Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Group 2 Awards:
Revised Exposure Drafts

30 June 2017

4 YEARLY REVIEW OF MODERN AWARDS

GROUP 2 AWARDS: REVISED EXPOSURE DRAFTS

CONTENTS

1. INTRODUCTION

1. On 9 June 2017, the Fair Work Commission (**Commission**) issued a statement in relation to group 2 awards and published revised exposure drafts of those awards. It invited feedback from interested parties regarding:

    - Any errors in the exposure drafts; and
    - Any outstanding technical and drafting issues that have been raised previously but are not listed in the Schedule to the statement (**Schedule**).

2. The Australian Industry Group (**Ai Group**) has a significant interest in a number of group 2 awards. This submission is filed in accordance with the aforementioned statement.

General Issues Previously Identified by Ai Group

3. There are various 'general issues' that are relevant to most if not all exposure drafts that have been raised by Ai Group in this Review. This includes, for instance, the wording of the 'Note' in the schedule of hourly rates and the terminology used in the exposure drafts to refer to rates of pay (penalties/loadings/allowances – see submission dated 31 August 2016).

4. We note that these matters have not yet been determined by the Commission and to that extent they remain outstanding, however they are not identified in the Schedule.

2. EXPOSURE DRAFT – CORRECTIONS AND DETENTION (PRIVATE SECTOR) AWARD 2015

5. The submissions that follow relate to the *Exposure Draft – Corrections and Detention (Private Sector) Award 2015*, published on 13 June 2017.

Schedule of Outstanding Issues

6. We make the following comments regarding the relevant part of the Schedule:

- Ai Group's submission of 9 December 2016 at paragraphs 22 – 23 remains outstanding, but is not identified in the Schedule.

  "We do not consider that clause 15.4 is a 'facilitative provision' in the sense contemplated by clause 5.1. 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.

  The reference to clause 15.4 should therefore be deleted from clause 5.2."

- Ai Group's submission of 9 December 2016 at paragraphs 24 – 25 remains outstanding, but is not identified in the Schedule:

  "We do not consider that clause 15.5 is a 'facilitative provision' in the sense contemplated by clause 5.1. 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.

  The reference to clause 15.5 should therefore be deleted from clause 5.2."

3. EXPOSURE DRAFT – GRAPHIC ARTS, PRINTING AND PUBLISHING AWARD 2016

7. The submissions that follow relate to the *Exposure Draft – Corrections and Detention (Private Sector) Award 2015*, published on 13 June 2017.

8. For the reasons identified in Ai Group's submission of 14 December 2016 at paragraph 46, the definition of "ordinary hourly rate", as previously determined by the Commission,[1] needs to be inserted. The Schedule identifies that this issue remains outstanding.

9. Also, the issues identified in paragraphs 1-10 and paragraph 29 of Ai Group's submission of 31 August 2016 have not been addressed. Clause 27.6(b)(ii) in the previous exposure draft, as referred to in the submission, is now clause 27.7(b)(ii). This issue is not referred to in the Schedule.

[1] [2014] FWCFB 9412 at [44] – [53] and [2015] FWCFB 4658 at [47].

4. EXPOSURE DRAFT – HEALTH PROFESSIONALS AND SUPPORT SERVICES AWARD 2015

10. The submissions that follow relate to the *Exposure Draft – Health Professionals and Support Services Award 2015*.

Clauses 19.2(a) – (c) – Overtime rates

11. Consistent with the Commission's earlier decision[2] in this Review, the words "of the minimum hourly rate" should be inserted after the rate appearing in clauses 19.2(a), 19.2(b) and 19.2(c).

Schedule of Outstanding Issues

12. We make the following comments regarding the relevant part of the Schedule:

- Ai Group's submission of 9 December 2016 at paragraphs 48 – 49 remains outstanding, but is not identified in the Schedule:

  "We do not consider that clause 20.4 is a 'facilitative provision' in the sense contemplated by clause 5.1. 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.

  The reference to clause 20.4 should therefore be deleted from clause 5.2."

