Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Group 3 Exposure Drafts

14 APRIL 2016

4 YEARLY REVIEW OF MODERN AWARDS

EXPOSURE DRAFTS: GROUP 3 AWARDS

CONTENTS

1. INTRODUCTION

1. On 2 November 2015, the Fair Work Commission (Commission) published directions in respect of all awards allocated to groups 3 and 4 of the award stage of the 4 yearly review of modern awards (Review). Specifically, parties were directed to file 'comprehensive written submissions on the technical and drafting issues related to exposure drafts in Group 3' by 10 March 2016. This deadline was subsequently amended on 23 March 2016.

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

    1. *Exposure Draft – Banking, Finance and Insurance Award 2015;*
    2. *Exposure Draft – Business Equipment Award 2015;*
    3. *Exposure Draft – Clerks – Private Sector Award 2015;*
    4. *Exposure Draft – Commercial Sales Award 2015;*
    5. *Exposure Draft – Contract Call Centres Award 2015;*
    6. *Exposure Draft – Electrical Power Industry Award 2016;*
    7. *Exposure Draft – Horticulture Award 2016;*
    8. *Exposure Draft – Legal Services Award 2015;*
    9. *Exposure Draft – Local Government Industry Award 2015;*
    10. *Exposure Draft – Market and Social Research Award 2015;*
    11. *Exposure Draft – Miscellaneous Award 2015;*
    12. *Exposure Draft – Seagoing Industry Award 2016;*
    13. *Exposure Draft – Sugar Industry Award 2016;*
    14. *Exposure Draft – Telecommunications Services Award 2015;* and

15. *Exposure Draft – Wine Industry Award 2016.*

3. This submission first deals with some issues of general concern. These submissions will largely be familiar to the Commission, as they were also made in respect of Group 1C – 1E revised exposure drafts in our submissions of 7 December 2015. As the Commission is yet to make a ruling on these issues, and given their relevance to the exposure drafts that we have here reviewed, we repeat those submissions for the benefit of the Full Bench and other interested parties. We note however that the matter raised at section 2.8 is one that we have not previously articulated.

4. The submission subsequently goes on to identify issues specific to the 15 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 the group 3 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

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. We are concerned that a change to the terminology used to describe a particular payment may have implications for the calculation of entitlements that are governed by State and Territory legislation, such as workers' compensation and long service leave. Such legislation prescribes the amount payable to an employee by reference to certain components of an employee's remuneration that is to be included or excluded from the relevant calculations. This is often done by reference to entitlements such as penalties, loadings and the like.

10. For instance, the *Workers Compensation Act 1987* (NSW) defines an employee's 'pre-injury average weekly earnings' to include 'overtime and shift allowance payments'.[23] We are concerned that if a shift premium presently labelled as a shift loading is subsequently characterised as a shift allowance, or vice versa, that may have some implication for the calculation to be performed under the aforementioned legislation.

11. We do not here intend to deal comprehensively with the proper interpretation of statutory provisions in relation to long service leave, workers' compensation or otherwise. We are, however, concerned that an alteration to the characterisation of an award derived entitlement may inadvertently alter the effect of a provision in other legislation and as such, have some unintended consequence for the quantum of an entitlement there prescribed.

12. We anticipate that employers who have had some interaction with such legislation would have determined the amounts payable to their employees, in accordance with the relevant provisions. Altering the terminology used in modern awards in respect of certain entitlements may have unintended

[23] Section 44C.

consequences for such employers and their employees, in circumstances where they are not necessarily aware of the change, given its subtlety. The alterations could disturb existing arrangements in a way that is not readily apparent to employers or employees. It is for these reasons that we submit that caution should be taken in retitling an entitlement in the awards system.

13. We additionally note that the re-characterisation of an entitlement may also have implications for other award derived entitlements. For instance, certain awards contain provisions that prescribe the amount payable during a period of annual leave and/or the amount to which the annual leave loading is to be applied. They stipulate the amounts that are to be included and/or excluded by referring to penalties, loadings and the like. The effect of such provisions may be altered.

14. A further example arises from those award provisions that state that any payments prescribed by a particular clause are "in substitution for any other loadings or penalty rates". If a payment presently characterised as a shift penalty were redrafted such that it was referred to as a shift *allowance* in the exposure draft, that may have unintended consequences for the application of a provision such as the above.

15. In these submissions, we have endeavoured to identify circumstances in which there has been a relevant change of this nature. Should the Commission accept the proposition that an alteration to the characterisation of a premium payable under an award may have unintended consequences for the calculation of entitlements due under other award provisions and/or legislation, it is our submission that the terminology currently used should, in each case, be restored. We note that our submissions to this effect in respect of the *Exposure Draft – Timber Industry Award 2014* have been accepted by the Commission in the October 2015 Decision.[24]

[24] [2015] FWCFB 7236 at [299].

2.3 The manner in which the premium is expressed

16. There is one additional matter relating to the issues canvassed above, which we here seek to raise. It relates to the manner in which the various loadings and penalties have been expressed in the exposure drafts.

17. 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%.

18. 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.

19. We raise this issue out of concern that it too may have the types of unintended consequences that have been outlined above. 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.

20. We point to an example that we have previously relied upon in respect of the Group 1C – 1E Exposure Drafts. In doing so, we note that similar instances arise from the Group 3 Exposure Drafts.

21. Clause 13 of the *Exposure Draft – Poultry Processing Award 2015* (Exposure Draft) has altered the way in which additional payments made to shiftworkers are expressed.

22. Clause 24.4 of the Poultry Processing Award provides that employees receive "an additional amount" for ordinary hours worked on a particular shift. Similarly, clause 24.5 provides certain additional amounts to be paid for working on weekends or public holidays.

23. In contrast, clause 13.2 of the Exposure Draft simply sets a higher hourly rate for such shifts or for work on a weekend or public holiday. That is, the Exposure Draft expresses the amount due as a total to be calculated by reference to the ordinary hourly rate (for example, 115% of the ordinary hourly rate), rather than stipulating that a portion of the hourly rate is to be added to it (for example, an additional amount of 15% of the hourly rate).

24. The proposed change is problematic when read in conjunction with clause 15.4 of the Exposure Draft, which deals with annual leave loading. It provides that, "in addition" to the amounts prescribed by clause 15.3, a shiftworker is to paid the greater of either a loading of 17.5% calculated on the base rate of pay or:

> "(ii) the shift rate including the relevant weekend penalty rate payments the employee would have received in respect of ordinary hours of work, where the employee would have worked shift work had the employee not been on leave during the relevant period."

25. Clause 13.2 provides that, "An employee will be paid annual leave at the base rate of pay as prescribed by the NES".

26. As the shift rate or weekend are no longer separately identifiable, the Exposure Draft materially increases costs because employers could be required, pursuant to clause 15.4, to pay both the base rate referred to in

clause 15.3 and the inflated rate referred to in clause 13.2 (rather than just the penalty or shift rate component).

27. We accept that those who have an understanding of the awards system and have participated in this process would possess an inherent understanding of the rationale for altering the way in which these penalties and loadings are expressed and would therefore, appreciate that the intention is not to re-characterise the premium as 130% of the relevant rate. However, for abundance of caution and for the purpose of ensuring that there is no unintended change, we raise this as a matter that may be relevant to the Commission's consideration of the final form of the exposure drafts.

2.4 The ordinary hours of work and s.147 of the Act

28. Section 147 of the Act requires that a modern award must include terms specifying, or providing for the determination of, the ordinary hours of work for each classification of employee covered by the award and each type of employment permitted by the award.

29. We have identified various instances in which a modern award does not satisfy s.147 in respect of casual employees. That is, the award does not specify or provide for the determination of the ordinary hours of work for casual employees covered by it. This is a matter that has primarily come to our attention whilst reviewing exposure drafts in respect of group 2 awards, particularly where they purport to (erroneously) limit the application of the ordinary hours of work provision to full-time employees.[25]

30. We acknowledge that this is not, as such, a difficulty borne out of the Commission's redrafting of the current awards. Nonetheless, we raise it wherever relevant as an issue that the Commission may decide to rectify so as to ensure that the relevant awards meet the requirements of s.147.

[25] See for example Ai Group's submissions dated 4 February 2015 regarding subgroup 2C and 2D exposure drafts at paragraphs 6.8 and 10.9. See also Ai Group's submissions dated 28 January 2015 regarding subgroup 2A and 2B exposure drafts at paragraphs 149 and 181.

31. We note that this issue was identified by Ai Group during a conference before Commissioner Bull (as he then was) regarding the *Gas Industry Award 2010*. Our submission was accepted and the Commission has proposed to vary the relevant provision of the exposure draft accordingly.[26]

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

32. The Commission's decision of 13 July 2015[27] (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.

33. 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"[28] but noted that "some issues have arisen concerning the methodology used in the exposure drafts" in this regard.[29]

34. 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:

> [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.[30]

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

[26] [2015] FWCFB 7236 at [23] – [25].

[27] [2015] FWCFB 4658.

[28] [2015] FWCFB 4658 at [40].

[29] [2015] FWCFB 4658 at [41].

[30] [2015] FWCFB 4658 at [44].

> [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.[31]

36. 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.[32]

37. 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.

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

39. 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

[31] [2015] FWCFB 4658 at [45].

[32] [2015] FWCFB 4658 at [47].

the redrafting process is not intended to create any substantive changes to the awards system.

40. 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.

41. 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.

42. If a clause that requires the payment of, for example, 150% of the minimum hourly rate, 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.

43. 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

44. 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.

45. In its decision of September 2015[33], 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.[34]

46. 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.

47. 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 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.[35]

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

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[33] [2015] FWCFB 6656.

[34] [2015] FWCFB 6656 at [110].

[35] [2015] FWCFB 6656 at [103] – [105].

> [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.[36]

49. 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.

50. 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.

51. 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 increase employer costs. Ai Group opposes such redrafting of the relevant award provisions on this basis.

52. 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 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

[36] [2015] FWCFB 6656 at [106].

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.[37]

53. 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.

54. 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.

55. 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:

> 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 <u>(except for the casual loading provided for in clause x)</u> or payment while they are on annual leave…

56. 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.

[37] [2015] FWCFB 6656 at [109].

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

57. 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.

58. 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'.[38]

59. 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.

2.7 Schedules summarising hourly rates of pay

60. In its July 2015 Decision[39], 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 <u>who meet their obligations under this schedule</u> are meeting their obligations under the award.

61. Whilst we understand that it is the Commission's intention that the schedules attached to the exposure drafts be legally enforceable,[40] we are concerned that this is not achieved by the note.

62. 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:

[38] [2015] FWCFB 4658 at [95] – [96].

[39] [2015] FWCFB 4658 at [63].

[40] [2015] FWCFB 4658 at [63].

- The minimum wages provision that prescribes the rate of pay for each classification; and

- Any penalties, loadings, allowances or other premiums.

63. 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 …

64. 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.

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

66. 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.

67. 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. 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.[41]

68. 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.

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

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

2.8 Minimum annual and weekly wages

70. Several of the exposure drafts for awards allocated to group 3 include a provision that articulates an obligation to pay the minimum annual, weekly and/hourly rates prescribed by the minimum wages clause to all adult employees covered by it. Read literally, the clause appears to require the payment of the minimum annual and/or weekly rate to part-time and casual employees.

71. The submissions below deal with this matter as it arises and propose a minor amendment that, in our view, will ensure that the proposed provision does not

[41] [2015] FWCFB 4658 at [61].

create a tension between it and other relevant clauses that deal with pro-rata or hourly payments to part-time and casual employees.

72. We note that this is a concern that has not previously been raised by Ai Group regarding exposure drafts released during the earlier stages of the Review. We may seek an opportunity to identify instances in which this issue arises in such exposure drafts in due course.

3. EXPOSURE DRAFT – BANKING, FINANCE AND INSURANCE AWARD 2015

73. The submissions that follow relate to the *Exposure Draft – Banking, Finance and Insurance Award 2015* (Exposure Draft).

Clause 3.1 – Coverage

74. The words *"and those employees"* have been removed from the coverage term. The only remaining reference to employees is one that is directed at the coverage of employers, specifically; the work performed by the employees by reference to their classification.

75. The effect of the change is that the Exposure Draft is not drafted to expressly cover any employees; rather it only covers the employer and the work performed by the employees in the relevant classifications.

76. The definition of 'employee' within Schedule H is too broad to assist in determining coverage.

77. We are concerned that the proposed change to a well-accepted and unambiguous coverage term without good cause could give rise to the suggestion that the change was intended to broaden the coverage of the award to cover persons who may not perform work within the classifications contained within the award.

78. We suggest the words *"and those employees"* be retained by reason that the drafting was intended to properly connect the work described in a classification with an employee who performs such work and to cover that employee.

Clause 3.5 – Coverage

79. Clause 3.5 references to *"industries set out in clauses 3.1 and 3.2".* This appears to be a drafting error. Clause 3.1 does not deal with industries, it deals only with coverage. Clause 3.2 defines the relevant industry.

80. Clause 3.5 should amended to read:

> This award covers any employer which supplies labour on an on-hire basis in the industries set out in clause 3.2 in respect of….

Clause 6.3(b) – Part-time employees

81. Clause 6.3(b) refers to the minimum hourly rate of pay and cross-references clause 9. Clause 9 only provides minimum weekly rates of pay, not hourly.

82. The existing award at clause 10.2(b) makes a reference to *"1/38th of the minimum weekly rate of pay".* This enables the cross reference to the minimum rates clause to operate properly.

83. We submit the original drafting of clause 10.2(b) should be maintained.

Clause 6.3(d) – Part-time employees

84. A change in how the paragraphs have been formatted has impacted the potential application of the award.

85. Clauses 6.3(c) and 6.3(d) appear as one combined paragraph when read under the existing award (see clauses 10.2(c)).

86. The reference *"All time worked in excess of these hours"* in clause 6.3(d) now has the effect of referring to every subclause of clause 6.3, which potentially confuses the overtime trigger for part-time employees.

87. Under the existing award, "these" only refers to the entitlements referred to within that subclause, that is, the hours that the employer informed the employee of (ordinary hours, start and finish times).

88. Clause 6.3(c) and (d) should be amalgamated so that the reference to 'these' is clear and the effect of the award is unchanged.

Clause 6.4(c)(i) – Casual loading

89. As provided earlier in respect of part-time employees, the clause refers to the minimum hourly rate and makes reference to clause 9. Clause 9 does not provide hourly rates.

90. Consistent with the current clause 10.3(b), clause 6.4(b)(i) should be replaced with the following:

(i) no less than 1/38th of the minimum weekly rate of pay; and

Clause 6.4(d) – Casual Loading

91. The Exposure Draft refers to the casual loading being paid in lieu of other *"entitlements"* of full-time or part-time employment. The existing award at Clause 10.3(c) uses the word *"attributes".* There is a considerable difference in the effect of the language used.

92. The casual loading was introduced for a number of reasons; it is an over simplification to suggest that it exists to directly compensate for comparative entitlements only.

93. Many of the reasons for a casual loading cannot be described as 'entitlements'. Rather, many of the reasons related to broader issues associated with the differences in the forms of employment.

94. The word *'attributes'* is capable of describing both entitlements and non-entitlement-based reasons for the casual loading. We submit the word 'attributes' should remain unchanged.

Clause 7.7(d) – Shiftwork penalties

95. We refer to our submissions at section 2.2 above. Consistent with the concerns we have there raised, clause 7.7(d) of the Exposure Draft should be amended by substituting the term 'penalties' in the heading with 'loadings'. This is consistent with clause 22.8(b) of the current award and the terms of clause 7.7(d) itself.

Clause 9.1(a) – Adult employees

96. The existing award provides at clause 13.1(a):

> A full-time adult employee must be paid a minimum rate for their classification as set out in the table below: …

97. The Exposure Draft has simplified the clause and has omitted the reference to the employee's classification within the text of the clause.

98. The requirement to pay an employee a minimum wage is no longer unambiguously associated to that employee's classification only. Further the language in the exposure draft is pluralised whereas it is singular in the existing award. It cannot be the intention for employers to pay any one employee for more than one classification for ordinary hours worked, this is the effect of the re-draft.

99. The text of clause should read:

> An employer must pay adult employees the following minimum <u>wage</u> for ordinary hours worked by the employee <u>for their classification as set out in the table below:</u>

Clause 9.1(a) – Adult employees

100. Clause 9.1(a) states that an employer must pay an adult employee the minimum wages that follow, which includes the minimum annual rate and the minimum weekly rate for each classification. This represents a change from the drafting of the current award.

101. As the preamble to the table in clause 9.1(a) is not confined to full-time employees, a literal reading of the provision appears to require the payment of the minimum annual rate and minimum weekly rate to all adult employees, including part-time and casual employees. This is of course not the intended effect of the provision.

102. We propose that the drafting of clause 10.1 be amended to reflect the intent that the minimum weekly rate only applies to full-time employees. It may be sufficient to include the words "(full-time employees)" below the headings of the second and third columns of the table.

103. We acknowledge that clause 6.3(b) may be argued to provide that part-time employees are in fact only entitled to receive terms and conditions on a pro-rata basis equivalent pay to full-time employees but contend that this is far from clear given the clause largely serves the purpose of defining a part-time employee. We similarly acknowledge that clause 6.4(c) could be argued to clarify that a casual employee is entitled to the hourly rate. Nonetheless, we suggest the proposed variation in the interests of ensuring that the Exposure Draft is simple and easy to understand.

