

2010-2011-2012

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**FAIR WORK AMENDMENT (TEXTILE, CLOTHING AND FOOTWEAR  
INDUSTRY) BILL 2011**

REVISED EXPLANATORY MEMORANDUM

THIS MEMORANDUM TAKES ACCOUNT OF AMENDMENTS MADE BY  
THE SENATE TO THE BILL AS INTRODUCED

(Circulated by authority of the Minister for Employment and Workplace Relations,  
the Honourable Bill Shorten MP)



## **FAIR WORK AMENDMENT (TEXTILE, CLOTHING AND FOOTWEAR INDUSTRY) BILL 2011**

### **OUTLINE**

The Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011 (the Bill) will amend the *Fair Work Act 2009* (FW Act) to enhance existing protections for vulnerable workers in the textile, clothing and footwear (TCF) industry.

Research has consistently shown that outworkers in the TCF industry suffer from unique vulnerabilities as a result of their engagement or employment in non-business premises. These vulnerabilities are often exacerbated by poor English language skills, a lack of knowledge about the Australian legal system and low levels of union membership in the industry.

Despite the existing provisions in the FW Act, the relevant modern award and in state legislation, outworkers continue to experience poor working conditions.

This Bill is intended to ensure equitable and consistent protection for these workers.

The Bill will also address a limitation that currently exists in relation to right of entry into premises in the TCF industry operating under ‘sweatshop’ conditions.

The Bill will:

- extend the operation of most provisions of the FW Act to contract outworkers in the TCF industry
- provide a mechanism to enable TCF outworkers to recover unpaid amounts up the supply chain
- extend specific right of entry rules that apply to suspected breaches affecting outworkers (which allow entry without 24 hours notice) to the industry more broadly, with an exception for the principal place of business of a person with appropriate accreditation (to which the standard right of entry rules would apply)
- enable a TCF outwork code to be issued.

These changes will promote fairness and ensure a consistent approach to workplace entitlements and protections for a class of workers that is widely recognised as being highly vulnerable to exploitation.

**Financial Impact Statement**

Nil

*NOTES ON CLAUSES*

In these notes on clauses, the following abbreviations are used:

FW Act	<i>Fair Work Act 2009</i>
FWA	Fair Work Australia
FWO	Fair Work Ombudsman
NES	National Employment Standards
TCF	textile, clothing and footwear
TCF Award	Textile, Clothing, Footwear and Associated Industries Award 2010
the Bill	Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011

**Clause 1 – Short title**

1. This is a formal provision specifying the short title.

**Clause 2 – Commencement**

2. The table in this clause sets out when the provisions of the Bill commence.

**Clause 3 – Schedule(s)**

3. This clause provides that an Act that is specified in a Schedule is amended or repealed as set out in that Schedule, and any other item in a Schedule operates according to its terms.

**Schedule 1 – Amendments**

*Fair Work Act 2009*

**Item 1 – At the end of section 4**

**Item 2 – After subsection 9(5)**

**Item 3 – At the end of Division 3 of Part 1-1**

4. These items amend provisions in Division 3 of Part 1-1 of the FW Act. Division 3 of Part 1-1 (sections 4 to 9) provides a guide to the FW Act. Section 4 contains an overview of the FW Act. Sections 5 to 9 provide an overview of chapters 2 to 6 of the FW Act.

5. Item 1 inserts new subsection 4(4) that explains that new Schedule 1 to the FW Act (as inserted by this Bill) contains application, saving and transitional provisions relating to amendments of the FW Act.

6. Item 2 inserts new subsection 9(5A), which states that new Part 6-4A contains special provisions about TCF outworkers.

7. Item 3 inserts new section 9A into the Guide in Division 3 of Part 1-1. New section 9A provides that Schedule 1 contains application, saving and transitional provisions relating to amendments of the FW Act. The note to this item indicates that application, saving and transitional provisions relating to the enactment of the FW Act and States becoming referring States are contained in the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

**Item 4 – At the end of section 11**

**Item 7 – Section 12 (at the end of the definition of *employee*)**

**Item 9 – Section 12 (at the end of the definition of *employer*)**

**Item 13 – Section 12 (at the end of the definition of *national system employee*)**

**Item 15 – Section 12 (at the end of the definition of *national system employer*)**

**Item 24 – At the end of section 25**

**Item 25 – At the end of section 42**

**Item 26 – At the end of section 60**

**Item 27 – At the end of section 133**

**Item 28 – At the end of section 170**

**Item 30 – At the end of section 259**

**Item 31 – At the end of section 283**

**Item 32 – At the end of section 301**

**Item 33 – At the end of section 308**

**Item 34 – At the end of section 322**

**Item 35 – At the end of section 335**

**Item 36 – At the end of section 380**

**Item 37 – At the end of section 407**

**Item 54 – At the end of section 529**

**Item 55 – At the end of section 538**

**Item 56 – At the end of section 561**

**Item 57 – At the end of section 574**

**Item 58 – At the end of section 680**

**Item 59 – At the end of section 720**

**Item 60 – At the end of section 736**

**Item 62 – At the end of section 791**

8. These items insert notes to sections of the FW Act that set out the meaning of employee for the Parts in which the sections are contained. The new notes refer readers to Division 2 of new Part 6-4A, which provides that TCF contract outworkers are taken to be employees for the purposes of most provisions of the FW Act (see item 61).

