TEXTILE CLOTHING & FOOTWEAR
UNION OF AUSTRALIA

The Senate Education and Employment Legislation Committee

Inquiry into the

Fair Work Amendment (Remaining 2014 Measures) Bill 2015

Submission of the Textile, Clothing and Footwear Union of Australia (TCFUA)

(22 December 2015)

Submission to the
Senate Education and Employment Standing Committee

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INTRODUCTION

1. The Textile, Clothing and Footwear Union of Australia ('TCFUA') is a registered organisation under the *Fair Work (Registered Organisations) Act 2009*. The TCFUA welcomes the opportunity to provide this submission to the Senate Education and Employment Standing Committee Inquiry ('Inquiry') into the *Fair Work Amendment (Remaining 2014 Measures) Bill 2015* ('Amendment Bill').

2. In summary, the Amendment Bill proposes the amendments to the Fair Work Act 2009 ('FW Act') which were included in the original Fair Work Amendment Bill 2014, which failed to pass the Senate. The Bill proposes amendments to the following areas of the FW Act:

    - Part 1 (Payment for annual leave)
    - Part 2 (Taking or accruing leave while receiving workers' compensation)
    - Part 3 (Individual flexibility arrangements)
    - Part 4 (Transfer of Business)
    - Part 5 (Right of Entry)
    - Part 6 (FWC hearings and conferences)

3. The TCFUA strongly opposes the changes encompassed in the Amendment Bill. If passed into law, the Amendment Bill will have serious and negative consequences for the rights and conditions of workers nationally, and particularly for those in the textile, clothing and footwear industry ('TCF industry'). The Amendment Bill seeks to either diminish entitlements for workers directly and/or limit the capacity of unions to effectively advocate and represent their interests in relation to those and other rights. We note that Parts 1 and 2 of the Amendment Act would diminish aspects of the ('NES') and which together with modern awards, constitute the *minimum* safety net for over a million workers in Australia, and a large number of workers in the TCF industry.

4. The TCFUA is affiliated with the Australian Council of Trade Unions ('ACTU') and supports and adopts the written submissions made by the ACTU to the Inquiry (21 December 2015). The TCFUA's submission additionally aims to highlight the particular issues faced by workers in the TCF industry.

NATURE OF THE TCF INDUSTRY

5. The TCFUA is the pre-eminent national union which represents the industrial interests of workers in the TCF industry. Its members include those at every level of what are commonly complex and multi-level TCF supply chains. These include workers employed in formalised, regulated factories, to those in sweatshops and outworkers in the home based sector. The TCFUA (and its predecessor organisations) has been proudly representing and advocating for the workplace rights of TCF workers for over a century. It has a critical and legitimate role in ensuring that appropriate labour standards are observed in the TCF industry and that unfair advantage is not gained at the expense of reputable businesses by those who breach those standards.

6. As a result, the TCFUA has a unique perspective on the nature of the TCF industry, the complexity of its supply chains and the major economic restructuring which has significantly impacted on the sector. The TCF industry is characterised by competing directions – a 'race to the bottom' where the primary competing element is the pushing down of labour costs, and conversely, an increasing recognition that the future of the Australian TCF industry must be founded on innovation and ethical and sustainable production.

7. Relevantly, the TCFUA has contact with TCF workers (both in the formalised and home based sectors) on a daily basis, and has accumulated a body knowledge of the wages and conditions under which they labour. Without directly being able to speak to workers, it would be very difficult for the TCFUA to identify the level of compliance with minimum award and legislative labour conditions across the TCF industry. Despite legislative reforms over the last 5 years, and despite some improvement in compliance, underpayment (or non-payment) of wages, overtime, penalties, leave and superannuation remains widespread. Additionally, in relation to outwork, sham contracting chronically persists. Occupational

health and safety in TCF workplaces is notoriously poor and often dangerous, particularly in so called 'sweatshops', an unfortunately growing phenomenon in the industry.

8. In this context, exploitation in the TCF industry is not an aberrant occurrence. It becomes systemised when supply chains are not transparent, and when workers cannot easily be identified at each level, including when they work at home. These factors are exacerbated when a significant percentage of the TCF workforce comes from a non–English speaking background and may be unfamiliar with Australian legal and industrial systems. Knowledge of rights and entitlements is often limited. However, even where workers are aware of their rights, many are fearful of enforcing those rights because of perceived and actual threats to their job and income security. This fear is not theoretical. The TCFUA has knowledge of countless examples where workers have been threatened by their employers with dismissal or a reduction in the hours of work when they have raised a workplace issue with the union.

9. This is an industry in which strong regulation, education and compliance is fundamental to the objective of ensuring that TCF workers receive their lawful wages and entitlements and other benefits of employment. The overwhelming majority of proposals contained in the Amendment Bill will, without justification, result in the diminution of current rights of TCF workers.