Clauses 11.3(b)(i) – Stand-by and call back allowances

104. Clause 18.2(b)(i) of the current award requires the payment of an allowance per day that an employee is required to be available by roster for stand-by to perform work outside their ordinary working hours. We understand this provision to require the payment of the prescribed allowance for each day upon which an employee is rostered for stand-by.

105. Clause 11.3(b)(i) of the Exposure Draft alters this position by requiring the payment of the allowance per day *or per shift*. The addition of these words is confusing and potentially extends the application of the clause. That is, an employee could be rostered on stand-by for a period that covers more than one 'shift' according to the employer's rostering arrangements on any one day. In those circumstances, under the current award, the employee would be entitled to the allowance prescribed for that day. Under clause 11.3(b)(i) of the Exposure Draft, however, for that day, the employee would be entitled to two counts of the allowance; one for each shift.

106. The effect of the redrafting is that the provision found in the Exposure Draft deviates substantively from the current award. The words 'or shift' should therefore be deleted. We note that this is consistent with Schedule C.1 of the Exposure Draft.

Clause 11.3(b)(ii) – Stand-by and call-back allowances

107. Clause 18.2(b)(ii) deals with the rate at which an employee is to be paid where that employee is formally rostered to stand by and is then recalled to

work. Clause 18.2(b)(iii) also applies in those circumstances; being where an employee is rostered to stand by and is recalled to work. That is, clause 18.2(b)(iii) provides for the payment of an allowance where an employee uses their own car 'in connection with the employer's business in the above circumstances'; being those specified in clause 18.2(b)(ii).

108. Clause 18.2(b)(vi) then applies in circumstances where an employee is *not* formally rostered to stand by but is recalled to work. The clause prescribes the rate at which the employee is to be pad for such work, the minimum payment, and the method by which the duration of the call out is to be assessed.

109. Clauses 18.2(b)(ii) and 18.2(b)(vi) have been conflated in the Exposure Draft at clause 11.3(b)(ii). It is not confined to circumstances in which an employee is rostered to stand-by and is then recalled to perform work. Rather, it applies to any circumstances in which an employee is recalled to work.

110. The effect of this redrafting is that clause 11.3(b)(iv), which refers to the 'above circumstances' in the same manner as the current clause 18.2(b)(iii), now applies irrespective of whether or not the employee was rostered to stand by. Whilst under the current award, the entitlement to the motor vehicle allowance arises only where the employee is rostered on stand-by, this is no longer the case. The redrafting of the current provision effectively extends its application to employees who, at present, would not be afforded this entitlement.

111. In order to remedy this, clause 11.b(ii) should be amended as follows:

(ii) Any employee who <u>formally is rostered to stand by and</u> is recalled to work …

112. Further, a new clause 11.3(b)(viii) should be inserted in the same terms as the current clause 18.2(vi).

Clause 13.6(a) – Length of rest period

113. The existing award, at clause 23.8, uses the words *"reasonably practicable".* The Exposure Draft uses the words *"where possible"*. The application of the

rest period in many operational circumstances may be possible, but not reasonably practicable.

114. We suggest this is a material change to the operation of the term and should revert to the original language of the existing award.

Schedule B.2.1 – Full-time and part-time shiftworkers – ordinary hours and penalty rates

115. The title uses the term *'penalty rates'*. We refer to our submissions at section 2.2 above. Consistent with the concerns we have there raised, Schedule B.2.1 of the Exposure Draft should be amended by substituting the term 'penalty rates' in the heading with 'shift loadings'. This is consistent with clause 22.8(b) of the current award and the terms of clause 7.7(d).

Schedule B.3.1 – Casual employees other than shiftworkers – ordinary and penalty rates

116. The structure of the table suggests that casuals cannot work ordinary hours on a Saturday by reason of the providing only an overtime rate for Saturdays. This is incorrect having regard to clause 7.1.

117. The table should be amended as follows:

- the reference to "Ordinary hours" includes Saturdays. The cell should read: *"Ordinary hours (Mon-Sat)".*
- the reference to Saturday on the first row indicates that the rates are overtime rates. The cell should read *"Saturday (overtime)"*.

Schedule H – Definitions

118. There are numerous references throughout the Exposure Draft to the term "minimum hourly rate". This term in not defined. The award only provides for weekly or annual rates of pay. We suggest a definition of "minimum hourly rate" be included at Schedule H – Definitions which should read: *"**minimum hourly rate** is 1/38th of the minimum weekly rate provided for at clause 9.1."*

4. EXPOSURE DRAFT – BUSINESS EQUIPMENT AWARD 2015

119. The submissions that follow relate to the *Exposure Draft – Business Equipment Award 2015* (Exposure Draft).

Clause 5.2 – Facilitative provisions

120. Clause 5.2 of the Exposure Draft identifies that clause 21.2 is a facilitative provision. That clause enables "an employer and the employees" to agree to substitute another day for a public holiday. Whilst we do not dispute that the provision is a facilitative one, it does not require agreement between an employer and the *majority* of employees, as stated by clause 5.2.

121. Clause 5.2 should therefore be amended by replacing the reference to "majority of employees" with "employees".

Clause 6.3(c) – Part-time employees

122. Clause 6.3(c) of the Exposure Draft makes reference to the 'minimum hourly rate'. The Exposure Draft does not provide for, or otherwise define this term.

123. The existing award at clause 12 makes a reference to *"1/38th of the weekly rate prescribed at …".* We submit that this drafting should be maintained.

Clauses 6.4(c)(i) and 6.4(c)(ii) – Casual loading

124. Clauses 6.4(c)(i) and 6.4(c)(ii) of the Exposure Draft refer to the 'ordinary hourly rate'. We refer to the difficulties arising from the definition of this term later in our submission.

Clause 6.4(c)(ii) – Casual loading

125. Clause 13.2 of the current award requires the payment of "1/38th of the weekly wage prescribed by this award for the work which the employee performs, plus 20%". That is, the loading is to be calculated on the minimum wage prescribed by the award, absent the inclusion of any all purpose allowances.

126. Notwithstanding the concerns we later raise regarding the definition of the 'ordinary hourly rate', we understand that the intention of its usage in clause 6.4(c)(ii) is to require that the casual loading be applied to a rate that incorporates any all purposes allowance. We refer also to our submissions above at section 2.5.

127. Clause 6.4(c)(ii) should be amended by replacing the reference to the "ordinary hourly rate" with "1/38th of the weekly wage prescribed by the award".

Clause 6.4(c) – Casual loading

128. The current award at clause 13.2 requires the payment of 1.38th of the weekly wage prescribed by the award "for the work which the employee performs". That is, the rate at which the employee is to be paid is contingent upon the work performed. It is not based upon a pre-determination of the employee's classification.

129. Clause 6.4(c) of the Exposure Draft alters the effect of the current clause by associating the rate at which a casual employee is to be paid with "the classification in which they are employed". This is despite the fact that, having regard to the relevant provisions of the award and the classification structure, a casual employee need not be *employed* at any specific classification.

130. For these reasons, the words "for the classification in which they are employed" should be replaced with "for the work which the employee performs".

Clause 7.2(a) – Flexibility in relation to ordinary hours of work – day workers

131. Clause 27.2(a) of the current award states that the "forms of flexibility" listed thereunder may be implemented in respect of all employees in a workplace or section(s) subject to agreement between the employer and the majority of employees concerned. Alternatively, agreement may be reached between an employer and individual employee, enabling the implementation of the relevant arrangement in respect of that employee.

132. The redrafting of this provision at clause 7.2(a) of the Exposure Draft has resulted in a clause that is potentially unclear. It does not distinguish between the circumstances in which one of the arrangements there identified can be applied to all employees in a workplace/section thereof and where such an arrangement may be implemented only in respect of an individual employee. For this reason, the current wording should be restored.

Clause 7.2(a)(i) – Flexibility in relation to ordinary hours of work – day workers

133. We refer to the question to parties: "Parties are asked to clarify the operation of clause 7.2(a)(i), i.e. whether the spread of hours can only be altered at one end, or altered simultaneously at each end by up to one or two hours in total."

134. It is Ai Group's position that the provision allows for the spread of hours to be altered by up to one hour at one or both ends of the spread simultaneously.

Clause 7.2(c) – Flexibility in relation to ordinary hours – day workers

135. Clause 7.2(c) refers to an agreement reached in accordance with clause 7.2(b). No agreement can be reached under clause 7.2(b). Clause 7.2(b) is a machinery term. The current award uses the language at clause 27(2)(c) *"where agreement is reached in accordance with this paragraph…".* We suggest the current award reference be maintained or that the reference to "clause 7.2(b)" be replaced with a reference to "clause 7.2".

Clause 8.1 – Meal Breaks

136. The current award uses the language at clause 29.1: "…not less than 30 minutes and not more than 60 minutes". The Exposure Draft uses the language at clause 8.1 "period between 30 minutes and 60 minutes"

137. The drafting of the Exposure Draft provision deviates substantively from the current award by reason that under the Exposure Draft, a break of 30 minutes or 60 minutes respectively is not permitted. We submit that the language in the current award should be retained.

Clause 8.2(a) – Flexibility in relation to breaks

138. We make the same submissions in respect of this provision as we have earlier regarding clause 7.2(a) of the Exposure Draft. The terms of the current provision should be retained.

Clause 8.2(c) – Flexibility in relation to breaks

139. Clause 8.2(c) of the Exposure Draft refers to the 'ordinary hourly rate'. We refer to the difficulties arising from the proposed definition of this term later in our submission.

Clause 9.2(a) – Adult employees

140. Clause 20.2(a) of the current award includes clause references in respect of trainees and employees receiving a supported wage, This clarifies the categories of employees who do not receive the minimum wages there prescribed. For instance, clause 20.2(a) specifically excludes trainees covered by the National Training Wage Schedule. It does not necessarily exclude an employee considered a 'trainee' by an employer in the sense that they are receiving in-house on-the-job training to perform their role.

141. For the purposes of avoiding any confusion arising from the redrafting of this clause, references to clauses 9.8 and 9.6, respectively, should be inserted.

Clause 9.2(b)(ii) – Junior employees – clerical stream

142. The exposure draft includes a junior rate of pay for employees aged 20 years at 100%. The rate is not prescribed in corresponding clause 20.2(b)(ii) of the current award and is superfluous. We submit that the rate be removed.

Clause 9.5(a) – Higher Duties

143. The Exposure Draft uses the term *"required".* The current award uses the term "directed". The term directed provides that the employer has the authority under the award to make such a direction to which the employee must obey. The change in language within the Exposure Draft does not suggest or confer

such a power. The change of language suggests that the award confers the ability of the employee to refuse.

144. Moreover, the application of the current clause is contingent upon an express instruction from the employer to perform work of a higher grade. The Exposure Draft, however, is less clear. It could apply, for instance, where an employee *perceives* that they are required to perform certain work, absent such a direction from their employer.

145. For the purposes of ensuring that the redrafting of the provision does not amount to a substantive change, we submit the existing wording should be retained. In so submitting we note that the current terminology (that is, the use of the word "directed") is neither ambiguous nor confusing. We see no reason or rationale for substituting it with the word "required".

Clause 10.3(b) – Exemptions for employees in the commercial travellers stream

146. Clause 21.3(b) of the current award states that part 5 of the instrument will not apply to employees in the commercial travellers stream. Part 5 includes the following provisions:

- Clause 27: Ordinary hours of work and rostering;
- Clause 28: Special provisions for shiftworkers;
- Clause 29: Meal breaks;
- Clause 30: Overtime;
- Clause 31: Annual leave;
- Clause 32: Personal carer's leave and compassionate leave;
- Clause 33: Community service leave; and
- Clause 34: Public holidays.

147. Clause 10.3(b) is the relevant provision of the Exposure Draft. It states that part 3 of the Exposure Draft does not apply to the commercial travellers stream. Due to the restructuring of the instrument, however, part 3 deals only

with ordinary hours of work and rostering, and meal breaks. The remaining provisions listed above are found in other parts of the Exposure Draft.

148. Clause 10.3(b) should be amended to identify the provisions corresponding with each of the clauses identified above, in lieu of the general reference to part 3.

Clause 11.2(a) – All purpose allowances

149. The Exposure Draft contains a new definition of *'all purposes'*. That definition is not consistent with the terms of the definition determined by the Commission in a decision handed down earlier in the Review.[42] This should be rectified by inserting the word "annual" before "leave".

Clause 11.3(a) – Motor vehicle allowance – employer provided vehicle

150. Clauses 11.3(a) and 11.3(b) deal generally with the provision of means of transport and pre-existing arrangements for the payment of an allowance. They are not confined to circumstances in which an employer provides an employee with a vehicle. Only subclause (c) relates specifically to such circumstances.

151. The heading to clause 11.3(a) is therefore misleading and should be amended by deleting the words "employer provided vehicle".

Clause 11.3(b)(iii) – Motor vehicle allowance – employee provided vehicle

152. The Exposure Draft has added an additional criteria being that travel must be from the 'usual place of residence'. The existing award clause 22.1(b)(ii)(B) does not contain this qualification which results in the Exposure Draft exemption having a narrow application. We submit the drafting of the current award should be maintained. As such, clause 11.3(b)(iii) should be amended as follows:

> The allowance in clause 11.3(b)(ii) is not payable in respect of the distance travelled ~~from their usual place of residence~~ to: …

[42] [2015] FWCFB 4658 at [91].

Clause 11.3(d)(i) – Area allowance

153. Clause 22.1(g)(iii) of the current award states that the Northern Territory area allowance, which is the first item to appear in the table at clause 22.1(g)(i), ceases to operate on 31 December 2014.

154. Clause 22.1(g)(iii) does not appear in the Exposure Draft and the Northern Territory area allowance has not been removed from clause 11.3(d)(i). This amounts to a substantive change, as it requires the ongoing payment of the allowance.

155. The Northern Territory area allowance should be deleted from clause 11.3(d)(i) as it is no longer payable and therefore superfluous.

Clause 11.4(c)(ii)(C) – Expenses and accommodation reimbursement

156. Clause 11.4(c)(ii)(C) is missing the words *"in pursuance of the performance of the employee's duties"* as provided at Clause 22.2(c)(ii)(C). The change results in the possibility of circumstances where an employee has made further arrangements, beyond those required for work purposes whereby the award would require the employer to cover additional expenses. For example, where an employee is required to be a remote location for work on a Monday, the employee, instead an overnight stay on the Sunday, chooses to spend the entirety of the weekend at the location.

Clause 12.7 – Casual employees

157. The cross reference to clause 24.1(a) should be amended to read "clause 12.1(a)". This appears to be a drafting error.

Clause 14 – Penalty rates – dayworkers

158. We refer to our submissions at section 2.2 above. Consistent with the concerns we have there raised, the heading to clause 14 of the Exposure Draft should be amended by substituting the term 'penalty rates' with

'allowances'. This is consistent with clauses 27.3 - 27.5 of the current award and the terms of clauses 14.1 – 14.3 of the Exposure Draft.

Clause 14.1 – Day work outside the spread of hours

159. We refer to the question for the parties at Clause 14.1 as to whether 'penalties' should be expressed as a percentage of a standard rate (as is the current position) or as a percentage of the employee's ordinary hourly rate.

160. Where an employee is on a salary or classification which, when calculated as an hourly rate, exceeds that of the standard rate, any application of a percentage approach will greatly increase the cost on employers. Presently the cost is fixed, and employers have made over-award wage rate and salary decisions having regard to such fixed costs which are calculated by reference to the standard rate. For this reason, the method of calculating the relevant rates should not be altered.

Clause 15 – Special provisions for shift workers

161. Provisions applicable to shiftwork appear at clause 15 of the Exposure Draft. Unlike the current award, they have been separated from provisions that deal generally with the ordinary hours of work and rostering (clause 7).

162. Given that certain provisions under clause 7 relate to both dayworkers and shiftworkers, it is both convenient and logical for the shiftwork provisions to appear immediately afterward. We propose that clause 15 therefore be relocated after clause 7.

Clause 15.2(b)(i) – Flexibility in relation to standard shiftwork

163. We make the same submissions in respect of this provision as we have earlier regarding clause 7.2(a) of the Exposure Draft. The terms of the current clause 28.2(b)(i) should be retained.

Clause 15.2(d) – Rate for Saturday and Sunday shifts

164. Clause 15.2(d) refers to the 'ordinary hourly rate'. We later deal with the difficulties arising from the proposed definition of this term at Schedule H of the Exposure Draft.

Clause 16.1(a) – Overtime rates

165. Clause 16.1(a) refers to the 'ordinary hourly rate'. We later deal with the difficulties arising from the proposed definition of this term at Schedule H of the Exposure Draft.

Clause 16.3(b) – Sunday

166. Clause 16.3(b) refers to the 'ordinary hourly rate'. We later deal with the difficulties arising from the proposed definition of this term at Schedule H of the Exposure Draft.

Clause 16.3(c)(ii) – Minimum payment

167. The cross reference in clause 16.3(c)(ii) should be to clause 16.1. This is consistent with the current clause 30.3(c).

