From: Vivienne Wiles [mailto:vwiles@cfmeu.org]
Sent: Wednesday, 19 September 2018 4:55 PM
To: AMOD
Subject: (AM2016/15) PLAIN LANGUAGE DRAFTING - STANDARD CLAUSES

Dear AMod Team,

(AM2016/15) Payment of Wages – Standard Clauses

In accordance with varied directions issued on 17 September 2018, please find attached a submission of the Construction, Forestry, Maritime, Mining and Energy Union – Manufacturing Division ('CFMEU – Manufacturing Division').

The submission relates to the following modern awards in which the CFMEU – Manufacturing Division has an interest:

- Dry Cleaning and Laundry Industry Award 2010
- Manufacturing and Associated Industries and Occupations Award 2010
- Textile, Clothing, Footwear and Associated Industries Award 2010
- Timber Industry Award 2010

Regards

Vivienne Wiles
National Industrial Officer

Manufacturing Division
Construction Forestry Maritime Mining & Energy Union
Manufacturing Division

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(AM2016/15)
Plain Language Redrafting – Standard Clauses
Draft Determinations – Various Awards

Submission of the
Construction, Forestry, Maritime, Mining and Energy Union
(Manufacturing Division)

BACKGROUND

1. On 14 August 2018[1] the Plain Language Drafting Full Bench issued a decision ('August Decision') finalising the form of the model terms for Standard Clauses in modern awards. The Standard Clauses are:

    A. Award flexibility
    B. Consultation about major workplace change
    C. Consultation about changes to rosters or hours of work
    D. Dispute resolution
    E. Termination of employment
    F. Redundancy
    G. Transfer to lower paid job on redundancy
    H. Employee leaving during the redundancy notice period.

2. At paragraph [15] of the August Decision, the Full Bench stated:

> [15] A consolidated version of the standard clauses is set out in Attachment A. It is our *provisional* view that all modern awards should be varied to replace the relevant existing terms with standard clauses. That provisional view would only be displaced in respect of any particular award if it is demonstrated that there are matters or circumstances particular to that award which compel the conclusions that the achievement of the modern award objective for that award does not necessitate the inclusion of the model standard terms.

[1] (AM2016/15) Plain Language Redrafting – Standard Clauses ; Decision [2018] FWCFB 4704 (14 August 2018)

[16] Draft determinations giving effect to our provisional view will be published in the coming weeks. Interested parties will have 14 days from the date of the draft determinations to comment and confirm whether any award-specific issues are pressed. In the absence of any comments in respect of a particular modern award we will confirm our *provisional* view and vary the modern award.'[2]

3. A Statement[3] and Draft Determinations for multiple awards were subsequently issued on 24 August 2018.

4. In response to correspondence filed by the ACTU with respect to model term G.1[4], the Commission issued a 'Revised schedule of draft determinations' on 7 September 2018. The Commission's document stated:

> *Please note:*
> *The wording of clause G.1 has been amended to read as it appeared at paragraph [259] [2017] FWCFB 5258.*
>
> > *"G.1 Clause G applies if, because of redundancy, an employee is transferred to new duties to which a lower ordinary rate of pay is applicable.*

5. Despite the note, it appears that the 'revised draft determinations' were not actually changed to reflect the correct wording for model term G.1. In relation to this issue we support, and adopt the ACTU submission and the submission of the Construction, Forestry, Maritime, Mining and Energy Union – Mining and Energy Division[5] by way of general application to the awards in which we have an interest.

6. On 10 September 2018, the Commission provided the Construction, Forestry, Maritime,

[2] Ibid; at [15] – [16]
[3] (AM20168 & AM2016/15) Payment of Wages – Plain Language – Standard Clauses, Statement[2018] FWC 4976 (24 August 2018)
[4] (AM2016/15) ACTU correspondence to FWC (5 September 2018)
[5] (AM2016/15) Submission by the Construction, Forestry, Maritime, Mining and Energy Union – Mining and Energy Division (7 September 2018)

Mining and Energy Union – Manufacturing Division ('CFMEU – Manufacturing Division') an extension to provide submissions by Monday, 17 September 2018. A further extension was provided on 17 September 2018 for the CFMEU – Manufacturing Division to provide its submissions by 5.00pm, Wednesday, 19 September 2018.

MODERN AWARDS IN WHICH THE CFMEU – MANUFACTURING DIVISION HAS AN INTEREST

7. In these proceedings, the CFMEU – Manufacturing Division has an interest in the following modern awards:

    - *Dry Cleaning and Laundry Industry Award 2010*[6] ('DC&LI Award')
    - *Joinery and Building Trades Award 2010*[7] ('Joinery Award')
    - *Manufacturing and Associated Industries and Occupations Award 2010*[8] ('Manufacturing Award')
    - *Textile, Clothing, Footwear and Associated Industries Award 2010* ('TCF Award')
    - *Timber Industry Award 2010* ('Timber Award').

8. For the above awards, draft determinations (and subsequently revised draft determinations) were published with respect to all except for the Joinery Award.

9. A review of the draft determinations for the remaining four awards (DC&LI Award, Manufacturing Award, TCF Award and Timber Award) indicate that there are a number of award specific issues which need addressing.

[6] [MA000096]
[7] [MA000029] Note: A separate Full Bench is considering the construction awards, including the Joinery Award
[8] [MA000010]

TEXTILE, CLOTHING, FOOTWEAR AND ASSOCIATED INDUSTRIES AWARD[9] - DRAFT DETERMINATION

10. The TCF Award contains various award specific provisions which the CFMEU – Manufacturing Division, presses for inclusion as part of a modified standard clause/s. Relevantly, various existing award terms were inserted into the TCF Award as a result of decisions of previous full benches in both the Part 10A Award Modernisation process and the 2014 Award Review.

11. We also identify a number of instances where the draft determination would result in unintended consequences and numbering/formatting issues.