- Ai Group's submission of 9 December 2016 at paragraphs 50 – 51 remains outstanding, but is not identified in the Schedule:

  "We do not consider that clause 20.6 is a 'facilitative provision' in the sense contemplated by clause 5.1. 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.

  The reference to clause 20.6 should therefore be deleted from clause 5.2."

- Ai Group's submission of 9 December 2016 at paragraphs 58 – 60 remains outstanding, but is not identified in the Schedule:

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

"Clause 9.1(a) states that an employee who works in excess of five hours will be entitled to an unpaid meal break of "between 30 minutes and 60 minutes". Read literally, the provision requires that an unpaid meal break must be at least 31 minutes in length. A meal break of 30 minutes would not satisfy clause 9.1(a).

This deviates substantively from the current clause 27.1(a), which is in the following terms:

(a) An employee who works in excess of five hours will be entitled to an unpaid meal break of not less than 30 minutes and not more than 60 minutes.

Accordingly, clause 9.1(a) should be amended as follows:

(a) An employee who works in excess of five hours will be entitled to an unpaid meal break of not less than 30 minutes and not more than 60 minutes ~~between 30 minutes and 60 minutes~~."

- Ai Group's submission regarding clause 19.1 continues to be an outstanding matter, however it is our understanding that it has in fact been referred to the Full Bench constituted to deal with substantive claims to the *Health Professionals and Support Services Award 2010* (AM2016/31).

5. EXPOSURE DRAFT – HORSE AND GREYHOUND TRAINING AWARD 2015

13. The submissions that follow relate to the *Exposure Draft – Horse and Greyhound Training Award 2015*, published on 13 June 2017.

Schedule of Outstanding Issues

14. We make the following comments regarding the relevant part of the Schedule:

- Ai Group's submission of 9 December 2016 at paragraphs 68 – 68 remains outstanding, but is not identified in the Schedule:

  "We do not consider that clause 14.2 is a 'facilitative provision' in the sense contemplated by clause 5.1. 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.

  The reference to clause 14.2 should therefore be deleted from clause 5.2."

- Ai Group's submission of 9 December 2016 at paragraphs 69 – 70 remains outstanding, but is not identified in the Schedule:

  "We do not consider that clause 14.8 is a 'facilitative provision' in the sense contemplated by clause 5.1. 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.

  The reference to clause 14.8 should therefore be deleted from clause 5.2."

- Ai Group's submission of 9 December 2016 at paragraph 87 remains outstanding, but is not identified in the Schedule:

  Schedule H contains a definition for the term "all purpose rate", however the term is not used elsewhere in the exposure draft. Accordingly, the definition is unnecessary and should be deleted.

6. EXPOSURE DRAFT – NURSES AWARD 2015

15. The submissions that follow relate to the *Exposure Draft – Nurses Award 2015*, published on 13 June 2017.

Schedule of Outstanding Issues

16. We make the following comments regarding the relevant part of the Schedule:

- Ai Group's submission of 9 December 2016 at paragraphs 103 – 104 remains outstanding, but is not identified in the Schedule:

  "We do not consider that clause 17.9 is a 'facilitative provision' in the sense contemplated by clause 5.1. 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.

  The reference to clause 17.9 should therefore be deleted from clause 5.2."

- Ai Group's submission of 9 December 2016 at paragraphs 105 – 106 remains outstanding, but is not identified in the Schedule:

  "We do not consider that clause 17.10 is a 'facilitative provision' in the sense contemplated by clause 5.1. 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.

  The reference to clause 17.10 should therefore be deleted from clause 5.2."

- Ai Group's submission of 9 December 2016 at paragraphs 107 – 109 remains outstanding, but is not identified in the Schedule:

  "Clause 9.1(a) states that an employee who works in excess of five hours will be entitled to an unpaid meal break of "between 30 minutes and 60 minutes". Read literally, the provision requires that an unpaid meal break must be at least 31 minutes in length. A meal break of 30 minutes would not satisfy clause 9.1(a).

