Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Group 4A – 4C Exposure Drafts (other than construction industry awards)

30 June 2016

4 YEARLY REVIEW OF MODERN AWARDS

EXPOSURE DRAFTS: GROUP 4A – 4C AWARDS

(OTHER THAN CONSTRUCTION INDUSTRY AWARDS)

1. INTRODUCTION

1. On 10 May 2016, the Fair Work Commission (Commission) published revised 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 submissions on technical and drafting issues in Group 4A, 4B and 4C exposure drafts.

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

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

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

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

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

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

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

3. Ai Group will file a separate submission in respect of the following construction industry exposure drafts:

    a. *Exposure Draft – Building and Construction General On-Site Award 2016;*

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

    c. *Exposure Draft – Joinery and Building Trades Award 2016;*

    d. *Exposure Draft – Mobile Crane Hiring Award 2016;*

    e. *Exposure Draft – Plumbing and Fire Sprinklers Award 2016*.

4. This submission first deals with issues of general concern. Those issues will be familiar to the Commission, as many of them were also raised in respect of Group 1C – 1E revised exposure drafts in our submissions of 7 December 2015 and Group 3 exposure drafts in our submissions of 14 April 2016. 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.

5. The submission subsequently goes on to identify issues specific to the exposure drafts identified above.

2. ISSUES OF GENERAL CONCERN

2.1 Matters that have been determined by the Commission

6. 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]

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

2.2 The characterisation of premiums payable pursuant to an award

8. 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].

9. 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*.

10. 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.

11. 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.

12. 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.

13. 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 consequences for such employers and their employees, in circumstances

[23] Section 44C.

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.

14. 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.

15. 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.

16. 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

17. 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.

18. 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%.

19. 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.

20. 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.

21. 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 4 Exposure Drafts.

22. 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.

23. 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.

24. 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).

25. 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."

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

27. 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).

28. 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 application of penalties and loadings to the ordinary hourly rate

29. The Commission's decision of 13 July 2015[25] (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.

30. 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"[26] but noted that "some issues have arisen concerning the methodology used in the exposure drafts" in this regard.[27]

31. 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.[28]

[25] [2015] FWCFB 4658.

[26] [2015] FWCFB 4658 at [40].

[27] [2015] FWCFB 4658 at [41].

[28] [2015] FWCFB 4658 at [44].

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

> [45] Ai Group submit that the term 'ordinary hourly rate' could be "confusing" and is concerned that it could "extend existing entitlements". Ai Group submit that all purpose allowances should not necessarily be added to a minimum rate of pay before calculating any penalty or loading. In some cases due to the wording of the current award, Ai Group submit that the allowance should be added after the loading is applied to the minimum rate, that is there should be a cumulative rather than compounding effect.[29]

33. 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.[30]

34. 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.

35. 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.

36. 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

[29] [2015] FWCFB 4658 at [45].

[30] [2015] FWCFB 4658 at [47].

change that may have significant cost implications for an employer. We note that the Commission has repeatedly acknowledged that the redrafting process is not intended to create any substantive changes to the awards system.

37. 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.

38. 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.

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

40. 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

41. 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.

42. In its decision of September 2015[31], 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.[32]

43. 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.

44. 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.[33]

[31] [2015] FWCFB 6656.

[32] [2015] FWCFB 6656 at [110].

[33] [2015] FWCFB 6656 at [103] – [105].

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

> [106] The obligation in s.134(1) of the FW Act to ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions carries with it a requirement (in s.134(1)(g)) to take into account "the need to ensure a simple, easy to understand, stable and sustainable modern award system …". We accept that the adoption of a clear and consistent approach in relation to whether the casual loading should apply to all purpose allowances is desirable in the interests of simplicity and ease of understanding, although the particular circumstances of some awards may require special consideration. The question is whether the approach proposed by the provisional decision is the one which should be preferred in this respect.[34]

46. 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.

47. 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.

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

49. 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

[34] [2015] FWCFB 6656 at [106].

> the preferable approach is to permit reconsideration, on an award-by-award basis during the course of the 4-yearly review, as to whether any existing allowance should retain its "all purpose" designation or should be payable on some different basis.[35]

50. 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.

51. 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.

52. 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…

53. 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.

[35] [2015] FWCFB 6656 at [109].

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

54. 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.

55. 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'.[36]

56. 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.

2.6 Schedules summarising hourly rates of pay

57. In its July 2015 Decision[37], 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.

58. Whilst we understand that it is the Commission's intention that the schedules attached to the exposure drafts be legally enforceable,[38] we are concerned that this is not achieved by the note.

[36] [2015] FWCFB 4658 at [95] – [96].

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

[38] [2015] FWCFB 4658 at [63].

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

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

60. 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 …

61. 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.

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

63. 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.

64. 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.[39]

65. 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.

66. 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.

2.7 Commencement clause

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

> This award commenced operation on 1 January 2010

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

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

[39] [2015] FWCFB 4658 at [61].

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

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

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

2.8 Wage rates and allowances

71. The wage rates and wage-related allowances contained in the group 4A – 4C exposure drafts require updating in light of the Annual Wage Review 2015 – 2016 decision. Accordingly, we have not, at this time, undertaken a comprehensive review of these rates/allowances.

72. We respectfully request that a further opportunity be afforded to interested parties to review and comment on revised rates/allowances prior to the exposure drafts replacing the current modern awards.

3. EXPOSURE DRAFT – AGED CARE AWARD 2016

74. The submissions that follow relate to the *Exposure Draft – Aged Care Award 2016* (Exposure Draft).

Clause 2 – Definitions – casual ordinary hourly rate

75. A definition for 'casual ordinary hourly rate' has been introduced, however the term is not used elsewhere in the Exposure Draft. The definition has no work to do. Accordingly, it should be deleted from clause 2.

Clause 11.1 – Casual employment

76. The current clause 10.4(a) defines a casual employee as "an employee engaged as such on an hourly basis". The Exposure Draft, at clause 11.1, does not include the words "as such".

77. These words carry an important meaning. They clarify that if an employee is engaged as a casual employee, for the purposes of the award, that employee is a casual employee. They appear in the very vast majority of modern award clauses that define casual employment and have been relevant to the determination of disputes as to whether an employee is a casual employee.[40] Their absence substantively alters the definition of casual employment under this award. That is, an employee would not necessarily be defined as a casual employee by virtue of having been engaged as one.

78. In order to preserve the current definition of casual employment, clause 11.1 should be amended by inserting the words "as such" after "engaged".

