CFMEU Manufacturing Division
Level 1, 165 Bouverie Street
CARLTON VIC 3053
Phone: (03) 9274 9200
Freecall: 1800 060 556

IN THE FAIR WORK COMMISSION

Fair Work Act 2009

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

STAGE 2, GROUP 2 AWARDS
Provisional Views of the Full Bench as outlined in the Statement [2021] FWCFB 4928 (11 August 2021)

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

In relation to the Textile, Clothing, Footwear and Associated Industries Award 2020 (clause 11.1, and clause 11.12 opening paragraph)

(30 August 2021)

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

BACKGROUND

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

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

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

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

STAGE 2 AWARDS

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

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[1] The *Fair Work Act 2009* as amended on 27 March 2021 by the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth).

[2] *Fair Work Act 2009* (Clause 48 of Schedule 1), Casual Terms Award Review 2021, Decision, [2021] FWCFB 4144 (16 July 2021)

[3] *Fair Work Act 2009* (Clause 48 of Schedule 1), Casual Terms Award Review 2021, Statement (AM2021/54) [2021] FWCFB 4714 (3 August 2021)

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

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

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

PREVIOUS CFMMEU-MD SUBMISSIONS

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

10. The CFMMEU-MD filed a second submission on 19 August 202 in response to direction 2 in paragraph [105] of the *11 August 2021 Statement* ("**CFMMEU-MD Second Submission**").[8]

11. On 25 August 2021, the CFMMEU-MD sought leave to file corrected versions of the First Submission and Second Submission, in order to correct a number of typographical errors .[9]

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[4] *Fair Work Act 2009* (Clause 48 of Schedule 1), Casual Terms Award Review 2021, Statement (AM2021/54) [2021] FWCFB 4928 (11 August 2021) – the Full Bench's provisional views are contained in the Statement and Attachment A to the Statement
[5] [2021] FWCFB 4928 at paragraph [104]
[6] [2021] FWCFB 4928 at paragraph [105]
[7] Casual Terms Award Review 2021, (AM2021/54) Group 2 Awards - Submission of the CFMMEU Manufacturing Division (18 August 2021)
[8] Casual Terms Award Review 2021, (AM2021/54) Group 2 Awards - Submission of the CFMMEU Manufacturing Division (19 August 2021)
[9] Casual Terms Award Review 2021, (AM2021/54) Group 2 Awards – Correspondence of the CFMMEU-Manufacturing Division, Corrected Submission (18 August 2021) and Corrected Submission (19 August 2021)

12. On 23 August 2021, a Directions Hearing was held before Vice President Hatcher with respect to a number of Group 2 awards (including the TCF Award) and for which there is a contest regarding the Full Bench's *provisional* views. The Directions subsequently issued (24 August 2021)[10] with respect to clauses 11.1 and 11.12 (opening paragraph) of the TCF Award provide:

    Textile, Clothing, Footwear and Associated Industries Award 2020

    (9) Any submissions in response to the submissions filed by the Construction, Forestry, Maritime, Mining and Energy Union on 18 August and 19 August 2021 or by the Ai Group on 19 August 2021 shall be filed by 5.00pm on Monday 30 August 2021.

13. On 26 August 2021, the CFMMEU-MD filed a third submission in response to Direction 1 and 2 with respect to clause 11.12 of the TCF Award (other than the opening paragraph) ("**CFMMEU-MD Third Submission**)".[11] In support of its position, the CFMMEU-MD filed 2 witness statements:

    - Witness statement of Elizabeth Macpherson[12] ("**MACPHERSON**"); and
    - Witness statement of Paris Nicholls including Exhibit 'PB-1'[13] ("**NICHOLLS**")

14. The CFMMEU-MD files these Reply submissions pursuant to direction (9) of the Directions issued 24 August 2021. They respond to the submission filed by the Ai Group on 19 August 2021.[14]

15. The CFMMEU-MD continues to rely on its First, Second and Third Submissions and the witness statements of MACPHERSON and NICHOLLS as relevant to these Reply submissions.

