(A)

Queensland Clothing Manufacturing Audit Program 2011-2012

Final report – April 2013

A report by the Fair Work Ombudsman under the Fair Work Act 2009

Date of Publication - April 2013

Australian Government

Fair Work OMBUDSMAN

an interpretation that is consistent with the objective stated in subsection (4) is to be preferred to an interpretation that is not consistent with that objective.

(4) The objective is that a TCF contract outworker who is taken to be an employee in relation to TCF work should have the same rights and obligations in relation to the work as an employee would have if he or she were employed by the person referred to in paragraph (1)(b) to do the work.

(5) This section has effect subject to regulations made for the purposes of section 789BC.

789BC Regulations relating to TCF outworkers who are taken to be employees

(1) For the purpose of furthering the objective stated in subsection 789BB(4), the regulations may do either or both of the following in relation to TCF outworkers (*deemed employees*) who are taken by section 789BB to be employees of other persons (*deemed employers*) in relation to TCF work:

(a) provide that provisions covered by this Division apply in relation to deemed employees and deemed employers with specified modifications;

(b) otherwise make provision relating to how provisions covered by this Division apply in relation to deemed employees and deemed employers.

(2) Regulations made for the purposes of subsection (1) may provide differently:

(a) for the purposes of different provisions; or

(b) in relation to different situations.

(3) This section does not allow regulations to:

(a) modify a provision that creates an offence, or that imposes an obligation which, if contravened, constitutes an offence; or

(b) include new provisions that create offences.

Australian Government **Fair Work OMBUDSMAN**

13/8/2012

Reference Number: 4849005

Mr Jon Griffin
Director
Apl Financial Pty Ltd
P.O Box 300
MULGRAVE VIC 3168

Dear Mr Griffin,

Thank you for your letters, dated 30 July 2012 and 30 April 2012, in relation to your concerns regarding the recent Textile, Clothing and Footwear amendments to the *Fair Work Act 2009* (FW Act) and their interaction with the *Income Tax Act 1986* (Income Tax Act).

Specifically, you have requested advice for provision to small business operators who use contract outworkers. In your correspondence, you have essentially raised two distinct issues:

- What are the obligations placed on small business operators who engage outworkers under the FW Act
- What are the obligations placed on small business operators who engage outworkers under the Income Tax Act.

Whether an outworker is engaged by a small business as an employee or a contractor is relevant to providing advice in respect of both of the above issues. However, in the Textile Clothing and Footwear industry the test applied under workplace relations laws differs to that under taxation law.

In your correspondence of 30 April 2012, in order to highlight the inconsistencies between the obligations placed upon small business operators who engage contract outworkers, you outlined that when an outworker is an employee, the business would need to obtain a tax file number and pay income tax. You then proceed to say that as an outworker is not an employee, the business cannot request a tax file number or deduct pay as you go withholding tax.

Your example, as outlined above, relates to whether the outworker is classified as an employee or a contractor under taxation laws, not under workplace relations laws. As previously advised, the Fair Work Ombudsman is responsible for providing education, assistance and advice about the Commonwealth workplace relations system. Whether an outworker is an employee or a contract worker for the purposes of the Income Tax Act is clearly a matter for the Australian Taxation Office and not a matter that the Fair Work Ombudsman is able to provide advice on.

However, as outlined in your recent correspondence, and confirmed in my previous response, I can advise that the FW Act does not deem a contract outworker as an employee for the purposes of the Income Tax Act. Therefore, the existing taxation obligations placed upon small business operators who engage contract workers would continue to apply where a genuine contractual relationship exists.

In order to determine what the taxation obligations are in relation to a specific outworker, I recommend that you consult with the Australian Taxation Office

The Fair Work Ombudsman is able to provide advice to small business operators who use contract outworkers in respect of their obligations under the FW Act. In this regard, contract workers in the Textile Clothing and Footwear industry are entitled to the payments and

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[2013] FWCFB 5729
FAIR WORK COMMISSION

DECISION

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009
Sch. 5, Item 6 - Review of all modern awards (other than modern enterprise and State PS awards) after first 2 years

The Ark Clothing Co Pty Ltd
(AM2012/93)
The Australian Industry Group
(AM2012/225)
Council of Textile and Fashion Industries of Australia Limited
(AM2012/248)
Textile, Clothing and Footwear Union of Australia
(AM2012/93, AM2012/225, AM2012/248, AM2012/273)

Textile, Clothing Footwear and Associated Industries Award 2010

Clothing industry

SENIOR DEPUTY PRESIDENT HAMBERGER
DEPUTY PRESIDENT SMITH
COMMISSIONER LEE

SYDNEY, 4 OCTOBER, 2013

Transitional review of modern awards - review of Textile, Clothing, Footwear and Associated Industries Award 2010

[1] Under Schedule 5, Item 6 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the Transitional Provisions Act), the Fair Work Commission is required to conduct a review of all modern awards after two years (the transitional review). In the transitional review the Commission must consider whether the modern award in question is achieving the modern awards objective and is operating effectively, without anomalies or technical problems arising from the Part 10A award modernisation process.