Part 1 – Payment for Annual Leave

10. The TCFUA supports the submissions of the ACTU and as follows.

11. Annual leave is a minimum safety net condition under the NES. In respect to payment for annual leave, ss90(1) and(2) of the FW Act provides as follows:

> ***s90(1)***
>
> *If, in accordance with this Division, an employee takes a period of paid annual leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period.*
>
> ***s90(2)***
>
> *If, when the employment of an employee ends, the employee has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave.*

12. The effect of the current s90(2) is that upon termination of employment, an employee is entitled to be paid their (untaken) accrued annual leave up and to the date of termination, including leave loading and a higher rate of pay (than the base rate) where that entitlement exists (e.g. under a modern award or enterprise agreement). This interpretation has been supported by senior advice received by the Fair Work Ombudsman.

13. The impact of the Amendment Bill's change to s90(2) is that the obligation on an employer is recast as one to *'pay the employee a rate for each hour of the employee's untaken leave'* with that rate to be *'no less than the employee's base rate of pay'* (expressed as an hourly rate). The amendment not only relates to the exclusion of leave loading from s90(2) but any other components of a 'higher rate of pay' including penalties, loadings and allowances etc.

14. The proposed amendment to s90(2) effectively lowers the bar in relation to the NES safety net entitlement. This is particularly the case in context of annual leave terms contained in modern awards, which are variously expressed as being *provided for in the NES* or *supplement[ing] the NES.* There are a range of formulations in modern awards regarding the payment of annual leave on termination and on what basis the quantum of annual leave is calculated. Some modern awards expressly provide for the payment of leave loading on termination whilst some others are silent.

15. Far from providing 'clarity', the proposed amendment to s90(2) will create a new field of uncertainty in relation to the interpretation of annual leave and termination provisions (Vis-a- vis the NES) in both modern awards and enterprise agreements. However, more fundamentally, the clear intention of the amendment is to seek to reduce workers' entitlements to their full annual leave upon termination. In the TCFUA's submission this is particularly harsh for workers in the TCF industry, which is highly award dependent and who, as a class of worker, are generally acknowledged as being low paid compared to many other sectors.

16. Most commonly, the timing and circumstances of termination of employment is within the power and control of the employer. This is obviously the case when an employer makes the decision to make a position redundant and the worker is retrenched as a consequence. It is of no fault of the worker, yet the worker will effectively be at risk of losing accrued entitlements to leave loading and a percentage of their accrued annual leave (calculated at the full rate of pay). It shifts the burden of redundancy yet further to the feet of the retrenched worker at a time when arguably they are in most need of financial support.

17. Further, there are no safeguards in the proposed amendment dealing with proportional accrual or 'grandfathering', such that a worker terminated after the Amendment Bill receives Royal Assent, could lose all their accrued leave loading accrued and payment on their full rate of pay. In this sense, the effect of the change is both prospective and retrospective, in terms of the potential loss of annual leave benefits.

18. In both sets of circumstances (prospective and retrospective), the change effectively punishes workers for the accrual of annual leave, yet there may be a range of reasons beyond the worker's control as to why the leave has accrued. In the TCFUA's experience, examples include where a worker is required by the employer to work through a normal annual close down period (when a new large order came through); the employer arranging their operations on an overtime model (without paying award overtime rates) rather than employing sufficient staff on a weekly basis to complete the volume of work; and a worker having a particular set of skills that no other employee has in a particular workplace (e.g. specialist textile mechanic).

19. We note the interaction between this amendment and the amendment (discussed below) regarding taking or accruing leave whilst on workers compensation, and the consequential negative impact on workers' leave entitlements.

Part 2 – Taking or accruing leave while receiving workers' compensation

20. The TCFUA supports the submissions of the ACTU and as follows.

21. The Amendment Bill would repeal the current section 130(2) which provides an exception to the rule in s130(1) that an employee is not entitled to take or accrue any leave or absence (paid or unpaid, other than unpaid parental leave) to which they are entitled under Part 2-3, when the employee is absent from work and in receipt of workers compensation under Commonwealth, state or territory laws. The exception in s130(2) to the general prohibition is triggered where a 'compensation law' permits an employee to take, or accrue leave.

22. As the ACTU outlines in its submission, compensation laws vary between the states and territories (and in respect to Comcare) regarding the level to which employees, absent from work and in receipt of workers compensation, are permitted to take, or accrue both paid and unpaid leave. What is clear however, is that there are employees who are so entitled in various jurisdictions, and who will lose those rights if s130(2) is repealed as proposed.

23. This change harshly impacts on employees who, through no fault of their own, are absent from work because of a workplace illness or injury. Most compensation systems provide for a staggered reduction in weekly payments over various periods of time, often resulting in workers receiving less than their pre injury/illness wage. Even where accident pay entitlements exist under awards or enterprise agreements, these are generally capped (i.e. maximum number of weeks). In the TCFUA's experience, for award dependent workers in particular, this often results in stress and financial hardship as they find it increasingly difficult to provide for themselves and their families the longer they remain on workers compensation benefits.

24. The Amendment Bill will have a disproportionate impact on workers in those sectors of the economy involving physical and demanding work, including in manufacturing, or who are otherwise at high risk of workplace illness or injury. Although not exclusively the case,

workers in the TCF industry predominantly perform manual work (for example, textile operators, sewing machinists). Such work commonly results in manual handling and/or repetitive handling injuries. It is also not unusual for workers to continue to work with injuries because of the fear of losing income or their job altogether (including fear of being the first to be chosen for redundancy).

