The Senate

Education, Employment
and Workplace Relations
Legislation Committee

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

February 2012
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RECOMMENDATIONS

Recommendation 1

2.33 The Committee recommends that the Commonwealth Government revise the deeming provisions in the bill to ensure that these provisions apply to all outworkers in the TCF industry, including those operating under a corporate structure.

Recommendation 2

2.49 The Committee recommends that the bill is amended to:

- remove the requirement of a TCF outworker to take "reasonable steps" to recover unpaid amounts from a responsible entity and instead require that a TCF outworker believes an entity is an indirectly responsible entity; and
- require an entity to pay an unpaid amount unless the entity satisfies a court that it is:
  - not an indirectly responsible entity; or
  - not liable to pay the unpaid amount; or
  - not liable to pay the unpaid amount in full.

Recommendation 3

2.60 The Committee recommends that, subject to the foregoing recommendations, the bill be passed.
CHAPTER 1

Background

Reference

1.1 On 25 November 2011, the Senate referred the Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011 (the Bill) to the Senate Education, Employment and Workplace Relations Legislation Committee for inquiry and report by 27 February 2012.

Conduct of the inquiry and submissions

1.2 In accordance with usual practice, the committee advertised the inquiry on its website and in The Australian on 7 December 2011, calling for submissions by 11 January 2012. The committee also wrote to a number of organisations inviting submissions.

1.3 The committee received 29 submissions, as listed in Appendix 1.

1.4 A public hearing was held in Melbourne on 2 February 2012. The witness list for the hearing is at Appendix 2.

The purpose of the bill

1.5 The bill seeks to amend the Fair Work Act 2009 (the Act) so that certain provisions of the Act apply to outworkers in the textile, clothing and footwear (TCF) industry.

1.6 The bill proposes to implement new Part 6-4A, which would apply special provisions about TCF workers, as described in the explanatory memorandum:

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

• providing nationally consistent rights and protections for those outworkers, regardless of whether they are employees or contractors;
• establishing an effective mechanism for recovery of unpaid amounts from other parties in the supply chain; (and)
• providing for a code dealing with standards of conduct and practice to be complied with by parties in the supply chain.¹

¹ Explanatory Memorandum, p. 11.
1.7 The extension of the Act to TCF outworkers proposed in the bill would not apply to:

- the right of entry provisions (separate amendments in the bill address right of entry provisions);
- the stand down provisions, as these are dealt with in the relevant TCF Award;
- the provisions that provide for the extended operation of the Act or parts of it; and
- the provisions giving effect to the extension itself and associated savings, application and transitional arrangements.²

1.8 Other amendments proposed in the bill would modify existing definitions in the Act or insert new definitions. For example, the bill proposes new definitions for 'indirectly' when used in relation to TCF work and 'indirectly responsible entity' in relation to TCF work performed by a TCF outworker.³

Acknowledgement

1.9 The committee thanks those organisations and individuals who contributed to this inquiry by preparing written submissions and giving evidence at the hearing.

Background

1.10 A number of inquiries have been conducted and reports published, over many years, examining outwork in the TCF industry in Australia. Notable examples include reports by the Productivity Commission in 2003, the Brotherhood of St Lawrence in 2007 and Professor Roy Green's review for the Department of Innovation, Industry, Science and Research (DIISR) in 2008.

1.11 In addition, both the Senate Economics and Senate Education, Employment and Workplace Relations Committees have conducted multiple inquiries that have examined, at least in part, conditions for and the treatment of outworkers in the TCF industry in Australia:

- 1996—Senate Economics References Committee report on Outworkers in the garment industry;
- 1998—Senate Economics References Committee Review of the inquiry into outworkers in the garment industry;

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² Explanatory Memorandum, p. 11.
³ Fair Work Amendment (TCF Industry) Bill 2011, ss 12 and 17A.
• 2008—Senate Standing Committee on Education, Employment and Workplace Relations report on the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008 [Provisions]*; and


1.12 These are discussed in summary below, but the committee was struck by the words of Deputy President Riordan of the Australian Conciliation and Arbitration Commission, who presided over a case in 1987 and found that:

> The remuneration and treatment generally of tens of thousands of persons performing work in the clothing trade as "outdoor workers" is scandalous and represents a serious affront to the moral and social conscience of the community...It would be unconscionable to ignore the plight of these workers and refuse to intervene in this situation of grossly improper exploitation of a weak and unorganised section of the workforce.4

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**1996 Senate Economics References Committee report**

1.13 In December 1996, the Economics Committee tabled its report on outworkers, and estimated that 'somewhere between 50,000 and 330,000 people [are] involved in outworking in the garment industry'. Of these, the majority were migrant women aged between 25–35 with young children at home.5 The Economics Committee found that outworkers experienced a range of problems such as:

> ...low piece rates which translate to low hourly rates; impossible deadlines for completion of work; late payment, underpayment, non-payment for completed work, rejection of work and unreimbursed expenses; physical and verbal harassment from intermediaries (blackmail, threats, coercion and bribes); substandard working environments; and worries associated with combining work with family responsibilities.6

1.14 As a result of the inquiry, the Economics Committee believed 'that there are sufficient people involved in the industry for concern about them to be warranted'.7 The Economics Committee made several recommendations, including (but not limited to):

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4  Mr Deputy President Riordan, Australian Conciliation and Arbitration Commission, *Decision: Clothing Trades Award 1982*, 7 April 1987, p. 9.


that the Government examine ways to clarify the employment status of outworkers in the garment industry;

that an industry 'Homeworkers Code of Practice' should be adopted by all participants in the garment retailing and manufacturing process;

that the garment industry voluntarily adopt an agreed label declaring that the employment conditions under which the garment was made complied with legislative requirements;

that the government investigate the concept of a National Outwork Committee which would have responsibility, inter alia, for the initiation and allocation of funding for projects relating to outwork;

that the Australian Bureau of Statistics conduct a comprehensive survey of the number of home-based workers across all industries;

that the government review federally funded arrangements for English language education with a view to increasing accessibility for migrants involved in outwork; and

that the government review educational arrangements in TCF industries for industrial relations and small business management.

1998 Senate Economics References Committee review

During 1997 and 1998, the Economics Committee conducted a review examining the progress of the recommendations of the inquiry into outworkers in the garment industry (see previous section). The Economics Committee was pleased that a Homeworkers Code of Practice had been implemented but noted that 'more needs to be done by all parties to ensure the code’s success'. The Economics Committee also continued to have concerns about 'the lack of action in the past 18 months to officially deem outworkers as employees'.

2003 Productivity Commission report

In 2003, the Productivity Commission conducted an inquiry into assistance provided to the TCF industry. In its final report, 'Review of TCF Assistance: Inquiry Report', the Productivity Commission recognised the flexibility afforded to outworkers by this type of work, but also the risk of their exploitation:

...the potential for the exploitation of outworkers through low rates of pay, long working hours and poor working conditions is a longstanding concern. While there is little hard information on the extent of exploitation, a variety

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of regulation has been introduced to try to ensure that outworkers are properly remunerated and work under appropriate conditions.\(^{10}\)

1.17 The commission went on to recommend that emphasis continue to be placed on compliance with voluntary codes as a way of addressing the problem.\(^{11}\) The lack of progress in subsequent years suggests that the Commission's confidence in non-binding approaches was misplaced.

**2004 Senate Economics Legislation Committee report**

1.18 During 2004, the Senate Economics Legislation Committee conducted an inquiry into the provisions of the Textile, Clothing and Footwear Strategic Investment Program Amendment (Post-2005 scheme) Bill 2004 and the Customs Tariff Amendment (Textile, Clothing and Footwear Post-2005 Arrangements) Bill 2004.