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[10] Casual Terms Award Review 2021, (AM2021/54) Group 2 Awards, Directions (Vice President Hatcher) 24 August 2021

[11] Casual Terms Award Review 2021, (AM2021/54) Group 2 Awards - Submission of the CFMMEU Manufacturing Division (26 August 2021)

[12] Casual Terms Award Review 2021, (AM2021/54) Group 2 Awards – Witness Statement of Elizabeth Macpherson (26 August 2021) filed on behalf of the CFMMEU Manufacturing Division

[13] Casual Terms Award Review 2021, (AM2021/54) Group 2 Awards – Witness Statement of Paris Nicholls (26 August 2021) filed on behalf of the CFMMEU Manufacturing Division

[14] Casual Terms Award Review 2021, (AM2021/54) Group 2 Awards – Submission of the Ai Group (19 August 2021)

ISSUE 1 – CLAUSE 11.1 TCF AWARD – FULL BENCH PROVISIONAL VIEW

16. The Full Bench has set out its *provisional* views in relation to various terms in the TCF Award in the *11 August 2021 Statement* and Attachment A to the Statement.

17. At paragraphs [96] – [98] of the *11 August 2021 Statement* the Full Bench stated:

> *'[96] The Textile Award contains the following definition of a casual employee:*
>
> > *"11.1 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."*
>
> *[97] No provision of this precise nature was considered in the July 2021 decision.*
>
> *[98] It is our provisional view that:*
>
> > *(1) Clause 11.1 is not consistent with the definition in s.15A of the Act because it incorporates restrictions on the use of casual employment not found in s.15A into a definition of casual employment.*
> >
> > *(2) The restrictions may be preserved provided they operate upon a definition of casual employment that is consistent with s.15A.*
> >
> > *(3) Accordingly, a new definition of 'casual employee' that refers to s15A of the Act should be added to clause 2, Definitions of the award, and clause 11.1 should be modified to read:*
> >
> > *"A casual employee may only be engaged in relieving work or work of a casual, irregular or intermittent nature."* [emphasis added]

18. In its First Submission at paragraph [16] the CFMMEU-MD indicated that it did not oppose the *provisional* view expressed in paragraph [98].

19. The Ai Group opposes the *provisional* view of the Full Bench with its reasons set out at paragraphs [56] – [72] of its submission.[15]

20. Ai Group's first ground in opposing the Full Bench's *provisional* view is:

[15] Casual Terms Award Review 2021, (AM2021/54) Group 2 Awards - Submission of the Ai Group (19 August 2021) at paragraphs [56] – [72]

- the existing clause 11.1 in the TCF Award arguably does not operate to impose any limitations on casual employment because it enables casuals to be engaged in all work of a 'casual nature'.
- the High Court judgment in *Workpac v Rossato* makes it clear that ongoing regular casual employment is not necessarily inconsistent with the nature of casual employment.'[16]

21. We reject the first contention above on the basis that the word 'casual' should properly be read in combination with the rest of clause 11.1, specifically the words which appear both before ('*relieving work'*) and after ('*irregular or intermittent nature'*) the word 'casual'.

22. On an ordinary construction the word 'casual' is placed in context of the associated restrictions on casual employment contained in the current clause 11.1. Further, the current clause 11.1 contains the following words '*but does not include an employee who could be classified as a full-time or part-time employee*'. It is submitted the use of the word 'casual' was intended to distinguish an employment status different from that of a full-time or part-time employee.