Part 3 – Individual Flexibility Arrangements

25. The TCFUA supports the submissions of the ACTU and as follows.

26. The Amendment Bill seeks to alter the status quo regarding Individual Flexibility Arrangements (IFA's) in modern awards and enterprise agreements in 5 main respects

- Extending the period for the unilateral minimum termination period for IFA's in both modern awards and enterprise agreements to 13 weeks;
- Inserting a new requirement into the FW Act that a flexibility term include an employee 'genuine needs statement' at the time of entering into an IFA;
- Creation of a new 'defence' for employers in relation to IFA's (both modern awards and enterprise agreements) such that, at the time of entering into an IFA they reasonably believed requirements of the flexibility term had been complied with;
- Insertion of a new Note to the effect that non-monetary benefits may be taken into account for the purposes of the Better Off Overall Test (BOOT); and
- Extending the subject matter of flexibility clauses required to be included in enterprise agreements to those matters currently required to be included in modern awards.

27. Both individually, and in combination, the effect of the Amendment Bill will be to significantly reduce what limited statutory safeguards currently exist in relation to the making of IFA's in both modern awards and enterprise agreements. The proposals in the Amendment Bill should be considered in context of their expected impact on sectors where vulnerable groups of workers are routinely subjected to unfair treatment by their employers. The TCFUA has held a consistently strong position since IFA's were first introduced into the

national industrial relations system, that the potential for exploitation arising from IFA's in the TCF industry (particularly for award dependent workers) is significant.

28. During the Part 10A Award Modernisation process, the TCFUA made comprehensive written[1] and oral[2] submissions regarding both the nature of the TCF industry, and its concerns regarding how an award IFA provision without adequate safeguards could operate negatively for workers in the TCF industry. It is notable that the AIRC (as it then was) in determining the inclusion of industries within the Priority Stage of the Award Modernisation process[3], implicitly accepted that the TCF industry:

    - may be characterised as low paid;
    - combined both formal and informal sectors (outworkers);
    - is largely award reliant;
    - a great proportion of employees in the sector are from a non-English speaking background;
    - the majority of employees in the sector are women; and
    - there is little bargaining power for employees in the sector.[4]

29. In relation to its specific concerns regarding the operation of IFA's for award dependent workers in the TCF industry, the TCFUA submitted:

    - That IFA's would not be monitored, even in a minimalist way and the excesses of statutory individual agreements under the Work Choices legislation was well documented;[5]
    - The need for additional safeguards and for workers to have the ability to be represented and involve their union in the process;[6]
    - The inclusion of a term in the proposed flexibility clause that there be 'no coercion or duress' cannot be considered in and of itself, an adequate safeguard against

[1] (AM2008/1); TCFUA Submission (6 June 2008); TCFUA Submission (12 June 2008)
[2] (AM2008/1); TCFUA Submission to Full Bench hearing (27 May 2008) [PN686] – [PN719]
[3] Award Modernisation; [2008] AIRCFB 550;
[4] Ibid;[94]
[5] (AM2008/1) TCFUA Submission (6 June 2008); [45]
[6] Ibid; [47]

employees being forced into agreeing into IFA's and that the coercion provisions in the legislation are notoriously hard to apply in practice;[7]

- The reality, experienced by workers each day, is of a more subtle pressure to agree with the demands of their employer, however unreasonable;[8]
- In the TCF industry, where there is very little bargaining power, workers will simply be told, that there is a new arrangement and will feel that they have no choice but to accept it unless there are appropriate safeguards such as a right to representation and union involvement in the process;[9]
- In the TCFUA's experience, workers are often told that if they do not agree to the employer's requests, the factory will have to close. Such statements may not meet the test of coercion or duress under the Act, but it is a very real pressure for workers, particularly in the TCF industry where factory closure is a day to day reality.[10]

30. In its written submission[11] to the Post Implementation Review of the Fair Work legislation undertaken in February 2012, the TCFUA stated:

> *'Individual Flexibility Arrangements*
> *[28] We do not believe IFA's are necessary to the maintenance of a safety net of fair, relevant and enforceable minimum conditions. The mandatory obligation for modern awards to include an IFA cannot, in the TCFUA's submission, contain sufficiently robust safeguards to ensure that workers in practice are not pressured or coerced into arrangements against their interests.*
>
> *[29] This is particularly the case in the TCF industry where widespread noncompliance with minimum conditions is endemic and long, complex supply chains make transparency difficult. The TCFUA is aware of examples where employers have essentially imposed arrangements on employees without their free consent and have not complied with some, or all of the obligations contained in the TCF Award in relation to IFA's (i.e. no agreement in writing retained as part of time and wages records).*

[7] Ibid; [49]
[8] Ibid; [50]
[9] Ibid; [50]
[10] Ibid; [50]
[11] TCFUA Submission to the Post Implementation Review of the Fair Work ACT 2009; (17 February 2012)

> *[30] ……Further, there is a fundamental issue in relation to the transparency of the existence, extent and content of IFA's operating within a particular industry. In the TCFUA's view, it should be mandatory that copies of IFA's (and terminations of IFA's) be filed with FWA within 7 days of the date of the Agreement or its termination. This would assist in the dual objective of assisting compliance and providing a basis for comprehensive research by relevant organisations regarding the effect of IFA's on particular industries or groups of workers.'*[12]

31. In the period since the introduction of IFA's, the TCFUA's concerns have been borne out in reality. The union regularly comes across examples where an employer has exerted pressure on workers to accept inferior conditions, or have simply implemented changes to their operations which impact on workers without any consultation or agreement. In an industry which is highly award dependent and which has suffered significant restructuring and job loss, the capacity of a worker to contest 'individual arrangements', 'suggested' or imposed by their employer is very limited, if not illusory.

