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

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments to be Moved on Behalf of the Government

(Circulated by authority of the Minister for Employment and Workplace Relations, the Honourable Bill Shorten MP)
AMENDMENTS TO THE FAIR WORK AMENDMENT (TEXTILE, CLOTHING AND FOOTWEAR INDUSTRY) BILL 2011

OUTLINE

The Government will move amendments to the Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011.

These amendments would reverse the burden of proof and simplify the steps an outworker must take in the recovery of unpaid amounts provisions under Division 3 of new Part 6-4A of the Bill.

The amendments would also make minor technical amendments to the Bill.

FINANCIAL IMPACT STATEMENT

The measures proposed in this Bill are budget neutral.

NOTES ON AMENDMENTS

1. In these notes on amendments, the following abbreviations are used:

<table>
<thead>
<tr>
<th>the Bill</th>
<th>Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011</th>
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<tbody>
<tr>
<td>FW Act</td>
<td><em>Fair Work Act 2009</em></td>
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Amendment 1 – Schedule 1, Page 3 (after line 25), after item 4
1. This item would insert item 4A into the Bill.
2. Item 4A inserts a definition of ‘apparent indirectly responsible entity’. This is a signpost definition that points readers to subsection 789CC(2).

Amendment 2 - Schedule 1, item 61, page 14 (line 15)
3. This item would make a minor technical amendment to item 61 of the Bill to replace ‘engaged’ in new paragraph 789BB(1)(b) with ‘engages’.

Amendment 3 – Schedule 1, item 61, page 14 (lines 25 and 26)
4. This item would make a minor technical amendment to item 61 of the Bill to replace the words ‘for the purpose of a contract for the provision of services (rather than as an employee)’ in new subsection 789BB(2) with the words ‘other than as an employee’.
5. New subsection 789BB(2) defines TCF contract outworker as a TCF outworker who performs work other than as an employee.

Amendment 4 – Schedule 1, item 61, page 16 (line 19)

Amendment 5 – Schedule 1, item 61, page 16 (lines 20 and 21)
6. Amendments 4 and 5 would amend new section 789CA of the Bill, which relates to when Division 3 applies.
7. Amendment 4 would amend item 61 of the Bill to omit the reference to ‘instrument; and’ in new paragraph 789CA(1)(c) to insert a reference to ‘instrument’. This amendment is a consequential change that is necessary as a result of the changes made by amendment 5.
8. Amendment 5 would omit paragraph 789CA(1)(d) of the Bill. These amendments are part of the measures to reverse the burden of proof in the Division.
9. 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.
10. 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.
Amendment 6 – Schedule 1, item 61, page 17 (line 27)

Amendment 7 – Schedule 1, item 61, page 17 (lines 30 to 33)

Amendment 8 – Schedule 1, item 61, page 18 (line 4)

Amendment 9 – Schedule 1, item 61, page 18 (lines 6 to 14)

11. Amendments 6 to 9 would amend new section 789CB of the Bill, which relates to the liability of an indirectly responsible entity for the unpaid amount.

12. Amendment 6 would amend item 61 of the Bill to omit the reference to ‘Subject to subsection (2), each’ in new subsection 789CB(1) to substitute a reference to ‘Each’. This amendment is a consequential change that is necessary as a result of the changes made by amendment 7.

13. Amendment 7 would amend item 61 of the Bill to omit subsection 789CB(2).

14. Amendment 8 would amend item 61 of the Bill to omit the reference to ‘subsection (5)’ in new subsection 789CB(4) to substitute a reference to ‘subsection 789CE(1A)’. This amendment is a consequential change that is necessary as a result of the changes made by amendments 9 and 12.

15. Amendment 9 would amend item 61 of the Bill to omit subsection 789CB(5).

16. 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.

17. 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.

18. 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.

Amendment 10 – Schedule 1, item 61, page 18 (line 15) to page 20 (line 3)

19. This amendment would amend item 61 of the Bill to omit existing sections 789CC and 789CD to substitute new sections 789CC and 789CD.
New Section 789CC – Demand for payment from an apparent indirectly responsible entity

20. 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.

21. 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.

22. 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.

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

24. 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 indirectly responsible entity.

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

25. 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 the 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.

26. 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.

27. 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.

28. 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).

29. 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).

30. 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.

31. Under this subsection, if the entity satisfies the court that it does not have the requisite connection to the TCF work (in accordance with section 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.

32. 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.

33. 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.

Amendment 11 – Schedule 1, item 61, page 20 (lines 4 and 5)

34. This amendment would amend item 61 of the Bill to omit the heading to new section 789CE to substitute a new heading. The new heading is required to reflect the changes that would be made to new section 789CE by amendment 12.

Amendment 12 – Schedule 1, item 61, page 20 (lines 6 to 9)

35. This amendment would amend item 61 of the Bill to omit subsection 789CE(1) to substitute new subsections 789CE(1) and 789CE(1A).

36. 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.

37. New subsection 789CE(1A) of the Bill 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.