23. In the alternative, if the CFMMEU-MD's submission is not accepted on this point by the Full Bench, the issue could be remedied by the simple deletion of the word 'casual', so that the amended clause 11.1 would read:

    11.1 A casual employee may only be engaged in relieving work or work of an irregular or intermittent nature.

24. Ai Group's <u>second</u> ground in opposing the Full Bench's *provisional* view is:
    - the proposed clause 11.1 would arguably not operate to impose any limitations on casual employment for the above reason.'[17]

[16] Casual Terms Award Review 2021, (AM2021/54) Group 2 Awards - Submission of the Ai Group (19 August 2021) at paragraph [58]
[17] Casual Terms Award Review 2021, (AM2021/54) Group 2 Awards - Submission of the Ai Group (19 August 2021) at paragraph [59]

25. We submit that the Ai Group's reasoning is not sustainable on the basis of the CFMMEU-MD's primary or alternate position outlined above in relation to Ai Group's first ground.

26. In our view, the reference to the High Court decision of *Workpac v Rossato*[18] also does not assist the contentions of the Ai Group. The High Court held at paragraph [49] of the decision:

> *[49]….there must exist a 'firm advance commitment' to continuing work unqualified by indicia or irregularity, such as uncertainty, discontinuity, intermittency and unpredictability, in order for employment to be other than casual.'*

27. As we know, the *Workpac v Rossato* decision was brought down after the amendments were made to the Act with respect to casual employment, including the new definition of a casual employee in s.15A. However, in any event, proposed clause 11.1 is neither inconsistent with s.15A or the decision in *Workpac v Rossato*. Proposed clause 11.1 of the TCF Award contains restrictions on casual employment which by their very meaning are indicative of an absence of a 'firm advance commitment'.

28. Ai Group's <u>third</u> ground in opposing the Full Bench's *provisional* view is summarised as follows:
    - the proposed clause 11.1 would lead to interaction difficulties with the Act;
    - the proposed clause is bound to confuse both employers and employees because the concepts of irregularity and intermittency do not align with the definition in s15A;
    - the concepts of irregularity and intermittency are inconsistent with the content of the Casual Employment Information Statement;
    - proposed clause 11.1 would create doubt as to the steps necessary to comply with the award and to meet the definition of a casual employee in s.15A(1).[19]

29. The Ai Group's submissions in ground 3 above fails to distinguish between the statutory definition of a casual employee in s.15A and the role played by award terms which incorporate

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[18] *Workpac v Rossato* [2021] HCA 23

[19] Casual Terms Award Review 2021, (AM2021/54) Group 2 Awards - Submission of the Ai Group (19 August 2021) at paragraphs [60] – [66]

restrictions on casual employment. It is submitted that the Ai Group's contentions with respect to interaction difficulties between the proposed clause 11.1 and the Act are highly speculative and without foundation. In our view, the respective award and Act provisions are able to operate harmoniously without undue confusion or concern given the preservation of the proposed clause 11.1 would operate *upon* a definition of a casual employee in s15A of the Act as amended.

30. The proposed award term restricts the circumstances in which an employee can be employed in the TCF Award – that is, a casual employee can be engaged in *relieving work* (for example, to cover a permanent employment absent on leave), work of a *casual, irregular or intermittent nature* (for example, to cover a temporary increase in production during a busy period, seasonal variations in customer demand etc). It is submitted that there is nothing in the formulation of the proposed clause 11.1 which would lead to inconsistency or interaction difficulties if the definition of casual employee is varied to comply with section 15A.

31. Ai Group's <u>fourth</u> ground in opposing the Full Bench's *provisional* view can be summarised as follows:
    - the proposed clause could, in effect, exclude the operation of the casual conversion rights in the NES;
    - a modern award must not exclude the NES or any provision of the NES (s55(1);
    - it cannot be validly argued that the exclusion of the NES casual conversion provisions by the proposed clause would not be detrimental to an employee in any respect;
    - a term which contravenes s.55 of the Act has no effect and cannot be included in a modern award.[20]

32. It is unclear to the CFMMEU-MD, as submitted by the Ai Group, how the retention of clause 11.1 (if amended as per the Full Bench's *provisional* view) 'could, in effect exclude the operation the casual conversion rights in the NES.' The Ai Group, in its submission does not elaborate on its contention, so it is difficult for the CFMMEU-MD to provide a more detailed response.

