Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Exposure Drafts: Subgroups 2C and 2D –

Road Transport and Distribution Award 2010 &

Road Transport (Long Distance Operations) Award 2010

11 FEBRUARY 2015

Ai GROUP

4 YEARLY AWARD REVIEW – AWARD STAGE
EXPOSURE DRAFTS – SUB-GROUPS 2C AND 2D AWARDS – ROAD TRANSPORT AND DISTRIBUTION AWARD 2010 AND ROAD TRANSPORT (LONG DISTANCE OPERATIONS) AWARD 2010

1. INTRODUCTION

1. The Australian Industry Group (**Ai Group**) makes this submission in response to the Fair Work Commission's publication of exposure drafts for modern awards in subgroups 2C and 2D during the Award Stage of the 4 Yearly Review of Modern Awards.

2. This submission is made in accordance with the Commission's Statement of 8 December 2014 and supplements our submissions dated 4 February 2015. They relate specifically to the following exposure drafts:

   - *Exposure Draft – Road Transport and Distribution Award 2014*

   - *Exposure Draft – Road Transport (Long Distance Operations) Award 2014*

2. EXPOSURE DRAFT – ROAD TRANSPORT (LONG DISTANCE OPERATIONS AWARD) 2014

Clause 3.3 – Coverage

3. Ai Group understands that the title of each modern award is to be varied as a consequence of the 4 Yearly Review by updating the year at the conclusion of the title to read "2014". On this basis, the reference to the *Road Transport and Distribution Award 2010* in clause 3.3 of the Exposure Draft should be amended to read "*Road Transport and Distribution Award 2014".*

Clause 5 – Facilitative provisions

4. This is a new provision. The last sentence of clause 5.1 should be deleted consistent with the approach adopted in the Full Bench's decision of 23 December 2014.

Clause 5.2 – Facilitative provisions

5. The reference to clause 8.5(b) in clause 5.2 of the Exposure Draft should be substituted with a reference to clause 8.5(c). This appears to be a drafting error.

Clause 6.3 – Types of employment – Full-time employment

6. Current clause 10.2 provides that a full-time employee is *"…engaged by an employer for an average of 38 ordinary hours…"* The proposed clause 6.3 of the exposure draft adopts the phrase *"engaged to work an average of 38 ordinary hours of work*".

7. The current award does not dictate that a full-time employee will necessarily be required to *work* for an average of 38 hours per week. This is reflected in the remuneration structure which provides minimum fortnightly rates of pay and a higher rate of pay where driving work is actually performed. The new wording introduces a substantive change. The former wording should be reinserted.

Clause 8.2(b) – (e) – Ordinary hours of work and rostering – Hours and fatigue management

8. The proposed clauses significantly alter the existing arrangements as contained in clause 20.2. In particular, clause 8.2 now appears to provide entitlements under clauses 8.2(c) and (d) that are not currently applicable in circumstances where clause 20.2(a) of the award applies.

Clause 8.3(c)(i) – Ordinary hours of work and rostering – Requirement to work reasonable additional hours

9. Clause 20.3 of the current award was amended during the two year review by a decision of Senior Deputy President Harrison, in which it was determined that the considerations listed in that provision should be consistent with s.62(3) of the Act.[1]

10. Clause 8.3(c)(i) of the Exposure Draft deviates from the current award by omitting the words "from working the additional hours". These words should be reinstated. They assist in clarifying that consideration given to an employee's health and safety must relate specifically to any risk arising from the employee working additional hours. This is consistent with s.62(3)(a) which does not, for the purposes of determining whether additional hours are reasonable, require a broader consideration of the employee's health and safety.

Clause 8.4 – Ordinary hours of work and rostering

11. The words "*Time must be computed*" have been replaced with the words "*Hours of work must be calculated"* in the exposure draft. This is a substantive change to the meaning of the clause and should not be made.

12. The provision relates to the computation of time for the purposes of the clause. The broader clause deals with hours of work and also with matters such as rest breaks. The change to the exposure draft means that the clause will no longer merely deal with the computation of time but will instead provide for a definition of hours of work.

Clause 8.5(b) – Ordinary hours of work and rostering – Rostered days off (RDOs)

13. The word "maybe" should be substituted with "may be". This appears to be a drafting error.

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[1] *Modern Awards Review 2012 – Road Transport (Long Distance Operations) Award 2010* [2014] FWC 3529 at [157].

