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Innovative Legislation in Australia Protects Homeworkers in the Garment and Footwear Sector

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Key Points

- ① Outworkers in Australia's Textile, Clothing and Footwear (TCF) industry are known to be particularly vulnerable to exploitation and unsafe working practices.
- ② Legislative reform took place between 2007 and 2013 when Australia had a progressive Labor government, culminating in the passage of the Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012. This followed a decades-long campaign to improve the working lives of outworkers in the TCF industry by the union, its allies and outworkers themselves.
- ③ With a strong national industrial award and specific laws for the TCF industry, the industry's union has a powerful legislative architecture underpinning its work. This gives it significant leverage in negotiations with employers and fashion houses/brands.
- ④ The union is consistently active on the ground, enforcing the laws. Also, it has refined its industrial, legal and organizing strategy, and seeks to adapt to new compliance challenges. The union has sometimes initiated court prosecutions against major fashion houses and brands in a parallel naming and shaming strategy.
- ⑤ There is increasing awareness within the TCF industry of the laws and the risks of non-compliance. An increasing number of outworkers are now receiving minimum wages and conditions no lesser than if they undertook that work in a traditional clothing factory.



Outwork Outreach Officer Nguyet Nguyen (front) and National Compliance Officer Elizabeth Macpherson at a TCFUA-organized protest in 2015. Photo courtesy of the CFMMEU-Manufacturing Division

.... Many have dependent children and have no other prospect of employment.

Such persons are easy prey for those with a will to deprive them of a fair and just reward for their skills and the performance of long hours of work. 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

Many of the features of outwork described above persisted over the next two decades. Most outworkers worked dangerously excessive hours, received significantly less than award rates of pay,⁵ and often contractors withheld payment for work performed. They also did not receive benefits such as paid leave, public holidays or superannuation (similar to a pension fund) and worked in very poor conditions.⁶

Outworkers were a mostly hidden, female migrant workforce working at the end of often long and complex supply chains (operating both vertically and horizontally), performing piece

work and being subjected to sham contracting and widespread wage theft.

Mainstream labour law was self-evidently not fit for purpose in regulating TCF outwork appropriately as it was premised on certain assumptions as to how and where work was undertaken. Firstly, it assumed a traditional, workplace factory environment in which trade unions could monitor the conditions of work. Secondly, it failed to acknowledge the specific nature of TCF supply chains with cascading levels of workers and increasingly lower rates of pay for each level down the chain. Thirdly, and most fundamentally, it assumed an employee/ employer relationship, ignoring the systemic practice of outsourcing work to migrant women and requiring them (as a condition of obtaining work) to establish a "business" (ABN)⁷ as an independent contractor.

TCF Industry Sweatshops

Inadequate regulation contributed to the growing phenomenon of sweatshops within the Australian TCF industry. Over time, the union observed that, increasingly, TCF work

was relocated away from traditional, organized factories to outworkers and sweatshops that share many of the same characteristics of engagement, with some outworkers moving between the two forms of work.

Sweatshops exist as part of the "formal" TCF sector on the one hand but operate in a type of parallel economy characterized by minimal transparency and scrutiny. Sweatshops are usually mobile and able to relocate at relatively short notice.

In the union's experience, while TCF sweatshops vary in nature they share commonly consistent features — workers (many of them migrants or refugees) labouring in isolation under poor health and safety conditions, with little if any autonomy over their work and under high levels of control by the sweatshop operator. Workers are typically expected to work to unrealistic deadlines until orders are completed and often are subjected to harassment, discrimination and threats of losing work. Workers in sweatshops almost uniformly do not receive the minimum legal

⁴ Ibid; [421-422].

⁵ The TCF industry award provides a minimum safety net of wages and conditions for all workers in the TCF industry in Australia, including outworkers.

⁶ See, for example:

- TCFUA; *The Hidden Cost of Fashion: Report of the National Outwork Information Campaign* (March 1995)
- Senate Economics Reference Committee report on "Outworkers in the garment industry" (1996)
- Cregan, C; *Home Sweat Home: Preliminary Findings of the first stage of a two-part study of outworkers in the textile industry in Melbourne, Victoria*; University of Melbourne (2001)
- Ethical Clothing Trades Council; *Outworkers' Lawful Entitlements Compliance Report* (2004)
- Brotherhood of St Laurence (Diviney, E & Lillywhite, S); *Ethical Threads – Corporate Social Responsibility in the Australian Garment Industry* (2007).