1.19 During the course of the inquiry, the Economics Committee 'heard a substantial amount of evidence relating to the continued employment of outworkers in substandard conditions in the TCF industry'.\(^{12}\) Given the Economics Committee's 1996 inquiry and 1998 review of outworkers in the TCF industry, the Committee was:

> ...disappointed that, nearly seven years after the tabling of that report in December [1996], it is still hearing evidence of the continued and systematic exploitation of outworkers in the TCF industry.\(^{13}\)

1.20 Ultimately, the Economics Committee reiterated its view that:

> All participants in the TCF industry should sign up to the Fair Wear Homeworkers Code of Practice, or to an equivalent code of practice, and end the exploitation of outworkers in this industry.\(^{14}\)

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Note: The Homeworkers Code of Practice was a voluntary code of practice.
1.21 In their dissenting report, Labor Senators shared the committee majority's disappointment that improvements had not been made with respect to the treatment of outworkers\textsuperscript{15} but argued:

...we do not share the Committee Majority's apparent view that the Government is unable to do any more than stand by and hope that the TCF industry will voluntarily improve working conditions for outworkers...Given that the current bills propose arrangements which will fundamentally change the TCF industry in Australia, [it] is disappointing that not one proposed measure, in a package worth some $600 million, specifically addresses the challenges faced by outworkers in this industry.\textsuperscript{16}

2006 Senate Employment, Workplace Relations and Education Legislation Committee report

1.22 In June 2006, the Senate Employment, Workplace Relations and Education Legislation Committee was referred the provisions of the Independent Contractors Bill 2006 and the Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006 for inquiry and report.

1.23 The Independent Contractors Bill 2006 sought to exclude state and territory laws which deemed as employees many independent contractors entering into commercial agreements with employers.\textsuperscript{17} The Workplace Relations Legislation Amendment (Independent Contractors) Bill sought to make consequential amendments to the \textit{Workplace Relations Act 1996}, especially in relation to TCF outworkers and to unfair contracts.\textsuperscript{18}

1.24 In an unusual step, the Committee presented a brief report of the whole committee followed by additional reports from each of Government Senators, Opposition Senators and the Australian Democrats.

1.25 The report of the whole committee explained:


This chapter reports the unanimous views of the committee as they relate to aspects of the bill dealing with the regulation of outworkers. This is a subject of long-standing interest to the committee, and this report describes the ultimately successful process of ensuring that the legislation effectively addressed some of the concerns of outworkers in the clothing industry, within the current workplace policy framework.\(^\text{19}\)

1.26 The report of the whole committee continued:

While members of the committee differ on the philosophy which underpins the Independent Contractors Bill, all agree that the increasing prevalence of independent contracting, which these bills seek to regulate, brings with it a possible danger for those workers most vulnerable to unscrupulous employers and to extreme forces in particular markets.\(^\text{20}\)

**Supplementary report by government senators**

1.27 Government (Coalition) senators presented a supplementary report reiterating their view of the importance of catering for independent contractors, but not at the expense of vulnerable TCF outworkers. Notably, Coalition senators agreed with Labor senators that outworkers 'require unusual protection':

This legislation delivers on a 2004 election pledge, in which the government promised to recognise the special status, and growing importance, of independent contractors, who constitute an increasing proportion of the workforce. The government's policy position is that parties which choose to enter independent contracting arrangements should not be prevented from doing so...Although the Government's policy is to minimise imposition of industrial relations laws on independent contractors, it does recognise that many outworkers in the textile, clothing and footwear (TCF) industries are vulnerable to exploitation and require unusual protection.\(^\text{21}\)

**2007 Brotherhood of St Lawrence report**

1.28 Little if any improvement in the situation is apparent from the Productivity Commission's 2003 report, and the 2007 report published by the Brotherhood of St Lawrence titled 'Ethical Threads: Corporate social responsibility in the Australian garment industry', which found that:

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...the Australian garment industry has been slow to embrace both mandatory and voluntary mechanisms to protect workers in international and local manufacturing supply chains.\(^{22}\)

1.29 With respect to conditions for outworkers in Australia, the report stated: Over the past decade, state and federal inquiries have consistently found that outworkers receive payment and conditions significantly lower than their award and statutory entitlements...Outworkers interviewed for this research indicated that conditions had worsened in the last five years. A shortage of work had left them with very little bargaining power with contractors.\(^{23}\)

1.30 The Ethical Threads report made numerous recommendations including:

• establishing a multi-stakeholder platform, in collaboration with state and territory governments and industry stakeholders, to 'promote and implement the uptake of the global dimensions of [Corporate Social Responsibility] in the Australian garment sector';

• introducing regulations in line with the European Union and Britain which require large corporations to demonstrate a process for monitoring and improving conditions in their contracting chain, both locally and internationally;

• ensuring that high value-added manufacturing is supported in Australia while monitoring that sector's compliance with regulatory frameworks;

• supporting the development and promotion of a database of ethical manufacturers;

• investigating the feasibility of harmonising state outworker regulation without eroding existing standards; and

• funding further research to provide up-to-date data on working conditions and numbers of outworkers in Australia.\(^{24}\)

2008 review of TCF industry by Professor Roy Green

1.31 In March 2008, the Commonwealth Government announced a review of the Australian textile, clothing and footwear industry. Professor Roy Green was appointed to conduct the review and was asked, via the review's terms of reference:

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...to consider the nature and needs of the industries post-2010, when tariffs are scheduled to reduce further and the current post-2005 Strategic Investment Program arrangements are due to be rescaled.25

1.32 The Green report stated:

The Review maintains, contrary to the manufacturing sceptics, that Australia’s TCF industries have a promising future, but this can only be achieved through a concerted effort to differentiate their products through uniqueness, product quality and design, branding, quick response and new approaches to supply chain management, with a clear emphasis on corporate social responsibility in the application of labour and environmental standards.26

Committee comment

1.33 These inquiries and reports demonstrate the mistreatment and exploitation TCF outworkers have endured over a period of at least 15 years. The road to justice for these vulnerable workers has been long and the achievement of equity is well overdue. The optimism expressed for voluntary codes by the Productivity Commission and others has proven misplaced. There has been bipartisan support to improve working conditions for TCF outworkers, as evidenced in previous Senate Committee reports; however, to date these attempts have failed to deliver the fair and equitable work conditions to which TCF outworkers are entitled.

1.34 The time has come to resolve the endemic mistreatment and exploitation of outworkers in the TCF industry so that these workers can share in the rights and protections enjoyed by other Australian workers.


CHAPTER 2

Key Issues

2.1 The question of legislative protection for TCF outworkers was at the core of this inquiry. Numerous submitters, including the Textile Clothing and Footwear Union of Australia (TCFUA), the Australian Council of Trade Unions (ACTU) and FairWear, were supportive of the bill and urged the parliament to implement it on the basis that it would provide much needed additional protection for outworkers in the TCF industry.¹

2.2 Other submitters claimed there was no evidence to support the notion that outworkers in Australia today require special protection. For example, the National Retail Association (NRA) claimed '[t]here is no compelling evidence justifying the need for the radical changes proposed'.² Similarly, the Australian Chamber of Commerce and Industry (ACCI) argued '[t]here is no evidence-based policy rationale for the measures'.³

2.3 The primary themes around which the arguments for and against the legislation were based included:

- the need for legislation to extend protections for outworkers;
- the potential for the legislation to impact on manufacturing in Australia; and
- the proposed process for recovering unpaid amounts due to outworkers.

2.4 These issues are discussed below.

The need for legislation to extend protections for outworkers

2.5 Organisations such as the TCFUA and FairWear argued that outworkers in the TCF industry in Australia continue to experience exploitation and poor working conditions.⁴ Ms Shelley Marshall, an academic specialist in the field of informal work

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¹ See for example Catholic Justice and Peace Commission of Brisbane, Submission 4; Australian Immigrant and Refugee Women's Alliance (AIRWA), Submission 9; Slater and Gordon Lawyers, Submission 11; Textile Clothing and Footwear Union of Australia (TCFUA), Submission 15; Oxfam Australia, Submission 18; Australian Council of Trade Unions (ACTU), Submission 19; Immigrant Women's Speakout Association (Speakout), Submission 20 and FairWear, Submission 26.

