Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Reply Submission

Exposure Drafts & Substantive Claims

Group 2 Awards

28 August 2015

4 YEARLY REVIEW OF MODERN AWARDS

GROUP 2 AWARDS

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1. INTRODUCTION

1. The Australian Industry Group (Ai Group) makes this reply submission with respect to the Fair Work Commission's (Commission) publication of Exposure Drafts and substantive variations to awards in Group 2 of the Award Stage of the 4 Yearly Review of Modern Awards (Review).

2. This submission is made in accordance with Amended Directions issued by the Commission on 6 May 2015, and an extension of time subsequently granted to Ai Group on 20 August 2015. It should be read in conjunction with previous submissions we have filed regarding the Group 2 Exposure Drafts on 28 January 2015, 4 February 2015, 11 February 2015, 4 March 2015 and 15 July 2015, and our 'Outlines of Issues' filed on 25 November 2014 and 28 November 2014.

3. We note that many parties pursuing substantive variations to the Award have proposed the variations sought by reference to the Exposure Draft. Given that the terms of the Exposure Draft are not yet settled and a significant number of technical and drafting issues have been raised in respect of numerous provisions, in relation to these substantive claims our reply submissions are made with reference to the current Award.

2. THE COMMISSION'S GENERAL APPROACH TO THE REVIEW

2.1 The Statutory Framework

4. A number of proposals have been put forward by parties to vary Group 2 Awards in the context of the Review which is being conducted by the Commission pursuant to s.156 of the *Fair Work Act 2009* (the Act).

5. In determining whether to exercise its power to vary a modern award, the Commission must be satisfied that the relevant award includes terms only to the extent necessary to achieve the modern awards objective (s.138).

6. The modern awards objective is set out at s.134(1) of the Act. It requires the Commission to ensure that modern awards, together with the National

Employment Standards (NES), provide a fair and relevant minimum safety net of terms and conditions. In doing so, the Commission is to take into account a range of factors, listed at s.134(1)(a) – (h). The modern awards objective applies to any exercise of the Commission's powers under Part 2-3 of the Act, which includes s.156.

2.2 The Commission's Approach to the Review

7. At the commencement of the Review, a Full Bench dealt with various preliminary issues that arise in the context of this Review. The Commission's *Preliminary Jurisdictional Issues Decision*[1] provides the framework within which the Review is to proceed.

8. The Full Bench emphasised the need for a party to mount a merit based case in support of its claim, accompanied by probative evidence (emphasis added):

> "[23] The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. We agree with ABI's submission that some proposed changes may be self evident and can be determined with little formality. However, <u>where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.</u>"

9. The Commission indicated that the Review will proceed on the basis that the relevant modern award achieved the modern awards objective at the time that it was made (emphasis added):

> "[24] In conducting the Review the Commission will also have regard to the historical context applicable to each modern award. Awards made as a result of the award modernisation process conducted by the former Australian Industrial Relations Commission (the AIRC) under Part 10A of the Workplace Relations Act 1996 (Cth) were deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Act). Implicit in this is a legislative acceptance that at the time they were made the modern awards now being reviewed were consistent with the modern awards

[1] [2014] FWCFB 1788.

> objective. The considerations specified in the legislative test applied by the AIRC in the Part 10A process is, in a number of important respects, identical or similar to the modern awards objective in s.134 of the FW Act. In the Review the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made."

10. The decision confirms that the Commission should generally follow previous Full Bench decisions that are relevant to a contested issue:

> "[25] Although the Commission is not bound by principles of stare decisis it has generally followed previous Full Bench decisions. In another context three members of the High Court observed in Nguyen v Nguyen:
>
> > "When a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasion upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law: see Queensland v The Commonwealth (1977) 139 CLR 585 per Aickin J at 620 et seq."
>
> [26] While the Commission is not a court, the public interest considerations underlying these observations have been applied with similar, if not equal, force to appeal proceedings in the Commission. As a Full Bench of the Australian Industrial Relations Commission observed in Cetin v Ripon Pty Ltd (T/as Parkview Hotel) (Cetin):
>
> > "Although the Commission is not, as a non-judicial body, bound by principles of stare decisis, as a matter of policy and sound administration it has generally followed previous Full Bench decisions relating to the issue to be determined, in the absence of cogent reasons for not doing so."
>
> [27] These policy considerations tell strongly against the proposition that the Review should proceed in isolation unencumbered by previous Commission decisions. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so."

11. In addressing the modern awards objective, the Commission recognised that each of the matters identified at s.134(1)(a) – (h) are to be treated "as a matter of significance" and that "no particular primacy is attached to any of the s.134 considerations". The Commission identified its task as needing to "balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net".

12. Section 138 of the Act imposes a significant hurdle. This was recognised by the Full Bench in the following terms (emphasis added):

> [36] … Relevantly, s.138 provides that such terms only be included in a modern award 'to the extent necessary to achieve the modern awards objective'. To comply with s.138 the formulation of terms which must be included in modern award or terms which are permitted to be included in modern awards must be in terms 'necessary to achieve the modern awards objective'. What is 'necessary' in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations. In the Review the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective."

13. The frequently cited passage from Justice Tracey's decision in *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* was adopted by the Full Bench. It was thus accepted that:

> "… a distinction must be drawn between that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action."

14. Accordingly, the *Preliminary Jurisdictional Issues Decision* establishes the following key threshold principles:

- A proposal to significantly vary a modern award must be accompanied by submissions addressing the relevant statutory requirements and probative evidence demonstrating any factual propositions advanced in support of the claim;
- The Commission will proceed on the basis that a modern award achieved the modern awards objective at the time that it was made;
- An award must only include terms to the extent necessary to achieve the modern awards objective. A variation sought must not be one that is merely desirable; and
- Each of the matters identified under s.134(1) are to be treated as a matter of significance and no particular primacy is attached to any of the considerations arising from it.

15. In a subsequent decision considering multiple claims made to vary the *Security Services Industry Award 2010*, the Commission made the following comments, which we respectfully commend to the Full Bench: (underlining added)

> [8] While this may be the first opportunity to seek significant changes to the terms of modern awards, a substantive case for change is nevertheless required. The more significant the change, in terms of impact or a lengthy history of particular award provisions, the more detailed the case must be. Variations to awards have rarely been made merely on the basis of bare requests or strongly contested submissions. In order to found a case for an award variation it is usually necessary to advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes. Such evidence should be combined with sound and balanced reasoning supporting a change. Ultimately the Commission must assess the evidence and submissions against the statutory tests set out above, principally whether the award provides a fair and relevant minimum safety net of terms and conditions and whether the proposed variations are necessary to achieve the modern awards objective. These tests encompass many traditional merit considerations regarding proposed award variations.[2]

16. As set out below, the relevant approach articulated by the Commission in the above decisions tells strongly against the adoption of the proposed variations opposed by Ai Group. Our specific concerns relating to each claim are set out in these submissions.

3. ALPINE RESORTS AWARD 2010

17. The following submissions relate to the *Exposure Draft – Alpine Resorts Award 2014* and substantive claims made to vary the *Alpine Resorts Award 2010* (Alpine Resorts Award). They are made in response to submissions filed by:

- The Australian Ski Areas Association (ASAA), dated 15 July 2015; and
- The Mount Hotham Alpine Resort Management Board, dated 15 July 2015.

[2] [2015] FWCFB 620

3.1 Exposure Draft – Alpine Resorts Award 2014

Clause 8.1 – Apprentices

18. In response to the ASAA's submission regarding clause 8.1 of the Exposure Draft, we refer to the Commission to Ai Group's submission of 28 January 2015 at paragraph 25. We do not oppose the ASAA's proposal.

3.2 Claims to Expand Coverage of the Award

19. The Falls Creek and Mount Hotham Chambers of Commerce, Thredbo Tourism and Perisher Resorts Chamber of Commerce have earlier filed proposals to vary the coverage of the Alpine Resorts Award to include any other business or employer operating within an alpine resort, regardless of whether they operate an alpine lift. These submissions were filed 28 January 2015 and 10 May 2015 respectively.

20. To the extent that those organisations are continuing with their claims, Ai Group opposes such proposals. Our concerns include:

- The award coverage would be based on geographic location rather than the industry which the award was intended to cover; and
- The award would cover industries that are more appropriately covered by existing awards;
- The proposal would significantly expand the award's coverage.

21. The proposed variation would be very significant and as such would need to be supported by probative evidence. Such evidence has not been filed and hence the claims should be rejected by the Commission.

4. ANIMAL CARE AND VETERNIARY SERVICES AWARD 2010

22. The following submissions relate to the *Exposure Draft – Animal Care and Veterinary Services Award 2014*. They are made in response to submissions filed by:

- The Australian Veterinary Association Ltd (AVA), dated 15 July 2015;
- The Australian Workers' Union (AWU), dated 15 July 2015; and
- United Voice (UV), dated 15 July 2015.

4.1 Exposure Draft – Animal Care and Veterinary Services Award 2014

Clause 8.3(c) – Veterinary surgeons

23. In response to the AVA, the AWU and UV submissions, Ai Group agrees that at clause 8.3(c) of the Exposure Draft:

- The words "*of paid overtime*" should be removed. The inclusion of these words changes the effect of the corresponding clause within the current award (clause 22.3(c)); and
- The reference to "*six months*" is incorrect and should be replaced with "*six weeks*" in accordance with the current award at clause 22.3(c).

Clause 11.2(a) – On call duty (wage related allowances – veterinary surgeons)

24. The Commission asks the parties whether the payment in clause 11.2(a) is paid in addition to the relevant hourly rate when an associate performs active call duty. Ai Group does not disagree with the position put by the other parties involved in this matter, that the payment is made in addition to the relevant hourly rate.

25. The Commission also asks the parties whether the "*relevant hourly rate*" is the overtime rate or ordinary hourly rate. Ai Group is of the view that the rate referred to is a reference to the ordinary hourly rate and not the overtime rate.

26. Clause 24.1(a) of the current award indicates that "*employers will compensate for time worked in addition to 38 hours per week, excepting when the associate is on call, …*" (Ai Group emphasis). It is therefore clear, from the operation of clause 24.1(a) that active on call duty is not 'compensated' by way of additional remuneration (amounting to overtime). Current clause 24.1(a) is simplified in clause 16.2(a) of the Exposure Draft.

27. Furthermore, a new cross reference (clause 16.4) was proposed by the FWC to clarify to the reader that employees required to be on call are paid an allowance in accordance with clauses 11.1(c) and 11.2(a). We understand that the parties present at the 4 February conference agreed to delete this provision. This is unfortunate given the clarity that this provision would provide to the reader of the award.

28. Ai Group's position is also support by the outcome of the matter [2013] FWC 4713 determined by Commissioner Roberts on 22 July 2013.

Clause 11.3(a)(i) – Clothing and laundry allowance (expense related allowances – all employees)

29. Ai Group does not oppose the agreement by the parties at the conference on 4 February 2015 that clause 11.3(a)(i) of the Exposure Draft should refer to "*a laundry allowance of at least $6.51 per week*"

Clause 11.4(a)(i) – Meal allowance (expense related allowances – all employees)

30. Ai Group does not oppose the agreement of the parties at the conference on 4 February 2015 that the words "*will be required to work the overtime*" in clause 11.4(a)(i) of the Exposure Draft be deleted. These words appear to have been inserted in error.

Clause 15.2(a) – Shift work penalties

31. The Commission has requested parties to make submissions about how clause 15.2(a) of the Exposure Draft interacts with clause 8.2(a) of the Exposure Draft which states that ordinary hours are worked until 9 pm.

32. AFEI explained that clauses 15.2 and 8.2 operate separately, as the latter concerns day workers and the former relates to shift workers. Ai Group supports AFEI's view.

33. Ai Group does not support the insertion of a definition of "*shift worker*" as suggested by AVA at paragraph 34 of its submission.

34. The award makes a clear delineation between shift work (clause 25 of the current award) and day work (clause 22.2 of the current award) and therefore we are of the view such a change is not necessary.

35. Such an amendment proposed by the AVA would amount to a substantive change to the award and therefore would require cogent evidence demonstrating a necessity for such a change.

Clause 15.3 – Weekend and public holiday rates – shift work

36. The Commission has requested that parties make submissions about whether its interpretation of clause 15.3 of the Exposure Draft, with respect to the payment of penalties for shift workers working weekends, is correct.

37. Ai Group supports the Commission's interpretation that the penalty specified in clause 15.3 should be based on the minimum hourly rate. We understand this to also be the position of the AVA.

Clause 16.1(a) – Employees other than veterinary surgeons – (overtime rates)

38. The Commission has asked parties if clause 16.1(a)(ii) should be repeated in the penalty rates clause. We understand the Commission's reference to the "penalty rates clause" means clause 15.2 of the Exposure Draft which specifies shift work penalties.

39. The AVA and AWU agree that clause 16(1)(ii) should be repeated.

40. Ai Group is of the view that, rather than repeating clause 16.1(a)(ii) in clause 15.2 (which would be lengthy), a simple reference or note referring the reader to clause 16.1(a)(ii) should be added in clause 15.2.

41. A reference similar to that contained within clause 16.1(a)(ii) (which refers to 15.2) would be appropriate, for example "*Note: The overtime rates for shift workers are contained in clause 16.1(a)(ii). The overtime rates in clause 16.1(1) are paid instead of the shift work penalties in this clause for shift workers working outside ordinary hours or in excess of eight hours per day*."

Clause 16.1(b) – Overtime rates for employees other than veterinary surgeons

42. AVA at paragraphs 17 to 20 of its submission responds to a query by the FWO in its correspondence of 24 November 2014. The FWO's query concerns the minimum payment for a work on a Sunday in clause 24.2(b)(ii) of the current award when an employee works a split shift. Clause 24.2(b)(ii) of the current award has been translated into clause 16.1(b) of the Exposure Draft.

43. AVA responds to the FWO's query in the context of clause 20.3(a) of the Exposure Draft concerning the minimum payment for work on a public holiday.

44. Ai Group agrees with the AVA that in circumstances when an employee is required to work a broken shift (see clause 11.1(a) of the Exposure Draft) the minimum payment/hours of engagement should apply over the combined shifts.

Clause 16.2(b) – Veterinary surgeons

45. In response to the Commission's question in clause 16.2(b) of the Exposure Draft, we do not support an amendment to the award which would specify when and/or how frequently the allowance in clause 16.2(b) is payable. (We note the question incorrectly refers to clause 17.2(b)). We understand this also to be the view of AFEI.

46. We disagree with the views of AVA, the AWU and UV.

47. Clause 16.2(b) of the Exposure Draft enables the associate (the employee) and the employer to reach agreement on the payment of an allowance. It also includes a protection to the associate that the allowance and any other payments for extra hours ought to not be less than what would otherwise have been payable under clause 16.2(a) calculated over a calendar year.

48. It is not necessary, nor is it appropriate, that additional regulation and/or limitations be imported into clause 16.2(b). This would not be in the interests of the parties seeking to enter into an agreement under clause 16.2(b).

49. Any such amendment to clause 16.2(b) would substantially alter the operation of the provision and should be supported by evidence of the necessity for such a change.

Clause 16.4 – On call (overtime rates)

50. A new cross reference (clause 16.4) was proposed by the FWC to clarify to the reader that employees required to be on call are paid an allowance in accordance with clauses 11.1(c) and 11.2(a). We understand that the parties present at the 4 February conference agreed to delete this provision. This is unfortunate given the clarity that this provision would provide to the reader of the award.

51. We do not agree with the views expressed by the AVA, the AWU and UV that this clause is confusing and unnecessary.

Clause 17.3(a) – Annual leave loading

52. Ai Group understands that the matter concerning clause 17.3 of the Exposure Draft would be resolved following the Commission's further decision in the Annual Leave Case with respect to annual leave loading.

53. In addition, the matter of section 90 of the Fair Work Act, which relates to clause 17.3(a), is being considered by the Federal Parliament in the *Fair Work*

Amendment Bill 2014. The outcome of this Bill will impact the interpretation of clause 17.3(a).

Clause 20.5(a) – Special provisions for associates who normally work on weekends

54. Ai Group does not oppose with the position agreed between the parties at the conference on 4 February 2015 with regard to the replacement of "*Monday and Friday*" with "*Monday to Friday*".

Clause 20.5(c) – Special provisions for associates who normally work on weekends

55. Ai Group seeks to reserve its position with respect to a 'substitute provision' defining a 'substitute day' following its review of the proposal for such a clause by the AWU as contemplated by 'Revised Summary of Submissions' dated 17 March 2015.

Clause 20.5(c)(ii) – Special provisions for associates who normally work on weekends

56. Ai Group agrees with the FWC's proposal that the reference to "*normal Saturday or Sunday rate*" within clause 20.5(c)(ii) should be replaced with the "*employee's rate of pay*". AVA also supports the FWC's proposal.

5. CORRECTIONS AND DETENTION (PRIVATE SECTOR) AWARD 2010

57. The following submissions relate to the *Exposure Draft – Corrections and Detention (Private Sector) Award 2014* (Exposure Draft). They are made in response to submissions filed by the Australian Workers' Union (AWU), dated 15 July 2015.

5.1 Exposure Draft – Corrections and Detention (Private Sector) Award 2014

Clause 7 – Classifications

58. Ai Group does not oppose the AWU's submissions regarding clause 7 of the Exposure Draft. We refer to our submissions of 4 February 2015 at paragraph 4.2 in this regard.

Clause 8.2(a) – Ordinary hours of work and rostering – Ordinary hours of work and roster cycles – day workers

59. The AWU has previously made submissions in response to the question contained in the Exposure Draft at clause 8.2(a).[3] Our response to those submissions, which we continue to rely upon, can be found at paragraphs 4 – 5 of our submissions dated 4 March 2015. It remains Ai Group's submissions that the span of ordinary hours in clause 8.2(a) does not apply to part-time day workers.

60. In response to the arguments raised by the AWU in its most recent submissions, we contend that:

- Clause 8.2(a) (which corresponds with clause 20.2 of the current award), is unambiguous. It clearly states that it applies only to full-time employees. We do not understand how the remaining subclauses in clause 8, as referred to by the AWU at paragraph 4, assist its interpretation of the provision.

- Clause 14.2(a) of the Exposure Draft reproduces clause 22.2(a) of the current award. It states that "a full-time or part-time employee is paid at overtime rates for any work done outside the spread of hours or rostered hours set out in clause 8". This clause does not, in and of itself, displace the specific terms of clause 8.2(a). Rather, it entitles a part-time employee to overtime rates for any work done outside the

[3] See AWU's submissions dated 5 February 2015.

spread of ordinary hours or rostered hours set out in clause 8, to the extent that such provisions apply to them.

- Clause 6.4(b)(iii) must be read subject to the terms of the specific provision that gives rise to the "conditions" referred to (i.e. clause 8.2(a)).

- Additionally, it is not immediately clear that clause 6.4(b)(iii) applies to the clause that is here the subject of contention. It contemplates that certain award terms and conditions apply on a pro-rata basis. The specification of a span of hours cannot be applied on a pro-rata basis and thus, the practical application of clause 6.4(b)(iii) to clause 8.2(a) is ambiguous (if indeed it does apply).

61. To the extent that the AWU seeks a variation to clause 8.2(a) so as to extend its application to part-time employees, this amounts to a substantive variation. The union should be required to mount a merit case in support of its claim.

Clause 10.1 Minimum wages

62. Whilst we have not been able to identify any potential unintended consequences arising from the redrafting of the current clause 14.1, we do not oppose an amendment to clause 10.1 such that it reflects the current award terms. However, the clause proposed by the AWU, and specifically the use of 'minimum wages of pay' does not read well.

63. We propose the following provision, which we believe will address any concerns the AWU might have about potential unintended consequences:

> "An employer must pay adult employees the following minimum wages applicable to the employee's classification for ordinary hours worked by the employee: …"

64. To the extent that the AWU continues to assert that clause 10.1 might suggest that an employer cannot pay their employees above the award rate,[4] and

[4] See AWU's submissions dated 5 February 2015.

therefore seeks the inclusion of the words "not less than", we refer the Commission to paragraph 8 of Ai Group's submissions, dated 4 March 2015.

Clause 11.2(b)(i) – Allowances – Wage related allowances – Dog handler's allowance

65. Ai Group does not oppose the amendment proposed by the AWU with respect to the preamble in clause 11.2(b)(i), on the basis that it reflects the current clause 15.5(a). We have previously dealt with this submission at paragraph 10 of our submissions dated 4 March 2015.

Clause 11.2(b)(i) – Allowances – Wage related allowances – Dog handler's allowance

66. Ai Group has previously dealt with the AWU's submission regarding the fifth dot point in clause 11.2(b)(i) at paragraph 11 of our submissions dated 4 March 2015. We do not oppose the amendment proposed.

Clause 11.2(b)(ii) – Allowances – Wage related allowances – Dog handler's allowance

67. We refer to the AWU's submission regarding the question contained in the Exposure Draft at clause 11.2(b)(ii) and refer the Commission to our submission at paragraph 4.9, dated 4 February 2015.

Clause 14.3 – Overtime – Time off instead of payment

68. The AWU's submissions at paragraphs 11 – 14 are identical to its earlier submissions dated 5 February 2015. Ai Group's response can be found at paragraphs 13 - 16 of our submission dated 4 February 2015. We note that our interpretation of the current provision is consistent with the model term that the Commission has proposed for insertion in a significant number of awards including the Corrections and Detentions Award, as a consequence of its recent decision regarding the Award Flexibility Common Issue Case.[5]

[5] [2015] FWCFB 4466.

Clause 14.5 – Overtime – Call-back

69. Ai Group has previously made submissions in response to the question contained in the Exposure Draft at clause 14.5.[6] The AWU has now made submissions regarding the application of clause 14.5 of the Exposure Draft to part-time employees.

70. As we have previously stated, the "appropriate rate" is the minimum rate payable based on the employee's classification, to be determined in accordance with when the work is performed. If the work performed is overtime, as defined by the award, the appropriate rate will be the overtime rate.

71. We note that no variation to this clause has been proposed by any interested party or the Commission.

Clause 18.3 – Public holidays

72. Ai Group agrees with the AWU's submission regarding the typographic error contained in clause 18.3. We refer to Ai Group's submission dated 4 March 2015 at paragraph 18.

6. HEALTH PROFESSIONALS AND SUPPORT SERVICES AWARD 2010

73. The following submissions relate to the *Exposure Draft – Health Professionals and Support Services Award 2014* (Exposure Draft) and substantive claims made to vary the *Health Professionals and Support Services Award 2010* (Health Professionals Award). They are made in response to submissions filed by:

- Tristar Medical Group (Tristar);

[6] See Ai Group's submissions dated 4 February 2015 at paragraph 4.14 and Ai Group's submissions dated 4 March 2015 at paragraph 17.

- The Private Hospital Industry Employer Associations (PHIEA), dated July 2015;
- The Chiropractors' Association of Australia (CAA), dated 15 July 2015;
- The Aged Care Employers (ACE), dated 15 July 2015;
- The Medical Imaging Employment Relations Group (MIERG), dated 15 July 2015;
- The Australian Workers' Union (AWU), dated 15 July 2015;
- The Association of Professional Engineers, Scientists and Managers, Australia (APESMA), dated 15 July 2015;
- The Health Services Union (HSU), dated 16 July 2015;
- The Australian Physiotherapy Association (APA), dated 16 July 2015.

