Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Reply Submission

Plain Language Re-Drafting –

Clerks – Private Sector Award 2010

(AM2016/15)

10 April 2017

AI GROUP

4 YEARLY REVIEW OF MODERN AWARDS

AM2016/15 PLAIN LANGUAGE RE–DRAFTING
– *CLERKS – PRIVATE SECTOR AWARD 2010*

1. On 3 February 2017, the Fair Work Commission (**Commission**) published the *Exposure Draft – Clerks – Private Sector Award 2017* (**Exposure Draft**) and amended directions requiring interested parties to file any reply submissions regarding 'award-specific clauses' in the *Clerks – Private Sector Award 2010* (**Award**) by 28 March 2017.[1]

2. This submission is filed in accordance with that amended direction in response to submissions filed by:

   - Australian Business Industrial and the New South Wales Business Chamber (**ABI and the NSWBC**);
   - Business SA; and
   - The Australian Services Union (**ASU**).

3. Our submission should be read in conjunction with our comprehensive submission regarding the Exposure Draft dated 28 February 2017 (**February 2017 Submission)**.

[1] *4 yearly review of modern awards – Plain language re-drafting* [2017] FWC 743 at [2].

Clause 2 – Definitions – clerical work - Business SA Submission

4. Business SA submits that the definition of clerical work, as found in the Award, should be inserted in the Exposure Draft. We refer to paragraphs 15 – 16 of our February 2017 Submission in this regard, noting that this issue relates to the redrafting of the coverage clause and the classification structure.

Clause 2 – Definitions – clerical work - ASU Submission

5. The ASU submits that the definition of clerical work, as found in the Award, should be inserted in the Exposure Draft. We refer to paragraphs 15 – 16 of our February 2017 Submission in this regard, noting that this issue relates to the redrafting of the coverage clause and the classification structure.

Clause 4.1 – Coverage – ABI and NSWBC Submission

6. ABI and the NSWBC submits that the omission of the words "with respect to [the employer's] employees" is problematic.

7. The matters raised by ABI and the NSWBC in relation to clause 4 were dealt with in Ai Group's February 2017 Submission at paragraphs 41 – 50. We propose that the issues raised by the aforementioned organisations be dealt with as we have there proposed.

Clause 4.1 – Coverage – ASU Submission

8. The ASU has made submissions regarding the words "clerical and administrative work" in clauses 4.1(a) and 4.1(b) of the Exposure Draft.

9. As we have set out at paragraphs 41 – 50 of our February 2017 Submission, have identified various concerns arising from the redrafted coverage clause as well as the classification structure to which it refers. These matters are, to some degree, interrelated. Accordingly, we may seek an opportunity to later respond to the ASU's submission, once the Commission expresses a view as to the approach it will take to the redrafting of the classification structure and definitions.

Clause 4.2(i) – Coverage – Business SA Submission

10. Business SA refers to the CCSA's claim to vary the Award, which has since been withdrawn. We refer however to our February 2017 Submission at paragraphs 68 – 70 where we raise another issue that may be relevant to the Commission's determination as to whether clause 4.2(i) is included in the Exposure Draft. It relates to a substantive variation sought to the *Children Services Award 2010* by United Voice.

Clause 4.3 – Coverage – Business SA Submission

11. As we understand it, clause 4.3 of the Exposure Draft will be dealt with by the Commission through a separate process in relation to 'common clauses'. The 'drafter's comments' indicate as much. We refer to paragraphs 71 – 74 of our February 2017 Submission in this regard, where we have identified that we, like Business SA, have some concerns regarding the redrafting of this provision.

12. We respectfully seek the Commission's guidance as to the manner in which this clause is to be dealt with.

Clause 7.2 – Facilitative provisions for flexible working practices – Altering spread of hours – Business SA Submission

13. Business SA submits that clause 13.6 is referred to twice in Table 1 at clause 7.2 and that one of those references should be deleted.

14. As set out at paragraphs 83 – 84 of our February 2017 Submission, we agree.

Clause 7.2 – Facilitative provisions for flexible working practices – Make-up time – Business SA Submission

15. Business SA submits that clause 13.10 is referred to twice in Table 1 at clause 7.2 and that one of those references should be deleted.

