Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Reply Submission

Group 4A – 4C Exposure Drafts

22 July 2016

4 YEARLY REVIEW OF MODERN AWARDS

EXPOSURE DRAFTS: GROUP 4A – 4C AWARDS

1. INTRODUCTION

1. On 15 July 2016, the Fair Work Commission (Commission) published amended directions in respect of all awards allocated to Group 4 of the award stage of the 4 yearly review of modern awards (Review). Specifically, parties were directed to file reply submissions on technical and drafting issues arising from certain group 4A – 4C exposure drafts by 21 July 2016.

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

   i. *Exposure Draft – Aged Care Award 2016;*

   ii. *Exposure Draft – Air Pilots Award 2016;*

   iii. *Exposure Draft – Aircraft Cabin Crew Award 2016;*

   iv. *Exposure Draft – Airline Operations – Ground Staff Award 2016;*

   v. *Exposure Draft – Children's Services Award 2016;*

   vi. *Exposure Draft – Electrical, Electronic and Communications Contracting Award 2016;* and

   vii. *Exposure Draft – Social, Community, Home Care and Disability Services Award 2010*.

2. EXPOSURE DRAFT – AGED CARE AWARD 2016

3. The submissions that follow relate to the *Exposure Draft – Aged Care Award 2016* (Exposure Draft). They are in response to submissions filed by:

    - the AWU, dated 6 July 2016;
    - ABI and the NSW Business Chamber, dated 1 July 2016;
    - the Aged Care Employers, dated 30 June 2016;
    - United Voice, dated 30 June 2016; and
    - the HSU, dated 30 June 2016.

Clause 1.3 – Title and commencement

4. The Aged Care Employers note the retention of clause 1.3 in the Exposure Draft. We understand that this issue was the subject of controversy during earlier stages of the Review and has been determined by the Commission.[1]

Clause 2 – Definitions – aged care industry

5. We do not oppose the HSU's submission that the definition of "aged care industry" be deleted from clause 2, on the basis that the term is only used in clause 4, where the definition appears for a second time.

Clause 2 – Definitions – all purposes

6. The Aged Care Employers and United Voice submit that the definition of "all purposes" be removed from clause 2 given that it also appears at clause 18. In our view that definition should be retained in clause 2 as the term is used elsewhere in the award, including the definition of "ordinary hourly rate". To this extent, we agree with the submissions of the HSU.

[1] [2014] FWCFB 9412 at [16] and [2015] FWCFB 6656 at [81].

7. We also note that its retention in clause 2 is consistent with the Commission's approach in other exposure drafts; we have not identified any difficulty arising from this.

Clause 2 – Definitions – casual ordinary hourly rate

8. The AWU's submissions appear to suggest that the definition of "casual ordinary hourly rate" should be deleted from clause 2. To that extent, we concur with its submissions, and those of the HSU, United Voice and the Aged Care Employers. We refer to paragraph 75 of our submissions dated 30 June 2016 in this regard.

Clause 2 – Definitions – minimum hourly rate

9. The AWU submits that the term "minimum hourly rate" is "missing" from clause 2 and should be inserted. Contrary to the AWU's position, we do not consider that such a definition is necessary. The minimum hourly rate is simply the rate so prescribed in clause 7 of the Exposure Draft.

10. The AWU also submits that the definition "would benefit in this Award by referencing the Classification, Level, and Grade of employees". The precise terms sought by the AWU are not clear to us.

Clause 2 – Definitions – minimum hourly rate

11. As set out above, we do not agree that a definition of "minimum hourly rate", as proposed by United Voice is necessary.

Clause 2 – Definitions – ordinary hourly rate

12. The AWU submits that the term "ordinary hourly rate" is "missing" from clause 2 and should be inserted. Contrary to the AWU's observation, the definition in fact appears on page 4 of the Exposure Draft.

13. The AWU also submits that the definition "would benefit in this Award by referencing the Classification, Level, and Grade of employees". The precise variation sought by the AWU to the definition determined by the Commission

earlier in this Review is not clear to us. We note however, for present purposes, that we do not consider that any additional cross references in the definition of "ordinary hourly rate" are necessary.

Clause 2 – Definitions – ordinary hourly rate

14. United Voice submits that the definition of "ordinary hourly rate" should be amended such that it means "the minimum rate of pay for the employee's classification, grade and level specified in clause 17 …".

15. We do not understand the rationale underpinning the change sought. The definition determined by the Commission, as reflected in the Exposure Draft, makes reference to the "hourly rate for the employee's classification specified in clause 17". The additional references proposed to "grade" and "level" are entirely unnecessary and need not be inserted.

16. We make the same observations regarding the HSU's proposal to insert the words "and level" in the definition of "ordinary hourly rate".

Clause 2 – Definitions – ordinary hourly rate

17. Whilst we do not oppose the amendment proposed by the Aged Care Employers, we note that the definition of "ordinary hourly rate" is consistent with that earlier determined by the Commission and do not consider that the variation sought is necessary.

Clause 3.3 – The National Employment Standards and this award

18. United Voice and the HSU submit that the words "whichever makes them more accessible" should be re-inserted in clause 3.3. This is a matter that has been determined by the Commission during the earlier stages of the Review.[2] Clause 3.3 is consistent with that decision and accordingly, the change sought should not be made.

[2] [2014] FWCFB 9412 at [29].

Clause 7.2 – Facilitative provisions for flexible working practices

19. The HSU submits that clause 7.2 should be amended to include references to the following additional clauses.

20. We do not agree that clause 14.3 of the Exposure Draft is a facilitative provision of the sort contemplated by clause 7.1. It does not provide that the standard approach may be departed from by agreement. Rather, it simply states that ADO's are to be taken by mutual agreement between the employer and employee. A reference to clause 14.3 should not be included in clause 7.2.

21. The same can be said of clause 14.6. Whilst clause 14.6(b) permits the working of a broken shift by mutual agreement, it is not a mechanism permitting a departure from a standard approach in an award clause. Therefore, a reference to clause 14.6 should not be included in clause 7.2.

22. Clause 16.1 is not a facilitative provision is the sense contemplated by clause 7.1. It provides for agreement as to the timing of a meal break but does not enable an employer and employee to depart from a standard approach in an award clause.

23. We do not oppose the insertion of a reference to clause 16.2(c) of the Exposure Draft on the basis that it may be argued that it permits an employer and individual employee to agree to depart from clauses 16.2(a) and (b), which otherwise appear to contemplate the taking of separate ten minute breaks.

24. We do not oppose the insertion of a reference to clause 22.3 on the basis that it permits an employer and employee to depart from the relevant award provisions that would otherwise require the payment of overtime rates.

Clause 11.1 – Casual employment

25. The AWU is seeking a substantive change to the definition of a "casual employee" at clause 11.1 of the Exposure Draft. It proposes that the words "on an hourly basis" be removed, because they are allegedly inconsistent with

clause 14.5(b). The AWU considers that that provision entitles casual employees "to at least the minimum engagement period of 2 hours".

26. The union's submission is ill-conceived. Firstly, clause 14.5(b) does not provide for a minimum engagement of two hours. Rather, it requires that each time a casual employee is engaged to work, they must be *paid* an amount equivalent to at least two hours of work. The provision does not impose a requirement for a minimum engagement period.

27. Secondly, no inconsistency arises between clause 11.1 and clause 14.5(b). One defines a casual employee by reference to the manner in which an employee is engaged; that being by the hour. The latter simply entitles a casual employee to a minimum payment for each engagement. Thus, if a casual employee is engaged to perform one hour of work, clause 14.5(b) requires that the employee must, nonetheless be paid an amount commensurate to two hours of work.

28. The AWU has failed to establish any proper basis for an amendment to clause 11.1. Accordingly, its proposal should be disregarded.

