



Fair Work Commission
Section 156 – Fair Work Act 2009
4 Yearly Review of Modern Awards

(AM2014/47) – Annual Leave
Textile, Clothing, Footwear and Associated Industries Award 2010
Response to Full Bench’s Provisional View and Draft Determination
(Excessive Annual Leave)

Submission of the
Textile Clothing and Footwear Union of Australia
(1 February 2017)

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2014 AWARD REVIEW
(AM2014/47) – ANNUAL LEAVE
TEXTILE, CLOTHING, FOOTWEAR AND ASSOCIATED INDUSTRIES AWARD 2010
Response to Full Bench’s Provisional View and Draft Determination
(Excessive Annual Leave)
SUBMISSION OF THE TEXTILE, CLOTHING AND FOOTWEAR UNION OF AUSTRALIA
(1 February 2017)

1. BACKGROUND

- 1.1 The Textile, Clothing and Footwear Union of Australia (TCFUA) provides this submission/comments in response to the Decision and directions of the Annual Leave Full Bench [2016] FWCFB 9074 on 19 December 2016¹ (*‘December 2016 decision’*).
- 1.2 The TCFUA’s submission is directed to the Full Bench’s provisional view and Draft Determination published in relation to the insertion of the model Excessive Annual Leave term into the Textile, Clothing, Footwear and Associated Industries Award 2010 (‘TCF Award’).²
- 1.3 The TCFUA’s submission includes 2 attachments as follows:
- Attachment A: Table providing a comparison of current TCF award term (Excessive Annual Leave) and the Draft Determination/Model Term
 - Attachment B: Table providing a comparison of current and previous TCF Award term (Excessive Annual Leave).
- 1.4 The TCFUA continues to rely on its previous written and oral submissions made during the Annual Leave Common Issues proceedings, both in terms of general application and submissions which specifically addressed the issue of the inclusion of the model term into the TCF Award (see, in particular, TCFUA written submissions, 17 July 2015³; 13 November 2015⁴).
- 1.5 For the reasons outlined below and in previous submissions, the TCFUA strongly supports the Full Bench’s provisional view and the Draft Determination for the TCF Award.

2. ANNUAL LEAVE FULL BENCH - PROVISIONAL VIEW

- 2.1 In its *December 2016 decision*, the Full Bench stated:

‘Textile, Clothing, Footwear and Associated Industries Award 2010

[31] In the May 2016 decision the Full Bench determined that the excessive leave model term in the Textile, Clothing, Footwear and Associated Industries Award 2010 would be

¹ 4 yearly review of modern awards – Annual Leave; [2016] FWCFB 9074 (19 December 2016)

² Textile, Clothing, Footwear and Associated Industries Award 2010; Draft Determination (published 20 December 2016)

³ (AM2014/47) Annual Leave: TCFUA Submission [17 July 2015] in Response to the Decision of the Annual Leave Full Bench [2015] FWCFB 2931 (11 June 2015)

⁴ (AM2014/47) Annual Leave: TCFUA Submission [13 November 2015] in relation to the insertion of the model term (Excessive Annual leave) into modern awards

the subject of further consideration later in the year. This decision was taken because a recent amendment had been made to clause 41.4 of the award which allowed an employer to direct an employee to take excessive accrued leave.

32] For the reasons given in the May 2016 decision and the June 2016 decision about the excessive leave model term generally, we express the provisional view that the variation of the Textile, Clothing, Footwear and Associated Industries Award 2010 to delete existing clause 41.4 and to insert the model excessive leave is necessary to ensure that the award meets the modern award objective. As to the matters in s.134(1)(a)-(h), insofar as they are relevant, we express the provisional view that the insertion of the model term in this award will promote flexible modern work practices and the efficient and productive performance of work (s.134(1)(d) and will assist business in managing excessive leave accruals (s.134(1)(f)). We are also provisionally satisfied that such variations are consistent with the objects of the FW Act.

[33] A draft determination will be issued shortly. Interested parties will have until 4.00pm on Tuesday 31 January 2017 to provide any comment on the draft determination and the provisional view....

[34] In the absence of any submissions opposing the provisional view, a final determination varying the award will be made.'

