

IN THE FAIR WORK COMMISSION

Section 156 - 4 Yearly Review of Modern Awards

(AM2019/17)

AWARD STAGE

FINALISATION OF EXPOSURE DRAFTS

**Textile, Clothing, Footwear and Associated Industries Award 2010  
(Exposure Draft and Draft Determination published 29 January 2020)**

**SUBMISSION OF THE  
CONSTRUCTION, FORESTRY, MARITIME, MINING & ENERGY UNION  
(MANUFACTURING DIVISION)**

(6 March 2020)

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## BACKGROUND

1. On 29 January 2020, the Fair Work Commission issued its Decision [2020] FWCFB 421<sup>1</sup> (*January 2020 Decision*) and published various Exposure Drafts and Draft Determinations for tranche modern awards as part of (AM2019/17), Award Stage – Finalisation of exposure draft proceedings.
2. The Construction, Forestry, Maritime, Mining and Energy Union – Manufacturing Division (“CFMMEU – MD”) has an interest in the Textile, Clothing, Footwear and Associated Industries Award 2010 (“TCF Award”), an award identified in tranche 3.<sup>2</sup>
3. The CFMMEU – MD files these submissions in response to paragraph [8] of the *January 2020 Decision* with respect to the Exposure Draft and the Draft Determination published for the TCF Award.
4. The CFMMEU – MD’s submission relates specifically to the terms of the Exposure Draft, but they apply equally to the Draft Determination.

## SUBMISSIONS ON THE TCF AWARD 2010 – EXPOSURE DRAFT

5. The finalisation of exposure drafts for tranche 3 occurs in the following context (as indicated, for example, by the preamble notes to the TCF Award Exposure Draft) which states, in part:
 

‘This exposure draft has been prepared by staff of the Fair Work Commission based on the ***Textile, Clothing, Footwear and Associated Industries Award 2010*** (the Textile award) as 29 October 2015 and incorporates updates up to 19 December 2019. This exposure draft does not seek to amend any entitlements under the Textile Award. Instead it has been prepared to address some of the structural issues identified in modern awards and to apply plain language drafting principles and techniques...

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<sup>1</sup> 4 yearly review of modern awards – finalisation of exposure drafts – tranche 3 awards; [2020] FWCFB 421 (29 January 2020)

<sup>2</sup> [2020] FWCFB 421 at Attachment A

The review does not represent the concluded view of the Commission in this matter.<sup>3</sup>

[emphasis added]

6. In the *January 2020 Decision* the Full Bench stated:

‘It is our *provisional* view that the variation of the modern awards in Tranche 3 in accordance with the draft variation determinations set out in Attachment C is, in respect of each of these awards, necessary to achieve the modern awards objective.’<sup>4</sup>

7. It is the submission of the CFMMEU – MD that the TCF Award Exposure Draft and Draft variation determination does not meet the modern awards objective for the reasons outlined below. The TCF Award Exposure Draft and draft variation determination contain various errors, omissions and inconsistencies with the terms of the current TCF Award (with such changes not resulting from one, or more decisions issued as part of the 4 yearly review).

#### TCF AWARD – SPECIFIC PROVISIONS

8. All references to clause numbers are references to the relevant clauses of the TCF Award Exposure Draft, unless otherwise specified. All references to the TCF Award are references to the version of the award as varied to 19 December 2019.

#### Clause 2 (Definitions)

9. The actual content of the definitions for the ‘*allied manufacturing and fabricating industries*’, ‘*bag making industry*’, ‘*button industry*’, ‘*clothing industry*’, ‘*footwear industry*’ and ‘*textile industry*’ have been deleted in the TCF Award - ED and replaced with a signpost type clause – for example, ‘*clothing industry has the meaning given in clause 4.2*’.<sup>5</sup> This has occurred for each of the TCF sub industries, other than for the ‘*textile industry*’.

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<sup>3</sup> Textile, Clothing, Footwear and Associated Industries Award 2020 - Exposure Draft – (published 29 January 2020) at page 3

<sup>4</sup> [2020] FWCFB 421 at [6]

<sup>5</sup> TCF Award – Exposure Draft, clause 2. The substantive content of each of the definitions for the TCF industries has been relocated to clause 4 (Coverage).

10. The omission of a signpost term for the ‘textile industry’ would appear to be an error. We submit clause 2 (Definitions) be amended to include the following:

*textile industry has the meaning given in clause 4.2.*

### Clause 3 (The National Employment Standards and this award)

11. Clause 3.4 of the TCF Award – ED states ‘*Outworkers covered by Schedule E – Outwork and Related Provisions, will be provided with the information sheet appended to that Schedule.*’<sup>6</sup>
12. For reasons outlined at paragraphs 70 – 87 of this submission, the CFMMEU-MD opposes the change of the clause numbering of the Outwork Schedule from its current ‘Schedule F’ to ‘Schedule E’

### Clause 4 (Coverage)

#### Clause 4.3

13. Clause 4.3 of the TCF Award – ED states ‘*This award covers all outwork entities who are covered by the terms of this award in respect of Schedule E – Outwork and Related Provisions.*’<sup>7</sup>
14. For reasons outlined at paragraphs 70 – 87 of this submission, the CFMMEU-MD opposes the change of the clause numbering of the Outwork Schedule from its current ‘Schedule F’ to ‘Schedule E’.