[20] Casual Terms Award Review 2021, (AM2021/54) Group 2 Awards - Submission of the Ai Group (19 August 2021) at paragraphs [67] – [72]

33. With respect to the potential interaction between clause 11.1 (if amended as per the *provisional* view) and the NES Casual Conversion entitlement, the Full Bench in the Stage 1 Decision set out its findings generally (at paragraphs [31] – [37]) regarding the interaction issue as follows:

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

> *[38] As mentioned earlier, cl.48(2)(b) provides that the Casual Terms Review must consider whether there is any 'uncertainty or difficulty relating to the interaction between the award and the Act' as amended.*
>
> *[39] As to the expression 'any uncertainty or difficulty relating to the interaction between the award and the Act so amended', in cl.48(2)(b) and 'a difficulty or uncertainty relating to the interaction between the award and the Act as so amended' in cl.48(3)(b), the words 'uncertainty' and 'difficulty' should be given their ordinary meaning.*[21]

34. If the Full Bench was to ultimately find that there would be an inconsistency between clause 11.1 (if amended as per the Full Bench's provisional view) and the Act as amended then, in our submission, it is a permitted inconsistency with the NES Casual Conversion provisions.

35. Ai Group's fifth ground in opposing the Full Bench's *provisional* view is:
    - the proposed clause is not necessary, in the sense contemplated by s.138, given the limitations on the circumstances in which an individual can be engaged as a casual, which are inconsistent with the new statutory definition and the enhanced pathway out of casual employment through the new casual conversion provisions in the NES;
    - the changed statutory context warrants the deletion of the provision, that on its face is directed at limiting the circumstances in which a casual employee may be utilised.[22]

36. The Ai Group's fifth ground of opposition to the Full Bench's provisional view, appears to be founded on a position that a term in a modern award which incorporates restrictions on the use of casual employment should, prima facie, not be retained as part of the Casual Terms Review. This is incorrect. In the *Stage 1 Decision* (16 July 2021) the Full Bench found that restrictions on casual employment could be retained, in circumstances where the substantive definition of a casual employee was varied to ensure consistency with the definition in s.15A.

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[21] [2021] FWCFB 4144 (16 July 2021) at paragraphs [31] – [39]
[22] Casual Terms Award Review 2021, (AM2021/54) Group 2 Awards - Submission of the Ai Group (19 August 2021) at paragraphs [71]

37. For example, the *Educational Services (Teachers) Award 2020* ("Teachers Award") included restrictions on casual employment in the following terms:

    12.1 Casual employment means employment on a day-to-day basis for a period of not more than 4 consecutive weeks, or 4 consecutive term weeks in the case of a teacher in a school or preschool.

38. With respect to the Teachers' Award the Full Bench's *provisional* view with respect to clause 12.1 was that a limitation on casual employment is a relevant term, however:

    '…A limitation on the length of any casual employment should not be expressed as part of the definition of casual employment. If any such limitation is separated from the casual definition, it does not cause interaction issues with the NES casual conversion entitlements in Div.4A of Pt.1-1 of the Act, is not inconsistent with those entitlements and is not prohibited by s55(1).[23]

39. In relation to clause 11.1 of the TCF Award, if the current definition of casual employee is replaced with the s.15A definition (in clause 2), and the balance of clause 11.1 is retained, it is submitted that there is no inconsistency with the Act as amended (either in respect to the s15A definition or the new NES casual conversion provisions).

