



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

(AM2014/91)

Textile, Clothing, Footwear and Associated Industries Award 2010
Group 1C

Revised Exposure Draft
Textile, Clothing, Footwear and Associated Industries Award 2015
(13 June 2017)

Submission of the
Textile Clothing and Footwear Union of Australia
In relation to the Further Revised Exposure Draft
(7 July 2017)

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2014 AWARD REVIEW
(AM2014/491)
AWARD STAGE – GROUP 1C
Textile, Clothing, Footwear and Associated Industries Award 2010
Revised Exposure Draft – 13 June 2017
Submission of the
Textile Clothing and Footwear Union of Australia

BACKGROUND

1. The *Textile, Clothing, Footwear and Associated Industries Award 2010* ('TCF Award')¹ is listed in the Group 1 awards (1C) as part of the 2014 Review of Modern Awards.
2. The Textile, Clothing and Footwear Union of Australia ('TCFUA') has a primary interest in the TCF Award and has been actively involved at all stages of its review.
3. On 9 June 2017 a Full Bench of the FWC issued a decision with respect to the Group 1 awards (technical and drafting issues) including in relation to several specific awards (the *July 2017 Decision*).²
4. The Full Bench in the July 2017 Decision with respect to Group 1 awards outlined a further process for these awards³ including:
 - The publication of revised exposure drafts and updated summaries of submissions;
 - Parties to review the revised exposure drafts and summaries of submissions and provide written comments by 30 June 2017 outlining any:
 - errors in the exposure drafts or summaries; and
 - any outstanding issues in the summaries of submissions that they wish to press.
 - After receipt of any comments, further directions will be issued to deal with outstanding issues;
 - As remaining issues are resolved during 2017, and following adjustment to wages and allowances arising from the 2016-17 Annual Wage Review, exposure drafts will be republished;
 - The exposure drafts will be further updated to incorporate revised standard clauses arising from the Plain Language processes; and

¹ *Textile, Clothing, Footwear and Associated Industries Award 2010* [MA000017] (AM2014/91). The most recent version of the TCF Award includes amendments up and including 21 June 2017.

² *4 yearly review of modern awards – Award stage – Group 1* [2017] FWCFB 3177 (9 June 2017). The decision also specifically concerned the *Manufacturing and Associated Industries and Occupations Award 2010* and the *Professional Diving Industry (Industrial) Award 2010*

³ [2017] FWCFB 3177 at [123] – [128]

- When all common and award-specific issues have been resolved, the awards will be republished for final comment.⁴
5. On 14 June 2017, the Fair Work Commission (FWC) published a further revised Exposure Draft with respect to the review of the TCF Award ('Exposure Draft').⁵
 6. On 29 June 2017, the TCFUA sought, and was provided with an extension of time to file its reply submissions by 6 July 2017.

PREVIOUS EXPOSURE DRAFTS AND TCFUA SUBMISSIONS

7. Previous exposure drafts with respect to the TCF Award were published by the FWC on 4 November 2015⁶ and 30 October 2014⁷. The TCFUA acknowledges that since the publication of the first exposure draft for the TCF Award, there have been a series of Full Bench decisions which have settled a range of issues common to multiple awards and which therefore have application to the review of the TCF Award.
8. In relation to the exposure drafts, the TCFUA has previously filed written submissions on 7 December 2015⁸, 24 November 2015⁹ and 14 November 2014.¹⁰
9. The TCFUA continues to rely on its earlier submissions.

TCFUA COMMENTS ON REVISED EXPOSURE DRAFT – 13 JUNE 2017

10. All references to clause numbers are to the clause numbers contained in the exposure draft unless expressly referred to as a clause of the TCF Award.
11. The preamble to the Exposure Draft published on 13 June 2017 states, amongst other things, that *'This exposure draft does not seek to amend any entitlements under the Textile award but has been prepared to address some of the structural issues identified in modern awards'* and *'This draft does not represent the concluded view of the Commission in this matter.'*¹¹

⁴ Ibid.

