

EXPLANATORY STATEMENT

Select Legislative Instrument 2012 No. 326

Issued by the authority of the Minister for Employment and Workplace Relations

Subject – *Fair Entitlements Guarantee Act 2012*

Fair Entitlements Guarantee Regulation 2012

The *Fair Entitlements Guarantee Act 2012* (the Act) provides a legislative basis for the payment of financial assistance to workers who have unpaid employment entitlements as a result of the insolvency or bankruptcy of their employer. This financial assistance was previously advanced under the administrative General Employee Entitlements and Redundancy Scheme (GEERS).

Subsection 50(1) of the Act provides that the Governor-General may make a regulation to create schemes for the provision of assistance to workers who were not ‘employees’ for the purposes of the Act. Subsection 50(2) of the Act allows for a regulation to set out other matters related to the scheme. This regulation making power was included in the Act to provide flexibility to extend the scheme under the Act to cover employment relationships that extend beyond the traditional employer/employee relationship. Such flexibility is particularly necessary in situations where vulnerable workers are engaged other than as employees and may therefore be disadvantaged.

The *Fair Entitlements Guarantee Regulation 2012* (the Regulation) builds upon the scheme under the Act to create a scheme to allow for financial assistance to be advanced to contract outworkers in the textile, clothing and footwear industry (TCF contract outworkers) in the event those amounts are unpaid due to the insolvency or bankruptcy of the person who engaged them to carry out the work. The amount of the advance is determined in accordance with the instruments that govern the TCF contract outworker’s performance of work.

The Regulation complements and reinforces the protections for TCF contract outworkers that are embedded in the *Fair Work Act 2009* (FW Act). While the FW Act seeks to encourage a collective sense of responsibility within the textile, clothing and footwear industry by creating recovery rights against indirectly responsible entities who are higher up the contractual chain, the Regulation is restricted to providing advances only where the person who directly engaged the TCF contract outworker has undergone an insolvency event. This ensures that the Regulation is limited by its enabling provision in the Act.

The Regulation modifies the Act to the extent necessary to make the scheme applicable to TCF contract outworkers. The Regulation modifies the Act by:

- substituting new sections that have the same effect but use terminology appropriate for TCF contract outworkers;
- substituting new sections to alter certain rules to make them applicable to TCF contract outworkers, such as the eligibility requirements contained in section 10 of the Act; and
- omitting sections that are not applicable to TCF contract outworkers.

The Regulation makes no changes to sections of the Act capable of applying to TCF contract outworkers without modification.

An overview of the Regulation is provided at the Attachment A.

Representatives from employer and employee groups were consulted in relation to this Regulation.

A Statement of Compatibility with Human Rights has been completed for the Regulation, in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Statement's assessment is that the measures in the Regulation are compatible with human rights. A copy of the Statement is at Attachment B.

The Act does not impose any conditions that need to be satisfied before the power to make the Regulation may be exercised.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Office of Best Practice Regulation advised that a Regulation Impact Statement was not required (reference 14481).

The Regulation commences after the end of the period in which the Regulation could be disallowed in either House of Parliament.

Details of the *Fair Entitlements Guarantee Regulation 2012*

The Regulation builds upon the scheme under the Act to create a scheme to advance entitlements to TCF contract outworkers where those amounts are unpaid and the person who engaged them to carry out work has undergone an insolvency event.

Section 1 – Name of Regulation

This section provides that the Regulation is to be known as the *Fair Entitlements Guarantee Regulation 2012*.

Section 2 – Commencement

This section provides that the Regulation is to commence at the end of the period in which it could be disallowed in either House of the Parliament.

Section 3 – Definitions

This section provides definitions for terms used in the Regulation.

Section 9 – Schemes for assistance of workers who were not employees – TCF contract outworkers

This section outlines who the Regulation applies to and how it operates. This includes identifying who the ‘specified person’ for a TCF contract outworker is and providing that the Regulation sets out a scheme for the provision of financial assistance to TCF contract outworkers, the recovery of amounts of that financial assistance and other matters related to the scheme.

SCHEDULE 1 – TCF Contract Outworkers—modifications of Act

Schedule 1 provides for modifications of the scheme established by the Act to make it applicable to TCF contract outworkers.

