



Independent contractors and employees

Australia's new workplace relations system

From 1 July 2009, most Australian workplaces are governed by a new system created by the *Fair Work Act 2009*.

The Fair Work Ombudsman helps employees, employers, contractors and the community to understand and comply with the new system. We provide education, information and advice, investigate workplace complaints, and enforce relevant Commonwealth workplace laws.

The *Independent Contractors Act 2006* in conjunction with the *Fair Work Act 2009* protects the rights and entitlements of independent contractors.

Who is an employee?

Who is an independent contractor?

There are a number of factors which may contribute to determining the difference between an employee and an independent contractor. However, it is important to

note that no single indicator can determine if a person is a contractor or an employee. Each determination is based on the individual merits of the work arrangement in place. Courts always look at the totality of the relationship between the parties when determining the status of a person's employment.

There are some common indicators that may contribute to determining whether a person is an employee or independent contractor:

Indicator	Employee	Independent Contractor
Degree of control over how work is performed	Performs work, under the direction and control of their employer, on an ongoing basis.	Has a high level of control in how the work is done.
Hours of work	Generally works standard or set hours (note: a casual employee's hours may vary from week to week).	Under agreement, decides what hours to work to complete the specific task.
Expectation of work	Usually has an ongoing expectation of work (note: some employees may be engaged for a specific task or specific period).	Usually engaged for a specific task.
Risk	Bears no financial risk (this is the responsibility of their employer).	Bears the risk for making a profit or loss on each task. Usually bears responsibility and liability for poor work or injury sustained while performing the task. As such, contractors generally have their own insurance policy.
Superannuation	Entitled to have superannuation contributions paid into a nominated superannuation fund by their employer.	Pays their own superannuation (note: in some circumstances independent contractors may be entitled to be paid superannuation contributions).
Tools and equipment	Tools and equipment are generally provided by the employer, or a tool allowance is provided.	Uses their own tools and equipment (note: alternative arrangements may be made within a contract for services).
Tax	Has income tax deducted by their employer.	Pays their own tax and GST to the Australian Taxation Office.
Method of payment	Paid regularly (for example, weekly/fortnightly/monthly).	Has obtained an ABN and submits an invoice for work completed or is paid at the end of the contract or project.
Leave	Entitled to receive paid leave (for example, annual leave, personal/carers' leave, long service leave) or receive a loading in lieu of leave entitlements in the case of casual employees.	Does not receive paid leave.

How can the Fair Work Ombudsman help independent contractors and employees?

Fair Work Inspectors can investigate alleged sham contracting arrangements and prohibited conduct in relation to reform opt-in agreements.

Sham contracting arrangements

A sham contracting arrangement occurs where an employer attempts to disguise an employment relationship as an independent contracting arrangement. This is usually done for the purposes of avoiding responsibility for employee entitlements.

Under the sham contracting provisions of the *Fair Work Act 2009*, an employer cannot:

- misrepresent an employment relationship or a proposed employment arrangement as an independent contracting arrangement
- dismiss or threaten to dismiss an employee for the purpose of engaging them as an independent contractor
- make a knowingly false statement to persuade or influence an employee to become an independent contractor.

The *Fair Work Act 2009* provides serious penalties for contraventions of these provisions. Employees and independent contractors can request assistance from the Fair Work Ombudsman if they feel their rights have been contravened.

Prohibited conduct in relation to reform opt-in agreements

The *Independent Contractors Act 2006* provides a four-year and six month transitional period (from 1 March 2007 and ending on 1 September 2011) where certain state or territory laws may continue to apply to an independent contractor and their principal.

Parties to an existing contract for services can choose to sign a reform opt-in agreement. A reform opt-in agreement is an agreement in writing, signed by the independent contractor and their principal, which states that they no longer want the state or territory laws to govern their contract for services.

The *Independent Contractors Act 2006* provides protections for parties in making the choice to sign a reform opt-in agreement.

These protections are that a person must not:

- take or threaten to take any action or
- prevent, or threaten to prevent, from taking any action

with the intent to coerce another person into signing or not signing a reform opt-in agreement.

Further, a person must not knowingly make a false statement in order to persuade or influence another person into signing or not signing a reform opt-in agreement.

The *Independent Contractors Act 2006* provides serious penalties for contraventions of these provisions.

Employees and independent contractors can request assistance from the Fair Work Ombudsman if they feel there has been prohibited conduct.

Penalties

Fair Work Inspectors can seek the imposition of penalties for contraventions of sham contracting arrangements and reform opt-in provisions. The courts may impose a maximum penalty of \$33,000 per contravention.

Fair Work Inspectors may also apply to the courts to grant an injunction or an interim injunction if an employer seeks (or threatens) to dismiss an employee for the purpose of engaging them as an independent contractor. The purpose of the injunction would be to prevent the dismissal from occurring, or otherwise remedy the effects. Courts can also make other orders to have the employee reinstated or compensated.

General protections

Some general protections provided under the *Fair Work Act 2009* extend to independent contractors and their principals.

Independent contractors and principals are afforded limited workplace rights, and the right to engage in certain industrial activities. An independent contractor or principal is protected from adverse action by any person in relation to the decision to exercise or potentially exercise their rights under these provisions.