12. As a general point, we note the observations of the Plain Language Full Bench in the development of the 'Guidelines – Plain language drafting of modern awards' in its decision of 20 January 2017 ('January 2017 Decision')[10] as follows:

> ***[13]*** *We will amend the draft Guidelines to make it clear that the aim of plain language drafting is to make the award as simple and as easy to understand as possible without unintentionally changing the legal effect of the award.*
>
> ***[20] '….****The objective of the plain language project is to remove ambiguity, promote certainty and make awards simpler and easier to understand, consistent with the statutory direction to take into account the 'need to ensure a simple, easy to understand, stable and sustainable modern award system' (s134(1)(g). An objective of the plain language project is to avoid disputation by providing clarity about the rights and responsibilities of those covered by modern awards.'*
>
> ***[21]*** *The Commission intends to engage in an extensive consultation process in each element of the plain language project to ensure that the redrafting process does not*

[9] Textile, Clothing, Footwear and Associated Industries Award 2010 (as varied to 27 July 2018) [MA000017]
[10] (AM2014/209 and AM2016/15) Pharmacy Industry Award 2010 – Plain language project [2017] FWCFB 344 (20 January 2017)

unintentionally alter the legal effect of any award term.' [11]

13. From the very early stages of the Plain Language Drafting proceedings, the (former) TCFUA raised its concerns regarding the potential impact of the development of model Standard Clauses on existing substantive provisions in the TCF Award. These concerns were raised in the various Conference held in late 2017 and early 2017 facilitated by Commissioner Hunt and in its written submissions. For example, in its submission filed on 11 August 2017,[12] the TCFUA stated:

> *'**TCF Award 2010***
>
> ***5.** The TCF Award contains a number of standard clauses (and ancillary provisions) which deviate from the relevant model term determined for modern awards. These include, for example:*
>
> - *Clause 7 – Award Flexibility*
> - *Clause 9.2 – Consultation about changes to rosters or hours of work*
> - *Clause 11 – Dispute resolution training leave*
>
> *6. On the issue of 'non-standard' clauses in modern awards, the Statement issued on 15 July 2016 provided:*
>
> > *[16] Where an award contains a provision that differs from the standard term of contains allied provisions (e.g. a dispute resolution training term), these terms may be dealt with by the Plain Language Full Bench or through the Award stage proceedings for the relevant award following a decision on the plain language model terms.'*
>
> *7. In context of the above, the TCFUA's participation in the 3 Conferences and the filing of submissions with respect to the standard clauses, should not be taken as support for the inclusion of any final, settled model standard clause into the TCF Award (without*

[11] Ibid; at [13], [20] and [21]
[12] (AM2016/15) Plain Language Redrafting – Standard Clauses, TCFUA Submission (11 August 2017)

appropriate modification), where currently there [is] a different, standard term.'[13]

14. In this context, we provide our submissions below with respect to specific elements of the draft determination for the TCF Award of concern to the union.

Clause 7 (Individual flexibility arrangements) – Draft Determination

15. The current clause 7 (Award flexibility) of the TCF Award[14] contains a number of terms in addition to the standard award model IFA clause determined initially as part of the Part 10A Award Modernisation process in 2008 and subsequently varied in the 2012 Transitional Review of Modern Awards.

16. The additional terms in clause 7 of the TCF Award, are reproduced as follows:

> ***7.4*** *An individual flexibility agreement cannot be made so as to effect the provisions of Schedule F – Outwork and Related Provisions*
>
> ***7.9*** *The employer must give the employee up to seven working days to enable the employee to seek advice, where appropriate, from the employee's union.*

17. We strongly submit that the current sub-clauses 7.4 and 7.9 of the TCF Award should be retained as part of a modified redrafted clause (award flexibility). In doing so we refer to the history of the formulation of the award flexibility term in the TCF Award.

18. The form of the TCF Award was determined in the Priority Stage of the Part 10A Award Modernisation process. [15] The Part 10A, Award Modernisation Full Bench in its decision of 20 June 2008 ('June 2008 Decision'), in accepting that that the TCF industry was a priority

[13] Ibid; at paragraphs 5 - 7

[15] S.576E – Procedure for carrying out award modernisation process; [2008] AIRCFB 550 (20 June 2008) at [92] – [95]

industry, stated, inter alia:

> *[95] Given the characteristics of the industry together with the fact that there is strong support for, and no opposition to, its inclusion, we will include it within the list of priority industries.*[16] [emphasis added]

19. The Full Bench in the June 2008 Decision, in addition to determining the priority industries, also considered and confirmed the form of the model award flexibility clause. [17] In so doing so, the Full Bench observed:

> *[19] The model clause may require adaption to suit the circumstances of the industry or occupation covered by a particular modern award. Clause 11 of the Minister's request provides that the model flexibility clause is to be included in each modern award "with such adaption as is required for the modern award in which it is included." In this respect some of the proposals directed at ensuring employees are aware of their award rights which we have not included in the model clause might be considered in particular industries…..'*[18]

20. In a Statement issued on 12 September 2008 ('September 2008 Statement'), [19]the Award Modernisation Full Bench dealt with the exposure drafts of priority awards as well as a number of general issues affecting multiple awards. In relation to the model flexibility term, the full bench stated:

> *[17] With one exception we have not found it necessary to modify the substance of the model award flexibility clause in any of the drafts. To put the intended operation of the clause beyond doubt we have included the words "Notwithstanding any other provision of this award" at the start of the model clause. The draft award flexibility*

[16] Ibid; at [95]
[17] Ibid; at [155] – [192]
[18] Ibid; at [191]
[19] Award Modernisation (AM2008/1-12) [2008] AIRCFB 717; Statement (12 September 2008)

clause in the exposure draft for the textile, clothing, footwear and associated industries contains some modifications directed to the nature of the employment in the industry. They deal with translation and time for consideration of proposed agreements.'[20] [emphasis added]

'[103] Given the nature of the industry we have added a requirement to the model award flexibility clause for translation of proposals into a person's first language so that any proposals are fully understood. In addition we have provided a period of consideration of any proposal under the clause.'[21] [emphasis added]

21. It is contended that the statements made by the Award Modernisation Full Bench illustrate that it took into account the particular nature, and characteristics of the TCF industry in concluding that TCF award workers needed additional safeguards with respect to the inclusion of a modified IFA term.