Clause 11.1 – Casual employment

29. The Exposure Draft queries whether a definition of "fixed term employee" should be inserted. We agree with the submissions of ABI, the NSW Business Chamber and the Aged Care Employers that a definition is not necessary.

30. United Voice has proposed a definition for "fixed term/specified task employee". We note at the outset that the term "specified task employee" is not in fact used in the Exposure Draft. The basis for its proposed inclusion is therefore unclear.

31. In any event, the insertion of the proposed definition is opposed by Ai Group. It introduces requirements pertaining to the engagement of an employee for a fixed term that are not otherwise contained in the award. If the definition sought were introduced, it would have the effect of limiting the circumstances in which a fixed term employee might otherwise be excluded from the definition of casual employee under the award. That is to say, if an employee were engaged on a

fixed term basis, but the specific requirements relating to written advice were not satisfied, the employee would not be excluded from the definition of a casual employee for the purposes of the award. This would be a substantive change to the current clause.

32. Further, it is not clear on the material filed whether the insertion of the definition sought would also have the effect of introducing a new "type" of employment for the purposes of the award. Nor is it clear whether this is the union's intention.

33. As we have earlier stated, we see no need to introduce a definition of "fixed term employee" in the award. Should United Voice seek to pursue the insertion of this definition, it should be put to the task of establishing that a definition in the specific terms it has proposed is necessary, in the sense contemplated by s.138 of the Act.

Clause 11.1 – Casual employment

34. The AWU and HSU submit that the reference to "fixed term employee" should be removed. The AWU states that to "create" such a category "would be a substantive change".

35. Contrary to the AWU's submissions, the Exposure Draft does not *create* a new category of employment. Clause 11.1 of the Exposure Draft, which is in relevantly similar terms to the current clause 10.4(a), simply defines casual employees as those who, amongst other things, are not fixed term employees. That is, the definition of casual employees excludes employees engaged on a fixed term basis. The reference to fixed term employment does not have the effect of *creating* a new category of employment under the award. Its deletion, however, would amount to a substantive change.

36. Accordingly, the AWU and HSU submissions should not be accepted.

Clause 11.2 – Casual employment

37. The AWU submits (at paragraph 4 of its submissions) that clause 11.2 should state that the casual loading is payable for all purposes. Ai Group strongly opposes this proposal.

38. The current clause 10.4(b), which corresponds with clause 11.2 of the Exposure Draft, does not require the payment of the casual loading "for all purposes". That is, under the terms of the present award, the casual loading would not be subject to the definition of "all purpose" now found in the Exposure Draft. Absent a proper merit basis for this substantive change, the variation sought should not be granted.

Clause 11.3 – Casual employment

39. Whilst we do not consider the variation proposed by ABI and the NSW Business Chamber necessary, we do not oppose it.

Clause 12.2 – Classifications

40. We do not agree with the HSU's proposed amendment to clause 12.2, as we are concerned that the use of the words "during their employment" in the proposed subclause (b) are potentially confusing in the context of, for instance, casual employees. We would not oppose the HSU's proposal if the proposed subclause (b) were replaced with: "any subsequent changes to their classification".

Clauses 10, 11 and 13 – Ordinary hours of part-time and casual employees

41. The AWU has raised a concern regarding the manner in which the Exposure Draft specifies or provides for the determination of the ordinary hours of work of part-time and casual employees. In doing so, it makes reference to s.147 of the Act. We note however that the AWU has not proposed a specific form of words. This poses some difficulty for responding parties. Furthermore, it does not appear that the union's concern arises specifically from the redrafting process.

42. Should the union seek to advance a proposal to amend the current award, Ai Group may seek an opportunity to respond at such time.

43. For present purposes we note that we do not agree with the AWU's general proposition. The ordinary hours of work of a part-time employee can be determined by reference to 22.2(c), which states that all time worked in excess of a part-time employee's rostered hours (unless agreement has been reached under clause 10.3) will be overtime. Therefore, the rostered hours of a part-time employee constitute their ordinary hours. The ordinary hours of work of a casual employee can be determined by reference to clause 13 and clause 21. No deficiency in respect of s.147 of the Act appears to arise.

Clause 14.4(b) – Rosters

44. Clause 14.4(a) of the Exposure Draft imposes an obligation on an employer to display a roster of each employee's ordinary hours at least two weeks before the first working day of the roster period. That provision operates subject to clause 14.4(b), which excludes certain employees from this requirement; those being casual employees and "relieving staff". Clause 14.4(b) of the Exposure Draft is in the same terms as the current clause 22.6(b).

45. United Voice submits that the reference to "relieving staff" should be deleted as "there is no classification or allowance in this Award for a permanent employee with no roster as exists in other modern awards". In the alternate it proposes a new definition of "relieving staff", the basis for which has not been explained. Both proposals put by United Voice would amount to a substantive change, for which there is no proper basis.

46. It is not necessary that the award contain a classification or allowance relating to relief staff in order for clause 14.4(b) to have effect. Rather, we understand the reference to "relieving staff" as encapsulating those employees that are providing relief to another employee (for example, substituting another employee taking personal/carer's leave). Such a situation could arise, for instance, in respect of a part-time employee who, in addition to the hours agreed pursuant to clause 10.2, may be required to "relieve" another employee.

Under clause 14.4(b), an employer in such circumstances is relieved of the requirement contained in clause 14.4(a). The deletion of the reference to "relieving staff" would thereafter extend the requirement under clause 14.4(a) to employers in respect of such employees. This is clearly a substantive change.

47. The definition proposed of "relieving staff" could have the effect of limiting the circumstances in which clause 14.4(b) applies. For instance, if an employee were required to "relieve" another employee who is taking annual leave that is not due to an illness or an emergency, clause 14.4(b) would no longer exclude that employee.

48. In the absence of any submissions and/or evidence as to why the changes sought are necessary to meet the modern awards objective, United Voice's proposals should be dismissed.

Clause 14.4(c) – Rosters

49. We support the HSU's submission that the reference to clause 30 be removed.

Clause 15.5(a) – Sleepovers

50. We agree that the amendment proposed by the Aged Care Employers and the HSU should be made to clause 15.1(a). We refer to paragraphs 83 – 85 of our submission dated 30 June 2016 in this regard.

Clause 15.7(a)(i) – Break between shifts

51. United Voice and the HSU have raised concerns in respect of clause 15.7(a)(i) of the Exposure Draft. If the unions seek that the issue identified be resolved by substituting the word "sleepover" with "completion of such work", we would not oppose this on the basis that it reflects the current clause 22.9(j).

Clause 17.1 – Minimum wages – Aged Care Employee

52. The HSU seeks the insertion of the following wording above the table at clause 17.1:

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

53. As the HSU highlights, text similar to that which it proposes appears in other exposure drafts. We have raised the following concerns in respect of many such exposure drafts.

54. As the preamble proposed is not confined to full-time employees, a literal reading of it appears to require the payment of the minimum weekly rate to all adult employees, including part-time and casual employees. We proceed on the basis that this is not the intended effect of the provision.

55. If the HSU's proposal is to be adopted, we propose that clause 17.1 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 heading of the second column of the table. This amendment has been made in various group 3 exposure drafts in light of the issue we have identified.

56. We acknowledge that clause 10.4 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 to full-time employees. We similarly acknowledge that clause 11.2 could be argued to clarify that a casual employee is entitled to the hourly rate. Nonetheless, we suggest that, if the HSU's proposal is accepted, the change we have proposed also be made in the interests of ensuring that the Exposure Draft is simple and easy to understand.