- 2.2 The TCFUA submits that the inclusion of the model Excessive Annual Leave term into the TCF Award is necessary to ensure that the TCF Award, together with the NES, provide a fair and relevant minimum safety net of terms and conditions, taking into account the considerations in s134(1)(a) – (h). As such, the TCFUA considers that the Full Bench’s provisional view regarding the TCF Award is appropriate and should be confirmed.
- 2.3 In the TCFUA’s view, there is currently no persuasive material before the Commission which would reasonably persuade the Full Bench to depart from its provisional view that the model Excessive Annual Leave model term be inserted into the TCF Award. On the contrary, the nature and characteristics of the TCF industry and those of its workforce who are award dependent suggest that these employees are arguably in greater need of the additional safeguards contained in the model term.
- 2.4 This submission is supported by, and is consistent with, the key findings made by the Annual Leave Full Bench in its substantive decisions regarding the necessity of including additional safeguards in a model Excessive Leave term for modern awards.
- 2.5 In its *June 2015 Decision*,⁵ the Full Bench made reference to the Skinner and Pocock research which illustrated that major reasons for the accrual of excessive leave included, where work pressure prevents an employee from taking all of their annual leave or where employees were not able to take their leave at a time of their choosing.⁶ This issue was significant in the Full Bench’s rejection of the Employer Group claims/model term in relation to excessive annual leave, finding that:

⁵ (AM2014/47) Annual Leave; [2015] FWCFB 3406 (11 June 2015)

⁶ Ibid; at [145], [180], [182], [187]

[183] ...the Employer Group’s model term provided no avenue for an employee to exercise any control over the time at which their leave is to be taken.

and

[189] We are not persuaded that the variation of modern awards to insert the Employer Group’s proposed model term is appropriate, nor will it be sufficient to address the problems of excessive accrued paid annual leave. We have redrafted the Employer’s group proposed model term to provide a model term dealing with the taking of annual leave. The model term incorporates the employer’s right to direct – which is the central feature of the Employer Group’s claim – but also makes provision for the circumstance where an employee accrues excessive paid annual leave but no direction is made.⁷

2.6 In addition, the Full Bench also determined that the Employer Group’s proposed term was deficient in several other respects including, (i) the 6 weeks threshold as being the trigger for ‘excessive leave’;⁸ and (ii) the absence of any obligation on an employer to have discussions with the affected employee, including no requirement for there to be a genuine attempt to reach agreement.⁹

2.7 Consequently, the Full Bench determined that further safeguards were necessary for an excessive annual leave model term including the following terms:

- the employer direction to an employee must be in writing;
- the employer direction must not result in the employee’s accrued leave entitlement at any time being less than 6 weeks;
- the employee must be given at least 8 weeks’ notice of the commencement of the directed leave (or 10 weeks if a shiftworker);
- the directed leave must not require the employee to take a period of annual leave more than 12 months after the direction is given;
- the employer direction must not be inconsistent with any leave arrangement agreed to by the employer and employee;
- the employer direction to the employee operates subject to s.88(2) FW Act i.e. an employer must not unreasonably refuse to agree to an employee request to take leave;
- inclusion of a new process by which an employee can give written notice to their employer of their request to take annual leave to address circumstances, for example, where employee requests have been repeatedly refused by the employer.

2.8 Since the determination of the model term for Excessive Leave by the Full Bench, the great majority of modern awards have been varied to include the model term. An analysis of the model term (as contained in the Draft Determination for the TCF Award) demonstrates that it provides significantly greater safeguards as compared to the

⁷ Ibid; at [183] – [184]

⁸ Ibid; at [173] – [175]

⁹ Ibid; at [177]

current provision (clause 41.4 of the TCF Award). To assist the Commission, Attachment A to these submissions contains a comparison of the current clause 41.4 of the TCF Award with the Draft Determination (20 December 2016).

2.9 It is submitted that it would be an anomalous outcome if the model term was not inserted into the TCF Award, in an industry which is generally acknowledged to be highly award dependent and low paid. The Commission and its predecessor tribunals have consistently confirmed the approach in taking into account, the particular nature and characteristics of the TCF industry in determining what is a fair and relevant minimum award safety net. In previous TCFUA submissions to the Annual Leave Full Bench, the TCFUA has highlighted the long history of decisions which confirm this principle.¹⁰ This is of particular relevance to the consideration in s.134(1)(a), the *'relative living standards and needs of the low paid'*.

2.10 In this context, the TCFUA submits that the additional safeguards in the model term (as reflected in the form of the Draft Determination) are fair, relevant and necessary for inclusion of the TCF Award in order to ensure that the award meets the modern awards objective (s.134), taking into account the factors in s134(1) (a) – (h) and the Objects of the Act.

3. TCF AWARD – REVIEW AND PREVIOUS FULL BENCH DECISION (11 May 2015)

3.1 The determination as to whether the model term should be inserted into the TCF Award was deferred by the Full Bench in context of an earlier Award Stage (Group 1) Full Bench decision in relation to the TCF Award – *Textile, Clothing, Footwear and Associated Industries Award 2010*, [2015] FWCFB 2831 (11 May 2015).¹¹ As relevant to the current annual leave proceedings, a brief chronology of the steps leading to the TCF Award Full Bench Decision is outlined below.

