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

Submission to the Senate Standing Committees on Education, Employment and Workplace Relations

13 January 2012

Introduction

The *Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011* ("the Bill") proposes a range of significant amendments to the *Fair Work Act 2009* ("the FW Act"). The Australian Industry Group (Ai Group) strongly opposes all of the key elements of the Bill as we believe that not only will the Bill create a complicated web of laws for those in the textile, clothing and footwear (TCF) sector but furthermore the Bill is unbalanced and unfair on business.

It is not legitimate or fair to deem contractors to be employees in circumstances where parties have agreed to enter into a contractor arrangement. It is not legitimate or fair to apply different right of entry regulations to employers in the TCF sector merely because they are employers in the TCF sector. It is not legitimate or fair to hold businesses accountable for the actions of others when they have no control or knowledge of those actions and indeed may never have any contractual relationship with that other party.

Ai Group has a substantial membership in the TCF sector and is concerned that not only do these proposals assume that all operators in the TCF sector operate illegitimately but furthermore the terms of this Bill may dramatically and adversely affect decisions regarding the engagement of outworkers and the ongoing viability of the TCF sector in Australia.

The Productivity Commission, in its final report on the Review of TCF Assistance in June 2003, estimated that in 2003 not more than 25,000 people were working as outworkers in the TCF industry[1]. During this same period, ABS data, referred to in the final report, revealed that approximately 58,000 people were directly employed in the industry. This data lead the Productivity Commission to infer that outworker employment was about 40% of total factory-based employment in the sector and exceeded factory-based clothing employment by about 25%[2]. Given this data it is clear that outworkers make up a significant portion of those performing manufacturing work in the TCF sector. In circumstances where any business that operates in a supply chain which contains outworkers will find themselves legally liable for unpaid monies owed to those outworkers, it is conceivable that businesses will find this risk too great and either contractually prohibit the use of outworkers or cease manufacturing within Australia. Either scenario would be harmful to the Australian economy and the TCF sector.

Over the past decade we have witnessed the TCF industry in decline particularly because of aggressive competition from cheap imports and burdensome regulation and red-tape imposed on Australian manufacturers. The decline is obvious from the falling labour market statistics, which are likely to be reflected in the prevalence of outworkers in the industry. It is without doubt that the proposed amendments, particularly in our current global economic climate and with a high Australian dollar, will place a further burden on local manufacturers.

Whilst no one doubts the importance of having adequate protections within Australia's workplace relations laws to prevent the exploitation of individuals, the FW Act already contains substantial protections for employees including outworkers. The proposed amendments within the Bill are unbalanced, inconsistent and extremely unfair to businesses that operate in the TCF Industry and should not be adopted.

[1] Review of TCF Assistance Inquiry Report, Productivity Commission, Report No. 26 (31 July 2003), p. XVI, http://www.airc.gov.au/safetynet_review/2004/aig/aig_submission_8.pdf
[2] Review of TCF Assistance Inquiry Report, Productivity Commission, Report No. 26 (31 July 2003), p. XVI and XLVIII, http://www.airc.gov.au/safetynet_review/2004/aig/aig_submission_8.pdf

The Australian Industry Group (Ai Group) is one of the largest national industry bodies in Australia representing employers in manufacturing, TCF, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, airlines and other industries.

Ai Group has had a strong and continuous involvement in the workplace relations system at the national, state, industry and enterprise level for nearly 140 years. Ai Group is well qualified to comment on the *Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011.*

Schedule 1 - Amendments

Schedule 1 of the Bill:

- Varies a number of definitions within section 12 of the *Fair Work Act 2009* ("the FW Act") to reflect amendments proposed in relation to outworkers in the textile, clothing or footwear industry;
- Establishes a distinction between work performed *directly* and *indirectly* for persons in a supply chain arrangement in the textile, clothing or footwear industry;
- Removes the ability for enterprise agreement flexibility terms to apply to employee outworkers;
- Expands the special right of entry provisions which apply to TCF outworkers to all employees covered by a TCF award;
- Introduces employee deeming provisions for TCF outworkers who are engaged under a contract for services;
- Creates legal liability for unpaid amounts owed to TCF outworkers for entities that are not the employer or responsible for the direct engagement of the TCF outworkers but who are in a supply chain connected to the TCF work performed; and
- Establishes a mechanism for the creation of a code of practice relating to TCF outwork.