Clause 17.5(f)(ii) – Attendance at block release training

57. We agree with the HSU's submission and refer to paragraph 99 of our 30 June 2016 submission in this regard.

Clause 17.6(a) – Payment of wages

58. We do not oppose the submission of United Voice and the HSU that the words "no later than payday" be inserted in clause 17.6(a), such that the provision is consistent with the current clause 17.2.

Clause 17.7 – Higher duties

59. We agree with the HSU's submission that the current clause 27.1 is simpler and easier to understand than clause 17.7 of the Exposure Draft. We do not, however, agree with the amended clause proposed by the HSU for the following reasons:

- The HSU proposal characterises the payment due as an "allowance", which is not the case under the current award. This may have unintended consequences. For instance, the provision could thereafter be the subject of an IFA pursuant to clause 6.1(d) of the Exposure Draft.

- The preamble in the proposed subclause (b) is somewhat confusing. It is less clear than the terms of the current award and the Exposure Draft.

60. Ai Group would not, however, oppose the substitution of clause 17.7 of the Exposure Draft with the current clause 27.1. We consider that this would appropriately address the HSU's concerns.

Clause 18.2 – Wage related allowances

61. Whilst we do not oppose the amendment proposed by the Aged Care Employers, we note that the format of clause 18 is consistent with that adopted in other exposure drafts and do not consider that the variation sought is necessary.

Clause 18.3(a)(i) – Laundry allowance

62. We support the amendment proposed by United Voice to the first bullet point under clause 18.3(a)(i). We refer to paragraphs 112 – 114 of our submissions of 30 June 2016 in this regard.

Clause 18.3(d)(i) – Travelling, transport and fares

63. Whilst we do not consider that the variation sought by the HSU is necessary, we do not oppose it on the basis that it is consistent with the current clause 15.7(a).

Clause 18.3(d)(iii) – Travelling, transport and fares

64. The HSU has raised a concern in respect of clause 18.3(d)(iii) of the Exposure Draft. If the union seeks that the issue identified be resolved by substituting the provision with the current clause 15.7(c), we would not oppose this.

Clause 21.1 – Shiftwork

65. The HSU submits that the definition of "shiftwork" should be moved to clause 13.2. We do not agree. Its placement with provisions that operate in relation to shiftwork is both logical and convenient.

Clause 21.2 – Shiftwork rates

66. The Aged Care Employers submit that clause 21.2 should be replaced with the current clause 26.1. We do not oppose this proposal. This would also address the concerns raised by United Voice and the HSU.

Clause 22.1(b) – Full-time employees

67. We agree with the HSU's submission.

Clause 23.2(a)(i) – Additional leave for certain shiftworkers

68. We do not oppose the submission of the Aged Care Employers, the HSU and United Voice that the word "and" be inserted at the end of clause 23.2(a)(i) such that the provision reflects the current clause 28.2(a)(i).

Clause 23.2(b) – Additional leave for certain shiftworkers

69. We do not oppose the submission of the HSU and the Aged Care Employers that "and/" be inserted before "or" in clause 23.2(b) such that it reflects the current clause 28.2(b).

Clause 23.2(a)(ii) – Additional leave for certain shiftworkers

70. Having regard to the various proposals put by interested parties in response to the question posed at clause 23.2(a)(ii), we suggest that this matter be referred for discussion at any conference to be held regarding the Exposure Draft.

Clause 26.2(e) – Full-time and part-time employees

71. Ai Group does not consider that the insertion of cross references, as proposed by the HSU, is necessary.

Schedule B – Summary of hourly rates of pay and Schedule C – Summary of monetary allowances

72. We do not oppose the HSU's general submission regarding Schedules B and C, however we note that the manner in which the relevant percentages and/or dollar amounts are expressed in the tables is consistent with other exposure drafts.

3. EXPOSURE DRAFT – AIR PILOTS AWARD 2016

73. The submissions that follow relate to the *Exposure Draft – Air Pilots Award 2016* (Exposure Draft). They are in response to submissions filed by:

- the Qantas Group, dated 30 June 2016;
- the Australian Federation of Air Pilots (AFAP), dated 30 June 2016; and
- the Aerial Application Association of Australia.

Clause 2 – Definitions – duty time

74. We agree with the submissions made by the Qantas Group regarding the proposed definition of "duty time". To this extent we oppose the submissions of the AFAP.

Clause 7.4 – Facilitative provisions

75. We do not oppose the Qantas Group's submission that a reference to clause 19.1(c) be inserted in clause 7.4.

Clause 9.5(b) – Minimum payments

76. We do not oppose the amendment proposed by the AFAP.

Schedule A.1.6 – First officer/second pilot

77. We agree with the amendment proposed by the AFAP. We refer to paragraph 195 of our submissions dated 30 June 2016 in this regard.

Schedule B.1.1 – Minimum salaries

78. We support the submissions of Qantas Group and the AFAP.

Schedule E – Summary of hourly rates of pay

79. We agree with the Qantas Group that a summary of hourly rates of pay is not necessary.

Schedule E.2 – Casual employees – other than aerial application operations employees

80. The AFAP seeks the insertion of references to various additional amounts payable to casual employees in Schedule E.2. Those amounts are prescribed in Schedule A and summarised at Schedule F.

81. We do not consider that the insertion of the references proposed is necessary. Schedule E and F are to be read in conjunction with the substantive terms of the instrument, including Schedule A. We are concerned that the insertion of numerous notes or references may result in a schedule that is confusing and unwieldy.

Schedule E.2.2 – Casual regional airline employees

82. It appears that the AFAP's submissions regarding Schedule E.2.2 are based on an earlier version of the Exposure Draft, published on 2 June 2016. The concern raised by the AFAP doesn't arise in a later iteration of the Exposure Draft, which contains amended rates at E.2.2 (published on 7 June 2016).

Submissions made by the Aerial Application Association of Australia

83. It appears that the submissions made by the Aerial Application Association of Australia identify, in large part, matters that do not arise from the redrafting of the current award. Rather the Association has proposed (or put in issue) a series of substantive changes to the terms of the current award. We suggest that these be referred for discussion during a conference before a Member of the Commission.

4. EXPOSURE DRAFT – AIRCRAFT CABIN CREW AWARD 2016

84. The submissions that follow relate to the *Exposure Draft – Aircraft Cabin Crew Award 2016* (Exposure Draft). They are in response to submissions filed by the Qantas Group, dated 30 June 2016.

Clause 2 – Definitions – sign on

85. We do not oppose the amendment proposed by the Qantas Group.

Schedule A.1.7(d) – Flying allowance

86. We agree that the clauses identified by the Commission should remain.

Schedule A.1.8(b) – Training allowance

87. We agree with the Qantas Group that the allowance prescribed by A.1.8(b) is based on the cabin crew member's minimum weekly rate. We refer to paragraphs 215 – 216 of our submissions dated 30 June 2016.

Schedule A.3.3 – Rostering

88. We support the submissions made by Qantas Group regarding A.3.3.

Schedule B.4.5(a) – Changes to duties

89. We support the submissions made by Qantas Group regarding B.4.5(a).

5. EXPOSURE DRAFT – AIRLINE OPERATIONS – GROUND STAFF AWARD 2016

90. The submissions that follow relate to the *Exposure Draft – Airline Operations – Ground Staff Award 2016* (Exposure Draft). They are in response to submissions filed by:

- the ASU, dated 30 June 2016;
- the AMWU, dated 30 June 2016;
- the AWU, dated 30 June 2016;
- the Qantas Group, dated 30 June 2016; and
- the TWU, dated 30 June 2016.

Clause 2 – Definitions – airline operations industry

91. Whilst we have not identified a difficulty arising from the repetition of the relevant definition, we do not oppose the AWU's proposal.

Clause 2 – Definitions – airline operations industry

92. Whilst we do not consider that the concern raised by the AMWU necessarily arises from the redrafting of the definition of "airline operations industry", we do not oppose its retention in its current form.

