

(SENATE)

STANDING COMMITTEE ON EDUCATION, EMPLOYMENT AND  
WORKPLACE RELATIONS

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

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## Introduction

As an academic specialist in the field of regulation of informal work and home-based outworkers, I welcome the opportunity to make this submission to the Senate Standing Committee on Education, Employment and Workplace Relations. I am broadly supportive of the amendments that this Bill will introduce to the Fair Work Act. My research suggests that similar provisions in state acts have at times been well utilised so as to improve the conditions of outworkers, and, when enforced, are making an important difference to outworkers' livelihoods, as well as their health and safety. The provisions in the Bill under consideration by this Inquiry represent an important step towards a uniform national system of protection for these most vulnerable of Australian workers, and are to be commended.

I note, however, that legal changes are only one part of the solution. Strong standards and well-crafted laws must be complemented by a suite of other measures to encourage broad compliance across the industry. As various previous inquiries have noted, non-compliance within the industry is endemic. Maximum strength policy levers must be employed so as to change labour practices within the industry.

## My expertise in this area

I am a Senior Lecturer in the Department of Business Law and Taxation at Monash University, Australia and am widely acknowledged as an international expert in the field of the regulation of informal work. My work on this topic<sup>1</sup> has been influential at the highest level of the International Labour Organisation and a metric I developed with Prof. Simon Deakin of Cambridge University for measuring the effectiveness and systemic fit of labour laws has recently been trialled and adopted by the technical arm of the ILO (Dialogue).<sup>2</sup> I have been called on to give expert advice a number of times regarding the regulation informal work, including to the Bulgarian Minister of Labour in 2011.

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<sup>1</sup> FENWICK, C., HOWE, J., MARSHALL, S. & LANDAU, I. 2008. Labour and Labour Related Laws in Small and Micro Enterprises: Innovative Regulatory Responses. *In*: SEED (ed.). Geneva: International Labour Organisation,.

<sup>2</sup> FENWICK, C. & VARGHA, C. 2011. Labour law as a tool to promote Decent Work: A view from the ILO. *Regulating for Decent Work Network* Geneva

## Main points made in this submission

- Past studies of the outworker conditions have consistently found non-compliance with the law and low pay and conditions for outworkers.
- My research-in-progress shows that in the recent period, the relevant Award, combined with state outworker laws and Ethical Clothing Australia's promotion of the Homeworkers Code of Practice are beginning to have a beneficial impact on outworker conditions.
- My research, combined with past studies, provides strong evidence that there are a number of features that make this Bill particularly important:
  - It will ensure that workers who are often outside the ambit of labour law are provided with protection;
  - It will provide legal recognition of the role that supply chain dynamics play in producing exploitation;
  - It will allow the tracing of the supply chain, and the inspection of the workplaces of the majority of TCF workers. Without the right to inspect that this Bill proposes, the Union will not be able to access the majority of workplaces in Australia, which is an untenable situation in a robust industrial relations system;
  - It will underpin the strong voluntary initiatives in Australia which rely on the law as a basis for the standards they promote;
  - It will create a unified national system of protection, compared with what is currently a fragmented, state-based system, exacerbating confusion amongst outworkers and employers;
  - It will allow the improvements that have been made possible due to state laws to be more broadly replicated.
- Employers of outworkers operate within an industry in which there are complex supply chains and which is highly exposed to overseas competition. They are generally small and medium enterprises that have low compliance capacity.

- This suggests that the elements of this Bill that allow for recovery higher in the supply chain are very important. It also suggests that elements, such as Mandatory Codes, that spread responsibility across the industry are particularly helpful.
- More is required, however, in the way of assistance with compliance if this Bill is going to have an impact. Measures of this nature are proposed at this conclusion of this submission.

## Difficult regulatory targets

This Bill which is the topic of this Inquiry aims to amend the Fair Work Act so as to regulate the conditions of outworkers, subject outworker ‘employers’ or those who give work to outworkers to the relevant Award standards, and provide measures for regulating supply chains when problems occur. It is well accepted in international and comparative labour law that each of these regulatory targets is particularly challenging for law makers,<sup>3</sup> and requires ‘smart’ regulatory strategies utilising maximum strength enforcement levers.<sup>4</sup>

### *Outworkers*

In particular, the Bill is concerned to improve the conditions of home-based outworkers in Australia. These workers are known internationally as ‘homeworkers’. Whilst ‘homeworker’ would seem to include only those people who are working in their homes, it is defined in International Labour Organisation (ILO) Convention No 177 article 1, as work carried out by a person in his or home or in other premises of his or her choice, other than the workplace of the employer for remuneration which results in a product or service as specified by the employer, irrespective of who provides the equipment, materials or other inputs used. This legal definition is very close to the colloquial use of ‘outworker’, which is used in Australia. The term ‘sweatshop’ is also in common colloquial use. The workers in sweatshops are most often, but not always, homeworkers, in accordance with the Convention No 177 definition. This Bill will bring Australia more closely into line with this this Convention.