For more information on workplace rights, industrial activities, and what constitutes adverse action, please see the *Fair Work Ombudsman Fact Sheet – General Protections*.

Need further information?

For further information, contact the Fair Work Infoline on **13 13 94**.

If you require further information on contracting and the provisions of the *Independent Contractors Act 2006*, please call the Independent Contractors Hotline on **1300 667 850** or visit www.innovation.gov.au/independentcontractors.

If you are in the building and construction industry, the Australian Building and Construction Commission (ABCC) may investigate and seek penalties for sham contracts. Contact the ABCC on **1800 003 338** or online at www.abcc.gov.au.

Sham contracting arrangements are prohibited by sections 357–359 of the *Fair Work Act 2009*.

The Fair Work Ombudsman has a collection of fact sheets, Best Practice Guides and other resources. For further information and assistance, visit www.fairwork.gov.au or contact the Fair Work Infoline on **13 13 94**.

Contact us

Fair Work Online: www.fairwork.gov.au

Fair Work Infoline: **13 13 94**

Monday to Friday, between 8.00am–6.00pm

Need language help?

Contact the Translating and Interpreting Service (TIS) on **13 14 50**

Hearing & speech assistance

Call through the National Relay Service (NRS):

- For TTY: 13 36 77. Ask for the Fair Work Infoline 13 13 94
- Speak & Listen: 1300 555 727. Ask for the Fair Work Infoline 13 13 94

Fair Work Act Schedule F – Outwork and Related Provisions

F.2.2 Work records

(a) Upon making an arrangement, a principal must make and retain a written record (a “work record”) which contains:

(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.

(b) A copy of a work record must be given to the person with whom the arrangement is made prior to the commencement of any work which is the subject of the arrangement.

.3 Additional requirements for making arrangements with workers

F.3.1 A principal must comply with this clause in addition to clause F.2 where the principal makes an arrangement:

(a) with a worker; or

(b) with a body corporate owned or managed by the worker or member of their family.

F.3.2 Written agreements

[E.3.2 varied by PR993032 ppc 18Feb10]

Prior to the commencement of work which is the subject of an arrangement, a principal must make a signed written agreement ("Written Agreement") with the worker which specifies:

- (a) whether the principal will provide the worker with work on a full-time or part-time basis; and
- (b) if part-time, the agreed number of hours of work per week in accordance with clause F.4.2(a).

[E.3.3 varied by PR993032 ppc 18Feb10]

F.3.3 The proposed terms of the written agreement must be expressed clearly and simply in a language the worker understands and must be provided in writing to the worker in that language a reasonable time before it is signed.

- (a) Any proposed variation of the written agreement must also comply with clause F.3.2(b) and will take effect three days after an agreement to vary the written agreement ("Variation Agreement") is signed.
- (b) A copy of the proposed written agreement, the signed written agreement and variation agreement, along with an English language version of each document if in a language other than English, must be retained by the principal ("Written Agreement Records").

F.3.4 Additional information in work records

[E.3.4 varied by PR993032 ppc 18Feb10]

A work record in respect of an arrangement under this clause must contain the following information in addition to that prescribed in F.2.2:

- (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).

F.3.5 A principal must provide the worker with a copy of this Schedule in the appropriate language for the worker.

F.3.6 A principal must provide the worker with the minimum conditions set out in clause F.4.

F.4 Minimum conditions for workers

F.4.1 National Employment Standards

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

F.4.2 Hours of work

(a) A principal must provide the worker with work which is:

(i) full-time, 38 hours per week; or

(ii) regular part-time, with no less than 20 regular hours per week to be agreed between the principal and the worker; or

[E.4.2(a)(iii) varied by PR993032 ppc 18Feb10]

(iii) regular part-time, with no less than 15 regular hours per week to be agreed between the principal and the worker with the consent of the Union in accordance with Schedule F - Outwork and Related Provisions.

ADDITIONAL REASONS WHY THE LEGISLATION WILL NOT IMPROVE THE CONDITIONS OF OUTWORKERS

In an ideal world the standard time sheet costing system may work however in the real world the standard time sheet process will add more red tape and paper work, will not work and most likely reduce the income of most outworkers.

Set out below are the reasons why the standard time sheet model will not work.

Standard costing time sheet models work where there is an employee/employer relationship and there is no such relationship here as the outworkers will not be paid until the garment is completed.

The outworker carries out the work away from the contractors premises therefore the contractor does not know and does not care who is undertaking the work. The outworker may complete the work himself or may engage other people to do the work. The contractor has no control over the outworker.

The production of a garment includes a multiple of jobs with many different people completing particular jobs throughout the production chain. The paper work and time required to set standard minutes per job and then to compare standard time to actual to ensure no out worker is being exploited defies logic and common sense.

The clothing industry has lost 13,000 jobs in the last 12 months (per TCFU). With the high Australian dollar and the global financial crisis designers and Australian manufactures cannot afford a further impost on production costs. As one manufacturer advised " we will stop manufacturing in Australia and just import all our garments from Asia"

Manufacturers who remain in Australia and who endeavour to comply with the additional red tape will of course pass part of the cost of compliance on to the out workers thus reducing their income.