Clause 15.3(a) – Sleepovers

79. The current clause 22.9(a) stipulates that the span for a sleepover will be "not less than eight hours and not more than 10 hours". Clause 15.3(a) of the Exposure Draft deviates from this by stating that the span will be "between eight

[40] See for example *Telum Civil (QLD) Pty Limited v CFMEU* [2013] FWCFB 2434.

and ten hours". Read literally, this would not permit a span of 8 hours or 10 hours.

80. For the purposes of ensuring that the Exposure Draft does not give rise to an outcome which is anomalous and a substantive change to the current award, clause 15.3(a) should be substituted with the text of the current clause 22.9(a).

Clause 15.5 – Sleepovers

81. The current clause 22.9(h) provides that a sleepover may be rostered and if it is rostered, it prescribes the two circumstances in which this is permitted. Clause 15.5 of the Exposure Draft appears to deviate from this. Read literally, it imposes an obligation to roster a sleepover in either of the two ways there prescribed.

82. To address this concern, we propose that clause 15.5 be amended by replacing "must" with "may". This is consistent with the current clause 22.9(h).

Clause 15.5(a) – Sleepovers

83. Clause 22.9(h) of the current award permits the rostering of a sleepover at the conclusion of an employee's shift and immediately prior to the commencement of an employee's shift. That is, an employer may roster a sleepover immediately prior to an employee's shift and another sleepover immediately after an employee's shift. An employer may also roster a sleepover either before or after an employee's shift. This is the effect of the words "and/or" in the second line.

84. Clause 15.5 of the Exposure Draft states that a sleepover must either be rostered to commence immediately at the conclusion of the employee's shift or immediately prior to the employee's shift. It does not enable the rostering of a sleepover in both of those circumstances. This is a substantive change to the current provision.

85. Accordingly, the "or" appearing at the end of clause 15.5(a) should be replaced with "and/or".

Clause 15.7(a) – Breaks between shifts

86. "Received" should be replaced with "receive". This appears to be a drafting error.

Clause 15.7(a) – Breaks between shifts

87. In the last line of the preamble, "of" should be replaced with "off". This appears to be a drafting error.

Clause 15.7(a)(ii) – Breaks between shifts

88. Clause 22.9(j) requires that an employee must be released after a sleepover period until they have had 8 consecutive hours off duty "without loss of pay for ordinary working time during such absence". The words "without loss of pay" mean that the employee must be paid for such hours at the rate that they would otherwise have been paid.

89. The absence of the underlined words from clause 15.7(a)(ii) may give rise to confusion as to the rate at which an employee is to be paid for any relevant ordinary working time. For the purposes of ensuring that this remains clear, the words "without loss of pay" should be retained.

Clause 15.7(b)(ii) – Breaks between shifts

90. Clause 22.9(j) also requires that where an employee is required to resume or continue work without 8 hours off duty, the employee must be entitled to be absent for 10 consecutive hours once they have been released "without loss of pay for ordinary working time occurring during such absence". The words "without loss of pay" mean that the employee must be paid for such hours at the rate that they would otherwise have been paid.

91. The absence of the underlined words from clause 15.7(b)(ii) may give rise to confusion as to the rate at which an employee is to be paid for any relevant ordinary working time. For the purposes of ensuring that this remains clear, the words "without loss of pay" should be retained.

Clause 16.1(a) – Unpaid meal breaks

92. The current clause 24.1(a) requires that an employee in certain circumstances will be entitled to an unpaid meal break of "not less than 30 minutes and not more than 60 minutes". Clause 16.1(a) of the Exposure Draft deviates from this by requiring that the employee be entitled to a break "between 30 and 60 minutes".

93. Whilst a break 30 minutes or 60 minutes in length would satisfy the current clause, we are concerned that it would not meet the requirements of the provision in the Exposure Draft. This is both a substantive deviation from the current award and a somewhat anomalous outcome. Accordingly, we submit that the wording of the current provision should be restored.

Clause 17.4(d) – Adult apprentices

94. Clause 17.4(d) applies only to "a person employed by an employer under this award immediately prior to entering into a training agreement as an adult apprentice with that employer". This can be seen in the current clause 14.4(c).

95. As a result of the disaggregation of the current clause into two separate subclauses, this is no longer clear. Rather, it appears that clause 17.4(d) applies to all adult apprentices, which is a substantive change to the current award.

96. Clause 17.4(d) should therefore be amended such that it forms part of the preceding subclause.

Clause 17.5(f) – Attendance at block release training

97. The new heading which appears at clause 17.5(f) is inappropriate and should be removed. Clauses 17.5(f)(i) and 17.5(f)(ii) are not confined to block release training. They relate to any training and assessment specified in, or associated with, the training contract. Further, clause 17.5(f)(iii) relates to the performance of overtime by an apprentice.

98. The heading should be deleted and the aforementioned clauses should be reformatted consistent with the current clauses 14.5(g) – 14.5(i).

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

99. The reference to clause 2 should be replaced with a reference to clause Schedule E – School-based Apprentices. This appears to be a drafting error.

Clause 18.2(b)(i) – Leading hand allowance

100. The current clause 15.3(a) excludes an employee "whose classification denotes supervisory responsibility" from eligibility for the leading hand allowance. The word "denote" is defined by the Macquarie Dictionary as a verb: "to be a mark or sign of; indicate". Thus, if an employee's classification is indicative of or suggests supervisory responsibility, that employee is excluded from the application of the clause.

101. The Exposure Draft refers to an employee "whose classification does not include supervisory responsibility". In our view, this potentially represents a different threshold. It could be interpreted to include only those employees whose classification expressly contemplates supervisory responsibility as forming part of that employee's duties.

102. So as to ensure that the Exposure Draft does not give rise to such an inadvertent change, "include" should be replaced with "denote".

Clause 18.2(b)(iv) – Leading hand allowance

103. Clause 15.3(d) of the current award deals with the calculation of the leading hand allowance in respect of employees who work less than 38 hours per week. In such circumstances, the allowance is payable "in the same proportion as the average hours worked each week bears to 38 ordinary hours". That is, it enables an averaging of the hours worked in determining the quantum of the allowance payable.

104. Clause 18.2(b)(iv) of the Exposure Draft deviates from this, as it simply states that the allowance is payable on a pro rata basis. This does not appear allow

an averaging of the number of hours worked each week. Rather, the provision requires that the amount paid each week must be directly proportional to the number of hours worked in that week.

105. For this reason, the words of the current clause should be retained.

Clause 18.2(c)(i) – Nauseous work allowance

106. The current clause 15.5(a) requires that the allowance prescribed is to be paid "per hour or part thereof". Therefore, where an employee works for less than an hour, the allowance is to be paid on a pro rata basis for that part hour.

