Inquiry into the Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011

Submission of

Slater & Gordon Lawyers

11 January 2012

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2. Slater & Gordon

Our history and values

1. Slater & Gordon was founded by William Slater and Hugh Gordon in Melbourne in 1935 to service the needs of unions and their members. Our history is intimately connected with providing legal assistance to working people. We have grown from humble beginnings to become one of the nation's best known law firms.

2. Slater & Gordon has handled some of the most complex and widely publicised cases undertaken in Australia. The firm has achieved a number of 'David and Goliath' wins on behalf of its clients. The firm's clients have included hundreds of asbestos miners who were dying as a result of their exposure to the deadly dust at the Wittenoom mine in Western Australia; 30,000 landowners affected by BHP's OK Tedi mine in PNG; victims of medically-acquired HIV from contaminated blood supplies; and women suffering health problems due to faulty IUDs and breast implants.

3. We have built a reputation as a leading and innovative law firm, through our desire to make legal services and justice accessible to everyday Australians.

Our work to improve conditions for outworkers in the textile, clothing and footwear industry

4. Slater & Gordon are the lawyers for the Textile, Clothing and Footwear Union of Australia National Office and Victoria Queensland Branch ("TCFUA"). We acted for a predecessor union of the TCUFA, the Clothing Trades Union, since approximately the 1980's.

5. We have a proud history of representing these unions in their tireless work to improve working conditions for outworkers in this country. Since the 1980's Slater & Gordon has assisted in the conduct of hundreds of prosecutions against employers who have failed to comply with relevant legal requirements for outworkers and the giving out of work in the industry.

6. In fact, the Prime Minister of Australia herself was engaged in this important work in her earlier life as a Slater & Gordon lawyer. She has said, about this work:

   One of the things I'm most proud of is that shortly after I started at Slater's, the Clothing Trades Union tried to fix the problem of outworkers in the industry…. I was basically the lead solicitor for all Australian claims over outworkers' hours, wages and conditions. I did all the enforcement work, trying to make their award live and breathe in the field, rather than just being a document written on paper"[1]

7. It is recorded that during her time at Slater & Gordon, the Prime Minister:

   …interviewed several hundred Victorian clothing outworkers, launching many legal actions on their behalf. …. The main difficulty Julia experienced in taking legal action was 'employers going into liquidation or receivership, or simply ceasing to trade prior to the hearing'. Often she found 'deliberate manipulation of corporate structures to avoid court cases and creditors in general'. One adverse effect of tightening the award was that 'employers have been at great pains to disguise employment arrangements with outworkers'.[2]

8. In more recent years, Slater & Gordon acted for the TCFUA in the significant prosecutions of *TCFUA v Lotus Cove Pty Ltd* [2004] FCA 43; *TCFUA v Southern Cross Clothing Pty Ltd* [2006] FCA 325 and

[1] Interview with Julia Gillard, 15 May 1997, quoted in Cannon M, *That disreputable firm … the inside story of Slater & Gordon* (1998, Melbourne University Press), p 108.
[2] Cannon M, above n 1, p 241.

TCFUA v Morrison Country Clothing Australia Pty Ltd [2008] FCA 604 and [2008] FCA 1965. We will outline these cases further in our submission.

9. We support the submissions of the TCFUA to this inquiry. As the TCFUA's lawyers, our interests necessarily coincide. In light of Slater & Gordon's history of advocacy for outworkers, our interests in fact coincide. Because of this we hope that this submission assists in informing the Committee of some important background regarding the development of outworker regulation in this country,[3] innovations in regulation by some States, the legal issues which arise in respect of outworker regulation that the Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill ("the Bill") seeks to address, and the absolute desirability of having a nationally consistent system of regulation in this area.

3. Contractors or employees?

4. Perhaps the key issue which has been grappled with over the course of the development of outworker regulation in Australia is whether an outworker is properly characterised as an employee or a contractor. That issue is centrally relevant to the Bill being considered by the Committee.

5. Early last century in *Archer's Case* the majority of the High Court found that a dispute over conditions to be applied to "outdoor workers" was a dispute about an "industrial matter". Higgins J observed that:

> *As for the third matter – a claim for an order forbidding work outside the shop or factory, or else for high rate on a piece work basis, the work to be confined to members of the union – this seems to me, whether the claim is just or unjust either in whole*

[3] The TCFUA submission to the Senate Employment, Workplace Relations and Education Legislation Committee Inquiry into the provisions of the Independent Contractors Bill 2006 and the Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006, 24 July 2006, and the TCFUA Submission to the Award Review Taskforce, 7 February 2006 provide a detailed examination of aspects of this background.

