Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission
Group 4D – 4F Exposure Drafts

18 January 2017

4 YEARLY REVIEW OF MODERN AWARDS

EXPOSURE DRAFTS: GROUP 4D – 4F AWARDS

1. INTRODUCTION

1. On 21 December 2016, the Fair Work Commission (**Commission**) published amended directions in respect of all awards allocated to Group 4D – 4F of the award stage of the 4 yearly review of modern awards. Specifically, parties were directed to file submissions on technical and drafting issues related to the exposure drafts by 18 January 2017.

2. The Australian Industry Group (**Ai Group**) files this submission in accordance with the aforementioned directions in respect of the following exposure drafts:

    - *Exposure Draft – Book Industry Award 2016;*
    - *Exposure Draft – Fast Food Industry Award 2016;*
    - *Exposure Draft – Food, Beverage and Tobacco Manufacturing Award 2016*;
    - *Exposure Draft – Hair and Beauty Industry Award 2016;*
    - *Exposure Draft – Professional Employees Award 2016;* and
    - *Exposure Draft – Water Industry Award 2010*.

3. Our submission in relation to the *Exposure Draft – Hair and Beauty Industry Award 2016* is filed jointly with the Hair and Beauty Australia Industry Association (**HABA**).

4. This submission first deals with issues of general concern. It subsequently goes on to identify issues specific to the exposure drafts identified above.

2. ISSUES OF GENERAL CONCERN

2.1 Matters that have been determined by the Commission

5. A number of issues arising from the exposure drafts have been determined by the Commission over the course of the Review thus far. Such matters include:

- An amendment to the title of the exposure drafts by substituting '2014' with '2015';[1]
- The terms of the commencement clause;[2]
- The deletion of the proposed supersession clause;[3]
- The removal of the absorption clause;[4]
- The retention of the take-home pay order provision;[5]
- An amendment to the provision that provides that the National Employment Standards (NES) and the relevant award provide the minimum conditions of employment;[6]
- A variation to the provision that imposes an obligation on an employer to ensure that a copy of the relevant award and NES is available to its employees;[7]
- An amendment to the text of the facilitative provisions;[8]

[1] [2015] FWCFB 4658 at [4].
[2] [2014] FWCFB 9412 at [11]; [2015] FWCFB 4658 at [4] and [2015] FWCFB 4658 at [8].
[3] [2014] FWCFB 9412 at [9].
[4] [2015] FWCFB 4658 at [9 – [20] and [2015] FWCFB 6656 at [74].
[5] [2014] FWCFB 9412 at [16] and [2015] FWCFB 6656 at [81].
[6] [2014] FWCFB 9412 at [23] – [25].
[7] [2014] FWCFB 9412 at [29].
[8] [2014] FWCFB 9412 at [42].

- The application of the casual loading to the minimum hourly rate or the ordinary hourly rate, which is to be determined on an award by award basis;[9]

- The deletion of the proposed clause that would list award provisions that do not apply to casual employees;[10]

- The inclusion of a table in the 'minimum wages' clause in the body of an award that contains the minimum weekly rate and minimum hourly rate;[11]

- The consequential removal of any columns from such a table that prescribe the 'casual hourly rate' or 'ordinary hourly rate' (where relevant);[12]

- The deletion of the proposed clause that would impose obligations on an employer regarding pay slips;[13]

- The insertion of a note that refers to Regulations 3.33 and 3.46 of the *Fair Work Regulations 2009*;[14]

- The deletion of summaries of the NES;[15]

- The insertion of a note in the annual leave provision of an award that refers to ss.16 and 90 of the *Fair Work Act 2009* (Act);[16]

- The definition of 'all purpose';[17]

[9] [2015] FWCFB 4658 at [70] – [72] and [2015] FWCFB 6656 at [109].
[10] [2014] FWCFB 9412 at [69].
[11] [2015] FWCFB 4658 at [54].
[12] [2015] FWCFB 4658 at [54];
[13] [2014] FWCFB 9412 at [35] – [36].
[14] [2015] FWCFB 4658 at [55] – [56].
[15] [2014] FWCFB 9412 at [35] – [36].
[16] [2015] FWCFB 4658 at [94].
[17] [2014] FWCFB 9412 at [44] – [53] and [2015] FWCFB 4658 at [91].

- The definition for and use of the terms 'minimum hourly rate' and 'ordinary hourly rate';[18]

- The application of penalties and loadings to the minimum rate prescribed by an award to the exclusion of over-award payments;[19]

- The restoration of the tables containing rates of pay in the National Training Wage Schedule;[20]

- The inclusion of tables that summarise hourly rates of pay in schedules attached to an award, noting that a 'one size fits all' approach may not be appropriate;[21] and

- The insertion of a note in the schedules summarising hourly rates of pay, which states that an employer meeting their obligations under the schedule is meeting their obligations under the award.[22]

6. Whilst reviewing these exposure drafts, we have endeavoured to identify any instances in which they do not reflect the aforementioned matters.

2.2 The characterisation of premiums payable pursuant to an award and the manner in which the premium is expressed

7. Modern awards variously characterise premiums that are payable to an employee as penalties, loadings or allowances. For example, the additional amount payable to an employee for work performed on a public holiday may be characterised in an award as a penalty rate. Further, an employee may be entitled to a shift loading in respect of work performed during a shift at a particular time.

[18] [2014] FWCFB 9412 at [44] – [53] and [2015] FWCFB 9412 at [47].

[19] [2015] FWCFB 4658 at [95] – [96].

[20] [2014] FWCFB 9412 at [67].

[21] [2014] FWCFB 9412 at [58] and [2015] FWCFB 4658 at [62].

[22] [2015] FWCFB 4658 at [63].

8. We have identified instances in which the characterisation of a particular premium payable under an award has been altered in the corresponding provision of an exposure draft. For instance, where a current award mandates the payment of a shift *allowance*, the exposure draft may instead refer to it is a shift *loading*.

9. Further, the modern awards system typically prescribes a premium payable as a percentage of the relevant hourly rate. For example, a shift loading may be described as 30% of the minimum hourly rate. In such circumstances, the relevant loading is readily identifiable as being 30% of the relevant rate. In practice, to determine the total amount payable, an employer would multiply the relevant hourly rate by 130%.

10. The exposure drafts have altered the way in which such premiums are expressed. The proposed provisions stipulate that an employee is to be paid 130% of the relevant rate. This is, of course, the calculation that must be undertaken, in practical terms, to ascertain the quantum payable. However, by expressing the amount due in this way, the component of the total amount payable that is to be characterised as the loading is no longer readily apparent. That is, the instrument would no longer separately identify that the shift loading equates to 30% of the relevant minimum rate. As a corollary of this, the amount that equates to the 'base rate' (that is, the component of the total amount payable that is stripped of any premium) is also no longer separately identified.

11. We raise this issue out of concern that it may have unintended consequences that. Whilst we appreciate and acknowledge that the manner in which the exposure drafts express the relevant penalty rates or loadings may make it easier to determine the calculation to be performed to ascertain the quantum due, the portion of the amount paid that is in fact the penalty or loading is not clear on the terms of the proposed provisions.

12. Ai Group has raised this issue in relation to a significant number of exposure drafts in a submission we filed on 31 August 2016. At that time, exposure

drafts for group 4D – 4F awards had not been published. As a result, it does not deal with the exposure drafts now before the Commission.

13. We understand that in a decision to be handed down by the Commission regarding group 3 awards, the Commission intends to deal with the 'general issues' that have consistently been raised by Ai Group regarding many of the exposure drafts we have reviewed to date.[23] Accordingly, we do not propose to here identify each instance in which the aforementioned issues arise in the group 4D – 4F exposure drafts. We may, however, seek an opportunity to revisit these exposure drafts once the Commission issues its decision in this regard.

2.3 The application of penalties and loadings to the ordinary hourly rate

14. The Commission's decision of 13 July 2015[24] (July 2015 Decision) deals with the use of the term 'ordinary hourly rate', which has been defined as the hourly rate for the employee's classification as prescribed by a specific clause of the relevant award, plus any all purpose allowances. An issue arising from the use of this terminology is the calculation of various loadings and penalties. That is, whether the relevant penalty or loading is to be applied to the minimum rate or a rate that is inclusive of applicable all purpose allowances.

15. The Commission observed that allowances defined as applying 'for all purposes' "have historically been treated as part of an employee's wages for the purpose of calculating penalties and loadings"[25] but noted that "some issues have arisen concerning the methodology used in the exposure drafts" in this regard.[26]

16. The Commission stated that the exposure drafts, as at the time that the decision was issued, dealt with penalties and loadings in the following way:

[23] Transcript of proceedings on 6 December 2016 at PN4.

[24] [2015] FWCFB 4658.

[25] [2015] FWCFB 4658 at [40].

[26] [2015] FWCFB 4658 at [41].

> [44] In affected awards, penalties and loadings are expressed as a percentage of the ordinary hourly rate, for example "overtime is paid at 150% of the ordinary hourly rate" to make it clear that an all purpose allowance to which an employee is entitled must be added to the minimum rate before calculating the loaded rate, that is, there is a *compounding* effect.[27]

17. The Full Bench went on to accurately summarise Ai Group's contentions as follows: (emphasis added)

> [45] Ai Group submit that the term 'ordinary hourly rate' could be "confusing" and is concerned that it could "extend existing entitlements". Ai Group submit that all purpose allowances should not necessarily be added to a minimum rate of pay before calculating any penalty or loading. In some cases due to the wording of the current award, Ai Group submit that the allowance should be added after the loading is applied to the minimum rate, that is there should be a cumulative rather than compounding effect.[28]

18. The Commission declined to alter the exposure drafts such that they do not use the term 'ordinary hourly rate' or define the term 'all purposes'. In doing so, however, it had regard to our argument, that the specific terms of a clause must be given consideration in determining whether an all purpose allowance is to be added before or after a penalty or loading is applied: (emphasis added)

> [47] … Any issues as to whether a particular payment is payable for all purposes, and, in particular, whether an allowance should be added to a minimum rate before calculating a penalty or loading, will be dealt with on an award-by-award basis. Ultimately the resolution of these issues will turn on the construction of the relevant award and the context in which it was made.[29]

19. The decision clearly contemplates the need to look to the specific drafting of a provision in order to determine the arithmetic exercise that must be undertaken to properly calculate an employee's entitlement. We took from the above passage that an opportunity would be afforded to interested parties to make submissions that go to how such a provision is to be applied on an award-by-award, clause-by-clause basis.

20. The submissions below, wherever relevant, deal with the appropriate construction of current award clauses that prescribe a penalty or loading in

[27] [2015] FWCFB 4658 at [44].

[28] [2015] FWCFB 4658 at [45].

[29] [2015] FWCFB 4658 at [47].

circumstances where we are of the view that the exposure draft ought to refer to the minimum hourly rate, rather than the ordinary hourly rate.

