From: Stephen Smith [mailto:Stephen.Smith@aigroup.com.au]
Sent: Wednesday, 14 December 2016 3:08 PM
To: AMOD
Subject: 4 Yearly Review - Group 2 Revised Exposure Drafts

A submission on the revised exposure drafts for the following Group 2 awards is attached:

- *Exposure Draft – Alpine Resorts Award 2016;*
- *Exposure Draft – Corrections and Detention (Private Sector) Award 2015;*
- *Exposure Draft – Graphic Arts, Printing and Publishing Award 2016;*
- *Exposure Draft – Health Professionals and Support Services Award 2015;*
- *Exposure Draft – Horse and Greyhound Training Award 2015;*
- *Exposure Draft – Medical Practitioners Award 2015;*
- *Exposure Draft – Nurses Award 2015;*
- *Exposure Draft – Racing Industry Ground Maintenance Award 2015;*
- *Exposure Draft – Road Transport (Long Distance Operations) Award 2016;*
- *Exposure Draft – Road Transport and Distribution Award 2016;*
- *Exposure Draft – Seafood Processing Award 2015;*
- *Exposure Draft – Storage Services and Wholesale Award 2016;*
- *Exposure Draft – Transport (Cash in Transit) Award 2016;* and
- *Exposure Draft – Waste Management Award 2016.*

Regards

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Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Group 2 Revised Exposure Drafts

9 December 2016

4 YEARLY REVIEW OF MODERN AWARDS

GROUP 2 EXPOSURE DRAFTS

1. INTRODUCTION

1. On 10 October 2016, the Fair Work Commission (**Commission**) issued a decision[1] in relation to technical and drafting issues arising from the group 2 exposure drafts. It advised that revised exposure drafts for each award in group 2 incorporating changes outlined in that decision and any determinations arising from the annual leave common issues proceedings (AM2014/47) and the award flexibility common issues proceedings (AM2014/300) would be published. Parties were requested to provide feedback in relation to such exposure drafts by 18 November 2016.

2. The Australian Industry Group (**Ai Group**) subsequently sought, and was granted, an extension of time to provide such feedback until 9 December 2016.

3. This submission relates to the following group 2 exposure drafts:

- *Exposure Draft – Alpine Resorts Award 2016;*
- *Exposure Draft – Corrections and Detention (Private Sector) Award 2015;*
- *Exposure Draft – Graphic Arts, Printing and Publishing Award 2016;*
- *Exposure Draft – Health Professionals and Support Services Award 2015;*
- *Exposure Draft – Horse and Greyhound Training Award 2015;*
- *Exposure Draft – Medical Practitioners Award 2015;*
- *Exposure Draft – Nurses Award 2015;*
- *Exposure Draft – Racing Industry Ground Maintenance Award 2015;*

[1] *4 yearly review of modern awards – Group 2* [2016] FWCFB 7254.

- *Exposure Draft – Road Transport (Long Distance Operations) Award 2016;*
- *Exposure Draft – Road Transport and Distribution Award 2016;*
- *Exposure Draft – Seafood Processing Award 2015;*
- *Exposure Draft – Storage Services and Wholesale Award 2016;*
- *Exposure Draft – Transport (Cash in Transit) Award 2016;* and
- *Exposure Draft – Waste Management Award 2016.*

2. GENERAL ISSUES

4. 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';[2]
- The terms of the commencement clause;[3]
- The deletion of the proposed supersession clause;[4]
- The removal of the absorption clause;[5]
- The retention of the take-home pay order provision;[6]
- An amendment to the provision that provides that the National Employment Standards (NES) and the relevant award provide the minimum conditions of employment;[7]
- 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;[8]
- An amendment to the text of the facilitative provisions;[9]

[2] [2015] FWCFB 4658 at [4].
[3] [2014] FWCFB 9412 at [11]; [2015] FWCFB 4658 at [4] and [2015] FWCFB 4658 at [8].
[4] [2014] FWCFB 9412 at [9].
[5] [2015] FWCFB 4658 at [9 – [20] and [2015] FWCFB 6656 at [74].
[6] [2014] FWCFB 9412 at [16] and [2015] FWCFB 6656 at [81].
[7] [2014] FWCFB 9412 at [23] – [25].
[8] [2014] FWCFB 9412 at [29].
[9] [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;[10]

- The deletion of the proposed clause that would list award provisions that do not apply to casual employees;[11]

- 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;[12]

- The consequential removal of any columns from such a table that prescribe the 'casual hourly rate' or 'ordinary hourly rate' (where relevant);[13]

- The deletion of the proposed clause that would impose obligations on an employer regarding pay slips;[14]

- The insertion of a note that refers to Regulations 3.33 and 3.46 of the *Fair Work Regulations 2009*;[15]

- The deletion of summaries of the NES;[16]

- 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);[17]

- The definition of 'all purpose';[18]

[10] [2015] FWCFB 4658 at [70] – [72] and [2015] FWCFB 6656 at [109].
[11] [2014] FWCFB 9412 at [69].
[12] [2015] FWCFB 4658 at [54].
[13] [2015] FWCFB 4658 at [54];
[14] [2014] FWCFB 9412 at [35] – [36].
[15] [2015] FWCFB 4658 at [55] – [56].
[16] [2014] FWCFB 9412 at [35] – [36].
[17] [2015] FWCFB 4658 at [94].
[18] [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';[19]

- The application of penalties and loadings to the minimum rate prescribed by an award to the exclusion of over-award payments;[20]

- The restoration of the tables containing rates of pay in the National Training Wage Schedule;[21]

- 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;[22] 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.[23]

5. Whilst reviewing the revised group 2 exposure drafts, we have endeavoured to identify any instances in which they do not reflect the aforementioned matters.

6. In addition, inconsistent terminology is used in the exposure drafts that will lead to interpretation difficulties if not addressed. In Ai Group's view:

    - An award provision which requires that shiftworkers be paid, for instance, 15% extra can legitimately be called a "*loading"*, but it cannot legitimately be called a *"penalty rate"* or a *"shift rate".*

    - An award provision which states that shiftworkers are to be paid, for instance, 115% of the minimum hourly rate cannot legitimately be referred to as a *"loading"* or an "*allowance"*, but it can be referred to as a *"shift rate".*

[19] [2014] FWCFB 9412 at [44] – [53] and [2015] FWCFB 4658 at [47].

[20] [2015] FWCFB 4658 at [95] – [96].

[21] [2014] FWCFB 9412 at [67].

[22] [2014] FWCFB 9412 at [58] and [2015] FWCFB 4658 at [62].

[23] [2015] FWCFB 4658 at [63].

- The annual leave clause in an award cannot legitimately refer to the *"shift loadings"* in the shiftwork clause if the shift loadings (e.g. 15%) have been replaced with shift rates (e.g. 115%) and the loading is not separately identified.

- The annual leave clause in the award cannot provide that an employee is to receive a 17.5% loading or any higher "shift penalty", if the former shift penalty of, for instance, 15% has been redrafted as 115%.