As designers and manufacturers move work to Asia there will be less work for the outworkers.

These changes are dramatic and will increase production costs substantially which will cause businesses to fail reducing the work available to outworkers.

The Fair Work Act will create the situation where the cost of preparing and monitoring the paper work on small low volume production runs will be greater than the price the designer will be prepared to pay to have the garments manufactured.

Unethical, unprofessional and disreputable businesses who exploit outworkers are not concerned with government legislation. Such businesses will find a way around legislative changes. When such businesses are prosecuted usually the assets have been dissipated.

According to the TCFU there are now sections in the Act whereby where an outworker is exploited and the contractor is prosecuted and all funds have been dissipated then the organization/individual providing the contract to the contractor is liable. Liability continues up the supply chain until funds are available to meet the underpayment and penalties of up to \$30,000.

Once again the legislation is a nonsense and unworkable. In these situations it can be assumed that the detailed standard and actual time sheets will not exist

therefore it will be impossible to determine which entity or individual in the production chain should pay the underpayment and penalties.

Why penalize companies and individuals further up the supply chain when they have complied with all legislation?

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BUILDING INNOVATIVE CAPABILITY

REVIEW OF THE AUSTRALIAN TEXTILE,
CLOTHING AND FOOTWEAR INDUSTRIES

29 August 2008.

REVIEW OF THE AUSTRALIAN TEXTILE, CLOTHING & FOOTWEAR INDUSTRIES

innovation.gov.au/tcfreview

29 August 2008

Senator the Hon Kim Carr
Minister for Innovation, Industry, Science
and Research
Parliament House
CANBERRA ACT 2600

TCF Review Secretariat
GPO Box 9839
Industry House, 10 Binara Street
CANBERRA CITY ACT 2601
Email: tcfreview@innovation.gov.au
Web: www.innovation.gov.au/tcfreview

Dear Minister

I am pleased to present to you my report *Building Innovative Capability*, in which I review the Australian Textile, Clothing and Footwear (TCF) industries according to the terms of reference announced by you on 8 March 2008.

During the course of the Review, I was impressed by the commitment and enthusiasm of stakeholders and their willingness to make their views known and to contribute to the Review through submissions, consultations and case studies. They also provided me with opportunities to undertake site visits and observe the industries in operation first hand.

It seems clear that with goodwill, effective leadership, sound business strategy and appropriate support from government, the TCF industries have a promising future. To help realise this future, I have recommended that for the period ahead the industries should focus on achieving competitive advantage through the development of innovative capability at the enterprise level.

I would like to express my appreciation for the insights, expertise and industry knowledge provided by the TCF Review Reference Group: Mr Brian Rush – President of the Council of Textile and Fashion Industries Australia Limited, Chief Executive Officer of Australian Defence Apparel Limited; Mr Phillip Butt – President of the Footwear Manufacturers' Association of Australia, Managing Director of J Robins & Sons; Professor Peter Forsyth – Department of Economics, Monash University; Mr Rod McKenna – representing the Technical Textiles and Nonwoven Association, Director of double-t innovations pty ltd; Ms Michele O'Neil – National Secretary, TCF Union of Australia; Mr Barry Tubner – National President, TCF Union of Australia; Dr Nigel Johnson – General Manager, CSIRO Client & Partner Relationships; and Professor Suzi Vaughan – Head of Fashion, Queensland University of Technology.

I would also like to acknowledge the important contribution to my deliberations made by the leaders of other concurrent Reviews, Dr Terry Cutler, the Hon Steve Bracks, and Mr David Mortimer AO.

Dr Phillip Toner of the Centre for Innovation Studies at the University of Western Sydney and Associate Professor Richard Denniss of the Crawford School of Economics and Government at the Australian National University provided invaluable support in the areas of economic and industry analysis.

Finally, I would like to thank Cecilia Wood, Linda Drummond, Luke Murray and Rachel Searl of the departmental Secretariat for their superb assistance during the conduct of the Review and in compiling the report. It was a pleasure to work with people of such high calibre and dedication.

I commend the report *Building Innovative Capability* to you.

Yours sincerely

Professor Roy Green

Reviewer

Review of the Australian Textile, Clothing and Footwear Industries

factory based employment across the whole TCF sector and exceeds factory based clothing manufacturing employment by about 25 per cent' (Productivity Commission 2003: 182).

Outsourcing is not restricted to clothing and footwear. In all other elements of the TCF industries, be it carpets, textiles or shoes, firms continually assess whether to 'make or buy' all, or parts, of their product range.

Moving into other activities

To avoid the market power of major department stores and fashion retailers, some firms have established their own retail outlets. These take a variety of forms, such as up-market retail shops, direct sales to the public from the factory or setting up a retail 'presence' within a larger department store. The survey of TCF firms in receipt of government assistance found that 14 percent of clothing producers sold directly to the public (WRC 2008: 5). Others supplement income derived from manufacturing and/or retailing with wholesaling.