**Item 12 – Section 12 (note at the end of the definition of *national system employee*)**

**Item 14 – Section 12 (note at the end of the definition of *national system employer*)**

9. These items make minor amendments to notes consequential upon the insertion of the new notes described in paragraph 8.

**Item 4A – Section 12**

**Item 6 – Section 12**

**Item 10 – Section 12**

**Item 11 – Section 12**

**Item 16 – Section 12**

**Item 17 – Section 12**

**Item 18 – Section 12**

**Item 19 – Section 12**

**Item 22 – Section 12**

10. The amendments made by items 4A, 6, 10, 11, 16, 17, 18, 19 and 22 are signpost definitions – that is, provisions that point readers to definitions included in the substantive provisions of the FW Act. These definitions are discussed in the relevant parts of this explanatory memorandum.

**Item 5 – Section 12**

11. Item 5 inserts a definition of Commonwealth outworker entity. A Commonwealth outworker entity is an outworker entity otherwise than as extended by sections 30F or 30Q of the FW Act. Sections 30F and 30Q of the FW Act extend the meaning of outworker entity to give effect to the referral of powers by state parliaments.

12. The effect of item 5 is that the expression Commonwealth outworker entity means any of the following entities, other than in their capacity as a national system employer:

- a constitutional corporation
- the Commonwealth
- a Commonwealth authority
- a body corporate incorporated in a Territory
- a person who arranges for work to be performed (directly or indirectly), where the work is of a kind often performed by outworkers, and the arrangement is connected with a Territory.

13. A person may be a Commonwealth outworker entity even if they do not directly engage outworkers. In fact, the expression Commonwealth outworker entity is often used in the context of describing entities that indirectly arrange for TCF work to be performed by entering into arrangements with others as part of a supply chain, which ultimately results in the performance of work by outworkers.

**Item 8 – Section 12 (definition of *employee record*)**

14. Item 8 repeals the definition of employee record (which operates by reference to the definition in the *Privacy Act 1988*) and substitutes a new definition that reflects the effect of Division 2 of new Part 6-4A (which provides that TCF contract outworkers are taken to be employees for the purposes of most provisions of the FW Act (see item 61)).

**Item 20 – Section 12 (definition of *TCF outworker*)**

15. Item 20 amends the current definition of TCF outworker to omit the phrase ‘whose work is covered by a TCF award’. This amendment relates to the changes to the right of entry provisions made by the Bill, which include a new concept of TCF award worker. These changes mean that a reference to a TCF award in the definition of TCF outworker is no longer necessary.

**Item 21 – Section 12**

16. Item 21 inserts a new definition of TCF work, which is defined to mean work in the textile, clothing or footwear industry.

**Item 23 – After section 17**

17. This item inserts new section 17A, which outlines the manner in which the expressions directly and indirectly are used in relation to TCF work.

18. In relation to a chain or series of two or more arrangements for the supply or production of goods produced by a person performing TCF work:

- the work is taken to be performed directly for the person who employed or engaged the worker. That person is also, under this item, taken to have arranged for the work to be performed directly for the person
- the work is taken to be performed indirectly for every other person who is a party to an arrangement in the chain or series, each of whom is also, under this item, taken to have arranged for the work to be performed indirectly.

19. The effect of the item is that, in circumstances where there is a chain or series of two or more arrangements for the supply or production of goods produced by TCF work, a person performs work directly for the person who employs or engages the person to perform work. A person performs work indirectly for every other person who is a party to any of the arrangements in the chain or series of arrangements that led to the performance of the work (whether that person is one, two or more arrangements removed from the performance of the work).

**Item 29 – After subsection 203(2)**

20. Modern awards can, where appropriate, include outworker terms that apply to both employees and contract outworkers (section 140 of the FW Act). This allows the TCF Award to include terms that enable monitoring of the supply chain, such as registration and record keeping.

21. Section 200 of the FW Act ensures that enterprise agreements cannot undercut outworker terms.

22. Section 203 of the FW Act sets out the requirements to be met by a flexibility term in an enterprise agreement.

23. Item 29 inserts new subsection 203(2A) to provide further protection of outworker terms. The new provision relates to the content of a flexibility term in an enterprise agreement. New subsection 203(2A) provides that if an enterprise agreement includes terms that would be outworker terms if they were included in a modern award, the flexibility term must not allow the effect of the outworker terms to be varied.

## **RIGHT OF ENTRY**

24. Items 38-53 make amendments to the right of entry provisions of the FW Act. These amendments are designed to enable effective entry rights in relation to sweatshop premises in the TCF industry.

25. The amendments will ensure that permit holders who are entitled to represent workers in the TCF industry have additional entry rights to enter business premises. This is necessary to ensure effective entry rights to business premises operating under sweatshop conditions, as the existing requirement to give at least 24 hours notice of entry to such premises could limit the effectiveness of these rights.

26. Under the FW Act, specific rules apply to union entry to investigate suspected contraventions relating to TCF outworkers (subdivision AA of Division 2 to Part 3-4). These rules allow a permit holder to enter premises without giving 24 hours notice for the purposes of investigating a suspected contravention of:

- the FW Act or a term of a fair work instrument that relates to or affects an outworker whose industrial interests the permit holder's organisation is entitled to represent and who performs work on the premises (paragraph 483A(1)(a) of the FW Act)
- a designated outworker term that is in an instrument that relates to TCF outworkers whose industrial interests the permit holder's organisation is entitled to represent (paragraph 483A(1)(b) of the FW Act).

