fashion Industries of Australia (2012), website, <http://www.tfia.com.au>, visited 8 January 2013.

Cregan C. (2001) 'Home Sweat Home', Department of Management, University of Melbourne, Melbourne.

Brotherhood of St Laurence. (2007) 'Ethical Threads: Corporate Social Responsibility in the Australian Garment Industry' Brotherhood of St Laurence, Victoria.

Ethical Clothing Australia (2011) 'Guide to Textile, Clothing, Footwear and Associated Industries Award -Helping You Meet Your Legal Obligations', Ethical Clothing Australia.

Fairwear (2012) 'Inquiry into the Fair Work Amendment (Textile, Clothing & Footwear Industry) Bill 2011, Fairwear, <http://www.senate.aph.gov.au/submissions>, viewed 7 January 2013.

Fairwear (2012) website, <http://www.fairwear.org.au>, viewed 7 January 2013.

Institute of Public Affairs. 'Outworkers Speak Out', Institute of Public Affairs, <http://www.tfia.com.au/about-tfia>, visited 22 January 2013.

International Employment Relations Association (2002) 'International Employment Relations: Focus on the Pacific Rim', University of Western Sydney, Printing Services, Sydney.

Queensland Government (2012), website, <http://www.justice.qld.gov.au>, viewed 8 January 2013.

Ramworth K. (2004) 'Trading Away Our Rights: Women Working in Global Supply Chains', Oxfam, Oxford, UK.

Senate Economics Reference Committee (1996) 'Outworkers in the Garment Industry', Commonwealth of Australia, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=economics\\_ctte/completed\\_inquiries/1996-99/outworkers/report/index.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=economics_ctte/completed_inquiries/1996-99/outworkers/report/index.htm), viewed 23 January 2013.

Shorten B. (2012) 'Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2012: Second Reading', Commonwealth of Australia, Canberra.

TCFUA (2012), website, <http://tcfua.org.au/outworkers/outworker-campaign>, viewed 7 January 2013.

TCFUA (2008) 'Submission of the TCFUA to the Australian Industrial Relations Commission', TCFUA, Melbourne.

TCFUA (1995) 'The Hidden Cost of Fashion: Report on the National Outwork Information Campaign, TCFUA, Sydney.

Weller S. (2007) 'Regulating Clothing Outworker: A Sceptic's View', *Journal of Industrial Relations*, <http://jirsagepub.com>, viewed 14 January 2013.

Weller S. (2007) 'Retailing, Clothing and Textiles Production in Australia', Centre for Strategic Economic Studies, Victoria University, Melbourne.

## Attachment E

### Performance measures for Australia's TCF industry

Following is a brief description of each variable in Table 4, what it measures and the performance of the TCF industry in relation to the wider manufacturing measure.

#### Share of purchases in total expenses

Although the ABS does not provide guidance, purchases are likely to include intermediate goods and other inputs to the production process. The data shows that the share of purchases in total expenses, at around 50 per cent, is consistently lower for TCF than the manufacturing sector as a whole (Table 6 below). This means that other costs to production, such as labour must have a relatively larger share.

#### Labour cost share in total expenses and Wages and Salaries per employee

The labour cost share of total expenses in TCF has averaged a little over 21 per cent, around 5 percentage points higher than the average for Manufacturing. Despite this, the average wage rate of employees in the TCF industry is much lower than Manufacturing as a whole as shown in Table 6. In fact, the gap was large in 2008-09 at 32.5 per cent and has grown over time to 55 per cent. Wages in Manufacturing have been growing, while in TCF they have been shrinking.

**Table 6: Performance of the Manufacturing industry**

	Share of purchases in total expenses	Labour cost share in total expenses	GFCF share of IVA	Investment rate (capex to value added)	Wages and salaries to sales and service income	Wages and salaries per employee	Sales and service income per person employed	Industry value added per person employed	Profit margin (OP to TO ratio)
	%	%	%	%	%	\$'000	\$'000	\$'000	%
2008-09	63.8	15	14.7	20.1	12.8	57	421	107	6.7
2009-10	61.3	16.2	12.9	19	13.7	57	397	103	6.9
2010-11	62.3	16.1	12.7	15.5	13.7	59.7	414.3	109	7.1
2011-12	62.4	16.2	13.2	16.3	14	62.6	428.1	109.2	5.6
2012-13	63.1	16.3	12.4	15.6	14.1	64.4	437.1	109.4	4.3

Source: ABS Cat. No. 8155.0 - Australian Industry, 2012-13

#### Gross Fixed Capital Formation to Industry Value Added (GFCF to IVA) and Investment Rate (Capex to Value Added)

GFCF is investment in capital; whether it is capital in the form of land improvements, plant machinery and equipment purchases, as well as other infrastructure, including the construction of roads, commercial and industrial buildings etc.

IVA is the contribution of the industry to GDP.

Capex is short for capital expenditure which is a broader measure than GFCF and includes all capital expenditure in physical assets which cannot be deducted (or used) in the financial year in which it is purchased. It includes improvements to existing assets to extend their productive life, whereas GFCF is the investment in new machinery, equipment etc. (GFCF is therefore a subset of Capex).

