Fair Work Commission
Section 156 - Fair Work Act 2009
4 Yearly Review of Modern Awards

Casual Employment and Part-time Employment
(AM2014/196 & AM2014/197)

Final written submissions in reply to common claims
Textile Clothing and Footwear Union of Australia

(8 August 2016)

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2014 AWARD REVIEW
(AM2014/196 & AM2014/197)
CASUAL AND PART-TIME EMPLOYMENT

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1. BACKGROUND

1.1 The Textile, Clothing and Footwear Union of Australia ('TCFUA') files these Final Written Submissions in Reply in accordance with the Directions issued by the Full Bench on 9 March 2016.

1.2 The TCFUA's submissions are directed to the common claims of the Australia Industry Group ('AIG) and the Recruitment and Consulting Services Australia ('RCSA') to vary multiple modern awards in respect to casual conversion provisions. The AIG and RCSA claims include proposed variations to clause 14.10 of the *Textile, Clothing, Footwear and Associated Industries Award 2010* ('TCF Award').

1.3 More specifically, the TCFUA's submissions are provided in response to the final written submissions filed by the AIG (13 June 2016)[1] and the RCSA (17 June 2016)[2] and the evidence provided at the Full Bench Hearings of these matters held in March 2016.[3]

1.4 The TCFUA strongly opposes the AI Group and RCSA claims.

1.5 The TCFUA's submission also responds to a number of questions in the FWC's Issues Paper[4] published on 11 April 2016 in relation to casual conversion provisions.

2. PREVIOUSLY FILED TCFUA SUBMISSIONS & EVIDENCE

2.1 In these proceedings, the TCFUA has to date filed the following documents in support of its opposition to the claims of AIG and RCSA:

- TCFUA Submission (27 February 2016)[5]
- TCFUA Submission (27 February 2016) – Attachment A (Table identifying current clause 14.10 of the TCF Award, proposed variations sought by the AIG and proposed variations sought by RCSA – marked up)[6]
- Witness Statement of Elizabeth Mary Macpherson (26 February 2016) [7]

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[1] (AM2014/196 & AM2014/197) Australian Industry Group; Final Written Submission (13 June 2016)
[2] (AM2014/196 & AM2014/197) Recruitment and Consulting Services Association; Outline of Final Submission – RCSA Application (17 June 2016)
[3] (AM2014/196 & AM2014/197) Full Bench Hearing (14 – 23 March 2016)
[4] (AM2014/196 & AM2014/197) FWC Issues Paper (11 April 2016)
[5] (AM2014/196 & AM2014/197) TCFUA Submission (27 February 2016)
[6] Ibid; Attachment A – note: reflects the AIG Draft Determination as amended by the AIG's written submission of 14 October 2016
[7] TCFUA: Exhibit #107 Witness Statement of Elizabeth Mary Macpherson (26 February 2016)

- TCFUA correspondence to FWC outlining objections to witness evidence filed by AIG and RCSA[8]

2.2 The TCFUA continues to rely on its submissions and evidence previously filed, the additional witness evidence given by Ms Macpherson at the Full Bench hearing,[9] and its objections to certain aspects of the RCSA's witness statements as outlined in its correspondence of 8 March 2016.

2.3 The TCFUA written submission (27 July 2016) was comprehensive in nature. To assist the Commission we outline below the matters which were addressed by the TCFUA and the relevant paragraphs of the TCFUA submission:

- Statutory framework for the 2014 Award Review[10]
- Nature of the TCF industry[11]
- Award regulation in the TCF industry [12]including:
    - Regulation of casual employment in TCF sector awards[13]
    - Part 10A Award Modernisation[14]
- Casual Conversion provision in the TCF Award 2010[15]
- Claims by the AI Group and RCSA[16]
    - AI Group and RCSA proposed variation: Employer obligation to provide written notice (4 weeks) to (eligible) casual employees[17]
    - The purported regulatory burden on employers of the notice requirement[18]
    - Employers' contention that written notice requirement is if limited utility and therefore not necessary[19]
    - Employer's contention that removal of written notice requirement would not disadvantage employees or remove the right to election[20]
- RCSA – other proposed variations to the TCF Award[21]
    - RCSA Claim – if 4 weeks' notice not given by employee, employee deemed to have elected against conversion[22]
    - RCSA Claim – change to requirement for discussion and agreement between employer and casual employee regarding nature of casual conversion[23]

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[8] TCFUA correspondence to FWC (8 March 2016) regarding objections to RCSA Witness Statements (Carly Fordred; Adele last; Amy Wolverson)
[9] Transcript PN8798 – PN8835; Oral evidence of Elizabeth Macpherson
[10] TCFUA Submission (27 February 2016); paras 2.1 – 2.2
[11] Ibid; paras 3.1 – 3.5
[12] Ibid; paras 4.1 – 4.18 [note: para 4.18 incorrectly numbered as 3.17]
[13] Ibid; paras 4.5 – 4.13
[14] Ibid; paras 4.14 – 4.18 [note: para 4.18 incorrectly numbered as 3.17]
[15] Ibid; paras 5.1 – 5.2
[16] Ibid; paras 6.1 – 6.55
[17] Ibid; paras 6.9 – 6.14
[18] Ibid; paras 6.16 – 6.20
[19] Ibid; paras 6.21 – 6.33
[20] Ibid; paras 6.34 – 6.38
[21] Ibid; paras 6.39 – 6.55
[22] Ibid; paras 6.40 – 6.44
[23] Ibid; paras 6.45 – 6.49

- RCSA Claim- proposed removal of provision confirming that after agreement, conversion is affected[24]
    - RCSA Claim – proposed deletion of anti-voidance provision[25]
- Modern Award Objective –s 134[26]
- AIG Submission in relation to Exposure Draft for TCF Award – Casual Conversion[27]

2.4 The Witness Statement of Elizabeth Macpherson (26 February 2016) filed on behalf of the TCFUA provided evidence in relation to:

- Experience and knowledge of the TCF industry[28]
- Nature of the TCF industry[29]
- Casualization in the TCF industry[30]
- Proposed variations by AI Group and RCSA[31]
    - Obligation on employers to provide written notice to casual employees[32]
    - RCSA claim – if not notice given by employee, employee deemed to have elected against conversion[33]
    - RCSA claim – change to requirement for discussion and agreement between employer and casual employee regarding nature of casual conversion[34]
    - RCSA claim – removal of obligation that an employer must not be engaged and re-engaged, dismissed or replaced to avoid obligations.[35]

2.5 Ms Macpherson has over 40 years' experience in the TCF industry, both as a production worker across all TCF sectors and as elected officer and/or employees with the TCFUA since 2002. [36]Ms Macpherson is currently a full time Organiser/Compliance Officer for the TCFUA, conducts on average between 750 – 850 compliance audits per year and has visited thousands of workplaces in the TCF industry.[37] It is submitted that her evidence should be given significant weight in context of such extensive experience over a significant period of time working in, and with employees in the TCF industry.