#### Clause 4.7

15. The last sentence of clause 4.7 in the TCF Award – ED (which deals with the subject matter of labour hire employees) states ‘*Clause 4.6 (c) operates subject to the exclusions from coverage in this award.*’ [emphasis added]. The relevant, current wording in clause 4.8 of the TCF Award is ‘*This subclause operates subject to the exclusions from coverage in this award.*’ [emphasis added] i.e. the current reference is to the substantive sub-clause in question (4.8) rather than to another sub-clause, as provided by the ED.

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<sup>6</sup> TCF Award – Exposure Draft, clause 3

<sup>7</sup> TCF Award – Exposure Draft, clause 4

16. In our view, the reference to ‘*Clause 4.6 (c)*’ in clause 4.7 of the TCF Award – ED would appear to be a referencing error. We submit the last sentence of clause 4.7 be amended as follows, in order that it reflects the equivalent term in the TCF Award:

*‘Clause 4.7 operates subject to the exclusions from coverage in this award.’*

### **Clause 5 (Individual Flexibility Arrangements)**

17. Clause 5.4 states ‘*An individual flexibility arrangement cannot be made so as to effect the provisions of Schedule E – Outwork and Related Provisions.*’ [emphasis added]
18. For reasons outlined at paragraphs 70 – 87 of this submission, the CFMMEU-MD opposes the change of the clause numbering of the Outwork Schedule from its current ‘Schedule F’ to ‘Schedule E’.

### **Clause 7 (Facilitative provisions)**

#### *Clause 7.2*

19. Clause 7.2 of the TCF Award – ED provides (in part) as follows:

*7.2 Facilitation by individual agreement’*

*The following facilitative provisions can be utilised by agreement between the employer and an individual employee:...*

*(h) substitution of public holidays by agreement.*

20. Clause 37.5 (Substitution of certain public holidays by agreement at the enterprise) and Schedule J (Part-day Public Holidays) [J.2(g) and J.3] of the ED, make provision for the substitution of part public holidays, as well as public holidays.

21. In this context, it would seem appropriate to amend clause 7.2(h) to:

*(h) substitution of public holidays or part-day public holidays by agreement.*

### **Clause 11 (Casual Employees)**

*(Clause 11.11 – Casual conversion to full-time or part-time employment)*

22. The opening paragraph of clause 11.11(g), states as follows:

*(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 11.11(c) and subject to clause 11.11(c) discuss and agree upon:...*  
[emphasis added]

23. The reference in the third line, in the first instance (as underlined) to 'clause 11.11(c)' would appear to be an error.

24. The current wording in clause 14.10(g) of the TCF Award is as follows:

*(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 this paragraph and subject to clause 11.11(c) discuss and agree upon:...*  
[emphasis added]

25. It would appear that the reference to 'this paragraph' in clause 14.10(g), TCF Award is more likely to be a reference to clause 14.10(g) itself and not clause 14.10(c) as translated into the TCF Award – ED.

26. We therefore submit clause 11.11(g) of the ED should be amended to consistently reflect the current provision in the TCF Award.

### Clause 13 (Apprentices)

27. Clause 13.2 states '*An employer may engage an apprentice in accordance with Schedule F – Apprentices.*' [emphasis added].

28. For reasons outlined at paragraphs 70 – 87 of this submission, the CFMMEU-MD opposes the change of the clause numbering of the Outwork Schedule from its current 'Schedule F' to 'Schedule E'.

### Clause 14 (Outwork and related provisions)

29. Clause 14.1 states *'Arrangements (including for the engagement of outworkers) must be made by Principals in accordance with Schedule E – Outwork and Related Provisions.'* [emphasis added].
30. For reasons outlined at paragraphs 70 – 87 of this submission, the CFMMEU-MD opposes the change of the clause numbering of the Outwork Schedule from its current 'Schedule F' to 'Schedule E'.