Clause 8.5(c) – Ordinary hours of work and rostering – Rostered days off (RDOs)

14. The opening words of the second paragraph to the current clause 20.5(b) (“Alternatively, subject to mutual agreement”) have been removed from clause 8.5(c) of the Exposure Draft. The words should be reinserted as they assist in making the award simple and easy to understand.

15. Clause 8.5(b) of the Exposure Draft states that an employee “must” take RDOs as prescribed by that clause. The requirement to *take* RDOs cannot be reconciled with the facilitative provision found at clause 8.5(c), without an indication that it operates as an alternative to the requirement under clause 8.5(b). The absence of the relevant words may give rise to an argument that clause 8.5(c) is in fact inconsistent with clause 8.5(b).

Clause 8.5(c) – Ordinary hours of work and rostering – Rostered days off (RDOs)

16. The existing reference to “*any number of accrued RDOs*” contained in clause 20.5(b) should be reinserted to clarify that the parties have the capacity to cash out some rather than all of the accrued RDOs.

Clause 8.5(e) – Ordinary hours of work and rostering – Rostered days off (RDOs) (Response to question)

17. Clause 20.5(b) already provides, in the last sentence of the second paragraph of clause (b) that, “*any payment for an RDO will be at 20% of the applicable minimum weekly rate.”* The rates referred to are contained in clause 13.1 of the current award which is titled “minimum weekly rates of pay.” Moreover, clause 20.5(d) of the current award already provides that “employees must be paid for rostered days of at the rate prescribed by clause 13.1”

18. The rates that includes overtime and/or the industry allowance are not required to be included in any payment in respect of RDOs. Such rates are driving rates and are only payable in relation to driving work performed.

Clause 8.6(c) – Ordinary hours of work and rostering – Absence from duty

19. The current clause 20.6(c) stipulates a formula by which an employee must be paid for the week during which an RDO is taken. The redrafting of this provision has created an obligation to pay an employee “during” the week that the rostered day off is taken. This is a substantive change to the current award. Ai Group submits that this should be rectified by replacing the word “during” with the words “in respect of” as found in the current award.

Clause 8.7 – Ordinary hours of work and rostering – Call back

20. Ai Group suggests greater clarity would be achieved by adding the words “*divided by 38*” after the reference to clause 11.1.

Clause 11.1 – Minimum wages – Minimum weekly rates of pay

21. We note that the preamble to the table of rates in clause 11.1 contains a standard form of words that has been adopted in various other exposure drafts published by the Commission. This differs from the current clause 13.1.

22. Ai Group submits that the variation made is not appropriate for this particular award and should not be adopted in this context. The text of clause 11.1 creates an obligation on an employer to pay the prescribed amounts for ordinary hours worked by an employee. This is not how the remuneration structure under this award operates. Rather, the minimum weekly rate forms the basis of the guaranteed minimum fortnightly payment to which an employee is entitled, pursuant to clause 11.2. It also provides the rates by reference to which other entitlements under the award are paid, such as rostered days off. For time spent driving, an employee is to be remunerated in accordance with either the cents per kilometre driving method (clause 11.4) or the hourly rate method (clause 11.5).

23. Clause 11.1, as currently drafted, may give rise to the argument that an employee must, in all circumstances, be paid the relevant minimum weekly rate prescribed by that clause, in addition to remuneration for driving. This is

a clear departure from the current award and would amount to a substantive change that should not be adopted.

24. The preamble contained in clause 11.1 of the exposure draft should be substituted with the text currently found at clause 13.1 of the award.

Clause 11.1 – Minimum wages – Minimum weekly rate of pay

25. A daily rate would not be appropriate. There is currently no obligation to pay employees a minimum amount per day.

26. We do not see any difficulty with continuing the longstanding approach of calculating certain daily entitlements by reference to a proportion of the relevant weekly rate.

Clause 11.1 – Minimum wages – Minimum weekly rates of pay - Note

27. We refer to submissions made above regarding clause 3.3 of the Exposure Draft. For the reasons there set out, Ai Group submits that the note at clause 11.1 should also be amended by substituting references to the "*Road Transport and Distribution Award 2010"* with "*Road Transport and Distribution Award 2014*".

