



Fair Work Commission  
Section 156 – Fair Work Act 2009  
4 Yearly Review of Modern Awards  
(AM2014/1 and Ors)

Response to issues raised by the Fair Work Ombudsman regarding  
alleged inconsistencies with the NES in modern awards

**Submission in Response  
of the  
Textile, Clothing and Footwear Union of Australia  
(TCFUA)**

15 October 2014

Submitted by:

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2014 Award Review  
(AM2014/1 and Ors)

Response to issues raised by the Fair Work Ombudsman regarding alleged inconsistencies  
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Submission in Response of the  
Textile, Clothing and Footwear Union of Australia

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**Textile, Clothing, Footwear and Associated Industries Award 2010**

1. The TCFUA filed written submissions on 26 September 2014 in relation to an issue (clause 13.9 – Part time employment) identified by the Fair Work Ombudsman (FWO) relating to the Textile, Clothing, Footwear and Associated Industries Award 2010 (*'TCF Award'*).
2. Clause 13.9 is one of several matters which remain the subject of further conferences before Commissioner Lee in relation to the TCF Award as part of the Award Stage (Group 1) proceedings.

**Dry Cleaning and Laundry Industry Award 2010**

3. The TCFUA also has a material interest in a number of other awards, including the Dry Cleaning and Laundry Industry Award 2010 (*'Dry Cleaning Award'*).
4. The *Dry Cleaning Award* is listed as one of 28 modern awards listed in Schedule 1 (Accrual of Leave for Shift Workers) in the FWO's document filed with the Commission on 4 April 2014.<sup>1</sup> FWO contend that the operation of the award shiftwork provisions (as listed) create a potential inconsistency with the NES provisions in relation to annual leave.

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<sup>1</sup> FWO Research for Modern Awards on Inconsistencies between the NES and Modern Awards (4 April 2014)

5. The AI Group<sup>2</sup> and Australian Business Industrial and NSW Business Chamber Ltd<sup>3</sup> ('ABI') filed submissions on 26 September 2014, including in relation to the issue of annual leave accrual for shiftworkers. The TCFUA provides the following response to those respective submissions.
6. The FWO describes the *effect* of the offending shiftworker provision/s applying across multiple awards as follows:

*'Where an employee with 12 months continuous service is engaged for part of the 12 month period as a seven day shiftworker, that employee must have their annual leave increased by half a day for each month the employee is continuously engaged as a seven day shiftworker.'*<sup>4</sup>

7. The FWO characterise the purported ambiguity/inconsistency as:

*'Under the NES, annual leave accrues progressively throughout the year on the basis of ordinary hours of work performed by the employee. Further, it is unclear whether the clause requires 12 months continuous service prior to an employee accessing the shift worker annual leave entitlement.'*<sup>5</sup>

8. ABI's response to the issue raised by the FWO stated:

*'The intention of the provision is to provide a pro-rata entitlement to the additional 'shiftworker' leave in circumstances where an employee works as a shiftworker for part of a year. However, the wording of the provision is arguably ambiguous in the sense that it could lead to an interpretation that employees must meet a 'qualification period' in order to be entitled to the additional week of leave'*

*This clause should be retained, but consideration should be given to expressing the provision more clearly.'*<sup>6</sup>

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<sup>2</sup> (AM2014/1 & Ors) AI Group Submission, 'Potential Inconsistencies between Modern Awards and the National Employment Standards' (26 September 2014)

<sup>3</sup> (AM2014/1 & Ors) ABI and NSW Business Chamber Ltd Submission, (29 September 2014)

<sup>4</sup> Ibid; Schedules 1 and 2 (Issues that affect awards in multiple award groups)

<sup>5</sup> Ibid;

<sup>6</sup> ABI Submission; Ibid; pg 20

9. AI Group's position is that:

*'In certain circumstances, the operation of this award clause could be detrimental to the employee as compared to the progressive accrual of annual leave according to the employee's ordinary hours of work. If that is the case, the clause should be deleted.'*<sup>7</sup>

10. In summary, the TCFUA opposes the deletion of the award shiftworker provisions (as suggested by the AI Group) as a possible solution to the inconsistency issue identified by the FWO. There is no sound justification for the removal of existing award shiftworker conditions. Such a variation would fail to meet the relevant statutory tests (s134 and 138 FW Act), and would represent a clear diminution in the minimum safety net for shiftworkers covered by various modern awards, including the *Dry Cleaning Award*.

11. We note that Full Bench in the Preliminary Issues decision in the 2014 Award Review<sup>8</sup> observed that *'In the Review, the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made'*<sup>9</sup>, and that *'previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.'*<sup>10</sup>

12. Clauses 23.1 and 25.3 of the *Dry Cleaning Award* provides, in part, as follows:

**23.1** *Notwithstanding clause 25.3(a), a **shiftworker** means an employee who works an afternoon shift and/or night shift whether alternating with day work or not. Such an employee is a shiftworker for the purposes of the NES.*

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<sup>7</sup> AI Group Submission; op cit; pg 7

<sup>8</sup> (AM2014/1) 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues; [2014]FWCFB 1788 (17 March 2014)

<sup>9</sup> Ibid; [24]

<sup>10</sup> Ibid; [27]

**25.1** *Annual leave is provided for in the NES. This clause supplements or deals with matters incidental to the NES provisions.*

**25.3** *Shiftworkers – laundry workplaces*

**(a)** *For the purposes of the extra week of leave prescribed by the NES, a **shiftworker** is an employee who is rostered to regularly work on Sundays and public holidays.*

**(b)** *Where an employee with one year's continuous employment is engaged for part of the yearly period as a shiftworker, the employee will be entitled to have the period of annual leave increased by half a day for each month employed as a shiftworker.*

13. Section 87(1) of the *Fair Work Act 2009* (FW Act), prescribes (in relation to modern awards) an entitlement of five weeks paid annual leave if '*a modern award applies to the employee and defines or describes the employee as a shiftworker for the purposes of the National Employment Standards*'. In relation to the method of accrual, s.87(2) provides that '*An employee's entitlement to paid annual leave accrues progressively during a year of service according to the employee's ordinary hours of work, and accumulates from year to year.*'

14. The TCFUA notes that that under section 56 of the FW Act, a term of a modern award (or enterprise agreement) has no effect to the extent that it contravenes s55 (i.e. where a modern award term excludes the NES or any provision of the NES).