PART 1 – Preliminary

Part 1 of the Act contains the preliminary matters for the scheme. This includes the objects of the Act (section 3), relevant definitions (section 5) and the five employment entitlements that are eligible to be advanced under the scheme (section 6).

Item [1] to [5] – Section 5

These items insert a number of new definitions relevant to TCF contract outworkers into section 5 of the Act.

Governing instrument mirrors the definition of ‘governing instrument’ in the Act. A TCF contract outworker’s entitlements will be determined in accordance with the governing instrument that applies to their performance of work. This includes:

- A written law of the Commonwealth, a State or a Territory;
- An award, determination or order that is made or recorded in writing;
- A written instrument; or
- An agreement (whether a contract or not).

Outworker has the same meaning as in the *Fair Work Act 2009*.

Specified Person, in relation to a TCF contract outworker, means a person for whom the TCF contract outworker did work in the capacity of an outworker (other than work performed indirectly for another person within the meaning of s 17A of the *Fair Work Act 2009*).

A TCF contract outworker will perform work in the capacity of an ‘outworker’ (as defined in the *Fair Work Act 2009*) when they perform work for the purpose of a contract for the provision of services. In other words, a ‘specified person’ will be the person with whom the TCF contract outworker has contracted with, either in writing or verbally.

If there is a chain of two or more arrangements for the supply or production of goods produced by the TCF contract outworker, and section 17A of the *Fair Work Act 2009* applies, the specified person will be the person for whom the TCF contract outworker did work ‘directly’.

The specified person must also owe the TCF contract outworker an amount for that work and be insolvent (or reasonably expected to become insolvent).

TCF contract outworker means an individual who performs work as an outworker in the textile, clothing or footwear industry otherwise than as an employee.

This identifies who is able to be advanced unpaid entitlements under the scheme created by the Regulation.

TCF contract outworker entitlements defines what entitlements a TCF contract outworker is entitled to be advanced under the scheme created by the Regulation. These are the same entitlements that an ‘employee’ is entitled to claim under the scheme created by the Act, namely:

- annual leave; or
- long service leave; or
- payment in lieu of notice; or
- redundancy pay; or
- wages.

Entitlements that a TCF contract outworker is entitled to claim under the scheme are entitlements which exist at the relevant time. It may not be the case that all of the entitlements listed would be available to TCF contract outworkers under his or her governing instrument.

PART 2 – Eligibility for advance

Part 2 of the Act sets out the eligibility requirements of the scheme. These include the matters that the Secretary must be satisfied of in order to find that a person is eligible for an advance under the Act, and the grounds on which eligibility can be excluded. This part also sets out what constitutes an effective claim under the Act, and that the Secretary must decide eligibility for an advance once an effective claim has been made.

Item [6] – Section 10

Section 10 of the Act sets out the conditions of eligibility for an advance under the scheme.

This item substitutes the conditions of eligibility for an advance contained in section 10 of the Act with a revised set of conditions. These revised conditions are based on the conditions contained in the Act but are modified to reflect the differences between employees and TCF contract outworkers.

The primary difference is that the end of a TCF contract outworker's engagement does not have to be linked to the insolvency of the specified person. This reflects the ad hoc nature of a TCF contract outworker's relationship with the specified person and the fact that the relationship between the parties may end simply as a result of the contract being fulfilled. In these cases, it is not possible to draw a direct link between the end of the relationship and the insolvency of the specified person.

By removing this requirement, the operative element in determining eligibility is whether the TCF contract outworker is owed unpaid amounts by a specified person who has undergone an insolvency event.

Item [7] – Section 11

Section 11 of the Act creates an exclusion from eligibility where an applicant has a personal connection with their employer.

This item substitutes the grounds for excluding a person from eligibility for an advance due to a personal connection with their employer that are contained in the Act with a set of grounds that are applicable to TCF contract outworkers.

In applying these exclusions, the Act provides that a person is not eligible for an advance if they are an 'excluded employee' for the purposes of section 556 of the *Corporations Act 2001*. TCF contract outworkers cannot be an excluded employee for the purposes of the *Corporations Act 2001*. This item modifies section 11 of the Act to ensure that the same exclusions that apply to employees under the scheme created by the Act also apply to TCF contract outworkers.