> *or in part – to come easily within the definition. Even on the narrowest view of "industrial matters" it is of vital importance to the members of the union that an employer shall not have facilities for evading the award rates and conditions, or for resorting to the individual bargaining which homework often involves, or for getting women and girls who have other aids to support to accept work at low prices.*[4]

6. The High Court in *Cocks' case* reached the opposite conclusion in respect to a provision requiring a permit to be obtained for work performed outside a workshop or factory under the *Dry Cleaning and Dyeing Industry Award 1966* because it extended to the performance of work whether by a "servant" or an "independent contractor".[5]

7. In *Re Clothing Trades Award 1982* Riordan DP distinguished *Cocks' case* and made a number of observations about the nature of outwork in the clothing industry which have been profoundly influential in the development of outworker regulation since that time. Some of his key findings were as follows:

> *There is no significant difference in the process of making garments, whether performed by workers in the factories of manufacturers or by outdoor workers in their own homes. The difference is about how the work is handed out and the method and level of payment for the completed work.*[6] *…*
>
> *The evidence in this case points to the conclusion that many of the persons engaged as outworkers are engaged in an employer-employee relationship. Usually, outdoor workers are members of a production team, although unknown to each other, with each one making up part of the garment. They are clearly part of an integrated manufacturing process. On the basis of the evidence and material presented I must conclude that the great majority of outdoor workers, who perform work as machinists, are employees and not independent contractors. Indeed, persons are performing machining work to set specifications, patterns and standards in a manner which establishes that they are part of a coordinated scheme of manufacturing garments.*[7]*…*

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[4] *Federated Clothing Trades of the Commonwealth of Australia v Archer and Ors* (1919) 27 CLR 207 at 217.
[5] *R v Commonwealth Industrial Court Judges; Ex Parte Cocks* (1968) 121 CLR 313.
[6] *Re Clothing Trades Award 1982* (1987) 19 IR 416 at p 419.
[7] *Re Clothing Trades Award 1982*, above n 6 at p 436.

> *Outdoor workers are clearly performing work which is integrated into the business of garment manufacture. They are concerned with sewing parts of garments, which have been cut out by some other person, usually an employee, to a predetermined design and pattern. In some cases their work represents the final stage in the manufacture but in other cases it is not. In any event it is only one part of the total process of manufacturing garments. Their work is but one aspect of several functions that must be performed to a specific plan in order to manufacture the garments concerned.*
>
> *Outdoor workers working as machinists are not permitted to use personal initiative. Their work is performed to rigid specifications as to quality, quantity and style as well as the time by which it must be completed. They have no say in the design. The garments are received already cut for sewing or the garments may be already partly sewn and require some further specialised machining. Their work is inspected and may be then passed on to some other person for the performance of an additional function such as further machining or pressing until the manufacture of the garment is complete. They are certainly subject to control and direction, their work is an integral part of the business of those for whom they work and the advertisements which many answered to obtain their jobs were in many cases for employees. This work could not be described as the work of an independent contractor within the ordinary and usually accepted meaning of that term.*
>
> *On the basis of the case law they are employees and not contractors. It follows that* Cocks' case *does not apply. … Further,* Cocks' case *was not concerned with the protection of the award and the use of devices designed to facilitate widespread avoidance or evasion of duties and obligations imposed by the award.*[8]

8. The legislative framework for regulation of outworkers by the Commonwealth is now dramatically different to that which underpinned the relevant award provisions in the cases referred to above. Accordingly, there is no longer any need to consider the specific questions addressed by those cases. However, the cases are relevant, in particular *Re Clothing Trades Award 1982*, in that they outline the reason that outwork, and the contracting out of work, has come to be regulated through laws which primarily deal with employment.

[8] *Re Clothing Trades Award 1982*, above n 6, at p 439.

9. Below we set out a history of outworker regulation in Australia. We suggest that the regulatory response to date in this country indicates broad and widespread acceptance that outworkers should be entitled to the benefits of employment, irrespective of the arrangements under which they are engaged. It is evident from the laws examined below that most jurisdictions in Australia have put this issue beyond doubt through the use of statutory deeming provisions. Even where no deeming provision applies, such as the federal jurisdiction, awards impose obligations on contractors that are identical to those which apply to employers of outworkers. This approach also reflects an acceptance of the same principle.

10. In our submission this well-established principle need not be revisited by the Committee. Further, this well-established principle should frame the approach of the Commonwealth in considering the Bill.

4. History of federal outworker regulation[9]

Federal award regulation

11. Outworker regulation under Commonwealth law is by no means a new phenomenon. Awards made pursuant to Commonwealth industrial relations statutes regulated outworkers from as early as 1919. The early focus of this regulation was prohibition of outwork, with only very limited classes of lawful outwork.[10] That approach continued for much of last century.