[2] In a Statement 1 issued by the President, Justice Ross on 27 April 2012 regarding the process for dealing with the transitional Review, His Honour indicated that applications in relation to the *Textile, Clothing, Footwear and Associated Industries Award 2010* (the modern award) in respect of outworkers would be allocated to a Full Bench. On 5 July 2012, Justice Ross indicated that the applications concerning outworkers would be dealt with as part of Stage 3 of the transitional review process.2

[3] Applications seeking variations to the modern award were received from The Ark Clothing Co Pty Ltd (The Ark) (AM2012/93), the Australian Industry Group (AIG) (AM2012/225), the Council of Textile and Fashion Industries of Australia Limited (TFIA) (AM2012/248), Business SA (AM2012/270) and the Textile, Clothing and Footwear Union of Australia (TCFUA) (AM2012/273). AM2012/270 was subsequently withdrawn by Business SA. The application by the TCFUA (AM2012/273) contained a mix of outworker and non outworker matters. The other applications were concerned only with those provisions in the modern award that relate to outworkers.

[4] Commissioner Lee listed matter AM2012/273 for report back and hearing on 5 December 2012. Prior to listing the matter, the Commissioner issued directions advising parties that in addition to dealing with the matters in AM2012/273, a number of proposed technical/drafting variations (technical matters) identified by Fair Work Commission would also be considered. Submissions on the proposed technical amendments were sought. Subsequent to the conference and hearing on 5 December 2012 directions were set for arbitration.

[5] On 13 February 2013, prior to the arbitration taking place, the TCFUA, Australian Business Industrial (ABI) and AIG jointly sought that the dates for arbitration be vacated and that the time be used for conciliation.

[6] On 15 February, Senior Deputy President Hamberger issued a statement which indicated that President, Justice Ross had referred all aspects of AM2012/273 to the Full Bench convened for proceedings in relation to the outworker provisions of the modern award. The statement indicated that documents filed in compliance with the directions of Commissioner Lee would be provided to the Full Bench for consideration.

[7] At the Full Bench proceedings conducted on 7 March 2013, the Full Bench determined that Commissioner Lee would conduct any required conferences between the parties in relation to the non-outworker matters in AM2012/273 and that the Commissioner would report back to the Full Bench on these matters.

[8] Subsequently, conferences were convened by Commissioner Lee on 29 April 2013 and 21 May 2013. These conferences dealt only with the non-outworker related matters contained in matter AM2012/273 as well as the technical

matters identified by the Commission. These conferences were attended by representatives of the TCFUA, AIG and ABI.

[9] Subsequent to the conduct of these conferences, the TCFUA, AIG, and ABI advised the Commission that they had reached agreement on all of the non-outworker related matters, and filed a proposed draft variation to the modern award for the consideration of the Full Bench.

[10] In relation to the outworker provisions, written submissions were received from each of the applicants, as well as a number of other interested parties. 3 An initial hearing was conducted in 7 March 2013 by the Full Bench in Melbourne (with a video link to Adelaide).

[11] On 22 May 2013, correspondence was received from the TCFUA, AIG, and ABI, advising that they believed it would be of benefit if the outworker matters were listed for conciliation.

[12] On 23 May 2013, Senior Deputy President Hamberger wrote to those parties advising that the outworker related matters would be referred to Commissioner Lee for the conduct of a conference on 26 June 2013 to explore possible resolutions to the outworker matters. The parties were advised that the matters remained before the Full Bench. This conference was attended by representatives of The Ark, TFIA, TCFUA, AIG, ABI, Business SA and FairWear.

[13] While progress was made at that conference on a range of issues, a number of disagreements remained. The Full Bench subsequently conducted further hearings on 9, 10 and 11 July 2013.

[14] At the commencement of proceedings on 9 July 2013 the TCFUA, AIG, TFIA, ABI and Business SA indicated that they had reached a consent position in relation to AM2012/225, AM2012/248 and AM2012/273. As part of this consent position, these parties agreed no longer to press most of the aspects of their applications save and except for the manner in which those aspects were reflected in the consent position.

The Legislative context

[15] The transitional review is being conducted under Item 6 of Schedule 5 to the Transitional Provisions Act. Item 6 provides:

> **'6 Review of all modern awards (other than modern enterprise awards and State reference public sector modern awards) after first 2 years**
>
> (1) As soon as practicable after the second anniversary of the FW (safety net provisions) commencement day, FWA must conduct a review of all modern awards, other than modern enterprise awards and State reference public sector modern awards.
>
> Note: The review required by this item is in addition to the annual wage reviews and 4 yearly reviews of modern awards that FWA is required to conduct under the FW Act.
>
> (2) In the review, FWA must consider whether the modern awards:
>
> (a) achieve the modern awards objective; and
>
> (b) are operating effectively, without anomalies or technical problems arising from the Part 10A award modernisation process.
>
> (2A) The review must be such that each modern award is reviewed in its own right. However, this does not prevent FWA from reviewing 2 or more modern awards at the same time.
>
> (3) FWA may make a determination varying any of the modern awards in any way that FWA considers appropriate to remedy any issues identified in the review.
>
> Note: Any variation of a modern award must comply with the requirements of the FW Act relating to the content of modern awards (see Subdivision A of Division 3 of Part 2-3 of the FW Act).
>
> (4) The modern awards objective applies to FWA making a variation under this item, and the minimum wages objective also applies if the variation relates to modern award minimum wages.
>
> (5) FWA may advise persons or bodies about the review in any way FWA considers appropriate.
>
> (6) Section 625 of the FW Act (which deals with delegation by the President of functions and powers of FWA) has effect as if subsection (2) of that section included a reference to FWA's powers under subitem (5).'