3.2 The TCF Award was allocated by the Commission to Group 1C of the Award Stage of the 2014 Award Review. As a result, the specific review of the TCF Award (with respect to both technical/drafting and substantive matters) commenced very early in the award review process, in mid 2014. Parties with an interest in the TCF Award (including the TCFUA) were therefore required to determine their positions and claims regarding the TCF Award at a similar point when the annual leave common issues proceedings were also being initiated.

¹⁰ For examples of decisions in which the nature of the TCF industry and its workforce have been considered, see: *Award Modernisation* [2008] AIRCFB (20 June 2008) at [94]-[95]; *Award Modernisation* [2008] AIRCFB 717 (12 September 2008) at [17, [100] – [104]. At [100] the Full Bench held that the TCF industry 'is a sector which is highly award reliant and where the constitution of the workforce is a relevant consideration.'; *Award Modernisation* [2008] AIRCFB 1000 (19 December 2008) at [50]; *Transitional Review of Modern Awards* [2013] FWCFB 5729 (4 October 2013) at [60] where the Full Bench confirmed that TCF outworkers were a 'very vulnerable section of the workforce'; *4 Yearly Review of Modern Awards (AM2014/91)* [2015] FWCFB 2831 (11 May 2015) where the high level of NESB workers in the TCF industry was a relevant consideration to enhancing the consultation clause (changes to rosters and hours of work) in the TCF Award.

¹¹ *4 yearly review of modern awards; (AM2014/91) Textile, Clothing, Footwear and Associated Industries Award 2010*, [2015] FWCFB 2831 (Watson DP, O'Callaghan DP, Cribb C) (11 May 2015)

3.3 In terms of timing, the TCFUA first indicated its potential claim in relation to excessive annual leave in the TCF Award in May 2014 when it filed an outline of issues affecting awards within Group 1 of the award Stage.¹² In summary, this document contained the TCFUA's response to FWC and FWO documents (published April 2014), technical/drafting issues identified by the TCFUA and an outline of further variations to be sought by the union, including the excessive annual leave claim.

3.4 On 30 June 2014, in response to a Statement (25 June 2014) ('June 2014 Statement')¹³ issued in relation to the review of the TCF Award, the TCFUA filed a further document¹⁴ setting out its proposed variations regarding technical/drafting matters, including in response to matters raised by the FWC and FWO.

3.5 On 7 July 2014, in accordance with the June 2014 Statement, the TCFUA filed 5 Draft Determinations¹⁵ with respect to the following provisions in the TCF Award:

- Clause 9.2 (Consultation about changes to rosters of hours of work)
- Clause 11.9 (Dispute Resolution Training Leave)
- Clause 13.11 (Part-time employment)
- Clause 41.4 (Annual Leave)
- New clause (Special Unpaid Leave)

3.6 At the time of the filing of the Draft Determinations, clause 41.4 of the TCF Award was in the following terms:

41.4 – Requirement to take annual leave

Annual leave must be taken within 18 months of the entitlement accruing. For the purpose of ensuring annual leave is taken within that period, and in the absence of agreement as provided for in s.88 of the Act, an employer may require an employee to take a period of annual leave from a particular date provided the employee is given at least 28 days notice.¹⁶

3.7 It is evident that clause 41.4, TCF Award (as it was in 2014) contained few protections for employees in circumstances where their employee could unilaterally direct them to take a period of annual leave with minimal discussion and notice.

3.8 The Draft Determination filed by the TCFUA in 2014 seeking a variation to clause 41.4 sought the inclusion of a range of employee safeguards including:

¹² 4 yearly review of modern awards; TCFUA 'Outline of Issues affecting awards within Award Stage – Group 1' (9 May 2014)

¹³ (AM2014/91) *Textile, Clothing, Footwear and Associated Industries Award 2010*; Statement [2014] FWC 4078, (Lee. C) (25 June 2014)

¹⁴ (AM2014/91) *Textile, Clothing, Footwear and Associated Industries Award 2010*; TCFUA Document outlining the TCFUA's position regarding (i) TCFUA's proposed variations in respect to technical/drafting matters; (ii) TCFUA's response to the FWC's Guide to the Award Stage and Exemplar award; and (iii) various documents filed by the FWO (30 June 2014)

¹⁵ (AM2014/91) *Textile, Clothing, Footwear and Associated Industries Award 2010*; TCFUA Draft Determinations (7 July 2014)

¹⁶ Clause 41.4, *Textile, Clothing, Footwear and Associated Industries Award 2010* (varied to 27 June 2014)

- 3 months written notice by the employer to the employee prior to the trigger for excessive leave;
- Arrangement of a meeting between the employee and employer to discuss the issue of excessive leave;
- Invitation to the employee to provide a proposal to the employer in relation to taking excessive leave and a timeframe for doing so;
- An obligation that the employer could not unreasonably refuse the employee's request to take a period of annual leave;
- Not less than 2 months written notice to the employee, where the employer makes a direction in relation to the excessive leave;
- A minimum retention of accrued leave subsequent the employer direction.