12. *Re Clothing Trades Award 1982*, the decision of Riordan DP which is quoted from above, was an application by the Clothing Trades Union to the Australian Industrial Relations Commission to vary the

[9] Current federal outworker regulation is addressed in Section 6.

[10] For a history of federal award provisions about outworkers see *Re Clothing Trades Award 1982*, above n 6, pp 421-435.

Clothing Trades Award 1982 by inserting comprehensive provisions to regulate outwork, and the giving out of work. These provisions were the origin of much modern outworker regulation.[11]

13. The nature of outwork and contracting chains in the industry is no doubt the subject of many other submissions to the Committee and we will not repeat it here. However, it is useful to observe that one of the key features of modern outworker regulation, from 1987 onwards, has been its explicit recognition that in order to improve conditions for outworkers, it is necessary to regulate a wide variety of contracting behaviour. The reasons for this are twofold: firstly, the false characterisation of outworkers as contractors which has been rife in the industry for many years; and secondly, to provide transparency and accountability within contracting arrangements in the industry which would otherwise obfuscate the use of outworkers.

14. A significant change regarding awards generally came about with the introduction of the *Workplace Relations Act 1996*, which confined the list of matters that were "allowable" for inclusion in awards to twenty. Amongst those twenty was, at s 89A(2)(t):

> *pay and conditions for outworkers, but only to the extent necessary to ensure that their overall pay and conditions of employment are fair and reasonable in comparison with the pay and conditions of employment specified in a relevant award or awards for employees who perform the same kind of work at a commercial establishment.*

15. In 1999, the Australian Industrial Relations Commission conducted award simplification on the Clothing Trades Award 1982 so that it contained only "allowable matters". In the course of doing so it considered the meaning of s 89A(2)(t) in the context of the pre-existing award provisions in respect of outworkers. A full bench of the AIRC found that s 89A(2)(t) permitted the substance of the pre-existing outworker award provisions to be retained in their entirety; in other

[11] *Re Clothing Trades Award 1982*, above n 6. See also M Print M3574 *Clothing Trades Award 1982,* Williams DP, 12 June 1995.

words, that provisions of that nature were “necessary” to ensure fair and reasonable terms and conditions in comparison with factory-based workers.[12]

16. The introduction of the *Work Choices* laws in 2005[13] further restricted permissible content in awards generally, and significantly curtailed their scope of operation. Notwithstanding this general approach, outworker award protections were retained through a series of measures, including:

a. The retention of the outworker allowable award matter, in identical terms to what appeared in the pre-*Work Choices Workplace Relations Act 1996* save that the reference to wages was omitted in light of their omission generally from awards (s 513(1)(o)):

b. Limiting the application of the prohibition on award terms regulating contracting out so that it did not apply in respect of outworker terms (s 515(3));

c. Providing that outworker provisions were “protected award conditions” in the true sense of the words, in that they were mandatory inclusions in any relevant workplace agreement (s 354(3)):

d. Preserving the operation of all State and Territory outworker laws (these laws are examined below) (s 16(3)(d)): and

e. Expressly facilitating the binding of non-employers to an award which contains outworker terms (Part 10 Division 7):

[12] S Print R2749 *Clothing Trades Award 1982*, McIntyre VP, Duncan DP, Blair C, 12 March 1999.
[13] *Workplace Relations Amendment (Work Choices) Act 2005*.

17. Shortly thereafter the *Independent Contractors Act 2006* again made special provision to retain outworker protections in State and Territory laws (s 7(2)(a)).

Prosecution activity

18. As noted above, Slater & Gordon has been involved in hundreds of prosecutions under the federal award outworker provisions.

19. Over the course of this prosecution activity, the Federal Court has made some observations about the importance of outworker regulation and the seriousness with which the court regards a failure to comply with the award provisions.

20. In *Re Clothing and Allied Trades' Union of Australia v J and J Saggio Clothing Manufacturers Pty Ltd* [1990] FCA 279, Gray J found a number of breaches of the Clothing Trades Award 1982 and observed:

> *In an industry in which the use of outworkers offers plenty of opportunity for exploitation of workers, failure to participate in a scheme designed to prevent such exploitation is a serious matter*: at [35].

21. In 2004, in *TCFUA v Lotus Cove*, Merkel J observed:

> *[T]he breaches of the award regime concerning outworkers in the present matter are serious. That regime is addressed at preventing abuses which are causing considerable social and economic problems in the community.* [refers to Gray J in *Saggio*] …
>
> *Employers in the industry should be aware that future breaches of the kind that have occurred in the present case are a serious matter and can result in substantial penalties. Employers should also be aware that the factors that I have taken into account in mitigation in the present case may be less compelling in the future if they are aware of their award obligations and continue to disregard them*: at [53].