Another common response is to abandon both manufacture and design in favour of simply importing and wholesaling foreign TCF goods. A small number of firms have used their extensive knowledge of the industry to establish consultancy services to assist local producers, wholesalers and retailers with sourcing, design and branding.

Shifting up-market

Given the declining competitiveness of local TCF 'commodity' production, many firms seek to find a competitive niche by exploiting the temporary monopolies and 'first-mover advantages' generated by fashion. For clothing, footwear and accessories producers, the upper end of the fashion market may be lucrative but, if exports are not pursued, it is also limited, given the small local demand for high-end fashion. In the past, the small size of the market and seasonal nature of fashion clothing items in Australia meant that manufacturers supplemented their income by supplying the local commodity clothing market. With the loss of this market to overseas low-cost producers, there is no longer the level of demand to enable these local manufacturers to maintain year-round production capacity (Webber & Weller 2001: 142).

Other firms engaged in, for example, the production of defence or corporate apparel, carpets, shade cloth and geo-textiles have sought to gain a competitive edge by improving the quality and technical attributes of their products and by working more closely with major clients to customise products to their specific needs. The survey of TCF firms in receipt of government assistance found that 38 percent of TCF firms have responded to intensifying competitive pressure by 'developing new products' and 25 percent were 'offering a product with unique features' (WRC 2008: 9). As noted earlier, the rate of increase of R&D intensity in TCF over the last two decades was much faster than for manufacturing as a whole, although the level of R&D expenditure as a share of value added is much lower than for manufacturing as a whole. It was also noted that the proportion of TCF firms investing in product, process and organisational innovation has increased at a much faster rate over the last few years than for manufacturing as a whole.

A further strategy is to change manufacturing production methods to improve productivity and reduce set-up costs and turnaround times from order to delivery, often in conjunction with a view to new market segments. The survey of TCF firms conducted for the Review found that, in response to increased competitive pressures:

- 40 percent of firms increased customisation to the needs of buyers
- 27 percent changed their production systems to enable short and flexible production runs
- 24 percent offered a high level of customer service
- 22 percent changed their production systems to minimise delivery times.

(WRC 2008: 9.)

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with award coverage extending to 16.9 percent of employees, registered collective agreements covering 10.7 percent of employees and the remaining 5.6 percent covered by state collective agreements and unregistered federal and state agreements. DEEWR advised the Review that the Australian Industrial Relations Commission is undertaking a review of TCF awards as part of the award modernisation process, whose purpose is both to simplify awards and to ensure a proper balance of flexibility and fairness in the workplace. While collective agreements extend to a relatively small proportion of the TCF workforce, they tend to be utilised by larger companies within the industries. Research in a number of countries has shown that these agreements, when structured to enhance collaboration in the workplace, contribute to improvements in productive performance (Bevan 2008).

In addition to the 48,000 TCF employees in the regulated workforce, it is estimated that there are potentially anywhere between 30,000 and 200,000 outworkers available to undertake home-based TCF manufacture, predominantly in clothing. However, the Senate Economics Reference Committee Inquiry in 1996 concluded that it was impossible to state with any accuracy the number of people directly engaged in home-based manufacture in Australia. The Review understands that the federal government is working with the states and territories to ensure that all TCF outworkers engaged in home-based manufacture are properly protected through a safety net of legislation and relevant award conditions. The 1996 Senate inquiry into outworkers in the garment industry and the *Ethical Threads* report (Diviney & Lillywhite 2007) found that outworkers experience poor working conditions and underpayment, rarely receiving the employment conditions available to those in the regulated workplace. Outworkers are often encouraged to identify themselves as subcontractors with Australian Business Numbers (ABNs) to get around a definitional description of an employee; or they might operate in the 'black' or cash economy.

The Homeworkers Code of Practice and 'No Sweat Shop' label were developed by the Homeworkers Code Committee to address the inequity facing outworkers, by educating and encouraging ethical and transparent clothing manufacture in Australia. The code of practice is a self-regulation system that monitors the TCF production supply chain to help ensure that minimum legal wages are paid to outworkers and employment standards are met. Businesses accredited under the code of practice are entitled to use the 'No Sweat Shop' label to promote their products. On 1 May 2008, the federal government announced it would provide \$4 million over four years to support the promotion of the code of practice and the 'No Sweat Shop' label. The purpose of this initiative is to promote a higher level of awareness and compliance with the existing federal, state and territory legislative framework for outworkers in Australia, including occupational health and safety protection. It will be assisted in this by the development of an Australian Ethical Quality Mark, along the lines recommended in this Review and increasingly supported by international standards (Arthur 2006).

As indicated, the Australian Government has put in place measures to modernise the award structure and promote flexibility and productivity in the workplace. It is also working cooperatively with the states and territories to provide redress for the unethical treatment and exploitation of outworkers. One important policy development that could contribute to the elimination or restriction of unethical practices is to clearly define what is meant by an 'employee' in respect of home-based manufacture. The Review recommends that the government consider defining as an employee a person undertaking home-based TCF manufacture for a single customer or business, regardless of the existence of an ABN or claimed subcontracting arrangement. Such a person could be 'deemed' to be an employee, with appropriate entitlements to apply in this case. On the other hand, where a person undertakes home-based TCF manufacture for two or more customers or businesses, it would be reasonable to treat this activity as a microbusiness, operating in a contracting or subcontracting relationship. Clarification of the anomaly whereby home-based manufacture can be used to avoid obligations to employees will not only contribute to the development of ethical supply chains but, as the Review heard from one major fashion retailer, may also help to improve quality assurance and response times, in the context of a well-managed, high-performance work system, especially if it encourages co-location of homeworkers, where appropriate, in an organisational environment.