3.9 During the Group 1 Award stage, the TCF Award was referred to Commissioner Lee who facilitated multiple conferences over a period of approximately 6 months with the main interested parties (TCFUA, AWU, AIG and ABI & NSWBC). At their conclusion, the parties were able to reach agreement in relation to a range of technical/drafting matters, a number of the TCFUA's claims and claims by AIG and ABI. As part of the consent position, the TCFUA did not press its claims in relation to clause 11.9 (Dispute Resolution Training Leave) and new proposed clause (Special Unpaid Leave), whilst agreement could not be reached in relation to Clause 9.2 (Consultation about changes to rosters of hours of work). The TCFUA's claim with respect to clause 9.2 was subsequently arbitrated by the TCF Award Full Bench as reflected in the 11 May 2015 decision.

3.10 In relation to the TCFUA's claim for clause 41.4 (Annual Leave), a consent position was reached to a significantly revised clause from that sought in the Draft Determination in the following form:¹⁷

41.4 – Requirement to take annual leave

Once an employee has accrued six weeks annual leave, for the purpose of ensuring accrued annual leave is taken, and in the absence of agreement as provided for in s.88 of the Act, an employer may direct an employee to take a period of annual leave, subject to the following:

- (a) the employer must provide the employee with no less than 28 days' notice of the requirement to take annual leave;*
- (b) where after an employer has issued a direction pursuant to this clause, the relevant employee requests to take annual leave at an alternative time (but within six months of the date of the direction), the employer must not unreasonably refuse to agree to that request; and*

the employer must retain at least four weeks of accrued annual leave after the direction is given by the employer.

3.11 As is evident, the proposed changes of the clause 41.4 were modest in nature and included a small number of additional employee safeguards.

¹⁷ (AM2014/91) *Textile, Clothing, Footwear and Associated Industries Award 2010*; TCFUA correspondence and Draft Determination reflecting consent position reached between the TCFUA, AWU, AIG and ABI&NSWBC)

- 3.12 The consent position in relation to clause 41.4 was ultimately accepted by the TCF Award Full Bench in the decision handed down on 11 May 2015,¹⁸ finding that the *‘variation is necessary to achieve the modern awards objective, having regard to the reasonableness requirement within s.93(3) of the Act.’*¹⁹
- 3.13 For ease of reference, Attachment **B** to these submissions contains a comparison between the terms of clause 41.4, TCF Award prior to the TCF Award Full Bench decision (11 May 2015) and after.
- 3.14 In 2014, the Annual Leave Common Issues proceedings commenced, continuing throughout 2015. Various employer parties subsequently filed draft determinations and submissions in support regarding proposed variations to some, but not all modern awards, including in respect to Excessive Annual Leave. The Employer Group common claims in relation to Excessive Annual Leave did not include the TCF Award.²⁰ The reasoning as to why particular awards were not included in the Employer Group claim is evident in the AI Group’s submission (13 July 2015),²¹ such that those awards (including the TCF Award) already contained greater employer flexibility in relation to Excessive Annual Leave than the Employer Group were seeking in its own proposed clause.
- 3.15 The TCF Award Full Bench decision (11 May 2015) was handed down prior to the substantive decisions of the Annual Leave Full Bench in June 2015²² and September 2015²³ (where the Full Bench determined model clauses in respect of ‘excessive annual leave’, ‘cashing out of annual leave’, ‘electronic funds transfer and paid annual leave’ and ‘granting leave in advance’).
- 3.16 The TCF Award Full Bench clearly did not have the benefit of hearing the very extensive evidence and submissions (employer, union, and academic) regarding the level and multiple causes of excessive annual leave accruals in Australian workplaces and the need for additional safeguards at the award safety level.

4. APPROACH OF THE ANNUAL LEAVE FULL BENCH

- 4.1 The TCFUA submits that the Annual Leave Full Bench, whilst having regard to the earlier decision of the TCF Award Full Bench, is not restrained by that decision in its capacity to insert the Excessive Annual Leave model term into the TCF Award. Early in the 2014 Review process, the issue of the interaction between the Award Stage and Common Issues proceedings were considered in context of the Common Issues processes:

[5]...‘Common issues’ are likely to be proposals for significant variation or change across the award system, such as applications which seek to change a common core provision in most, if not all modern awards.