93. Any change made in this regard should also be implemented at clause 4.2 (if the definition is to be retained in both clauses).

Clauses 2, 17.1(d), 17.4 and Schedule B – permanent night shift

94. The ASU and TWU oppose the introduction of the term "permanent night shift". Whilst we have not identified a difficulty arising from the insertion of the definition as there is no substantive change arising from it and we appreciate that it is consistent with the approach taken by the Commission in other exposure drafts, we do not oppose the deletion of the definition from clause 2

and clause 17.1(d). If the Commission adopts this course, clause 17.4 should be replaced with the current clause 30.4 and the necessary amendments should be made to Schedule B.

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

95. We do not agree that the references to clauses 16.1(d) and 16.2(e) should be deleted.

96. The submission of the AWU appears to arise from a potential uncertainty flowing from the reference to "employees" in clauses 16.1(d) and 16.1(e). As it stands, the clauses do not expressly require agreement of the majority of employees. They appear to permit agreement with individual employees or with groups of individual employees. Merely changing clause 7.3 will not address this issue.

97. Clause 16.1(d) and 16.1(e) should be amended so that they expressly provides that the facilitative provision can be utilised by agreement between the employer and either individual employees or the majority of employees.

98. Adopting this approach, clause 16.1(d) and 16.1(e) would be amended to provide

> An employer and either individual employees or the majority of employees may agree to stagger meal breaks to meet the operational requirements of the business.

99. If this variation was implemented a reference to clause 16.1 would need to be inserted in clause 7.4, as is currently proposed by the AWU.

Clause 10.2(b) – Part-time day workers

100. Ai Group opposes the AWU's suggested deletion of the reference to clause 7.4. Contrary to their submissions, clause 7.4 does not merely include a list of clauses. It affords employers (and employees) a right to utilise the listed provisions, upon agreement. It also binds employees to arrangements put in place through the facilitative provisions, where there is agreement by the majority. The clause ensures that any such agreement overrides an arrangement specified in 10.2(b).

101. The reference to clause 7.4 should remain in clause 10.2(b).

Clause 11 – Casual employees

102. We do not consider that the insertion of a note referring to clause 18.7(c), as proposed by the ASU, is necessary.

Clause 11.3 – Casual employees

103. We do not oppose the amendment proposed by the AWU.

Clauses 12.6(c) and 12.6(d) – Travel payment for block release training

104. We agree that clauses 12.6(c) and 12.6(d) appear to be duplicates. We would not oppose the retention of clause 12.6(d) and deletion of clause 12.6(c), as proposed by the ASU and AWU.

Clause 12.17 – Reduction of payment

105. We refer to the AMWU's submission regarding clause 12.17. We do not oppose the reformatting of the provision such that it is consistent with the current clause 11.6(p)(iii).

106. If the heading is to be amended instead, it should read "Reduction of travel payment for block release training".

Clause 15.1(a) – Method of arranging ordinary hours

107. We do not oppose a reversion to the current clause 28.4(a), as proposed by the AWU.

Clause 17.6 – Multiple shift allowance

108. We refer to the ASU's submissions. We would not oppose the retention of the wording in the current clauses 30.6(a) and (b).

Clause 18 – Minimum wages

109. We do not oppose the AMWU's submission regarding clause 18 of the Exposure Draft, however we note the necessary amendments will require significant renumbering throughout the document.

Clause 18.5 – Apprentice minimum weekly wages

110. We do not oppose the amendment proposed by the AWU.

Clause 18.5(b)(i) – Minimum wages for apprentices commencing an apprenticeship on and from 1 January 2014

111. We agree with the amendment proposed by the AWU.

Clause 18.5(b)(ii) – Minimum wages for apprentices commencing an apprenticeship on and from 1 January 2014

112. We agree with the amendments proposed by the AWU

Clause 18.5(e)(i) – Competency based progression

113. We agree with the amendment proposed by the AWU.

Clause 18.6(b) – Maintenance and engineering stream

114. We do not oppose the submissions of the AWU and AMWU in response to the question contained at clause 18.6(b).

Clause 19.7(e)(i) – Special appointments – additional payments

115. We do not oppose the AWU's submission that the monetary value of the allowance payable should be inserted in clause 19.7(e)(i) (third bullet point).

116. We note, however, that the allowances contained in clause 19.7(e) are not set out at Schedule C. As a result, the instrument does not provide for the derivation of the amount payable. Schedule C should be amended to include the relevant allowances currently set out at clause 21.24.

Clause 21 – Indemnity/insurance

117. Any change to the monetary amounts in clause 21, as supported by the AWU and AMWU, would amount to a substantive change to the current clause. If the unions seek to pursue such a change, they should be put to the task of mounting a merit case in support of the variation sought. Any increase to the amounts prescribed is opposed by Ai Group.

Clause 23.1 – Payment for working overtime

118. The AWU submits that the current clause 32.1(c) should be retained.

119. Whilst we would not oppose its inclusion in the Exposure Draft, we do not consider that the provision is necessary in light of the inclusion of hourly rates in the Exposure Drafts and the redrafting of the overtime clause such that the rates payable are now expressed as a percentage of the relevant *ordinary hourly* rate. As a result, where an employee works more than 38 ordinary hours in a week (for instance, as a result of an averaging arrangement), the overtime rate payable to that employee will nonetheless be calculated by reference to the ordinary hourly rate. The ordinary hourly rate is defined as the hourly rate specified in clause 19.3 plus any all purpose allowances. The hourly rates set out in clause 19.3 are calculated by dividing the weekly rate by 38.

120. The issue identified by the AWU also gives rise to a broader question over whether the newly proposed definition of "ordinary hourly rate" makes it sufficiently clear how any "all purpose" weekly allowance is to be included in the calculation of ordinary hourly rates. The definition does not specify that the allowances are to be included in the hourly rate on a proportionate basis. Assuming they are to be included in this manner, the definition similarly does not identify whether the ordinary hourly rate is to be calculated by dividing the allowances by 38 or on some other basis. Any reconsideration of this issue would of course have potential implications for the preparation of a significant number of exposure drafts.

121. Regardless, if the clause referred to by the AWU was deemed necessary in the context of this award, it is unclear why it wouldn't also be necessary in the context of other awards.

Clause 23.1(c) – Payment for working overtime

122. The AWU's submission is a matter for the award flexibility common issues Full Bench.

Clause 25 – Annual leave

123. The AWU's submission is a matter for the annual leave common issues Full Bench.

Clause 25.5(b) – Annual leave loading

124. The AWU's submission falls squarely within the ambit of the ACTU's claim that has been referred to the annual leave common issues Full Bench.[3] Accordingly, this issue should be referred to the relevant Full Bench.

Schedule B.1.1 – Ordinary hourly rate

125. We do not oppose the insertion of a reference to clause 19.9(a) as proposed by the AWU.

[3] See page 6 of ACTU correspondence dated 21 May 2014.

6. EXPOSURE DRAFT – CHILDREN'S SERVICES AWARD 2016

126. The submissions that follow relate to the *Exposure Draft – Children's Services Award 2016* (Exposure Draft). They are in response to submissions filed by:

- ABI and the NSW Business Chamber, dated 1 July 2016;
- United Voice, dated 30 June 2016; and
- Business SA, dated June 2016.

Clause 2 – Definitions – all purposes

127. The Exposure Draft does not contain a definition of all purpose in clause 2 as asserted by United Voice. Accordingly, its submission need not be dealt with.

128. It is our view, however, that the definition should be inserted at definition 2. This is because the term is used in other parts of the other word (such as the definition of "ordinary hourly rate" – see paragraph 237 of Ai Group's submission dated 30 June 2016). Accordingly, the definition of "all purposes" should be inserted in clause 2.

