

QUESTION ON NOTICE

Senate Education, Employment and Workplace Relations Committee Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011

QUESTION: Clarify why the deeming provisions of this bill do not ensure that someone who has been deemed to be an employee gets superannuation.

The Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011 (the Bill) extends the operation of most provisions of the *Fair Work Act 2009* (FW Act) to contract outworkers in the textile, clothing and footwear (TCF) industry. It does this by making provision for TCF contract outworkers to be treated as employees for the purposes of the FW Act (new section 789BB of the Bill). The effect of these provisions is that, within the constitutional powers of the Commonwealth, TCF contract outworkers will have generally equivalent entitlements and protections under the FW Act as employee outworkers (who, as employees, are already entitled to the benefit of the protections under the Act).

The provisions of the Bill do not deem TCF contract outworkers to be employees for the purposes of other legislation. In relation to superannuation entitlements, under the *Superannuation Guarantee (Administration) Act 1992* (SGAA), the obligation to meet the superannuation guarantee is imposed on all employers. Where an employer fails to provide adequate superannuation, they become liable for the superannuation guarantee charge (SGC). However, failing to pay superannuation in relation to TCF contract outworkers does not give rise to the SGC because contractors fall outside of the definition of employee in that Act (s 12 of the SGAA). As noted, the provisions of the Bill will not affect the existing arrangements under the SGAA in relation to TCF contractor outworkers as it will not deem them to be employees for the purpose of the SGAA (noting that TCF **employee** outworkers are already entitled to superannuation and are covered by the SGAA).

Awards and enterprise agreements may provide a requirement for employers to provide superannuation to their employees. The Textile, Clothing, Footwear and Associated Industries Award 2010 (the Award) provides employees with an entitlement to superannuation in clause 44.2. Under the Award, the entitlement to superannuation provided by sub-clause 44.2(a) does not extend to contract outworkers. This is despite the effect of clause F.4.8 of Schedule F to the Award, which states that 'a principal must apply the remaining provisions of this award to the worker as though the worker is an employee, whether or not the principal is an employer or the worker is an employee' (subject to defined exceptions).

Sub-clause 44.2(a) of the Award states that 'an employer must make such superannuation contributions to a superannuation fund for the benefit of an employee *as will avoid the employer being required to pay the superannuation guarantee charge* under superannuation legislation with respect to that employee'. This means that under the Award, superannuation is only payable by an employer in circumstances where the SGC would otherwise be levied in cases of underpayment. Under the SGAA, the SGC can only be levied in respect of underpayment of an employee's superannuation entitlement and cannot be levied for underpayment in respect of contractors. As a result, TCF contract outworkers do not have a general award entitlement to be paid superannuation.

As noted above, because the deeming effect of the Bill is limited to the provisions of the FW Act and will not extend to the provisions of the SGAA, and because the Award refers in the relevant provisions to the SGC (which does not apply to contractors), the provisions of the Bill will also not alter the existing operation of the Award in relation to superannuation for TCF contract outworkers.