7. We refer to our submission of 31 August 2016 in this regard.

8. To address the above problems Ai Group proposes the following standard approach, unless the terms of a particular award warrant a different approach:

   - Additional payments for shiftwork that are expressed as a percentage should be called *"loadings";*

   - Additional payments for shiftwork that are expressed as a flat dollar amount should be called *"allowances";*

   - *"Shift rates"* should identify the amount of the loading. For example:

     Shift rates

     An employee whilst working afternoon shift will be paid 115% of their ordinary hourly rate of pay. This rate includes a shift loading of 15%.

3. EXPOSURE DRAFT – ALPINE RESORTS AWARD 2016

9. The submissions that follow relate to the *Exposure Draft – Alpine Resorts Award 2016* published on 4 November 2016.

'Minimum hourly rate' and 'applicable hourly rate'

10. The exposure draft variously uses the terms "minimum hourly rate" and "applicable hourly rate". Whilst "minimum hourly rate" has not been defined in Schedule H, clause 13.1 so labels the hourly rates there prescribed. Further, provisions such as clause 6.4(a)(i) of the exposure draft use the term by reference to clause 13.1. As a result, we proceed on the basis that "minimum hourly rate" is intended to refer to the minimum rate prescribed by the award. This is consistent with the approach taken by the Commission in other exposure drafts.

11. The exposure draft also contains a definition for "applicable hourly rate":

> **applicable hourly rate** means the relevant rate for the classification the employee is working under as set out in clause 13 – Minimum wages

12. Having regard to the above definition, it appears that "applicable hourly rate" and "minimum hourly rate" are synonymous. We are concerned however, that the use of interchangeable terminology that is not defined is confusing and may give rise to an argument as to whether "minimum hourly rate" in fact has the same meaning as "applicable rate of pay".

13. In our submission, the exposure draft should adopt consistent terminology throughout the instrument. The relevant phrase should be 'minimum hourly rate".

Clause 5.2 – Facilitative provisions

14. We do not consider that clause 18.2 is a 'facilitative provision' in the sense contemplated by clause 5.1. It does not enable an employer and its employee (or employees) to agree to depart from "the standard approach in an award provision". Rather, it enables an employer and employee to agree to take annual leave prior to its accrual in accordance with the NES.

15. The reference to clause 18.2 should therefore be deleted from clause 5.2.

Clause 5.2 – Facilitative provisions

16. In addition to our submissions above, we note that the table at clause 5.2 erroneously refers to clause 18.2 twice and unnecessarily replicates the note found below clause 18.1 of the exposure drafts. These drafting errors should be rectified.

Clause 5.2 – Facilitative provisions

17. We do not consider that clause 18.7 is a 'facilitative provision' in the sense contemplated by clause 5.1. It does not enable an employer and its employee (or employees) to agree to depart from "the standard approach in an award provision". It enables an employer and employee to agree to cash out annual leave. The award itself does not, however, contain any provisions from which such a provision contemplates a departure.

18. The reference to clause 18.7 should therefore be deleted from clause 5.2.

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

19. The insertion of the reference to full-time employees "who do the same kind of work" is unnecessary and confusing. The entitlement to pro-rata payments under the current award arise if a part-time employee has an entitlement to that amount or condition by virtue of the terms of the relevant provision that provides that term or condition. For instance, a part-time employee is entitled to pro-rata payment of an allowance if the terms providing for the allowance itself are satisfied. The entitlement does not arise simply because the part-time employee is performing "the same kind of work" as a full-time employee but does not in fact perform the specific task or suffer the specific disability for which the allowance is intended to compensate an employee.

20. The words "who do the same kind of work" should be deleted. They do not appear in the current clause 10.4(c).

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

21. The submissions that follow relate to the *Exposure Draft – Corrections and Detention (Private Sector) Award 2015* published on 31 October 2016.

Clause 5.2 – Facilitative provisions

22. We do not consider that clause 15.4 is a 'facilitative provision' in the sense contemplated by clause 5.1. It does not enable an employer and its employee (or employees) to agree to depart from "the standard approach in an award provision". Rather, it enables an employer and employee to agree to take annual leave prior to its accrual in accordance with the NES.

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

Clause 5.2 – Facilitative provisions

24. We do not consider that clause 15.5 is a 'facilitative provision' in the sense contemplated by clause 5.1. It does not enable an employer and its employee (or employees) to agree to depart from "the standard approach in an award provision". It enables an employer and employee to agree to cash out annual leave. The award itself does not, however, contain any provisions from which such a provision contemplates a departure.

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

Clause 10.1 – Adult minimum wages

26. Clause 10.1 imposes an obligation on an employer to pay all adult employees the minimum wages there prescribed for ordinary hours worked by an employee. The table that follows includes minimum weekly rates and minimum hourly rates. Read literally, the clause purports to require the payment of the minimum weekly rate to all employees including part-time and casual employees.

27. Whilst it might be argued that clauses 6.4(b)(iii) and 6.5(b)(i) require only the payment of the minimum hourly rates to part-time and casual employees respectively, at the very least clause 10.1 creates a tension with those provisions. We note that the preamble now found at clause 10.1 does not appear in the corresponding clause 14 of the current award.

28. We suggest that the words "(full-time employee)" be inserted under "minimum weekly wage" in the tables at clause 10.1 in the interests of ensuring that the award is "simple and easy to understand". This proposal has been adopted in multiple group 3 exposure drafts to address the concern we have here raised.

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

29. The submissions that follow relate to the *Exposure Draft – Graphic Arts, Printing and Publishing Award 2016*, published on 4 November 2016.

Clause 5.2 – Facilitative provisions

30. We do not consider that clause 27.11 is a 'facilitative provision' in the sense contemplated by clause 5.1. It does not enable an employer and its employee (or employees) to agree to depart from "the standard approach in an award provision". Rather, it enables an employer and employee to agree to take annual leave prior to its accrual in accordance with the NES.

31. The reference to clause 27.11 should therefore be deleted from clause 5.2.

Clause 5.2 – Facilitative provisions

32. We do not consider that clause 27.14 is a 'facilitative provision' in the sense contemplated by clause 5.1. It does not enable an employer and its employee (or employees) to agree to depart from "the standard approach in an award provision". It enables an employer and employee to agree to cash out annual leave. The award itself does not, however, contain any provisions from which such a provision contemplates a departure.

33. The reference to clause 27.14 should therefore be deleted from clause 5.2.

Clause 6.4(b)(iii) – Casual loading

34. Clause 6.4(b)(iii) purports to identify the matters in lieu of which the casual loading is paid. Such a provision is not present in the current award and in our view, is not necessary, nor does it accurately describe the various factors that are intended to be compensated by payment of the casual loading.

35. Clause 6.4(b)(iii) should be deleted. This would be consistent with the approach taken in a significant number of other exposure drafts.

Clause 18.5 – Payment of wages

36. Consistent with the Commission's earlier decisions,[24] "time and a half" should be replaced with "150% of the ordinary hourly rate". This will make clear that the relevant penalty is to be calculated by reference to the award-prescribed rates and does not include over-award amounts.

