



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

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Economics Section

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

Date introduced: 24 November 2011

House: Senate

Portfolio: Education, Employment and Workplace Relations

Commencement: On Proclamation or on the day after 6 months from Royal Assent, whichever is the sooner.

Links: The links to the [Bill, its Explanatory Memorandum and second reading speech](#) can be found on the Bill's home page, or through <http://www.aph.gov.au/bills/>. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at <http://www.comlaw.gov.au/>.

Purpose

The Bill:

- extends the operation of most provisions of the *Fair Work Act 2009* (the Act) to contract outworkers in the textile, clothing and footwear (TCF) industry by deeming contract outworkers to be employees
- provides a mechanism to enable TCF outworkers to recover unpaid amounts including from contractors along the supply chain
- extends specific right of entry rules that apply to suspected breaches affecting outworkers (which allow entry without 24 hours notice) to the TCF industry, and
- enables a TCF outwork code to be issued.

Background

As with other manufacturing industries, the textile, clothing and footwear (TCF) industry has undergone considerable structural change following tariff reforms and industry assistance reforms commencing in the 1970s and TCF specific measures having effect from 1992. The Productivity Commission reported that in 2000-01, Australia's 5000 TCF firms generated turnover of \$9 billion and provided factory-based employment for almost 60 000 people. The TCF industry was largely based in Melbourne and Sydney with significant TCF activity in regional centres such as Geelong, Bendigo, Wangaratta, Albury-Wodonga and Devonport. Producing goods from home (one dimension of outwork) has long been a feature of the industry, however with the downsizing of the employed workforce outwork now occupies a larger part of the TCF industry according to the Productivity Commission:

While it is difficult to ascertain the number of people periodically engaged in outwork, the full-time equivalent number of outworkers in Australia is unlikely to be much above 25 000.

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Nonetheless, with the decline in factory-based employment in the TCF sector over the past few years, outworker employment is now about 40 per cent of total factory-based employment in the sector and exceeds factory-based clothing employment by about 25 per cent.¹

A later Productivity Commission report revisited these estimates. It found that value added in the TCF manufacturing sector was around \$2.8 billion in 2007. Exports were valued at \$1.7 billion. Both figures were about one-half of levels a decade ago. Over half of all TCF manufacturers produce solely for the domestic market and only 10 per cent of businesses export more than 50 per cent of production. Imports increased in real terms by 21 per cent (to \$9.1 billion) in the ten years to 2007.

Based on ABS labour force survey data, approximately 48 500 people were employed in the TCF sector in 2007-08. The sector also has a significant 'outworker' component. In 2003, the Commission estimated that the number of outworkers was equal to around 40 per cent of factory-based employment. If this share remained constant, there would have been around 19 400 outworkers in 2007-08.²

The Textile, Clothing and Footwear Union of Australia (TCFUA) has observed dramatic changes in the way the Australian TCF industry has been organised from the 1990s.³ The TCF industry, particularly the garment industry, has become dependent upon and structured around subcontracting, outsourcing and the prolific use of outworkers or home based workers, most often migrant women with limited English skills, forming supply chains of manufactured items to each other for final completion and distribution to retail outlets. The second reading speech mentioned low levels of payment for the work of outworkers, as little as \$2 to \$3 per hour.⁴

This system of supply through subcontracting has been described thus:

Typically, at the apex of this integrated system are major retailers that enter into arrangements with principal manufacturers for the latter to supply the retailers with clothing products. The principal manufacturer, with a substantial workforce, will give out orders for the production of clothing goods to a smaller manufacturer or offsite contractor or subcontractor. In some instances a fashion house, with a very small onsite workforce, will give out orders directly to the