22. In its decision of 19 December 2008 ('December 2008 Decision)[22], the Award Modernisation Full Bench determined the form of the new modern awards for the industries in the Priority Stage, including the making of the modern TCF Award 2010. In addition, it determined a number of general issues and standard clauses, including a revised award flexibility term. The only revision to the model award flexibility term was the inclusion of an additional written proposal requirement in circumstances when an employer sought to seek to enter into an IFA.[23] The other additional safeguards in the TCF Award remained.

23. Schedule F (Outwork and Related Provisions) of the TCF Award provides a comprehensive framework for the regulation of the giving out of work in the TCF industry, including to outworkers. The current safeguard in clause 7.4, TCF Award appropriately reflects the importance give to the protection required to be given to this class of workers who have a particular vulnerability to systemic exploitation and abuse.

[20] Ibid; at [17]
[21] Ibid; at [103]
[22] Award Modernisation [2008] AIRCFB 1000 (19 December 2008)
[23] Ibid; at [38]

24. The Commission and its predecessor organisations over many decades have consistently acknowledged and accepted the need for specific regulation with respect to TCF outworkers as part of the award and minimum safety net for the TCF industry. In the development of the exposure draft for the TCF Award, there was strong support amongst interested parties for the inclusion of effective outwork provisions. In the September 2008 Statement, the Award Modernisation Full Bench stated:

> *[104] A key area in this exposure draft is the provisions in relation to outworkers. In this connection, the Victorian government proposed a clause for inclusion into the award. This is a matter that it has raised with the parties and other Governments. We have included the proposed clause in the exposure draft as it may well represent a significant area of consensus.'*[24]

25. In determining the form of the modern TCF Award, the award modernisation full bench stated:

> *'Important submissions were also made in relation to the regulation of outworkers. There has been no disagreement about the need to properly protect this class of employee.'* [25]

26. We note that in the 2014 Award review, the Commission has proceeded on the basis that '*prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made*,'[26] and that although it is not a court and not bound by the principles of stare decisis [27]'*previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so*.'[28]

[24] Award Modernisation [2008] AIRCFB 717 (12 September 2008) at [103]
[25] Award Modernisation [2008] AIRCFB 1000 (19 December 2008) at [150]
[26] 4 Yearly Review of Modern Awards; Preliminary Jurisdictional Issues [2014] FWCFB 1788 (17 March 2018) at [24]
[27] Ibid; at [25]
[28] Ibid; at [27]

27. Given the history of the award flexibility clause in the TCF industry, including its consideration by the Award Modernisation Full Bench, it is submitted that the additional safeguards currently contained in clause 7 of the TCF Award (7.4 and 7.9) should be retained as part of a redrafted Standard IFA clause for the TCF industry. These are substantive current conditions which should be not abrogated as part of a plain language redrafting process.

28. Subsequent to the *Preliminary Issues Decision*, the task of the Commission in the 2014 Award Review has now been enunciated on numerous occasions in decisions of various Full Benches constituted for the purposes of the review. In context of the Plain Language Redrafting proceedings, the purpose of the review and the role of the Commission has been described as follows:

> *'[1] Section 156(2)(a) of the Fair Work Act 2009 (Cth) (the Act) requires the Commission to review all modern awards every four years (the Review). The Review is at large to ensure that that the modern awards objective is being met; that the award, together with the National Employment Standards, provides a fair and relevant minimum safety net of terms and conditions. The Commission must review each modern award and, by reference to the matters in s.134(1) and any other considerations consistent with the purpose of the modern awards objective, come to an evaluative judgment about the modern awards objective and what terms should be included only to the extent necessary to achieve that objective.'*[29]
>
> *[3] In determining whether an award achieves the modern awards objective the Commission must take into account the matters set out in s.134(1)(a) – (h). The matter in s.134(1)(g) is particularly apposite in the context of the plain language redrafting project, that is, 'the need to ensure a simple, easy to understand, stable and sustainable modern award system.'*[30]

[29] [2017] FWCFB 4419 at [1] citing *CFMEU v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC at [28] – [29]
[30] [2017] FWCFB 4419 at [3]

29. With respect the current clause 7.4 and clause 7.9 in the TCF Award, we submit that their retention (as part of a modified model term) is necessary to ensure that the TCF Award, together with the NES, provides a fair and relevant minimum safety net of terms and conditions, taking into account the considerations in s.134(1) (a) – (h).

30. Whilst the Commission is required to take into account all of the factors in s.13491) (a) – (h) we submit that the consideration in s.134(1) (a) *'relative living standards and needs of the low paid'* is particularly relevant. It is generally acknowledged that workers in the TCF industry are commonly low paid and award dependent. The additional safeguards (as contained in clauses 7.4 and 7.9 of the TCF Award) are intended to ensure (i) that the conditions and protections of outworkers s provided by Schedule F of the TCF Award are not overridden, and (ii) that TCF workers are properly informed as to their rights in relation to a proposal to enter into an IFA.

31. In context of our submissions above, we propose the following revised clause, consistent with the settled Standard Clause (award flexibility) but containing the two additional safeguards.

Proposed revised standard clause for TCF Award – individual flexibility arrangements [current additional terms underlined]

Clause 7 – Individual flexibility arrangements

7.1 *Despite anything else in this award, an employer and an individual employee may agree to vary the application of the terms of this award relating to any of the following in order to meet the genuine needs of both the employee and employer:*

(a) arrangements for when work is performed; or

(b) overtime rates; or

(c) penalty rates; or

(d) allowances; or

(e) annual leave loading.

7.2 An agreement must be one that is genuinely made by the employer and the individual employee without coercion or duress.

7.3 An agreement may only be made after the individual employee has commenced employment with the employer.

7.4 An individual flexibility agreement cannot be made so as to effect the provisions of Schedule F – Outwork and Related Provisions. [i.e. current clause 7.4, TCF Award]

7.5 An employer who wishes to initiate the making of an agreement must:

(a) give the employee a written proposal; and

(b) if the employer is aware that the employee has, or reasonably should be aware that the employee may have, limited understanding of written English, take reasonable steps (including providing a translation in an appropriate language) to ensure that the employee understands the proposal; and

(c) give the employee up to seven working days to enable the employee to seek advice, where appropriate, from the employee's union. [i.e. current clause 7.9, TCF Award]

7.6 An agreement must result in the employee being better off overall at the time the agreement is made than if the agreement had not been made.

