From: Vivienne Wiles <vwiles@cfmeumd.org>
Sent: Thursday, 19 August 2021 4:07 PM
To: AMOD <AMOD@fwc.gov.au>
Cc: Chambers - Hatcher VP <Chambers.Hatcher.VP@fwc.gov.au>
Subject: (AM2021/54) Casual Terms Award Review 2021 - Stage 2 - Group 2 Awards
Importance: High

Dear AMod Team,

Please find attached a further submission of the CFMMEU – Manufacturing Division with respect to the following award:

- *Textile, Clothing, Footwear and Associated Industries Award 2020* ("TCF Award")

The submission is filed pursuant to paragraph [105] of the 11 August 2021 Statement [2021] FWCFB 4928 and the extension provided to the CFMMEU-MD in email correspondence from chambers of Vice President Hatcher on 18 August 2021.

Kind Regards

Vivienne Wiles
Senior National Industrial Officer and Co-ordinator

Manufacturing Division
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IN THE FAIR WORK COMMISSION

Fair Work Act 2009

Clause 48 of Schedule 1
(Casual Terms Award Review 2021)

STAGE 2, GROUP 2 AWARDS
Provisional Views of the Full Bench as outlined in the Statement [2020] FWCFB 4928

SUBMISSION IN RESPONSE OF THE CONSTRUCTION, FORESTRY, MARITIME, MINING & ENERGY UNION (MANUFACTURING DIVISION) In relation to Textile, Clothing, Footwear and Associated Industries Award 2021

(19 August 2021)

CFMEU – Manufacturing Division	**Contact Person:** Vivienne Wiles Senior National Industrial Officer	**Address:** Level 2, 165 Bouverie Street, Carlton VIC, 3053	**Tel:** **Email:**	0419 334 102 vwiles@cfmeumd.org industriamd@cfmeu.org.au

BACKGROUND

1. The Casual Terms Award Review 2021 ("Casual Terms Review") is being undertaken by the Fair Work Commission ("FWC") pursuant to clause 48 of Schedule 1 to the *Fair Work Act 2009* as amended ("the Act as amended").[1]

2. The 27 March 2021 Amendments to the Act, inter-alia:
    - introduced a definition of 'casual employee' (section 15A);
    - introduced a new NES entitlement concerning casual conversion arrangements (Division 4A of Part 2-2).

3. In undertaking the Casual Terms Review, the FWC is required to review 'relevant terms' in all awards, and vary awards where necessary to remove inconsistencies, difficulties or uncertainties caused by the amendments to the Act as amended.

4. The Casual Terms Review is being undertaken in 2 stages. On 16 July 2021, a 5 member Full Bench issued a decision [2021] FWCFB 4144 in relation to Stage 1 of the Casual Terms Review ("the Stage 1 Decision").[2] The Stage 1 Decision, amongst other things, outlined the statutory framework for the review (nature and scope) and reviewed and made findings about relevant terms in the initial group of 6 modern awards.

STAGE 2 AWARDS

5. On 3 August 2021, a Statement [2021] FWCFB 4714 ("*3 August 2021 Statement*") was issued by a newly constituted 3 member full bench setting out the process of review of the balance of modern awards in Stage 2.[3] Attachment A to the *3 August 2021 Statement* categorised the remaining modern awards into 4 groupings – Group 1, Group 2, Group 3 and Group 4.