⁵ Exposure Draft – Textile, Clothing Footwear and Associated Industries Award 2015 [MA000017] (Republished 13 June 2017)

⁶ Exposure Draft - Textile, Clothing Footwear and Associated Industries Award 2015 [MA000017] (Republished 4 November 2015)

⁷ Exposure Draft - Textile, Clothing Footwear and Associated Industries Award 2015 [MA000017] (Published 30 October 2014)

⁸ (AM2014/91) TCFUA submission in Reply (4 December 2015) re: Revised Exposure Draft – Textile, Clothing, Footwear and Associated Industries Award 2015 (4 November 2015)

⁹ (AM2014/91) TCFUA submission (24 November 2015) re: Revised Exposure Draft – Textile, Clothing, Footwear and Associated Industries Award 2015 (4 November 2015)

¹⁰ (AM2014/91) TCFUA submission (14 November 2014) re: Exposure Draft - Textile, Clothing, Footwear and Associated Industries Award 2014 (30 October 2014)

¹¹ Exposure Draft – Textile, Clothing Footwear and Associated Industries Award 2015 [MA000017] (Republished 13 June 2017) p2

Table of Contents¹²

12. The TCFUA has previously proposed that in the Table of Contents, the heading of Part 4 be amended to read ‘Wages, Allowances and Superannuation’ to assist in the useability for readers of the award, particularly those who do not have English as their first language.¹³ The proposal was advanced in context whereby the TCF Award currently provides for a separate ‘Part 6 – Superannuation’ and is therefore easily identifiable in the table of contents.
13. The TCFUA’s proposal is not opposed by the main parties with an interest in the TCF Award (AWU¹⁴, AI Group¹⁵, ABI & NSWBC¹⁶).
14. The TCFUA submits that sub-headings used to define a ‘Part’ of the TCF Award should accurately describe the provisions existing under that Part. Whilst historically, the development of superannuation was sometimes viewed as ‘deferred wages’, in the modern workplace, an award entitlement to employer superannuation is often considered to have a different/separate characterisation than either ‘wages’ or ‘allowances’.
15. It is submitted that the nature and characteristics of the TCF industry, in which a significant percentage of workers come from a non-English background, is a relevant consideration as to what is a fair and relevant safety net for the TCF industry. Further, the underpayment and non-payment of superannuation in the TCF industry is widespread and systemic.¹⁷
16. In this context, the TCFUA’s proposal to amend the title of ‘Part 4’ of the Table of Contents will act as a ‘signpost’ to both employees and employers regarding their respective entitlements to, and obligations about, superannuation. It is submitted the proposed amendment is necessary (section 138) to ensure that the TCF Award meets the modern award objective (section 134).
17. The TCFUA continues to press this issue.

Sub-clause 6.3(h) (Part-time employees)¹⁸

18. Sub-clause 6.3(h) has been amended in the exposure draft as follows to address a referencing error previously identified by the parties:

¹² Exposure Draft (13 June 2017) at pp 1-3

¹³ (AM2014/91) TCFUA submission (24 November 2015), p1 of attached Table

¹⁴ (AM2014/91) AWU Reply submission (4 December 2015) at para 40

¹⁵ (AM2014/91) AI Group Reply submission (7 December 2015) at para 222

¹⁶ (AM2014/91) ABI & NSWBC Reply submission (7 December 2015) at para 4.1

¹⁷ See TCFUA submission (1 March 2017) to the Senate Economics References Committee: Inquiry into the impact of non-payment of the Superannuation Guarantee and the Report of the Economics References Committee, ‘*Superbad – wage theft and non-compliance of the Superannuation Guarantee*’ (2 May 2017)

¹⁸ Exposure Draft (13 June 2017) at pp 9-10

6.3(h)

All time worked in excess of the hours mutually agreed in accordance with clause 6.3(d) will be overtime and paid for at the rates prescribed in clause 20 – Overtime.

19. The Ai Group submits that sub-clause 6.3(h) should reference both 6.3(d) and 6.3(e).
20. In the FWC's summary of submissions (13 June 2017) a Note is provided '*AWU and TCFUA do not address whether reference to 6.3(c) should be included. This change not added to ED. Current award does not include either cross-references.*'
21. The FWC's note is correct in that sub-clause 13.6 of the TCF Award currently provides:
- 13.6*
All time worked in excess of the hours mutually agreed will be overtime and paid for at the rates prescribed in clause 39 – Overtime rates.
22. The TCFUA submits that the preferable approach is for sub-clause 6.3(h) not to include any references to other sub-sections within clause 6 and consistent with clause 13.6 of the TCF Award, simply refer to the substantive overtime provision.

Sub-clause 6.5 (Casual conversion to full-time or part-time employment)

23. Sub-clause 6.5 (casual conversion) of the exposure draft has significantly reformulated the existing casual conversion clause in the TCF Award (sub-clause 14.10). Since the commencement of the review of the TCF Award in 2014, the TCFUA has consistently and strongly opposed the changes to clause 14.10 of the TCF Award.
24. On the material before the Commission, there is no apparent or reasonable rationale for the changes to clause 14.10 of the TCF Award on as represented in the various exposure drafts. In the absence of any cogent argument for the changes, the TCFUA's primary submission is that sub-clause 6.5 should revert to the current wording in sub-clause 14.10 of the TCF Award.
25. The new formulation in clause 6.5 of the exposure draft (as compared to the current clause 14.10) is not limited to 'technical/drafting' matters but instead represent substantive changes to the award, with clear changes in legal effect.
26. For example, sub-clause 6.5 of the exposure draft introduces an entirely new term (6.5(e)) which allows for the variation of the 6 month qualifying period to be increased to 12 months by agreement between the employer and:
- the majority of employees in the workplace; or
 - the majority of employees in a section or sections of the workplace; or
 - the casual employee concerned.

