

**SENATE EDUCATION, EMPLOYMENT AND WORKPLACE
RELATIONS COMMITTEE**

**INQUIRY INTO THE FAIR WORK
AMENDMENT (TEXTILE, CLOTHING AND
FOOTWEAR INDUSTRY) BILL 2011**

**DEPARTMENT OF EDUCATION,
EMPLOYMENT AND WORKPLACE
RELATIONS**

The Department of Education, Employment and Workplace Relations welcomes the opportunity to make a written submission to the Senate Committee Inquiry into the Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011 (the Bill).

The Bill will amend the *Fair Work Act 2009* (FW Act) to enhance protections for outworkers in the textile, clothing and footwear (TCF) industry and ensure equitable and consistent protection for these workers by:

- extending the operation of most provisions of the FW Act to contract outworkers in the TCF industry – this will ensure that outworkers will have equivalent protection under the FW Act regardless of whether they would otherwise be employees or contractors
- providing a mechanism to enable TCF outworkers to recover unpaid amounts up the supply chain, and
- enabling a TCF outwork code to be issued.

The Bill will also address a limitation in the current provisions governing right of entry into premises in the TCF industry to investigate ‘sweatshop’ conditions. The Bill will extend specific right of entry rules that apply to suspected breaches affecting outworkers (which allow entry without 24 hours notice) to the industry more broadly. An exception will apply for the principal place of business of a person with appropriate accreditation.

The Bill is designed to ensure nationally consistent minimum workplace standards for the protection of outworkers.

State legislation dealing with outworkers will continue to apply to the extent that it is not directly inconsistent with the FW Act. As a result, the impact of the Bill will vary by state. In circumstances where the Bill provides the same kinds of protection that exist in state legislation, the relevant provisions in the Bill will have limited impact on either outworkers or businesses in the TCF industry.

A detailed overview of the Bill is provided at [Attachment A](#).

The Department’s submission:

- provides background information on the TCF industry and its workforce
- provides an overview of existing legislative and award protection for outworkers
- considers the impact of the Bill, and
- addresses possible unintended consequences of the Bill.

A: THE TCF INDUSTRY AND WORKFORCE

The TCF industry covers all stages of production of textile, clothing, footwear and leather products, from the 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. Linkages extend 'up stream' to the supply of natural fibres and 'downstream' to service areas including design, pattern making and retailing.¹

A 2008 review of the TCF industry commented that clothing manufacture (particularly footwear) is labour intensive and there is limited scope for mechanisation of significant parts of these processes. This has led to the parts of the TCF industry involved in the production of low value commodities to outsource all or part of their labour intensive production to either offshore locations with lower labour costs or local outworkers.²

- 'Outwork' refers to work performed by workers outside regular business premises, often in the worker's own home. Outworkers may be either employee outworkers or contract outworkers (see s 12 of the FW Act).

Over the last four decades there has been a large-scale transfer of global TCF production to developing economies, particularly China, that enjoy a competitive advantage in low labour costs. This has resulted in a significant decline in both employment and industry value-add. In August 2011, around 42 000 workers were employed in Australia's TCF industries, down from 83 000 workers in 2000-01.³ Further, in 2010-11 the TCF industries contributed over \$4.3 billion in industry value-added (around 4 per cent of all manufacturing), which is down from \$8.1 billion recorded in 2000-01.⁴

The following table shows the number of businesses that operated in the TCF industry in 2009, broken down by the main state in which they operated and the number of employees they employed.

¹ Productivity Commission, *Review of TCF Assistance*, 2003, p.iv

² Green *Building Innovative Capacity: Review of the Australian Textile, Clothing and Footwear Industries*, 2008, pp22, 34

³ Labour Force, Australia, Detailed, Quarterly, Aug 2011 (Cat. No. 6291.0.55.003) note that 4-quarter rolling average has been used

⁴ Australian National Accounts: National Income, Expenditure and Product, Sep 2011 (Cat. No. 5206.0)

TCF businesses by number of employees and by state and territory in 2009⁵

	Non employing ₆	1-19 employees	20-199 employees	200+ employees	Total
New South Wales	1546	1253	147	3	2949
Victoria	1191	1359	189	12	2751
Queensland	786	582	132	3	1503
South Australia	278	219	18	0	515
Western Australia	371	310	36	0	717
Tasmania	60	36	12	3	111
Australian Capital Territory	60	18	0	0	78
Northern Territory	12	15	6	0	33
Other ⁷	24	0	0	0	24
Total	4328	3792	540	21	8681

Although the table does not indicate the number of businesses that engage outworkers, it does show that a large proportion of businesses in the TCF industry are based in New South Wales, Queensland and Victoria, which all provide specific legislative protections for outworkers. Only 12 per cent of TCF businesses were located in Western Australia which does not provide specific legislative protection for outworkers.

The high levels of production outsourcing in the TCF industry result in long and complex manufacturing supply chains that regularly end with a worker performing work at home. A large proportion of clothing manufacture in Australia is performed by outworkers in this informal sector.

There is a significant disparity in estimates of TCF outworker numbers reflecting, to a large extent, the hidden nature of the work. Accurate estimates of TCF outworker numbers are also affected by respondent bias (for example, where the outworker has been pressured by those that engage them not to identify as an outworker), language difficulties (as many outworkers are recent migrants) and the need to rely on workers self identifying as outworkers (some with multiple jobs may not identify themselves as outworkers).

⁵ Source: Australian Bureau of Statistics, Counts of Australian Business, including entries and exits (Cat. No. 8165.0)

⁶ Non employing means businesses that do not pay any employees. However, such businesses may have non-salaried directors; volunteers; persons paid by commission only; and self employed persons such as consultants and contractors.

⁷ 'Other' consists of businesses that are yet to be coded to a main state of operation

- A report produced by the Textile, Clothing and Footwear Union of Australia (TCFUA) in 1995 put the figure of the total number of outworkers (both employee outworkers and contract outworkers) in Australia at 330 000.⁸
- The Productivity Commission's 2003 report estimates that the full time equivalent number of TCF outworkers in Australia is unlikely to be much above 25 000.⁹
- Other estimates suggest that there are somewhere between 30 000 and 200 000 outworkers available to undertake home-based manufacture, predominantly in the clothing industry. This number is an estimate of the total pool of people who undertake outwork on either a part time, full time or irregular basis.¹⁰

Estimates of the number of outworkers do not provide a breakdown of how many are employee outworkers and how many are contract outworkers. The Department is not aware of any data that addresses this distinction.

Inquiries and reviews over the last 15 years¹¹ have consistently shown that TCF outworkers:

- experience poor working conditions and are frequently underpaid
- are often encouraged by those that engage them to identify as independent contractors in order to avoid payment of employee entitlements, and
- are often more vulnerable than many other low paid workers to being denied their minimum entitlements as a result of poor English language skills, lack of knowledge of the Australian legal system and low levels of union membership.