Clause 24.2(b) – Payment for overtime

37. Consistent with the Commission's earlier decisions,[25] "time and a half" should be replaced with "150% of the ordinary hourly rate". This will make clear that the relevant rate is to be calculated by reference to the award-prescribed rates and does not include over-award amounts.

Clause 24.2(b) – Payment for overtime

38. Consistent with the Commission's earlier decisions,[26] "double time" should be replaced with "200% of the ordinary hourly rate". This will make clear that the relevant rate is to be calculated by reference to the award-prescribed rates and does not include over-award amounts.

Clause 24.3(a) – Overtime work on a Saturday or Sunday

39. Consistent with the Commission's earlier decisions,[27] "double time" should be replaced with "200% of the ordinary hourly rate". This will make clear that the relevant rate is to be calculated by reference to the award-prescribed rates and does not include over-award amounts.

Clause 24.3(b) – Overtime work on a Saturday or Sunday

40. Consistent with the Commission's earlier decisions,[28] "double time" should be replaced with "200% of the ordinary hourly rate". This will make clear that the

[24] [2015] FWCFB 4658 at [95] – [96].
[25] [2015] FWCFB 4658 at [95] – [96].
[26] [2015] FWCFB 4658 at [95] – [96].
[27] [2015] FWCFB 4658 at [95] – [96].
[28] [2015] FWCFB 4658 at [95] – [96].

relevant rate is to be calculated by reference to the award-prescribed rates and does not include over-award amounts.

Clause 24.4(a) – Work on a rostered day off

41. Consistent with the Commission's earlier decisions,[29] "time and a half" should be replaced with "150% of the ordinary hourly rate". This will make clear that the relevant rate is to be calculated by reference to the award-prescribed rates and does not include over-award amounts.

Clause 24.4(a) – Work on a rostered day off

42. Consistent with the Commission's earlier decisions,[30] "double time" should be replaced with "200% of the ordinary hourly rate". This will make clear that the relevant rate is to be calculated by reference to the award-prescribed rates and does not include over-award amounts.

Clause 31.3 – Public holidays

43. Consistent with the Commission's earlier decisions,[31] "double time and a half" should be replaced with "250% of the ordinary hourly rate". This will make clear that the relevant rate is to be calculated by reference to the award-prescribed rates and does not include over-award amounts.

Clause 31.3(a) – Public holidays

44. Consistent with the Commission's earlier decisions,[32] "double time and a half" should be replaced with "250% of the ordinary hourly rate". This will make clear that the relevant rate is to be calculated by reference to the award-prescribed rates and does not include over-award amounts.

Clause 31.4 – Public holidays

[29] [2015] FWCFB 4658 at [95] – [96].

[30] [2015] FWCFB 4658 at [95] – [96].

[31] [2015] FWCFB 4658 at [95] – [96].

[32] [2015] FWCFB 4658 at [95] – [96].

45. Consistent with the Commission's earlier decisions,[33] "double time" should be replaced with "200% of the ordinary hourly rate". This will make clear that the relevant rate is to be calculated by reference to the award-prescribed rates and does not include over-award amounts.

Schedule I.1 – Definitions and interpretation – ordinary hourly rate

46. This exposure draft contains all purpose allowances[34] and uses the term "ordinary hourly rate" in various instances[35] but does not contain the definition of that term previously determined by the Commission.[36] We submit that in the interests of ensuring that the award is simple and easy to understand, and for the purposes of ensuring that the exposure draft reflects the Commission's decision, the definition should be inserted.

[33] [2015] FWCFB 4658 at [95] – [96].

[34] See clause 17.2(a).

[35] See clauses 20.3(e)(iii); 20.7(e)(ii); 20.10(c); 20.10(e); 20.11(b) and 25.3.

[36] [2014] FWCFB 9412 at [44] – [53] and [2015] FWCFB 4658 at [47].

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

47. The submissions that follow relate to the *Exposure Draft – Health Professionals and Support Services Award 2015*, published on 31 October 2016.

Clause 5.2 – Facilitative provisions

48. We do not consider that clause 20.4 is a 'facilitative provision' in the sense contemplated by clause 5.1. It does not enable an employer and its employee (or employees) to agree to depart from "the standard approach in an award provision". Rather, it enables an employer and employee to agree to take annual leave prior to its accrual in accordance with the NES.

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

Clause 5.2 – Facilitative provisions

50. We do not consider that clause 20.6 is a 'facilitative provision' in the sense contemplated by clause 5.1. It does not enable an employer and its employee (or employees) to agree to depart from "the standard approach in an award provision". It enables an employer and employee to agree to cash out annual leave. The award itself does not, however, contain any provisions from which such a provision contemplates a departure.

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

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

52. The current clause 10.3(d) states:

> **(d)** The terms of this award will apply on a pro rata basis to part-time employees on the basis that the ordinary weekly hours for full-time employees are 38.

53. The provision relates only to terms and conditions contained in the award and states that they are to apply on a pro-rata basis to part-time employees.

54. Clause 6.3(a)(iii) substantively deviates from this, as it is not confined to award terms and conditions. Rather, it purports to deal with all pay and conditions received by "full-time employees who do the same kind of work".

55. It is neither necessary (in the sense contemplated by s.138) nor appropriate for an award to deal with over-award terms and conditions of employment. A provision that appears to require that a part-time employee receive, on a pro rata basis, over-award terms and conditions to which a full-time employee is entitled, is not *necessary* to ensure a fair and relevant *minimum* safety net of terms and conditions. This is consistent with the Commission's decision that penalties payable under the award are to be calculated by reference to the minimum rate prescribed by the award; the relevant provisions do not require that the penalty be calculated on a rate that includes over-award components.[37]

56. We also consider that the insertion of the reference to full-time employees "who do the same kind of work" is unnecessary and confusing. The entitlement to pro-rata payments under the current award arise if a part-time employee has an entitlement to that amount or condition by virtue of the terms of the relevant provision that provides that term or condition. For instance, a part-time employee is entitled to pro-rata payment of an allowance if the terms providing for the allowance itself are satisfied. The entitlement does not arise simply because the part-time employee is performing "the same kind of work" as a full-time employee but does not in fact perform the specific task or suffer the specific disability for which the allowance is intended to compensate an employee.

57. For these reasons, we submit that:

- Clause 6.3(a)(iii) should be deleted.
- A new clause 6.3(d) should be inserted in the same terms as the current clause 10.3(d).

[37] [2015] FWCFB 4658 at [95] – [96].

Clause 9.1(a) – Unpaid meal breaks

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

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

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

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

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

Clause 18.4 – Shiftwork penalties

61. Clause 18.4 should be amended by replacing the words "their minimum hourly rate" with "the minimum hourly rate". Consistent with the Commission's earlier decision,[38] this will make clear that provision is in fact referring to the minimum hourly rate prescribed by the award, not the minimum hourly rate payable to a specific employee, which may include over award payments.