[16] The legislative provisions applicable to the transitional review were considered in a decision relating to the *Modern Awards Review 2012* given on 29 June 2012. 4 In that decision the Full Bench dealt with various preliminary issues relating to the approach to be adopted in the transitional review. Amongst other things, the Full Bench noted:

'**[23]** First, any variation of a modern award must comply with the requirements of the FW Act which relate to the content of modern awards. These requirements are set out in Subdivision A of Division 3 of Part 2-3 of the FW Act...

[25] Any variation to a modern award arising from the Review must comply with s.136 of the FW Act and the related provisions which deal with the content of modern awards (ss.136-155 of the FW Act) ...

[89] In circumstances where a party seeks a variation to a modern award in the Review and the substance of the variation sought has already been dealt with by the Tribunal in the Part 10A process, the applicant will have to show that there are cogent reasons for departing from the previous Full Bench decision, such as a significant change in circumstances, which warrant a different outcome ...

[99] To summarise, we reject the proposition that the Review involves a fresh assessment of modern awards unencumbered by previous Tribunal authority. It seems to us that the Review is intended to be narrower in scope than the 4 yearly reviews provided in s.156 of the FW Act. In the context of this Review the Tribunal is unlikely to revisit issues considered as part of the Part 10A award modernisation process unless there are cogent reasons for doing so, such as a significant change in circumstances which warrants a different outcome. Having said that we do not propose to adopt a "high threshold" for the making of variation determinations in the Review, as proposed by the Australian Government and others.

[100] The adoption of expressions such as a "high threshold" or "a heavy onus" do not assist to illuminate the Review process. In the Review we must review each modern award in its own right and give consideration to the matters set out in subitem 6(2). In considering those matters we will deal with the submissions and evidence on their merits, subject to the constraints identified in paragraph [99] above.'

[17] The modern awards objective is set out in s.134 of the *Fair Work Act 2009* (the FW Act) as follows:

'134 The modern awards objective

What is the modern awards objective?

(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

(a) relative living standards and the needs of the low paid; and

(b) the need to encourage collective bargaining; and

(c) the need to promote social inclusion through increased workforce participation; and

(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and

(e) the principle of equal remuneration for work of equal or comparable value; and

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

*This is the **modern awards objective**.*

When does the modern awards objective apply?

(2) The modern awards objective applies to the performance or exercise of the FWC's modern award powers, which are:

(a) the FWC's functions or powers under this Part; and

(b) the FWC's functions or powers under Part 2 6, so far as they relate to modern award minimum wages.

Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284).'

[18] The FW Act contains specific provisions concerning modern award terms relating to outworkers. These are set out at

s.140 of the Act:

'140 Outworker terms

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

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

(b) terms relating to the conditions under which an outworker entity may arrange for work to be performed for the entity (either directly or indirectly), if the work is of a kind that is often performed by outworkers.

Note: A person who is an employer may also be an outworker entity (see the definition of *outworker entity* in section 12).

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

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

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

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

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

Background to the outworker provisions of the modern award

[19] Schedule F 5 of the modern award deals specifically with outworkers. Special provisions for outworkers have existed in federal awards for some decades. The current scheme broadly owes its origins to a 1987 decision by Deputy President Riordan.6 In that decision the Deputy President stated:

> 'The evidence and material in this case discloses a very distressing situation which has no place in a society which embraces the concepts of social justice. The undisputed facts reveal the existence of widespread and grossly unfair exploitation of migrant women of non-English speaking background who are amongst the most vulnerable persons in the work-force." 7

[20] Deputy President Riordan was particularly concerned with the use of complex contractual arrangements in a way that facilitated widespread avoidance or evasion of duties and obligations imposed by the award. The Deputy President inserted a set of provisions specific to outworkers into the *Clothing Trades Award 1982* which, in modified form, continued to exist until the creation of the modern award. These included provisions with regard to record keeping and specific enforcement mechanisms. They also included detailed provisions aimed at ensuring regularity of hours and minimum levels of income.

[21] The modern award was made by the Australian Industrial Relations Commission as one of 17 priority modern awards. An exposure draft of the modern award was published on 12 September 2008. It included outworker provisions based on those in the *Clothing Trades Award*, but further negotiated and updated by some interested parties from government and the TCFUA. From there all interested parties were given the opportunity to make written and oral submissions in response to the exposure draft. None of the major employer groups made submissions in support of significant changes to the outworker provisions contained in the exposure draft. One feature of the exposure draft that differed from the *Clothing Trades Award* was that the latter defined outworkers as a person who performed work for an employer outside the employer's workshop of factory under a 'contract of service'. In other words it only covered outworkers who were employees. The exposure draft on the other hand, included in the definition of outworker:

> 'an individual who is a party to a contract for services and who, for the purposes of the contract, performs work:
>
> (i) in the textile, clothing or footwear industry; and
>
> (ii) at private residential premises or at other premises that are not business or commercial premises of the other party to the contract, or (if there are two or more other parties to the contract) of any of the other parties to the contract.'