27. These amendments will broaden the entry rules in paragraph 483A(1)(a) of the FW Act. At present, this provision is limited to entry relating to outworkers (that is, those who perform work at residential premises or other premises not conventionally regarded as business premises). These amendments would extend the existing right to enter without notice in paragraph 483A(1)(a) to breaches relating to TCF award workers.

### **Item 40 – Subdivision AA of Division 2 of Part 3-4 (heading)**

### **Item 41 – Section 483A (heading)**

28. These items repeal and substitute the headings of Subdivision AA of Division 2 of Part 3-4 of the FW Act and of section 483A of the FW Act, to reflect the extension of entry rights in the TCF industry.

### **Item 38 – Section 478**

### **Item 39 – Paragraph 480(b)**

### **Item 43 – Paragraph 483A(1)(a)**

### **Item 44 – Paragraph 483A(1)(b)**

### **Item 45 – After subsection 483A(1)**

### **Item 48 – Subparagraphs 483B(3)(a)(ii) and (iii)**

### **Item 49 – Section 484**

**Item 50 – Paragraph 518(2)(ca)****Item 51 – Paragraph 518(2)(cb)****Item 52 – Paragraphs 518(2)(cc) and (d)****Item 53 – Paragraphs 518(3)(b) and (c)**

29. Item 45 inserts a new definition of TCF award worker.

30. The definition of TCF award worker covers employees whose work is covered by a TCF award, or individuals who, for the purpose of a contract for the provision of services, perform work that is covered by a TCF award.

31. The amendments made by items 38, 39, 43, 44 and 48 to 53 substitute references in Part 3-4 to TCF outworker with references to the broader TCF award worker.

32. The effect of these amendments is to extend the scope of the TCF specific right of entry rules in relation to suspected breaches of the FW Act and fair work instruments under paragraph 483A(1)(a) (which allow entry without the requirement to provide 24 hours notice) for breaches that relate to or affect an outworker to breaches that relate to or affect a TCF award worker.

33. Although the expression TCF outworker is replaced with TCF award worker in paragraph 483A(1)(b), this does not have the effect of changing the scope of that provision, as entry remains related to breaches of designated outworker terms – which is a term defined in section 12 of the FW Act (and regulation 1.04 of the *Fair Work Regulations 2009*). A designated outworker term is a term of a modern award, enterprise agreement, workplace determination or other instrument about one of a specified range of matters that relates to outworkers in the TCF industry.

**Item 42 – Subsection 483A(1)****Item 46 – At the end of section 483A**

34. Item 46 inserts new subsections 483A(6) and (7). These provisions provide an exception to the new entry rules that apply to accredited premises.

35. New subsection 483A(6) provides that the new entry rules in paragraph 483A(1)(a) do not apply to particular premises of a person if:

- the person is accredited by a prescribed person or body
- the accreditation is in writing and in force
- the premises are identified in the accreditation as the principal place of business of the accredited person.

36. The note to this provision makes clear that:

- if the new entry rules do not apply, the ‘standard’ entry rules in Subdivision A apply instead

- new subsection 483A(6) does not affect entry rights in relation to designated outworker terms under paragraph 483A(1)(b).

37. New subsection 483A(7) provides that before regulations can be made under new subsection 483A(6) specifying a particular person or body, the Minister must be satisfied that the person or body:

- has aims consistent with the objects of the new provisions in Part 6-4A, which are directed at eliminating exploitation of TCF outworkers, and
- has the endorsement of at least one employee organisation and at least one employer organisation that are entitled to represent the industrial interests of TCF award workers or of persons who employ or engage TCF award workers.

38. Item 42 makes an amendment to subsection 483A(1) of the FW Act that is consequential upon the insertion of new subsection 483A(6) by item 46.

#### **Item 47 – Subparagraph 483B(3)(a)(i)**

39. This item makes a technical change to section 483B of the FW Act. Subparagraph 483B(3)(a)(i) currently refers to a person who ‘employs’ a TCF outworker. As the workers to which this provision relates (now extended to TCF award workers) can be employees or contractors, this amendment changes the reference to ‘employs’ to ‘employs or engages’.

### **IMPROVED PROTECTION FOR TCF OUTWORKERS**

#### **Item 61 – After Part 6-4**

40. This item inserts new Part 6-4A into the FW Act to make special provisions about TCF outworkers.

41. Part 6-4A includes a range of measures to address the unique vulnerabilities of outworkers in the TCF industry. The new part addresses these issues by:

- extending the operation of most provisions of the FW Act to contract outworkers in the TCF industry (Division 2 of new Part 6-4A)
- providing a mechanism to enable outworkers to recover amounts owing up the supply chain (Division 3 of new Part 6-4A)
- enabling regulations to be made prescribing a TCF outwork code (Division 4 of new Part 6-4A).

42. These amendments will provide consistent workplace rights and protections for workers in the TCF industry regardless of whether they are employees or contractors, and provide enhanced enforcement of unpaid entitlements and monitoring of supply chain arrangements.

#### *New Division 1 - Introduction*

#### *New section 789AA – Guide to this Part*

43. New section 789AA provides a guide to Part 6-4A.

*New section 789AB – Meanings of employee and employer*

44. In this Part, the terms employee and employer have their ordinary meanings and are not limited to national system employees and employers (see sections 13 and 14 of the FW Act).

*New section 789AC – Objects of this Part*

45. New section 789AC sets out the objects of Part 6-4A. The objects are 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
- providing for a code dealing with standards of conduct and practice to be complied with by parties in the supply chain.