² National Retail Association (NRA), Submission 21, p. 5.

³ Australian Chamber of Commerce and Industry (ACCI), Submission 3, Attachment 1, p. 1.

⁴ See for example Textile Clothing and Footwear Union of Australia (TCFUA), Submission 15, p. 9; Working Women's Centre SA, Submission 6, p. 1 and FairWear, Submission 26, p. 2.
and home-based outworkers at Monash University, concurred and stated in her submission:

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, low job quality, low productivity, low revenue for the government and is a persistent feature of both developed and developing economies.5

2.6 The TCFUA described the 'precarious circumstances' in which outworkers are employed6 and the lack of control these type of workers have over the work they perform:

[Outworkers] do not design or direct the production of the garment nor dictate when they are to be paid. They are commonly placed under significant pressure to complete work to urgent, unrealistic or shifting deadlines. Despite having an entitlement to the payment of overtime penalty rates under the TCF Award, many outworkers work excessively long hours both during the week and on weekends without additional compensation. Many work through injuries and illnesses sustained as a result of overwork, repetitive strain and poor working environments.

Such vulnerability to exploitation is a product of outworkers as a class being largely hidden and operating outside of the mainstream work environment (i.e. outside of established, medium to larger size factories). As a category of workers, outworkers most commonly are women from Non English Speaking Backgrounds, (often recently arrived migrants) with limited economic resources and negligible bargaining power.7

2.7 In addition, the TCFUA furnished the Committee with photographs depicting the unsatisfactory conditions in which TCF outworkers often work, both in their own homes and in sweatshops.8

2.8 The Committee also heard from several outworkers who described their experiences in the TCF industry. Their descriptions outlined low rates of pay, slow or no payment for work, poor working conditions, long hours and the inability to negotiate effectively with their employer. Ms Nguyet stated:

I have been working as an outworker for 21 years. I make a range of different lace fashion dresses for several different labels from the high end

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5 Ms Shelley Marshall, Submission 17, p. 8.
6 TCFUA, Submission 15, p. 16.
7 TCFUA, Submission 15, p. 16.
8 TCFUA, Additional information, tabled 2 February 2012.
of the clothing market. The garments I make are complex with different colours of material needing to be sewn together. It takes me around one hour to finish a garment. I have a lot of experience working at home as an outworker. My pay is very low, around $5 or $6 per hour, without benefits. That is the reason why, sometimes, I refuse an order because of the very complex garments. There are too many colours to match and I feel too much pressure. This salary came with the first time I was given an order to complete.

It is common for me to be given 100 garments to complete in one week. It is one hour of complex work for one complex garment. I told my employer that I can only handle 50 garments a week. This means my income is now very low. My body is tired and one of my legs is very sore, so I cannot handle the heavy workload anymore. My hopes for the future are the same as my friends. Others who are working at home like me would like to get fair wages and better conditions. We want the government to help improve our conditions at work so we can keep working and contributing to Australian society.  

2.9 Ms Anh Dang and Ms Susan Tran also shared their experiences as outworkers:

I have been working for one employer for four years, but I have not got any entitlements. My employer pays me about $5 per hour. Whether I can make enough money or not depends on how difficult the job is. Sometimes I have to work day and night but I cannot make enough money because the work is so difficult to do. I virtually have to work 12 hours per day, including weekends. I do not have enough time for my daughter. I do not have enough time for myself. With the little money, not only do I need to spend very carefully on my living expenses but I also need to pay for other working expenses such as power, cotton, machine and other costs when the machinery is broken. My boss normally pays me two or three weeks after the delivery. If the work has any mistakes for any reason, I do not get paid until I have fixed all the orders. The employer wants me to show him my ABN before I can get the job. My life is so difficult. Sometimes I ask the boss for more money but he says can't pay more. If I ask too much he would stop the work and give to other people. I do not want to stop working or find another job because of my age. My daughter is in year 10 and I have to keep working to make money to raise her and pay for the rent.

I hope my work is more stable and I can make enough money for my living and have some rights and entitlements so I do not have to worry so much if my boss stops his work or make me redundant.  

And:

9 Ms Nguyet, Proof Committee Hansard, 2 February 2012, p. 8.
10 Ms Anh Dang, Proof Committee Hansard, 2 February 2012, p. 18.
In 2006 I discovered that my first son had autism. That was the time I started working from home. At the end of 2006 I gave birth to my second son and he also had the same problem as the first one. The reason I work from home is because I want to look after both of my two sons.

My husband left because he could not put up with his sons. My life is so difficult. Over the years I worked for different labels, different factories. They pay me by piecework. I estimate my pay to be about $4 an hour without any other entitlements. Recently some employers asked me to have an ABN number—to set up a company to have a propriety limited—and employ some other workers in my home. Since they know it is hard for me to get to work, they were able to convince me to get paid in cash, but the cash pay is much lower. I have to work from home but, because of the low pay, I have to work very long hours—between 12 and 15 hours per day without holiday pay or super or other entitlements. On one occasion my employer did not pay me for four months, which they blamed on the fact that the principal company had not paid them. After that, my employer said they would pay me a bit at a time until they caught up. I am working here in Australia where workers have entitlements and rights, but unfortunately I do not have those. I hope that I can get the same rights and entitlements as the workers in the factory.11

2.10 However, submissions in favour of the legislation did not go unchallenged. The Australian Chamber of Commerce and Industry (ACCI) opined:

Apart from references in the Minister’s second reading speech to a November 2011 Channel 9 story in a Melbourne TCF "sweatshop" and a July 2011 Sunday Herald Sun report on "sweatshops and outworkers producing school uniforms for Victorian families for as little as $7 an hour", there are no examples provided in the extraneous materials as to the precise deficiencies of the existing legal framework, what recommendations these proposals are based on (such as from the Productivity Commission or a dedicated independent inquiry by the Federal Government) and how the proposed measures will reduce possible exploitation of workers in the TCF industry.12

2.11 The Council of Textile and Fashion Industries of Australia (TFIA) had 'serious concerns' about the bill and felt that:

The arguments for introducing the legislation are based on research conducted nearly 5 years ago not current evidence and fail to acknowledge the gains made in the 10 years of existing legislation and the 4 years of investment by the Federal Government in Ethical Clothing Australia.13

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12 ACCI, *Submission 3*, Attachment 1, p. 3.
13 Council of Textile and Fashion Industries of Australia (TFIA), *Submission 16*, p. 3.
2.12 The debate about the treatment of TCF outworkers and whether this warranted special legislative protection was related to another matter raised during the course of the inquiry regarding the status of outworkers as either independent contractors or employees.

**Independent contractors versus employee outworkers**

2.13 The difference between independent contractors and employee outworkers, and the deeming provisions proposed in the bill to address this question, was the subject of debate during the course of the inquiry.

2.14 The question of whether outworkers are independent contractors or employees was described by Slater and Gordon Lawyers (Slater and Gordon) as 'the key issue which has been grappled with over the course of the development of outworker regulation in Australia'. Slater and Gordon continued:

...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.

2.15 Some small businesses and industry groups argued that TCF outworkers in Australia were, and should continue to be treated as, independent contractors. Small business owners engaged in the TCF industry claimed that TCF outworkers chose to be independent contractors. These submitters voiced their concern that the amendments proposed in the bill would penalise outworkers by restricting their ability to determine their own hours of work and other work conditions, such as rates of pay, as independent contractors.