7.7 An agreement must do all of the following:

(a) state the names of the employer and the employee; and

(b) identify the award term, or award terms, the application of which is to the varied; and

(c) set out how the application of the award term, or each award term, is varied; and

(d) set out how the agreement results in the employee being better off overall

at the time the agreement is made than if the agreement had not been made; and

(e) state the date the agreement is to start.

7.8 An agreement must be:

(a) in writing; and

(b) signed by the employer and the employee and, if the employee is under 18 years of age, by the employee's parent or guardian.

7.9 Except as provided in clause 7.7(b), an agreement must not require the approval or consent of a person other than the employer and the employee.

7.10 The employer must keep the agreement as a time and wages record and give a copy to the employee.

7.11 The employer and the employee must genuinely agree, without duress or coercion to any variation of an award provided for by an agreement.

7.12 An agreement may be terminated:

(a) at any time, by written agreement between the employer and the employee; or

(b) by the employer or employee giving 13 weeks' written notice to the other party (reduced to 4 weeks if the agreement was entered into before the first full pay period starting on or after 4 December 2013).

Note: If an employer and employee agree to an arrangement that purports to be an individual flexibility arrangement under this award term and the arrangement does not meet a requirement set out in s.144 then the employee or the employer may terminate the arrangement by giving written notice of not more than 28 days (see s.145 of the Act).

7.13 An agreement terminated as mentioned in clause 7.119b) ceases to have effect at the end of the period of notice required under that clause.

7.14 The right to make an agreement under clause 7 is additional to, and does not affect, any other term of this award that provides for an agreement between an employer and an individual employee.

Clause 9A (Consultation about changes to rosters or hours of work) – Draft Determination

32. The model standard clause (Consultation about changes to rosters or hours) excludes a substantive term currently contained at clause 9.2(c) of the TCF Award. Clause 9.2(c) of the TCF Award provides as follows:

    9.2

    (c) Information must be provided to affected employees and their representatives, if any, in accordance with clause 9.2(b) in a manner which facilitates employee understanding of the proposed changes, having regard to their English language skills. This may include the translation of the information into an appropriate language.'

33. Clause 9.2(c) was inserted into the TCF Award as result of an arbitrated Full Bench decision[31] issued on 11 May 2018 as part of the 2014 Award Review (Award Stage – Group 1). Whilst the (former) TCFUA's formulated claim in this regard was rejected, the Full Bench determined an alternative formulation, as reflected in the current cluse 9.2(c). In doing so, the Full Bench made the following findings:

    '[118] We accept that there will be some circumstances in which steps including translation of information provided, whether in writing where effective consultation requires it or orally, will be necessary to ensure that the provision of information occurs in a manner, which provides affected employees with a genuine opportunity to

[31] 4 yearly review of modern awards, (AM2014/91) Textile Clothing Footwear and Associated Industries Award 2010, [2015] FWCFB 2831 (11 May 2015) (corrected 12 May 2015)

attempt to persuade the employer to adopt a different course of action. Whatever, the precise level, we are satisfied that a substantial group of TCF workers have very limited or no spoken English skills. Effective consultation, the undertaking of genuine consultation in the particular circumstances in which it occurs, would better meet the needs of the low paid (and other workers) and enhancing social inclusion by ensuring proper regard is had to their family circumstances.

[119] Consistent with the past recognition of the English language skills of a proportion of the TCF workforce by the Commission, the fact that there is a substantial group of TCF workers who have very limited or no spoken English language skills, and the evidence of Ms O'Neil of instances of lack of understanding of decisions conveyed to employees in English affecting their employment, we are persuaded that some augmentation of the consultation provision in relation to changes to regular rosters and ordinary hours of work in the TCF Award is necessary to ensure that the purpose of the clause reflected in s.145A is effectively achieved. We will insert a new clause 9.2(c) in the following terms:

> "(c) Information must be provided to affected employees and their representatives, if any, in accordance with clause 9.2(b)(i) in a manner which facilitates employee understanding of the proposed changes, having regard to their English language skills. This may include the translation of the information into an appropriate language."

[120] We are not satisfied that the TCFUA has established a case for the third element of its proposed variation, but we are persuaded to vary the award in the manner indicated above.

[121] The additional provision would not create a burden on employers beyond the necessary to ensure that they undertake consultation about changes in regular rosters and ordinary hours of work in a manner which ensures that genuine consultation occurs in the sense set out by Consultation Full Bench.

[122] To the extent that the variation of clause 9.2, as we have decided, goes beyond the express terms of s.145A, we are satisfied that the variation is essential for the purpose of making that term operate in a practical way in the TCF industry, within the scope of s.142(1) of the Act and is necessary to achieve the modern awards objective (s.138 of the Act).'[32]

34. We submit that the current clause 9.2(c) is a substantive term and its deletion would represent a significant diminution of a current right available to TCF workers covered by the TCF Award. It is relevant that the inclusion of current clause 9.2(c) was included in the TCF Award arising from a recent Full Bench decision issued as part of the 2014 Award Review, and in context where the Plain Language Redrafting is not, prima facie, intended to affect existing substantive provisions in awards.

35. The continued inclusion of clause 9.2(c) is, in our submission, necessary to ensure that the TCF Award, together with the National Employment Standards, provides a fair and relevant minimum safety net of terms and conditions, taking into account the considerations in section 134(1) (a) – (h). In summary, clause 9.2(c) is intended to ensure that consultation is as effective as possible for TCF workers with respect to an employer's proposed change to rosters or hours of work. In particular we refer to the considerations in s.134(1) (a) '*the living standards and needs of the low paid*'.