### Clause 18 (Breaks)

#### *Clause 18.2 (Meal breaks – shiftworkers in the textile industry)*

31. Clause 18.2 of the TCF Award- ED, provides:
- (a) *Where 2 eight hour or 3 eight hour shifts are worked, instead of the meal break provided in clause 18.1, the employer has the discretion to, as opportunity offers, provide the shiftworker a 20 minute paid crib break per shift which will be counted as time worked.*
  - (b) *7 day continuous shiftworkers are entitled to a paid 20 minute meal break during each shift.*
32. Clauses 38.1 and 38.2 of the TCF Award currently provide:
- 38.1 Meal breaks**
- (a) *A meal interval of not less than 30 minutes and not more than one hour must allowed each shift or day.*
  - (b) *If the employer requires an employee (other than a maintenance employee who is required to work through a meal break to rectify a mechanical breakdown) to work through a meal break, the employee must be paid at overtime rates (clause 39) until the break is taken.*
  - (c) *No employee will be required to work for more than five hours without a meal break unless an employer and a majority of employees in an enterprise or part of an enterprise concerned agree to work in excess of five hours but less than six hours without a meal break, provided such agreement is in accordance with clause 8.3.*

**38.2 Meal breaks and Shift Workers (textile industry)**

Shift workers in the textile industry are entitled to meal breaks in accordance with clause 38.1, and as follows:

(a) *Where two eight hour or three eight hours shifts are worked, in lieu of the meal break provided in clause 38.1(a), the employer has the discretion to, as opportunity offers, provide the shift worker a 20 minute paid crib break per shift which shall be counted as time worked.* [emphasis added]

33. Clause 18.2 of the TCF – ED has deleted the opening paragraph (as highlighted above) of the current provision in clause 38.2 of the TCF Award. In our submission, the deletion constitutes a diminution of a current condition. Clause 38.1 of the TCF Award contains 3 elements – 38(a), (b) (c) including an entitlement to an unpaid meal break of not less than 30 minutes per day. The deletion in the TCF Award ED of the opening paragraph to clause 38.2 changes the effect of the provision for shiftworkers in the textile industry including with respect to (c) and has potentially unintended consequences.

34. The current formulation of clause 38.2 in the TCF Award was inserted into the award as result of two Full Bench decisions issued in context of the previous 2012 Transitional Review and the 2014 Review of Modern awards, as follows:

- (Transitional Review) [2013] FWCFB 5729<sup>8</sup>
- (4 Yearly Review) [2014] FWCFB 2831<sup>9</sup>

35. The terms of clause 38.2 in the TCF Award (including the opening paragraph) was part of a range of matters about which the TCFUA, ABI and AIG reached consent about and which were adopted by the Full Bench in the Transitional Review decision. That Full Bench held:

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<sup>8</sup> Sch. 5, Item 6 – Transitional Review of Modern Awards – Textile, Clothing, Footwear and Associated Industries Award 2010; [2013] FWCFB 5729 (4 October 2013); Hamberger SDP; Smith DP; Lee C. and Determination (PR542901) at item 24.

<sup>9</sup> S.156 – 4 yearly review of modern awards – Textile, Clothing, Footwear and Associated Industries Award 2010; [2015] FWCFB 2831 (11 May 2015); Watson DP; O’Callaghan DP; Cribb C and Determination (PR563434) at item 8.



*[67] The Full Bench has considered the terms of the draft determination proposed by the TCFUA, ABI and AIG in so far as it deals with the non-outwork matters and technical amendments. We are satisfied that the proposed amendments are consistent with the modern awards objective in s.134 of the Act. Further, we are satisfied the amendments proposed will allow the award to operate more effectively, without anomalies or technical problems arising from the Part 10A award modernisation process. Accordingly, we think it appropriate to amend the award consistent with the terms of the draft determination provided by the TCFUA on the 4 July 2013.<sup>10</sup>*

36. The further amendment to clause 38.2 of the TCF Award was determined by the 4 yearly award Full Bench, with its reasoning contained at paragraphs [123] – [129] of the decision.<sup>11</sup>
37. For the above reasons, we submit that clause 18.2 be amended to include the current text (as underlined below) in clause 38.2 of the TCF Award, as follows:

*Shift workers in the textile industry are entitled to meal breaks in accordance with clause 38.1, and as follows:*

- (a) Where 2 eight hour or 3 eight hour shifts are worked, instead of the meal break provided in clause 18.1, the employer has the discretion to, as opportunity offers, provide the shiftworker a 20 minute paid crib break per shift which will be counted as time worked.*
- (b) 7 day continuous shiftworkers are entitled to a paid 20 minute meal break during each shift.*

## **Clause 19 (Minimum Rates)**

*Preamble to Clause 19 (wage rates)*

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<sup>10</sup> [2013] FWCFB 5729 at [67]

<sup>11</sup> [2015] FWCFB 2831 at [123] – [129]

38. The preamble paragraph to clause 19 of the TCF Award – ED states, *‘An employer must pay employees the following minimum rates for ordinary hours worked by the employee:’* [emphasis added]
39. The CFMMEU-MD is concerned that the inclusion of the words *‘hours worked by the employee’* may be interpreted as negating the minimum engagement provisions contained elsewhere in the award with respect to part-time employees (3 hours)<sup>12</sup> and casual employees (3 hours).<sup>13</sup> That is, the minimum engagement provisions effectively provide an entitlement to a minimum engagement of 3 hours (actually worked) or 3 hours payment. They are not limited by the qualifier *‘hours worked’*.
40. We submit that one potential way to address this issue is to insert a note that makes clear that the minimum payment for *‘hours worked’* does not affect the minimum engagement provisions for part-time and casual employees (i.e. in circumstances where such employees do not actually work the 3 hours, they remain entitled to the payment of a minimum of 3 hours.