  This deviates substantively from the current clause 27.1(a), which is in the following terms:

  (a) An employee who works in excess of five hours will be entitled to an unpaid meal break of not less than 30 minutes and not more than 60 minutes.

Accordingly, clause 9.1(a) should be amended as follows:

(a) An employee who works in excess of five hours will be entitled to an unpaid meal break of not less than 30 minutes and not more than 60 minutes ~~between 30 minutes and 60 minutes~~."

17. Also, the issues identified in paragraphs 1-10 and paragraph 36 of Ai Group's submission of 31 August 2016 have not been addressed. Clause 17.5(b)(ii) in the previous exposure draft, as referred to in the submission, is now clause 17.8(b)(ii). This issue is not referred to in the Schedule.

7. EXPOSURE DRAFT – RACING INDUSTRY GROUND MAINTENANCE AWARD 2015

18. The submissions that follow are in relation to the *Exposure Draft – Racing Industry Ground Maintenance Award 2016*.

Schedule of Outstanding Issues

19. We make the following comments regarding the relevant part of the Schedule:

- Ai Group's submission of 9 December 2016 at paragraphs 118 – 119 remains outstanding, but is not identified in the Schedule:

  "We do not consider that clause 15.2 is a 'facilitative provision' in the sense contemplated by clause 5.1. 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.

  The reference to clause 15.2 should therefore be deleted from clause 5.2."

- Ai Group's submission of 9 December 2016 at paragraphs 120 – 121 remains outstanding, but is not identified in the Schedule:

  "We do not consider that clause 15.7 is a 'facilitative provision' in the sense contemplated by clause 5.1. 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.

  The reference to clause 15.7 should therefore be deleted from clause 5.2."

8. EXPOSURE DRAFT – ROAD TRANSPORT (LONG DISTANCE OPERATIONS) AWARD 2015

20. The submissions that follow relate to the *Exposure Draft – Road Transport (Long Distance Operations) Award 2015*.

Clause 5.2(a) – Facilitative provisions

21. The reference to clause 8.5(c) should instead be to clause 5.2(a). This appears to be a drafting error.

Clause 7. Classifications

22. The classification structure in the previous exposure draft was restructured with the intent of aligning it to the classification structure in the Road Transport & Distribution Award 2010. There is merit in this approach given that some employers utilise both instruments. It makes the system simple and easy to understand (s.134(1)(g). However, the adoption of the approach results in an anomalous outcome in that the new classification structure should technically commence at grade 3. Accordingly, it was proposed during the conferencing process that a reference to grades 1 and 2 be included in the new classification structure, with a note indicating that they were "not applicable" to avoid parties being confused as to why the classifications started at grade 3. The references to grades 1 and 2 have been deleted in the most recent exposure draft. Ai Group is content for the Full Bench to decide whether the references to grades 1 and 2 should be retained considering this background.

Schedule of Outstanding Issues

23. We make the following comments regarding the relevant part of the Schedule:

- Ai Group's submission of 9 December 2016 at paragraphs 127 – 129 remains outstanding, but is not identified in the Schedule:

  "A definition of 'long distance operation' has been inserted into clause 3 - Coverage. The same definition is replicated in the definitions clause

contained at Schedule 3. We assume that the inclusion of the definition is intended to assist the reader to identify what constitutes a 'long distance operation', as referred to in the coverage clause.

One difficulty with the proposed approach is that it fails to identify that the term 'interstate operation' as utilised within the definition of "long distance operation" is also a defined term. Accordingly, the reader will still need to refer to the definitions section to understand the special meaning afforded to such a term under the Award. There is a risk that the inclusion of a definition for only one relevant term in the coverage clause may mislead the reader into not recognising that the term 'interstate operation' also has a special meaning under the Award.

Clause 3.2 of the exposure draft should be deleted. All definitions should only be included in the definitions section."

- Ai Group's submission of 9 December 2016 at paragraphs 130 – 131 remains outstanding, but is not identified in the Schedule:

"We do not consider that clause 14.7 is a 'facilitative provision' in the sense contemplated by clause 5.1. 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.

The reference to clause 15.9 should therefore be deleted from clause 5.2."