⁷ In Australia, an ABN is a reference to an Australian Business Number which is required to be obtained from the Australian Taxation Office if an entity seeks to operate as a registered business (to which different taxation rates and requirements apply) as compared to employment as an employee.

- (iv) Each entity must submit a list on a quarterly basis that includes details of persons to whom the work has been given.
- (v) Each entity must keep copies of work agreements/contracts which set out the basis upon which the work is undertaken.

Additional obligations (records and agreements) apply when a principal gives work directly to an outworker, including:

- (i) The written agreement between the principal and outworker must specify whether the workers will be provided with full-time (38 hours per week) or part-hours (no less than 15 hours per week, or 10 with the agreement of the union) and must be expressed clearly and in a language the outworker can understand.
- (ii) The written records must contain additional information, including the date and time for the garments to be provided to and picked up from the outworker; the time standard to be used to determine the sewing time for each garment; the number of working hours necessary to complete the work; the appropriate time and date of commencement and completion of the work; the total amount to be paid to the outworker for the hours worked. Schedule F

allows the union to determine to whom TCF work is given, where work is undertaken, by how many workers and under what wages and conditions. These transparency provisions allow the union to map a particular supply chain (both vertically and horizontally).

From the late 1990s to the mid-2000s, the union regularly initiated federal court prosecutions against employers and major fashion houses for breaches of the industrial award as part of a "name and shame" brand media strategy.¹²

The Seeds of National Legislative TCF Outworker Reform

In coalition with community and civil society organizations (such as Fair Wear and Asian Women at Work) and outworker groups with the support of key academics, the union lobbied for national legislative change to improve the rights of TCF outworkers across Australia.

A window of opportunity came in 2007 with the election of a national progressive Labor government after 11 years of conservative rule. The union had advocated for the then-Labor opposition (1996-2007) to support a

platform of outworker reform as part of its public policy position.

The federal parliament passed the Fair Work Act in 2009. Despite opposition from the TCF industry and the conservative opposition, in March 2012, the Fair Work Act 2009 was amended to include major reforms for outworkers in the TCF industry.

Legislative Reforms to Protect Outworkers in the Australian TCF Industry

Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012

Prior to the passage of the TCF Bill into law in March 2012, there was an inquiry by a Committee of the Australian Senate (upper house). In a submission to the Senate Inquiry into the TCF Bill 2011, Shelley Marshall,¹³ an academic specializing in the regulation of informal work, argued that the Bill had several important features:

- It would include and protect workers usually excluded from labour law.

¹² Clothing Trades Award 1982; Clothing Trades Award 1999 - This award was consolidated as part of the modern award made for the TCF industry in 2010, the Textile, Clothing, Footwear and Associated Industries Award 2010. Key decisions of the Federal Court of Australia included: *Re: Clothing and Allied Trades' Union of Australia v J and J Saggio Clothing Manufacturers Pty Ltd* [1990] FCA 279; *Textile, Clothing & Footwear Union of Australia v Lotus Cove Pty Ltd* [2004] FCA 43; *Textile, Clothing & Footwear Union of Australia v Southern Cross Clothing Pty Ltd* [2006] FCA 325; *Textile, Clothing & Footwear Union of Australia v Morrison Country Clothing Pty Ltd (No 2)* [2008] FCA 1965.

¹³ Shelley Marshall (Senior Lecturer, Department of Business Law and Taxation, Monash University) submission to the (Senate) Standing Committee on Education, Employment and Workplace Relations, Inquiry into the Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011 (January 2011).

employees (contract of service) or contractors (contract for services), and have the same right to minimum terms and conditions of employment, minimum wage rates, leave entitlements, access to unfair dismissal remedies, protections against adverse action, and collective bargaining rights¹⁶

Pillar 2: Recovery of Money Owed to TCF Outworkers

The second pillar to the TCF Act 2012 was the introduction of a legal mechanism to enable outworkers (whether employee or contract worker), or the union on their behalf, to recover unpaid monies from entities further up the contracting supply chain for whom they had indirectly done the work.