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1. Productivity Commission, *Review of TCF assistance, Inquiry report no. 26*, Commonwealth of Australia, 31 July 2003, p. Xlviii, viewed 16 January 2012, http://www.pc.gov.au/data/assets/pdf_file/0020/26822/tcf.pdf
 2. Productivity Commission, *Modelling economy-wide effects of future TCF assistance, Research report*, Commonwealth of Australia, June 2008, p. 2, viewed 16 January 2012, http://www.pc.gov.au/data/assets/pdf_file/0003/81777/tcf-assistance-modelling.pdf
 3. TCFUA submission to the Senate Employment, Workplace Relations and Education Legislation Committee, *Inquiry into the provisions of the Independent Contractors Bill 2006 and Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006*, para. 27, viewed 16 January 2012, http://www.aph.gov.au/Senate/committee/eet_ctte/completed_inquiries/2004-07/contractors06/submissions/sub37.pdf
 4. J Ludwig, 'Second reading speech: Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011', Senate, *Debates*, 24 November 2011, p. 9491, viewed 17 January 2012, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2F83aa0e04-585d-4b47-b3c1-a97ffb9c1f5b%2F0025%22>

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small manufacturer or offsite contractor. The orders for production from the principal manufacturer or the fashion house will then be successively handed down through a sequence of intervening parties, or 'middlemen' until the goods are finally produced by a small factory sweatshop, which usually passes the order for the actual production of the clothing product to an outworker working at home. The finished goods are then delivered back up the chain of contractual arrangements until they arrive back at the original principal manufacturers or the fashion houses.⁵

Maconachie and Goodwin have looked at industrial relations issues in the enforcement of labour standards on individuals and entities forming these supply chains. They note that corporations at the peak of the apex often design their affairs so that while *they* are compliant with labour law standards, others in their supply chain may not be. Subcontractors may be squeezed on deadlines and profit margins to such an extent that they are forced to breach regulations; as they put it:

The corporation ultimately profits from these violations while maintaining immunity from prosecution.⁶

Quinlan and Sheldon have observed that while industrial relations mechanisms which set minimum wages and maximum hours establish an essential underpinning to health and safety at the workplace, the development of supply chain production systems through subcontracting methods has posed unique challenges to the traditional award-based and state/territory based occupational health and safety systems (and workers compensation schemes as well). They note however the particularly Australian response to these developments:

During the past decade, Australia has introduced innovative supply chain regulation in the clothing and trucking industries. This makes use of both industrial relations and OHS regulatory frameworks to establish minimum standards on hours, pay and health and safety ... Unions and community groups have played a critical role in securing these interventions and, in the clothing trade at least, also occupy a critical role in overseeing enforcement.⁷

At the state level, various governments have enacted laws to protect outworkers. The *Outworkers (Improved Protection) Act 2003* (Vic) and the *Industrial Relations (Ethical Trades) Act 2001* (NSW) are examples. There are outworker provisions in certain state labour laws as well as federal law, including the effect on the meaning of outworker entity resulting from the referral of state industrial

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5. I Nossar, R Johnstone and M Quinlan, 'Regulating supply chains to address the occupational health and safety problems associated with precarious employment: the case of home based clothing workers in Australia', *Australian Journal of Labour Law*, vol. 17, para. 28, 2004, p. 145, cited in TCFUA submission.
 6. G Maconachie and M Goodwin, 'Employer evasion of workers' entitlements 1986-1995: why, what and whose?', *Journal of Industrial Relations*, vol. 52, no. 4, 2010, p. 422, viewed 16 January 2012, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fjrnart%2F251375%22>
 7. M Quinlan and P Sheldon, 'The enforcement of minimum labour standards in an era of neo-liberal globalisation: an overview', *The Economic and Labour Relations Review*, vol. 22, no. 2, 2011, p. 8, viewed 16 January 2012, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fjrnart%2F1024508%22>

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powers.⁸ The federal award for the TCF industry has dealt with TCF outwork over many years.⁹ The modern award for the industry thus contains specific outwork provisions now located under a schedule to the award. In particular, it provides that a principal ‘must apply the National Employment Standards (NES) to the worker as though the worker is an employee’.¹⁰