#### Clause 28 (Overtime)

##### *Clause 28.3 (Payment for working overtime)*

41. Clause 28.3(c)(i) of the TCF Award – ED contains a typographical error in the second line – the word *‘of’* after the words *‘ordinary hourly rate’* should be deleted.

#### Clause 32 (Annual Leave)

##### *Clause 32.3 (Excessive leave accruals: general provision)*

42. Clause 32.3(a) of the TCF Award – ED provides:
- (a) An employee has an excessive leave accrual if the employee has accrued more than 8 weeks’ paid annual leave (or 10 weeks’ paid annual leave for a shiftworker, as defined by Schedule H – Agreement to Take Annual Leave in Advance).*
- [emphasis added]

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<sup>12</sup> TCF Award – Exposure Draft. Clause 10.6 provides *‘An employer is required to roster a part-time employee for a minimum of 3 consecutive hours on any day or any shift.’*

<sup>13</sup> TCF Award – Exposure Draft. Clause 11.4 provides *‘On each occasion a casual employee is required to work, the casual employee is entitled to a minimum payment for 3 hours work.’*

43. We submit the reference in clause 32.3(a) is an error and should instead refer to clause 2 (Definitions) which is the clause which relevantly contains the definition of ‘seven-day shiftworkers’.

44. The equivalent term in the TCF Award (at clause 41.4(a)) provides as follows:

*41.4 Excessive leave accruals: general provision*

*(a) An employee has an excessive leave accrual if the employee has accrued more than 8 weeks’ paid annual leave (or 10 weeks’ paid annual leave for a shiftworker, as defined by clause 3.1).*

45. We note further that in the previous TCF Award – Exposure Draft (13/2/2019), clause 21.3 of that ED included a reference to ‘Schedule J – Definitions’.

*Clause 32.5 (Excessive leave accruals: request by employee for leave)*

46. Clause 32.5(d) of the TCF Award – ED provides:

*(d)An employee is not entitled to request by a notice under clause 32.5(a) mor than 4 weeks’ paid annual leave (or 5 weeks’ paid annual leave for a shiftworker) as defined by Schedule H – Agreement to Take Annual Leave in Advance) in any period of 12 months.*

47. The same issue as outlined above in relation to clause 32.3(a), similarly applies to clause 32.5.

**Clause 43 (Redundancy)**

*Clause 43.4 (Redundancy pay for employee of small business employer)*

48. Clause 43.4 of the TCF Award – ED provides sets out a table of redundancy pay entitlements for small business employees as follows:

**Table 2 – Redundancy pay period**

**Column 1**

**Employee’s period of continuous service with the employer on termination**

**Column 2**

**Redundancy pay period**

<i>Less than 1 year</i>	<i>Nil</i>
<i>At least 1 year but less than 2 years</i>	<i>4 weeks</i>
<i>At least 2 years but less than 3 years</i>	<i>6 weeks</i>
<i>At least 3 years but less than 4 years</i>	<i>7 weeks</i>

49. We submit that there is an omission in clause 43.4(d) with respect to the redundancy pay entitlement for employees with continuous service of 4 years and over (8 weeks). The equivalent provision in the TCF Award - clause 19.4 (d) provides:

**Table 2 – Redundancy pay period**

<b>Column 1</b>	<b>Column 2</b>
<b><i>Employee’s period of continuous service with the employer on termination</i></b>	<b><i>Redundancy pay period</i></b>
<i>Less than 1 year</i>	<i>Nil</i>
<i>At least 1 year but less than 2 years</i>	<i>4 weeks</i>
<i>At least 2 years but less than 3 years</i>	<i>6 weeks</i>
<i>At least 3 years but less than 4 years</i>	<i>7 weeks</i>
<u><i>At least 4 years and over</i></u>	<u><i>8 weeks</i></u>
[emphasis added]	

50. The formulation of clause 19.4(d) reflects the relevant terms of the Determination [PR711479] varying the TCF Award arising from the Plain Language Redrafting process with respect to the Standard clauses.<sup>14</sup>

51. We therefore submit, in order to ensure consistency with the current entitlement in the TCF Award, the table in clause 43.4(d) be amended to include the additional words as follows:

<i>At least 4 years and over</i>	<i>8 weeks</i>
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## SCHEDULE C – SUMMARY OF HOURLY RATES OF PAY

<sup>14</sup> (AM2016/15) Plain language re-drafting – standard clauses; Textile, Clothing, Footwear and Associated Industries Award 2010; PR711479 (20 August 2019) at item 6.

*(Clause C.3.3 – Full-time and part-time employees – shiftworkers in the textile industry – seven day continuous shiftworkers – ordinary and penalty rates)*

52. In clause C.3.3 of the TCF Award – ED, the table includes a 5<sup>th</sup> column titled ‘Monday to Friday – 12-hour shift’, including 2 sub-columns titled ‘First 10 hours’ and ‘Last 2 hours’. The wage rates in the first sub-column are higher than those in the second sub-column. This would appear to be an error, given the current equivalent provision in the TCF Award.