[22] This broader definition, which in effect brought contractors within the reach of the award, reflected s.576K of the *Workplace Relations Act 1996.* This provision had been enacted by the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008,* which, inter alia, initiated the process of award modernisation. According to the supplementary explanatory memorandum to the Bill (at paragraph 22) this provision was included because:

> 'Outworker arrangements are typically complex and outworkers are not always engaged as a direct employee of the

business contracting the work. Often outworkers are engaged under contracting arrangements.'

[23] The supplementary explanatory memorandum continued:

> 'The amendment will ensure that modern awards can include provisions relating to both employee outworkers and to contract outworkers and to contract outworkers in the textile, clothing or footwear industry.'

[24] The modern award was published on 19 December 2008. In the accompanying decision, the only comments the Commission made about the outworker provisions were the following:

> '**[150]** Important submissions were also made in relation to the regulation of outworkers. There has been no disagreement about the need to properly protect this class of employee. In the submissions of the TCFUA and some State governments, it was put that we should ensure that existing State legislation which protects outworkers should not be inadvertently overridden by the modern award. We agree with this and have made provision for the saving of relevant State legislation.' 8

[25] Some relatively minor amendments were made to the outworker provisions in the modern award by Fair Work Australia on 3 March 2010. 9 These, inter alia, changed the definition of outworker by specifically referring to the definition in the recently passed FW Act. The revised definition of outworker in the legislation continued to include individuals performing work 'for the purpose of a contract for the provision of services'. The current outworker provisions in the modern award are attached to this decision.

The Consent Position

[26] As part of the 'consent position', the TCFUA, AIG, TFIA, ABI and Business SA supported the following nine changes to Schedule F of the modern award:

1. The insertion of the following clause at the beginning of Schedule F:

> 'For information in relation to the operation of this Schedule the following organisations can be contacted for further information:
>
> - Australian Industry Group
> - Business SA
> - NSW Business Chamber
> - Textile, Clothing and Footwear Union of Australia.'

2. Amending clause F.2.2 (a) (viii) so that the work record made and retained by the principal must include 'the time (including sewing time) for the work required on each garment, article or material', as opposed to merely the 'the sewing time' for the work etc. as now.

3. Amending clause F.3.2 (b) so that the written agreement between the principal and the worker must indicate - if the worker is to be provided with work on a part time basis - whether agreed numbers of hours 'are to be averaged and over what period'.

4. Amending clause F.3.4(b) so that the work record in respect of arrangements made under the clause includes the details of the time standard applied in accordance with clause F.4.4(a) in order to determine the appropriate 'time (including sewing time)' for the purposes of clause F.2.2(a)(viii), as opposed to merely 'the sewing time' as now.

5. Amending F.3.4 (c) so that work records in respect of arrangements under the clause must indicate the number of working hours to complete the work by multiplying the relevant number of garments etc. by 'the time (including sewing time' referred to in clause F.2.2, as opposed to merely the 'sewing time' per garment etc. as now.

6. Amending clause 4.2(a) to allow a principal to provide a worker with regular part time work of no less than 15 regular hours per week (as opposed to 20 as now); or no less than 10 regular hours per week with the consent of the TCFUA (as opposed to 15 as now).

7. Inserting a new clause allowing regular part time work to be averaged over a period not exceeding four consecutive weeks.

8. Inserting a clause ensuring that payment for regular part-time hours where there has been agreement to average those

hours is based on the average number of hours agreed (as opposed to, for instance, the actual number of hours worked.)

9. Making a number of amendments to the appendix to Schedule F to ensure that the information provided to outworkers reflects the amendments to the schedule as well as some other minor changes.

[27] The parties to the consent position submitted that the consent position is necessary to achieve the modern awards objective for the following reasons:

- the averaging of hours is a flexible modern work practice which is not presently a feature of schedule F of the TCF Award (s.134(1)(d));
- the averaging of hours may assist in providing greater stability in income for outworkers which supports the relative living standards and needs of the low paid (s.134 (1)(a));
- the appendix to schedule F assists in providing a simple and easy to understand modern award system (s.134(1)(g));
- the identification of relevant organisations within schedule F and the appendix for the provision of information regarding the operation of the award assists in providing a simple and easy to understand modern award system (s.134(1)(g)).