Clause 2 – Definitions – children's services and early childhood education industry

129. Whilst we do not consider the amendment proposed by Business SA necessary, we do not oppose it.

Clause 2 – Definitions – minimum hourly rate

130. Contrary to the submission of United Voice, we do not consider that such a definition is necessary. The minimum hourly rate is simply the rate so prescribed in clause 16 of the Exposure Draft.

Clause 2 – Definitions – ordinary hourly rate

131. United Voice submits that the definition of "ordinary hourly rate" should read "the minimum rate of pay for the employee's classification, grade and level specified in clause 17 …".

132. We do not understand the rationale underpinning the change sought to the definition determined by the Commission, which makes reference to the "hourly rate for the employee's classification specified in clause X". The additional references proposed to "grade" and "level" are entirely unnecessary and need not be inserted.

Clause 3.3 – The National Employment Standards and this award

133. United Voice submits that the words "whichever makes them more accessible" should be re-inserted in clause 3.3. This is a matter that has been determined by the Commission during the earlier stages of the Review.[4] Clause 3.3 is consistent with that decision and accordingly, the change sought should not be made.

Clause 4.1 – Coverage

134. United Voice has proposed a substantive change to the coverage of the award. It purports to deal with the interaction between this award and the *Clerks – Private Sector Award 2010*. The basis for its inclusion in the union's submission of 30 June 2016 is unclear, given that the present task is to identify *technical and drafting issues* arising from the exposure draft.

135. In any event, to the extent that it is relevant, we draw the Commission's attention to the fact that a claim has also been made by CCSA to vary the *Clerks – Private Sector Award 2010* to exclude from its coverage employers covered by the *Children's Services Award 2010* with respect to employees covered by it.

[4] [2014] FWCFB 9412 at [29].

Clause 11.1 – Casual employment

136. For the reasons set out at paragraphs 238 – 240 of our submissions dated 30 June 2016, we agree with the submission of ABI and the NSW Business Chamber that the words "as such" should be retained in clause 11.1.

Clause 17.2(c) – Broken shift allowance

137. We support the amendment proposed by ABI and the NSW Business Chamber. We refer to paragraph 243 of our submission dated 30 June 2016 in this regard.

Clause 17.3(d) – Use of vehicle allowance

138. We do not consider that the change proposed by Business SA is necessary.

Schedule C.2.1(a) – Adjustment of expense related allowances

139. Whilst we do not oppose the amendment proposed by ABI and the NSW Business Chamber, we note that the wording of clause C.2.1(a) is consistent with the current clause 15.8(a) and that contained in other modern awards.

7. EXPOSURE DRAFT – ELECTRICAL, ELECTRONIC AND COMMUNICATIONS CONTRACTING AWARD 2016

140. The submissions that follow relate to the *Exposure Draft – Electrical, Electronic and Communications Contracting Award 2016* (Exposure Draft). They are in response to submissions filed by:

- Master Electricians Australia (Master Electricians);
- the National Electrical and Commutations Association SA Chapter (NECA SA);
- Business SA, dated June 2016;
- the Fire Protection Association of Australia (Fire Protection Association);
- the National Electrical and Communications Association (NECA); and
- the CEPU.

Clause 1 – Title and commencement

141. NECA proposes the reinsertion of the absorption clause from clause 2.2 of the current award. This matter has already been determined by the Commission.

Clause 2.2 – Definitions – all purpose

142. NECA and NECA SA have proposed amendments to the definition of all purpose. Ai Group does not agree that such an amendment is necessary. The definition makes sufficiently clear that all purpose allowances are to be incorporated for the purposes of calculating certain rates. Furthermore, the definition is consistent with that previously determined by the Commission.

Clause 2.2 – Definitions – continuous shiftworker

143. The proposal by the Fire Protection Association to amend the definition of continuous shift worker is not necessary.

Clause 2.2 – Definitions – default fund employee

144. NECA proposes for the retention of the definition of default fund employee. Ai Group does not agree that such amendment is necessary. The term "default fund employee" is not used in the Exposure Draft.

Clause 7 – Facilitative provisions for flexible working practices

145. We refer to the submissions of the Master Electricians at paragraphs 34 – 38.

146. Clause 7.2, as we understand it, is not intended to give rise to any substantive change to the operation of the relevant facilitative provisions. Rather, clause 7.2 serves as an index of facilitative provisions contained in the instrument. The application and effect of those clauses is to be understood by having regard to the specific terms of each of those clauses. Accordingly, the "further clarification" sought by the Master Electricians is not necessary.

147. The Master Electricians refer to clause 13.3 of the Exposure Draft and "seek clarification" as to the following three matters:

- "Can an employer and a group of employees agree to have the spread of hours between 4am and 4pm meaning that there is no obligation to consider overtime rates time worked in the altered spread?"
- "… whether there is any requirement to ensure the employee is better off".
- " … if such an agreement is made with an individual employee should this form part of an Individual Flexibility Agreement ("IFA")".

148. We deal with each of these issues in turn.

149. Clause 13.3 prescribes that the spread of ordinary hours is 6.00am to 6.00pm. This means that ordinary hours must be worked within the above times. Clause 13.3(b), however, is a facilitative provision. It enables an agreement to be reached to vary that spread of hours. If the spread of hours were so varied, ordinary hours of work could be performed within the amended spread. By

virtue of the fact that such work constitutes ordinary hours, it does not attract overtime rates (unless, through the operation of some other provision of the award, the hours worked are not ordinary hours). Accordingly, in response to the Master Electricians first question: yes, clause 13.3(b) would permit a variation to the spread of hours mentioned and an obligation to pay overtime rates would not arise (subject to the aforementioned caveat).

150. Clause 13.3, self-evidently, does not contain any requirement to ensure that an employee is "better off" if an agreement is reached under clause 13.3. Nor does any other provision of the award. Accordingly, the answer to the Master Electricians second question is "no".

151. Again, it is apparent on the terms of the clause that an agreement reached under clause 13.3 does not form part of an IFA. The agreement is reached pursuant to the terms of clause 13.3 itself. Accordingly, the answer to the Master Electricians third question is "no".

152. We are not aware of any confusion or disputation arising from the terms of clause 13.3 (or other facilitative provisions contained in this award), despite the Master Electricians submission that "it *appears* that these facilitative provisions could result in a dispute regarding whether an IFA should have been used and ensured that the employee was better off overall …". We submit that no variation to the award is necessary in this regard.

Clause 7 – Facilitative provisions for flexible working practices

153. Business SA amendments as sought in clause 3.1.1 of their submission is unnecessary as the reference in the facilitative provision of the Exposure Draft is clause 16.6(b)(i).

Clause 10.3 – Part-time employment

154. The amendment proposed by Business SA is not necessary. Clause 10.3 requires that a part-time employee must be paid the ordinary hourly rate "for the relevant classification". This necessarily means the classification relevant to the particular employee. The amendment proposed by Business SA would

cause the clause to refer to "*their* relevant classification" which is somewhat cumbersome and confusing.

155. The change proposed should not be made.

Clause 10.5(b) - Part time employment - public holidays

156. The submissions of the CEPU, Business SA, the Master Electricians and NECA SA are consistent with Ai Group's submission at paragraph 87, dated 30 June 2016.

157. Whilst the alternate position of NECA accepts this, its primary position and position of the Fire Protection Association of Australia regarding a broader redrafting is unnecessary. The insertion of the additional referencing is adequate in order to provide a simple and easy to understand Award.

Clause 11.4 – Casual employment

158. Ai Group opposes the position of the CEPU that clause 11.4 should reference the whole of clause 13. In proposing this, the CEPU is seeking to extend the entitlements of casuals.