Clause 16.6 – Rest Period after working overtime

168. The current award at clause 30.6(a) uses the term "reasonably practicable". The Exposure Draft uses the term "where possible". We submit what is possible may not be reasonably practical having regard to the circumstances of the workplace. That is, the terms of the Exposure Draft amount to a substantive change to the current award. The words of the current award should therefore be retained.

Clause 16.6(b)(i) – Where the employee does not get a 10 hour rest

169. The current award at clause 30.6(b) uses the term *'…and the commencement of the ordinary work on the next day…'*. The Exposure Draft uses the term *'…start of the employee's work on the next day'*. The change in language results in a change of entitlement. The start of next day's work may not

necessarily be ordinary hours; it could be rostered overtime or some other arrangement. As such, the Exposure Draft has changed the possible effect of the clause. We submit the term *'ordinary'* should be retained.

Clause 16.6(b)(ii) – Where the employee does not get a 10 hour rest

170. Clause 16.6(b)(ii) refers to the 'ordinary hourly rate'. We later deal with the difficulties arising from the proposed definition of this term at Schedule H of the Exposure Draft.

Clause 17.2(b) – Annual leave loading

171. Clause 31.2(a) of the current award states that the annual leave loading is to be calculated on the rate of wage prescribed by clause 20. That rate is the minimum rate payable under the award, without the inclusion of any all purpose allowances. Clause 31.2(b) then specifies the quantum of the loading.

172. Clause 17.2 mirrors the structure of the current clause 31.2, however it deviates from the current award specifying that the annual leave loading is to be applied to the 'ordinary hourly rate'. Putting to one side the issue we later identify regarding the definition of this term at Schedule H, we understand that the intention underpinning the usage of this term is to require that the leave loading is to be applied to a rate that incorporates all purpose allowances. This is, however, inconsistent with the preceding clause (clause 17.2(a)) and deviates substantively from the current award. We also note that the definition of "all purpose" states that such allowances are *not* payable during a period of annual leave.

173. For these reasons, clauses 17.2(b)(i) and (ii) should be amended by deleting the words 'of the ordinary hourly rate'.

Clause 21.3 – Public holidays

174. Clause 21.3 refers to the 'ordinary hourly rate'. We later deal with the difficulties arising from the proposed definition of this term at Schedule H of the Exposure Draft.

Schedule B – Summary of hourly rates of pay

175. Clause B.1.2 states that the rates calculated in the schedule are based on the minimum hourly rate. Notwithstanding that such rates are not defined or described in the award, we proceed on the basis that it is intended to mean 1/38th of the minimum weekly rate prescribed by the award. Despite this, the tables indicate that the rates there prescribed are a percentage of the ordinary hourly rate (see for example second row of B.2.1: "% of ordinary hourly rate").

176. This reference is confusing and misleading as it suggests that the rates have been calculated based on the ordinary hourly rate, which is defined to include all purpose allowances. All such references should be amended.

Schedule B.1 – Ordinary hourly rate

177. We deal with the definition of 'ordinary hourly rate' below. We note for present purposes that the cross reference to clause 11.2(a) appears to be a drafting error and should be instead to clause 9.2.

Schedule B.1.2 – Ordinary hourly rate

178. Clause B.1.2 states that the rates calculated in the tables are based on the minimum hourly rates 'in accordance with clause 9.2'. Clause 9.2 does not, however, contain minimum hourly rates. This reference is therefore confusing.

Schedule B.3.2 – Full-time and part-time shiftworkers – overtime rates

179. The table suggests that all instances of overtime on a Sunday for shiftworkers is paid at double-time. The award does not provide this generalised provision.

180. Clause 28.2(e) of the current award provides that work performed on a Sunday is paid at double-time. It is implicit that this clause deals with ordinary hours of work by reason that it does not deal with overtime.

181. Clause 30.1(a) of the current award provides that work performed in excess of or outside of the employee's ordinary hours is paid at time and one half for the first 3 hours and double-time thereafter.

182. Clause 30.3(b) of the current award only provides double-time on a Sunday if that day is a day off.

183. We submit that the table provided for at Clause B.3.2 of the exposure draft makes an incorrect assumption that all overtime on a Sunday for a shift worker is paid at double-time. We submit the table headers must be amended. The 'Monday to Saturday' reference should read 'Monday to Sunday' and the 'Sunday' reference to include a footnote clearly identifying the circumstances where overtime is immediately paid at 200%, that is, when it is worked on a day off.

Schedule H – Definitions

184. The Exposure Draft has provided a new definition of *'all purposes'*. That definition is not consistent with the terms of the definition determined by the Commission in a decision handed down earlier in the Review.[43] This should be rectified by inserting the word "annual" before "leave".

Schedule H – Definitions

185. The definition of 'ordinary hourly rate' refers to 'the hourly rate for the employee's classification specified in clause 9'. As we have previously identified, clause 9 does not contain hourly rates. Therefore, this definition is confusing.

[43] [2015] FWCFB 4658 at [91].

5. EXPOSURE DRAFT – CLERKS – PRIVATE SECTOR AWARD 2015

186. The submissions that follow relate to the *Exposure Draft – Clerks – Private Sector Award 2015* (Exposure Draft).

Clause 5.2 – Facilitative provisions

187. The reference to clause 13.5(c) in clause 5.2 should be amended to read 'clause 13.6'. This appears to be a drafting error.

Clause 5.2 – Facilitative provisions

188. Clause 18.2 has been identified as a facilitative provision, which enables agreement to be reached between an employer and the majority of employees. Clause 18.2 is in the same terms as clause 31.2 of the current award:

> 18.2 An employer and the employees may by agreement substitute another day for a public holiday.

189. The provision allows for an employer and 'the employees' to agree to substitute another day for a public holiday. It does not, however, operate by agreement with the majority of employees. That is, it is not a facilitative provision of the sort often found elsewhere in the modern awards system that enables an employer to reach agreement with the majority of employees to vary the application of a particular award clause and subsequently apply that outcome to all relevant employees.

190. For this reason, the reference in clause 5.2 of the Exposure Draft to the 'majority of employees' in respect of clause 18.2 is erroneous and should be substituted with 'the employees'.

Clause 6.2(a)(ii) – Part-time employment

191. Clause 11.1 of the current award defines a part-time employee as one who is engaged to perform less than full-time hours on a reasonably predictable basis. This definition does not relate to how or when the employee performs

their actual hours of work. Rather, it pertains to the total number of hours worked; that being less than full-time hours.

192. This definition of part-time employment has been altered by clause 6.2(a)(ii) of the Exposure Draft, which states that a part-time employee "has reasonably predictable hours of work". This would require that the employee's *hours of work* (which carries a different meaning to the total number of hours worked by an employee each week) be reasonably predictable. This necessarily relates to the number of hours as well as *when* that work is performed.

193. The alteration to the definition amounts to a substantive change. Accordingly, clause 6.2(a) should be varied as follows:

> (a) A part-time employee:
>
> > (i) is engaged to work less than the full-time hours at the workplace on a reasonably predictable basis; and
> >
> > ~~(ii) has reasonably predictable hours of work; and~~
> >
> > (iii) receives on a pro rata basis, pay and conditions equivalent to those of full-time employees who do the same kind of work.

Clause 6.2(a)(iii) – Part-time employment

194. The words "who do the same kind of work" at the conclusion of clause 6.2(a)(iii) should be deleted. They are apt to confuse and do not serve any clear purpose. Further, they do not appear in the corresponding clause 11.2 of the current award. The text is unnecessary and should therefore be removed.

Clause 8.1(a)(i) – Weekly hours of work – day workers

195. At section 2.4 of these submissions, we have set out our concerns in respect of s.147 of the Act. It is our view that in many instances, the ordinary hours of work provisions in an award do not meet the requirements of s.147. The *Clerks – Private Sector Award 2010* is one such award. Should the Commission determine that it is appropriate to rectify this issue, we propose that clause 8.1(a)(i) of the Exposure Draft be amended as follows:

> (i) an average of up to 38 per week but not exceeding …

Clause 8.1(a)(ii) – Weekly hours of work – day workers

196. At section 2.4 of these submissions, we have set out our concerns in respect of s.147 of the Act. It is our view that in many instances, the ordinary hours of work provisions in an award do not meet the requirements of s.147. The *Clerks – Private Sector Award 2010* is one such award. Should the Commission determine that it is appropriate to rectify this issue, we propose that clause 8.1(a)(ii) of the Exposure Draft be amended as follows:

> (ii) an average of <u>up to</u> 38 over the period of an

Clause 8.1(a)(ii) – Weekly hours of work – day workers

197. The words "per week" should be inserted after "38" in clause 8.1(a)(ii) to clarify the period over which the average of 38 ordinary hours are to be worked. Whilst we acknowledge that these words do not appear in the current clause 25.1(a), we do not consider that the change sought is substantive in nature and do not anticipate that it will be a controversial matter.

Clause 8.1(c) – Weekly hours of work – day workers

198. Clause 25.1(b) of the current award provides for circumstances in which the spread of hours prescribed earlier in that clause will not apply to an employee: (emphasis added)

> … Provided that where an employee <u>works in association with</u> other classes of employees …

199. Clause 8.1(c) of the Exposure Draft alters the way in which this exemption is prescribed:

> … Where an employee <u>works with</u> other classes of employees …

200. The current award provision provides an exemption to the application of the spread of hours stipulated by the award where an employee works *in association with* other classes of employees who work outside the spread of hours prescribed by it. The requirement that the employees be working 'in association with' other classes of employees suggests that there must be

some connection between an employee to whom the award applies and the other class of employees. The words of the current award suggest that the employee must be working in conjunction with another class of employees as described.

201. We are concerned that by replacing the words 'in association with' with a statement that the clause applies wherever 'an employee works *with*' other classes of employees, this alters the circumstances in which the provision operates and therefore deviates substantively from the current clause. For instance, it would appear that the redrafted provision would capture circumstances in which an employee to whom the award applies works within the same office or department as another class of employees who work outside the spread of hours prescribed by it, without there being some relationship between them.

202. It is for this reason that we submit that the words of the current provision should be reinstated as follows:

> Where an employee works <u>in association</u> with other classes of employees …

Clause 8.1(c) – Weekly hours of work – day workers

203. Clause 25.1(b) provides that where an employee works in association with other classes of employees who work ordinary hours outside the spread prescribed by this clause, *the hours during which ordinary hours may be worked* are as prescribed by the modern award applying to the majority of employees in the workplace.

204. This provision has been redrafted at clause 8.1(c) of the Exposure Draft. It provides that 'the ordinary hours that may be worked' by the relevant employees are as prescribed by the majority of employees in the workplace.

205. Award provisions setting out the ordinary hours of work establish the parameters within which an employee's ordinary hours of work may be performed. They do not necessarily prescribe the actual ordinary hours to be worked. For this reason, clause 8.1(c) should be amended as follows:

(c) Where an employee works with other classes of employees who work ordinary hours outside the span prescribed clause 8.1(b), the hours during which ordinary hours ~~that~~ may be worked are as prescribed by the modern award …

Clause 8.1(c) – Weekly hours of work – day workers

206. Clause 8.1(b) specifies the days and times within which ordinary hours of work may be performed. Clause 8.1(c) refers to the times there stipulated as the 'span'. It is our submission that 'span' should be substituted with 'spread', as per the current clause 25.1(b), to avoid any suggestion that a different interpretation is intended.

207. Clause 25.1(b) of the current award first sets out the days of the week, and the times on such days within which the ordinary hours of work are to be performed. The clause then goes on to state that despite this, where an employee works in association with other classes of employees who work ordinary hours 'outside the spread prescribed by this clause', the hours during which ordinary hours may be worked are as prescribed by the modern award applying to the majority of employees in the workplace. That is, the provision provides for circumstances in which the spread of hours stipulated by this award may not apply to an employee who is otherwise covered by the award.

208. Clause 25.1(b) of the award corresponds with clauses 8.1(b) and 8.1(c) in the Exposure Draft. Clause 8.1(c), however, refers to the matters set out in clause 8.1(b) as the 'span' rather than the 'spread'.

209. Given that clause 8.1(b) of the Exposure Draft deals with the *spread* of hours rather than the *span*, the reference in clause 8.1(c) should be to 'the *spread* prescribed [by] clause 8.1(b)'.

Clause 8.1(c) – Weekly hours of work – day workers

210. The word 'by' should be inserted in clause 8.1(c) as proposed below, in order to rectify a drafting error:

… ordinary hours outside the span prescribed by clause 8.1(b) …

Clause 8.2 – Altering the span of hours

211. We refer to the submissions above regarding clause 8.1(c). For the reasons there articulated, the heading to clause 8.2 should be replaced with 'Altering the *spread* of hours'. This is consistent with the current clause 25.2.

Clause 8.2(b) – Altering the span of hours

212. For the reasons identified above, the reference to the 'span' of hours in clause 8.2(b) should be substituted with a reference to the 'spread' of hours. This is consistent with the current clause 25.2.

Clause 8.2(b) – Altering the span of hours

213. The first time the word 'by' is used in clause 8.2(b), it should be replaced with 'be' in order to rectify a drafting error.

Clause 8.5(a) – Banking system

214. Clause 8.5(a) of the Exposure Draft refers to clause 8.4. When read in conjunction with that provision, it would appear that the cross reference is erroneous. We have not been able to identify any element of clause 8.4 that allows for agreement 'as to the working of the 38 hour week'.

215. Consistent with the current clause 25.4(c), the reference should be substituted with a reference to clause 8 generally, the various subclauses of which deal with the arrangement of ordinary hours.

Clause 9.1(a) – Unpaid meal break

216. We refer to the question contained at clause 9.1(a) of the Exposure Draft. Clause 14.4(e) provides for a paid meal break that must be allowed to a shiftworker. The opening words of clause 9.1(a) state that subject to the more specific provisions found at 14 (i.e. clause 14.4(e)), an employee is entitled to a meal period as set out thereafter. It follows that where clause 14.4(e) applies, an employee is not entitled to the meal break provided for in clause 9.1(a).

Clause 9.2(c) – Paid rest break

217. The word 'taken' in clause 9.2(c) is unnecessary and should be deleted. It does not appear in the current clause 26.2(c).

Clause 10.1 – Adult employees

218. Clause 10.1 states that an employer must pay an adult employee the minimum wages that follow, which includes the minimum weekly wage and the minimum hourly wage for each classification. This represents a change from the drafting of the current award.

219. As the preamble to the table in clause 10.1 is not confined to full-time employees, a literal reading of the provision appears to require the payment of the minimum weekly wage to all adult employees, including part-time and casual employees. This is of course not the intended effect of the provision.

220. We propose that the drafting of clause 10.1 be amended to reflect the intent that the minimum weekly rate only applies to full-time employees. It may be sufficient to include the words "(full-time employees)" below "minimum weekly rate" in the second column of 10.1.

221. We acknowledge that clause 6.2(a)(iii) may be argued to provide that part-time employees are in fact only entitled to receive terms and conditions on a pro-rata basis equivalent pay to full-time employees but contend that this far from clear given the clause largely serves the purpose of defining a part-time employee. We similarly acknowledge that clause 6.3(b) could be argued to clarify that a casual employee is entitled to the hourly rate. Nonetheless, we suggest the proposed variation in the interests of ensuring that the Exposure Draft is simple and easy to understand.

Clause 10.3(c) – Day off coinciding with payday

222. Clause 23.3 of the current award applies where an employee is 'by virtue of the *arrangement of their ordinary hours*' to take a day off on a day that coincides with a pay day. Clause 10.3(c) of the Exposure Draft deviates from

this as it states that it operates where an employee is, 'due to their *rostered hours*', to take a day off on a day that coincides with a pay day.

223. The award does not require that an employee's hours of work must be rostered. That is, there is no award derived obligation for an employer to prepare a roster that sets out 'the arrangement of [an employee's] ordinary hours'. Therefore, the reference to 'rostered hours' in clause 10.3(c) is both confusing and erroneous. It should be substituted with the terms of the current clause.

Clause 10.5 – Higher duties

224. Clause 19.7 of the current award is titled 'higher duties allowance' and located within clause 19 which is headed 'allowances'. Clause 17.1(a) permits an employer to pay an employee an annual salary in satisfaction of various award clauses there listed, including clause 19. This necessarily includes clause 19.7, the higher duties allowance.

225. By relocating the higher duties allowance (clause 10.5) to a provision that does not sit within the allowances clause (clause 11), the effect of the annualised salary provision is altered. That is, the higher duties allowance is no longer a matter that can be satisfied by the payment of an annualised salary.

226. In order to reverse this unintended change, clause 10.5 should be relocated as a subclause under clause 11 of the Exposure Draft.

Clause 11.3(a) – Transport of employees – shiftworkers

227. Clause 19.1 of the current award provides an entitlement to 'an employee *working shiftwork* [who] commences or finishes work at a time other than the employee's normal time of commencing or finishing and when reasonable means of transport is not available'.

228. The text of the clause 11.3(a) of the Exposure Draft does not make clear that the clause applies only where an employee is *working shiftwork*. That is, it

does not make explicit that the provision does not apply to any employee who from time to time performs shiftwork in accordance with clause 14 but in the relevant instance the employee is performing day work. Whilst the heading to the clause refers to 'shiftworkers', we are concerned that the provision's application is not sufficiently clear.