[28] The parties to the consent position relied on the evidence led by the TCFUA in the proceedings. 10

[29] The changes to Schedule F agreed to by TCFUA, AIG, ABI, TFIA and Business SA in their 'consent position' can be grouped into four categories:

1. Changes to make clear that work records must include all the time taken to make each garment etc. (not just 'sewing time');

Changes to allow regular part time hours to be averaged over a period of up to four weeks;

2. Changes to allow regular part time hours to be no less than 15 per week (or 10 with the consent of the TCFUA);

3. Changes to improve the provision of information to users of the Schedule.

[30] We are satisfied that the changes agreed to by TCFUA, AIG, ABI, TFIA and Business SA would help ensure that the modern award complies with the modern awards objective. In particular the changes to the part time provisions are consistent with more flexible modern work practices and the efficient and productive performance of work. The other changes will clarify the operation of the modern award. We consider it appropriate to vary the modern award in line with the proposed changes.

The AIG's Jurisdictional Argument

[31] Despite the resolution of most of their application through the 'consent position' the AIG continued to submit that parts of Schedule F are beyond jurisdiction and should be deleted. In particular, AIG submitted that Schedule F.6.3, F.6.4 and F.7 are not contemplated for inclusion in modern awards by ss.139, 140 and 142 of the FW Act, and are therefore beyond statutory power.

[32] AIG submitted that the terms of clause F.6, which focuses on award compliance and a mechanism for the union to ensure compliance with the award, are not contemplated by any of the matters identified in s.139. AIG agreed that s.140 of the FW Act defines outworker terms for the purpose of terms which may be included in modern awards. However AIG submitted that clause F.6 is not about '*conditions which an outwork entity may arrange for work to be performed to the entity.*' Section 140 did not therefore create jurisdiction for the Commission to include F.6 in the modern award.

[33] AIG noted that s.142 of the FW Act enables modern awards to include terms that are incidental to the terms identified in ss. 139 or 140 of the FW Act, or are machinery terms. However it submitted that for a term to be '*incidental*' it must not only be incidental to a permitted or required matter in the modern award but also must be '*essential*' for the purpose of making a particular term operate in a practical way. AIG submitted that clause F.6 is not 'essential' as the FW Act already requires compliance with modern award terms and provides a mechanism for the union to review and inspect records. Nor is F.6 a '*machinery term*' as this refers to such matters as title, date or table of contents.

[34] With regard to clause F.7 of the modern award, AIG submitted that the process for the recovery of monies from an apparent principal is already provided in Part 6-4A of the FW Act (which commenced on 1 July 2012). Given that these statutory provisions '*wholly and entirely traverse the same ground that F.6.3 and F.7 traverse... those terms cannot be necessary for Schedule F to do its work.*' Moreover, AIG submitted, if those terms did not exist in the modern award, the net result would be no different as a result of s.483 (a) to (c). 11 AIG concluded that F.7 as an '*enforcement*' provision was not permitted by ss.139, 140 or 142 of the Act.

[35] The AIG's submissions were supported by ABI, TFIA, and Business SA. They were opposed by the Commonwealth

Government, TCFUA, and the ACTU.

[36] The Commonwealth rejected as misconceived the submission that F6.3, F6.4 and F7 were not needed because of the enactment of Part 6-4A. In particular, Schedule F utilises the powers referred to the Commonwealth by the States as well as the core powers '*thereby enabling coverage of all outworker entities, whatever their corporate or non-corporate status, who directly or indirectly arranged for work to be performed by outworkers*'. 12 Part 6-4A, by contrast, is expressly limited to the core constitutional powers available to the Commonwealth Parliament, and does not rely on the referred powers. Thus any outworkers who are not employed or contracted by a corporation (and are not in a Territory) would not be covered by the provisions of Part 6-4A - though they would be by Schedule F of the modern award. '*Taking F7 out would leave those persons vulnerable, and for that reason it should not be done.*' 13

[37] The Commonwealth submitted that the provisions of Schedule F are within the general notion of terms relating to the conditions under which an employer may employ employees who are outworkers; and terms relating to the conditions under which an outworker entity may arrange for work to be performed for the entity (either directly or indirectly), if the work is of a kind that is often performed by outworkers, as provided for by s.140 of the Act. The term '*conditions*' has historically been given a very wide meaning. The Commonwealth also drew attention to paragraph 548 of the explanatory memorandum which stated that:

> 'Clause 140 is intended to give Fair Work Australia broad scope to include terms dealing with chain of outworkers, in particular it will allow terms dealing with chain of contract arrangements, registration of employers, employer record keeping and inspection to be included in modern awards.'

[38] We note that in 1999, a Full Bench of the Australian Industrial Relations Commission considered whether similar provisions to Schedule F which were then in the *Clothing Trades Award 1982* were "allowable award matters" under s.89A(2) of the *Workplace Relations Act 1996* (the WR Act). These included similar provisions regarding record keeping requirements, and inspection and enforcement mechanisms. Under s.89A(2)(t) of the WR Act awards could include:

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

[39] As part of its consideration, the Commission concluded that '*Giving the words "pay and conditions" their "ordinary meaning having regard to industrial relations usage" ... we are of the view that clauses 26, 27 and 27A come within the description of "pay and conditions for outworkers" and are also "incidental to" ..."pay and conditions for outworkers."* 14

[40] We are satisfied that the word "*conditions*" should be given its ordinary meaning having regard to its industrial relations usage. Accordingly we are quite satisfied that the provisions at F.6.3, F.6.4 and F.7 are "*terms relating to the conditions under which an employer may employ employees who are outworkers, or terms relating to the conditions under which an outworker entity may arrange for work to be performed for the entity (either directly or indirectly)...*". Such terms are expressly contemplated for inclusion in a modern award by s.140 of the FW Act. Accordingly we reject AIG's contention that there is a jurisdictional bar to their inclusion in the modern award. The AIG's application for their deletion from the modern award is therefore dismissed.