**Extension of FW Act to contract outworkers**

*New Division 2 – TCF contract outworkers taken to be employees in certain circumstances*

*New section 789BA – Provisions covered by this Division*

46. Division 2 of new Part 6-4A makes provision for TCF contract outworkers to be treated as employees for the purposes of the FW Act. New section 789BA provides that Division 2 applies to the provisions of the FW Act, subject to limited exceptions (paragraphs 789BA(1)(a) – (g)). These are:

- the right of entry provisions (in respect of which separate amendments are being made)
- the stand down provisions (which are dealt with comprehensively in the relevant TCF Award)
- the provisions that provide for the extended operation of the FW Act, or parts of it
- the provisions giving effect to the extension itself and associated savings, application and transitional arrangements.

47. New subsections 789BA(2) and 789BA(3) set out the manner in which the provisions of the FW Act that are affected by the amendments contained in new Division 2 are to be read together with the provisions that are not affected, and vice versa.

*New section 789BB – TCF contract outworkers taken to be employees in certain circumstances*

48. New section 789BB extends provisions of the FW Act that currently apply to employees and employers to TCF contract outworkers and entities that engage them.
49. This provision is intended to ensure that TCF contract outworkers have the same entitlements and protections under the FW Act as TCF employee outworkers.
50. New subsection 789BB(2) defines TCF contract outworker as a TCF outworker who performs work other than as an employee.
51. New paragraph 789BB(1)(a) provides that, where particular TCF work is performed directly or indirectly for a Commonwealth outworker entity for the purposes of the FW Act, the TCF contract outworker who performs the work will be taken to be an employee (within the ordinary meaning of that expression) and to be a national system employee.
52. Where the work performed by the TCF contract outworker is arranged directly or indirectly by a Commonwealth outworker entity that is a constitutional corporation, the TCF work must be performed for the purposes of a business undertaking of the corporation (new subparagraph 789BB(1)(a)(ii)).
53. The expressions directly and indirectly are explained in new section 17A. As the provision extends to work arranged indirectly, TCF contract outworkers engaged at the end of a series of arrangements are taken to be employees provided the requirements of new paragraph 789BB(1)(a) are met.
54. New paragraph 789BB(1)(b) provides that the person that engages such an outworker is taken to be the employer (within the ordinary meaning of the expression) and to be a national system employer of the outworker in relation to the TCF work for the purposes of the FW Act. This provision applies to the person taken to be the employer whether or not the person is a Commonwealth outworker entity or another person.
55. The objective of new section 789BB is set out in new subsection 789BB(4). The objective is that a TCF contract outworker who is taken to be an employee under this section should have the same rights and obligations in relation to the work as an employee would have in the same circumstances.
56. New subsection 789BB(3) provides guidance for interpreting the FW Act or any instrument that is relevant to the relationship between the TCF contract outworker and the person taken to be their employer under new section 789BB (for example, in interpreting the operation of the provisions of the relevant modern award). The new subsection provides that an interpretation of these instruments that is consistent with the objective set out in new subsection 789BB(4) is to be preferred to an interpretation that is not consistent with that objective.
57. New subsection 789BB(5) states that new section 789BB has effect subject to any regulations made under new section 789BC (regulations under new section 789BC may be made for the purpose of furthering the objective contained in new subsection 789BB(4)).

*New section 789BC – Regulations relating to TCF outworkers who are taken to be employees*

58. The regulation making power in new section 789BC is intended to enable the operation of provisions of the FW Act to be clarified or modified should this prove necessary to ensure the effective implementation of the objective of TCF contract outworkers having

the same rights as employees. The reference to furthering the objective is designed to make clear that while regulations might be made to address technical issues if they arise, regulations cannot be made to undercut the effectiveness of the extension of the FW Act to TCF contract outworkers.

59. New subsection 789BC(1) allows regulations to be made for the purpose of furthering the objective of TCF contract outworkers having the same rights and obligations in relation to the work as employees. These regulations may:

- provide that provisions covered by this Division apply in relation to deemed employees and deemed employers with specified modifications
- otherwise make provision relating to how provisions covered by this Division apply in relation to TCF contract outworkers and the person taken to be their employer under new section 789BB.

60. New subsection 789BC(2) allows for the regulations made under new subsection 789BC(1) to provide differently for the purposes of different provisions of the FW Act or in relation to different situations.

61. However, new subsection 789BC(3) makes clear that regulations may not be made to modify provisions dealing with offences or to create new offences.

### **Recovery of unpaid amounts**

#### *New Division 3 – Recovery of unpaid amounts*

62. New Division 3 will provide TCF outworkers with a mechanism to recover an unpaid amount from an entity further up the supply chain in circumstances where the person who is responsible for doing so has not paid the outworker.

63. A TCF outworker may recover the unpaid amount if the TCF work was performed indirectly for a Commonwealth outworker entity and, if the entity is a constitutional corporation, for the purposes of a business undertaking of that corporation.

64. As long as the entity is in a chain or series of arrangements for the supply or production of the goods and the relevant TCF work has the requisite connection to the Commonwealth outworker entity, the entity will be an indirectly responsible entity. There can be more than one indirectly responsible entity in relation to a particular unpaid amount.

- The circumstances in which work is considered to have been performed indirectly for a person are set out in new section 17A (outlined earlier in this explanatory memorandum). The concept of a Commonwealth outworker entity is explained in paragraphs 11 to 13 of this explanatory memorandum.