32. In the TCFUA's experience, in many cases, an employer simply imposes the arrangement without even resorting to the process of formally entering into an IFA with a worker. Even when an IFA is recorded in writing, it invariably does not comply with either the terms of FW Act and/or the relevant modern award for the TCF industry.[13] It has also been the case, that an IFA purported to be with an individual, is in fact a template arrangement imposed on groups of workers, or all of the workers at a site.

[12] Ibid; [28] – [30]
[13] Textile, Clothing, Footwear and Associated Industries Award 2010 [MA000017]

33. In the TCFUA's submission, the current safeguards contained in the FW Act regarding the making of IFA's are nowhere near sufficient to prevent abuse of the provisions. The Amendment Bill if passed into law, would exacerbate significantly the potential and actuality of pressure and duress placed on employees to 'agree' to new arrangements. Rather than encouraging meaningful and genuine flexibility which mutually benefits employers and employees, the amendments would further entrench unequal bargaining power.

Extension of unilateral minimum termination period

34. The Amendment Bill extends the unilateral minimum termination period for IFA's to 13 weeks. This represents a significant extension from the current 28 days for parties who have entered into an IFA under an enterprise agreement. We note that the FWC in 2013 determined to impose a 13 week unilateral termination period for modern awards.

35. The TCFUA is strongly opposed to the extension to 13 weeks for both modern awards and enterprise agreements. As far as the TCFUA is aware, there is no publicly available evidence that the 28 day termination period has posed any serious difficulties for employers or employees, or that of itself it has acted as a disincentive to enter into an IFA. It gives sufficient time for a party to rescind the arrangement when it no longer meets their need for flexibility and yet gives adequate notice to the other party. Conversely, a 13 week unilateral period locks in a party to an arrangement which, for example, due to unforeseen or exceptional circumstances means they can no longer reasonably accommodate the requirements of the IFA. This may particularly be the case when the worker experiences an unexpected event, such as their own illness or that of a family member which results in additional caring responsibilities. In such circumstances, the worker is beholden to the employer to mutually agree to an earlier termination date.

'Genuine needs statement' and *defence for employers*

36. The Amendment Bill inserts a new requirement into the FW Act[14], that an employer must ensure that an IFA includes a statement by the employee setting out why the employee believes (at the time of agreeing to the arrangement) that the arrangement:
    - Meets the genuine needs of the employee; and
    - Results in the employee being better off overall than if no IFA was agreed to.

37. The amendment is clearly intended to assist employers, together with the new defence provision, to avoid liability for any failure to comply with the statutory IFA requirements. This is a significant diminution of current safeguards. On the basis of the TCFUA's experience over the last four years since IFA's have been in operation, we doubt that many TCF employers will comply with the requirement for a worker to complete a 'genuine needs statement'. Further, even if an employer does have an employee complete the 'genuine needs statement' in all likelihood it will have been drafted by the employer or the employer's advisors, and the employee will simply be told to sign. The TCFUA also seriously questions the efficacy of the 'genuine needs statement' in circumstances where the worker may have limited English language or written skills and is effectively required to articulate the BOOT test in relation to their own purported circumstances.

38. The creation of a 'genuine needs statement' entrenches and worsens the current 'genuineness' problem inherent in the IFA provisions in the FW Act. We note the publicly stated position of the Fair Work Ombudsman (FWO) that *'It is the employer's responsibility to ensure that an employee has genuinely agreed to an IFA…and that the IFA is made correctly and meets all the requirements of the FW Act.'*[15] However, in practical terms, *'If an IFA is not made properly, the terms of an IFA still continue to govern the employee's terms of employment as if it were made properly.'* [16] The current FW Act provisions provide that an employee can seek compensation and penalties if they are disadvantaged by an IFA which has not been made in accordance with statutory IFA requirements. The effect of the Amendment Bill, removes this right of redress where an employer is able to rely on a

[14] Fair Work Amendment (Remaining Measures) Bill 2015; new ss144(4)(ca) [modern awards] and ss203(4) [enterprise agreements]
[15] Fair Work Ombudsman: Best Practice Guide – Use of Individual Flexibility Arrangements (2013)
[16] Ibid; [p 5]

worker's 'genuine needs statement' to support the employer's 'reasonable belief' that at the time of entering into the IFA, the requirements of the flexibility term was complied with.

Note – non-monetary benefits may be taken into account for purposes of the BOOT

39. The Amendment Bill inserts a new Note[17] to the effect that benefits other than an entitlement to a payment of money may be taken into account for the purposes of the BOOT. The TCFUA strongly opposes the amendment as it would seriously undermine the application of the BOOT to IFA's and open up the capacity for monetary entitlements (for example, overtime rates) to be 'traded off' for so called flexibility in relation to non-monetary benefits (e.g. preferred hours arrangements). This effectively reverses the current legal position.