40. We further take issue with the Ai Group's reference (at paragraph 71 of its submission) of '*the enhanced pathway out of casual employment through the new casual conversion provisions in the NES'*. The CFMMEU-MD opposes the Full Bench's provisional view regarding clause 11.12 (Casual Conversion) (other than the opening paragraph) of the TCF Award. We have taken that view on the basis that the deletion of the current clause 11.12 (which, amongst other things, applies to <u>all</u> TCF employers and triggers an entitlement after 6 months rather than 12 months) is more beneficial than the NES provision. As such, we do not accept that the NES casual conversion entitlement represents an 'enhanced pathway' out of casual employment.

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[23] Casual Terms Award Review 2021, (AM2021/54) Stage 1 Awards, Decision [2021] FWCFB 4144 at paragraph [93]

41. Ai Group's final ground in opposing the Full Bench's *provisional* view is:
    - the clause is inconsistent with the modern awards objective because it would make the award difficult to understand, rather than 'simple' and 'easy to understand' (s134(1)(g).[24]

42. In the Stage 1 Decision (16 July 2021) the Full Bench held that in relation to the application of s134 and s138 to the Casual Terms Awards Review:

> *[42] In our view any variation made in accordance with cl.48(3) of Schedule 1 must make the award consistent with or operate effectively with the provisions of the Act relating to casual employment specifically, as well as the Act generally. Any such variations must therefore also conform with the requirements of s.138 – that is, the varied award terms must be necessary to achieve (relevantly) the modern awards objective in s.134(1). To ensure compliance with s.138, the considerations in s.134 (1) (a) – (h) need to be taken into account even though on a strict reading s.134 of the Act does not apply to the Casual Terms Review.*[25]

43. The Ai Group's reference to s138 and s134 is minimal at best, only refers to one of the considerations in s134 and misconstrues the task involved in applying the modern awards objective (MAO).

44. The nature, and application of the MAO has been considered in numerous Full Bench decisions since the commencement of the operation of the *Fair Work Act 2009*. As part of the Four Yearly Review of Modern Awards, in relation to the determination of the nature and scope of the Review, the Full Bench held in the *Preliminary Issues Decision* [26]: [footnotes not included]

> *[31] The modern awards objective is directed at ensuring that modern awards, together with the NES, provide a 'fair and relevant minimum safety net of terms and conditions' taking into account the particular considerations identified in paragraphs 134 (1)(a)-(h)*

[24] Casual Terms Award Review 2021, (AM2021/54) Group 2 Awards - Submission of the Ai Group (19 August 2021) at paragraph [72]
[25] [2021] FWCFB 4144 at paragraph [42]
[26] 4 Yearly Review of Modern Awards: *Preliminary Jurisdictional Issues* [2014] FWCFB 1788 (17 March 2014)

> *(the s.134 considerations). The objective is very broadly expressed. The obligation to take into account the matters set out in paragraphs 134(1)(a)-(h) means that each of these matters must be treated as a matter of significance in the decision making process. As Wilcox J said in Nestle Australia Ltd v Federal Commissioner of Taxation:*
>
> > *"To take a matter into account means to evaluate it and give it due weight, having regard to all other relevant factors. A matter is not taken into account by being noticed and erroneously discarded as irrelevant."*
>
> *[32] No particular primacy is attached to any of the s.134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular modern award.*
>
> *[33] There is a degree of tension between some of the s.134(1) considerations. The Commission's task is to balance the competing considerations in s.134(1) and the diversity in the characteristics of the employers and employees covered by different awards means that the application of the modern awards objective may result on different outcomes between different modern awards.*
>
> *[34] Given the broadly expressed nature of the modern awards objective and the range of considerations which the Commission must take into account there may be no one set of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the modern awards objective.*[27] [emphasis added]

45. The Ai Group's fifth ground of opposition to the Full Bench's provisional view, contends that clause 11.1 of the TCF Award is 'inconsistent with the modern awards objective' on the basis of the sole consideration in s.134(1)(g). This is not the required exercise. The task when considering s134(1) (as it relates to s138) is the one set out in the passages outlined above in the *Preliminary*

[27] Ibid; at paragraphs [31] – [34]

Issues Decision – that is, to take into account <u>all</u> of the considerations in s134(1)(a)-(h) and to balance the competing considerations in ensuring a fair and relevant minimum safety net of terms and conditions.