22. In 2006, in *TCFUA v Southern Cross* [2006] FCA 325 Marshall J observed, in respect of the award protections for outworkers:

> *Outworkers in the clothing industry in Australia are some of the most exploited people in the Australian workforce. They perform garment making work often at absurdly low rates in locations outside their employer's premises. This frequently occurs in the homes of outworkers.*
>
> *To help alleviate this blatant exploitation the Australian Industrial Relations Commission has sought to regulate the provision of outworkers in the clothing industry:* at [1]-[2]*.*

23. In 2008, in *TCFUA v Morrison Country Clothing*, the TCFUA brought a successful contempt motion against the Respondent, who failed to file an affidavit of documents with the court in a proceeding for breach of the award provisions. In considering the appropriate penalty for contempt, Tracey J observed:

> *In the principal proceeding, the applicant sought the imposition of penalties against Morrison Clothing pursuant to s 719 of the Workplace Relations Act 1996 (Cth) ("the WR Act") for breaches of clauses 46 and 48 of the Clothing Trades Award 1999. Clauses 46 and 48 regulate the terms and conditions of outworkers. The Award is intended to regulate the use of outworkers in the clothing industry to ensure that outworkers receive their minimum entitlements. The relevant provisions of the Award were specifically designed to remedy the exploitation of this vulnerable group of workers: see Clothing Trades Award 1982 Print R2749 and cf the observations of Marshall J in Textile Clothing and Footwear Union of Australia v Southern Cross Clothing Pty Ltd [2006] FCA 325.*
>
> *The applicant claimed, inter alia, that Morrison Clothing had utilised outworkers but had not provided the minimum wages and conditions provided for in the Award or kept all of the requisite work records. The work records of Morrison Clothing are essential for the applicant to prove its case. The failure of Mr Morrison to provide discovery of the work records has severely limited the ability of the applicant to continue the proceedings. As the applicant submits, if Mr Morrison is permitted to ignore the Order he is able to circumvent the outworkers' regulatory regime. In those circumstances, and particularly in light of the objectives of that regime, the amount of the penalty should be sufficient to deter Mr Morrison and others from conduct designed to circumvent the legislative protections which are provided for outworkers*: at [12]-[13].

24. The prosecution work conducted by Slater & Gordon and the TCFUA has evidenced two disturbingly predictable scenarios amongst some employers in the industry: firstly, there are those who wilfully

avoid their obligations, then fail to even defend the proceedings or attend court; and secondly, there are those who seek to identify and exploit every loophole and technical argument available to avoid accountability to the persons who are performing work on their behalf.

25. This attitude of some employers in the industry makes it vitally important that outworker protections are strong, comprehensive, nationally consistent and universally applicable. In our submission, strong, comprehensive, nationally consistent and universally applicable laws to protect outworkers would make a significant contribution to the attitudinal change in the industry which is clearly necessary to end the exploitation of outworkers.

5. State regulation

26. In addition to the federal outworker regulation identified above, several States have in place laws directed at protection of outworkers in the textile, clothing and footwear industry. These laws have ongoing operation, notwithstanding the operation of the *Fair Work Act 2009* ("FW Act").[14] These laws are in many cases broadly similar, and have some similar features to the current federal regulation of outwork, however each differs from the others in the range of issues they address and in their precise terms.

Queensland

27. The *Industrial Relations Act 1999* (Qld) ("Qld Act") contains the following elements of outworker regulation:
    a. **Deeming:** An "outworker" is deemed to be an employee, and "a person for whose calling or business an outworker works" is deemed to be an employer for the purposes of the Qld Act. *Outworker* is defined as a person engaged, for someone else's calling or business, in or about a private residence or other

[14] *FW Act* ss 26-27

premises that are not necessarily business or commercial premises, to: (a) pack, process or work on articles or material; or (b) carry out clerical work: See Qld Act ss 5, 6, and Schedule 5.

b. **Award regulation:** Outwork and contract work in the clothing industry is regulated by award, in particular the *Clothing Trades Award – Southern and Central Divisions 2003* ("Qld Award"), which contains specific protections for outworkers and specific obligations on persons who contract out work in the industry. These provisions include: specific terms and conditions for engaging an outworker; registration requirements; limits on the capacity to contract out work; record keeping requirements and a prohibition on contracting on terms less favourable than the award: see Qld Award clauses 4.4-4.6.