65. The primary liability to pay the TCF outworker remains with the person (the responsible person) who employed or engaged them. However, if the responsible person fails to pay the TCF outworker, an outworker may demand payment from an entity that the outworker reasonably believes to be an indirectly responsible entity (the apparent indirectly responsible entity) and initiate proceedings in reliance on these new provisions.

66. If the entity pays the unpaid amount, that entity will be able to recover an equivalent amount, plus interest, from the responsible person, whether by way of offset or proceedings in the Federal Court, Federal Magistrate's Court or eligible state or territory court.

67. To the extent that the Commonwealth outworker entity is a retailer that sells goods produced by the outworker's work but the retailer did not have the right to supervise or otherwise control the performance of work before the goods are delivered to the entity, that entity will not be an indirectly responsible entity for the purposes of these provisions.

*New Section 789CA - When this Division applies*

68. New subsection 789CA(1) sets out when the Division will apply. The Division will apply to a TCF outworker who performs TCF work for a person. The person for whom the TCF outworker performs the work is defined as the responsible person.

69. New subsection 789CA(1) provides that the Division will apply if the responsible person has not paid the outworker (or another person for the benefit of the outworker) by the time the amount is due and the amount is payable under:

- a contract
- the FW Act, or an instrument made under or in accordance with the FW Act
- another Commonwealth law (for example, superannuation legislation)
- a transitional instrument
- a State or territory industrial law or a State industrial instrument.

70. New subsection 789CA(2) specifies that subject to new paragraph 789CA(1)(c) and without limiting new paragraph 789CA(1)(b), an unpaid amount may include:

- an amount payable by way of remuneration or commission
- an amount payable in respect of leave (for example, an amount owing in respect of untaken accrued annual leave)
- an amount payable by way of contributions to a superannuation fund
- an amount payable by way of reimbursement for expenses incurred.

71. New subsection 789CA(3) defines indirectly responsible entity as the entity that will be responsible for payment of the unpaid amount owing to the TCF outworker as a result of new subsection 789CA(1). An entity will be an indirectly responsible entity in relation to TCF work if the entity is a Commonwealth outworker entity and the work was performed indirectly for the entity and, if that entity is a constitutional corporation, the work was performed for the purposes of a business undertaking of that corporation.

72. The note directs the reader to new section 17A, which explains the circumstances in which work is considered to have been performed indirectly for a person as part of a chain or series of arrangements for the supply or production of goods. The effect of this is that an entity further up the supply chain (whether one, two or more arrangements removed from the

performance of the work) will be an indirectly responsible entity, subject to the other requirements being met.

73. New subsection 789CA(4) makes clear that an entity is only an indirectly responsible entity in relation to TCF work performed indirectly for the entity and not in relation to other TCF work performed by the outworker.

74. New subsection 789CA(5) provides that a Commonwealth outworker entity which, as a retailer, sells goods produced by the TCF work but in circumstances where the retailer did not have any right to supervise or otherwise control the performance of work before the goods are delivered to the entity is not an indirectly responsible entity.

*New Section 789CB-Liability of indirectly responsible entity for unpaid amount*

75. New subsection 789CB(1) provides that each indirectly responsible entity (or the indirectly responsible entity, if there is only one) is liable to pay the unpaid amount to the TCF outworker.

76. New subsection 789CB(3) provides that if there is more than one indirectly responsible entity in a chain or series of arrangements, each of those entities is jointly and severally liable for the payment of the unpaid amount. This ensures that an indirectly responsible entity in the chain is not able to escape liability by establishing that there are other indirectly responsible entities from whom payment of the unpaid amount could also have been sought under this Division.

77. New subsection 789CB(4) ensures that, subject to new subsection 789CE(1A), the capacity to recover money from an indirectly responsible entity does not affect the liability of the responsible person to pay the unpaid amount. This ensures that the responsible person retains the primary obligation to pay the unpaid amount.

*New Section 789CC – Demand for payment from an apparent indirectly responsible entity*

78. Under new subsection 789CC(1), the TCF outworker, or a person acting on their behalf, may give an apparent indirectly responsible entity a written demand for payment of an amount that the outworker reasonably believes the entity is liable for under section 789CB.

79. New subsection 789CC(2) defines an apparent indirectly responsible entity as the entity that the TCF outworker reasonably believes to be an indirectly responsible entity in relation to the TCF work. This is to ensure that the TCF outworker, who may not know whether an entity is an indirectly responsible entity for the purposes of the Division, is able to make a claim against an entity for the unpaid amount if the outworker has a reasonable belief that the entity is an indirectly responsible entity which has received the benefit of the work they have performed.

80. This amendment would ensure that a claim for an unpaid amount does not fail at the outset for a lack of information, which the outworker is not in the best position to know, as to the legal status of the entity against which the claim is being made.

81. New subsection 789CC(3) sets out the particulars the demand must contain.

82. New subsection 789CC(4) provides that the time specified by which the amount must be paid must be no less than 14 days after the demand is given to the entity.

*New Section 789CD – Court order for entity to pay amount demanded*

83. Under new subsection 789CD(1), proceedings may be commenced by the applicant (namely the persons in subsection 789CD(2)) against an apparent indirectly responsible entity for payment of the amount specified in the demand (the specified amount) if the entity has been given a demand for payment of that amount (in accordance with section 789CC) and the amount has not been paid in full by the time it became due.

84. New subsection 789CD(2) provides that proceedings may be commenced by the TCF outworker, or on the TCF outworker's behalf by an organisation that is entitled to represent the industrial interests of the outworker, or by a Fair Work Inspector.