2.6 The TCFUA's correspondence to the FWC (8 March 2016) outlined objections to various paragraphs in the RCSA's witness statements of:

- Carly Fordred[38]
    - objection to Attachment CF-1, Q8 of RCSA Survey

[24] Ibid; paras 6.50 – 6.51
[25] Ibid; paras 6.52 – 6.53
[26] Ibid; paras 7.1 – 7.29
[27] Ibid; paras 8.1 – 8.6
[28] TCFUA: Exhibit #107 Witness Statement of Elizabeth Macpherson (26 February 2016); paras [4] – [13]
[29] Ibid; paras [14] – [20]
[30] Ibid; paras [21] – [23]
[31] Ibid; paras [24] – [47]
[32] Ibid; paras [26] – [40]
[33] Ibid; paras [41] – [42]
[34] Ibid; paras [43] – [44]
[35] Ibid; paras [45] – [47]
[36] TCFUA: Exhibit #107 Witness Statement of Elizabeth Macpherson (26 February 2016)
[37] Ibid; paras [9] – [11]
[38] RCSA: Exhibit #78 Witness Statement of Carly Fordred (3 October 2015)

- objection to Attachment CF-4, Q8 of RCSA Survey Results
- Adele Last[39]
  - objection to paragraph [14]
- Amy Wolverson[40]
  - objection to paragraph [24]
  - objection to paragraph [29]

2.7 The TCFUA maintains its objections to those parts of the RCSA evidence as outlined above.

3. TCF AWARD 2010 – INCLUSION OF CASUAL CONVERSION PROVISION

3.1 Prior to the making of the modern TCF Award there was a long history of regulation of casual employment in both pre-reform and pre-simplified awards in the TCF industry. [41] Although not uniform, the limitations on casual employment typically included terms such as:

- Definition of 'casual employee' as one who is engaged in relieving work or work of a casual, irregular or intermittent nature (and not an employee who could be properly classified as a full-time or regular part-time employee);
- maximum engagement periods for casual employees;
- maximum engagement of casual employees over a 12 month period;
- minimum daily engagement of casual employees;
- minimum weekly engagement of casual employees;
- ratio of casual employees to permanent employees (e.g. 1:15)
- higher casual loading (e.g. 33 and on third in the clothing sector);
- employees not be engaged as a casual employee to avoid any obligations under the relevant award.[42]

3.2 A number of these limitations were included in the same or similar form in the casual employment clause of the modern TCF Award.[43]

3.3 The current clause 14.10 (casual Conversion) (including the employer notification term) was first inserted the modern TCF award arising from the Part 10A award Modernisation process. The form of the casual employment term was a highly contested issue during the Part 10 Award Modernisation process, with the TCFUA and the main employer parties, including the AIG making substantive and detailed submissions in relation to it.[44] The AIG during this process consistently opposed the inclusion of a casual conversion clause for the proposed modern award for the TCF industry.

3.4 Despite this, the AIRC's Exposure Draft for the TCF Award (12 September 2008) contained a draft casual conversion provision and which was ultimately held to be necessary for inclusion in the final TCF Award made by the AIRC Full Bench on December

[39] RCSA: Exhibit #67 Witness Statement of Adele Last (6 October 2015)

[40] RCSA: Exhibit #62 Witness Statement of Amy Wolverson (29 February 2016)

[41] TCFUA Submission (27 February 2016), see paras [4.5] – [4.13] for detail of casual employment clauses in the TCF sector pre-reform and pre-simplified awards.

[42] Ibid;

[43] Textile, Clothing, Footwear and Associated Industries Award 2010; clause 14 (Casual Employment)

[44] See for example: (AM2008/91) TCFUA Submission (10 October 2008) in relation to the AIRC Exposure Draft; TCFUA Submission (1 August 2008); AIG Submission Submissions (1 September 2008), (9 September 2008) and (10 October 2008)

2008.[45] The form of the casual conversion provision determined by the AIRC is in identical terms to that which currently exists in clause 14.10 of the TCF Award 2010.

3.5 In determining the terms of the TCF Award, the Part 10A Award Modernisation Full Bench held, inter alia, that the 33 and one third casual loading for the clothing industry would not be retained and that a uniform casual loading of 25% would apply under the TCF Award for the textile, clothing and footwear sectors. Relevantly to the current proceedings, the Full Bench also determined that it was necessary to include a casual conversion term in the TCF Award having regard to both the reduction in the 33 and one third casual loading in the clothing industry, the nature of TCF industry and the history of casual employment regulation in the sector.

3.6 The Full Bench held in its Priority Stage decision regarding 'General Issues and Standard Clauses' in relation to 'casual conversion:

> *[51] An issue has also arisen concerning the provision permitting casuals to have the option to convert to non-casual employment in certain circumstances. This provision has its genesis in the Full Bench decision already mentioned in connection with the fixation of the casual loading of 25 per cent in the Metal Industry award. The Bench made clear that it had formulated the casual provision based on the circumstances of the industry covered by the award and that there had been no evidence concerning other industries. Section 515(1)(b) of the WR Act identifies casual conversion provisions as matters which cannot be included in awards. Section 525 provides that such terms have no effect. These sections were part of the WorkChoices amendments. It appears, however, that casual conversion provisions in NAPSA's were not invalidated. Modern awards can contain a casual conversion provision. In light of the arbitral history of such provisions in the federal jurisdiction we shall maintain casual conversion provisions where they currently constitute and industry standard, but we shall only extend them in exceptional circumstances. The modern awards reflect this approach. We note in particular that we have decided to include a casual conversion provision in the Textile, Clothing, Footwear and Allied* [sic] *Industries Award 2010 (the Textile Award) against the opposition of employers. We have done so taking into account the nature of the industry and the reduction in the casual loading from 33 1/3 percent to 25 per cent in part of the industry covered by the award.* [46] [citation numbers not included] [our emphasis]

3.7 Further, specifically in relation to the inclusion of the casual employment provision in the TCF Award 2010, the Full Bench held:

> *'[148] Particularly strong submissions were put in relation to casual employment. In the first place the TCFUA expressed great concern at the reduction in the casual loading from 33 1/3 per cent to 25 per cent. The second aspect, which the Australian Industry Group (AiGroup) raised, was the question of casual conversion. As to the percentage loading for casuals, we dealt with that issue in the general part of our decision. After examining the casual conversion we have decided to retain the clause in the exposure draft. Award limitations on the use of casuals have been of two*

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[45] *Award Modernisation* [2008] AIRCFB 1000 (19 December 2008); Textile, Clothing, Footwear and Associated Industries award 2010 [MA000017], operative date, 1 January 2010

[46] *Award Modernisation* [2008] AIRCFB 1000 (19 December 2008), at para [51]

kinds: the level of the loading and a limit on the number of times a casual can be engaged in a calendar year; the latter approach being more common in NAPSA's.

[1499] We think that given the history of the use of casual employment in the sectors the better approach for a modern award to apply throughout Australia is to include provision for a casual who elects to do so to convert to weekly employment'[47]

3.8 The extracted passages from the Priority Stage Award Modernisation decision illustrates that the Full Bench gave detailed consideration to the submissions of the union and employer parties in relation to the casual employment provision for the modern TCF Award. It is evident that the Full Bench weighed the retention of the higher 33 and one third casual loading against the proposed reduction to a uniform 25% casual loading and the inclusion of a casual conversion provision. Ultimately the Full Bench determined to include a casual conversion provision (including the employer notice obligation) for the TCF Award which remains in its current form.

4. AIG & RCSA CLAIMS: CASUAL CONVERSION – EMPLOYER NOTICE REQUIREMENT

4.1 The AIG[48] and the RCSA[49] have respectively filed claims to delete sub-clause 14.10(b) of the TCF Award which provides as follows:

14.10(b)
'Every employer of such a casual employee must give the employee notice in writing of the provisions of this subclause within four weeks of the employee having attained such period of six months. However, the employee retains the right of election under this subclause if the employer fails to comply with this notice requirement.'

4.2 The TCF Award is one of 21 modern awards which the AIG seeks to vary by removing the employer notification requirement. The RCSA seeks to vary 20 modern awards in a similar vein, including the TCF Award.