c. **Recovery of remuneration:** The Qld Act contains specific provisions for recovery of wages by clothing outworkers. These provisions allow an outworker to make a claim for unpaid wages against a person whom the outworker believes to be the employer ("the apparent employer"). That person will be liable for payment of the wages unless that person proves in proceedings that the work wasn't done, the amount is incorrect or the amount has already been paid. The apparent employer may also refer the claim to a person whom it believes is liable for the payment, and may recover any payment made from that person: Qld Act Chapter 11 Part 2 Division 3A.

d. **Code of practice:** The Qld Act facilitates the making of a mandatory code of practice for outworkers for the purpose of ensuring that outworkers in the clothing industry receive their lawful entitlements and provides that contravention of the code of practice is an offence: Qld Act s 400I. The *Mandatory Code of Practice for Outworkers in the Clothing Industry 2011* ("Qld Code") was made pursuant to this provision. The Qld Code applies to retailers, suppliers, contractors, subcontractors and successors with the requisite connection to Queensland. It imposes obligations on retailers to obtain information from

suppliers about the manufacture of garments; to only deal with registered suppliers and to report less favourable conditions. It imposes similar and complimentary obligations on suppliers, and contractors.

South Australia

28. The *Fair Work Act 1994* (SA) ("SA Act") contains a number of similar protections for outworkers, as follows:
    a. **Deeming:** The SA Act contains a broad definition of outworker, including making provision for a person engaged through a body corporate of which the person is an officer or employee and for which the person personally performs all or a substantial part of the work undertaken by the body corporate: SA Act s 5.The SA Act deems outworkers to be employees, and makes provision for the SA Act to apply to outworkers, by:
        i. Providing that a "contract of employment" includes a contract under which a person (the employer) engages another (the employee) to carry out work as an outworker (even though the contract would not be recognised at common law as a contract of employment); and defining "employer" to include a person who employs the employee for remuneration in an industry under a contract of employment: SA Act s 4;
        ii. Providing that specified matters relating to outworkers constitute "industrial matters": SA Act s 4; and
        iii. Providing that the provisions of the SA Act apply in all respects to outworkers if a provision of an award relates to outworkers: SA Act s 5(4).
    b. **Award:** The SA *Clothing Trades Award* ("SA Award") contains protections for outworkers of a similar nature to those contained in the Qld Award: SA Award clauses 4.10-4.12; Schedules 3-5.
    c. **Recovery of remuneration:** The SA Act contains specific provisions facilitating the recovery of remuneration from a

person identified by the outworker as the person whom the outworker believes on reasonable grounds to be a responsible contractor in relation to the outworker ("the apparent responsible contractor"). The apparent responsible contractor is liable for the payment unless that person can establish that the relevant work was not performed or that the amount is incorrect. Further, the apparent responsible contractor may refer the claim to the person the apparent responsible contractor knows or believes is the actual employer ("the designated employer"), and may recover any payment made from the designated employer: SA Act Part 3A Division 3.

d. **Code of Practice:** The SA Act facilitates the making of a code of practice for the purpose of ensuring that outworkers are treated fairly in a manner consistent with the objects of this Act. The *Clothing Outworker Code of Practice* (SA Code) was made pursuant to these provisions. Like the Qld Code, the SA Code also obliges retailers, suppliers and contractors to make and supply records which demonstrate how clothing is produced and supplied in South Australia.

Victoria

29. In Victoria, the *Outworkers (Improved Protection) Act 2003* ("Vic Act") regulates the engagement of outworkers. It contains the following provisions:

    a. **Deeming:** The Vic Act deems outworkers as employees, and persons who engage outworkers as employers, for the purposes of specified Victorian legislation such as the *Long Service Leave Act 1992*, and the *Occupational Health and Safety Act 2004*: Vic Act s 4.

    b. **Award:** Victoria does not have operable State Awards as a result of its referral of powers to the Commonwealth for the purposes of the *Workplace Relations Act 1996.* However, the Vic Act provides that an outworker engaged by a person is

entitled to the same benefits, terms and conditions as he or she would, if he or she were an employee of the person, have under any relevant federal award and specified federal statutory minimum conditions of employment: Vic Act s 14A.

c. **Recovery of remuneration:** The Vic Act makes provision for recovery of remuneration in similar terms to the Qld Act and SA Acts: Vic Act Part 2 Division 2.
d. **Code of Practice:** The Vic Act facilitates the making of a code of practice by the Minister for the purposes of ensuring that outworkers receive their lawful entitlements: Vic Act Part 3 Division 2. No code of practice has been made pursuant to these provisions.
e. **Ethical Clothing Trades Council:** The Vic Act establishes a council of representatives from unions, employers and outworker advocates in order to monitor compliance with the Act, and to report to the Minister about specified matters under the Act: Vic Act Part 3 Division 1.