Outworkers are non-traditional workers in the sense that they are not those originally envisaged for protection by landmark labour law Australian cases such as the Harvester

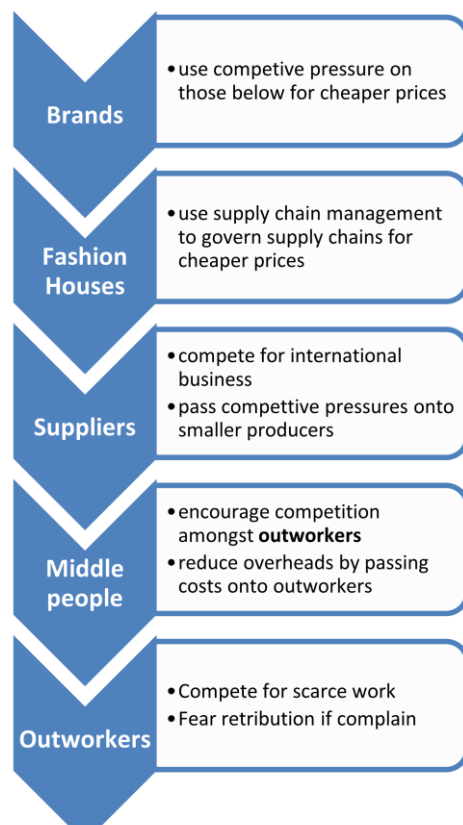
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<sup>3</sup> ILO 2004. Decent Employment through Small Enterprises: A Progress Report on SEED activities. *In*: IFP/SEED (ed.). Geneva: International Labour Organisation.

<sup>4</sup> GUNNINGHAM, G. & GRABOSKY, P. 1998. *Smart Regulation*, Oxford, Clarendon Press.

Judgment which provided the foundations for our understanding of an ‘employee’ who deserved protection. They work at the periphery of the labour market, outside factories that are easier to regulate and inspect. Although they are well recognised internationally as

**Figure 1: Private Market Regulation  
Results in Downwards Pressure**



being amongst the most vulnerable workers, they often sit outside the standard definitions of ‘employee’, and are thus extruded from the protections afforded to other workers conducting similar work within factories. As the next section of this submission evinces, most outworkers in Australia are migrant women, with low English language skills and legal literacy, making them particularly exposed to exploitation.

#### *Small and micro-enterprises*

If enacted, the Bill will regulate the activities of those who give work out to outworkers. Most of the businesses that give work out to outworkers are small and micro-enterprises (SMEs). A great proportion of the larger factories that once operated in Australia

have now closed, with the contraction of manufacturing in this industry.<sup>5</sup> This has left the industry dominated by SMEs that are more difficult to regulate, and who struggle to make productivity increases through industrial upgrading or adopting new technology thanks to problems of low capital investment. SMEs are more likely to compete on the basis of low labour costs. This is exacerbated in industries that are highly exposed to competition with developing countries where, as a factor of overall production costs, labour costs are low, as

<sup>5</sup> Economic Development and Infrastructure Committee, *Inquiry into Manufacturing in Victoria*, July 2010, p. 18.; Department of Education, Employment and Workplace Relations (DEEWR), *Employment Outlook for Manufacturing*, SkillsInfo Report A10-0081 (Canberra: Australian Government, 2011), 5. Available at <<http://www.skillsinfo.gov.au/NR/rdonlyres/E05ABD76-D7EC-4EB4-9C3E-E2E9A1D0E259/0/OutlookManufacturing.pdf>> (accessed 30 July 2011); Industry Commission, *The Textiles, Clothing and Footwear Industry*, Report number 59, 1997.

is the case in the Australian textile, clothing and footwear industry. These types of businesses are subject to frequent failure, resulting in employment churning and high levels of bankruptcy and winding up. They are not a source of secure employment, but are nevertheless a crucial source of livelihoods for many workers.

### *Supply chains*

SMEs operate in complex supply chains. Supply chains in the TCF industry are hierarchical markets in which large 'core businesses' (retailers, fashion houses and brand names) wield strong control over the other parties in the supply chain in order to reduce risk and increase profits.<sup>6</sup> (Smaller fashion houses and fashion designers do not wield such strong control.) The direct employers may have only partial discretion in determining the wages (piece rates), hours (largely determined by volume of work) or other conditions under which outworkers toil.<sup>7</sup> Parties above them in the supply chain, such as larger manufacturers, wholesalers and retailers, may, in fact, have far greater control over these factors. By setting tight deadlines for orders and pushing prices down, these 'core businesses' dictate the terms lower in the supply chain. It is important, therefore, that regulatory measures target the entire supply chain.

Both homeworkers and small and micro-enterprises present a particularly tough challenge for policy makers and regulators due to the interplay of complex supply chain factors. Studies from around the world show that special and often unusual initiatives are required so as to improve the conditions of informal, homebased workers and the activities of MSEs.<sup>8</sup> A new body of labour law scholarship has emerged in the last 15 years that proposes ways that the growing numbers of 'post industrial' workers can be provided with labour law protections.<sup>9</sup> This scholarship acknowledges that standard labour law techniques have been

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<sup>6</sup> GEREFFI, G., HUMPHREY, J. & STURGEON, T. J. Developing a Theory of Global Value Chains: A Framework Document. Global Value Chains Conference, April 25-28 2002 2002 Rockport, Massachusetts.

<sup>7</sup> MARSHALL, S. 2006. An Exploration of Control in the Context of Vertical Disintegration, and Regulatory Responses. In: ARUP, C., HOWE, J., MITCHELL, R. & O'DONNELL, A. (eds.) *Labour Law and Labour Market Regulation: Essays in the Construction, Constitution, and Regulation of Labour Markets and Work Relationships*. Sydney: Federation Press.