Legislative framework

4.3 The Full Bench *Preliminary Issues Decision* set the framework in which the 2014 Award Review is to be undertaken. Without repeating here in detail the key findings in the *Preliminary Issues Decision*, in context of the AIG and RCSA proposals to vary multiple awards by removing the notice obligation, a number of principles/legislative tests are particularly relevant. These include:

- a proponent of a significant change to a modern award must support such proposal with a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation;[50]

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[47] Award Modernisation [2008] AIRCFB 1000 (19 December 2008), at paras [148] – [149]
[48] AIG: Draft Determination – Textile, Clothing, Footwear and Associated Industries Award 2010 [MA000017] (filed 17 July 2015)
[49] RCSA: Draft Determination – Textile, Clothing, Footwear and Associated Industries Award 2010 [MA000017] (filed 17 July 2015
[50] *Preliminary Issues Decision*; para [60.3]

- the Commission will also have regard to the historical context applicable to each modern award and will take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also be considered. Previous Full Bench decisions will generally be followed, in the absence of cogent reasons for not doing so;[51]
- 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;[52]
- there may be no one set of provisions in a particular modern award which can be said to provide a fair and relevant minimum safety net of terms and conditions. There may be a number of permutations of a particular modern award, each of which may be said to achieve the modern awards objective;[53]
- the characteristics of the employees and employers covered by modern award varies between modern awards. To some extent the determination of a fair and relevant minimum safety net will be influenced by these contextual considerations. It follows that the application of the modern awards objective may result in different outcomes between different modern awards. [54]

4.4 The TCFUA submits that the historical context of the making of the modern TCF Award and the characteristics of the employees and employers in the TCF industry are directly relevant to the Full Bench's consideration of the AIG and RCSA claims. These contentions are expanded on elsewhere in this submission.

4.5 In its earlier written submission (27 February 2016)[55] the TCFUA dealt extensively with the AIG and RCSA variation proposals to remove the employer obligation to provide written notice to a casual employee seeking casual conversion. The TCFUA Submission included a summary of the contentions made by AIG and RCSA, the evidence led in support by RCSA and the TCFUA's arguments and evidence in response.

4.6 In respect to evidentiary material, the AIG filed no witness statements in support of is claim. Instead, the AIG sought to rely on the witness evidence filed by the RCSA in the proceedings which given the nature of RCSA are solely limited to employers in the labour hire or on-hire industry.

4.7 There is no witness evidence led by either the RCSA or the AIG which specifically deals with the casual conversion clause in the TCF Award and/or the circumstances of casual conversion in the TCF industry,

4.8 In reviewing the Final Written Submissions filed by the AIG[56] and the RSCA,[57] it appears that both AIG and RCSA have, with minimal change, essentially repeated their original contentions.

[51] Ibid; para [60.3]
[52] Ibid; para [60.3]
[53] Ibid; para [60.6]
[54] Ibid; para [60.7]
[55] TCFUA Submission (27 February 2016) at paras 6.9 – 6.38
[56] AIG Final Submission (13 June 2016)
[57] RCSA Final Submission (17 June 2016)

RCSA Evidence

4.9 The RCSA witness evidence, by implication, is limited to labour or on-hire employers. The TCFUA submits that the RCSA evidence, either individually or in totality, does not meet the test of being probative in the sense required by the *Preliminary Issues Decision*; that is, probative evidence properly directed to demonstrating the facts supporting the proposed variation. Much of the RCSA evidence is speculative, self-serving and/or based on flawed survey results and/or incomplete internal data relating to casual conversion.

4.10 Very little of the RCSA evidence has any specific relevance to the incidence and circumstances of casual conversion in TCF industry under the TCF Award. In this context, the TCFUA submits little if any weight should be given to the RCSA evidence as supporting a variation to the TCF Award in the manner sought.

4.11 Further, the TCFUA submits that any generalised findings (which apply to all employers, or all employers in a particular industry) should not be made on the basis of the RCSA evidence given its limited scope as applying to on-hire employers only.

3.12 In the TCF industry, labour hire or on-hire employment is not the norm for casual employees, who are generally more likely to be directly employed. In respect to the form of casual employment in the TCF industry, Ms Macpherson's unchallenged evidence provided on behalf of the TCFUA, was that:

> *'Whilst labour hire or on-hire does exist in the TCF industry, in my experience casual workers in the sector (particularly in clothing manufacture) tend to be directly employed by their employer, rather than through a labour hire company.'*[58]

Witness evidence of Carly Fordred (Marketing and Communications Manager, RCSA)[59]

4.12 Ms Fordred's evidence comprises a short statement with four attachments:

- "CF-1" Final version of Casual Conversion Survey, 29 September 2015
- "CF-2" Copy of email sent to RCSA corporate delegates with link to Survey, 29 September 2015
- "CF-3" Copy of reminder email sent to same contacts, 5 October 2016
- "CF-4" Copy of raw data of result

4.13 The TCFUA has formally objected[60] to certain aspects of Ms Fordred's witness statement on the following grounds:

Paragraph	Nature of Objection
Attachment "CF-1" Q8 of RCSA Survey	Objection on basis of hearsay evidence: ○ Q 8 asks respondents 'What is the most common reason given by an eligible casual as to why they do not want to convert to permanent employment with your firm?' ○ Objection on the basis that the question seeks to illicit answers that are based on hearsay, or

[58] TCFUA: Exhibit #107 Witness Statement of Elizabeth Macpherson (26 February 2016), para [22]
[59] RCSA: Exhibit #78 Witness Statement of Carly Fordred (3 October 2015)
[60] TCFUA correspondence to the FWC (Objections to witness evidence), Attachment A (8 March 2016)

	purported hearsay i.e. purported statements made by unidentified casual employee/s to an unidentified respondent/s (labour hire company) o The TCFUA is prejudiced as it is not in a position to test the veracity of the responses provided in response to Q8.
Attachment 'CF-4' Q8 of RCSA Survey Results	Objection on basis of hearsay: o Objection on the basis that the results to Q8 are hearsay – see comments above o The TCFUA is prejudiced as it is not in a position to test the veracity of the responses provided in response to Q8.

4.14 The TCFUA maintains its objections outlined above.

4.15 It is submitted that the RCSA Survey ("CF-1") is seriously flawed in terms of design and methodology, and the subsequent results ("CF-4") are similarly compromised and cannot be said to be representative of on-hire employers, even of RCSA's own membership. Attachment "C-4" to Mr Fordred's statement illustrates the extremely limited information which can be drawn from the survey results. For example:

- The total number of respondents to the survey was 28[61] (out of approximately 3,000 company and individual members the RCSA represents[62]);
- of 28 respondents, 25 employed on-hire employees on a casual basis;[63]
- of 28 respondents, 10 indicated that they predominantly on-hire workers to the 'manufacturing industry'[64] (but no further sectoral breakdown is provided);
- of 21 respondents, 11 said that they were covered by an 'award which requires you to write to casual employees after a period of ongoing casual employment, and give them the right to elect to convert to permanent employment';[65]
- only 8 respondents answered the question regarding the percentage of casual employees who had been sent a letter advising of their right to elect to become a permanent employee.[66]

4.16 The documents subsequently provided by the RCSA (Carly Fordred) to the Commission subject to an Order to Produce[67] similarly illustrates the serious limitations in the survey results, with widespread non-responses in questions, particularly Question 5 (Covered by awards in Attachment A), Question 6 (Casuals wanting to convert) and Question 7 (Average time taken to manage conversion process per quarter).

