Australian Industry Group

Casual Terms Award Review 2021

Stage 2 of the Review

Group 2 Awards

Textile, Clothing and Footwear Award 2020

Reply submission re. clause 11.1 and opening paragraph of clause 11.12

30 August 2021

AM2021/54 – CASUAL TERMS AWARD REVIEW 2021

STAGE 2 – GROUP 2 AWARDS

TEXTILE, CLOTHING AND FOOTWEAR AWARD 2020

REPLY SUBMISSION RE. CLAUSE 11.1 AND OPENING PARAGRAPH OF CLAUSE 11.12

1. INTRODUCTION

1. This reply submission is made by the Australian Industry Group (**Ai Group**) in response to the following Direction issued by Vice President Hatcher on 24 August 2021:

> *Textile, Clothing, Footwear and Associated Industries Award 2020*
>
> (9) Any submissions in response to the submissions filed by the Construction, Forestry, Maritime, Mining and Energy Union on 18 August and 19 August 2021 or by the Ai Group on 19 August 2021 shall be filed by **5.00pm on Monday 30 August 2021.**

2. The submission deals with the following clauses in the *Textile, Clothing, Footwear and Associated Industries Award 2020* (**TCF Award**):

- Clause 11.1; and
- The opening paragraph of clause 11.12.

Clause 11.1

3. In its submission of 18 August 2021, the CFMMEU expressed support for the FWC's *provisional* view regarding clause 11.1 in the TCF Award but did not provide any additional arguments in support of that view.

4. The reasons why Ai Group strongly opposes the *provisional* view are set out in paragraphs [56] to [72] of Ai Group's revised Group 2 Awards submission of 19 August 2021.

Opening paragraph of clause 11.12

5. Ai Group's position on the opening paragraph of clause 11.12 is set out in paragraphs [74] to [81] of Ai Group's revised Group 2 Awards submission of 19 August 2021.

6. In its submission of 19 August 2021, the CFMMEU puts forward the following arguments about the opening paragraph of clause 11.12:

- The term has work to do, both generally in maximising permanent employment within the TCF industry, but also as part of the facilitation of conversion of casual employees.

- The term is a substantive obligation which requires primarily that an employer covered by the TCF Award 'take all reasonable steps to provide its employees with secure employment by maximising the number of permanent positions in the employer's workforce'.

- The term is not inconsistent with the *Fair Work Act 2009* (**FW Act**).

- There is no uncertainty or difficult relating to the interaction between the Award and the FW Act.

- If the Commission proceeds to delete the rest of the casual conversion clause, the term should still be retained and redrafted as follows:

  > '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.'

- The term is necessary for the Award to achieve the modern awards objective given the need to 'discourage widespread casualisation" in the TCF industry; and

- The Award Modernisation Full Bench found that it was necessary (as required by s.138) for a casual conversion clause (including the term) to be included in the TCF Award.

7. As highlighted by the CFMMEU, the Award Modernisation Full Bench decided that a casual conversion clause which contained the paragraph should be included in the Award. However, it certainty did not decide that a stand-alone job security clause should be included in the Award.

8. As argued in Ai Group's revised submission of 19 August 2021, once separated from the subject matter of casual conversion, the provision would have a completely different character. It would become, in effect, a job security clause that would impact upon an employer's ability to:

- Engage casuals;
- Engage employees for a specific period of time;
- Engage employees for a specific task;
- Engage employees for a specific season;
- Engage independent contractors;
- Outsource work; and
- Engage labour hire firms.

9. The only jurisdictional basis upon which the opening paragraph of clause 11.12 could have been included in the TCF Award as a result of the 2008/09 Award Modernisation process was that the Full Bench considered the provision to be incidental to the casual conversion term and essential for the purposes of making the casual conversion term operate in a practical way. (See ss.576J and 576M in Part 10A of the *Workplace Relations Act 1996*).

10. Accordingly, if the casual conversion term is removed from the TCF Award, the jurisdictional basis for including the provision is similarly removed.

11. General job security clauses have never been permissible in awards.

12. The paragraph about job security in clause 11.12 of the TCF Award is obviously not permitted by s.139 of the FW Act as it does not deal with any of the matters addressed in this section.

13. In addition, the paragraph is not permitted by s.142 of the Act. It is not incidental to any term permitted by s.139, nor is essential for the purposes of making any term permitted by s.139 operate in a practical way.

14. Section 142 was considered by a Full Bench during the review of apprenticeship and traineeship provisions in 2012, in which it observed the narrow basis upon which it allows for the inclusion of an award term: (Emphasis added)

> **[101]** We should, however, say something about s.142(1), which allows terms to be included in an award that are incidental to a term that is permitted or required to be in an award and which is essential to make the particular term operate in a practical way. The terms of this section are to be contrasted with s.89A(6) of the WR Act. That section provided that the AIRC "may include in an award provisions that are incidental to the matters in subsection (2) and necessary for the effective operation of the award". We agree with the submission of the employers that s.142(1) provides only a relatively narrow basis for the inclusion of award terms. It is not in itself an additional power for the inclusion of any terms that cannot be appropriately linked back to a term that is permitted by s.139(1). The use of the word "essential" suggests that the term needs to be "absolutely indispensable or necessary" for the permitted term to operate in a practical way. The wording of the section suggests that it provides a more limited power to include terms than that of its earlier counterpart in s.89A(6).[1]

15. In *4 Yearly Review of Modern Awards - Pastoral Award 2010*,[2] a Full Bench made the following comments about s.142: (Emphasis added)

> **[59]** As to the proper construction of s.142 of the Act, we agree with the following observation from the Apprentices decision:
>
> > 'We agree with the submission of the employers that s.142(1) provides only a relatively narrow basis for the inclusion of award terms. It is not in itself an additional power for the inclusion of any terms that cannot be appropriately linked back to a term that is permitted by s.139(1). The use of the word 'essential' suggests that the term needs to be 'absolutely indispensable or necessary' for the permitted term to operate in a practical way.'

[1] *Modern Awards Review 2012 – Apprentices, Trainees and Juniors* [2013] FWCFB 5411 at [101]

[2] [2016] FWCFB 4393.

16. Given that a job security clause is not permissible under either s.139 or s.142, if included in the TCF Award the clause would have no effect as a result of s.137 of the Act.

17. The clause is not necessary to achieve the modern awards objective and hence is inconsistent with s.138 of the Act.

18. Further, the clause is not consistent with the modern awards objective, particular the elements in s.134(1)(d) and (f).

19. With regard to ss.138 and 134, in the *Casual Terms Award Review 2021 – Stage 1 Decision*[3] the Full Bench stated: (Emphasis added)

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

20. For the above reasons, clause 11.12, in its entirety, should be deleted from the Award and replaced with a reference to the NES casual conversion entitlements.

[3] [2021] FWCFB 4144.