<sup>8</sup> RINEHART, R. 2004. Designing Programmes to Improve Working and Employment Conditions in the Informal Economy: A Literature Review. In: ILO (ed.); REINECKE, G. 2005. Labour and labour-related laws in micro and small enterprises: Cases from Latin America. In: ORGANIZATION, I. L. (ed.) *Draft Document*; KLEIN, V. T. A. E. 1996. *Regulation and the Informal Economy: Microenterprises in Chile, Ecuador, and Jamaica*; MORRISON, C. 1995. What Institutional Framework for the Informal Sector? In: OECD (ed.).

<sup>9</sup> Australian labour law scholars are at the forefront of this scholarship. See, for example, ARUP, C. & MITCHELL, R. 2006. Labour law and labour market regulation. In: ARUP, C. E. A. (ed.) *Labour law and*

outstripped by new economic formations that are the consequence of the globalisation of trade and finance, and the breaking up of large enterprises into smaller, more fragmented enterprises that operate within global supply chains.<sup>10</sup> The Bill before this Inquiry is in keeping with the proposals made in the scholarship that suggest that the way that labour law conceives of the categories of ‘worker’ and ‘employer’ needs to change if labour law is to continue to effectively regulate the labour market.

### **Impetus for special protective measures based on previous studies**

Previous research shows that there is a strong impetus for special protective measures for outworkers in Australia as they are amongst the most vulnerable workers in Australia. They work in an industry in which there is a widespread culture of non-compliance with labour laws and unacceptably low labour standards. The work is often informal. Informality has gained increasing international attention because it is linked with poverty,<sup>11</sup> low job quality,<sup>12</sup> low productivity,<sup>13</sup> and low revenue for the government. It presents a particularly difficult challenge for governments wishing to improve labour standards, productivity and production quality in manufacturing.

#### *Numbers of outworkers unknown*

The exact extent of the problem is not clear, and is deserving of further study. Outwork grew in the 1980s and 1990s following the reduction of tariff and non-tariff protections. By

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*labour market regulation: Essays on the construction constitution and regulation of labour markets and work relationships.* Melbourne: Federation Press.. See also: ARTHURS, H. 2006. What immortal hand or eye? Who will redraw the boundaries of labour law? In: DAVIDOV, G. & LANGILLE, B. (eds.) *Boundaries and frontiers of labour law: Goals and means in the regulation of work.* Oxford: Hart.; DEAKIN, S., LELE, P. & SIEMS, M. 2006. *The Evolution of Labour Law: Calibrating and Comparing Regulatory Regimes.*; HEPPLER, B. 2005. *Labour laws and global trade,* Oxford, Hart.; SANKARAN, K. 2008. *Legislating for the Informal Economy: The Challenges for Labour Law. Africa IIRA Congress 2008.* Cape Town, South Africa.; TAJGMAN, D. 2006. *Extending labour law to all workers : promoting decent work in the informal economy in Cambodia, Thailand and Mongolia,* Bangkok, Thailand, International Labour Office.; TEKLE, T. (ed.) 2010. *Labour law and worker protection in developing countries,* Geneva: International Labour Office..

<sup>10</sup> COLINS, H. 1990. Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws. *Oxford Journal of Legal Studies*, 10, 353-380.; MACDONALD, K. & MARSHALL, S. 2010. *Fair Trade, Corporate Accountability and Beyond: Experiments in Global Justice Governance Mechanisms,* London, Ashgate..

<sup>11</sup> KUCERA, D. & XENOIANI, T. 2009. Persisting Informal Employment: What Explains It? . In: JÜTTING, J. P. & DE LAIGLESIA, J. R. (eds.) *Is Informal Normal? Towards more and better jobs in developing countries.* Paris: OECD.

<sup>12</sup> SEED 2003. Decent Employment through Small Enterprises: A Progress Report on SEED Activities. In: ORGANIZATION, I. L. (ed.).

<sup>13</sup> MCMILLAN, M. & RODRIK, D. 2011. *Globalization, Structural Change, and Productivity Growth.* Cambridge: Harvard University.

the mid-1990s, the number of outworkers working in the textile, clothing and footwear (TCF) industry in Australia numbered anywhere between 23,650<sup>14</sup> and 329,000<sup>15</sup>, depending on the source of the estimate. Figures are likely to be unreliable due to the informal, sporadic and seasonal nature of outworker employment, however, it is broadly accepted that the proportion of outworkers compared with factory workers exploded in this period. The Textile, Clothing and Footwear Union of Australia (the Union or the TCFUA) estimated that outworkers outnumbered factory workers by 12 to 1 by 1994<sup>16</sup>.

Unfortunately, we have no more recent figures. As at February 2010, textile, leather, clothing and footwear manufacturing employed 40,600 people in formal jobs, representing 4.4% of the entire manufacturing sector workforce in Australia.<sup>17</sup> It is important to note however, that the Australian Bureau of Statistics (ABS) data accounts for the formal workforce and does not include analysis of the informal workforce, about whom it is difficult to estimate numbers. Numbers of outworkers are likely to have shrunk with the contraction of production in Australia, although it is broadly believed that the proportion of outworkers compared with factory workers has continued to grow. It is recommended that household survey techniques are employed by the government to ascertain the current extent of home-based work and design appropriate enforcement strategies.