53. The source of the substantive entitlement for seven-day continuous shiftworkers (textile industry) who work 12 hour shifts, is clause 37.5 of the TCF Award which provides, as relevant:

*37.5 (12 hour shifts)*

*(b) 12 hour shifts may be implemented in accordance with the following requirements:*

*(iii) Payment is to be made on the following basis:*

- *Monday to Friday – first 10 hours at ordinary rate plus two hours at double time plus shift penalty where appropriate.*
- *Saturday – time and half for all hours worked.*
- *Sunday – double time for all hours worked.*

[emphasis added]

#### **SCHEDULE C – SUMMARY OF HOURLY RATES OF PAY – CASUAL EMPLOYEES**

*(General issue)*

54. The CFMMEU-MD notes the boxed statement underneath clauses C.4 and C.5 in the TCF Award – ED as follows:

*A Full Bench has been constituted in AM2017/51 to deal with the issue of overtime for casuals. The rates in the tables below dealing with overtime for casuals will not become operative until a decision is made in that matter and only to the extent that they are consistent with the decision.*

55. The (former TCFUA) and the CFMMEU-MD during the 4 yearly review has consistently argued that the rates of pay for casual employees in relation to overtime, and other penalties (such as those applying for work performed on a public holiday) should be calculated on a compounding method rather than a cumulative method. These submissions have been made in context of both the TCF Award Exposure Draft process (which commenced as part of the review of Group 1 awards in 2014) and the Overtime for Casuals proceedings (AM2017/51).
56. As relevant to TCF Award, the TCFUA/CFMMEU-MD has made the following written submissions to the Full Bench in the Overtime for Casuals proceedings:
- (AM2017/51) Submission of the TCFUA (22 January 2020)<sup>15</sup>
  - (AM2017/51) Submission of the CFMMEU – Manufacturing Division in response to the submissions of the ABI&NSWBC and AIG (9 December 2019)<sup>16</sup>
  - (AM2017/51) Submission of the CFMMEU – Manufacturing Division in response to the submissions of the AFEI (20 December 2019).<sup>17</sup>
57. The CFMMEU – MD’s submission of 9 December 2020 outlined in some detail its contentions regarding the basis upon which a casual employee’s entitlement to overtime payments should be appropriately calculated on a compounding method rather than a cumulative method. These submissions included a discussion of the implications of the Full Bench decision in *Australian Nursing and Midwifery Federation v Domain Aged care (Qld) Pty Ltd T/A Opal Aged Care* (17 April 2019).<sup>18</sup>
58. We continue to rely on our submissions in (AM2017/51) specifically with respect to the overtime for casuals issue, but also by way of broader application to the matters relevant in these proceedings.

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<sup>15</sup> <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201751-sub-tcfua-220118.pdf>

<sup>16</sup> <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201751-sub-reply-cfmmeu-091219.pdf>

<sup>17</sup> <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201751-91-sub-reply-cfmmeu-201219.pdf>

<sup>18</sup> *Australian Nursing and Midwifery Federation v Domain Aged Care (QLD) Pty Ltd T/A Opal Aged Care* [2019] FWCFB 1716 (17 April 2019), Gostenicnik DP, Colman DP and McKenna C.

59. Whilst the Full Bench in matter (AM2017/51) will ultimately determine the applicable method of calculation for the TCF Award in relation to overtime for casuals, a similar issue arises in respect to the calculation of other loadings, including public holiday penalties.

60. Clause 14 in the TCF Award provides (in part):

*14.1 A casual employee is an employee who is engaged in relieving work or work of a casual, irregular or intermittent nature, but does not include an employee who could properly be classified as a full-time or part-time employee.*

*14.2 A casual employee must be notified at their initial engagement of their employment category and when their employment status changes.*

*14.3 A casual employee will be paid per hour 1.38<sup>th</sup> of the weekly award wage prescribed for the relevant classification plus a loading of 25%.*

*14.4 On each occasion a casual employee is required to work, they are entitled to a minimum payment for three hours work.*

*14.5 Casual employees are entitled to penalty payment for overtime, shiftwork and work on public holidays in accordance with the provisions of this award as they apply to permanent employees.*

*14.6 Casual employees must be paid at the end of each day, but may agree to be paid weekly.*

*14.7 Casual employees are entitled to all provisions of this Award including overtime and superannuation and excluding annual leave, sick leave and public holidays.*

*14.8 An employer must not require a casual employee to attend for duty more than once on any day.*

*14.9 A casual employee will be engaged by the hour. Employment can be terminated by either the giving of one hour's notice by either party or the payment or forfeiture of one hour's wages.*

[emphasis added]

61. Clause 39 of the TCF Award provides when the general entitlement to overtime is triggered, expressed as follows:

39.1 *Overtime is all time worked by an employee in excess of an employee's ordinary hours of work or outside the span of hours prescribed.*

[emphasis added]

62. Clause 43 of the TCF Award provides for the relevant entitlement when work is performed on a public holiday as follows:

43.2 *Work on public holidays*

*(a) An employer must be paid at the rate of 250% for a minimum of three hours when required to work on a public holiday.*

[emphasis added]

63. It is evident that clauses 39 and 43.2 of the TCF Award are silent on the method of calculation for casual employees. However, on the basis of *ANMF v Domain*, it is equally arguable the compounding method should apply to the calculation of a casual employee's entitlement to payment on a public holiday.