40. The trading off of minimum safety net entitlements under modern awards and for low paid workers generally under enterprise agreements, should not be supported. It is not difficult to see how the impact of this amendment will disproportionately affect women workers who typically have primary carer responsibilities for children and older ailing parents. This demographic carer 'squeeze' often places such workers in an intolerable position as they constantly juggle the responsibilities of paid employment together with family obligations. The Amendment Bill, if passed into law, would constitute regressive public policy which runs counter to the developing area of industrial law in relation to family friendly measures and employment. It is inherently discriminatory and should be rejected on this basis alone.

41. Under the Amendment Bill there appears to be no statutory constraint on the level or quantum of monetary benefits which could potentially be traded off for non-monetary flexibility. This is particularly dangerous in relation to award dependent works, a large percentage of whom are part time. As a community, the answer to a lack of flexibility within workplaces is not solved by pressuring employees to give up income and other monetary benefits in order to, for example, meet pressing family and carer obligations. Instead the challenge is to craft an industrial system which more fully acknowledges and enhances a worker's capacity to meet those responsibilities without having negative impacts on their job and income security.

[17] New Note to be inserted at the end of s144(4) [modern awards] and s203(4) [enterprise agreements]

Enterprise Agreements – extension of matters contained in flexibility term

42. The Amendment Bill includes new requirements as to the content of flexibility terms contained in enterprise agreements. The expansion of matters means that an agreement flexibility term must now cover (where the agreement includes terms that deal with such subject matter) the following:
    - Arrangements about when work is performed;
    - Overtime rates;
    - Penalty rates;
    - Allowances; and
    - Leave loading.

43. Although this list mirrors the mandated subject matter covered in the model flexibility clause included in modern awards, in respect to enterprise agreements they represent the *minimum* requirements. An enterprise agreement flexibility clause could potentially include further terms which can be the subject of an IFA. The amendment represents a major extension, and provides significantly more scope for employers (in combination with the other IFA amendments) to have employees trade off monetary entitlements under the Agreement for non-monetary benefits. It has potentially serious consequences for the integrity of the bargaining framework under the FW Act.

Part 4 – Transfer of Business

44. The TCFUA supports the submissions of the ACTU.

Part 5 – Right of Entry

45. The TCFUA supports the submissions of the ACTU and as follows.

46. The Amendment Bill changes the current right of entry provisions in 4 key areas:
    - Repealing 2013 amendments in relation to the provision of transport and accommodation arrangements for remote locations;

- Repealing 2013 amendments in relation to the location for interviews or discussions with employees;
- Introducing onerous provisions relating to the capacity of unions to enter workplaces to hold discussions with employees; and
- Providing the FWC with increased powers to deal with disputes regarding frequency of visits by unions to workplaces for discussion purposes.

47. The TCFUA strongly opposes the proposed changes to right of entry provisions in the FW Act. If passed into law, the amendments will severely diminish the rights of workers to have access to a union whilst at work, including information about their wages and conditions, entitlements and rights. Union right of entry is a fundamental element of fairness and representation at work and is critical to freedom of association. Without it, there is little capacity for a light to be shone on unfair treatment, discriminatory work practices, underpayment of wages and entitlements and dangerous health and safety. Without transparency, including being able to speak directly to workers about their workplace experiences, exploitation is given a green light to flourish.

48. In the TCF industry, the necessity for having effective right of entry laws is amplified in context of complex TCF supply chains, with multiple levels and participants. Over the last decade, the TCFUA has consistently highlighted in submissions to Senate and other inquiries, the numerous ways that employers in the TCF industry have sought to frustrate the union's right of entry. These were again documented in detail (including 6 recent case studies) in the TCFUA's submission to the Senate Inquiry into the Fair Work Amendment Bill 2013. [18] The TCFUA submitted:

[25]…. in practice the TCFUA's right of entry is regularly frustrated by employers in the industry. Some businesses, hostile to the union generally and/or its role in investigating compliance with minimum award and legal conditions, have used a range of strategies (often used in combination) in an effort to keep the union out of their workplaces.

[26] The most obvious strategy used is to isolate the union's officers from where workers gather and rest in their breaks. The easiest way to do this is to deny the union meeting with

[18]TCFUA Submission to the Senate Standing Committee on Education, Employment and Workplace Relations Inquiry into the Fair Work Amendment Bill 2013 (15 April 2013)

workers in the meal and lunch areas. In addition, the employer may also employ a range of other strategies, including:

- *Refusing to facilitate notice that the union will be attending, e.g. by allowing the distribution and posting of notices or removing them once posted by a delegate;*
- *Forcing the union to use rooms or areas which ordinarily are not used for, or associated with meetings of workers (e.g. management and administration areas; management training rooms or within eye view of such);*
- *Allocating rooms or areas without appropriate facilities (e.g. heating, cooling, chairs, tables, fridge, food warming, running water);*
- *Allocating rooms or areas a distance from the employee lunch area, making it logistically very difficult for an employee to attend the discussions in their meal and rest breaks;*
- *Having managers or supervisors present in close vicinity to where the employee discussions/meetings are taking place so that those workers attending can be observed and recorded;*
- *Threatening workers in advance of the union's visit (or after) and intimidating them not to attend meetings or provide information in relation to an investigation.*

