

National Secretary

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To: The Committee Secretary
House of Representatives
Standing Committee on Economics
PO Box 6021
Parliament House
CANBERRA ACT 2600
AUSTRALIA

By e-mail: economics.reps@aph.gov.au

**Re: House of Representatives Economics Committee
Inquiry and Report into Pay as You go Withholding Non-Compliance Tax
Bill 2011**

Please find enclosed submission by the Textile, Clothing and Footwear Union of Australia into the above Inquiry.

If you wish to discuss any aspect of this submission please do not hesitate to contact me (see details below).

Yours Sincerely



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House of Representatives Economics Committee Inquiry and Report into Pay As You Go Withholding Non-compliance Tax Bill 2011

Submission by the Textile, Clothing & Footwear Union of Australia

1. The Textile Clothing & Footwear Union of Australia ('TCFUA') is an organisation of employees registered pursuant to the *Fair Work (Registered Organisations) Act 2009*. Our membership consists of workers employed in the textile, clothing and footwear industry in Australia, including outworkers.
2. The Textile, Clothing and Footwear industry ('TCF industry') encompasses a range of products and processes including (but not limited to), carpets, technical textiles, clothing, accessories, design, footwear and allied and component products. Some parts of the industry are characterised by a small number of large employers (primarily in the textile sector). However, a great proportion of the industry consists of small to medium sized employers.
3. The Bill documentation available on the Committee's website did not appear to be complete, including Clauses 1 – 4 only. Our submission therefore addresses general matters and matters raised in the Explanatory Memorandum only.
4. The TCFUA supports in principle the policy objectives of the proposed Bill, which the TCFUA understand to be:
 - a. Deter fraudulent phoenix activity
 - b. Deter companies from avoiding payment of employee's entitlements, including superannuation obligations; and
 - c. Deter companies from avoiding payment of Pay As You Go withholding amounts.
5. The TCFUA understands that the Bill aims to achieve this by:
 - a. Making directors of companies personally liable for superannuation guarantee payments;
 - b. Making directors of companies personally liable for failure to pay Pay As You Go withholding amounts; and
 - c. Automating the director penalty scheme.
6. Workers in the TCF industry are generally low-paid and predominantly award dependent. A large proportion of workers in the industry are women, often from non-English speaking backgrounds with low levels of English language and literacy.
7. Workers in the TCF industry are also predominantly older and likely to have limited or insufficient superannuation funds when they reach retirement age and may be reliant upon social security payments to meet minimum living standards. The superannuation guarantee payments are therefore of great importance to the individuals concerned and to the community as a whole, and

has an effect upon the government budget allocated to social security payments for retirement age Australians.

8. The TCF industry is also one characterised by widespread and chronic failure to pay employer's compulsory superannuation contributions, despite the requirement in the industry's Modern Award of monthly remission of superannuation contributions.
9. A further unfortunately frequent occurrence in the TCF industry is the failure of companies, who become insolvent (either by entering into administration or being placed into liquidation or receivership) and unable to pay employees' entitlements, and who may not have been paying employees superannuation guarantee payments for a period of time prior to insolvency. Furthermore, companies may also have been failing to pay employees' voluntary contributions to their superannuation funds for a period of time prior to formal insolvency. Companies gain a benefit to their apparent cash flow and credit-worthiness from failure to pay superannuation and often incur more debt, while employees are left with nothing and no viable remedy when insolvency finally catches up with the company.
10. Also prevalent in the TCF industry is the revival of companies, either operated by the same director or group of directors or by associates of directors of the insolvent company. Sometimes, there is a long historical chain of corporate entities, operated and controlled by the same person or group of people, who continue to avoid payment of employee entitlements and from whom employees are unable to seek redress as each new corporate entity is protected by the 'corporate veil'.

- a. Case Study 1

In May 2011, Company A, who employed approximately 30 employees producing women's garments was unable to pay its debts and was placed into liquidation. It had been operating for many years but over time ended up with only one client. The company had been in a payment arrangement with the ATO since 2009/2010 financial year and had not been paying employer's superannuation guarantee charge since prior to this time. In the company's Report as to Affairs (Form 507), the company reported that it owed approximately \$500,000 in respect of employee's entitlements, of which approximately \$135,000 was superannuation.

The only secured creditor of the company was another company, whose directors were the same as the directors of the insolvent company.

Most employees recovered their entitlements through the GEERS scheme but could not recover a significant proportion of their unpaid superannuation contributions, which included voluntary contributions.¹

Shortly after liquidation, a further company, Company B, controlled by a relative of a director of Company A and who had in the past been a director of Company A, began operations from the same premises of Company A, making the same products and supplying to the same client. Company B also employed some of the same employees of the insolvent company.

Due to the corporate veil, employees did not have a viable legal remedy against Company B for their unpaid superannuation contributions, including employer's superannuation guarantee and their voluntary contributions.

b. Case Study 2

In December 2008, Company C trading under a trading name transmitted its business to Company D. Company D traded under a similar trading name and employed Company C's former employees, recognising service and accepting responsibility for accrued entitlements.

Company D was placed into liquidation in April 2010. Prior to this date, Company D had failed to remit superannuation on behalf of its employees. Another company, Company E, controlled by the wife of the director of Company D, purchased assets from Company D's liquidators on the same day that liquidators were appointed. Company E traded under the same trading name as Company D. Company E offered employment to Company D's employees on the basis that they resign from their employment with Company D. As a result, employees were unable to recover their superannuation guarantee entitlements.

Company D was placed into liquidation in November 2010, owing approximately \$600,000 in respect of employee's entitlements, of which approximately \$13,000 was superannuation.

11. Complaints about allegedly fraudulent phoenix activities are rarely successfully pursued in the TCF industry as they relate to small to medium businesses. There is also no clear offence in the Corporations Law related to fraudulent phoenix activities and prosecutions can only be made in relation to more general offences relating to directors' duties under the Corporations Law. It is difficult for employees to amass the relevant and sufficient evidence to satisfy the elements of offences in breach of directors' duties.

¹ GEERS does not make payments for outstanding employer superannuation contributions. It does however, cover unpaid voluntary employee superannuation contributions (as unpaid wages) but only goes back 13 weeks.

Awareness of the lack of success often means that complaints will not be made and the extent of phoenix activity is unreported and undetected.

12. We submit that this Bill goes partially to address these concerns and welcome, as a first step, the extension of personal liability of company directors in relation to failure to pay superannuation guarantee charge.
13. We submit that the extension of personal liability for associates of company directors in relation to PAYG withholding amounts should also be extended to superannuation guarantee payments.

Michele O'Neil
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Victorian State Secretary
Textile Clothing and Footwear Union of Australia

(27 October 2011)