- Ai Group's submission of 9 December 2016 at paragraph 132 remains outstanding, but is not identified in the Schedule:

"We do not consider that clause 14.10 is a 'facilitative provision' in the sense contemplated by clause 5.1. 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."

9. EXPOSURE DRAFT – ROAD TRANSPORT AND DISTRIBUTION AWARD

25. The submissions that follow relate to the *Exposure Draft – Road Transport and Distribution Award 2015*, published on 13 June 2017.

Clause 5.2(a) – Facilitation by agreement

26. The clause should refer to clause 8.4. The references to 8.6(a) and 8.6(b) should be deleted. Clause 8.6(a) is not a facilitative provision and clause 8.6(b) is already identified in clause 5.2(a). This is consistent with the approach taken in clause 5.3(a).

Clause 8.2 – Ordinary hours of work and roster cycles – employees other than oil distribution workers

27. The clause should cross reference clauses 6.4(b) and (c). The reference to clause 6.4(a) is incorrect.

28. Clause 6.4(a) defines part-time employment. It does not govern the determination of the ordinary hours of work.

Clause 13.2 – Allowances

29. Clause 13.2 of the exposure draft provides that the allowances at clauses 13.3(c) to (g) are payable to full-time, part-time and casual employees. However, only "weekly employees" are entitled to the the allowance provided for in clause 13.3(f)(iii). Clause 31.2 should be amended to reflect this. The easiest way to achieve this may be to simply replace the reference to (g) in clause 13.2 with a reference to (g)(ii).

Schedule of Outstanding Issues

30. We make the following comments regarding the relevant part of the Schedule:

- Ai Group's submission of 9 December 2016 at paragraphs 141 - 142 remains outstanding, but is not identified in the Schedule:

"We do not consider that clause 18.5 is a 'facilitative provision' in the sense contemplated by clause 5.1. 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.

The reference to clause 15.9 should therefore be deleted from clause 5.2."

- Ai Group's submission of 9 December 2016 at paragraphs 143 remains outstanding, but is not identified in the Schedule:

"We do not consider that clause 18.10 is a 'facilitative provision' in the sense contemplated by clause 5.1. 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."

31. Also, the issues identified in paragraphs 1-10 and paragraph 38 of Ai Group's submission of 31 August 2016 have not been addressed. Clause 18.3(b)(ii) in the previous exposure draft, as referred to in the submission, is now clause 18.4(b)(ii). This issue is not referred to in the Schedule.

10. EXPOSURE DRAFT – SEAFOOD PROCESSING AWARD 2015

32. The submissions that follow relate to the *Exposure Draft – Seafood Processing Award 2015*, published on 13 June 2017.

Clause 14.1(a)(i) – (iii) – Payment for working overtime

33. Consistent with the Commission's earlier decision[3] in this Review, the words "of the minimum hourly rate" should be inserted after the rate appearing at the commencement of clauses 14.1(a)(i), 14.1(a)(ii) and 14.1(a)(iii).

Clause 14.4 – Saturday work

34. Consistent with the Commission's earlier decision[4] in this Review, the words "of the minimum hourly rate" should be inserted after "150%" and "200%" in clause 14.4.

Schedule of Outstanding Issues

35. We make the following comments regarding the relevant part of the Schedule:

- We agree that the AMWU's submission regarding clause 8.2(c) is 'outstanding' in the sense that it has not yet been dealt with, but we do not accept the proposition that it is a technical and drafting matter. The AMWU seeks to argue that a substantive change ought to be made to that clause, which is opposed by Ai Group.

- We agree that the AMWU's submission regarding clause 13.4 is 'outstanding' in the sense that it has not yet been dealt with, but we do not accept the proposition that it is a technical and drafting matter. The AMWU seeks to argue that a substantive change ought to be made to that clause, which is opposed by Ai Group.

[3] *4 yearly review of modern awards* [2015] FWCFB 4658 at [95] – [96].

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

- We agree that the AMWU's submission regarding clause 13.5 is 'outstanding' but we note that it was made in response to a submission of Ai Group on 31 August 2016 (paragraph 39) which, by extension, is also outstanding.