107. Clause 18.2(c)(i) instead requires that the allowance prescribed is to be paid "per hour or part hour". This may substantively change the entitlement to the allowance.

108. For this reason, "part hour" should be replaced with "part thereof". This is consistent with Schedule C.2 of the Exposure Draft.

Clause 18.2(c)(ii) – Nauseous work allowance

109. The concluding sentence of the current clause 15.5(a) requires that in any week, where an employee performs work that entitles them to the allowance prescribed by that clause, a minimum sum of 0.27% of the standard rate must be paid.

110. Clause 18.2(c)(ii) of the Exposure Draft potentially deviates from this. It simply requires that the minimum weekly amount prescribed must be paid "to an employee entitled to the allowance" in the preceding clause. The payment of that weekly amount is not confined to those weeks in which the employee in fact performs the relevant type of work. That is, clause 18.2(c)(ii) could be read to require that if an employee at any point in time is entitled to the allowance in clause 18.2(c)(i), that employee must each week thereafter be paid the minimum weekly amount. This would clearly be a substantive change to the current entitlement.

111. For the purposes of ensuring that Exposure Draft is consistent with the current clause 15.5(a), clause 18.2(c)(ii) should be replaced with the final sentence of clause 15.5(a).

Clause 18.3(a)(i) – Clothing and equipment

112. The current clause 15.2 requires that in certain circumstances an employer must supply uniforms to an employee and that the uniform will be "appropriate to the occupation".

113. The first bullet point under clause 18.3(a)(i) of the Exposure Draft rephrases the current provision, although the intention behind this redrafting is unclear. It requires that the employer must "supply the employee with an adequate number of uniforms free of cost appropriate to the occupation". The connection between the reference to what is "appropriate to the occupation" and the obligation to supply uniforms is no longer clear. That is, the clause is ambiguous as to what must be "appropriate to the occupation" – the uniform itself, the number of uniforms or some other element of the entitlement.

114. Accordingly, we propose that the words "appropriate to the occupation" instead appear after "number of uniforms", consistent with the current clause.

Clause 18.3(a)(ii) – Clothing and equipment

115. The second part of clause 18.3(a)(iii) ("and must be provided to the employee and laundered free of charge") duplicates the second bullet point under clause 18.3(a)(i). Such repetition is unnecessary and does not appear in the current clause.

116. Either the second bullet point under clause 18.3(a)(i) should be deleted or the text identified in the paragraph above in clause 18.3(a)(ii) should be removed.

Clause 18.3(a)(iii) – Uniform allowance

117. We refer to the submissions we have earlier made regarding the use of "part thereof" in clause 18.2(c)(i). A similar difficulty arises from clause 18.3(a)(iii) which no longer allows the allowance to be paid on a pro rata basis where an

employee works for part of a shift. Therefore, "part shift" should be replaced with "part thereof". This is consistent with Schedule C.2 of the Exposure Draft.

Clause 18.3(a)(iv) – Laundry allowance

118. The laundry allowance prescribed by the current clause 15.2(b) is payable only where instead of providing the uniforms, the employer pays the employee a uniform allowance. The laundry allowance is not payable where the uniforms are provided by the employer in accordance with clause 15.2(a). The terms of clause 18.3(a)(iv) do not make this clear. Indeed it creates a new and separate entitlement to a laundry allowance that is not confined in the manner described above. This is clearly a substantive change to the current clause.

119. Clause 18.3(a)(iv) should be amended as follows:

"Where clause 18.3(a)(iii) applies and where such employee's uniforms are ~~the uniform is~~ not laundered …"

Clause 18.3(a)(iv) – Laundry allowance

120. For the reasons articulated above, "part shift" should be replaced with "part thereof". This is consistent with Schedule C.2 of the Exposure Draft.

Clause 20.3 – Weekend penalties

121. The current clause 23.2 states that casual employees will be paid in accordance with clause 23.1. Clause 23.1 prescribes the relevant penalties and states that they will be paid "in substitution for and not cumulative upon the shift premiums prescribed in clause 26".

122. The current clause 23.1 appears as to separate subclauses in the Exposure Draft: clause 20.1 and clause 20.2. Clause 20.3 states that casual employees will be paid in accordance with clause 20.1, which prescribes the weekend penalties. The provision does not include a reference to clause 20.2, which states that the penalty rates in clause 20.1 are in substitution for and not cumulative upon the shift premiums in clause 21.

123. We are concerned that as a result, under the Exposure Draft a casual employee may be entitled to weekend penalties and shift premiums, which is a significant departure from the current award. Accordingly, clause 20.3 should be amended to include a reference to clause 20.2.

Clause 22.2(a) – Part-time and casual employees

124. The current clause 25.1(b)(i) prescribes the circumstances in which a part-time or casual employee is entitled to overtime rates. That is, the overtime rates prescribed by that clause are payable for "all time worked … in excess of 38 hours per week or 76 per fortnight".

125. Clause 22.2(a) of the Exposure Draft does not accurately define the circumstances in which overtime rates are payable. Rather, it describes a part-time or casual employee's eligibility to overtime rates in the following terms:

> A part-time or casual employee who works more than 38 hours per week or 76 hours per fortnight must be paid at the following rates …

126. As can be seen, the clause does not make clear that the overtime rates apply only to work in excess of 38 hours per week or 76 hours per fortnight. Indeed on one reading, the provision could be said to require the payment of the relevant rates to all hours of work where an employee works more than 38 hours per week or 76 hours per fortnight.

127. The preamble in clause 22.2(a) should be replaced with the following:

> (a) All time worked by a part-time or casual employee in excess of 38 hours per week or 76 per fortnight will be paid at the following rates: …

128. The proposed wording is consistent with the current award.

Clause 22.2(b) – Part-time and casual employees

129. The concern identified above also arises in respect of clause 22.2(b). The provision does not make clear that the overtime rates prescribed apply only to those hours of work that are in excess of 10 hours in a day. Accordingly, the preamble in clause 22.2(b) should be replaced with the following:

> (b) All time worked by a part-time or casual employee which exceeds 10 hours per day will be paid at the following rates: …

Clause 22.4(a) – Rest period after overtime

130. The current clause 25.1(d)(i) refers to the performance of overtime between the termination of ordinary work "on any day or shift" and the commencement of ordinary work "on the next day or shift". The deletion of the reference to shifts in clause 22.4(a) may give rise to confusion as to how the clause is to be applied to shiftworkers. This is particularly relevant where the ordinary hours of one shift end on a particular day and the ordinary hours of the next day commence on that same calendar day.