Item [8] – Sections 12 and 13

Section 12 of the Act creates an exclusion from eligibility for contractors who were newly employed after working as a contractor, and section 13 of the Act excludes former Ansett

employees whose entitlements were provided for by the Special Employee Entitlements Scheme for Ansett Group Employees.

This item omits sections 12 and 13 of the Act from applying to the scheme for TCF contract outworkers as they are not applicable to TCF contract outworkers.

Item [9] – Section 14

Section 14 of the Act lists what is required for a claim to be effective.

This item substitutes the requirements for making an effective claim with a revised list of requirements. These include changes in terminology and removing requirements relating to previous claims under the General Employee Entitlements and Redundancy Scheme that are not applicable to TCF contract outworkers.

Item [10] – Section 15

Section 15 of the Act provides that the Secretary must decide an individual's eligibility if an effective claim is made.

This item substitutes a new section 15 that has the same effect as the section contained in the Act but with terminology that makes it applicable to claims made by TCF contract outworkers.

PART 3 – Amount of advance

Part 3 of the Act sets out how the decision maker is to work out the amount of an advance for a person. This involves working out the basic entitlements for each of the employment entitlements a person is owed and then deducting any amounts that a person has already been paid for those entitlements or is entitled to be paid. Part 3 also contains a number of exclusions, including where some entitlements could be transferred to a new employer, where the employee owes the employer a debt and where the liquidator is likely to pay the amount of the entitlement within 112 days

Items [11] to [18] – Sections 16 to 23

Sections 16 to 23 of the Act set out principles for working out the amount of an individual's advance. These include the basic amounts to be advanced for each entitlement and the reductions that can be applied.

These items substitute new sections 16 to 24 that have the same effect as those contained in the Act but with terminology that makes them applicable to claims made by TCF contract outworkers.

Item [19] – Section 24

Section 24 of the Act provides that a person's wages entitlement is subject to Pay as you go (PAYG) withholding.

This item substitutes section 24 with a new section that reflects the different nature of a TCF contract outworker's engagement by the specified person. The new section distinguishes between situations where a TCF contract outworker has made an agreement with the specified person for the purposes of PAYG voluntary withholding, and where the TCF contract outworker is responsible for their own tax arrangements.

If such an arrangement is in place, the basic amount of their wages entitlement is reduced by the amount that is to be withheld under the agreement. If no agreement exists, the basic amount of the wages entitlement is not reduced and the applicant will be required to make their own arrangements with the Australian Tax Office.

Items [20] & [21] – Sections 25, 26 & 27

Sections 25, 26 and 27 of the Act set out special rules for the basic amounts for employment entitlements. Section 25 provides that recently agreed changes in terms and conditions can be disregarded in certain circumstances. Sections 26 and 27 deal with the application of the maximum weekly wage rate to entitlements.

These items substitute new sections 25, 26 and 27 that have the same effect as those contained in the Act but with terminology that makes them applicable to claims made by TCF contract outworkers.

PART 4 – Payment of advance

Part 4 of the Act places an obligation on the Commonwealth to pay an advance to an eligible person and outlines how payments may be made.

Item [22] – Section 28(1) to (3)

Section 28 of the Act sets out how payments under the Act are to be made.

This item substitutes new subsections 28(1) to (3) that have the same effect as the section contained in the Act but with terminology that makes it applicable to claims made by TCF contract outworkers.

PART 5 – Recovery of advance

Part 5 of the Act deals with the Commonwealth's ability to recover money advanced under the scheme established by the Act. This includes the Commonwealth's ability to assume the recovery rights of an individual to whom an advance has been made, as well as the ability to recover money from an individual who has received an advance and later received, from another source, an amount for an employment entitlement that was part of the advance.

Item [23] – Sections 29 and 30

Sections 29 and 30 of the Act set out the Commonwealth's recovery rights under the *Corporations Act 2001* and the *Bankruptcy Act 1966*.

This item omits sections 29 and 30 of the Act from applying to the scheme for TCF contract outworkers as they are not applicable to TCF contract outworkers.

Item [24] – Section 31

Section 31 of the Act sets out the Commonwealth's recovery rights in situations where the *Corporations Act 2001* and the *Bankruptcy Act 1966* do not apply.