¹⁸ (AM2014/91) *Textile, Clothing, Footwear and Associated Industries Award 2010*; [2015] FWCFB 2831 (11 May 2015) at paragraphs [140] – [148]

¹⁹ *Ibid*; at paragraph [148]

²⁰ See [2015] FWCFB 3406 (Attachment D – New Subclause for Excessive Annual Leave) and (Attachment E – Replacement Subclause for Excessive Annual Leave).

²¹ (AM2014/47) Annual Leave: AI Group submission (13 July 2015) at paras [77] – [78]

²² (AM2014/47) Annual Leave [2015] FWCFB 3406

²³ (AM2014/47) Annual Leave [2015] FWCFB 5771

[6] A matter identified as a common issue will be referred to a Full Bench for determination in a 'stand alone' proceeding, as distinct from having the issue determined on an award by award basis during the award stages of the review. The Full Bench will be responsible for managing the proceedings for the common issue. This may result in the Full Bench issuing determinations varying particular modern awards or issuing statements of principle that may be considered when reviewing individual modern awards.

*[7] To ensure that the rights of all interested parties are protected the review of a particular award will not be finalised until all of the common issues have been determined. While the review of a particular award will not be finalised until all of the common issues have been determined, this will not preclude a determination being issued varying modern awards and the determination taking effect in the award phase.*²⁴ [emphasis given]

- 4.2 The TCFUA submits that the framework for the conduct of the 2014 Review comprehended that the Award Stage and the Common Issues would operate in parallel, including overlapping proceedings which may impact on the other. The passage from the Statement outlined above, addressed the concern of potential prejudice to interested parties by providing that that the 'review of a particular award will not be finalised until all of the common issues have been determined.' That is, parties with an interest in a particular award, should not be prejudiced in pursuing or defending claims, based only on the stage at which the particular award is being reviewed.
- 4.3 In context of the process determined for the review of the TCF Award in Group 1, and the Employer Group Annual Leave common claims not specifically including the TCF Award, the opportunity for the TCFUA to pursue an improved Excessive Leave clause, by necessity, had to be pursued through the Award Stage in early 2014. The TCFUA at that time was clearly not in a position to apprehend, that the Annual Full Bench would reject the form of the Employer Group's variation proposal and ultimately determine a comprehensive model Excessive Annual Leave terms for the majority of modern awards.
- 4.4 Or put another way, had the TCF Award been allocated to Group 4, for example, the substantive Annual Leave proceedings would have preceded the review of the individual award and there would have been little, or no reason for the TCFUA to press a claim in relation to clause 41.4. As a corollary, the TCFUA and workers governed by the TCF Award, should now not be disadvantaged by the TCF Award having been subject to review in Group 1 of the Award Stage, rather than at a later time.
- 4.5 In addition, the Annual Leave Full Bench in its *June 2015 Decision*,²⁵ observed that in exercising its modern award powers, it is not limited to the terms of relief sought by a party, nor by the scope of the variations proposed (i.e. the awards to be varied) and that '*context is important in this regard*'.²⁶

²⁴ 4 yearly review of modern awards – Common Issues (AM2014/1), Statement and Directions (Ross, J) (17 March 2014)

²⁵ [2015] FWCFB 3406; op cit; at

²⁶ Ibid; at [155]

[156] These issues arise in the 4 yearly review of all modern awards. The Review is essentially a regulatory function and the Commission must ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions. The role of modern awards and the nature of the Review are quite different from the arbitral functions performed by the Commission in the past. In the Review context, the Commission is not creating an arbitral award in settlement of an inter partes industrial dispute – it is reviewing a regulatory instrument.

[157] In considering whether a particular term should prima facie be consistently inserted into all modern awards it is important to consider the subject matter of the term itself...

[163] Annual leave is one of the minimum standards specified in the NES. The NES is intended to provide a consistent set of minimum standards that apply to the employment of national system employees. The NES annual leave provisions provide both a consistent set of substantive rights (e.g. quantum of leave, method of accrual; and payment for leave) as well as a degree of conditional flexibility...

[165] A model term dealing with the taking of paid annual leave to address the excessive accrual of such leave is plainly a term of the type contemplated by ss.93(3) and (4). That is, the model term is a term that is expressly permitted to be included in a modern award. It seems to us that it will generally be desirable for greater consistency in respect of terms of this character. This is particular so in circumstances where the regulatory burden between the NES and modern awards is clearly delineated and the legislature has plainly contemplated (by permitting such terms) that the terms of a modern award may provide some conditional flexibility to the provisions in the NES.