131. The reference to shifts should be retained as they clarify the application of the clause to shiftworkers.

Clause 22.4(a)(ii) – Rest period after overtime

132. Clause 25.1(d)(i) requires that an employee must be released after completion of overtime until they have had 10 consecutive hours off duty "without loss of pay for rostered ordinary hours occurring during such absence". This creates an entitlement to be paid for any rostered ordinary hours that fall during the 10 hour absence. The words "without loss of pay" mean that the employee must be paid for those hours at the rate that they would otherwise have been paid.

133. Clause 22.4(a)(ii) of the Exposure Draft corresponds with that part of clause 25.1(d)(i) that we have identified above. It gives rise to the following issues:

- The reference to rostered ordinary hours is absent. The provision instead refers to "ordinary working time", the meaning of which is less clear. The rostered ordinary hours of an employee are the ordinary

hours that an employee is rostered by their employer to work. We are concerned that a reference to "ordinary working time" could be interpreted as meaning something broader; for instance, ordinary hours of work generally as defined by the award at clause 22.

- The rate at which the employee is to be paid is no longer clear. The clause makes no reference to the relevant rate that applies.

134. For the reasons above, the text currently found at clause 25.1(d)(i) should be retained.

Clause 22.4(b)(ii) – Rest period after overtime

135. The current clause 25.1(d)(ii) deals with circumstances in which an employee is required to resume or continue work without having 10 consecutive hours off duty. The provision first requires payment at double time until the employee is released from duty. It goes on to state that the employee will "then be entitled to be absent until they have had 10 consecutive hours off duty without loss of pay for rostered ordinary hours occurring during such absence".

136. Clause 22.4(b)(ii) of the Exposure Draft deviates from this in the following ways:

- It does not expressly provide for an entitlement to be absent until the employee has had 10 consecutive hours off duty. As a consequence, the reference to the "period of absence" is not limited to that period of 10 hours. Rather, it appears to be a reference to any period of absence after the employee is released from work. This is a substantive change to the current clause.

- The reference to rostered ordinary hours is absent. The provision instead refers to "ordinary working time", the meaning of which is less clear. The rostered ordinary hours of an employee are the ordinary hours that an employee is rostered by their employer to work. We are concerned that a reference to "ordinary working time" could be interpreted as meaning something broader; for instance, ordinary hours of work generally as defined by the award at clause 22.

- The rate at which the employee is to be paid is no longer clear. The clause makes no reference to the relevant rate that applies. The words "without loss of pay" in the current clause make clear that the employee must be paid for those hours at the rate that they would otherwise have been paid.

137. For the reasons set out above, the terms of the current clause should be retained.

Clause 22.5(a) – Recall to work overtime

138. Clause 25.1(e) of the current award requires that where an employee is recalled to work overtime after leaving the employer's premises, they will be paid for a minimum of four hours' work at the appropriate rate for each time they are so recalled.

139. Clause 22.5(a) of the Exposure Draft potentially deviates from this. The provision applies to an employee recalled to work overtime after leaving the employer's premises. It then appears to create an entitlement to a certain minimum payment for each time that employee is recalled. The entitlement is not limited to circumstances in which the employee is recalled as described at the commencement of the clause. This is because the word "so" has been deleted from the last line.

140. Consistent with the current clause 25.1(e), and for the purposes of ensuring that the entitlement afforded by the current provision is not expanded, the word "so" should be reinserted.

Clause 22.6(d) – Meal breaks during overtime

141. The current clause 25.1(f)(ii) requires that the meals referred to in the preceding clause are to be allowed to the employee free of charge. It is only in circumstances where "the facility is unable to provide such meals" that a meal allowance is payable to the employee.

142. Clause 22.6(d) substantively deviates from this. It effectively provides an entitlement to a meal allowance and an entitlement to be provided a meal but in no way explains the relationship between the two. The provision no longer limits the circumstances in which the meal allowance is payable to those where "the facility is unable to provide such meals".

143. Clause 22.6(d) should be replaced with the current clause 25.1(f)(ii) to ensure that the status quo is retained.

Clause 26.3(c) – Casual employees

144. Clause 29.2(c)(i) of the current award states that a casual employee is to be paid "at the total rate of 250%" for all hours worked on a public holiday. We understand this to mean that this clause wholly regulates the amount payable to a casual employee working on a public holiday and that an entitlement under a separate provision (such as a shift premium) does not arise.

145. Clause 26.3(c) of the Exposure Draft has erased the reference to "the total rate". We are concerned that this may later give rise to dispute as to whether a casual employee is also entitled to any other separately identifiable amount under the award for work on a public holiday.

146. For the purposes of ensuring that the provision clearly prescribes the amount payable to a casual employee on a public holiday, the words of the current clause should be retained.

Clause 26.3(c) – Casual employees

147. "Addition" should be replaced with "additional". This appears to be a drafting error.

Schedule B – Summary of Hourly Rates of Pay

148. The various tables contained in Schedule B set out hourly rates that are payable. However, the structure of the tables suggests that they reflect a percentage of the ordinary hourly rate. In some instances this will of course be

inaccurate, as there will be an allowance payable for all purposes that will need to be included in rates.

149. We acknowledge that it could be argued that the clauses should not be considered inaccurate when read in the context of B.1. Relevantly, B.1.1 defines the ordinary hourly rate and B.1.2 specifies that the tables below are based on the minimum hourly rates.

150. Nonetheless, we are concerned that the structure of each table is likely to mislead readers who may assume that the rates specified reflect the actual percentage of the ordinary hourly rate applicable in all circumstances and may not appreciate that a determination of the actual rate payable will depend on whether the body of the award dictates that an additional allowance must be included in the calculation of the relevant rates. Put simply, we suggest it likely that some readers will refer directly to the numbers in the table and fail to read B.1 and otherwise fail to appreciate the special meaning ascribed to the phrase "ordinary hourly rate" within the award. This risk is amplified in exposure drafts such as this one where there are many pages of tables included in Schedule B.

151. Ai Group has raised similar issues in a number of exposure drafts. Ai Group intends to make a separate submission highlighting this as a matter of general application and identifying the awards in which we contend that the issue arises.

152. In the context of other awards, we have previously suggested that the words "% of ordinary hourly rate" as contained within the relevant heading in the wage tables, should be replaced with the words "% of the minimum hourly rate." Another way of addressing the matter may be to provide some indication in the body of each relevant table that different rates may be applicable where an employee is entitled to an allowance pursuant to clause 18.2(b).