Of particular importance in highlighting and overcoming outworkers’ employment conditions has been a coalition of community organisations and unions formed under the title FairWear. FairWear in turn has supported the Ethical Clothing Australia (ECA) accreditation and labelling scheme as a tool for countering exploitation in the TCF industry.¹¹ ECA enlists TCF businesses to commit to ensuring that workers in their supply chain receive the correct pay and entitlements and work in fair and safe conditions, manifested in the labelling of TCF products to indicate compliance with ECA work standards.¹²

Basis of policy commitment

No commitment was given to introducing the amendments by the Australian Labor Party in its election commitments dealing with industrial relations.¹³

Committee consideration

The Bill was referred to the Senate Education, Employment and Workplace Relations Legislation Committee on 25 November 2011 for inquiry and report by 27 February 2012. Details of the inquiry are at the [inquiry’s webpage](#).¹⁴

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8. Fair Work Act under section 12 given additional effect by section 30F and section 30Q. For an overview of state/territory outworker and related provisions, see: M Rawling, ‘The impact of federal legislation upon the scope of state jurisdictions to regulate outwork’, *Australian Journal of Labour Law*, vol. 22, no. 2, 2009, viewed 16 January 2012, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fjrnart%2FLIHU6%22>
 9. TCFUA submission to the Senate Committee cited in footnote 3 at para. 41.
 10. Textile, Clothing, Footwear and Associated Industries Award 2010 at schedule F. 4, viewed 18 January 2012, http://www.fwa.gov.au/documents/modern_awards/pdf/MA000017.pdf
 11. In 2008 the Australian Government provided a \$4 million grant to Ethical Clothing Australia to support its work in highlighting issues faced by outworkers and promoting accredited brands to consumers’. The Government announced a further grant of \$4 million in 2011 to Ethical Clothing Australia. Senator C Evans (Minister for Education, Employment and Workplace Relations), *Australian workers protected from exploitation*, media release, 24 November 2011, viewed 25 January 2012, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F1248837%22>
 12. Fibre2Fashion, ‘FairWear welcomes ethical fashion label’, 1 November 2011, viewed 17 January 2012, http://www.fibre2fashion.com/news/garment-apparel-news/australia/newsdetails.aspx?news_id=104695
 13. Election commitments made in the run-up to the 2010 federal election in respect of industrial relations have been compared in ‘IR policies compared — where the parties stand’, *Workplace express.com.au*, 20 August 2011.
 14. Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011*, viewed 25 January 2012, http://www.aph.gov.au/Senate/committee/eet_ctte/textiles_fair_work/index.htm

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Position of major interest groups

The National Retailers Association (NRA) states that there has been no consultation with industry about the changes included in the proposed legislation and has criticised the timing of the Bill's release which coincided with the peak trading season for retailers, inhibiting the ability for the organisation to consult with its members. The NRA thus opposes the Bill in its entirety. NRA submits that the Bill should be withdrawn or not proceeded with.¹⁵

Heather Ridout, chief executive of the Australian Industry Group, voiced employer concerns with the Bill. She commented in a National Press Club address in November 2011 that the Bill will add another 30 pages to the Fair Work Act to increase union entry rights and protections for workers in the Textile Clothing and Footwear industry. Ridout listed a raft of government measures such as the Road Safety Regulation Tribunal Bill 2011, funding award wage increases for Social and Community workers, extending the GEERS scheme for the payment of unfunded employee liabilities in the event of employer insolvency, a Bill to abolish the Australian Building and Construction Commission as well as this Bill as indicative of the Government agreeing to an extraordinary series of union claims:

The (TCF) Bill implements longstanding TCFUA claims which were opposed by Ai Group and other employer groups when the Fair Work Act was being developed and rejected by the Government at that time.¹⁶

The Australian Council of Trade Unions however regards the Bill as:

...providing a sensible underpayment recovery mechanism which will encourage responsible risk management, compliance and ethical practices throughout the supply chain.¹⁷