[27] Often these strategies used in combination, result in parts of the workforce not even being aware that the union is on site and available to speak to them…

[28] The fear that many workers have in the TCF industry as being identified as a union member or having had contact with the union cannot be underestimated. Their concern is not a theoretical one. The TCFUA is aware of numerous examples of where workers have been targeted or victimised after joining the union and/or assisting the union when it is investigating contraventions of award and legal conditions. For this reason, many workers elect to be 'silent members'. In an industry where there is widespread non-compliance, the capacity to obtain accurate and clear information directly from workers affected is critical. Without effective access to workers, this capacity is significantly compromised.'[19]

49. The following series of case studies contained in the TCFUA submission illustrated the combined impact of the various strategies employed by businesses to frustrate the union's right of entry. As submitted,

[19] Ibid; [250 – [28]

[42] ….the TCFUA organisers reported that they believed the choice of venue by the employer directly affected the numbers of workers attending the discussions. A number of factors lead to this conclusion including:

- *The lack of knowledge amongst some or all of the workers when the employer has not taken reasonable steps to facilitate access by posting notices etc;*
- *The time involved in reaching a venue other than the lunch/meals area. This is particularly a factor in the context of 10 minute paid rest breaks and at lunchtime where the employee either has a 30 minute unpaid break or 20 minute crib break (textile industry);*
- *The lack of meal and rest facilities which means the employee must first go to the lunch room and warm up food etc, and then travel to the alternative venue. The absence of sink and water facilities also means that they have no facilities to wash dishes and clean hands etc;*
- *The lack of adequate seating for the numbers of employees who could attend discussions. This is particularly relevant given that the great majority of workers perform manual work, and often on their feet for their entire shifts;*
- *The capacity of management and supervisors to easily identify workers who attend the union discussions in venues other than the lunch areas.'*[20]

50. Subsequent changes to the right of entry framework with the passage of the Fair Work Amendment Act 2013 sought to ameliorate a number of these issues, particular the amendments relating to the venue for interviews and discussions. In essence, the current s492 provides that in the absence of agreement between the permit holder and the occupier as to the appropriate room or area for holding interviews/discussion, the default is the room/area in which the employees *ordinarily take their meal or other breaks*, and which is provided by the occupier for this *purpose*.

51. The right of entry amendments commenced operation on 1 January 2014. Since that time, the TCFUA has sought to exercise right of entry under the new provisions across of variety of TCF workplaces. Whilst the new venue provision has assisted in the facilitation of the union's access to workers and members in their meal/rest areas, employer strategies designed to intimidate workers and the union in its legitimate representative role persist. Over the last 2

[20] Ibid; [42]

years, TCFUA officers have directly observed, experienced or been made aware of the following conduct of employers in the TCF industry relating to the exercise of right of entry:

- Employers deliberately being vague and misleading about the times of meal and rest breaks, including advising the union that there *'are no designated breaks'* information subsequently confirmed as incorrect by the workers;
- Employers refusing to confirm when the meal and rest breaks commence for each section of the plant;
- Employers refusing to reasonably facilitate access by refusing to put up union notices of the visit and/or taking down notices that had been placed there by a delegate;
- An employer deliberately delaying entry to the site by refusing to accompany the permit holder to the meal/lunch area (a 10 minute walk away) until the actual start of the breaks;
- The permit holder of the union being directed to leave the meal/lunch areas (and the site) before the completion of the breaks;
- Members and workers being constantly asked by their managers/supervisor as to *'who called in the union'* and *'why'*;
- Whilst on site, but prior to the actual commencement of the meal breaks, a HR manager insistently questioning the union permit holder as to *'what they were going to speak to the workers about'*;
- An employer interrogating the union permit holder as to *'which worker contacted the union'* and *'when'*;
- An employer directing the union permit holder to a meals area which was not used by the workers in a particular section of the factory that the union was seeking to hold discussions with;
- During a union entry visit to workers in their main lunchroom, a senior production manager sat in the lunchroom eating his lunch within close proximity to where the union officer was speaking to employees. The union's members (many of whom were long serving) told the union that they had never once seen the production manager before use the lunch room during their period with the company;
- After the union has left the site after exercising right of entry, the members being questioned by their employer as to *'what was said or discussed'.*

- An employer who threatened workers in advance of the union visit *that 'if the union became involved he would shut the factory'*.

52. Much of this behaviour is not new, but it does illustrate the lengths that some TCF employers will go to in order to delay, frustrate and make difficult the union's exercise of its right of entry powers under the FW Act. In its simplest terms, employers understand that if workers are more readily able to speak with the union in a non-threatening (and non-identifying environment such as a canteen or lunchroom), the more likely it is that that their workplace practices and breaches of award and legal minimums will be exposed.

53. The proposed repeal of the 2013 amendments in respect to venue for interviews/discussions will embolden such employers in their desire to ensure as far as possible, that their employees have no access to information, advocacy or representation from the union at the workplace. By returning the system to one where the employer effectively decides where the union must hold interviews or discussions, the range of issues identified by the TCFUA in its previous submission to the Senate Committee will quickly recur.