21. We do so on the basis that where a current award provision requires the application of a premium to a rate that does not include any all-purpose allowances, but the exposure draft deviates from this, the result is a substantive change that may have significant cost implications for an employer. We note that the Commission has repeatedly acknowledged that the redrafting process is not intended to create any substantive changes to the award system.

22. In addition, we make the following observations regarding the definition of 'all purpose' that has been inserted in the revised exposure drafts, in accordance with the July 2015 Decision. It is in the following terms: (emphasis added)

> all purpose means the payment that will be included in the rate of pay of an employee who is entitled to the allowance, when calculating any penalties or loadings or payment while they are on annual leave.

23. We are concerned that, even if the Commission accepts our submission in respect of any particular clause that the relevant loading or penalty is to be applied to the minimum hourly rate (rather than a rate that includes an all purpose allowance), there would remain an apparent tension between a clause that refers explicitly to the minimum hourly rate and the above definition. This is because the definition suggests that an all purpose allowance is to be *included* in the relevant rate of pay when calculating a loading or penalty.

24. Consider a clause that requires the payment of, for example, 150% of the minimum hourly rate. If such a clause, when read in conjunction with the definition of 'all purposes', is interpreted to require that the loading or penalty is to be calculated on a rate that includes all purpose allowances, it would clearly run contrary to the intention of referring expressly to the minimum hourly rate.

25. Whilst we appreciate that the Commission has not sought further submissions regarding the definition of 'all purposes', we think it appropriate to here raise

the matter, as it may become apparent that there is a need to modify the definition, or accommodate for it when re-drafting the relevant provisions that prescribe the penalty or loading.

Calculation of the casual loading

26. The question of whether the casual loading should be applied to the minimum hourly rate or ordinary hourly rate has also been the source of some controversy in the context of the exposure drafts. The Commission previously expressed the provisional view that a general approach involving the application of casual loading to the minimum hourly rate should be adopted.

27. In its decision of September 2015[30], the Full Bench determined that the provisional view should not be adopted. It also indicated that:

> 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.[31]

28. Ai Group does not understand the Full Bench's September decision to amount to a determination that the 'general approach' would necessarily be applicable in all awards.

29. In the proceedings associated with the September 2015 decision, both employer and union parties either argued for, or at least accepted, the need for some deviation from the application of a uniform approach to such matters: (emphasis added)

> [103] The primary submission of the AWU, the CFMEU and the AMWU was that the proposed general rule should not be adopted, so that issue 3 did not arise. The AWU submitted in the alternative that, if the proposed general rule was adopted, it should be on the basis that no employee suffered a reduction in remuneration as a result. The AMWU submitted that the *2008 decision* demonstrated that there may be departures from a general rule in relation to particular modern awards.
>
> [104] ABI declined to make a submission in relation to issue 3 beyond noting that the *On-Site Award* and the *Cotton Ginning Award* were examples of modern awards which might require individual consideration. The Ai Group submitted that there

[30] [2015] FWCFB 6656.

[31] [2015] FWCFB 6656 at [110].

should generally be a consistent position across all awards, but accepted that there could be a justification for a departure from that position in relation to particular awards, in which case the party contending for the departure should carry the onus of demonstrating the requisite justification.

[105] The MBA and the HIA both contended that adoption of the provisional decision in the *On-Site Award* would resolve the existing dispute concerning the interpretation of that award, but that if it was not considered appropriate to resolve the dispute in that way, the problem should be given specific consideration by the Commission as expeditiously as possible.[32]

30. In relation to this point the Full Bench stated: (emphasis added)

[106] The obligation in s.134(1) of the FW Act to ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions carries with it a requirement (in s.134(1)(g)) to take into account "the need to ensure a simple, easy to understand, stable and sustainable modern award system …". We accept that the adoption of a clear and consistent approach in relation to whether the casual loading should apply to all purpose allowances is desirable in the interests of simplicity and ease of understanding, although the particular circumstances of some awards may require special consideration. The question is whether the approach proposed by the provisional decision is the one which should be preferred in this respect.[33]

31. Ai Group has previously identified that numerous awards, as currently drafted, expressly require that the casual loading be calculated on the applicable minimum award rate of pay rather than compounding the benefits of any allowance, including 'all purpose' allowances.

32. To the extent that it is necessary, we point out that the inclusion of an all-purpose allowance in an award does not prevent the instrument from potentially providing that any applicable casual loading is to be calculated by reference to an amount not including any all-purpose allowance.

33. To require that the casual loading be applied to a rate that includes one or more all-purpose allowances in an exposure draft where that is not the approach under the current award would be a substantive change and would significantly increase employer costs. Ai Group opposes such redrafting of the relevant award provisions on this basis.

34. Such redrafting would unjustifiably compound the benefits of either the relevant allowance or loading. There is no basis in the text of any of the

[32] [2015] FWCFB 6656 at [103] – [105].

[33] [2015] FWCFB 6656 at [106].

relevant awards for concluding that this reflects the purpose for which either the casual loading or relevant allowances in the award is paid. Such issues were, to an extent, acknowledged by the Full Bench:

> [109] The concern which underlay the provisional decision was whether it was appropriate for certain allowances currently expressed as all-purpose allowances to be paid at an increased level for casual employees by reason of the application of the casual loading. Ultimately however we have concluded that to deal with this concern in the manner proposed by the provisional decision is too broad-brush an approach and involves conducting the analysis from the wrong starting point. We consider that the preferable approach is to permit reconsideration, on an award-by-award basis during the course of the 4-yearly review, as to whether any existing allowance should retain its "all purpose" designation or should be payable on some different basis.[34]

35. Ai Group agrees that the Full Bench's concern is an important matter that must be addressed. In circumstances where an award did not previously require the compounding of such entitlements it is difficult to understand how the Full Bench can be satisfied that such a term is now necessary to meet the modern awards objective, as required by s.138.

36. Ultimately, these issues may need to be addressed differently in the context of particular awards. However, one potentially appropriate approach to addressing this matter would be to maintain the practice in a particular award of specifically defining or articulating the way in which the casual loading is to be calculated in a manner that expressly deals with, and precludes, any compounding of the relevant all-purpose allowance and to slightly modify the definition of 'all purpose' adopted in the context of that instrument.

37. This is necessary as there will, as already identified, be a tension between the proposed 'all purpose' definition and the clause specifying what a casual employee is to be paid if there is not to be a compounding effect. In the interests of ensuring the award is simple and easy to understand this should be expressly dealt with. There may be a different means of addressing this within different awards. However, one way would be to modify the proposed definition of 'all purpose' so that, in relevant awards, it states:

[34] [2015] FWCFB 6656 at [109].

Allowances paid for all purposes are included in the rate of pay of an employee who is entitled to the allowance, when calculating any penalties, loadings (except for the casual loading provided for in clause x) or payment while they are on annual leave…

38. Importantly, the definition of "all-purpose allowance" is a new provision in awards. Accordingly, any difficulty reconciling the wording of the new definition with a current entitlement should not be considered a reason for varying the current award entitlements.

2.4 The application of penalties and loadings to over-award payments

39. The July 2015 Decision also considered arguments made by various parties as to whether a penalty or loading prescribed by an award is to be applied to the minimum award rate or a rate that incorporates over-award payments.

40. The Commission rejected the unions' arguments in this regard and in doing so, accepted Ai Group's contention that penalties and loadings stipulated by an award do not require an employer to apply them to over-award rates. The decision states that the exposure drafts will therefore express the relevant loadings and penalties as a percentage of the minimum rate prescribed by the award, rather than using the terms 'time and a half' or 'double time'.[35]

41. Despite this, there are certain instances in which the exposure drafts do not reflect this aspect of the Commission's decision. We have endeavoured to identify any such examples in the submissions that follow.

2.5 Schedules summarising hourly rates of pay

42. In its July 2015 Decision[36], the Commission decided that a note would be inserted in all exposure drafts that contain a schedule summarising the hourly rates payable under the award. It is in the following terms: (emphasis added)

NOTE: Employers who meet their obligations under this schedule are meeting their obligations under the award.

[35] [2015] FWCFB 4658 at [95] – [96].

[36] [2015] FWCFB 4658 at [63].

43. Whilst we understand that it is the Commission's intention that the schedules attached to the exposure drafts be legally enforceable,[37] we are concerned that this is not achieved by the note.

44. The schedules do not, as such, impose any *obligation* on an employer. Rather, they merely summarise the rates that are payable to an employee by virtue of various clauses found in the body of the award including:

- The minimum wages provision that prescribes the rate of pay for each classification; and
- Any penalties, loadings, allowances or other premiums.

45. The obligation to pay an employee a particular rate arises from the terms of the award itself. For instance, clause 10.1 of the *Exposure Draft – Rail Industry Award 2015* states that: (emphasis added)

> An employer must pay adult employees the following minimum wages for ordinary hours worked by the employee …

46. That is, clause 10.1 requires that an employer pay an employee the rates there prescribed for ordinary hours of work. Similarly, clause 13 states: (emphasis added)

> An employee will be paid the following penalty rates for all ordinary hours worked by the employee.

47. The provision then goes on to state various penalties payable for shiftwork and work performed on weekends or pubic holidays.

48. Neither the terms found in the body of the exposure drafts, nor the terms of the schedules itself, impose an obligation on an employer to pay the rates summarised in the schedules. That is, neither the exposure drafts nor the schedules purport to require the employer to pay the rates prescribed by the schedules. Therefore, the reference in the note to an employer meeting its "*obligations* under [the] schedule" appears somewhat erroneous.

[37] [2015] FWCFB 4658 at [63].

49. Further, in our view, the schedules should not, and indeed cannot, provide a substitute for reading the terms of an award itself. That is, the schedules must be read in the context of the award. This is because the award contains provisions that explain the circumstances in which a particular rate is payable. Similarly, an award may provide for exceptions or caveats around the application of a particular monetary entitlement. Indeed these complexities were acknowledged by the Full Bench in its July 2015 Decision: (emphasis added)

> [61] In submissions to the Review, a number of parties have raised general and specific issues about the inclusion of such detailed schedules. In their submission of 6 March 2015, Ai Group supports the inclusion of such schedules but states that the Commission's approach must be considered on an award-by-award basis and "be guided by the submissions of the parties and outcomes of the conferencing process". While most parties support the inclusion of schedules of hourly rates, there is concern about adopting a 'one size fits all' approach. <u>While rates including penalties and loadings can be clearly summarised in some awards, others are more complex due to the inter-relationship between loadings or the incidence of all purpose allowances payable to only some employees.</u>[38]

50. In our view, it would be prudent to alert a reader of the award to the need to make reference to the corresponding award provisions in order to ascertain the relevant entitlement. Indeed this is a practice that is often adopted by industrial organisations that provide summaries of rates of pay to their membership. The intention is to ensure that an employer and employee are aware of the need to consider the text of the relevant provisions, rather than to assume that a rate prescribed by the schedules is applicable in all circumstances.

51. For this reason, we propose that the note determined by the Commission be amended as follows:

> NOTE: <u>This schedule should be read in conjunction with the terms of the award.</u> Employers who pay the relevant rates contained in ~~meet their obligations under~~ this schedule are meeting ~~their~~ <u>the corresponding</u> obligations under the award.