A 2007 report prepared by the Brotherhood of St Laurence indicated that non-compliance with minimum wages and conditions of employment for outworkers was the norm and that some outworkers were paid as little as \$2-3 per hour.

There is also evidence that the complicated structure of the outworker subcontracting supply chain allows some manufacturers to:

- reduce wage costs, given that outworkers are difficult to identify by compliance authorities and unions
- avoid ancillary costs relating to penalty rates, superannuation, workers' compensation and payroll tax
- circumvent costs of plant and equipment by transferring costs to outworkers

⁸ *The Hidden Cost of Fashion*, Report on the National Outwork Information Campaign, March 1995

⁹ These figures are based on data supplied by the TCF industry in 1997 on the number of workers required to manufacture the total volume of locally produced apparel, adjusted to take into account a shift in garment production out of factories in the period 1997-2003.

¹⁰ Green, 2008, p. 116

¹¹ For example, Senate Economics Reference Committee's *Inquiry into Outworkers in the Garment Industry* (1996), the Productivity Commission's *Review of TCF Assistance* (2003) and the Brotherhood of St Laurence's *Ethical Threads Report* (2007).

- artificially reduce wage costs, which are in some cases compensated for by welfare payments, and
- demand quick turnaround times that can lead to poor work practices and a high rate of workplace injuries.¹²

In addition to concerns about outworkers, there is also anecdotal evidence that non-outworker employees in the TCF industry are sometimes engaged in so-called 'sweatshop' environments. Sweatshops are generally seen as a type of small factory in non-traditional premises, such as backyard garages or converted shops, and are characterised by employees working very long hours for low rates of pay and with poor working conditions.

B: EXISTING LEGISLATIVE AND AWARD PROTECTION FOR TCF WORKERS

Federal and state governments have for some time accepted that special measures are needed to address the unique vulnerabilities of workers in the TCF industry.

Legislative protections for TCF outworkers are provided federally, under the FW Act and in the *Textile, Clothing, Footwear and Associated Industries Award 2010* (the TCF Award), and in most states.

FW Act and the TCF Award

Under the FW Act, TCF employee outworkers are entitled to the same protections as other employees. These include:

- a safety net of minimum terms and conditions of employment comprised of the National Employment Standards (NES) and a system of modern awards and minimum wages
- the right to negotiate collective enterprise agreements with their employer in good faith, underpinned by the safety net
- protections against unfair dismissal and protection against adverse action and discriminatory treatment under the general protections in Part 3-1 of the FW Act
- protection of the freedom to choose whether or not to be a member of a union and to be represented by that union in the workplace.

The FW Act includes special rules that apply to union entry to investigate alleged breaches of TCF outworker entitlements.

- Unlike the general right of entry provisions in Part 3-4 of the FW Act, the TCF outworker right of entry provisions do not require unions to provide 24 hours notice of entry. In addition, it is not necessary for there to be a member of the relevant union to be working at the premises. A union may enter premises other than

¹² Ethical Clothing Trades Council – Outworkers Lawful Entitlements Compliance Report, November 2004

the workplace if they reasonably suspect documents relating to an alleged contravention of TCF outworker entitlements are kept at those premises.

- Further, when investigating breaches of ‘designated outworker terms’, unions may enter without the need to have first formed a reasonable suspicion that a breach has occurred.

Part 3-1 of the FW Act sets out a range of workplace protections called ‘general protections’. Most of the general protections already apply to TCF contract outworkers (for example, provisions protecting contractors against a principal terminating their contract or altering their position to their prejudice).

The principal protections in Part 3-1 are divided into protections relating to workplace rights (which can be broadly described as employment entitlements and the freedom to exercise and enforce those entitlements) and engaging in industrial activities (which encompasses the freedom to be or not be a member or officer of an industrial association and to participate in lawful activities). There are also a number of other protections included in Part 3-1 such as protection from workplace discrimination.

The scope of the application of some of the general protections to independent contractors, particularly in relation to ‘workplace rights’, is necessarily more limited because of the small number of direct rights and entitlements conferred by workplace laws (for example, the *Independent Contractors Act 2006*) and workplace instruments to which the workplace rights protection can attach. However, the industrial activities protection (for example, the freedom to be or not be a member of a union) and the protection against coercion and misrepresentation readily apply to independent contractors, including TCF contract outworkers.

Modern awards can, where appropriate, include outworker terms that apply to both employee and contract outworkers (s 140 of the FW Act). Outworker terms are terms that relate to:

- the conditions under which an employer may employ employee outworkers, or
- the conditions under which an outworker entity may arrange for work to be performed for the entity (directly or indirectly), if the work is of a kind often performed by outworkers.

The FW Act ensures that outworker terms in modern awards cannot be undercut through bargaining for an enterprise agreement (s 200 of the FW Act).

Schedule F of the TCF Award makes provision for outworkers in the TCF industry. It includes terms dealing with:

- minimum wages and conditions for outworkers, including an entitlement to the NES for contract outworkers, stand down and dispute resolution
- general requirements for engaging outworkers, such as registration of principals (defined as an employer or outworker entity), requirements for the keeping of work

records, lists of the number and type of arrangements entered into with outworkers and records of the terms of those arrangements

- an 'arrangement' is an arrangement made by a principal with another person to have work carried out for the principal – whether or not the person carries out the work themselves or arranges with another person for the work to be performed – but does not apply to the employment of a non-outworker
- additional requirements for making arrangements with workers, such as information that must be provided to outworkers about their entitlements under the TCF Award
- registration of a board of reference for the registration of principals and the maintenance of a register of principals, and
- provisions about recovery of unpaid remuneration against 'principals' and 'apparent principals'.

State laws for the protection of outworkers

There are varying approaches taken to the regulation of TCF outworkers in state jurisdictions, including:

- deeming TCF contract outworkers to be employees for the purposes of state employment law
- capacity to pursue unpaid remuneration up the supply chain
- enforceable mandatory codes of practice relating to the clothing industry.

No specific legislative protections for TCF outworkers exist in Western Australia.

For a comparison of measures in the Bill and state laws relating to outworkers, see Attachment B.

Deeming TCF contract outworkers to be employees

Legislation in New South Wales, Queensland and Tasmania deems outworkers to be employees.¹³ In these states, outworkers are treated as employees under the relevant legislation in relation to minimum pay and leave entitlements as well as the broader range of employment matters dealt with under the state laws.

- This means, for example, that outworkers in New South Wales and Queensland have protections against unfair dismissal and rights in relation to bargaining and taking industrial action. Similar rights exist under Tasmanian law in relation to unfair dismissal and bargaining.