15. In respect to clause 25.3 of the *Dry Cleaning Award*, the TCFUA submits the provision should be retained, but varied in a number of respects to enhance clarity and operation of the clause.

16. To the extent that that the words 'with one year's continuous employment' in clause 25.3(b) are inconsistent with the NES (s87(2)), the TCFUA would agree to a variation to clause 25.2(b) which removes those words.

17. By the TCFUA's analysis, the quantum of additional annual leave to which a shiftworker is entitled under clause 25.3(b) (i.e. half a day for each month employed as a shiftworker) is more beneficial than the equivalent shiftworker entitlement under the NES. For example, assuming an employee defined as a shiftworker works a 7.6 hour day (average 38 hours per week), the employee would be entitled to an accrual of annual leave entitlement (under the NES) of 15.833 hours per month (based on a yearly accrual of 190 hours). By comparison, the employee would be entitled to an annual leave accrual of 16.46 hours per month under the *Dry Cleaning Award*.

18. The award term (providing greater quantum of annual leave) is clearly supplementary in nature, is not detrimental to an employee in any respect and is allowable under section 55(4). This is supported by the second note located underneath section 55(4) which provides:

*'Note 2: Supplementary terms permitted by paragraph (a) include (for example) terms:*

*(a) That increase the amount of paid annual leave to which an employee is entitled beyond the number of weeks that applies under 87; or*

*(b) That provide for an employee to be paid for taking a period of paid annual leave or paid/personal carer's leave at a rate of pay that is higher than the employee's base rate of pay (which is the rate required by sections 90 and 99.'*

19. The TCFUA submits that a variation to clause 25.3 of the *Dry Cleaning Award* in the following terms (changes as marked) would address any purported inconsistency identified by the FWO and also clarifies the method of annual leave accrual for employees who are engaged as shiftworkers for periods less than one month.

## Dry Cleaning and Laundry Industry Award 2010

### 25.3 Shiftworkers – laundry workplaces

- (a) For the purposes of an extra week of leave prescribed by s87(1)(b) of the Act ~~the NES~~, a **shiftworker** is an employee who is rostered to regularly work on Sundays and public holidays.
- (b) Where an employee ~~with one years' continuous employment~~ is engaged for part of a 12 monthly ~~the yearly~~ period as a shiftworker, the employee will be entitled to have ~~the~~ their period of annual leave increased by half a day for each completed month employed as a shiftworker.
- (c) An employee engaged for only part of a month as a shiftworker will accrue leave for the part month proportionate to the leave prescribed in (b) above.
- (c) An employee who is engaged for part of any year as a shiftworker, and whose employment is terminated, must be paid, in addition to any other amounts due, an additional amount equal to 1/49<sup>th</sup> of their ordinary pay in respect of the period of employment as a shiftworker.

20. A Draft Determination reflecting the proposed variation above is attached to these submissions.

21. In the development of the proposed Draft Determination, the TCFUA has consulted with United Voice which has a material interest in the *Dry Cleaning Award*. United Voice have indicated their in-principle support for the TCFUA's proposal.

Filed by:

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(National Office)

15 October 2014

# DRAFT DETERMINATION

*Fair Work Act 2009*  
Part 2-3, Div 4 – 4 Yearly reviews of modern awards

## **Dry Cleaning and Laundry Industry Award 2010** (ODN AM2008/69) MA000096

Dry cleaning and laundry industry

JUSTICE ROSS

MELBOURNE, XX/XX 2014

*Review of modern awards to be conducted.*

A. Further to the Decision and Reasons for Decision <<DecisionRef>> in <<FileNo>> it is determined pursuant to section 156(2)(b)(i) of the *Fair Work Act 2009*, that the *Dry Cleaning and Laundry Industry Award 2010* be varied as follows.

1. By deleting clause 25.3 Shiftworkers – laundry workplaces, in its entirety and inserting the following new clause 25.3 in lieu thereof:

**“25.3 Shiftworkers – laundry workplaces**

- (a) For the purposes of an extra week of leave prescribed by s87(1)(b) of the Act, a **shiftworker** is an employee who is rostered to regularly work on Sundays and public holidays.
- (b) Where an employee is engaged for part of a 12 monthly period as a shiftworker, the employee will be entitled to have their period of annual leave increased by half a day for each completed month the employee is engaged as a shiftworker.
- (c) An employee engaged for only part of a month as a shiftworker will accrue leave for the part month proportionate to the leave prescribed in (b) above.
- (d) An employee who is engaged for part of any year as a shiftworker, and whose employment is terminated, must be paid, in addition to any other amounts due, an additional amount equal to 1/49<sup>th</sup> of their ordinary pay in respect of the period of employment as a shiftworker.

**B.** The determination shall operate on and from XX/XX/XXXX

JUSTICE ROSS, PRESIDENT

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**B.** The determination shall operate on and from XX/XX/XXXX

JUSTICE ROSS, PRESIDENT