[38] [2015] FWCFB 4658 at [61].

2.6 Commencement clause

52. Clause 2.1 of current modern awards states as follows:

> This award commenced operation on 1 January 2010

53. At clause 1.2 of the exposure drafts this has been changed to:

> This modern award, as varied, commenced operation 1 January 2010

54. There is obviously a need to include such a clause to reflect that the awards have been in operation since 1 January 2010. However, the words, "as varied" in the sentence contained at clause 1.2 are misleading. The awards, as varied, did not commence operation on 1 January 2010.

55. We nonetheless suggest that there may be merit in alerting the reader to the fact that the award has been varied since its commencement. While this observation may seem trite to industrial relations practitioners, it may not be apparent to all lay employers and employees. We suggest the following clause, or comparable wording, should be included in all modern awards:

> This modern award commenced operation on 1 January 2010. The award has been varied since that date.

3. EXPOSURE DRAFT – BOOK INDUSTRY AWARD 2016

57. The submissions that follow relate to the *Exposure Draft – Book Industry Award 2016*.

Clause 4.4(c) – Exclusions from coverage

58. Clause 4.4 states "this award does not cover" and sub-clauses (a)-(d) then set out the specific exclusions from the award. Clause 4.4(c) currently specifies as follows:

> (c) who are covered by a modern enterprise award, or an enterprise instrument (within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)), or employers in relation to those employees; or

59. It appears to us that the word "employees" should be inserted before the word "who" so that the clause reads coherently.

Clause 7.2 – Facilitative provisions

60. We do not consider that clause 18.2 of the exposure draft is a 'facilitative provision' in the sense contemplated by clause 7.1. It does not enable an employer and its employee (or employees) to agree to depart from "the standard approach in an award provision". Rather, it enables an employer and employee to agree to take annual leave prior to its accrual in accordance with the NES.

61. Given this, the reference to clause 18.2 should be deleted from clause 7.2.

Clause 7.2 – Facilitative provisions

62. We do not consider that clause 18.3 of the exposure draft is a 'facilitative provision' in the sense contemplated by clause 7.1. It does not enable an employer and its employee (or employees) to agree to depart from "the standard approach in an award provision". Rather, it enables an employer and employee to agree to cash out annual leave.

63. Given this, the reference to clause 18.3 should be deleted from clause 7.2

Clause 10.1 – Casual employment

64. Pursuant to the current clause 10.2(a), a casual employee is defined as meaning "an employee who is engaged as such." In clause 10.1 of the proposed exposure draft this has been changed such that a casual employee is now defined as one "who is engaged and paid as a casual employee."

65. It is unclear why this additional qualification to the definition of a casual has been added. In our view, the additional words could result in a substantial change and should be deleted.

Clauses 12.3 and 17.4 – Exemption from hours of work and overtime provisions

66. In the current award, clause 20 provides an exemption from Part 5 of the award, specifying as follows:

> Part 5 of this award will not apply to employees classified as Senior editors Level 3 Grade 3 or Publicists Grade 6 or 7. Such employees will, however, be entitled to receive at least two days off work each week.

67. Part 5 of the existing award contains provisions dealing with ordinary hours of work and rostering (clause 17), breaks (clause 18) and overtime (clause 19). Clause 20 is therefore excluding Senior editors Level 3 Grade 3 and Publicists Grade 6 or 7 from the provisions in clause 17, 18 and 19.

68. In the proposed exposure draft, there is no separate exemption provision excluding the relevant employees from a part of the award. Clause 12.3 exempts Senior editors Level 3 Grade 3 and Publicists Grade 6 or 7 from the ordinary hours of work provisions contained in clause 12 and clause 17.4 exempts these same employees from the overtime provisions contained in clause 17.

69. However, it is evident that there is no clause exempting Senior editors Level 3 Grade 3 and Publicists Grade 6 or 7 from the provisions dealing with breaks under the award (contained at clause 13).

70. It is unclear why this is the case. The exemption contained in the current clause 20 should be retained in clause 13 of the exposure draft.

Clause 14 – Minimum wages

71. Clause 14 imposes an obligation on an employer to pay all "adult employees" the minimum wages there prescribed for ordinary hours worked by an employee. The table that follows includes minimum weekly rates and minimum hourly rates. Read literally, the clause purports to require the payment of the minimum weekly rate to all employees including part-time and casual employees.

72. We suggest that the words "(full-time employee)" be inserted under the title "minimum weekly wage" in the middle column of the table contained in clause 14 to avoid any uncertainty and ensure that the award is easily understood. We note that this proposal has been adopted in multiple group 3 exposure drafts to address the concern we have here raised.

Clause 17 – Overtime

73. We note that parties have been asked to consider whether the award should include a definition of when overtime applies. The existing award does not contain such a definition, and we do not see the necessity of creating one now.

Part 6 – Heading

74. The heading to Part 6 of the exposure draft is 'Leave Public Holiday.' This heading does not make sense and should be amended to avoid confusion as to what Part 6 is about.

75. We suggest the heading could be amended to 'Leave and Public Holidays.'

4. EXPOSURE DRAFT – FAST FOOD INDUSTRY AWARD 2016

76. The submissions that follow relate to the *Exposure Draft – Fast Food Industry Award 2016*.

Clause 7.2 – Facilitative provisions

77. We do not consider that clause 22.4 is a 'facilitative provision' in the sense contemplated by clause 7.1. It does not enable an employer and its employee (or employees) to agree to depart from "the standard approach in an award provision". Rather, it enables an employer and employee to agree to take annual leave prior to its accrual in accordance with the NES.

78. The reference to clause 22.4 should therefore be deleted from clause 7.2.

Clause 7.2 – Facilitative provisions

79. We do not consider that clause 22.5 is a 'facilitative provision' in the sense contemplated by clause 7.1. It does not enable an employer and its employee (or employees) to agree to depart from "the standard approach in an award provision". It enables an employer and employee to agree to cash out annual leave. The award itself does not, however, contain any provisions from which such a provision contemplates a departure.

80. The reference to clause 22.5 should therefore be deleted from clause 7.2.

Clause 10.1(c) – Part-time employees

81. Clause 10.1(c) is a new provision; no equivalent provision appears in the current award. Whilst we support the inclusion of a provision that makes clear that part-time employees are entitled to pay and conditions on a pro-rata basis, we make the following submissions about the specific terms of the proposed clause.

82. Clause 10.1(c) purports to deal with all pay and conditions received by "full-time employees who do the same kind of work".

83. It is neither necessary (in the sense contemplated by s.138) nor appropriate for an award to deal with over-award terms and conditions of employment. A provision that appears to require that a part-time employee receive, on a pro rata basis, over-award terms and conditions to which a full-time employee is entitled, is not *necessary* to ensure a fair and relevant *minimum* safety net of terms and conditions. This is consistent with the Commission's decision that penalties payable under the award are to be calculated by reference to the minimum rate prescribed by the award; the relevant provisions do not require that the penalty be calculated on a rate that includes over-award components.[39]

84. We also consider that the reference to full-time employees "who do the same kind of work" is unnecessary and confusing. The entitlement to pro-rata payments under the current award arise if a part-time employee has an entitlement to that amount or condition by virtue of the terms of the relevant provision that provides that term or condition. For instance, a part-time employee is entitled to pro-rata payment of an allowance if the terms providing for the allowance itself are satisfied. The entitlement does not arise simply because the part-time employee is performing "the same kind of work" as a full-time employee but does not in fact perform the specific task or suffer the specific disability for which the allowance is intended to compensate an employee.

85. For these reasons, we submit that:

- clause 10.1(c) should be deleted; and
- a new clause 10.9 should be inserted in the following terms:

  The terms of this award will apply on a pro rata basis to part-time employees on the basis that the ordinary weekly hours for full-time employees are 38.

[39] [2015] FWCFB 4658 at [95] – [96].

Clause 11.1 – Casual employment

86. Pursuant to the current clause 13.1, a casual employee is defined as one who is "engaged as such". That has been altered in the exposure draft such that a casual employee is now one who is "engaged and paid" as a casual employee.

87. The rationale for introducing additional criteria in order for an employee to be deemed a casual employee is not apparent. In our view the words are unnecessary and should be deleted. They potentially amount to a substantive change to the award and, in any event, do not make the instrument any simpler or easier to understand by virtue of their introduction.

Clause 11.1 – Casual employment

88. The text following the first line of clause 11.1 ("A casual employee will be paid … ") should be numbered as a separate clause.

Clause 12.1 – Classifications

89. The words "set out in" should be inserted after "structure". This appears to be a drafting error.

Clause 12.4(a) – Level 1

90. The heading should be amended to read: "Fast Food Employee Level 1" such that it is consistent with the references contained to an employee engaged at that level in clauses 12.4(a)(ii) and 12.4(b).

Clause 12.4(a)(i) – Level 1

91. Clause B.1.1 of the current award defines a fast food employee level 1 as follows:

> An employee engaged in the preparation, the receipt of orders, cooking, sale, serving or delivery of meals, snacks and/or beverages which are sold to the public primarily to take away or in food courts in shopping centres.

92. The definition encapsulates employees engaged in any or all activities there listed. No one activity must be undertaken by an employee in order for the definition to be met.

93. Clause 12.4(a)(i) substantively deviates from this. It states: (emphasis added)

> An employee engaged in the receipt of orders; and the preparation, cooking, sale, serving or delivery of meals, snacks and/or beverages which are sold to the public primarily to take away or in food courts in shopping centres.

94. The redrafted classification definition appears to require that a fast food employee level 1 must be engaged in:

- the receipt of orders; and
- the preparation, cooking, sale, serving or delivery of meals, snacks and/or beverages which are sold to the public primarily to take away or in food courts in shopping centres.

95. As a result, an employee who, for instance, is not engaged in the receipt of orders but is engaged in the preparation, cooking etc of meals, snacks and/or beverages as described would no longer meet the definition of a level 1 fast food employee. This is a significant substantive change.

96. Accordingly, clause 12.4(a)(i) should be replaced with the current B.1.1.

Clause 12.4(b) – Level 2

97. The heading should be amended to read: "Fast Food Employee Level 2" such that it is consistent with the proposed heading for clause 12.4(a).

Clause 12.4(c) – Level 3

98. The heading should be amended to read: "Fast Food Employee Level 3" such that it is consistent with the proposed heading for clauses 12.4(a) and 12.4(b).

Clause 13.4 – Ordinary hours of work

99. The current clause 25.1 refers to "this clause"; that being all of clause 25.

100. Clause 25 has been disaggregated in the exposure draft, such that its contents now appear at clauses 13, 14 and 21. We are concerned that the reference in clause 13.4 to only clause 13 amounts to a substantive change.

101. In order to retain the effect of the current clause 25.1, clause 13.4 should be amended to refer to clauses 13, 14 and 21.