229. To ensure that the application of the provision is unambiguous, consistent with the current clause 19.1, we propose that clause 11.3(a) be amended as follows:

> The employer will reimburse an employee working shiftwork for the cost of any transport to and/or from their home when ~~an~~ the employee starts or finishes work …

Clause 11.3(a) – Transport of employees – shiftworkers

230. Clause 19.1 of the current award provides for the reimbursement of the cost of any transport 'which allows an employee to reach the employee's home'. It relates to an employee travelling from work *to their home*.

231. Clause 11.3(a) of the Exposure Draft significantly extends this entitlement. It requires an employer to reimburse an employee for the cost of any transport to and/or from their home. That is, it now includes costs incurrent by an employee in the relevant circumstances where there are travelling *to work* from their place of residence.

232. To ensure that the redrafting of the current clause does not amount to a substantive change, clause 11.3(a) should be amended so that it is consistent with the current clause as follows:

> The employer will reimburse an employee for the cost of any transport which allows the employee to reach ~~to and/or from~~ their home when an employee …

Clause 13.3(a) – Payment for working Saturdays and Sundays

233. Clause 13.3(a) of the Exposure Draft has again substituted the word 'spread' (as found in clause 27.1(a) of the current award) with 'span'. For the reasons articulated above regarding clause 8.1(c), 'spread' should be reinserted in clause 13.3(a).

Clause 13.4(a) – Length of rest period

234. Clause 27.3(a) of the current award requires that when overtime is necessary, it must 'wherever reasonably practicable' be arranged so that employees have at least 10 consecutive hours off duty between the work of successive days. In effect, the provision requires overtime be so arranged wherever it is reasonably able to be done.

235. Clause 13.4(a) deviates substantively from that provision. It requires that overtime must be so arranged 'where possible' and in doing so, removes the consideration of whether it can *reasonably* be done. This effectively creates a higher threshold or obligation for an employer.

236. For the purposes of ensuring that the Exposure Draft does not create a substantive change from the current provision, clause 13.4(a) should be amended as follows:

> When overtime work is necessary it will be arranged, wherever reasonably practicable, ~~where possible~~ for …

Clause 13.4(b)(i) – When the employee does not get a 10 hour rest

237. The word 'time' should be deleted from the second bullet point. This appears to be a drafting error.

Clause 13.4(b)(ii) – When the employee does not get a 10 hour rest

238. The word 'during' should be deleted from the first bullet point. This appears to be a drafting error.

Clause 13.4(d) – When the employee does not get a 10 hour rest

239. The cross reference to clause 13.1 should be amended to read 'clause 13.2'. This appears to be a drafting error.

Clauses 14.5(b) and 14.5(c) – Overtime

240. There appears to be a drafting error at clauses 14.5(b) and 14.5(c). This should be rectified by relocating the text at subclause (c) to the end of subclause (b) and deleting subclause (c).

Clause 14.7 – Special rates not cumulative

241. The current clause 28.7 states that the 'special rate prescribed' are in substitution for and not in addition to the shift allowances prescribed. We do not consider that such special rates are confined to the overtime rates prescribed by the clause. Rather, it is our submission that the reference to 'special rates' includes weekend and public holiday penalties.

242. For this reason, clause 14.7 should be substituted with the current clause 28.7.

6. EXPOSURE DRAFT – COMMERCIAL SALES AWARD 2015

243. The submissions that follow relate to the *Exposure Draft – Commercial Sales Award 2015* (Exposure Draft).

Clause 9.1 – Classifications and minimum wages

244. Clause 9.1 states that an employer must pay an adult employee the minimum wages that follow, which includes the minimum weekly wage and the minimum hourly wage for each classification. This represents a change from the drafting of the current award.

245. As the preamble to the table in clause 9.1 is not confined to full-time employees, a literal reading of the provision appears to require the payment of the minimum weekly wage to all adult employees, including part-time and casual employees. This is of course not the intended effect of the provision.

246. We propose that the drafting of clause 9.1 be amended to reflect the intent that the minimum weekly rate only applies to full-time employees. It may be sufficient to include the words "(full-time employees)" below "minimum weekly rate" in the second column of 10.1.

Clause 10.2(f)(i) – Expenses and accommodation reimbursement

247. Clause 16.2(a) of the current award provides for the reimbursement of 'expenses actually and properly incurred by the employee *in discharge of the duties*'. The Exposure Draft has replaced this with a reference to 'expenses actually and properly incurred by the employee *in the course of their employment*'. We do not consider that these terms are interchangeable. Rather, the expression found in the current award is narrower in scope than that proposed in the Exposure Draft. For this reason, the current wording should be retained.

Clause 10.2(f)(ii) – Expenses and accommodation reimbursement

248. Clause 16.2(b) requires that 'all reasonable expenses actually and properly incurred by the employee in discharge of the duties' that can reasonably be anticipated will be paid in advance. That the provision relates to those expenses that are dealt with in clause 16.2(a) is made clear by the opening words of the clause: '*such* expenses'.

249. Clause 10.2(f)(ii) deviates from this as the word 'such' does not appear at the commencement of the provision. As a result, it is no longer clear what 'expenses' the clause is referring to. The word 'such' should therefore be reinserted.

Clause 13.3(a) – Leave loading

250. Clause 13.3(a) of the Exposure Draft refers to the 'employee's minimum rate of pay'. That term is not defined by the instrument. For the purposes of clarity, the provision should be amended to refer to the 'employee's minimum rate of pay prescribed by clause 9'.

Schedule A.1.2 – Full-time and part-time employees – Overtime rates

251. The first column, titled 'ordinary hours' appears unnecessary and should be deleted.

7. EXPOSURE DRAFT – CONTRACT CALL CENTRES AWARD 2015

252. The submissions that follow relate to the *Exposure Draft – Contract Call Centres Award 2015* (Exposure Draft).

Clause 6.3 – Part-time employees

253. Clause 12.2 of the current award prescribes the amount payable to an employee for ordinary hours work: 1/38th of the weekly rate prescribed by clause 18, per hour. Such a clause does not appear in the Exposure Draft.

254. Clause 10.1 of the Exposure Draft states that "adult employees, except where otherwise provided in this award, will be entitled to receive the salary for the relevant classification as set out in the table below …". The table there contained prescribes the minimum weekly rate and the minimum hourly rate payable in respect of each classification.

255. Absent the current clause 12.2, clause 10.1 requires the payment of the minimum weekly rate set out in the table. This is a substantive change from the current award, which requires the payment of 1/38th of the weekly rate for each hour worked (clause 18.1 read subject to clause 12.2). Therefore, where a part-time employee works less than 38 hours in a week, they are not entitled to the minimum weekly rate in full.

256. For these reasons, clause 12.2 of the current award should be reinstated as a new subclause under clause 6.3 of the Exposure Draft.

Clause 6.3(a)(iii) – Part-time employees

257. The words "who do the same kind of work" at the conclusion of clause 6.3(a)(iii) should be deleted. They are apt confuse and do not serve any clear purpose. Further, they do not appear in the corresponding clause 12.3 of the current award. The text is unnecessary and should therefore be removed.

Clause 7.1 – Classifications

258. Clause 18 refers to the content of Schedule B to the award as "definitions for the classifications" listed in clause 18.1. This is consistent with the terminology used in the schedule itself.

259. Clause 7.1 of the Exposure Draft alters the characterisation of the relevant schedule by referring to the "descriptions" of the classifications under the award. We are concerned that this change, albeit subtle, results in a meaning that deviates substantively from the current award.

260. A description is effectively a representation or a statement that gives an account of something. It is less precise than a definition, which is a formal statement of the meaning or signification of a word, phrase, or as is here the case, a classification.

261. We cannot identify any reason for substituting the word "definition" for "description". There is no apparent complexity or difficulty associated with the text of the current clause. This consideration, coupled with the potential deviation in meaning, lend support for retaining the terms of the current clause as they are.

Clause 8.1 – Ordinary hours and rostering

262. At section 2.4 of these submissions, we have set out our concerns in respect of s.147 of the Act. It is our view that in many instances, the ordinary hours of work provisions in an award do not meet the requirements of s.147. The *Contract Call Centres Award 2010* is one such award. Should the Commission determine that it is appropriate to rectify this issue, we propose that clause 8.1 of the Exposure Draft be amended as follows:

263. The ordinary hours of work are to be an average of <u>up to</u> 38 per week.

Clause 8.7 – Flexibility in relation to working hours

264. We refer to the question to parties: whether the span of hours can be increased by one hour at both ends. It is Ai Group's position that the clause

allows for the span to be altered by up to two hours in total; that is, one hour at each end simultaneously.

Clause 9.1 – Breaks

265. The current award, at clause 25.1 provides two exceptions to instances where employees must not be required to work for more than five hours without a break – clause 24.12 (make-up time) and clause 25.2 (Flexibility in relation to meal breaks).

266. The Exposure Draft lists clause 9.3 (which provides compensation where a break has not been granted) and Clause 9.4 (Flexibility in relation to meal breaks).

267. The Exposure Draft has changed the operation of the term and removed make-up time as an exception, which amounts to a substantive change to the current clause. We seek that the reference to clause 9.3 be replaced with a reference to clause 8.11, such that clause 9.1 properly reflects the current clause.

Clause 9.2 – Breaks

268. The current clause 25.1 would be satisfied in circumstances where an employee took a break that was 30 minutes in length. Clause 9.2 of the Exposure Draft, by contrast, requires a break for a period of "between 30 and 60 minutes". Read literally, this requires a break of 31 to 59 minutes in length.

269. So as to ensure that the Exposure Draft clause does not result in this inadvertent and somewhat absurd result, clause 9.2 should be amended by replacing the words "between 30 and 60 minutes" with "not less than 30 minutes and not more than 60 minutes".

Clause 9.3 – Breaks

270. Clause 25.3 of the current award applies where an employee is directed by their employer to work in excess of five hours without a meal. It creates an exception to the application of the clause, however, in those circumstances

where agreement has been reached that an employee may work in excess of five hours but not more than six hours without a break under clause 25.2(a). Relevantly, clause 25.2(a) allows for an agreement that the employee work between five and six hours; for instance five and a half hours.

271. Clause 9.3 of the Exposure Draft creates an exception only in respect of those employees who have agreed to work more than six hours in accordance with clause 9.4. It therefore does not apply to those employees that have reached agreement to work between five and six hours without a break.

272. This redrafting amounts to a substantive change. The text in parenthesis in clause 9.3 should be replaced with the words "or such period as extended in accordance with clause 9.4". This is consistent with the current clause 25.3.

Clause 11.3(g)(v) – Relocation expenses

273. The current clause 20.5(d)(iv) refers to clauses 20.5(d)(i) and 20.5(d)(ii). Clause 11.3(g)(v) of the Exposure Draft, however, refers to clauses 11.3(g)(i) and 11.3(g)(iv). This appears to be a drafting error.

274. This change could result in a situation where an employee secures a new residence within a 6-week period, yet the employer must continue to pay for relocation for the entirety of the 6 week.

275. The references to "clauses 11.3(g)(i) and (iv)" should be substituted with "clauses 11.3(g)(i), 11.3(g)(ii) and 11.3(g)(iii)".

Clause 13.1(a) – Penalty rates for time worked outside the spread of hours Monday to Friday and on weekends

276. We refer to the question to parties as to whether the reference to clause 13.2(a) is correct. We note the current award cross-references the corresponding clause 24.10(a).

277. Under the current award, the relevant penalty rates are provided for work performed either outside the spread of hours on a Monday to Friday, or certain time on weekends (clause 24.7). The exception to these penalty rate

payments is any flexibility arrangement regarding changes to the spread of hours and provisions applicable to employees working afternoon or night shifts (clause 24.10(a)). This has been properly been replicated in the Exposure Draft and in our view, are the correct cross references. We refer specifically to clause 24.7(c) of the current award, which confirms that the penalty rates in that clause do not apply when the shift penalties in clause 24.10(a) apply.

278. The reference in clause 13.1 to clause 13.2(a) is correct; indeed it could be widened to all of clause 13.2.

Clause 13.1(a) – Penalty rates for time worked outside the spread of ordinary hours Monday to Friday and on weekends

279. The current clause 24.7(a)(iii) attributes certain time worked on a Sunday as falling "outside the spread of ordinary hours". Those times are reproduced in the first and second rows setting out rates for ordinary hours worked on a Sunday under clause 13.1(a) Exposure Draft. Accordingly, they should both be labelled "(outside the spread of hours)".

Clause 13.1(a) – Penalty rates for time worked outside the spread of ordinary hours Monday to Friday and on weekends

280. The current clause 24.7(a)(iv) attributes certain time worked on a Sunday as falling "between the spread of ordinary hours". Those times are reproduced in the final rows setting out rates for ordinary hours worked on a Sunday under clause 13.1(a) of the Exposure Draft. Accordingly, they should both be labelled "(outside the spread of hours)".

Clause 14.1(a) – Payment for working overtime

281. Clause 6.3(c) of the Exposure Draft provides for the circumstances in which a part-time employee is entitled to overtime rates. It does not, however, prescribe the rates that are in fact payable. It rather refers to clause 14 for this purpose.

282. Clause 14.1(a) specifies the overtime rates payable, however the application of the clause is limited to "full-time and casual employees". The preamble to the table in clause 14.1(a) would suggest that the rates there prescribed do not apply to part-time employees.

283. Clause 14.1(d) of the Exposure Draft then states that part-time employees are entitled to overtime in accordance with clause 6.3(c). As we have earlier stated, however, clause 6.3(c) does not deal with the overtime *rate* payable to a part-time employee. It only provides a definition for overtime.

284. So as to ensure that the Exposure Draft clearly provides for the overtime rates applicable to a part-time employee, clause 14.1(a) should be amended by replacing the words "For full-time and casual employees" with "Except as provided for in clause 6.3(c).

Clause 14.1(d) – Payment for working overtime

285. If the above change is made, clause 14.1(d) will be superfluous and should be deleted.

Clause 14.4(a) – Length of the rest period

286. The Exposure Draft uses the words *"where possible"* in relation to the 10 consecutive hours off duty. The current award uses the term *"wherever reasonably practicable"*. What is "possible" in a particular case may not necessarily be what is "reasonably practicable". The language of "practicable" suggests a consideration of the relevant facts and circumstances.

287. We submit that the language of the current award should be retained.

Clause 15.4(a) – Annual leave loading

288. Consistent with the Commission's July 2015 decision at paragraphs [95] – [96], clause 15.4(a) of the Exposure Draft should be amended by inserting the words "of the minimum hourly rate" after "17.5%".

Clause 24 – Dispute resolution procedure training leave

289. We agree the reference to the 'Workplace Relations Act 1996 *(Cth)'* should be replaced with 'the Act'.

Schedule B.1.1 – Full-time and part-time adult employees – all employees – ordinary and penalty rates

290. The second column in table B.1.1 prescribes rates payable for work performed on Monday – Friday "outside ordinary hours". We submit that this should be substituted with "outside the spread of hours" so as to properly reflect the current clause 24.7(a)(i) and clause 13.1(a) of the Exposure Draft.

Schedule B.1.1 – Full-time and part-time adult employees – all employees – ordinary and penalty rates

291. The second column from the right in table B.1.1 states that the rates there prescribed are payable for work performed on a Sunday from "7pm to 12pm". We submit that the reference to "12pm" should be substituted with "12am" so as to properly reflect the current clause 24.7(a)(iii) and clause 13.1(a) of the Exposure Draft.

Schedule B.1.2 – Full-time and part-time adult employees – designated shiftworkers – ordinary and penalty rates

292. The second column from the right in table B.1.2 refers to a "permanent night shift". This term is not defined or used elsewhere in the Exposure Draft. We assume that it is intended to be a reference to clause 13.2(c) of the Exposure Draft and propose that a reference to it be inserted in the table by way of a footnote.

Schedule B.1.1 and Schedule B.1.2 – Full-time and part-time adult employees

293. The circumstances in which the rates prescribed in B.1.1 and B.1.2 are payable is not clear from the schedule. Specifically, the occasions upon which a designated shiftworker receives a penalty rate prescribed in B.1.1 in lieu of the shift penalties in B.1.2 is not apparent on the face of the schedule. This

should be addressed by inserting a note that refers to clauses 13.1(c) and (d) of the Exposure Draft.

Schedule B.2.1 – Adult casual employees – all employees – ordinary and penalty rates

294. The second column in table B.2.1 prescribes rates payable for work performed on Monday – Friday "outside ordinary hours". We submit that this should be substituted with "outside the spread of hours" so as to properly reflect the current clause 24.7(a)(i) and clause 13.1(a) of the Exposure Draft.

Schedule B.2.1 – Full-time and part-time adult employees – all employees – ordinary and penalty rates

295. The second column from the right in table B.2.1 states that the rates there prescribed are payable for work performed on a Sunday from "7pm to 12pm". We submit that the reference to "12pm" should be substituted with "12am" so as to properly reflect the current clause 24.7(a)(iii) and clause 13.1(a) of the Exposure Draft.

Schedule B.2.2 – Adult casual employees – overtime rates

296. The second column from the right in table B.2.2 refers to a "permanent night shift". This term is not defined or used elsewhere in the Exposure Draft. We assume that it is intended to be a reference to clause 13.2(c) of the Exposure Draft and propose that a reference to it be inserted in the table by way of a footnote.