*Various studies consistently find low compliance with legal standards*

All the studies conducted into the conditions of outworkers have found that there has never been widespread compliance with the outworker provisions of the Federal Award or the parallel state Awards. In 1996, a Senate Committee noted that '[t]he practice of non-compliance with the award wages and conditions is so widespread that it is considered to be the norm'.<sup>18</sup> A study comparing the occupational health and safety (OHS) experience of factory-based workers and outworkers in the clothing industry found that outworkers

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<sup>14</sup> INDUSTRY COMMISSION 1997. The Textile, Clothing and Footwear Industries. Commonwealth of Australia.

<sup>15</sup> TEXTILE CLOTHING AND FOOTWEAR UNION OF AUSTRALIA 1995. The Hidden Cost of Fashion. Sydney: Textile, Clothing and Footwear Union of Australia.

<sup>16</sup> Ibid.

<sup>17</sup> Department of Education, Employment and Workplace Relations (DEEWR), *Employment Outlook for Manufacturing*, SkillsInfo Report A10-0081 (Canberra: Australian Government, 2011), 5. Available at <<http://www.skillsinfo.gov.au/NR/rdonlyres/E05ABD76-D7EC-4EB4-9C3E-E2E9A1D0E259/0/OutlookManufacturing.pdf>> (accessed 30 July 2011). Graph source from ABS Labour Force Survey cat. no. 6291.0.55.003 (DEEWR trend data).

<sup>18</sup> COMMITTEE, S. E. R. 1996. Outworkers in the Garment Industry. Canberra: Parliament of the Commonwealth of Australia.



suffered three times the level of injuries experienced by factory-based workers. The two main reasons for the differences in injury rates were the use of a piecework payment system and the long hours worked by outworkers.<sup>19</sup>

The most recent and comprehensive picture of outworkers conditions comes from a study conducted by Prof. Christina Cregan of the University of Melbourne in 2001.<sup>20</sup> She surveyed 119 homeworkers using a 'snowballing technique' and found that they were generally receiving only around a third of the award rate. As well as revealing a thorough representation of conditions, Cregan's study is important because it allows us to understand a range of factors that compound the vulnerability of these workers.

The working conditions experienced by the workers surveyed were well below the legal minimum. Working hours were particularly long. Nearly two-thirds (62 per cent) spent 7 days a week sewing, with a further 26 per cent working for 6 days. Almost all of them worked during the school holidays and on public holidays. On average, daily hours routinely spent on the job ranged between 3 and 17. The largest group – 25 – worked 12 hours, the second largest – 22 – were in the 14 and 15 hour bands. Less than a quarter of the sample consistently found regular work, that is, with no gaps between jobs.

The reason for the longest hours were rush jobs. When workers had to finish rush jobs they worked from very early in the morning to midnight or later. The workers expressed no choice about taking on rush jobs, since any job was needed. Other studies have also found that long hours are experienced because of low pay.<sup>21</sup> In order to make close to a living wage, workers need to work for as many hours as possible.

As has been found in other studies, the payment received by workers surveyed was also well below the legally stipulated amount. The payment system for all workers surveyed was

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<sup>19</sup> MAYHEW, C. & QUINLAN, M. 1998. *Outsourcing and Occupational Health and Safety: A Comparative Study of Factory-based and Outworkers in the Australian TCF Industry*. Sydney: Industrial Relations Research Centre, University of New South Wales, NOSSAR, I., JOHNSTONE, R. & QUINLAN, M. 2004. 'Regulating Supply-Chains to Address the Occupational Health and Safety Problems Associated with Precarious Employment: The Case of Home-Based Clothing Workers in Australia'. *Australian Journal of Labour Law*, 17, 137.

<sup>20</sup> CREGAN, C. 2011. Vietnamese outworkers in the Australian garment industry: Sweated labour and the social wage. *IREC*. Barcelona.

<sup>21</sup> MAYHEW, C. & QUINLAN, M. 1998. *Outsourcing and Occupational Health and Safety: A Comparative Study of Factory-based and Outworkers in the Australian TCF Industry*. Sydney: Industrial Relations Research Centre, University of New South Wales, NOSSAR, I., JOHNSTONE, R. & QUINLAN, M. 2004. 'Regulating Supply-Chains to Address the Occupational Health and Safety Problems Associated with Precarious Employment: The Case of Home-Based Clothing Workers in Australia'. *Australian Journal of Labour Law*, 17, 137.

piece-rate. The payment for each article the workers were currently sewing ranged from twenty cents to AUD \$5.35. There was one outlier of AUD \$9.50. The garments took between 3 and 90 minutes to complete. Cregan calculated their hourly pay. This rate refers not just to sewing, but includes setting up, trimming, cleaning up and transporting the garments. The average rate of pay was AUD \$3.60 per hour and the mode was AUD \$5.00. The highest rate was AUD \$10, while several earned below a dollar. The homeworkers earned between AUD \$60 and AUD \$500 per week, the largest group – 23 – earned AUD \$300.

A major problem for the workers was that they did not receive payment on time, and, sometimes were not paid at all. 80 per cent had experienced late wages. Just over half had experienced unpaid wages or wages lower than the agreed price. Workers did not receive sick pay or paid holidays.

Cregan found that the workers knew that they received a very small proportion of the selling price of the garments they made. For the workers, low pay reflected weak bargaining power due to competition with many other workers. They also reported concerns about declining rates of pay and rumours of outsourcing offshore.