Schedule B.1.1 – Ordinary hourly rate

153. The first sentence of B.1.1 purports to define "ordinary hourly rate" but is in different terms to the definition found at clause 2. For the purposes of ensuring consistency, the definition in clause 2, which reflects the Commission's July 2015 Decision, should be adopted in B.1.1.

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

154. The rate for Sunday should be 175% rather than 200%. This is consistent with the current clause 23.1 and the rates contained in B.2.1 of the Exposure Draft.

Schedule B.2.2 – Full-time and part-time shiftworkers – ordinary and penalty rates

155. The descriptors of the afternoon and night shifts at B.2.2 are inconsistent with clauses 21.2(a)(i) – 21.2(a)(iv) of the Exposure Draft. These should be amended to use the same verbiage as that which appears in the body of the instrument.

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

156. The rate for Sunday should be 175% rather than 200%. This is consistent with the current clause 23.1 and the rates contained in B.3.1 of the Exposure Draft.

Schedule B.3.2 – Casual shiftworkers – ordinary and penalty rates

157. The descriptors of the afternoon and night shifts at B.3.2 are inconsistent with clauses 21.2(a)(i) – 21.2(a)(iv) of the Exposure Draft. These should be amended to use the same verbiage as that which appears in the body of the instrument.

Schedule B.4.2 – Cooking apprentices – shiftwork rates

158. Consistent with B.2.2 and B.3.2, the description associated with the various afternoon and night shift premiums should be included in B.4.2.

Schedule B.4.2 – Cooking apprentices – shiftwork rates

159. The rates payable for ordinary hours of work on a Saturday, Sunday or pubic holiday should be included in B.4.1 which is headed “ordinary and penalty rates” rather than under “shiftwork rates”. This is consistent with B.2.1 and B.3.1.

Schedule B.4.5 – Gardening apprentices commencing before 1 January 2015 – shiftwork rates

160. Consistent with B.2.2 and B.3.2, the description associated with the various afternoon and night shift premiums should be included in B.4.5.

Schedule B.4.5 – Gardening apprentices commencing before 1 January 2015 – shiftwork rates

161. The rates payable for ordinary hours of work on a Saturday, Sunday or pubic holiday should be included in B.4.4 which is headed “ordinary and penalty rates” rather than under “shiftwork rates”. This is consistent with B.2.1 and B.3.1.

Schedule B.4.8 – Gardening apprentices commencing on or after 1 January 2015 – shiftwork rates

162. Consistent with B.2.2 and B.3.2, the description associated with the various afternoon and night shift premiums should be included in B.4.8.

Schedule B.4.8 – Gardening apprentices commencing on or after 1 January 2015 – shiftwork rates

163. The rates payable for ordinary hours of work on a Saturday, Sunday or pubic holiday should be included in B.4.7 which is headed “ordinary and penalty rates” rather than under “shiftwork rates”. This is consistent with B.2.1 and B.3.1.

Schedule B.5 – Apprentice rates – adult apprentices commencing on or after 1 January 2014

164. The text following the above heading does not accurately reflect clause 17.4 of the Exposure Draft. The minimum wage payable to an adult apprentice is to be derived in one of three ways, as set out at clauses 17.4(a), 17.4(b) and 17.4(c). The text at B.5 reflects only 17.4(b).

Schedules B.5.1 – B.5.3 - Apprentice rates – adult apprentices commencing on or after 1 January 2014

165. The rates at B.5.1 – B.5.3 appear to be calculated based on 80% of the Level 4 adult rate, in accordance with clause 17.4(a)(i), which is only relevant to apprentices who commenced their apprenticeship on or after 1 January 2014 and is in their first year of apprenticeship. The schedule does not, however, explain how these rates have been derived or to whom they apply.

Schedule B.5.2 – Cooking and gardening adult apprentices – shiftwork rates

166. Consistent with B.2.2 and B.3.2, the description associated with the various afternoon and night shift premiums should be included in B.5.2.

Schedule B.5.2 – Cooking and gardening adult apprentices – shiftwork rates

167. The rates payable for ordinary hours of work on a Saturday, Sunday or pubic holiday should be included in B.5.1 which is headed “ordinary and penalty rates” rather than under “shiftwork rates”. This is consistent with B.2.1 and B.3.1.

4. EXPOSURE DRAFT – AIR PILOTS AWARD 2016

168. The submissions that follow relate to the *Exposure Draft – Air Pilots Award 2016* (Exposure Draft).

Clause 2 – Definitions – appropriate accommodation

169. The reference to C.1.4 should instead be to C.1.2. This appears to be a drafting error.

Clause 2 – Definitions – home base (pilots employed subject to Schedule E of this Award)

170. The reference to Schedule E should instead be to Schedule D. This appears to be a drafting error.

Clause 2 – Definitions – home base (pilots employed subject to Schedules B, C or D of this Award)

171. The references to Schedules B, C or D should instead be to Schedules A, B or C. This appears to be a drafting error.

Clause 4.1 – Coverage

172. The coverage of the existing award is expressed in the following terms at clause 4.1:

> This award covers employers throughout Australia of air pilots and those employees.

173. This has been replaced with the following at Clause 4.1 of the Exposure Draft:

> This occupational award covers employers throughout Australia of air pilots and those employees who are engaged in the air pilots industry in respect of work by their employees in the classifications listed in clause 18 – Minimum wages to the exclusion of any other modern award.

174. We observe firstly that the rationale underpinning this redrafting is unclear to us. Apart from the substantive effect that it has on the coverage of the instrument, which we detail below, it does not make the provision simpler or easier to understand. It rather complicates and elongates the clause without

any evident reason for doing so. It is of course trite to observe that such redrafting of coverage provisions is fraught with the risk of a consequent substantive albeit unintended change of significant consequence. We therefore urge the Commission to adopt the prudent approach of refraining from redrafting clause 4.1 of the current award.

175. We have identified the following two elements of the redrafted provision that are particularly problematic, as set out below:

- the reference to the "air pilots industry"; and
- the exclusion of other modern awards.

The Air Pilots Industry

176. Clause 4.1 of the Exposure Draft is expressed such that the award would cover employers of air pilots and those employees "who are engaged in the air pilots industry".

177. The meaning of "air pilots industry" is entirely unclear. It is not a defined term and such a notion does not appear in the current award. The introduction of this concept is confusing as the relevant industry cannot be identified.

178. Furthermore, the award as presently crafted is an occupational one. The recasting of the clause by reference to an industry substantially alters the character of the coverage provision to one that operates by reference to an (unidentifiable) industry.