#### **C.4 Casual employees – day workers**

##### *(C.4.1 Casual employees – ordinary and penalty rates)*

64. The table in clause C.4.1 contain public holiday rates of pay (275% of ordinary rate) which appear to be based on a cumulative method of calculation.

65. For the reasons outlined above, we submit the correct method of calculation is compounding.

##### *(C.5.1 Casual employees – shiftworkers other than in the textile industry – ordinary and penalty rates)*

66. The table in clause C.5.1 contains public holiday rates of pay (275% of ordinary rate) which appear to be based on a cumulative method of calculation.

67. For the reasons outlined above, we submit the correct method of calculation is compounding.



*(C.5.2 Casual employees – shiftworkers in the textile industry – other than seven day continuous shiftworkers – ordinary and penalty rates)*

68. The table in clause C.5.2 contains penalty rates of pay for:

- work performed Midnight Sunday – 7am Monday (first 3 hours) (175% of ordinary rate)
- work performed Midnight Sunday – 7am Monday (after 3 hours) (225% of ordinary rate)
- public holidays (275% of ordinary rate)
- week's work commences on Sunday – all hours on Sunday (225% of ordinary rate).

69. These rates appear to be based on a cumulative method of calculation. For the reasons outlined above, we submit the correct method of calculation is compounding.

*(C.5.3 Casual employees – shiftworkers in the textile industry – seven day continuous shiftworkers – ordinary and penalty rates)*

70. The table in clause C.5.3 contains penalty rates of pay for:

- Work performed on a Saturday (175% of ordinary rate)
- Sunday and public holiday (225% of ordinary rate)
- Monday to Friday – 12 hour shift (first 10 hours) (125% of ordinary rate)
- Monday to Friday – 12 hour shift (last 2 hours) (225% of ordinary rate)

71. These rates appear to be based on a cumulative method of calculation. For the reasons outlined above, we submit the correct method of calculation is compounding.

#### **SCHEDULE D – SUMMARY OF MONETARY ALLOWANCES**

*(Clause D.1 – Wage-related allowances)*

72. Clause D.1.1. of the TCF Award - ED contains a table of wage related allowances. Under the sub-heading 'Textile Industry' on page 97, an allowance 'wool scouring pits' has not been included. Instead it has been included under clause D.3 (Other Allowances) on page 98.

73. We note that currently, under clause 26 (Textile Industry Allowances) of the TCF Award, the 'wool scouring pits allowance' is included at clause 26.14 as a textile allowance.

74. In these circumstances we submit that the table in clause D.1.1 of the TCF Award – ED be amended to include the 'wool scouring pits allowance' under the sub-heading 'Textile Industry'.

#### **SCHEDULE E – OUTWORK AND RELATED PROVISIONS**

75. As outlined above, in the TCF Award – ED, the Outwork and Related Provisions schedule has been changed from 'Schedule F' to 'Schedule E'. We assume the change has occurred based on plain language formatting reasons, and not for any other substantive basis.

76. The CFMMEU – MD strongly opposes this change. We note that in the previous TCF – Exposure Draft (published 13/2/2019) the outworker provisions schedule was numbered 'Schedule F' consistent with the current numbering in the TCF Award (Schedule F – Outwork and Related Provisions).

77. We submit that for the following reasons, the numbering in the TCF Award – ED should be reversed from 'Schedule E – Outwork and Related Provisions' and 'Schedule F – Apprentices' to:

- 'Schedule E – Apprentices' and
- 'Schedule F – Outwork and Related Provisions'.

#### *Context – Schedule F TCF Award - comprehensive framework of outworker terms and conditions*

78. Schedule F (Outwork and Related Provisions) of the TCF Award is a comprehensive framework governing the giving out of work in the TCF industry, with obligations applying to both national

system employers and outwork entities (as defined in s.12 of the FW Act). Schedule F is unique in modern awards, as it is structured to regulate complex TCF supply chains at each level e.g. from the fashion house/brand at the head of the contracting chain to outworkers undertaking the work at the bottom of the chain.