¹³ Section 5(3) and item 1(f) of Schedule 1 to the *Industrial Relations Act 1996* (NSW); s 5(1)(g) of the *Industrial Relations Act 1999* (Qld); s 3 of the *Industrial Relations Act 1984* (Tas).

The South Australian *Fair Work Act 1994* extends employment entitlements and protections to contract outworkers if an award or enterprise agreement includes terms that apply to outworkers, or a regulation extends coverage.¹⁴

- The effect of this is that in South Australia contract outworkers (as well as employees) who are covered by an award or enterprise agreement have protection against unfair dismissal and have access to the bargaining provisions of the *Fair Work Act 1994*.

In Victoria, the *Outworkers (Improved Protection) Act 2003* extends minimum wage and conditions entitlements to contract outworkers, and deems outworkers to be employees for the purposes of the *Long Service Leave Act 1992*, the *Occupational Health and Safety Act 2004* and the *Public Holidays Act 1993*.¹⁵

Avenues to recover unpaid amounts

In Victoria, New South Wales, Queensland and South Australia an outworker may make a claim for any unpaid remuneration (expressed as 'wages or superannuation contributions' in Queensland and South Australia) against an apparent employer (the 'apparent responsible contractor' in South Australia) within six months after the work was finished.¹⁶

In Tasmania, there is no special mechanism for TCF contract outworkers to recover unpaid remuneration. However, the Court may order the payment of unpaid remuneration if an employer is found guilty of the offence of not paying an employee (which includes a 'deemed' employee outworker).¹⁷

Mandatory Code of Practice

New South Wales, Queensland and South Australia each have a mandatory code of practice relating to clothing (a power also exists for the establishment of a mandatory code in Victoria).¹⁸ These codes:

- enable monitoring of the use of outworkers in the manufacture of clothing products
- prescribe practices and standards to aid compliance with applicable laws and industrial instruments
- prescribe reporting practices and conduct to prevent the avoidance of payment of remuneration and other lawful entitlements.

¹⁴ Section 5(4), of the *Fair Work Act 1994* (SA).

¹⁵ Section 4 of the *Outworkers (Improved Protection) Act 2003* (Vic).

¹⁶ Sections 5-9, 12 of the *Outworkers (Improved Protection) Act 2003* (Vic); ss 129B-129H of the *Industrial Relations Act 1996* (NSW); ss 400B-400D and 400F of the *Industrial Relations Act 1999* (Qld); ss 99D-99J of the *Fair Work Act 1994* (SA).

¹⁷ Sections 51-52 of the *Industrial Relations Act 1984* (Tas).

¹⁸ Part 3 of the *Industrial Relations (Ethical Clothing Trades) Act 2001* (NSW); s 400I of the *Industrial Relations Act 1999* (Qld); s 99C of the *Fair Work Act 1994* (SA) (made as a regulation).

The mandatory *Ethical Clothing Trades Extended Responsibility Scheme* is in effect in New South Wales.¹⁹ The Scheme places obligations on clothing retailers, suppliers, contractors and sub-contractors, continuing entities of suppliers and transferees (other than charitable organisations) of clothing goods made in Australia and sold within New South Wales. These obligations relate to the keeping and exchanging of information about the manufacture of clothing, and making those records open to inspection. Retailers are exempt from the New South Wales code if they are a signatory to the voluntary national Homeworkers Code of Practice (now known as Ethical Clothing Australia).

In Queensland, the *Mandatory Code of Practice for Outworkers in the Clothing Industry* places obligations on retailers, suppliers, contractors, subcontractors and successors (other than charitable organisations) engaged in the supply or retail of clothing products in Queensland.²⁰ A person who is accredited by Ethical Clothing Australia, or is a retail signatory to the *National Retailers Ethical Clothing Code* or has signed Ethical Clothing Australia's Procurement Code of Practice is not bound by the Queensland code.

- The Office of Fair and Safe Work Queensland announced on 11 October 2011 that it will conduct an evaluation of the *Mandatory Code of Practice for Outworkers in the Clothing Industry*, in response to industry concerns that the Queensland code will place an excessive administrative burden on retailers and business owners. Key industry stakeholders such as unions, retailers, manufacturers and employer organisations will be consulted as part of the evaluation.

In South Australia, the *Clothing Outworker Code of Practice* places obligations on persons, including but not limited to retailers, suppliers, contractors, subcontractors, continuing entities of suppliers and transferees (other than charitable organisations) engaged in or in connection with the manufacture or provision of clothing products in Australia to ensure outworkers in the clothing trades receive their lawful entitlements under the *Clothing Trades Award* (SA) and under any other enforceable industrial instrument. Parties are exempt from the *Clothing Outworker Code of Practice* if accredited and compliant with Ethical Clothing Australia.²¹

The table below shows a summary of the types of outworker provisions that are provided in each state in relation to the issues that are dealt with in the Bill:

	NSW	Vic	Qld	SA	WA	Tas
Deemed to be employees	Yes	For long service leave, occupational health and safety and public holidays; minimum entitlements	Yes	Yes, if covered by an outworker provision in an award or enterprise agreement	No	Yes

¹⁹ See http://www.industrialrelations.nsw.gov.au/pdfs/ethical_clothing_trades.pdf (accessed 18 May 2011). The Scheme is established under Part 3 of the *Industrial Relations (Ethical Clothing Trades) Act 2001* (NSW).

²⁰ Section 8 of the *Mandatory Code of Practice for Outworkers in the Clothing Industry*, Queensland

²¹ Item 8 of Schedule 1 to the *South Australian Clothing Outworker Code of Practice, Fair Work (Clothing Outworker Code of Practice) Regulations 2007* (SA).

		apply 'as if' employees				
Provisions for recovery of unpaid remuneration up the supply chain	Yes	Yes	Yes	Yes	No	No, but there is a capacity to recover under general employment law.
Mandatory code of practice	Yes	No, but the power to establish a code of practice exists.	Yes	Yes	No	No

C: ANTICIPATED IMPACT OF THE BILL

Overview

Despite current protections, some workers in the TCF industry continue to experience the problems outlined earlier in this submission, including underpayment and denial of guaranteed minimum entitlements.

The Government recognises the ongoing disadvantage of these workers and in introducing the Bill, has sought to provide an integrated package of measures that will create nationally consistent, equitable and effective protections, which:

- extend to all TCF outworkers a minimum set of terms and conditions of employment, as well as other rights and entitlements
- ensure arrangements for the performance of TCF work, by both outworkers and non-outworker employees, can be effectively monitored, and
- enhance compliance with and enforcement of the relevant legislative provisions at all levels of the supply chain.

The measures in the Bill will supplement existing regulation.