Under the recovery mechanism, the person who directly engages the outworker is the “responsible person,” but critically it includes a definition of an *indirectly responsible entity* in relation to the TCF work undertaken by the outworker¹⁷

The definition of what constitutes an “unpaid amount” includes any amount due under a



A union-organized picnic day with outworkers in 2018. Photo courtesy of the CFMMEU-Manufacturing Division

contract, the FW Act, an award, industrial instrument, state or federal laws. These include wages, piece rates, commission, leave entitlements, superannuation contributions and reimbursement for expenses incurred.

Where the responsible person fails to pay the unpaid amount to the outworker and there are one or more indirectly responsible **entities**,

these indirectly responsible entities become jointly and severally liable.

To start the recovery process, the outworker (or the union on their behalf) gives a written demand to the party it believes is indirectly responsible for the payments owed. The demand must include details of the amounts claimed, the work undertaken, why the entity is

¹⁶ In terms of coverage, all outworkers engaged by a constitutional corporation and outworkers engaged by a non-constitutional corporation in all states and territories (other than the state of Western Australia). Consequently, almost every outworker (whether employee or contractor) is now covered by the majority of rights and entitlements provided to employees under the Fair Work Act 2009.

¹⁷ Section 17A contains a definition of what is meant by “directly” or “indirectly” in relation to TCF work:

- (1) If there is a chain or series of 2 or more arrangements for the supply or production of goods produced by TCF work performed by a person (the *worker*), the following provisions have effect:
 - (a) the work is taken to be performed *directly* for the person (the *direct principal*) who employed or engaged the worker (and the direct principal is taken to have arranged for the work to be performed *directly* for the direct principal)
 - (b) the work is taken to be performed *indirectly* for each other person (an *indirect principal*) who is a party to any of the arrangements in the chain or series (and each indirect principal is taken to have arranged for the work to be performed *indirectly* for the indirect principal).

- employment or engagement of TCF outworkers
- arranging for TCF work to be performed, if the work is to be performed by TCF outworkers or is of a kind that is often performed by outworkers
- the sale of goods produced by TCF work.

The Code would apply to anyone who arranges for TCF work to be performed, such as an employer of an outworker or anyone in a supply chain, including retailers.

It would include details about record keeping, the reporting of compliance and general matters relating the operation administration of the code (but could not deal directly with the regulations of wages and entitlements).

However, the then-federal Labor government lost power in the 2013 federal election. At that time, the Code was still being developed. The incoming government declined completing the process. Although the capacity to regulate a national outwork code of practice remains in the legislation, it remains an important piece of unfinished business arising from the suite of reforms.

Enforcement of the Legislation

While the TCF Act 2012 amendments were a significant achievement for the reform of TCF outworker rights and conditions, the necessity of mapping TCF supply chains and enforcing

such rights remains a consistent challenge for the union. Without a strong union presence on the ground and a clear enforcement framework, there is always the risk that gold-plated laws will not achieve their intended purpose.

Union Compliance and Outwork Outreach Officers

The TCF industry provisions of the FW Act and the outwork provisions of the TCF Award 2020 form the fundamental core of the enforcement framework used. The union has a discrete compliance team which includes both Compliance and Outwork Outreach Officers (bilingual) supported by Industrial/Legal officers employed by the union. The union's enforcement strategies have developed significantly over time and continue to adapt as the more unscrupulous parts of the TCF industry seek to avoid, in part or in whole, regulation of their businesses. The compliance and outwork officers are learning all the time and continue to tweak and make changes to improve the enforcement strategy wherever possible.

A key role of the Compliance Officers is the detailed mapping of TCF supply chains to identify the key participants, the number of arrangements to give work out, the value and volume of work subject to the arrangements, how many workers are undertaking that work and what has been paid for that work. In following TCF supply chains in this way, a high level of transparency is achieved which

assists in TCF outworkers receiving their full legal wages and employment entitlements. The Compliance Officers deal with the fashion house/label at the top of the chain to ensure rectification is completed.