36. We propose that a revised model standard clause for the TCF Award (which includes the current clause 9.2(c)) be included as amended as follows:

Proposed revised standard clause for TCF Award – Consultation about changes to rosters or hours of work [current additional terms underlined]

Clause 9A Consultation about changes to rosters or hours of work

9A.1 Clause 9A applies if an employer proposes to change the regular roster or ordinary hours of work of an employee, other than an employee whose working hours

[32] Ibid; at [118] – [122]

are irregular, sporadic or unpredictable.

9A.2 The employer must consult with any employees affected by the proposed change and their representatives (if any).

9A.3 For the purpose of the consultation, the employer must:

(a) provide to the employees and representatives mentioned in clause 9A.2 information about the proposed change (for example, information about the nature of the change and when it is to begin); and

(b) invite the employees to give their views about the impact of the proposed change on them (including any impact on their family or caring responsibilities) and also invite their representatives (if any) to give their views about that impact.

9A.4 The employer must consider any views given under clause 9A.3(b).

9.A.5 Information must be provided to affected employees and their representatives, if any, in accordance with clause 9A.3(a) in a manner which facilitates employee understanding of the proposed changes, having regard to their English language skills. This may include the translation of the information into an appropriate language. [current clause 9.2(c) of the TCF Award but with the reference to clause 9.2(b)(i) amended to reflect the numbering in the model term above]

9.A.6 Clause 9A is to be read in conjunction with any other provisions of this award concerning the scheduling of work or the giving of notice.

Clause 10 (Dispute Resolution) – Draft Determination

37. We do not raise concerns with the form of the model term, proposed clause 10 (Dispute resolution) of the TCF Award. However, the change in the numbering in the model term has

unintended consequences for another clause in the TCF Award (in Schedule F) which refers to the current clause 10 of the TCF Award.

38. Schedule F (Outwork and Related Provisions) contains a specific dispute resolution clause at F.5.10 relevant to the practical circumstances of TCF outworkers. Current clause F.5.10 provides as follows:

> ***F.5.10 Dispute Resolution***
> *In the event of a dispute involving parties to which this schedule applies in relation to a matter arising under this Award, or the NES, in the first instance the parties will attempt to resolve the dispute through direct discussions. If the dispute cannot be resolved through direct discussions, a party to the dispute may refer the dispute to the Fair Work Commission. The provisions of clauses 10.3 – 10.5 apply in respect to the dispute.*

39. Under the current clause 10 of the TCF Award, the reference to 'clauses 10.3 – 10.5' is a reference to the following steps in the dispute resolution process at clause 10:

> ***10.3*** *The parties may agree on the process to be utilised by the Fair Work Commission including mediation, conciliation and consent arbitration.*
>
> ***10.4*** *Where the matter in dispute remains unresolved, the Fair Work Commission may exercise any method of dispute resolution permitted by the Act that it considers appropriate to ensure the settlement of the dispute.*
>
> ***10.5*** *An employer or employee may appoint another person, organisation or association to accompany and/or represent them for the purposes of the dispute.*

40. The current clause 10.3 of the TCF Award has a relevantly similar effect as clause 10.5 of the draft determination.

41. The current clause 10.4 of the TCF Award has a relevantly similar effect as clause 10.6 of the draft determination.

42. The current clause 10.5 of the TCF Award has a relevantly similar effect as clause 10.7 of the draft determination.

43. It is submitted, therefore, that an appropriate amendment to clause F.5.10 of Schedule F is to simply reflect the change in numbering in the draft determination to reflect the current status quo in the TCF Award.

Proposed consequential amendment to clause F.5.10 of the TCF Award arising from the revised standard clause – Dispute Resolution [proposed amendment underlined]

> ***'F.5.10 Dispute Resolution***
> *In the event of a dispute involving parties to which this schedule applies in relation to a matter arising under this Award, or the NES, in the first instance the parties will attempt to resolve the dispute through direct discussions, a party to the dispute may refer the dispute to the Fair Work Commission. The provisions of clauses 10.5 – 10.7 apply in respect to the dispute.'*

Clause 19 (Redundancy) – Draft Determination

44. The draft determination for the TCF Award seeks to amend clause 19.4 (Transfer to lower paid duties), clause 19.5 (Employee leaving during notice period) and clause 19.6 (Job search entitlement).

45. We assume that as a result, the current clauses 19.1 to 19.3 in the TCF Award remain unaffected by the model term. If we wrong about this assumption then the CFMEU – Manufacturing Division would seek a further opportunity to address this issue. Clauses 19.1 to 19.3 of the TCF Award are substantive provisions which we submit should be maintained in the award.

46. We note that in Attachment A to the August 2018 Decision, the model clause 'F'

Redundancy, includes the following term:

> *'Redundancy pay is provided for in the NES.'*

47. The same term is not included in the draft determination for the TCF Award. We understand the form of the model term 'F. Redundancy' was finalised as part of the Full Bench decision issued on 28 August 2017 ('August 2017 Decision').[33] We assume that the absence of the model clause F in the draft determination is an error and not an intentional deletion by the Commission. We submit that model clause F should be reinserted into the draft determination to bring it into consistency with the Full Bench's previous determination.

48. We make the following submissions in relation to clause 19.5 and 19.6 of the draft determination.

Clause 19.5 (Employee leaving during notice period) – Draft determination

49. Clause 19.5 of the draft determination provides:

> ***19.5 Employee leaving during redundancy period***
> ***(a)*** *An employee given notice of termination in circumstances of redundancy may terminate their employment during the period of the notice prescribed by s.117(3) of the Act.*
>
> ***(b)*** *The employee is entitled to receive the benefits and payments they would have received under clause 19.5 of this award or under Subdivisions B and C of Division 11 of Part 2-2 of the Act had they remained in employment until the expiry of the notice.*
>
> ***(c)*** *However, the employee is not entitled to be paid for any part of the period of notice remaining after the employee ceased to be employed.* [emphasis added]

[33] [2017] FWCFB 4419 (28 August 2017) – at [134] & Attachment A (page 44)

50. We note that clause 19.5(b) of the draft determination for the TCF Award does not reflect the final form of the model Standard Clause provided at Attachment A to the August 2018 Decision. [34] In Attachment A, the model clause (H. Employee leaving redundancy period) the formulation is as follows:

> *'H.2 The employee is entitled to receive the benefits and payments they would have received under clause H of this award or under Subdivisions B and C of Division 11 of Part 2-2 of the Act had they remained in employment until the expiry of the notice.'* [emphasis added]

51. Whilst we acknowledge that this model term has been considered by the parties and the Commission in some detail, it appears to us that there is an unintended consequence of limiting the entitlement in clause 19.5(b) of the TCF Award draft determination to *'benefits and payments they would have received under clause 19.5 of this award or under Subdivisions B and C of Division 11 of part 2-2 of the Act'.*

52. Under the TCF Award, the primary source of the substantive redundancy pay entitlements are found in clauses 19.1 – 19.3. For completeness, these provisions are reproduced below:

> ***19.1*** *Redundancy pay is provided for in the NES.*
>
> ***19.2*** *In this clause* ***small employer*** *means an employer to whom Subdivision B – Redundancy Pay of Division 11 of the NES does not apply because of the provisions of s.121(1)(b) of the Act.*
>
> ***19.3 Redundancy pay – employees of a small employer***
> *Despite the terms of s.121(1(b) of the Act, the remaining provisions of Subdivision B – Redundancy pay of Division 11 of the NES apply in relation to an employee of a small employer in the clothing industry as defined in clause 3.1 above except that the*

[34] [2018] FWCFB 4704; op cit, at p.9

amount of redundancy pay to which such an employee may be entitled must be calculated in accordance with the following table:

Period of continuous service	*Severance pay*
Less than 1 year	*Nil*
At least 1 year but less than 2 years	*4 weeks' pay*
At least 2 years but less than 3 years	*6 weeks' pay*
At least 3 years but less than 4 years	*7 weeks' pay*
At least 4 years and over	*8 weeks' pay*

53. Therefore, in its current formulation, clause 19.5 of the draft determination would not include the award entitlements to redundancy pay contained in clauses 19.1 to 19.3 of the TCF Award, or indeed any benefits under clause 19.

54. In these circumstances, we submit that the most straightforward way to address this unintended consequence is to amend the draft determination to refer to simply refer to 'clause 19 of this award.' A proposed amended draft determination is outlined below:

Proposed revised standard clause for TCF Award – clause 19.5 (Employee leaving during redundancy notice period [proposed amendments underlined]

19.5 Employee leaving during redundancy period

(a) *An employee given notice of termination in circumstances of redundancy may terminate their employment during the period of the notice prescribed by s.117(3) of the Act.*

(b) *The employee is entitled to receive the benefits and payments they would have received under clause 19 of this award or under Subdivisions B and C of Division 11 of Part 2-2 of the Act had they remained in employment until the expiry of the notice.*

(c) *However, the employee is not entitled to be paid for any part of the period of notice*

remaining after the employee ceased to be employed.

Clause 19.5(d) (Job search entitlement) – draft determination

55. We do not raise a concern as to the formulation of the model term, clause 19.5(d) itself. We do however, raise an issue regarding the placement and numbering of this model term (as 19.5(d)) under the sub-heading *'19.5 Employee leaving redundancy notice period.'*

56. The subject matter of clause 19.5 and its sub-clauses (a), (b) and (c) is self-evidently 'about', and limited to, circumstances where an employee leaves during the redundancy notice period. By contrast, the subject matter of clause 19.5(d) of the draft determination is 'about' Job search entitlement generally. It is not limited to the circumstances of clause 19.5 (a) – (c).

57. In this context, we consider that the placement of clause 19.5(d) (Job search entitlement) is not reflective of the subject matter of clause 19.5 as a whole and is therefore potentially confusing to readers of the award.

58. On this basis, we submit that to assist in the plain language redrafting of this model term, clause 19.5(d) of the draft determination should be renumbered as clause 19.6 with its own sub heading, 'Job search entitlement'. If this suggestion was adopted by the Full Bench then paragraph 9 of the draft determination which currently states *'By deleting clause 19.5'* would become unnecessary.

59. We note that the FWC's Plain Language Guidelines (published 20 June 2017)[35] states:

> *'1.3 Plain language drafting is not just about the language used. It also covers the structure and design of a document.'*[36]

and

[35] Fair Work Commission Guidelines – Plain language drafting of modern awards (Published 20 June 2017)
[36] Ibid; at p.5

'3.1 An award as whole, and each clause within it, should be organised logically and in a clear and meaningful way.'[37]

60. In this context, we submit that the proposal for amendment would ensure that the TCF Award, together with the NES, provides a fair and relevant minimum safety net of terms and conditions taking into account the considerations in section 134, in particular section 134(g), *'the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia'*.

DRY CLEANING AND LAUNDRY INDUSTRY AWARD 2010[38] - DRAFT DETERMINATION

Clause 12 (Redundancy) – Draft Determination

61. We note that that the Draft Determination for the DC&LI Award does not include the current clause 12.1 of the DC&LI Award which provides:

    12.1 *Redundancy pay is provided for in the NES.*

62. The deletion of the wording of clause 12.1 in the draft determination is also inconsistent with the form of the finalised model term as contained in Attachment A to the August 2018 Decision.[39]

Clause 12.3 (Employee leaving during redundancy notice period) – Draft Determination

63. Clause 12.3(b) of the draft determination for the DC&LI Award provides as follows:

    (b)*The employee is entitled to receive the benefits and payments they would have received under clause 12.3 of this award or under Subdivisions B and C of Division 11 of Part 2-2 of the Act had they remained in employment until the expiry of the notice.* [emphasis added]

[37] Ibid; at p.7
[38] Dry Cleaning and Laundry Industry Award 2010 (as varied to 27 July 2018) [MA000096]
[39] [2018] FWCFB 4704; op cit, at p.8

64. As we similarly identified in relation to the TCF Award, the formulation in clause 12.3(b) of the draft determination for the DC&LI Award is inconsistent with Attachment A of the August 2018 Decision.[40]

65. We therefore submit that clause 12.3(b) of the draft determination should be amended to refer to 'clause 12', rather than 'clause 12.3'.