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[1] The *Fair Work Act 2009* as amended on 27 March 2021 by the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth).
[2] *Fair Work Act 2009* (Clause 48 of Schedule 1), Casual Terms Award Review 2021, Decision, [2021] FWCFB 4144 (16 July 2021)
[3] *Fair Work Act 2009* (Clause 48 of Schedule 1), Casual Terms Award Review 2021, Statement (AM2021/54) [2021] FWCFB 4714 (3 August 2021)

6. On 11 August 2021, the Full Bench issued a Statement, [2021] FWCFB 4928, in relation to Stage 2, Group 2 Awards (*"11 August 2021 Statement")*, including *provisional* views regarding relevant terms in each of those 45 awards.[4]

7. In Stage 2, Group 2, the CFMMEU-MD has an interest in the following modern awards:
    - *Textile, Clothing, Footwear and Associated Industries Award 2020* ("TCF Award")
    - *Timber Industry Award 2020* ("Timber Award")

8. The *11 August 2021 Statement* directed interested parties to (i) file any responses in relation to the *provisional* views concerning the Group 2 awards (as set out in the Statement and in Attachment A to the Statement) by 4:00pm (AEST) Wednesday, 18 August 2021;[5] and (ii) provide submissions in relation to specific issues identified concerning the Horse and Greyhound Award 2020 and the Textile Award about which the Full Bench has not expressed provisional views by 4:00pm (AEST) Wednesday, 18 August 2021.[6]

9. The CFMMEU-MD filed a submission on 18 August 2021 in response to direction 1 in accordance with paragraph [104] of the *11 August 2021 Statement* ("CFMMEU-MD First Submission").[7]

10. With respect to direction 2 in paragraph [105] of the *11 August 2021 Statement*, on 18 August 2021 an extension was granted to the CFMMEU-MD to file submissions by 4:00pm, Thursday 19 August 2021.

TCF AWARD – WHERE FULL BENCH HAS INDICATED NO PROVISIONAL VIEW

11. In the *11 August 2021 Statement* the Full Bench indicates at paragraphs [48] – [51] its *provisional view* regarding 11.12 (Casual conversion to full-time or part-time employment) of the TCF Award,

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[4] *Fair Work Act 2009* (Clause 48 of Schedule 1), Casual Terms Award Review 2021, Statement (AM2021/54) [2021] FWCFB 4928 (11 August 2021) – the Full Bench's provisional views are contained un the Statement and Attachment A to the Statement
[5] [2021] FWCFB 4928 at paragraph [104]
[6] [2021] FWCFB 4928 at paragraph [105]
[7] Casual Terms Award Review 2021, (AM2021/54) Submission of the CFMMEU Manufacturing Division (18 August 2021)

with one exception, the opening paragraph of clause 11.12. The relevant paragraphs are reproduced below:

> *[48] The Textile, Clothing, Footwear and Associated Industries Award 2020 (Textile Award) does not contain the model conversion clause. Instead, it contains the following provision which has been included in the award since it commenced operation on 1 January 2010:*
>
> ***11.12 Casual conversion to full time or part-time employment***
>
> *The employer will take all reasonable steps to provide its employees with secure employment by maximising the number of permanent positions in the employer's workforce, in particular by ensuring that casual employees have an opportunity to elect to become full time or part-time employees.*
>
> ***(a)** A casual employee engaged by a particular employer on a regular and systematic basis for a sequence of periods of employment under this award during a calendar period of 6 months will thereafter have the right to elect to have their ongoing contract of employment converted to permanent full-time employment or part-time employment if the employment is to continue beyond the conversion process prescribed by clause 11.12.*
>
> ***(b)** Every employer of such a casual employee must give the employee notice in writing of the provisions of clause 11.12 within 4 weeks of the employee having attained such period of 6 months. However, the employee retains their right of election under clause 11.12 if the employer fails to comply with this notice requirement.*
>
> ***(c)** Any casual employee who has a right to elect upon receiving notice or after the expiry of the time for giving such notice, may give 4 weeks' notice in writing to the employer that the employee seeks to elect to convert their ongoing contract of employment to full-time or part-time employment, and within 4 weeks of receiving such notice from the employee, the employer must consent to or refuse the election, but will not unreasonably so refuse.*
>
> ***(d)** Where an employer refuses an election to convert, the reasons for doing so must be fully stated and discussed with the employee concerned, and a genuine attempt will be made to reach agreement.*
>
> ***(e)** Any casual employee who does not, within 4 weeks of receiving written notice from the employer, elect to convert their ongoing contract of employment to full-time employment or part-time employment will be deemed to have elected against any such conversion.*