Clause 11.2(d) – Minimum wages – Guaranteed minimum payment (comments on redrafting and response to exposure draft question)

28. Pursuant to the current clause 13.2(d), an employee travelling by sea or rail in company with a vehicle must be paid eight hours' ordinary pay in any day. The applicable rate of pay is based upon the minimum weekly rate prescribed in clause 13.1. However, if an employee works for a period less than eight hours on that day, and that period of time is covered by another part of the award, the employee is entitled, under this clause, to the difference between eight hours and the actual time worked.

29. While we appreciate that the intention behind redrafting this provision is to simplify it, clause 11.2(d) of the Exposure Draft is ambiguous. The simple reference to an employee working less than eight hours does not adequately

differentiate between work performed under another part of the award and remuneration to which an employee is entitled under this clause. On this basis Ai Group submits that the relevant text of the current clause be reinstated.

30. The final sentence of clause 13.2(d) of the award currently provides that, "*The cost of transport must be borne by the employer.*" Clause 11.2(d) of the exposure draft provides that the cost must be "…*paid by the employer*". Although only a minor difference, the current clause makes the employer ultimately responsible for the cost of transport while the new wording appears to require the employer to directly pay for the transport. The new wording would appear to prohibit arrangements involving an employee initially paying for the transport but being subsequently reimbursed by the employer. The former wording should be reinstated.

Clause 11.3(d) – Minimum wages – Rates of pay

31. Clause 11.3(d) should be amended by substituting the reference to clause 11.3(a) with a reference to clauses 11.3(a) and (b). This properly reflects the cross reference contained in the current clause 13.3(c).

Clause 11.4(a) – Minimum wages – Rates of pay – kilometre driving method

32. The clause has been amended to insert casual rates. If the column is to be included a footnote should be inserted to explain that the amounts specified include the 15% loading mandated by clause 6.4(b).

33. Ai Group is also concerned that the table gives the reader the incorrect impression that these casual rates are applicable on a public holiday. Clause 26.5 of the current specifically regulates rates of pay for casual employees working on a public holiday and does not require that the casual loading be included. Instead the rate of remuneration is calculated by reference to the method of remuneration contained in clause 13.1.

Clause 11.5(b) – Minimum wages – Rates of pay – hourly driving method

34. The clause has been amended to insert casual rates. A footnote should be inserted to explain that the amounts specified include the 15% loading mandated by clause 6.4(b).

Clause 11.5(b) – Minimum wages – Rates of pay – hourly driving method (question)

35. The clause should not be varied as proposed by the comment in the exposure draft. The proposal does not reflect the manner in which the rates are calculated.

Clause 11.6 – Minimum wages – Loading or unloading

36. The proposal should not be adopted. It is a substantive change that would increase employer costs. We are concerned that it would not be justified on work value grounds.

Clause 11.7(d) – Minimum wages – Payment of wages

37. The current clause (18.4) makes it clear that a decision to pay an employee by means of an electronic funds transfer is at an employer's discretion. In contrast, the wording in the exposure draft is merely permissive in that it makes it clear that a payment may be made via this method. A reference to the employer's discretion should be reinserted.

Clause 11.11 – Minimum wages – Penalty rates

38. Ai Group submits that clause 11.11 should be amended by inserting the words "payable for work performed on a public holiday" at the conclusion of the clause. This variation would ensure that the clause more accurately describes the content of clause 18.

Clause 12.1 – Allowances

39. The reference to Schedule D in clause 12.1 should be amended to read "Schedule B". This appears to be a drafting error.

Clause 12.2(c)(i) – Allowances – Wage related allowances – Other allowances

40. We refer to submissions made above regarding clause 3.3 of the Exposure Draft. For the reasons there set out, Ai Group submits that clause 12.2(c)(i) should also be amended by substituting the reference to the "*Road Transport and Distribution Award 2010*" with "*Road Transport and Distribution Award 2014*".

Clause 11.5(b) – Allowances – Expense related allowances – Housing

41. There is no need for the frequency of the allowance to be specified. The frequency may vary depending upon when the rent is charged.

Clause 12.3(e)(ii) – Allowances – Expense related allowances – Training

42. The removal of the word "provided" makes it less clear that the reimbursement of fees is permitted to be made at the end of the prescribed course or annually and that it is subject to the reports of attendance at such courses, even if evidence of the expenditure has been provided at an earlier time.