Ai Group's position on the provisions of Schedule 1 is set out in the table below. Ai Group has proposed a few amendments to address some issues but generally opposes all of the central amendments contained within the Bill.

Provisions of Schedule 1 of the Bill	*Ai Group's Position*	*Basis of Ai Group's Position*
Inclusion of legislative notes and cross-referencing of definitions	**Not opposed (with the exception of any matters specifically identified below)**	A substantial number of the items that are referenced in either the legislative notes or cross-referenced definitions are opposed. The basis of this opposition is detailed below in reference to those specific sections. To the extent however, despite our opposition, that the proposed amendments are retained it is appropriate, subject to any specific exemptions that are referred to below, that the legislative notes and cross-referencing of definitions be retained.
Variations to definitions **Definition of *Commonwealth outworker entity*** Excludes from the definition of *Commonwealth outworker entity* those that would otherwise be defined as an *outworker entity* as a result of the extended definition of *outworker entity* which applies to those performing work of a kind performed by outworkers in a referring State.	**Opposed**	The Explanatory Memorandum ("EM") to the Bill states in relation to this amendment: *"11.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.* *12. 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*

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		by outworkers." (our emphasis added) The introduction of legal liability for the terms and conditions paid to outworkers to those who have not directly engaged those outworkers is extremely unfair on businesses in the supply chain. This is further discussed in relation to Part 6-4A of the Bill.
Definition of *employee record* Amendment to the definition of *employee record* to include TCF contract outworker records under the definition of *employee record* if such records would be employee records for the purposes of the *Privacy Act 1988* had the outworker been an employee.	**Opposed**	See explanation of position relating to deeming of TCF contract outworkers as employees (section 789BA, 789BB and 789BC)
Definition of *TCF outworker* Removal of reference to a TCF outworker being an outworker *"whose work is covered by a TCF award*".	**Opposed**	The EM to the Bill states in relation to this amendment: *"14. 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."* Whilst the proposed section 438A(1A) of the Bill inserts a definition of *TCF award worker* for the purposes of the right of entry provisions relating to TCF outworkers (Subdivision AA of Division 2 of Part 3-4 of the Bill), the term *TCF outworker* is also used in Part 6-4A of the Bill in defining a *TCF contract outworker* (section 789BB(2)).

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		Whilst Ai Group opposes in its entirety the inclusion of Part 6-4A within the Bill, the removal of reference to *"work that is covered by a TCF award"* in the definition of *TCF outworker* in section 12 means that Part 6-4A could have broad and uncertain coverage. Absent reference to a TCF outworker being a outworker *"whose work is covered by a TCF award"* Part 6-4A could apply to any employer and employee who is deemed to be in the textile clothing and footwear industry. Importantly, "*textile, clothing and footwear industry"* is also not defined within the FW Act or the Bill. Given the significant obligations created by Part 6-4A on employers it is extremely unfair that there is no certainty in relation to the breadth of coverage of these provisions. The Bill should be amended so that the definition of *TCF outworker* which is currently in the FW Act is retained. That is: *"**TCF outworker** means an outworker in the textile, clothing or footwear industry whose work is covered by a TCF award."*
Definition of *TCF work* Inclusion of definition of *TCF work* to mean *"work in the textile, clothing and footwear industry."* **[s.12]**	**Not opposed (with amendment)**	The definition of *TCF work* is too broad and uncertain as it only refers to *"work in the textile, clothing and footwear industry."* Without amendment the provisions of Part 6-4A of the Bill, in particular Division 3 – Recovery of unpaid amounts, could be capable of applying to work of a TCF outworker that may not be outworker work for an entity in the textile, clothing or footwear industry which is not covered by a TCF award. For example, a TCF contract outworker who may also work for an entity as a cleaner, and as an employee, would be covered by Division 3 of Part 6-4A under the current definitions as they are a TCF outworker performing work in the textile, clothing or footwear