2.16 The example given by The Ark Clothing Co. was indicative of these:

[The Ark Clothing Co.] design, wholesale and retail women's fashion in Melbourne where we directly employ approximately 40 staff. We use reputable manufacturers to make our clothes, who in turn use machinists

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14 Slater and Gordon Lawyers, Submission 11, p. 5.
15 Slater and Gordon Lawyers, Submission 11, p. 8.
16 See Mr Arthur Thomas, Submission 1; The Ark Clothing Co., Submission 2; Mr Richard Thomas, Submission 8 and Ms Lou Lorkin, Submission 12.
17 See Mr Arthur Thomas, Submission 1; The Ark Clothing Co., Submission 2; Mr Richard Thomas, Submission 8 and Ms Lou Lorkin, Submission 12.
who have been running their own businesses (registered with ABN) from their homes.

We have serious concerns that the amendments will inadvertently harm the very workers they seek to protect by restricting their ability to operate as independent and autonomous businesses. We believe that these amendments are responding to an outdated view of the industry, and that most of the workers this Bill seeks to protect do not see themselves as outworkers or employees, but as independent contractors working from home businesses.

Most of these home-based operations are mainly women-owned businesses working from home out of choice. Many have invested significant funds into these businesses in preference to working as an employee in a manufacturing plant or other out-of-home workplaces because of a desire to take control of their working hours and conditions. They are able to adapt to the seasonal nature of their work by bringing in other family members or friends to help with heavy workloads, or by working longer hours during these times. The home-based nature of their work means they are still available to look after and supervise their children as required.

2.17 Similarly, the TFIA argued:

It is inappropriate for all outworkers to be subject to many of the provisions of the Fair Work Act 2009 regardless of their circumstances and the nature of their businesses. Further, many outworkers operate legitimately as independent contractors and there are prudent tax and business reasons why they might wish to continue to operate in this way.

Many outworkers run successful businesses and have done so for many years. The current regulatory framework is proving inflexible and does not cater for those home based businesses that are successful and profitable. In some cases, the need for those home based businesses to begin receiving employment-like benefits poses a risk to the continuing operation of their businesses.

2.18 The AiG was strongly opposed to the deeming provisions proposed in the bill because, in the AiG’s view, ‘[i]t is not legitimate or fair to deem contractors to be employees in circumstances where parties have agreed to enter into a contractor arrangement’.20

2.19 Conversely, FairWear claimed that 'outworkers wish to be treated as employees' and 'do not consider themselves to be "entrepreneurs"' despite often being told they must get an ABN or incorporate a proprietary limited company in order to

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19 TFIA, Submission 16, pp 15–16.
receive work. FairWear believed that the complex contracting arrangements for outworkers typical of the TCF industry necessitated 'the legislative protections provided for in this Bill'.

2.20 FairWear was one of many submitters that were strongly supportive of the proposed deeming provisions. Some of these submitters went further and suggested the deeming provisions in the bill required strengthening to further improve protections for TCF outworkers.

2.21 Some submitters were concerned that as drafted the amendment may not capture all outworkers. For example, Dr Michael Rawling believed there was an 'apparent loophole' in the bill and drew attention to the South Australian state deeming provisions as a possible alternative approach, describing these as 'the broadest deeming approach of all the state jurisdiction statutory outworker protection regimes'. Dr Rawling continued:

Most relevant...is the fact that the South Australian state jurisdiction deeming approach is the only state jurisdiction deeming regime which is explicitly designed to ensure that "no outworker is inadvertently beyond their reach by operation of the corporate veil".

2.22 Dr Rawling proposed specific amendments to the bill intended to ensure that outworkers who operate as a company or with a corporate structure would be captured by the deeming provisions.

2.23 Other organisations also recommended the deeming provisions be widened 'to ensure that outworkers in all forms of supply chains are covered'. The TCFUA stated:

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21 FairWear, Submission 26, p. 7.
22 FairWear, Submission 26, p. 7.
23 See for example Dr Michael Rawling, Submission 7, p. 2; Slater and Gordon Lawyers, Submission 11, p. 25; TCFUA, Submission 15, p. 3; Oxfam Australia, Submission 18, p. 5; Australian Council of Trade Unions (ACTU), Submission 19, p. 1; Immigrant Women's Speakout Association of NSW (Speakout), Submission 20, p. 2; Justice and International Mission, Mission Commission, Uniting Church in Australia, Submission 25, p. 8; FairWear, Submission 26, p. 7 and Asian Women at Work, Submission 29, p. 4.
24 See Dr Michael Rawling, Submission 7, p. 2; TCFUA, Submission 15, p. 3; Oxfam Australia, Submission 18, p. 5; Speakout, Submission 20, p. 2 and FairWear, Submission 26, p. 7.
25 Dr Michael Rawling, Submission 7, p. 2.
26 Dr Michael Rawling, Submission 7, p. 3.
27 Dr Michael Rawling, Submission 7, p. 3.
28 Dr Michael Rawling, Submission 7, pp 3–4.
The TCFUA believes that as far as possible, the provisions (which are enabling in intent) should have the widest possible application. However, it remains concerned that some outworkers within the TCF industry may not be captured by the legislation and therefore will not be entitled to the same protections as other outworkers. In particular, these concerns go to both the complexity of the provisions themselves and the potential for deeming not to apply where an outworker’s connection or nexus to a corporation within the supply chain cannot be sufficiently established. In the TCFUA’s view, such an outcome would undermine the clear policy objective behind the provisions to legislate protections for outworkers as a class of worker.31

2.24 In response to claims that the bill would prevent outworkers from choosing to be independent outworkers, DEEWR stated:

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

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

The extension of the [Fair Work] Act to contract outworkers will also provide this group of vulnerable workers with important additional workplace protections under federal law.32

2.25 The department elaborated at the public hearing:

Senator BACK: ...Can you explain to me so that I am clear on it whether, under the provisions of the proposed bill, an outworker can still present themselves as a contractor for the purposes of undertaking their work, or does this preclude them from that course of action?

Mr Thompson: For the purposes of the Fair Work Act, the contractor in your question will be an employee for that act. How that applies for other pieces of legislation is not really a matter that is covered by the bill.

29 See TCFUA, Submission 15, p. 3; Oxfam Australia, Submission 18, p. 5; Speakout, Submission 20, p. 2 and FairWear, Submission 26, p. 7.
30 Oxfam Australia, Submission 18, p. 5.
31 TCFUA, Submission 15, pp 17–18.
32 DEEWR, Submission 27, p. 11.
Ms Wyborn: The specific issue that I suppose you are getting to is whether the person can present themselves as an independent contractor for the work that they are doing. The answer is yes, but the effect of this piece of legislation will be to deem them to be an employee for the purposes of this piece of legislation.  

2.26 With respect to the deeming provisions and their scope, DEEWR acknowledged the Minister's statement during his second reading speech that the government is considering whether changes are required 'to ensure the greatest possible reach of the deeming provisions so that no outworker is inadvertently beyond their reach by operation of the corporate veil'. The Committee was also informed that '[t]he Department is examining these issues'.

Committee view

2.27 It is clear to the Committee, based on the evidence presented to this inquiry as well as that provided to past Senate Committee inquiries, that the mistreatment and exploitation of outworkers is a long-standing problem that continues to blight the textile, clothing and footwear industry in Australia. The Committee is appalled that this remains the case.

2.28 As outlined in Chapter 1, governments of various political persuasions have in the past attempted to improve working conditions for and extend the protections afforded to TCF outworkers, however, these attempts have been unsuccessful in eliminating the systemic mistreatment of these vulnerable workers.

2.29 It is the Committee's view that outworkers in the TCF industry should be deemed as employees for the purposes of the Fair Work Act. The Committee shares the view of Deputy President Riordan when he stated:

An outdoor worker does not lose the status of employee and the protection of the Award merely because she is required by a maker-up or his agent to register a business name or to engage in dubious devices in an attempt to co-operate in achieving an evasion of responsibilities, rights and duties...
2.30 The Committee also notes the Senate Economics References Committee reached a similar conclusion in 1996.  

2.31 As such, the Committee supports the deeming provisions in the bill as a mechanism to resolve the ongoing exploitation and mistreatment of outworkers by extending operation of the FWA as it applies to their terms and conditions of employment and by providing additional workplace protections under federal law.