- We agree that the AMWU's submission regarding clause 13.6, 13.7 and 13.8 is 'outstanding' but we note that it was made in response to a submission of Ai Group on 31 August 2016 (paragraph 39) which, by extension, is also outstanding.

- Ai Group's submission of 9 December 2016 at paragraphs 150 – 151 remains outstanding, but is not identified in the Schedule.

  "We do not consider that clause 15.9 is a 'facilitative provision' in the sense contemplated by clause 5.1. 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.

  The reference to clause 15.9 should therefore be deleted from clause 5.2."

- Ai Group's submission of 9 December 2016 at paragraphs 152 – 153 remains outstanding, but is not identified in the Schedule.

  "We do not consider that clause 15.10 is a 'facilitative provision' in the sense contemplated by clause 5.1. 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.

  The reference to clause 15.10 should therefore be deleted from clause 5.2."

36. Also, the issues identified in paragraphs 1-10 and paragraph 39 of Ai Group's submission of 31 August 2016 have not been addressed. This issue is not referred to in the Schedule.

11. EXPOSURE DRAFT – STORAGE SERVICES AND WHOLESALE AWARD 2015

37. The submissions that follow relate to the *Exposure Draft – Storage Services and Wholesale Award 2015*, published on 13 June 2017.

Clause 1.4 – Title and commencement

38. The reference to "Schedule A" should be replaced with "Schedule G". This appears to be a drafting error.

Schedule of Outstanding Issues

39. We make the following comments regarding the relevant part of the Schedule:

- Ai Group's submission of 9 December 2016 at paragraphs 161 – 162 remains outstanding, but is not identified in the Schedule:

  "We do not consider that clause 17.6 is a 'facilitative provision' in the sense contemplated by clause 5.1. 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.

  The reference to clause 17.6 should therefore be deleted from clause 5.2."

- Ai Group's submission of 9 December 2016 at paragraphs 163 – 164 remains outstanding, but is not identified in the Schedule:

  "We do not consider that clause 17.7 is a 'facilitative provision' in the sense contemplated by clause 5.1. 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.

  The reference to clause 17.7 should therefore be deleted from clause 5.2."

40. Also, the issues identified in paragraphs 1-10 and paragraph 41 of Ai Group's submission of 31 August 2016 have not been addressed. Clause 13A.1 refers to "shift loadings". Clause 15.3(f) refers to "shiftwork penalties". Clause 15.4 refers to "shift allowances" but the clause contains rates, not allowances. Clause 17.4(b)(iii) refers to "shift loadings".

12. EXPOSURE DRAFT – TRANSPORT (CASH IN TRANSIT) AWARD 2015

41. The submissions that follow relate to the *Exposure Draft – Transport (Cash in Transit) Award 2015*, published on 13 June 2017.

Clause 12.2(a) – All purpose allowances

42. The definition of "all purposes" is inconsistent with the definition previously determined by the Commission[5], because it does not limit the requirement to pay such allowances during leave to periods of *annual* leave. It purports to require the payment of the relevant allowances during all forms of leave.

43. This should be amended by inserting the word "annual" before "leave". The definition would then also be consistent with that found at Schedule F.

Schedule A.2.1 – Full-time and part-time employees other than shiftworkers – ordinary, overtime and penalty rates

44. Consistent with the relevant footnote, the remainder of the schedule and the terminology otherwise used in the exposure draft, the words "ordinary rate of pay" in the table should be replaced with "ordinary hourly rate".

Schedule F – Definitions – ordinary hourly rate

45. The definition of "ordinary hourly rate" is problematic because it refers specifically to the minimum rates of pay prescribed by clause 11.1, which are payable to some but not all employees covered by the award. For instance, an employee undertaking a traineeship or an employee to whom the supported wage system applies may be entitled to a lower minimum rate of pay. In such circumstances, the employee's "ordinary hourly rate" must be calculated by reference to those rates of pay, in lieu of the rates prescribed by clause 11.1.