[61] RCSA: Exhibit #78 Witness Statement of Carly Fordred (3 October 2015); "C-4", Question 1 results
[62] RCSA: Exhibit #78 Witness Statement of Carly Fordred (3 October 2015); para [3]
[63] RCSA: Exhibit #78 Witness Statement of Carly Fordred (3 October 2015); "C-4", Question 4 results
[64] RCSA: Exhibit #78 Witness Statement of Carly Fordred (3 October 2015); "C-4", Question 1 results
[65] RCSA: Exhibit #78 Witness Statement of Carly Fordred (3 October 2015); "C-4", Question 5 results
[66] RCSA: Exhibit #78 Witness Statement of Carly Fordred; "C-4", Question 6 results
[67] Order Requiring Production of Documents to FWC, VP Hatcher (15 February 2016) on application by the ACTU, AMWU & CFMEU (Construction and General Division) requiring Ms Fordred to provide 'All documents, spreadsheets and/or electronic files that show the individuals responses to each of the questions identified in Attachment "CF-1" to the statement of Carley Fordred, made by the 28 firs that responded to the casual employment survey referred to in paragraphs 4 to 13 of the statement of Carly Fordred.'

4.17 Even taking the RCSA Results at face value, they demonstrate the paucity of data which could be considered relevant to the key issues in contest in these proceedings. For example:

- Less than 1% (approximately 0.90%) of RCSA's approximate membership of 3000 responded to the RSCA Survey;
- Only 10 respondents out of 28 responded that they predominantly on-hire workers to the 'manufacturing industry' with no further breakdown to manufacturing sectors;
- Only 8 respondents out of 28 provided a response to the questions about the extent of casual conversion after the issuing of a letter to relevant casual employees. This equates to a response rate of approximately 1.27% of RCSA's membership of 3000.

4.18 Critically neither Ms Fordred's witness statement, "Attachment 'CF-4" to the Witness Statement or the documents provided pursuant to the Order for Production identify which specific modern awards the respondents to the RCSA Survey were covered by and/or which of them, if any, operated in the TCF industry.

4.19 In these circumstance the TCFUA submits that Ms Fordred's evidence, including the RCSA Survey results are not probative in the sense contemplated by the Preliminary Issues Decision and should be given little weight. Further, Ms Fordred's evidence does not assist the Commission to draw any reasonable findings regarding casual conversion for employees covered by the TCF Award in the on-hire industry.

Witness evidence of Adele Last (General Manager of Horner Recruitment Systems Pty Ltd)[68]

4.20 The TCFUA has objected[69] to certain parts of Ms Last's witness statement on the following grounds:

Paragraph	Nature of Objection
Paragraph [14]	Objection on the basis of hearsay: o Paragraph [14] refers to a conversation between the witness and Mr Darren James (IR Manager) in relation to what unidentified casual employees have purportedly said to Mr James. o Further, the last sentence of paragraph [14] includes a statement whereby the witness purports to summarise a conversation between Mr James and the unidentified casual employees. o Mr James was not been called by RSCA as a witness in the proceedings. o The TCFUA is prejudiced as it is not in a position to test the veracity of the purported conversations between Mr James and the unidentified casual employees

[68] RCSA: Exhibit #67 Witness Statement of Adele Last (06 October 2015); Transcript PN5855 – PN6057
[69] TCFUA correspondence to the FWC (Objections to witness evidence), Attachment A (8 March 2016)

4.21 The TCFUA maintains its objection to paragraph [14] of Ms Last's witness statement. In light of Ms Last's failure to produce documents (see below) relevant to the purported conversations referred to in paragraph [14] of her statement, and the failure of RCSA to call Mr James as a witness, the TCFUA submits that paragraph [14] should be struck out.

4.22 An Order for Production of Documents was made in relation to Ms Last on 15 February 2016.[70] The Schedule to the Order required Ms Last to provide documents as specified in relation to 9 main categories. Documents provided by Ms Last pursuant to the Order related to only 4 categories. Documents sought by the Applicant unions but not provided include:

- (Category 2) All documents that identify the number of on-hire employees of Horner Recruitment covered by each of the awards referred to paragraph 9 of the statement of Adele Last;
- (Category 3) All documents relating to or recording the process detailed at paragraph 12 of the statement of Adele Last, including but not limited to all documents relating to or recording:
    - (Sub-category 3(1) The reports produced by Darren James, Industrial Relations Manager, referred to in paragraphs 12(a) and (b), since 1st January 2010 recording the casual on hire employees employed for 6 or 12 months;
    - (Sub-category 3(3) The date on which each of the eligible employees was notified as referred to in paragraph 12(d)
- (Category 4) The diary notes recording all contact between Mr James and casual employees regarding casual conversion referred to in paragraph 14 of the statement of Adele Last;
- (Category 5) All documents that identify the length of employment and the average hours worked each week of each of the eligible casual employees referred to in paragraph 15 of the statement of Adele Last;
- (Category 8) Copies of all reminders sent to employees as referred to in paragraph 17 of the statement of Adele Last.
- (Category 9) All diary notes, time and wages records and other documents that identify the time take taken by the Industrial Relations Manager to implement the process, for each quarter from 1st January 2010 up to the present date, as referred to in paragraph 19 of the statement of Adele Last.

4.23 Ms Last's evidence is that Horner Recruitment employs on-hire employees in Victoria only[71] and employs approximately 600 on-hire employees.[72] In respect to those 600 employees Ms Last has provided no evidence as to the number of casual on-hire employees covered by the TCF Award, including the average length of employment of such employees (if any).

4.24 Ms Last's evidence is to the effect that since 1 January 2010 there are 82 notification letters on file at Horner Recruitment which have been purportedly sent to casual employees covered by modern awards which provide a right to elect to convert to

[70] Order Requiring Production of Documents to FWC, VP Hatcher (15 February 2016) on application by the ACTU, AMWU & CFMEU (Construction and General Division)
[71] RCSA: Exhibit #67 Witness Statement of Adele Last (6 October 2015); para [10]
[72] Ibid; para [8]

permanent employment (as at the date of the hearing held on 18 March 2016).[73] Copies of the notification letters were produced as part of the Order to Produce ("Notification Letters"). The evidence in relation to the Notification Letters illustrates:

- they are all in template form other than the date, name and address of employee (redacted), the current assignment, name of the award, and permanent rate of pay;[74]
- whilst the notification letters are dated there is no evidence before the Commission as to when the casual employees received the letter, or if they received them. Ms Last's evidence is that 'A letter is prepared at head office for each eligible employee, and sent to the relevant branch for distribution to the employee's home address.'[75]
- the 82 letters were sent on 8 discrete dates ranging from 30 July 2010 to 9 September 2015;[76]
- each of the template letters refer to the relevant casual conversion clause as being '13.3 Casual conversion to full-time or part-time employment' irrespective of which modern award actually covered the casual employee in question;[77]
- of the 82 Notification Letters produced only 5 relate to a casual employee covered by the TCF Award, and all 5 are dated on the same day, 8 August 2014 and concerned the same current assignment.[78]

4.25 Ms Last's evidence is that previously Horner Recruitment sent reminders to employees that had not responded to the notification,[79] but did not produce copies of any such documents in accordance with the Order to Produce (category 8).

4.26 Ms Last's gave evidence as to the purported time Horner's Industrial Relations Manager [Darren James] spent on the process of notifying [eligible] employees of their right to elect to convert to permanent employment.[80] However, Ms Last did not produce any documents in accordance with the Order to Produce (category 9) which supports such a statement. Nor was Mr James called by RCSA to give direct evidence of such matters.

4.27 Ms Last's evidence is that Mr James produces quarterly reports of casual on-hire employees employed for 6 or 12 months. However, Ms Last did not produce any documents in accordance with the Order to Produce (category 3(1) which supports such a statement. Nor was Mr James called by RCSA to give direct evidence of such matters.