2.32 However, the Committee also sees merit in the recommendation from some submitters, for example Dr Michael Rawling, FairWear and the TCFUA, that these provisions be broadened to ensure all outworkers in the TCF industry are captured. The Committee notes that this is an issue already being considered by the government: the Committee therefore recommends that the government revise the deeming provisions in the bill to ensure that the deeming provisions apply to all outworkers in the TCF industry, including those operating as a company or under a corporate structure.

**Recommendation 1**

2.33 The Committee recommends that the Commonwealth Government revise the deeming provisions in the bill to ensure that these provisions apply to all outworkers in the TCF industry, including those operating under a corporate structure.

**Potential impact on manufacturing in Australia**

2.34 Some submitters expressed concern about the potential impact of the proposed amendments on manufacturing in Australia. They argued that clothing manufacture is already facing significant challenges to remaining in Australia and the proposed legislation represented yet another such challenge. The Australian Industry Group (AiG) stated:

> Over the past decade we have witnessed the TCF industry in decline particularly because of aggressive competition from cheap imports and burdensome regulation and red-tape imposed on Australian manufacturers. The decline is obvious from the falling labour market statistics, which are likely to be reflected in the prevalence of outworkers in the industry. It is without doubt that the proposed amendments, particularly in our current


38 See for example Australian Industry Group (AiG), Submission 22; Council of Textile and Fashion Industries of Australia (TFIA), Submission 16 and The Ark Clothing Co. Pty Ltd, Submission 2.
global economic climate and with a high Australian dollar, will place a further burden on local manufacturers.\(^{39}\)

2.35 Other submitters, particularly small local businesses engaged in the TCF industry, shared concern about the potential negative impact on local manufacturing.\(^{40}\) The Ark Clothing Co. Pty Ltd eloquently described the fears of some small businesses:

...it will result in the death of manufacturing (already grossly diminished) in the clothing industry in Australia. We will have no choice but to join the long list of others who have decided to have their clothing made offshore as a direct result of this legislation.\(^ {41}\)

The Bill makes complex and technical amendments to the Fair Work Act 2009, some of which appears to result in changes which are not practical, will add costs throughout the supply chain and create uncertainty in existing commercial arrangements.\(^{42}\)

2.36 In response to this type of claim, the TCFUA stated:

We are probably not quite as pessimistic about the future of the industry as that. We think there is the capacity for the Australian textile, clothing and footwear industry to survive and in fact grow in some sectors. Critically important is the ability to differentiate our industry from low-wage countries and countries that are doing high-volume mass production of cheap products. So I think you are right in one sense: I do not think it is likely that we are going to see the type of large clothing factories that make very cheap products in the Australian system going into the future.

...

It is the case that the industry is under extraordinary pressure. The pressure we have seen in terms of job losses is primarily as a result of reduced tariffs, increased imports from low-wage countries, the effect of the high Australian dollar and of course some slump in retail in clothing and footwear. Also, as reported in yesterday's Financial Review, there has been a bit of a slow or ineffective response from the local industry to internet sales and in its capacity to move into that type of approach to selling products. We think that is where the industry is struggling. It is not as a result of these laws.\(^ {43}\)

\(^{39}\) AiG, Submission 22, p. 3.

\(^{40}\) See Mr Arthur Thomas, Submission 1; The Ark Clothing Co. Pty Ltd, Submission 2 and Ms Lou Lorkin, Submission 12.

\(^{41}\) The Ark Clothing Co. Pty Ltd, Submission 2, p. 2.

\(^{42}\) Australian Chamber of Commerce and Industry (ACCI), Submission 3, p. 1.

\(^{43}\) Ms Michele O'Neil, National Secretary, TCFUA, Proof Committee Hansard, 2 February 2011, pp 20–21.
2.37 The department informed the committee that its examination of the potential impacts of the bill had indicated there was unlikely to be a negative effect on the manufacturing sector. Indeed, DEEWR explained that in all likelihood other factors had already resulted in 'low-end...short-run' manufacturing moving offshore and therefore, the department did not expect to see significant changes in local manufacturing as a consequence of the bill:

Senator BILYK: We have heard from some other witnesses that there is a great chance that the manufacturing industry within Australia may well, for lack of better terminology, go down the gurgler or people might move offshore or any of these things might happen if the bill goes ahead. I am just wondering if you have any comments to make in regard to that. In my eyes, having a safe workplace and decent working conditions does not necessarily mean that the industry will not survive. Do you have any comments to make about the bill in regard to that area?

Mr Thompson: ...in our research behind the bill we did not come across any strong evidence either way, really. Certainly there were those arguments and then there were arguments the opposite way as well. There were arguments that, yes, this will lead to the impact of manufacturing going offshore. The other side of the argument was that a lot of the manufacturing that could go offshore, because it came out of factories, has already done so. With respect to low-end manufacturing, short-run work that is done largely by outworkers, if it could have gone it already has. There is probably always going to be some market left for outworkers in Australia.44

2.38 DEEWR also argued that 'providing fair workplace protection is not inconsistent' with achieving 'economic growth, employment and productivity goals' through a strong manufacturing sector45 and stated:

...it is not a penalty on industry participants to meet their obligations under the law to ensure the fair and equitable treatment of workers in the TCF industry. The fact that some parties breach their legal obligations and are thus receiving an unfair advantage supports rather than undermines the rationale for these measures. Industry participants should take steps to ensure that as far as possible the industry as a whole is complying with the law in relation to the engagement of TCF outworkers. This will ensure that the legal rights and entitlements of outworkers are protected and that there is a level playing field and competitiveness across the industry.46

44 Mr Brett Thompson, Senior Government Lawyer, Safety Net, Organisations and Protections Branch, Workplace Relations Legal Group, DEEWR, Proof Committee Hansard, 2 February 2012, p. 25.
45 DEEWR, Submission 27, p. 17.
46 DEEWR, Submission 27, p. 18.
Committee view

2.39 The Committee acknowledges the challenges, such as a strong Australian dollar and ubiquitous low-cost imports, currently facing the manufacturing sector in the Australian TCF industry. However, the Committee notes the finding in the Green report about a positive outlook for the Australian TCF industry.47 The Committee also agrees with DEEWR's argument that competitive advantage is not an acceptable reason for failing to comply with legal obligations and withhold work entitlements and protection from TCF outworkers. The Committee believes that the need to extend workplace rights and protections for vulnerable outworkers outweighs concerns about the potential loss of some local clothing manufacture.

Process for recovery of unpaid amounts

2.40 A number of submitters were critical of the process for recovery of unpaid amounts proposed in the bill.48 The NRA described the recovery of unpaid amount provisions as 'unacceptable' and argued:

The proposition that liability is created by a retailer's participation "in a chain or series of arrangements for the supply or production of goods" is in our view completely untenable.49

2.41 AiG stated:

It is not legitimate or fair to hold businesses accountable for the actions of others when they have no control or knowledge of those actions and indeed may never have any contractual relationship with that other party.50

2.42 Other submitters were supportive of the recovery of unpaid amount provisions,51 although many of these felt the provisions placed an onerous burden of proof on outworkers and that this should be rectified.52 The Committee heard about the complex supply-chains frequently found in the TCF industry and that these

48 See AiG, Submission 22; ACCI, Submission 3; TFIA, Submission 16 and NRA, Submission 21.
49 NRA, Submission 21, p. 6.
50 AiG, Submission 22, p. 2.
51 See for example Catholic Justice and Peace Commission of the Archdiocese of Brisbane, Submission 4; FairWear SA, Submission 5; Australian Immigrant and Refugee Women's Alliance, Submission 9; Slater and Gordon Lawyers, Submission 11; TCFUA, Submission 15; Oxfam Australia, Submission 18 and Asian Women at Work, Submission 29.
52 See for example Catholic Justice and Peace Commission of the Archdiocese of Brisbane, Submission 4; FairWear SA, Submission 5; Australian Immigrant and Refugee Women's Alliance, Submission 9; Slater and Gordon Lawyers, Submission 11 and TCFUA, Submission 15.
supply-chains would make it very difficult for an outworker to identify an "indirectly responsible entity". FairWear explained:

Recovering outworkers under payment or non payment from their direct employer is often extremely difficult. Apart from the circumstances where the employer disappears or becomes insolvent, in some cases it is difficult to identify who is the employer. Many outworkers know very little about their employer, and have only simple contact details. This is particularly pronounced for outworkers who have their work delivered to them by their employer. They may have no address for the employer at all.