46. It is submitted that it is relevant to the issue of 'necessity' (s.138) that clause 11.1 of the TCF Award was included in the making of the modern TCF Award as determined by the 7 member, Part 10A Award Modernisation Full Bench.

ISSUE 2 – CLAUSE 11.1 TCF AWARD – FULL BENCH EXPRESSED NO PROVISIONAL VIEW

47. The opening paragraph to clause 11.12 of the TCF Award states:

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

48. In the *11 August Statement 2021*, the Full Bench set out its *provisional* view regarding the opening paragraph to clause 11.12 as follows:

> *[51] Our provisional view does not extend to the opening paragraph of clause 11.12. It is clearly a relevant term but, if it is detached from the casual conversion provisions which follow so that it reads 'The employer will take all reasonable steps to provide its employees with secure employment by maximising the number of permanent positions in the employer's workforce', then on one view it neither gives rise to inconsistency with the Act nor causes any interaction difficulty. We do not propose to express any provisional view about this, and we will invite further submissions about the matter.*[28]

49. On 19 August 2021, the CFMMEU-MD filed a detailed submission setting out its views at paragraphs [11] – [33] regarding the opening paragraph of clause 11.12 ("CFMMEU-MD Second

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[28] [2021] FWCFB 4928 at paragraphs [48] – [51]

Submission").[29] We continue to rely on those submissions. In short summary, the CFMMEU submitted, inter alia, that the opening paragraph of clause 11.12:

- is a relevant term pursuant to clause 48 of Schedule 1 to the Act as amended;[30]
- it is not merely an expression of an objective but is a substantive obligation which has work to do, both generally in maximising permanent employment within the TCF industry, but also as part of the facilitation of conversion of casual employees;[31]
- the second part of the term is not a qualification or limitation on the primary obligation which precedes it;[32] however, the second part of the term reinforces the importance of the casual conversion procedure in ensuring that permanent positions in the employer's workforce are maximised;[33]
- the opening paragraph to clause 11.12 is not inconsistent with the Act as amended;[34]
- the opening paragraph to clause 11.12 does not constitute any uncertainty or difficulty relating to the interaction between the award and the NES;[35]
- if the CFMMEU-MD's primary submission is not accepted (i.e., the retention of the opening paragraph to clause 11.12 as currently drafted), in the alternative, the term should be retained and redrafted as, *'The employer will take all reasonable steps to provide its employees with secure employment by maximising the number of permanent positions in the employee's workforce'*;[36]
- the retention of the term in the TCF Award is necessary (as required by s.138) in order to achieve the modern awards objective (s134) in context of the Part 10A Award Modernisation process and reasoning and further, the 2012 Transitional Review and Four Yearly Review of Modern Awards.[37]

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[29] Casual Terms Award Review 2021, (AM2021/54) Group 2 Awards - Submission of the CFMMEU Manufacturing Division (19 August 2021)
[30] Ibid; at paragraph [15]
[31] Ibid; at paragraphs [16] – [17]
[32] Ibid; at paragraph [18]
[33] Ibid; at paragraph [19]
[34] Ibid; at paragraphs [20] – [24]
[35] Ibid; at paragraph [25]
[36] Ibid; at paragraph [26] – [27]
[37] Ibid; at paragraphs [30] – [33]

50. The Ai Group opposes the retention of the opening paragraph to clause 11.12 of the TCF Award as outlined at paragraphs [75] – [81] of its submission of 19 August 2021.[38]