(f) *Once a casual employee has elected to become and been converted to a full-time employee or a part-time employee, the employee may only revert to casual employment by written agreement with the employer.*

(g) *If a casual employee has elected to have their contract of employment converted to full-time or part-time employment, the employer and employee will, in accordance with clause 11.12(g), and subject to clause 11.12(c), discuss and agree upon:*

(i) *whether the employee will convert to full-time or part-time employment; and*

(ii) *if it is agreed that the employee will become a part-time employee, the number of hours and the pattern of hours that will be worked consistent with any other part-time employment provisions of this award.*

Provided that an employee who has worked on a full-time basis throughout the period of casual employment has the right to elect to convert their contract of employment to full-time employment and an employee who has worked on a part-time basis during the period of casual employment has the right to elect to convert their contract of employment to part-time employment, on the basis of the same number of hours and times of work as previously worked, unless other arrangements are agreed between the employer and the employee.

(h) *Following an agreement being reached the employee will convert to full-time or part-time employment.*

(i) *An employee must not be engaged and re-engaged, dismissed or replaced in order to avoid any obligation under clause 11.12."*

[49] The Textile Award casual conversion clause is in substantially the same form as the Manufacturing Award. However, the Manufacturing Award provision contains no equivalent to the opening paragraph of clause 11.12 of the Textile Award. On one view, that opening paragraph is not simply a statement of the objective of the casual conversion provisions which follows because it arguably imposes a substantive obligation on employers to 'take all reasonable steps to provide its employees with secure employment by maximising the number of permanent positions in the employer's workforce', which is not confined to allowing for casual conversion.

[50] We are of the view that the casual conversion provisions of clause 11.12 (that is, paragraphs (a)-(i) are less beneficial than the NES residual right to because they provide for broader and less defined grounds for the employer to refuse an election under clause 11.12(c) and(d) of the Textile

Award. In contrast, under the Act an employer must give an employee a written response to their request for casual conversion, the details of the reasons must be included in the response, the refusal must follow (not precede) consultation with the employee, and the reasonable grounds for refusal must be based on facts that are known, or reasonably foreseeable, at the time of refusing the request. The Act also provides examples of 'reasonable grounds of refusal.' Additionally, the Textile Award clause only provides for a 'one-off' right to elect for conversion, which is less beneficial than the NES residual right, as that is a continuing one. Accordingly, our provisional view is that paragraphs (a)-(i) of clause 11.12 should be deleted from the award and replaced with a reference to the NES casual conversion entitlements in order to satisfy the requirement in clause cl.48(3) of Schedule 1.

[51] Our provisional view does not extend to the opening paragraph of clause 11.12. It is clearly a relevant term but, if it is detached from the casual conversion provisions which follow so that it reads 'The employer will take all reasonable steps to provide its employees with secure employment by maximising the number of permanent positions in the employer's workforce', then on one view it neither gives rise to inconsistency with the Act nor causes any interaction difficulty. We do not propose to express any provisional view about this, and we will invite further submissions about the matter.[8] [added emphasis]

12. In the CFMMEU-MD First Submission, we confirmed our opposition to the Full Bench's *provisional* views regarding clause 11.12 (Casual Conversion) of the TCF Award (i.e. to delete the current clause 11.12 and replace it with a reference to the NES term, together with the Note regarding dispute resolution under clause 40.)[9] Detailed submissions in support of the CFMMEU-MD's position will be filed pursuant to further directions made by the Commission.

[8] [2021] FWCFB 4928 at paragraphs [48] – [51]
[9] Casual Terms Award Review 2021, (AM2021/54) Submission of the CFMMEU Manufacturing Division (18 August 2021)

TCF AWARD – CLAUSE 12.11 (OPENING PARAGRAPH)

13. The opening paragraph of clause 12.11 (Casual conversion to full-time or part-time employment) of the TCF Award ("the term") provides:

    'The employer will take all reasonable steps to provide its employees with secure employment by maximising the number of permanent positions in the employer's workforce, in particular by ensuring that casual employees have an opportunity to elect to become full-time or part-time employees.'