The recovery of money provisions ensures outworkers can recover the money owed to them directly from the principal contractor in the supply chain (usually the Fashion House) who gave out the work to the first layer of sub-contractors. The principal contractor can in turn seek to recover this money from the sub-contractor who failed to pay the outworker correctly in the first place.

... FairWear is concerned that the Bill currently suggests outworkers would need to provide detailed information about their supply chain in order to make a successful claim. It is unrealistic for an outworker to access such information, as in most cases the outworker only has a name (and possibly an address) of their immediate employer. They do not know who the potential contractor gets work from, or any other details of the supply chain other than the name of the label. The Bill also places the onus of proof on the outworker. We seek amendments that reflect the provisions in state outworker legislation.53

2.43 Oxfam Australia opined that 'the practical application of this provision may be undermined if the onus of proof to investigate supply chain relationships and identify responsible entities falls on the outworker'.54 To address this issue, Oxfam recommended 'that legislation clearly stipulates that the principle contractor has responsibility to disclose supply chain information and identify the relevant entities'.55

2.44 Slater and Gordon advocated for changes to the recovery of unpaid amount provisions so the bill incorporated '[a] key feature of all existing recovery of remuneration provisions' where 'the onus on ascertaining and proving liability for payment of remuneration' is shifted:
...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.\textsuperscript{56}

2.45 In regards to claims that entities in the supply could be liable for payment of unpaid amounts even where that entity did not have a direct contractual relationship with an outworker, DEEWR stated:

Under the Bill, an entity that has been required to pay an unpaid amount to an outworker will be provided with a right to recover an equivalent amount from the responsible person, or offset the amount against any amount they owe to that person. This right will apply whether the unpaid amount is paid voluntarily, or as a result of a court order.\textsuperscript{57}

2.46 The department anticipated that as a result of the proposed recovery of unpaid amounts provisions:

...entities further up supply chains may choose to contract with more reputable suppliers and could also shorten supply chains to limit exposure to claims of this nature. This would be a desirable outcome for outworkers as it is likely to result in the reduced risk of businesses defaulting on their obligation to pay outworkers.\textsuperscript{58}

\textit{Committee view}

2.47 The Committee supports the introduction of the recovery of unpaid amounts provisions in the bill as a mechanism to assist TCF outworkers to obtain money they are due from others in the supply chain. Given the complexity of the supply chains involved in the TCF industry, and TCF outworkers' limited contact with and / or knowledge of each entity in the supply chain, it is appropriate to afford outworkers the ability to recover unpaid monies from indirectly responsible entities.

2.48 The Committee is concerned, however, about the difficulties facing outworkers in identifying indirectly responsible entities and their subsequent ability to take "reasonable steps" to request payment from a responsible entity. To address this problem, the Committee recommends that the bill is amended to remove the requirement for TCF outworkers to take prior steps and instead, require only that a TCF outworker believes an entity is a responsible entity. The Committee notes that such a change may also require the provision of further protections in the bill for entities where they are found not to be an indirectly responsible entity, or are an indirectly responsible entity not liable to pay an unpaid amount, or not liable to pay an unpaid amount in full.


\textsuperscript{57} DEEWR, \textit{Submission 27}, p. 13.

\textsuperscript{58} DEEWR, \textit{Submission 27}, p. 13.
Recommendation 2

2.49 The Committee recommends that the bill is amended to:

- remove the requirement of a TCF outworker to take "reasonable steps" to recover unpaid amounts from a responsible entity and instead require that a TCF outworker believes an entity is an indirectly responsible entity; and
- require an entity to pay an unpaid amount unless the entity satisfies a court that it is:
  - not an indirectly responsible entity; or
  - not liable to pay the unpaid amount; or
  - not liable to pay the unpaid amount in full.

Right of entry

2.50 Some submitters to the inquiry opposed the proposed new right of entry provisions that would provide permit holders with additional entry rights to enter business premises, in particular sweatshops. For example, the TFIA described the right of entry provisions as 'excessive and unnecessary'. 59 The NRA opposed 'the granting of rights to union officials to enter the premises of bone fide independent contractors' and claimed:

...there is no definition of what is meant by “sweatshop” premises in the act. Nor is there any substantive attempt to differentiate between “sweatshop” operations and legitimate, fair and productive independent contract arrangements.

In what is considered a very convoluted process, the bill does purport to limit the right of entry in respect to “accredited persons”. In order for a person to be accredited an application will have to be made to a particular “person or body” and the applicant will have to secure the endorsement of a union and an employer organisation.

NRA is opposed to the establishment of convoluted and elaborate processes requiring bone fide independent contractors to secure an accreditation and union endorsement in order to operate their businesses. 60

2.51 Conversely, other submitters endorsed the right of entry provisions. 61 The Australian Immigrant and Refugee Women's Alliance (AIRWA) acknowledged the controversy around right of entry but argued:

59 TFIA, Submission 16, p. 3.
60 NRA, Submission 21, p. 9.
61 See for example Australian Immigrant and Refugee Women's Alliance (AIRWA), Submission 9; FairWear, Submission 26 and TCFUA, Submission 15.
...the ongoing exploitation of vulnerable migrant sweatshop and homebased outworkers in our own Australian clothing industry justifies these special provisions.

Without the capacity to enter sweatshops and monitor working conditions, other legislative provisions lack effectiveness. The current special rights of entry in the TCF industries give access to the records of outworkers employed by a contractor, but not to the records of the workers who might be working in the informal factory or sweatshop at the time of the inspection of the outworker records. These sweatshop workers are similarly vulnerable to outworkers and deserve the protection of special laws.

We strongly support the additional special rights of entry provisions to cover sweatshop workers as well as homebased outworkers.62

2.52 FairWear described some of the difficulties encountered by the union when investigating sweatshop premises and the need for special rights of entry to address these:

The TCF Union has reported the frustration of identifying sweatshop situations, but being unable to investigate details without providing notice under the general right of entry provisions, resulting in workers being unavailable and the production of records that were clearly recently produced. In other situations they have had access to records pertaining to outworkers while visiting a factory that appears to be set up informally, but have not been able to access the records of those factory workers who appear to be working in conditions less than the award.

... Outworkers wages and conditions may be improved, but the supply of work to award compliant outworkers may be undermined by the increased flow of work to the sweatshop workers in the same supply chain.

The additional special right of entry provisions are vital to the efforts to address the exploitation of sweatshop workers and outworkers in the TCF industry.63

2.53 In its submission, the TCFUA elaborated on the problems associated with identifying and monitoring conditions for workers in sweatshops.64 Specifically, the TCFUA described the difficulties of accessing sweatshop premises under the current legislative framework.