27. This new term appears to have been taken from the *Manufacturing and Associated Industries and Occupations Award 2010*.¹⁹ Such a term has not existed in the casual conversion clause in the TCF Award since casual conversion was first included in the TCF Award as part of the Part 10A Award Modernisation process. It is unclear how the introduction of the facilitation term in the casual conversion clause is necessary for the TCF Award to meet the modern awards objective in section 134.
28. The AI Group in its Reply submission²⁰ stated that it did not oppose the deletion of clause 6.5(e) on the basis that such a clause does not appear in the TCF Award.
29. The FWC's document '*Summary of submissions on revised exposure draft*' published on 13 June 2017 identifies that in relation to sub-clause 6.5(e) of the exposure draft, the Casual Conversion clause is being considered in matter (AM2014/197) by the Casual and part-time Full Bench.²¹ This reflects the decision [2015] FWCFB 7236 at [263] where the Full Bench stated:
- Casual conversion*
[264] *The TCFUA strongly oppose any amendment to the wording of the casual conversion clause in the award. The issue will be referred to the Casual and Part-time Employment Full Bench in AM2014/197.*²²
30. The ACTU made various claims as part of the casual and part-time common issues proceedings, including the introduction of a model casual conversion term into 105 modern awards, 88 of which did not currently contain such a term and 17 which did. It also sought to vary 5 awards which currently contained a casual conversion clause by changing a right to elect to deeming. The TCF Award was not included in the list of awards subject to these specific ACTU claims.
31. The AI Group (as well as the RCSA²³) as part of the Casual Employment common issue proceedings made a claim to delete the notification requirement upon employers in existing casual conversion clauses in modern awards, including the TCF Award. In the proceedings the TCFUA strongly opposed the AI Group and RCSA claims.
32. The Casual and Part-time Employment Full Bench issued a decision on 5 July 2017²⁴ with respect to the substantive claims of unions and employers.
33. The ACTU claim with respect to the inclusion of a model casual conversion clause was accepted in principle by the Full Bench for those modern awards which currently

¹⁹ Manufacturing and Associated Industries and Occupations Award 2010, sub-clause 14.4(j)

²⁰ (AM2014/91) Ai Group Reply submission (7 December 2017) at para 215

²¹ (AM2014/91) Textile, Clothing, Footwear and Associated Industries Award 2010; FWC, Summary of Submissions on Revised Exposure Draft (13 June 2017) at p 6 (Item 11)

²² [2015] FWCFB 7236 at [264]

²³ Recruitment & Consulting Services Australia & New Zealand (RCSA)

²⁴ s.156 – 4 Yearly Review of Modern Awards [2017] FWCFB 3541 (5 July 2017)

do not contain a casual conversion term and provided a model provision for further submissions.²⁵

34. The ACTU claim with respect to 5 awards which currently contain a casual conversion clause and which deeming was sought was rejected by the Full Bench.²⁶

35. The claims advanced by the AI Group and RCSA to remove the notification requirement from casual conversion clauses in existing awards, including the TCF Award, was not accepted by the Full Bench.²⁷ The Full Bench in its decision however, outlined a further process regarding the form of the notification requirement in awards which currently contain a casual conversion clause.²⁸

36. The TCFUA continues to press this issue.

Clause 6A (Outwork and related provisions)²⁹

37. Sub-clause 6A.3 of the exposure draft contains numbering (c) to (k). This is a typographical error. The numbering should be (a) to (j) to reflect the current clause 17.3 of the TCF Award.

Clause 8.3 (Changes to hours)³⁰

38. In the FWC's *Summary of Submissions on Revised Exposure Draft* (13 June 2017) in relation to sub-clause 8.3(a) the FWC note states: *'Insertion of full stop appears to be agreed by parties and has been amended in exposure draft in red. Note: the error points to issue in format of the clause. Clause reformatted, parties at liberty to comment.'*

39. The TCFUA considers that a preferable formulation to the one provided by the FWC in the exposure draft is:

8.3 Changes to hours

(a) Where the employer and a majority of employees agree, in accordance with clause 5.4:

(i) Starting and finishing times may be altered by up to one hour at either end of the spread of hours.