6.1 Exposure Draft – Health Professionals and Support Services Award 2014

Clause 3.1 - Coverage

74. We note the agreement between the parties to adopt the variation proposed by Ai Group in its submission filed 28 January 2015. The agreement is reflected in Appendix A of the HSU's submission.

Clause 3.2 and Schedule I - Coverage and Definitions

75. We note the agreement between the parties to not repeat the definition of "*health industry*" as it appears in clause 3.2 of the Exposure Draft in Schedule I – Definitions. The agreement is reflected in Appendix A of the HSU's submission.

Clause 5.2 – Facilitative provisions

76. We note the agreement between the parties to include a reference to clause 6.3(c) of the Exposure Draft dealing with part-time employment in clause 5.2. The agreement is reflected in Appendix A of the HSU's submission.

Clause 6.4(c) and (d) – Casual employment

77. Following clause 6.4(d) of the Exposure Draft, the Commission asks a question with regard to minimum engagement periods. Ai Group continues to press the position it expressed in its submission dated 4 March 2015.

Clause 15.2(a)(iii) – Heat allowance

78. We note the agreement between the parties to refrain from deleting the heat allowance (clause 15.2(a)(iii) of the Exposure Draft). The agreement is reflected in Appendix A of the HSU's submission.

Clause 18.1 – Weekend penalties—day worker

79. The HSU submit there was an error in the drafting of the Award with respect to weekend penalty rates because weekend penalty rates are not applicable to shift workers.

80. The HSU's claim appears to not be a technical or drafting issue arising out of the Exposure Draft, but rather a substantial variation.

Schedule B – List of common health professionals

81. We note the correspondence on behalf of the Dental Hygienist Association of Australia Ltd (**DHAA**) of 22 July in regard to the question within the Exposure Draft seeking clarification as to whether the list of common health professionals contained in Schedule B is an exhaustive list of those covered by the Award or whether it is an indicative list of examples of the types of health professionals matter arising within the Exposure Draft.

82. Ai Group continues to hold the view, as expressed in its 4 March 2015 submission, that the list of common health professionals is exhaustive. The HSU disagrees.

83. We note that the DHAA opposes the HSUA's view and has sought (and was granted) leave to make submissions (and call evidence if required) in relation to the meaning and current relevance of the decision [2009] AIRCFB 948, in which it was involved. This decision is cited by Ai Group in its 4 March 2015 submission. Ai Group reserves its right to respond to the DHAA's submission when filed.

6.2 The HSU's Claim to vary Clause 3.2 – Definitions and Interpretation – Day Worker and Shiftworker

The claim

84. The Health Professionals Award does not, as such, contain a definition of a 'day worker'. Rather, it specifies a span of hours within which the ordinary hours of a day worker are to be worked, at clause 24.1:

> Unless otherwise stated, the ordinary hours of work for a day worker will be worked between 6.00 am and 6.00 pm Monday to Friday.

85. Subsequent subclauses that form part of clause 24 specify various spans that apply to different sectors in the industry.

86. The Award distinguishes between day workers and shiftworkers with reference to the aforementioned span of hours. A shiftworker is defined at clause 3.1 as follows:

> shiftworker is an employee who is regularly rostered to work their ordinary hours outside the ordinary hours of work of a day worker as defined in clause 24

87. Clause 29 then specifies a loading that is payable to a 'shiftworker' as defined, where the ordinary hours of work commence or finish at particular times.

88. The terms of the Award do not inhibit the ability of an employer to require an employee to perform 'day work' and 'shiftwork' from time to time. That is, the Award does not require that an employee only perform day work within the span of hours specified at clause 24, or in the alternate, only perform work as a shiftworker. Thus, an employee may be required to perform work within the span of hours at clause 24 or otherwise from time to time.

89. The HSU seeks to insert a definition of 'day worker' in the following terms: (emphasis added)

> day worker means an employee who is engaged as such and whose ordinary hours are worked between the span of hours as defined in clause 23[7]

90. It also proposes to vary the definition of 'shiftworker' as follows:

> shiftworker means an employee who is engaged as such and who is required ~~regularly rostered~~ to work shifts ~~their ordinary hours~~ outside the span of hours ~~the ordinary hours of work~~ of a day worker as defined in clause 23 ~~clause 24~~[8]

91. The HSU mischaracterises its proposals as a "technical and drafting issue". Ai Group strongly opposes the variations sought.

The effect of the proposed changes

92. Whilst the HSU submits that the intent of its proposals is to address the absence of clarity in the current definitions, the effect of the changes proposed is substantial and extends far beyond removing any alleged ambiguity.

93. Under the present terms of the Award, an employee who performs ordinary hours of work in accordance with the span of hours specified at clause 24 is characterised as a day worker. The performance of work between certain hours prescribed by the Award is all that is required.

[7] The HSU's claim is framed with reference to the Exposure Draft. The proposed clause refers to clause 8.1 of the Exposure Draft, which corresponds with clause 23 of the Award. That clause does not specify a span of hours but rather stipulates the ordinary hours of work for a full-time employee and the maximum number of ordinary hours that may be worked in a day or shift. We assume that the intended reference is to clause 24, which specifies the various spans of hours that apply in this industry.

[8] As above.

94. The HSU has proposed a definition of 'day worker' that applies to an employee who is 'engaged as such'. That is, the employee is engaged on the basis that they are a day worker and, as a consequence, will perform ordinary hours of work within the span prescribed at clause 24. There is presently no requirement that an employee be engaged as a day worker or otherwise. That is, an employer is at liberty to require an employer to perform work as a day worker or a shiftworker from time to time. It is not a matter associated with the *engagement* of an employee. The effect of the HSU's proposal would be to invert that position. The same can be said of the proposal to vary the definition of 'shiftworker'.

95. The Award does not contain, nor has the HSU proposed, provisions that would facilitate movement between day work and shiftwork once an employee is engaged as one or the other. The obvious limitation this places on a current flexibility that is available to both employers and employees cannot be overstated. In an industry where a large number of businesses operate over extensive hours, including those that are in operation 24 hours a day, 7 days a week, the effect of the proposal is significant. It would preclude an employer from implementing rostering arrangements where there is a changeover between day work and shiftwork in accordance with operational needs. To suggest that such a variation is merely a "technical or drafting issue" is misleading.

96. If the HSU intends to pursue what is a substantial variation to the terms of the Award, it is incumbent upon it to mount a sound merit case. The material filed to date falls well short of this. Notably, the HSU does not propose to call evidence in support of its claim and insists that the proposal is one that could simply be dealt with by the Full Bench alongside other "technical and drafting issues".

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97. It is for the proponent of a change to establish that its proposed provisions are necessary in order to achieve the modern awards objective. Given that the basis for the HSU's claim is that it is not substantive in nature, it has made no

attempt to address the relevant legislative provisions. In our view, however, the proposals run contrary to the following considerations listed at s.134(1) of the Act:

- The need to encourage collective bargaining;
- The need to promote flexible modern work practices and the efficient and productive performance of work;
- The likely impact on business, including on productivity, employment costs and the regulatory burden;
- The need to ensure a simple and easy to understand, stable and sustainable modern award system; and
- The likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy to the extent that the above factors may impact upon them.

Conclusion

98. For the reasons stated above, the HSU's claim extends far beyond one that is merely a matter of drafting. It substantively varies the effect of current Award provisions. The claim should be dismissed.

6.3 The AWU's Claim to vary Clause 3.1 – Definitions and Interpretation

99. The AWU submits that "the words 'in accordance with a roster' be deleted from the current definition of shiftworker'". The definition presently found in clause 3.1 does not contain those words. Therefore, we are unable to respond to this claim at this time.

6.4 APESMA's Claim to vary the Coverage of the Award

The claim

100. The Health Professionals Award is an industry and occupational Award. That is, it is expressed to cover employers in the health industry (as defined) and their employees, as well as employers that engage a health professional employee that falls within the classification structure contained in the Award (see clause 4.1).

101. The Award contains two classification streams: health professionals and support service employees. The classification definitions can be found at Schedule B to the Award. Relevantly, the classification definitions for support services employees contemplates interpreters, qualified and unqualified. They are identified as indicative roles performed at level 5 and level 7 respectively.

102. By virtue of clause 4.1(a) of the Award, an interpreter employed in the health industry will be covered by the Health Professionals Award. However, given that they are not classified as 'health professionals', if the employee is employed by an employer that is not in the health industry, they would not be covered by the Award.

103. APESMA seeks to vary the Award such that interpreters and translators are covered by it, pursuant to clause 4.1(b). It proposes that this can be achieved by:

- Deleting the references to interpreters currently found in the classification definitions for support services employees levels 5 and 7;
- Classifying 'NAATI accredited paraprofessional translators and interpreters' and 'NAATI accredited professional interpreters and translators' at 'health professional employee – level 1';
- Inserting 'interpreter' in Schedule C to the Award, which lists common health professionals; and

- Inserting a definition of 'NAATI' in clause 3.1, to mean the National Accreditation Authority for Translators and Interpreters Ltd.

104. Ai Group opposes APESMA's claim for the reasons outlined below.

Whether the Health Professionals Award is appropriate

105. APESMA's submissions do not address the reasons why it considers that the Health Professionals Award provides an appropriate safety net for interpreters and translators in numerous industries.

106. The terms and conditions contained in the Award are tailored to apply to employers in the health industry, and employees that are traditionally considered health professionals. This includes the hours of work provisions, the rates of pay, overtime rates, penalty rates, shiftwork provisions, entitlements to breaks and rostering provisions. The basis upon which APESMA submits that these terms and conditions should be extended to work performed by interpreters and translators in any business that forms part of any industry, is not clear.

107. Translators and interpreters are engaged to perform work in a very wide range of circumstances. Whilst they are undoubtedly engaged by employers in the health industry, they are also relevant to legal services, the public sector, educational services, the social, home care and disability services industry, broadcasting and journalism, the airlines sector, the hospitality industry, and many others. The imposition of obligations contained in the Health Professionals Award upon employers operating in any of the aforementioned industries is inappropriate. This is particularly so when regard is had to the fact that the work performed by the employee is not akin to that undertaken by 'health professionals' otherwise listed at Schedule C to the Award.

Work value considerations

108. The reclassifying of interpreters currently covered by the Health Professionals Award such that they would be classified as a health professional employee – level 1, would result in a variation to their minimum wage. By virtue of s.156(3)

of the Act, the Commission may only make such a determination if it is satisfied that that the variation is justified by work value reasons as set out at s.156(4). We note that APESMA has not addressed the matters there listed.

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109. In addition to the matters we have here raised, we note that APESMA must also establish that the proposed clauses are necessary to achieve the modern awards objective. APESMA has not addressed the relevant legislative provisions in its outline of written submissions.

Conclusion

110. Ai Group is concerned that the inclusion of interpreters and translators in the Health Professionals Award is not appropriate for the reasons we have here set out. The Award should not be varied so as to cover such employees on an occupational basis.

6.5 The HSU's Claim to vary Clause 10.1(b) – Types of Employment

111. The HSU seeks a variation to clause 10.1(b) of the Award so as to require that an employer must advise an employee, upon engagement, as to whether they are employed as a day worker or shiftworker:

> (b) At the time of engagement an employer will inform each employee whether they are employed on a full-time, part-time or casual basis, and whether they are employed as a day worker or shiftworker. An employer may direct an employee to carry out such duties that are within the limits of the employee's skill, competence and training, consistent with the respective classification.

112. The proposed variation is associated the union's claim to insert a definition of 'day worker' and amend the definition of 'shiftworker' in clause 3.1 of the Award. For the reasons we have there set out, this element of the HSU's claim is also opposed.

6.6 The CAA's Claim to insert a new Annualised Salaries Clause

113. The CAA seeks the insertion of an annualised salary provision in the Health Professionals Award. Ai Group also proposes the inclusion of such a clause, and has filed detailed written submissions dated 15 July 2015 in support of our claim (see paragraph 56 onwards).

114. Whilst we are clearly supportive, in principle, of the insertion of such a clause, we may seek an opportunity to make submissions as to the terms of any proposed clause pursued by the CAA, once filed.

6.7 Various Claims to vary Clause 24 Span of Hours

115. A number of claims have been made to vary the span of hours in the Health Professionals Award. As we understand it, the following proposals are before the Commission:

- The HSU has proposed that clause 24 be substituted with a single spread of hours that applies to all employers and employees covered by the Award; 6am – 6pm, Monday to Friday.

- The AWU seeks to vary the Award such that it provides "a simple span of hours". No further detail has been provided.

- The CAA is seeking to vary clause 24.1 of the Award such that the ordinary hours of work that apply to chiropractic practices include weeknights and Saturdays.

- Tristar is pursuing the insertion of a new clause 24.2(b) that would specify the span of hours that would apply to a seven day private medical, dental and pathology practice. It would enable ordinary hours of work to be performed on Monday to Sunday, 7am – 9pm. The provision also provides for weekend penalty rates; time and a quarter for a Saturday and time and a half for work performed on a Sunday.

- The APA has proposed that clause 24.4 of the Award be varied, which relates specifically to physiotherapy practices. The spread of hours for a day worker on Monday – Friday is currently 6am – 6pm. It seeks that this be varied to 7am – 8pm. It also proposes that the spread on Saturdays be varied from 6am – noon to 7am – 2pm.

- The PHIEA is seeking the insertion of a new clause 24.5, which would stipulate a spread of hours in private hospitals operating 24 hours a day, 7 days a week, of 6am – 6pm on Monday – Sunday. It also seeks consequential amendments to current weekend and public holiday penalty provisions.

116. Ai Group strongly opposes the AWU's and HSU's claim. The variation proposed would be of significant consequence to employers in a range of operations covered by the Award. It would result in significant new costs and reduce flexibility in an Award that is clearly tailored to take into consideration the breadth of enterprises to which it applies. In such circumstances, a 'one size fits all' approach, as proposed by the HSU, is entirely inappropriate. It is important to note that this issue was expressly considered by the AIRC when the Award was made:

> [154] Particular submissions were made on the span of hours for various private practices which reflected the underlying awards and the needs of the sectors. Whilst some rationalisation has taken place we have sought to maintain a specific spread in these areas.[9]

117. It appears likely that these matters will be referred to a separate Full Bench and that the relevant proponents will be allowed to call evidence and make further submissions in support of their claims. Ai Group will seek an opportunity to respond to such material in due course.

[9] [2009] AIRCFB 345 at [154].

6.8 The HSU's Claim to vary Clause 24.3 – Span of Hours – Private Medical Imaging Practices

The claim

118. Clause 24.3 of the Award sets out the span of hours that apply to private medical imagining practices. Subclause (b) deals specifically with seven day practices: (emphasis added)

> (b) Seven day practice
>
> Where the work location of a practice services patients on a seven day a week basis, the ordinary hours of work for an employee at that location will be between 7.00 am and 9.00 pm Monday to Sunday. Work performed on a Saturday will be paid at the rate of time and a quarter of the employee's ordinary rate of pay instead of the loading prescribed in clause 26—Saturday and Sunday work. Work performed on a Sunday will be paid at the rate of time and a half of the employee's ordinary rate of pay instead of the loading prescribed in clause 26.

119. Clause 26 of the Award prescribes the rates payable generally for work performed during ordinary hours on a Saturday or Sunday. For all work performed between midnight on Friday and midnight on Sunday, a day worker is to be paid an additional 50% loading. A casual employee is entitled to a 75% loading.

120. Clause 24.3(b), however, stipulates that work performed on a Saturday or Sunday in a seven day private medical imaging practice attracts the penalty rates there prescribed. The quantum payable in respect of work performed on a Saturday is lower than that found in clause 26; at time and a quarter. Work performed on a Sunday is remunerated at the same rate. No special provision is made relating to casual employees.

121. The HSU seeks to remove the distinction made by the Award between seven day medical imaging practices and others. This would require an increase to the rate payable to employees engaged in a seven day medical imaging practice on Saturdays.

122. Ai Group opposes the HSU's claim.

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123. In order to adopt the variation proposed by the HSU, the Commission must be satisfied that the proposed clauses are necessary to ensure that the Award, together with the National Employment Standards, provides a fair and relevant minimum safety net of terms and conditions, taking into account each of the matters listed at ss.134(1)(a) – (h).

124. It should be borne in mind that the Commission has determined that the Review is to proceed on the basis that modern awards achieved the modern awards objective when they were made. When the Health Professionals Award was made, it contained the very provisions that are the source of controversy in these proceedings. Therefore, it is for the HSU to establish that a departure from the decision of the AIRC to make the Award in its current terms is necessary to ensure that the Award continues to achieve the modern awards objective.

Section 134(1)(a) – Relative living standards and the needs of the low paid

125. The HSU has not put forward any justification for the proposed variation with reference to the relative living standards and needs of the low paid. In our view, this is an argument that would not be open to it, as the claim is not confined in its effect to those who would be considered 'low paid', nor has it foreshadowed any evidence that might establish that the current Award provisions are failing to protect the relative living standards and needs of the low paid.

Section 134(1)(b) - The need to encourage collective bargaining

126. Contrary to the HSU's submissions the current provisions leave greater room for bargaining and may incentivise employers and employees to negotiate a higher rate. The altered penalty rates proposed by the HSU would only serve to raise the minimum safety net, thus limiting the scope of matters that might otherwise encourage an employer and its employees to participate in the process of collective bargaining.

127. The significance of this element of the modern awards objective is reinforced by s.3(f) of the Act, which emphasises the importance of enterprise bargaining.

Section 134(1)(c) - The need to promote social inclusion through increased workforce participation

128. The HSU's outline of submissions does not suggest that the proposed amendment will result in increased social inclusion or that the current Award clauses are impacting upon workforce participation. It appears that this is a neutral consideration in this matter.

Section 134(1)(d) - The need to promote flexible modern work practices and the efficient and productive performance of work

129. To the extent that the variation proposed by the HSU discourages employers in the relevant enterprises from engaging employees to perform work on weekends, the variation proposed is contrary to s.134(1)(d).

Section 134(1)(da)(iii) - The need to provide additional remuneration for employees working on weekends

130. The HSU does not appear to rely on s.134(1)(iii) of the Act. In the event that it later seeks to do so, we observe the importance of having regard to the text of this provision. It requires that the Commission take into account "the need to provide additional remuneration for … employees working on weekends or public holidays". It says nothing about the quantum of that additional remuneration. Nor does it mandate that an award *must* provide additional remuneration for employees working on weekends. Rather, it simply requires that the Commission *take into account* the need to provide *additional remuneration* where an employee performs such work.

131. In our view, the Commission can be satisfied that, by virtue of 24.3(b), the Award already provides additional remuneration for employees working weekends.

132. In any event, as stated by the Commission in its Preliminary Jurisdictional Issues decision which we have earlier cited, no one factor arising from s.134(1) is to be given particular primary. Each of the matters arising under s.134(1) are to be treated as issues of significance, which should be given due consideration and weight. Even if the Commission forms the view that considerations arising from this subsection lend support for the HSU's claims, this is not determinative. Equal consideration should be given to matters arising under each of the other limbs of s.134(1), which we have here addressed.

Section 134(1)(e) - The principle of equal remuneration for work of equal or comparable value

133. The HSU appears to submit that the differential between the weekend rates payable to employees engaged in seven day medical imagining practice as compared to other employees covered by the Award is contrary to the principle of equal remuneration for work of equal or comparable value.

134. This argument is rejected. In our view, s.134(1)(e) is not relevant to these proceedings.

135. The notion of "equal remuneration for work of equal or comparable value" is defined by the Act. The phrase appears in s.12 of the Act (the dictionary), with a reference to s.302(2). Section 302 falls within Division 2 of Part 2-7 (Equal Remuneration) of the Act. Section 302(2) states:

> ***Equal remuneration for work of equal or comparable value*** means equal remuneration for men and women workers for work of equal or comparable value.

136. Consideration given to whether an award provides equal remuneration for work of equal or comparable value requires an assessment of whether men and women workers receive equal remuneration for work of equal or comparable value. The comparison to be made under s.134(1)(e) is by reference to gender.

137. The HSU's submission regarding s.134(1)(e), should, therefore, be disregarded.

Section 134(1)(f) - The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden

138. The impact of the variation proposed on employment costs and business is self-evident. It would clearly impose an additional employment cost. To the extent that it discourages employers from requiring employees to work on Saturdays, the impact of the variation may instead be felt by way of a reduction in productivity. Either result cannot be reconciled with s.134(1)(f).

139. We note of course, that the need to have regard to the impact of any variation on small and medium enterprises is particularly pertinent and reinforced by s.3(g) of the Act.

Section 134(1)(g) - The need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards

140. The need for a stable system tells against varying awards in the absence of a proper evidentiary and merit based case which establishes that the proposed provision is necessary, in the sense contemplated by s.138. This is particularly relevant in circumstances where the provision is question has operated in the industry since the modern award was made. To now introduce additional costs without there being any evidence that the Award does not presently provide a fair and relevant minimum safety net, is contrary to s.134(1)(g).

Section 134(1)(h) – The likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy

141. To the extent that the matters arising from ss.134(1)(b), (d), (f) and (g) adversely impact employment growth, inflation and the sustainability, performance competitiveness of the national economy, the HSU's claim conflicts also conflicts with s.134(1)(h).

Conclusion

142. For all the reasons stated above, the HSU's claim should be dismissed.

6.9 The ACE's Claim to vary Clause 25(b) – Rostering

143. The ACE proposes to vary clause 25(b) of the Nurses Award such that a roster may be changed with less than seven days' notice where an employee agrees. The ACE has framed its claim with reference to clause 8.3(b) of the Exposure Draft.

144. Ai Group supports the proposed variation.

6.10 The HSU's Claim to insert a new Clause 25(d) – Rostering

The claim

145. Clause 25 of the Health Professionals Award, which deals with rostering, is in the following terms:

> 25. Rostering
>
> (a) The ordinary hours of work for each employee will be displayed on a fortnightly roster in a place conveniently accessible to employees. The roster will be posted at least two weeks before the commencement of the roster period.
>
> (b) Seven days' notice will be given of a change in a roster. However, a roster may be altered at any time to enable the functions of the hospital, facility or organisation to be carried on where another employee is absent from duty on account of illness or in an emergency.
>
> (c) Unless the employer otherwise agrees, an employee desiring a roster change will give seven days' notice except where the employee is ill or in an emergency.

146. The clause requires that an employer display a fortnightly roster at least two weeks before the commencement of the roster period. That roster is to set out the ordinary hours of work for each employee. It also provides for the circumstances in which an employer may alter the roster.

147. The HSU seeks the insertion of the following new subclause (d):

(d) Rosters will be developed in accordance with the provisions of clause 10 Types of employment, clause 23 Ordinary hours of work and clause 24 Span of hours.