New South Wales

30. New South Wales regulates outwork through the *Industrial Relations Act 1996* NSW ("NSW IR Act") and the *Industrial Relations (Ethical Clothing Trades) Act 2001* NSW ("NSW ECT Act"). Regulation of outwork in NSW spans the following areas:
    a. **Deeming:** The NSW IR Act deems any person (not being the occupier of a factory) who performs outside a factory any work in the clothing trades or the manufacture of clothing products, whether directly or indirectly, for the occupier of a factory or a trader who sells clothing by wholesale or retail to be an employee, and the occupier or trader as the employer for the purposes of the NSW IR Act: NSW IR Act s 5; Schedule 1.
    b. **Award:** The *Clothing Trades (State) Award* ("NSW Award") regulates outwork and the giving out of work in a manner similar to the other awards considered above: NSW Award clauses 31-

33; Schedules B and C. The NSW IR Act gives the Award force as if it was a provision directly in the Act itself in respect of constitutional corporations: NSW IR Act s 129B.

c. **Recovery of remuneration:** The NSW IR Act contains recovery of remuneration provisions which are similar in nature to those contained in the Qld Act, SA Act and Vic Act: NSW IR Act Part 11 Division 3.

d. **Code of practice:** The NSW ECT Act provides that the Minister may make a code of practice for the purpose of ensuring that outworkers in the clothing trades receive their lawful entitlements: NSW ECT Act Part 3. The *Ethical Clothing Trades Extended Responsibility Scheme* ("NSW Code") was made pursuant to these provisions. It operates, similarly to the Qld Code and SA Code, to impose obligations on retailers, suppliers and their contractors directed towards ensuring transparency of supply chains and ensuring appropriate conditions are afforded to outworkers as a result.

e. **Ethical Clothing Trades Council: T**he NSW ECT Act establishes a council of representatives from unions, employers and outworker advocates in order to monitor compliance with the Act, and to report to the Minister about specified matters under the Act: NSW ECT Act Part 2.

Tasmania

31. Tasmania has the following laws in respect of outworkers:

a. **Deeming:** The *Industrial Relations Act 1984* ("Tas Act") provides that an employee includes an outworker. An outworker is defined as a person who performs for an employer work related to the manufacture of a garment outside the employer's premises: Tas Act, s 3.

b. **Award:** The *Clothing Industry Award* ("Tas Award") also regulates outwork: Tas Award clause 19.

Western Australia

32. In Western Australia, the *Industrial Relations Act 1979* contains no specific provisions regulating outwork, however the *Clothing Trades Award 1973* contains outwork provisions at clauses 25A-25C.

Summary

33. The above outline demonstrates that whilst outwork regulation under State laws is prevalent, it is nonetheless inconsistent and patchy across Australia. Outworkers in some States do not have access to the benefits of some of the more modern innovations in outworker regulation. In circumstances where Australia has a national industrial relations system for the private sector, it is difficult to identify any justification for continuing to rely on the States alone to implement these important protections.

6. Opportunities arising from a national industrial relations system in the private sector

34. The FW Act presents opportunities for a coherent, nationally consistent, universal system of outworker regulation that has never before been present in Australia's history of outworker regulation.

35. The FW Act, like the WR Act before it, no longer relies upon s 51(xxxv) of the Australian Constitution as its constitutional underpinning. This has two key implications. Firstly, the breadth of Commonwealth powers in respect of corporations means that the Commonwealth, relying only on these powers, has significant capacity to regulate. Secondly, there can be no argument that this regulation is confined in its scope to persons who are employers and employees at common law. The Commonwealth is at liberty to regulate all corporations, including non-employers.

36. In addition, the referral of powers in respect of private sector employers and entities by all States can operate to “plug the gaps” which might remain through a utilisation of the Commonwealth’s powers only (other than in Western Australia).

37. The combination of these two factors mean that the FW Act is an appropriate vehicle for a nationally consistent system for regulating outwork, and for regulating behaviour of contracting parties (who may or may not also be employers at common law) in the TCF industry.

38. The FW Act already makes some headway towards development of that national system through the provisions which facilitate the making of the *Textile, Clothing, Footwear and Associated Industries Award 2010* (“the TCF Award”), and the TCF Award itself.

39. Notably, the FW Act regulation of outwork in the textile, clothing and footwear industry is not confined to circumstances where there is an employment relationship between the outworker and the person who engages the outworker. Rather, the FW Act facilitates the regulation of relationships between contracting parties, including but not limited to contracts to which an outworker is a party, with a view to ensuring transparency and accountability throughout the contracting chain, and to ensuring that outworkers receive their lawful entitlements.