(ii) The number of hours in a day that may be worked without the payment of overtime may be changed. However, the ordinary hours of work must not exceed ten hours on any day.

²⁵ [2017] FWCFB 3541 at [369], [379] – [382]

²⁶ Ibid; at [383] – [394]

²⁷ Ibid; at [395] – [398]

²⁸ Ibid; at [398] and Directions at pp 351-353

²⁹ Exposure Draft (13 June 2017) at pp 13-14

³⁰ Exposure Draft (13 June 2017) at pp 15-16

(b)The starting and/or finishing times in any factory or part of any factory will not be altered without agreement between the employer and majority of employees in accordance with clause 5.4 or after seven days' notice to affected employees.

Sub-clause 8.5 (Substitution of rostered day off)³¹

40. The TCFUA previously raised that sub-clause 8.3(b) of the exposure draft had changed from clause 33.2 of the TCF Award, potentially changing its legal effect.³²
41. Clause 33.2 of the TCF Award provides:
'By agreement with the majority of employees concerned, the employer may substitute the rostered day off agreed to for another day provided in accordance with clause 8.3.' [emphasis added]
42. In the exposure draft this has been changed to *'a majority of affected employees'*. It is unclear from the drafters, as to the rationale for the amendment. The new formulation potentially narrows the group of persons required to be involved in the majority agreement in accordance with clause 5.3 (Facilitative provisions) of the exposure draft. In our submission, the word *'affected'* is not necessarily equivalent to the word *'concerned'*.
43. The TCFUA's proposed amendment with respect to sub-clause 8.5 is supported by the AWU³³ and is not opposed by the AI Group on the basis that it is consistent with the current award term.³⁴
44. The TCFUA continues to press this issue.

Sub-clause 9.5 (Minimum break before or after overtime shifts) - subheading³⁵

45. The TCFUA previously raised a concern with the subheading of sub-clause 9.5 of the exposure draft.³⁶
46. Clause 40.3 of the TCFUA provides a subheading titled *'Rest period before or after overtime'* which it is submitted accurately reflects the substantive character of the term itself.
47. In the 4 November 2015 Revised Exposure Draft this had been changed to *'Minimum breaks between overtime shifts'*. In its previous submission (24 November 2015) the TCFUA stated that *'This subheading is misleading as the substantive provision in*

³¹ Exposure Draft (13 June 2017) at p 16

³² (AM2014/91) TCFUA submission (24 November 2015), p6 of attached Table

³³ (AM2014/91) AWU Reply submission (4 December 2015) at para 40

³⁴ (AM2014/91) AI Group Reply submission (7 December 2015) at para 219

³⁵ Exposure Draft (13 June 2017) at p 18

³⁶ (AM2014/91) TCFUA submission (24 November 2015), p6 of attached Table

clause 9.5 relates to minimum breaks between periods of work, before or after overtime (not minimum breaks between 2 periods of overtime as the subheading implies). The TCFUA submitted that the wording should revert to the current award formulation.

48. In the current exposure draft (13 June 2017), the subheading has been further amended to read 'Minimum break before or after overtime shifts' [emphasis added].
49. It is submitted that the continued use of the word 'shifts' in the subheading is a misnomer, in that the TCF Award overtime provisions do not refer to 'overtime shifts' but 'all time worked by an employee in excess of an employee's ordinary hours of work or outside the span of hours prescribed' (see clause 39.1, TCF Award).
50. The TCFUA continues to submit that the appropriate heading for sub-clause 9.5 should read 'Rest period before and after overtime'. The TCFUA's original proposal was supported by the AWU³⁷, not opposed by the AI Group³⁸ and considered by the ABI & NSWBC not to be controversial.³⁹
51. The TCFUA continues to press this issue.

Sub-clause 9.5 (Minimum break before or after overtime shifts)⁴⁰

52. A second issue relating to sub-clause 9.5 concerns the deletion of the word '*consecutive*' in the expression '10 hours off duty' in **9.5(b)(i) and (ii)**. This issue was raised previously by the TCFUA in its submission (24 November 2015).⁴¹
53. Clause 40.4(b)(i) and (ii) of the TCF Award contains the expression '10 consecutive hours off duty' consistent with the wording in clause 40.3(a).
54. The TCFUA continues to submit that sub-clauses 9.5(b)(i) and (ii) of the exposure draft should similarly contain the expression '10 consecutive hours off duty' to ensure consistency within the provision itself.
55. The TCFUA's proposed amendment was supported by the AWU⁴² and not opposed by the AI Group on the basis that they are intended to reflect the current clauses 30.3(b) (i) and (ii) of the TCF Award.⁴³
56. The TCFUA continues to press this issue.