27 December 2011

The Hon Bill Shorten MP
Department of Education, Employment & Workplace Relations
GPO Box 9880
CANBERRA ACT 2601

P.O. Box 300, Mulgrave Victoria 3170
Suite 8, 758 Blackburn Road,
Clayton Victoria, 3168

Copy sent by email on 27/12/2011 www.aplfinancial.com.au

T: 03 9558 6288

F: 03 9558 6266

Dear Minister

Re: The Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011

We are a firm of chartered accountants operating in suburban Melbourne and act for clients in the clothing industry.

Our client's attention has been brought to the amendments which have been referred for enquiry and report.

The clothing industry is in crisis and according to the textile clothing and footwear union "Over 11,000 jobs have been lost in the last 12 months to September 2011" Copy attached marked A.

Jobs are moving offshore at an alarming rate and the whole industry is threatened.

On behalf of our client we are preparing a submission which needs to be submitted by 11 January 2012.

In order to complete the submission the following information is requested from your office by 9 January 2012.

Reference is made to page 1 of the Fair Work Amendment – OUTLINE – Copy attached Marked B

- Paragraph 2 states "research that has consistently shown that out workers in the TCF industry suffer from unique vulnerabilities."
Please provide copies of the research as we are unable to locate any definitive research.
- Paragraph 3 states that "Despite the existing provisions in the FW Act, the relevant modern award and in state legislation, outworkers continue to experience poor working conditions"
Please provide evidence to support the above statement.
- Paragraph 5 states "the bill will address a limitation that currently exists in relation to right of entry into premises in the TCF industry operating under "'sweatshop'" conditions".
Please advise what the limitations currently are?

Page 2 states that a Financial Impact Statement has not been undertaken.

Please advise why this has not been done when the proposed amendments will cripple an industry which is currently in survival mode.


Please advise whether advice was sought from the Fair Work Ombudsman – Policy Section.

If advice was provided please provide a copy of the advice. If advice was not sought please advise why it was not sought?

Please provide all information by 9 January 2012 in order that our submission can be completed and submitted by 11 January 2012.

Please provide all information by email to

Regards

Jon Griffin 
Director

Snapshot of the Real Effect of Job Loss

05-Oct-2011

MEDIA ALERT

TCFUA MEDIA CONFERENCE BEFORE JOBS FORUM

SNAPSHOT OF THE REAL EFFECT OF JOB LOSS

8.30am, Thursday 6 October 2011

Room 2R1, Parliament House, Canberra

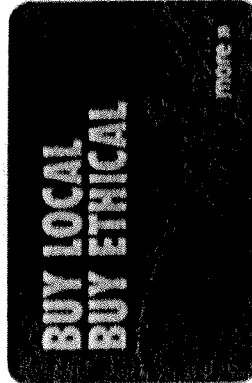
Textile Clothing and Footwear Union of Australia (TCFUA), National Secretary Michele O'Neil and workers who lost their jobs at Pacific Brands will hold a media conference immediately prior to today's Jobs Forum to release data on the experience of redundancy and the labor market of ex Pacific Brands workers

"We want to make sure that both the human face and real story of job loss is understood by participants at today's forum" Ms O'Neil said. "Urgent action is needed in the manufacturing sector."

Over 11,000 textile, clothing and footwear workers lost their jobs in the last 12 months to September 2011

For further information and comment please contact:
Michele O'Neil 0419 338 853

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FAIR WORK AMENDMENT (TEXTILE, CLOTHING AND FOOTWEAR INDUSTRY) BILL 2011

OUTLINE

- ① The Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011 (the Bill) will amend the *Fair Work Act 2009* (FW Act) to enhance existing protections for vulnerable workers in the textile, clothing and footwear (TCF) industry.
- ② Research has consistently shown that outworkers in the TCF industry suffer from unique vulnerabilities as a result of their engagement or employment in non-business premises. These vulnerabilities are often exacerbated by poor English language skills, a lack of knowledge about the Australian legal system and low levels of union membership in the industry.
- ③ Despite the existing provisions in the FW Act, the relevant modern award and in state legislation, outworkers continue to experience poor working conditions.
- ④ This Bill is intended to ensure equitable and consistent protection for these workers.
- ⑤ The Bill will also address a limitation that currently exists in relation to right of entry into premises in the TCF industry operating under 'sweatshop' conditions.
- ⑥ The Bill will:
 - extend the operation of most provisions of the FW Act to contract outworkers in the TCF industry
 - provide a mechanism to enable TCF outworkers to recover unpaid amounts up the supply chain
 - extend specific right of entry rules that apply to suspected breaches affecting outworkers (which allow entry without 24 hours notice) to the industry more broadly, with an exception for the principal place of business of a person with appropriate accreditation (to which the standard right of entry rules would apply)
 - enable a TCF outwork code to be issued.
- ⑦ These changes will promote fairness and ensure a consistent approach to workplace entitlements and protections for a class of workers that is widely recognised as being highly vulnerable to exploitation.