This item substitutes a new section 31 that has the same effect as the section contained in the Act but with terminology that makes it applicable to claims made by TCF contract outworkers.

This section provides that the payment of an advance by the Commonwealth extinguishes the liability of the specified person who owed the debt to the claimant and specifies that the claimant's rights in the winding up process of the specified person become the rights of the Commonwealth. This section provides the basis for the Commonwealth's recovery rights in relation to advances paid to TCF contract outworkers.

Items [25] to [27] – Section 32 to 34

Section 32 of the Act provides for how reductions made to a person's advance as a result of their owing a debt to their employer are apportioned between the different employment entitlements. Section 33 creates special provisions for partnerships in relation to the Commonwealth's recovery rights. Section 34 allows the Commonwealth to recovery amounts from an individual when they receive an advance but later receive money for the same entitlement from a third party.

These items substitutes certain new sections within sections 32, 33 and 34 that have the same effect as those contained in the Act but with terminology that makes them applicable to claims made by TCF contract outworkers.

PART 6 – Administration

Part 6 of the Act contains provisions about decision-making, internal review of decisions and review of decisions by the Administrative Appeals Tribunal. It also contains provisions relating to information management and delegation of decision-making.

Items [28] to [42] – Sections 35 to 46(1)

Sections 35 to 46 of the Act deal with a range of matters relating to the administration of the Act. These cover matters such as the giving of notice to applicants, review mechanisms and information management.

These items substitute certain new sections within sections 35 to 46(1) that have the same effect as those contained in the Act but with terminology that makes them applicable to claims made by TCF contract outworkers.

Item [43] – Section 47

Section 47 of the Act sets out how and to whom the Secretary's powers and functions under the Act can be delegated.

This item omits a reference to ‘this Act’ and replaces it with a reference to ‘this Scheme’.

PART 7 – Miscellaneous

Part 7 of the Act deals with miscellaneous matters related to the operation of this legislation.

Item [44] – Section 49

Section 49 of the Act allows the Minister to extend the operation of the scheme to employers that are in administration under Part 5.3A of the *Corporations Act 2001*. To utilise this section, the Minister must be satisfied that the employer’s creditors will resolve to wind the company up and that it is practicable to administer the Act in these circumstances.

This item substitutes a new section 49 that has the same effect as the section contained in the Act but with terminology that makes it applicable to claims made by TCF contract outworkers.

Item [45] – Section 50

Section 50 of the Act provides for schemes for assistance of workers who were not employees.

This item omits section 50 as it is not applicable to the scheme implemented by the Regulation.

Item [46] – Section 51

Section 51 of the Act provides for the funding of the Act.

This item omits a reference to ‘this Act’ and replaces it with a reference to ‘this Scheme’.

Item [47] – Section 52(1)

Section 52 of the Act provides a mechanism for recovery of funds incorrectly paid out under the Act.

This item substitutes a new sub-section 52(1) that has the same effect as the section contained in the Act but with terminology that makes it applicable to claims made by TCF contract outworkers.

Item [48] – Section 54

Section 54 of the Act provides that a right to payment of financial assistance is granted on the basis that the amount of the assistance may be reduced, cancelled, revoked, terminated or varied by or under later legislation.

This item omits a reference to ‘this Act’ and replaces it with a reference to ‘this Scheme’.

Item [49] – Section 55

Section 55 of the Act provides for the making of regulations.

This item omits section 55 as it is not applicable to the scheme implemented by the Regulation.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Fair Entitlements Guarantee Regulation 2012

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Fair Entitlements Guarantee Act 2012* (the Act) provides a legislative basis for the payment of financial assistance to workers who have unpaid employment entitlements as a result of the insolvency or bankruptcy of their employer. This financial assistance was previously advanced under the administrative General Employee Entitlements and Redundancy Scheme (GEERS). Section 50 of the Act provides that the Governor-General may make regulations creating schemes for the provision of assistance to workers who were not employees.

The *Fair Entitlements Guarantee Regulation 2012* (the Regulation) has been made under section 50 of the Act to create a scheme to allow for financial assistance to be advanced to contract outworkers in the textile, clothing and footwear industry (TCF contract outworkers). The Regulation replicates the scheme created by the Act, but with some modifications. These modifications adapt the scheme created by the Act to recognise the different characteristics of the relationship between a TCF contract outworker and their direct engagers, who are referred to as a 'specified person' for whom the TCF contract outworker did work in the capacity of an outworker (see item 2 of the Regulation).