Financial implications

The Bill's Explanatory Memorandum reports its financial implications as nil.¹⁸

15. Submission of the National Retail Association Limited to the Senate Education, Employment and Workplace Relations Committee on provisions of the Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011, 11 January 2012, pp. 1-2, viewed 18 January 2012, submission 21 at:

http://www.aph.gov.au/Senate/committee/eet_ctte/textiles_fair_work/submissions.htm

16. H Ridout, 'Taking charge of our future', *Address to the National Press Club*, 30 November 2011, pp. 7-8, viewed 17 January 2012,

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fjrnart%2F1283909%22>

17. Submission of the Australian Council of Trade Unions to the Senate Education, Employment and Workplace Relations Committee on provisions of the Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011, 11 January 2012, viewed 18 January 2012, submission 19.

18. Explanatory Memorandum, p. 2.

Key provisions

Schedule 1—Amendments to the *Fair Work Act 2009* Definitions

Item 5 inserts a definition of ***Commonwealth outworker entity*** into section 12 of the Act. A Commonwealth outworker entity means an entity that is an outworker entity otherwise than because of sections 30F or 30Q (which provide for extended meaning of outworker entity in relation to a referring state).

Items 16 to 19 introduce new definitions to the Act (section 12). They are sign post definitions meaning they refer the reader to the relevant new provisions. They include: ***responsible person (proposed subsection 789CA(1))***, ***TCF award worker (proposed section 483A(1A))***, ***TCF contract outworker (proposed subsection 789BB(2))*** and the ***TCF outworker code (proposed section 789DA)***.

Item 23 inserts **proposed section 17A** which provides meanings of ***directly*** and ***indirectly (in relation to TCF outwork)*** and introduces the notion of a supply chain. **Proposed paragraph 17A(1)(a)** defines work performed directly for the direct principal being the person who engaged the worker directly. Under **paragraph 17A(1)(b)** work is taken to be performed indirectly for indirect principals who are parties to any of the arrangements in the chain or series of arrangements and each indirect principal is taken to have arranged for the work to be performed indirectly for the indirect principal.

Item 29 inserts **proposed subsection 203(2A)** which prevents the effect of award outworker terms being varied by an individual flexibility arrangement under section 202.

Right of entry rules

Items 40 to 53 extend the Act's TCF right of entry rules for unions which relate to suspected contraventions of designated outworker terms of an award or similar instrument to the TCF sector generally.¹⁹ The Bill achieves this, in the main, by replacing the term ***TCF outworkers*** with ***TCF award workers*** in the TCF right of entry provisions. **Item 45** defines ***TCF award worker*** by inserting **proposed subsection 483(1A)** which states that a TCF award worker is an employee whose work is covered by a TCF award, or for the purpose of a contract for the provision of services, performs work that is covered by a TCF award. 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 ... entry (however) remains related to breaches of designated outworkers terms.²⁰

19. Fair Work Act, section 483A.

20. Explanatory Memorandum, p. 9. Designated outworker terms are defined in section 12.

Item 46 inserts **proposed subsection 483A(6) and 483A(7)**. **Proposed subsection 483A(6)** prevents entry under the TCF entry provisions to an *accredited* person's principal place of business. A note to the new subsection states that entry will continue to be available subject to the general right of entry provisions (including the 24 hours' notice requirement). In making a regulation specifying a person or entity as accredited, the Minister must be satisfied that the person/entity has aims consistent with the provisions of Part 6-4A and has the endorsement of the relevant employer organisation and relevant union (**proposed subsection 483A(7)**).

Special provisions about TCF outworkers— new Part 6-4A

Item 61 inserts **new Part 6-4A—Special provisions about TCF outworkers**. The new Part consists of five Divisions which are described below.

Division 1—Introduction

Proposed section 789AC sets out objects for the Part. These go to the prevention of TCF outworker exploitation by providing nationally consistent protections; by providing effective payment recovery systems and by provision of a code of conduct to be complied with by parties in a supply chain.