Clause 19.1 – Overtime rates

62. Clause 19.1 of the exposure draft has been amended with reference to paragraph [98] of the Commission's decision[39] regarding the group 2 awards, which states that all agreed changes set out in Commissioner Roe's reports to the Full Bench will be adopted.

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

[39] [2016] FWCFB 7294 at [98].

63. Ai Group does not agree to clause 19.1 in the form contained in the exposure draft. Further, it is not clear that the provision is in fact documented as one that was agreed between the parties in Commissioner Roe's various reports. In any event, we contend that it contains significant substantive changes (such as requiring the payment of overtime rates after 10 hours of work, as compared to after 10 *ordinary* hours of work under the current award). On this basis, it is opposed by Ai Group.

64. On 5 August 2016 the HSU filed draft determinations outlining substantive variations it seeks to the *Health Professionals and Support Services Award 2010*. This includes a redrafting of clause 19. Consideration of this matter should accordingly be referred to the Full Bench constituted to deal with substantive claims to vary that award (AM2016/31).

7. EXPOSURE DRAFT – HORSE AND GREYHOUND TRAINING AWARD 2015

65. The submissions that follow relate to the *Exposure Draft – Horse and Greyhound Training Award 2015*, published on 2 November 2016.

Clause 1.4 – Title and commencement

66. A drafting error appears to have occurred at clause 1.4 of the exposure draft. The references to Schedule A should be deleted. Clause 1.4 should commence with a reference to Schedule G.

Clause 5.2 – Facilitative provisions

67. We do not consider that clause 14.2 is a 'facilitative provision' in the sense contemplated by clause 5.1. It does not enable an employer and its employee (or employees) to agree to depart from "the standard approach in an award provision". Rather, it enables an employer and employee to agree to take annual leave prior to its accrual in accordance with the NES.

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

Clause 5.2 – Facilitative provisions

69. We do not consider that clause 14.8 is a 'facilitative provision' in the sense contemplated by clause 5.1. It does not enable an employer and its employee (or employees) to agree to depart from "the standard approach in an award provision". It enables an employer and employee to agree to cash out annual leave. The award itself does not, however, contain any provisions from which such a provision contemplates a departure.

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

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

71. The current clause 10.3 states:

> A part-time employee means an employee who works a regular pattern of hours from week to week which is less than the standard ordinary hours in any week. <u>The terms</u>

of this award apply pro rata for part-time employees on the basis that ordinary weekly hours for full-time employees are 38.

72. The provision relates only to terms and conditions contained in the award and states that they are to apply on a pro-rata basis to part-time employees.

73. Clause 6.3(a)(iii) substantively deviates from this, as it is not confined to award terms and conditions. Rather, it purports to deal with all pay and conditions received by "full-time employees who do the same kind of work".

74. It is neither necessary (in the sense contemplated by s.138) nor appropriate for an award to deal with over-award terms and conditions of employment. A provision that appears to require that a part-time employee receive, on a pro rata basis, over-award terms and conditions to which a full-time employee is entitled, is not *necessary* to ensure a fair and relevant *minimum* safety net of terms and conditions. This is consistent with the Commission's decision that penalties payable under the award are to be calculated by reference to the minimum rate prescribed by the award; the relevant provisions do not require that the penalty be calculated on a rate that includes over-award components.[40]

75. Accordingly, clause 6.4(a)(iii) should be deleted and a new clause 6.4(b) should be inserted as follows:

(b) The terms of this award apply pro-rata for part-time employees on the basis that ordinary weekly hours for full-time employees are 38.

Clause 9.1 – Classifications and minimum wages

76. Clause 9.1 imposes an obligation on an employer to pay all adult employees the minimum wages there prescribed for ordinary hours worked by an employee. The table that follows includes minimum weekly rates and minimum hourly rates. Read literally, the clause purports to require the payment of the minimum weekly rate to all employees including part-time and casual employees.

[40] [2015] FWCFB 4658 at [95] – [96].

77. Whilst it might be argued that clauses 6.4(b)(iii) and 6.5(e)(i) require only the payment of the minimum hourly rates to part-time and casual employees respectively, at the very least clause 9.1 creates a tension with those provisions. We note that the preamble now found at clause 9.1 does not appear in the corresponding clause 13.1 of the current award.

78. We suggest that the words "(full-time employee)" be inserted under "minimum weekly wage" in the table at clause 9.1 in the interests of ensuring that the award is "simple and easy to understand". This proposal has been adopted in multiple group 3 exposure drafts to address the concern we have here raised.

Clause 9.3(a) – Junior employees

79. The reference to "clause 0" should be replaced with "clause 9.1". This appears to be a drafting error.

Schedule 9.4(a) – Apprentice minimum wages

80. The reference to "clause 0" should be replaced with "clause 9.1". This appears to be a drafting error.

Schedule 9.4(b)(i) – Apprentice minimum wages

81. The reference to "clause 0" should be replaced with "clause 9.1". This appears to be a drafting error.

Schedule 9.4(c)(i) – Apprentice minimum wages

82. The reference to "clause 0" should be replaced with "clause 9.1". This appears to be a drafting error.

Schedule 9.4(e) – Apprentice minimum wages

83. The reference to "clause 0" should be replaced with "clause 9.1". This appears to be a drafting error.

Clause 14.3(b) – Close down

84. The reference to “clause 14.2” should be replaced with “clause 14.3(a)”. This appears to be a drafting error.

Schedules B – J

85. Schedules B – J should be renumbered Schedules A – I, such that they correspond with the table of contents.

86. All cross-references to schedules contained in the exposure draft should thereafter be checked to ensure that they are correct. For instance, the reference to Schedule D at clause 9.6 (Supported Wage System) should thereafter be replaced with a reference to Schedule C.

Schedule H – Definitions – all purpose rate

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

Schedule H – Definitions – apprentice jockey

88. The definition of apprentice jockey is not in the same terms as that currently found in the award. This should be amended.

Schedule H – Definitions – standard rate

89. The reference to “clause 0” should be replaced with “clause 9.1”. This appears to be a drafting error.

8. EXPOSURE DRAFT – MEDICAL PRACTITIONERS AWARD 2015

90. The submissions that follow relate to the *Exposure Draft – Medical Practitioners Award 2015*, published on 2 November 2016.

Clause 5.2 – Facilitative provisions

91. We do not consider that clause 15.5 is a 'facilitative provision' in the sense contemplated by clause 5.1. It does not enable an employer and its employee (or employees) to agree to depart from "the standard approach in an award provision". Rather, it enables an employer and employee to agree to take annual leave prior to its accrual in accordance with the NES.

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

Clause 5.2 – Facilitative provisions

93. We do not consider that clause 15.6 is a 'facilitative provision' in the sense contemplated by clause 5.1. It does not enable an employer and its employee (or employees) to agree to depart from "the standard approach in an award provision". It enables an employer and employee to agree to cash out annual leave. The award itself does not, however, contain any provisions from which such a provision contemplates a departure.