79. Broadly, the key areas of obligations in Schedule F for principals who give out work in the TCF industry. These are:

- registration with the TCF Board of Reference;<sup>19</sup>
- making and retention of Work Records;<sup>20</sup>
- making and retention of quarterly lists and provision of those lists to the General Manager of the FWC;<sup>21</sup>
- making and retention of work arrangements documentation;<sup>22</sup>
- providing minimum conditions for workers;<sup>23</sup>
- observance of the award;<sup>24</sup>
- recovery of unpaid remuneration.<sup>25</sup>

80. In essence, the terms of Schedule F are designed to create transparency within TCF supply chains as to where TCF work is being undertaken, by who, and under what wages and conditions of employment. The series of obligations are intended to be cascading to apply to participants at each level of the chain. Additionally, Schedule F provides guaranteed award and NES terms and conditions for TCF outworkers whether in an employment relationship or otherwise considered to be an outworker 'contractor'.

81. The inclusion of Schedule F in the TCF Award (and predecessor outworker provisions in pre-reform TCF industry awards) is a recognition that TCF outworkers as a class are particularly vulnerable to exploitation (including sham contracting) and require specific protection in the

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<sup>19</sup> TCF Award, Schedule F – clause F.3.1; F.6

<sup>20</sup> TCF Award, Schedule F – clause F.3.2; F.3.4

<sup>21</sup> TCF Award, Schedule F – clause F.3.3

<sup>22</sup> TCF Award, Schedule F – clause F.3.4; F.4

<sup>23</sup> TCF Award, Schedule F – clause F.5

<sup>24</sup> TCF Award, Schedule F – clause F.7

<sup>25</sup> TCF Award, Schedule F – clause F.8

form of award safety regulation. Such acknowledgment has been consistently reaffirmed by the FWC<sup>26</sup> and its previous bodies, including the AIRC.

*Knowledge and Compliance with Schedule F in the TCF industry*

82. The importance of Schedule F of the TCF Award cannot be overstated in terms of seeking to ensure that the minimum award wages and conditions in the TCF industry are met by industry participants. However, the achievement of full compliance remains a consistent challenge, particularly in relation to the engagement of TCF outworkers. This has been the everyday experience of the TCFUA and the CFMMEU – Manufacturing Division, (post amalgamation) as well as regulators (FWO)<sup>27</sup> and key findings of academic research.<sup>28</sup>
83. Integral to the challenge of achieving compliance with Schedule F of the TCF Award, the TCFUA/CFMMEU – MD spends considerable time and resources informing, and educating TCF employers about their obligations and responsibilities under Schedule F. Since the modern TCF Award commenced operation on 1 January 2010, part of this role is assisting industrial participants to become familiar with the existence of Schedule F, its terms, and what is required to achieve compliance.
84. The ‘familiarity’ objective is important to compliance, as employers in discussions with the union now commonly speak of ‘Schedule F’ as referring to their outwork obligations. It is terminology which is, in a positive sense, much more broadly understood than it was even 4-5 years previously.

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<sup>26</sup> See for example: Sch. 5, Item 6 – Transitional Review of Modern Awards – Textile, Clothing, Footwear and Associated Industries Award 2010; [2013] FWCFB 5729 (4 October 2013); Hamberger SDP; Smith DP; Lee C at [60]

<sup>27</sup> <https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/january-2019/20190111-textile-clothing-footwear-campaign-report-media-release>

<sup>28</sup> Cregan, C and Johnston, P; ‘*Wages and Conditions of outworkers in the clothing industry in Melbourne, Victoria (Part 1)*’; University of Melbourne (June 2014) and Cregan, C and Johnston, P; ‘*Wages and Conditions of outworkers in the clothing industry in Melbourne, Victoria (Part 2)*’; University of Melbourne (December 2016)

85. In this context, we are concerned that a change from ‘Schedule F’ to ‘Schedule E’ (as proposed in the TCF Award – ED) will only serve to confuse TCF employers who give work out, including engaging TCF outworkers either directly, or otherwise in their supply chains. We submit this would be a retrograde step given the time spent assisting TCF employers to become aware of Schedule F over the last 10 years.

#### *TCF Board of Reference*

86. One of the key obligations of Schedule F of the TCF Award is the obligation on a ‘principal’ (as defined at F.2.4) to become registered with the (TCF) Board of Reference, prior to entering into an arrangement to give work out.<sup>29</sup> Schedule F makes provision for the establishment and operation of the (TCF) Board of Reference for this purpose.<sup>30</sup> The General manager of the FWC convenes the TCF Board of Reference which has an equal number of union and employer/principal representatives.

87. As part of its operation, the FWC (TCF Board of Reference) has developed various forms to facilitate applications and renewals of registration submitted by principals. These forms make reference to ‘Schedule F’ of the TCF Award. If the schedule is changed to ‘Schedule E’, the forms for the TCF Board of Reference would need to be amended.

88. As outlined above, a change to the numbering of Schedule F will, in our submission create unnecessary confusion for employers and principals. This will be exacerbated in terms of the requirement to complete documentation for registration with the TCF Board of Reference.

89. For the reasons outlined above, we submit that the numbering of Schedule F in the TCF Award should remain as ‘Schedule F’. The potential negative compliance impacts arising from a change of numbering to ‘Schedule E’ outweighs any benefit gained by changing the schedule numbering because of the plain language redrafting process.