The scheme for TCF contract outworkers is set up by the provisions in Parts 1 to 7 of the Act, modified in accordance with Schedule 1 of the Regulation. As such, the Regulation is required to be read in conjunction with Act. Essentially, the Regulation raises the same human rights implications as does the Act. However, for completeness, these human rights implications have been outlined in this statement of compatibility with human rights. The statement refers to provisions of the Act and the Regulation, as the scheme for TCF contract outworkers is underpinned by both the Act and the Regulation.

Human Rights Implications

Rights to Equality and Non-discrimination

Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) provides:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language,

religion, political or other opinion, national or social origin, property, birth or other status.

Article 26 of the ICCPR provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The rights to equality and non-discrimination in Articles 2 and 26 ensure that no one is denied their rights because of a prohibited ground (for example race, colour or sex). In addition to the prohibited grounds specified in these articles, discrimination is also prohibited on 'other status'. The UN Human Rights Committee has held that 'nationality' may be a prohibited ground for discrimination.

Item 5 of the Regulation modifies subsection 10(1)(f) of the Act to require a TCF contract outworker to be an Australian citizen or the holder of a permanent visa or a special category visa under the *Migration Act 1958* to be eligible for an advance under the scheme. This subsection engages and limits the rights to equality and non-discrimination under Articles 2 and 26 because it makes citizenship or visa status a condition of eligibility for financial assistance.

The rights to equality and non-discrimination are not absolute rights and can be subjected to permissible limitations. The UN Human Rights Committee has recognised that 'not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'.

The Regulation establishes an assistance scheme, which is intended to operate as a safety net for eligible TCF contract outworkers. In this way, it is analogous to social security legislation. As such, care has been taken to maintain some consistency with conditions of eligibility in analogous social security legislation. This is a legitimate objective.

The limitation is also reasonable in the context of the Regulation's purpose to provide a safety net for TCF contract outworkers whose employment has ended due to the insolvency of their direct engagers. Importantly, the restriction on eligibility in subsection 10(1)(f) will not in any way affect an excluded TCF contract outworker's right to recover any unpaid entitlements from a specified person for whom the TCF contract outworker performed work.

It is considered that the limitations on the right to equality and non-discrimination which are contained in subsection 10(1)(f) are not incompatible with the rights. The Regulation pursues a legitimate objective and making citizenship, residency, or visa status a condition of eligibility for financial assistance under the Regulation is reasonable, necessary and proportionate to that objective.

Right to Privacy

The right to privacy in Article 17 of the ICCPR prohibits unlawful or arbitrary interferences with a person's privacy, family, home and correspondence. It also prohibits unlawful attacks on a person's reputation. Division 3 of the Act provides for the sharing of personal information about an employer or employee between the Department and other parties who have a need for the information in relation to the administration of the scheme. Because Division 3 of the Act limits a person's right to control their personal information, it engages and limits the right to privacy under Article 17.

Article 17 provides for an implied permissible limitation on the right to privacy to the extent that the limitations are not arbitrary or unlawful. In order for an interference with the right to privacy not to be 'arbitrary', the interference must be for a reason consistent with the ICCPR and reasonable in the particular circumstances. Reasonableness, in this context, involves notions of proportionality, appropriateness and necessity.¹

Use of personal information

Items 37 to 39 of the Regulation modify sections 42(a), 43(1)(a), 43(2)(a) and 44(a) of the Act to provide that for the purposes of administering the scheme, the following parties may use personal information about a specified person or a TCF contract outworker:

- the Department;
- specified parties, which are:
 - an insolvency practitioner for the specified person;
 - a person with whom the Commonwealth has a contract to pass on to a TCF contract outworker payments made under this Bill; or
 - a person, who is making, proposes to make or has made a payment to a TCF contract outworker associated with an amount owing or owed to TCF contract outworker in connection with work done for the specified person.

The very nature of a scheme which provides for the payment of entitlements necessitates the use of personal information about the TCF contract outworker making a claim. Information will only be used for the purposes of administering the scheme and, in practice, the administration of the scheme will include safeguards to prevent the arbitrary use of personal information. For example, applicants making a claim under the scheme will provide consent to the use of their personal information for the purposes of administering the scheme.