Australian Government

Fair Work OMBUDSMAN

31 OCT 2011

Mr Jon Griffin
Director
APL Financial Pty Ltd
PO Box 300
MULGRAVE VIC 3170

Dear Mr Griffin,

Thank you for your correspondence to the Fair Work Ombudsman, Mr Nicholas Wilson, received 19 October 2011. Mr Wilson has requested that I respond on his behalf. I understand from your letter that you have concerns about the *Textile, Clothing, Footwear and Associated Industries Award 2010* (the modern award).

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

I refer to your conversation with Senior Policy Officer Sarah Clifford on 26 October 2011, during which you have raised concerns regarding the contents of the 'Guide to the Textile, Clothing, Footwear and Associated Industries Award' (the guide), produced by Ethical Clothing Australia.

Ethical Clothing Australia is a joint business-union initiative that runs an accreditation and education program designed to help businesses and workers in the textile, clothing and footwear industry, particularly home workers. Ethical Clothing Australia is governed by an independent committee with representation from stakeholders including the Textile Clothing and Footwear Union of Australia (TCFUA) and the Council of Textile and Fashion Industries of Australia (TFIA).

As the guide is not a Fair Work Ombudsman publication, should you have any questions regarding its content, please contact Ethical Clothing Australia on (03) 9419 0222, or at www.ethicalclothingaustralia.org.au.

In your correspondence, you also requested information about the percentage of businesses complying with the modern award and whether research has been conducted on the costs of compliance. The Fair Work Ombudsman has not conducted any research relevant to these questions.

You have also requested that the Fair Work Ombudsman comment on the purpose and efficacy of the modern award. The Fair Work Ombudsman is an independent statutory authority, and as a result, cannot comment on the efficacy of the modern award or government policy.

Finally, the Fair Work Ombudsman does not provide funding to the TCFUA. However, this agency cannot comment on the TCFUA's other sources of funding.

Should you have any specific questions in relation to the interpretation of the modern award or to the FW Act more generally that the Fair Work Ombudsman may assist you with, please feel free to contact Ms Clifford on

GPO Box 9887 HOBART TAS 7001
142-146 Elizabeth Street HOBART

16 December 2011

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Fair Work OMBUDSMAN

Mr Jon Griffin
Director
APL Financial Pty Ltd
PO Box 300
MULGRAVE VIC 3170

Dear Mr Griffin,

Thank you for your letter dated 16 November 2011, I apologise for the delay in providing a response to you. Given the previous correspondence with you in regards to this matter, I wanted to ensure that we provided the most comprehensive response possible.

In your letter, you asked a number of questions about outworkers in the textile, clothing and footwear industry. Please find our answers to your questions set out below.

1. Contracting Structure

In your letter, you provided the Fair Work Ombudsman (FWO) with a diagram setting out a specific contracting structure between a number of principals, as well as some further information about the arrangements between the principals. You asked FWO to 'comment on the structure ... and whether it complies with the legislation'.

FWO is unable to provide definitive advice about whether or not specific contractual arrangements comply with *the Fair Work Act 2009* (the **FW Act**), or fair work instruments such as the Textile, Clothing, Footwear and Associated Industries Award 2010 [MA000017] (the **Modern Award**). If this is what you require, it is recommended that you seek independent legal advice.

2. 'Written Agreements' and Other Records

In your letter, you noted that '*[t]he legislation states a written agreement with the makers that include the minimum terms is required*'. You asked FWO to 'please provide an example of such an agreement'.

In addition, you noted that:

'To comply with the legislation Principal A must know the working conditions, pay rates, super, leave loading, holidays of all outworkers/employees employed by Principal E prior to the garments being made. When the garments are completed Principal A will need to check detailed time sheets and job costing reports kept by Principal D and Principal E to ensure each worker is paid in accordance with the award.'

You asked FWO:

'How are these records to be kept, if the work is performed on Principal D, E & F's premises and the employee is working on a multiple of garments for a multiple of Principal A's.'

It is our understanding that, when you refer to the 'legislation,' you are referring to the Modern Award.

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We note that the Modern Award requires a 'principal' who makes an 'arrangement' under the Award to make and retain a variety of written records, including written agreements. For your information, a general overview of the record-keeping obligations of principals contained in Schedule F of the Modern Award, in relation to the making of arrangements under the Award, is set out as Appendix 1 to this letter (the **Overview**).

We note that a principal must retain all records identified in the Overview for a period of six years after the relevant record was made, and must ensure that such records are available for inspection and copying in accordance with the Award.

We note that the Modern Award does not prescribe the form that any of the records identified in the Overview must take, other than that they must be in writing. FWO has not developed any such template or sample records at this time.

3. Superannuation and Privacy Legislation

In your letter, you asked FWO to:

'Please comment on a situation where principals A, B & C have taken reasonable steps to ensure principle D/employee complies to employment and taxation law however principal D/employee does not pay the 9% super guarantee charge. Principal D/employee pays the 9% to himself as salary and wages.'