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		industry. The definition of *TCF work* needs to be amended as follows: *"**TCF work** means work which is outworker work in the textile, clothing or footwear industry and which is covered by a TCF award."* (proposed amendments)
Definition of *directly and indirectly* (in relation to TCF work) Definition of when work is performed *directly* (for the direct principal) and *indirectly* (for the indirect principal) in relation to TCF work performed by a worker. In addition, the definitions of *directly* and *indirectly* are expanded by section 17A(2) so that the terms are capable of a broader meaning than that which has been defined. The definitions of *directly* and *indirectly* however do not apply in relation to persons who are covered by the FW Act as a result of the referral of State powers as contemplated by Division 2A or 2B of Part 1-3 of Chapter 1. **[s.17A]**	**Opposed**	The definition of *directly* and *indirectly* are included in the Bill for the purpose of the obligations created by Part 6-4A. We oppose the obligations included in Part 6-4A in their entirety and should they be removed from the Bill, section 17A can be deleted. Should Part 6-4A be retained in some form: • the definition of *indirectly* (section 17A(1)(b)) is far too broad and requires amendment; and • section 17A(2) should be deleted as it makes the definitions in 17A(1) of limited utility. In relation to section 17A(1)(b) the EM explains that a person performs work indirectly; *"18. … 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."* (our emphasis added) There is no requirement that the indirectly responsible persons

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		also be engaged in the textile, clothing or footwear industry. This means that a transport operator that delivers fabric or materials to an outworker so that they can produce their goods would be an *indirect principal* as they are party to an arrangement (a contract for the delivery of materials) that led to the performance of the work. Equally, a business that provides maintenance services for machines used in the performance of TCF work is also capable of satisfying the definition of an *indirect principal* as an arrangement for the service, repair or maintenance of such machines arguably has led to the performance of the work by the TCF outworker. Ai Group has considerable membership not only in the transport industry but also in the metal and engineering repair, service and maintenance sector. It is unreasonable for these employers to be deemed an *indirect principal*, and therefore be liable for any unpaid monies owed to TCF outworkers. If the Bill proceeds despite Ai Group's objections, the definition of work performed *indirectly* must be amended as follows: *"17A(1)(b) Subject to (c) the work is taken to be performed **indirectly** for each other person (the **indirect principal**) who is a party to any of the arrangements in the chain or series (and each indirect principal is taken to have arranged for the work to be performed **indirectly** for the indirect principal).* *17A(1)(c) for a person to be an indirect principal they must be a person in the textile, clothing or footwear industry."* (proposed amendments) Section 17A(2) should be deleted as it provides no certainty about the circumstances where TCF work is being performed directly or

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		indirectly for a person. Instead, it identifies that that the definitions contained within section 17A(1) are not an exclusive statement of what *directly* and *indirectly* mean for the purpose of TCF work. Given the substantial obligations and liabilities which are imposed on an *indirect principal* within Part 6-4A it is imperative that as much certainty as possible regarding the application of indirect responsibility of persons is established. Retention of section 17A(2) makes the definitions within section 17A(1) of little utility. Section 17A(3) specifies that the definitions of *directly* and *indirectly* do not apply in relation to persons bound to the FW Act as a result of the referral of powers of States. This is because the extended meaning of outworker entity which arises in sections 30F and 30Q does not apply to *Commonwealth outworker entities* which are the entities which are subject to the obligations of Part 6-4A. Whilst Ai Group does not support the provisions of Part 6-4A the Bill fails to create a national regime to protect outworkers and instead forces employers in the TCF industry to comply with a complex web of State and Federal laws. In addition to the stated amendments the Bill should delete section 27(2)(d) of the FW Act to remove *"matters relating to outworkers (within the ordinary meaning of the term)"* as a non-excluded matter for the purposes of section 27(1)(c). Without this amendment the Bill will substantially increase the regulatory burden and create a great deal of risk and uncertainty in relation to the laws which apply to outworkers.

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Enterprise Agreement Flexibility terms If an enterprise agreement includes terms which apply to outworkers the flexibility term which is mandatory content in all enterprise agreements must not allow for any variation of the outworker terms. **[s.203(2)]**	**Opposed**	The inclusion of provisions within modern awards and enterprise agreements which allow for individual employees and their employer to come to an agreement, subject to safeguards, was a central element of the Fair Work regime given the removal of AWAs. The safeguards which are present in the FW Act including the requirement for genuine agreement (section 203(3)), that the employee be *"better off overall*" (section 203(4)) and the ability to terminate a flexibility agreement with notice (section 203(6)) are adequate to ensure that the interests of employee outworkers are protected.
Right of Entry – Subdivision AA, Part 3-4, Chapter 3 The amendments to the right of entry provisions expand the operation of the special provisions relating to right of entry which currently apply to *TCF outworkers* to *TCF award workers*. **[s.483A(1)(a) & (b), s.483B(3)(a)(i), (ii) & (iii), s.484]** *TCF award* workers are defined as: • an employee whose work is covered by a TCF award; or • an individual who works under a	**Opposed**	The current right of entry provisions for TCF outworkers do not require the provision of notice of entry (section 487(3)) and allow for a permit holder to review the records of non-union members in addition to union members (section 483(1)(c)). It has been argued that these enhanced rights are necessary due to the specific circumstances of outworkers however there is no basis for applying such one-sided rights to all employees covered by a TCF award as proposed by the right of entry amendments to the Bill. It would be highly inappropriate and unfair to subject TCF industry employers to a right of entry regime which is unbalanced and which does not contain the protections which employers in every other industry enjoy. It is also not appropriate for non-union members in the TCF industry to be exposed to uninvited and