4.28 The evidence of Ms Last illustrates that, based on the number of employees who received Notification letters between 1 January 2000 and 18 March 2016, the overwhelming majority of on-hire casual employees engaged by Horner Recruitment do

[73] RCSA: Exhibit #67 Witness Statement of Adele Last (6 October 2015); para [15], as amended at Hearing. Transcript PN5857 – PN5868
[74] Notification Letters produced in response to Order for Production; Transcript PN5930 – PN5931
[75] RCSA: Exhibit #67 Witness Statement of Adele Last (6 October 2015); para [12(c)]
[76] Notification Letters produced in response to Order for Production; Transcript PN5901 – PN5927
[77] Notification Letters produced in response to Order for Production; Transcript PN5932 – PN5953
[78] Notification Letters produced in response to Order for Production
[79] RCSA: Exhibit #67 Witness Statement of Adele Last (6 October 2015); para [17]
[80] RCSA: Exhibit #67 Witness Statement of Adele Last; (6 October 2015); para [19]

not reach the 6 or 12 month point in order to even trigger the casual conversion clauses in the relevant awards.

4.29 Further, during the same period, the number of casual employees engaged by Horner Recruitment covered by the TCF Award who reached the 6 month mark was a total of 5 (approximately 0.85% of the 600 on-hire employees). It is submitted that this demonstrates that Horner Recruitment spends negligible time and resources facilitating the casual conversion obligations contained in clause 14.10 of the TCF Award, in particular the obligation to provide written notice to eligible casual employees under the clause.

RCSA: Witness evidence of Amy Wolverson (QA and HR Co-ordinator, McArthur (SA) Pty Ltd[81]

4.30 The TCFUA has objected[82] to certain parts of Ms Wolverson's witness statement as follows:

Paragraph	Nature of Objection
Paragraph [24]	Objection on basis of generalised hearsay: o The witness in paragraph [24] makes generalised conclusions in relation to the needs of 'on-hire workers' based on (presumably) unidentified statements made by such workers.
Paragraph [29]	Objection on basis of speculation: o The statement made by the witness in paragraph [29] is purely speculative and without reasonable foundation. o It is evident from the statement that Mr McArthur (SA) Pty Ltd has no experience in implementing existing casual conversion clauses in modern awards.

4.31 The TCFUA maintains its objections to paragraphs [24] and [29] of Ms Wolverson's witness statement.

4.32 Ms Wolverson's evidence is that approximately 13% of McCarthur's on hire casual employees work on assignment for more than 6 months (approximately 840 employees per year) and that none of these are covered by the TCF Award.[83]

RCSA: Witness evidence of Stephen Noble (Managing Director at Australia Wide Personnel Pty Ltd Ltd)[84]

4.33 Mr Noble gave evidence that Australia Wide Personnel Pty Ltd engages employees covered by 7 modern awards which relevantly provide for a casual conversion clause.[85]

4.34 None of the awards identified by Mr Noble include the TCF Award.

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[81] RCSA: Exhibit #62 Witness Statement of Amy Wolverson (29 February 2016); Transcript PN5635 – PN5659
[82] TCFUA correspondence to the FWC (Objections to witness evidence), Attachment A (8 March 2016)
[83] RCSA: Exhibit #62 Witness Statement of Amy Wolverson (29 February 2016); para [30]; Transcript PN5651 – PN5652
[84] RCSA: Exhibit #71 Witness Statement of Stephen Noble (17 October 2015); Transcript PN6240 – PN6283
[85] RCSA: Exhibit #71 Witness Statement of Stephen Noble (17 October 2015) , para [6] as amended at hearing – Transcript PN6066 – PN6067

RCSA: Witness evidence of Kathryn MacMillan (Managing Director of Nine2Three Employment Solutions Pty Ltd)[86]

4.35 Ms MacMillan gave evidence that all Nine2Three Employment Solutions casual on-hire employees are engaged under the Nine2ThreeEmploymetn Solutions Pty Ltd Employee Collective Agreement 2007.[87] The definition of 'Award' in clause 2 of the Agreement identifies that the agreement would not cover any employee who would undertake work covered by the TCF Award.

RCSA and AIG Final Submissions

4.36 In summary, the AIG's contentions in support of its claim to remove the employer notification provision in awards with casual conversion clauses are that:

- the merits of the notification requirement originated as part of an earlier casual conversion package;[88]
- the context in which the notification requirement was originally determined has changed substantially;[89]
- the disproportionate burden on employers;[90]

4.37 The RSCA in its Final Submission, generally adopts and relies on the submissions made by the AIG.[91]

Contention: FWC should not be 'overly constrained' by previous decisions (casual conversion)

4.38 The AIG contends variously that 'it should not be assumed that the merits of notification requirements that exist in modern awards today are necessarily established by past key decisions on casual conversion rights' and that the 'Commission should not be overly constrained' by such decisions 'when separately considering the merits of a notification requirement'.[92]

4.39 In the consideration of the AIG and RCSA's claim to remove the employer notification in casual conversion clauses, in context of the broader 2014 Award Review the primary question before this Full Bench is whether the notification requirement is a necessary term, as part of a casual conversion clause is necessary to ensure that modern awards meet the modern awards objective (s.134). In undertaking this task, the *Preliminary Issues Decision* makes clear that the Full Bench is to have regard to the historical context applicable to each modern award and will take into account previous decision relevant to any contested issue and consider the context in which those decisions were made. In the absence of cogent reasons for not doing so, previous Full Bench decisions should generally be followed and prima facie the modern award being reviewed achieved the modern awards objective at the time it was made.

4.40 Whilst the AIG contends that the Casual and Full Employment Full Bench should not consider itself overly constrained by the Full Bench decisions referred to in its Final

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[86] RCSA: Exhibit #75 Witness Statement of Kathryn MacMillan (29 February 2016); Transcript PN6392 – PN6540
[87] RCSA: Exhibit #75 Witness Statement of Kathryn MacMillan (29 February 2016); para [11]
[88] AIG Final Submission (13 June 2016); paras [15] – [27]
[89] Ibid; paras [28] – [34]
[90] Ibid; paras [35] – [45]
[91] RCSA Final Submission (17 June 2016); para [5]
[92] AIG Final Submission (13 June 2016);paras [26] – [27]

Submission, equally the statutory framework for the 2014 Award Review confirms that those decisions cannot be disregarded and due consideration needs to be given to them.

Contention: 'changed context'

4.41 Secondly, the AIG contend that the context in which the notification requirement was determined has 'substantially changed.' The TCFUA strongly oppose these contentions. The witness evidence led by the ACTU and other unions (AMWU in particular) in their common claims matters, illustrates that the necessity for casual conversion provisions at the safety net level remains directly relevant in transitioning eligible casual employees to permanent work. The multiple benefits for employees which attaches to permanent employment has been well documented. The growth in casual employment over the last 15 years, whilst having steadied in the more recent period, demonstrates contrary to AIG's submission that the current 'context' even more significantly supports the retention of the notice provision.

4.42 The approach by the AIG in seeking to disaggregate the notification requirement from the balance of the terms in casual conversion provisions in awards ignores the beneficial and enabling purpose of casual conversion processes at the safety net level. For example, the preamble of clause 14.10 of the TCF Award provides that:

> *'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.'*[93]

4.43 The employer notification requirement directly facilitates eligible casual employees to access the opportunity to transition to permanent full time or part-time employment. In the TCF industry it is an important and necessary element of the casual conversion framework. Ms Macpherson's unchallenged evidence was:

> *'In my day to day experience as an organiser/compliance officer I regularly come across circumstances where casual employees are about to, or have already reached or surpassed the six month mark in their employment. Some casual employees that I see have been employed casually for some years, and in other cases they have not. But in either case the obligation is important because it is part of the trigger to the right for an employee to seek to elect to convert, and sets in train the other notice provisions in the clause.*
>
> *I have found that in a practical sense, that if the notification obligation is complied with, it alerts the casual employee to the fact that they have such a right (casual conversion election) under the TCF Award, and to make contact with, and seek advice and assistance from the union and/to start the discussion with their employer about the conversion process.*
>
> *Even where the employer has not provided the written notice, but I become aware that a particular employer has casual employees with employment over the 6 months, it assists in raising the issues the employer directly. Some employers in the TCF industry (often smaller clothing companies) appear not to be aware of the casual*

[93] TCF Award 2010; clause 14.10

conversion provisions in the TCF Award. When I advise them of their obligations and award framework for casual conversion (particularly the requirement to give written notice) it lends a degree of formality and structure to a discussion about the conversion process. I believe this assists in identifying reasonably quickly whether the casual employees wants to convert to permanent employment, and what is the position in response from the employer.'[94]

4.44 Additionally, Ms Macpherson in her witness evidence provided a number of actual examples of where she has assisted a TCF employee to access the casual conversion clause in the TCF Award and moved successfully to permanent employment.[95] Contrary to AIG's contention 'that most casual employees do not wish to convert to permanent employment', Ms Macpherson's evidence illustrates that she regularly represents casual employees in the TCF industry to transition to full time or part-time permanent employment.