    Proposed revised standard clause for DC&LI Award – clause 12.3 (Employee leaving during redundancy notice period [proposed amendments underlined]

    (b)*The employee is entitled to receive the benefits and payments they would have received under clause 12 of this award or under Subdivisions B and C of Division 11 of Part 2-2 of the Act had they remained in employment until the expiry of the notice.*

66. The proposed amendment above would ensure that clause 12.3 of the draft determination is consistent with Attachment A of the August 2018 Decision and the current, equivalent term (clause 12.3) in the DC&LI Award.

Clause 12.3(d) (Job search entitlement) – Draft Determination

67. We raise the same concern here as we did in relation to the TCF Award. The issue raised concerns the placement and numbering of this model term (as 12.3(d)) under the sub-heading *'12.3 Employee leaving redundancy notice period.'*

68. The subject matter of clause 12.3 and its sub-clauses (a), (b) and (c) is self-evidently 'about', and limited to, circumstances where an employee leaves during the redundancy notice period. By contrast, the subject matter of clause 12.3(d) of the draft determination is 'about' Job search entitlement generally. It is not limited to the circumstances of clause 12.3 (a) – (c).

[40] [2018] FWCFB 4704; op cit, at p.9

69. In this context, we consider that the placement of clause 12.3(d) (Job search entitlement) is not reflective of the subject matter of clause 12.3 as whole and it is therefore potentially confusing to readers of the award.

70. On this basis, we submit that it would assist in the plain language redrafting of this model term clause if 12.3(d) was renumbered as a 12.4 with its own sub heading, 'Job search entitlement'. If this suggestion was adopted by the Full Bench then paragraph 8 of the draft determination which currently states '*By deleting clause 12.4'* would become unnecessary.

71. We submit that the proposal for amendment would ensure that the DC&LI Award, together with the NES, provides a fair and relevant minimum safety net of terms and conditions taking into account the considerations in section 134, in particular section 134(g), '*the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia'*.

TIMBER INDUSTRY AWARD 2010[41] - DRAFT DETERMINATION

Clause 14.1 (Notice of termination) – Draft Determination

72. The draft determination for the Timber Award at paragraph 5 states '*5. By deleting clause 14.1 and inserting the following*.'

73. Under the Timber Award, clause 14.1 provides, 'Notice of termination is provide for in the NES' and clause 14.2 deals with 'Notice of termination by an employee.'

74. Therefore, it would seem that paragraph 5 of the draft determination should correctly state *'By deleting clause 14.1 <u>and 14.2</u> and inserting the following*.'

[41] Timber Industry Award 2010 (varied to 27 July 2018) [MA000071]

Clause 14.2 (Job search entitlement) – Draft Determination

75. The draft determination for the Timber Award at paragraph 6 states, *'6. By deleting 14.2 and inserting the following:'*

76. Under the Timber Award, clause 14.2 deals with 'Notice of termination by an employee' and clause 14.3 deals with 'Job search entitlement.'

77. Therefore, it would seem that paragraph 6 of the draft determination (which deals with 'Job search entitlement') should correctly state '*By deleting 14.3 and inserting the following*:'

    14.2 Job search entitlement

    Where an employer has given notice of termination to an employee, the employee must be allowed time off without loss of pay of up to one day for the purpose of seeking other employment.

Clause 15 (Redundancy) – Draft Determination

78. The draft determination for the Timber Award is not consistent with the form of the model term contained in Attachment A to the August 2018 Decision.[42] Specifically, the draft determination has not included clause F (Redundancy) of the model term in Attachment A which provides:

    F. Redundancy

    Redundancy pay is provided for in the NES.

79. The draft determination is also inconsistent with the content of current clause 15 (Redundancy) of the Timber Award.

Clause 15.3 (Employee leaving during redundancy notice period) – Draft Determination

[42] [2018] FWCFB 4704, at p.8

80. Clause 15.3 of the draft determination provides:

> ***15.3 Employee leaving during redundancy notice period***
> *(a) An employee given notice of termination in circumstances of redundancy may terminate their employment during the period of the notice prescribed by s.117(3) of the Act.*
>
> *(b) The employee is entitled to receive the benefits and payments they would have received under clause 15.3 of this award or under Subdivisions B and C of Division 11 of Part 2-2 of the Act had they remained in employment until the expiry of the notice.*
>
> *(c) However, the employee is not entitled to be paid for any part of the period of notice remaining after the employee ceased to be employed.* [emphasis added]

81. Similarly to the submissions we made above in relation to the TCF Award and the DC&LI Award, the source of the primary entitlement to redundancy pay and other benefits is not found in clause 15.3 but elsewhere in clause 15. We note the entitlement to redundancy pay is located primarily in clause 15.1 and clause 15.7 (Small employer) of the Timber Award.

82. Clause 15.3 is inconsistent with the form of the model term contained at Attachment A to the August 2018 Decision which provides, in part, '*the benefits and payments they would have received under clause H of this award...*'. [43] The current clause in the Timber Award (15.3) uses a relevantly identical expression that is, '*entitled to receive the benefits and payments under this clause*..'

83. We propose that clause 15.3 of the draft determination be amended to ensure consistency with the award and Attachment A of the August 2018 Decision as follows:

[43] [2018] FWCFB 4704 at p.9

Proposed revised standard clause for Timber Award – clause 15.3 (Employee leaving during redundancy notice period [proposed amendments underlined]

'15.3 Employee leaving during redundancy notice period

(b) The employee is entitled to receive the benefits and payments they would have received under clause 15 of this award or under Subdivisions B and C of Division 11 of Part 2-2 of the Act had they remained in employment until the expiry of the notice.'
[amendment underlined]

Clause 15.3(d) (Job search entitlement) – Draft Determination

84. We raise the same concern here as we did in relation to draft determinations for the TCF Award and the DC&LI Award. The issue raised concerns the placement and numbering of this model term (as 15.3(d)) under the sub-heading *'12.3 Employee leaving redundancy notice period.'*

85. The subject matter of clause 15.3 and its sub-clauses (a), (b) and (c) is self-evidently 'about', and limited to, circumstances where an employee leaves during the redundancy notice period. By contrast, the subject matter of clause 15.3(d) of the draft determination is broader being 'about' Job search entitlement generally. It is not limited to the circumstances of clause 15.3 (a) – (c).