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contract for services, and performs work that is covered by a TCF award. **[s.483A(1A)]** These special powers relating to right of entry cannot be utilised in circumstances where a person is accredited and the location for which access is sought is the principal place of business of the accredited person. **[s.483A(6) & (7)]**		unwanted union access to their employment records which will occur as a result of these amendments and the absence of equivalent restrictions to the access of *non-member record or document* which apply generally but which are currently omitted in relation to right of entry for TCF outworkers. The EM explains the expansion of the right of entry rights by saying: *"24. … 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."* This explanation appears to misinterpret the current provisions of the FW Act as *"sweatshops"* should already be covered within the definition of *outworker* which includes the performance of work *"at residential premises or at other premises that would not conventionally be regarded as being business premises,"* (Section 12). (our emphasis) Furthermore, the inclusion of an exemption from these onerous and unfair right of entry provisions which exists under the Bill for an "*accredited person*" (section 483A(6)), provides little meaningful relief from the regime as the body responsible for a person's accreditation must be endorsed by at least one employee organisation entitled to represent the industrial interest of TCF award workers (section 483A(7)). Without such an endorsement the Governor-General is prohibited from making a regulation empowering a body or person to provide accreditation. The operation of section 483A(6) could therefore be thwarted and left meaningless as an employee organisation could deliberately withhold its endorsement and prevent the creation of

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		any body capable of conferring accreditation.
Special Provisions about TCF outworkers – **Part 6-4A** **TCF Contract outworkers taken to be employees in certain circumstances** The Bill provides that a TCF contract outworker, that is a TCF outworker who performs work under a contract for services rather than an employee, is taken to be an employee if: • the work is performed either directly or indirectly for a Commonwealth outworker entity; and • if the entity is a constitutional corporation the work is performed for the purpose of the business undertaking of the corporation. The outworker will be the employee of the person or entity that engaged them as an outworker. **[s.789BB]** For TCF contract outworkers the provisions of the FW Act apply with the exception of:	**Opposed**	It is not appropriate to deem contract outworkers to be employees for all purposes of the Act except for a few minor, specified areas. This is not logical or fair on employers and will create a great deal of uncertainty and risk for employers. Contract outworkers are not employees and they already receive a very high level of protection under existing laws. Additionally, section 789BB(4) of the Bill provides *"(4) The objective is that a TCF contract outworker who is taken to be an employee in relation to TCF work should have the same rights and obligations in relation to the work as an employee would have if he or she were employed by the person referred to in paragraph 1(b) to do the work."* The drafting of this section is extremely unclear and use of the term *"objective"* creates uncertainty regarding whether this provision is intended to create any enforceable legal rights or obligations. If it is intended that this provision create a legal right to assume the conditions which apply to an outworker employee for contract outworkers does this mean that provisions of enterprise agreements which apply to employee outworkers would now apply to contract outworkers engaged by an employer? Such an outcome would be extremely unfair on employers and may also be unfair on the contract outworkers in applying conditions to their employment unilaterally which they never voted on and may not support. If any additional provisions of the FW Act are to apply to contract