The Ark's Application

[41] The Ark is a Melbourne based clothing business with 40 employees. It purchases over $1 million worth of manufactured clothing from Melbourne based makers. In its application (AM2012/93) The Ark sought "whatever variations are most efficient to remove legitimate subcontractors from the scope of Schedule F of the Award."

[42] The Ark submitted that the Australian TCF manufacturing industry needs to be competitive and flexible if it is to survive in the face of global competition. Overseas manufacturers can utilise a cheap, deregulated workforce which results in labour rates which are a fraction of the labour rates paid in Australia. A small manufacturing sector has been able to survive in Australia by being able to utilise a small but efficient flexible labour force despite the high labour rates paid by Australian manufacturers. Flexibility enables small runs of goods to be produced quickly enabling sales to respond to market demands. Overseas manufacturers require large orders and long lead times. Companies utilising local manufacturers can make smaller runs initially and quickly make more stock if the market demands. This ability to respond quickly is a major competitive advantage for Australian manufacturers. However, according to The Ark, the modern award conditions substantially reduce this vital flexibility by:

- Forcing the industry to adopt conditions of labour hire more suited to industries that do not have the same need for flexibility;
- Not recognising the need for individual workers to carry out work for multiple Principals;
- Not recognising the intricate and interconnected supply chain required to produce most goods;

- Not recognising the seasonal nature of the work. Fashion houses have two or three seasons each year and the work is intense as stock is prepared for each season. However, between the seasons the work load may be quite weak.

[43] The Ark also submitted that the compliance requirements of Schedule F add to costs and reduce competitiveness. More flexibility would also give outworkers greater control over their working hours. The Ark submitted that the introduction of the modern award had led to work being moved offshore.

[44] The following gave evidence on behalf of The Ark:

- Jon Griffin (chartered accountant);
- Hung Tranh Trinh (manufacturer);
- Denise Longley (computer pattern maker);
- Arthur Thomas (manufacturer; and
- Jenny Layton (Principal, The Ark).

[45] Mr Griffin stated that it was impossible to comply with both the Income Tax Act and the Fair Work Act, as an outworker could be an employee under the latter and a contractor under the former. This could lead a business operator into committing an offence under the Tax Act. 15 He also asserted that treating a contractor as an employee led to an increase in costs for the business, such as payroll tax, workers' compensation premiums, superannuation etc.16

[46] Mr Trinh gave evidence that the requirement to provide at least 20 hours a week made it difficult for him to employ outworkers. Workers did not necessarily want that much work and that amount of work was not always available. 17

[47] Ms Longley gave evidence that she would prefer to work from home, for a number of different companies. However under the modern award she had been forced to work in a factory. If she worked from home she was deemed to be an outworker and each company had to engage her for a minimum of 20 hours. They did not necessarily have enough work to make up 20 hours. "*I work for five companies - I do not have a 100 hours in a week. I enjoy the flexibility of working when and with whom I want.*" 18 She said that she had bought her own computer pattern making equipment for $20,000, and earned a substantial wage. During her examination-in-chief she said that she charged a set hourly rate19. She said she preferred working for different companies for the variety.20

[48] Mr Thomas gave evidence that he had formerly used contractors to make a garment. Different contractors would perform different tasks, as one might need up to six different machines to complete a garment. During quiet periods there would not be enough work to employ this number of people. 21 When work was busy he could not afford to pay overtime.22 When he engaged contractors they worked for a number of different factories.23

[49] Ms Layton gave evidence that the lack of contractors within the industry affected the speed and efficiency of being able to respond to market demands. The Ark was established 22 years ago as a home based business. Under the modern award this would not have been possible. 24 During her examination-in-chief she said they needed different people at different times for different parts of the process and for the different fabrics and the different products they made. She compared her business to a house builder: '*you don't need an electrician, a plumber, a roofer, a brickie, a cabinet maker all year round. We don't either...we have a jeans maker, we might only sell jeans for four months of the year. So what do we do with that maker who's a jeans maker? You know, they don't become a T-shirt maker. The buttonholer doesn't - we don't need a buttonholer on T-shirts and we don't need them on jeans, so how do we employ a buttonholer when we're only going to do shirts for six months of the year and some of those shirts don't have buttons on them.*'25

[50] Ms Layton described what she saw as the difficulty for someone starting a business now had who needed '*an extra pair of hands sewing...But under Schedule F she couldn't afford to take someone on at 20 hours a week and guarantee that she would need that level of work done on a regular basis.*' 26

[51] In response to a question from the Bench, Ms Layton confirmed that the main problem she saw with Schedule F were the minimum hours, in combination with the requirement to pay overtime after 38 hours: '*Because of one person gives you 20 hours a week you have to find another person that only wants you for exactly 18 hours a week.*' 27

[52] The following witnesses gave evidence on behalf of the TCFUA:

- Michele O'Neil (National Secretary);
- Susan Tran (outworker);
- Ky Dang To (outworker); and
- Elizabeth Macpherson (Organiser and Compliance Officer).