51. The grounds of the Ai Group's opposition can be summarised as:
    - such a clause is not permitted to be included in a modern award;[39]
    - when the provision was one sentence in relatively lengthy clause about casual conversion rights, it was arguably an incidental term (s.142) dealing with the allowable award matter of casual employment (s.136(1)(b));[40]
    - once separated from the subject matter of casual conversion, the provision would take on a completely different character and would become in effect, a job security clause that would impact on an employer ability to:
        - engage casuals;
        - engage casuals for a specific period of time, for a specific task, or for a specific season;
        - engage independent contractors;
        - outsource work;
        - engage labour hire firms.[41]
    - the suggested clause would offend s136 of the Act;[42]
    - the clause is not necessary to achieve the modern awards objective (particularly s.134(1)(d) and (f).[43]

52. At the outset, we reiterate the CFMMEU-MD's primary position that the opening paragraph should be retained in its entirety, for the reasons we outline in the CFMMEU-MD Second Submission.

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[38] Casual Terms Award Review 2021, (AM2021/54) Group 2 Awards - Submission of the Ai Group (19 August 2021) at paragraphs [74] – [81]
[39] Casual Terms Award Review 2021, (AM2021/54) Group 2 Awards - Submission of the Ai Group (19 August 2021) at paragraph [77]
[40] Ibid; at paragraph [77]
[41] Ibid; at paragraph [78]
[42] Ibid; at paragraph [79]
[43] Ibid; at paragraph [80]

53. If, however, the Full Bench is against the CFMMEU-MD on this, then the proposed amended opening paragraph to clause 11.12, is we submit, a permitted term under sections 136 and 139.

54. We submit the term (as amended) would be an incidental term as provided by clause 142 of the Act with respect to *'type of employment such as full-time employment, casual employment, regular part-time employment….'* (s.139(1). The term is of sufficient character to relate to one or more of those types of employment as currently provided for in the TCF Award – see clause 8 (Types of Employment), clause 9 (Full-time employees), clause 10 (Part-time employees) or clause 11 (Casual employees).

55. We dispute the retention of the term would, as the Ai Group submit, 'impact on an employer's ability to engage casuals.' There is nothing in the term which prevents an employer engaging one or more casuals in its operations. For example, an employer pursuant to the term could maximise the number of permanent positions based on its operational requirements and still engage casual employees consistent with clause 11 of the TCF Award.

56. With respect to the engagement of employees for a specific period of time, for a specific task or for a specific season, again it is unclear to the CFMMEU-MD how the operation of the amended term would alter the current position under the award on such engagement. Arguably, under the award currently, these forms of employment are not permitted, at the very minimum they are not expressly provided for (unlike in a number of other modern awards).

57. With respect to the engagement of independent contractors (other than in relation to TCF contract outworkers) the TCF Award currently does not cover, limit, or otherwise provide for the engagement of contractors. The retention of the term would not have any impact on the current situation under the TCF Award.

58. With respect to the outsourcing of work, the TCF Award currently contains Schedule F (Outwork and Related Provisions) which provides a comprehensive framework for the giving out of work in the TCF industry. Such a framework would remain unaffected by the retention of the term.

59. With respect to the engagement of labour hire firms, the TCF Award currently covers *'any employer which supplies labour on an on-hire basis in any of the industries set out in clause 4.1 in respect of on-hire employees in classifications covered by the award, and those on-hire employees, while engaged in the performance of work for a business on those industries.*' (see clause 4.7). The retention of the term in the TCF Award would have no impact on clause 4.7.

60. For the reasons outlined above, we reject the argument of the Ai Group that 'the suggested clause offends s.136 of the Act' and if included 'would have no effect as a result of s.137 of the Act.'

61. Finally, with respect to the Ai Group's submission regarding s134 (MAO) and s138 (necessity) of the Act, we refer to and rely on our submissions above at paragraphs [41] – [46] with respect to clause 11.1 of the TCF Award.

Filed on behalf of:

Construction Forestry Maritime Mining and Energy Union
(Manufacturing Division)

Vivienne Wiles
Senior National Industrial Officer and Co-ordinator

(30 August 2021)