94. The reference to clause 15.6 should therefore be deleted from clause 5.2.

Clause 10.1 – Minimum wages

95. Clause 10.1 imposes an obligation on an employer to pay all adult employees the minimum wages there prescribed for ordinary hours worked by an employee. The tables that follow include minimum annual salaries, minimum weekly rates and minimum hourly rates. Read literally, the clause purports to require the payment of the minimum annual salary and minimum weekly rate to all employees including part-time and casual employees.

96. Whilst it might be argued that clauses 6.3(c) and 6.4(b)(i) require only the payment of the minimum hourly rates to part-time and casual employees respectively, at the very least clause 10.1 creates a tension with those provisions. We note that the preamble now found at clause 10.1(a) does not appear in the corresponding clause 14 of the current award.

97. We suggest that the words "(full-time employee)" be inserted under "minimum annual salary" and "minimum weekly wage" in the tables at clause 10.1 in the interests of ensuring that the award is "simple and easy to understand". This proposal has been adopted in multiple group 3 exposure drafts to address the concern we have here raised.

Clause 11.2(a) – All purpose allowances

98. Clause 11.2(a) does not reflect the definition of "all purposes" which has been determined by the Commission.[41] It should be amended by inserting the word "annual" before "leave".

Clause 15.8(a) – Excessive leave accruals: direction by employer that leave be taken

99. The reference to "clause 15.7(a)" should be replaced with "clause "15.7(b)". This appears to be a drafting error.

Schedule D – Definitions – all purpose

100. The definition of all purpose in Schedule D does not reflect that which has been determined by the Commission.[42] It is also inconsistent with the definition at clause 11.2(a).

101. The definition should be amended by inserting the word "annual" before "leave" and deleting the words "and superannuation".

[41] [2014] FWCFB 9412 at [44] – [53] and [2015] FWCFB 4658 at [91].

[42] [2014] FWCFB 9412 at [44] – [53] and [2015] FWCFB 4658 at [91].

9. EXPOSURE DRAFT – NURSES AWARD 2015

102. The submissions that follow relate to the *Exposure Draft – Nurses Award 2015*, published on 2 November 2016.

Clause 5.2 – Facilitative provisions

103. We do not consider that clause 17.9 is a 'facilitative provision' in the sense contemplated by clause 5.1. It does not enable an employer and its employee (or employees) to agree to depart from "the standard approach in an award provision". Rather, it enables an employer and employee to agree to take annual leave prior to its accrual in accordance with the NES.

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

Clause 5.2 – Facilitative provisions

105. We do not consider that clause 17.10 is a 'facilitative provision' in the sense contemplated by clause 5.1. It does not enable an employer and its employee (or employees) to agree to depart from "the standard approach in an award provision". It enables an employer and employee to agree to cash out annual leave. The award itself does not, however, contain any provisions from which such a provision contemplates a departure.

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

Clause 9.1(a) – Unpaid meal breaks

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

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

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

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

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

Clause 10 – Minimum wage rates

110. Clause 10 imposes an obligation on an employer to pay all employees the minimum wages there prescribed for ordinary hours worked by an employee. The tables that follow includes minimum weekly rates and minimum hourly rates. Read literally, the clause purports to require the payment of the minimum weekly rate to all employees including part-time and casual employees.

111. Whilst it might be argued that clauses 6.3(d) and 6.4(b) require only the payment of the minimum hourly rates to part-time and casual employees respectively, at the very least clause 10 creates a tension with those provisions. We note that the preamble now found at clause 10 does not appear in the corresponding clause 14 of the current award.

112. We suggest that the words "(full-time employee)" be inserted under "minimum weekly wage" in the tables at clause 10 in the interests of ensuring that the award is "simple and easy to understand". This proposal has been adopted in multiple group 3 exposure drafts to address the concern we have here raised.

Clause 14.2(a) – Shift penalties

113. Clause 14.2(a) should be amended by replacing the words "their minimum hourly rate" with "the minimum hourly rate". Consistent with the Commission's earlier decision[43], this will make clear that provision is in fact referring to the minimum hourly rate prescribed by the award, not the minimum hourly rate payable to a specific employee, which may include over award payments.

[43] [2015] FWCFB 4658 at [95] – [96].

Clause 14.2(b) – Shift penalties

114. Clause 14.2(b) should be amended by replacing the words "their minimum hourly rate" with "the minimum hourly rate". Consistent with the Commission's earlier decision[44], this will make clear that provision is in fact referring to the minimum hourly rate prescribed by the award, not the minimum hourly rate payable to a specific employee, which may include over award payments.

Clause 16.1 – Saturday and Sunday work

115. Clause 16.1 should be amended by replacing the words "their minimum hourly rate" with "the minimum hourly rate". Consistent with the Commission's earlier decision[45], this will make clear that provision is in fact referring to the minimum hourly rate prescribed by the award, not the minimum hourly rate payable to a specific employee, which may include over award payments.

Clause 16.2 – Saturday and Sunday work

116. Clause 14.2(a) should be amended by replacing the words "their minimum hourly rate" with "the minimum hourly rate". Consistent with the Commission's earlier decision[46], this will make clear that provision is in fact referring to the minimum hourly rate prescribed by the award, not the minimum hourly rate payable to a specific employee, which may include over award payments.

[44] [2015] FWCFB 4658 at [95] – [96].

[45] [2015] FWCFB 4658 at [95] – [96].

[46] [2015] FWCFB 4658 at [95] – [96].

10. EXPOSURE DRAFT – RACING INDUSTRY GROUND MAINTENANCE AWARD 2015

117. The submissions that follow relate to the *Exposure Draft – Racing Industry Ground Maintenance Award 2015*, published on 31 October 2016.

Clause 5.2 – Facilitative provisions

118. We do not consider that clause 15.2 is a 'facilitative provision' in the sense contemplated by clause 5.1. It does not enable an employer and its employee (or employees) to agree to depart from "the standard approach in an award provision". Rather, it enables an employer and employee to agree to take annual leave prior to its accrual in accordance with the NES.

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

Clause 5.2 – Facilitative provisions

120. We do not consider that clause 15.7 is a 'facilitative provision' in the sense contemplated by clause 5.1. It does not enable an employer and its employee (or employees) to agree to depart from "the standard approach in an award provision". It enables an employer and employee to agree to cash out annual leave. The award itself does not, however, contain any provisions from which such a provision contemplates a departure.

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

Clause 10.1 – Adult minimum wages

122. Clause 10.1 creates an entitlement for all adult employees to the minimum wages there prescribed. The table that follows includes minimum weekly rates and minimum hourly rates. Read literally, the clause purports give rise to an entitlement to the minimum weekly rate to all employees including part-time and casual employees.

123. Whilst it might be argued that clauses 6.4(a)(iii) and 6.5(b) require only the payment of the minimum hourly rates to part-time and casual employees respectively, at the very least clause 10.1(a) creates a tension with those provisions.

124. We suggest that the words "(full-time employee)" be inserted under "minimum weekly rate" in the table at clause 10.1 in the interests of ensuring that the award is "simple and easy to understand". This proposal has been adopted in multiple group 3 exposure drafts to address the concern we have here raised.