4.45 In its Final Submissions, the AIG takes issue with the use of the word 'trigger' in the Ms Macpherson's evidence.[96] The AIG's argument mischaracterises Ms Macpherson's evidence. As outlined in the extract of her evidence outlined above, Ms Macpherson states that that the *'[notice] obligation is important because it is part of the trigger to the right for an employee to seek to elect to convert and sets in train the other notice obligations in the clause.'* There is nothing untrue or misleading in Ms Macpherson's statement. It reflects the actual terms of the casual conversion clause in the TCF Award (14.10) in that the employer notice obligation is mandatory and the giving of the notice to the employer then triggers subsequent time based obligations as follows:

'14.10
(c) Any casual employee who has a right to elect upon receiving notice or after the expiry of the time for giving such notice, may give four weeks' notice in writing to the employer that the employee seeks to convert their ongoing contract of employment to full-time or part-time employment, and within four weeks of receiving such notice from the employee, the employer must consent to or refuse such election, but will not so unreasonably refuse.'[97]

Contention: 'The disproportionate regulatory burden on employers'

4.46 The AIG's third contention in support of the removal of the notice obligation is the 'disproportionate burden on employers'. AIG make these contentions but did file any evidence of its own in support of this submission, simply relying on the evidence of the RCSA. Rather than repeat them here, the TCFUA relies on its submissions above in respect to the RCSA evidence.

4.47 AIG contend that the 'notification requirement applies despite the employer's right to refuse an employee's request to convert, where reasonable, and that this therefore makes the burden of the notice requirement 'disproportionate to the benefit afforded the employee.'[98] There is minimal employer evidence before the Commission generally

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[94] TCFUA: Exhibit #107 Witness Statement of Elizabeth Macpherson (26 February 2016) paras [27] – [29]
[95] Ibid; at paras [30], [31] in respect to employees at 'Flags of All Nations' (Qld) and Geelong Monogramming (Vic)
[96] AIG Final Submission (13 June 2016), paras [65] – [67], [70] – [72]
[97] Textile, Clothing, Footwear and Associated Industries Award 2010, Clause 14.10(c)
[98] AIG Final Submission (13 June 2016) para [45]

as to the level of employer refusal to convert casual employees, and none in relation to the TCF Award. In any event, AIG's (and RCSA's) contentions on this issue ignore the express beneficial purpose of casual conversion clauses, including in the TCF Award.

Contention: notification requirement is no longer necessary under s.138

4.48 AIG contend that the employer notification requirement is no longer necessary under s138, particularly when other measures are now in place to advise employees of their rights and entitlements, including:

- obligations in modern awards requiring employers to provide access to the award and the NES;
- obligation on employers under the FW Act to provide each new employee with a copy of the Fair Work Information sheet;
- information on FWO website.

4.49 These submissions do not reflect the reality of many workplaces, particularly in the TCF industry where award compliance is often low. The assumptions include:

- provision of access to award and NES is generally complied with;
- provision of the *Fair Work Information Statement* is generally complied with;
- where access to the award and the NES is provided, employees read the award/NES in total and understand its contents;
- all employees have proficient English language reading and comprehension skills;
- all employees have proficient computer literacy skills;
- the *Fair Work Information Statement* is provided to employees from NESB and CALD backgrounds in a language other than English when they commence employment;
- employees being aware that they have casual conversion rights in the first instance, as distinct from having a general understanding of the nature of casual employment itself as being insecure etc.

4.50 Ms Macpherson's unchallenged evidence[99] demonstrates the unsustainability of these assumptions in context of the TCF industry.

4.51 On the issue of access to the award/NES, Ms Macpherson gave evidence that:

> *'…in practice I regularly visit workplaces where typically there is no noticeboard as such, or if there is there is not a copy of the TCF Award placed on it. Additionally, the nature of the work that many TCF workers perform (clothing machinist for example), does not provide them with ready access to computers by which they could have access to an electronic version of the TCF Award.'*[100]

4.52 On the issue of employer provision of the *Fair Work Information Statement* Ms Macpherson's evidence was:

[99] TCFUA: Exhibit #107 Witness Statement of Elizabeth Macpherson (26 February 2016), paras [16] – [20], [38] – [40]
[100] TCFUA: Exhibit #107 Witness Statement of Elizabeth Macpherson (26 February 2016), paras [38]

'In the course of my extensive workplace visits and dealings with workers, it is rare to find that an employer has provided new employees with the Fair Work Information Statement. Occasionally I have met a new employee in the TCF industry who has been provided with this document, but it is very much the exception rather than the rule. If it has been provided to the worker it is invariably in English and no attempt has been made to provide it in their primary language, if they are Vietnamese for example.[101]

The failure by employers to ensure access to the TCF Award and to provide the 'Fair Work Information Sheet' are just two of many and varied breaches of the award/NES that I come across every week in TCF workplaces.'[102]

4.53 In relation to the extent of English language proficiency amongst workers in the TCF industry, Ms Macpherson gave evidence that:

'The profile of the TCF workforce is characterised by high numbers of workers from non-English speaking backgrounds, including longer term migrants and more recent arrivals to Australia. Workers form Vietnamese and Chinese backgrounds represent the two nationalities most commonly found in the TCF sector. Many have limited English language and literacy skills. To assist in the organising and representation of NESB workers the TCFUA employs organisers and outreach workers with specific language skills.'[103]

4.54 The AIG opposes that the TCFUA's contentions regarding non-compliance of employers in the TCF industry with the award access and *Fair Work Information* obligations, given that the substantive obligation under the casual conversion clause is not altered.[104] This is a disingenuous position, given that it is AIG (and RCSA) which contend that the access to award/NES and *Fair Work Information Statement* obligations *justify* the removal of the notice obligation, yet then contend that non-compliance with these obligations is somehow irrelevant.

4.55 The TCFUA submits that the issue of compliance with award safety net terms is a relevant consideration for the Full Bench within the statutory framework applying the 2014 Award Review. The Preliminary Issues Decision held that s.3 (Objects of the Act) are relevant to the Review.[105] The Objects of the Act include *'ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders.'* [106][our emphasis]

4.56 Ms Macpherson's evidence above also goes by implication to an employee's capacity to firstly access the FWO website (assumes computer proficiency) and to accurately comprehend the information provided there.