85. Under new subsection 789CD(3) proceedings may be commenced in the Federal Court, the Federal Magistrates Court or an eligible state or territory court. The conferral of jurisdiction on these courts is consistent with the conferral of jurisdiction in respect of unpaid wages and entitlements in the FW Act more generally.

86. New subsection 789CD(4) provides that, subject only to subsections 789CD(5) and (6), the court may make an order requiring the entity to pay to the outworker or to another person on the outworker's behalf, the specified amount (or as much of the amount as the applicant alleges is still owing). This means that the order will be made unless the entity has proved to the court's satisfaction that it is not liable under section 789CB to pay any of the specified amount or that the amount of the liability is less than that alleged (in which case, the order will be made for the lesser amount).

87. New subsection 789CD(5) provides that a court must not make an order under subsection (4) if the entity satisfies the court that the entity is not liable under section 789CB to pay any of the specified amount. This provision reverses the onus of proof on to the entity to disprove that they are an indirectly responsible entity or to disprove the requisite connection to the TCF work in accordance with section 789CB (or the requisite connection to a lesser extent to that alleged).

88. New subsection 789CD(6) provides that if the entity satisfies the court that the amount of the entity's liability under section 789CB is less than the specified amount (or is less than so much of the amount as the applicant alleges is still owing), the court must not make an order under subsection (4) requiring the entity to pay more than that lesser amount. These amendments ensure that the outworker's claim does not fail because the specified amount alleged to be owed is found to be greater than the amount for which the entity can be found to be liable under section 789CB. This provision reverses the onus of proof onto the entity to prove that lesser amount. Similarly, if some but not all of the specified amount has been paid, the court can make an order for the payment of any lesser amount still owing.

89. Under this subsection, if the entity satisfies the court that it does not have the requisite connection to the TCF work (in accordance with subsection 789CB) or only to a lesser extent to that alleged, the court must only make an order to pay to the extent of the liability.

90. New subsections 789CD(7) and (8) provide for the inclusion of an amount of interest in making an order under new subsection 789CD(4). The court must, on application, include an amount of interest in the sum owing, unless good cause is shown to the contrary, to ensure that the TCF outworker is not penalised for any delay in payment but is restored to the position they would have been in had the amount been paid on time.

91. Under new subsection 789CD(9) the limitation period for the commencement of proceedings is 6 years after the time when the unpaid amount becomes due for payment by the responsible person.

*New section 789CE – Effect of payment by entity (including entity’s right to recover from responsible person)*

92. Under new section 789CE, an indirectly responsible entity may recover the unpaid amount from the responsible person. New subsection 789CE(1) provides that this right of recovery applies whether or not the payment by the entity was in discharge of the liability of the entity under new section 789CB, or pursuant to an order by the court under new section 789CD.

93. New subsection 789CE(1A) makes clear that payment of the unpaid amount (or a part of that amount) by the entity discharges the liability of the responsible person to the extent of the payment. The amendment does not affect any right that the entity has to recover an equivalent amount from the responsible person or another person or to be otherwise indemnified.

94. New subsections 789CE(2) and 789CE(3) provide that the indirectly responsible entity may recover from the responsible person an amount (the recoverable amount) equivalent to the unpaid amount and any interest paid. The entity may recover the recoverable amount by offsetting it against any amount that the entity owes to the responsible person or by taking court proceedings against the responsible person (new subsection 789CE(4)).

95. Under new subsection 789CE(4), the entity may commence proceedings against the responsible person for the recoverable amount in the Federal Court, the Federal Magistrates Court or an eligible state or territory court.

96. Under new subsection 789CE(5), the court may make an order requiring the responsible person to pay the entity the recoverable amount (or as much of it as remains owing).

97. New subsection 789CE(6) provides for the court to make an order for the payment of interest on the recoverable amount, calculated from the time when the indirectly responsible entity paid the unpaid amount (new subsection 789CE(7)).

98. Under new subsection 789CE(8) the limitation period for the commencement of proceedings is 6 years after the time when the unpaid amount becomes due for payment by the responsible person.

*New section 789CF – Division does not limit other liabilities or rights*

99. New section 789CF provides that nothing in these amendments limits any other liability or right in respect of the entitlement of the TFC outworker to the unpaid amount, for example under a state law that provides for recovery of unpaid amounts up the supply chain.

### **TCF outwork code**

*New Division 4– Code of practice relating to TCF outwork*

*New section 789DA-Regulations may provide for a code*

100. New section 789DA provides that the regulations may prescribe a code (the TCF outwork code) for the purpose of furthering the objects of the Part.

- The objects of the Part as set out in new section 789AC are to eliminate the exploitation of outworkers in the TCF industry and to ensure that those outworkers are employed or engaged under secure, safe and fair systems of work.

101. The regulations prescribing a TCF outwork code may deal with standards of conduct and practice to be complied with in relation to the employment or engagement of TCF outworkers, the arranging for TCF work to be performed or the sale of goods produced by TCF work.

102. The notes to new section 789DA remind readers that:

- subject to new section 789DC, in situations where the supply or production of goods occurs by way of a chain or series of arrangements, the TCF outwork code may impose obligations on any persons that are parties to arrangements in that chain or series of arrangements, and not just on those who directly employ or engage TCF outworkers for the work to be done.
- References in other provisions to ‘this Act’ will include the code, as the definition of ‘this Act’ in section 12 of the FW Act includes the regulations. This will enable (for example) Fair Work Inspectors to exercise their powers under the FW Act in relation to the code.