Schedule B.2.1 and Schedule B.2.2 – Adult casual employees

297. The circumstances in which the rates prescribed in B.2.1 and B.2.2 are payable is not clear from the schedule. Specifically, the occasions upon which a designated shiftworker receives a penalty rate prescribed in B.2.1 in lieu of the shift penalties in B.2.2 is not apparent on the face of the schedule. This should be addressed by inserting a note that refers to clauses 13.1(c) and (d) of the Exposure Draft.

Schedule B.2.3 – Adult casual employees – overtime rates

298. Schedule B.2.3 prescribes overtime rates for casual employees. They erroneously include the casual loading. Clause 13.1 of the current award and clause 6.4(e) of the Exposure Draft clearly state that a casual employee is to be paid "for working ordinary time", the minimum hourly rate plus a 25% loading. The entitlement to the loading does not extend to work performed beyond ordinary time (that is, to overtime).

299. On this basis, all of the rates prescribed in clause B.2.3 require recalculation and the relevant percentages identified should be reduced by 25.

8. EXPOSURE DRAFT – ELECTRICAL POWER INDUSTRY AWARD 2016

300. The submissions that follow relate to the *Exposure Draft – Electrical Power Industry Award 2016* (Exposure Draft).

Clause 6.4(c) – Part-time employees

301. In clause 6.4(c), the words "regular pattern of hours" in existing clause 12.3 have been replaced with "hours of work". This is a substantive change to the entitlement. The current wording should be retained. Also, the word "employ" at the end of the clause should be "employee".

Clause 6.4(e) – Part-time employees

302. In clause 6.4(e), the words "as mutually arranged" in existing clause 12.5 have been replaced with "as mutually agreed". This could represent a change to the entitlement. The current wording should be retained.

Clause 6.5(d) – Casual employees

303. In this clause, the word "entitlements" should be replaced with "attributes", as used in the current award, for the reasons discussed earlier in this submission.

Clause 6.5(e) – Casual employees

304. In this clause, the phrase "ordinary rate of pay" should be replaced with "minimum rate of pay" given that there are no all purpose allowances in this award.

Clause 6.6 – Casual entitlement to overtime

305. In clause 6.6(a)(i), the words "a shift" needs to be replaced with the words "an ordinary shift" to clarify when overtime applies.

306. In clause 6.6(b), the words "in the employer's establishment" need to be replaced with "in the relevant section of the employer's establishment". It is

not uncommon for different working hours arrangements to apply in different sections of an establishment.

Clause 7.4 – Pay structure conditions

307. The second sentence in clause 7.4(c) should be deleted. Clause 7.4 deals with the recognition of skills within a classification level, the payment for which is included within the relevant minimum wage rate. Higher duties payments are a different concept and referring to such payments in this clause would most likely confuse readers of the award.

Clause 8.2(d) – Shiftworkers and rosters

308. In clause 8.2(d), the words “are to be” should be replaced with “may be”. There may be occasions where shift workers are engaged on a roster but their ordinary hours are not averaged over the whole cycle.

Clause 9.7 – 10 hour break

309. In clause 9.7(a), the words “where possible” should be replaced with “wherever reasonably practicable”, consistent with clause 25.7(a) in the current award. The wording in the exposure draft would lead to a substantive change in the entitlement.

Clause 10.1 – Minimum wages

310. “Operations grade 8” needs to be added to Pay Level 8, consistent with the current award.

Clause 10.7(b) – Higher duties

311. The words “”or a period attracting accident pay” should be deleted, because accident pay is no longer included in the award.

Clause 14.4 – Illness during a period of annual leave

312. The term “personal leave” should be replaced with “personal/carer’s leave”.

Clause 14.7 – Payment on termination of employment

313. The term “ordinary rate of pay” should be replaced with “minimum rate of pay” given that there are no all purpose allowances in this award.

Clause 15.2 – Personal/carer’s leave and compassionate leave

314. In clause 15.2, the term “personal leave” should be replaced with “personal/carer’s leave”.

9. EXPOSURE DRAFT – HORTICULTURE AWARD 2016

315. The submissions that follow relate to the *Exposure Draft – Horticulture Award 2016* (Exposure Draft).

Clause 5.2 – Facilitative provisions

316. Clause 8.1(a)(i) contains a facilitative provision relating to the performance of work on Saturday which can be accessed by majority agreement. It has been omitted from the list of facilitative provisions listed in clause 5.2.

317. Additionally, clauses 10.2(a) and 10.2(b) collectively are the provisions which prescribe the parameters around which the standard approach in the award can be departed from by agreement. A reference to clause 10.2(b) should be inserted into the list of facilitative provisions in clause 5.2.

318. The following amendments should accordingly be inserted into clause 5.2:

Clause	**Provision**	**Agreement between an employer and:**
8.1(a)(i)	Ordinary hours of work – days of work	The majority of employees
10.2(a) and 10.2(b)	Minimum wages - pieceworkers	An individual

Clause 6.4(b) – Part-time employees

319. Clause 6.4(b) refers to the "ordinary hourly rate … in clause 10 – Minimum wages". The table of rates at clause 10 does not include ordinary hourly rates. Rather, the third column is titled "minimum hourly rate". Therefore, the phrase "minimum hourly rate" should be used in clause 6.4(b). The clause would therefore read as follows:

> (b) For each ordinary hour worked, a part-time employee will be paid no less than the minimum hourly rate for the relevant classification in clause 10 – Minimum wages.

Clause 6.5(c)(i) – Casual loading

320. Clause 10.4(b) of the current award requires the payment of "1/38th of the minimum weekly rate of pay for an employee in that classification in clause 14 – Minimum wages, plus 25%". That is, the loading is to be calculated on the minimum wage prescribed by the award, absent the inclusion of any all purpose allowances.

321. We refer also to our submissions above at section 2.5. Clause 6.4(c)(ii) should be amended by replacing the reference to the "ordinary hourly rate" with "minimum hourly rate".

Clause 8 – Ordinary hours of work and rostering

322. The hours of work provisions in the Exposure Draft have been separated so that shiftworkers are dealt with in a separate clause (clause 14). For clarity it is appropriate to alter the title of clause 8 so that it is clear that it only applies to employees who are not shiftworkers. It is proposed that clause 8 be renamed "Clause 8 – Ordinary hours of work and rostering (employees other than shiftworkers)".

Clause 8.1 – Ordinary hours and roster cycles

323. Clause 8 contains only one subclause; clause 8.1. A separate subheading for clause 8.1 therefore appears unnecessary and should be deleted.

Clause 8.1(a)(iv) – Ordinary hours and roster cycles

324. At the conclusion of clause 8.1(a)(iv) the phrase *"and paid in accordance with clause 15 – Overtime"* has been included where previously such a phrase was not included in the equivalent clause 22.1(d) of the current award. The award contains the ability for time off in lieu of the payment of overtime (clause 15.2). Inclusion of the additional phrase that full-time and part-time employees will be *"paid in accordance with clause 15 – Overtime"* is likely to create confusion as to whether time off in lieu is available to these employees or only payment at overtime rates. Indeed the proposed provision would appear to mandate

the payment of overtime rates for such time worked. The additional phrase which has been included in clause 8.1(a)(iv) should be deleted.

Clause 9.1(a) – Meal break

325. The current award uses the language at clause 23.1(a): "…not less than 30 minutes and not more than one hour". The Exposure Draft uses the language at clause 9.1(a) "period between 30 minutes and one hour".

326. The drafting of the Exposure Draft provision deviates substantively from the current award by reason that under the Exposure Draft, a break of 30 minutes or 60 minutes respectively is not permitted. We submit that the language in the current award should be retained.

Clause 9.1(c) – Meal break

327. Clause 23.1(b) of the current award requires payment at 200% of the "appropriate minimum wage" for work performed on the instruction of the employer during a recognised meal break. This is clearly a reference to the rates prescribed in clause 14.1. The second and third columns in that table are titled "minimum weekly wage" and "minimum hourly wage". These rates do not incorporate any all purpose allowances.

328. Despite this, clause 9.1(c) of the Exposure Draft refers to the "ordinary hourly rate" which is defined to include all purpose allowances. This is a substantive change to the current award and therefore should not be made. The clause should be amended to read "minimum hourly rate".

Clause 9.2 – Rest break

329. We refer to the question contained at clause 9.2(a) of the Exposure Draft. The plain and ordinary meaning of that provision is that the break it provides for is to be allowed during the morning. An entitlement to the break does not, therefore, arise at times other than the morning. If work performed by an employee during an afternoon or night shift as defined by clause 14.1(b) of

the Exposure Draft does not occur during the morning, the entitlement does not arise.

Clause 11.3(b)(i) – Tool and equipment allowance

330. The clause has been altered slightly so that it is not clear that the reimbursement for the cost of supplying tools only occurs in circumstances where the employer requires the employee to supply their own tools and equipment. The following minor amendment is proposed to make this clear (as it is in the current award):

> (i) The employer must reimburse the employee for the cost of supplying tools and equipment if the employer requires the employee to supply their own tools and equipment."

Clause 14.1(h) – Shiftwork

331. At the conclusion of clause 14.1(h) the phrase *"paid in accordance with clause 15 – Overtime"* has been included where previously such a phrase was not included in the equivalent provision of the current award. The award contains the ability for time off in lieu of the payment of overtime (clause 15.2). Inclusion of the additional phrase *"paid in accordance with clause 15 – Overtime"* is likely to create confusion as to whether time off in lieu is available to shiftworkers or only payment at overtime rates. The additional phrase which has been included in clause 14.1(h) should be deleted.

Clause 15 – Definition

332. Clause 15.1 states that "all time worked by employees in excess of their ordinary hours will be deemed overtime". The provision is not limited in its application to full-time and part-time employees and in this way, extends the application of overtime rates to casual employees. This is a substantive change to the current award and is opposed by Ai Group.

333. We note that an AWU claim to vary the award such that casual employees are entitled to overtime rates has been referred to a Full Bench constituted to deal with casual and part-time employment common issues. A determination as to

whether clause 15.1 is inserted in the Exposure Draft should be contingent upon the outcome of that claim.

Schedule B – Summary of hourly rates of pay

334. Clause B.1.2 states that the rates calculated in the schedule are based on the minimum hourly rate. Despite this, the tables indicate that the rates there prescribed are a percentage of the ordinary hourly rate (see for example second row of B.2.1: "% of ordinary hourly rate").

335. This reference is confusing and misleading as it suggests that the rates have been calculated based on the ordinary hourly rate, which is defined to include all purpose allowances. All such references should be amended.

Schedule B.2.3 – Full-time and part-time employees – overtime rates

336. Clause 24.2(d) of the current award prescribes the overtime rate payable during harvest period. It states that the first eight hours of overtime in a week may include five hours of work on a Sunday, paid at 150% of the minimum hourly rate. Those five hours on a Sunday need not necessarily be the *first* five hours in that period of eight hours. Accordingly, the word "first" before "5" in the fourth column of B.2.3 should be deleted.

Schedule G – Definitions – ordinary hourly rate

337. The definition of 'ordinary hourly rate' should be amended by replacing the reference to "clause 10.1(a)" to "clause 10" such that in also includes, for instance, rates payable to junior employees which are prescribed at clause 10.3.

10. EXPOSURE DRAFT – LEGAL SERVICES AWARD 2015

338. The submissions that follow relate to the *Exposure Draft – Legal Services Award 2015* (Exposure Draft).

Clause 5.2 – Facilitative provisions

339. The reference in the second row of the table to the 'spread of *weekly* hours of work' should be amended by deleting the word 'weekly'. Clause 8.1(c)(ii) stipulates the times within which ordinary hours on a particular day, Monday to Friday, must be worked.

Clause 6.4(a)(ii) – Part-time employment

340. Clause 10.4(a) of the current award defines a part-time employee as one who is engaged to perform less than 38 hours per week on a reasonably predictable basis. This definition does not relate to how or when the employee performs their actual hours of work. Rather, it pertains to the total number of hours worked; that being less than 38 per week.

341. This definition of part-time employment has been altered by clause 6.4(a)(ii) of the Exposure Draft, which states that a part-time employee "has reasonably predictable hours of work". This would require that the employee's *hours of work* (which carries a different meaning to the total number of hours worked by an employee each week) be reasonably predictable. This necessarily relates to the number of hours as well as *when* those hours are worked.

342. The alteration to the definition amounts to a substantive change. Accordingly, clause 6.2(a) should be varied as follows:

> (a) A part-time employee:
>
> > (i) is engaged to work less than 38 ordinary hours per week <u>on a reasonably predictable basis</u>; <u>and</u>
> >
> > ~~(ii) has reasonably predictable hours of work; and~~
> >
> > (iii) receives on a pro rata basis, pay and conditions equivalent to those of full-time employees who do the same kind of work.

Clause 6.4(a)(iii) – Part-time employment

343. The words "who do the same kind of work" at the conclusion of clause 6.4(a)(iii) should be deleted. They are apt to confuse and do not serve any clear purpose. Further, they do not appear in the corresponding clause 10.4(c) of the current award. The text is unnecessary and should therefore be removed.

Clause 8.1(d)(ii) – Rostered day off

344. Clause 8.1(d)(i) provides that arrangements for rostered days off may be reached between an employee and an employer. Clause 8.1(d)(ii) should be amended by inserting the word "such" before "arrangements" so as to make clear that the reference to "arrangements" is to those made under the preceding clause. This is consistent with clause 24.1(e) of the current award.

Clause 10.1 – Minimum wages

345. Clause 10.1 states that an employer must pay an adult employee the minimum wages that follow, which includes the minimum weekly wage and the minimum hourly wage for each classification. This represents a change from the drafting of the current award.

346. As the preamble to the table in clause 10.1 is not confined to full-time employees, a literal reading of the provision appears to require the payment of the minimum weekly wage to all adult employees, including part-time and casual employees. This is of course not the intended effect of the provision.

347. We propose that the drafting of clause 10.1 be amended to reflect the intent that the minimum weekly rate only applies to full-time employees. It may be sufficient to include the words "(full-time employees)" below "minimum weekly rate" in the second column of 10.1.

348. We acknowledge that clause 6.4(a)(iii) may be argued to provide that part-time employees are in fact only entitled to receive terms and conditions on a pro-rata basis but contend that this far from clear given the clause largely

serves the purpose of defining a part-time employee. We similarly acknowledge that clause 6.5(b) could be argued to clarify that a casual employee is entitled to the hourly rate. Nonetheless, we suggest the proposed variation in the interests of ensuring that the Exposure Draft is simple and easy to understand.

Clause 13.3 – Early morning, afternoon and night shift penalties

349. We refer to our submissions at section 2.2 above. Consistent with the concerns we have there raised, clause 7.7(d) of the Exposure Draft should be amended by substituting the term "penalties" in the heading with "allowances". This is consistent with clause 31.2 of the current award.

Clause 13.3(a) – Early morning, afternoon and night shift penalties

350. Clause 13.3(a) states that an employee is to be paid "the following shift penalties". The table thereunder, however, does not prescribe the separately identifiable shift penalty (or allowance, as submitted above). Rather, it stipulates the *rate* payable to an employee for work performed at the relevant times. Therefore, the term "penalties" should be substituted with "rates".

Clause 13.3(a) – Early morning, afternoon and night shift penalties

351. For the reasons articulated above, the heading to the second column ("penalty rate") should be amended. We also note that the table does not indicate the relevant amount to which the percentages below are to be applied.

352. Therefore, "penalty rate" should be replaced with "Full-time and part-time employees (% of the minimum hourly rate)".

Clause 13.3(a) – Early morning, afternoon and night shift penalties

353. For the reasons set out above, the heading to the third column should be replaced with "Casual employees (% of the minimum hourly rate, inclusive of casual loading)".

Clause 14.7(f) – Call-back

354. The cross-reference to clause 14.1 in clause 14.7(f) should be replaced with a reference to clause 14.6. This is consistent with the current clause 34.7(f).

Schedule B.2.1 – Casual shiftworkers – ordinary, early morning, afternoon and night shift rates

355. The percentage identified in the final column (185%) should be replaced with 155%. This appears to be a drafting error. The rates below do not require recalculation.

11. EXPOSURE DRAFT – LOCAL GOVERNMENT INDUSTRY AWARD 2015

356. The submissions that follow relate to the *Exposure Draft – Local Government Industry Award 2015* (Exposure Draft).

Clause 3.3 – Coverage

357. We understand that a determination[44] has been issued by the Commission in the context of this Review to vary the award by deleting the then clause 4.3(e). Notwithstanding, the relevant provision appears at clause 3.3(e) of the Exposure Draft. It should be deleted.

Clause 6.5(c)(ii) – Casual employees

358. The current clause 10.5(b) states that the casual loading is payable in addition to weekend and shift penalties. Overtime rates are not referred to in this clause. We understand this to mean that where a casual employee works overtime, they are not entitled to the casual loading. This is confirmed by clause 10.5(c), which states that penalties including overtime rates will be calculated on the minimum rate exclusive of the casual loading.

359. We are concerned that the final sentence of clause 6.5(c)(ii) deviates from the current position as it requires that the penalties there referred to, which includes overtime rates, are paid in addition to the casual loading of 25%. This is a substantial change to the current award. The sentence should be deleted.

Clause 8.1(a) – Ordinary hours

360. At section 2.4 of these submissions, we have set out our concerns in respect of s.147 of the Act. It is our view that in many instances, the ordinary hours of work provisions in an award do not meet the requirements of s.147. The *Local Government Industry Award 2010* is one such award. Should the Commission determine that it is appropriate to rectify this issue, we propose that clause 8.1(a) of the Exposure Draft be amended as follows:

[44] PR575440.