Respondents to Cregan's study reported constantly worrying about irregular work and gaps between the end of a job and the beginning of a new one. Work could be interspersed with weeks of inactivity and no earnings. Regular work was crucial to achieve stability of income and payment of ongoing bills. When they had no job, homeworkers had insufficient money to carry out costly leisure pursuits. Some walked round shopping complexes, looking at the kind of clothes they sewed and knowing they could not afford to buy them.

A number of homeworkers reported received unfair treatment. They were intimidated and controlled by their need for work and pay. If workers did not deliver on time or argued with the agent or factory, they received no more work or difficult work. This had a significant disciplining effect. Quality control was exacted by non-payment, return for re-sewing, or even fines (payment for spoiled material) for low quality work, alleged or real; sometimes the worker was cheated out of pay, even when meeting the deadline.

Cregan also found that the work had negative flow on affects for family. Work disrupted the household. The homeworker and the imperative of the deadline were at the centre of the

home. During the day, workers sacrificed leisure and breaks for food and household routines were staging posts in the race to finish jobs. The women surveyed looked after the family and carried out household chores as well as homeworking. They felt unable to look after children as well as they might and suffered great anxiety about their welfare. Other members of the household also contributed to homeworking. There were examples of husbands who did double shifts, working in a factory by day, followed by several hours of homeworking at night. Cregan also found occasional examples of older schoolchildren helping out at night.

The excessive hours and worry led to other health problems of both a physical and emotional nature. Physical problems included exhaustion, dizziness, eye problems and aches and pains. Often, after a long day, workers complained of difficulty getting to sleep. When they slept, work invaded their consciousness. Cregan observed that dreams reflected their hopelessness: they dreamed of winning the national lottery.

What Cregan found, then, was evidence of informality amongst the workers she surveyed. None in her sample were enjoying even close to their legal wages.

Two factors impacting on vulnerability were recent immigration to Australia and gender. All had come to Australia from 1979 onwards. They had travelled in small boats and arrived via transit camps in South East Asia. They were ethnic Vietnamese from the South. She surveyed 116 females and 3 males whose ages ranged from 17 to 64. The average age was 39 and the mode was 50.

Further factors compounding vulnerability were education levels and English standards. Many of the people interviewed had low education levels and the overall level of English was poor. Nearly a sixth had been educated only to primary school level, over a half had attended high school level, and the remainder had attended a tertiary institution. Only about ten per cent - those raised and educated in Australia - said they were fluent. Most had tried to learn English but had insufficient time due to job and family demands.

Cregan's study confirmed that outworkers find work through ethnic networks, which, although helpful for economic survival, also result in high levels of isolation and compound other factors such as low English levels. Workers mainly found the work through friends (70 per cent). The average length of time spent as a homeworker was seven and a half years,

though a few had done this work for more than 15 years. In all cases, since they began homeworking, they had continuous employment in the occupation. None of the sample had worked outside the garment industry since arrival in Australia.

In sum, all previous studies of the conditions of outworkers have found evidence of endemic non-compliance with the relevant Award and labour laws resulting in low labour standards for these vulnerable migrant workers. These previous studies provide a strong impetus for the Bill being considered by this Inquiry.

### What positive role will this Bill play?

Based on my research regarding the challenges of regulating ‘peripheral’ or ‘non-traditional’ workers in industries in which there exist complex supply chain relations<sup>22</sup>, there are a number of features that make this Bill particularly important:

- It will ensure that workers who are often outside the ambit of labour law are provided with protection;
- It will provide legal recognition of the role that supply chain dynamics play in producing exploitation;
- It will allow the tracing of the supply chain, and the inspection of the workplaces of the majority of TCF workers. Without the right to inspect that this Bill proposes, the Union will not be able to access the majority of workplaces in Australia, which is an untenable situation in a robust industrial relations system;
- It will underpin the strong voluntary initiatives in Australia which rely on the law as a basis for the standards they promote;
- It will create a unified national system of protection, compared with what is currently a fragmented, state-based system, exacerbating confusion amongst outworkers and employers;

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<sup>22</sup> See in particular: MARSHALL, S. 2006. An Exploration of Control in the Context of Vertical Disintegration, and Regulatory Responses. In: ARUP, C., HOWE, J., MITCHELL, R. & O'DONNELL, A. (eds.) *Labour Law and Labour Market Regulation: Essays in the Construction, Constitution, and Regulation of Labour Markets and Work Relationships*. Sydney: Federation Press.; MARSHALL, S. 2010. Australian Textile Clothing and Footwear Supply Chain Regulation. In: FENWICK, C. & NOVITZ, T. (eds.) *Human Rights at Work: Perspectives on Law and Regulation*. Oxford: Hart.; MACDONALD, K. & MARSHALL, S. 2010. *Fair Trade, Corporate Accountability and Beyond: Experiments in Global Justice Governance Mechanisms*, London, Ashgate..

- It will allow the improvements that have been made possible due to state laws to be more broadly replicated.