148. The HSU submits that the clauses 10, 23 and 24 should be referred to as they "provide restrictions on the rosters that could be developed or posted by an employer".

149. Ai Group does not support the union's proposal.

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150. In order for the Commission to adopt the HSU's proposal, it must be satisfied that the provision in question is *necessary* to achieve the modern awards objective. In our view there is insufficient material before it to reach that conclusion.

151. Undoubtedly, the rostering provision is to be read with other clauses of the Award, including those identified by the HSU. However, it for the union to establish that the insertion of the cross-references proposed is necessary. In order to do so, it must call evidence which goes to substantiating the factual proposition that the current clause "gives rise to questions about rostering split or broken shifts". Notably, the union has foreshadowed that it "does not at this stage intent (sic) to lead substantial amounts of evidence beyond detailed submissions".

152. Clause 25(a) states that the 'ordinary hours of work' for each employee are to be displayed in a roster. It seems to us that this, in and of itself, draws attention to the ordinary hours of work provisions contained in the Award and should go some way in addressing any concerns that the union might have.

153. Whilst we appreciate and acknowledge the desire to ensure that awards are 'simple and easy to understand', the insertion of additional cross references does not necessarily serve to further this intent. Indeed it invariably gives rise to the question as to the point at which such signposting is in fact at cross purposes with the need to ensure that awards are clear, simple and are not unduly lengthy.

154. For instance, the model dispute resolution clause may be triggered "in the event of a dispute about a matter under [the] award." However, to insert a reference to it in every award provision would unnecessarily add to the length and complexity of the instrument, without adding any value. Similarly, references to the model flexibility term in award provisions that may be the subject of an individual flexibility arrangement are not found in awards for, we submit, the same reason. An award must necessarily be read as a whole, having regard to all relevant provisions.

155. Further, to the extent that the proposed clause fails to refer to a provision that is of relevance to the development of rosters, this may itself give rise to confusion or an adverse inference. For example, clause 27 deals with breaks. It prescribes an employee's eligibility to a meal break, the length of a meal break and provides for tea breaks. This clause is potentially relevant to the development of a roster but the HSU's proposal does not include a reference to it. Similarly, clause 28.2 may be relevant where an employee is required to work overtime. We are not here submitting that these clauses must necessarily be included in subclause (d), if the Commission decides that it is to be inserted. Rather, it is our contention that there is a clear risk associated with including a clause such as the one proposed, if it is absent cross references that are potentially of relevance.

156. Whilst clause 25(a) mandates that the roster must set out the ordinary hours of work for each employee, the provisions do not preclude an employer from also rostering overtime. A cross reference to provisions that relate only to the ordinary hours of work may suggest that an employer cannot do so. To this extent, the proposal has substantive effect that extends beyond the purported intent of the new subclause and should therefore, be rejected. There has been no reason advanced in favour of the imposition of such a limitation.

157. The HSU has not dealt with the factors listed at s.134(1) in its outline of submissions and we are unable to identify any other matter there contained that its proposal is arguably designed to advance.

Conclusion

158. The HSU's proposal is not necessary to meet the modern awards objective. Therefore, it should not be adopted.

6.11 The AWU's Claim to vary Clause 25 – Rostering

159. The AWU proposes that the rostering provisions refer to the span of hours and ordinary hours of work provisions. It has not proposed a draft clause and so it is not clear whether it pursues a variation that is in different terms to the HSU.

160. Ai Group opposes the insertion of a reference to the span of hours and ordinary hours of work provisions in the rostering clause, for the reasons we have stated above. We may seek an opportunity to respond to the AWU's claim once it provides further detail of what is sought.

6.12 The HSU's Claim to vary Clause 28.1 – Overtime Rates

The claim

161. The HSU seeks a suite of variations to clause 28.1 of the Award.

162. Clause 28 of the Award is headed 'overtime penalty rates'. It commences with clause 28.1(a), which sets out the overtime penalty rates as follows:

> 28.1 Overtime rates
>
> (a) An employee who works outside their ordinary hours on any day will be paid at the rate of:
>
> (i) time and a half for the first two hours; and
>
> (ii) double time thereafter.
>
> (b) All overtime worked on a Sunday will be paid at the rate of double time.
>
> (c) These extra rates will be in substitution for and not cumulative upon the shift loading prescribed in clause 29—Shiftwork.

163. Clause 28.1(d) deals more specifically with the payment of overtime rates to part-time employees.

164. Clause 23 sets out the ordinary hours of work under this Award. By virtue of clause 23.1, the ordinary hours of work for a full-time employee will be 38 hours per week in a fortnight or four week period. Clause 23.2 applies to full-time, part-time and casual employees, whether they are day workers or shiftworkers. It stipulates that the maximum number of ordinary hours of work per day will be 10 hours, exclusive of meal breaks. Clause 24 then sets out the various spans that apply to employers and employees covered by the Award, with specific provision made in respect of certain sectors.

165. Whilst the HSU's proposal is framed with reference to the Exposure Draft, we propose to deal with it in the context of the current Award provisions. It seeks the following variations to clause 28.1:

> 28.1 Overtime rates
>
> (a) ~~An employee who works outside their~~ Hours worked in excess of the ordinary hours on any day or shift prescribed in accordance with clauses 23 - 25 will be paid at the rate of:
>
> (i) ~~time and a half~~ 150% of the minimum hourly rate for the first two hours; and
>
> (ii) double time thereafter.
>
> (b) All overtime worked on a Saturday or Sunday will be paid at the rate of 200% of the minimum hourly rate ~~double time~~.
>
> (c) ~~These extra rates~~ Overtime rates under this clause will be in substitution for and not cumulative upon the weekend premiums prescribed in Clause 26 Weekend penalties ~~shift loading prescribed in clause 29—Shiftwork~~.
>
> (d) For the purposes of overtime each shift, day, week or averaged roster period stands alone. All work beyond these hours will be overtime and paid as prescribed in clauses 19.1(a) or (b).
>
> ~~(d)~~ (e) Part-time employees
>
> Where agreement has been reached in accordance with clauses 10.3(b) or (c), a part-time employee who is required by the employer to work in excess of those agreed hours must be paid overtime in accordance with this clause.
>
> (f) Casual employees
>
> A casual employee, who works beyond their rostered or agreed hours, the maximum daily hours or a 38 hour week, must be paid overtime in accordance with this clause.

(g) Day workers

Day workers will be paid overtime for all hours worked outside the Span of Hours in clause 24.

166. Ai Group opposes the HSU's claim.

167. We deal with the various elements of the claim below but here note that it's claim is made on the following bases: (emphasis added)

- "To ensure that there is no ambiguity as to the payment of overtime to all employees, including casual employees, performing work outside or in excess of the times, rosters and patterns considered 'ordinary' under the [Health Professionals] Award."

- " … to clarify that each period of overtime stands alone in its own right, whether that employee works beyond the hours for that single day or shift, their hours of engagement or the normal hours for a full-time employee in a week."

- "… an employee who works in excess of their rostered times … should be entitled to payment at overtime rates."

The proposed clauses 28.1(a) – reference to 'average weekly hours on any day or shifts'

168. The redrafting of clause 28.1(a) is both confusing and potentially anomalous. We do not understand the intention behind inserting a reference to the 'average weekly hours on any day or shift'. The wording of the current clause is appropriate and should be retained.

The proposed clauses 28.1(a) – cross-reference to other Award clauses

169. The HSU's claim is drafted by reference to the Exposure Draft. At the proposed subclause (a), it seeks the insertion of the following text: (emphasis added)

Hours worked in excess of the ordinary hours or average weekly hours on any day or shift prescribed in accordance with clause 8 will be paid at the rate of …

170. In our view, a cross reference to other provisions is not necessary. The Award clauses that prescribe the ordinary hours of work for an employee are self-evident. However, if the clause is to contain a cross-reference, we submit that it should be amended.

171. Clause 8 of the Exposure Draft stipulates the ordinary hours of work, span of hours and rostering provisions. However, it is only clauses 8.1 and 8.2 that prescribe an employee's ordinary hours of work. For this reason, if the clause is to contain a cross reference, it should be to the aforementioned subclauses. In the current Award, this would translate to clauses 23 and 24.

The proposed clauses 28.1(a)(i) and (ii) – the expression of the overtime rates

172. We raise this as a matter that pertaining to the drafting of the proposal. At clause 28.1(a)(i), the relevant rate is described as '150% of the minimum hourly rate for the first two hours'. This language appears to have been adopted from the Exposure Draft and is not opposed.

173. Clause 28.1(a)(ii), however, states that the employee will be paid 'double time'. We have not been able to understand the logic underpinning the different way in which this rate is articulated. In our view, it should read '200% of the minimum hourly rate thereafter'. This is consistent with clause 19.1(a)(ii) of the Exposure Draft,

The proposed clause 28.1(b) – the overtime rate payable on Saturday

174. Overtime work performed on a Saturday is currently remunerated in accordance with clause 28.1(a). That is, at time and a half for the first two hours and double time thereafter. Clause 28.1(b) requires that all overtime worked on a Sunday will be paid at the rate of double time.

175. The HSU proposes to vary clause 28.1(b) by inserting a reference to 'Saturday'. This would mean that an employee performing overtime on a Saturday would be paid at double time for all such work.

176. As acknowledged by the HSU, this element of its claim amounts to a substantive change and is opposed.

Clause 28.1(c) – overtime rates in substitution for other rates

177. The current clause 28.1(c) states that the overtime rates there prescribed are paid in substitution for the shift loading contained at clause 29. The HSU is seeking to vary the Award such that the shift loading is payable in addition to overtime rates. We refer to our submissions below regarding the HSU's claim to amend clause 29 in this regard. The proposed deletion of the relevant text from clause 28.1(c) relates to it. Ai Group opposes the variation sought.

178. In lieu of the reference to the shift penalty in clause 28.1(c), the HSU here proposes the insertion of a reference to clause 24, which stipulates the weekend penalties payable under the Award. The provision would read as follows:

> (c) Overtime rates under this clause will be in substitution for and not cumulative upon the weekend premiums prescribed in Clause 26 Weekend penalties.

179. Clause 26.1 specifies the loading payable "for all ordinary hours worked" on a Saturday or Sunday. Quite clearly, an employee performing work during ordinary hours is not entitled to overtime rates. They are payable for work performed at different times and so the question of whether they are to be paid in substitution for one or the other does not arise. We do not understand the purpose behind this aspect of the claim.

180. Clause 26.2 requires that a casual employee who works on a weekend will be paid a loading of 75% in lieu of the casual loading "for all time worked" on a weekend. This necessarily includes overtime. The HSU seeks to introduce a reference in clause 28.1(c) which would alter the amount due to a casual for work performed on a weekend, without any basis for it. This aspect of the claim should also be rejected.

The proposed clause 28.1(d) – the first element

181. The proposed clause 28.1(d) would require that, for the purposes of overtime, "each shift, day, week or averaged roster period stands alone".

182. It is our contention that, as earlier stated, clause 28.1(a) currently requires that each day stand alone for the purposes of calculating overtime. It does so by requiring that "an employee who works outside their ordinary hours *on any day*" be paid at overtime rates.

183. We note however that the HSU's proposal refers to "each shift, day, week or averaged roster period". The intended meaning of this part of the proposed provision is entirely unclear. Overtime is calculated on a daily basis. That is, clause 28.1(a) prescribes the rates payable to an employee for overtime performed on Monday to Saturday inclusive, by reference to the number of hours of such work. The first two hours worked in excess of ordinary hours on any day are to be paid at time and a half for the first two hours. Hours worked thereafter, *on any day*, are to be paid at double time. We cannot see the relevance of the notion the HSU proposes for introduction, which would require that each shift, week or average roster period stand alone. We do not understand what impact this would have upon the calculation of overtime rates in practice (if any), or indeed what it is intended to achieve.

184. We are of the view that this element of the HSU's proposal is unnecessary. Clause 28.1(a) already requires that each day stand alone for the purposes of calculating overtime. To the extent that the HSU proposes that this be "clarified" by expressly stating that each day is to stand alone for the purposes of calculating overtime, we would not oppose such an approach. However, for the reasons stated above, the remaining text in this part of the HSU's proposal seems meaningless and likely to give rise to confusion. It should not be adopted.

The proposed clause 28.1(d) – the second element

185. We next turn to the second element to the proposed clause 28.1(d), as underlined below:

(d) For the purposes of overtime each shift, day, week or averaged roster period stands alone. All work beyond these hours will be overtime and paid as prescribed in clause 28.1(a).

186. The reference to "these hours" is somewhat confusing. Even if we assume that the clause is intended to require the payment of overtime rates for work beyond "each shift, day, week or averaged roster period", as per the preceding sentence, the meaning of the clause is not clear. It is also not clear how the clause would operate in respect of part-time or casual employees.

187. It may be that this element of the HSU's proposal is intended to require that an employee be paid at overtime rates for time worked in excess of 'rostered' hours, as intimated in its submissions. Whilst we oppose the insertion of such a provision in the Award, we note that in any event, the HSU's proposal (at subclause (d) or any other proposed clause), does not appear to achieve such an outcome. Given that the clause is ambiguous in its meaning and effect, it should not be adopted.

The proposed clause 28.1(f) – Casual employees

188. We do not consider that the proposed clause 28.1(f) is 'necessary' in the relevant sense. The Award is sufficiently clear as to the circumstances in which overtime rates are payable to a casual employee. Further, we are concerned that the requirement to pay overtime to a casual employee 'who works beyond their rostered or agreed hours' amounts to a substantive change to the Award, that extends beyond a 'clarification' of the current provisions. The proposed clause should not be included.

The proposed clause 28.1(g) – Day workers

189. We do not consider that the proposed clause 28.1(g) is 'necessary' in the relevant sense. The Award is sufficiently clear as to the circumstances in which overtime rates are payable to a day worker. The proposed clause should not be included.

Section 138 and the modern awards objective

190. The Commission must be satisfied that the proposed terms are necessary to achieve the modern awards objective. The HSU has not made any attempt to justify its proposals against the considerations arising from s.134(1).

191. It is trite to observe that, to the extent that any variation made to the Award, expands the entitlement to overtime rates, this is not consistent with:

- The need to encourage collective bargaining;
- The need to promote flexible modern work practices and the efficient and productive performance of work;
- The likely impact on business, including productivity, employment costs and the regulatory burden;
- The need to ensure a simple, easy to understand, stable and sustainable modern award system;
- The likely impact on employment growth, inflation and the sustainability and competitiveness of the national economy, to the extent that such matters are impact by the above factors.

Conclusions

192. For the reasons stated above, the HSU's claim should be dismissed.

6.13 The AWU's Claim to Vary Clause 28.1 – Overtime Rates

193. The AWU submits that "amendment to the current provisions are required to ensure there is no uncertainty with regard to the payment of overtime for employees performing work outside of ordinary hours". It has not, however, provided any detail of the amendments sought. Ai Group may seek an opportunity to respond to this claim once filed.

6.14 The HSU's Claim to vary Clause 29 – Shiftwork

The claim

194. Clause 29 of the Award provides for an additional payment to be made where the ordinary rostered hours of work of a shiftworker finish between certain times:

> 29. Shiftwork
>
> Where the ordinary rostered hours of work of a shiftworker finish between 6.00 pm and 8.00 am or commence between 6.00 pm and 6.00 am, the employee will be paid an additional 15% of their ordinary rate of pay.

195. The HSU proposes that the above clause be replaced with the following:

> 29. Shiftwork
>
> (a) Where the ordinary rostered hours of a shiftworker finish between 6.00 pm and 8.00 am or commence between 6.00 pm and 6.00 am <u>on any day of the week</u>, the employee will be paid an additional 15% of their minimum hourly rate <u>for each hour worked</u>.
>
> (b) <u>The shiftwork rate is payable in addition to any penalty, allowance, overtime, weekend or casual rates of pay.</u>

196. A shiftworker is defined as an employee who is regularly rostered to work their ordinary hours outside the ordinary hours of work of a day worker as defined in clause 24.

197. The effect of the proposed variations would be as follows:

- Where the ordinary rostered hours of a shiftworker finish between the times specified *on any day of the week*, the employee would be entitled to an additional payment as prescribed by clause 29. Currently, a shiftworker is entitled to the shift penalty on any day on which the Award permits the performance of ordinary hours of work. This is contingent upon clause 24 and the definition of shiftworker. In circumstances where this proposal does not create a substantive change, it is unnecessary.

- The term ‘ordinary rate of pay’ would be substituted with ‘minimum hourly rate’. We appreciate that this reflects the terminology adopted in the Exposure Draft.

- The additional amount prescribed would be payable ‘for each hour worked’. This would include overtime. We note that clause 28.1(c) currently states that overtime rates are payable in substitution for the shift loading prescribed in clause 29, however the HSU has sought to delete it as part of its claim in respect of clause 28 (see above).

- The clause would provide that the ‘shiftwork rate’ is payable in addition to any penalty, allowance, overtime, weekend or casual rates of pay. The intended effect of the proposed new subclause is unclear. If its purpose is to require the compounding of the shift penalty on the other amounts there listed, it would impose additional costs. To the extent that it is intended to “clarify” that the shift penalty is payable in addition to other amounts due under the Award (that is, that those amounts do not substitute the payment of the shift penalty), and it would not amount to a substantive change to the current terms of the Award, the HSU must establish that it is necessary.

198. The HSU makes its claim on the following bases:

- the variation is intended to “ensure that shift allowances are payable to employees when they work an afternoon or night shift”;[10]

- the payment of such additional remuneration is consistent with s.134(1)(da) of the Act;

- the modern awards objective does not require that only one form of penalty or loading be paid during a certain period of work;

[10] See paragraph 93 of the HSU’s submission. We assume that this is intended to refer to “weekends and public holidays” rather than “afternoon or night shift”.

- shiftwork is detrimental to an employee's health. That detriment is suffered irrespective of whether the work is performed on a weekday or weekend;

- weekend penalty rates and shift loadings compensate an employee for two different matters. One cannot be substituted with the other; and

- the payment of shift loadings in addition to weekend penalty rates was a feature of many pre-modern awards, some modern awards and many enterprise agreements.

199. Ai Group opposes the various elements of the HSU's claim for the reasons that follow.

Section 138 and the modern awards objective

200. In order to adopt the variations proposed by the HSU, the Commission must be satisfied that the proposed clauses are necessary to ensure that the Award, together with the National Employment Standards, provides a fair and relevant minimum safety net of terms and conditions, taking into account each of the matters listed at ss.134(1)(a) – (h).

201. We note also the following observations made by the Commission in its Preliminary Issues Decision:

> [33] There is a degree of tension between some of the s.134(1) considerations. The Commission's task is to balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions. The need to balance the competing considerations in s.134(1) and the diversity in the characteristics of the employers and employees covered by different modern awards means that the application of the modern awards objective may result in different outcomes between different modern awards.
>
> [34] Given the broadly expressed nature of the modern awards objective and the range of considerations which the Commission must take into account there may be *no one set* of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the modern awards objective.

202. These comments are relevant to the HSU's assertions that the payment of shift loadings in addition to weekend penalty rates is found in other awards. Putting to one side whether this is in fact the case, its incidence in other awards cannot in and of itself justify a change to the Health Professionals Award. The terms and conditions found in an award represent a carefully struck balance of employee benefits and employer obligations that should not be disturbed by simply pointing to other modern awards that contain entitlements that are similar in nature to those sought by the proponent for a change. Rather, there must be a proper basis upon which the claim can be granted, including submissions and probative evidence that compel the Commission to decide that the proposed term is one that is necessary in the sense contemplated by s.138. That a handful of other awards might contain a similar entitlement does not meet this threshold.

203. It should also be borne in mind that the Commission has determined that the Review is to proceed on the basis that modern awards achieved the modern awards objective when they were made. When the Health Professionals Award was made, it contained the very provisions that are the source of controversy in these proceedings. Therefore, it is for the HSU to establish that a departure from the decision of the AIRC to make the Award in its current terms is necessary to ensure that the Award continues to achieve the modern awards objective.

Section 134(1)(a) – Relative living standards and the needs of the low paid

204. The HSU has not put forward any justification for the proposed variation with reference to the relative living standards and needs of the low paid. In our view, this is an argument that would not be open to it, as the claim is not confined in its effect to those who would be considered 'low paid', nor has it foreshadowed any evidence that might establish that the current Award provisions are failing to protect the relative living standards and needs of the low paid.

Section 134(1)(b) - The need to encourage collective bargaining

205. The current provisions leave greater room for bargaining and may incentivise employers and employees to negotiate a higher rate. The HSU's proposal would only serve to raise the minimum safety net, thus limiting the scope of matters that might otherwise encourage an employer and its employees to participate in the process of collective bargaining.

206. The significance of this element of the modern awards objective is reinforced by s.3(f) of the Act, which emphasises the importance of enterprise bargaining.

Section 134(1)(c) - The need to promote social inclusion through increased workforce participation

207. The HSU's outline of submissions does not suggest that the proposed amendment will result in increased social inclusion or that the current Award clauses are impacting upon workforce participation. It appears that this is a neutral consideration in this matter.

Section 134(1)(d) - The need to promote flexible modern work practices and the efficient and productive performance of work

208. To the extent that the variation proposed by the HSU discourages employers from engaging shiftworkers to perform work on weekends or during overtime, the variation proposed is contrary to s.134(1)(d).

Section 134(1)(da) - The need to provide additional remuneration

209. The HSU appears to place significant weight on s.134(1) of the Act. It is important to have regard to the text of this provision. It requires that the Commission take into account "the need to provide additional remuneration for" … employees working shifts, on weekends or overtime. It says nothing about the quantum of that additional remuneration. Nor does it mandate that an award *must* provide additional remuneration for employees working in such circumstances. Rather, it simply requires that the Commission *take into*

account the need to provide *additional remuneration* where an employee performs such work.

210. The Commission can be satisfied that the Award already provides additional remuneration for employees working in such circumstances. This is achieved through the application of various penalties and loadings prescribed by the Award. Where an employee performs work as a shiftworker, that employee is entitled to additional remuneration. The quantum of that additional remuneration is determined according to the day and time at which that work is performed.

211. In any event, as stated by the Commission in its Preliminary Jurisdictional Issues Decision which we have earlier cited, no one factor arising from s.134(1) is to be given particular primary. Each of the matters arising under s.134(1) are to be treated as issues of significance, which should be given due consideration and weight.

212. For these reasons, it is not sufficient for the HSU to rest its case entirely on the basis of s.134(1)(da). Although the Commission may form the view that considerations arising from this subsection alone lend support for the HSU's claims, this is not determinative. Equal consideration should be given to matters arising under each of the other limbs of s.134(1), which we have here addressed.

Section 134(1)(e) - The principle of equal remuneration for work of equal or comparable value

213. This is a neutral consideration in this matter.

Section 134(1)(f) - The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden

214. The impact of the variation proposed on employment costs and business is self-evident. It would clearly impose additional employment costs. To the extent that it discourages employers from rostering such shifts, the impact of

the variation may instead be felt by way of a reduction in productivity. Either result cannot be reconciled with s.134(1)(f).