16. As set out at paragraphs 85 – 86 of our February 2017 Submission, we agree.

Clause 7.2 – Facilitative provisions for flexible working practices – Shiftwork – averaging ordinary hours – Business SA Submission

17. We agree with Business SA's submission that the reference to clause 27.1 in Table 1 should be replaced with a reference to clause 27.1(b).

Clause 7.2 – Facilitative provisions for flexible working practices – Shiftwork – time off instead of overtime – Business SA Submission

18. Clause 7.2 refers to clause 30. Business SA submits that it is in fact clause 30.1 that is a facilitative provision, but does not further submit whether clause 7.2 should be varied and if so, how it should be varied.

19. We would not oppose an amendment to clause 7.2 such that the reference to clause 30 is replaced with a reference to clause 30.1.

Clause 9 – Full-time employment – Business SA Submission

20. Business SA submits that clause 9 should be amended as follows because clauses 9.1 and 9.2 are separated by the word "or":

> ~~Each~~ Either of the following is a full-time employee:
>
> **9.1** an employee who is engaged to work 38 ordinary hours per week; or
>
> **9.2** an employee who is engaged to work the number of ordinary hours (fewer than 38) per week that is considered full-time at the workplace by the employer.

21. We do not oppose this proposal.

Clause 10.5 – Part-time employment – ABI and NSWBC Submission

22. We agree with ABI and the NSWBC that clause 10.5 of the Exposure Draft accurately represents the Award.

Clause 10.5 – Part-time employment – Business SA Submission

23. We agree with Business SA that clause 10.5 of the Exposure Draft accurately represents the Award.

Clause 10.5 – Part-time employment – ASU Submission

24. We agree with the ASU that clause 10.5 of the Exposure Draft accurately represents the Award.

Clause 10.6 – Part-time employment – ABI and NSWBC Submission

25. We agree with ABI and the NSWBC that clause 10.6 of the Exposure Draft accurately represents the Award.

Clause 10.6 – Part-time employment – Business SA Submission

26. We agree with Business SA that clause 10.6 of the Exposure Draft accurately represents the Award.

Clause 10.6 – Part-time employment – ASU Submission

27. We agree with the ASU that clause 10.6 of the Exposure Draft accurately represents the Award.

Clause 11.1 – Casual employment – Business SA Submission

28. Business SA submits that cluse 11.1 "requires a minor amendment to make clear that a casual employee under this award is one specifically engaged as a casual employee and who is not a part-time or full-time employee".

29. Ai Group has raised fundamental concerns arising from clause 11.1 of the Exposure Draft, which largely subsume Business SA's submission. They can be found at paragraphs 123 – 131 of our February 2017 Submission. As we there submitted, clause 11.1 should be replaced with clause 12.1 of the Award such that it reads:

    11.1 A casual employee is an employee engaged as such.

Clause 11.4 – Casual employment - ASU Submission

30. The ASU submits that clause 11.4 of the Exposure Draft should remain. We do not disagree with this proposition on the basis that it reflects clause 12.4 of the Award.

Clause 13.1 – Ordinary hours of work (employees not engaged on shifts) – ABI and NSWBC Submission

31. ABI and the NSWBC submits that the reference to "shifts" in the heading of clause 13.1 may lead to confusion and suggests an amendment to clause 13.1 in order to remedy this, as follows:

> **13.1** Clause 13 applies to employees who are not engaged ~~on~~ to work the shifts, ~~as~~ defined in clause 25.

32. We do not consider that the confusion alleged in fact arises or that the variation proposed is necessary.

Clause 13.2 – Ordinary hours of work (employees not engaged on shifts) – Business SA Submission

33. Business SA submits that clause 13.2 "should clarify (by cross reference) that this reflects the provisions at 9.2 which allow for a full-time week of less than 38 in a particular workplace".

34. For the reasons set out at paragraphs 135 – 140 of our February 2017 Submission, we consider that clause 13.2 should be deleted. This position subsumes Business SA's concern. We note also that Business SA has not proposed a precise form of words which might remedy its concern.