Where state laws are not directly inconsistent with the new provisions, they will continue to operate in conjunction with the FW Act.

As a result, the impact of the Bill will vary by state. In circumstances where the Bill provides equivalent protections to those that exist in state legislation, the relevant provisions in the Bill are likely to have limited additional impact on outworkers and businesses in the TCF industry. In contrast, in states with no specific laws relating to outworkers the impact of the Bill will be more pronounced.

A key difficulty in quantifying the impact of the Bill is the lack of reliable data about both the number of outworkers in Australia and the number of businesses that engage

outworkers. As such, the Department's assessment does not include quantitative analysis.

Extension of FW Act

The Bill makes provision for TCF contract outworkers to be treated as employees for the purposes of the FW Act (subject to limited exceptions: see paragraphs 789BA(1)(a)-(g)). This will ensure that contract outworkers in the TCF industry have the same terms and conditions, as well as other rights and entitlements, as employee outworkers.

Under the TCF Award, TCF contract outworkers are entitled to the same minimum terms and conditions of employment as employee outworkers, including an entitlement to the NES and to minimum wages. While the provisions of the Bill will end the distinction under the FW Act between TCF contract and employee outworkers, it will not lead to additional minimum wages and entitlements compared to those that are already afforded under the TCF Award.

The Department is aware of concern amongst industry stakeholders about the impact of removing the distinction between contractors and employees. However, it is important to note that there will be minimal impact on business in relation to additional costs for increased wages and entitlements as employers and principals are already obliged under the TCF Award to meet these minimum standards.

Rather, the Bill will remove the distinction between outworkers who are employees and contractors in relation to their 'terms and conditions of employment', when the distinction is not relevant to the manner in which they are entitled to be treated under the TCF Award. This will help improve the visibility of the minimum entitlements of contract outworkers and should assist in improving compliance.

The extension of the FW Act to contract outworkers will also provide this group of vulnerable workers with important additional workplace protections under federal law.

TCF contract outworkers covered by the Bill will have access to unfair dismissal remedies under the FW Act, which will provide these workers with greater job security and protection against having their engagement ended in circumstances that were harsh, unjust or unreasonable.

In states that deem contract outworkers to be employees, access to unfair dismissal protections under state industrial relations legislation already exists. However, this is not the case in Victoria and Western Australia. As such, contract outworkers in those jurisdictions will have access to additional protection as a result of the Bill.

As noted, many businesses in the TCF sector are small businesses. The Small Business Code applies to businesses that employ fewer than 15 employees. The Small Business Code (the Code) makes specific arrangements that ensure a dismissal will be found to be fair if Fair Work Australia (FWA) is satisfied that the small business owner has complied with the Code. The Code recognises the special circumstances of small business owners who cannot access human resource management departments, who cannot afford to lose time dealing with disputes and who cannot readily redeploy employees into alternative positions or workplaces. This will help ensure that the impact

of the extension of unfair dismissal provisions for these businesses can be appropriately managed.

The Bill will allow a business that contracts multiple outworkers to bargain collectively with them for an enterprise agreement. The FW Act ensures, however, that the terms of an enterprise agreement cannot be used to undercut outworker terms in the relevant modern award (s 200 of the FW Act). The Bill also provides additional protection of outworker terms, by ensuring that they cannot be varied by a flexibility term (new s 203(2A) of the FW Act).

Bargaining would be subject to the good faith bargaining rules in the FW Act. Parties who are bargaining for an enterprise agreement must comply with the good faith bargaining requirements set out in s 228(1) of the FW Act. This includes:

- recognising and bargaining with other bargaining representatives
- attending and participating in meetings at reasonable times
- disclosing relevant information (but not information that is confidential or commercially sensitive)
- giving genuine consideration to the proposals of other bargaining representatives and responding (with reasons) to proposals in a timely manner, and
- refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining.

While outworkers would be entitled to bargain collectively for an enterprise agreement, it is possible that many would not do so. As at 31 March 2011 there were only 97 current agreements covering employers in the TCF industry (out of a total of 24 946 current agreements as at that date).²² A number of these agreements only cover stores or administrative workers, so the number of agreements that cover employees engaged in manufacturing in the TCF industry is relatively small.

The Department is not aware of any cases where employee outworkers, who are already eligible to collectively bargain for an enterprise agreement, have used the majority support provisions of the FW Act to require an employer to bargain. Further, the Department is not aware of any cases where employee outworkers have taken industrial action in support of bargaining.

The Department considers that it would be consistent with the Government's policy and the objectives of the FW Act for outworkers to engage in enterprise bargaining in order to negotiate higher wages and conditions of employment and to reach agreements that also suit the needs of the relevant business. Nevertheless, for the same reasons that the outworker workforce is generally considered vulnerable, including poor English skills and low levels of union membership, bargaining is likely to be limited.

²² DEEWR, Workplace Agreements Database, unpublished data

Recovery of unpaid amounts up the supply chain

The capacity for outworkers to recover unpaid remuneration from businesses further up the supply chain is already a feature of the TCF Award and legislation in New South Wales, Victoria, Queensland and South Australia.

The provisions in this Bill will provide a standard entitlement across Australia and emphasise the importance of the protection of pay and entitlements of outworkers. The new recovery mechanism will supplement (but not override) existing state mechanisms.

Outworkers that are covered by the Bill already have access to a recovery mechanism in the TCF Award and, in some cases, in state legislation. However, as a consequence of the changes in the Bill, outworkers in Tasmania and Western Australia will gain increased (statutory) capacity to recover unpaid amounts up the supply chain. The range of entities against which recovery can be sought is also potentially broader under the Bill than under existing mechanisms.

Under the Bill, an entity that has been required to pay an unpaid amount to an outworker will be provided with a right to recover an equivalent amount from the responsible person, or offset the amount against any amount they owe to that person. This right will apply whether the unpaid amount is paid voluntarily, or as a result of a court order.

The Department considers that, as a result of these amendments, entities further up supply chains may choose to contract with more reputable suppliers and could also shorten supply chains to limit exposure to claims of this nature. This would be a desirable outcome for outworkers as it is likely to result in the reduced risk of businesses defaulting on their obligation to pay outworkers.

Mandatory Code of Practice

A TCF outwork code would help to improve compliance with both the new provisions and the existing minimum conditions for outworkers, by providing greater transparency in the supply chain and making it easier to identify the entity responsible for an outworker's entitlements. It would also assist in improving compliance more generally by enabling businesses to more easily identify ethical supply chains for the purposes of contracting, thus reducing the capacity of, and business incentive for, parties in the chain to undercut workplace standards.