Schedule B.3 – Casual employees

125. Schedule B.3 should be amended to make clear that the morning work rates, evening work rates, Saturday rates, Sunday rates, public holiday rates and overtime rates do not apply to a casual employee engaged on night cleaning duties, consistent with clause 6.5(c). This could be achieved by simply inserting an appropriate footnote.

126. We are concerned that absent such a notation, the schedule suggests that *all* casual employees are entitled to the rates there set out.

11. EXPOSURE DRAFT – ROAD TRANSPORT (LONG DISTANCE OPERATIONS) AWARD 2016

127. A definition of 'long distance operation' has been inserted into clause 3 - Coverage. The same definition is replicated in the definitions clause contained at Schedule 3. We assume that the inclusion of the definition is intended to assist the reader to identify what constitutes a 'long distance operation', as referred to in the coverage clause.

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

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

Clause 5.3 – Facilitative provisions – Annual leave in advance

130. We do not consider that clause 14.7 is a 'facilitative provision' in the sense contemplated by clause 5.1. It does not enable an employer and its employee (or employees) to agree to depart from "the standard approach in an award provision". Rather, it enables an employer and employee to agree to take annual leave prior to its accrual in accordance with the NES.

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

Clause 5.2 – Facilitative provisions – Cashing out of annual leave

132. We do not consider that clause 14.10 is a 'facilitative provision' in the sense contemplated by clause 5.1. It does not enable an employer and its employee (or employees) to agree to depart from "the standard approach in an award provision". It enables an employer and employee to agree to cash out annual

leave. The award itself does not, however, contain any provisions from which such a provision contemplates a departure.

Clause 11.2(a)

133. NatRoad have raised concerns regarding the inclusion of a new sentence in clause 11.2(a).[47] That sentence is as follows;

> "The fortnightly payment must be calculated by reference to continuous consecutive fortnightly periods."

134. The NatRoad submissions unintentionally misstate the proposed variation.

135. Ai Group has had discussions with the relevant officer at Natroad, Richard Calver. We understand that their concern is largely related to a perceived deficiency in the drafting of the new provision. More specifically, they contend that there is not a necessity to include both the word "continuous" and "consecutive". They contend that the word "consecutive" should suffice. We understand that their concerns would be addressed if the proposed new provision was reworded to remove the word continuous. It would accordingly state as follows:

> "The fortnightly payment must be calculated by reference to consecutive fortnightly periods."

136. Ai Group would not oppose this alternate variation. We nonetheless note that the wording contained within the exposure draft was generally agreed by the parties during the conferencing process. There does not appear to be a substantive difference in the manner in which the clause would operate if either approach was adopted.

Clause 11.1 - Minimum weekly rates of pay

137. The note below clause 11.1 should be deleted. It is no longer accurate or necessary given the changes to the classification structure.

[47] Paragraph 10 of the NatRoad submissions regarding the further exposure draft

12. EXPOSURE DRAFT – ROAD TRANSPORT AND DISTRIBUTION AWARD 2016

Clause 12.1 – Classifications and minimum wages

138. Both clause 12.1 and clause 12.2 impose an obligation on an employer to pay all adult employees the minimum wages there prescribed for ordinary hours worked by an employee. The tables that follow include minimum weekly rates and minimum hourly rates. Read literally, the clauses purport to require the payment of the minimum weekly rate to all employees including part-time and casual employees.

139. Whilst it might be argued that clauses 6.4(e) and 6.5(c) require only the payment of the minimum hourly rates to part-time and casual employees respectively, at the very least clause 12.1 and 12.2 create a tension with those provisions. We note that the preamble now found at clause 12.1 and 12.2 does not appear in the corresponding clause 15.2 of the current award.

140. We suggest that the words "(full-time employee)" be inserted under "minimum weekly wage" in the table at clause 12.1 and 12.2 in the interests of ensuring that the award is "simple and easy to understand". This proposal has been adopted in multiple Group 3 exposure drafts to address the concern we have here raised.

Clause 5.3 – Facilitative provisions – Annual leave in advance

141. We do not consider that clause 18.5 is a 'facilitative provision' in the sense contemplated by clause 5.1. It does not enable an employer and its employee (or employees) to agree to depart from "the standard approach in an award provision". Rather, it enables an employer and employee to agree to take annual leave prior to its accrual in accordance with the NES.

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

Clause 5.2 – Facilitative provisions – Cashing out of annual leave

143. We do not consider that clause 18.10 is a 'facilitative provision' in the sense contemplated by clause 5.1. It does not enable an employer and its employee (or employees) to agree to depart from "the standard approach in an award provision". It enables an employer and employee to agree to cash out annual leave. The award itself does not, however, contain any provisions from which such a provision contemplates a departure.

Clause 16.2 – Public Holidays

144. Clause 16.2 does reflect the obligations contained within the current award.

145. During the course of the conferencing process the parties agreed on an alternate clause that properly reflects that current operation of the award. The proposed clause is set out below.

16.2 Work on public holidays

(a) All time worked by a full-time or part-time employee on a public holiday must be paid at the following rates with a minimum payment of four hours:

	% of the ordinary hourly rate
Good Friday and Christmas Day	200%
Any other public holiday	150%

(b) Payment for work on a public holiday is in addition to any amount payable in respect of the weekly wage.

(c) Despite clause 16.2(a) an employee required to work on a public holiday during hours which, if the day were not a public holiday, would be outside the range of ordinary working time, will be paid for such hours at the following rates:

	% of the ordinary hourly rate
Good Friday and Christmas Day	300%
Any other public holiday	250%

(d) If Christmas Day falls on a Saturday or Sunday and another day is observed as a public holiday in accordance with ss. 114-116 of the Act, a full-time or part-time

employee who is regularly rostered to work ordinary hours on a Saturday or Sunday will be paid:

(i) a loading of **50%** of a normal day's wage for a full day's work; and

(ii) the Saturday/Sunday rate for all ordinary hours worked on 25 December with a minimum of four hours pay; and

(iii) the employee will also be entitled to the benefit of the substituted public holiday.

(e) All time worked by a casual employee on a public holiday must be paid at the following rates in addition to the casual loading in clause 6.5. The minimum payment will be four hours:

	% of the ordinary hourly rate
Good Friday and Christmas Day	300%
Any other public holiday	250%

146. Paragraph 14 of Senior Deputy President Hamberger's report to the Full Bench dated 19 February 2016 confirms the agreement of the parties to the above clause, as proposed by the Ai Group in an email dated 3 February 2016. Unfortunately, the email appears to have been omitted from the report. A copy is attached to these submissions and marked "Annexure A".

Schedule H - Definitions

147. The reference to "clause X" in the definition of "ordinary hourly rate" should be replaced with a reference to clause 12.

13. EXPOSURE DRAFT – SEAFOOD PROCESSING AWARD 2015

148. The submissions that follow relate to the *Exposure Draft – Seafood Processing Award 2015* published on 4 November 2016.

Clause 3.7(c) – Coverage

149. The clause should be amended by deleting "; or" at the end of the provision and replacing it with a full stop. This appears to be a drafting error.