215. We note of course, that the need to have regard to the impact of any variation on small and medium enterprises is particularly pertinent and reinforced by s.3(g) of the Act.

Section 134(1)(g) - The need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards

216. The need for a stable system tells against varying awards in the absence of a proper evidentiary and merit based case which establishes that the proposed provision is necessary, in the sense contemplated by s.138. This is particularly relevant in circumstances where the provision is question has operated in the industry since the modern award was made. To now introduce additional costs without there being any evidence that the Award does not presently provide a fair and relevant minimum safety net, is contrary to s.134(1)(g).

Section 134(1)(h) – The likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy

217. To the extent that the matters arising from ss.134(1)(b), (d), (f) and (g) adversely impact employment growth, inflation and the sustainability, performance competitiveness of the national economy, the HSU's claim conflicts also conflicts with s.134(1)(h).

Conclusion

218. For all the reasons stated above, the HSU's claim should be dismissed.

6.15 The AWU's Claim to vary Clause 29 – Shiftwork

219. The AWU "seeks to ensure that shift allowances are payable to employees to perform when they work an afternoon or night shift". No further particulars have been provided by the union. We do not understand the reference to 'afternoon or night shift', as the Award does not contemplate such concepts.

220. We will seek an opportunity to respond to the AWU's claim once particularised.

6.16 The HSU's Claim to vary Clause 31 – Quantum of Annual Leave

The claim

221. Section 87(1) of the NES prescribes the amount of leave to which an employee is entitled. By virtue of s.87(1)(a)(i), an employee is entitled to five weeks of paid annual leave if a modern award applies to the employee and defines or describes the employee as a shiftworker for the purposes of the NES.

222. The Health Professionals Award contains such a definition at clause 31.1: (emphasis added)

> 31.1 Quantum of leave
>
> (a) The NES provides that an employee who is defined as a shiftworker under this clause is entitled to an additional weeks annual leave on the same terms and conditions.
>
> (b) For the purpose of the NES a shiftworker is an employee who is regularly rostered to work Sundays and public holidays.

223. The HSU has proposed the following variations:

> 31.1 Quantum of leave
>
> (a) The NES provides that an employee who is defined as a shiftworker under this clause is entitled to an additional weeks annual leave on the same terms and conditions.

(b) For the purpose of the NES a shiftworker is an employee who works for more than four ordinary hours on 10 or more weekends and/or ~~is regularly rostered to work Sundays and~~ public holidays.

(c) An employee who is engaged for part of the yearly period as a shiftworker, is entitled to have the period of four weeks' annual leave increased by half a day for each month the employee is engaged on shiftwork, up to a maximum of 5 days additional leave.

224. The HSU seeks the proposed amendments in order to:

- Address a reduction in the entitlement to annual leave for shiftworkers resulting from the two year review of modern awards; and
- "Clarify" the position in relation to employees engaged for part of the year as a shiftworker.

225. Ai Group opposes the HSU's claim.

Variation proposed to clause 31.1(b)

226. The current terms of clause 31.1 of the Award are preceded by some history and has been the subject of previous consideration by the Commission and its predecessors. This was set out in a decision of a Full Bench of the Commission (Hatcher VP, Hamberger SDP and McKenna C) that heard an appeal by the HSU of Vice President Watson's decision to vary the Award during the two year review of modern awards. The following passage provides a comprehensive summary of that history and the Commission's recent consideration of it:

> [79] In the Award as it was when first made on 3 April 2009, clause 31.1 dealt with the issue of this additional annual leave entitlement in the following terms:
>
> "31.1 Quantum of leave
>
> (a) In addition to the entitlements in the NES, a shiftworker or an employee who works for more than four ordinary hours on 10 or more weekends is entitled to an additional week's annual leave on the same terms and conditions.
>
> (b) For the purpose of the NES a shiftworker is defined as an employee who is regularly rostered to work their ordinary hours outside the ordinary hours of work of a day worker as defined in clause 24 - Span of hours."

[80] This clause was expressed in a curious way. Read literally, it appeared to confer a double entitlement. Clause 31.1 conferred an additional week's leave, on top of the NES standard, for a shiftworker or for an employee working the requisite number of weekends. Clause 31.2, for the purpose of the NES entitlement of an additional week's leave, then defined a shiftworker as an employee regularly rostered to work ordinary hours outside of the Award's span of ordinary hours. That definition was consistent with the definition of "shiftworker" to be found in clause 3.1 of the Award: "shiftworker is an employee who is regularly rostered to work their ordinary hours outside the ordinary hours of work of a day worker as defined . . .". The apparent result was that a shiftworker would be entitled to six weeks of annual leave.

[81] This anomaly was soon picked up by the Victorian Hospitals Industrial Association (VHIA), which made an application to vary clause 31.1 under s.160 of the FW Act on the basis that the existing provision was ambiguous or uncertain or constituted an error requiring correction. The VHIA's application, which was supported by the PHIEA and the ADA, was to vary clause 31.1 to read as follows:

> "31.1 Quantum of leave
>
> (a) The NES provides that an employee who is defined as a shiftworker under this clause is entitled to an additional weeks leave on the same terms and conditions.
>
> (b) For the purposes of the NES a shiftworker is an employee who works for more than four ordinary hours on 10 or more weekends during the year in which his or her annual leave accrues."

[82] The VHIA's proposed variation had its own curiosities. In particular, in seeking to eliminate the apparent double entitlement to an additional week of leave by confining the provision's operation to the definition of "shiftworker" for the purpose of the NES, it did not retain the existing definition of "shiftworker" for that purpose appearing in the original clause 31.1(b). Instead, it picked up the criterion for the extraneous additional week's leave found in the original clause 31.1(a), and in doing so omitted any requirement for the employee to actually be a shiftworker as defined in clause 3.1 in order to qualify for the extra entitlement.

[83] In a decision issued on 12 May 2010 29, Vice President Watson granted the VHIA's application. His Honour's reasoning was as follows:

> "[14] In my view the existing clause is ambiguous and on its face creates obligations greater than those which previously applied. There is no history of more generous entitlements than the four and five week standard in this area of employment and therefore the modern award clause should not provide any additional entitlements. To the extent it may provide for entitlements greater than the four and five week standard the provision in my view is inconsistent with the intention of the AIRC and is therefore an error.
>
> [15] The Award annual leave clause should define the basis of the additional week's leave for the purposes of NES by defining the term "shiftworker" for this purpose in a similar way to which the qualification for the additional week was expressed in previous awards. This will usually be a class of shiftworkers only - not all shiftworkers for other purposes of the Award.

[16] In my view the application in this matter properly reflects the previous award qualifications for the additional week's leave. I will make a determination in terms of the application to correct the ambiguity and errors involved in the current clause with an operative date of 1 January 2010.

…

[86] In the 2012 Review for this Award conducted by his Honour, the issue of clause 31.1 was initially agitated only by the ADA in its application for variation. The ADA's proposed variation was as follows:

"(b) For the purposes of the additional week of annual leave provided for in the NES and in substitution for definition of a "shiftworker" in clause 3.1, a shiftworker is a permanent full-time employee who is regularly rostered to work in an enterprise in which shifts are continuously rostered 24 hours a day for 7 days a week and the employee regularly works on Sundays and public holidays."

[87] Subsequently, the other employer groups jointly advanced by way of Exhibit I1 an alternate variation to clause 31.1(b) so that it read:

"(b) For the purposes of the NES a shiftworker is an employee who is regularly rostered to work on Sundays and public holidays."

[88] At the hearing before Vice President Watson, the ADA called extensive evidence from a number of witnesses which demonstrated that the cost of the additional week's annual leave for persons employed to work ordinary hours on Saturdays was inhibiting dental practices from opening on Saturdays, despite there being a public demand for them to do so. No other party called any evidence in relation to the matter.

[89] Vice President Watson determined to grant the variation to clause 31.1(b) proposed in Exhibit I1. His Honour's reasoning in the Decision in this matter was as follows:

"[51] I note that the definition of shiftworker in clause 31.1(b) in this Award is different to the common definition in modern awards and that it did not arise from a detailed consideration of alternative formulations and detailed arguments by the parties during the award modernisation process. Nor is it apparent that the wording reflected the pre-existing instruments applying to dental practices.

[52] The evidence of restrictions on operating hours of dental practices arising from the new obligations created by the clause is a matter of concern. It shows that the Award provision is impacting on the viability of operating on Saturdays despite the business desire and client wishes to access those services at those times.

[53] In my view the notion of an extra week of annual leave provided in the NES is intended to be a benefit provided to employees who generally satisfy a common test, although a case may exist for varying that test with respect to particular areas of employment. I am not satisfied that a case has been established in the past or in the present case for a different test to be adopted for this area of employment compared to other areas of employment covered

by other modern awards. I will therefore make an order substituting the definition to that sought by the employers in the annual leave clause which is a common shiftworker definition in modern awards for the purposes of the extra weeks leave under the NES. There is no need to amend the definition of shiftworker for other purposes of the Award in clause 3.1."

[90] The HSU submitted that his Honour erred in varying the Award in this way because:

(1) the variation had been made without there being evidence of a significant change of circumstances since the modern award was made, contrary to the principles stated in the Modern Awards Review 2012 decision;

(2) the evidence did not demonstrate an anomaly or technicality, or a failure to achieve the modern awards objective; and

(3) in the alternative, the variation was not adapted to remedying the difficulty identified in the evidence, which was confined to the dental industry.

[91] The HSU's first submission requires some further analysis as to the origins of clause 31.1(b). The starting point to this analysis must be that clause 31.1(b), even in the form that it was as a result of the 12 May 2010 variation, was unusual. The historical basis for an entitlement to an extra week's annual leave was usually to compensate seven-day shiftworkers for having to regularly work on Sundays and public holidays. There was considerable debate in various decisions of industrial tribunals over the course of the last century as to what constituted seven-day shift work (sometimes alternatively characterised as "continuous shift work") either generally or for the purpose of particular occupations and industries. The minimum position seems to have been that a seven-day shiftworker had to have been a shiftworker who regularly worked Sundays and public holidays, with "regularly" defined in the most generous case as being 35 shifts per year.

[92] In order to qualify for the extra week's leave under the clause in the Award here as it stood after the 12 May 2010 variation, the employee did not have to be a shiftworker at all, and did not have to have worked any Sundays or public holidays at all (if ten or more Saturdays had otherwise been worked). This was clearly a marked departure from the historic standard. That does not mean in itself that the previous provision was industrially unjustifiable. It was recognised in the award modernisation process that there was a wide variety of provisions in pre-existing instruments concerning annual leave, including as to the definition of a shiftworker for that purpose, such that the development of such a standard provision was not possible. However, one would expect to find some historic rationale for the departure from the standard.

[93] An analysis prepared by the AFEI in its written submissions at first instance demonstrated that, overwhelmingly, the various instruments covering health professionals and support staff in each State which the Award replaced did not have annual leave provisions equivalent to that in clause 31.1 of the Award as it was prior to the variation the subject of the appeal. The HSU identified two predecessor instruments in Victoria, the *Health and Allied Services - Public Sector - Victoria Consolidated Award 1998* and the *Health and Allied Services - Private Sector - Victoria Consolidated Award 1998* as the source, and therefore

justification, of the Award provision as it previously was. However, we consider that the annual leave provisions in those awards had a different effect. …

…

[96] It cannot be said therefore that either clause 31.1 as it was originally made by the Award Modernisation Full Bench, or as subsequently varied by Vice President Watson on 12 May 2010, reflected the leave entitlements found in the various pre-modern awards. The form of the original clause was, as Vice President Watson found in his 12 May 2010 decision, an error. It is difficult to discern what occurred in the award modernisation process, but there may have been unintended drafting consequences in an attempt to adapt the leave provisions from the *Health and Allied Services - Public Sector - Victoria Consolidated Award 1998* and the *Health and Allied Services - Private Sector - Victoria Consolidated Award 1998*. The 12 May 2010 variation which was intended to rectify this likewise did not have the same effect as the equivalent provisions in the two identified predecessor awards.

[97] Having regard to the historical context we have described, the HSU's first submission must be rejected. The principle stated in the Modern Awards Review 2012 decision was that a variation to a modern award provision as part of the 2-year review should not be made absent "cogent reasons for doing so". The demonstration of a "significant change of circumstances which warrants a different outcome" was identified in the Modern Awards Review 2012 decision as merely an example of what might constitute "cogent reasons". We consider that where, as here, the modern award provision has been demonstrated to have been made in error, that would equally constitute "cogent reasons" for a variation. The position is a fortiori where the evidence demonstrates that the erroneous provision has been having unintended and detrimental consequences upon the capacity of employers to meet public demand for their services.

[98] The HSU's submission that the evidence did not demonstrate an anomaly or technicality, or a failure to achieve the modern awards objective must also be rejected. Vice President Watson's finding of fact in paragraph [15] of the Decision, which we have earlier set out, was not challenged by the HSU in the appeal. That finding, we consider, clearly made available the conclusion that clause 31.1 of the Award as it previously was did not meet the modern awards objective in s.134(1) having regard in particular to "the need to promote flexible modern work practices and the efficient and productive performance of work" (s.134(1)(d)) and "the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden" (s.134(a)(f)).

[99] We also reject the HSU's third submission that the actual variation granted by Vice President Watson was not adapted to remedying the problem identified in the evidence concerning the dental industry. We do so for two reasons. Firstly, the variation to clause 31.1 was made by his Honour not only on the basis of the evidence adduced by the ADA, but also on the basis that clause 31.1 departed from common standards concerning the entitlement to an extra week's leave in circumstances where nothing that occurred in the award modernisation process identified a rationale for such a departure. This provided an independent justification for a variation which applied to all employers and employees under the Award. Secondly, neither the HSU nor any other party submitted, even in the alternative, that any variation to clause 31.1 should be confined to the dental

> industry. Accordingly, we think that his Honour was entitled in those circumstances to determine the issue on an all or nothing basis.
>
> [100] This aspect of the HSU's appeal is therefore dismissed.[11]

227. The variation here sought by the HSU is essentially a reversion to the clause that was inserted in the Award pursuant to the 12 May 2010 decision and remained as such until the Commission's decision to vary it during the Two Year Review. It seeks to re-agitate matters recently considered and determined by a Full Bench in the absence of any cogent reasons. We do not envisage that the form in which the clause is now proposed, nor the circumstances in the industry, are such as to warrant a departure from the Commission's earlier decisions. Such an outcome would clearly be inconsistent with the approach to be adopted by the Commission in this Review, as set out earlier in this submission.[12]

228. We note that there are, however, two identifiable differences between what the HSU has here proposed and the clause that was previously contained in the Award. Following the 12 May 2010 decision, a shiftworker was defined, for the purposes of the NES, as an employee who works for more than four ordinary hours on 10 or more *weekends during the year in which his or her annual leave accrues*. The HSU's proposal differs from this because it:

- Applies where an employee works more than four ordinary hours on 10 or more weekends *and/or public holidays*. The entitlement is thus potentially broader in scope.

- The entitlement is not confined to circumstances in which an employee works four or more ordinary hours on 10 or more weekends/public holidays *during one year*. The absence of a reference to a period of one year potentially confuses the manner in which the entitlement is to accrue. It might, however, be argued that the greater entitlement to annual leave applies on an ongoing basis once an employee works more than four ordinary hours on any 10 or more weekends and/or

[11] [2013] FWCFB 5551 at [79] – [100].

[12] [2014] FWCFB 1788 at [25] – [27].

public holidays. This is a significantly more generous entitlement than what was previously contemplated.

Conclusion regarding the variation proposed to clause 31.1(b)

229. As we have here set out, the HSU's claim is a matter that has recently been the subject of careful and detailed consideration by a Full Bench of the Commission. Its claim essentially seeks to re-run an unsuccessful appeal of Vice President Watson's decision. In fact, it appears that the HSU may be seeking a more generous entitlement than what was previously found in the Award. To grant it's claim would be a clear departure from the well know principle cited in *Nguyen v Nguyen* which was adopted by the Commission in its Preliminary Jurisdictional Issues Decision. The HSU's claim should, therefore, be dismissed.

The proposed insertion of a new clause 31.1(c)

230. A number of modern awards contained terms that provided for the accrual of annual leave for employees defined as shiftworkers for the purposes of the NES. Specifically, it contemplated circumstances in which the employee was engaged as a shiftworker for part of a 12 month period. They were relevantly similar to that which has now been proposed by the HSU. That is, they required that a shiftworker's entitlement to annual leave would be increased on a monthly basis where that employee was engaged for part of the year as a shiftworker.

231. For instance, clause 41.3(b) of the *Manufacturing and Associated Industries an Occupations Award 2010* was in the following terms:

> (b) Where an employee with 12 months continuous service is engaged for part of the 12 month period as a seven day shiftworker, that employee must have their annual leave increased by half a day for each month the employee is continuously engaged as a seven day shiftworker.

232. In the course of proceedings that dealt with the alleged inconsistency between various award provisions and the NES as part of the Review, the Commission found that the above term as well as other similar clauses found in a number

of awards were inconsistent with the s.87(2) of the NES, which states that an employee's entitlement to paid annual leave accrues *progressively* during a year of service according to the employee's ordinary hours of work: (emphasis added)

> [88] We consider the following modern award provisions to be inconsistent with s.87(2) because, in respect of the entitlement conferred by s.87(1)(b)(i) to an additional week's annual leave for employees covered by a modern award who are defined or described as shiftworkers, each of them:
>
> (1) requires a minimum of 12 months' service before the additional entitlement applies; and
>
> (2) provides that the additional entitlement accrues on a monthly and not a daily basis.[13]

233. The Commission proposed that the aforementioned provision be replaced with the following: (emphasis added)

> (b) Where an employee is engaged for part of a 12 month period as a seven day shiftworker, that employee must have their annual leave increased by half a day for each month the employee is continuously engaged as a seven day shiftworker.
>
> (c) An employee engaged for only part of a month as a seven day shiftworker will accrue leave for the part month proportionate to the leave prescribed in clause 41.3(b).

234. After having heard interested parties as to the above proposal, the Commission decided that rather than to insert it, the pre-existing clause, which it had previously found to be inconsistent with the NES, would simply be deleted. It did so on the basis that the "NES provision for progressive accrual of this entitlement is sufficient to deal with the situation of part-year seven day shiftworkers who meet the award requirement in clause 41.3(a) of being *"regularly rostered".*[14]

235. The Health Professionals Award was not one of the Awards affected by the above decision, as it did not contain a clause such as the one found in the

[13] [2014] FWCFB 9412 at [88].

[14] [2015] FWCFB 3023 at [12].

Manufacturing and Associated Industries and Occupations Award 2010. However, the above decisions have clearly determined that:

- An award provision that provides that the additional annual leave entitlement for shiftworkers accrues on a monthly basis is inconsistent with the NES; and

- The NES adequately deals with the situation where an employee is engaged as a shiftworker, as defined by an award for the purposes of the NES, for part of a year.

236. Like the HSU's claim in respect of clause 31.1(b), it here yet again raises an issue that has already been determined by the Commission. In this case, it is a matter that was dealt with during this very Review. The HSU has not established any cogent reason for reconsidering a matter so recently determined by a five-Member Full Bench, nor has it suggested why the Commission should depart from its previous decision.

237. The HSU's claim should not be granted.

6.17 The AWU's Claim to vary Clause 31.1 – Quantum of Annual Leave

238. The AWU "seeks to vary leave provisions for shiftworkers to ensure the additional annual leave is provided for shiftworkers". No further particulars have been provided by the union. It is not clear whether it simply supports the HSU's proposal or intends to pursue its own.

239. Ai Group opposes any claim to increase the current entitlement to annual leave under the Award. We may seek an opportunity to respond to the AWU's claim and material in support once filed.

6.18 The HSU's Claim to vary Clause 35 – Ceremonial Leave

240. The HSU has proposed that clause 33 of the Award (found at clause 19 of the Exposure Draft) be varied as follows:

33. Ceremonial leave

An employee who is legitimately required by Aboriginal or Torres Strait Islander tradition to be absent from work for Aboriginal ceremonial purposes will be entitled to up to ten working days unpaid leave in any one year, with the approval of the employer.

241. Ai Group does not oppose the variation sought.

6.19 The HSU's Claim to vary Schedule B.2.1 Health Professional – level 1

242. The HSU seeks a variation to the classification structure in the Award such that it would explicitly provide for an employee undertaking an internship. It proposes that this be achieved by inserting the following paragraph in Schedule B.2.1:

This level is the level for employees who are undertaking an internship.

243. It is not apparent that the proposed insertion of the above text is necessary as it appears that the current definition for 'health professional employee – level 1" is adequate. Ai Group currently has concerns that the proposal may result in unintended consequences for the application of the remainder of the classification structure.

6.20 The HSU's Claim to vary Schedule C – List of Common Health Professionals

244. Schedule C to the Award provides a list of common health professionals. It is relevant to the classification definitions of health professional employees contained at Schedule B. The preamble to that schedule states:

> A list of common health professionals which are covered by the definitions is contained in Schedule C – List of Common Health Professionals.

245. The effect of the above statement is to capture health professionals listed at Schedule C in the classification structure set out at Schedule B. The minimum weekly wage payable to employees with respect to each classification is set out at clause 15.

246. The classification structure is of course relevant to the coverage of the Award. By virtue of clause 4.1, the Health Professionals Award covers:

- employers in the health industry and their employees listed in clause 15; and
- employers engaging a health professional employee falling within the classifications listed in clause 15.

247. In this way, the list of health professionals found at Schedule C is relevant to the coverage of the Award.

248. The HSU is seeking to expand the list of health professionals by inserting numerous new titles in Schedule C, including the following:

- administrator;
- building engineer;
- child life therapists;
- clinical coders;
- dental prosthetist;
- dental technician;
- dentist;
- denturist;
- director of allied health;
- dispenser;
- environmental engineer;
- health promotion officer;
- hospital engineer;

- human resource professional
- information manager;
- manager;
- massage therapist;
- medical engineer;
- medical physicist;
- microbiologist;
- nutritionists;
- optician;
- optometrist;
- orthotist;
- plant engineer;
- radiation engineer;
- rehabilitation counsellor; and
- technical officer.

249. Whilst the HSU has dressed up its claim as one that is intended to "make the schedule easier to read" and will "not change the current [Health Professionals] Award", this is clearly inconsistent with the proper interpretation of clause 4 and Schedule B. The HSU's claim is more appropriately characterised as an attempt to broaden the coverage of the Award.

250. A brief overview of the additional titles of "health professionals" proposed to be added suggests that some such employees may presently be covered by other modern awards whilst others may in fact be award free. If adopted, the

Award would be modified to cover such employees and their employers, given that the coverage of the Award is both industrial and occupational in nature.

251. The HSU has not mounted a merit case in support of its claim, nor has it provided any reason or rationale for why the proposal is necessary in order to ensure that the Award achieves the modern awards objective. Indeed it has attempted to sidestep the need to demonstrate such matters by mischaracterising its claim as one that has no substantive effect.

252. Ai Group opposes the HSU's claim and submits that it should be dismissed.

6.21 Claims Made by the MIERG

253. The MIERG has proposed a significant number of variations to the Award. Whilst some would only apply to private medical imagining practices, several would have broader application to all employers and employees covered by the Award.