A code would require employers or other persons engaged in the TCF industry, or a sector of the TCF industry specified in the code, to adopt certain standards of conduct and practice with respect to the engagement of outworkers. Under the Bill, the matters that may be dealt with in the code include but are not limited to:

- record keeping requirements
- reporting on compliance with record keeping requirements or on compliance with other requirements of the code
- general matters relating to the operation and administration of the code.

These matters are consistent with the matters that are set out in Schedule F of the TCF Award, which also sets minimum conditions of employment and includes additional obligations about registration and record keeping.

At the state level, New South Wales, Queensland and South Australia have codes of practice relating to clothing. Similar to the requirements under Schedule F to the TCF Award, these codes:

- enable monitoring of the use of outworkers in the manufacture of clothing products
- prescribe practices and standards to aid compliance with applicable laws and industrial instruments
- prescribe reporting practices and conduct to prevent the avoidance of payment of remuneration and other lawful entitlements.

Provisions of the Bill make clear that the TCF outwork code would not override the TCF Award but would prevail over an agreement or workplace determination.

The Bill enables appropriate elements of state codes to be incorporated into, or taken to be compliant with, the TCF outwork code. This would ensure, for example, that a party does not have multiple similar obligations arising from different sources in relation to record keeping.

For these reasons, the Department considers that a TCF outwork code would result in a limited increase in administrative costs for businesses in the TCF industry.

The Department is aware of the review of the *Clothing Outworker Code of Practice* announced by the Office of Fair and Safe Work Queensland on 11 October 2011, in response to industry concerns that the Queensland code places an excessive administrative burden on retailers and business owners. The Department considers that the outcome of this review will be relevant in determining the approach to any federal TCF outwork code.

Right of Entry

The extension of right of entry provisions would allow a permit holder from the relevant union to more easily investigate suspected breaches of the FW Act or a relevant industrial instrument.

There is evidence that there are non-outworker employees engaged in sweatshops in the TCF industry who are in a vulnerable position in terms of their ability to access their minimum pay and conditions of employment. These workers are often recent migrants, have poor English language skills and are often unaware of their workplace rights. The TCFUA have indicated that combined with these vulnerabilities, many employees are fearful about speaking out about their conditions and, even if they do contact the union for assistance, are fearful about repercussions if it is discovered that they contacted the union.

The Department acknowledges that some industry stakeholders may not be convinced of the need for this extension of right of entry provisions. However, it should be noted that the expansion will benefit vulnerable employees by allowing a permit holder to discover and investigate workplaces in the TCF industry, particularly those operating under sweatshop conditions, and check relevant documents before these businesses can be closed and moved to another location to avoid scrutiny. It may also benefit employees who are fearful about seeking assistance, by limiting the capacity of employers to refuse entry.

The key change in the extension of the outworker-specific right of entry provisions in the FW Act to all businesses in the TCF industry will be that a permit holder will not be required to give 24 hours notice when exercising their right of entry into an employer's premises. The requirement that the permit holder have a reasonable suspicion of a breach of a fair work instrument or the Act continues to apply, although the alleged breach need not necessarily relate to, or affect, a member of the relevant union. In addition, an exception will apply for the principal place of business of a person with appropriate accreditation.

It is also important to note that except in relation to the notice requirements for entry under the outworker-specific right of entry provisions in the FW Act to investigate suspected breaches of the FW Act or a relevant industrial instrument, the other requirements for entry will continue to apply. For example:

- To obtain an entry permit, a union official must be a fit and proper person (s 512 of the FW Act)
- 24 hours notice must be given to occupier of the premises in relation to entry to hold discussions with employees or TCF outworkers who perform work on the premises, whose industrial interests the permit holder's organisation is entitled to represent and who wish to participate in those discussions (s 484 and s 487 of the FW Act)
- discussions may only be held during breaks from work on the day specified in the entry notice (s 490 of the FW Act)
- a permit holder must comply with any reasonable request by the occupier of the premises in relation to occupational health and safety requirements that apply to the premises (s 491 of the FW Act)
- a permit holder must comply with any reasonable request by the occupier of the premises to hold discussions in a particular room or area or take a particular route to that room or area of the premises (s 492 of the FW Act), and
- strict rules apply to the unauthorised use or disclosure of information or documents obtained in the investigation of suspected breaches of the FW Act or a relevant industrial instrument (s 502 of the FW Act).

It is likely that some additional businesses will be subject to right of entry rules as a result of these amendments, although the Department is not able to provide an estimate of the number of premises affected.

The existing capacity under s 519 of the FW Act to seek FWA approval for entry without notice is not an adequate alternative to the measures proposed.

Section 519 provides for limited circumstances in which FWA is able to grant an exemption certificate. In contrast, the new TCF right of entry rules will provide for a general right of entry without notice when the suspected contravention relates to or affects a TCF award worker.

- A 'TCF award worker', is an employee whose work is covered by a TCF award or an individual who, for the purpose of a contract for the provision of services, performs work that would be covered by a TCF award (item 45 of the Bill).

These measures will address practical difficulties that have arisen as a result of the different notice requirements that apply to breaches relating to outworkers and non-outworker employees. For example, where a permit holder enters premises to investigate a suspected breach of designated outworker terms, they may become aware of possible breaches of a fair work instrument or the FW Act relating to outworkers and non-outworker employees working in sweatshop conditions.

It is not practical in this situation to obtain an exemption certificate as the permit holder does not necessarily know that the sweatshop is operating until after they have entered and the requirement to provide notice and return the following day could undermine the effectiveness of entry rights.

D: POSSIBLE UNINTENDED CONSEQUENCES

In his second reading speech on the Bill, Minister Evans stated that:

In the consultation on the Bill the union has raised issues over the unintended effect of certain provisions.

In particular, the Government is consulting with the relevant union to streamline the evidential processes relating to recovery of unpaid amounts up the supply chain, to reflect the difficulties that outworkers with poor English language skills may face and the complex nature of TCF supply chains.

The Government is also considering what changes need to be made to ensure the greatest possible reach of the deeming provisions so that no outworker is inadvertently beyond their reach by operation of the corporate veil.

These changes will be reflected in amendments which the Government will introduce during the passage of this Bill early in 2012.

The Department is examining these issues.

There are a number of mechanisms to ensure that the legislation operates as intended:

- A regulation making power has been included in new s 789BC of the Bill to enable the operation of provisions of the FW Act to be clarified or modified should this prove

necessary to ensure the effective implementation of the objective of TCF contract outworkers having the same rights as employees.