14. As the Full Bench indicates in the *11 August 2021 Statement* at paragraph [49] 'the Manufacturing Award provision [casual conversion] contains no equivalent to the opening paragraph of clause 11.12 of the Textile Award.' As such, to date no findings have been made by a Full Bench in the Casual Terms Review regarding such a term.

15. The CFMMEU-MD accepts that the term is a relevant term pursuant to clause 48 of Schedule 1 to the Fair Work Act 2009 ("the Act") as it is included as part of clause 12.11 which '*provides for the conversion of casual employment to another types of employment*' [cl.48(1)(c)(iv) of Schedule 1].

16. The CFMMEU-MD contends that the term is not merely an expression of an objective (i.e. the right for a casual employee covered by the TCF Award to elect to seek casual conversion under the procedure outlined in clause 12.11 (a) – (i). In our view, the term has work to do, both generally in maximising permanent employment within the TCF industry, but also as part of the facilitation of conversion of casual employees. This is relevant given the particular nature and characteristics of the TCF industry and the history of award regulation in the TCF sector, including in the making of the modern TCF Award 2010 arising from the Part 10 Award Modernisation process (discussed further below).

17. It is submitted the term is a substantive obligation which requires *primarily* that an employer covered by the TCF award '*take all reasonable steps to provide its employees with secure employment by maximising the number of permanent positions in the employer's workforce'*. The obligation is followed by the words *'in particular by ensuring that casual employees have an opportunity to elect to become full-time or part-time employees.'*

18. The second part of the term is not a qualification or limitation on the primary obligation which precedes it. On a plain reading there are no words included in the term which confines the primary obligation to the casual conversion part of the clause. If there had been such an intention by the drafters of the clause, one would expect that words of confinement would have been included. For example, the words 'in particular' would not have been used, such that the primary obligation (*to take all reasonable steps to provide its employees with secure employment by maximising the number of permanent positions in the employer's workforce')* was to be directly achieved only by reference to '*ensuring that casual employees have an opportunity to elect to become full-time or part-time employees.'*

19. However, we also contend, that the second part of the term reinforces the importance of the casual conversion procedure which follows in ensuring that permanent positions in the employer's workforce are maximised.

Whether an inconsistency, or any uncertainty or difficulty exists in relation to the term

20. Pursuant to clause 48(2) and (3) of Schedule 1 to the Act, the tasks before the Commission once it determines that a term is a 'relevant term' (as required under clause 48(1) of Schedule 1 to the Act) is as follows:

> *(2) The review must consider the following:*
>
> *(a) whether the relevant term is consistent with this Act as amended by Schedule 1 to the amending Act;*
> *(b) whether there is any uncertainty or difficulty relating to the interaction between the award and the Act as so amended.*
>
> *(3) If the review of a relevant term under subclause (1) finds that:*
>
> *(a) the relevant term is not inconsistent with this Act as amended by Schedule 1 to the amending Act; or*
>
> *(b) there is difficulty or uncertainty relating to the interaction between the award and the Act so amended;*
>
> *then the FWC must make a determination varying the modern award to make the award consistent or operate effectively with the Act as so amended.*

21. In the Stage 1 Decision (16 July 2021) the Full Bench with respect to the meaning of 'consistent', 'uncertainty or difficulty' and 'operate effectively', held at paragraphs [31] – [37] [footnotes not included]:

> *[31] In the present context the Act regulates the relationship between the NES and modern awards through the NES interaction rules in s.55. These rules make clear that the NES do not cover their respective fields, as s.55(4) permits the inclusion of terms in a modern award that are ancillary or incidental to, or that supplement, the NES, provided the effect of those terms is not detrimental to an employee in any respect.*
>
> *[32] It follows that award terms which comply with s.55(4) might be directly inconsistent with provisions of the NES but nevertheless consistent with the Act, provided they not 'exclude' the NES (s.55(1)). Having regard to the nature of the NES as a set of minimum employee entitlements, an award term will exclude the NES if its operation results in an outcome whereby an employee does not receive in full or at all a benefit provided by the NES.*
>
> *[33] The objects of the Act also envisage a role for both the NES and modern awards in establishing a guaranteed safety net, which suggests that a purposive approach to construing the term 'inconsistent with' favours a construction which would allow for modern awards to contain terms that are not identical to the NES.*
>
> *[34] In the Review we are required to consider whether relevant terms in a modern award are consistent with this Act as amended by….the amending Act' (cl.48(2)(a) (emphasis added). A permitted inconsistency with the NES casual conversion provisions is 'consistent with' the Act.*
>
> *[35] Returning to the meaning of the expression 'consistent with'; we agree with the observation of Sackville J in Flanagan v Australia Prudential Regulation Authority, that 'there is a certain elasticity about the expression'. Further, we perceive no relevant distinction between the expression 'no consistent with' and the word 'inconsistent'. In discussion cl.48 the EM uses the terms 'inconsistent' and 'no inconsistent' interchangeably.*
>
> *[36] Having regard to the terms of the cl.48(2)(a) the context and legislative purpose, we agree with the ACTU that relevant terms are not 'inconsistent with' the Act as amended merely because they differ from the newly enacted provisions.*
>
> *[37] [not reproduced]*
>
> *[38] As mentioned earlier, cl.48(2)(b) provides that the Casual Terms Review must consider whether there is any 'uncertainty or difficulty relating to the interaction between the award and the Act' as amended.*
>
> *[39] As to the expression 'any uncertainty or difficulty relating to the interaction between the award and the Act so amended', in cl.48(2)(b) and 'a difficulty or uncertainty relating to the*

interaction between the award and the Act as so amended' in cl.48(3)(b), the words 'uncertainty' and 'difficulty' should be given their ordinary meaning.[10]

22. The CFMMEU-MD submits the term is not inconsistent with the Act as amended by Schedule 1. As outlined above, the term contains 2 elements.

23. The first element of the term, *'The employer will take all reasonable steps to provide its employees with secure employment by maximising the number of permanent positions in the employer's workforce'* is not inconsistent with either the definition of a 'casual employee' in section 15A, or the NES entitlement in relation to casual conversion provided in Division 4A. To further illustrate the point, an employer may take reasonable steps to prioritise across its operations the percentage of permanent positions, yet still employee one or more casual employees consistent with the definition in s15A, and follow award the casual conversion procedure to facilitate their conversion (unless there are reasonable grounds not to).

24. The second element of the term, *'in particular by ensuring that casual employees have an opportunity to elect to become full-time or part-time employees'* cannot on its face be said to be inconsistent with the NES casual conversion provisions, given the NES entitlement provides an *opportunity* for a casual employee to respond to an employer (other than a small business) offer of conversion (as provided under Division 4A, Subdivision B) or to access the residual right to request casual conversion (as provided under Division 4A, Subdivision C).

25. Further, it is submitted that neither the first or second elements of the term constitutes any uncertainty or difficult relating to the interaction between the award and the Act so amended. The term does not impugn the NES casual conversion entitlement in any respect. We submit that its continuing operation, would not '*result in an outcome whereby an employee does not receive in full or at all a benefit provided by the NES.'*

[10] [2021] FWCFB 4144 (16 July 2021) at paragraphs [31] – [39]

In the alternative

26. If the Full Bench does not accept the CFMMEU's submissions on this point, and finds that that term (as currently drafted) is inconsistent, or there is uncertainty or difficulty (as provided in clause 48(3) to Schedule 1) in the alternative, the CFMMEU-MD submits the term should still be retained and redrafted as follows:

    'The employer will take all reasonable steps to provide its employees with secure employment by maximising the number of permanent positions in the employer's workforce.'