With respect to information which is about a specified person, this information will only relate to the specified person in his or her professional capacity, and is necessary for the processing of a TCF contract outworker's claim.

Disclosure of personal information- assessment of claims

Items 37 to 39 of the Regulation modify subsections 42(b), 43(1)(b), 43(2)(b) and 44(b) of the Act to provide for the disclosure of personal information about a specified person or a TCF contract outworker between the Department and the specified parties. The disclosure of

¹ *Toonen v Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994) at 8.3

personal information between the Department and the specified parties under sections 42, 43 and 44 is considered proportionate, appropriate and necessary to facilitate the effective administration of the scheme. It is vital that the Department considers personal information which is provided by the specified parties to determine whether a TCF contract outworker is eligible for an advance and accurately calculate the amount of such an advance. The ability of these parties to disclose information to the Department is critical in ensuring that applications are assessed and money disbursed in a timely manner.

Set out below are explanations about each clause, and why disclosure of personal information is necessary in each particular circumstance.

It is also relevant to note that each specified party or agency to which information will be disclosed has its own legal and professional obligations about the collection, storage and use of personal information under privacy laws. In addition, a person who is contracted by the Commonwealth for the purpose of passing an advance on to a recipient will be bound by the privacy clauses in that contract.

Furthermore, the administrative safeguards described above in relation to the use of personal information (for example obtaining consent) will also apply to the disclosure of personal information.

Section 42

Item 37 of the Regulation modifies subsection 42(b) of the Act to provide that for the purposes of administering the scheme, the Department can disclose personal information about a specified person or a TCF contract outworker to the specified parties. This subsection facilitates the disclosure of information by the Department where it is necessary to do so to assess a TCF contract outworker's claim.

It is important that the Department consults the specified parties as they are likely to have information that would assist the Department to accurately determine a TCF contract outworker's eligibility for an advance, as well as the amount of the advance to be paid under the scheme.

Section 42(b) limits the Department's ability to disclose information by specifying the parties to which it can disclose personal information and requiring that the disclosure is only for the purposes of administering the scheme. In practice, the specified parties will almost always be large professional organisations, for example, accounting firms and firms specialising in insolvency. As such, the specified parties will have professional obligations with respect to the collection, storage and use of personal information and may also have obligations under the National Privacy Principles in the *Privacy Act 1988*. In addition, the Act does not permit the specified party to disclose the information to any other party.

Section 43

Item 38 of the Regulation modifies subsections 43(1)(b) and 43(2)(b) of the Act to enable an insolvency practitioner (including a liquidator or a bankruptcy trustee) to disclose personal information about a specified person or a TCF contract outworker to the Department for the purposes of administering the scheme. These provisions facilitate the Department's ability to gather the information required to make decisions about advances under the scheme.

For example, section 35 of the Act (modified by item 27 of the Regulation) provides that for the purposes of deciding whether a TCF contract outworker is eligible for an advance and the amount of such an advance, the Secretary may presume that information relating to the TCF contract outworker that is provided by an insolvency practitioner is accurate. Subsection 43(1)(b) facilitates the operation of section 35 by enabling the insolvency practitioner to disclose this information to the Department. In order to accurately determine a TCF contract outworker's eligibility for an advance and the amount of such an advance, it is important that the Department considers personal information which is provided by the specified parties. In the majority of cases, this information is held by an insolvency practitioner.

Section 44

Item 39 of the Regulation modifies subsection 44(b) of the Act to enable a person making payments to a TCF contract outworker to disclose personal information about a specified person or a TCF contract outworker to the Department for the purposes of administering the scheme. Similar to section 43, this provision facilitates the Department's ability to gather the information required to make decisions about advances under the scheme.

For example, section 19 of the Act (modified by item 13 of the Regulation) provides that the amount to be advanced to a TCF contract outworker is determined by working out the basic amount for their entitlements (for example annual leave and unpaid wages) and then reducing that amount by amounts, such as a payment which has already been made by another person to the TCF contract outworker. Section 44(b) enables a person who has made a payment to a TCF contract outworker to provide details of this payment to the Department. This information would allow the Department to accurately calculate the amount of the advance, in accordance with section 19.