- Importantly, however, while regulations might be made to address technical issues if they arise, the fact that regulations can only be made for the purpose of furthering the objective of TCF contract outworkers having the same rights and obligations as employees, means that regulations cannot be made to undercut the effectiveness of the extension of the FW Act to TCF contract outworkers.
- Minister Evans wrote to his state and territory counterparts and discussions have commenced between officials about any practical concerns or uncertainty that may arise about how the provisions in the Bill intersect with existing state outworker legislation. The Minister indicated in his letter that he was prepared to consider whether technical amendments are required to address any issues identified during these discussions. The incoming Minister supports this approach. (The Department is aware that Minister Shorten has received a letter stating that in broad terms the Western Australian Government supports the intent of the Bill).
- The Office of Fair and Safe Work Queensland is currently conducting an evaluation of the *Clothing Outworker Code of Practice*, in response to industry concerns that the code will place an excessive administrative burden on retailers and business owners. The outcome of this review will be a relevant consideration in determining the approach to any TCF outwork code.
- FWA has the capacity (if necessary) to amend the TCF Award under its existing powers to ensure that the provisions of the Award are consistent with the amendments introduced by the Bill (for example, as part of the review of modern awards or under s 160 of the FW Act to vary an award to remove ambiguity or uncertainty).
- The Office of Best Practice Regulation (OBPR) has indicated that post-implementation review of the Bill is required within one or two years of implementation of the Bill. This review will provide an opportunity to examine whether the legislation has operated as intended.

The Department is aware of concerns among TCF industry groups that the Bill will inhibit the capacity of TCF outworkers, who operate successful and legitimate businesses as independent contractors, to conduct their business by taking an inflexible approach that poses a risk to the continuing viability of those businesses.

While there are outworkers in the TCF industry who are in a position to make a genuine choice about their working arrangements, it has long been acknowledged that special measures are required to protect the most vulnerable workers in the industry.

The Government acknowledges that a strong manufacturing and retail industry is vital to achieving the Government's economic growth, employment and productivity goals. However, providing fair workplace protection is not inconsistent with these goals.

Many of the amendments introduced by the Bill will mirror obligations that are already owed by those that use outworker labour whether under the TCF Award or state

legislation (in particular, in states with widespread use of outworker labour that have specific legislative provisions relating to the engagement of outworkers) and therefore should not prevent most industry participants from continuing their business as usual.

The Department is aware of reports that businesses that are complying with existing arrangements are concerned that they are being penalised under increasing regulation in the form of additional labour, time and administrative costs of compliance.²³

In the Department's view, it is not a penalty on industry participants to meet their obligations under the law to ensure the fair and equitable treatment of workers in the TCF industry. The fact that some parties breach their legal obligations and are thus receiving an unfair advantage supports rather than undermines the rationale for these measures. Industry participants should take steps to ensure that as far as possible the industry as a whole is complying with the law in relation to the engagement of TCF outworkers. This will ensure that the legal rights and entitlements of outworkers are protected and that there is a level playing field and competitiveness across the industry.

Nevertheless, it has also been alleged that retailers in the TCF industry are by-passing Australian manufacturers and sourcing their goods from overseas as a way of avoiding the obligations that relate to the engagement of Australian based TCF workers.²⁴ This concern is also said to apply to TCF manufacturers, who may choose, in response to any actual or perceived increase in regulation as a result of this Bill, to engage overseas-based manufacturers instead of relying on local outworkers.

However, research indicates that the use of outworkers will continue to be a feature of the TCF industry in Australia despite substantial elements of TCF manufacturing having been moved offshore. In 2003, the Productivity Commission found that while total employment in the TCF industry was declining, the number of outworkers engaged was increasing. The Productivity Commission found that:

*The flexibilities offered by outworkers are particularly important in Australia now that much of the high volume clothing production has moved offshore with domestic producers now concentrating on the quick response/low volume production which can be difficult to source from imports.*²⁵

As such, outworkers may not be vulnerable to international competition in the same way as, for example, factory-based TCF manufacturing. The Department does not anticipate that the changes in the Bill will result in a substantial increase in sections of the TCF industry moving offshore, although a small rise cannot be ruled out.

²³ Belinda Smart, *NSW Business Claims Outworker Provisions are Damaging to Local Manufacturing*
<http://www.textilesource.com.au/news>

²⁴ Belinda Smart, *NSW Business Claims Outworker Provisions are Damaging to Local Manufacturing*
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²⁵ Productivity Commission, 2003, p. 179

**FAIR WORK AMENDMENT (TEXTILE, CLOTHING AND FOOTWEAR INDUSTRY)
BILL 2011 – SUMMARY OF KEY PROVISIONS**

The Bill will improve protection for outworkers in the TCF industry by:

- extending the operation of most provisions of the FW Act to contract outworkers in the TCF industry
- providing a mechanism to enable TCF outworkers to recover unpaid amounts up the supply chain, and
- enabling a TCF outwork code to be issued.

The Bill will also address a limitation in the current provisions governing right of entry into premises in the TCF industry operating under 'sweatshop' conditions.

Improved Protection for TCF Outworkers

Objects

New Part 6-4A contains provisions to improve the workplace protection of TCF outworkers.

The objects of the Part are to eliminate the exploitation of TCF contract outworkers and ensure that outworkers are employed or engaged under secure, safe and fair systems of work, by:

- providing nationally consistent rights and protections for those outworkers, regardless of whether they are employees or contractors
- establishing an effective mechanism for recovery of unpaid amounts from other parties in the supply chain
- providing for a code dealing with standards of conduct and practice to be complied with by parties in the supply chain.

Extension of FW Act to TCF contract outworkers

The Bill will extend the operation of most provisions of the FW Act to TCF contract outworkers to ensure that all outworkers in the TCF industry have the same terms and conditions as well as other rights and entitlements as other workers, regardless of their status as employees or contractors.

There are a limited number of provisions to which the 'deeming' effect of the amendments is not extended, including provisions governing stand down, which is comprehensively dealt with in the TCF Award, and right of entry, which is being dealt with by amendments to existing provisions rather than by deeming.

The new provisions make clear that where work is performed directly or indirectly for a Commonwealth outworker entity (that is an entity which the Commonwealth can regulate using its 'core' constitutional powers), the outworker will be taken to be an employee within the meaning of the FW Act. Where the work is arranged directly or indirectly by a Commonwealth outworker entity that is a constitutional corporation, the work must be performed for a business undertaking of the corporation.

The Bill includes an express statement that the objective of these provisions is that a TCF contract outworker, who, as a result of these amendments, is taken to be an employee, should have the same rights and obligations under the FW Act as an employee would have in the same circumstances.

The Bill recognises that there may be circumstances where technical modifications or clarifications are required and allows regulations to be made to ensure the effective application of particular provisions of the FW Act to contract outworkers. However, the Bill makes clear that regulations can only be made to ensure the effectiveness of, and not to undercut, the extension of the FW Act to contract outworkers.