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<sup>29</sup> TCF Award, Schedule F – clause F.3.1

<sup>30</sup> TCF Award, Schedule F – clause F.6

90. Consequentially, we submit the following clauses in the TCF Award – ED requires amendment to reflect Schedule ‘F’:

- Heading of schedule – from ‘Schedule E’ to ‘Schedule F’
- Change sub-clause numbering to begin with ‘F’
- Clause E.3.1(a) – reference to ‘clause E.6.7’
- Clause E.2.1(b) – reference to ‘clause E.6.7’
- Clause E.3.4(b) – reference to ‘clause E.3.2(a)’
- Clause E.3.4(c) – reference to ‘clause E.4 and E.5’
- Clause E.4.1 – reference to ‘clause E.4’ and ‘clause E.3’
- Clause E.4.2(b) – reference to ‘clause E.5.2(a)’
- Clause E.4.3(a) – reference to ‘clause E.4.2(b)’
- Clause E.4.4 – reference to ‘clause E.4’, ‘E.3.2’
- Clause E.4.4(a) – reference to ‘E.3.2(a)(v)’
- Clause E.4.4(b) – reference to ‘E.3.2(a)(viii)’
- Clause E.4.4(c) – reference to ‘clause E.3.2(a)(vii)’ and ‘E.3.2(a)(viii)’
- Clause E.4.4(d) – reference to ‘clause E.3.2(a)(v)’
- Clause E.4.4(e) – reference to ‘clause E.4.4(c)’ and ‘clause E.5.4(b)’
- Clause E.4.6 – reference to ‘clause E.5’
- Clause E.5.2(a)(iii) – reference to ‘Schedule E’
- Clause E.5.2(b) – reference to ‘E.5.2(a)(ii) and E.5.2(a)(iii)’
- Clause E.5.2(d) – reference to ‘clause E.5.7’
- Clause E.5.3(c) – reference to ‘clause E.5.3(a)’
- Clause E.5.4(b)(v) – reference to clause ‘E.5.4(b)’
- Clause E.8.2(b) – reference to ‘clause E.8.2(b)’
- Clause E.8.2(d) – reference to ‘clause E.8.2’
- Clause E.8.2(e) – reference to ‘clause E.8.2’
- Clause E.8.2(f) – reference to ‘clause E.8.2’
- Clause E.8.3(e) – reference to ‘clause E.8.3’
- Clause E.8.3(f) – reference to ‘clauses E.8.2 or E.8.3’
- Clause E.8.3(g) – reference to ‘clause E.8.3’, ‘clause E.8.2 or E.8.3.’

### Appendix to Schedule E – Information to be given to outworkers

91. Consistent with our submission above, we submit that the heading of the Appendix be amended to read ‘Appendix to Schedule F’.

### SCHEDULE F – APPRENTICES

*(Schedule F – Apprentices – clauses F.1 to F.22)*

92. As outlined above, in the TCF Award – ED, the ‘Outwork and Related Provisions’ schedule has been changed from ‘Schedule F’ to ‘Schedule E’. The Apprentices schedule is now Schedule F. We reiterate our opposition to the change in the respective schedule renumbering.

93. In Schedule F – Apprentices in the TCF Award – ED, there are references to either ‘Schedule F’ or clause F at the following clause numbers:

- Clause F.5 (first sentence) – reference to ‘clause F.1’
- Clause F.9 (first sentence) – reference to ‘Schedule F’
- Clause F.14 (first sentence) – reference to ‘Schedule F’
- Clause F.19 (5<sup>th</sup> sentence) – reference to ‘clause F.19’
- Clause F.20 (1<sup>st</sup> sentence) – reference to ‘clause F.19’
- Clause F.20 (5<sup>th</sup> sentence) – reference to ‘clause F.19’
- Clause F.21 (1<sup>st</sup> sentence) – reference to ‘clause F.19’
- Clause F.22 (4<sup>th</sup> sentence) – reference to ‘clause F.22’
- Clause F.22 (5<sup>th</sup> sentence) – reference to ‘clause F.24 – School-based apprentices of Schedule F.’

94. Consistent with our primary submission above, we contend that the above references should be amended to reflect a differently named schedule, rather than ‘Schedule F’.

*(Clause F.24 – School-based apprentices – clauses F.24.1 to F.24.10)*

95. The same issue applies to the references in clause F.24. The relevant clauses are:

- Clause F.24.1 (2<sup>nd</sup> sentence) – reference to ‘clause F.24’
- Clause F.24.5 (1<sup>st</sup> sentence) – reference to ‘clause F.24’

96. Similarly we submit that these references should be amended to reflect a differently named schedule, rather than 'Schedule F.

Filed on behalf of:

**Construction Forestry Maritime Mining and Energy Union  
(Manufacturing Division)**

Vivienne Wiles  
Senior National Industrial Officer and Co-ordinator  
(6 March 2020)