Disclosure of personal information to certain agencies- Section 45

Item 40 of the Regulation modifies subsection 45 of the Act to provide that for the purposes of facilitating the exercise of powers, or performance of functions, an agency (as defined in the *Privacy Act 1988*) has in relation to the *Corporations Act 2001* (the Corporations Act), the *Bankruptcy Act 1966* or entitlements of TCF contract outworkers, the Department may disclose to the agency personal information that the Department has in connection with the administration of the scheme. That information can be about a specified person, an officer (as defined in the Corporations Act) of a specified person, an insolvency practitioner for a specified person, or a TCF contract outworker who did work for the specified person.

The disclosure of personal information by the Department will facilitate enforcement activities undertaken by other Commonwealth agencies. For example, the disclosure of information about a company director to the Australian Securities and Investments Commission would assist in a civil proceeding against the director for the contravention of the director's duties under the Corporations Act. Such disclosure would be proportionate, appropriate and necessary to the enforcement of the Corporations Act.

Further, with respect to information which is provided about a specified person, an officer or an insolvency practitioner, this information will only relate to such persons in their professional capacity. Importantly, each specified party or agency to which information will

be disclosed has its own legal obligations concerning the collection, storage and use of personal information under privacy laws.

Right to Social Security

Article 9 of the International Covenant on Economic, Social and Cultural Rights (the ICESCR) provides that, ‘the States Parties to the present Covenant recognise the right of everyone to social security, including social insurance.’ The Committee on Economic, Social and Cultural Rights has stated that the right to social security encompasses the right to access benefits, whether in cash or in kind, without discrimination in order to secure protection from lack of work-related income caused by unemployment².

The Regulation establishes an assistance scheme, which is intended to operate as a safety net for TCF contract outworkers where the person who directly engaged the TCF contract outworker has undergone an insolvency event. The Explanatory Memorandum for the Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011 highlights that outworkers in the TCF industry suffer from unique vulnerabilities as a result of their engagement or employment in non-business premises. These vulnerabilities are often exacerbated by poor English language skills, a lack of knowledge about the Australian legal system and low levels of union membership in the industry. In this context, the Regulation sets up an assistance scheme to help alleviate some of the disadvantages experienced by TCF contract outworkers during an insolvency event.

The safety net established by the Regulation could be characterised as ‘social insurance’ because it ensures that TCF contract outworkers’ unpaid entitlements are met when they are affected by an insolvent event. It thus seeks to protect individuals from lack of work-related income due to unemployment, and in this way, promotes the right to social security. As mentioned above, the Act limits the right to non-discrimination because eligibility for an advance is limited to Australian citizens or the holders of a permanent visa or a special category visa under the *Migration Act 1958*. However, as highlighted above, this limitation pursues a legitimate objective and is considered reasonable, necessary and proportionate to that objective.

Item 6 of the Regulation amends section 11 of the Act to exclude certain TCF contract outworkers from being eligible to receive an advance, thereby limiting the rights to social security and non-discrimination for those workers.

A TCF contract outworker will not be eligible for an advance for work done for a company that has been wound up if the TCF contract outworker, at any time in the 12 months prior to the winding up, was a director, spouse of a director, or a relative of a director of the specified person being wound up. Similar rules will apply if the specified person is a bankrupt or a partnership.

Section 11 of the Act excludes the abovementioned persons from receiving an advance to prevent a person who had a direct relationship with the director, employer or partner of a business from financially benefiting from the wind up or bankruptcy of a business. This approach reflects the policy intent of section 556 of the *Corporations Act 2011* and is

² Committee on Economic, Social and Cultural Rights, *General Comment 19, The Right to Social Security*, U.N. Doc. E/C.12/GC/19 (2008)

consistent with principles of good corporate governance. Further, in the absence of such a provision, the Act would authorise payments for entitlements that are not payable to such persons in winding up proceedings.

It is considered consistency with corporations law is a legitimate objective and excluding directors, employers and partners or their spouses, de facto partners or relatives from receiving an advance under the scheme is reasonable, necessary and proportionate to that objective.

Conclusion

The Legislative Instrument is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

William Richard Shorten, Minister for Employment and Workplace Relations