Clause 5.2 – Facilitative provisions

150. We do not consider that clause 15.9 is a 'facilitative provision' in the sense contemplated by clause 5.1. It does not enable an employer and its employee (or employees) to agree to depart from "the standard approach in an award provision". Rather, it enables an employer and employee to agree to take annual leave prior to its accrual in accordance with the NES.

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

Clause 5.2 – Facilitative provisions

152. We do not consider that clause 15.10 is a 'facilitative provision' in the sense contemplated by clause 5.1. It does not enable an employer and its employee (or employees) to agree to depart from "the standard approach in an award provision". It enables an employer and employee to agree to cash out annual leave. The award itself does not, however, contain any provisions from which such a provision contemplates a departure.

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

Clause 6.4(d) – Casual loading

154. The word "employees" should be replaced with "employee". This appears to be a typographical error.

Clause 10.1(a) – Adult minimum wages

155. Clause 10.1(a) imposes an obligation on an employer to pay all adult employees the minimum wages there prescribed for ordinary hours worked by an employee. The table that follows includes minimum weekly rates and minimum hourly rates. Read literally, the clause purports to require the payment of the minimum weekly rate to all employees including part-time and casual employees.

156. Whilst it might be argued that clauses 6.3(a) and 6.4(b) require only the payment of the minimum hourly rates to part-time and casual employees respectively, at the very least clause 10.1(a) creates a tension with those provisions. We note that the preamble now found at clause 10.1(a) does not appear in the corresponding clause 15.1(a) of the current award.

157. We suggest that the words "(full-time employee)" be inserted under "minimum weekly wage" in the table at clause 10.1(a) in the interests of ensuring that the award is "simple and easy to understand". This proposal has been adopted in multiple group 3 exposure drafts to address the concern we have here raised.

14. EXPOSURE DRAFT – STORAGE SERVICES AND WHOLESALE AWARD 2016

158. The submissions that follow relate to the *Exposure Draft – Storage Services and Wholesale Award 2016*, dated 2 November 2016.

Clause 3.3 – Coverage

159. The words “and 0” in clause 3.3 should be deleted. In an earlier iteration of the exposure draft, this was a reference to the definition of ‘storage services and wholesale industry’ at clause 3.2, which has now been deleted.

Clause 3.4 – Coverage

160. The words “and 0” in clause 3.4 (second and fourth lines) should be deleted. In an earlier iteration of the exposure draft, this was a reference to the definition of ‘storage services and wholesale industry’ at clause 3.2, which has now been deleted.

Clause 5.2 – Facilitative provisions

161. We do not consider that clause 17.6 is a ‘facilitative provision’ in the sense contemplated by clause 5.1. It does not enable an employer and its employee (or employees) to agree to depart from “the standard approach in an award provision”. Rather, it enables an employer and employee to agree to take annual leave prior to its accrual in accordance with the NES.

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

Clause 5.2 – Facilitative provisions

163. We do not consider that clause 17.7 is a ‘facilitative provision’ in the sense contemplated by clause 5.1. It does not enable an employer and its employee (or employees) to agree to depart from “the standard approach in an award provision”. It enables an employer and employee to agree to cash out annual leave. The award itself does not, however, contain any provisions from which such a provision contemplates a departure.

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

Clause 8.4(a) – Rostered days off

165. As stated at item 26 of Deputy President Bull's report to the Full Bench of 15 March 2016, interested parties have agreed that clause 8.4(a) should be amended, in order to address a concern raised by the SDA:

> (a) Where a system of working is adopted to allow one rostered day off in each four weeks worked an employee will not be entitled to more than ~~12~~ 13 rostered days off in any 12 month period.

166. Whilst the Commission's decision states that all agreed changes are to be adopted (save for one issue identified in the decision),[48] the above change is not reflected in the exposure draft. We submit that this should be rectified.

Clause 9.2 – Rest break

167. As stated at item 28 of Deputy President Bull's report to the Full Bench of 15 March 2016, interested parties have agreed that clause 9.2 should be replaced with the current clause 23.2.

168. Whilst the Commission's decision states that all agreed changes are to be adopted (save for one issue identified in the decision),[49] the above change is not reflected in the exposure draft. We submit that this should be rectified.

Clause 15 – Shiftwork

169. In light of various issues raised by the AWU and Ai Group, the parties had agreed that clause 15 of the exposure draft should be replaced with the current clause, subject to certain amendments to ensure that the relevant provisions are consistent with the Commission's earlier decisions regarding general technical and drafting matters. This is documented at item 41 of the Deputy President's report.

[48] *4 yearly review of modern awards – Group 2* [2016] FWCFB 7254 at [195].

[49] *4 yearly review of modern awards – Group 2* [2016] FWCFB 7254 at [195].

170. Whilst the Commission's decision states that all agreed changes are to be adopted (save for one issue identified in the decision),[50] the above change is not reflected in the exposure draft. We submit that this should be rectified.

[50] *4 yearly review of modern awards – Group 2* [2016] FWCFB 7254 at [195].

15. EXPOSURE DRAFT – TRANSPORT (CASH IN TRANSIT) AWARD 2016

Clause 5.2 – Facilitative provisions

171. We do not consider that clause 16.5 is a 'facilitative provision' in the sense contemplated by clause 5.1. It does not enable an employer and its employee (or employees) to agree to depart from "the standard approach in an award provision". Rather, it enables an employer and employee to agree to take annual leave prior to its accrual in accordance with the NES.

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

Clause 5.2 – Facilitative provisions

173. We do not consider that clause 16.9 is a 'facilitative provision' in the sense contemplated by clause 5.1. It does not enable an employer and its employee (or employees) to agree to depart from "the standard approach in an award provision". It enables an employer and employee to agree to cash out annual leave. The award itself does not, however, contain any provisions from which such a provision contemplates a departure.

Clause 11.1 Minimum rates

174. Clause 11.1 imposes an obligation on an employer to pay all adult employees the minimum wages there prescribed for ordinary hours worked by an employee. The table that follows includes minimum weekly rates and minimum hourly rates. Read literally, the clause purports to require the payment of the minimum weekly rate to all employees including part-time and casual employees.

175. We suggest that the words "(full-time employee)" be inserted under "minimum weekly wage" in the table at clause 11.1 in the interests of ensuring that the award is "simple and easy to understand". This proposal has been adopted in multiple group 3 exposure drafts to address the concern we have here raised.

16. EXPOSURE DRAFT – WASTE MANAGEMENT AWARD 2016

Clause 5.2 – Facilitative provisions

176. We do not consider that clause 17.3 is a 'facilitative provision' in the sense contemplated by clause 5.1. It does not enable an employer and its employee (or employees) to agree to depart from "the standard approach in an award provision". Rather, it enables an employer and employee to agree to take annual leave prior to its accrual in accordance with the NES.

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

Clause 5.2 – Facilitative provisions

178. We do not consider that clause 17.4 is a 'facilitative provision' in the sense contemplated by clause 5.1. It does not enable an employer and its employee (or employees) to agree to depart from "the standard approach in an award provision". It enables an employer and employee to agree to cash out annual leave. The award itself does not, however, contain any provisions from which such a provision contemplates a departure.