179. The reference to the "air pilots industry" is therefore both confusing and substantially alters the effect of the current clause. It should not be adopted.

The exclusion of other modern awards

180. Clause 4.1 of the Exposure Draft purports to deal with the possible interaction between the coverage of this award and others by stating that it covers the relevant employers and employees "to the exclusion of other modern awards". These words do not appear in the pre-existing clause 4.1.

181. The current award deals with any potential interaction at clause 4.2 (clause 4.2(a) of the Exposure Draft) and clause 4.6 (found at clause 4.4 of the Exposure Draft). The insertion of the relevant text at clause 4.1 creates an inconsistency with these clauses and thereby gives rise to confusion.

182. For instance, read in isolation, clause 4.1 purports to cover a pilot who meets the criteria there set out to the exclusion of any other modern award. This is clearly inconsistent with clause 4.2(a) which in fact states that if an employee is covered by an industry award that contains pilot classifications, this award does not cover such an employee (even if that employee met the requirements set out in clause 4.1). If clause 4.1 were applied such that the employee was, nonetheless, deemed to be covered by this award, that would amount to a substantive change to the operation of the current provisions.

183. For these reasons, the relevant words should not be included.

Clause 7.4 – Facilitative provisions

184. Clause 15.3 of the Exposure Draft states that clauses 15.4 – 15.8 may be varied by agreement between the employer and majority of employees in the workplace or part of it. It does not enable agreement between an employer and an individual employee.

185. Despite this, the table in clause 7.4 states that under clauses 15.4, 15.5, 15.6, 15.7 and 15.8, an agreement may be reached between an employer and an individual or the majority of the employees. This does not properly reflect the terms of clause 15.3.

186. Accordingly, in respect of each of the provisions identified above, clause 7.4 should be amended by deleting the words “An individual or”.

Clause 32 – Transfer to lower paid job on redundancy

187. Clause 32 is headed “transfer to lower paid job on redundancy”. It is followed by two subclauses, both of which deal with circumstances in which an employee is transferred to lower paid duties by reason of redundancy.

188. It is our submission that the use of the word "job" in the heading is anomalous and confusing. The relevant provisions relate to the *duties* performed by the employee. The notion of the employee's "job" is potentially a separate and distinct one.

189. Furthermore, the words "on redundancy" do not make sense. The following clauses apply where an employee, by virtue of a redundancy, have been transferred to lower paid duties. An employee is not generally said to be "on" redundancy.

190. For these reasons, the heading to clause 32 should be replaced with: "Transfer to lower paid duties by reason of redundancy".

Clause 33 – Employee leaving during redundancy notice period

191. Clause 13.3 of the current award deals with circumstances in which an employee terminates their employment during the notice period that follows the employee having been given notice of termination in circumstances of redundancy. The employee is entitled to receive the benefits and payments that they would have received under clause 13 had they remained in employment until the expiry of the notice, but is not entitled to payment instead of notice. The relevant benefits and payments under clause 13 are:

- Clause 13.2: Transfer to lower paid duties; and
- Clause 13.4: Job search entitlement.

192. Clause 33 of the Exposure Draft corresponds with clause 13.3. It states that the employee is entitled to receive the benefits and payments they would have received under clause 31. Clause 31 simply states that redundancy pay is provided for in the NES.

193. Accordingly, the cross reference in clause 33 should be replaced with references to clauses 32 and 34. This will ensure that the provision does not deviate substantively from the current clause 13.3.

Clause 34.2 – Job search entitlement – redundancy

194. The current clause 13.4(c) has not been included in the Exposure Draft. We submit that it should be retained in order to make clear that where clause 34.2 of the Exposure Draft applies, an entitlement under clause 34.1 does not arise. This will assist in ensuring that the award is simple and easy to understand.

Schedule A.1.6 – First Officer/Second Pilot

195. The cross reference to A.1.3(a), (b) or (c) should be replaced with a reference to A.1.3(a), (c) or (d). This is consistent with the current B.1.6.

5. EXPOSURE DRAFT – AIRCRAFT CABIN CREW AWARD 2016

196. The submissions that follow relate to the *Exposure Draft – Aircraft Cabin Crew Award 2016* (Exposure Draft).

Clause 11.1 – Casual employment

197. Clause 14.1 of the current award defines a casual employee as, "…an employee engaged as such". The Exposure Draft, at clause 11.1, defines a casual employee as an employee, "…engaged on a casual basis".

198. The current award wording should be reinstated. We are concerned that the change either substantively alters the meaning of what constitutes a casual employee under the award, or at the very least, it could be argued that the altered wording gives rise to a different meaning to the current clause.

199. It is not clear what is meant by the words "casual basis." They do not serve to make the award simpler or easier to understand, as contemplated under s.134(1) of the Act.

200. There is no apparent difficulty with the current wording. Similar wording is currently found in many awards and we are unaware of any difficulties flowing from the provision. Accordingly, there is no obvious reason why the wording should be changed or indeed how the new wording could be considered necessary.

201. An award derived definition of casual employment is of great significance. It is determinative of the nature of the employee's employment type and associated rights and entitlements under both under the award and Act.[41] It would not be prudent for the Commission to adopt the altered wording.

[41] See for example *Telum Civil (QLD) Pty Limited v CFMEU* [2013] FWCFB 2434.

Clause 11.2 - Calculation of casual loading

202. Clause 11.2 specifies that:

> A casual employee must be paid the ordinary hourly rate for the class of work performed, plus 25%. …

203. This is a substantive change from the current award terms that should not be made. We refer to our contentions at section 2.4 of this submission.

204. We also observe that the cover of the Exposure Draft states:

> This exposure draft does not seek to amend any entitlements under the Cabin Crew award but has been prepared to address some of the structural issues identified in modern awards.

205. Clause 14.2 of the current award states;

> A casual cabin crew member must be paid per hour at the rate of 1/38th of the weekly rate prescribed for the class of work performed, plus 25%. …

206. The reference to "weekly rates prescribed" must be read in the context of the award as a whole. We contend that the reference to "weekly rate prescribed" is transparently a reference to the rates in clause18. Our view in this regard is reinforced by the words "for the class of work performed." Not all of the all-purpose allowances contained in the award are referrable to a "class of work performed" by an employee.

207. Clause 11.2 cannot be read in a manner the enables any allowance to be taken into account in the calculation of a casual employee's rate of pay. The 25% is directly linked to the minimum weekly rate.