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• Division 2A and 2B of Part 1-3 (application of the FW Act in referring States); • Part 3-4 (right of entry); • Part 3-5 (stand down); • Part 6-3 (extension of National Employment Standards entitlements); • Part 6-4 (additional provisions relating to termination of employment); and • Part 1 of Schedule 1 **[s.789BA]**		outworkers then those provisions should be specifically identified in the Act. Such provisions should not include: • The NES; • The unfair dismissal laws; • The bargaining laws; • The low paid bargaining stream which can result in the imposition of arbitrated over-award outcomes upon employers; • The transfer of business laws; and • The transfer of employment laws.
Recovery of unpaid amounts Where a TCF outworker performs TCF work for a person ("the responsible person") as either an employee or under a contract for services and the responsible person does not pay the TCF outworker an amount that is owed to the outworker, another entity can become indirectly responsible for payment of the unpaid money to the TCF outworker in certain circumstances. A person is indirectly responsible for an unpaid amount where: • They are a Commonwealth outworker entity; • The TCF work has been performed *indirectly* (as defined by section 17A)	**Opposed**	The imposition of legal liability on entities that are not the employer of a particular outworker or directly responsible for the engagement of a particular outworker is manifestly unfair and is likely to result in businesses choosing to avoid the manufacture of textiles, clothing and footwear in Australia for fear of unexpected liability arising in circumstances where they cannot otherwise effectively control or prevent these risks. The Bill creates an absolute and indefensible liability for any business or entity (with the exception of some retailers) that is a part of a supply chain in which a TCF outworker has not received an amount of money which is owed to them. This liability exists despite the fact that the indirectly responsible entity may be multiple stages down the supply chain and have no commercial or contractual relationship with the "responsible person", no effective means of controlling or influencing the conduct of the "responsible person", and no awareness that the "responsible person" exists let alone engages or employs outworkers.

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for the entity; and • If the entity is a constitutional corporation – for the purpose of the business undertaking of the corporation. If there is more than one indirectly responsible entity they are each liable for any unpaid monies to the TCF outworker. **[s.789CA, s.789CB]** Proceedings in the Federal Court, Federal Magistrates Court or an eligible State or Territory Court may be commenced against an indirectly responsible entity for the unpaid amount owed to the TCF outworker. If an indirectly responsible entity is required to pay an unpaid amount on behalf of a responsible person, the indirectly responsible entity is entitled to commence proceedings against the responsible person to recover the amount paid on their behalf. **[s.789CD, s.789CE]** Retailers who do not have a right to supervise or otherwise control the performance of work of a TCF outworker prior to goods being delivered to the retailer are not an indirectly responsible entity. **[s.789CA(5)]**		The FW Act already contains detailed provisions in relation to the rights of employees including outworkers, these rights include mechanisms to recover unpaid amounts from those who are *directly* responsible for any underpayment. This is the appropriate level of regulation and provides for restitution against those who are *actually* responsible for the outworker's underpayment. The exemption within the Bill (section 789CA(5)) for retailers only serves to highlight the unfairness and illegitimacy of the provisions more broadly. Specifically, section 789CA(5) exempts retailers from the definition of *indirectly responsible entity* in circumstances where: *"(b) the entity does not have any right to supervise or otherwise control the performance of the work before the goods are delivered to the entity."* In circumstances however where another entity or person, not being a retailer, has no power to supervise or otherwise control the performance of work prior to performing their role in the supply chain, they are still provided with no relief from the damaging and potentially costly financial liabilities created by the Bill for indirectly responsible entities. Even if an entity conducted inquiries and investigations into the employment practices of those who they were directly dealing with and those who they reasonably knew were in the supply chain, such undertakings under the terms proposed in the Bill would not prevent that entity from being prosecuted for the conduct of a third party in the supply chain who was beyond their control and even their knowledge. The effect of these provisions will be that those who have the responsibility for unpaid monies not being pursued through the

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		legal system but instead those within the supply chain most capable of paying the unpaid amounts as the targets. The joint and severable liability for all entities with an indirect connection to the relevant TCF work will result in at best an arbitrary pursuit of an indirectly responsible entity or more likely (and much worse) pursuit of the indirect entity with the greatest capacity to pay. In order to create liability for an indirectly responsible entity the TCF outworker must have only taken *"reasonable steps to get the responsible person to pay the unpaid amount"* (section 789CB(2)). There is no definition of what amounts to *"reasonable steps"* however this threshold is far too low as it will likely result in cursory attempts to extract money from the responsible person given that an indirectly responsible entity will ordinarily be more easily located. The articulation of a mechanism for an indirectly responsible entity's right to seek recompense from the responsible person through Court proceedings is also an entirely inadequate remedy for businesses who find themselves with indirect liability in these circumstances. Not only will they be exposed to the legal costs and expense associated with being prosecuted for a debt which they have no direct responsibility in incurring but then they must incur further legal expense in pursuing the legitimately responsible person if they want restitution.
Code of practice relating to TCF outwork	**Opposed**	We do not consider the FW Act including an Outworker Code or any other Code. The Act needs to include provisions which are certain. The inclusion of a Code in the Act will lead to uncertainty.