Clause 13.6(a) – Ordinary hours of work (employees not engaged on shifts) – Business SA Submission

35. Business SA submits that the legal effect of clause 13.6 is different to clause 25.2 of the Award because it "increases the population of employees with whom agreement is required for the spread of ordinary hours to be altered".

36. For the reasons set out at paragraphs 159 – 168 of our February 2017 Submission, we agree. As we have there submitted, clause 13.6(a) should be amended as follows:

> **(a)** by agreement between the employer and the majority of employees concerned ~~at the workplace covered by this award~~; or

Clause 13.6 – Ordinary hours of work (employees not engaged on shifts) – ABI and NSWBC Submission

37. In response to the question contained in the Exposure Draft, ABI and the NSWBC submit that the spread of hours in clause 13.5 may be altered by up to one hour at both ends pursuant to clause 13.6.

38. As per paragraphs 169 – 170 of our February 2017 Submission, we agree.

Clause 13.6 – Ordinary hours of work (employees not engaged on shifts) – ASU Submission

39. In response to the question contained in the Exposure Draft, the ASU submits that the spread of hours in clause 13.5 may be altered by up to one end at one end of the spread but not both.

40. As per paragraphs 169 – 170 of our February 2017 Submission, we do not agree. We note that neither the Commission nor any interested party has advanced a variation to the Award or the Exposure Draft in this regard. Should such a change be proposed, Ai Group will seek an opportunity to be heard. A variation that gives effect to the ASU's interpretation would, in our view, amount to a substantive change to the Award.

Clause 13.7 – Setting hours of work by a different award – ABI and NSWBC Submission

41. We do not agree with ABI and NSWBC's submission that clause 13.7 "substantially captures the intention of the current clause 25.1(b)" for all of the reasons set out in our February 2017 Submission at paragraphs 171 – 186. We do not consider that the amendments proposed by ABI and the NSWBC to clause 17.1 would adequately address the many concerns we have there raised.

42. Accordingly, the Commission should instead replace clause 13.7 of the Exposure Draft with our proposal at paragraph 186 of the February 2017 Submission.

Clause 13.7 – Setting hours of work by a different award – Business SA Submission

43. We do not agree with Business SA's submission that clause 13.7 "accurately reflects the intention of the current modern award clause 25.1(b)" for all of the reasons set out in our February 2017 Submission at paragraphs 171 – 186.

44. Accordingly, the Commission should replace clause 13.7 of the Exposure Draft with our proposal at paragraph 186 of the February 2017 Submission.

Clause 13.7(a) – Setting hours of work by a different award – Business SA Submission

45. The series of concerns set out in our February 2017 Submission at paragraphs 171 – 185 and the amendment proposed at paragraph 186 subsume Business SA's submission that clause 13.7(a) be amended to refer to clause 13.7(b).

Clause 13.7 – Setting hours of work by a different award – Example – ASU Submission

46. For the reasons set out at paragraphs 171 – 187 of our February 2017 Submission, we do not agree with the ASU's submission that the example at clause 13.7 "accurately reflects the intention of current modern award clause 25.1(b)".

47. For the reasons we have there set out, the example should be amended as follows:

> EXAMPLE: ~~Employees~~ An employee covered by this award works in association with employees who ~~are covered by an award that sets ordinary hours of~~ work ordinary hours between 5.30 am and 6.30 pm Monday to Friday. The award that ~~sets ordinary hours of work between 5.30 am and 6.30 pm Monday to Friday~~ covers the majority of employees at the workplace sets ordinary hours of work between 5.30 am and 6.30 pm Monday to Friday. The employer may direct ~~that employees~~ the employee covered by this award to work ordinary hours between 5.30 am and 6.30 pm Monday to Friday (rather than the spread set out in clause 13.5).

Clause 13.10 – Ordinary hours of work (employees not engaged on shifts) – ABI and NSWBC Submission

48. ABI and the NSWBC submits that clause 13.10 of the Exposure Draft should be amended by inserting a reference to the span of ordinary hours as follows:

> **13.10** The employer and an employee may agree that the employee may take time off during ordinary hours and make up that time by working at another time during <u>the span of</u> ordinary hours.