The union Outwork Outreach Officers have, in most cases, worked as TCF outworkers previously and understand intimately the issues faced by outworkers in seeking redress for wage theft and the failure to be afforded minimum entitlements. The Outwork Outreach Officers explain the role of the union, the laws which apply to TCF outwork and provide ongoing language support and assistance to outworkers through the process. The making and retention of a trusted relationship between the union and the outworker is fundamental to effective enforcement.

Protecting Outworkers in the Enforcement Strategy

The TCF outworker laws have been hard fought for over many years. Fundamental to the reform success has been the strength of TCF outworker participation, including sharing their stories and highlighting the problems that they have experienced in union submissions and at government inquiries. They have done so often at great risk to their own job security. Without the voice of outworkers being central to the law reform campaign, the TCF Act 2012 amendments would either not have happened at all or been in a much-diminished form.

The key information that is sought from the company includes:

- disclosure of the full extent of the supply chain (i.e., all participants and their details)
- checking the company has written agreements in place with the outworkers; these should contain each of the matters prescribed by the TCF Award (i.e., identify agreed hours of work per week)
- checking that the work records for arrangements contain each of the matters prescribed by the TCF Award
- all relevant requirements for outsourcing of work, for both contractors and outworkers
- that outworker details are recorded in time and wage records and that the outworker receives payment and a payslip on a weekly basis.

This helps identify any “hidden” outworkers that were not declared by the company to the union or via the TCF Board of Reference registration (if registered). The Board of Reference registration is a legal requirement under the TCF Award in which an entity/person must be registered if outsourcing work in the TCF industry (i.e., a principal).

Mostly companies the union audits are non-compliant to a greater or lesser extent. As part of its compliance strategy, the union commonly identifies multiple contraventions of the TCF Award and the outworker provisions of the FW Act, such as:

- no set agreed hours of work with the outworker
- irregular or late payment to the outworker
- underpayment of the minimum ordinary hourly rate
- no accrual of leave entitlements
- no superannuation paid on behalf of the outworker.

Another important and successful part of the supply chain strategy is what the union describes as the “two-prong approach”. That is, the Compliance Officer deals directly with the top principal and works down the supply chain at the same time as the Outwork Outreach team members are meeting with the outworkers.

This allows the team to collect information at or around the same time, match it up and see whether or not it equals — most of the time it doesn’t. It is really valuable information for the union to be able to understand exactly what’s happening in the supply chain and be able to get a better overview of the scale and complexity of the rectification required. The recovery mechanism in the FW Act gives the union significant leverage with the principal fashion house/label to correct the non-compliance within its supply chain.

It is essential the Outwork Outreach Officer develops a trusting relationship with the outworkers, which can take a period of some time. Information is then obtained on the areas

of non-compliance, which the Compliance officer will use to develop a strategy to rectify the issues in a way that does not negatively impact the outworker. In the process, it is imperative that the outworker’s work is not disrupted. We ensure that the principal/ employer/direct engager cannot see a direct link between the union contacting them and the outworker themselves.

The union also retains the option to take recalcitrant companies to court for contraventions of the TCF Award and the FW Act. However, initiating court proceedings is usually a much longer process than working with the primary principal to bring their supply chain up to full compliance. Court proceedings are also very expensive and resource intensive. Practically, in a majority of cases the union is able to negotiate a settlement to address all levels of non-compliance within a particular supply chain, including addressing money and entitlements owed to any outworkers.

Outwork Community Outreach

Community outreach to outworkers is crucial to the union’s work and ensuring that outworkers understand they have enforceable legal rights to a minimum safety net of wages and conditions. The Outwork Outreach Officers engage outworker communities in a range of ways, including face-to-face catch-ups (usually in relation to individual work matters); Zoom meetings (to provide updates on their rights at work and annual changes to pay rates, etc.,



End-of-year outing to the Blue Hills Cherry Orchard and Dandenong Ranges Park, bringing outworkers together in a social setting. Photo courtesy of the CFMMEU-Manufacturing Division

also elected to a number of positions in the TCFUA. I believe I am the first outworker to hold an elected union office in Australia.

Working as an outworker myself and unable to find any help, I had an opportunity to help other outworkers in similar circumstances. My outreach role is to support the vulnerable workers who are sewing for work at home, to ensure that they are protected and are receiving the working conditions and rights as per the TCF Award and other legislation.