### **How does the Bill fit in the over-all scheme of public and private regulation in Australia?**

It is particularly important that the Bill reflect the best aspects of the existing legislation. There has been broad support for the extension of protections to outworkers on both sides of politics and across the industry over the last decade, resulting in important legal and voluntary measures to regulate outwork. They include four interlocking elements, with voluntary measures dependent on the Award and state based legislation for the basis of their standards:

- i. *Industrial awards* and other laws which govern the minimum conditions TCF workers, including outworkers. These include the Textile, Clothing, Footwear and Associated Industries Award 2010, the National Employment Standards and the Fair Work Act 2009 Cth.
- ii. *Ethical Clothing Australia* is a voluntary initiative that regulates the supply chain and aims to bolster the award by requiring further transparency and information sharing along the supply chain. It sets up an incentive structure in the form of a labelling system and consumer preferencing. The Homeworkers Code of Practice that Ethical Clothing Australia promotes enforces the standards set by the Award and the Fair Work Act.
- iii. *Mandatory Codes* that apply to organisations that supply or retail clothing products in New South Wales, Queensland and South Australia.<sup>23</sup> The Queensland Code is the most highly regarded of the mandatory codes.
- iv. *State-based legislation* provided for the ‘deeming’ of outworkers as ‘employees’ and for the claiming of unpaid and underpaid wages up the supply chain.

The Bill being considered by the present Inquiry is a Federal iteration of the third and fourth elements of these special measures for outworkers. State governments have enacted

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<sup>23</sup> See the Ethical Clothing Trades Extended Responsibility Scheme (NSW) at [http://www.industrialrelations.nsw.gov.au/pdfs/ethical\\_clothing\\_trades.pdf](http://www.industrialrelations.nsw.gov.au/pdfs/ethical_clothing_trades.pdf) made under the Industrial Relations (Ethical Clothing Trades) Act 2001 No 128 (NSW); the Mandatory Code of Practice for Outworkers in the Clothing Industry (QLD) <http://www.justice.qld.gov.au/fair-and-safe-work/?a=65330> made under section 400I of the Industrial Relations Act 1999 (QLD); and the South Australian Clothing Outworker Code of Practice [http://www.austlii.edu.au/au/legis/sa/consol\\_reg/fwocopr2007549/sch1.html](http://www.austlii.edu.au/au/legis/sa/consol_reg/fwocopr2007549/sch1.html) made under the Fair Work (Clothing Outworker Code of Practice) Regulations 2007 – Schedule 1 (SA).

various versions of the fourth element in order to attempt to improve the conditions of outworkers.<sup>24</sup> The first state to legislate was NSW in 2001, followed by Victoria in 2003 and in 2005 in both Queensland and South Australia.

State legislation was enacted with the complex supply chains that are common in the industry in mind. For example, Della Bosca, in his second reading speech introducing the NSW Act, said:<sup>25</sup>

It is proving extremely difficult to achieve improvements because of the nature of the industry itself. Retailers frequently dictate time and financial constraints that affect the whole supply chain down to the outworkers. Multiple layers of subcontracting often make it difficult to identify who is the employer. . . . The initiatives in the Industrial Relations (Ethical Clothing Trades) Bill and the wider package are designed to strongly support a mature approach by the clothing industry where all participants receive a fair share. Inequitable and avoidance practices are not acceptable.

The South Australian Act is the strongest of the state based acts, and it is recommended that the Inquiry ensure that the Bill under consideration here be no weaker than the provisions found in that Act. It uses the language of the “responsible contractor” who is defined as any person in a contracting chain who organises or gives out work.<sup>26</sup>

### **More recent evidence regarding the effectiveness of new laws and voluntary mechanisms**

How effective have these interlocking mechanisms been in promoting better labour standards for outworkers? Although studies conducted up to 10 years ago show consistently low compliance with Awards and other labour law standards, there is no more recent study of outworker conditions that would allow us to track the impact of state legislation and the Homeworkers Code of Practice.

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<sup>24</sup> The Industrial Relations (Fair Work) Act 2005 (South Australia) amended the Industrial and Employee Relations Act 1994 (South Australia); Schedule 2 of the Industrial Relations (Ethical Clothing Trades) Act 2001(NSW) amended the Industrial Relations Act 1996 (NSW); the Outworkers (Improved Protection) Act 2003 (Victoria); and the Industrial Relations and Other Acts Amendment Act 2005 (Queensland) amended the Industrial Relations Act 1999 (Queensland). See the discussion by RAWLING, M. J. A Generic Model of Regulating Supply Chain Outsourcing. *LABOUR LAW AND LABOUR MARKET REGULATION: ESSAYS ON THE CONSTRUCTION, CONSTITUTION AND REGULATION OF LABOUR MARKETS AND WORK RELATIONSHIPS*, Christopher Arup, Federation Press: Sydney, pp. 520-541, 2006..

<sup>25</sup> John Della Bosca, Minister for Industrial Relations, Second Reading Speech, NSW Legislative Council *Hansard* 11 December 2001.

<sup>26</sup> Section 99B(1) of the *Fair Work Act* 1994 (SA).

I have recently been collecting narrative histories from outworkers in the Australian clothing industry to ascertain how their working conditions have changed over the last 10 years since a survey of outworkers was performed. I am also concerned with why workers are still conducting this type of work despite the poor comparative pay and conditions. Although this research is only at an embryonic stage it shows some positive trends that are important for the current Inquiry and which should stand up to robust review.

### *Methodology*

I have collected narrative histories from outworkers. This is a form of qualitative research. It is important to note, therefore, that my recent research does not provide a representative picture of outwork in Australia in the way that quantitative research might. On the other hand, the benefit of qualitative research is that it provides a comprehensive understanding of the dynamics affecting these workers' lives which could not be captured by broader quantitative surveys.