Clause 15.1 – Breaks during work periods – between 4 and 5 hours

102. The current clause 27.1(a) specifies, in the third row of the table, the breaks that will be given where 4 hours but less than 5 hours are worked.

103. Clause 15.1 of the exposure draft, in the third row of the table, refers to "between 4 and 5 hours". Arguably, the breaks there set out are no longer to be given to an employee who works 4 hours. This creates an anomaly as the preceding entry relates only to circumstances in which *less* than 4 hours are worked.

104. Accordingly, the words "between 4 and 5 hours" should be replaced with "4 hours but less than 5 hours".

Clause 15.1 – Breaks during work periods – between 5 and 9 hours

105. The current clause 27.1(a) specifies, in the fourth row of the table, the breaks that will be given where 5 hours but less than 9 hours are worked.

106. Clause 15.1 of the exposure draft, in the fourth row of the table, refers to "between 5 and 9 hours". Arguably, the breaks there set out are no longer to be given to an employee who works 5 hours. This creates an anomaly as the preceding entry relates only to circumstances in which *between* 4 and 5 hours are worked.

107. Accordingly, the words "between 5 and 9 hours" should be replaced with "5 hours but less than 9 hours".

Clause 15.1 – Breaks during work periods – between 5 and 9 hours

108. The meal break to be given where between 5 and hours are worked is described as "one meal break of between 30 and 60 minutes". Read literally, a meal break of 30 minutes in length would not satisfy this clause.

109. The provision deviates substantively from the current clause 27.1(a), which describes the entitlement as "one meal break of at least 30 minutes but not more than 60 minutes".

110. We submit that the relevant text in the exposure draft should be replaced with that found in the current clause.

Clause 16.1 – Minimum wage

111. Clause 16.1 imposes an obligation on an employer to pay all adult employees the minimum wages there prescribed for ordinary hours worked by an employee. The table that follows includes minimum weekly rates and minimum hourly rates. Read literally, the clause purports to require the payment of the minimum weekly rate to all employees including part-time and casual employees.

112. Whilst it might be argued that clauses 10.1(c) and 11.1 require only the payment of the minimum hourly rates to part-time and casual employees respectively, at the very least clause 16.1 creates a tension with those provisions. We note that the preamble now found at clause 16.1 does not appear in the corresponding clause 17 of the current award.

113. We suggest that the words "(full-time employee)" be inserted under "minimum weekly wage" in the table at clause 16.1 in the interests of ensuring that the award is "simple and easy to understand". This proposal has been adopted in multiple group 3 exposure drafts to address the concern we have here raised.

Clause 17.1(a) – Broken Hill allowances

114. The current clause 19.9 describes the Broken Hill allowance as one that is payable for "the exigencies of working in Broken Hill". The underlined text has been removed in the proposed clause 17.1(a).

115. The inclusion of district allowances in modern awards and the basis upon which they may be permitted has been, and continues to be, a live issue in this Review. This includes an ACTU claim to remove transitional district allowance provisions, Federal Court proceedings regarding the Commission's decision to retain the Broken Hill allowance in the *Fast Food Industry Award 2010* amongst others, and an SDA regarding district allowances in this award, to which clause 19.9 is relevant. This matter has not yet been heard and determined.

116. We note that the text underlined above was relevant to the Federal Court's consideration of whether the clause can properly be included in a modern award and the underlying purpose for such a provision.[40] We envisage that such matters may also be of some relevance to future proceedings in relation to this clause and the proposed insertion of additional district allowances.

117. For these reasons, the relevant words should be inserted in clause 17.1(a).

Clause 17.1(b)(i) – Cold work disability allowance

118. The current clause 19.8(a) requires the payment of the allowance there prescribed only while the employee is required to perform the relevant type of work or activity. This is so because the clause states that the allowance is to be paid while the employee is "so employed". The absence of these words in clause 17.1(b)(i) of the exposure draft results in a provision that potentially requires the payment of the allowance for all hours worked by an employee, so long as the employee, at some point in time, undertook the work there described. This is quite clearly a significant substantive change.

[40] *ACCI v ACTU* [2015] FCAFC 131.

119. For these reasons, the words “while so employed” should be inserted at the end of the clause.

Clause 17.1(b)(ii) – Cold work disability allowance

120. The current clause 19.8(b) requires the payment of the allowance there prescribed only while the employee is required to perform the relevant type of work or activity. This is so because the clause states that the allowance is to be paid while the employee is “so employed”. The absence of these words in clause 17.1(b)(ii) of the exposure draft results in a provision that potentially requires the payment of the allowance for all hours worked by an employee, so long as the employee, at some point in time, undertook the work there described. This is quite clearly a significant substantive change.

121. For these reasons, the words “while so employed” should be inserted at the end of the clause.

Clause 17.2(d)(i) – Travelling time reimbursement

122. Under the current clause 19.4(a), an employee is entitled to be paid travelling time for all time reasonably spent in reaching and returning from a place away from their usual place of employment. The payment, however, is only due for the duration of time that is in excess of the time normally spent travelling from the employee’s home to their usual place of employment and returning. The employee is not entitled to be paid for the *entire* duration of time spent travelling.

123. Clause 17.2(d)(i) deviates substantively from this. Whilst it only applies if the time reasonably spent travelling to and from that place exceeds the time normally spent travelling to and from their usual place of employment, it does not limit the obligation to pay travelling time to the difference between the two. This clearly has the effect of increasing the entitlement.

124. Accordingly, the first bullet point under clause 17.2(d)(i) should be replaced with the following:

> for all time reasonably spent reaching and returning from that place that exceeds the time normally spent in travelling from their home to their usual place of employment and returning; and

Clause 17.2(d)(ii) – Travelling time reimbursement

125. As we understand it, the current clause 19.4(b) requires the payment of travelling time from the pick-up point to the place away from the employee's usual place of employment and from that place back to the pick-up point. The employee is *not* entitled to payment from the employee's home (or any other place) to the pick-up point, from which they will then travel to the other place.

126. The proposed clause 17.2(d)(ii) appears to apply where an employee is travelling to and from the pick-up point from their home or their usual place of employment. This is because it refers to travel "to and from" the pick-up place rather than travel "from and return thereto", as stated in the current clause. This substantively alters the entitlement.

127. Accordingly, clause 17.2(d)(ii) should be amended as follows:

> Where the employer provides transport from a pick-up point, an employee will be paid travelling time for all time spent travelling ~~to and from that pick-up point~~ <u>from such pick up point and return thereto</u>.

Clause 20.1(a)(i) – Overtime

128. The word "ordinary" should be inserted after "38" each time it appears in clause 20.1(a) to make clear that overtime rates are payable only where an employee works in excess of 38 <u>ordinary</u> hours, as compared to any 38 hours of work.

Clause 20.2(a) – Monday to Saturday – all employees

129. The words "all employees" in the heading to clause 20.2(a) do not appear in the current award.

130. There is presently a contest between some interested parties as to whether overtime rates are in fact payable under the award to casual employees, which has been referred to the casual and part-time common issues Full Bench for determination. The proposed new heading to clause 20.2(a) has the effect of predetermining the SDA's claim in this regard and should, therefore, not be adopted. This matter may be revisited if considered necessary once the Full Bench has issued its decision.

Clause 20.2(b) – Sunday – all employees

131. The words "all employees" in the heading to clause 20.2(b) do not appear in the current award.

132. There is presently a contest between interested parties as to whether overtime rates are in fact payable under the award to casual employees, which has been referred to the casual and part-time common issues Full Bench for determination. The proposed new heading to clause 20.2(b) has the effect of predetermining the SDA's claim in this regard and should, therefore, not be adopted. This matter may be revisited if considered necessary once the Full Bench has issued its decision.

Schedule A 1.1 – Full-time and part-time employees – ordinary and penalty rates

133. The words "Monday – Friday" should be inserted under the "Evening work" headings in order to make clear that the rates there prescribed are not payable on weekends.

Schedule A.2.1 – Casual employees other than shiftworkers – ordinary and penalty rates

134. The words “other than shiftworkers” in the heading are unnecessary and should be deleted.

Schedule A.2.1 – Casual employees other than shiftworkers – ordinary and penalty rates

135. The words “Monday – Friday” should be inserted under the “Evening work” headings in order to make clear that the rates there prescribed are not payable on weekends.

Schedule A.3.1 – Full-time and part-time junior employees – ordinary and penalty rates

136. The words “Monday – Friday” should be inserted under the “Evening work” headings in order to make clear that the rates there prescribed are not payable on weekends.

Schedule A.3.3 – Casual junior employees – ordinary and penalty rates

137. The words “Monday – Friday” should be inserted under the “Evening work” headings in order to make clear that the rates there prescribed are not payable on weekends.

5. EXPOSURE DRAFT – FOOD, BEVERAGE AND TOBACCO MANUFACTURING AWARD 2016

138. The submissions that follow relate to the *Exposure Draft – Food, Beverage and Tobacco Manufacturing Award 2016*.

Applicable rate of pay

139. The exposure draft contains a definition for the term 'applicable rate of pay' at clause 2 in the following terms:

> **applicable rate of pay** means the ordinary hourly rate plus penalties and relevant loadings

140. The term has been used in the following provisions of the exposure draft:

- Clause 13.1(b) – Meal breaks;
- Clause 13.5 – Meal breaks;
- Clause 20.2(f)(iv) – Travelling time payment;
- Clause 20.3 – Extra rates not cumulative;
- Clause 22.9(b) – Rest breaks;
- Clause 22.9(c) – Rest breaks;
- Clause 22.12 – Standing by;
- Clause 27.5(a) – Rostered day off on a public holiday; and
- Clause 34 – Transfer to lower paid job on redundancy.

141. The introduction of this term, the definition proposed and its adoption in the aforementioned clauses is strongly opposed by Ai Group.

142. Earlier in this Review, the Commission proposed the introduction of the same phrase in a range of clauses in the *Manufacturing and Associated Industries and Occupations Award 2010* that are very similar in their terms to those

identified above.[41] Ai Group filed detailed submissions opposing the changes proposed on the basis that if adopted, the award variations would result in significant cost increases and would, in some cases, undermine the workability of relevant clause.

143. There were thereafter multiple conferences listed before the Commission in this regard and numerous discussions between interested parties as to how the matter should be dealt with. Ultimately, the parties reached a consent position regarding the majority of provisions in question, save for the provision that deals with rostered days off falling on a public holiday. Ai Group filed submissions on 28 October 2016 and 11 November 2016 in support of our position in relation to that provision, which is in the same terms as clause 27.5(a) of the *Exposure Draft – Food, Beverage and Tobacco Manufacturing Award 2016*.

144. It is our understanding that the Commission will consider the submissions filed by Ai Group and other interested parties regarding the *Manufacturing and Associated Industries and Occupations Award 2010*, including the consent position reached between the parties, and issue its decision thereafter. Given the commonality between the provisions there being considered and those identified above, we submit that this matter should be deferred until the Commission issues its decision. Parties should subsequently be given an opportunity to consider the decision, participate in discussions and, if necessary, file submissions regarding the clauses identified above in the *Exposure Draft – Food, Beverage and Tobacco Manufacturing Award 2016*.