4.57 It is worth noting that the *Fair Work Information Statement* does not refer to 'casual employment' or 'casual conversion' but simply to 'types of employment'. The Table of

[101] TCFUA: Exhibit #107 Witness Statement of Elizabeth Macpherson (26 February 2016), para [39]
[102] TCFUA: Exhibit #107 Witness Statement of Elizabeth Macpherson (26 February 2016), para [40]
[103] TCFUA: Exhibit #107 Witness Statement of Elizabeth Macpherson (26 February 2016), para [18]
[104] AIG Final Submission, paras [89] – 92]
[105] Preliminary Issues Decision; para [10]
[106] Fair Work Act 2009, s.3(b)

Contents in the TCF Award refers to 'Casual Employment' but not to 'Casual Conversion'. As part of the 2014 Award Review, the Revised Exposure Draft for the TCF Award no longer separately refers to 'Casual Employment' in the Table of Contents, but is now subsumed under the heading 'Types of Employment'.[107] The assumption that all award dependent employees in the TCF industry can easily navigate through these documents to information which identifies that there is a right for a casual to elect to convert to permanent employment, is with respect, illusory for many.

4.58 The AIG submit that 'there are no other specific award entitlements that an employer must separately advise employees about.'[108] However, modern awards do and awards have traditionally, contained terms which require an employer to advise employees about certain rights, with a view to facilitate understanding. For example, in the TCF Award, the consultation clause, 'Consultation about changes to rosters or hours of work' contains an additional obligation whereby the information to be required to affected employees is provided '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.'[109]

5. RCSA CLAIMS: CASUAL CONVERSION – OTHER CLAIMS IN RELATION TO CLAUSE 14.10

5.1 The RCSA Draft Determination for the TCF Award 2010 (filed 27 July 2015)[110] seeks 4 further variations to clause 14.10 in addition to the removal of the employer notice obligation discussed above. To assist the Commission, the RCSA's additional variations are shown as marked up in Attachment A to the TCFUA Submission (27 July 2016).

5.2 The TCFUA submits that RCSA's additional 4 proposed variations are substantive in nature and would represent a significant change to the current casual conversion provision in the TCF Award. They are not technical/drafting, or simply 'consequential' variations and should be considered as stand-alone proposed variations which affect existing substantive rights.

5.3 However, at no stage in these proceedings has the RSCA filed any specific submissions or evidence in support of the proposed variations to sub-clauses 14.10(c), 14.10(e), 14.10(g) and 14.10(i) of the TCF Award. In this respect the RCSA has failed to comply with the Commission's directions in this matter.

5.4 The failure of the RCSA to advance any merit argument at all in relation to the proposed variations is also directly inconsistent with the statutory framework for the conduct of the 2014 Award Review. The Full Bench in the *Preliminary Issues Decision*,[111] held:

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[107] (AM2014/91) Textile, Clothing, Footwear and Associated Industries Award 2010; Revised Exposure Draft (published 4 November 2015), Table of Contents – 'Part 2- Types of Employment and Classifications' and clause 6 'Types of Employment'.

[108] AIG Final Submission (13 June 2016) para [86]

[109] Textile, Clothing, Footwear and Associated Industries Award 2010, clause 9.2(c) and s.156 – *4 Yearly Review of Modern Awards*; (AM2014/91) Textile, Clothing, Footwear and Associated Industries Award 2010, [2015] FWCFB 2831 (11 May 2015)

[110] RCSA Draft Determination; op cit.

[111] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 (17 March 2104)

'[23] The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the <u>Review must advance a merit argument in support of the proposed variation</u>. The extent of such an argument will depend on the circumstances. We agree with ABI's submission that some proposed changes may be self-evident and can be determined with little formality. However, <u>where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation</u>.'[112] [our emphasis]

5.5 In these circumstances, it is the TCFUA's primary submission that the RCSA's proposed variations to sub-clauses 14.10(c), 14.10(e), 14.10(g) and 14.10(i) of the TCF Award should be dismissed on the grounds they are not supported by a submission which addresses the relevant legislative provisions and are not accompanied by probative evidence directed to demonstrating the facts supporting the proposed variation. Consistent with the legislative tests, there would appear to be no reasonable basis upon which the Commission could satisfy itself in the exercise of its discretion under s.156(2) to make the variations sought by the RCSA.

5.6 In the alternative, the TCFUA submits that the RCSA's proposed variations should be dismissed as without merit, as there is no material before the Commission as to how the proposals meet the modern awards objective (s.134) or could be held to be 'necessary' in the sense contemplated by s.138. The TCFUA provides further submissions below in this regard.

RCSA Claim: if 4 weeks' notice given by employee, employee deemed to have elected against conversion

5.7 The RCSA's Draft Determination proposed variations to the current sub-clauses 14.10(c) and 14.10(e), renumbered as 14.10(b) and 14.10(d) on the basis of the deletion of the employer notice obligation (current 14.10(b)). If the RCSA's proposed variation was accepted the relevant clauses (as amended would read as follows):

14.10(b) [renumbered from current 14.10(c)]
'Any casual employee who has a right to elect upon completing the period of six months employment may give four weeks' notice in writing to the employer that the employee seeks to elect to convert their ongoing employment, and within four weeks of receiving such notice from the employee, the employer must consent or refuse the election, but will not so unreasonably refuse.'

14.10(d) [renumbered from current 14.10(e)]
'Any casual employee who does not, within four weeks of completing the period of six months employment, elect to convert their ongoing contract of employment to full-time employment or part-time employment will be deemed to have elected against any such conversion.' [our emphasis]

[112] Ibid; at para [23]

5.8 This proposed variation, in combination with the removal of the employer notice obligation would mean:

- the onus directly shifts to the casual employee to trigger the casual conversion process;
- assumes the casual employee has actual knowledge of their right to seek to elect to convert to permanent employment under the TCF Award;
- whether the casual employee has knowledge of this right or not, requires the employee to provide written notice of their election to the employer within four weeks of completing the period of 6 months employment; and
- if the casual employee fails to do so they are deemed to have elected against such conversion.

5.9 The clear implication of the proposed variation is that many casual employees will have their current right to elect under the TCF Award essentially extinguished.

5.10 The unchallenged evidence of Ms Macpherson[113] went directly to this potential consequence:

> *'As I understand this proposed variation, the casual employee would lose their right to elect to convert where they had not provided written notice to their employee seeking conversion within 4 weeks of reaching 6 months' employment. Given my experience to date as to how the current casual conversion clause in the TCF Award works in practice, this variation would mean than many casual workers would have their rights taken away without even knowing they had a right to elect to convert in the first place. I say this on the basis that commonly casual workers are ignorant of the casual conversion process, so that many would reach the 6 month mark unaware that the clock had started ticking on the brief window to make that election.'*[114]

5.11 The significant risk of casual employees being disenfranchised from seeking to transition to permanent employment is exacerbated in context of the nature and characteristics of the TCF industry itself. Ms Macpherson's extensive unchallenged evidence regarding the nature of the TCF industry[115] provided that *'Many workers in the TCF industry are award dependent and low paid…'* and

> *'The profile of the TCF workforce is characterised by high numbers of workers from non-English backgrounds, including longer terms migrants and more recent arrivals to Australia. Workers from Vietnamese and Chinese backgrounds represent the two nationalities most commonly found in the TCF sector workforce. Many have limited English language and literacy skills. To assist in organising and representation of NESB workers the TCFUA employs organisers and outreach workers with specific language skills.'*[116]

5.12 It is submitted that the nature and characteristics of the TCF industry and the profile of its workforce is a relevant consideration in the determination of a fair and relevant minimum safety net of terms and conditions for the industry. This principle has been consistently affirmed by the FWC and its predecessor tribunals in relation to the TCF

[113] TCFUA: Exhibit #107 Witness Statement of Elizabeth Macpherson (26 February 2016)
[114] Ibid; at para [42]
[115] Ibid; at paras [14] – [23]
[116] Ibid; at para [18]

industry (see TCFUA Submission 27 February 2016, at paragraphs 4.1 – 4.4 including references to relevant authorities).