You also asked about the interaction between the record-keeping obligations of principals under the 'legislation' – which we again understand to be a reference to the Modern Award – and privacy legislation.

FWO is unable to provide advice about legislation that falls outside its scope of advice, including superannuation and privacy legislation.

For further information about superannuation legislation, you may wish to refer to the website of the Australian Taxation Office.

For further information about privacy legislation, you may wish to refer to the website of the Office of the Australian Information Commissioner.

4. FWO Enforcement Action

In your letter, you asked FWO to *'please advise how many cases the ombudsman has prosecuted and how many cases the ombudsman is currently investigating'*.

Information regarding the recent litigations FWO has undertaken can be viewed on the legal section of our website <http://www.fairwork.gov.au/about-us/legal/pages/default.aspx>

In regards to current investigations, we do not publically provide this information, but our annual report may contain some data regarding the number of investigations we undertake and the nature of those investigations: <http://www.fairwork.gov.au/about-us/publications/pages/annual-reports.aspx>

We trust this information is of assistance. If you have any further queries or require clarification about the information provided in this letter, please feel free to contact me on or via email at

Yours sincerely

Sally Dennington
Assistant Director – Government Policy
FAIR WORK OMBUDSMAN
16 December 2011

Important note: Disclaimer

FWO is committed to providing useful, reliable information to help you understand your rights and obligations under workplace laws.

There are a number of factors that might affect the applicability of the information written here

These include:

- whether you have provided us with all the relevant and correct information about your situation;
- changes in your circumstances; and
- changes in the law.

It is your responsibility to comply with workplace laws that apply to you.

FWO's information is not legal advice and FWO does not accept legal liability arising from or connected to the accuracy, reliability, currency or completeness of this information. Therefore, you may wish to seek independent professional advice to ensure all the factors relevant to your circumstances have been properly considered.



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Appendix 1: General Overview of Record-Keeping Obligations of Principals Contained in Schedule F of the Modern Award, in relation to the Making of Arrangements under the Award

Record	Clause	When record is required	To whom record must be provided	Information that record must contain
'Work Record'	F.2.2 and F.3.4	Principal must make and retain a Work Record upon making an arrangement.	Principal must give a copy of the Work Record to the 'person' with whom the arrangement is made, prior to the commencement of any work under the arrangement	<p>A Work Record must contain:</p> <ul style="list-style-type: none">• 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; and• The price to be paid for each garment, article or material. <p>In addition, where the principal makes an arrangement with a 'worker' or a body corporate owned or managed by the worker or a member of their family, the Work Record must also contain:</p> <ul style="list-style-type: none">• 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;• Details of the time standard applied in order to determine the appropriate sewing time;• The number of working hours that will be necessary to complete the work, calculated by multiplying the number of garments by the sewing time per garment, article or material;



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'Lists'	F.2.3		Principal must provide a copy of the List to the General Manager or their nominee and to the relevant State Branch of the Union <u>within 7 days of the last</u> working day of February, May, August and November of each year.	<ul style="list-style-type: none">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; andThe total amount to be paid to the worker for the hours and days, applying the appropriate rates of pay. <p>A List must contain:</p> <ul style="list-style-type: none">The name and address of each person with which the principal makes an arrangement; andThe date each arrangement is made.
'Written Agreement'	F.3.2	Principal must make a signed Written Agreement with a worker upon making an arrangement with the worker, prior to the commencement of any work under the arrangement.	The Written Agreement must be expressed clearly and simply in a language the worker understands, and be provided in writing to the worker in that language a reasonable time before it is signed.	<p>The Written Agreement must specify:</p> <ul style="list-style-type: none">Whether the principal will provide the worker with work on a full-time or part-time basis; andIf part-time, the agreed number of hours per week. <p>In addition, any proposed variation to a Written Agreement must specify the number of agreed part-time hours (if applicable).</p>
'Terms of Arrangements'	F.2.4	Principal must retain a copy of the proposed Written Agreement, the signed Written Agreement and any variation agreement, along with an English language version of each document if the documents are in a language other than English.		<p>An arrangement must contain a term requiring the person with whom the arrangement is made to have a written agreement with any other person who performs any work under the arrangement, which specifies each of the matters set out in clause F.2.2 (a) and provides for wages and conditions no less favourable than those contained in clauses F3 and F4.</p>

To:
Subject:

To Sabrina,

We act as accountants, tax agents for small to medium size businesses.

A client of ours has asked us to review the Guide to the Textile, Clothing, Footwear & Associated Industries Award which was forwarded by Ethical Clothing Australia.

Set out below are our views on how the legislation will affect small to medium size business and your comments are requested:

1. **Reference is made to page 25 of the Guide to the Award 2010/11.** Principal A can be responsible for how Principal E treats its outworkers and if they are not treated in accordance with the award then Principal A can be fined \$33,000 for each breach of the award. Although the legislation is fine in theory from a practical point of view Principal A cannot and will not know how Principal E treats its outworkers.