Clause 2 – Definitions – ordinary hourly rate

145. The definition of "ordinary hourly rate" contained in clause 2 does not reflect the definition earlier determined by the Commission.[42] Specifically, it does not include a reference to the minimum wages clause of the award, by virtue of which it is not clear that term captures only award-derived rates and does not include over-award payments.

[41] *4 yearly review of modern awards* [2015] FWCFB 7236.

[42] *4 yearly review of modern awards* [2015] FWCFB 4658.

146. We submit that the definition should be replaced with that which has previously been determined by the Commission.

Clause 7.2(a) – Facilitation by individual agreement

147. The reference to clause 22.9 should be replaced with a reference to clause 22.9(d) to make clear that only that subclause is a facilitative provision.

Clause 7.2(a) – Facilitation by individual agreement

148. We do not consider that clause 24.10 is a 'facilitative provision' in the sense contemplated by clause 7.1. It does not enable an employer and its employee (or employees) to agree to depart from "the standard approach in an award provision". Rather, it enables an employer and employee to agree to take annual leave prior to its accrual in accordance with the NES.

149. The reference to clause 24.10 should therefore be deleted from clause 7.2(a).

Clause 7.2(a) – Facilitation by individual agreement

150. We do not consider that clause 24.13 is a 'facilitative provision' in the sense contemplated by clause 7.1. It does not enable an employer and its employee (or employees) to agree to depart from "the standard approach in an award provision". It enables an employer and employee to agree to cash out annual leave. The award itself does not, however, contain any provisions from which such a provision contemplates a departure.

151. The reference to clause 24.13 should therefore be deleted from clause 7.2(a).

Clause 7.2(a) – Facilitation by individual agreement

152. The current clause 8.2(a) identifies clause 32 as a facilitative provision. We proceed on the basis that this is intended to be a reference to clause 32.5 specifically.

153. Clause 7.2(a) of the exposure draft does not refer to clause 13.5, which corresponds with the current clause 32.5. It should be reinserted.

Clause 7.3(a) – Facilitation by majority or individual agreement

154. The reference to clause 12.5 should be replaced with a reference to clause 12.5(a) to make clear that only that subclause is a facilitative provision. This would be consistent with the current clause 8.3(a).

Clause 7.4(c)(i) – Additional safeguard

155. The reference to clause 12.3(c) should be replaced with a reference to clause 12.3(d). This would be consistent with the current clause 8.4(c)(i).

Clause 7.4(c)(i) – Additional safeguard

156. The reference to clause 12.4(b) should be replaced with a reference to clause 12.4(c). This would be consistent with the current clause 8.4(c)(i).

Clause 9.9 – Part-time employment

157. The reference to clause 20.2(f)(iv) should be replaced with a reference to clause 23.5. This appears to be a drafting error. The amended clause would be consistent with the current clause 12.9.

Clause 10.2(a) – Casual employment

158. Clause 10.2(a) requires the payment of the "ordinary hourly rate prescribed in clause 14". Clause 14 does not, however, set out the ordinary hourly rates payable under the award. Rather, it contains the minimum hourly rates, which do not include any all purpose allowances.

159. Accordingly, clause 10.2(a) should be amended by replacing the words "ordinary hourly rate" with "minimum hourly rate".

Clause 10.6 – Casual conversion to full-time or part-time employment

160. We have not undertaken a review of clause 10.6 as it is the subject of the casual employment common issues proceedings. The decision of the Full Bench constituted to hear and determine that matter has reserved its decision.

161. Should the Full Bench ultimately determine that a variation will not be made to the casual conversion provision, Ai Group may seek an opportunity to subsequently make submissions about the proposed clause 10.6.

Clause 12.1(b) – Hours of work

162. Clause 12.1(b) is a new provision; it does not appear in the current award. In our submission the provision is unnecessary and should be deleted.

163. Further, the provision inaccurately states that facilitative provisions in clauses 12.2 – 12.5 operate in conjunction with clause 7.3. However this disregards the fact that not all facilitative provisions contained in clauses 12.2 – 12.5 operate in conjunction with clause 7.3, which relates to facilitation by majority or individual agreement. Some (such as clause 12.4(c)) only provide for facilitation by majority agreement and therefore do not interact with clause 7.3.

Clause 12.3(d) – Ordinary hours of work – continuous shiftworkers

164. The word "are" in the third line should be replaced with "is". This appears to be a drafting error.

Clause 12.5(d) – Methods of arranging ordinary working hours

165. The words "a shift" should be inserted after "work on". This appears to be a drafting error.

Clause 14.1(a) – Adult employee minimum wages

166. Clause 14.1(a) imposes an obligation on an employer to pay all adult employees the minimum wages there prescribed for ordinary hours worked by an employee. The table that follows includes minimum weekly rates and minimum hourly rates. Read literally, the clause purports to require the payment of the minimum weekly rate to all employees including part-time and casual employees.

167. Whilst it might be argued that clauses 9.7 and 10.2 require only the payment of the minimum hourly rates to part-time and casual employees respectively, at the very least clause 16.1 creates a tension with those provisions. We note that the preamble now found at clause 14.1(a) does not appear in the corresponding clause 24.1(a) of the current award.

168. We suggest that the words "(full-time employee)" be inserted under "minimum weekly wage" in the table at clause 14.1(a) in the interests of ensuring that the award is "simple and easy to understand". This proposal has been adopted in multiple group 3 exposure drafts to address the concern we have here raised.

Clause 20.1(e) – First aid allowance

169. The word "body" should be inserted after "similar". This appears to be a drafting error.

Clause 20.2(d) – Damage to clothing and equipment allowance

170. Clause 20.2(d) is unnecessarily repetitive and somewhat confusing. It should be redrafted as follows:

> The employer is liable for the replacement, repair or cleaning ~~of any clothing or personal equipment including spectacles and hearing aids~~ where an employee suffers any damage to, or soiling of, clothing or other personal equipment, including spectacles and hearing aids, as a result of: …

Clause 22.2(b)(i) – Unrelieved shiftwork on rostered day off

171. The current clause 33.1(d) applies in circumstances where a shiftworker is required to <u>continue</u> work on their rostered day off due to the circumstances there described. That is, the clause applies where a shiftworker is working, is due to be relieved by another shiftwork, is not relieved because of the circumstances described in the clause, and as a result is required to continue work on what would otherwise have been their rostered day off.

172. The word "continue" does not appear in clause 22.2(b)(i) of the exposure draft. This potentially amounts to a substantive change. It appears to have the effect of expanding the application of the clause to any circumstances in

which an employee is required to work on their rostered day off as described, rather than confining it to circumstances in which an employee is already performing work and, as a consequence of another shiftworkers' absence, is required to continue doing so.

173. Accordingly, "continue" should be inserted before "work" in the first line.

Clause 22.4 – Saturday work – day worker

174. The current clause 40.7 is in the following terms:

> A day worker required to work overtime on a Saturday must be afforded at least four hours work or be paid for four hours at the rate of time and a half for the first three hours and double time thereafter, except where the overtime is continuous with overtime commenced on the previous day.

175. The underlined exemption does not appear in clause 22.4 of the exposure draft. This is a substantive change. Under the redrafted clause, an employee would be entitled to the overtime rates prescribed for Saturday and the four hour minimum payment even if the overtime was continuous with overtime commenced on the previous day.

176. The underlined words should, therefore, be reinserted.

Clause 22.11(a) – Call back

177. The current clause 33.4 provides an entitlement to be paid certain rates where an employee is recalled to work overtime after leaving the employer's enterprise. That entitlement is subject to to clauses 33.4(a) – (e). The restructuring of clause 33.4 at clause 22.11 of the exposure draft makes this less clear.

178. The provision should be restructured and renumbered such that it is consistent with the current clause 33.4.

Clause 23.3(d) – Rates for shiftworkers

179. Pursuant to the current clause 31.3(d), an employee is entitled to a 30% allowance where an employee words on a night shift described in subclauses (i), (ii) and (iii). The allowance is not payable for any shift or time worked.

180. We are concerned that the proposed clause 23.3(d) has a substantively different effect. It appears to require the payment of the allowance for all ordinary hours worked on an engagement period or cycle on permanent night shifts, including ordinary hours that do not in fact form part of a night shift as described in clause 23.1(e). This amounts to a substantive change.

181. For the purposes of preserving the current entitlement, clause 31.3(d) should be retained.

Clause 24.4(c) – Payment for period of annual leave

182. The exposure draft does not reflect a recent variation made by the Commission to the current clause 34.4(c) (PR588653). The change there made should be incorporated in the exposure draft.

183. Having regard to the terminology used in the exposure draft to describe amounts payable during shifts (i.e. 'shift rates'), clause 24.4(c) should be replaced with the following:

> Subject to clause 24.5, the employee is not entitled to payments in respect of overtime, shift rates, weekend penalty rates, special rates or any other payment which might have been payable to the employee as a reimbursement for expenses incurred.

Clause 24.11 – Annual close-down

184. The reference to clause 24.6 should be replaced with a reference to clause 24.7. This appears to be a drafting error.

Clause 27.2 – Public holidays

185. The reference to clause 20.2(f)(iv) should be replaced with a reference to clause 23.5. This appears to be a drafting error.

Schedule B.1.1 – Full-time and part-time adult employees

186. In the interests of consistency, the definition of 'ordinary hourly rate' at B.1.1 should be in the same terms as that found in clause 2 (subject to the variation we have previously proposed to it, so as to ensure that it is consistent with the Commission's earlier decision).

Schedule B.1.5 – Full-time and part-time shiftworkers – ordinary and penalty rates

187. The second column ('minimum hourly rate') is unnecessary and should be deleted.

Schedule B.2.1 – Casual adult employees

188. In the interests of consistency, the definition of 'casual ordinary hourly rate' should be in the same terms as that found in clause 2.

Schedule B.2.3 – Casual shiftworkers – ordinary and penalty rates

189. The second column ('day shift') is unnecessary and should be deleted.

6. EXPOSURE DRAFT – HAIR AND BEAUTY INDUSTRY AWARD 2016

190. The submissions that follow relate to the *Exposure Draft – Hair and Beauty Industry Award 2016*. They are filed jointly on behalf of Ai Group and HABA.

Clause 7.2 – Facilitative provisions for flexible working practices

191. The reference to clause 15.1 should be replaced with a reference to clause 15.1(b) to make clear that only subclause (b) is a facilitative provision.

Clause 7.2 – Facilitative provisions for flexible working practices

192. We do not consider that clause 24.4 is a 'facilitative provision' in the sense contemplated by clause 7.1. It does not enable an employer and its employee (or employees) to agree to depart from "the standard approach in an award provision". Rather, it enables an employer and employee to agree to take annual leave prior to its accrual in accordance with the NES.