40. *Outworker* is defined in s 12 of the FW Act as:

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

41. FW Act obligations in respect of outworkers fall upon both *national system employers* and *outworker entities*. Section 12 of the FW Act provides that an *Outworker Entity* means:

> *…any of the following entities, other than in the entity's capacity as a national system employer:*
>
> *(a) a constitutional corporation*
>
> *(b) the Commonwealth*
>
> *(c) a Commonwealth authority*
>
> *(d) a body corporate incorporated in a Territory*
>
> *(e) a person so far as:*
>
> > *(i) the person arranges for work to be performed for the person (either directly or indirectly); and*
> >
> > *(ii) the work is of a kind that is often performed by outworkers; and*
> >
> > *(iii) the arrangement is connected with a Territory.*

42. Further, FW Act s 30F and s 30Q extend the meaning of *outworker entity* in respect of Victoria (as the only Division 2A referring State) and the Division 2B referring States respectively as follows:

> *(1) An outworker entity includes a person, other than in the person's capacity as a national system employer, so far as:*
>
> > *(a) the person arranges for work to be performed for the person (either directly or indirectly); and*
> >
> > *(b) the work is of a kind that is often performed by outworkers; and*
> >
> > *(c) one or more of the following applies:*
> >
> > > *(i) at the time the arrangement is made, one or more parties to the arrangement is in a State that is a referring State because of this Division;*
> > >
> > > *(ii) the work is to be performed in a State that is a referring State because of this Division;*
> > >
> > > *(iii) the person referred to in paragraph (a) carries on an activity (whether of a commercial,*

governmental or other nature) in a State that is a referring State because of this Division, and the work is reasonably likely to be performed in that State;

(iv) the person referred to in paragraph (a) carries on an activity (whether of a commercial, governmental or other nature) in a State that is a referring State because of this Division, and the work is to be performed in connection with that activity.

(2) This section does not limit the operation of the definition of outworker entity in section 12.

43. Section 140 of the FW Act provides that a modern award may include outworker terms as follows:

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

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

(b) terms relating to the conditions under which an outworker entity may arrange for work to be performed.

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

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

(a) Terms referred to in subsection (1);

(b) Terms that are incidental to terms referred to in subsection (1), included in the modern award under subsection 142(1);

(c) Machinery terms in relation to the terms referred to in subsection (1), included in the modern award under subsection 142(2).

44. The TCF Award contains outworker terms. Clause 4 of the Award extends the coverage of the TCF Award to outworker entities who are the subject of Schedule F. Schedule F is enforceable pursuant to clause 17.1 of the Award. The Schedule F provisions have their genesis in the previous federal awards and the State laws described above.

45. The obligations in Schedule F (relevantly) fall upon *Principals*, a term which is defined in clause F.1.4 to include both employers and outworker entities within the meaning of the FW Act. The obligations apply when a Principal makes an *arrangement*. Arrangement is defined in clause F.1.1 to mean:

> *any arrangement made by a principal with any legal or natural person to have work carried out for the principal, whether or not the person carries out the work, but does not include employment of an employee who is not an outworker to carry out the work.*

46. *Work* is then defined in clause F.1.5 to mean:

> *Work on or in relation to any garment, article or material in the textile, clothing and footwear industry, including for example design, preparation, manufacture, packing, processing and finishing work, and organisation, procurement, control, management or supervision of work.*

47. TCF Award obligations on Principals relate to registration; making, retention and provision of work records and lists; and ensuring minimum conditions for outworkers are afforded by persons with whom the Principal makes an arrangement. Further, where a Principal makes an arrangement directly with a worker (an outworker or a person who personally performs the work – see clause F.1.6) additional obligations primarily relating to the conditions to be provided to the worker apply, including applying the NES. Schedule F also contains provisions allowing recovery of monies owed by a worker from a Principal.

48. Some of the measures which the former Australian Industrial Relations Commission included in the TCF Award during the award modernisation process were obvious omissions from the FW Act itself. For example, the absence of a deeming provision of the nature now being considered meant that not all outworkers could be assured of receiving the basic employment standards in the NES. Further, the absence of proper recovery of remuneration provisions in the FW Act led to the inclusion of similar provisions in the TCF Award. Clearly, both

of these matters are much more appropriately dealt with directly in the FW Act.

49. In addition, the TCF Award does not rectify the deficiency in the FW Act in not extending other key protections to all outworkers, such as the general protections provisions, payment of wages protections and protections from unfair dismissal. It does not make provision for a code of practice, and it does not address issues with entry and inspection of premises associated with outwork and sweatshops.