[53] Ms O'Neil said that '*outworkers as a group within the TCF industry are regularly required to work under appalling conditions of engagement. These include, the practice of sham contracting, the imposition of unreasonable completion times by principals, long and excessive hours of work, very low rates of pay, non payment of overtime, superannuation*

and leave entitlements. Frequently, outworkers are required to register an ABN (or increasingly to incorporate) in order to receive work. If they refuse, the principal will go elsewhere.' 28

[54] Ms O'Neill stated that:

> *'The TCFUA collects extensive data on the level of compliance in the industry. In addition to its daily organising work and general contact with thousands of workers and workplaces, between 1 July 2010 and 31 December 2012, the TCFUA undertook compliance checks in 1,319 workplaces in the TCF industry and had direct contact with 1,184 outworkers during the same period. The union's assertions in relation to the experience of outworkers are evidence based and grounded in direct and intensive contact with these workers.*
>
> *The TCFUA has observed a small but not insignificant change in the levels of compliance with the minimum award conditions over the last 12 months to 2 years. After 20 years or so, the union is finally starting to see a difference to the working conditions of outworkers. For the first time some outworkers are receiving the correct minimum weekly award wage and superannuation is being paid on their behalf for the first time in the entire time they have lived and worked in Australia.'* 29

[55] Ms Tran gave evidence that she has worked as an outworker since 2006. She is paid per piece and received about $4-$5 per hour, with no superannuation, sick leave, public holidays or annual leave. She said:

> *'The clothing company tells me that I must have ABN or ACN Pty Ltd to work with them. If not, it is very difficult to get work.'* 30

[56] Mr Ky Dang To gave evidence that until the recent involvement of the union he got paid about $7 an hour without entitlements such as superannuation, paid holidays etc. *'Recently the Company agreed to engage me to be a full time outworker under Ethical Clothing Australia program. I am paid by hour rate and the work is regular every week....However, my employer keeps giving me a hard time and says he wants me to become subcontractor.'* 31

[57] Ms Macpherson stated that:

> *'In my experience, sham contracting arrangements are rife in the TCF industry. For example, I have met with outworkers who were told to say that they had engaged a casual such as one of their children so they could be classified as an employer, and therefore were not an outworker. Outworkers were told that if they did this, then they were guaranteed on going work.'*

[58] Ms Macpherson also said that:

> *'I have been told by outworkers of situations where the principal has reduced, or stopped their work in response to the outworker refusing to be forced into a sham contracting arrangement.'* 32

[59] We are satisfied, based on the evidence, that the current working hours restrictions do present obstacles in the way of some businesses in the TCF industry. However we are hopeful that the changes agreed to as part of the 'consent position' will add flexibility and reduce some of these obstacles.

[60] We are also satisfied, based on the evidence presented by the TCFUA (and to some extent even The Ark's witnesses), that there continues to be a poor level of understanding of, and compliance with, the outworker provisions of the modern award, though we note Ms O'Neil's evidence that there has been some improvement in the recent past. It is reasonable to infer from the evidence that removal of contractors from the remit of the modern award would lead to an increase in 'sham contracting' in order to evade award obligations. Indeed the changes made to the outworker provisions by the FW Act were clearly intended to give the Commission the power to include non employee working arrangements precisely to prevent these arrangements being used in this way. We do not consider such a major change in the modern award - with all its potential downside for a very vulnerable section of the workforce - should be made without a much stronger evidentiary case than that presented by The Ark.

[61] Moreover even if we had been persuaded by the merits of The Ark's case, it is very doubtful that we have the power to grant their application to remove 'legitimate subcontractors' from the scope of the modern award. As Ms Wiles pointed out in her submission on behalf of the TCFUA, s.163 of the FW Act provides special criteria relating to changing the coverage of modern awards. In particular s.163(1) states:

> 'The FWC must not make a determination varying a modern award so that certain employers or employees stop being covered by the award unless the FWC is satisfied that they will instead become covered by another modern award (other than the miscellaneous modern award) that is appropriate for them.'

[62] Section 12 of the FW Act defines the terms "employee" and "employer". It indicates that the appropriate definition is to be found in the first Division of each Part. A note draws particular attention to Part 6-4A - 'Special provisions about TCF outworkers.' A similar note draws attention to Part 6-4A at s.133 which deals with the definition of "employee" and "employer" in relation to modern awards. Division 2 of Part 6-4A is headed "TCF Contract Outworkers Taken to be Employees in Certain Circumstances". S.789BA(1) states that the Division covers the provisions of the FW Act (with

some exceptions that are not relevant here.) Later in the Division s.789BB states:

'789BB TCF contract outworkers taken to be employees in certain circumstances

(1) For the purposes of the provisions covered by this Division:

(a) a TCF contract outworker is taken to be an employee (within the ordinary meaning of that expression), and to be a national system employee, in relation to particular TCF work performed by the outworker, if:

(i) the work is performed directly or indirectly for a Commonwealth outworker entity; and

(ii) if the entity is a constitutional corporation—the work is performed for the purposes of a business undertaking of the corporation; and

(b) the person (whether a Commonwealth outworker entity referred to in subparagraph (a)(i) or another person) that engages the outworker is taken to be the employer (within the ordinary meaning of that expression), and to be a national system employer, of the outworker in relation to the TCF work.