Clause 14.4 – Annual leave – Rostered day off falling during annual leave

43. The hyphen between the words "Upon returning" should be deleted. This appears to be a drafting error.

Clause 18.3(a) – Public holidays – Substitution of certain public holidays by agreement at the enterprise

44. The current clause 26.2(a) enables the substitution of another day for any prescribed public holiday by agreement between the employer and employees. It also provides that, for this purpose, the consent of the majority of "affected" employees will constitute agreement. By comparison, clause 18.3(a) of the Exposure Draft requires the consent of the majority of employees in the entire enterprise.

45. The proposed variation alters the operation of the current award and should not be adopted. The former wording of clause 26.2 should be reinserted.

46. The NES does not provide for a paid day off as referred to in the second sentence of clause 18.1. Whether an employee has an entitlement to a payment on a public holiday will depend upon their ordinary hours of work. The sentence should be deleted.

Schedule A – Summary of hourly rates of pay

47. If the schedule is to include public holiday rates it should also include a reference to clause 18.5 given it limits the circumstances when the penalty is applicable.

3. EXPOSURE DRAFT – ROAD TRANSPORT AND DISTRIBUTION AWARD 2014

Clause 5.2(a) – Facilitative provisions – Facilitation by individual agreement

48. Ai Group makes the following submissions regarding clause 5.2(a) of the Exposure Draft:

- Clause 5.2(a)(ii): the reference to clause 8.3 should be amended to clauses 8.4(a) and (b), which deal with the spread of ordinary hours and the ability to alter that spread by agreement. This corresponds with the reference to clause 22.3 in the current clause 8.1(b).

- Clause 5.2(a)(vi): this subclause should be deleted. Clause 13.4(a) is not a facilitative provision as it does not provide for an ability to alter, by agreement, the way in which it applies.

Clause 5.3(a) – Facilitative provisions – Facilitation by majority agreement

49. Ai Group makes the following submissions regarding clause 5.3(a) of the Exposure Draft:

- Clause 5.3(a)(ii): the reference to clause 8.3 should be amended to clauses 8.4(a) and (b), which deal with the spread of ordinary hours and the ability to alter that spread by agreement. This corresponds with the reference to clause 22.3 in the current clause 8.1(c).

- Clause 5.3(a)(iv): this subclause should be deleted. Clause 9.7(a) is not a facilitative provision as it does not provide for an ability to alter, by agreement, the way in which it applies.

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

50. Clause 6.4(a)(ii) deviates from the current clause 12.4(g), as it is not confined to “the terms of this award”. Its application therefore potentially extends to over-award pay and entitlements. This is a substantive change which imposes additional costs on employers. It should not be adopted.

51. Additionally, the use of the words “same kind of work” gives rise to an ambiguity. The application of the clause is unclear where part-time employees are engaged to perform a “kind of work” that is not performed by any full-time employees.

52. The words of the current clause should be retained.

Clause 6.4(e) – Types of employment – Part-time employment

53. Clause 12.4(f) provides that the hourly rates for part-time employees are to be calculated based on 1/3th of the weekly rate contained in the Award. The Award does not currently provide higher hourly rates for oil distribution workers. We are accordingly concerned that the new approach adopted in the exposure draft results in an increase in rates of pay for such employees.

Clause 6.4(f) – Types of employment – Part-time employment

54. The cross reference in this clause should be to clause 6.4(b)(i) - (iii).

Clause 6.4(h) – Types of employment – Part-time employment

55. The cross reference in this clause should be to clause 6.4(b)(i) – (iii).

Clause 6.5(c) – Types of employment – Casual employment – Casual loading

56. Clause 6.5(c) should be amended by deleting the words ""*in which they are employed*" and replacing them with "*for their classification."*

57. The classification under which a casual employee performs work under this award may differ upon each engagement, or even within a single engagement. Employees are classified according to the vehicle they drive. It is common practice that a casual employee engaged as a driver be required to operate a different vehicles. A casual employee will thus be paid according to the classification under which they perform work on a particular engagement. Where an employee performs two or more grades of work on any one day of work, the higher duties clause applies.

58. The introduction of the relevant text presupposes that a casual employee is *employed* at a particular classification.

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

59. Ai Group notes that the current clause 12.6 has been significantly redrafted. We have identified various concerns arising from this redrafting, which are similar to those identified with respect to many other Group 1 Exposure Drafts. We note that such issues have been referred to the Casual Employment Common Issues Full Bench. Ai Group intends to make submissions before that Full Bench regarding the redrafting of these provisions.