50. We understand that the Bill seeks to address each of these issues, and comment further on these elements below.

7. The Bill

General

51. Slater & Gordon are generally very supportive of the Bill. It will overcome most of the deficiencies of the current federal regulation of outworkers. We congratulate the Government for introducing this important piece of legislation.

52. We note that the Bill (with the exception of the provisions in respect of entry and inspection) does not purport to rely on the powers to amend the FW Act which were referred to the Commonwealth by the referring States. One obvious deficiency with this approach is that the improvements in outworker regulation provided for in the Bill will not apply outside of the Commonwealth's own sphere of constitutional power. We would encourage the Government to explore whether the amendment referrals of the referring States could be used to extend the reach of the Bill and ensure its broadest possible application.

53. We address each specific subject matter dealt with in the Bill below.

"Deeming" provisions

54. Proposed new Part 6-4A Division 2 provides for outworkers to be deemed as employees; and persons who engage outworkers to be deemed as employers, for the purposes of most of the FW Act.

55. Slater & Gordon strongly supports a deeming provision.

56. As we have outlined above, there is a clear and cogent policy basis for provisions of this nature. The findings of Riordan DP in *Re Clothing Trades Award* extracted above demonstrate the sham associated with classifying outworkers as contractors.

57. As we have further outlined above, there has been a longstanding acceptance of the policy position which underlies this type of regulation. It reflects the position under most State laws. It also reflects the current acceptance, in respect of the TCF Award and the provisions which facilitate its making and enforcement, that all outworkers should be entitled to the same minimum conditions. The absence of a deeming provision in the FW Act to date has been incongruous with this accepted policy position.

Right of entry provisions

58. Proposed amendments to subdivision AA of Division 2 of Part 3-4 of the FW Act will strengthen the capacity for the TCFUA to enter premises to investigate non-compliance with outworker obligations.

59. Slater & Gordon strongly supports this proposed strengthening of entry and inspection powers for the TCFUA. The TCFUA has a history of in fact being *the* key regulator on the ground in this industry. Their prosecution record speaks for itself. Improvements in compliance throughout the industry have resulted from this important work. However, their efforts in determining compliance by entities in the industry can sometimes be hampered by entities refusing entry on technical grounds. Measures to overcome this are supported.

60. We note that the proposed amendments to the FW Act will allow regulations to be made granting exemptions from the application of these provisions to certain persons who are accredited as provided for in the regulations. This appears to us to provide a reasonable balance between, on the one hand, the importance of the TCFUA's capacity to undertake compliance work, and on the other, ensuring that the rights of persons in the industry who can demonstrate their compliance through a relevant accreditation are not unduly affected.

Recovery of remuneration provisions

61. Proposed new Part 6-4A Division 3 – Recovery of unpaid amounts, makes provision for outworkers to recover unpaid remuneration from parties in a contracting chain who are indirectly responsible for the work which led to the remuneration being payable. It then provides for the indirectly responsible entity to recover any remuneration paid from the responsible entity.

62. Slater & Gordon strongly supports the inclusion of provisions to allow for the recovery of remuneration in this way. Again, there are cogent policy reasons, in light of the practices in the industry, for provisions of this nature.

63. Recovery of remuneration provisions are present in the majority of States' outworker laws. In addition, they are currently contained in the TCF Award. However, given that the FW Act itself governs enforcement of obligations, it is far preferable for consistency, clarity and simplicity that these obligations be contained directly in the FW Act along with other enforcement provisions.

64. A key feature of all existing recovery of remuneration provisions is that they shift the onus on ascertaining and proving liability for payment of remuneration away from the outworker and towards persons in the contracting chain who are much more likely to be in a position to

identify the party liable, and extract the requisite payment from that liable party.

65. In our view, the provisions of the Bill do not exhibit this feature as clearly as is desirable. We understand from the second reading speech that amendments to the Bill will be made to ensure these provisions work effectively, and we support that approach.

Code provisions

66. Proposed new Part 6-4A Division 4 – Code of Practice relating to TCF outwork, makes provision for a code of practice to be made by regulation.

67. Slater & Gordon supports the inclusion of provisions of this nature.

68. Codes of practice in the TCF industry currently operate in New South Wales, Queensland and South Australia. The Vic Act makes provision for the making of a code of practice by the Minister, however this has not occurred.

69. The current codes provide an important role in the scheme of outworker regulation in that, broadly speaking, they make provision for retailers to participate in the kinds of record keeping practices which apply under the relevant awards to employers and other entities. This provides for enhanced transparency throughout the contracting chain.