New provisions regarding the entry of unions to hold discussions with workers

54. The Amendment Bill goes further with significant alterations to eligibility rules regarding the circumstances in which a union can seek access to hold discussions with workers.[21] The current status quo under the FW Act[22] permits a permit holder of a union to enter premises to hold discussions with employees who perform work on the premises whose industrial interests the permit holder is entitled to represent (i.e. under their eligibility rules) and who wish to participate in those discussions.

55. Under the Amendment Bill, right of entry for discussion purposes will be restricted to where:

    - An enterprise agreement applies to work performed on the premises and the permit holder's organisation is covered by the agreement;[23]
    - The permit holder's organisation is not covered by an enterprise agreement which applies to work performed on the premises *or* no enterprise agreement applies to work performed on the premises, and a member/prospective member has invited the union to send a representative to visit the premises for the purposes of holding discussions.[24]

56. In respect to the 'invitation' necessary to satisfy the test in the proposed amended s484(2), the Amendment Bill provides for a process by which a union can apply to the FWC for an 'invitation certificate'.[25] The FWC must issue an invitation certificate if it is satisfied of 3 elements:
    - A member/prospective member of the union performs work on particular premises; and
    - The union is entitled to represent the industrial interests of the member/prospective member; and

[21] Fair Work Amendment (Remaining 2014 Measures) Bill 2015; Item 25 – s484
[22] Fair Work Act 2009: s484
[23] Fair Work Amendment (Remaining 2014 Measures) Bill 2015; Item 25, s484(1)
[24] Fair Work Amendment (Remaining 2014 Measures) Bill 2015; Item 25, s484(2)
[25] Fair Work Amendment (Remaining 2014 Measures) Bill 2015; Item 22 (s12) and Item 25 (s484(2)); Item 31 (Subdivision DA – Invitation certificates); s520A

- The member/prospective member has invited the union to send a representative to the premises for the purposes of holding discussions with one or more employees or TCF award workers.

57. Further, where an invitation certificate has been issued it must specify an expiry date (and ceases to operate after that date),[26] comply with any limitations, restrictions or requirements prescribed by regulations,[27] and must also not reveal the identity of the member/prospective member to whom it relates.[28]

58. The potential impact of these proposed amendments to diminish freedom of association in Australia cannot be underestimated. They will seriously limit the capacity of workers to meet with a union officer in their workplace and will undermine the legitimate role of unions to represent workers in their industry. The amendments will have a disproportionately negative impact on workers in industries (such as the TCF sector) which are highly award dependent and have limited scope for bargaining. There is no valid public policy objective as to why this should be the case. It is arguable, that workers in award dependent industries, (who are more likely to be low paid and subject to exploitation), are actually more in need of the capacity to meet with an union officer in their workplace without fear of intimidation or being identified.

59. As outlined elsewhere in this submission, in the TCF industry the level of victimisation and unfair treatment experienced by workers who even make an inquiry of the TCFUA is considerable. Within individual workplaces, fear of retribution (including threats to income and job security) is often entrenched. Where workers do join the union, it is often as 'silent members'. It is not uncommon for the TCFUA to receive anonymous telephone calls or handwritten letters of complaint from workers (often in their first language) detailing exploitation and abuse at a particular workplace and asking if something can be done. Regularly, they are reluctant to even provide their first name for fear that their employer will find out.

60. The option of a union seeking an 'invitation certificate' from the FWC is no answer to this problem. The TCFUA is opposed to the 'invitation certificate' process in principle; it is

[26] Fair Work Amendment (Remaining 2014 Measures) Bill 2015; s520A(3)
[27] Fair Work Amendment (Remaining 2014 Measures) Bill 2015; s520A(4)
[28] Fair Work Amendment (Remaining 2014 Measures) Bill 2015; s520A(5)

unnecessarily bureaucratic, and runs counter to internationally accepted rights regarding freedom of association. However, in practice, it will not work to remedy the fundamental reality for many workers in the TCF industry. In the TCFUA's experience, few if any workers would be prepared to 'admit' to being the employee who 'invited' the union into their workplace. Any 'promises' of confidentiality via what is likely to be perceived as a formalised 'court' process will not assure them.

61. Many workers in the industry have limited knowledge of the Australian legal and industrial systems; for some, the negative experiences of courts and government institutions in their country of origin has left them with deep mistrust of authority. What they want is the union to be able to visit them in a general way, over time and in circumstances where the union is able to hold discussions with the workers as a group or in a group setting (such as in their meal areas). That is, an individual worker does not have to be singled out or identified as the person seeking the information, or contact from the union. In this way, relationships can be built between the union and a group of workers over time, and as a result, instil confidence in workers that they can speak out and take action about their wages and conditions.

62. The amendments also assume that workers in all workplaces are even aware of what the role of a union is in Australia. For example, consider a typical clothing sweatshop in the TCF industry. The workers will nearly always have come from another country (either as refugees or migrants), commonly have limited English language and written skills, and will be receiving significantly under award wages and other conditions in poor and dangerous physical work environments. Often their employer will be from the same ethnic community and may also employ other family members of the worker. The factory sweatshop may well be difficult to locate, operating behind roller doors in a suburban industrial estate or a painted out shop front that appears abandoned from the street. There may be no physical identifying information about the factory apparent on the building. No-one who works in the sweatshop is a member of the union. The TCFUA may not know of its existence, until and unless they receive an anonymous tip off or become aware through normal supply chain mapping and compliance activities. In such a circumstance, how will a worker even be aware that they can 'invite' the union to send a representative into the workplace to meet with them?