5.13 Further, in the specific context of the 2014 Award Review, the Full Bench in the Preliminary Issues decision held that:

'[33]….The Commission's task is to balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions. The need to balance the competing considerations in s.134(1) and the diversity in characteristics of the employers and employees covered by different modern awards means that the application of the modern awards objective may result in different outcomes between different modern awards.'[117] [our emphasis]

5.14 The proposed variation would significantly diminish the efficacy of the casual conversion clause and its principal purpose which is to provide an opportunity for a casual employee in the TCF industry to transition to permanent employment (see current Preamble in clause 14.10, TCF Award).

RCSA Claim: Change to requirement for discussion and agreement between the employer and the casual employee regarding nature of casual conversion

5.15 The RCSA's second additional claim is to seek to vary sub-clause 14.10(g)(i) and (ii) (renumbered as 14.10(f)) by the deletion of substantive terms currently contained in the TCF Award. These terms act to facilitate agreement between the casual employee and their employer regarding the status of permanent employment post conversion (full time or part time), and if part-time, the number and pattern of hours.

5.16 The substance of the RCSA's proposed variation is best illustrated by the following text reproduced from the RCSA's Draft Determination and the specific text from the current clause 14.10 which would be deleted under the RCSA's proposal.

RSCA Draft Determination

14.10(g) [renumbered as 14.10(f)]
"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 14.10(b), discuss and agree upon:

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

Deleted text from current clause 14.10(g)(ii) TCF Award

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

[117] *Preliminary Issues Decision*; para [33]

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

5.17 The proposed deletion of the terms of clause 14.10(g) outlined above, if adopted by the Commission, would represent a significant diminution of the casual conversion provision of the TCF Award, including:

- Once agreement is reached that conversion will occur, removing the current guarantee that a full-time casual employee has the right to convert to full-time permanent employment;
- Once agreement is reached that conversion will occur, removing the current guarantee that a part-time casual employee has the right to part-time permanent employment; and
- Once agreement is reached that conversion will occur, removing the current guarantee that the conversion will take place on the basis of the same number of hours and times of work as previously worked, unless other arrangements are agreed between the employer and the employee.

5.18 Ms Macpherson's unchallenged evidence is that in her view, the removal of the provisions:

'…would seriously impact on the capacity of casual workers (and their union) to negotiate the actual terms of their conversion from casual to permanent employment. From my experience in representing casual workers, these obligations are an important part of the discussion with the employer – they essentially mean that whilst the transition from casual employment to permanent employment results in a change of employment status, other key aspects of the employment (number of hours and time of work) remain the same unless otherwise agreed. This is important because from my experience, casual employees are often worried that if they seek permanent employment they will be disadvantaged with reduced hours or different hours or shifts.'[118]

RCSA Claim: proposed removal of provision confirming that after agreement to convert, the conversion is affected

5.19 The RCSA's third additional claim is the proposed deletion of sub-clause 14.10(h) from clause 14.10 of the TCF Award which provides:

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

[118] TCFUA: Exhibit #107 Witness Statement of Elizabeth Macpherson (26 February 2016), para [44]

5.20 Sub-clause 14.10(h) confirms the act of converting a casual employee to permanent employment on the basis of the agreement process contained in sub-clause 14.10(g). Sub-clause 14.10(h) is an important term within the overarching scheme in clause 14.10 regarding casual conversion. The RCSA has provided no rationale for the deletion of the term given that it has not filed any submission or evidence in support of the proposed variation. It cannot be said the proposed change is one which is *'self-evident and can be determined with little formality.'*[119] It is submitted that the RCSA claim in relation to sub-clause 14.10(h) does not satisfy the statutory tests and should be rejected by the Commission.

RCSA Claim: proposed deletion of anti-avoidance term

5.21 The RCSA's fourth additional claim is the deletion of clause 14.10(i) from clause 14.10 of the TCF Award which currently provides:

> ***14.10(i)***
> *'An employer must not be engaged or re-engaged, dismissed or replaced in order to avoid any obligation under this clause.'*

5.22 Within the scheme of casual conversion in clause 14.10 of the TCF Award, the anti-avoidance provision sets out a clear statement which prohibits employer conduct in terminating and/or re-engaging casual employees with a view to negating the casual conversion process. It is squarely aimed at preventing the defeat of the beneficial purpose of the casual conversion term; that is, that casual employees are provided an opportunity at the safety net level, to elect to convert to permanent employment.

5.23 In the TCFUA's submission, sub-clause 14.10(i) is a substantive term and its removal would represent a diminution of clause 14.10 in respect to its safeguards for casual employees. Ms Macpherson[120] gave unchallenged evidence as follows:

> *'In my view, this clause provides a useful disincentive for an employer to take action to dismiss etc. a casual employee seeking to convert to full time employment. I have been involved with disputes with employees in the TCF industry who, after I have raised the issue of casual conversion, have threatened to terminate the worker. In circumstances such as these I have drawn the employer's attention to clause 14.10(i) and made clear that such action would constitute a breach of the TCF Award and the consequences of such breach.'*[121]

5.24 Similarly with the other three additional RCSA claims, RCSA has provided no submission or evidentiary material in support of this claim. Equally for the reasons outlined above the claim should be dismissed.

[119] *Preliminary Issues Decision*; para [60. 3]
[120] TCFUA: Exhibit #107 Witness Statement of Elizabeth Macpherson (27 February 2016)
[121] Ibid; para [46]

6. MODERN AWARD OBJECTIVE

6.1 The TCFUA submits that the various proposals by AIG and the RCSA to vary clause 14.10 (Casual Conversion) of the TCF Award, if adopted by the Commission would constitute *significant changes* and therefore to the minimum safety net for the TCF industry. The proposed changes are not *self-evident and which can be determined with little formality*.[122] Consistent with the statutory framework for the conduct of the 2014 Award Review, the onus rests with AIG and the RCSA as the proponents of a significant change, such that their claims '*must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.'*[123]

6.2 On the material before the Commission, the TCFUA submits that the AIG and the RCSA have not discharged that onus in relation to the proposed variations to the TCF Award. We reiterate that AIG has filed no witness evidence in relation to its proposed variations. The RCSA evidence has little relevance to the circumstances of casual conversion in the TCF industry, is not probative and should be given little weight.

6.3 The TCFUA Submission (27 February 2016) [124]outlined in some detail it submissions in relation to the s.134(1) considerations and the grounds upon which the retention of the employer notice obligation is necessary to ensure the TCF Award, together with the NES, provide a fair and relevant safety net of terms and conditions for the industry.

6.4 Rather than repeat those submissions here, the TCFUA confirms its reliance on paragraphs 7.1 to 7.29 as part of these submissions.

7. FWC ISSUES PAPER[125]

7.1 In addition to these submissions, The TCFUA supports and adopts the written submissions of the ACTU (20 June 2016) and the AMWU (14 June 2016) in relation to the FWC Issues Paper, in particular in relation to Questions 18 and 19.

7.2 In respect to question 18, the TCFUA reiterates its submission, that the abolition of the employer notice obligation would seriously diminish the current casual conversion clause in the TCF Award. Ms Macpherson's evidence (TCFUA) illustrates that the employer notice obligation provides utility and efficacy to the casual conversion framework for award dependent casual employees in the TCF sector. In our submission, its removal would likely become 'inutile due to lack of employee knowledge.'

8. CONCLUSION

8.1 For the reasons outline above the TCFUA submits that the AIG and RCSA have not met the required statutory test, and their claims in relation to the TCF Award should be rejected.

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[122] *Preliminary Issues Decision*; op cit. at para [23]
[123] Ibid;
[124] TCFUA Submission (27 February 2016) at paras 7.1 – 7.29
[125] (AM2014/196 and 2014/197) FWC Issues Paper (11 April 2016)

Filed on behalf of:

Textile Clothing and Footwear Union of Australia

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