³⁷ (AM2014/91) AWU Reply submission (4 December 2015) at para 40

³⁸ (AM2014/91) AI Group Reply submission (7 December 2015) at para 220

³⁹ (AM2014/91) ABI & NSWBC Reply submission (7 December 2015) at para 4.7

⁴⁰ Exposure Draft (13 June 2017) at p 18-19

⁴¹ (AM2014/91) TCFUA submission (24 November 2015), p7 of attached Table

⁴² (AM2014/91) AWU Reply submission (4 December 2015) at para 40

⁴³ (AM2014/91) AI Group Reply submission (7 December 2015) at para 221

Heading of Part 4 – Wages and Allowances

57. The TCFUA has submitted above in relation to the ‘Table of Contents’ above that the heading of Part 4 should be amended to read, ‘Wages, Allowances and Superannuation’. We rely on our submissions in relation to the item, ‘Table of Contents’.

Sub-clause 18.3 (Payment for shiftwork) – textile⁴⁴

58. The FWC note under sub-clause 18.3 states ‘Rates updated as a result of AWR 2016’. However, the amounts in sub-clause 18.3(a) - \$21.05 and 18.3(b) \$42.11 appear not to be updated in line with the variation to the TCF Award arising from the Annual Wage Review 2015/16 and are inconsistent with the equivalent rates contained in Schedule C.

59. It is submitted that the correct rates (to reflect the AWR 2015/16) are 18.3(a) - \$21.56 and 18.3(b) - \$43.12.

60. The TCFUA acknowledges generally that the monetary amounts in the TCF Award, including wage rates and allowances, have increased again arising from the Annual Wage Review 2016/17 but are not reflected in the exposure draft.

Sub-clause 21.3 (Requirement to take annual leave)⁴⁵

61. The TCFUA notes that this clause remains subject to the Annual Leave Common Issue proceedings (AM2014/47).

SCHEDULE C (Summary of Hourly Rates of Pay)⁴⁶

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

62. Based on the applicable wage rates arising from the 2015/16 Annual Wage Review, the rates for skill level 2 and skill level 3 appear to be incorrect in the in the second, third, fourth, fifth and sixth columns. A number of these calculation should be identical to the equivalent rates in Schedule C.3.2.

63. Similarly, the rates for skill level 5 and thereafter appear to be incorrect in the third, fourth and sixth columns.

Schedule C.3.4 (Full-time and part-time employees – shiftworkers –overtime rates)

⁴⁴ Exposure Draft (13 June 2017) at p36

⁴⁵ Exposure Draft (13 June 2017) at p 42

⁴⁶ Exposure Draft (13 June 2017) at p 71-77

64. Based on the applicable wage rates arising from the 2015/16 Annual Wage Review, the rates for skill level 2, skill level 3 and skill level 5 and thereafter appear to be incorrect in the second, third, fourth, fifth and sixth columns.

SCHEDULE C.4 (CASUAL EMPLOYEES – DAY WORKERS)⁴⁷

SCHEDULE C.5 (CASUAL EMPLOYEES – SHIFTWORKERS)⁴⁸

65. Since the commencement of the review of the TCF Award in 2014, the TCFUA has consistently submitted that the wage rates for casual employees with respect to penalties and loadings are incorrectly calculated in the various tables in Schedule C in the exposure drafts.

66. The substance of the TCFUA's submission is that the casual wage rates with respect to penalties and loadings, have been calculated based on a cumulative method rather than a compounding method.⁴⁹ The TCFUA acknowledges that the contest between the TCFUA and employer parties regarding the method of calculation would appear to be a substantive issue.

67. In relation to casual day workers, this submission applies to:

- Schedule C.4.1 (Casual employees - ordinary and penalty rates); and
- Schedule C.4.2 (Casual employees – overtime rates)

68. In relation to casual shiftworkers, this submission applies to:

- Schedule C.5.1 (Casual employees – shiftworkers other than in the textile industry – ordinary and penalty rates);
- Schedule C.5.2 (Casual employees – shiftworkers in the textile industry – other than seven day continuous shift workers-ordinary and penalty rates);
- Schedule C.5.3 (Casual employees – shiftworkers in the textile industry – seven day continuous shift workers-ordinary and penalty rates); and
- Schedule C.5.4 (Casual employees – shiftworkers – overtime rates).