63. The current capacity of the TCFUA to enter into a workplace to hold discussions with workers (without an invitation) means that the union gets to hear directly from workers and generally observe the health and safety standards of the factory or sweatshop (for example, whether exits are blocked, whether fire extinguishers exist at the site, whether there are frayed electrical cords; whether there are dirty or unhygienic lunch room conditions etc). Commonly this results in timely follow up contact with the company to rectify obvious breaches of health and safety legislation and/or referral to the relevant Work Safe authority in the state. In this sense, the union visits act as an early warning process, by identifying and addressing dangerous health and safety contraventions.

64. The importance of this role of the union cannot be underestimated. There has been the 2013 international example of a clothing sweatshop fire in the Tuscan city of Prato, where 7 Chinese workers died in December 2013 making 'Made in Italy' fashion garments for the European market.[29] It is alleged that the fire was started by an electric stove in the building where the workers lived and worked. In a form of 'reverse globalisation' the burgeoning Italian sweatshop sector relies on poor foreign workers working up to 16 hour days in appalling and dangerous conditions, despite the existence of Italian health and safety regulations. [30]The lack of independent inspections allowed such gross violations of health and safety standards to go unidentified, and tragically unaddressed.

65. The fact that the Amendment Bill provides that an 'invitation certificate' issued by the FWC is time limited only amplifies the issues raised above. It is one thing for a vulnerable worker in small, award dependent workplace to issue an 'invitation' to the union once; it is altogether unlikely that they would continue to do so over an extended period of time, exposing them to the real possibility of their identity being discovered by their employer.

[29] 'Chinese in Italy: Seven deaths foretold'; The Economist (2 Dec 2013) http://www.economist.com/node/21591085/print
[30] 'Insight: Italy's Chinese garment workshops boom as workers suffer'; (29 Dec 2013); http://reuters.com/article/2012/12/29/us-italy-sweatshop-insight-idUSBRE9BS)

FWC – new dispute resolution procedure – frequency of visits

66. The Amendment Bill amends the framework for the FWC to resolve disputes in relation to the frequency of visits by permit holders of union to a particular workplace.[31] In effect, the amendment provides that where a dispute relates to an employer or occupier, the FWC is mandated to take into account:
    - Fairness between the parties concerned; and
    - The combined impact on the employer's/occupier's operations of entries onto the premises by permit holders of organisations,[32] irrespective of whether the organisations, or their permit holders, are parties to the dispute.[33]

67. This amendment is strongly opposed by the TCFUA. It is unnecessary, given the broad scope FWC currently has in the resolution of disputes regarding right of entry. It is also significantly broad in scope in its impact on all unions and all permit holders who may seek to exercise statutory entry rights at the one workplace.

Part 9 – FWC Hearings and Conferences

68. The TCFUA supports the submissions of the ACTU and as follows.

69. The Amendment Bill[34] overturns the current requirement under the FW Act[35] that the FWC must hold either a conference or a hearing in relation to an unfair dismissal claim, *'if and to the extent that, the matter involves facts the existence of which is in dispute'*. That is, the FWC may decide such factual disputes 'on the papers'. The only limitation on such summary dismissal powers, is that the FWC must have invited the parties to provide information about whether the power should be exercised, and to take account of such information.[36]

70. The TCFUA strongly opposes the amendment. Under Part 3-2 of the FW Act there are a broad range of matters which can potentially give rise to contested facts, including for example, whether the application was made in accordance with the FW Act; whether the

[31] Fair Work Amendment (Remaining 2014 Measures) Bill 2015; Items 27 to 30; s505 and s505A
[32] Fair Work Amendment (Remaining 2014 Measures) Bill 2015; s505A(6)
[33] Fair Work Amendment (Remaining 2014 Measures) Bill 2015; s505A(7)
[34] Fair Work Amendment (Remaining 2014 Measures) Bill 2015; Items 36 to 42
[35] Fair Work Act 2009; s397
[36] Fair Work Amendment (Remaining 2014 Measures) Bill 2015; Item 40; s399B

application is frivolous or vexatious or has no prospect of success; whether the applicant failed to comply with a direction or order.

71. The amendments will directly diminish the position of workers in the unfair dismissal jurisdiction. Many applicants in unfair dismissal claims are unrepresented or otherwise unfamiliar with the Tribunal's rules and processes. In the TCFUA's submission, the amendment is also likely to impact disproportionately on workers who have limited written language or literacy skills. One of the key components of the current requirement for the FWC to hold either a conference or hearing is that such applicants at least have an opportunity to verbally articulate their position and submissions to a Commission member. This opportunity may be lost if the applicant does not have the skills to articulate their position in writing, prior to the Commission making the decision to summarily dismiss the application. Justice should be done, but also seen to be done.

Submitted on behalf of the:

Textile Clothing and Footwear Union of Australia

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