193. The reference to clause 24.4 should therefore be deleted from clause 7.2.

Clause 7.2 – Facilitative provisions for flexible working practices

194. We do not consider that clause 24.6 is a 'facilitative provision' in the sense contemplated by clause 7.1. It does not enable an employer and its employee (or employees) to agree to depart from "the standard approach in an award provision". It enables an employer and employee to agree to cash out annual leave. The award itself does not, however, contain any provisions from which such a provision contemplates a departure.

195. The reference to clause 24.6 should therefore be deleted from clause 7.2.

Clause 10.9(c) – Rosters

196. Clause 10.9(c) states that where an employer proposes to change an employee's roster under clause 10.9, the employer "must comply" with the consultation requirements in clause 30.

197. Clause 30 applies only where an employer proposes to change an employee's "regular roster or ordinary hours of work". That is, the provision does not necessarily apply in every instance in which an employer proposes to alter an employee's roster. Rather, it requires a process of consultation only where the employer seeks to alter an employee's regular roster or ordinary hours of work.

198. Clause 10.9(c) purports to require compliance with clause 30 in any instance in which an employer proposes to change an employee's roster under clause 10.9. The obligation is imposed in broad terms and is not confined to the circumstances in which clause 30 is crafted to apply. To this extent, it is inconsistent with clause 30 and potentially confusing.

199. It is our primary view that clause 10.9(c) is not necessary and should be deleted. Clause 30 adequately and appropriately sets out the requirement to consult in the relevant circumstances.

200. Should the Commission nonetheless determine that clause 10.9 is to be retained, it should be amended by inserting the word "regular" before "roster" such that the provision's application is consistent with that of clause 30.

Clause 11 – Casual employment

201. Clause 28.2 of the current award states that the spread of hours on Monday – Friday is 7am – 9pm. By virtue of clause 13.3, a casual employee is to be paid 150% of the minimum hourly rate for work performed outside the hours of 7am – 9pm on Monday – Friday.

202. Clause 13.3 does not appear in the exposure draft. This appears to be a drafting error. It should be reinserted.

203. We note that despite its absence, the final column in A.2.1 accurately represents the current clause 13.3.

Clause 11.1 – Casual employment

204. Pursuant to the current clause 13.1, a casual employee is defined as one who is "engaged as such". That has been altered in the exposure draft such that a casual employee is now defined as one who is "engaged and paid" as a casual employee.

205. The rationale for introducing additional criteria in order for an employee to be deemed a casual employee is not apparent. In our view the words are unnecessary and should be deleted. They potentially amount to a substantive change to the award and, in any event, do not make the instrument any simpler or easier to understand by virtue of their introduction.

Clause 14.1(f) – Notification of rosters

206. Clause 14.1(f) states that where an employer proposes to change an employee's roster under clause 14.1, the employer "must comply" with consultation requirements in clause 30.

207. Clause 30 applies only where an employer proposes to change an employee's "regular roster or ordinary hours of work". That is, the provision does not necessarily apply in every instance in which an employer proposes to alter an employee's roster. Rather, it requires a process of consultation only where the employer seeks to alter an employee's regular roster or ordinary hours of work.

208. Clause 14.1(f) purports to require compliance with clause 30 in any instance in which an employer proposes to change an employee's roster under clause 14.1. The obligation is imposed in broad terms and is not confined to the circumstances in which clause 30 is crafted to apply. To this extent, it is inconsistent with clause 30 and potentially confusing.

209. It is our primary view that clause 14.1(f) is not necessary and should be deleted. Clause 30 adequately and appropriately sets out the requirement to consult in the relevant circumstances.

210. Should the Commission nonetheless determine that clause 14.1(f) is to be retained, it should be amended by inserting the word "regular" before "roster" such that the provision's application is consistent with that of clause 30.

Clause 15.1(a) – Unpaid meal breaks – all employees

211. Clause 15.1(a) requires that all employees be allowed a meal break of "between 45 and 60 minutes". Read literally, a break that is 45 minutes in length would not satisfy this requirement. This is a substantive change to the current clause 32.3, which requires that all employees be allowed a break of "45 to 60 minutes".

212. Accordingly, clause 15.1(a) should be amended as follows:

> All employees must be allowed a meal break of ~~between~~ 45 ~~and~~ <u>to</u> 60 minutes after five hours of work.

Clause 15.3(a) – Paid rest breaks – part-time and casual employees

213. The words "rest break" should be deleted from clause 15.3(a) as they are unnecessary and virtually duplicate the words "rest period" earlier in the provision.

Clause 16.1 – Minimum wages

214. Clause 16.1 imposes an obligation on an employer to pay all adult employees the minimum wages there prescribed for ordinary hours worked by an employee. The table that follows includes minimum weekly rates and minimum hourly rates. Read literally, the clause purports to require the payment of the minimum weekly rate to all employees including part-time and casual employees.

215. Whilst it might be argued that clause 11.2 requires only the payment of the minimum hourly rates to casual employees, at the very least clause 16.1 creates a tension with it. Importantly, unlike many other awards, there is no provision under clause 10 or elsewhere in the award which stipulates that clause 16 is to apply on a pro-rata basis to part-time employees. We note that

the preamble now found at clause 16.1 does not appear in the corresponding clause 17 of the current award.

216. We suggest that the words "(full-time employee)" be inserted under "minimum weekly wage" in the table at clause 16.1 in the interests of ensuring that the award is "simple and easy to understand". This proposal has been adopted in multiple group 3 exposure drafts to address the concern we have here raised.

Clause 18.4(d) – Adult apprentices

217. Clause 19.4(c) applies to some but not all adult apprentices. That is, it applies only to a person employed by an employer under this award immediately prior to entering into a training agreement as an adult apprentice with that employer. It requires that such adult apprentices must continue to receive the minimum wage that applies to the classification in which the adult apprentice was engaged immediately prior to entering into the training agreement.

218. Clause 19.4(c) has been disaggregated into two subclauses in the exposure draft: clause 18.4(c) and clause 18.4(d). As a result, it is no longer clear that the above requirement, now contained in clause 18.4(d) applies only to those adult apprentices described above. Rather, it purports to expand the entitlement to all adult apprentices. This is a substantive change.

219. Accordingly, clause 18.4(d) should be amended as follows:

> Where clause 18.4(c) applies, for ~~For~~ the purpose only of fixing a minimum wage, the adult apprentice must continue to receive the minimum wage that applies to the classification specified in clause 16 in which the adult apprentice was engaged immediately prior to entering into the training agreement.

Clause 18.5(g) – Apprentice conditions of employment

220. Clause 19.5(f) enables an employer to meet its obligations under clause 19.5(e) by paying training fees charged by an RTO for prescribed courses and/or the cost of textbooks directly to the RTO. That is, the employer could pay training fees, or they could pay the cost of textbooks or both, directly to the RTO.

221. The effect of clause 19.5(f) has been varied substantively in clause 18.5(g) of the exposure draft. This is because an employer can now only meet its obligations under the preceding clause by paying fees and textbook costs. It does not appear to be open to an employer to pay only one or the other in order to meet its obligations under clause 18.5(f).

222. Accordingly, clause 18.5(g) should be varied by replacing the word "and" with "and/or".

Clause 20.2(a) – Manager's allowance

223. The current clause 21.1 requires the payment of an allowance where an employee is in charge of a hair and/or beauty establishment for a full week. The allowance is only payable "for that week". That is, if an employee is so in charge on a particular week but is not in charge the following week, the allowance is not payable during the second week.

224. Clause 20.2(a) of the exposure draft appears to deviate substantively from this. We are concerned that it may be interpreted to require the payment of the allowance on a weekly basis in any instance upon which an employee was, at some point in time, in charge of a hair and/or beauty establishment for a full week. That is, the obligation to pay the allowance is not limited to those weeks during which the employee was in fact so in charge.

225. Accordingly, clause 20.2(a) should be amended by replacing the words "per week" with "for that week".

Clause 20.2(c) – Broken Hill allowance

226. The current clause 22 describes the Broken Hill allowance as one that is payable for "the exigencies of working in Broken Hill". The underlined text has been removed in the proposed clause 20.2(c).

227. The inclusion of district allowances in modern awards and the basis upon which they may be permitted has been, and continues to be, a live issue in this Review. This includes an ACTU claim to remove transitional district

allowance provisions, Federal Court proceedings regarding the Commission's decision to retain the Broken Hill allowance in the *Hair and Beauty Industry Award 2010* amongst others, and an SDA regarding district allowances in this award, to which clause 20.2(c) is relevant. This matter has not yet been heard and determined.

228. We note that the text underlined above was relevant to the Federal Court's consideration of whether the clause can properly be included in a modern award and the underlying purpose for such a provision.[43] We envisage that such matters may also be of some relevance to future proceedings in relation to this clause and the proposed insertion of additional district allowances.

229. For these reasons, the relevant words should be inserted in clause 20.2(c).

Clause 20.3(f)(ii) – Travelling time reimbursement

230. As we understand it, the current clause 21.5(b) requires the payment of travelling time from the pick-up point to the place away from the employee's usual place of employment and from that place back to the pick-up point. The employee is *not* entitled to payment from the employee's home (or any other place) to the pick-up point, from which they will then travel to the other place.

231. The proposed clause 20.3(f)(ii) appears to apply where an employee is travelling to and from the pick-up point from their home or their usual place of employment. This is because it refers to travel "to and from" the pick-up place rather than travel "from and return thereto", as stated in the current clause. This substantively alters the entitlement.

232. Accordingly, clause 20.3(f)(ii) should be amended as follows:

> Where the employer provides transport from a pick up point, an employee will be paid travelling time for all time spent travelling ~~to and from such pick-up point~~ <u>from such pick up point and return thereto</u>.

[43] *ACCI v ACTU* [2015] FCAFC 131.

Clause 20.3(h)(ii) – Transport of employee reimbursement

233. Clause 20.3(h)(i) requires the reimbursement of taxi fares by an employer in certain circumstances. Clause 20.3(h)(ii) provides an exemption to that clause. It states that the provision does not apply if the employer provides or arranges proper transportation "to and from" the employee's usual place of residence. This deviates substantively from the current clause 21.8(a), which states that an employer is not required to reimburse the employee's taxi fare if the employer provides or arranges proper transportation "to and/or from" the employee's usual place of residence. The exemption applies to transportation to the employee's usual place of residence or from their usual place of resident; whichever is relevant in the specific circumstances.

234. Accordingly, clause 20.3(h)(ii) should be amended by replacing "and" in the second line with "and/or".

Clause 27.3(a) – Public holidays

235. The word "the" should be inserted after "on". This appears to be a drafting error.

Clause 27.3(a) – Public holidays

236. The word "the" should be inserted after "by". This appears to be a drafting error.

Schedule A.1.1 – Full-time and part-time adult employees other than shiftworkers – ordinary and penalty rates

237. The words "other than shiftworkers" in the heading are unnecessary and should be deleted.

Schedule A.1.2 – Full-time and part-time adult employees other than shiftworkers – overtime

238. The words "other than shiftworkers" in the heading are unnecessary and should be deleted.

Schedule A.2.1 – Casual adult employees other than shiftworkers – ordinary and penalty rates

239. The words “other than shiftworkers” in the heading are unnecessary and should be deleted.

Schedule A.2.1 – Casual adult employees other than shiftworkers – ordinary and penalty rates

240. The rates prescribed in the final column of A.2.1 are payable where a casual employee works outside the spread of hours in clause 13.1(a). This is by virtue of the current clause 13.3.