Clause 10.1 – Adult Rates

179. Clause 10.1 imposes an obligation on an employer to pay all adult employees the minimum wages there prescribed for ordinary hours worked by an employee. The table that follows includes minimum weekly rates and minimum hourly rates. Read literally, the clause purports to require the payment of the minimum weekly rate to all employees including part-time and casual employees.

180. We suggest that the words "(full-time employee)" be inserted under "minimum weekly wage" in the table at clause 10.1 in the interests of ensuring that the award is "simple and easy to understand". This proposal has been adopted in multiple group 3 exposure drafts to address the concern we have here raised.

Schedule F – Definition of all purposes

181. There is an error in the definition of the "all purposes" contained in schedule G.

182. The definition should be amended in the following manner;

> **All purposes** means the payment will be included in the rate of pay of an employee who is entitled to the allowance, when calculating any penalties or loadings or ~~while they are on leave~~ payment while they are on annual leave (see clause 11.2(b)).

183. This will align the definition with the approach to defining "all purposes" that has been generally adopted by the Full Bench in the context of the exposure draft process. Retaining the current wording in the exposure draft would result in a change to employee entitlements under the Award. It would potentially require the payment of an all-purpose allowance during all periods of leave, including leave that is provided under the NES and which is properly payable at the employee's base rate of pay, as defined in s16 of the Act.

Clause 20.5 – Payment for work on public holidays

184. Clause 20.5 of the exposure draft significantly alters employee entitlements for working on a public holiday. The parties previously agreed to alter clause 25 of the exposure to reflect an Ai Group proposed version of the clause in order to address this issue. Such agreement is recorded in paragraph 6 of Senior Deputy President Hamberger's report to the Full Bench dated 19 February 2016.

185. Unfortunately, an email setting out the Ai Group proposal appears to have been unintentionally omitted from the report. A copy is attached and marked "Annexure B".

186. Clause 20.5 of the exposure draft should be amended to reflect the agreed proposal.

ANNEXURE A

Ruchi Bhatt

From: Ruchi Bhatt
Sent: Wednesday, 3 February 2016 8:43 AM
To: 'Wendy Carr'; Therese Walton; Stephen Crawford; kyle.scott@ablawyers.com.au; Paula Thomson
Cc: Chambers - Hamberger SDP; Brent Ferguson
Subject: AM2014/212 Road Transport and Distribution Award 2010 - public holidays clause

Importance: High

Dear all,

I refer to the above matter and clause 16.2 of the *Exposure Draft – Road Transport and Distribution Award 2015* (Exposure Draft).

Further to correspondence exchanged between the parties following a conference before Senior Deputy President Hamberger on 30 October 2015, and for the purposes of discussion during the conference before His Honour today (3 February 2016), please find below a draft clause 16.2 to replace that which currently appears in the Exposure Draft.

16.2 Work on public holidays

(a) All time worked by a full-time or part-time employee on a public holiday must be paid at the following rates with a minimum payment of four hours:

	% of the ordinary hourly rate
Good Friday and Christmas Day	200%
Any other public holiday	150%

(b) Payment for work on a public holiday is in addition to any amount payable in respect of the weekly wage.

(c) Despite clause 16.2(a) an employee required to work on a public holiday during hours which, if the day were not a public holiday, would be outside the range of ordinary working time, will be paid for such hours at the following rates:

	% of the ordinary hourly rate
Good Friday and Christmas Day	300%
Any other public holiday	250%

(d) If Christmas Day falls on a Saturday or Sunday and another day is observed as a public holiday in accordance with ss. 114-116 of the Act, a full-time or part-time employee who is regularly rostered to work ordinary hours on a Saturday or Sunday will be paid:

(i) a loading of **50%** of a normal day's wage for a full day's work; and

(ii) the Saturday/Sunday rate for all ordinary hours worked on 25 December with a minimum of four hours pay; and

(iii) the employee will also be entitled to the benefit of the substituted public holiday.

(e) All time worked by a casual employee on a public holiday must be paid at the following rates in addition to the casual loading in clause 6.5.The minimum payment will be four hours:

	% of the ordinary hourly rate
Good Friday and Christmas Day	300%
Any other public holiday	250%

Ai Group has also identified an additional matter arising from Schedule C.4, which we intend to raise during the conference today.

Kind regards,
Ruchi.

Ruchi Bhatt
Adviser – Workplace Relations Policy

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ANNEXURE B

Ruchi Bhatt

From: Ruchi Bhatt
Sent: Tuesday, 2 February 2016 6:41 PM
To: 'Wendy Carr'; Therese Walton; Stephen Crawford; 'Stuart Maxwell'; Warren Tegg; kyle.scott@ablawyers.com.au; 'Martin Dunne'; esthav@business-sa.com; Paula Thomson
Cc: Chambers - Hamberger SDP; Brent Ferguson
Subject: AM2014/216 Waste Management Award 2010 - public holidays clause

Dear all,

I refer to the above matter and clause 20.6 of the *Exposure Draft – Waste Management Award 2015* (Exposure Draft).

Further to correspondence exchanged between the parties following a conference before Senior Deputy President Hamberger on 30 October 2015, and for the purposes of discussion during the conference before His Honour tomorrow (3 February 2016), please find below a draft clause 20.6 to replace that which currently appears in the Exposure Draft. We understand that the TWU does not oppose the proposal.

20.6 Payment for work on public holidays

(a) All time worked by a weekly employee on a public holiday must be paid at the following rates, with a minimum payment of four hours:

	% of the ordinary hourly rate
Good Friday and Christmas Day	200%
Any other public holiday	150%

(b) Payment for work on public holiday is in addition to any amount payable in respect of the weekly wage.

(c) Despite clause 20.6(a) an employee required to work on a public holiday during hours which, if the day were not a public holiday, would be outside the range of ordinary working time as mentioned in clause 16, will be paid for such hours at the following rates:

	% of the ordinary hourly rate
Good Friday and Christmas Day	300%
Any other public holiday	250%

(d) Where Christmas Day falls on a Saturday or Sunday and another day is observed as a public holiday in accordance with ss. 114-116 of the Act, a full-time employee who is regularly rostered to work ordinary hours on a Saturday or Sunday will be paid:

(i) a loading of **50%** of the ordinary hourly rate; and

(ii) the Saturday/Sunday rate for all ordinary hours worked on 25 December with a minimum of four hours pay.

(e) An employee referred to in clause 20.6(d)will also be entitled to the substituted public holiday.

(f) Where an employee is entitled to a public holiday but the employer requires the employee to work, the employer must notify the employee on the preceding working day. Otherwise the employee is entitled to be absent on the public holiday without deduction of pay.

(g) All time worked by a casual employee on a public holiday must be paid at the following rates, with a minimum payment of four hours:

	% of the ordinary hourly rate
Good Friday and Christmas Day	325%
Any other public holiday	275%

Kind regards,
Ruchi.

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