The ordinary hours of work are to be an average of up to 38 per week.

Clause 8.1(c) – Ordinary hours

361. Clause 8.1(c) of the Exposure Draft states that the ordinary hours of work for a casual employee will be in accordance with clause 6. Clause 6 does not, however, deal with the ordinary hours of a casual employee. Therefore, the words "or a casual employee" in clause 8.1(c) should be deleted.

Clause 8.1(g) – Ordinary hours

362. Clause 8.1(g) refers to "customer services". We proceed on the basis that this is intended to reflect the current clause 21.2(b)(vi) which refers to employees in "customer service centres". We are concerned that that the slight change in the terminology used may have a substantial impact on the application of the clause. The current terminology should therefore be retained.

Clause 10.1 – Minimum wages

363. Clause 10.1 states that an employer must pay an adult employee the minimum wages that follow, which includes the minimum weekly wage and the minimum hourly wage for each classification. This represents a change from the drafting of the current award.

364. As the preamble to the table in clause 10.1 is not confined to full-time employees, a literal reading of the provision appears to require the payment of the minimum weekly wage to all adult employees, including part-time and casual employees. This is of course not the intended effect of the provision.

365. We propose that the drafting of clause 10.1 be amended to reflect the intent that the minimum weekly rate only applies to full-time employees. It may be sufficient to include the words "(full-time employees)" below "minimum weekly rate" in the second column of 10.1.

366. We acknowledge that clause 6.4(b)(iii) may be argued to provide that part-time employees are in fact only entitled to receive terms and conditions on a pro-rata basis equivalent pay to full-time employees but contend that this far

from clear given the clause largely serves the purpose of defining a part-time employee. We similarly acknowledge that clause 6.5(b) could be argued to clarify that a casual employee is entitled to the hourly rate. Nonetheless, we suggest the proposed variation in the interests of ensuring that the Exposure Draft is simple and easy to understand.

Clause 10.3(f) – Apprentices

367. We refer to the current clause 14.3(f), which has been reproduced at clause 10.3(e) and 10.3(f) of the Exposure Draft. Clause 10.3(f) applies only in those circumstances described in clause 10.3(e); that is, where a person is employed by an employer under this award immediately prior to entering into a training agreement as an adult apprentice. It does not apply to apprentices generally. The clause should be amended to make this clear. This could be achieved by simply amalgamating clauses (e) and (f), as per the current award.

Clause 10.5(a)(i) – Annual salary instead of award provisions

368. Under clause 14.7(a)(i) of the current award, an employer and an employee may agree that the employer may pay the employee an annual salary in satisfaction of, amongst other provisions, clause 14. Clause 14 includes minimum wages payable to adult employees, junior employees and apprentices.

369. Clause 10.5(a)(i) of the Exposure Draft effectively narrows the scope of the entitlements that may be compensated for by an annual salary, as it refers only to clause 10.1, which prescribes the minimum wages payable to adult employees.

370. So as to ensure that a substantive change is not effected by the cross reference found at clause 10.5(a)(i), it should be replaced with a reference to clause 10.

Clause 10.5(c) – Annual salary instead of award provisions

371. For the reasons set out above, the reference to clause 10.1 should be replaced with a reference to clause 10.

Clause 10.5(d)(ix) – Annual salary instead of award provisions

372. The parties have been invited to comment on whether the reference to "accident make up pay" should be deleted. We submit that clause 10.5(b)(ix) should be removed given that clause 17 (accident pay) of the current award was deleted by virtue of the Full Bench Decision [2015] FWCFB 644 and Determination PR561478.

Clause 10.6 – Higher duties

373. The reference to "a position at a higher level" in the third line is unnecessary and confusing. The commencing words of the clause establish that the provision applies where an employee is required by the employer to relieve in "a higher level position". The drafting of the current clause 18.1 sufficiently describes the application of the clause and should be retained.

Clause 11.2(c)(v) – Adverse working conditions

374. The cross reference to "clause (e)(iv)" should be replaced with "clause 11.2(c)(iv)". This appears to be a drafting error.

Clause 11.2(d)(i) – Camping allowance

375. The current clause 15.4A applies where an employee is required to camp at the site of any work for one of two reasons:

- because of a direction of the employer; or
- because no reasonable transport facilities are available to enable the employee to proceed to and from home each day.

376. Clause 11.2(d)(i) seeks to reformat this clause and in doing so, does not properly reflect its current terms. We submit that it should be substituted with the following:

> (i) An employee will be paid a camping allowance of $23.15 per night where required to camp at the site of any work:
>
> - by direction of the employer; or
> - because no reasonable transport facilities are available to enable the employee to proceed to and from home ach day.

Clause 11.3(b)(i) – Tool allowance – tradespersons and apprentices

377. The cross reference to "clause (e)(iv)" should be replaced with "clause 11.2(c)(iv)". This appears to be a drafting error.

Clause 11.3(b)(i) – Tool allowance – tradesperson and apprentices

378. The current clause 15.3(a) applies where a tradesperson or apprentice tradesperson is required by "the employer" to supply and maintain tools. Clause 11.3(b)(i) of the Exposure Draft, however, omits the words "by the employer". In so doing, it is no longer clear that the operation of the clause is limited to circumstances in which the requirement is imposed by the employee's employer. The relevant words should be re-inserted.

Clause 14.4(a) – Length of the rest period

379. The Exposure Draft uses the words "where possible" in relation to the 10 consecutive hours off duty. The current award uses the term "wherever reasonably practicable". What is "possible" in a particular case may not necessarily be what is "reasonably practicable". The language of "practicable" suggests a consideration of the relevant facts and circumstances.

380. We submit that the language of the current award be retained.

Clause 14.4(b)(i) – Rest period after overtime

381. The word "time" in the second bullet point should be deleted. It is superfluous and its inclusion is somewhat confusing.

Schedule B – Summary of Hourly Rates of Pay

382. The words “other than shiftworkers” appear in the heading to each of the tables in Schedule B. The purpose for this is unclear. This award does not contain separate entitlements that apply to shiftworkers as distinct from other employees (often referred to as ‘day workers’) as might be the case in other awards. Indeed there are no separate entitlements that apply to employees who perform work at certain times that are defined by the award to be a type of ‘shift’. For this reason, the relevant words should be deleted.

Schedule I – Definitions

383. The definition of ‘shiftworker’ in Schedule I is new. It does not appear in the current definitions clause. We understand that it reflects the definition of shiftworker for the purposes of s.87(1)(b) of the Act, as found at clause 25.2 of the current award.

384. The insertion of the definition is not necessary. It is not a term that is used in the body of the award (other than current clause 25.2) such that it would require a definition. Further, its insertion would confuse the meaning of “shiftworker” as it now appears in Schedule B (see submission above).

12. EXPOSURE DRAFT – MARKET AND SOCIAL RESEARCH AWARD 2015

385. The submissions that follow relate to the *Exposure Draft – Market and Social Research Award 2015* (Exposure Draft).

Regular employees

386. There are various current award terms that refer to "regular employees". In the following Exposure Draft provisions, that reference has altered:

- Clause 8.2: full-time and part-time employees;
- Clause 8.3: full-time and part-time employees;
- Clause 8.3(d): full-time and part-time employee;
- Clause 8.6: all employees;
- Clause 8.7: part-time employees;
- Clause 9.4: full-time or part-time employee;
- Clause 9.5(a): all employees;
- Clause 10.2: all employees;
- Clause 12.2(a): full-time or part-time employee.

387. We are concerned that in some, if not all, of the above clauses, the redrafting has resulted in a substantive change. We note that clause 6.4 of the current award, which deals with the engagement of part-time employees, does not, require that a part-time employee's hours be fixed; and by extension, a part-time employee's ordinary hours of work may not necessarily be 'regular'.

388. We propose that this matter be dealt with by way of a conference between interested parties.

Clause 3.4 – Coverage

389. Clause 3.4 refers to the *"industry set out in clauses 3.1 and 3.2".* Clause 3.1 is not a definition of the industry. Clause 3.2 is. We submit the reference to clause 3.1 is removed.

Clause 3.5 – Coverage

390. Clause 3.5 refers to the *"industry set out in clauses 3.1 and 3.2".* Clause 3.1 is not a definition of the industry. Clause 3.2 is. We submit the reference to clause 3.1 is removed.

Clause 6.5(c)(ii) – Casual Loading

391. Clause 6.5(c)(ii) refers to the "entitlements" of full-time and part-time employment. The current award at clause 11.3(b) uses the words "attributes".

392. The casual loading was introduced for a number of reasons; it is an over simplification to suggest that it exists to directly compensate for comparative entitlements only.

393. Many of the reasons for a casual loading cannot be described as 'entitlements'. Rather, many of the reasons related to broader issues associated with the differences in the forms of employment.

394. The word *'attributes'* is capable of describing both entitlements and non-entitlement-based reasons for the casual loading. We submit the word 'attributes' should remain unchanged.

Clause 7.2 – Classifications

395. The reference to "Schedule B" is an error, it should reference "Schedule A".

Clause 8.5 – Ordinary hours of work and rostering

396. Clause 8.5 refers to the "casual hourly rate of pay set out in clause 9". Clause 9 does not, however, set out a casual hourly rate of pay. The cross reference should be amended to "clause 6.5(c)".

Clause 10.4(b) – Expenses reimbursement

397. Clause 17.1(a)(i) of the current award requires an employer to reimburse an employee for certain expenses. Those expenses are described as having been "actually and properly incurred by the employee as required by the employer in the discharge of the employee's duties". Clause 17.1(a)(ii) then states that such expenses; that is, expenses of the sort referred to in the preceding subclause, that can reasonably be anticipated will be payable in advance.

398. Clause 10.4(b) deviates substantively from the current clause 17.1(a)(ii). This is because the word "such" at the commencement of the clause has been deleted. The effect is that clause 10.4(b) requires that *any* expenses, without limitation, that can reasonably be anticipated will be payable in advance. The application of the clause is no longer limited to expenses of the type referred to above.

399. For these reasons, the word "such" should be inserted at the commencement of clause 10.4(b).

Clause 13.1 – Out of hours penalty

400. We refer to the question to parties as to whether the penalties, which are under the current award, expressed as a percentage of the standard rate, should be expressed as a percentage of the employee's employees' minimum hourly rate.

401. We submit such a change could significantly increase existing payroll costs. Employers make over-award remuneration offers taking into account the existing and predictable additional costs associated with the employment. A change which would reference a percentage of the employees' earnings could compound the costs for certain employers. We submit the current fixed model of compensation for such working hours should remain unchanged.

Clause 13.2 – Out of hours penalty

402. We refer to the question to parties regarding the rate of time off in lieu for penalty rates. The current award does not provide for a 'time for penalty' basis. Rather, it provides "time off instead".

403. The award does not presently prescribe the quantum of the time off that may be taken. Rather, this is left to the discretion of the employer. To introduce such prescription would amount to a substantive change that is unwarranted.

Clause 17.2 – Public Holidays

404. The Exposure Draft contains a new clause which provides that where an employee works on a public holiday, either overtime of penalty rates shall apply. Such a clause does not exist in the current award.

405. The effect of the unnecessary inclusion of this clause is as follows:

- The clause may confuse as to the appropriate payment method for work on a Public Holiday by reference to two possible methodologies. Such issues are already dealt with by those clauses where the payment arises.

- The clause mandates that only one of those two payment methodologies can apply. This eliminates the ability to work make-up time on a public holiday for the purposes of clause 8.8(a) and could confuse the payment methodology of an employee who as part of an RDO cycle whereby part of the their work time is ordinary hours and part is overtime designated for the accrual of an RDO (and not to be paid for the time so work as mandated by the new clause).

Clause 23.1 – Dispute resolution procedure training leave

406. We refer to the question to parties regarding the reference to the Workplace Relations Act 1996 *(Cth)*. We agree the reference should be amended to reflect the *Fair Work Act 2009 (Cth)*.

Schedule A.5 Door-to-door interviewer

407. A new sub-clause has been added for this role. The current award groups both the Executive (face-to-face) interviewer and door to door interviewer together. The addition of the sub-clause incorrectly suggests the two roles are distinct classifications.

408. The format in the current award should be retained.

13. EXPOSURE DRAFT – MISCELLANEOUS AWARD 2015

409. The submissions that follow relate to the *Exposure Draft – Miscellaneous Award 2015* (Exposure Draft).

Clause 10.1 – Minimum wages

410. Clause 10.1 states that an employer must pay an adult employee the minimum wages that follow, which includes the minimum weekly wage and the minimum hourly wage for each classification. This represents a change from the drafting of the current award.

411. As the preamble to the table in clause 10.1 is not confined to full-time employees, a literal reading of the provision appears to require the payment of the minimum weekly wage to all adult employees, including part-time and casual employees. This is of course not the intended effect of the provision.

412. We propose that the drafting of clause 10.1 be amended to reflect the intent that the minimum weekly rate only applies to full-time employees. It may be sufficient to include the words "(full-time employees)" below "minimum weekly rate" in the second column of 10.1.

413. We acknowledge that clause 6.3(a)(iii) may be argued to provide that part-time employees are in fact only entitled to receive terms and conditions on a pro-rata basis equivalent pay to full-time employees but contend that this far from clear given the clause largely serves the purpose of defining a part-time employee. We similarly acknowledge that clause 6.4(b) could be argued to clarify that a casual employee is entitled to the hourly rate. Nonetheless, we suggest the proposed variation in the interests of ensuring that the Exposure Draft is simple and easy to understand.

Clause 10.2(e) – Apprentice minimum wages

414. Clause 10.2(e) should be renumbered as 10.2(d)(iii). In the alternate, the clause should not be numbered, but should simply appear as a separate paragraph following clause 10.2(d)(ii). This is because it is only relevant to the

operation of clause 10.2(d). This is consistent with the approach adopted in the current award.

Clause 10.3(b)(ii) – Reduction of payment

415. The comma after “apprenticeship” in the third line should immediately follow it.

14. EXPOSURE DRAFT – SEAGOING INDUSTRY AWARD 2016

416. The submissions that follow relate to the *Exposure Draft – Seagoing Industry Award 2016* (Exposure Draft).

Clause 8.5 – Minimum hours of rest

417. Clause 8.5 refers to subsection 6(1) of the *Navigation Act 2012 (Cth).* Section 6(1) no longer provides a definition of seafarer. The reference to s.6(1) should be replaced with s.14 of the *Navigation Act 2012 (Cth)* which now defines seafarer.

Schedule F – Definitions

418. The Exposure Draft contains a definition of seafarer based on subsection 6(1) of the *Navigation Act 2012 (Cth).* Section 6(1) no longer provides a definition of seafarer. The reference to s.6(1) should be replaced with s.14 of the *Navigation Act 2012 (Cth)* which now defines seafarer.

15. EXPOSURE DRAFT – SUGAR INDUSTRY AWARD 2016

419. The submissions that follow relate to the *Exposure Draft – Sugar Industry Award 2016* (Exposure Draft).

Clauses 10.2(d)(iii) – Rostered day off

420. Clause 10.2(d)(iii) should be amended as follows:

> (iii) An employer may substitute the day an employee is to take off for another day for the following reasons:
>
> - in case of a break down in machinery; or
> - a failure or shortage of electric power; or ~~to meet the requirements of the business (including the necessity to work shifts so as to provide continuity of operations); and~~
> - to meet the requirements of the business (including the necessity to work shifts so as to provide continuity of operations); and
> - for farm field sector employees, to manage wet weather and/or those circumstances for which the field sector employer is not responsible or over which the field sector employer has no control.

421. This amendment is intended to reflect the fact that each of the bullet points represent a different reason for which an employer may substitute the day an employee is to take off. The Exposure Draft conflates the second and third points above.

Clause 10.3(e)(iii) – Notice of rostered days off

422. The amendment proposed above to clause 10.2(d)(iii) should also be made to clause 10.3(e)(iii).

Clause 11.1(a) – Meal breaks

423. The current clause 30.1(a) would be satisfied in circumstances where an employee took a break that was 30 minutes in length. Clause 11.1(a) of the Exposure Draft, by contrast, requires a break for a period of "between 30 and 60 minutes". Read literally, this requires a break of 31 to 59 minutes in length.

424. So as to ensure that the Exposure Draft clause does not result in this inadvertent and somewhat absurd result, clause 11.1(a) should be amended by replacing the words "between 30 and 60 minutes" with "not less than 30 minutes and not more than 60 minutes".

Clauses 11.1(a), 11.1(c), 11.1(d) and 11.1(e) – Meal breaks

425. Clause 30.1(a) of the current award applies only to day workers. That provision has been reproduced in the Exposure Draft at clauses 11.1(a), 11.1(c), 11.1(d) and 11.1(e). The terms of those provisions do not make clear that they apply only to day workers and do not apply to shiftworkers. This amounts to a substantive change to the current award and should be amended. This could be achieved by restructuring the clause such that the aforementioned clauses appear as one subclause 11.1(a), consistent with the current award.

Clause 11.1(c) – Meal breaks

426. The current clause 30.1(a) requires that the meal break must *commence* not later than five hours after commencing work or after the resumption of work from a previous meal break. The clause does not, however, state that the break, in its entirety, must be taken not later than those five hours.