[166] This may be contrasted with terms which supplement the NES, for example by providing an additional period of paid leave. Ordinarily one would expect such supplementation to reflect the circumstances applicable to particular modern awards, with the desirability of consistency across modern awards a less important consideration.²⁷

4.6 In this context, the TCFUA submits that given the statutory framework for the conduct of the 2014 Award Review and the character of the annual leave model term, the Annual Leave Full Bench can, and should, exercise its discretion under s154 to vary the TCF Award by the inclusion of the model Excessive Annual Leave model term.

5. DRAFT DETERMINATION FOR TCF AWARD 2010

5.1 The TCFUA has reviewed the terms of the Draft Determination (20 December 2016) published for the TCF Award. Should the Annual Leave Full Bench ultimately decide to include the model term in the TCF Award, the TCFUA submits that the Draft Determination is an appropriate form.

²⁷ [2015] FWCFB 3406; op cit; at paragraphs [155] – [157], [163], [165] – [166]

6. CONCLUSION

6.1 For the reasons outlined above, the TCFUA supports the provisional view of the Annual Leave Full Bench and the Draft Determination issued for the TCF Award.

Filed on behalf of:

Textile, Clothing and Footwear Union of Australia
(National Office)

(1 February 2017)

2014 REVIEW OF MODERN AWARDS

(AM2014/47) ANNUAL LEAVE

Textile, Clothing, Footwear and Associated Industries Award 2010 [MA000017]

Submission of the Textile, Clothing and Footwear Union of Australia regarding Excessive Leave Model Term

(Attachment A – Comparison of current TCF Award term and Draft Determination/Model term)

1 February 2017

TEXTILE, CLOTHING, FOOTWEAR & ASSOCIATED INDUSTRIES AWARD 2010 – CL. 41.4 ¹	FWC DRAFT DETERMINATION (20/12/2016)
<p>Clause 41.4 – Requirement to take annual leave</p>	<p>1. By deleting clause 41.4 – Requirement to take annual leave and inserting the following:</p>
<p>Once an employee has accrued six weeks annual leave, for the purpose of ensuring accrued annual leave is taken, and in the absence of agreement as provided for in s.88 of the Act, an employer may direct an employee to take a period of annual leave, subject to the following:</p> <ul style="list-style-type: none"> (a) the employer must provide the employee with no less than 28 days’ notice of the requirement to take annual leave; (b) where after an employer has issued a direction pursuant to this clause, the relevant employee requests to take annual leave at an alternative time (but within six months of the date of the direction), the employer must not unreasonably refuse to agree to that request; and (c) the employee must retain at least four weeks of accrued annual leave after the direction is given by the employer. 	<p>Clause 41.4 – Excess leave accruals: general provision</p> <p>Note: Clauses 41.4 to 41.6 contain provisions, additional to the national Employment Standards, about the taking of paid annual leave as a way of dealing with the accrual of excessive paid annual leave. See Part 2.2, Division 6 of the Fair Work Act.</p> <ul style="list-style-type: none"> (a) An employee has an excessive leave accrual if the employee has accrued more than 8 weeks’ paid annual leave (or 10 weeks’ paid annual leave for a shiftworker, as defined by clause 3.1). (b) If an employer has an excessive leave accrual, the employer or the employee may seek to confer with the other and genuinely try to reach agreement on how to reduce or eliminate the excessive leave accrual. (c) Clause 41.5 sets out how an employer may direct an employee who has an excessive leave accrual to take paid annual leave. (d) Clause 41.6 sets out how an employee who has an excessive leave accrual may require an employer to grant paid annual leave requested by the employee. <p>2. By renumbering clauses 41.5 to 41.9 as 41.7 to 41.11</p> <p>3. By inserting a new clause 41.5 as follows:</p>

¹ Textile, Clothing, Footwear and Associated Industries Award 2010 (as varied to 14 December 2016)

