

FAIR ENTITLEMENTS GUARANTEE REGULATIONS 2022

EXPLANATORY STATEMENT

Issued by authority of the Minister for Employment and Workplace Relations

Under section 55 of the *Fair Entitlements Guarantee Act 2012*

PURPOSE AND OPERATION OF THE 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.

Section 55 of the Act provides that the Governor-General may make regulations prescribing matters as required or permitted by the Act to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

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.

Pursuant to section 50 of the Act, the *Fair Entitlements Guarantee Regulation 2012* (the Original Regulation) created 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 Original Regulation complemented and reinforced 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 Original Regulation was restricted to providing advances only where the person who directly engaged the TCF contract outworker has undergone an insolvency event. This ensured that the Original Regulation was limited by its enabling provision in the Act.

The Original Regulation was scheduled to automatically repeal on 1 April 2023 pursuant to the sunset provisions of the *Legislation Act 2003*. The *Fair Entitlements Guarantee Regulations 2022* (the Regulations) will continue to complement and reinforce the protections for TCF contract outworkers that are embedded in the FW Act by prescribing the same operational terms as present in the Original Regulation.

As with the Original Regulation, the scheme established by the Regulations would consist of the provisions of Parts 1 to 7 of the FEG Act, modified in accordance with Schedule 1 of the Regulation, to ensure that the Act applies to TCF workers consistently with the manner in

which the FEG Act applies to employees covered by the Act. The key modifications imposed by the proposed Regulations for TCF workers would include:

- 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 Regulations make no changes to sections of the Act capable of applying to TCF contract outworkers without modification.

An overview of the Regulations is provided at the [Attachment A](#).

CONSULTATION

The following organisations were consulted in relation to the Regulations:

- Australian Council of Trade Unions;
- Australian Chamber of Commerce and Industry;
- Australian Industry Group;
- CFMMEU Manufacturing Division; and
- Ethical Clothing Australia
- Asian Women At Work
- Australian Retailers Association
- Brotherhood of St Laurence
- Cabramatta Community Centre- Now 'CORE'
- Australian Fashion Council
- Federation of Ethnic Communities Council of Australia
- Immigrant Women's Speak Out Association of NSW Inc.
- Multicultural Communities Council of South Australia
- Business NSW
- Oxfam
- Spectrum Migrant Resource Centre
- Working Women Queensland
- Working Women's Centre - South Australia
- Sister Works
- Australia Migrant Resource Centre
- Migrant Resource Centre North West Region Inc.
- Metro Assist (formerly Metro Migrant Resource Centre)

REGULATION IMPACT STATEMENT

The Office of Best Practice Regulation advised that a Regulation Impact Statement was not required (reference OBPR21-01145).

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

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

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Overview of Legislative Instrument

The Regulations repeal the *Fair Entitlements Guarantee Regulation 2012*, which was scheduled to automatically repeal on 1 April 2023 pursuant to the sunset provisions of the *Legislation Act 2003*, and replace it in essentially the same terms. The Regulations continue the scheme provided by the *Fair Entitlements Guarantee Regulation 2012* that allows 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 can continue to be provided

The Hon Tony Burke MP

Minister for Employment and Workplace Relations

NOTES ON SECTIONS

Details of the *Fair Entitlements Guarantee Regulations 2022*

Section 1 – Name

This section would provide for the proposed Regulation is to be known as the *Fair Entitlements Guarantee Regulations 2022*.

Section 2 – Commencement

This section would provide that the proposed Regulations would take effect at the end of the period in which it could be disallowed in either House of the Parliament.

Section 3 – Authority

This section would provide that the proposed Regulations are to be made under the *Fair Entitlements Guarantee Act 2012*.

Section 4 – Definitions

This section would provide definitions for terms used in the proposed Regulations.

Section 5 – Schedules

This section would provide that each instrument that is specified in a Schedule to this proposed instrument is to be amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this proposed instrument is to have effect according to its terms.

Section 6 – Scheme for assistance of workers who were not employees

This section would outline who the proposed Regulations apply to and how it operates. This includes identifying who the ‘specified person’ for a TCF contract outworker is and providing that the proposed Regulations 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.

Section 7 – Application provision relating to the *Fair Entitlements Guarantee Regulation 2012*

This section would provide for the continued application of the *Fair Entitlements Guarantee Regulation 2012* in relation to an insolvency event that occurred before the commencement of this instrument.

Schedule 1 – Modifications of the Act in relation to TCF contract outworkers

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

Schedule 2 – Repeal of the Fair Entitlements Guarantee Regulation 2012

Schedule 2 would provide for the repeal of the Fair Entitlements Guarantee Regulation 2012

Schedule 1 – Modifications of the Act in relation to TCF contract outworkers

Item [1] – Section 5

This item would insert new definitions relevant to TCF contract outworkers into section 5 of the Act:

Governing instrument would mirror 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 would have the same meaning as in the *Fair Work Act 2009*.