159. The reference in clause 11.4 to clause 13.13 is accurate. The intent is for the shift provisions that are found in clause 13.13 to apply to casuals who work afternoon and night shifts as defined.

Clause 12.10 – Apprentice

160. The Exposure Draft seeks confirmation as to whether the reference to clause 16.2 in clause 12.10 should instead be reference to clause 16.4. Ai Group refers to paragraph 88 of its 30 June 2016 submissions and confirms that this is position aligns with that of the other parties.

Clause 13 – Hours of Work

161. NECA and NECA SA have proposed amendments and reordering of the titles of clause 13.10 and 13.11 respectively. Ai Group does not agree that such amendments are necessary

162. NECA has proposed an amendment to the title of clause 13.15. Ai Group has no objection to this.

163. We do not agree with NECA's proposed amendment to clause 13.5, as it is likely to raise confusion.

164. The Fire Protection Association's proposal to create a new shift work provision and to add the words *"including part –time/casual workers"* next to the words *"shift worker"* in clause 13.15(b) is not necessary. The associated proposed variations in paragraph 16 of its submission are also unnecessary.

165. The Master Electricians proposal for a dedicated shiftwork clause is unnecessary.

Clause 13.6 – Late comers

166. Ai Group opposes the position proposed by the CEPU that clause 13.6 is contrary to or contravenes section 326 of the *Fair Work Act*. The clause provides for an employer to utilise fractional or decimal proportions of an hour in terms of timekeeping. Once set this is utilised for both calculating working time of employees who attend work late, leave work early, or for overtime purposes.

167. The nature of such a clause is to provide for payroll systems that employers utilise which do not provide for calculations to the second or minutes.

168. An employer in such circumstance is not deducting from an employee's wages, hours which are ordinarily worked by the employee. It is in fact setting the method that would apply for the purposes of calculating start and finish times and the payments that ensue. This is not the deduction as dealt with in section 326.

169. NECA and NECA SA support making the clause clearer. Ai Group does not agree that this is necessary. NECA SA and the Fire Protection Association, support the view that the clause does not contravene section 326.

170. The non-payment for time not worked in such an incremental manner has not been deemed to contravene s.326 of the *Fair Work Act*, in the approval of enterprise agreements by the FWC.

Clause 13.9 – Rest Breaks

171. It appears from the current Award and the placement of clause 13.9, that the rest breaks are restricted to day workers. The Fire Protection Association supports the view. The CEPU has proposed that the clause is not limited to day workers but provides no reasoning to support this.

172. NECA and NECASA support the retention of the clause as drafted. Ai Group agrees with this.

173. NECA and NECA SA propose that a new clause relating to shift work be created with subsequent renumbering of clauses 13.10 to 13.18. Ai Group does not regard this as necessary.

Clause 13.10 - Ordinary Hours of Work – Continuous shiftwork

174. With respect to the question posed in the Exposure Draft, Ai Group agrees with the other parties (with the exception of NECA SA) that the term crib time should not be replaced with rest break. The term is well known in the industry and is different character to "rest break". The definition should be retained.

175. NECA SA has proposed that "crib time" should be changed to "crib break". Ai Group does not agree to this on the basis that it is not necessary

176. NECA has also submitted at paragraph 49 of its submissions, that the title of clause 13.10 be amended to simply read "Shift work". Ai Group does not agree that this is necessary. The current title does not create any confusion.

Clause 13.11 Ordinary Hours of Work –other than continuous shiftwork

177. With respect to the question posed in the Exposure Draft, Ai Group agrees with the other parties that the proposed amendment regarding crib time being taken at the discretion of the employer is clearer than that in the current Award.

Clause 14 – Breaks

178. The Exposure Draft, raises a question with regard to a possible amendment of clause 14.1(c) to read *"the timing of meal breaks will be at the discretion of the employer"*. It also alleges that clause 14.1(c) is inconsistent with clause 13.1.1(c)(iii) in relation the timeframe for a meal break to be taken by non-continuous shift workers.

179. Ai Group agrees with the other parties that the amendment of the clause to read *"the timing of meal breaks will be at the discretion of the employer"* would clarify the provision.

180. In relation to the issue of alleged inconsistency between clauses 14.1(c) and 13.11(c)(iii), Ai Group disagrees that there is inconsistency. Clauses 13.10 and 13.11 provide that shift workers, whether continuous or not, are not required to work for more than five hours without a break for a meal or crib. This is consistent with clauses 24.10 and 24.11 of the current Award. Additionally, the definition of crib time in clause 3.2 of the current Award which is replicated in the Exposure Draft provides that:

"crib time *as used in clauses* ***Error! Reference source not found.****,* ***Error! Reference source not found.*** *and* ***Error! Reference source not found.****—* ***Error! Reference source not found.*** *of this award will take the place of any meal break during overtime or shiftwork and will be taken without loss of pay at the appropriate rate"*

181. It appears that the timing for shift workers (continuous or otherwise) as to the timing of meal or crib breaks is consistent, in that it must be no more than 5 hours.

182. It appears that clause 14.1(c), when read with clauses 13.10 and 13.11, is not intended to be contradictory but complementary. Ai Group suggests that clause 14.1(c) should note that it applies to *"other than shift workers".*

183. Ai Group notes that the CEPU holds a similar view. We do not agree that the amendments proposed by the Fire Protection Association and the Master

Electricians are necessary. We do not oppose the amendments proposed by Business SA.

Clause 15 – Inclement weather

184. The Exposure Draft raises a question with regard to the provisions of clause 15.

185. Ai Group agrees with the other parties, with the exception of the Master Electricians and Business SA. The clause should be retained in its current form as the requirements referred to in clause 15.4(b) extend further than clause 15.2.

Clause 16.4 – Apprentice minimum wages

186. The Exposure Draft raises a question regarding how clause 16.4(a)(iii) and 16.4(a)(iv) interact.

187. The clauses do interact. Clause 16.4(a)(iii) identifies the payments an apprentice receives in relation to wages including all-purpose allowances and other allowances paid on an as needs basis. Clause 16.4(iv) clarifies the calculation of an all-purpose rate and when it is payable.

188. Ai Group agrees that there may be some utility in redrafting the two clauses to achieve better clarity.

189. We do not agree to the removal of the clause as proposed by NECA and NECA SA or the amendments proposed by Master Electricians. The latter's proposal, would result in the inclusion of other allowances, which are not currently a feature of the clauses.

190. Ai Group proposes the following alteration:

> (iii) In addition to the minimum wage payments arising from clause16.4(a) **Error! Reference source not found.**, apprentices will be paid the full amount of the tool allowance in clause 17.2(g) and the fares allowances in 17.5(d) and the percentages shown in clause 16.4(a) of the electrician's licence allowance in clause 17.2(b) the travel time allowance in clause 17.5(c)and the industry allowance in clause 17.2. <u>These weekly payments in total will form the all-purpose rate to be paid to an apprentice . The weekly all-purpose rate of pay is payable for all purposes of the award and will be</u>

included as appropriate when calculating payments for overtime, all forms of paid leave, annual leave loading, public holidays and pro rata payments on termination. Any other special allowances in clause 17.3 and 17.4 and allowances for travel and expenses in clauses 17.5 and 17.6 will be paid to apprentices on an 'as incurred' basis at the rate specified, subject to clause 17.1(b)

Clause 16.4(b)(ii) – Adult apprentices minimum wages

191. NECA proposes that the table in clause 16.4(b)(ii) of the Exposure Draft refers to adult apprentices in Queensland only and seeks amendments to reflect this. No amendment is required in the Exposure Draft.

Clause 16.6 – Payment of Wages

192. NECA, in its submission relating to the comparison table, seeks an amendment to the reference. No amendment is required to the Exposure Draft as there is no error.