60. Should the Commission adopt a different approach with respect to these issues regarding the Group 2 Exposure Drafts, Ai Group will seek an opportunity to make submissions at the appropriate time.

Clause 8.1(a) – Ordinary hours of work and roster cycles – employees other than oil distribution workers

61. Clause 22.1 of the current award is not confined to full-time employees. It also applies to part-time and casual employees. The insertion of the words "for a full-time employee" in clause 8.1 of the Exposure Draft potentially results in a breach of s.147, as the Exposure Draft does not include a term specifying, or providing for the determination of, the ordinary hours of work for a part-time and casual employee. The relevant words should therefore be deleted from clause 8.1(a).

62. The clause should also be amended by inserting the words "<u>up to</u> 38 hours per week". Without this amendment, the clause purports to require part-time and casual employees to work 38 ordinary hours a week, which is contrary to clause 6.4(a).

Clauses 8.4(c) and (d) – Ordinary hours of work and roster cycles – employees other than oil distribution workers – Spread of hours

63. Clauses 8.4(c) and (d) correspond with the clause 22.4 of the current award. The redrafting of clause 22.4 is problematic as it deviates from the current award. Ai Group raises the following concerns in this regard:

- The current clause applies to the performance of certain activities listed at clauses 22.4(a) – (d). An employee is not necessarily "employed in" such activities for the provision to apply. It is sufficient that an employee is required to perform one of the activities on an ad hoc basis. The clause does not require any degree of regularity.

- The current clause makes clear that an employer may *require* an employee to commence ordinary hours between the times specified. Clause 8.4(c) does not clarify that an employee can be so directed.

- Employees required to commence ordinary hours in accordance with clause 22.4 are to be paid an additional 30% of the "weekly wage rate". This is a reference to the weekly wage rate prescribed by the

minimum wages clause of the award and does not include all purpose allowances. By applying the 30% to the "ordinary hourly rate", which is defined at C.1 of the Exposure Draft, the clause gives rise to a substantive change.

64. Based on the above, Ai Group submits that clause 8.4(c) and (d) should be substituted with the following:

> *"(c) The times within which ordinary hours of work may be performed will not apply to:*
>
> *…*
>
> *(d) Provided that instead of the times in clauses 8.4(a) and (b), an employer may require an employee to commence ordinary hours of work between 12.01am and 6.00am (Monday to Friday inclusive) but not otherwise and, in which case, the applicable minimum hourly rate of the employee must be increased by 30% for each ordinary hour worked."*

Clause 8.5(a) – Ordinary hours of work and roster cycles – employees other than oil distribution workers – Method of working ordinary hours – Providing for rostered days off (RDOs)

65. The newly inserted reference to "*ordinary hourly rate of pay*" should be replaced by a reference to the "*applicable minimum hourly rate of pay*."

Clause 8.5(b) – Ordinary hours of work and roster cycles – employees other than oil distribution workers – Method of working ordinary hours – Providing for other than a rostered day off

66. The reference to except for meal breaks should be amended to also include a reference to breaks taken for the purpose of complying with fatigue management rules/regulations.

Clause 8.5(b)(ii) – Ordinary hours of work and roster cycles – employees other than oil distribution workers – Method of working ordinary hours – Providing for other than a rostered day off

67. The current clause 22.5(b)(ii) refers to "all such days of the week". When the provision is read as a whole, it is clear the reference is to five days of each week, Monday to Friday inclusive, where the relevant arrangements entered into with a client would be prejudiced. The Exposure Draft has varied the text of the clause to instead read "all days of the week". This may give rise to confusion as to whether the reference includes any day, outside of the above parameters. Such an interpretation would be anomalous in the context of this clause.

68. Ai Group submits that in the interests of avoiding such confusion, the word "such" should be reinstated.

Clause 8.5(b)(iii) – Ordinary hours of work and roster cycles – employees other than oil distribution workers – Method of working ordinary hours – Providing for other than a rostered day off

69. The current clause 22.5(b)(iii) refers to "all such days of the week". When the provision is read as a whole, it is clear the reference is to five days of each week, Monday to Friday inclusive, where the employer's arrangements would be prejudiced. The Exposure Draft has varied the text of the clause to instead read "all days of the week". This may give rise to confusion as to whether the reference includes any day, outside of the above parameters. Such an interpretation would be anomalous in the context of this clause.