254. The MIERG has not made submissions that provide any justification for the specific various changes sought. We are concerned that many of the proposals would introduce additional costs and significant inflexibilities for employers in various sectors in the health industry. Ai Group may seek an opportunity to respond to any material filed by the MIERG in support of its claims.

7. HORSE AND GREYHOUND TRAINING AWARD 2010

255. The following submissions relate to the *Exposure Draft – Horse and Greyhound Training Award 2014* (Exposure Draft). They are made in response to submissions filed by:

- The Australian Trainers' Association (ATA), dated 15 July 2015; and
- The Australian Workers' Union (AWU), dated 15 July 2015.

7.1 Exposure Draft – Horse and Greyhound Training Award 2014

Clause 6.1 – Types of employment

256. Ai Group agrees with the ATA's submission at paragraph 3. We refer to our submissions of 4 February 2015 at paragraph 5.1 in this regard.

Clause 6.2 – Types of employment

257. At paragraph 2 of its submissions, the AWU seeks an amendment to clause 6.2 of the Exposure Draft, which would amount to a substantive change. It makes the assertion that "an employer informs its employees of the terms of their employment and type of employment before the employee has commenced employment", but does not point to any current award term that creates an obligation as to *when* employees are informed of the terms and type of employment. Its submissions are, in essence, the same as those it has earlier put[15], to which we have responded in our submissions of 4 March 2015 at paragraphs 19 – 21. Ai Group remains opposed to the AWU's proposal and refers the Commission to the aforementioned submissions for our reasons.

Clause 6.5(a) – Types of employment – Casual employees

258. Both the AWU and ATA have made further submissions in response to the question contained in the Exposure Draft at clause 6.5(a). We continue to rely on submissions we have earlier made in this regard.[16] The AWU has not provided any additional rationale for its proposed amendment, other than to argue that such a clause is not commonly found in other awards. That is not a valid justification for removing the current provision.

[15] See AWU's submissions dated 4 February 2015 at paragraphs 2 – 3.

[16] See Ai Group's submissions dated 4 February 2015 at paragraphs 5.7 – 5.8 and Ai Group's submissions dated 4 March 2015 at paragraphs 25 – 27.

Clause 9.4(g) – Classifications and minimum wages – Apprentice minimum wages – Apprentice jockey minimum wages

259. We refer the Commission to submissions we have previously made in response the ATA regarding clause 9.4(g) of the Exposure Draft and the proposed amendments there contained.[17]

Clause 9.5(a) – Classifications and minimum wages – Apprentice conditions of employment

260. Ai Group agrees with the ATA's submissions regarding clause 9.5(a) of the Exposure Draft. We refer to paragraph 5.21 of our submissions dated 4 February 2015 in this regard.

Clause 9.5(b) – Classifications and minimum wages – Apprentice conditions of employment

261. Ai Group agrees with the ATA's submissions regarding clause 9.5(b) of the Exposure Draft. We refer to paragraph 5.22 of our submissions dated 4 February 2015 in this regard.

Clauses 13.1 and 13.2 – Overtime and penalty rates

262. We do not oppose the ATA's submissions regarding clauses 13.1 and 13.2. We refer to our submissions of 4 March 2015 at paragraphs 32 – 34 in this regard.

Clause 13.2 – Overtime and penalty rates

263. Ai Group does not oppose the amendment proposed by the AWU to clause 13.2 of the Exposure Draft. If made, the clause would properly reflect the current clause 22.2.

[17] See Ai Group's submissions dated 4 March 2015 at paragraphs 29 – 31.

Clause 14.4 – Annual leave – Requirement to take leave

264. The AWU's submission at paragraph 8 is the same as that which it has earlier put in its submissions of 4 February 2015. Ai Group's response can be found at paragraphs 35 – 36 of our submissions of 4 March 2015.

265. Ai Group agrees with the ATA's submissions regarding clause 14.4.

Schedule A.2 – Casual employees

266. Ai Group does not oppose the inclusion of additional tables that contain overtime and penalty rates payable to casual employees, as proposed by the AWU. We request that parties be granted an opportunity to review and make comment on the accuracy of such rates if they are to be included.

Schedule D.4 – School-based apprentices

267. We continue to rely on paragraph 40 of our submission dated 4 March 2015 in respect of ATA's submission regarding Schedule D.4.

8. MEDICAL PRACTITIONERS AWARD 2010

268. The following submissions relate to the *Exposure Draft – Medical Practitioners Award 2014* (Exposure Draft) and substantive claims made to vary the *Medical Practitioners Award 2010*. They are made in response to submissions filed by:

- The Health Services Union (HSU), dated 16 July 2015; and
- The Australian Salaried Medical Officers (ASMO); dated 6 March 2015.

8.1 Exposure Draft – Medical Practitioners Award 2014

Clause 8.1(a)(ii) – Ordinary hours and roster cycles—day workers

269. Ai Group does not agree with the variation proposed by ASMO. The variation proposed would change the way in which hours may be average over a period of time.

270. ASMO's proposal amounts to a substantive variation and thereby ought to be supported by the necessary submissions and evidence.

Clause 8.1(b)(ii) – Span of hours

271. Ai Group does not oppose the proposal submitted by ASMO.

8.2 The HSU's Claim to insert a new Clause 17 Ceremonial Leave

The claim

272. The HSU seeks the insertion of a new clause in the Medical Practitioners Award, which would entitle an employee who is legitimately required by Aboriginal and Torres Strait Islander tradition to be absent from work for ceremonial purposes to up to 10 days unpaid leave in any year.

273. The proposed clause is in the following terms:

> 17 Ceremonial Leave
>
> An employee who is legitimately required by Aboriginal or Torres Strait Islander tradition to be absent from work for ceremonial purposes will be entitled to up to 10 working days unpaid leave in any one year, with the approval of the employer.

274. The HSU makes its claim on the following bases:

- The variation meets the modern awards objective, particularly s.134(1)(c);
- Clauses in the same or similar terms are a common feature of modern awards;
- The failure to include an entitlement to ceremonial leave in the Medical Practitioners Award when it was made was "an oversight and is as such an anomaly".

275. Ai Group opposes the clause sought.

Oversight or anomaly

276. The HSU submits that the failure to include an entitlement to ceremonial leave in the Award when it was made during the Part 10A Award Modernisation process was "an oversight and is as such an anomaly". We do not agree.

277. When the AIRC published the exposure draft to the Award, it did not contain an entitlement to ceremonial leave. The National Aboriginal Community Controlled Health Organisation (NACCHO) subsequently filed a submission, on 16 February 2009, in which it propagated the need for a standalone modern award that covered Aboriginal and Torres Strait Islander community controlled health organisations. It also made reference to specific entitlements, including ceremonial leave, under the *Health Services Union (Aboriginal & Torres Strait Islander Health Services) Award 2002* and "a number of state awards and specific awards covering Medical Practitioners and Nurses in Aboriginal Health Services".

278. Whilst separately dealing with the issue of whether a distinct modern award as sought should be made, the AIRC gave specific consideration to the inclusion of ceremonial leave when finalising the content of the 'health and welfare services awards' (that is, the *Nurses Award 2010, Aged Care Industry Award 2010, Health Professionals and Support Services Award 2010* and Medical Practitioners Award).

279. After dealing with various other entitlements and obligations to be included in the aforementioned awards, the Full Bench went on to state:

> [157] The National Aboriginal Community Controlled Health Organisation (NACCHO) submitted that the aboriginal and Torres Strait islander controlled health services deliver primary health care services and are operated by local aboriginal communities with elected boards of management. It argued that the services need separate regulation and it opposed the "mainstreaming" of staff through the award modernisation process which may have the affect (sic) of divorcing staff from the existing governance structures. It raised current award provisions dealing with self-determination and ceremonial leave. We have included ceremonial leave provisions in the relevant awards. We deal with the question of separate award coverage at the end of this decision.[18]

[18] [2009] AIRCFB 345 at [157].

280. As earlier set out, the NACCHO's submissions referred to pre-modern awards which, it said, contained an entitlement to self-determination clauses and ceremonial leave. This included the *Health Services Union (Aboriginal & Torres Strait Islander Health Services) Award 2002*; however it did not cover medical practitioners. This was acknowledged by the NACCHO. Rather its coverage and classification structure is not dissimilar to what is now found in the *Aboriginal Community Controlled Health Services Award 2010*.

281. The NACCHO also submitted that there were a number of state awards and specific awards covering Medical Practitioners and Nurses in Aboriginal Health Services. Having reviewed the list of pre-modern awards that were relevant to the making of the health and welfare service modern awards,[19] there appears to be only one such instrument that applied to medical practitioners; the *Medical Officers (Aboriginal Medical Services) Interim Award 2001*. It did not contain an entitlement to ceremonial leave.

282. The comments made by the AIRC in the passage above must be seen in light of this. It referred to the submissions of the NACCHO and decided to insert a ceremonial leave clause "in the *relevant* awards". This suggests that it deliberately decided not to include the clause in all modern awards that formed part of the 'health and welfare service' group. Whilst we accept that the other modern awards it had earlier referred to each contain a ceremonial leave clause, it seems that the AIRC had specific regard to the instruments referred to by the NACCHO and their coverage before determining whether a ceremonial leave clause should be inserted in all awards before it in that group.

283. In our view, the absence of a ceremonial leave provision in the Medical Practitioners Award is not an anomaly or an oversight. Rather, it is the consequence of a deliberate decision made by the AIRC when the Award was made. It is now incumbent upon the HSU to establish that there are cogent reasons for departing from it.

[19] [2009] AIRCFB 708.

Section 138 and the modern awards objective

284. To the extent that the HSU seeks the insertion of the proposed clause on its merits, the Commission must be satisfied that it is necessary to achieve the modern awards objective, noting of course that the Commission has decided that the Review is to proceed on the basis that an award achieved the objective when it was made. The inclusion of an entitlement in other modern awards is not sufficient, in and of itself, to justify its insertion here.

285. Whilst the HSU submits that the proposed clause is consistent with s.134(1)(c), which refers to the need to promote social inclusion through increased workforce participation, it has not called any evidence (nor does it propose to) which might establish that this will in fact be the case. Nor is there any attempt made at demonstrating the extent to which the clause would in fact be utilised; a matter that is clearly relevant to s134(1)(c) and whether the term is *necessary*.

Conclusion

286. For all of the reasons stated above, the HSU's claim should be dismissed.

9. NURSES AWARD 2010

287. The following submissions relate to the *Exposure Draft – Nurses Award 2014* (Exposure Draft) and substantive claims made to vary the *Nurses Award 2010*. They are made in response to submissions filed by:

- The Health Services Union (HSU), dated 16 July 2015;
- The Australian Workers' Union (AWU), dated 15 July 2015;
- The Australian Nursing and Midwifery Federation (ANMF), dated 15 July 2015;
- The Aged Care Employers (ACE), dated 15 July 2015; and

- The Private Hospital Industry Employer Association (PHIEA), dated July 2015.

9.1 Exposure Draft – Nurses Award 2014

288. The submissions of the ASU, ANMF, AWU and PHIEA include a document outlining 'agreed matters'. Ai Group addresses a number of items within this document with which we have concern.

Various clauses – use of the term 'minimum hourly rate'

289. Ai Group strongly disagrees with the views expressed by the HSU in its submission with respect to the expression of 'minimum hourly rate'.

290. The HSU asserts that the use of the term 'minimum hourly rate' could result in an underpayment to an employee covered by the Award because it does not refer specifically to the 'employee's individual' minimum rate, or in other words, the employee's 'paid rate', in circumstances that the employee is paid above award.

291. Modern awards operate as a minimum safety net applicable to those employees covered by the Award. Modern awards are not intended to reflect 'paid rates'. Ai Group's submissions to the Commission filed 6 March 2015 considers this issue in detail.

Clause 5.2 – Facilitative provisions

292. We refer to the document identified by the ASU, ANMF, AWU and PHIEA as 'agreed matters'. We note that in reference to clause 5.2, that the parties recommend that the last column with respect to the payment of wages remain blank. Ai Group is of the view that it would be more appropriate that the words "*An individual*" be inserted. This would provide greater clarity to the parties and is a reasonable expectation of the interpretation and application of clause 10.7(a) dealing with the payment of wages.

Clause 6.3 – Part-time employment

293. We refer to the document identified by the ASU, ANMF, AWU and PHIEA as 'agreed matters'. We note the proposed variation to clause 6.3(a) of the Exposure Draft. Ai Group is concerned that the rewording of clause 6.3(a)(iii), with respect to the payment of part-time employees, has the potential to be misconstrued as giving rise to a different intention or application of the 'pro-rata entitlement'. We prefer that the existing wording with the Exposure Draft remains. It is noteworthy that Ai Group has not identified any problems with the existing wording and it therefore begs the question why a change is necessary.

Clause 6.4(d), clause 16.1(c) and clause 16.2 – 'Casual employees, overtime and weekend work'

294. Ai Group maintains the position expressed in its 4 March 2015.

Clause 9.3 – Rest breaks between rostered work

295. We refer to the document identified by the ASU, ANMF, AWU and PHIEA as 'agreed matters'. We note the repositioning of clause 9.3 to clause 8.3.

296. Ai Group's submission of 4 March 2015 opposed this variation proposed by the ANMF.

Clause 11.4(b) – Meal allowances

297. We note that ACE no longer presses this variation.

Clause 14.2(a) and (b) and clause 16 – 'Use of the term 'penalty''

298. Ai Group does not agree with the contention advanced by ACE that the use of the terms "loadings", "penalties", allowances" and "premium" (and the singular use of these terms) are confusing. Ai Group does not support a change to the Exposure Draft to the extent that the use of such terms would deviate from their use or interpretation within the current award.

299. The industrial interpretation of these terms (and different meaning attributed to these terms) emanates from important industrial history and must not lightly be disturbed.

300. Any variation of the nature proposed by ACE would require an in-depth consideration of the term and the context within it is used in the Award. The Commission and parties would need to also be mindful of the accepted industrial meaning of these terms and their use within many awards. Any change to their use in the Nurses Award could impact other awards. We urge the Commission to proceed with caution with respect to this matter.

Clause 17.5 - Annual leave loading for shift workers

301. Ai Group maintains the position expressed in its 4 March 2015 submission that annual leave loading for shift workers is calculated on 4 weeks.

9.2 The ANMF's Claim to vary Clause 10 – Types of Employment

302. The ANMF has foreshadowed a claim to introduce a minimum shift length that would apply to all employees, whether engaged on a full-time, part-time or casual basis. The particulars of the variation proposed are not yet known.

303. Ai Group strongly opposes the introduction or further reduction of minimum shift lengths under the Nurses Award. Should the Commission decide to deal with the variation sought after the casual employment and part-time employment common issues cases are heard and determined as proposed by the union, Ai Group will seek an opportunity to respond to the claim at such time.

9.3 The ANMF's Claim to vary Clause 16.4 – On Call Allowance

The claim

304. Clause 16.4 provides an employee with an on call allowance, where an employee is required by the employer to be on call at their private residence, or at any other mutually agreed place. It the ANMF's contention that this

clause provides inadequate compensation to employees and on so proposes the insertion of a new subclause (c):

> (c) Employees shall accrue up to an additional 5 days of annual leave if they are placed on call for 50 or more times in any on year, according to the following:
>
> Placed on call for 10 or more times in any one year – 1 day additional annual leave
>
> Placed on call for 20 or more times in any one year – 2 day additional annual leave
>
> Placed on call for 30 or more times in any one year – 3 day additional annual leave
>
> Placed on call for 40 or more times in any one year – 4 day additional annual leave
>
> Placed on call for 50 or more times in any one year – 5 day additional annual leave
>
> This leave is paid at ordinary rates and is exclusive of leave loading.

305. The new subclause would entitle employees to additional annual leave, in excess of what is due under the NES, where they are placed on call 10 or more time in any one year.

306. Ai Group opposes the ANMF's claim.

Interaction with the NES

307. The proposed subclause (c) effectively provides an employee with an additional 'day' or 'days' of annual leave, where an employee is placed on call for 10 or more times in any one year. As an aside, we note that the meaning of 'in any one year' is not clear; that is, it not apparent whether the 'year' commences from the date that the employee is first engaged, whether it is triggered where an employee is placed on call for the first time or whether it is a reference to a calendar year.

308. Section 87(2) of the NES states that an employee's entitlement to annual leave accrues progressively during a year of service according to the employee's ordinary hours of work. In our view the proposed clause excludes

s.87(2) of the Act because it does not allow for the progressive accrual of annual leave during a year of service according to the employee's ordinary hours of work. Rather, it provides an employee with the benefit of additional annual leave that is contingent upon the number of times they are placed on call in a year. Given that an employer is not able to definitely assess the number of times an employee will be placed on call during any one year, a determination as to how much annual leave is to be credited to the employee can only be made after the year has come to an end. In such circumstances the annual leave cannot be said to have accrued progressively, in accordance with s.88. To this extent, the award clause excludes s.87(2), in the sense contemplated by s.55(1).

309. Consistent with the Commission's recent decision regarding various alleged inconsistencies between the NES and award provisions, "A provision which operates to exclude the NES will not be an incidental, ancillary or supplementary provision authorised by s.55(4)".[20] The award term, therefore, cannot be included by virtue of s.55(4).

310. A provision that excludes s.55(1) has no effect (s.56) and cannot be included in a modern award (s.136(2)(b)). Therefore, it is our contention that the Commission does not have power to include the proposed clause.

311. We note that the construction of s.55 is being considered by the Commission in the context of the ACTU's claim to insert family and domestic violence leave and a 'family friendly work arrangements' clause in all modern awards. Ai Group respectfully requests that an opportunity be granted to further develop our arguments in respect of this claim, should that decision bear any relevance to what is here before the Commission.

Section 138 and the modern awards objective

312. The ANMF's submissions filed to date do not make any reference to s.138 or the modern awards objective.

[20] [2014] FWCFB 3023 at [37].

313. The proposed clause is contrary to the modern awards objective when regard is had to the following matters:

- The need to encourage collective bargaining;
- The need to promote flexible modern work practices and the efficient and productive performance of work;
- The likely impact on business including on productivity, employment costs and the regulatory burden; and
- The need to ensure a simple, easy to understand, stable and sustainable modern award system.

Conclusion

314. For the reasons stated above, the ANMF's claim should not be granted.

9.4 The ANMF's Claim to insert a new Clause 16.6 – In Charge Allowance

The claim

315. The ANMF seeks the insertion of a new entitlement to an 'in charge allowance' in the Nurses Award. It would apply to a registered nurse other than one holding a classified position of a higher grade than Registered Nurse – Level 2. The clause would require the payment of an allowance per shift where such an employee is designated to be in charge of a facility. The quantum payable would be contingent upon the number of beds in the facility or whether the employee was designated to be in charge of a section of a facility.

316. The proposed clause is in the following terms:

> 16.6 In charge allowance
>
> (a) A registered nurse who is designated to be in charge of a facility during the day, evening or night shall be paid in addition to his or her

appropriate salary, whilst so in charge, the per shift allowance set out as follows:

(i) in charge of facility of less than 100 beds - $22.82 per shift

(ii) in charge of facility, 100 beds or more - $36.77 per shift

(iii) in charge of a section of a facility - $22.82 per shift

(b) This clause shall not apply to registered nurses holding classified positions of a higher grade than registered nurse – level 2.

317. Ai Group opposes the ANMF's claim.

Previous consideration given to the inclusion of an 'in charge allowance'

318. It is important to note that the ANMF is here raising a matter that was considered by the Commission during the Part 10A Award Modernisation process and during the Two Year Review of Modern Awards.

319. The following extract from the Commission's decision during the Two Year Review of the Nurses Award is relevant: (emphasis added)

> [20] The ANF seeks the following clause:
>
> "16.7 Nurse in charge allowance
>
> A Registered Nurse Level 1 or a Registered Nurse Level 2 directed by the employer to take charge of a health unit, on a Saturday, Sunday, public holiday, or between the hours of 6.00 pm and 8.00 am on any day will:
>
> (a) If in charge of a worksite of 100 beds or greater, be paid an allowance of $36.00 per shift.
>
> (b) If in charge of a worksite of less than 100 beds, be paid an allowance of $21.50 per shift."
>
> [21] The change is sought in order to compensate the senior nurse who may be in charge of a health unit at night or a on a weekend or public holiday. The ANF submits that the additional responsibilities taken on in those circumstances are significant and are not taken into account in the minimum award wage for the relevant classifications.
>
> [22] The Aged Care Employers and other employer representatives submit that this matter was addressed in the award modernisation process, in-charge allowances were sought by the ANF and the Full Bench deliberately refrained from inserting them. They further submit that supervisory functions of the type concerned are already built into the nurse classification definitions. They submit that if additional remuneration is justified it should be based on the precise circumstances in enterprise specific arrangements. As units vary considerably in

> their size and complexity it is submitted that it is inappropriate to adopt a uniform approach to the allowance in a safety net award.
>
> [23] I do not consider that a case has been established for inserting this allowance. The matter was addressed in the award modernisation process. In my view, in an award such as this with wide-ranging application, there are sound reasons for leaving matters of this nature to the agreement or overaward area where the precise circumstances can be considered and appropriate compensation can be given to the extent that it is agreed to be warranted. I will not make the variation sought.[21]

320. Whilst the union's proposal there put was not identical in its terms, its effect was the same: to require the payment of an additional allowance where a registered nurse is required to be in charge for a particular duration. In some respects, the application before the Commission during the Two Year Review was more confined; it would have applied only where an employee undertook such duties at particular times during the week and it would have been confined in its's application to circumstances where an employee was required to be in charge of a 'health unit'. Whilst that is not a term that is defined by the Award, it appears that it may have been narrower in meaning than a 'facility', as referred to in the clause now before the Commission.

321. The ANMF's claim is a re-agitation of matters recently considered by the Commission. In essence, the union seeks a decision that departs from that determination, in the absence of any cogent reasons for doing so. We do not envisage that the form in which the clause is now proposed, nor the circumstances in the industry, are such as to now warrant a departure from the Commission's earlier decisions. Such an outcome would clearly be inconsistent with the approach to be adopted by the Commission in this Review, as set out earlier in this submission.[22]

Section 138 and the modern awards objective

322. It is for the ANMF to establish that the variation proposed is necessary, in the sense contemplated by s.138 of the Act, to achieve the modern awards

[21] [2012] FWA 9420 at [20] – [23].

[22] [2014] FWCFB 1788 at [25] – [27].

objective. The submissions filed to date do not make any reference to such considerations.

323. The proposed clause is contrary to the modern awards objective when regard is had to the following matters:

- The need to encourage collective bargaining;
- The need to promote flexible modern work practices and the efficient and productive performance of work;
- The likely impact on business including on productivity, employment costs and the regulatory burden; and
- The need to ensure a simple, easy to understand, stable and sustainable modern award system.