427. Clause 11.1(c) of the Exposure Draft, however, deviates from the current clause by requiring that the entire break be taken within the first five hours. This is a substantive change. For this reason, the current wording should be retained.

Clause 11.5(c) – Meal breaks on overtime

428. We refer to the current clause 30.3. It provides for meal breaks during the performance of overtime in two separate scenarios:

- The first is where an employee works overtime immediately after the cessation of ordinary hours. The clause provides for certain breaks that must be provided in these circumstances.

- The second arises where an employee is "called out to work". That is, where an employee is required to attend work to perform overtime which is not worked directly after the cessation of ordinary hours. It is, as it were, a standalone shift. In such circumstances, an employee is to be provided the meal breaks there prescribed, as well as meals in certain circumstances. The requirement to provide such meals does not arise in the scenario above.

429. Clause 11.5(c) of the Exposure Draft appears as a separate subclause and therefore appears to apply in both sets of circumstances described above. This is clearly a substantive change to the current award and should be rectified. This might be achieved by simply amalgamating clauses 11.5(b) and (c).

Clause 12.2 – Single contract hourly rate

430. A new clause 12.2(d) should be inserted based on the current clause 38.3 of the award which does not appear to be replicated in the Exposure Draft. This would supplement clause 12.2(a) in respect of clarifying the interaction of the 115% minimum hourly rate with any hours worked that may otherwise attract a shift loading. This is clarified with current clause 38.3.

431. A new clause 12.2(d) should read:

> Employees engaged on a single contract hourly rate in accordance with clause 20.1(a) shall be paid the number of hours worked per day at 115% of the minimum hourly rate irrespective of the number of hours worked per day or per pay period or the days of the pay period on which work is performed.

Clauses 12.3(d) – Piecework

432. The current clause 20.2(d) defines the base rate of pay with reference to the "minimum wage identified in clause 38". Clause 38 includes the junior wages in respect of cultivation/cane production (clause 38.2).

433. Clause 12.3(d), however, refers only to clause 12.1. This does not include the junior wages listed at clause 12.4 and amounts to a substantive change to the

current award. The reference to clause 12.1 should be replaced with a reference to clause 12.

Clauses 12.3(e) – Piecework

434. The current clause 20.2(e) defines the base rate of pay with reference to the "minimum wage identified in clause 38". Clause 38 includes the junior wages in respect of cultivation/cane production (clause 38.2).

435. Clause 12.3(e), however, refers only to clause 12.1. This does not include the junior wages listed at clause 12.4 and amounts to a substantive change to the current award. The reference to clause 12.1 should be replaced with a reference to clause 12.

Clause 13.1(a) – Work in water and cleaning drains

436. Clause 21.2 makes clear that the allowance there prescribed is payable only while the employee is performing the relevant work. This prescription does not appear in clause 13.1(a). We are concerned that it may be interpreted such that an employee who, from time to time performs such work, is entitled to the allowance for the performance of all work.

437. We submit that clause 13.1(a) should be amended as follows:

> Employees must be paid an allowance of $0.90 per hour when employed in cleaning drains where the water is over 76.2 cm in depth. <u>This allowance is payable only during the time they are actually engaged on such work.</u>

Clauses 17.3(b) and (c) – Method of work and payment for ordinary hours

438. Clauses 17.3(b) and (c) have not been accommodated in the Schedule D.2, as the rates there prescribed are based on a 38 hour week. A clear notation should be inserted that the Schedule D.2 hourly rates do not necessarily apply, with references to the aforementioned clauses.

Clauses 17.4 – Absences from duty under an averaging system

439. Unlike the current award, clause 17.4 is confined to employees and employers covered by Part 5 of the Exposure Draft (Milling, Distillery, Refinery

and Maintenance). The current award provides for the same provision as a general term applicable to all employees and employers working under an averaging system, not just those in milling, distillery, refinery and maintenance (see clause 27.4). Clause 17.4 should be relocated from Part 5 to Part 7 (Other Wage Related Provisions).

Clause 25.4(a) – Length of rest period

440. The current award at clause 31.4(a) uses the term “reasonably practicable”. The Exposure Draft uses the term “where possible”. We submit what is possible may not be reasonably practical having regard to the circumstances of the workplace. That is, the terms of the Exposure Draft amount to a substantive change to the current award. The words of the current award should therefore be retained.

16. EXPOSURE DRAFT – TELECOMMUNICATIONS SERVICES AWARD 2015

441. The submissions that follow relate to the *Exposure Draft – Telecommunications Services Award 2015* (Exposure Draft).

Clause 6.3(a)(i) – Part-time employees

442. Clause 6.3(a)(i) of the Exposure Draft states that a part-time employee "works up to 38 hours per week". Whilst we acknowledge that this properly reflects the current clause 11.2(a), we submit that the provision should be amended to refer to ordinary hours for the purposes of making clear that a part-time employee is effectively one who works less than full-time ordinary hours.

Clause 6.4(a)(iv) – Part-time employees

443. The words "who do the same kind of work" in clause 6.4(a)(iv) should be deleted. They are apt to confuse and do not serve any clear purpose. Further, they do not appear in the corresponding clause 11.2(c) of the current award. The text is unnecessary and should therefore be removed.

Clause 6.3(b)(i) – Overtime

444. Clause 11.2(a) of the current award states that an employee may be engaged on a part-time basis "involving a regular pattern of hours". The provision does not mandate that those hours be pre-determined or that they fall on set days and times each week. Expressed another way, the clause does not require that the hours of work be fixed. The clause simply states that an employee may be engaged on the basis that they will work a regular pattern of hours which will average less than 38 ordinary hours per week.

445. Clause 11.2(b) of the current award requires that overtime will be payable to a part-time employee for "time worked in excess of the hours fixed in accordance with the pattern of hours applicable to the employee". We consider that this is a reference to the arrangement of the employee's pattern of hours, which need not necessarily be identical each week. Rather, they are

the hours set by the employee's employer which, in accordance with clause 11.2(a), will follow a regular pattern.

446. Clause 6.3(b)(i) redrafts the existing provision such that it now requires the payment of overtime for time worked "in excess of the employee's fixed pattern of hours". This rather suggests that an employee has a fixed, recurring pattern of hours that does not change. We are concerned that, read with clause 6.3(a)(ii), the terms of the Exposure Draft suggest that a part-time employee's ordinary hours must be performed within rigid constraints that do not presently exist in the award.

447. For these reasons, we submit that clause 6.3(b)(i) should be amended as follows:

> (i) Overtime is payable to a part-time employee, in accordance with clause 15 – Overtime for time worked in excess of the ~~employee's fixed pattern of~~ hours fixed in accordance with the pattern of hours applicable to the employee.

Clause 6.3(b)(ii) – Overtime

448. The current award at clause 11.2(b) provides both the entitlement to overtime and an exclusion to it. The first sentence (which provides the entitlement) is clearly subject to the exclusion:

> (b) Overtime will be payable to part-time employees for time worked in excess of the hours fixed in accordance with the pattern of hours applicable to the employee. However, a part-time employee is not entitled to be paid overtime penalties on a day until they have worked at least an equivalent number of hours that day to an equivalent full-time employee in the relevant section of the enterprise, provided that a part-time employee will not work more than 38 hours in any week at ordinary rates.

449. We provide the following as an example of the application of the clause. Consider a part-time employee who is engaged to work a pattern of 24 hours per week, 8 hours per day over 3 days; Monday, Tuesday & Wednesday. In a particular week, the employee worked those hours and performed an additional five hours on a Thursday. For present purposes, the "number of hours [on Thursday] of an equivalent full-time employee in the relevant section of the enterprise" is eight hours. Therefore, the employee would not be entitled to the overtime rate under clause 11.2(b). This is because the

employee would not have worked at least the equivalent amount of hours as a full-time employee in the relevant section of the enterprise on a Thursday and therefore, the employee is excluded from the entitlement provided by clause 11.2(b).

450. The Exposure Draft at clause 6.3(b)(ii) differs from the current clause, as the word "however" has been removed. As a result, it is no longer clear that the rule at clause 6.3(b)(i) is subject to the exclusion clause 6.3(b)(ii). As such, in a same scenario, the exposure draft could be interpreted such that:

- The employee has satisfied clause 6.3(b)(i). That is, that the employee has worked in excess of their fixed pattern of hours.

- Clause 6.3(b)(ii) then provides the opposite outcome, that the employee is not entitled to overtime rates. In this scenario, the drafting of the Exposure Draft does not make clear which of the two provisions are to take precedence.

451. We submit that the redrafted provision may be ambiguous. The drafting of the current clause should therefore be maintained.

452. We note that the current provision was inserted into the relevant predecessor award in the early 2000s by consent between Ai Group and relevant unions. It was also inserted into the modern award by consent between Ai Group and relevant unions, when the modern award was being developed/

Clause 6.3(b)(ii) – Overtime

453. Clause 6.3(b)(ii) of the Exposure Draft states that a part-time employee "will not work more than 38 hours per week". Whilst we acknowledge that this properly reflects the current clause 11.2(b), we submit that the provision should be amended to refer to ordinary hours for the purposes of making clear that a part-time employee is effectively one who works less than full-time ordinary hours.

Clause 6.4(b)(ii) – Casual loading

454. Clause 11.3(b) of the current award requires the payment of "1/38th of the minimum weekly wage prescribed by this award for the work which the employee performs, plus 25%". That is, the loading is to be calculated on the minimum wage prescribed by the award, absent the inclusion of any all purpose allowances.

455. We refer also to our submissions above at section 2.5. Clause 6.4(b)(ii) should be amended by replacing the reference to the "ordinary hourly rate" with "minimum hourly rate".

Clause 6.4(b)(iii) – Casual loading

456. Clause 6.4(b)(iii) should appear as a separate paragraph under clause 6.4(b)(ii) rather than a numbered paragraph. This appears to be a drafting error.

Clause 8.1 – Hours of work

457. At section 2.4 of these submissions, we have set out our concerns in respect of s.147 of the Act. It is our view that in many instances, the ordinary hours of work provisions in an award do not meet the requirements of s.147. The *Telecommunications Services Award 2010* is one such award. Should the Commission determine that it is appropriate to rectify this issue, we propose that clause 8.1 of the Exposure Draft be amended as follows:

> The ordinary hours of work are to be an average of <u>up to</u> 38 per week.

Clause 8.7(d) – Provisions applicable only to afternoon or night shifts

458. The reference to clause 14.1 should be amended to refer to clause 14.2. This appears to be a drafting error.

Clause 9.2 – Breaks

459. The current clause 22.1 would be satisfied in circumstances where an employee took a break that was 30 minutes in length. Clause 9.2 of the

Exposure Draft, by contrast, requires a break for a period of "between 30 and 60 minutes". Read literally, this requires a break of 31 to 59 minutes in length.

460. So as to ensure that the Exposure Draft clause does not result in this inadvertent and somewhat absurd result, clause 9.2 should be amended by replacing the words "between 30 and 60 minutes" with "not less than 30 minutes and not more than 60 minutes".

Clause 9.3 – Breaks

461. Clause 22.3 of the current award applies where an employee is directed by their employer to work in excess of five hours without a meal. It creates an exception to the application of the clause, however, in those circumstances where agreement has been reached that an employee may work in excess of five hours but not more than six hours without a break under clause 22.2(a). Relevantly, clause 22.2(a) allows for an agreement that the employee work between five and six hours; for instance five and a half hours.

462. Clause 9.3 of the Exposure Draft creates an exception only in respect of those employees who have agreed to work more than six hours in accordance with clause 9.4. It therefore does not apply to those employees that have reached agreement to work between five and six hours without a break.

463. This redrafting amounts to a substantive change. The text in parenthesis in clause 9.3 should be replaced with the words "or such period as extended in accordance with clause 9.4". This is consistent with the current clause 22.3.

Clause 9.4 – Flexibility in relation to meal breaks

464. The current award at clause 22.2(a) enables flexibility in relation to the timing of when the meal break is to be taken (22.2(a)(i)) and in relation to the length of the meal break (22.2(a)(ii)).

465. The Exposure Draft has removed the flexibility provided at clause 22.2(a)(ii) of the current award. This is a substantive change. The terms of the current clause should be inserted in the Exposure Draft.

Clause 10.1 – Minimum wage rates

466. Clause 10.1 states that an employer must pay an adult employee the minimum wages that follow, which includes the minimum weekly rate and the minimum hourly rate for each classification. This represents a change from the drafting of the current award.

467. As the preamble to the table in clause 10.1 is not confined to full-time employees, a literal reading of the provision appears to require the payment of the minimum weekly wage to all adult employees, including part-time and casual employees. This is of course not the intended effect of the provision.

468. We propose that the drafting of clause 10.1 be amended to reflect the intent that the minimum weekly rate only applies to full-time employees. It may be sufficient to include the words "(full-time employees)" below "minimum weekly rate" in the second column of 10.1.

469. We acknowledge that clause 6.3(a)(iv) may be argued to provide that part-time employees are in fact only entitled to receive terms and conditions on a pro-rata basis to full-time employees but contend that this far from clear given the clause largely serves the purpose of defining a part-time employee. We similarly acknowledge that clause 6.4(b) could be argued to clarify that a casual employee is entitled to the hourly rate. Nonetheless, we suggest the proposed variation in the interests of ensuring that the Exposure Draft is simple and easy to understand.

Clause 10.4(p)(i) – Apprentices

470. A full-stop should be inserted after "such training".

Clause 12.3(a) – All purpose allowances

471. The Exposure Draft contains a new definition of *'all purposes'*. That definition is not consistent with the terms of the definition determined by the

Commission in a decision handed down earlier in the Review.[45] This should be rectified by inserting the word "annual" before "leave".

Clause 12,4(g)(ii) – Relocation expenses

472. The current clause 17.1(e)(iv) states that where an employee is directed by the employer to another locality for employment, and the conditions there specified are met, "the employee will be provided with suitable accommodation for a period not exceeding 6 weeks".

473. The obligation imposed on the employer in the relevant circumstances under clause 12.4(g)(ii) of the Exposure Draft deviates from this. It requires that the employee "must be reimbursed for the cost of accommodation for up to six weeks". This clause would no longer enable an employer to arrange, pay for and provide the employee with suitable accommodation. Rather, it would operate to entitle an employee to be repaid for expenses arising from the accommodation that may be selected and paid for by the employee.

474. The redrafting of this provision is a substantive change to the current clause. The current text should therefore be retained.

Clause 14.1(a) – Definitions

475. The current award defines an "afternoon shift" at clause 20.7(c)(i) as any shift finishing after 7pm and at or before midnight. The term is defined "subject to clause 20.6(b)", which allows for the spread of hours applying to day workers (7am – 7pm) to be extended by one hour at one or both ends of the spread.

476. The effect of the opening words of the afternoon shift definition is to make clear that where a day worker performs work such that it ends after 7pm in accordance with an arrangement put in place pursuant to clause 20.6(b), that work does not constitute an "afternoon shift" and therefore does not attract the afternoon shift penalty. Rather, it is to be treated as day work.

[45] [2015] FWCFB 4658 at [91].

477. Clause 14.1(a) of the Exposure Draft does not state that the afternoon shift definition is subject to clause 8.6(b). As a result, the interaction between the two clauses is unclear. Work performed in accordance with an arrangement put in place pursuant to clause 8.6(b), whereby the cessation of the employee's ordinary hours occur after 7pm, would meet the definition of an afternoon shift, which is a substantive change from the current award.

478. For these reasons, clause 14.1(a) of the Exposure Draft should be amended by inserting the words "Subject to clause 8.6(b)" at the start of the clause.

Clauses 14.2(a) and 14.2(b) – Shiftwork Penalties

479. Clause 14.2 describes the shiftwork penalty for afternoon shift as "115%". By defining, the penalty as "115%" this could be interpreted that the employer must pay a penalty of 115% in addition to the employee's minimum rate of pay. However, the penalty (that is, the separately identifiable amount payable in addition to the employee's minimum rate) is in fact 15%.

480. For this reason, we submit that the references to "115%" be replaced with "15%".

Clause 15.5(a) – Length of rest period

481. The current award at clause 21.4(a) uses the term "reasonably practicable". The Exposure Draft uses the term "where possible". We submit what is possible may not be reasonably practical having regard to the circumstances of the workplace. That is, the terms of the Exposure Draft amount to a substantive change to the current award. The words of the current award should therefore be retained.

Clause 15.5(b) – Where the employee does not get a 10 hour rest

482. Clause 21.4(b) of the current award exempts both casual and part-time employees from the clause. The Exposure Draft only exempts casual employees. This would appear to be an error; we submit that the exemption

for part-time employees be retained. To do otherwise would amount to a significant substantive change to the current terms of the award.

Clause 15.7(d) – Call back

483. The reference to clause 15.4 should be replaced with a reference to clause 15.5. This is consistent with the current clause 21.6(d).

Clause 15.8(d) – Remote service/support – Technical stream

484. The reference to clause 15.4 should be replaced with a reference to clause 15.5. This is consistent with the current clause 21.7(c).

Schedule B – Summary of hourly rates of pay

485. Clause B.1.2 states that the rates calculated in the schedule are based on the minimum hourly rate. Despite this, the tables indicate that the rates there prescribed are a percentage of the ordinary hourly rate (see for example second row of B.2.1: "% of ordinary hourly rate").