Clause 17.1(b) – Special Allowances

193. The Exposure Draft raises a question as to whether the special allowances are cumulative.

194. The clause is clear that where more than one of the disabilities which entitles an employee to the payment of a special allowance occurs, the allowances are not cumulative.

195. Ai Group agrees with the propositions raised by NECA and NECA SA that better clarity can be obtained by removing the First Aid Allowance and placing it elsewhere in the clause.

Clause 17.2(f)(ii) – Rate for ordering materials

196. Business SA in its submissions at paragraph 3.1.3 has proposed that the word "only" be reinserted in the first dot point to replicate the current award term. Ai Group has no objection to such clarity.

Clause 17.3(b)(ii) – Towers Allowance

197. Business SA, in its submissions at paragraph 3.1.4, has proposed that clause 17.3(b)(ii) should be referred to in the facilitative provisions table.

198. Ai Group does not agree with this as the clause does not appear to be a facilitative provision. The clause provides that if agreement is not reached the matter will be determined by the Fair Work Commission. In our view, the clause has a different character to a facilitative provision.

Clause 17.4 – Special allowances – expense related

199. NECA proposes at paragraph 44-46 of its submission that there is confusion in the new wording and there is replication of clauses. Ai Group does not agree that an amendment is required in this regard.

Clause 17.5(d)(ii) – Payment for travelling time

200. Paragraph 39 of the Master Electricians submission proposes a clarification which confirms that the payment for travelling time is to be paid at ordinary rates. Ai Group agrees that this amendment would provide better clarity.

Clause 17.5(d)(iii) – Travel Expenses

201. Paragraphs 40 to 42 of the Master Electricians submission proposes a clarification regarding the payments in clauses 17.5(d)(i) and 17.5(d)(iii). This amendment would ensure that an employee is not entitled to receive both payments. Ai Group agrees that this would provide better clarity.

Clause 17.5(e) – Travel Expenses

202. The Exposure Draft, asks parties to clarify which allowances do not apply under clause 17.5(e).

203. Ai Group agrees with the parties that the allowances that do not apply under clause 17.5(e) are the allowances found in clauses 17.5(b), 17.5(c) and 17.5(d).

204. We do not agree with the Master Electricians that there is a need to redraft clause 17.5(c).

Clause 17.6 (b) (I) – Regular returns home

205. Business SA in its submissions at paragraph 3.1.5 has proposed that the exception as stated in clause 17.6(b)(ii) be referenced in clause 17.6(b)(i). This is to read: *"Except as provided in clause 17.6(b) (ii), an employee on distant work....."*. Ai Group has no objection to this as it preserves the intent of current clause.

Clause 21 - Personal/Carers leave and compassionate leave

206. Paragraphs 43 to 46 of the Master Electricians submission proposes that the term "ordinary hourly rate" be replaced with "all-purpose rate". Ai Group does not agree with this. The clause in the Exposure Draft is appropriately drafted and the term "ordinary hourly rate" is defined in the definition section at clause 2.2.

207. It is necessary to adopt the term ordinary hourly rate to ensure that the calculation of the payment is based on ordinary rates and not overtime rates.

208. There is no confusion or ambiguity in the Exposure Draft and no change needs to be made.

8. EXPOSURE DRAFT – SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRY AWARD 2016

209. The submissions that follow relate to the *Exposure Draft – Social, Community, Home Care and Disability Services Industry Award 2016* (Exposure Draft). They are in response to submissions filed by:

- AFEI, dated 8 July 2016;
- the AWU, dated 6 July 2016;
- ABI and the NSW Business Chamber, dated 1 July 2016;
- Jobs Australia, dated 1 July 2016;
- Business SA, dated June 2016;
- the Aged Care Employers, dated 30 June 2016;
- the ASU, dated 30 June 2016;
- United Voice, dated 30 June 2016; and
- the HSU, dated 30 June 2016.

Clause 1.3 – Title and commencement

210. The Aged Care Employers note the retention of clause 1.3 in the Exposure Draft. We understand that this issue was the subject of controversy during earlier stages of the Review and has been determined by the Commission.[5]

Clause 2 – Definitions – minimum hourly rate

211. The AWU, United Voice and HSU have proposed that the Exposure Draft contain a definition of "minimum hourly rate". Each union has proposed a specific definition for insertion.

[5] [2014] FWCFB 9412 at [16] and [2015] FWCFB 6656 at [81].

212. If a definition is to be inserted, we do not agree with those proposed by the unions. We are concerned that the definition proposed by the AWU does not have regard to the equal remuneration order that applies to certain employees. The definition proposed by United Voice and the HSU does not make clear that references to the minimum hourly rate are to the minimum rate prescribed by the relevant instrument, and does not incorporate over-award payments, as determined by the Commission earlier during this Review.[6]

Clause 2 – Definitions – sleepover

213. We do not agree with the suggestion of the Aged Care Employers or Jobs Australia that the definition of "sleepover" at clause 2 is unnecessary, as the term is used in clauses other than clause 14.5 (see for example clause 14.2(b)). It is therefore appropriate that the term be retained in the definitions clause. We similarly do not agree with the HSU's submission in this regard.

214. We do not consider that the amendments proposed by Business SA or the ASU are necessary. We have not identified any difficulty arising from the duplication of the definition.

Clause 2 – Definitions – social and community services sector

215. We do not oppose the HSU's and United Voice's submission regarding the second paragraph of the definition.

Clause 3.3 – The National Employment Standards and this award

216. United Voice and the HSU submit that the words "whichever makes them more accessible" should be re-inserted in clause 3.3. This is a matter that has been determined by the Commission during the earlier stages of the Review.[7] Clause 3.3 is consistent with that decision and accordingly, the change sought should not be made.

[6] [2015] FWCFB 4658 at [95] – [96].

[7] [2014] FWCFB 9412 at [29].

Clause 5.2 – Facilitative provisions for flexible working arrangements

217. We agree with AFEI and United Voice's submission regarding the numbering of clause 5.2. We refer to paragraph 252 of our submissions dated 30 June 2016 in this regard.

Clause 11.3(c) – Casual employment

218. In response to question contained at clause 11.3(c) of the Exposure Draft, we do not oppose the proposition put by United Voice, the HSU, AWU, ACE, Jobs Australia and Business SA; that the relevant employees are entitled to a two hour minimum engagement.

219. The ASU's submission goes further than the question posed in the Exposure Draft. It suggests that clause 11.3(a) should be amended such that the relevant employees are entitled to a longer minimum engagement period. This would amount to a substantive change. If it is to be pursued, the union must be put to the task of substantiating a merit basis for it. We note that the union's proposal may also be affected by casual employment common issues proceedings.

Clause 12.2 – Classifications

220. We agree that the variation proposed by the Aged Care Employers should be made.

Clause 12.4(a) – Progression

221. We agree with the Aged Care Employers' interpretation of clause 12.4(a), and the position taken by the HSU, ASU, AWU, AFEI, Business SA, Jobs Australia, ABI and the NSW Business Chamber. We refer to paragraph 253 of our submission dated 30 June 2016 in this regard.

Clauses 10, 11 and 13 – ordinary hours for part-time and casual employees

222. The AWU has made a lengthy submission regarding the ordinary hours of work of part-time and casual employees. They appear to suggest that the award does not meet the requirements of s.147 of the Act. They have not, however,

proposed a precise form of wording that, in their view, would rectify any alleged deficiency in the current award. Should the AWU later seek to advance such a proposal, we may seek an opportunity to respond.