Division 2—TCF contract outworkers taken to be employees in certain circumstances

Proposed section 789BA stipulates that Division 2 applies to provisions of the Act subject to the exceptions set out in paragraphs 789BA(1)(a)–(g).

Proposed paragraph 789BB(1)(a) stipulates that a TCF contract outworker is taken to be an employee and to be a national system employee if the work performed by the outworker is work performed directly or indirectly for a Commonwealth outworker entity; and if the entity is a constitutional corporation, the work is performed for the purposes of the corporation's business undertaking. **Proposed paragraph 789BB(1)(b)** stipulates that the person who engaged the outworker is taken to be the employer and the national system employer of the outworker in relation to TCF work.

Proposed subsection 789BB(2) defines a *TCF contract worker* as a TCF outworker who performs work for the purpose of a contract for the provision of services (rather than as an employee).

Proposed subsection 789BB(3) requires any interpretation of the provisions of the Act or relevant instruments to be consistent with the objective stated in subsection 789BB(4). **Proposed subsection 789BB(4)** stipulates 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.

Proposed section 789BC provides a regulation making power which may allow specified modification of Division 2 provisions.

Division 3—Recovery of unpaid amounts

Proposed subsections 789CA(1) and 789CA(2) stipulate that the Division will apply when a TCF worker performs work for a **responsible person** and the person does not pay an amount (including payments for commission, leave, superannuation contributions and expenses) specified under a contract, or under Commonwealth law or state or territory industrial law or under industrial instruments and there are one or more indirectly responsible entities in relation to the TCF work.

Proposed subsection 789CA(3) defines **indirectly responsible entity** where the person is a Commonwealth outworker entity and the TCF work was performed indirectly for the entity – if a company, for the company’s business undertaking.

Proposed subsection 789CA(4) distributes the payment liability of indirectly responsible entities and other entities or persons.

Proposed subsection 789CA(5) excludes a Commonwealth outworker entity as a retailer as an indirectly responsible entity where the retailer does not have supervision or control responsibilities over the TCF work.

Proposed subsection 789CB(1) provides that each indirectly responsible entity is required to pay the unpaid amount, providing the unpaid TCF outworker took reasonable steps to get the responsible person to pay the unpaid amount (**proposed subsection 789CB(2)**). **Proposed subsection 789CB(3)** obliges two or more indirectly responsible entities to be jointly and severally liable for the unpaid amount, without affecting the initial liability of the responsible person (**proposed subsection 789CB(4)**). Where an indirectly responsible entity discharges the payment liability, it may seek recovery from the responsible person (**proposed subsection 789CB(5)**).

Proposed subsection 789CC(1) allows the TCF outworker or agent to make a written demand for payment for the unpaid amount to the indirectly responsible entity. Under **proposed subsection 789CC(2)** the demand must specify and identify the responsible person for which payment is claimed and include particulars such as the TCF work performed, the steps taken to obtain the payment and outline reasons why an indirectly responsible entity is an entity in relation to unpaid work, and stipulate a time period for payment (not less than 14 days after a claim is made per **proposed subsection 789CC(1)** and **proposed subsection 789CC(3)**).

Proposed section 789CD facilitates proceedings (within 6 years) in either the Federal Court, the Federal Magistrates Court or an eligible state or territory court for unpaid amounts owed to a TCF outworker against an indirectly responsible entity. The court may make an order to pay the amount (or amount remaining) providing the entity is liable under **proposed section 789CB** and (**proposed subsection 789CD(4)**).

Proposed section 789CE allows the indirectly responsible entity to recover any amounts paid by the entity under **proposed section 789CB** from the responsible person in either: the Federal Court, the Federal Magistrates Court or an eligible state or territory court.