49. We do not oppose the amendment proposed, however suggest that the word "spread" be used in lieu of "span", consistent with clause 27.6 of the Award:

> **27.6 Make-up time**
>
> An employee may elect, with the consent of the employer, to work 'make-up time' under which the employee takes time off during ordinary hours, and works those hours at a later time, during <u>the spread of</u> ordinary hours provided in the award.

Clause 14 – Rostered days off (employees not engaged on shifts) – ASU Submission

50. For all of the reasons set out at paragraphs 197 – 214 of our February 2017 Submission, we do not agree with the ASU's submission that clause 14 "reflects the intention of clauses 25.3 and 25.4 of the Award.

Clause 14.2 – Rostered days off – ABI and NSWBC Submission

51. We agree with ABI and NSWBC that clause 14.2 of the Exposure Draft is problematic. We have set out our concerns at paragraphs 197 – 209 of the February 2017 Submission. We agree that the matter should be the subject of discussion during any conference listed before the Commission in this regard.

Clause 14.6 – Banking rostered days off (employees not engaged on shifts) – Business SA Submission

52. Business SA has identified elements of the current clause 25.4(d) that it says do not appear in the Exposure Draft. Specifically: (emphasis added)

25.4 Substitute days

(a) An employer may substitute the day an employee is to take off for another day in case of a break down in machinery or a failure or shortage of electric power or to meet the requirements of the business in the event of rush orders or some other emergency situation.

(b) An individual employee, with the agreement of the employer, may substitute the day the employee is to take off for another day.

(c) Where the working of the 38 hour week is agreed to in accordance with this clause, an employee and the employer may agree to a banking system of up to a maximum of five rostered days off. An employee would therefore work on what would normally have been the employee's rostered day off and accrue an entitlement to bank a rostered day off to be taken at a mutually convenient time for both the employee and the employer, provided not less than five days' notice is given before taking the banked rostered day(s) off.

(d) <u>No payments or penalty payments are to be made to employees working under this substitute banked rostered day off.</u> However the employer will maintain a record of the number of rostered days banked <u>and will apply the average pay system during the weeks when an employee elects to take a banked rostered day off.</u>

(e) Employees terminating prior to taking any banked rostered day(s) off must receive one fifth of average weekly pay over the previous six months multiplied by the number of banked substitute days.

(f) Employees who work on a rostered day off basis each 20 day cycle are entitled to 12 rostered days off in a 12 month period.

53. It appears that clause 17.4(b)(i) of the Exposure Draft is intended to reflect clause 25.4(d) of the Award, however we agree that it is problematic. We refer to paragraph 291 of our February 2017 Submission, where we set out a proposed alternate clause which would, in our view, address Business SA's concern:

17.5 Where clause 14.6 applies:

(a) No payments or penalty payments are to be made to employees working under this substitute banked rostered day off. However the employer will maintain a record of the number of rostered days banked

and will apply the average pay system during the weeks when an employee elects to take a banked rostered day off.

(b) Employees terminating prior to taking any banked rostered day(s) off must receive one fifth of average weekly pay over the previous six months multiplied by the number of banked substitute days.

Clause 15 – Breaks (employees not engaged on shifts) – ASU Submission

54. For all of the reasons set out at paragraphs 215 – 244 of our February 2017 Submission, we do not agree with the ASU's submission that clause 15 "accurately reflects the intention of the current modern award clauses 26.1 and 26.2".

Clause 15.1 – Breaks (employees not engaged on shifts) – ABI and NSWBC Submission

55. ABI and the NSWBC submits that the reference to "shifts" in the heading of clause 15.1 may lead to confusion, but does not propose any remedy.

56. We do not consider that the confusion alleged in fact arises.

Clauses 15.2 – 15.4 – Breaks (employees not engaged on shifts) – ABI and NSWBC Submission

57. For the reasons set out at paragraphs 215 – 244 of our February 2017 Submission, we do not agree with ABI and the NSWBC that "the re-drafted clause appears to capture the same content as the existing clauses 26.1 and 26.2". We submit that the many issues we have there identified should be addressed in the manner proposed.