Clause 13.1(a)(i) – Ordinary hours

223. The amendment proposed by the AWU is not necessary.

Clause 14.1(b) – Rostered days off

224. We do not oppose the deletion of the word "rostered" from clause 14.1(b), as sought by the ASU.

Clause 14.2(b) – Rest breaks between rostered work

225. We do not oppose the retention of the current clause as sought by the HSU.

Clause 14.3(d) – Rosters

226. We agree with the response provided by the HSU, ASU, AFEI, Aged Care Employers, Jobs Australia and Business SA to the question contained at clause 14.3(d) of the Exposure Draft. This is consistent with that of United Voice, ABI and the NSW Business Chamber.

227. The AWU proposes the introduction of the notion that mail or facsimile may be used as the form of communication "where necessary". It also seeks the deletion of the reference to "mail". These are substantive changes to the current provision which, notably, no other interested party has sought to amend.

228. The union has not provided any basis for the amendment sought, apart from "modernising" the clause and "taking into account changes in technology norms". This does not establish that the provision it has proposed is necessary to achieve the modern awards objective, nor has the union sought to explain the reasons by which the current clause fails to do so. Absent any such material before the Commission, the change sought should not be made.

Clause 14.3(e) – Rosters

229. We agree with the Aged Care Employers, Jobs Australia, AFEI, Business SA, ABI and the NSW Business Chamber that the term "relieving staff" need not be defined. We refer to paragraph 254 of our 30 June 2016 submissions in this regard.

Clause 14.3(e) – Rosters

230. Clause 14.3(b) of the Exposure Draft imposes an obligation on an employer to display a roster at least two weeks before the commencement of the roster period. That provision operates subject to clause 14.3(e), which excludes certain employees from this requirement; those being casual employees and "relieving staff". Clause 14.3(e) of the Exposure Draft is in the same terms as the current clause 25.5(c).

231. United Voice and the HSU submit that the reference to "relieving staff" should be deleted as "there is no classification or allowance in this Award for a permanent employee with no roster as exists in other modern awards". In the alternate, United Voice proposes a new definition of "relieving staff", the basis for which has not been explained. Both proposals put by United Voice would amount to a substantive change, for which there is no proper basis.

232. It is not necessary that the award contain a classification or allowance relating to relief staff in order for clause 14.3(e) to have effect. Rather, we understand the reference to "relieving staff" as encapsulating those employees that are providing relief to another employee (for example, substituting another employee taking personal/carer's leave). Such a situation could arise, for instance, in respect of a part-time employee who, in addition to the hours agreed pursuant to clause 10.3, may be required to "relieve" another employee. Under clause 14.3(e), an employer in such circumstances is relieved of the requirement contained in clause 14.3(b). The deletion of the reference to "relieving staff" would thereafter extend the requirement under clause 14.3(b) to employers in respect of such employees. This is clearly a substantive change.

233. The definition proposed of "relieving staff" would significantly limit the circumstances in which clause 14.4(e) applies. It would thereafter only apply to full-time and part-time employees whose roster was changed "to enable the service of the organisation to be carried on where another employee is absent from duty on account of illness or in an emergency".

234. In the absence of any submissions and/or evidence as to why the changes sought are necessary to meet the modern awards objective, United Voice's proposals should be dismissed.

Clause 14.3(e) – Rosters

235. The AWU submits that the provision should be deleted but provides no basis for this substantive change. The union's submissions appear to misunderstand the application of clause 14.3 of the Exposure Draft. In any event, we once again submit that a substantive variation to the award should not be made in circumstances where the union has not established a proper basis for it.

Clause 14.3(f) – Rosters

236. We have not identified a cross-reference to clause 28 as referred to by the HSU.

Clause 14.6(d) – 24 hour care

237. We do not agree that the insertion of the words "for eight hours" in clause 14.6(d) would "clarify the intention of the clause", as argued by United Voice. The provision would then read:

> The employee will normally <u>for eight hours</u> have the opportunity to sleep during a 24 hour care shift and, where appropriate, a bed in a private room will be provided for the employee.

238. Clause 14.6 does not presently stipulate the number of hours during which an employee will normally have an opportunity to sleep. It simply states that an employee will have *an* opportunity to do so. On the face of the instrument, we can identify no intention that that opportunity arise specifically for eight hours (or any other period of time). United Voice's proposal would introduce a degree

of prescription that does not presently exist and could give rise to a substantive change. Accordingly, the change should not be made.

Clauses 16.1, 16.2 and 16.3 – Minimum wages

239. We here seek to raise an additional concern arising from the preamble to the tables at clauses 16.1 – 16.3, which has recently come to our attention. Read literally, the text appears to create an obligation to pay the weekly and hourly rates prescribed in those clauses to all employees, including part-time and casual employees, as well as those employees to whom the transitional pay equity order or equal remuneration order referred to applies. We assume, however, that this is not the intention (for example, it is not intended that a casual employee must be paid the minimum weekly rate prescribed, irrespective of the number of hours worked in a week).

240. On this basis, consistent with the current award, the text appearing immediately above the tables in clauses 16.1 – 16.3 should be removed.

Clause 17.2(b) – First aid allowance – casual and part-time employees

241. Whilst we do not consider the change proposed by Business SA necessary, we do not oppose it.

Clause 17.2(c) – Heat allowance

242. We agree with the HSU, Jobs Australia and United Voice.

Clause 17.3(a)(i) – Clothing and equipment

243. We refer to the amendment proposed by AFEI. We would not oppose the insertion of words that note that clause 17.3(a)(i) operates subject to clause 17.3(a)(iii). We do not consider, however, that clause 17.3(a)(i) operates *subject to* clause 17.3(a)(iv).

Clause 17.3(b)(i) – Meal allowances

244. We agree that the variation proposed by the Aged Care Employers should be made. The redrafting of the current clause 20.3(a) amounts to a substantive change to the current entitlement.

Clause 17.3(b)(i) – Meal allowances

245. We do not oppose the amendment proposed by AFEI.

Clause 17.3(b)(iii) – Meal allowances

246. We do not consider that the amendment propose by AFEI is necessary.

Clause 17.3(c)(iii) – Travelling, transport and fares

247. We would not oppose the replacement of clause 17.3(c)(iii) with the current clause 20.5(c) to address the concern raised by the HSU.

Clause 17.3(e)(ii) – Board and lodging

248. Business SA proposes the introduction of a definition for the term "ruling cafeteria rates", however it has not proposed a specific form of words. Should it later choose to do so, we may seek an opportunity to respond.

249. For present purposes we note that we are not aware of any disputation arising from the use of this term and do not consider a definition necessary.

Clause 19.3 – Rest period after overtime

250. We do not oppose AFEI's submission that the current clause 28.3 be retained.

Clause 19.3(a) – Rest period after overtime

251. We do not oppose the amendments proposed by United Voice and the HSU on the basis that they are consistent with the current clause 28.3(a).

Clauses 20.1(a) and 20.1(b) – Saturday and Sunday work

252. We agree that the change proposed by Business SA should be made as it will ensure that the relevant provisions clarify that the rates prescribed are payable only for the ordinary hours worked during the relevant times. This would also resolve the concern raised by the HSU at paragraphs 34 – 36 of its submissions.

Clause 21.2 – Additional leave for certain shiftworkers

253. Whilst we do not consider it necessary, we do not oppose the change sought by the ASU to the heading of clause 21.2.

Clause 21.2 – Additional leave for certain shiftworkers

254. The ASU proposes the insertion of a note with reference to s.87(1). We suggest that the unions' intent can more readily be achieved by simply replacing the words "the NES" in clause 21.2 with "s.87(1) of the Act". This is consistent with the approach taken in many other modern awards.

Schedule E – Summary of hourly rates of pay and Schedule F – Summary of monetary allowances

255. We do not oppose the HSU's general submission regarding Schedules B and C, however we note that the manner in which the relevant percentages and/or dollar amounts are expressed in the tables is consistent with other exposure drafts.