We have a range of ways to meet and communicate with TCF outworkers. Outworkers are invited to join meetings via the National Outworker Zoom meetings

that we hold twice a year. This provides another opportunity for outworkers to receive information without leaving their home, but also everyone can see each other online and the sharing of stories and asking questions is helpful to them to confirm that they are not alone. An Outworker newsletter is developed twice a year to provide updated information. This is circulated via a number of ways, handing out at community events, attending activities or sending to their home address.

Each year, outworkers and their family are invited to come together for a picnic day on the bus, where they can spend a day at various farms, such as the lily farm, lavender farm, fruit picking and attending the National Park (Thousand Steps), water dam and many more interesting places. This brings the outworkers together to share experiences and develop networks within their community.

We discuss with the outworkers their working conditions and rights at work. This includes how the Union can assist if they aren't receiving the correct rate of pay or irregular hours of work and not receiving their lawful entitlements.

During the pandemic, we weren't able to hold meetings with the outworkers face to face like we have done in the past, so to maximize communication we held meetings via phone to provide assistance to the outworkers to receive government support and explain what was happening etc.

Have the TCF Reforms Made a Difference?

The TCF industry reforms have now been in operation for over a decade. The union acknowledges that although the laws are significant in both ambition and reach, addressing the exploitation of outworkers in the Australian TCF industry remains a constant challenge. In the union's experience, the laws need to be consistently used and enforced on a daily and weekly basis. The union must both be on the ground and be seen to be so.

There will always be fashion brands, employers, manufacturers and other supply chain participants looking for creative loopholes to avoid having the laws apply to their operations. The union's enforcement strategies must be alert to and remain fluid and adaptive to new unscrupulous practices in the industry. We must also think of other and varied ways to engage with the outworker community.

However, change is happening. There is increasing awareness within the TCF industry of the laws and the risks of non-compliance. An increasing number of outworkers are now receiving minimum wages and conditions no lesser than if they undertook that work in a traditional clothing factory. We have provided a number of individual examples below of outworker stories where they have experienced positive changes to their working lives.

Key Lessons

- Opportunities for legislative reform come rarely and are hard won. In the case of the Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012 reforms, there was a relatively brief window of opportunity between 2007 and 2013 when a progressive Labor government was elected nationally in Australia. The union had to be prepared and ready to prosecute that case for change. The reforms crystallized after a decades-long campaign by the union in coalition with academics, community, activist and faith organizations, and of course outworkers themselves. Having a strong national award and specific TCF laws for the TCF industry means that the union has a powerful legislative architecture underpinning our work. This gives the union significant leverage and bargaining power when we are in negotiations with employers and fashion houses/brands.
- Additionally, over the years the union has refined its industrial, legal and organizing strategy and needs to remain adaptive to new compliance challenges. When necessary, the union has not been afraid to initiate court prosecutions against major fashion houses and brands in a parallel naming and shaming strategy.
- Tracing and mapping TCF supply chains is critical to successful enforcement.



From left: Elizabeth Macpherson (National Compliance Officer), Hanh Tran (TCF Outworker), Vivienne Wiles (Senior National Legal and Industrial Officer) and Nguyet Nguyen (Outwork Outreach Officer). Photo courtesy of the CFMMEU-Manufacturing Division

Transparency must be embedded in the system of compliance. We gather information, records and intelligence from both ends of the supply chain and at all levels: from the fashion brand/principal at the top through the mechanisms in the award and exercising TCF right of entry powers, and from the bottom by direct engagement with TCF outworkers via the union's outwork outreach officers.

- Developing trust with outworkers is fundamental. It takes time, resources, patience and understanding. Appropriate language and cultural support need to be provided. At all times in its work, the union seeks to protect the identity of the

outworker, so that the risks of an outworker losing work or having other adverse action taken against them is minimized.

- Enforcement is everything. Having landmark laws of themselves is not enough. The union needs to be consistently active on the ground, enforcing the laws, week on week, otherwise the reforms wither on the vine and become open to attack by conservative forces. Finally, the union, in coalition with its allies, must be prepared to defend the laws when needed. Outworkers rightly expect nothing less.