Note 1: See section 17A for when TCF work is performed *directly* or *indirectly* for a person.

Note 2: See also section 789BC, which allows regulations to deal with matters relating to TCF contract outworkers who are taken by this section to be employees.

(2) A *TCF contract outworker* is a TCF outworker who performs work other than as an employee.

(3) In interpreting any of the following for the purposes of the provisions covered by this Division:

(a) provisions of this Act;

(b) any instrument that is relevant to the relationship between the TCF contract outworker and the person referred to in paragraph (1)(b);

an interpretation that is consistent with the objective stated in subsection (4) is to be preferred to an interpretation that is not consistent with that objective.

(4) The objective is that a TCF contract outworker who is taken to be an employee in relation to TCF work should have the same rights and obligations in relation to the work as an employee would have if he or she were employed by the person referred to in paragraph (1)(b) to do the work.

(5) This section has effect subject to regulations made for the purposes of section 789BC.

[63] A 'Commonwealth outworker entity' is defined in s.12 as an 'entity that is an outworker entity otherwise than because of s.30F or 30Q' (that is the provisions that extend the meaning of outworker entity in relation to a referring State.

[64] While not a model of pellucid drafting, we conclude that the combined effect of all the relevant provisions is that the Commission must not vary the modern award so that certain types of outworkers are excluded from coverage unless it is satisfied that they would instead be covered by another modern award. It is clear that acceding to The Ark's application would mean that at least some contract outworkers would be excluded from award coverage altogether. This is not something permitted by the FW Act. Both for this reason, and for the previous reasons referred to, we dismiss The Ark's application.

Non-outworker and technical matters

[65] Subsequent to the Full Bench concluding its proceedings on 9 July, correspondence was received from the TCFUA on 18 July, confirming a submission made at the commencement of the proceedings of the Full Bench on the 9 of July, that the parties had further agreed additional information relevant to the proposed variation to clause 20.6, (Pedestrian forklift operator) That additional information is as follows:

- That the variation will be prospective (i.e. operate from the date of the determination) and

- That the variation to clause 20.6 made by the Determination does not take effect so as to require an employee engaged as a Pedestrian forklift operator to repay any component of the wages pertaining to the Pedestrian forklift rate of pay paid in respect to the period 1 January 2010 until the date of the Determination.

[66] The correspondence made clear that the parties did not seek to have the additional information above included in the Determination, but rather that it be referenced in the decision of the Full Bench that accompanies the determination.

[67] The Full Bench has considered the terms of the draft determination proposed by the TCFUA, ABI and AIG in so far as it deals with the non-outworker matters and technical amendments. We are satisfied that the proposed amendments are

consistent with the modern awards objective in s.134 of the Act. Further, we are satisfied the amendments proposed will allow the awards to operate more effectively, without anomalies or technical problems arising from the Part 10A award modernisation process. Accordingly, we think it appropriate to amend the award consistent with the terms of the draft determination provided by the TCFUA on the 4 July 2013.

[68] In respect to the "additional information" relevant to the variation of clause 20.6, we confirm that the determination operates in respect to all matters, including clause 20.6, prospective from the date of determination. That is, the variations do not have retrospective effect.

Determination

[69] A determination varying the modern award is attached to this decision.

SENIOR DEPUTY PRESIDENT

Appearances:

Ms V Wiles with *Ms M O'Neil* for the Textile, Clothing and Footwear Union of Australia

Mr T Clarke for the Australian Council of Trade Unions

Ms S Marshel and *Ms S Dann* for FairWear

Mr R Bunting, Solicitor for the Australian Government

Mr M Mead for the Australian Industry Group

Ms J Kellock and *Mr N Tindley* for the Council of Textile & Fashion Industries of Australia

Mr S McIvor and *Ms Z Jenkins* for Australian Business Industrial

Mr H Wallgren for Business SA

Mr Metcalfe, of Counsel and *Ms J Layton* for The Ark Clothing Company

Hearing details:

2013

MELBOURNE

7 March

9, 10, 11 July

Attachment A

Schedule F—Outwork and Related Provisions
F.1 Definitions
F.1.1 Arrangement means any arrangement made by a principal with any legal or natural person to have work carried out for the principal, whether or not the person carries out the work, but does not include employment of an employee who is not an outworker to carry out the work.
Note: The obligations in this part apply whether or not a principal has obtained the work which is the subject of the arrangement pursuant to any other arrangement or from any other person.
F.1.2 Ordinary working week means the hours and days occurring between midnight on Sunday night and midnight on Friday night in any week.
F.1.3 Outworker has the same meaning as that contained in section 12 of the *Fair Work Act 2009* (Cth).
F.1.4 Principal means:
(a) An employer; or