Conclusion

324. For the reasons stated above, the ANMF's claim should be dismissed.

9.5 The ANMF's Claim to insert a new Clause 16.7 – Leading Hand Allowance

The claim

325. The ANMF seeks the insertion of a new allowance payable to an enrolled nurse or nursing assistant who is placed in charge of two or more employees classified as an enrolled nurse or nursing assistant.

326. The proposed clause is in the following terms:

> 16.7 Leading hand allowance
>
> (a) A leading hand is an enrolled nurse or nursing assistant who is placed in charge of not less than two other employees of the classification of enrolled nurse or nursing assistant.
>
> (b) A leading hand will be paid a weekly allowance of the amount specified in the following scale:

Leading hand in charge of:	% of standard rate
2 – 5 other employees	2.67
6 – 10 other employees	3.81
11 – 15 other employees	4.81
16 or more other employees	5.88

(c) This allowance will be part of salary for all purposes of this award. (

(d) An employee who works less than 38 hours per week will be entitled to allowances prescribed by this clause in the same proportion as the average hours worked each week bears to 38 ordinary hours.

327. Ai Group opposes the ANMF's claim.

Section 138 and the modern awards objective

328. It is for the ANMF to establish that the variation proposed is necessary, in the sense contemplated by s.138 of the Act, to achieve the modern awards objective. The submissions filed to date do not make any reference to such considerations.

329. The proposed clause is contrary to the modern awards objective when regard is had to the following matters:

- The need to encourage collective bargaining;
- The need to promote flexible modern work practices and the efficient and productive performance of work;
- The likely impact on business including on productivity, employment costs and the regulatory burden; and
- The need to ensure a simple, easy to understand, stable and sustainable modern award system.

Conclusion

330. For the reasons stated above, the ANMF's claim should be dismissed.

9.6 The ACE's Claim to insert a new Clause – Remote Communication Allowance

331. The ACE have proposed the introduction of a new allowance, in the following terms:

> Remote communication allowance
>
> (i) This clause applies to an employee who is on call to provide advice or assistance remotely, including via telephone, text, web chat or email.
>
> (ii) Where an employee is required to be on call to provide advice or assistance remotely they will receive:
>
> (a) 50 percent of the on call allowance as specified in clause 16.4 for the relevant on call period; and
>
> (b) a remote communication allowance equivalent to the employee's ordinary hourly rate of pay for time actually worked, with a minimum payment of one hour, irrespective of the number of calls/communications received during the on call period.
>
> Note: the on call and remote communication allowances do not apply to employees classified at Registered nurse levels 4 and 5.

332. The ACE has indicated that the intention of the clause is to remunerate employees who provide advice or assistance remotely, without being required to return to the employee's place of work.

333. Ai Group proposes that further discussions take place between the industrial parties regarding the clause proposed by the ACE regarding:

- Whether a remote communication clause is necessary in this award;
- If so, whether the concept of "remote communication" is appropriate rather than the concept of "remote service / support" or "remote advice";
- Whether a one hour minimum is appropriate, rather than a half hour minimum, or a half hour minimum during the day and a one hour minimum in the middle of the night;

- Whether both the on call allowance and the remote communication allowance should be payable for the same time period.

9.7 The ANMF's Claim to vary Clause 23 – Rest Breaks between Rostered Work – the length of the rest break

The claim

334. Clause 23 of the Award stipulates that an employee will be allowed a rest break of eight hours between the completion of one ordinary work period or shift and the commencement of another ordinary work period or shift.

335. The ANMF has proposed that the length of the rest break be increased to ten hours, unless the employer and employee agree that it may be reduced to eight hours.

336. Ai Group opposes the ANMF's claim.

Section 138 and the modern awards objective

337. It is for the ANMF to establish that the variation proposed is necessary, in the sense contemplated by s.138 of the Act, to achieve the modern awards objective. The submissions filed to date do not make any reference to such considerations.

338. The proposed clause is contrary to the modern awards objective when regard is had to the following matters:

- The need to encourage collective bargaining;
- The need to promote flexible modern work practices and the efficient and productive performance of work;
- The likely impact on business including on productivity, employment costs and the regulatory burden; and

- The need to ensure a simple, easy to understand, stable and sustainable modern award system.

Conclusion

339. For the reasons stated above, the ANMF's claim should be dismissed.

9.8 The ANMF's Claim to vary Clause 23 – Rest Breaks between Rostered Work – the introduction of a penalty

340. In addition to the above proposal, the ANMF also seeks the insertion of an additional subclause under clause 23 of the Award, which would require payment at a higher rate where an employee is instructed by their employer to resume or continue work without having 10 consecutive hours off duty:

> 23.3 If, on the instruction of the employer, an employee resumes or continues to work without having had 10 consecutive hours off duty, they will be paid at the rate of double time until released from duty for such period.

341. For the reasons cited above, Ai Group also opposes this element of the ANMF's claim.

9.9 The ACE's Claim to vary Clause 25.4 – Rostering

342. The ACE proposes to vary clause 25.4 of the Nurses Award such that a roster may be changed with less than seven days' notice where an employee agrees. The ACE has framed its claim with reference to clause 8.2(e) of the Exposure Draft.

343. Ai Group supports the proposed variation.

9.10 The ANMF's Claim to vary Clause 27.1(a) – Meal breaks

The claim

344. Clause 27 of the Nurses Award provides employees with an entitlement to breaks. The first subclause deals with meal breaks and the second, with tea breaks.

345. Subclause 27.1 is the subject of the ANMF's claim. Paragraph (a) entitles an employee who works in excess of five hours to an unpaid meal break of at least 30 minutes. It permits some flexibility as to when the break may be taken; that is, at any time, before or after the passage of those five hours. By virtue of paragraph (b), an employee required to remain available or on duty during a meal break is to be paid overtime for all time worked until the meal break is taken.

346. The ANMF seek to vary clause 27.1(a), such that it regulates when a meal break is taken, 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. Such meal breaks will be taken between the fourth and the sixth hour after beginning work, unless otherwise agreed by the majority of employees affected. Provided that, by agreement of individual employees, employees who work shifts of six hours or less may forfeit the meal break.

347. The effect of the variation proposed variation would be to:

- Mandate that the unpaid meal break be taken between the fourth and sixth hour after beginning work. That is, where the break could presently be taken at any time (such as, after the third hour), the clause would instead require that the break be taken between the fourth and sixth hour after commencing work.

- Enable an employer and the majority of employees affected to agree otherwise; and

- Enable an employer and an individual employee who works shifts of six hours or less to agree that the unpaid meal break will be forfeited.

348. In submissions dated 15 July 2015, we outlined our proposal to vary clause 27.1(a) 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. Provided that, an employee who works not more than six hours may elect to forgo the meal break, with the consent of the employer.

349. The variation proposed would, in effect, enable an employee to work a shift of six hours or less, without taking a break, subject to the employer's agreement. It appears that, to this extent, there is some degree of consensus between Ai Group and the ANMF.

350. Nonetheless, Ai Group opposes the insertion of a requirement that the unpaid meal break prescribed for in clause 27.1(a) must be taken between the fourth and sixth hour after beginning work. To do so would be to introduce unnecessary prescription and an inflexibility that could have a significant impact on rostering arrangements in the various workplaces and enterprises in which this Award applies.

Previous consideration given to the timing of meal breaks

351. The ANMF is here raising a matter that was considered by the Commission during the Two Year Review of Awards.

352. The following extract from the Commission's decision regarding the Two Year Review of the Nurses Award is relevant: (emphasis added)

> [39] The ANF seeks a variation to clause 27.1 by adding the following words in bold to the existing clause:
>
> "(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 which will be taken between the fourth and sixth hour after commencing work.
>
> (b) Where an employee is required to remain available or on duty during a meal break, the employee will be paid overtime for all time worked until the meal is taken."
>
> [40] The ANF contends that it has frequent calls from members about their inability to access meal breaks because of work commitments. It submits that the current wording of the clause contributes to this situation because it does not mandate a time by which the break must be given.

> [41] The employers contend that a similar claim was made and rejected during the award modernisation process. They contend that the claim is a further restriction on rostering that removes the flexibility that operates around operational needs and employee preferences. They submit that any further issues about the timing of meal breaks should be dealt with at the enterprise level. The employers accepted that the current award provision requires a meal break to be provided, either by rostering it or otherwise, and if the employer requires the employee to work through the meal break, it must pay the employee at overtime rates until a meal break is given.
>
> [42] In my view the employers have correctly acknowledged the obligations under the Award. Any practice whereby an employee is not provided with a meal break must result in overtime payments being made until the scheduled meal break is given. A small amount of give and take based on operational requirements is understandable, but a failure to provide a break, or overtime payments until the end of the shift would not be consistent with the intent of the clause. Nevertheless, I do not consider that a case has been made out for regulating the time for the meal break in the way proposed by the ANF. Such an approach would inhibit the existing flexibility which is no doubt necessary in many operations covered by this Award. The clarification of obligations in this decision and the availability of the disputes procedure should assist in the event of further difficulties with regard to meal breaks.[23]

353. The Commission clearly accepted the employers' contentions summarised at paragraph [41] of the passage cited above. Those concerns remain relevant and reflect the reasons for Ai Group's opposition to this claim. In the material filed to date, the ANMF has not established why the Commission should, in this review, depart from recent consideration given to the ANMF's claim. To do so would clearly be inconsistent with the approach to be adopted by the Commission in this Review, as set out earlier in this submission.[24]

Section 138 and the modern awards objective

354. It is for the ANMF to establish that clause 27.1(a), as varied, is necessary, in the sense contemplated by s.138 of the Act, to achieve the modern awards objective. The submissions filed to date do not make any reference to such considerations.

355. The proposed clause is contrary to the modern awards objective when regard is had to the following matters:

[23] [2012] FWA 9420 at [39] – [42].

[24] [2014] FWCFB 1788 at [25] – [27].

- The need to encourage collective bargaining;
- The need to promote flexible modern work practices and the efficient and productive performance of work;
- The likely impact on business including on productivity, employment costs and the regulatory burden; and
- The need to ensure a simple, easy to understand, stable and sustainable modern award system.

Conclusion

356. For the reasons stated above, the ANMF's claim should be dismissed.

9.11 The ANMF's Claim to vary Clause 27.1(b) – Meal Breaks

357. Clause 27.1(a) of the Nurses Award provides employees with an entitlement to an unpaid meal break of 30 to 60 minutes in length. It applies where an employee works more than five hours.

358. Clause 27.1(b) then deals with circumstances in which an employee is required to remain available or on duty during a meal break. In either circumstance, the employee will be paid overtime for all time worked until the break is taken. In this way, the meal break is considered to have not been taken where the employee is required to remain available or on duty during a meal break. It does not expressly contemplate that an employee may be so required for only part of a break. Rather, it appears to deal with situations that relate to an employee being required to remain available or on duty for the entire duration of the break. It compensates such employees and contemplates that the meal break will ultimately be taken.

359. The ANMF seeks to vary the Award by substituting clause 27.1(b) with the following:

> (b) Where an employee is required to be on duty during a meal break, the employee will be paid overtime for all time worked until the meal break is taken.

(c) Where an employee is required by the employer to remain available during a meal break, but is free from duty, the employee will be paid at ordinary rates for a 30 minute meal break. If the employee is recalled to perform duty during this period the employee will be paid overtime for all time worked until the balance of the meal break is taken.

360. The effect of the proposal is to draw a distinction between the notion of an employee "on duty" during a meal break and an employee remaining available during a meal break.

361. Where an employee is required to be "on duty", the effect of the amended subclause (b) does not deviate from the current clause. However, where an employee is required to "remain available during a meal break, but is free from duty", the employee will be paid for the duration of the break at the prescribed rate. The clause treats the break as having been taken.

362. The clause would then go on to deal with circumstances in which an employee is required to remain available during a meal break, and is "recalled to perform duty" during the break. The employee would be entitled to be paid overtime rates for all time worked until the balance of the meal break is taken. Like the current subclause (b), it contemplates that the break will ultimately be taken.

363. The ANMF seeks this change so as to "provide for compensation while being effectively 'on call' during a meal break". In its view, the consequences of remaining available during a meal break here the employee is not required to return to work is unclear. The intention is to address the circumstances whereby "in some workplaces nurses and midwives are prevented from leaving the workplace during a meal break. The proposal would either require employers to enable employees to leave the workplace during the meal break or compensate them for being prevented from doing so".

364. To the extent that the ANMF's proposal introduces additional costs for employers, the claim is opposed. The material before the Commission falls well short of establishing that the provisions proposed are necessary to achieve the modern awards objective.

9.12 The HSU's Claim to vary Clause 28.1 – Overtime

The claim

365. The HSU seeks a variation to the overtime provision found in the Exposure Draft. In order to properly understand the effect of the proposed variation, it is necessary to first set out the relevant terms of the current Award.

366. Clause 28 of the Award is headed 'overtime'. It commences with clause 28.1(a), which sets out the overtime penalty rates as follows:

> 28.1 Overtime penalty rates
>
> (a) Hours worked in excess of ordinary hours on any day or shift prescribed in clause 21 – Ordinary hours of work, are to be paid as follows:
>
> (i) Monday to Saturday (inclusive) – time and a half for the first two hours and double time thereafter;
>
> (ii) Sunday – double time; and
>
> (iii) Public holidays – double time and a half.

367. Clause 28.1(d) deals more specifically with the payment of overtime rates to part-time employees.

368. Clause 21, as referred to above, sets out the ordinary hours of work under this Award. By virtue of clause 21.1, the ordinary hours of work for a full-time employee will be 38 hours per week, 76 hours per fortnight or 152 hours over 28 days. Clause 21.2 applies to full-time, part-time and casual employees, whether they are day workers or shiftworkers, as described by clause 22. It stipulates that the maximum shift length or ordinary hours of work per day will be 10 hours, exclusive of meal breaks. The remaining subclauses are not relevant for present purposes.

369. Read together, clauses 21 and 28.1(a) require that:

- Hours worked in excess of ordinary hours as defined by clause 21, on any day or shift, attract overtime rates. This is, in our view, a (perhaps

unconventional) way of stating that each day stands alone when calculating overtime rates.

- Where a full-time employee works more than 38 ordinary hours per week, 76 hours per fortnight or 152 hours over 28 days, the employee is to be remunerated at overtime rates for such work.

- Where a full-time, part-time or casual employee, performing day work or shift work, works more than 10 ordinary hours (exclusive of meal breaks) in a day, the employee will be paid at overtime rates for time so worked.

370. Whilst the HSU's proposal is framed with reference to the Exposure Draft, we propose to deal with it in the context of the current Award provisions. It seeks the following variation to clause 28.1:

> 28.1 Overtime penalty rates
>
> (a) Hours worked in excess of the ordinary hours on any day or shift prescribed in clause 21—Ordinary hours of work, are to be paid as follows:
>
> (i) Monday to Saturday (inclusive)—time and a half for the first two hours and double time thereafter;
>
> (ii) Sunday—double time; and
>
> (iii) Public holidays—double time and a half.
>
> (b) Overtime penalties as prescribed in clause 28.1(a) do not apply to Registered nurse levels 4 and 5.
>
> (c) Overtime rates under this clause will be in substitution for and not cumulative upon the shift and weekend premiums prescribed in clause 26—Saturday and Sunday work and clause 29—Shiftwork.
>
> (d) For the purposes of overtime each shift, day, week or averaged roster period stands alone. All work beyond these hours will be overtime and paid as prescribed in clause 28.1(a).
>
> (e) All work beyond 10 hours in a day, whether in a single shift or not, will be overtime and paid as prescribed in clause 28.1(a).
>
> (f) Overtime is payable to all employees, other than those specifically excluded by clause 28.1(b).
>
> ~~(d) Part-time employees~~

~~All time worked by part-time employees in excess of the rostered daily ordinary full-time hours will be overtime and will be paid as prescribed in clause 28.1(a).~~

371. We deal with the various elements of the HSU's claim below but here note that it's claim is made on the following bases: (emphasis added)

- "To ensure that there is no ambiguity as to the payment of overtime to all employees, including casual employees, performing work outside or in excess of the times, rosters and patterns considered 'ordinary' under the Nurses Award."

- " … to clarify that each period of overtime stands alone in its own right, whether that employee works beyond the hours for that single day or shift, their hours of engagement or the normal hours for a full-time employee in a week."

- "… an employee who works in excess of their rostered times … should be entitled to payment at overtime rates."

372. It is not clear whether the HSU is asserting that the Award *currently* requires the payment of overtime rates for work performed outside rostered hours or whether the Award should be varied as proposed because the union is of the view that that *ought* be the case. In any event, it is our submission that the Award, as presently drafted, requires the payment of overtime rates in the circumstances listed above, which does not include circumstances in which an employee works outside their rostered hours.

The proposed clause 28.1(d) – the first element

373. The proposed clause 28.1(d) would require that, for the purposes of overtime, "each shift, day, week or averaged roster period stands alone".

374. It is our contention that, as earlier stated, clause 28.1(a) currently requires that each day stand alone for the purposes of calculating overtime. It does so by requiring that "hours worked in excess of the ordinary hours *on any day or shift*" be paid at overtime rates.

375. We note however that the HSU's proposal refers to "each shift, day, week or averaged roster period". The intended meaning of this part of the proposed provision is entirely unclear. Overtime is calculated on a daily basis. That is, clause 28.1(a)(i) prescribes the rates payable to an employee for overtime performed on Monday to Saturday inclusive, by reference to the number of hours of such work. The first two hours worked in excess of the ordinary hours prescribed in clause 21 on any day or shift are to paid at time and a half for the first two hours. Hours worked thereafter, *on any day or shift*, are to be paid at double time. We cannot see the relevance of the notion the HSU proposes for introduction, which would require that each shift, week or average roster period stand alone. We do not understand what would impact this would have upon the calculation of overtime rates in practice (if any), or indeed what it is intended to achieve.

376. We are of the view that this element of the HSU's proposal is unnecessary. Clause 28.1(a) already requires that each day stand alone for the purposes of calculating overtime. To the extent that the HSU proposes that this be "clarified" by expressly stating that each day is to stand alone for the purposes of calculating overtime, we would not oppose such an approach. However, for the reasons stated above, the remaining text in this part of the HSU's proposal seems meaningless and likely to give rise to confusion. It should not be adopted.

The proposed clause 28.1(d) – the second element

377. We next turn to the second element to the proposed clause 28.1(d), as underlined below:

> (d) For the purposes of overtime each shift, day, week or averaged roster period stands alone. <u>All work beyond these hours will be overtime and paid as prescribed in clause 28.1(a).</u>

378. The reference to "these hours" is somewhat confusing. Even if we assume that the clause is intended to require the payment of overtime rates for work beyond "each shift, day, week or averaged roster period", as per the

preceding sentence, the meaning of the clause is not clear. It is also not clear how the clause would operate in respect of part-time or casual employees.

379. It may be that this element of the HSU's proposal is intended to require that an employee be paid at overtime rates for time worked in excess of 'rostered' hours, as intimated in its submissions. Whilst we oppose the insertion of such a provision in the Award, we note that in any event, the HSU's proposal (at subclause (d) or any other proposed clause), does not appear to achieve such an outcome. Given that the clause is ambiguous in its meaning and effect, it should not be adopted.

380. Nonetheless, in light of the HSU's indication that it desires a variation that would require the payment of overtime rates for work performed in excess of an employee's *rostered* hours, as well as what it characterises as an amendment to ensure that there is "no ambiguity as to the payment of overtime to all employees … performing work outside or in excess of the *times, rosters and patterns considered 'ordinary'* under the Nurses Award", we propose to here deal with the distinction between the concept of ordinary hours and rostered hours. It is important to appreciate that the two are entirely separate notions that should not be conflated. To do so would essentially expand the current entitlement to overtime.

381. The Award presently requires that, by virtue of clause 28.1(a), overtime payments be made for work performed outside ordinary hours prescribed by the Award. Those ordinary hours are set out by the various clauses we have outlined earlier.

382. 'Ordinary hours of work' is a distinct and well understood concept that is deeply embedded in the award system. This is reaffirmed by s.147 of the Act, which states that a modern award 'must include terms specifying, or providing for the determination of, ordinary hours of work for each classification of employee covered by the award and each type of employment permitted by the award'. Clauses 10.2, 10.3(a) and 21 are in accordance with this mandatory requirement.

383. The relevant award provisions set the parameters within which an employee's ordinary hours can be arranged and worked. They do so by specifying the days on which such hours may be worked, the times between which the work may be performed (see clause 22) and a maximum number of hours (on a daily and weekly basis). These ordinary hours of work are expressed in general terms, within which an employer has the discretion to decide how an employee's ordinary hours may be arranged. Work performed within the restrictions imposed by the various clauses will form part of an employee's ordinary hours of work.

384. The terms of the Award and the Act refer to and rely upon the notion of ordinary hours in various ways:

- A full-time employee is defined by clause 10.2 of the Award as one 'who is engaged to work 38 hours per week or an average of 38 hours per week pursuant to clause 21.1 of this award'. Work performed during ordinary hours will form part of this 38 hours. Such time worked is not overtime and does not attract overtime rates pursuant to clause 28.1(a) of the Award.

- Various NES entitlements are accrued and credited by reference to an employee's ordinary hours.

- Ordinary hours of work also form the basis of determining the superannuation contributions payable to an employee in accordance with the Superannuation Guarantee Legislation.

385. An employee's *rostered* ordinary hours are an entirely different concept. Firstly, it relates to the rostered ordinary hours of an individual employee, which are specific to and potentially different for each employee. This is to be compared to the general terms in which ordinary hours are presently set by the Award. Secondly, the term appears to contemplate ordinary hours that an employee is required to work pursuant to a roster.

386. The concept of ordinary hours, and the distinction to be drawn between it and other descriptors of an employee's hours of work were accepted by Senior Deputy President Harrison during the Two Year Review of the *Road Transport (Long Distance Operations) Award 2010*. Her Honour made the following remarks in her decision:

> [146] I agree with the Ai Groups' submission about the meaning of the term "ordinary hours of work" in "industrial parlance". The manner in which that term has developed and been understood in awards does not suggest it is synonymous with what an employee's usual or regular hours may be.[25]

387. The notion of rostered ordinary hours is of course related to the ordinary hours prescribed by the Award. An employee's rostered ordinary hours must fall within the ordinary hours prescribed by the Award. They would otherwise be deemed overtime by clause 28.1(a).

388. Were the Award varied to define work performed outside an employee's rostered ordinary hours as overtime, this may have the effect of requiring payment at overtime rates for time worked that would not presently attract an overtime penalty. For instance, if a full-time day worker is required to perform work outside their rostered hours, however those hours fall within the span of hours on a Monday - Friday, and they do not exceed the daily maximum number of hours or the weekly maximum (having regarding to the ability to average this under clause 21.1), clause 28.1(a) does not presently define such time worked as overtime. If the Award were varied to achieve the HSU's intent, it would consequently do so and thereby require payment of overtime rates.

389. Whilst the union attempts to suggest that the ordinary hours of work prescribed by the Award and an employee's rostered ordinary hours are the same, it remains our view that these two concepts are not interchangeable. A variation to the Award would not merely 'clarify' the operation of the current provisions. Rather, it would result in a substantive change to the Award derived obligations.