Specified Person, in relation to a TCF contract outworker, would mean 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’ would 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 would 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 would mean 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 proposed Regulation.

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

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

Entitlements that a TCF contract outworker is entitled to claim under the proposed 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 would also set 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 [2] – Section 10

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

This item would substitute 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 between the operation of section 10 to the Act and the section 10 that would be modified by this item 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 amending the requirement in section 10 of the Act that the end of employment be linked to the insolvency the operative element in determining eligibility of a TC contract outworker within the proposed Regulations is whether the TCF contract outworker is owed unpaid amounts by a specified person who has undergone an insolvency event.

Item [3] – Sections 12 and 13

Section 12 of the Act creates an exclusion from eligibility for an advance under section 10 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 would omit 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. The inclusion of section 12 of the Act excludes contractors, or people who are not employees, from being eligible for an advance under the Act. As a TCF contract outworker is a contractor, and not an employee, if section 12 of the Act continued to apply a TCF contract outworker would be ineligible for an advance. Section 13 of the Act is not relevant to TCF contract outworker as their employment does not fall within the scope of the scheme known as the Special Employee Entitlements Scheme for Ansett Group Employees

Item [4] – Subsection 14(1)

Subsection 14(1) of the Act lists what is required for a claim to be effective.

This item would omit a reference to ‘this Act’ and replace it with a reference to ‘this Scheme’.

Item [5] – Subsections 14(4) and (5)

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

This item would omit subsections 14(4) and (5) of the Act from applying as they are no longer relevant to the making of an effective claim. Subsections 14(4) and (5) of the Act relate to claims made under the General Employee Entitlements and Redundancy Scheme. the General Employee Entitlements and Redundancy Scheme which was replaced by the Act in 2012.

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

Item [6] – Subsections 16(2) to (4)

Section 16 of the Act set out principles for working out the amount of an individual’s advance. Subsections 16(2) to (4) provide for excluding some basic amount in circumstances where there is a transfer of business.

The item would repeal subsections 16(2) to (4) as they are not applicable to claims made by directly engaged TCF contract outworkers as these provisions relate to transfer of employment. A TCF contract outworker is not an employee and cannot transfer employment. Subsections 16(2) to (4) cannot apply .

Item [7] – 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 would substitute 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 would distinguish 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.

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 [8] – 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 would omit 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 [9] – Subsection 31(3)

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 would omit subsection 31(3) to provide that there be a uniformity for the treatment of payments under the proposed regulations when regard is had to the proposed omission of sections 29 and 30 of the Act by item [23].

Item [10] – Paragraph 33(a)

Section 33 of the Act provided for the recovery of an advance where employment is by a partnership.

This item would omit the reference “sections 29, 30 and 31 apply” and replace it with the reference “section 31 applies”.

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.

Item [11] – Section 45

Section 45 of the Act deals with how the department may disclose personal information to certain agencies.

This item would substitute certain new sections within section 45 that would 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 7 – Miscellaneous

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

Item [12] – 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 would substitute a new section 49 that would 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.

Item [13] – Section 50

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

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

Item [14] – Section 51

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

This item would omit a reference to 'this Act' and replace it with a reference to 'this Scheme'.

Item [15] – Section 52

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

This item would omit section 52 (1) as it is not applicable to the scheme implemented by the proposed Regulation. As section 52 of the Act provides for the recovery of payments made under the scheme, as well as payments made under the Act, it is not necessary to include an equivalent of section 52 in the scheme to be provided by the proposed Regulations.

Item [16] – Section 55

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

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

Schedule 2 – Repeal of the Fair Entitlements Guarantee Regulation 2012

Item [1] – The whole of the instrument

This item would provide for the repeal of the Fair Entitlements Guarantee Regulation 2012

Statement of Compatibility with Human Rights

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

Fair Entitlements Guarantee Regulations 2022

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 Regulations 2022* (the Regulations) 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 Regulations 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 1 of the Regulations).

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 Regulations. As such, the Regulations are required to be read in conjunction with Act. Essentially, the Regulations raise 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 Regulations, as the scheme for TCF contract outworkers is underpinned by both the Act and the Regulations.

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 2 of the Regulations 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 Regulations establish 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 Regulations' 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 Regulations pursue a legitimate objective and making citizenship, residency, or visa status a condition of eligibility for financial assistance under the Regulations 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

The Regulations 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

The Regulations 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

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

outworker between the Department and the specified parties. The disclosure of 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

The Regulations 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

The Regulations modify 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 the Regulations) 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

The Regulations modify 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 the Regulations) 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 11 of the Regulations 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 Regulations establish 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 Regulations set 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 Regulations 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.

The Regulations amend 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

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)

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 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.

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