Both these measures indicate that investment in the TCF industry is declining over time, not only relative to value added within industry but also in absolute terms. The data shows that net capital investment (capital investment minus disposal of assets) in TCF declined from \$265 million in 2008-09 to \$167 million in 2011-12. Investment in manufacturing as a whole has declined over the same period, but not to the same extent as in TCF. Investment in TCF is around half the rate of investment in the manufacturing sector as a whole.

### **Wages and salaries to sales and service income**

This measure reflects the labour intensity of the industry relative to income. It shows that the ratio of the wages and salaries in TCF has been steady over the period, but at a higher level than in manufacturing generally. TCF is on average 25 per cent more labour intensive than other manufacturing, even remembering that wages and salaries in TCF are much lower than in manufacturing, so it must be concluded that there are more individuals employed in TCF for every dollar of value added than in manufacturing as a whole (i.e. it is a much more labour intensive industry than manufacturing – therefore has lower productivity). This measure is related to the other (following) two labour intensity measures.

### **Sales and Service Income per Person Employed and Sales and Industry Value Added per Person Employed**

These are indicators of the productivity of the industry. In the case of TCF, IVA per person is improving slowly, while sales and service income per person is reducing. This is because sales and service income is falling faster than IVA, but employment within the industry is falling faster than both. The logical conclusion to make from this is that low productivity firms (thus employees) are exiting the industry. It may be noteworthy that employment has fallen 20.9 per cent over the four years to 2011-12.

When compared to the industry as a whole, TCF performs poorly; sales and service income per employee is on average less than half that of manufacturing as a whole – and the ratio (the gap between TCF and manufacturing) is getting larger. The gap between IVA in TCF and manufacturing is on average (over the four years) around 70 per cent (i.e. the performance of manufacturing is 70 per cent higher than TCF), with the gap remaining relatively constant over time.

### **Profit Margin (OP to TO ratio)**

OP to TO is operating profit before tax to total income ratio.

This ratio seems variable and may be cyclical depending on economic conditions and prices within the industry. Profitability in TCF is generally higher than manufacturing as a whole, with 2008-09 being the exception.

It is likely that the reason profitability is higher in TCF is because investment is lower, that is firm owners are taking profits and not re-investing at as high a rate as the rest of the manufacturing industry. This may mean that the average age of capital may be higher in the TCF industry than the rest of manufacturing, but as we do not have data on this, it would be hard to establish as a certainty.

**Summary**

TCF is a low productivity industry (in comparison with the manufacturing as a whole) as evidenced by the high number of employees per dollar of value added (or low value added per employee), relative high labour share of total expenses and high ratio of wages and salaries to sales and service income.

It is also a poorly paid industry in which the average wage has been falling over time. Investment in the industry is also falling, which indicates that the average age of capital must also be higher. This paints a picture of relatively lowly-paid workers, using ageing capital and equipment to maintain production (i.e. IVA is relatively constant).



# Attachment F

## Consultation

### Stakeholders advised in writing of the post-implementation review

- Australian Industry Group
- Australian Chamber of Commerce and Industry
- Council of Textile and Fashion Industries of Australia
- National Retail Association
- Australian Council of Trade Unions
- Textile, Clothing and Footwear Union of Australia
- Carpet Institute of Australia
- Footwear Manufacturers Association of Australia
- The Ark Clothing Co.
- Mr K and Co.
- Cue Clothing Co.
- So Stella
- Asian Women at Work Inc.
- Australian Migrant and Refugee Women’s Alliance
- Melbourne Made Clothing
- FairWear Inc.

### Public submissions to the post-implementation review

<b>Group</b>	<b>Type of organisation</b>
Australian Industry Group	Employer organisation
Asian Women at Work	Worker support organisation
Australian Chamber of Commerce and Industry	Industry organisation
Australian Council of Trade Unions	Union
Chung Tin Pty Ltd	Business
Committee to Protect Vietnamese Workers	Worker support organisation
Council of Textile and Fashion Industries of Australia	Industry organisation
Cue Clothing Co.	Business
Dallrove Pty Ltd	Business
Fair Wear Inc.	Worker support organisation
Fair Wear SA	Worker support organisation
Gouda Pty Ltd	Business
Law Society of NSW	Interested party

Lisa Barron Pty Ltd	Business
Mr K and Co.	Business
National Retail Association	Industry organisation
Office of the Employee Ombudsman SA	Interested party
Textile, Clothing and Footwear Union of Australia	Union
Uniting Church – Commission for Mission	Interested party

There were also:

- Five anonymous outworker submissions
- Three confidential outworker submissions
- Two confidential employee submissions
- 22 confidential business submissions

**Additional consultation conducted by Department of Employment**

- Textile, Clothing and Footwear Union of Australia
- Council of Textile and Fashion Industries of Australia
- Fair Work Ombudsman
- Asian Women at Work
- Australian Industry Group