241. For the purposes of ensuring that the table at A.2.1 adopts terminology consistent with the exposure draft itself, the words “ordinary hours” in the final column should be replaced with “spread of hours”.

Schedule A.3 – Junior rates

242. The reference to “21 years of age” should be replaced with “18 years of age”, such that the provision is consistent with clause 17, which requires the payment of 100% of the adult rate to employees who are 18 years of age.

Schedule A.3.1 – Full-time and part-time junior employees – ordinary and penalty rates

243. The words “junior hourly rate” in the second column are unnecessary and should be deleted.

Schedule A.4.1 – Casual junior employees – ordinary and penalty rates

244. The words “junior hourly rate” in the second column are unnecessary and should be deleted.

Schedule A.4.1 – Casual junior employees– ordinary and penalty rates

245. The rates prescribed in the final column of A.4.1 are payable where a casual employee works outside the spread of hours in clause 13.1(a). This is by virtue of the current clause 13.3.

246. For the purposes of ensuring that the table at A.4.1 adopts terminology consistent with the exposure draft itself, the words "ordinary hours" in the final column should be replaced with "spread of hours".

Schedule A.5.3 – Hairdressing and beauty therapy apprentices commencing an apprenticeship on or after 1 January 2014 – ordinary and penalty rates

247. The words "apprentice hourly rate" in the second column are unnecessary and should be deleted.

Schedule A.5.3 – Hairdressing and beauty therapy apprentices commencing an apprenticeship on or after 1 January 2014 – ordinary and penalty rates

248. The rates payable to a 3rd year hairdressing apprentice (77% of the level 3 rate) and those payable to a 3rd year beauty therapy apprentice (80% of the level 3 rate) are different. The table at A.5.3 is erroneous to the extent that it purports to set out the rates payable to both hairdressing and beauty therapy third year apprentices.

Schedule A.5.4 – **Hairdressing and beauty therapy apprentices commencing an apprenticeship on or after 1 January 2014 – overtime**

249. The rates payable to a 3rd year hairdressing apprentice (77% of the level 3 rate) and those payable to a 3rd year beauty therapy apprentice (80% of the level 3 rate) are different. The table at A.5.3 is erroneous to the extent that it purports to set out the rates payable to both hairdressing and beauty therapy third year apprentices.

Schedule A.5.5 – Pre-apprentices commencing an apprenticeship on or after 1 January 2014 – ordinary and penalty rates

250. The words “apprentice hourly rate” in the second column are unnecessary and should be deleted.

Schedule A.5.7 – Full-time trainees and graduates – ordinary and penalty rates

251. The words “apprentice hourly rate” in the second column are unnecessary and should be deleted.

7. EXPOSURE DRAFT – PROFESSIONAL EMPLOYEES AWARD 2016

253. The submissions that follow relate to the *Exposure Draft – Professional Employees Award 2016*.

Clause 2.2 – Engineering stream – Experienced engineer

254. The current clause 3.2 defines an 'experienced engineer' as a professional engineer:

- with the qualifications listed at (a) – (c); and
- who is engaged in employment where the adequate discharge of any portion of the duties requires qualifications of the employee as a member of Engineers Australia (or at least equal to those of a member of Engineers Australia).

255. The redrafted definition in the exposure draft has removed the first requirement above. It no longer requires that the employee holds one of the qualifications listed. This is a major, substantive change to the terms of the award, and would significantly increase the award's coverage. A fundamental requirement of all of the relevant pre-modern awards (several of which were made by consent between Ai Group and APESMA), and of the current modern award, is that each employee covered by the award must have one of the specified qualifications. It is vital that this fundamental requirement is maintained in the re-drafted award.

256. The second requirement has also been altered. The exposure draft requires that the employee is engaged in employment where the adequate discharge of any portion of the duties requires the qualifications listed.

257. For these reasons, the definition of 'experienced engineer' should be replaced with that found in the current award.

Clause 2.2 – Engineering stream – Graduate engineer

258. The exposure draft has replaced the word "testamur" with "certificate".

259. "Testamur" carries a particular meaning, for which the word "certificate" is not necessarily an appropriate substitute. A testamur is a specific legal document issued by an educational institution certifying the successful completion of a course or degree and confirms that the relevant person holds a certain qualification. We are concerned that the substitution of the term with "certificate" potentially requires the production of a document that is of a different nature and status.

260. Accordingly, "testamur" should not be replaced with "certificate".

Clause 2.2 – Engineering stream – Professional engineering duties

261. The current definition of 'professional engineering duties' includes duties the adequate discharge of which requires qualifications of the employee as a graduate member of Engineers Australia or qualifications of the employee that are at least equal to those of a graduate member of Engineers Australia.

262. The redrafted definition at clause 2.2 of the exposure draft does not contain the second underlined element of the definition and as a result substantively changes the current definition. The current wording should therefore be retained.

Clause 2.3 – Information technology and telecommunications services stream – Experienced information technology employee

263. The definition of 'experienced information technology employee' deviates substantively from the definition found in the current award, as it does not require that the employee hold "the undermentioned qualifications". This is a major, substantive change that would significantly increase the award's coverage. A fundamental requirement of the IT professionals pre-modern award and the telecommunications professionals pre-modern award (both of which were made by consent between Ai Group and APESMA), was that

each employee covered by the awards must have one of the specified qualifications. It is vital that this fundamental requirement is maintained in the re-drafted modern award.

264. The definition should be replaced with that found in the current award.

Clause 2.3 – Information technology and telecommunications services stream – Telecommunications service

265. The definition of 'telecommunications service' now contains an additional sentence in the following terms:

> Carry may include to transmit, switch or receive.

266. It appears that the definition of 'carry' presently found at clause 3.1 has been relocated such that it appears with the definition of 'telecommunications service'.

267. Whilst we do not oppose its relocation, we raise the following two matters:

- The current award defines the term 'carry' as including "transmit, switch or receive". That is, where the term 'carry' is used, the term is to be read as including transmitting, switching or receiving. The exposure draft, in contrast, states that "carry <u>may</u> include to transmit, switch or receive". The redrafting potentially changes the meaning of the term and this may have unintended consequences for the award's coverage.

- The definition of 'telecommunications service' in the exposure draft (and the current award) uses the term "carrying" rather than "carry". It is appropriate that the definition be amended to reflect this.

268. In light of these concerns, we submit that the final sentence of the definition of 'telecommunications service' be replaced with:

> Carrying includes transmitting, switching or receiving.

Clause 2.4 – Scientist stream – Experienced scientist

269. The current definition of 'experienced scientist' requires that the employee in fact possesses the qualifications there set out. That requirement has been omitted from the proposed definition in the exposure draft. This is a major, substantive change to the terms of the award, and would significantly increase the award's coverage. A fundamental requirement of all of the relevant pre-modern awards (several of which were made by consent between Ai Group and APESMA), and of the current modern award, is that each employee covered by the award must have one of the specified qualifications. It is vital that this fundamental requirement is maintained in the re-drafted award.

270. Accordingly, the definition should be amended as follows:

> Experienced scientist means a professional scientist <u>possessing the following qualifications and</u> engaged in employment where the adequate discharge of any of the duties requires the possession of the following qualifications: …

Clause 2.4 – Scientist stream – Experienced scientist

271. Subclause (a) of the definition does not make clear that the employee must have had the relevant number of years of experience *after* obtaining their degree or diploma, as stated in the current definition at clause 3.4. This is a substantive change as the definition may now include an employee who has four years of experience which did not necessarily occur after they obtained their degree or diploma.

272. Accordingly, the preamble at (a) should be replaced with the following:

> a degree or diploma and the following further experience in professional scientific duties obtained after their degree or diploma: …

273. The wording proposed is consistent with the current definition.

Clause 2.5(a)(ii) – Quality auditing stream – Educational requirements

274. The current subclause (b) regarding educational requirements serves three purposes:

- First, it mandates that in all cases, documentary evidence of the educational standard claimed will be required.
- Secondly, it specifies the specific documentary evidence that will be required; that being copies of degrees or certificates.
- Thirdly provides for the manner in which those copies of degrees or certificates will be verified.

275. The redrafted provision in the exposure draft truncates the current clause and in so doing:

- Does not state the specific documentary evidence that will be required as evidence of the educational standard claimed; that being copies of degrees or certificates; and
- Does not make clear that the matters listed at the three bullet points under subclause (ii) provide for the manner in which the above documents are to be verified.

276. The clause set out in the exposure draft deviates substantively from the current clause. It should be replaced with the current provision.

Clause 4.1 – Coverage

277. Clause 4.1 refers to the award as an "industry and occupational award". It then goes on to express the coverage of the award by reference to employees performing certain duties who are covered by the classification structure contained in the award. This aspect of the award's coverage is 'occupational'.

278. Clause 4.2 expresses the coverage of the award by reference to the "information technology industry", the "quality auditing industry" and the

"telecommunications services industry". This aspect of the award's coverage renders it an 'industry award'.

279. The insertion of the words "industry and occupational" in clause 4.1, which deals with only part of the award's coverage and more specifically, does *not* describe the award by reference to an industry, is potentially confusing. Further, their addition does not simplify or clarify the meaning of clause 4.1. As a result, the rationale for their insertion is unclear and appears unnecessary.

280. The relevant words should be deleted.

Clause 7.2 – Facilitative provisions for flexible working practices

281. Clause 18.5 of the current award, which corresponds with clause 13.7 of the exposure draft, is not identified in clause 8.2 of the current award. As a result, whilst it allows for agreement between an employer and employee, clause 8.3 does not apply to it and therefore, a written agreement is not required.

282. A reference to clause 13.7 has been included in clause 7.2. This amounts to a substantive change because, by virtue of clause 7.3, agreements made pursuant to that provision must now be recorded in writing. This is a substantive change that would have the effect of increasing the regulatory burden. The change should not be made absent a proper merit basis for it, which has not been established.

283. Accordingly, the reference to clause 13.7 should be deleted from clause 7.2.

Clause 7.2 – Facilitative provisions for flexible working practices

284. We do not consider that clause 17.5 is a 'facilitative provision' in the sense contemplated by clause 7.1. It does not enable an employer and its employee (or employees) to agree to depart from "the standard approach in an award provision". Rather, it enables an employer and employee to agree to take annual leave prior to its accrual in accordance with the NES.

285. The reference to clause 17.5 should therefore be deleted from clause 7.2.

Clause 7.2 – Facilitative provisions for flexible working practices

286. We do not consider that clause 17.6 is a 'facilitative provision' in the sense contemplated by clause 7.1. It does not enable an employer and its employee (or employees) to agree to depart from "the standard approach in an award provision". It enables an employer and employee to agree to cash out annual leave. The award itself does not, however, contain any provisions from which such a provision contemplates a departure.