Schedule C.4.1 (Casual employees - ordinary and penalty rates)⁵⁰

69. The TCFUA submits that the wage rates in the first column ('Ordinary hours') for each of the skill levels are correct as they are based on the calculation of the *ordinary hourly rate* plus the *casual loading* (25%). This is consistent with clause 14.3 of the TCF Award which provides, 'A casual employee will be paid per hour 1/38th of the weekly award wage prescribed for the relevant classification plus a loading of 25%.' In the exposure draft this has been reformulated to read:

Clause 6.4(i) casual loading

⁴⁷ Exposure Draft (13 June 2017) at p 74-75

⁴⁸ Exposure Draft (13 June 2017) at p 75-77

⁴⁹ (AM2014/91) TCFUA submission (24 November 2015), pp 8-14 of attached Table

⁵⁰ Exposure Draft (13 June 2017) at p 74

For each hour worked, a casual employee must be paid:

- (i) the ordinary hourly rate; and*
- (ii) a loading of 25% of the ordinary hourly rate.*

70. This formulation is consistent with the Full Bench decision in [2015] FWCFB 6656⁵¹ which dealt, inter alia, with the issue of all-purpose allowances and ordinary rates of pay:

[110] The general approach will remain as expressed in the exposure drafts, namely that the casual loading will be expressed as 25% of the ordinary hourly rate in the case of awards which contain any all-purpose allowances and will be expressed as 25% of the minimum hourly rate in awards which do not contain any such allowances. ⁵²

71. That is, for each hour that a casual employee works, they must be paid the 'ordinary hourly rate' (inclusive of any all-purpose allowances) and the 25% casual loading.

72. The TCFUA's concern relates to the third column in Table C.4.1 which contains wage rates applicable on a public holiday. The exposure draft calculates the public holiday loading for a casual using the following cumulative method:

Example:

Skill level 2 – ordinary rate, not inclusive of casual loading (\$18.81) x 2.75% (expressed as 275% of the ordinary hourly rate) = \$50.08

73. The TCFUA submits that this method of calculation is not reflective of the substantive casual and public holiday provisions in the TCF award.

74. Clause 14.5 of the TCF Award with respect to casual employment, provides, inter alia:

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

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

75. Clause 43.2 of the TCF Award currently provides:

43.2 Work on public holidays

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

⁵¹ [2015] FWCFB 6656 (30 September 2015)

⁵² Ibid; at [110]

76. Under the TCF Award a casual employee is not entitled to be absent from work on a paid public holiday (as is the case for a permanent employee). However, a casual employee is entitled to penalty payments for work undertaken on a public holiday at the rate of 250% for each hour they work and for a minimum of three hours. Clause 14.3, reproduced above, makes clear that a casual employee must be paid the ordinary hourly (i.e. the permanent hourly rate plus the 25 % casual loading) for each hour that they work.

77. The TCFUA submits that the correct method of calculation is as follows:

Example:

*Skill level 2 – ordinary rate (\$18.91 + 25% casual loading = \$23.64),
X 2.50 = \$59.10*

Schedule C.4.2 (Casual employees – overtime rates)⁵³

78. The TCFUA submits that the wage rates for all skill levels have been incorrectly calculated in relation to the following:

- third column (Monday to Saturday overtime first 3 hours) – expressed in the table as 175% of the ordinary hourly rate;
- second column (Monday to Saturday overtime after 3 hours) – expressed in the table as 225% of the ordinary hourly rate; and
- fourth column (Sunday overtime) – expressed in the table as 225% of the ordinary hourly rate

79. It is evident that the wages rates under these columns have been calculated using the cumulative method rather than the compounding method in a similar way to that outlined above with respect to public holiday penalties.

80. Clause 39 of the TCF Award contains the relevant provisions regarding the working and payment of overtime. Clause 39 provides, in part, as follows:

39 Overtime rates

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

39.1 Requirement to work reasonable overtime

Subject to the NES, an employer may require an employee to work reasonable overtime at overtime rates.

39.3 Payment of working overtime

(a) An employer must pay an employee overtime at the rate of:

⁵³ Exposure Draft (13 June 2017) at p 75

- (i) 150% for the first three hours; and
 (ii) 200% thereafter.

(b) For the purpose of calculating overtime each day must stand alone.

(c) An employer must pay an employee who is paid under any system of payment by results for any overtime worked:

- (i) for the first two hours, at the rate of 150% of the award rate for their skill level; and
 (ii) for any subsequent hours, at the rate of 200% of the award rate for their skill level,
 in addition to the payment by results earnings earned by the worker.

39.4 Weekend work

(a) All work on a Sunday will be paid at 150% of the employee's ordinary rate for the first three hours and 200% thereafter.