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Division 4—Code of practice relating to TCF outwork

Proposed section 789DA allows regulations to be made to prescribe a code (the **TCF outworker code**) dealing with standards of conduct in relation to the employment or engagement of TCF outworkers; arranging for work to be performed if of a kind that is performed by TCF outworkers and the sale of goods produced by TCF outwork.

Proposed section 789DB prescribes the matters which the code may deal with. They include record-keeping; reporting on compliance with record keeping or other requirements of the code and other general matters.

Proposed section 789DC stipulates that the TCF outwork code will apply to national system employers employing outworkers; a Commonwealth outworker entity (a constitutional corporation) engaged in the performance of TCF work; to a person not a Commonwealth outworker entity but who arranges for work to be performed by TCF outworkers indirectly for a Commonwealth outworker entity; to constitutional corporations selling TCF goods.

Proposed section 789DD allows the TCF outworker code to be expressed to apply to all or specified persons prescribed under **proposed section 789DC** as well as all or prescribed classes of TCF outwork; or to different classes of persons and different classes of TCF work and to different situations.

Proposed section 789DE clarified that a TCF award prevails over the TCF outwork code to the extent of any inconsistency. **Proposed subsection 789DE(2)** however, provides that the TCF outwork code prevails over any enterprise agreement or workplace determination or agreement-based transitional instruments under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*. **Proposed subsection 789DE(3)** allows the TCF outwork code to include provisions concerning any matter contained in instruments or other writing subject to **proposed subsection 789DE(5)** which prevents reference to enterprise agreement or workplace determination or agreement-based transitional instruments. **Proposed subsection 789DE(4)** provides that the TCF outwork code may make provision for matters covered by an award or a state or territory code dealing with outworkers.

Division 5—Miscellaneous

Proposed section 789EA confirms that **proposed Part 6—4A** is not intended to exclude or limit state and territory laws relating to outworkers to the extent that such a law is capable of operating concurrently with this Part.

New Schedule 1 to the *Fair Work Act 2009*— Application, saving and transitional provisions

Item 64 inserts new Schedule 1 at the end of the Act. The schedule is to contain application, saving and transitional provisions relating to amendments of the Act. The Explanatory Memorandum at page 21 explains the reason for accumulating these provisions into a separate schedule. **Item 64**

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specifically inserts Part 1—Amendments made by the *Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2011*. It contains the following clauses.

Proposed subclause 2(1) specifies that **proposed section 789BB** applies to TCF work performed by a TCF outworker after commencement of this Bill. **Subclause 2(2)** however allows for regulations to be made to deal with matters before commencement.

Proposed clause 3 ensures that accrued entitlements of a TCF contract outworker are not affected by the Bill's operation. **Subclause 3(2)** prevents a TCF outworker covered by a modern award and accruing a National Employment Standards entitlement, from accruing a double benefit under the Bill.

Proposed clause 4 requires fair work and transitional instruments made before commencement which include reference to deemed employer and deemed employee to be varied after commencement to make clear that the reference is intended to include deeming provisions.

Proposed clause 5 clarifies that for the purposes of Division 3 of **proposed Part 6–4A** an entity is not an indirectly responsible entity if an arrangement for TCF work was entered into before commencement.

Proposed clause 6 ensures that **proposed subsection 203(2A)** applies to enterprise agreements made after commencement.

Proposed clause 7 allows regulations to be made dealing with matters of an application, saving or transitional nature. **Proposed subclause 7(3)** allows regulations to be made dealing with how the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* applied in relation to TCF outworkers.

Concluding comments

The second reading speech alluded to the possibility of some TCF businesses being concerned by the changes facilitated by the Bill, in particular the enhanced ability for the relevant union to enter sweatshops and assist employees working in unacceptable conditions as well as for the Fair Work Ombudsman to investigate breaches of the Fair Work Act and the TCF modern award. The ability for outworkers to retrieve unpaid amounts under the Bill's provisions will build on similar provisions available under state legislation. The Government has also flagged further amendments to the deeming provisions of the Bill to limit the possibility of them being avoided by the use of corporate structures.

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