287. The reference to clause 17.6 should therefore be deleted from clause 7.2.

Clause 11.1(a) – Casual employment

288. The current clause 11.4(a) makes clear that the hourly rate payable to a casual employee under the award is to be calculated by reference to the amounts prescribed by clause 15. That is, clause 11.4(a) entitles a casual employee to the rate prescribed by the award; it does not create an obligation to pay any higher amount.

289. Clause 11.1(a) of the exposure draft does not make this clear. That is, it does not specify that the "minimum hourly rate appropriate to the employee's classification" is that which is prescribed in clause 14 of the exposure draft. We are concerned that absent a reference to clause 14, it is not clear that the reference to the "minimum hourly rate" is intended to require the payment of only the award prescribed rate.

290. Accordingly, the words "prescribed in clause 14 – Minimum wages" should be inserted after "classification". This is consistent with the approach taken in clause 10(b) in relation to part-time employees.

Clause 11.1(a) – Casual employment

291. It is appropriate that the award include the following standard definition of a casual employee: "A casual employee is an employee engaged and paid as a casual employee".

292. We suggest that this definition be inserted as paragraph 11.1(a), with the other paragraphs in clause 11.1 consequentially re-numbered.

Clause 13.5 – Ordinary hours of work

293. The words "time to time" should be inserted after "from", as per the current clause 18.3. This appears to be a drafting error.

Clause 14.1 – Minimum wages

294. Clause 14.1 imposes an obligation on an employer to pay all adult employees the minimum wages there prescribed for ordinary hours worked by an employee. The table that follows includes annual wages and minimum hourly rates. Read literally, the clause purports to require the payment of the relevant annual wage to all employees including part-time and casual employees.

295. Whilst it might be argued that clauses 10(b) and 11.1(a) require only the payment of the minimum hourly rates to part-time and casual employees respectively, at the very least clause 14.1 creates a tension with those provisions. We note that the preamble now found at clause 14.1 does not appear in the corresponding clause 15 of the current award.

296. We suggest that the words "(full-time employee)" be inserted under "Annual wages" in the table at clause 14.1 in the interests of ensuring that the award is "simple and easy to understand". This proposal has been adopted in multiple group 3 exposure drafts to address the concern we have here raised.

Clause 14.1 – Minimum wages

297. In the Commission's decision of July 2015, it was determined that the minimum wages clause in the body of the exposure draft would set out only the minimum weekly rate payable (if relevant) and the minimum hourly rate: (emphasis added)

> **[54]** In our view, the inclusion of hourly rates of pay in the body of the award is appropriate to ensure that awards are simple and easy to understand. The body of the award will contain the weekly rate of pay along with the minimum hourly rate. Where employees are entitled to other payments, these will be included in the

schedule to the award. For example, if an award contains an all purpose allowance, the minimum rate will be included in the body of the award, with the ordinary hourly rate outlined in the schedule to the award.[44]

298. Whilst exposure drafts published in the early stages of the Review, prior to the issue of the decision cited above, contained casual minimum hourly rates in the minimum wages clause, these exposure drafts were subsequently amended by deleting those rates from the relevant clause. That approach is consistent with the Commission's decision.

299. Accordingly, the final column in clause 14.1 should be deleted.

Clause 15.3 – Vehicle allowance

300. Clause 15.3 of the exposure draft deviates substantively from clause 16.2 of the current award.

301. Clause 16.2 of the current award applies only where it is agreed by the employer and employee that the employee will be required to use their private vehicle on the employer's business. The proposed clause 15.3, however, does not require mutual agreement. Rather, it applies wherever an employee is required to use their private vehicle on the employer's business. The provision does not specify by whom or under what circumstances the employee is so required. As a result, the provision may apply where an employee asserts that he/she was *required* to use their private vehicle in order to perform a particular task or undertake certain duties, absent any express direction from or agreement with the employer to do so. Under the current clause, the vehicle allowance would clearly *not* be payable under such circumstances.

302. Also, the current clause 16.2 states that "the employee will be paid reasonable compensation, but in no case will the employee receive payment at a rate less than $0.78 per kilometre travelled". The concept of "reasonable compensation" does not appear in the exposure draft. The removal of this concept potentially significantly reduces the flexibility available to employers

[44] *4 yearly review of modern awards* [2015] FWCFB 4658 at [54].

and employees because it is common for professionals who use their vehicle on company business to be compensated in a different manner to the payment of a per kilometre allowance (e.g. they are often paid a monthly or annual car allowance, or a higher salary that takes this requirement into account).

303. The existing wording should be retained.

Clause 17.2(a) – Annual leave

304. A question is asked in the exposure draft regarding the operation of clause 17.2(a) which relates to the calculation of annual leave loading.

305. The intent of this provision in the modern award, and the equivalent provisions in the relevant pre-modern awards, is that an employee will not be entitled to be paid a separate annual leave loading if the total "amount" that they are paid for the relevant period of annual leave is greater than "the ABS average weekly earnings for all males (Australia) for the preceding September quarter of the year preceding the year in which the date of the accrual of the annual leave falls".

306. This provision provides important flexibility and it needs to be retained in the award.

Clause 17.2(a) – Annual leave

307. The words "the year" should be inserted after "preceding". This appears to be a drafting error. The proposed amendment is consistent with the current clause 19.2(a).

Clause 17.4(a) – Annual close-down

308. The current clause 19.4 contemplates the closing down of an entire enterprise, a section of the enterprise, or sections of the enterprise. In an attempt to abbreviate that clause, the exposure draft refers to "a section or more of the enterprise". We are concerned that this wording does not make clear that an employer does have the ability to close down the enterprise in its

totality. We do not consider that the proposed re-wording renders the clause simpler or easier to understand and accordingly, the redrafting of this element of the clause is unnecessary.

309. The words "a section or more of the enterprise" in the first line of clause 17.4(a) should be replaced with "the enterprise, or a section or sections thereof". This is consistent with the current clause 19.4.

Clause 17.4(a) – Annual close-down

310. The current clause 19.4 deals with the purpose for which the employer may close down its enterprise or part thereof; that being to allow annual leave "to all or the majority of employees in the enterprise, section or sections concerned". That is, the clause contemplates the ability of the employer to close down:

- the enterprise to allow annual leave to all or the majority of employees in the enterprise;
- a section of the enterprise to allow annual leave to all or the majority of employees in the section concerned; or
- sections of the enterprise to allow annual leave to all or the majority of employees in the sections concerned.

311. Clause 17.4 refers to the purpose of "allowing annual leave to all or the majority of employees", however does not describe the relevant group by reference to which the 'majority' is to be determined. That is, the redrafted clause may be read to require that an employer may close down a section of the enterprise for the purpose of allowing annual leave to all or the majority of all employees in the enterprise, rather than simply requiring a majority of employees in the relevant section.

312. For the purposes of ensuring that clause 17.4(a) does not give rise to such an unintended consequence, and having regard to the additional issue raised above regarding the same, we propose that clause 17.4(a) be replaced with the following:

> An employer may close down the enterprise, or a section or sections thereof for the purpose of allowing annual leave to all or the majority of employees in the enterprise, section or sections concerned.

Clause 19.4 – Annual close down

313. Where an employer closes down the enterprise, section or sections thereof, the current clause 19.4 states that the "same conditions which apply to the other employees of the enterprise, section or sections may also apply to employees covered by this award".

314. The provision is permissive in nature. It allows for the same conditions to apply, however it does not mandate their application.

315. The fundamental nature of the clause has been altered by the redrafted clause 17.4(b), which now states that the same conditions "also apply to employees covered by this award". It purports to make mandatory their application. This is clearly a substantive change.

316. Accordingly, the word "may" should be inserted before "also" in clause 17.4(b).

8. EXPOSURE DRAFT – WATER INDUSTRY AWARD 2016

317. The submissions that follow relate to the *Exposure Draft – Water Industry Award 2016*.

Clause 2 – Definitions

318. In relation to the question posed by exposure draft about the definition of shiftworker and the different definition in clause 20.2, Ai Group does not agree that the amendment proposed is necessary as the definition references clause 20.2 which appropriately outlines the terms.

Clause 7.2 – Facilitative provisions for flexible working arrangements

319. In relation to clause 13.2(c) in the last column, the words "or group of employees" should be added after the word "employee" to ensure that it reflects the parties to the agreement more accurately.

Clause 7.2 – Facilitative provisions for flexible working practices

320. We do not consider that clause 20.8 is a 'facilitative provision' in the sense contemplated by clause 7.1. It does not enable an employer and its employee (or employees) to agree to depart from "the standard approach in an award provision". Rather, it enables an employer and employee to agree to take annual leave prior to its accrual in accordance with the NES.

321. The reference to clause 20.8 should therefore be deleted from clause 7.2.

Clause 7.2 – Facilitative provisions for flexible working practices

322. We do not consider that clause 20.9 is a 'facilitative provision' in the sense contemplated by clause 7.1. It does not enable an employer and its employee (or employees) to agree to depart from "the standard approach in an award provision". It enables an employer and employee to agree to cash out annual leave. The award itself does not, however, contain any provisions from which such a provision contemplates a departure.

323. The reference to clause 20.9 should therefore be deleted from clause 7.2.

Clause 12 – Casual Employment

324. The current clause 10.5(c) provides that penalties (including public holiday penalties) and overtime for causal employees will be calculated on the ordinary hourly rate for the classification in which they are employed, exclusive of the casual loading.

325. Clause 11.2(b) of the exposure draft provides that the casual employee will be paid "penalties and loadings payable for shiftwork, overtime and public holidays on the same basis as a full-time employee".

326. The exposure draft provisions whilst not a substantial deviation from the current award, lacks the clarity provided in the current provision. Importantly, it does not make clear that penalty rates and overtime rates are not to be calculated on a rate that includes the casual loading, Accordingly, we propose that the wording of the current provision should be restored.

Clause 19.4 – Rest Period after Overtime

327. In relation to clause 19.4(b) of the exposure draft, Ai Group proposes that the words "subject to the other provisions of this clause" are added between the words "at least 10 consecutive hours off duty" and "must be released"

328. In its current form, the clause mandates that the employee must be released for a 10 hour break. In such circumstance, subclause (c) will have no work to do.

329. The amendment proposed will ensure that the intent of the provision in the current award is preserved.

Schedule C – Summary of Monetary Allowances

24. The table at C.1 references that the allowance "Transfers, travelling and working away from normal starting point" is a wage related allowance, when clause 16.3(c)(v) identifies it as a expense related allowance.

25. Ai Group proposes that the allowance be treated as an expense related allowance as set out in clause 16.3 (c)(v).

26. Further the clause reference in the table refers to a Clause 16.3(c)(iv) when it should reference Clause 16.3(c)(v). Ai Group proposes that the referencing in the schedule be amended to reflect clause 16.3(c)(v).