Recovery of unpaid amounts

The Bill will provide a mechanism for both employee and contract outworkers in the TCF industry to recover unpaid amounts for work from entities up the supply chain for whom the work was in fact performed, albeit indirectly.

Before seeking to recover an unpaid amount from an 'indirectly responsible entity', an outworker must take reasonable steps to recover the money from the person who is responsible for paying them. Whether steps taken will be considered reasonable will depend on the circumstances, including the particular circumstances of the outworker (including language or other difficulties they may face) and whether there are any difficulties in locating the responsible entity.

An unpaid amount may include remuneration, an amount payable in respect of leave, an amount payable to a superannuation fund or an amount payable by way of reimbursement for expenses incurred.

An application for recovery of an unpaid amount must be made within 6 years of the amount falling due.

In keeping with the requirements of the FW Act for unpaid wages more generally, when ordering payment of an unpaid amount, a court will be required to order an amount of interest be paid unless good cause is shown to the contrary.

To the extent that an entity is a retailer that sells goods produced by TCF work but does not have any right to supervise or otherwise control the performance of the work before the goods are delivered to them, they will not be liable for any unpaid amount owing to an outworker in respect of the TCF work.

An indirectly responsible entity that pays an unpaid amount will have a right to recover an equivalent amount from the responsible person, or offset the amount against any

amount they owe to that person. This right will apply whether the amount is paid voluntarily, or as a result of a court order.

An application for recovery by an indirectly responsible entity against a responsible person must be made within 6 years of paying the amount. A court will be required to order an amount of interest be paid unless good cause is shown to the contrary.

TCF outwork code

The Bill includes a capacity for a TCF outwork code to be issued for the purpose of furthering the objects of Part 6-4A of the FW Act. A TCF outwork code will enable a consistent approach to monitoring of compliance with obligations relating to the engagement of outworkers and the performance of TCF work.

The TCF outwork code may deal with standards of conduct and practice to be complied with in relation to the employment or engagement of TCF outworkers, the arranging for TCF work to be performed or the sale of goods produced by TCF work.

The matters that may be dealt with in the TCF outwork code include but are not limited to:

- record keeping requirements
- reporting on compliance with record keeping requirements or on compliance with other requirements of the code
- general matters relating to the operation and administration of the code.

These matters are consistent with the types of matters that are currently dealt with in the TCF Award, in state outworker codes of practice as well as in the obligations on manufacturers accredited with Ethical Clothing Australia.

The code may impose obligations on employers (including those who engage contractors, who are taken to be employers because of the changes in the Bill) and other entities in the supply chain who arrange for work to be performed where the work is to be performed by TCF outworkers, or is of a kind often performed by TCF outworkers. The code may also impose obligations on retailers that sell goods produced by TCF work.

The outwork code will not override a TCF Award, but will prevail over an agreement or workplace determination.

To assist with integration of the range of existing codes (including the voluntary Commonwealth code), the TCF outwork code may incorporate by reference matters contained in an instrument or other document (such as a State code, but not including an agreement or workplace determination) and may provide that compliance with requirements in another instrument or document amounts to compliance with a particular requirement of the TCF outwork code.

Right of Entry

The Bill will make amendments to the right of entry provisions of the FW Act. These amendments are designed to enable effective entry rights in relation to sweatshop premises in the TCF industry.

The amendments will ensure that permit holders who are entitled to represent workers in the TCF industry have additional entry rights to enter business premises. This is necessary to ensure effective entry rights to business premises operating under sweatshop conditions, as the existing requirement to give at least 24 hours notice of entry tends to undermine the effectiveness of these rights.

The Bill will extend specific right of entry rules that apply to suspected breaches affecting outworkers (which allow entry without 24 hours notice) to the industry more broadly. An exception will apply for the principal place of business of a person with appropriate accreditation.

Accreditation providers may be prescribed by regulation. To ensure that accreditation providers have support among both employee and employer representative, the regulation making power includes as a prerequisite that the Minister be satisfied that a proposed accreditation provider has aims consistent with the objects of Part 6-4A and the endorsement of at least one federal union and one registered employer association that cover members in the sector.

If a person is accredited, the effect would be that the standard right of entry rules in Subdivision A of Part 3-4 of the FW Act would apply to the premises that are their principal place of business instead of the enhanced entry rules. The existing enhanced capacity for entry to investigate suspected breaches of designated outworker terms (paragraph 483A(1)(b) of the FW Act) will not be affected by these amendments.

Other measures

Modern awards can, where appropriate, include outworker terms that apply to both employees and contract outworkers. This allows the TCF Award to include terms that enable monitoring of the supply chain, such as registration and record keeping.

The FW Act ensures that outworker terms cannot be undercut through bargaining for an enterprise agreement (s 200 of the FW Act). Protection for outworker terms is also provided by ensuring that these standards cannot be undercut by use of flexibility terms in enterprise agreements (s 203 of the FW Act).

The Bill inserts a new subsection 203(2A), which provides further protection of outworker terms. The new provision relates to the content of a flexibility term in enterprise agreements and provides that if an enterprise agreement includes terms that would be outworker terms if they were included in a modern award, the flexibility term must not allow the effect of the outworker terms to be varied.

Comparison of the measures in the Bill with the existing regulation

Legislative protections for TCF outworkers are provided both federally, under the FW Act and in the TCF Award, as well as in most states.

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, and
- enable a TCF outwork code to be issued.

The Bill will also address a limitation in the current provisions governing right of entry into premises in the TCF industry operating under 'sweatshop' conditions.

Under the TCF Award, TCF contract outworkers are already entitled to the same minimum terms and conditions of employment as employee outworkers.

The minimum conditions and entitlements extended to TCF contract outworkers by the Bill also closely align with many of the entitlements and protections currently afforded under state law, particularly in states that deem outworkers to be employees for the purposes of their industrial relations laws.

TCF Award

The Bill will extend provisions of the FW Act that relate to minimum conditions of employment to contract outworkers.

Under the TCF Award, TCF contract outworkers are entitled to the same minimum terms and conditions of employment as employee outworkers. This includes minimum wages and conditions for outworkers, including an entitlement to the NES for contract outworkers. While the provisions of the Bill will end the distinction between contract outworkers and employee outworkers in the FW Act, it will not lead to additional wages and conditions when compared with those that are already afforded under the TCF Award.

The provisions of the Bill creating a mechanism for the recovery of unpaid amounts broadly reflect award provisions allowing the recovery of unpaid remuneration against 'principals' and 'apparent principals'. The mechanism in the Bill will create an additional protection to the provisions about the recovery of unpaid remuneration contained in the TCF Award.