TEXTILE, CLOTHING, FOOTWEAR & ASSOCIATED INDUSTRIES AWARD 2010 – CL. 41.4 ¹	FWC DRAFT DETERMINATION (20/12/2016)
	<p>41.5 Excessive Leave Accruals: direction by employer that leave be taken</p> <p>(a) If an employer has genuinely tried to reach agreement with an employee under clause 41.5(b) but agreement is not reached (including because the employee refuses to confer), the employer may direct the employee in writing to take one or more periods of annual leave.</p> <p>(b) However, a direction by the employer under paragraph (a):</p> <ul style="list-style-type: none">(i) is of no effect if it would result at any time in the employee’s remaining accrued entitlement to paid annual leave being less than 6 weeks when any other paid annual leave arrangements (whether made under clause 41.4, 41.5 or 41.6 or otherwise agreed by the employer and employee) are taken into account; and(ii) must not require the employee to take any period of annual leave of less than one week; and(iii) must not require the employee to take a period of annual leave beginning less than 8 weeks, or more than 12 months, after the direction is given; and(iv) must not be inconsistent with any leave arrangement agreed by the employer and employee. <p>(c) The employee must take paid annual leave in accordance with a direction under paragraph (a) that is in effect.</p> <p>(d) An employee to whom a direction has been given under paragraph (d) may result in the direction ceasing to have effect. See clause 41.5(b)(i)</p>

2014 REVIEW OF MODERN AWARDS

(AM2014/47) ANNUAL LEAVE

Textile, Clothing, Footwear and Associated Industries Award 2010 [MA000017]

Submission of the Textile, Clothing and Footwear Union of Australia regarding Excessive Leave Model Term

(Attachment A – Comparison of current TCF Award term and Draft Determination/Model term)

1 February 2017

TEXTILE, CLOTHING, FOOTWEAR & ASSOCIATED INDUSTRIES AWARD 2010 – CL. 41.4 ¹	FWC DRAFT DETERMINATION (20/12/2016)
	<p>Note 1: Paid annual leave arising from a request mentioned in paragraph (d) may result in the direction ceasing to have effect. See clause 4.5(b)(i).</p> <p>Note 2: Under section 88(2) of the Fair Work Act, the employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave.</p> <p>4. By inserting new clause 41.6 as follows:</p>
	<p>41.6 Excessive leave accruals: request by employee for leave</p> <p>(a) Clause 41.6 comes into operation from XX February 2018.</p> <p>(b) If an employee has genuinely tried to reach agreement with an employee under clause 41.4(b) but agreement is not reached (including because the employer refuses to confer), the employee may give a written notice to the employer requesting to take one or more periods of paid annual leave.</p> <p>(c) However, an employee may only give a notice to the employer under paragraph (b) if:</p> <ul style="list-style-type: none"> (i) the employee has had an excessive leave accrual for more than 8 months at the time of giving the notice; and (ii) the employee has not been given a direction under clause 41.5(a) that, when any other paid annual leave arrangements (whether made under clause 41.4, 41.5 or 41.6 or otherwise agreed by the employer and employee) are taken into account, would eliminate the employee’s excessive leave accrual. <p>(d) A notice given by an employee under paragraph (b) must not:</p>

2014 REVIEW OF MODERN AWARDS

(AM2014/47) ANNUAL LEAVE

Textile, Clothing, Footwear and Associated Industries Award 2010 [MA000017]

Submission of the Textile, Clothing and Footwear Union of Australia regarding Excessive Leave Model Term

(Attachment A – Comparison of current TCF Award term and Draft Determination/Model term)

1 February 2017

TEXTILE, CLOTHING, FOOTWEAR & ASSOCIATED INDUSTRIES AWARD 2010 – CL. 41.4 ¹	FWC DRAFT DETERMINATION (20/12/2016)
	<ul style="list-style-type: none"> (i) if granted, result in the employee’s remaining accrued entitlement to paid annual leave being at any time less than 6 weeks when any other paid annual leave arrangements (whether made under clause 41.4, 41.5 or 41.6 or otherwise agreed by the employer and employee) are taken into account; or (ii) provide for the employee to take any period of paid annual leave of less than one week; or (iii) provide for the employee to take a period of paid annual leave beginning less than 8 weeks, or more than 12 months, after the notice is given; or (iv) be inconsistent with any leave arrangement agreed to by the employer and employee. <p>(e) An employee is not entitled to request by a notice under paragraph (b) more than 4 weeks’ paid annual leave (or 5 weeks’ paid annual leave for a shiftworker, as defined by clause 3.1) in any period of 12 months.</p> <p>(f) The employer must grant paid annual leave requested by a notice under paragraph (b).</p> <p>5. By updating the cross references accordingly. 6. By deleting clause 41.6 and inserting the following:</p>
	<p>41.6 Excessive leave accruals: request by employee for leave</p> <p>(a) If an employee has genuinely tried to reach agreement with an employer under clause 41.4(b) but agreement is not reached (including because the employer refuses to confer), the employee may give a written notice to the employer requesting to take one or more periods of paid annual leave.</p>

2014 REVIEW OF MODERN AWARDS

(AM2014/47) ANNUAL LEAVE

Textile, Clothing, Footwear and Associated Industries Award 2010 [MA000017]