(b) All work on a Sunday will be paid at 200% of the employees' ordinary rate.

(c) The ordinary hours of a night shift finishing on Saturday morning will not be subject to overtime rates. [emphasis added]

81. It is submitted that under the TCF Award overtime provisions, a casual employee's 'ordinary rate' is the ordinary (permanent) hourly rate plus the 25% loading. The application of the overtime penalties (either 150% or 200%) under clause 39 should therefore be applied to the casual hourly rate i.e. on a compounding basis.

SCHEDULE C.5 (CASUAL EMPLOYEES – SHIFTWORKERS)

Schedule C.5.1 (Casual employees – shiftworkers other than in the textile industry – ordinary and penalty rates)⁵⁴

82. The TCFUA submits that the following casual wage rates have been calculated using the cumulative method rather than the compounding method and are incorrect as a consequence:

- Third column (Public holiday) – expressed in the table as 275% of the ordinary hourly rate;

83. In relation to the public holiday rates we refer to, and rely on, our submissions above regarding table C.4.1.

⁵⁴ Exposure Draft (13 June 2017) at p 75

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

84. The TCFUA submits that the following casual wage rates in Schedule C.5.2 of the exposure draft have been calculated using the cumulative method and are incorrect as a consequence:

- Second column (Sunday 12am to 7am – First 3 hours) – expressed in the table as 175% of the ordinary hourly rate;
- Second column (Sunday 12am to 7am – After 3 hours) – expressed in the table as 225% of the ordinary hourly rate;
- Third column (Public holiday) – expressed in the table as 275% of the ordinary hourly rate;
- Fourth column (Week’s work commencing on Sunday – all hours on Sunday)

85. Clause 36 of the TCF Award deals with shiftwork in the textile industry other than for seven day continuous shift workers.

86. With respect to the second column in the table, sub-clause 36.5(d) of the TCF Award provides:

36.5

(d) All time worked by a shiftworker (other than a seven day continuous shiftworker) between midnight on Sunday and 7.00am on Monday must be paid for at the rate of time and a half [i.e. 150%] for the first three hours and double time thereafter [i.e. 200%].

87. Consistent with our previous submissions, we contend that the correct method of calculation is to apply the 150% or 200% penalty, as applicable, to the casual ordinary hourly rate of pay (inclusive of the casual loading).

88. With respect to the third column (public holiday penalty) we refer to, and rely on our submissions above regarding table C.4.1.

89. With respect to the fourth column, sub-clause 36.5(e) provides as follows:

36.5

(e) Where an employer begins the week’s work on Sunday night, the employee will receive double time [i.e. 200%] for all work performed on Sunday. However, an employer and the majority of employees in an enterprise or part of an enterprise may agree to arrange shifts so that they commence on Sunday night instead of Monday with ordinary rates to be paid for Sunday provided that agreement is in accordance with clause 8.3.

90. Consistent with our previous submissions, we contend that the correct method of calculation is to apply the 200% penalty, to the casual ordinary hourly rate of pay (i.e. inclusive of the casual loading).

Schedule C.5.3 (Casual employees – shiftworkers in the textile industry – seven day continuous shift workers – ordinary and penalty rates)⁵⁵

91. The TCFUA submits that the following casual wage rates in Schedule C.5.3 in the exposure draft have been calculated using the cumulative method and are incorrect as a consequence:

- Third column (Saturday) – expressed in the table as 175% of the ordinary hourly rate;
- Fourth column (Sunday and public holiday) – expressed in the table as 225% of the ordinary hourly rate;
- Fifth column (Monday to Friday – 12 hour shift – Last 2 hours) – expressed in the table as 225% of the ordinary hourly rate.

92. Clause 37 of the TCF Award deals with shiftwork in the textile industry for seven day continuous shiftwork. As relevant to the third, fourth and fifth columns above, sub-clause 37.3 provides in part, as follows:

37.3 (Work on Saturdays, Sundays and public holidays)

- (a) *Where a seven day continuous shiftworker works a rostered shift, the major portion of which is performed on a Saturday, the employee must be paid at the rate of time and a half [i.e. 150%] for the whole shift.*
- (b) *Where a seven day continuous shiftworker works a rostered shift, the major portion of which is performed on a Sunday, the employee must be paid at the rate of double time [i.e. 200%] for the whole shift.*
- (c) *Where a seven day continuous shiftworker works on a rostered shift, the major portion of which is performed on a public holiday, the employee must be paid at the rate of double time [i.e. 200%] for the whole shift.*

93. Consistent with our previous submissions, we contend that the correct method of calculation is to apply the 150% and 200% penalty, as applicable, to the casual ordinary hourly rate of pay (inclusive of the casual loading).