Clause 15 – Breaks (employees not engaged on shifts) – Note – Business SA Submission

58. Business SA submits that the note following clause 15.4 in the Exposure Draft alters the legal effect of clause 26.2(a) of the Award because it has replaced the word "should" with "will". It is in the following terms: (emphasis added)

> NOTE: Where suitable to business requirements, the employer <u>will</u> arrange for an employee who is entitled to 2 paid rest breaks to take one rest break before, and one rest break after, their unpaid meal break.

59. At the very least, the nature of clause 26.2(a) of the Award, has been altered by the Exposure Draft. Clause 26.2(a) does not mandate, as the above note does, that rest intervals be scheduled as there outlined. It is in the following terms: (emphasis added)

> **(a)** An employee must be allowed two 10 minute rest intervals to be counted as time worked on each day that the employee is required to work not less than eight ordinary hours. Each rest interval should be taken at a time suitable to the employer taking into account the needs of the business. If suitable to business operations, the first rest interval <u>should</u> be allowed between the time of commencing work and the usual meal interval and the second rest interval <u>should</u> be allowed between the usual meal and the time of ceasing work for the day.

60. Accordingly, we agree that the note should be amended as follows:

> NOTE: Where suitable to business requirements, the employer ~~will~~ <u>should</u> arrange for an employee who is entitled to 2 paid rest breaks to take one rest break before, and one rest break after, their unpaid meal break.

Clause 15.4 – Breaks (employees not engaged on shifts) – ASU Submission

61. Clause 15.4 of the Exposure Draft is in the following terms:

> **15.4** An employer must pay an employee who is required to work through their meal break 200% of the minimum hourly rate until a meal break is taken.

62. The ASU makes the following submission in relation to it:

> Clause 15.4 states that *"An employer must pay an employee who is required to work through their meal break 200% of the <u>minimum hourly rate</u> until a meal break is taken"*. The use of "minimum hourly rate" is repeated further in the PLD particularly with respect to penalties, overtime and shiftwork payments. "Minimum hourly rate" is not a term used in the current modern award and the effect will be that penalties, overtime

and shiftwork payments will be applied on the minimum hourly rate regardless of an employee being paid more than the minimum hourly rate.

63. We agree with the ASU's observation regarding the operation of the term "minimum hourly rate" which, as we understand it refers to the minimum rate prescribed by the Exposure Draft. All penalties and loadings payable pursuant to the instrument are to be calculated by reference to that rate, even if the employee is in receipt of over-award payments. This is consistent with the Commission's decision earlier during this Review:

> **[95]** The AMWU and TCFUA, supported by a number of other unions submitted that replacing terms such as 'time and a half' and 'double time' with '150% of the minimum hourly rate' or '200% of the minimum hourly rate' (or '200% of the ordinary hourly rate' in awards where there is an all purpose payment) reduces an employee's entitlements under the award. They argue that where an employee is receiving an overaward payment, it is the higher rate that should be multiplied to calculate the amount payable.
>
> **[96]** Modern awards provide a safety net of minimum entitlements. The modern award prescribes the minimum rate an employer must pay an employee in given circumstances. Overaward payments, while permissible, are not mandatory. Further, if an employer chooses to pay an employee more than the minimum amount payable for ordinary hours worked, the employer is not required to use that higher rate when calculating penalties or loadings. We are not persuaded by the submissions advanced by union parties and do not propose to replace the terms 150% and 200% with time and a half or double time, etc.[2]

64. We do not understand the ASU's submission to be proposing a variation or the adoption of a different approach. If it later seeks to do so, Ai Group may seek an opportunity to respond.

Clause 16.4 – Junior employees – Business SA Submission

65. Business SA submits that the reference to the weekly rate in Table 4 should be replaced with a reference to the minimum hourly rate. Importantly, it points to an issue that arises from the entitlement of part-time and casual employees.