Submission of the Textile, Clothing and Footwear Union of Australia regarding Excessive Leave Model Term

(Attachment A – Comparison of current TCF Award term and Draft Determination/Model term)

1 February 2017

TEXTILE, CLOTHING, FOOTWEAR & ASSOCIATED INDUSTRIES AWARD 2010 – CL. 41.4 ¹	FWC DRAFT DETERMINATION (20/12/2016)
	<p>(b) However, an employee may only give a notice to the employer under paragraph (a) if:</p> <ul style="list-style-type: none">(i) the employee has had an excessive leave accrual for more than 6 months at the time of giving the notice; and(ii) the employee has not be given a direction under clause 41.5(a) that, when any other paid annual leave arrangements (whether made under clause 41.4, 4.5 or 41.6 or otherwise agreed by the employer and employee) are taken into account, would eliminate the employee’s excessive leave accrual. <p>(c) A notice given by an employee under paragraph (a) must not:</p> <ul style="list-style-type: none">(i) if granted, result in the employee’s remaining accrued entitlement to paid annual leave being at any time less than 6 weeks when any other paid annual leave arrangements (whether made under clause 41.4, 41.5 or 41.6 or otherwise agreed by the employer and employee) are taken into account; or(ii) provide for the employee to take any period of paid annual leave of less than one week; or(iii) provide for the employee to take a period of paid annual leave beginning less than 8 weeks, or more than 12 months, after the notice is given; or(iv) be inconsistent with any leave arrangement agreed by the employer and employee. <p>(d) An employee is not entitled to request by a notice under paragraph (a) more than 4 weeks’ paid annual leave (or 5 weeks’ paid annual leave for a shiftworker, as defined by clause 3.1) in any period of 12 months.</p>

2014 REVIEW OF MODERN AWARDS

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TEXTILE, CLOTHING, FOOTWEAR & ASSOCIATED INDUSTRIES AWARD 2010 – CL. 41.4 ¹	FWC DRAFT DETERMINATION (20/12/2016)
	<p>(e) The employer must grant paid annual leave requested by a notice under paragraph (a).</p> <p>B. Items 1 to 5 of this determination come into operation from XX February 2017. In accordance with s.165(3) of the Fair Work Act 2009 these items do not take effect until the start of the first full pay period that starts on or after XX February 2017.</p> <p>C. Item 6 of this determination comes into operation from XX February 2018. In accordance with s.165(3) of the Fair Work Act 2009 these items do not take effect until the start of the first full pay period that starts on or after XX February 2018.</p>

2014 REVIEW OF MODERN AWARDS

(AM2014/47) ANNUAL LEAVE

Textile, Clothing, Footwear and Associated Industries Award 2010 [MA000017]

Submission of the Textile, Clothing and Footwear Union of Australia regarding Excessive Leave Model Term

(Attachment B – Comparison of current and previous TCF Award term)

1 February 2017

TEXTILE, CLOTHING, FOOTWEAR & ASSOCIATED INDUSTRIES AWARD 2010 Clause 41.4 (current) ¹	TEXTILE, CLOTHING, FOOTWEAR & ASSOCIATED INDUSTRIES AWARD 2010 Clause 41.4 (previous clause prior to previous Full Bench decision, 11 May 2015) ²
Clause 41.4 – Requirement to take annual leave	Clause 41.4 – Requirement to take annual leave
<p>Once an employee has accrued six weeks annual leave, for the purpose of ensuring accrued annual leave is taken, and in the absence of agreement as provided for in s.88 of the Act, an employer may direct an employee to take a period of annual leave, subject to the following:</p> <ul style="list-style-type: none"> (a) the employer must provide the employee with no less than 28 days’ notice of the requirement to take annual leave; (b) where after an employer has issued a direction pursuant to this clause, the relevant employee requests to take annual leave at an alternative time (but within six months of the date of the direction), the employer must not unreasonably refuse to agree to that request; and <p>the employee must retain at least four weeks of accrued annual leave after the direction is given by the employer.</p>	<p>Annual leave must be taken within 18 months of the entitlement accruing. For the purpose of ensuring that annual leave is taken within that period, and in the absence of agreement as provided for in s.88 of the Act, an employer may require an employee to take a period of annual leave from a particular date provided the employee is given at least 28 days notice,</p>

¹ *Textile, Clothing, Footwear and Associated Industries Award 2010* (varied to 14 December 2016)

² 4 Yearly Review, (AM2014/91) *Textile, Clothing, Footwear and Associated Industries Award 2010*, [2015] FWCFB 2831 (11 May 2015)