13 February 2012

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Australia

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Secretary
Senate Standing Committee on Education,
Employment and Workplace Relations
Parliament House
CANBERRA ACT 2600

Dear Secretary,

Re: Inquiry into the *Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011*

At the hearing on 2 February, Ai Group undertook to provide further information to the Senate Committee on the following two issues:

1. Under the terms of the *Fair Work Act 2009* ("the FW Act") does the principal manufacturer have any influence over or liability for the activities of home based work or outwork performed overseas on their behalf; and
2. Whether in New South Wales there exist provisions in the construction industry which allow employees of contractors to seek to recover monies from a principle contractor up the supply chain where their employer has not paid them. Additionally, whether that is a similar approach to that which is proposed in the *Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011* ("the Bill").

Below is the additional information as foreshadowed.

1. Liability of principal manufacturer for the outwork performed overseas on their behalf

Under the FW Act the liability of a principal manufacturer for the entitlements of a home based worker or outworker only arise if the outworker is a direct employee of the principal manufacturer. In all other circumstances, particularly where there are multiple links in a supply chain arrangement between the principal manufacturer and the outworker, no responsibility or liability for the entitlements or actions of the outworker are conferred on the principal manufacturer.

In relation to the performance of work overseas by home based workers or outworkers, it is highly unlikely that any principal manufacturer in Australia would directly engage these workers or engage them pursuant to a contract of service (an employer/employee arrangement). Accordingly, the FW Act would not create

any liability or responsibility for the actions or entitlements of these workers for the principal manufacturers in Australia.

This fact highlights the significant concerns that Ai Group has for the continued existence of local manufacturing in the textile, clothing and footwear industries should the Bill be enacted into law. Even the diligent and scrupulous manufacturers of TCF in this country may decide to cease to manufacture locally given the risk of financial liability for the actions of those further down the supply chain over which they have no control.

2. Operation of the New South Wales construction industry scheme

Ai Group could not find any scheme operating in New South Wales which creates liability for a principal contractor where those sub-contractors that the principal has contracted with fail to pay their employees their legal entitlements and which applies exclusively to operators in the construction industry. The *Industrial Relations Act 1996 (NSW)* does however contain provisions which impose obligations including on principal contractors in the construction industry in some circumstances. The relevant provisions are found at section 127 of the *Industrial Relations Act 1996 (NSW)* as follows:

> ***"127 Liability of principal contractor for remuneration payable to employees of subcontractor***
>
> *(1) Application*
> *This section applies where:*
>
> *(a) a person ("the principal contractor") has entered into a contract for the carrying out of work by another person ("the subcontractor"), and*
> *(b) employees of that subcontractor are engaged in carrying out the work ("the relevant employees"), and*
> *(c) the work is carried out in connection with a business undertaking of the principal contractor.*
>
> *(2) Liability of principal contractor*
> *The principal contractor is liable for the payment of any remuneration of the relevant employees that has not been paid for work done in connection with the contract during any period of the contract unless the principal contractor has a written statement given by the subcontractor under this section for that period of the contract.*
>
> *(3) Content and form of statement*
> *The written statement is a statement by the subcontractor that all remuneration payable to relevant employees for work under the contract done during that period has been paid. The regulations may make provision for or with respect to the form of the written statement.*
>
> *(4) Retention of copies of statements*
> *The subcontractor must keep a copy of any written statement under this section for at least 6 years after it was given.*
>
> *(5) Payments under contract*
> *The principal contractor may withhold any payment due to the subcontractor under the contract until the subcontractor gives a written statement under this*

section for any period up to the date of the statement. Any penalty for late payment under the contract does not apply to any payment withheld under this subsection.

(6) Remuneration
For the purposes of this section, remuneration means remuneration or other amounts payable to relevant employees by legislation, or under an industrial instrument, in connection with work done by the employees.

(7) False statement not effective
The written statement is not effective to relieve the principal contractor of liability under this section if the principal contractor had, when given the statement, reason to believe it was false.

(8) False statement is offence
A person who gives the principal contractor a written statement knowing it to be false is guilty of an offence if:

(a) the person is the subcontractor, or
(b) the person is authorised by the subcontractor to give the statement on behalf of the subcontractor, or
(c) the person holds out or represents that the person is authorised by the subcontractor to give the statement on behalf of the subcontractor.

Maximum penalty: 100 penalty units.

(9) Recovery
The provisions of this Act relating to the recovery of amounts payable under industrial instruments apply to the recovery of remuneration payable by a principal contractor under this section.

(10) Exclusion
This section does not apply in relation to a contract if the subcontractor is in receivership or in the course of being wound up or, in the case of an individual, is bankrupt and if payments made under the contract are made to the receiver, liquidator or trustee in bankruptcy.

(11) Application
To avoid doubt, this section extends to a principal contractor who is the owner or occupier of a building for the carrying out of work in connection with the building so long as the building is owned or occupied by the principal contractor in connection with a business undertaking of the principal contractor.

(12) Nothing in this section limits or excludes any liability with respect to payment of remuneration by a person who is a principal contractor arising under this Act or any other law or any industrial instrument."

Whilst on its face it may appear that these provisions are similar to the provisions which are proposed under the Bill there are a number of important differences.

First, and probably most significantly, whilst section 127(2) creates liability for a principal contractor where a relevant employee of a sub-contractor has not been paid their legal entitlements, the principal contractor can be absolved from liability where the principal contractor has a written statement from the subcontractor which specifies "*that all remuneration payable to relevant employees for work*

under the contract done during that period has been paid" (section 127(2) and 127(3)). There are protections within the section to ensure that such statements are not obtained by principal contractors where the principal knows such statements to be false (section 127(7)) however absent these deliberate attempts to rely on false information, a written statement from a sub-contractor provide an absolute shield against any legal liability for the breaches of the sub-contractor.

Second, the language of section 127(1) appears to require a direct contractual relationship between the principal and the sub-contractor. They cannot be strangers in a contractual sense as section 127 only applies where a principal contractor "*has entered into a contract for the carrying out of work by another person ("the subcontractor")"* (section 127(1)(a)). This is a marked difference to the approach contemplated by the Bill which would see legal liability created for the principal even in circumstances where they have no knowledge or contractual arrangement with a sub-contractor engaging outworkers in the supply chain.

These important differences reflect comments made by Ai Group in its submissions and in response to questions posed by the Committee during the public hearing. We maintain our opposition to the Bill for the reasons previously outlined however should elements of the Bill be enacted in some form it is imperative that these practical and sensible safeguards for contractors who have no power of control or supervision over the work of outworkers in the supply chain are replicated.

Yours sincerely

Michael Mead
National Manager – Advocacy and Policy