[5] *4 yearly review of modern awards* [2015] FWCFB 4658 at [91].

46. Accordingly, the words "specified in clause 11.1" should be replaced with "prescribed by this award".

Schedule of Outstanding Issues

47. We make the following comments regarding the relevant part of the Schedule:

- Ai Group's submission of 9 December 2016 at paragraphs 171 – 172 remains outstanding, but is not identified in the Schedule:

  "We do not consider that clause 16.5 is a 'facilitative provision' in the sense contemplated by clause 5.1. 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.

  The reference to clause 16.5 should therefore be deleted from clause 5.2."

- Ai Group's submission of 9 December 2016 at paragraphs 173 remains outstanding, but is not identified in the Schedule:

  "We do not consider that clause 16.9 is a 'facilitative provision' in the sense contemplated by clause 5.1. 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"

13. EXPOSURE DRAFT – WASTE MANAGEMENT AWARD 2015

48. The submissions that follow relate to the *Exposure Draft – Waste Management Award 2016,* published on 13 June 2016.

Clause 11.2(a) – All purpose allowances

49. The definition of "all purposes" is inconsistent with the definition previously determined by the Commission[6], because it does not limit the requirement to pay such allowances during leave to periods of *annual* leave. It purports to require the payment of the relevant allowances during all forms of leave.

50. This should be amended by inserting the word "annual" before "leave". The definition would then also be consistent with that found at Schedule F.

Clause 21.5 – Work on public holidays

51. In our submission of 9 December 2016, we identified that clause 20.5 (as it was then numbered, now clause 21.5) should be replaced with the provision set out in Annexure B to that submission, which reflects the agreed position reached between interested parties after lengthy and numerous discussions.

52. The revised exposure draft, however, appears to have adopted the provision set out at Annexure A to that submission, which relates to the *Road Transport and Distribution Award 2010*. There are substantive differences between the two and accordingly, we submit that the exposure draft should be amended by replacing clause 21.5 with the provision set out at Annexure B to the aforementioned submission.

Schedule F – Definitions – ordinary hourly rate

53. The definition of "ordinary hourly rate" is problematic because it refers specifically to the minimum rates of pay prescribed by clause 10.1, which are payable to some but not all employees covered by the award. For instance, a

[6] *4 yearly review of modern awards* [2015] FWCFB 4658 at [91].

junior employee, an employee undertaking a traineeship or an employee to whom the supported wage system applies may be entitled to a lower minimum rate of pay. In such circumstances, the employee's "ordinary hourly rate" must be calculated by reference to those rates of pay, in lieu of the rates prescribed by clause 10.1.

54. Accordingly, the words "specified in clause 10.1" should be replaced with "prescribed by this award".

Schedule of Outstanding Issues

55. We make the following comments regarding the relevant part of the Schedule:

- We agree that the AMWU's submission regarding clause 15.3 is 'outstanding' but we note that it was made in response to a submission of Ai Group on 31 August 2016 (paragraph 47) which, by extension, is also outstanding.

- We agree that the AMWU's submission regarding clause 17.2(b) is 'outstanding' but we note that it was made in response to a submission of Ai Group on 31 August 2016 (paragraph 47) which, by extension, is also outstanding.

- Ai Group's submission of 9 December 2016 at paragraphs 176 – 177 remains outstanding, but is not identified in the Schedule:

  "We do not consider that clause 17.3 is a 'facilitative provision' in the sense contemplated by clause 5.1. 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.

  The reference to clause 17.3 should therefore be deleted from clause 5.2."

- Ai Group's submission of 9 December 2016 at paragraphs 178 remains outstanding, but is not identified in the Schedule:

  "We do not consider that clause 17.4 is a 'facilitative provision' in the sense contemplated by clause 5.1. 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."

56. Also, the issues identified in paragraphs 1-10 and paragraph 47 of Ai Group's submission of 31 August 2016 have not been addressed. Clause 17.2(b)(in the previous exposure draft, as referred to in the submission, is now clause 18.2(b). This issue is not referred to in the Schedule.