486. This reference is confusing and misleading as it suggests that the rates have been calculated based on the ordinary hourly rate, which is defined to include all purpose allowances. All such references should be amended.

Schedule B – Summary of hourly rates of pay – shiftworkers

487. Unlike some other modern awards, this award does not create a distinction between 'day worker' and 'shift worker'. Rather, different entitlements are provided if and when an employee works an afternoon or night shift. That is, the application of a particular penalty is contingent upon when the work is performed.

488. The references to "shiftworkers" in the headings above each of the tables in Schedule B is therefore confusing and potentially misleading.

489. For example, the table contained at Schedule B.2.2 suggests that a 'shiftworker' shall receive 200% for work on a public holiday, irrespective of when they work.

490. The 200% rate for a public holiday, however, is only payable when a person works afternoon or night shift on a public holiday. If the same person performs 'day work', the relevant rate is 250%.

491. The table at B.2.2 suggests that the 200% applies only by reason of the type of worker (that being a 'shiftworker') irrespective of when they work on the public holiday. This is incorrect and inconsistent with the clause 19.3(a).

Schedule B.2.4 – Full-time and part-time employees – shiftworkers – overtime rates

492. We refer to the submissions we have made earlier regarding the entitlement of 'shiftworkers' to public holiday rates, which are also relevant to B.2.4.

Schedule B.2.6 – Casual employees – shiftworkers – ordinary and penalty rates

493. We refer to the submissions we have made earlier regarding the entitlement of 'shiftworkers' to public holiday rates, which are also relevant to B.2.6.

17. EXPOSURE DRAFT – WINE INDUSTRY AWARD 2016

494. The submissions that follow relate to the *Exposure Draft – Wine Industry Award 2016* (Exposure Draft).

Clause 6.4(a)(i) – Part-time employees

495. Clause 6.4(a)(i) of the Exposure Draft states that a part-time employee "works up to 38 hours per week". Whilst we acknowledge that this properly reflects the current clause 12.1(a), we submit that the provision should be amended to refer to ordinary hours for the purposes of making clear that a part-time employee is effectively one who works less than full-time ordinary hours.

Clause 6.6 – Casual conversion to full-time or part-time employment

496. The following 15 paragraphs relate to clause 6.6 of the Exposure Draft. Whilst we acknowledge that this clause may be affected by the casual employment common issues proceedings, we have approached this exercise on the basis that the provision contained in the Exposure Draft should not deviate from that which is presently found in the award. These submissions are relevant in the event that the ACTU's claim to replace the current casual conversion clause with its proposal is unsuccessful.

Clause 6.6(a)(ii) – Eligible casual employee

497. The current clause 13.5(a) provides that the entitlement to convert arises in respect of a casual employee who has been engaged "by a particular employer" for a sequence of periods of employment under this award during a period of 12 months. The proposed clause 6.6(a)(ii) deviates from this as it does not require that the sequence of periods of employment be by one particular employer. Therefore, an entitlement to convert would arise once the relevant time period has lapsed even if the employee had been employed by multiple employers.

498. For this reason, the words "by a particular employer" should be inserted after "who is employed".

Clause 6.6(a)(ii) – Eligible casual employee

499. The current clause 13.5(a) provides that the entitlement to convert arises in respect of a casual employee who has been engaged by a particular employer for a sequence of periods of employment "under this award" during a period of 12 months. The proposed clause 6.6(a)(ii) deviates from this as it does not require that the sequence of periods of employment be by one particular employer under the *Wine Industry Award 2010*. Therefore, an entitlement to convert would arise once the relevant time period has lapsed even if the employee had been employed during that period under this and other modern awards.

500. For this reason, the words "under this award" should be inserted at the end of clause 6.6(a)(ii).

Clause 6.6(a)(ii) – Eligible casual employee

501. The current clause 13.5(a) of the current award entitles a casual employee to convert where that employee has been "engaged … for a sequence of periods of employment … during a period of 12 months". That is, over a period of 12 months, the casual employee must be engaged for a sequence of periods.

502. Clause 6.6(a)(ii) of the Exposure Draft instead states that the casual employee must be "employed for a sequence of periods of 12 months". This would require that the sequence of periods, when added together, equate to 12 months. This is a substantial deviation from the current clause.

503. For this reason, and in light of the two issues we have raised above, clause 6.6(a)(ii) should be replaced with the following:

> (ii) who is engaged by a particular employer for a sequence of periods of employment under this award during a period of 12 months; and

Clause 6.6(a)(iii) – Eligible casual employee

504. The current clause 13.5(a) requires that the employment will "continue beyond the conversion process". Clause 6.6(a)(iii) deviates from this by requiring that

the employment "continue beyond the period of 12 months". The current wording should be retained.

Clause 6.6 – Eligible casual employee

505. It is unclear why the paragraph following clause 6.6(a)(iii) refers to "six months". Further, it does not make clear that the right to elect arises after the passage of 12 months as described in clause 6.6(a)(ii). That is, it does not arise after the mere passage of 12 months where the conditions there stipulated are not met.

506. Consistent with the preceding subclauses and clause 13.5(a), that paragraph should instead read as follows:

> An eligible casual employee has the right, after the 12 month period described in clause 6.6(a)(ii), to elect to have their contract …

Clause 6.6(b)(i) – Notice and election of casual conversion

507. Consistent with the current clause 13.5(b), clause 6.6(b)(i) should be amended to refer to "the twelve month period".

Clause 6.6(c)(iv) – Full-time or part-time conversion

508. Clause 13.5(f) of the current award applies where a casual employee has elected to have their contract of employment converted. In such circumstances, the employer and employee must "subject to clause 13.5(d)" discuss and agree on certain matters there specified.

509. Clause 13.5(d) deals with two matters:

- that an employee may elect to convert by giving written notice; and
- an employer's right to refuse the election.

510. Logically, the cross-reference to clause 13.5(d) in clause 13.5(f) is to the second element of the provision. That is, the requirement that the employer and employee discuss and agree on certain matters once an employee has elected to convert is subject to the employer having refused that election.

511. On this basis, the second cross reference in clause 6.6(c)(iv) of the Exposure Draft should be to clause 6.6(d)(i) rather than to clause 6.6(b)(iii).

Clauses 8.1 – 8.4 – Ordinary hours of work and rostering

512. We understand that consistent with the corresponding current award provisions, clauses 8.1 - 8.4 of the Exposure Draft are intended to apply to day workers and shiftworkers. We are concerned however, that this is not clear due to the restructuring of the award, as a result of which shiftwork provisions appear separately at clause 18.2.

513. We suggest that a new subheading be inserted above clauses 8.1 – 8.4 which refers to day workers and shiftworkers. Alternatively, the shiftwork provisions should be moved to clause 8, such that they reflect the current arrangement under clause 28.

Clause 8.2 – Ordinary hours of work and rostering

514. At section 2.4 of these submissions, we have set out our concerns in respect of s.147 of the Act. It is our view that in many instances, the ordinary hours of work provisions in an award do not meet the requirements of s.147. The *Wine Industry Award 2010* is one such award. Should the Commission determine that it is appropriate to rectify this issue, we propose that clause 8.2 of the Exposure Draft be amended as follows:

… an average of <u>up to</u> 38 per week.

Clause 8.5(a)(i) – Ordinary hours of work – day workers

515. The current clause 28.2(c) requires that ordinary hours "are to be worked" as there prescribed. Clause 8.5(a)(i) of the Exposure Draft states that ordinary hours "may be worked" as there prescribed. Effectively the Exposure Draft has altered what is presently a mandatory requirement to a provision that is permissive in nature. We cannot identify the rationale underpinning this change and consider that it is confusing, particularly given the interaction

between ordinary hours of work provisions and the requirement to pay overtime rates for work performed outside them.

516. The word “may” should be substituted with “are to”.

Clause 8.5(a)(ii) – Ordinary hours of work – day workers

517. We make the same observations regarding clause 8.5(a)(ii) as we have above regarding clause 8.5(a)(i). Again the word “may” should be substituted with “are to”.

Clause 8.5(b)(i) – Vineyard employees during the vintage

518. Clause 8.5(b)(i) defines the term “vintage” “for the purposes of this clause”. Having regard to the current clause 28.2(d)(ii), it is clear that that definition applies to the term as it appears in clause 28.2(d)(i) and therefore, the definition should apply to “vintage” as it appears in clause 8.5(a)(ii) of the Exposure Draft.

519. We are concerned that the opening words of clause 8.5(b)(i) of the Exposure Draft (“for the purposes of this clause”) may be read as referring only to clause 8.5(b). For the purposes of ensuring that the definition is read to apply to the preceding clause, we submit that “this clause” should be substituted with “clause 8.5”.

Clause 8.6 – Methods of arranging ordinary working hours

520. We understand that consistent with the corresponding current award provision, clause 8.6 of the Exposure Draft is intended to apply to day workers and shiftworkers. We are concerned however, that this is not clear due to the restructuring of the award as a result of which shiftwork provisions appear separately at clause 18.2.

521. We suggest that the subheading be amended to refer to day workers and shiftworkers. Alternatively, the shiftwork provisions should be moved to clause 8, such that they reflect the current arrangement under clause 28.

Clause 8.7 – Daylight saving

522. We understand that consistent with the corresponding current award provision, clause 8.7 of the Exposure Draft is intended to apply to day workers and shiftworkers. We are concerned however, that this is not clear due to the restructuring of the award as a result of which shiftwork provisions appear separately at clause 18.2.

523. We suggest that the subheading be amended to refer to day workers and shiftworkers. Alternatively, the shiftwork provisions should be moved to clause 8, such that they reflect the current arrangement under clause 28.

Clause 8.8 – Make-up time

524. We understand that consistent with the corresponding current award provision, clause 8.8 of the Exposure Draft is intended to apply to day workers and shiftworkers. We are concerned however, that this is not clear due to the restructuring of the award as a result of which shiftwork provisions appear separately at clause 18.2.

525. We suggest that the subheading be amended to refer to day workers and shiftworkers. Alternatively, the shiftwork provisions should be moved to clause 8, such that they reflect the current arrangement under clause 28.

Clause 9.2(a) – Meal break – shiftworkers

526. A full-stop should be inserted at the conclusion of clause 9.2(a).

Clause 10.1 – Minimum wages

527. Clause 10.1 states that an employer must pay an adult employee the minimum wages that follow, which includes the minimum weekly wage and the minimum hourly wage for each classification. This represents a change from the drafting of the current award.

528. As the preamble to the table in clause 10.1 is not confined to full-time employees, a literal reading of the provision appears to require the payment of

the minimum weekly wage to all adult employees, including part-time and casual employees. This is of course not the intended effect of the provision.

529. We propose that the drafting of clause 10.1 be amended to reflect the intent that the minimum weekly rate only applies to full-time employees. It may be sufficient to include the words "(full-time employees)" below "minimum weekly rate" in the second column of 10.1.

530. We acknowledge that clause 6.4(a)(ii) may be argued to provide that part-time employees are in fact only entitled to receive terms and conditions on a pro-rata basis to full-time employees but contend that this far from clear given the clause largely serves the purpose of defining a part-time employee. We similarly acknowledge that clause 6.5(b) could be argued to clarify that a casual employee is entitled to the hourly rate. Nonetheless, we suggest the proposed variation in the interests of ensuring that the Exposure Draft is simple and easy to understand.

Clause 11.3(j)(iii) – Attending training

531. The current clause 19.8 provides that time spent in attending training "specified in, or associated with, the training contract" is to be regarded as time worked. These words of limitation do not appear in the corresponding clause 11.3(j)(iii) of the Exposure Draft. That is, clause 11.3(j)(iii) as presently drafted would apply to time spend attending any training, rather than it being limited to training that is specified in or associated with the training contract.

532. Accordingly, clause 11.3(j)(iii) should be amended as follows:

> (iii) Time spent attending training <u>specified in, or associated with, the training contract,</u> will be counted as time worked for the purposes of calculating the apprentice's wages and determining their employment conditions.

Clause 12.4 – Piecework rates

533. The current clause 23.4(b) states that clause 28 of the award does not apply to an employee on a piecework rate. Clause 28 includes penalty rates that are payable to day workers on weekends and public holidays at clause 28.2(g).

534. Clause 28.2(g) is reproduced at clause 18.1 of the Exposure Draft, however clause 18.1 has not been identified at clause 12.4. The result is that under the Exposure Draft a pieceworker is entitled to the relevant penalty rates. This is clearly a substantive change from the current award.

535. A reference to clause 18.1 should be included in clause 12.4.

Clause 12.4(d) – Piecework rates

536. The current clause 23.4(c) states that clause 30 of the award does not apply to an employee on a piecework rate. Clause 30 deals with the rates payable for overtime, the rest period after overtime, call back and time off instead of payment for overtime.

537. Despite this, the reference at clause 12.4(d) of the Exposure Draft has been confined to clause 19.2, which sets out the overtime rates. The remaining provisions identified above are not listed at clause 12.4(d). The effect is that they would apply to an employee on a piecework rate. This is clearly a substantive change from the current award.

538. The reference to clause 19.1 should be replaced with a reference to clause 19.

Clause 12.6(d) – Piecework rates

539. The current clause 23.6(d) states that clause 28 of the award does not apply to an employee on a piecework rate. Clause 28 includes penalty rates that are payable to day workers on weekends and public holidays at clause 28.2(g).

540. Clause 28.2(g) is reproduced at clause 18.1 of the Exposure Draft, however clause 18.1 has not been identified at clause 12.6(d). This is clearly a substantive change from the current award.

541. A reference to clause 18.1 should be included in clause 12.6(d).

Clause 12.6(d)(iv) – Piecework rates

542. The current clause 23.6(d)(iii) states that clause 30 of the award does not apply to an employee on a piecework rate. Clause 30 deals with the rates payable for overtime, the rest period after overtime, call back and time off instead of payment for overtime.

543. Despite this, the reference at clause 12.6(d)(iv) has been confined to clause 19.2, which sets out the overtime rates. The remaining provisions identified above are not listed at clause 12.6(d)(iv). This is clearly a substantive change from the current award.

544. The reference to clause 19.1 should be replaced with a reference to clause 19.

Clause 12.12 – Piecework rates

545. Consistent with the Commission's July 2015 decision at paragraphs [95] – [96], clause 12.12 of the Exposure Draft should be amended by inserting the words "of the minimum hourly rate" after "20%".

Clause 16.3(a)(ii) – Travel and expenses

546. Clause 24.1(b) of the current award applies where an employee is "compelled by their duties" to spend the night away from their home or the property on which they are employed.

547. Clause 16.3(a)(ii) of the Exposure Draft applies where an employee is "required" to spend the night away. The provision does not explain the basis upon which or the circumstances in which the employee is so required. It is less clear than the current provision, which expressly states that the clause applies where an employee is required to spend the night away *by virtue of their duties*. Further, the application of the provision in the Exposure Draft is potentially broader than the current clause.

548. For this reason, the current wording should be retained.

Clause 18.1(c) – Day workers

549. The current clause 28.2(g)(ii) requires the payment of the prescribed penalty where a day worker is "required to work" on a public holiday. This specification is absent from clause 18.1(c) of the Exposure Draft. It would therefore apply in circumstances where an employee is not *required* to work but chooses to do so voluntarily. This is a substantive change.

550. Clause 18.1(c) should be amended to make clear that it applies only where an employee is required to work on a public holiday.

Clause 19.3(a) – Length of the rest period

551. Clause 19.3(a) creates a new positive obligation on employers to arrange overtime where possible such that employees have at least 10 consecutive hours off duty between the work of successive days. Such a provision does not appear in the award presently. This is a substantive change. The clause should be deleted.

Clause 19.3(b)(ii) – Where the employee does not get a 10 hour rest

552. The word "during" in the first dot point should be deleted. This appears to be a drafting error.

Clause 19.3(b)(ii) – Where the employee does not get a 10 hour rest

553. The word "time" in the third dot point should be deleted. This appears to be a drafting error.

Clause 20.5 – Excessive leave

554. Clause 31.5 of the current award states that the clause operates "notwithstanding s.88 of the Act". Section 88 states that paid annual leave may be taken for a period agreed between the employer and employee; and that a request to take leave must not be unreasonably refused by the employer. The opening words of the provision make the relationship between it and the NES clear; that despite the requirement that annual leave be taken

by agreement, the employer has the ability to require an employee to take annual leave in the circumstances prescribed by the clause.

555. As a result of the absence of a reference to s.88 of the Act from clause 20.5 of the Exposure Draft, the relationship between it and the NES is no longer apparent from the text of the provision. For clarity, it should be reinserted.

Clause 20.7 – Annual close down

556. For the reasons set out above, the opening words of clause 31.7 of the current award should be inserted at the commencement of clause 20.7 of the Exposure Draft.

Clause 20.9 – Transfer of business

557. Clause 20.9 of the Exposure Draft previously appeared as clause 30.9 of the current award. It was deleted, as a product of the NES inconsistencies proceedings earlier in the Review.[46] Therefore, it should be removed from the Exposure Draft.

Schedule B – Summary of hourly rates of pay

558. The Commission has determined that a note will be inserted 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.[47] This note has not been inserted in Schedule B of the Exposure Draft.

Accident Pay

559. The current clause 24.8 does not appear in the Exposure Draft.

[46] PR568686.

[47] [2015] FWCFB 4658 at [63].