*New section 789DB – Matters that may be dealt with in TCF outwork code*

103. New subsection 789DB(1) sets out the matters that may be dealt with in the TCF outwork code. The matters that may be dealt with include (but are not limited to):

- record keeping requirements
- reporting on compliance with record keeping requirements or on compliance with other requirements of the code
- general matters relating to the operation and administration of the code.

104. These matters are consistent with the types of matters that are currently dealt with in the relevant modern award, in state outworker codes of practice as well as in the obligations on manufacturers accredited with Ethical Clothing Australia.

105. New subsection 789DB(2) provides that the TCF outwork code must not specify wages or other entitlements for TCF outworkers, as it is not the purpose of the code to deal with such matters.

*New section 789DC – Persons on whom obligations may be imposed by TCF outwork code*

106. New subsection 789DC(1) provides that the TCF outwork code may only impose obligations on a person if one or more of new subsections 789DC(2) to 789DC(5) apply to the person.

107. The note to new subsection 789DC(1) refers to new subsection 789DC(6), which identifies the matters in relation to which obligations may be imposed.

108. New subsection 789DC(2) deals with the situation where a person is a national system employer that employs TCF outworkers.

109. The note to new subsection 789DC(2) reminds readers that the effect of Division 2 of Part 6-4A (which provides that TCF contract outworkers are taken to be employees in certain circumstances) must be taken into account for the purposes of the subsection.

110. New subsection 789DC(3) deals with the situation where a person is a Commonwealth outworker entity that has arranged for TCF work to be performed directly or indirectly. A note to this subsection refers to new section 17A, which outlines the circumstances in which TCF work is performed directly or indirectly for a person.

111. New subsection 789DC(4) deals with the situation where a person who is not a Commonwealth outworker entity arranges for TCF work to be performed indirectly for a Commonwealth outworker entity.

112. New subsection 789DC(5) provides that the subsection applies to a person if the person is a constitutional corporation that sells goods produced by TCF work.

113. New subsection 789DC(6) identifies the matters in relation to which obligations may be imposed on the persons identified in each of subsections 789DC(2) to 789DC(5). Obligations may be imposed in relation to:

- a person's employment of TCF outworkers (in the case of subsection (2))
- TCF work (or arrangements for TCF work) (in the case of subsections (3) and (4))
- the person as a seller of relevant goods (in the case of subsection (5)).

*New section 789DD – Other general matters relating to content of TCF outwork code*

114. New subsection 789DD(1) provides that the TCF outwork code may be expressed to apply in relation to all persons covered by new section 789DC or specified classes of those persons, and to all TCF work or specified classes of TCF work. A note to the subsection makes clear that a class of person or TCF work may be identified (for example) by reference to a particular sector of the TCF industry.

115. New subsection 789DD(2) provides that the TCF outwork code may provide differently for differently classes of persons covered by new section 789DC or different

classes of TCF work or different situations. This ensures that the TCF outwork code can contain targeted provisions if necessary or appropriate.

*New section 789DE – Relationship between the TCF outwork code and other instruments*

116. New subsection 789DE(1) provides that a TCF award prevails over the TCF outwork code, to the extent of any inconsistency. This amendment ensures that in the hierarchy of subordinate legislation to which the code and the award belong, the award prevails. This ensures that terms developed by the independent industrial body will remain the benchmark for any new arrangements.

117. On the other hand, new subsection 789DE(2) makes clear that the TCF outwork code prevails over an enterprise agreement, a workplace determination or an agreement-based transitional instrument as continued in existence by Schedule 3 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, to the extent of any inconsistency.

118. New subsections 789DE(3) and 789DE(4) provide that the TCF outwork code may apply, adopt or incorporate any matter contained in an instrument or other writing as in force from time to time, or make provision to the effect that compliance with a specified term of an instrument or other writing as in force or existing from time to time is taken to satisfy a particular requirement of the code. The kinds of instruments or other writing by reference to which the TCF outwork code may make provision include, but are not limited to the TCF Award or a code dealing with matters relating to outworkers that is made under a law of a state or territory.

119. The capacity to incorporate terms as they exist from time to time by reference is an exception to subsection 14(2) of the *Legislative Instruments Act 2003* (new subsection 789DE(6)). This is designed to enable maximum flexibility in the way in which the code is designed, given the extent to which multiple arrangements already operate in this area.

- Mandatory codes of practice for the TCF industry have been declared in New South Wales, Queensland and South Australia. A voluntary code of practice also exists at the federal level.

120. These amendments will enable, for example, obligations in a state code of practice or another instrument to be incorporated by reference into a new TCF outwork code, allowing the code to limit the extent to which a person will need to comply with multiple obligations directed to the same end as a result of the operation of a new TCF outwork code.

121. New subsection 789DE(5) makes clear that the TCF outwork code cannot apply, adopt or incorporate a matter contained in any instrument or other writing under new subsection 789DE(3) by reference to an enterprise agreement, a workplace determination or an agreement-based transitional instrument as continued in existence by Schedule 3 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*. These instruments are generally workplace specific and are not appropriate for incorporation into a code of general operation.

## Miscellaneous

### *New Division 5 – Miscellaneous*

#### *New section 789EA – Part not intended to exclude or limit State or Territory laws relating to outworkers*

122. New subsection 789EA(1) provides that new Part 6-4A is not intended to exclude or limit the operation of a law of a State or Territory (or an instrument made under a law of a State or Territory) to the extent that the law (or instrument) relates to outworkers and is capable of operating concurrently with this Part.