I contacted outworkers through intermediaries. There are limited means of contacting outworkers: studies of informal workers are notoriously difficult to conduct. Outworkers are isolated and hard to identify, and once contacted are often reluctant to be interviewed or surveyed because of fear of identification and loss of work. The same reasons that make them hard to regulate are those that make them difficult to research. The benefit of contacting outworkers through intermediaries such as outworker advocates is that the intermediaries are trusted, thereby helping to overcome the problem of fear. Broader quantitative techniques such as household surveys are confronted by problems of mistrust, as subjects fear that the survey is in fact a method for identifying 'illegal work' or tax evasion. Large scale survey work using snowballing techniques can help to overcome this problem in vulnerable populations.<sup>27</sup>

I have conducted 26 interviews with ethnic Vietnamese outworkers in Victoria identified by outworker advocates. In the course of these interviews I have replicated the questions asked by Prof. Christina Cregan and collected detailed narrative histories about the outworkers' lives and history of work.

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<sup>27</sup> KALTON, G. & ANDERSON, D. W. 1986. Sampling Rare Populations. *Journal of the Royal Statistical Society*, 149, 65.; SUDMAN, S., SIRKEN, M. G. & COWAN, C. D. Sampling rare and elusive populations. *Science*, 240, 991..

## *Composition*

The composition of the workers broadly matches those surveyed by Cregan. They all migrated to Australia from Vietnam between 1982 and 1993. Most were refugees. All are Australian citizens or residents. Few speak English and none are literate in English. I interviewed a number of husband and wife teams, which allowed me to interview a higher proportion of men than captured by Cregan's survey.

## *Low English skills and other factors trap workers in outwork*

Almost all of the workers interviewed can be identified as being trapped in outwork or similar precarious work. This is of significance to this Inquiry for two reasons. First, it provides an insight into the nature of the power relations within the employment relationship. The perception of having no other options in a shrinking industry diminishes the bargaining position of the outworker. Second, it suggests that a wider suite of policies are required than those offered by labour law alone, as is addressed at the end of this submission.

Only a few interviewees believed they could move to another occupation. When asked what other profession they would like to be working in, most laughed, as if it were futile to imagine another occupational alternative. They perceive that their options are extremely limited, regardless of their previous occupational training. For example, one male outworker who had attended University in Vietnam and worked as a high school teacher teaching mathematics, insisted that there was no way he could return to a career as a teacher after working for around 20 years as an outworker. He explained that to be a teacher one requires high level of language fluency and, at the age of 51, he could neither expect to gain that fluency or to be an attractive prospect for an employer.

One of the reasons for this lack of labour market mobility is the highly 'networked' nature of the work.<sup>28</sup> Work occurs within closely tied social networks within the Vietnamese community. All started doing outwork after it was recommended by friends or family as an occupation that was easy to move into without English skills, did not require start-up capital

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<sup>28</sup> See the work of BACCHETTA, M., ERNST, E. & BUSTAMANTE, J. 2009. Globalisation and Informal Jobs in Developing Countries. In: ORGANISATION, A. J. S. O. T. I. L. O. A. W. T. (ed.). Geneva: International Labour Organisation and World Trade Organisation.; see also AGARWALA, R. 2009. The Economic Sociology of Informal Work: The Case of India. In: BANDELI, N. (ed.) *Economic Sociology of Work*. for a description of the nature of networked and relational informal work, and its impact on labour mobility.



and would allow them to care for a young family. Most answered an ad in a Vietnamese language newspaper and have received work from more than one factory/workshop in the time of their time as outworkers. In most cases, the person who the outworker dealt with within the factory was Vietnamese speaking.

Yet the same reasons that make outworking easy to move into also undermine the labour market mobility of the workers. Outworking is very isolating. The majority of interviewees reported leaving the house only rarely to pick up supplies, shop, to ferry their children around and to attend social activities and events in their community. These activities can, in the main, comfortably be conducted in Vietnamese. Most of the time workers stay at home sewing so as to meet orders and take care of their families. The long hours worked compounds this isolation.

Isolation results in low English language skill development and a low level of knowledge of the broader institutional landscape in Australia which might assist with increased bargaining power or labour mobility. Almost all interviewees had attended some English classes when they first arrived in Australia; however, because of family pressures and the need to earn a living, they had not continued these. They generally reported that, with time, they had lost whatever English skills they had initially gained. Only two interviews could be conducted without an interpreter and the interviewees rated their English skills very poorly. Some told me that their friends who had found work in larger factories had made friends with non-ethnic Vietnamese people and had developed far better English skills. Importantly, though, factory work was not an attractive alternative for many outworkers because they valued the control that they had over their working hours. Although they often work long hours, they are able to conduct the work around family duties such as cooking, caring for children, elderly family members or those with disabilities. The rigidity of factory work resulted in a stated preference for home-based work amongst a number of interviewees. For others, factory work seemed out of reach.`

### *Conditions*

So far, these findings are consistent with those of previous studies, although they relate to the experience of workers in a later stage of their working lives and thus provide an opportunity to explore different themes. Where the findings depart from previous studies is that I have found evidence that some outworkers working in supply chains linked to

companies that are accredited under the Homeworkers Code of Practice are receiving their legal entitlements. This contrasts greatly with previous studies which found no evidence of compliance.

Five of the workers interviewed for my study are receiving work as 'employees' receiving the full entitlements expected for an employee, including sick pay, holiday pay and superannuation. They are paid a set wage on a fortnightly basis. These people are sewing accredited labels, and the factories that gave out the work have been inspected by the Textile, Clothing and Footwear Union of Australia. Four of these workers elected to work on a part-time basis because the pay they could receive as employees was the same as working long hours as a contractor, when the breaks between orders were taken into account.