[25] [2014] FWC 3529.

The proposed clause 28.1(e)

390. The proposed subclause (e) would require that "all work beyond 10 hours in a day, whether in a single shift or not, will be overtime and paid as prescribed in clause 28.1(a)".

391. Clause 21.2 stipulates that the shift length or ordinary hours of work per day will be a maximum of 10 hours, exclusive of meal breaks. By virtue of clause 21.5, the hours of work are to be continuous, except for meal breaks. Further, an employee must not be required to work more than one shift in each 24 hours, except for the regular changeover of shifts.

392. Clause 28.1(a), as presently drafted, entitles an employee to overtime rates for hours worked in excess of the maximum number of ordinary hours or shift length set by clause 21.2. The HSU's proposal deviates from this in the following respects:

- It would define "all work beyond 10 hours in a day" as overtime, and require the payment of the rates prescribed by clause 28.1(a). We proceed on the basis that this, in isolation, is intended to capture the position under the current clauses (although we note that the absence of a reference to *ordinary* hours is confusing and potentially problematic). To this extent, the variation proposed is unnecessary. The current terms of the Award are clear and the union has not established that there is any confusion or ambiguity arising from them. We cannot see how the inclusion of the proposed clause in this respect would advance the modern awards objective.

- It would require the payment of overtime where an employee works more than 10 hours in a day, "whether in a single shift or not". If there are circumstances in which an employee is required to work more than 10 ordinary hours in a day, however those hours are separated by a break that is not an unpaid meal break taken in accordance with clause 27.1, they would not currently be entitled to the payment of overtime rates pursuant to clauses 28.1(a) and clause 21.2. The

proposed variation would, however, capture such circumstances. The HSU has not addressed, let alone established, why this change is *necessary* to achieve the modern awards objective.

393. For these reasons, the proposed clause 28.1(e) should not be inserted.

The proposed clause 28.1(f)

394. The proposed clause 28.1(f) is not 'necessary' in the relevant sense. The Award is sufficiently clear as to the circumstances in which, and the employees to whom, overtime rates are payable. The proposed clause should not be included.

Section 138 and the modern awards objective

395. The Commission must be satisfied that the proposed terms are necessary to achieve the modern awards objective. The HSU has not made any attempt to justify its proposals against the considerations arising from s.134(1).

396. Any variation made to the Award which expands the entitlement to overtime rates is not consistent with:

- The need to encourage collective bargaining;
- The need to promote flexible modern work practices and the efficient and productive performance of work;
- The likely impact on business, including productivity, employment costs and the regulatory burden;
- The need to ensure a simple, easy to understand, stable and sustainable modern award system;
- The likely impact on employment growth, inflation and the sustainability and competitiveness of the national economy, to the extent that such matters are impact by the above factors.

Conclusion

397. For the reasons stated above, the HSU's claim should be dismissed.

9.13 The ANMF's Claim to vary Clauses 28.5 and 28.6 – Recall to Work

398. Clauses 28.5 and 28.6 of the Award deal with circumstances in which an employee is recalled to work.

399. Clause 28.5 is in the following terms:

> 28.5 Recall to work when on call
>
> An employee, who is required to be on call and who is recalled to work, will be paid for a minimum of three hours work at the appropriate overtime rate.

400. The ANMF seek to vary clause 28.5 by inserting the text underlined below:

> 28.5 Recall to work when on call
>
> An employee, who is required to be on call and who is recalled to work, will be paid for a minimum of three hours work at the appropriate overtime rate. To avoid doubt, this includes any occasion where the work can be managed without the employee having to return to the workplace, such as by telephone.

401. Similarly, the ANMF also seeks to vary clause 28.6, which currently applies where an employee who is not required to be on call but is recalled to work after leaving the employer's premises:

> 28.6 Recall to work when not on call
>
> (a) An employee who is not required to be on call and who is recalled to work after leaving the employer's premises will be paid for a minimum of three hours work at the appropriate overtime rate. To avoid doubt, this includes any occasion where the work can be managed without the employee having to return to the workplace, such as by telephone.
>
> (b) The time spent travelling to and from the place of duty will be deemed to be time worked. Except that, were an employee is recalled within three hours of their rostered commencement time, and the employee remains at work, only the time spent travelling to work will be included with the actual time worked for the purposes of the overtime payment.

(c) An employee who is recalled to work will not be obliged to work for three hours if the work for which the employee was recalled is completed within a shorter period.

(d) If an employee is recalled to work, the employee will be provided with transport to and from their home or will be refunded the cost of such transport.

402. Ai Group opposes the ANMF's claim.

Interpretation of the current clauses

403. Clause 28.5 of the Award, as presently drafted, does not make explicit whether an employee required to be on call must remain at the workplace, or whether such an employee may be on call at their private residence, as contemplated by clause 16.4, which provides for an on call allowance. Nor does it expressly state that an employee recalled to work must attend the workplace.

404. Clause 28.6, however, clearly applies in circumstances where an employee has left the employer's premises and is required to attend work. Indeed subclause (d) states that "*If* an employee is recalled to work, the employee *will be* provided with transport to and from their home or will be refunded the cost of such transport". It appears to suggest that in all circumstances where an employee is recalled to work when not on call, it will be necessary for that employee to travel to and from their home.

405. Despite this, the ANMF has framed its claim as seeking to "clarify" that the aforementioned clauses apply where an employee is "recalled to perform work remotely", such as by telephone. In its view, the proposed variations "remove doubt" as to whether the clauses apply where an employee is required to perform work without needing to return to the usual workplace.

406. Ai Group does not agree with the ANMF's interpretation of the current clauses. We are concerned that the reference to an employee being 'recalled to work' requires an employee to physically attend the workplace and thus, does not extend to situations in which an employee performs work remotely. The ANMF's characterisation of its claim, as being one that simply purports to

clarify a current entitlement under the Award, is misleading. In our view, it is incumbent upon the ANMF to establish, having regard to text, context and history of the relevant clauses, that they are to be interpreted as contended by the union, and that the variation sought is necessary in the sense contemplated by s.138.

Section 138 and the modern awards objective

407. The ANMF's submissions filed to date do not make any reference to s.138 or the modern awards objective.

408. The proposed clause is contrary to the modern awards objective when regard is had to the following matters:

- The need to encourage collective bargaining;
- The need to promote flexible modern work practices and the efficient and productive performance of work;
- The likely impact on business including on productivity, employment costs and the regulatory burden; and
- The need to ensure a simple, easy to understand, stable and sustainable modern award system.

Conclusion

409. For the reasons stated above, the ANMF's claim should not be granted.

9.14 The HSU's Claim to vary Clause 29.1 – Shift Penalties

The claim

410. The HSU seeks to vary clause 29.1 of the Nurses Award. It submits that the intention of its proposal is to extend the requirement to pay shift penalties to weekends and public holidays.

411. Whilst the union has framed its proposal by reference to the Exposure Draft the submissions that follow are in respect of the current Award. Having regard to clause 29.1, the union proposes the following variations:

29.1 Shift penalties

(a) Where an employee works a rostered afternoon shift on any day ~~between Monday and Friday~~, the employee will be paid an additional ~~a loading of~~ 12.5% of their minimum hourly rate ~~ordinary rate of pay~~ for each hour they work.

(b) Where an employee works a rostered night shift on any day ~~between Monday and Friday~~, the employee will be paid an additional ~~a loading of~~ 15% of their minimum hourly rate ~~ordinary rate of pay~~ for each hour they work.

(c) The provisions of this clause do not apply where an employee commences their ordinary hours of work after 12.00 noon and completes those hours at or before 6.00 pm on that day.

(d) For the purposes of this clause:

(i) Afternoon shift means any shift commencing not earlier than 12.00 noon and finishing after 6.00 pm on the same day; and

(ii) Night shift means any shift commencing on or after 6.00 pm and finishing before 7.30 am on the following day.

~~(e) The shift penalties prescribed in this clause will not apply to shiftwork performed by an employee on Saturday, Sunday or public holiday where the extra payment prescribed by clause 26 – Saturday and Sunday work and clause 32 – Public holidays applies.~~

(f) The provisions of this clause will not apply to Registered nurse levels 4 and 5.

(g) Shift allowances for a casual employee will be added to the casual loading in accordance with clause 10.4(d).

412. The effect of the proposed variations would be as follows:

- Where an employee works a rostered afternoon shift or a rostered night shift on any day of the week, the employee would be entitled to an additional payment as prescribed by clauses 29.1(a) and 29.1(b). The current entitlement, which applies only where an employee works a rostered afternoon or night shift between Monday and Friday, would be extended to also apply where an employee works such shifts at a

time during which the employee would also be entitled to weekend and public holiday penalties prescribed by clauses 26 and 32 respectively.

- The additional payment due to an employee under clauses 29.1(a) and (b) is presently characterised by the text of those subclauses as a 'loading'. The removal of this terminology would mean that that is no longer the case. We assume that the intention behind this variation is to instead characterise the amounts due as a 'penalty', as per the heading to the clause.

- The term 'ordinary rate of pay' would be substituted with 'minimum hourly rate'. We appreciate that this reflects the terminology adopted in the Exposure Draft.

- The loading or penalty payable, however characterised, would be payable 'for each hour worked'. Read in isolation, clauses 29.1(a) and 29.1(b) would suggest that this includes overtime.

- The proposed new subclause would insert a reference to how the additional amount due is to be calculated where a casual employee performs such work. It would require that 'shift allowances for a casual employee will be added to the casual loading in accordance with clause 10.4(d)'. Whilst the current Award does not include such a subclause, we note that it appears at clause 14.2(f) of the Exposure Draft.

413. The HSU makes the following arguments in support of its claim:

- The requirement to pay shift loadings for work performed on weekends is consistent with s.134(1)(da)(iv) of the Act;

- The modern awards objective does not require that only one form of penalty or loading be paid during a certain period of work;

- Shiftwork is detrimental to an employee's health. That detriment is suffered irrespective of whether the work is performed on a weekday or weekend;

- Weekend penalty rates and shift loadings compensate an employee for two different matters. One cannot be substituted with the other; and

- The payment of shift loadings in addition to weekend or public holiday penalty rates was a feature of many pre-modern awards, some modern awards and many enterprise agreements.

414. Ai Group opposes the various elements of the HSU's claim for the reasons that follow.

The payment of the shift loading during overtime

415. Whilst not found in the current Award terms, the HSU's proposal would require the additional shift loading be paid 'for each hour [the employee] works'. It is not clear whether the intention is to extend the entitlement to the shift loadings to the performance of overtime.

416. Should that be the case, we refer the Commission to clause 28.1(c), which states:

> (c) Overtime rates under this clause will be in substitution for and not cumulative upon the shift and weekend premiums prescribed in clause 26 – Saturday and Sunday work and clause 29 – Shiftwork.

417. The effect of this provision is that where an employee performs work for which they are to be paid overtime rates, such rates are payable in lieu of any shift loadings prescribed by clause 29. In our view, the insertion of the words 'for each hour they work' in clauses 29.1(a) and 29.1(b) is likely to give rise to confusion. If the union intends to require the payment of shift loadings during overtime, the proposed amendment, when read with clause 28.1(c), would only serve to create a tension between the relevant provisions.

418. On this basis, it is our submission that the words 'for each they work' should not be included.

The payment of the shift loading to casual employees

419. Clause 10.4(d) of the Award explains the methodology by which the amount payable to an employee who works an afternoon or night shift is to be calculated:

> (d) A casual employee will be paid shift allowances calculated on the ordinary rate of pay excluding the casual loading with the casual loading component then added to the penalty rate of pay.

420. That clause stipulates that the casual loading is applied to a rate that includes the relevant shift loading (albeit referred to as an 'allowance'). Despite this, the HSU has proposed the insertion of a new subclause under clause 29 which states that: (emphasis added)

> Shift allowances for a casual employee will be <u>added to the casual loading</u> in accordance with clause 10.4(d).

421. The proposed clause suggests the inverse of what is found at clause 10.4(d). That is, it contemplates the calculation of the shift allowance on a rate that incorporates the casual loading. When read with clause 10.4(d), this is likely to give rise to an ambiguity.

422. On this basis, it is our submission that the proposed clause 29.1(g) should not be inserted. The clause is not necessary. Clause 10.4(d) adequately deals with the payment of the shift loading to casual employees.

423. If, in the alternate, the Commission determines that the clause should be included, it our submission that it should take the form found at clause 14.2(f) of the Exposure Draft, which is consistent with clause 10.4(d) of the Award and clause 6.4(d) of the Exposure Draft.

Section 138 and the modern awards objective

424. In order to adopt the variations proposed by the HSU, the Commission must be satisfied that the proposed clauses are necessary to ensure that the Award, together with the National Employment Standards, provides a fair and relevant

minimum safety net of terms and conditions, taking into account each of the matters listed at ss.134(1)(a) – (h).

425. We note also the following observations made by the Commission in its Preliminary Issues Decision:

> [33] There is a degree of tension between some of the s.134(1) considerations. The Commission's task is to balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions. The need to balance the competing considerations in s.134(1) and the diversity in the characteristics of the employers and employees covered by different modern awards means that the application of the modern awards objective may result in different outcomes between different modern awards.
>
> [34] Given the broadly expressed nature of the modern awards objective and the range of considerations which the Commission must take into account there may be *no one set* of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the modern awards objective.

426. These comments are relevant to the HSU's assertions that the payment of shift loadings in addition to weekend and public holiday penalty rates is found in other awards. Clearly such an entitlement in other awards is not common but its incidence in other awards cannot justify a change to the Nurses Award. The terms and conditions found in an award represent a carefully struck balance of employee benefits and employer obligations that should not be disturbed by simply pointing to other modern awards that contain entitlements that are similar in nature to those sought by the proponent for a change. Rather, there must be a proper basis upon which the claim can be granted, including submissions and probative evidence that compel the Commission to decide that the proposed term is one that is necessary in the sense contemplated by s.138. That a handful of other awards might contain a similar entitlement does not meet this threshold.

427. It should also be borne in mind that the Commission has determined that the Review is to proceed on the basis that modern awards achieved the modern awards objective when they were made. When the Nurses Award was made, it contained the very provisions that are the source of controversy in these proceedings. Therefore, it is for the HSU to establish that a departure from the

decision of the AIRC to make the Award in its current terms is necessary to ensure that the Award continues to achieve the modern awards objective.

Section 134(1)(a) – Relative living standards and the needs of the low paid

428. The HSU has not put forward any justification for the proposed variation with reference to the relative living standards and needs of the low paid. In our view, this is an argument that would not be open to it, as the claim is not confined in its effect to those who would be considered 'low paid', nor has it foreshadowed any evidence that might establish that the current Award provisions are failing to protect the relative living standards and needs of the low paid.

Section 134(1)(b) - The need to encourage collective bargaining

429. The HSU's submissions suggest that many enterprise agreements require the payment of shift loadings in addition to weekend and public holiday penalty rates. If this is true it indicates that the Award is presently encouraging collective bargaining.

430. The current provisions leave greater room for bargaining and may incentivise employers and employees to negotiate a higher rate. The insertion of the penalty rates proposed by the HSU would only serve to raise the minimum safety net, thus limiting the scope of matters that might otherwise encourage an employer and its employees to participate in the process of collective bargaining.

431. The significance of this element of the modern awards objective is reinforced by s.3(f) of the Act, which emphasises the importance of enterprise bargaining.

Section 134(1)(c) - The need to promote social inclusion through increased workforce participation

432. The HSU's outline of submissions does not suggest that the proposed amendment will result in increased social inclusion or that the current Award

clauses are impacting upon workforce participation. It appears that this is a neutral consideration in this matter.

Section 134(1)(d) - The need to promote flexible modern work practices and the efficient and productive performance of work

433. To the extent that the variation proposed by the HSU discourages employers from engaging shiftworkers to perform work on weekends or public holidays, the variation proposed is contrary to s.134(1)(d).

Section 134(1)(da)(iv) - The need to provide additional remuneration for employees working shifts

434. The HSU appears to place significant weight on s.134(1)(iv) of the Act. It is important to have regard to the text of this provision. It requires that the Commission take into account "the need to provide additional remuneration for … employees working shifts". It says nothing about the quantum of that additional remuneration. Nor does it mandate that an award *must* provide additional remuneration for employees working shifts. Rather, it simply requires that the Commission *take into account* the need to provide *additional remuneration* where an employee performs such work.

435. In our view, the Commission can be satisfied that, by virtue of clauses 29.1(a), 29.1(b), 26 and 32.1, the Award already provides additional remuneration for employees working shifts. This is achieved through the application of various penalties and loadings prescribed by the Award. Where an employee works an afternoon or night shift, that employee is entitled to additional remuneration. The quantum of that additional remuneration is determined according to the day of the week upon which the work falls.

436. In any event, as stated by the Commission in its Preliminary Jurisdictional Issues Decision which we have earlier cited, no one factor arising from s.134(1) is to be given particular primary. Each of the matters arising under s.134(1) are to be treated as issues of significance, which should be given due consideration and weight.

437. For these reasons, it is not sufficient for the HSU to rest its case entirely on the basis of s.134(1)(da). Although the Commission may form the view that considerations arising from this subsection alone lend support for the HSU's claims, this is not determinative. Equal consideration should be given to matters arising under each of the other limbs of s.134(1), which we have here addressed.

Section 134(1)(e) - The principle of equal remuneration for work of equal or comparable value

438. This is a neutral consideration in this matter.

Section 134(1)(f) - The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden

439. The impact of the variation proposed on employment costs and business is self-evident. It would clearly impose a significant additional employment cost. To the extent that it discourages employers from rostering such shifts, the impact of the variation may instead be felt by way of a reduction in productivity. Either result cannot be reconciled with s.134(1)(f).

440. We note of course, that the need to have regard to the impact of any variation on small and medium enterprises is particularly pertinent and reinforced by s.3(g) of the Act.

Section 134(1)(g) - The need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards

441. The need for a stable system tells against varying awards in the absence of a proper evidentiary and merit based case which establishes that the proposed provision is necessary, in the sense contemplated by s.138. This is particularly relevant in circumstances where the provision is question has operated in the industry since the modern award was made. To now introduce additional costs without there being any evidence that the Award does not

presently provide a fair and relevant minimum safety net, is contrary to s.134(1)(g).

Section 134(1)(h) – The likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy

442. To the extent that the matters arising from ss.134(1)(b), (d), (f) and (g) adversely impact employment growth, inflation and the sustainability, performance competitiveness of the national economy, the HSU's claim conflicts also conflicts with s.134(1)(h).

Conclusion

443. For all the reasons stated above, the HSU's claim should be dismissed.

9.15 The HSU's Claim to vary Clause 33 – Ceremonial Leave

444. The HSU has proposed that clause 33 of the Award (found at clause 19 of the Exposure Draft) be varied as follows:

> 33. Ceremonial leave
>
> An employee who is legitimately required by Aboriginal or Torres Strait Islander tradition to be absent from work for ~~Aboriginal~~ ceremonial purposes will be entitled to up to ten working days unpaid leave in any one year, with the approval of the employer.

445. Ai Group does not oppose the variation sought.

10. PASSENGER VEHICLE TRANSPORTATION AWARD 2010

446. The following submissions relate to the *Exposure Draft – Passenger Vehicle Transportation Award 2014*. They are made in response to submissions filed by:

- The Transport Workers' Union (TWU), dated 20 July 2015; and

- The Australian Public Transport Industry Association (APTIA), dated 15 July 2015.

10.1 Exposure Draft – Passenger Vehicle Transportation Award 2014

Clauses 6.4(e), (f) and (h) – Types of employment – Part-time employment

447. We note that the TWU agrees with our earlier submissions regarding clauses 6.4(e), (f) and (h). Accordingly the cross-references contained in those clauses should be amended to read 'clauses 6.4(b)(i) – (iii)'.

Clause 6.5(e) – Types of employment – Casual employment

448. APTIA has suggested a list of clauses to be inserted at clause 6.5(e) of the Exposure Draft, however in accordance with the Commission's decision of December 2014[26], the provision should be deleted.

Clause 8.1(a) – Ordinary hours of work and rostering – Ordinary hours and roster cycles

449. APTIA's submission regarding clause 8.1(a) of the Exposure Draft is consistent with our position; that the clause should not be confined in its application to full-time employees.[27]

Clause 10.1 – Minimum wages

450. We do not agree with APTIA's submissions that the headings contained in the table at clause 10.1 should be amended. The variation proposed is unnecessary as the table makes it sufficiently clear that the rates in the first two columns apply to full-time and part-time employees. Further, the current headings are consistent with the approach adopted by the Commission in other Exposure Drafts.

[26] [2014] FWCFB 9412 at [69].

[27] See Ai Group's submissions dated 4 February 2015 at paragraph 6.7.

Clause 13.2 – Penalty rates – Employees on two-driver operations

451. We note that the TWU no longer presses its submissions regarding the above clause.

11. RACING INDUSTRY GROUND MAINTENANCE AWARD 2010

452. The following submissions relate to the *Exposure Draft – Racing Industry Ground Maintenance Award 2014* (Exposure Draft). They are made in response to submissions filed by:

- The Australian Workers' Union, dated 15 July 2015; and
- Business SA, dated 15 July 2015.

11.1 Exposure Draft – Racing Industry Ground Maintenance Award 2014

Rates of Pay

453. The AWU, at paragraphs 7 – 12, has made submissions regarding the articulation of rates of pay in various clauses of the Exposure Draft. We do not agree with the AWU's characterisation of the Commission's recent decision in this regard, nor do we accept that the clauses listed should be amended as proposed.

454. It is our understanding that the Commission will publish revised Exposure Drafts that give effect to its decision in due course.[28] Ai Group requests that parties be given an opportunity to review such Exposure Drafts and make comment regarding the terminology adopted in specific clauses, having regard to the Commission's decision. Of particular relevance is paragraph [47] where the Commission stated: (emphasis added)

[28] [2015] FWCFB 4658 at [97].

> **[47]** We are not persuaded to depart from established practice in relation to the operation of all purpose payments and how they interact with an employee's rate of pay. Definitions of 'all purpose' and 'ordinary hourly rate of pay' will be inserted into all affected awards based on the wording in paragraphs [35] and [91]. Any issues as to whether a particular payment is payable for all purposes, and, in particular, whether an allowance should be added to a minimum rate before calculating a penalty or loading, will be dealt with on an award-by-award basis. Ultimately the resolution of these issues will turn on the construction of the relevant award and the context in which it was made.

Clause 14.1(a) – Overtime

455. We note that the AWU does not oppose Ai Group's proposal that clause 14.1(a) be amended such that it applies "to all time worked in excess of 38 ordinary hours a week".

12. ROAD TRANSPORT (LONG DISTANCE OPERATIONS) AWARD 2010

456. The following submissions relate to the *Exposure Draft – Road Transport (Long Distance Award 2014*. They are made in response to submissions filed by the TWU dated 22 July 2015.

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

Clause 8.5(e) – Ordinary hours of work and rostering - RDOs

457. The TWU has made further submissions in response to a question contained in the Exposure Draft regarding the payment to be made to an employee for an RDO.