Schedule C.5.4 (Casual employees – shiftworkers – overtime rates)

94. The TCFUA submits that the following casual wage rates in Schedule C.5.4 in the exposure draft have been calculated using the cumulative method and are incorrect as a consequence:

⁵⁵ Exposure Draft (13 June 2017) at p 76

- Second column (Monday to Saturday – First 3 hours) – expressed as 175% of the ordinary hourly rate;
- Second column (Monday to Saturday – After 3 hours) – expressed as 225% of the ordinary hourly rate;
- Third column (Sunday – all hours) – expressed as 225% of the ordinary hourly rate; and
- Fourth column (7 day continuous shift workers – all hours) – expressed as 225% of the ordinary hourly rate.

95. In the TCF Award, the relevant percentage penalties are expressed as 150% or 200%.

96. Consistent with our previous submissions, we contend that the correct method of calculation is to apply the 150% or 200% penalty, as applicable, to the casual ordinary hourly rate of pay (inclusive of the casual loading).

SCHEDULE D (Summary of Monetary Allowances)⁵⁶

97. The TCFUA has only recently identified that Schedule D of the exposure draft does not include a current allowance contained in the TCF Award. Under clause 26 (Textile industry allowances), sub-clause 26.14 provides as follows:

26.14 Wool scouring pits allowance

An employee required to clean wool scouring pits which are in an unusually dirty or offensive condition will be paid at 200% ordinary rates whilst employed in the cleaning of the pits.

98. The TCFUA submits that sub-clause 16.14 should similarly be included in Schedule D of the exposure draft.

99. The TCFUA presses this issue.

SCHEDULE F (Outwork and Related Provisions)⁵⁷

100. Schedule F of the exposure draft contains an 'Appendix to Schedule F – Information to be given to outworkers'. Under the subheading 'Superannuation' in the Appendix, the FWC contains a question 'Should 9.25% be updated to 9.5% in line with current superannuation guarantee requirements?'⁵⁸

101. The TCFUA raised this issue in its previous submission (24 November 2015).⁵⁹

⁵⁶ Exposure Draft (13 June 2017) at pp 78-80

⁵⁷ Exposure Draft (13 June 2017) at pp 82-94

⁵⁸ Exposure Draft (13 June 2017) at p 93

⁵⁹ (AM2014/91) TCFUA submission (24 November 2015), p16 of attached Table

102. The TCFUA submits that the Appendix should be amended to read '9.5%' as this represents the legal position under relevant superannuation legislation since 1 July 2014. A failure to make the amendment otherwise risks misleading employers and outworkers about their respective obligations and entitlements with respect to superannuation.
103. Given the primary purpose of the Appendix is to provide accessible award information to a group of TCF workers (outworkers) who have a particular vulnerability to exploitation, it is appropriate and necessary that the correct rate of 9.5% be included to aid compliance.
104. The TCFUA continues to press this issue.

SCHEDULE I (National Training Wage) ⁶⁰

105. The TCFUA notes that further to the decision issued on 9 June 2017,⁶¹ the TCFUA Award was varied on 21 June 2017 to delete Schedule E (National Training Wage) and vary clause 20.12.⁶²

SCHEDULE J (Definitions)⁶³

106. Schedule J of the exposure draft contains a definition of junior employee as follows:

*'junior employee means an employee who is less than 21 years of age.'*⁶⁴

107. Sub-clause 6.6 (Juniors) of the exposure draft similarly provides at 6.6(a):

(a) A junior employee is an employee who is less than 21 years of age.

108. In the TCF Award, there is no definition of a 'junior employee' in clause 3 (Definitions and interpretation) and the award contains the substantive provisions relating to junior employees at clause 15 (Juniors) and sub-clause 20.10 (Junior rates).
109. In the exposure draft a question arises whether it is necessary to contain a definition of 'junior employee' in both Schedule J and sub-clause 6.6. The TCFUA submits that it is preferable for ease of navigation within the award, to have the definition sitting within the substantive term at sub-clause 6.6(a).
110. The TCFUA raises this issue for consideration of the Commission and the parties.

⁶⁰ Exposure Draft (13 June 2017) at pp 102-111

⁶¹ [2017] FWCFB 3176 (9 June 2017)

⁶² PR593813 (21 June 2017), which took effect from the first full pay period that starts on or after 1 July 2017.

⁶³ Exposure Draft (13 June 2017) at pp 112-115

⁶⁴ Exposure Draft (13 June 2017) at p 113

Submitted on behalf of:

Textile, Clothing and Footwear Union of Australia
(National Office)

7 July 2017