2.54 The TCFUA voiced its strong support for the proposed right of entry provisions, and stated '[t]he TCF Bill provisions appropriately recognise that

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62 AIRWA, Submission 9, p. 3.
63 FairWear, Submission 26, pp 11 and 12.
64 TCFUA, Submission 15, pp 11 and 28–30.
exploitation is not limited to home based work but also exists in sweatshop factory environments as well.65

2.55 The department recognised the limitation of the current rights of entry and explained that the proposed extension to rights of entry ‘...would allow a permit holder from the relevant union to more easily investigate suspected breaches of the [Fair Work] Act or a relevant industrial instrument’.66 DEEWR continued:

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

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

It is also important to note that except in relation to the notice requirements for entry under the outworker-specific right of entry provisions in the [Fair Work] Act to investigate suspected breaches of the [Fair Work] Act or a relevant industrial instrument, the other requirements for entry will continue to apply.67

Mandatory TCF outwork code

2.56 The provisions in the bill that would enable the development of a mandatory TCF outwork code were raised by some submitters. Submitters such as the AiG and the NRA were opposed to the introduction of a mandatory code.68 The NRA questioned the need for a mandatory code ‘[g]iven the operation of the current

66 DEEWR, Submission 27, pp 1 and 14.
67 DEEWR, Submission 27, p. 15.
68 See AiG, Submission 22, p. 17 and NRA, Submission 21, p. 4.
voluntary code and the failure of the Bill to identify any compelling need for legislation and stated:

Many retailers, particularly our national retail chains, have over many years actively supported an ethical Australian textile, clothing and footwear industry by becoming a retail signatory to the National Retailers Ethical Clothing Code which is administered by Ethical Clothing Australia. By participating in this Code, retailers play a key role in efforts to ensure transparency in the industry.

Under the Code retail signatories are required to provide details twice a year of their Australian textile, clothing and footwear suppliers and ensure they are complying with the relevant Award provisions and laws. In providing the details of their suppliers, retail signatories are committing to take appropriate action if they are provided with evidence from the Textile Clothing and Footwear Union of Australia that any of their suppliers are not meeting their legal obligations.

2.57 Conversely, submitters such as FairWear, the TCFUA, AIRWA, Slater and Gordon, and Oxfam Australia were supportive of the mandatory code provisions. FairWear's comments were indicative of those who supported development of a mandatory code:

FairWear strongly supports the Bill’s provision for the creation of a national mandatory code for TCF industries, modelled on the existing codes in New South Wales, South Australia and Queensland.

... The creation of a national mandatory TCF Code of Practice will provide a uniform scheme nationally, which will make it more accessible to industry and provide broader protection for outworkers and sweatshop workers.

The codes of practice require record keeping and reporting throughout the supply chain. This allows regulatory bodies to identify what volumes of work are going where, and identify where outworkers are involved in supply chains, and under what pay and conditions. The codes also require all entities throughout the supply chain to take action against any of their suppliers who are failing to meet their obligations which ensure that the workers in those supply chains receive the wages and conditions to which they are entitled.

69 NRA, Submission 21, p. 8.
70 NRA, Submission 21, p. 3.
71 See FairWear, Submission 26, p. 10; TCFUA, Submission 15, p. 3; AIRWA, Submission 9, p. 3; Slater and Gordon, Submission 11, p. 27 and Oxfam Australia, Submission 18, p. 5.
72 FairWear, Submission 26, p. 10.
2.58 DEEWR explained that the bill itself did not create a mandatory code but rather contained the capacity for the creation of a mandatory code via regulations, noting the decision to develop such a code was 'a matter for the government'.

2.59 The department also described the requirements of TCF industry participants if a mandatory code was developed, as well as the reasons why such a code might be implemented:

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

Recommendation 3

2.60 The Committee recommends that, subject to the foregoing recommendations, the bill be passed.

Senator Gavin Marshall
Chair


COALITION SENATORS' DISSENTING REPORT

Introduction

1.1 Faced with convincing evidence of endemic and inappropriate conduct in workplaces in a specific industry, Coalition Senators are willing to consider industry-specific legislation to address that inappropriate conduct. It was on this basis that the Coalition maintained protections for outworkers in the textile, clothing and footwear industry in the various iterations of workplace relations legislation between 1996 and 2007. It was on this same basis that the Coalition implemented workplace legislation specific to the building and construction industry.

1.2 We note that there continues to be specific provisions in the Fair Work Act to protect outworkers, as well as varying equivalent provisions in state and territory legislation.

Inquiry processes

1.3 This inquiry has not been assisted by the fact that a key stakeholder and representative body – the Council of Textile & Fashion Industries of Australia – was refused permission to appear at the Committee's public hearing.

Evidence

1.4 The majority report suggests that the Committee was ‘struck’ by comments made in 1987 by a Deputy President of the Australian Conciliation and Arbitration Commission. Coalition Senators consider this suggestion is disingenuous given that these comments were made 25 years ago.

1.5 The Government's justification for this Bill in 2011, as proposed by then Minister Chris Evans was based on a reference to a 2007 report by the Brotherhood of St Lawrence and a 1996 Senate Economics References Committee inquiry.

1.6 Coalition Senators note that both reports had been completed prior to the passage of the Fair Work Bill. If these reports constitute such a strong case for this proposed Bill, then why has the Government waited until now to act? Why didn’t the Government address those concerns as soon as it had the first legislative opportunity to do so, namely the introduction and subsequent passage of the Fair Work Act?

1.7 Coalition Senators note concerns expressed by industry participants throughout the TCF supply chain in relation to the proposed Bill:

1.8 The Australian Chamber of Commerce and Industry in its submission expressed concern about the evidence supporting this legislation:

Apart from references in the Minister’s second reading speech to a November 2011 Channel 9 story in a Melbourne TCF "sweatshop" and a July 2011 Sunday Herald Sun report on "sweatshops and outworkers producing school uniforms for Victorian families for as little as $7 an hour", there are no examples provided in the extraneous materials as to the precise deficiencies of the existing legal framework, what recommendations these proposals are based on (such as from the Productivity Commission or a dedicated independent inquiry by the Federal Government) and how the proposed measures will reduce possible exploitation of workers in the TCF industry.²

1.9 The Council of Textile and Fashion Industries of Australia expressed similar concern:

The arguments for introducing the legislation are based on research conducted nearly 5 years ago, not current evidence, and fail to acknowledge the gains made in the 10 years of existing legislation and the 4 years of investment by the Federal Government in Ethical Clothing Australia.³

1.10 Indeed, the then Minister for Education, Employment and Workplace Relations, and now Prime Minister Julia Gillard, said at the time 'I believe the Fair Work system is right...We worked hard to get the balance right and I believe the Fair Work Act is right."⁴

1.11 If there is such a strong case for change, clearly the balance was not right and Ms Gillard's comments were not accurate.

1.12 Coalition Senators received advice from textile suppliers expressing concern at the loss of business and jobs if garment construction continues to disappear offshore and textiles and accessories are sourced in the locations where the work is undertaken.

1.13 Coalition Senators suspect that the Government's motivation for this amendment is more about appeasing the trade union movement in the lead-up to the next federal election. In any event, Coalition Senators note that a review of the Fair Work Act is currently underway. The provisions of this Bill should only be considered as part of that review, and along with any other changes proposed in any final and publicly available report resulting from that review.

² ACCI, Submission 3, Attachment 1, p. 3.
³ Council of Textile and Fashion Industries of Australia (TFIA), Submission 16, p. 3.
⁴ The Australian newspaper, 21 July 2010.
Recommendation 1

1.14 Coalition senators recommend that this bill not be considered by the Senate before the release of the final report of the 2012 Review of the Fair Work Act.

Scope and status of workers

1.15 Coalition Senators are concerned by evidence that the definition of 'outworker' and 'TCF work' in this Bill will have far broader reach than current provisions, to cover many more workers, including designers with university degrees.

1.16 The Council of Textile and Fashion Industries of Australia have made this point in their submission:

Because of the broad definitions of an ‘outworker’ and ‘TCF work’ those that are not vulnerable i.e. those with qualifications, knowledge and skills are also treated in the same way. For example a designer with a University degree wanting to set up a home based business would be treated the same as a person with poor English language skills and little knowledge of the Australian legal system.\(^5\)

1.17 Coalition Senators are concerned that genuine independent contractors or others, such as those in the TFIA’s example, could be unjustifiably covered and disadvantaged by this Bill.