86. In this context, we consider that the placement and numbering of clause 15.3(d) (Job search entitlement) is not reflective of the subject matter of clause 15.3 as whole and it is therefore potentially confusing to readers of the award.

87. On this basis, we submit that it would assist in the plain language redrafting if model term clause 15.3(d) was renumbered as clause 15.4 with its own sub heading, 'Job search entitlement'. If this suggestion was adopted by the Full Bench then paragraph 10 of the draft determination which currently states '*By deleting clause 15.4'* would become unnecessary.

88. Consequentially, paragraph 11 of the draft determination which currently provides '*By renumbering clauses 15.7 and 15.8 as 15.4 and 15.5 respectively*' would also need to be amended to read '*By renumbering clause 15.7 and 15.8 as 15.5 and 15.6 respectively.'*

89. We submit that the proposal for amendment would ensure that the Timber Award, together with the NES, provides a fair and relevant minimum safety net of terms and conditions taking into account the considerations in section 134, in particular section 134(g), *'the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia'*.

MANUFACTURING AND ASSOCIATED INDUSTRIES AND OCCUPATIONS AWARD 2010[44] - DRAFT DETERMINATION

Model term (Redundancy) – Draft Determination

90. The Draft Determination for the Manufacturing Award is not consistent with the form of the model term (Redundancy) contained at Attachment A to the August 2018 Decision.[45] The model term F. Redundancy provides as follows:

> ***F. Redundancy***
>
> *Redundancy pay is provided for in the NES.*

91. The model term is in identical form to the current clause 23.1 of the Manufacturing Award. However, this clause does not appear in the draft determination.

92. We assume that the current clause 23.2 (Small furnishing employer) in the Manufacturing Award remains unaffected by the model term. If we wrong about this assumption then the CFMEU – Manufacturing Division would seek a further opportunity to address this issue.

[44] Manufacturing and Associated Industries and Occupations Award 2010 (varied to 27 July 2018) [MA000010]
[45] [2018] FWCFB 4704 at p. 8

Clauses 23.2 of the Manufacturing Award is a substantive provision which we submit should be maintained in the award.

Clause 23.4 (Employee leaving during redundancy notice period) – Draft Determination

93. Clause 23.4 of the draft determination provides:

> ***23.4 Employee leaving during redundancy notice period***
> *(a) An employee given notice of termination in circumstances of redundancy may terminate their employment during the period of the notice prescribed by s.117(3) of the Act.*
>
> *(b) The employee is entitled to receive the benefits and payments they would have received under clause 23.4 of this award or under Subdivisions B and C of Division 11 of Part 2-2 of the Act had they remained in employment until the expiry of the notice.*
>
> *(c) However, the employee is not entitled to be paid for any part of the period of notice remaining after the employee ceased to be employed.* [emphasis added]

94. Similarly to the submissions we made above in relation to the TCF Award, the DC&LI Award and the Timber Award, the source of the primary entitlement to redundancy pay and other benefits is not found in clause 23.4 but elsewhere in clause 23. We note the entitlement to redundancy pay is located primarily in clause 23.1 and clause 23.2 (Small furnishing employer) of the Manufacturing Award.

95. Clause 23.4 of the draft determination is inconsistent with the form of the model term contained at Attachment A to the Full Bench decision of 14 August 2018 which provides, in part, '*the benefits and payments they would have received under clause H of this award.*' [46]

[46] [2018] FWCFB 4704 at p.9

96. The current clause in the Manufacturing Award (23.4) uses the broader expression of '*entitled to receive the benefits and payments under clause 23 - Redundancy*.'

97. We propose that clause 23.4 of the draft determination be amended to ensure consistency with the Manufacturing Award and Attachment A of the August 2018 Decision as follows:

Proposed revised standard clause for Manufacturing Award – clause 23.4(b) (Employee leaving during redundancy notice period) [amendment underlined]

'23.4 Employee leaving during redundancy notice period

(b) The employee is entitled to receive the benefits and payments they would have received under clause 23 of this award, or under Subdivisions B and C of Division 11 of Part 2-2 of the Act had they remained in employment until the expiry of the notice.'

Clause 23.4(d) (Job search entitlement) – Draft Determination

98. We note that directly prior to clause 23.4(d) in the draft determination there is no paragraph stating '*By deleting 23.5 and inserting the following*.'

99. In addition, we raise the same concern here as we did in relation to the draft determinations for the TCF Award, the DC&LI Award and the Timber Award. The issue raised concerns the placement and numbering of this model term (as 23.4(d)) under the sub-heading *'23.4 Employee leaving redundancy notice period.'*

100. The subject matter of clause 23.4 and its sub-clauses (a), (b) and (c), is self-evidently 'about', and limited to, circumstances where an employee leaves during the redundancy notice period. By contrast, the subject matter of clause 23.4(d) of the draft determination is broader, being 'about' Job search entitlement generally. It is not limited to the circumstances of clause 23.4 (a) – (c).

101. In this context, we consider that the placement and numbering of clause 23.4(d) (Job

search entitlement) is not reflective of the subject matter of clause 23.4 as whole and is therefore potentially confusing to readers of the award.

102. On this basis, we submit that to assist in the plain language redrafting of this model term, clause 23.4(d) should be renumbered as 23.5 with its own sub heading, 'Job search entitlement'. If this suggestion was adopted by the Full Bench then paragraph 8 of the draft determination which currently states *'By deleting clause 23.5*' would become unnecessary.

103. We submit that the proposal for amendment would ensure that the Manufacturing Award, together with the NES, provides a fair and relevant minimum safety net of terms and conditions taking into account the considerations in section 134, in particular section 134(g), '*the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia'*.

Filed by the:

Construction, Forestry, Maritime, Mining and Energy Union
Manufacturing Division

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