70. Ai Group submits that in the interests of avoiding such confusion, the word "such" should be reinstated.

Clause 9.6 – Ordinary hours of work and roster cycles – oil distribution

71. The current clause 23.4 requires the payment of a higher rate where work is performed in excess of 35 hours in any three consecutive days, Monday to

Saturday, during which an employee is rostered to work pursuant to this provision.

72. The deletion of the word “such” in the redrafted clause 9.6 gives rise to an ambiguity as the reference to work rostered over three days in accordance with clause 9.5 is lost. The provision, as currently drafted, would suggest that an oil distribution worker is to be paid at the rates there prescribed for work performed in excess of 35 hours on any three days. This is a clear departure from the current provision, which would introduce substantial additional employment costs (s.134(1)(f)). On this basis, the text of the current clause should be reinstated.

Clause 9.7(b)(ii) – Ordinary hours of work and roster cycles – oil distribution workers – Providing for other than a rostered day off

73. The current clause 23.5(b)(ii) refers to “all such days of the week”. When the provision is read as a whole, it is clear the reference is to five days of each week, Monday to Friday inclusive, where the relevant arrangements entered into with a client would be prejudiced. The Exposure Draft has varied the text of the clause to instead read “all days of the week”. This may give rise to confusion as to whether the reference includes any day, outside of the above parameters. Such an interpretation would be anomalous in the context of this clause.

74. Ai Group submits that in the interests of avoiding such confusion, the word “such” should be reinstated.

Clause 9.7(b)(iii) – Ordinary hours of work and roster cycles – oil distribution workers – Providing for other than a rostered day off

75. We refer to our submissions above with respect to clause 9.7(b)(ii) and submit that on this basis, clause 9.7(b)(iii) should be amended as follows:

> *“… rostered days off be taken on any or all <u>such</u> days.”*

Clause 11.1(c) – Breaks – Regular meal break

76. Clause 26.1(c) presently requires the calculation of the prescribed penalty on the "minimum hourly rate in clause 15.2". The rates contained in clause 15.2 do not include all purposes allowances.

77. By substituting the above text with a reference to the "ordinary hourly rate in clause 12.1", the Exposure Draft deviates substantively from the current award term. The ordinary hourly rate is defined by the Exposure Draft as including all purpose allowances.

78. Additionally, clause 12.1 of the Exposure Draft contains the minimum weekly, hourly and casual rates. No mention is made in that clause of ordinary hourly rates. Clause 11.1(c) is thus likely to give rise to confusion.

79. Ai Group submits that the clause should be amended by reinstating the current reference to the "minimum hourly rate".

Clause 11.2(b) – Breaks – Meal breaks after ordinary hours and before overtime hours

80. The exposure draft provides that rest breaks will be paid for at the ordinary hourly rate. The reference should be amended to "*the applicable minimum hourly rate."*

Clause 12.1 – Minimum wages – Minimum wage rates – employees other than oil distribution workers

81. The table should include a note confirming that the casual rates include the relevant casual loading.

Clause 12.2 – Minimum wages – Minimum wage rates – oil distribution workers

82. The Award does not currently provide a higher hourly rate for oil distribution workers. Accordingly it should not simply be assumed that the hourly rate for such workers can be determined by dividing the standard weekly rate by 35.

83. Ai Group suggests that the application of various clauses of the award to oil distribution workers requires further consideration.

84. A note confirming the inclusion of the casual loading should also be inserted in the table.

Clause 12.3(a) – Minimum wages – Junior employees

85. The current clause 15.3(a) describes the rate payable to junior employees as a percentage of the "*base wage payable to an adult employee for the class of work performed in the area in which it is performed as provided by clause 15*". This has been substituted in the Exposure Draft for a reference to the "applicable adult rate for their classification".

86. The exposure draft should be amended to clarify that the applicable junior rates will continue to be calculated by reference to the relevant award prescribed rate. Accordingly, the preamble in clause 12.3(a) should be substituted with the following:

> *"(a) Junior employees will be entitled to a percentage of the applicable adult minimum hourly rate for their classification, prescribed in clause 12, as follows:"*

87. The heading to the second column of the table in clause 12.3(a) should also be substituted with "% of the applicable adult minimum hourly rate".