Other workers interviewed were also working for factories operating within accredited label supply chains, but were not receiving their full entitlements. They are still receiving their pay on a piece rate basis. The piece rate had been calculated so as to ensure that they received around \$17 per hour (though this did not include payment for the time taken for transportation, etc, as well as various on-costs). Yet these workers were not receiving holiday pay, sick pay or superannuation. This is evidence that there is some 'creative' interpretation of the rules. When I checked with the Textile, Clothing and Footwear Union of Australia they explained that they were working their way through the supply chain and often the process of full adoption of the legal provisions took some time, and a number of visits. Regardless of the fact that the workers were not receiving their full entitlements, the pay rate received is still well above that recorded by previous studies, and is evidence that the state outworker laws combined with the Homeworkers Code of Practice and operation of the Ethical Clothing Council is having an incremental improving effect within the industry.

For all workers interviewed who are receiving either their full legal entitlements or close to their legal entitlements, this was a relatively new phenomenon. For all, only a year or a few months ago, they were receiving conditions close to that described by Cregan. Perhaps the most significant finding was the difference that the change in conditions had made to the interviewees' lives. Interviewees who received higher pay reported a lessening in pain related to injuries thanks to the capacity to take breaks, time to spend with family and leisure time which they had not enjoyed since arriving in Australia.

*Obfuscation of employment relationship*

All outworkers interviewed had, in the past, been told by their 'employers' to register for ABNs as a condition of receiving work. More recently, many had been told to incorporate proprietary limited companies and employ someone. A number of outworkers who had set up such an arrangement had employed a relative. In one case, the outworker had employed an international student who was renting a room in their house. These findings suggest that there is an effort to obfuscate the employment relationship being made within the industry.

#### *Conclusions from the study thus far*

My study-in-progress provides strong evidence that, for some workers, the Award, combined with state outworker laws and Ethical Clothing Australia is having a remarkably beneficial effect. The Bill before this Inquiry should help to spread this positive effect across the nation.

It is my view that if more outworkers were to receive their legal entitlements they would not only work under fairer conditions; the flow on effect for their lives would be extremely positive. Outworkers suffer from a lack of labour market mobility due to compound effects of immigration and social isolation produced by long hours of work at home. The need to work long hours is produced by low pay. If workers were paid Award rates they would have more time to engage in other activities such as English lessons and retraining. For those workers who work for low piece rates, it is impossible to engage in activities of this type, leaving them trapped in outwork.

#### **Additional Policy Measures Needed**

This submission has demonstrated that the Bill before this Inquiry is to be lauded. However, its application will occur in a struggling industry in which those responsible for enforcement (the Union, primarily) have low enforcement capacities and those responsible for compliance have low compliance capacities. The low compliance capacity of small and micro-enterprises has been well established within Australia, and is heightened in an industry which has high exposure to overseas competition. It is my view that the Bill will fail to have a positive impact unless it is supported by a suite of other measures. These include:

##### *Practical measures to assist compliance*

- There is low use of technology in accounting and production techniques in the SMEs that dominate the industry which makes compliance more difficult. Employers who

complain about excessive paper work and the difficulty of compliance have often not adopted the software packages and supply chain tracking technologies that would allow them to more easily comply with their legal obligations.

- Greater assistance in enforcement of the law is also required. The relevant unions do not have sufficient funds to track the complex supply chains in the industry and ensure that compliance occurs. Although the funding of Ethical Clothing Australia has greatly helped in this respect, more is required if a major shift in the industry is to occur.

#### *A legal education campaign*

- Plain language explanations of the operation of the law, what is required so as to comply, and the penalties entailed with non-compliance should accompany this new legislation. This should occur in various community languages, disseminated through a legal information campaign in the industry for outworkers *and* employers. There is a high level of misunderstanding of the current legal environment amongst employers and outworkers which may be exacerbated if this law is not well explained.
- There is also widespread acceptance in the industry of non-compliance with labour, OHS and taxation laws as a method of maintaining some competitive advantage in an environment of competition with low labour cost countries. This should be addressed by gaining the support of industry representative bodies and employing other means to change the 'culture' of the industry with regards to non-compliance. Ethical Clothing Australia provides a 'carrot' or incentive for compliance. However, genuine buy-in by retailers and manufacturers has only occurred amongst a small proportion of the industry. More needs to occur to encourage genuine engagement with Ethical Clothing Australia within the industry.

#### *Industrial policies that encourage industrial upgrading and higher quality production*

- Much of the production in Australia is low end, low quality production. Outworkers provide an attractive labour source when competition is on the basis of low-end production. There are widespread complaints amongst fashion designers and fashion houses that the quality of production is so low as to force them to source overseas. More needs to occur within the industry to shift to higher value added activities within the industry.

In conclusion, the legislation before this committee is consistent with the recommendations for legal reform made in the academic and policy literature. However, legal reform on its own will not be sufficient to bring about widespread change in the textile, clothing and footwear industry of Australia with regards to the employment conditions of outworkers. Further policy measures are required to support this new national legislation. I would welcome the opportunity to discuss this submission further with the committee, and elaborate on possible additional policy initiatives that might be adopted, based on my knowledge of measures adopted internationally.

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