208. Ai Group notes that some of the all purpose allowances specified in this award constitute large sums of money. Adopting the wording in the Exposure Draft would significantly increase the monetary obligations imposed upon employers by the award. Accordingly, it is particularly important that the Commission not vary the entitlements of casual employees in the manner proposed. It is not the kind of change that should be made purely in support of a desire to achieve greater consistency between awards in order to purportedly make the system "simpler and easier to understand".

209. If the Commission accepts the concerns that we have raised, there will need to be consequential amendments to the tables in Schedule B relating to casual employees.

Clause 14.2 – Minimum wages

210. Clause 14.2 includes a new sentence stating:

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

211. This is not accurate as the weekly rates referred to are only strictly applicable to full-time employees.

212. We suggest that the words, "(full-time employees)" be inserted directly below the words "minimum weekly wage" in clause 14.2. This variation will make the award simpler and easier to understand.

Schedule A.1.7 – Flying allowance

213. We refer to the question contained in the Exposure Draft at A.1.7.

214. A.1.7(c) and A.1.7(d) deal with the nature of the allowance and what it is paid instead of, or as reimbursement for. The provisions are not redundant. The deletion of the clauses may have implications for how they are treated for taxation and superannuation purposes.

Schedule A.1.8(b) – Training allowance

215. We refer to the question contained in the Exposure Draft at A.1.8(b).

216. A.1.8(b) means that the rate is based on a cabin member's rate. The definition of cabin crew manager indicates that such a person is a crew member.

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

217. The submissions that follow relate to the *Exposure Draft – Airline Operations – Ground Staff Award 2016* (Exposure Draft).

Clause 2 – Definitions – ordinary hourly rate

218. The definition of "ordinary hourly rate" at clause 2 refers to clause 18.3, which contains the minimum rates for the engineering and maintenance stream. There are however other streams of classifications. We suggest that the reference should accordingly be to clause 18.

Clause 11.1 – Casual employment

219. Clause 11.5(a) of the current award defines a casual employee as, "…an employee engaged as such". The Exposure Draft, at clause 11.1, defines a casual employee as an employee, "…engaged on a casual basis".

220. The current award wording should be reinstated. We are concerned that the change either substantively alters the meaning of what constitutes a casual employee under the award, or at the very least, it could be argued that the altered wording gives rise to a different meaning to the current clause.

221. It is not clear what is meant by the words "casual basis." They do not serve to make the award simpler or easier to understand, as contemplated under s134(1) of the Act.

222. There is no apparent difficulty with the current wording. Similar wording is currently found in many awards and we are unaware of any difficulties flowing from the provision. Accordingly, there is no obvious reason why the wording should be changed or indeed how the new wording could be considered necessary

223. An award derived definition of casual employment is of great significance. It is determinative of the nature of the employee's employment type and associated

rights and entitlements under both under the award and Act.[42] It would not be prudent for the Commission to adopt the altered wording.

Clause 11.2 – Calculation of the casual rate of pay

224. The approach to calculating the casual rate of pay required by clause 11.2 differs from that taken under clause 11.5(b) of the current award. The Exposure Draft increases the rate of pay for casuals. It results in the 25% being calculated on an amount that includes all purpose allowances while the current award requires that it be calculated on a proportion of the relevant minimum weekly rate.

225. The clause is relevantly similar to the equivalent provision in the *Aircraft Cabin Crew Award 2010*. We accordingly rely on the submissions we have earlier made regarding a similar issue arising from clause 11.2 of the *Exposure Draft – Aircraft Cabin Crew Award 2016*.

226. If the Commission accepts the concerns that we have raised, there will need to be consequential amendments to the tables in Schedule B relating to casual employees.

Clause 17.3 – Shift Rates

227. We refer to our submissions at sections 2.2 and 2.3 above. Consistent with the concerns we have there raised, clause 17.3 of the Exposure Draft should be amended by replacing the references to "rates" with "loadings" and replacing the percentages in the final column of the table with those found in the current clause.

Clause 18 – Minimum wages

228. Clause 18 of the Exposure Draft includes a new sentence stating:

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

[42] See for example *Telum Civil (QLD) Pty Limited v CFMEU* [2013] FWCFB 2434.

229. This is not accurate as the weekly rates subsequently prescribed are only strictly applicable to full-time employees.

230. We suggest that the words "(full-time employees)" be inserted directly below the words "minimum weekly rate" in each of the tables in clause 18. This variation will make the award simpler and easier to understand.

Schedule B – Summary of Hourly Rates of Pay

231. The various tables contained in Schedule B set out hourly rates that are payable. However, the structure of the tables suggests that they reflect a percentage of the ordinary hourly rate. In some instances this will of course be inaccurate, as there will be an allowance payable for all purposes that will need to be included in rates.

232. We acknowledge that it could be argued that the clauses should not be considered inaccurate when read in the context of B.1. Relevantly, B.1.1 defines the ordinary hourly rate and B.1.2 specifies that the tables below are based on the minimum hourly rates.

233. Nonetheless, we are concerned that the structure of each table is likely to mislead readers who may assume that the rates specified reflect the actual percentage of the ordinary hourly rate applicable in all circumstances and may not appreciate that a determination of the actual rate payable will depend on whether the body of the award dictates that an additional allowance must be included in the calculation of the relevant rates. Put simply, we suggest it likely that some readers will refer directly to the numbers in the table and fail to read B.1 and otherwise fail to appreciate the special meaning ascribed to the phrase "ordinary hourly rate" within the award. This risk is amplified in exposure drafts such as this one where there are many pages of tables included in Schedule B.

234. Ai Group has raised similar issues in a number of exposure drafts. Ai Group intends to make a separate submission in order to highlight this as a matter of general application and to identify the awards in which we contend that the issue arises.

235. In the context of other awards, we have previously suggested that the words "% of ordinary hourly rate" as contained within the relevant heading in the wage tables, should be replaced with the words "% of the minimum hourly rate." Another way of addressing the matter may be to provide some indication in the body of each relevant table that different rates may be applicable where an employee is entitled to an allowance pursuant to clause 19.7(a).

7. EXPOSURE DRAFT – CHILDREN'S SERVICES AWARD 2016

236. The submissions that follow relate to the *Exposure Draft – Children's Services Award 2016* (Exposure Draft).

Clause 2 – Definitions

237. Ai Group notes the reoccurring reference throughout the Exposure Draft to the phrase "ordinary hourly rate" to reflect that this award provides for an all-purpose allowance, being the qualifications allowance at clause 17.2. While the Exposure Draft contains a definition of "ordinary hourly rate" in Schedule B at B.1.1, the definition should also appear in clause 2 given that the phrase is used in other important parts of the instrument.