Clause 12.7(e) – Minimum wages – Payment of wages

88. The words at "its discretion" contained in the corresponding current award clause should be reinstated to make it clear that the decision to pay an employee by means of an electronic funds transfer (EFT) or by some other means is entirely at the employer's discretion. The exposure draft merely affords the employer the ability to pay my means of an EFT.

Clause 13 – Allowances

89. The current clause 16.1 has not been included in the Exposure Draft, on the basis that it is “redundant”.

90. Clause 16.1 was inserted as a consequence of the two year review of the award. The provision was designed to address any ambiguity arising from the award as to whether the allowances contained in it are payable to part-time and casual employees and how they are to be calculated. Its insertion was consented to by the interested parties involved in the review. Senior Deputy President Harrison granted the variation to the award, on the basis that it would make the award simpler and easier to understand.[2]

91. Ai Group submits that the clause is not redundant. As stated above, it was inserted during a recent review of the award, as Commission found that the provision is necessary to ensure that the award achieves the modern awards objective. In the absence of a claim from any interested party seeking its deletion, this clause should be retained.

Clause 13.2 – Allowances

92. Ai Group reiterates our previous submissions relating to the insertion of clauses of this nature in exposure drafts.

Clause 13.2(a)(i) – Allowances – Wage related allowances – All purpose allowances

93. Clause 13.2(a)(i) of the Exposure Draft refers to an industry allowance under Schedule B. The allowances referred to are payable to drivers of certain classes of vehicles. They are not payable to all employees in the industry generally. The reference to “industry allowance” should therefore be amended to read “Allowance payable to employees classified as Transport Worker Grade 7 or Transport Worker Grade 10”.

[2] *Modern Awards Review 2012 - Road Transport and Distribution Award 2010* [2013] FWC 9805 at [19] – [21].

Clause 13.2(a)(ii) – Allowances – Wage related allowances – All purpose allowances

94. Clause 13.2(a)(ii) of the Exposure Draft lists the leading hand allowance as an all-purpose allowance. Having regard to the current clause 16.2(a) of the award and clause 13.2(b) of the Exposure Draft, it is not apparent from the text of the clause that the allowance is an all-purpose allowance. Clause 13.2(a)(ii) should be deleted.

Clause 13.2(a)(i) – Allowances – Wage related allowances – All purpose allowances

95. Ai Group would not oppose the allowances being moved to the clause dealing with allowances. While they are merely contained within the classification structure there is a risk that they will be overlooked.

Clause 13.4(a) – Allowances – Expense related allowances – Travelling allowance

96. Clause 13.4(a) should be amended to make clear that the allowance is payable in circumstances where an employee is engaged "on work on which the employee is unable to return home at night". The clause, as redrafted, could apply in any circumstances where an employee is unable to return home at night due to circumstances that do not involve the work on which they are engaged. This is a substantive change which would impose additional expenses on an employer. The change is contrary to the modern awards objective (s.134(1)(f)) and should not be adopted.

Clause 13.4(b) – Allowances – Expense related allowances – Work diary

97. Clause 13.4(b) of the Exposure Draft omits the word "weekly" as currently found at clause 16.4(a). In doing so, the redrafted provision extends its application to casual employees. Ai Group submits that this amounts to a substantive change that would impose additional costs on employers (s.134(1)(f)). On this basis, the word "weekly" should be reinserted.

Clause 13.4(d)(ii) – Allowances – Expense related allowances – Housing

98. Ai Group refers to the question contained at clause 13.4(d)(ii) of the Exposure Draft. The effect of the clause is that where an employer provides accommodation for an employee and his/her family, requires the employee to live there and charges the employee rent, the employer must pay the employee an allowance that equates to the amount of rent charged, less $2.85. The frequency of this allowance should not be prescribed as it will be determined by the frequency with which an employer requires the employee to pay rent. No variation should be made to this clause.

Clause 13.4(f)(i) – Allowances – Expense related allowances – Meal allowance

99. Ai Group notes that we have proposed substantive amendments to the corresponding award clause. Such matters are currently being considered in the conferences before SDP Harrison.

Clause 15.1(d) – Shiftwork – Definitions – Non continuous afternoon or night

100. The definition of a non continuous night shift is new and deviates from the current terms of clause 24.10.

101. Clause 24.10 defines a non continuous afternoon or night shift based on the occurrence of the shift. That is, it is described as a shift that does not continue for at least five consecutive afternoons or nights.