66. Accordingly, the words "% of weekly rates" should be replaced with "% minimum hourly rate", consistent with the terminology used in clause 16.1. We refer also to paragraphs 271 – 272 of our February 2017 Submissions in this regard.

[2] 4 yearly review of modern awards [2015] FWCFB 4658 at [95] – [96].

Clause 17.4(a) – Payment of wages under an averaging or banking system – ABI and NSWBC Submission

67. ABI and the NSWBC has raised a concern arising from the phraseology used in clause 17.4(a) and suggest that it be amended as follows:

> **17.4 Payment of wages under an averaging or banking system**
>
> **(a)** Employees who work weekly hours under an averaging system in according with / as set out in clause 13.2 or rostered day off system in clause 114 must be paid according to the average number of hours worked.

68. Ai Group has raised certain fundamental concerns arising from clause 17.4(a), which subsume the above submission. Those concerns are identified at paragraphs 283 – 291 of our February 2017 Submission.

Clause 19.4(d) – Clothing and footwear allowance – ABI and NSWBC Submission

69. ABI and the NSWBC submit that clause 19.4(d) "does not make clear that the employee must be required to launder a uniform to be entitled to the allowance". It suggests the following amendment:

> **(d)** If the uniform that is required to be worn by the employee needs to be laundered by the employee, the employer must pay the employee an allowance of: …

70. We agree that the proposed change should be made. Absent the additional words, it is not clear that the allowance is payable only where the employee is required to launder the uniform, as compared to circumstances in which the employer launders the uniform.

Clause 19.6(a) – Vehicle allowance – Business SA Submission

71. Business SA submits that clause 19.6(a) of the Exposure Draft alters the legal effect of clause 19.4 of the Award. We agree with this proposition for very similar reasons at paragraphs 301 – 305 of our February 2016 Submissions.

72. For the reasons there set out, clause 19.6(a) should be amended as follows:

> **(a)** An employer must pay an employee who is required by the employer to use their own motor vehicle in performing their duties an allowance of:

Clause 19.7(a)(i) – Living away from home allowance – Business SA Submission

73. Business SA submits that for the purposes of clarity and consistency, clause 19.7(a)(i) should be amended such that it makes express reference to the employee's employer.

74. Ai Group dealt with this issue at paragraphs 306 – 310 of our February 2017 Submission. For the reasons there set out, clause 19.7(a)(i) should be amended as follows:

> **(i)** the employee is required by the employer to temporarily work away from their usual place of employment; and

Clause 21 – Penalty rates (employees not engaged on shifts) – ABI and NSWBC Submission

75. ABI and the NSWBC submits that the reference to "shifts" in the heading of clause 21 may lead to confusion, but does not propose any remedy.

76. We do not consider that the confusion alleged in fact arises.

Clause 21.3 – Public holidays – ABI and NSWBC Submission

77. For the reasons set out at paragraphs 325 – 337 of the February 2017 Submission, we do not agree with ABI and the NSWBC's submission that clause 21.3 "is better placed in the Penalty rates clause" or that "the re-drafted clause accurately reflects the intention of the current clause 31.3".

Clause 21.3 – Public holidays – ASU Submission

78. For the reasons set out at paragraphs 325 – 337 of the February 2017 Submission, we do not agree with the ASU's submission that clause 21.3 "reflects the intention of current modern award clause 31.3" or that it is "better placed in the Penalty Rates clause".

Clause 22 – Overtime (employees not engaged on shifts) – ABI and NSWBC Submission

79. ABI and the NSWBC submits that the reference to "shifts" in the heading of clause 22 may lead to confusion, but does not propose any remedy.

80. We do not consider that the confusion alleged in fact arises.

Clause 22.1(c) – Overtime (employees not engaged on shifts) – ABI and NSWBC Submission

81. ABI and the NSWBC submit that clause 22.1(c) be amended as follows, in order to rectify a drafting error:

    (c) outside the spread of hours in clause 13.5, or as altered under clause 13.6;

82. Ai Group has raised certain fundamental concerns arising from clause 22.1(c), which subsume the above submission. Those concerns are identified at paragraphs 346 - 349 of our February 2017 Submission.