The keeping of the proper paperwork and accreditation in no way protects Principal A from any wrongdoing undertaken by Principal D or E

Reference is made to page 40 of the Guide to the Award 2010/11 and Step 4. Create written agreements with the makers that include the minimum terms. Please provide an example of such an agreement.

The only practical way that Principal A can be certain that outworkers contracted by Principal E are treated in accordance with the award would be to personally interview every outworker employed by Principal E after each shipment of clothing is delivered to Principal A. This is obviously impractical and will not happen. Also all outworkers' employed by Principal D will need to be interviewed by Principal A.

Point 5 on page 25 is impractical. Outworker F will need to be interviewed by Principal A after Principal A receives the garments and before payment is made to Principal E. It is not practical for this to happen.

In our view it is impossible to comply to the legislation.

2. There are issues of privacy. Worker F is not an employee/outworker of Principal A. Worker F may not agree to the details of her income and working conditions being disclosed to Principal A and Principal D. In this situation what is Principal A to do?

To comply with the legislation Principal A must know the working conditions, pay rates, super, leave loading holidays of all outworkers employed by Principal E prior to the garments being made. When the garments are completed Principal A will need to check detailed time sheets and job costing reports kept by Principal D and Principal E to ensure each worker is paid in accordance with the award. How are these records to be kept, if the work is not performed on Principal E's premises and the outworker is working on a multiple of garments for a multiple of Principal A's.

Once again the legislation is fine in theory but cannot be complied with in practice.

Please provide details of the legislation which allows Principal E to release private employee/outworker information to Principal A.

3. Please provide an estimate of what % of the businesses in the industry are complying with the legislation.
4. Has any research been done on the cost of compliance? If so please provide the information.

5. Is the purpose of the legislation to remove outworkers from the clothing, textile & footwear industry?
6. The introduction page 1 states that the Textile, Clothing & Footwear Union of Australia is a program partner and performs compliance checks of worksites. Is the union receiving funding for the compliance checks and if so how is the funding calculated?
7. Is the union receiving other government funding?
8. The logical and practical way to ensure outworkers are not exploited is to require a business to be accredited and to comply to levels of documentation and conduct which is within its control. Where an accredited business transacts with another accredited business the first business has the right to rely on the accreditation provided by the second business.
9. The legislation as it stands is impractical, illogical and cannot be adhered to. The end result must be, garments which are now made in Australia will in the future be made overseas.

Please email a reply to our questions within 10 days.

 Regards

181956140610

Jon Griffin

Director

aplFinancial Pty Ltd

Suite 8 758 Blackburn Rd, Clayton Vic 3168

PO Box 300, Mulgrave Vic 3170

Ph: (03) 9558 6288 Fax: (03) 9558 6266

Mobile 0419 532 609

Website: www.aplfinancial.com.au

Jon Griffin

To:
Subject: FW: textile clothing & footwear - outworkers_2011.10.18
Attachments: image001.png; image004.png; image002.jpg; image005.png; image006.jpg

From: Jon Griffin
Sent: 16 November 2011 1:46 PM
To:
Subject: FW: textile clothing & footwear - outworkers_2011.10.18

To Simon McRae
National Manager

Set out below is a copy of our email sent to Sabrina of your office on the 18 October 2011.

We have not received a reply and request that you reply to our email by 5.00pm 26 November 2011.

Regards

161956140611
Jon Griffin
Director
aplFinancial Pty Ltd
Suite 8 758 Blackburn Rd, Clayton Vic 3168
PO Box 300, Mulgrave Vic 3170
Ph: (03) 9558 6288 Fax: (03) 9558 6266
Mobile 0419 532 609
Website: www.aplfinancial.com.au

From: Jon Griffin
Sent: 18 October 2011 3:17 PM
To:
Subject: textile clothing & footwear - outworkers_2011.10.18

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12

Régards

181956140610

Jon Griffin

Director

aplFinancial Pty Ltd

Suite 8 758 Blackburn Rd, Clayton Vic 3168

PO Box 300, Mulgrave Vic 3170

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Website: www.aplfinancial.com.au



HOLLINGSWORTH & CO. PTY. LTD.

ABN 62 007 106 514
CERTIFIED PRACTISING ACCOUNTANT
REGISTERED TAX AGENT

-J'

5 December 2011

M/s Michele O'Neil
National Secretary
Textile Clothing & Footwear Union of Australia National Council
PO Box 441
Carlton South, VIC 3053

Dear M/s O'Neil

Re Textile Clothing & Footwear Industry –Victoria

We are an accounting practice which provides business and taxation advice to small and medium size businesses throughout Victoria.

Apparently there have been changes to the way outworkers operate.

It has been suggested that outworkers are now deemed to be employees. It has also been suggested that outworkers do not have a choice and can no longer work as stand alone independent contractors.

Please confirm that this is the case.

Regards

Kevin Hollingsworth
Hollingsworth and Co Pty Ltd

Governing Director: Kevin Hollingsworth FCPA FCMA
LEVEL 2/ 517 FLINDERS LANE, MELBOURNE, VIC 3000
PO BOX 16039, COLLINS STREET WEST, MELBOURNE, VIC 8007

Email:

www.hollingsworthandco.com.au