27. The term as amended could be removed from the casual conversion clause and be relocated to another place in the TCF Award, for example, at the commencement of Part 2 – Types of Employment and Classifications or alternatively at the commencement of clause 11 (Casual Employment). In such a case, we submit there would be no inconsistency with the Act or cause any interaction difficulty or uncertainty.

Importance of the retention of term

28. In relation to the primary and alternate positions outlined above, the CFMMEU strongly submits that the term should be retained in the TCF Award (either in its current or alternate proposed amended form).

29. The CFMMEU-MD submits that the retention of the term is necessary (as required by section 138 of the Act) in order to achieve the modern awards objective (section 134) with respect to the TCF Award. In the Stage 1 Decision, the Full Bench held in relation to the application of sections 134 and 138 the following:

    [42] In our view any variation made in accordance with cl.48(3) of Schedule 1 must make the award consistent with or operate effectively with the provisions of the Act relating to casual employment specifically, as well as the Act generally. Any such variations must therefore also conform with the requirements of s.138 – that is, the varied award terms must be necessary to

achieve (relevantly) the modern awards objective in s.134(1). To ensure compliance with s.138, the considerations in s.134 (1) (a) – (h) need to be taken into account even though on a strict reading s.134 of the Act does not apply to the Casual Terms Review.[11]

30. It is relevant to the issue of 'necessity' that the term was included in the casual conversion clause in the making of the modern TCF Award as determined by the 7 member Part 10A Award Modernisation Full Bench. Prior to Award Modernisation, the pre-reform federal *Clothing Trades Awards 1999* provided for a casual loading of 33 and 1/3%, a reflection of the regulatory need to dis-encourage widespread casualisation in an industry known for pervasive award non-compliance and exploitation in some sub-sectors.

31. The reasoning of the Award Modernisation Full Bench for the inclusion of a new casual conversion provision (including the term in question) into the TCF Award is discernible in its Priority Award Decision [2008] AIRCFB 1000, issued on 19 December 2009.[12] In effect, it removed the 33 and 1/3% casual loading and included the casual conversion clause in the TCF Award. It is evident, that in including the casual conversion clause in the modern TCF Award, the Full Bench took into account the nature and characteristics of the TCF industry. Relevant extracts from the decision are included below.

Types of employment

[47] *In our statement of 12 September 2008 we indicated that we intended to adopt a standard loading of 25 per cent for casual employees. We received many representations in relation to that indication. For example, a number of employer representatives submitted that we should not adopt a standard casual loading or that if we did so 25 per cent was too high.*

[48] *There is great variation in the casual loadings in NAPSAs and federal awards. In some cases the situation is complicated by the fact that casuals receive an annual leave payment, usually through an additional loading of one twelfth, although in most cases casuals do not receive annual leave payments. To take some examples, a casual loading of 25 per cent is common throughout the manufacturing industry, casual loadings in the retail industry vary from 15 per cent to 25 per cent. A loading of 25 per cent is very common, although not universal, throughout the hospitality industry. A number of pre-reform awards currently provide for a 33⅓ per cent loading and higher when the annual leave payment is taken into*

[11] [2021] FWCFB 4144 at paragraph [42]
[12] Award Modernisation (AM2008/1-12) [2008] AIRCFB 1000 (19 December 2008)

account. It seems to us to be desirable to standardise provisions to apply to casuals where it is practicable to do so to avoid claims in the future based on unjustified differences in loadings. We appreciate that there are casual employees in some industries in some States receiving loadings less than 25 per cent and we understand that employers of those employees will experience an increase in labour costs if the loading is standardised to 25 per cent. Equally, there will be reductions in labour costs where the loading, including the annual leave loading where it applies, exceeds 25 per cent currently.