Clause 23.4 – Rest period after working overtime (employees not engaged on shifts) – Business SA Submission

83. Business SA submits that clause 23.4 of the Exposure Draft should apply only where an employee resumes or continues work upon the instruction of their employer, as required by clause 27.3(c) of the Award.

84. As set out at paragraphs 397 – 401 of our February 2017 Submission, we agree. As we have there proposed, clause 23.4 of the Exposure Draft should be amended as follows:

> **23.4** If on the instructions of the employer ~~Where~~ an employee resumes or continues work without having at least 10 consecutive hours off duty in accordance with clause 23.3 all of the following apply:

Clause 25.2 – Shiftwork definitions – ASU Submission

85. In response to the question contained in the Exposure Draft, the ASU submits that the spread of hours may be altered by up to one end at one end of the spread but not both.

86. As per paragraphs 442 - 443 of our February 2017 Submission, we do not agree. We note that neither the Commission nor any interested party has advanced a variation to the Award or the Exposure Draft in this regard. Should such a change be proposed, Ai Group will seek an opportunity to be heard. A variation that gives effect to the ASU's interpretation would, in our view, amount to a substantive change to the Award.

Clause 25 – Shiftwork definitions – ASU Submission

87. The ASU appears to be proposing a substantive variation to the shiftwork definition such that an employer must inform an employee in writing if the employee is required to work shifts. No basis is provided for the change sought.

88. Ai Group opposes a variation of the nature sought by the ASU. If it is pressed, the union may choose to mount a substantive claim in support of its proposal. We strongly submit that it should not be dealt with through this process; it is not a matter that arises from the plain language re-drafting of the Award.

Clause 26.3 – Public holidays – ASU Submission

89. For the reasons set out at paragraphs 449 – 453 of our February 2017 Submission, we do not agree with the ASU's submission that clause 26.3 of the Exposure Draft "reflects the intention of current modern award clause 31.3".

Clause 27.1(b) – Ordinary hours of work and rostering for shiftwork – Business SA Submission

90. Business SA submits that the legal effect of clause 27.1(b) of the Exposure Draft is different to clause 28.3(b) of the Award, as it does not require agreement with the majority of employees.

91. As set out at paragraphs 454 – 458 of our February 2017 Submission, we agree. Consistent with the proposal we have there put, clause 27.1(b) should be amended as follows:

> **(b)** by agreement between an employer and the majority of employees concerned, an average of 38 hours over a roster period, not exceeding 12 months~~, as agreed between an employer and the employees~~.

Clause 28 – Breaks for shiftwork – ASU Submission

92. For the reasons set out at paragraphs 468 – 489 of our February 2017 Submission, we do not agree with the ASU's submission that clause 28 "reflects the intention of current modern award clauses 26.1, 26.2 and 28.4(f)".

Clause 32(b) – Transport reimbursement for shiftworkers – Business SA Submission

93. Business SA submits that the legal effect of clause 32 of the Exposure Draft deviates from the Award by extending the entitlement to travel from an employee's home to their usual place of employment.

94. As set out at paragraphs 556 – 560 of our February 2017 submission, we agree. Consistent with the proposal we have there put, clause 32(b) of the Exposure Draft should be amended as follows:

> **(b)** The employer must reimburse the employee he cost they reasonably incurred in taking a commercial passenger vehicle ~~from the employee's usual place of residence to the usual place of employment or~~ from the place of employment to the employee's usual place of residence~~, whichever is applicable~~.

Clause 33 – Annual leave – Note – ABI and NSWBC Submission

95. We agree that the typographic error identified should be amended as follows:

> NOTE: Where an employee is receiving overaward payments resulting in the employee's base rate of pay being higher than the rate specified under this award, the employee is ~~be~~ entitled to receive the higher rate while on a period of paid annual leave (see ss.16 and 90 of the Act).

Schedule A – Classification Structure and Definitions – Business SA Submission

96. Ai Group has outlined various concerns arising from Schedule A to the Exposure Draft, which are set out at paragraphs 585 – 616 of our February 2016 Submission. They also deal with the matters raised by Business SA, which are consistent with the types of issues we have identified.