Finally, the TCF Award includes provisions that deal with matters outside of those dealing with terms and conditions of employment, which relate to the conditions under

which an outworker entity may arrange for the performance of work by outworkers. The provisions deal with matters such as:

- general requirements for engaging outworkers, such as registration of principals, requirements for the keeping of work records, lists of the number and type of arrangements entered into with outworkers and records of the terms of those arrangements
- additional requirements for making arrangements with workers, such as information that must be provided to outworkers about their minimum conditions under the TCF Award, and
- registration of a board of reference for the registration of principals and the maintenance of a register of principals.

The Bill includes the capacity for a TCF outwork code to be issued. The code may deal with standards of conduct and practice to be complied with in relation to the employment or engagement of TCF outworkers, the arranging for work to be performed or the sale of goods produced by TCF work.

The matters that may be dealt with in the code include but are not limited to:

- record keeping requirements
- reporting on compliance with record keeping requirements or on compliance with other requirements of the code
- general matters relating to the operation and administration of the code.

These matters are consistent with the additional matters that are set out in the TCF Award. The TCF outwork code will not override a TCF Award (but will prevail over an agreement or workplace determination).

State laws

Where the Bill provides entitlements and protections for outworkers that already exist in state legislation, the relevant provisions in the Bill will ensure protections for outworkers are nationally consistent but will not significantly increase the level of entitlements.

However, because of the differing approaches to the regulation of outworkers across states, the extent to which this occurs will vary from state to state.

In New South Wales, Queensland and Tasmania a similar approach is taken to the regulation of contract outworkers to that adopted by the Bill, in that contract outworkers in those states are deemed to be employees for the purpose of the relevant state laws. Many of the protections provided to outworkers in these states' laws closely align with those that will be extended under federal law as a result of the Bill.

In New South Wales, subclause 1(f) of Schedule 1 to the *Industrial Relations Act 1996* (NSW IR Act) deems outworkers in the clothing trades to be employees. As employees under that Act, outworkers are entitled to:

- general minimum conditions of employment (Chapter 2 of the NSW IR Act)
- protection from unfair dismissal (s 83 of the NSW IR Act)
- the right to bargain for and be a party to an enterprise agreement, either as a member of a union or individually (s 31 of the NSW IR Act)
- access to dispute resolution proceedings in relation to an industrial dispute (Part 1 of Chapter 3 of the NSW IR Act), and
- entitlement to membership of state organisations (s 260 of the NSW IR Act).

In Queensland, s 5 of the *Industrial Relation Act 1999* (QLD IR Act) defines employee as including an outworker. As employees under that Act, outworkers are entitled to:

- general minimum conditions of employment (Chapter 2 of the QLD IR Act)
- protection from unfair dismissal (s 73 of the QLD IR Act)
- the right to be a party to a certified agreement either as a member of a union or individually (s 142 of the QLD IR Act)
- the ability to take strike action and access to dispute resolution procedures in relation to an industrial dispute (Chapter 7 of the QLD IR Act), and
- entitlement to membership of state organisations (s 531 of the QLD IR Act).

In Tasmania, s 3 of the *Industrial Relations Act 1984* (Tas IR Act) defines employee as including an outworker. As employees under that Act, outworkers are entitled to:

- minimum conditions of employment relating to all employees (Division 2A of Part 3 of the Tas IR Act)
- the right to make an application to the Tasmanian Industrial Relations Commission in respect of termination of employment (s 29 of the Tas IR Act)
- the right to be a party to an enterprise agreement either as a member of a union or individually (s 61D of the Tas IR Act), and
- the right to be a member of a registered organisation (s 62 of the Tas IR Act).

In South Australia, under the *Fair Work Act 1994* outworkers receive employment entitlements and protections if an award or enterprise agreement outworker provision extends to them (or a regulation extends coverage) (s 5 of the *Fair Work Act 1994*).

If an award or enterprise agreement outworker provision applies, outworkers in South Australia will be entitled under the *Fair Work Act 1994* to:

- general conditions of employment (Part 1 of Chapter 3 of the *Fair Work Act 1994*)
- protection from unfair dismissal (s 106 of the *Fair Work Act 1994*)
- the right to form and be a member of a registered association (s 119 of the *Fair Work Act 1994*), and
- the right to be a party to a enterprise agreement (s 75 of the *Fair Work Act 1994*).

In Victoria, the *Outworkers (Improved Protection) Act 2003* extends minimum wage and conditions entitlements to contract outworkers, and deems outworkers to be employees for the purposes of the *Long Service Leave Act 1992*, the *Occupational Health and Safety Act 2004* and the *Public Holidays Act 1993*. However, contract outworkers in Victoria do not have a right to more general employment conditions and protections such as bargaining and unfair dismissal protections.

Western Australia has no specific laws relating to outworkers.

Provisions of the Bill relating to the recovery of unpaid amounts are also broadly similar with existing provisions for the recovery of unpaid remuneration under state laws, although the range of entities against whom recovery can be sought is potentially broader under the Bill than under existing mechanisms.

In Victoria, New South Wales, Queensland and South Australia an outworker may make a claim for any unpaid remuneration (expressed as ‘wages or superannuation contributions’ in Queensland and South Australia) against an apparent employer (the ‘apparent responsible contractor’ in South Australia) within six months after the work was finished.

In Tasmania, there is no special mechanism for TCF contract outworkers to recover unpaid remuneration. However the Court may order the payment of unpaid remuneration if an employer is found guilty of the offence of not paying an employee (including a ‘deemed’ employee) the remuneration to which the employee is entitled.

As noted, no special provision in relation to outworkers exists in Western Australia.

The Bill allows recovery against any indirectly responsible entity. As long as the entity is in a chain or series of arrangements for the supply or production of the goods and the relevant TCF work has the requisite connection to the Commonwealth outworker entity, the entity will be an indirectly responsible entity. There can be more than one indirectly responsible entity in relation to a particular unpaid amount.

Finally, New South Wales, Queensland and South Australia each have a code of practice relating to clothing (powers exist for the establishment of a mandatory code in Victoria). In general, these codes:

- monitor the use of outworkers in the manufacture of clothing products

- prescribe practices and standards to aid compliance with applicable laws and industrial instruments
- prescribe reporting practices and conduct to prevent the avoidance of payment of remuneration and other lawful entitlements.

A TCF outwork code issued under the Bill may deal with standards of conduct and practice to be complied with in relation to the employment or engagement of TCF outworkers, the arranging for work to be performed or the sale of goods produced by TCF work.

The TCF outwork code may incorporate by reference matters contained in an instrument or other document (such as a state code) and may provide that compliance with requirements in another instrument or document amounts to compliance with a particular requirement of the code.

The provisions allowing elements of existing state codes of practice to be incorporated is to ensure that businesses that are already compliant with state codes (as well as with the TCF Award or the requirements of Ethical Clothing Australia) will not have their business affairs disrupted by the introduction of a code under federal law.