Clause 11.1 – Casual employment

238. The current clause 10.5(a) defines a casual employee as "an employee engaged as such …". The Exposure Draft, at clause 11.1, does not include the words "as such".

239. These words carry an important meaning. They clarify that if an employee is engaged as a casual employee, for the purposes of the award, that employee is a casual employee. They appear in the very vast majority of modern award clauses that define casual employment and have been relevant to the determination of disputes as to whether an employee is a casual employee.[43] Their absence substantively alters the definition of casual employment under this award. That is, an employee would not necessarily be defined as a casual employee by virtue of having been engaged as one. Rather, a casual employee is now defined by reference to the purpose for which they are engaged; that being "for temporary and relief purposes".

240. In order to preserve the current definition of casual employment, clause 11.1 should be amended by inserting the words "as such" after "engaged".

[43] See for example *Telum Civil (QLD) Pty Limited v CFMEU* [2013] FWCFB 2434.

Furthermore, the current clause 10.5(b) should be restored as a separate subclause and the words "for temporary and relief purposes" should be deleted from clause 11.1.

Clause 11.1 – Casual employment

241. Ai Group also notes that the current award at clause 10.5(a) does not calculate the casual loading on an employee's ordinary hourly rate inclusive of an all-purpose allowance, but on the hourly rate payable to a full-time employee as per the relevant classification in the minimum wages clause. Accordingly, the current award provides for a calculation of the casual loading on the minimum hourly rate and if the all-purpose qualifications allowance is payable to the employee, then this allowance is added to the casually loaded rate. Ai Group opposes the calculation of the casual loading on the ordinary hourly rate as provided for in the Exposure Draft, as this is a substantive change departing from the current terms in the award.

242. If Ai Group's contention in this regard is accepted, the rates at Schedule B.3 will require recalculation.

Clause 17.2(c) – Broken shift allowance

243. The word "who" should be inserted after "employee" in clause 17.2(c). This appears to be a typographical error.

Schedule B – Summary of Hourly Rates of Pay

244. The various tables contained in Schedule B set out hourly rates that are payable. However, the structure of the tables suggests that they reflect a percentage of the ordinary hourly rate. In some instances this will of course be inaccurate, as there will be an allowance payable for all purposes that will need to be included in the rates.

245. We acknowledge that it could be argued that the clauses should not be considered inaccurate when read in the context of B.1. Relevantly, B.1.1

defines the ordinary hourly rate and B.1.2 specifies that the tables below are based on the minimum hourly rates.

246. Nonetheless, we are concerned that the structure of each table is likely to mislead readers who may assume that the rates specified reflect the actual percentage of the ordinary hourly rate applicable in all circumstances and may not appreciate that a determination of the actual rate payable will depend on whether the body of the award dictates that an additional allowance must be included in the calculation of the relevant rates. Put simply, we suggest it likely that some readers will refer directly to the numbers in the table and fail to read B.1 and otherwise fail to appreciate the special meaning ascribed to the phrase "ordinary hourly rate" within the award. This risk is amplified in exposure drafts such as this one where there are many pages of tables included in Schedule B.

247. Ai Group has raised similar issues in a number of exposure drafts. Ai Group intends to make a separate submission in order to highlight this as a matter of general application and to identify the awards in which we contend that the issue arises.

248. In the context of other awards, we have previously suggested that the words "% of ordinary hourly rate" as contained within the relevant heading in the wage tables, should be replaced with the words "% of the minimum hourly rate." Another way of addressing the matter may be to provide some indication in the body of each relevant table that different rates may be applicable where an employee is entitled to an allowance pursuant to clause 17.2.

8. EXPOSURE DRAFT - HYDROCARBONS FIELD GEOLOGISTS AWARD 2016

249. Ai Group does not have a substantial interest in the *Hydrocarbons Field Geologists Award 2010*. Accordingly, we have only considered the coverage provisions of the *Exposure Draft – Hydrocarbons Field Geologists Award 2016* (Exposure Draft) to ascertain whether such provisions would expand the coverage of the award and, as a consequence, potentially impact upon the coverage of other awards.

250. With regard to clause 4.1 of the Exposure Draft, the wording *"This award ..."* in the current award has been replaced with *"This occupational award..".* We propose that the existing wording be retained. The term "occupational award" is typically used to describe an award which applies to a particular occupation in numerous industries. This award only applies to the hydrocarbons industry and therefore it is, in effect, an industry award, albeit one that only applies to a few classifications in that industry.

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

251. The submissions that follow relate to the *Exposure Draft – Social, Community, Home Care and Disability Services Industry Award 2016* (Exposure Draft).

Clause 5.2 – Facilitative provisions for flexible working practices

252. Clause 5.2 in the Exposure Draft should be renumbered clause 7.2. This appears to be a typographical error.

Clause 12.4(a) – Progression

253. In response to the question regarding the meaning *"each level within the level'* in sub-clause 12.4(a), Ai Group considers that this is intended to mean '*each pay point within the level*.' Ai Group does not oppose a redrafting of the provision in these terms.

Clause 14.3(e) – Rosters

254. In response to the question regarding defining 'relieving staff', Ai Group considers that this phrase is well understood in the industry and does not require the introduction of a specific definition.

Clause 14.6(c) – 24 hour care

255. Ai Group considers that the Exposure Draft has introduced a substantive change to clause 14.6(c) when compared to the current award provision at 25.8(a). The second and third sentences of clause 25.8(a) should be retained.

256. The Exposure Draft seeks to limit the provision of care to the specified care plan for a total of no more than eight hours, which carries a different meaning to an employee being separately required to provide services specified in the care plan, as well as being requiring to provide a total of no more than eight hours of care during the 24 hour care shift. Ai Group contends that these are two separate obligations on employees that cannot be conflated.

Clause 14.7(b)(iii) – Monday to Friday excursions

257. In response to the Exposure Draft question, an employee is only entitled to the sleepover allowance provided for in sub-clause 14.5(e). This is because excursions under clause 14.7 are explicitly excluded from the definition of sleepover in clause 14.5, meaning that the remaining subclauses in 14.5 do not apply unless otherwise stated. Accordingly, for any conditions under clause 14.5 to apply to overnight stays on excursion under clause 14.7, such as the sleepover allowance, the specific subclauses and conditions should be referred to. For this reason, Ai Group submits that the reference to clause 14.5 in clause 14.7(b)(iii) should be substituted with a reference to clause 14.5(e) to make this clearer and to be consistent with the terms of clause 14.5.