1.18 Coalition Senators have received representation from many young and upcoming designers concerned about this Bill. The following communication is from just one student who wrote to Coalition Senators:

I am an emerging Australian Fashion Designer starting a label from home. I would like to draw your attention to the Fair Work Act and the Textile, Clothing, Footwear and Associated Industries 2010 (the TCFAI Award) Modern Award regime which defines me as an outworker, despite my 4 year degree in fashion from Ultimo TAFE. The current TCFAI Modern Award definition has a” catch all” definition where anyone working from home in the fashion industry is an OUTWORKER  …yes, I can be considered an OUTWORKER if I sell to a boutique or department store, because of the deeming provisions of the award.

Most graduating & emerging Australian Fashion Designers starting out, establish a trading relationship with a fashion boutiques on “indent”. In the eyes of the law, MA000017- Schedule F that would mean boutique owners are required to pay me as an employee, including all benefits and entitlements under the National Employment Standards and unfair dismissal laws. This is unfair and an unworkable regime that disadvantages me and other graduating & emerging Australian Fashion Designers, and is making

\(^5\) Submission 16, p. 3.
it very difficult starting up a new business, as no boutique owner will agree to employ me, and I don’t want to be employed by them either.

Beyond that as a fashion student/designer, if I hand out work to a “maker/outworker” to sample a design I am obligated by law to employ them with full benefits and entitlements, and that is against the law for me to employ them casually. Further I am aware that in the final form of the Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011 (the Bill) currently before parliament, deems all outworkers to be employees for most purposes of the Fair Work Act 2009 (Clth) (the FW Act) including the National Employment Standards, Superannuation and unfair dismissal laws. As a start-up business, in the beginning it will be challenging to pay myself, never mind employ a ‘maker/outworker’ on a regular basis, and pay all these entitlements. Again this is unworkable and in trading in such an environment, I face prosecution in breach of the TCFAI Modern Award 2010. The risks are too great.

I would like you and your government to consider this letter and make the necessary changes to allow me and other graduating & emerging Australian Fashion Designers making samples and small orders (with business turning over less than $100,000 per year) to apply for exemption to this onerous and impractical regime, as part of the Modern Awards Review 2012.

**Recommendation 2**

1.19 Coalition senators recommend that the Bill be amended to ensure that genuine independent contractors – those who have traditionally worked as independent contractors – are neither covered by, nor disadvantaged as a result of this legislation.

1.20 The Fair Work Act allows for Individual Flexibility Arrangements (IFA) to be made which 'meet the genuine needs of the employee and employer'⁶, subject to complying with certain requirements. These include that the employee must be better off overall under the IFA.

1.21 This Bill appears to deny access to IFAs for outworkers, whether they be in the TCF industry or not as 'the flexibility term must not allow the effect of those outworker terms to be varied'.

1.22 This is also despite the ‘better off overall test’ which ensures that IFAs cannot undercut outworker terms.

1.23 The TFIA points out in its submission:

On its face, therefore, employees may be able to benefit from individual flexibility terms that would be denied to outworkers even though TCF contract outworkers are treated as employees in the new Part 6–4A, which

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⁶ Fair Work Act.
extends the operation of most provisions of the FWA (including sections 202 and 203) to contract outworkers in the TCF industry.

If this proves to be the case, the intention to provide “nationally consistent rights...for those outworkers, regardless of whether they are employees or contractors” (see paragraph 44 of the Explanatory Memorandum) may not be achieved.7

1.24 Coalition Senators are concerned that this could leave many workers worse off, absent any need or justification for coverage by the Bill.

**Recommendation 3**

1.25 Coalition senators recommend that the Bill be amended to incorporate the ‘No disadvantage Test’ and ensure that no worker will be worse off as a result of its implementation.

**The State Systems**

1.26 This Bill will replicate in the Fair Work Act many provisions in current state and territory legislation as well as the relevant Federal Modern Award.

1.27 This is despite the absence of adequate evidence as to whether these protections have worked at a state or territory level, or in the relevant modern award. Coalition Senators have yet to see any evidence that showed these provisions worked where they have been in place for some time.

1.28 It defies good policy sense for the government at a federal level to, in effect, harmonise these laws in the absence of proof that they have delivered results at a state and/or territory level.

1.29 There is a confusing message. It is asserted that problems still exist in the textile, clothing and footwear industry, despite already having very similar protections in various states and territories. How replicating these provisions which are apparently ineffective will assist has not been adequately explained.

**Conclusion**

1.30 The Coalition in Government recognised the need for additional protections in the TCF industry and provided additional protections and safeguards – including additional powers to the union movement. At the same time, the Coalition also recognised the need for protections in the building and construction sector leading to the establishment of the Australian Building and Construction Commission.

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7 Submission 16, p. 11.
1.31 At present, one of the core arguments of the Government in abolishing the ABCC is that it discriminates against certain workers and that the industrial relations regime should take a 'one size fits all' approach. This Bill clearly defies Labor's view in relation to the ABCC.

1.32 The Government has failed to identify and present sufficient evidence and justification let alone consistency for this Bill. Without that, this Bill should not be passed.

**Recommendation 4**

1.33 Coalition senators recommend that notwithstanding earlier recommendations, this Bill should be opposed until adequate evidence and justification is presented by the Government.

Senator Chris Back
Deputy Chair

Senator the Hon Eric Abetz

Senator Bridget McKenzie

Senator Sue Boyce

Senator Mary Jo Fisher
APPENDIX 1

Submissions received by the Committee

1. Arthur Thomas, Gouda
2. The Ark Clothing Co.
3. Australian Chamber of Commerce and Industry
4. Catholic Justice and Peace Commission of Brisbane
5. Fairwear SA
6. Working Women's Centre SA Inc
7. Michael Rawling
8. Richard Thomas
9. Australian Immigrant and Refugee Women’s Alliance
10. SafeWork South Australia
11. Slater and Gordon Lawyers
12. Lou Lorkin
13. UnionsWA
14. UnionsACT
15. Textile Clothing and Footwear Union of Australia
16. Council of Textile and Fashion Industries of Australia
17. Shelley Marshall
18. Oxfam Australia
19. Australian Council of Trade Unions
20. Speakout
21. National Retail Association
22. Australian Industry Group
23. apl Financial
24. Unions NSW
25. Commission for Mission
26. Fairwear
27. Department of Education, Employment and Workplace Relations
28. Name Withheld
29. Asian Women at Work Inc

**Additional Information received by the Committee**

1. Document tabled by Textile Clothing and Footwear Union of Australia on 2 February 2012
2. Answers to questions on notice received from the Australian Industry Group on 13 February 2012
3. Answers to questions on notice received from the Department of Education Employment and Workplace Relations on 17 February 2012
APPENDIX 2

Witnesses who appeared before the Committee

Cliftons Conference Centre, Melbourne, Victoria
2 February 2012

CARSTENS, Ms Debbie, Chairperson Fairwear New South Wales

JOHNSON, Mr Timothy, Director of Minimum Wages and Conditions Policy Section, Department of Education, Employment and Workplace Relations

MACPHERSON Ms Elizabeth, President and Organiser Victoria Branch, Textile Clothing and Footwear Union of Australia

MARSHALL, Ms Shelley, Management Committee Member, FairWear Victoria

MCMULLEN, Mr Antony John, Administration Committee, FairWear Victoria

MEAD, Mr Michael, National Manager Advocacy and Policy, Australian Industry Group

NOLAN, Mr Peter, Director Workplace Relations, Australian Industry Group

O’NEIL, Ms Michele, National Secretary, Textile Clothing and Footwear Union of Australia

PHAM, Ms Bich Thuy, Policy Group, FairWear New South Wales

THOMPSON, Mr Brett, Senior Government Lawyer, Department of Education, Employment and Workplace Relations

WILES, Ms Vivienne, National Industrial Officer, Textile Clothing and Footwear Union of Australia

WYBORN, Ms Jennifer, Branch Manager Net Organisations and Protections Branch, Department of Education, Employment and Workplace Relations