102. The definition found at clause 15.1(d) of the Exposure Draft deviates from this by describing the shift by the reference to *work performed* on an afternoon or night shift as described. This is a substantive change. Ai Group submits that clause 15.1(d) should be amended as follows:

> *"Non continuous afternoon or night shift means ~~work on~~ any afternoon or night shift which does not continue for at least five consecutive afternoons or nights".*

Clause 15.10 – Shiftwork – Rate for non-continuous afternoon or night shift

103. The rate prescribed by the current clause 24.10 is payable to a shiftworker who works on any afternoon or night shift which does not continue for at least five consecutive afternoon or nights. Clause 15.10 of the Exposure Draft deviates from this as it is expressed as applying to "shiftworkers who work on any afternoon or night shift".

104. Clause 15.10 should be amended as follows, subject to the definition of "non-continuous afternoon or night shift" being amended as proposed above:

> *"Shiftworkers who work on any non-continuous afternoon or night shift must be paid … ".*

Clause 16.2(a) – Penalty rates – Work on public holidays

105. The clause should be reworded to clarify that the penalties are payable based on the minimum rates contained in the award. For example, the casual loading referred to in clause 28.2(g) is currently required to be calculated by reference to the minimum rates contained in the current award.

106. Further, simply rolling the casual loading into the rate contained in the table (a) of the Exposure Draft also fails to reflect the fact that the 25% casual loading is not applicable when overtime hours are worked. It accordingly increases an employer's costs. The clause will accordingly need to be reworded.

Clause 16.2(b) – Penalty rates – Work on public holidays

107. In response to the question on page 27 we note that the rates for casuals are incorrect. The rates of pay for all time worked by a casual employee are as per clause 28.2(f) of the current award, This would of course include overtime. The casual loading referred to in 28.2(g) is not applicable during overtime.

Clause 16.2(d) – Penalty rates – Work on public holidays

108. This subclause should be amended to make it clear that it forms part of subclause (c).

109. Clause 17.5(c)(ii) of the Exposure Draft substitutes the words "during such absence", as found at the conclusion of the current clause 27.3(c) with "during ordinary hours".

110. The purpose of this provision is to ensure that an employee is paid for ordinary working time that occurs during their 10 consecutive hours off duty. The reference to ordinary hours is confusing and may lead to an anomalous application of the provision. Ai Group submits that the words "during such absence" should be reinstated.

Clause 17.7(a) – Overtime – Call-back

111. Ai Group refers to the question contained at clause 17.7(a) of the Exposure Draft. Given the time referred to in the clause is time worked as overtime it suggests it will be paid at the overtime rates.

Clause 18.2(a) – Annual leave – Additional leave for certain shiftworkers

112. Clause 18.2(a) of the Exposure Draft refers to clause 18.1. In light of the Commission's decision that summaries of the NES will not be included in modern awards,[3] the reference to clause 15.1 should be amended to read "s.87(1)(b) of the Act".

Schedule H - Definitions – non continuous afternoon or night

113. We refer to our submissions regarding clause 15.1(d). The definition for "non continuous afternoon or night" at Schedule H should also be amended as we have earlier proposed.

[3] *4 Yearly Review of Modern Awards* [2014] FWCFB 9412 at [35] – [36].

Schedule C – Summary of Hourly Rates of Pay

114. Ai Group raises the following concerns regarding Schedule C to the Exposure Draft:

- Ai Group has previously raised concerns around the proposed definition of the term "ordinary hourly rate" within the exposure drafts.

- As per clause C.1.2, rates in the schedule have been calculated based on the minimum hourly rate. The reference to the ordinary hourly rate in each of the tables is accordingly erroneous and confusing. Ai Group submits that the Schedule should be amended to refer to the "% of the minimum hourly rate" throughout.

- We refer to submissions earlier made with respect to the definition of "non continuous afternoon or night shift" in clause 15.1(d) and Schedule H. The amendment there proposed should also be made to the footnote contained in C.2.2, C.2.4, C.2.6, C.4.2, C.4.4 and C.4.6.

- The afternoon shift rates in C.2.2 and C.2.4 are incorrect and require recalculation.

115. The exposure draft provides higher rates of pay for Oil Distribution Workers. The current award does not prescribe such rates.