123. The new section makes clear that where state and territory laws dealing with the employment of engagement of outworkers are not directly inconsistent with the FW Act as amended by this Bill they will continue to apply.

124. New subsection 789EA(2) states that a reference in new subsection 789EA(1) to this Part includes a reference to any regulations made for the purposes of this Part.

### **Item 63 – After section 795**

125. This item inserts new section 795A which provides that new Schedule 1 (which provides application, saving and transitional provisions) has effect.

### **Item 64 – At the end of the Act**

126. Item 64 inserts new Schedule 1 dealing with application, saving and transitional provisions relating to amendments of the FW Act.

127. The amendments to the FW Act will, to some extent, be supported by referrals of power from a number of State Parliaments (the amendments relating to right of entry). As the state referrals only gave the Commonwealth power to deal with matters by express amendment of the FW Act, there are some application, saving and transitional matters that can only be dealt with by amending the FW Act. In the interests of all application, saving and transitional provisions for amendment of the FW Act being located in the same place (whether or not they need to rely on the State reference) a new Schedule 1 is being added at the end of the FW Act as a repository for all application, saving and transitional provisions relating to these amendments and future amending Bills.

### *New clause 1 - Definitions*

128. This clause defines terms used in new Part 1 of Schedule 1 to the FW Act, which are:

- *amended Act*
- *amending Act*
- *commencement*
- *deemed employee*

- *deemed employer.*

*New clause 2 – Section 789BB of amended Act applies to contracts entered into after commencement*

129. New subclause 2(1) provides that new section 789BB of the FW Act as amended, which provides that TCF contract outworkers are taken to be employees in certain circumstances, applies only in relation to TCF work performed by a TCF contract outworker where the contract for the provision of services under which the TCF work was performed was entered into after the commencement of new Part 1 of Schedule 1 to the FW Act.

130. New subclause 2(2) makes clear that new subclause 2(1) does not prevent regulations from being made, under either new section 789BC of the FW Act as amended or new clause 7 of the Part, that deal with the effect of matters that occurred prior to the commencement of new Part 1 of Schedule 1 to the FW Act in relation to a person taken by new section 789BB to be an employee.

*New clause 3– Effect on TCF contract outworker’s entitlements*

131. New subclause 3(1) provides that entitlements accrued by a TCF contract outworker prior to the commencement of new Part 1 of Schedule 1 will not be affected by the amendments in this Bill.

132. New subclause 3(2) addresses a situation that may arise where the NES is to be applied to a TCF contract outworker as though the outworker is an employee because of a term of a modern award, and that TCF contract outworker is taken to be an employee due to the operation of Division 2 of Part 6-4A of the FW Act. In that situation, to the extent that the entitlement derived from the term of the award is the same as the NES entitlement, the term operates in parallel to (rather than in addition to) the outworker’s NES entitlement.

133. The provision ensures, for the avoidance of doubt, that the outworker does not receive a double benefit as a result of these amendments.

*New clause 4 – Fair work instruments etc. made before commencement*

134. New clause 4 makes clear that a reference to an employee or employer contained in a fair work instrument made before the commencement of new Part 1 of Schedule 1 to the FW Act, or in a transitional instrument that is still in operation because of the effect of Schedule 3 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, will not be taken to include a deemed employee or deemed employer unless the instrument is specifically varied to do so.

135. New subclause 4(3) makes clear that new subclause 4(2) does not confer a power to vary a fair work instrument. Variation may occur in accordance with relevant provisions of the FW Act or the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

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*New clause 5– Application of Division 3 of Part 6-4A of amended Act*

136. This clause relates to parties to an arrangement for TCF work entered into before the commencement of new Part 1 of Schedule 1 to the FW Act.

137. The clause provides that, for the purposes of Division 3 of Part 6-4 of the FW Act (which provides for the recovery of unpaid amounts), an entity will not be treated as an indirectly responsible entity if the arrangement for the TCF work was entered into before the commencement of these amendments.

*New clause 6– Application of subsection 203(2A) of amended Act*

138. This clause makes clear that subsection 203(2A) of the FW Act as amended applies in relation to enterprise agreements made after the commencement of new Part 1 of Schedule 1 to the FW Act.

*New clause 7 – Regulations dealing with various matters*

139. This clause provides for regulation making powers under new subclause 7(1) and new subclause 7(3).

140. New subclause 7(1) allows regulations to be made in relation to matters of an application, saving or transitional nature relating to the amendments to the FW Act, and new subclause 7(2) makes clear that the new Part 1 of Schedule 1 to the FW Act operates subject to any regulations made under new subclause 7(1).

141. New subclause 7(3) allows regulations to be made in relation to how the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* applies in relation to TCF outworkers.

142. New subclause 7(4) provides that, without limiting new subclause 7(3), regulations may provide that the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* applies with specified modifications or otherwise make provision relating to how provisions of that Act apply.

143. New subclause 7(5) makes clear that regulations made for the purposes of new subclause 7(1) or new subclause 7(3) may be expressed to take effect from a date before the regulations are registered under the *Legislative Instruments Act 2003*. This is designed to ensure that, should it prove necessary to deal with transitional issues arising after commencement of the amendments, the regulations are able to do so seamlessly and in a manner that does not disadvantage TCF outworkers.