[49] *In 2000 a Full Bench of this Commission considered the level of the casual loading in the Metal, Engineering and Associated Industries Award 1998 (the Metal industry award). 12 The Bench increased the casual loading in the award to 25 per cent.13 The decision contains full reasons for adopting a loading at that level. The same loading was later adopted by Full Benches in the pastoral industry.14 It has also been adopted in a number of other awards. Although the decisions in these cases were based on the circumstances of the industries concerned, we consider that the reasoning in that case is generally sound and that the 25 per cent loading is sufficiently common to qualify as a minimum standard.*

[50] *In all the circumstances we have decided to confirm our earlier indication that we would adopt a standard casual loading of 25 per cent. We make it clear that the loading will compensate for annual leave and there will be no additional payment in that respect. Also, as a general rule, where penalties apply the penalties and the casual loading are both to be calculated on the ordinary time rate.*

[51] *An issue has also arisen concerning the provision permitting casuals to have the option to convert to non-casual employment in certain circumstances. This provision has its genesis in the Full Bench decision already mentioned in connection with the fixation of the casual loading of 25 per cent in the Metal industry award. 15 The Bench made it clear that it had formulated the casual conversion provision based on the circumstances of the industry covered by the award and that there had been no evidence concerning other industries. Section 515(1)(b) of the WR Act identifies casual conversion provisions as matters which cannot be included in awards. Section 525 provides that such terms have no effect. These sections were part of the Work Choices amendments. It appears, however, that casual conversion provisions in NAPSAs were not invalidated. Modern awards can contain a casual conversion provision. In light of the arbitral history of such provisions in the federal jurisdiction we shall maintain casual conversion provisions where they currently constitute an industry standard, but we shall only extend them in exceptional circumstances. The modern awards reflect this approach. We note in particular that we have decided to include a casual conversion provision in the Textile, Clothing, Footwear and Allied Industries Award 2010 (the Textile industry award) against the opposition of employers. We have done so taking into account the nature of the industry and the reduction in the casual loading from 33⅓ per cent to 25 per cent in part of the industry covered by the award.*

Clothing industry (including footwear manufacturing), textile industry

> ***[147]*** *During the second round of consultations a number of submissions were put on the need to ensure that employees properly understood any proposal advanced for individual or majority flexibility. As discussed earlier we have decided to broaden the obligation originally drafted so as to focus on, not just English as a second language, but on a person's comprehension or otherwise of written English.*
>
> ***[148]*** *Particularly strong submissions were put in relation to casual employment. In the first place the TCFUA expressed great concern at the reduction in the casual loading from 33⅓ per cent to 25 per cent. The second aspect, which the Australian Industry Group (AiGroup) raised, was the question of casual conversion. As to the percentage loading for casuals, we dealt with that issue in the general part of our decision. After examining the casual conversion we have decided to retain the clause in the exposure draft. Award limitations on the use of casuals have been of two kinds: the level of the loading and a limit on the number of times a casual can be engaged in a calendar year; the latter approach being more common in NAPSAs.*
>
> ***[149]*** *We think that given the history of the use of casual employment in the sectors the better approach for a modern award to apply throughout Australia is to include provision for a casual who elects to do so to convert to weekly employment.*

32. In context of the Award Modernisation Full Bench's reasoning outlined above, the term (opening paragraph of what is now clause 11.12) is a substantive obligation consistent with an appropriate framework of regulation of casual employment for the TCF industry. That is, the Award Modernisation Full Bench found that it was necessary (as required by s.138) for a casual conversion clause (including the term) to be included in the TCF Award.

33. The casual conversion clause (including the term) in the TCF Award was subsequently extensively reviewed as part of the 2012 Transitional Review and the Four Yearly Review of Modern Awards. The CFMMEU-MD submits the term remains a relevant and necessary provision, and should not be deleted as a result of the Casual Terms Review (which is a relatively confined process).

Filed on behalf of:

Construction Forestry Maritime Mining and Energy Union
(Manufacturing Division)

Vivienne Wiles
Senior National Industrial Officer and Co-ordinator
(19 August 2021)