458. In addition to the submissions we have earlier made,[29] we oppose the TWU's assertion that the disability allowance is payable during an RDO. The union states that the allowance "is equivalent to an all purpose allowance as defined in the Full Bench decision in relation to ordinary hourly rates of pay". The Commission has there decided the terms of the definition of 'all purposes',

[29] See Ai Group's submissions dated 4 March 2015 at paragraphs 77 – 79.

which is to be inserted in awards that presently contain an all purpose allowance.[30] Whether a particular allowance is payable for 'all purposes' is to be determined by having regard to the terms of the current award. As stated in the decision:

> [36] The identification of a particular allowance or loading as being for all purposes in the exposure drafts is intended to reflect the existing position in each of the current modern awards.[31]

459. The TWU has not established that the existing provision (clause 14.1(a)) requires that the allowance be paid for all purposes. Rather, it simply states that the rates per kilometre, as prescribed by the Award, are calculated to incorporate a 30% industry disability allowance, which compensates an employee for the factors listed at clauses 14.1(a)(i) – (xi). We cannot see any basis upon which it can be concluded that the text of the current clause suggests that the allowance is payable for 'all purposes'. We note of course that the Exposure Draft does not presently contain the aforementioned definition because, in drafting the Exposure Draft, the Commission has identified (correctly, in our view) that the Award does not contain any all purpose allowances.

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

460. In our submissions of 4 March 2014,[32] we argued that the TWU's proposal[33] regarding clause 8.7 of the Exposure Draft would amount to a substantive change. We note that the TWU no longer presses the relevant part of its original submission.

Clause 9.2 – Unpaid meal breaks

461. We refer to paragraph 85 of our 4 March 2015 submissions in response to the TWU's submission that the reference to "Commonwealth, State or Territory Acts" should be reinstated. When regard is had to the definition of that term in

[30] [2015] FWCFB 4658 at [35].

[31] [2015] FWCFB 4658 at [36].

[32] See Ai Group's submission dated 4 March 2015 at paragraph 83.

[33] See TWU's submission dated 4 February 2015 at paragraph 8.

Schedule H of the Exposure Draft, we are of the view that the clause does not alter the substance of the current provision.

13. ROAD TRANSPORT AND DISTRIBUTION AWARD 2010

462. The following submissions relate to the *Exposure Draft – Road Transport and Distribution Award 2014*. They are made in response to submissions filed by the TWU dated 22 July 2015.

13.1 Exposure Draft – Road Transport and Distribution Award 2014

Clause 3.2(h) – Coverage

463. Ai Group acknowledges that the wording of the clause seems odd. However, it appears that the clause is only intended to capture dairy products. It may be that the reference to fruit juice was intended to capture products that were made from both milk and fruit juice, but not products derived only from fruit juice.

464. The TWU proposal would potentially broaden the scope of clause 3.2(h). Ai Group suggests that the current wording should be retained in order to avoid any unintended consequences of varying the wording.

465. No party has suggested that the matter has ever created any problem.

Clauses 9.5 and 9.6 – Ordinary hours of work and roster cycles – oil distribution workers

466. We do not oppose the TWU's proposal that clauses 9.5 and 9.6 be amalgamated on the basis that this is consistent with clause 23.4 of the current Award.

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

467. Ai Group does not agree with the TWU's proposal that the words "as soon as possible" in the Exposure Draft be replaced with "immediately". It is difficult to

understand why an award should require that something occur sooner than is possible.

Clause 17.3 – Overtime

468. Ai Group does not oppose the TWU's proposal that clause 17.3 be deleted, as this is consistent with the terms of the current Award.

Clause 17.5(c)(ii) – Overtime – Rest period after overtime

469. Ai Group does not oppose the TWU's proposal to amend clause 17.5(c)(ii) of the Exposure Draft.[34] We note that it addresses the concern raised by Ai Group at paragraphs 109 – 110 of our submissions dated 11 February 2015.

14. SEAFOOD PROCESSING AWARD 2010

470. The following submissions relate to the *Exposure Draft – Seafood Processing Award 2014* (Exposure Draft) and substantive claims made to vary the *Seafood Processing Award 2010* (Seafood Processing Award). They are made in response to submissions filed by:

- The Australia Manufacturing Workers' Union (AMWU), dated 21 July 2015 and
- The Australian Workers' Union (AWU), dated 15 July 2015.

14.1 Exposure Draft – Seafood Processing Award 2014

Clause 3.3 – Coverage

471. The AMWU has made further submissions in support of its proposed variation to clause 3.3 of the Exposure Draft. We note that the change sought is not one that has arisen from the drafting of the Exposure Draft. Rather, the AMWU says is necessary in order to "clarify" the coverage of the Seafood Processing Award. It makes reference to a concern raised by the FWO with the AMWU, without providing any specifics as to what that concern might be.

[34] See TWU's submissions dated 4 February 2015 at paragraph 13 – 14.

We note that the FWO filed correspondence with the Commission on 24 November 2014 regarding issues it had identified in various Group 2 Awards. That correspondence does not include any reference to the Seafood Processing Award.

472. Ai Group remains opposed to the proposed change. Our reasons are as set out at paragraphs 107 – 109 of our submissions dated 4 March 2015. In the absence of any convincing explanation as to the alleged confusion that has arisen from the current award terms, we are of the view that inclusion of the proposed example is not 'necessary' to achieve the modern awards objective. We are concerned that the proposed variation might result in a substantive variation to the Award.

Clause 5.2 – Facilitative Provisions

473. As foreshadowed by the AWU at paragraph 7 of its submissions, the joint document filed by Business SA on 21 July 2015 clarifies that the additional reference sought to clause 8.6(d) in clause 5.2 of the Exposure Draft should state that it requires agreement between the employer and "the majority of employees".

Clause 8.2(a) – Ordinary hours of work and rostering – Ordinary hours of work – day workers

474. The AMWU and AWU have provided their response to Ai Group's proposal that clause 8.2(a) of the Exposure Draft be amended by inserting the words "up to". Whilst we appreciate the concern identified by the unions, we are of the view that clause 6.2(b) cures the issue identified as it states that a full-time employee works an average of 38 ordinary hours per week. The Award would not contain "two contradictory explanations of full time hours", as alleged by the AMWU. Rather, clause 6.2(b) would impose a requirement as to the number of ordinary hours to be worked by a full-time employee, whilst clause 8.2(a) would set the parameters around the maximum number of ordinary hours that may be worked by an employee covered by the Award, engaged as a full-time, part-time or casual.

475. We note the AWU's alternate proposal at paragraph 12 of its submissions, but remain of the view that compliance with s.147 of the Act with respect to casual employees is best achieved by the variation we have proposed, whilst ensuring that there is no unintended substantive change to the operation of the current clause.

Clause 11.4 – Allowances – Extra Rates not Cumulative

476. The AMWU seeks the deletion of clause 11.4 of the Exposure Draft based on the assertion that it "*may* create confusion and result in underpayment". We note that despite the fact that the AMWU is here seeking a substantive variation to the Award, it has not brought any evidence that might establish that the clause has given rise to any confusion or lead to underpayments. Its assertion is merely speculative. We are not aware of the clause creating any difficulties in either this Award, or the many others that contain the same or a similar provision.

477. Ai Group continues to rely upon its earlier submissions opposing the AMWU's proposal.[35]

Clause 13.1(c) – Penalties and shiftwork – Saturday and Sunday work – day worker

478. In respect of clause 13.1(c) of the Exposure Draft, we make the following submissions with reference to the AWU's submission at paragraph 14:

- The comparative document between the Exposure Draft and the Award, as published by the Commission, refers to clause 8.2(f) however the Exposure Draft itself contains a reference to clause 8.2(d). We agree with the AWU; the correct reference is clause 8.2(f).

- Additionally, the opening words of clause 13.1(c) should be amended as clause 8.2(f) does not deal with changing the *spread* of hours. Consistent with the current clause 23.2(f), the clause should be

[35] See Ai Group's submissions date d 4 March 2015 at paragraph 122.

amended to read: "Where agreement is reached in accordance with clause 8.2(f) …".[36]

Clause 14.3(a) and (b) – Overtime – Rest period after overtime

479. Ai Group acknowledges that the AWU no longer seeks to vary clause 14.3 of the Exposure Draft such that it does not contain an exclusion of casual employees. This is consistent with our earlier submission of 4 March 2015 at paragraph 128.

480. Nonetheless, the variations now sought remains opposed by Ai Group. In particular, its proposal to vary clause 14.3(a) by substituting the words "between the work of successive working days" with "after finishing the overtime" amounts to a substantive change to the Award and therefore, should not be adopted. Similarly the proposed removal of the reference to the commencement of ordinary hours "on the next day" in clause 14.3(b) is also opposed. We refer to our submissions of 4 March 2015 at paragraphs 129 – 130 in this regard.

Clause 14.6(b) – Overtime – Public holiday work

481. We note that in response to Ai Group's submissions of 4 March 2015 at paragraph 131, the AWU no longer seeks a variation to cluse 14.6(b) of the Exposure Draft.

Clause 14.7(c) – Overtime – Paid rest break

482. The AWU has made submissions regarding the reference to the 'minimum hourly rate' in clause 14.7(c). We note that the Commission recently published its decision regarding the articulation of rates of pay generally and has indicated that the Exposure Drafts will be republished in order to give effect to its decision. Ai Group respectfully requests that parties be given an opportunity to review the relevant Exposure Draft and provide any comment regarding the terminology adopted in specific clauses once published.

[36] See Ai Group's submissions of 4 March 2015 at paragraph 123.

Schedule A.1.3 – Summary of Hourly Rates of Pay – Full-time and part-time employees – Full-time and part-time shiftworkers – penalty rates

483. We do not oppose the amendment proposed by the AWU to the current heading of the third column in Schedule A.1.3, such that it reads "non-successive shifts". If adopted, the heading to clause 13.5(b) should also be amended.

Schedule A.1.3 Summary of Hourly Rates of Pay – Full-time and part-time employees – Full-time and part-time shiftworkers – penalty rates

484. Ai Group agrees with the AWU's submission that Schedule A.1.3 should be amended to include an additional column that contains the rate payable to shiftworkers on Saturdays, as per clause 13.6 of the Exposure Draft. We refer to paragraph 163 of our 28 January 2015 submissions in this regard.

485. Ai Group requests that parties be given an opportunity to the review the rates, (if published) and make submissions regarding their accuracy.

Schedule A.1.4 - Summary of Hourly Rates of Pay – Full-time and part-time employees – Full-time and part-time shiftworkers – penalty rates

486. We do not oppose the insertion of overtime rates for Sundays and public holidays in Schedule A.1.4, as proposed by the AWU. We refer to paragraph 140 of our submissions dated 4 March 2015 in this regard.

487. Ai Group requests that parties be given an opportunity to the review the rates, (if published) and make submissions regarding their accuracy.

14.2 The AMWU's claim to vary Clause 23.2(c) – Ordinary hours of work – day workers

The claim

488. Clause 23.2 of the Seafood Processing Award deals with the ordinary hours of work for day workers. Clause 23.2(a) states that, subject to clause 23.5 (to which we later return), the ordinary hours of work for a day worker are an

average of 38 per week. Subclause (b) then stipulates the days on which those ordinary hours may be worked.

489. Clause 23.2(c) is the subject of the AMWU's claim. It is in the following terms:

> (c) The ordinary hours of work are to be worked continuously, except for meal breaks, at the discretion of the employer between 6.00 am and 6.00 pm. The spread of hours (6.00 am to 6.00 pm) may be altered by up to one hour at either end of the spread, by agreement between an employer and the majority of the employees concerned or, in appropriate circumstances, between the employer and an individual employee.

490. Subclause (c) is facilitative in nature. It enables an employer to reach agreement with an individual employee or the majority of employees concerned to alter the spread of hours. It sets only one parameter around the extent to which the spread may be varied: *by up to one hour at either end*. That is, the Award enables a variation to the spread so as to extend it or confine it by up to one hour at either end, subject to agreement. That agreement may be reached with an individual employee, such that the ordinary hours worked by that particular employee are to fall within the spread as varied. Alternatively, an agreement may be reached with the majority of 'employees concerned', after which the employer may implement the agreed variation to the spread as it applies to that group of employees.

491. Subclauses (d) – (g) then go on to deal with the requirement to pay overtime and penalty rates. We need not detail those provisions for the purposes of these submissions.

492. The AMWU had not, as such, identified that it seeks a variation to clause 23.2(c) in accordance with the Commission's statement of 30 October 2014.[37] Rather, the AMWU submitted, in response to the Exposure Draft, that clause 8.2(c) (which corresponds with the second sentence in clause 23.2(c)) should be varied as follows:

> (c) The spread of hours may be altered by up to one hour at either end of the spread <u>but may not be altered to increase the spread of hours beyond 12 hours a day</u>, by agreement between an employer and the majority of

[37] [2014] FWC 7743.

> employees concerned or, in appropriate circumstances, between the employer and an individual employee.[38]

493. Ai Group strongly opposes the variation proposed.

494. The AMWU submits that the clause should be varied as proposed "to highlight that while the spread of hours can be changed its duration cannot". Its proposal appears to be premised on the basis that if the Exposure Draft were amended as proposed, the effect of the provision, as presently drafted, would remain unaltered. As we have identified in our earlier submissions regarding the Exposure Draft,[39] this is not the case. We therefore concur with the union's characterisation of its proposal in its submissions of 21 July 2015, as being a substantive one.[40]

495. We note that the AMWU points to a claim it has made to vary the *Hydrocarbons Industry (Upstream) Award 2010* (Hydrocarbons Award). Ai Group has filed submissions in opposition, dated 22 May 2015. Whilst the matter there is raised is not dissimilar in nature, there are certain subtleties arising from the drafting of the relevant provisions in that award as well as the intent of the proposal there made, which differ from what is here before the Commission.

496. The AMWU proposes that consideration of its claim in respect of the Seafood Processing Award be deferred until the Commission issues its decision with respect to the Hydrocarbons Award. If the Commission was so minded, Ai Group would not oppose such a course of action.

497. Whilst the AMWU has not yet filed written submissions in support of the variation it seeks, we propose to here deal with certain relevant considerations arising from its claim.

[38] See AMWU's submissions dated 28 January 2015 at paragraph 3.

[39] See Ai Group's submissions dated 4 March 2015 at paragraph 114.

[40] See AMWU's submissions dated 21 July 2015 at paragraph 4.

The current Award terms

498. The AMWU seeks to vary clause 23.2(c) of the Award and clause 8.2(c) of the Exposure Draft so as to "clarify" that the duration of the spread of hours cannot be altered. That is, that the spread of hours must be not more than 12 hours.

499. Any suggestion that the current Award terms mandate that the spread must not extend beyond 12 hours is erroneous. We can see no requirement in the Award, either express or implied, that the duration of the spread must be not more than 12 hours.

500. The plain and ordinary meaning of clause 23.2(c) (and consequentially, clause 8.2(c) of the Exposure Draft) is clear:

- Ordinary hours of work are to be worked within the spread of hours. They are to be worked continuously, except for meal breaks, at the discretion of the employer.
- The spread of hours is 6.00 am to 6.00 pm.
- The spread of hours may be altered by up to one hour at either end of the spread, by agreement. This enables a variation by one hour or less, at the commencement of the spread, the conclusion of the spread or both.
- The clause makes no references to the *duration* of the spread. That is, there is no requirement that the spread be 12 hours in length. Indeed if it were agreed, then clause 23.2(c) would enable the spread to be varied such that the spread is:
    - 10 hours in duration (7.00 am to 5.00 pm);
    - 11 hours in duration (for example, 7.00 am to 6.00 pm);
    - 12.5 hours in duration (for example, 6.00 am to 6.30 pm); or

- 14 hours in duration (5.00 am to 7.00 pm).

501. The AMWU's interpretation would significantly restrict a current flexibility that is available under the Award, which would be disadvantageous to both employers and employees.

502. We raise one additional matter that we believe fundamentally undermines the AMWU's proposal.

503. Clause 23.5 of the Award deals with the arrangement of ordinary working hours. In essence, an employer has the right to fix the daily hours of work for day workers within the spread stipulated, and the commencing and finishing times of shifts from time to time. Clauses 23.5(a) and (b) then state that, subject to the aforementioned discretion, the arrangement of ordinary working hours must be by agreement between the employer and majority of employees in the enterprise or part of the enterprise concerned. This does not, however, preclude an employer from reach agreement with individual employees about how their working hours are to be arranged. As an example of one of the matters on which agreement may be reached, clause 23.5(b)(viii) refers to "any arrangements of ordinary hours that exceed eight hours in any day but not exceeding 12 hours in a day or shift".

504. Despite the limitation contained in clause 23.5(b)(iii), the implementation of days or shifts that are 12 ordinary hours in length is expressly contemplated by clause 23.5(c). It sets out various conditions that must be met in order for such days or shifts to be introduced. By virtue of clause 25.1, an employee working 12 ordinary hours would be entitled to at least one meal break.

505. An employee cannot work a 12 ordinary hour day within a spread that does not exceed 12 hours in circumstances where that employee must also take a meal break that does not count as time worked. If the AMWU's interpretation is correct, a day worker cannot work 12 ordinary hours in a day and to that extent, clause 23.5(c) has no work to do. If the spread were restricted to 12 hours, it is inevitable that part of the employee's "ordinary hours" would fall outside the spread.

506. There is therefore a clear tension between the AMWU's proposal and the operation of clause 23.5(c). This suggests that clause 23.2(c), as presently drafted, should not be interpreted as suggested by the AMWU. It would run contrary to the clear intention of clause 23.5(c), which enables the introduction of 12 ordinary hour days. In fact, clause 23.5(c) supports our contentions as to the proper interpretation of the clause. It enables an employer to stagger working days of up to 12 ordinary hours in length for different employees over a possible spread of 14 hours. This flexibility is essential to business operations in the industry and needs to be maintained.

The modern awards objective

507. In order to adopt the variation proposed by the AMWU, the Commission must be satisfied that the proposed clause is necessary to ensure that the Award, together with the NES, provides a fair and relevant minimum safety net of terms and conditions, taking into account each of the matters listed at ss.134(1)(a) – (h).

508. It should also be borne in mind that the Commission has determined that the Review is to proceed on the basis that modern awards achieved the modern awards objective when they were made. When the Seafood Processing Award was made, it contained the very provision that is the source of controversy in these proceedings. Therefore, it is for the AMWU to establish that a departure from the decision of the AIRC to make the Award in its current terms is necessary to ensure that the Award continues to achieve the modern awards objective.

509. The proposed amendment would run contrary to the following considerations arising from s.134(1):

- the need to encourage collective bargaining;
- the need to promote flexible modern work practices and the efficient and productive performance of work;

- the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

- the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards.

Conclusion

510. For the reasons stated above, the AMWU's claim should be dismissed.

14.3 The AMWU's claim to vary Clause 24.2 – Special provisions for shiftworkers

The claim

511. Clause 24 of the Seafood Processing Award deals with special provisions for shiftworkers. Clause 24.1 defines an 'afternoon shift' and 'night shift' as follows:

- 'afternoon shift' means any shift finishing after 6.00 pm and at or before midnight; and

- 'night shift' means any shift finishing after midnight and at or before 8.00 am.

512. Clause 24.2 is the subject of the AMWU's claim. It is in the following terms:

> 24.2 By agreement between the employer and the majority of employees concerned or in appropriate cases an individual employee, the span of hours over which shifts may be worked may be altered by up to one hour at either end of the span.

513. Clause 24.2 is facilitative in nature. It enables an employer to reach agreement with an individual employee or the majority of employees concerned to alter the span of hours over which shifts may be worked. It sets only one parameter around the extent to which the span may be varied: *by up*

to one hour at either end. That is, the Award enables a variation to the span so as to extend it or confine it by up to one hour at either end, subject to agreement. That agreement may be reached with an individual employee, such that the shift worked by that particular employee is to fall within the span as varied. Alternatively, an agreement may be reached with the majority of 'employees concerned', after which the employer may implement the agreed variation to the span as it applies to that group of employees.

514. The AMWU had not, as such, identified that it seeks a variation to clause 24.2 in accordance with the Commission's statement of 30 October 2014.[41] Rather, the AMWU submitted, in response to the Exposure Draft, that clause 13.4 (which corresponds with the second sentence in clause 24.2) should be varied as follows:

> 13.4 By agreement between the employer and the majority of employees concerned or in appropriate cases an individual employee, the span of hours over which shifts may be worked may be altered by up to one hour at either end of the span <u>but not both</u>.[42]

515. Ai Group strongly opposes the variation proposed.

516. The AMWU submits that the clause should be varied "to highlight that while the spread of hours can be changed its duration cannot". Its proposal appears to be premised on the basis that if the Exposure Draft were amended as proposed, the effect of the provision, as presently drafted, would remain unaltered. As we have identified in our earlier submissions regarding the Exposure Draft[43], this is not the case. We therefore concur with the union's characterisation of its proposal in its submissions of 21 July 2015, as being a substantive one.[44]

517. We note that the AMWU points to a claim it has made to vary the *Hydrocarbons Industry (Upstream) Award 2010* (Hydrocarbons Award). Ai Group has filed submissions in opposition, dated 22 May 2015. In our view,

[41] [2014] FWC 7743.

[42] See AMWU's submissions dated 28 January 2015 at paragraph 3.

[43] See Ai Group's submissions dated 4 March 2015 at paragraph 124.

[44] See AMWU's submissions dated 21 July 2015 at paragraph 4.

the matters there raised for consideration differ from the claim that is now before the Commission.

518. The AMWU proposes that consideration of its claim in respect of the Seafood Processing Award be deferred until the Commission issues its decision with respect to the Hydrocarbons Award. If the Commission was so minded, Ai Group would not oppose such a course of action.

Section 138 and the modern awards objective

519. Whilst the AMWU has not yet filed written submissions in support of the variation it seeks, we note that it must mount a merit case that enables the Commission to find that the proposed clause is necessary to ensure that the Award, together with the NES, provides a fair and relevant minimum safety net of terms and conditions, taking into account each of the matters listed at ss.134(1)(a) – (h).

520. It should also be borne in mind that the Commission has determined that the Review is to proceed on the basis that modern awards achieved the modern awards objective when they were made. When the Seafood Processing Award was made, it contained the very provision that is the source of controversy in these proceedings. Therefore, it is for the AMWU to establish that a departure from the decision of the AIRC to make the Award in its current terms is necessary to ensure that the Award continues to achieve the modern awards objective.

521. We note that the proposed amendment would run contrary to the following considerations arising from s.134(1):

- the need to encourage collective bargaining;
- the need to promote flexible modern work practices and the efficient and productive performance of work;

- the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

- the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards.

Conclusion

522. For the reasons stated above, the AMWU's claim should be dismissed.

15. STORAGE SERVICES AND WHOLESALE AWARD 2010

523. The following submissions relate to the *Exposure Draft – Storage Services and Wholesale Award 2014* (Exposure Draft) and substantive claims made to vary the *Storage Services and Wholesale Award 2010*. They are made in response to submissions filed by:

- The Australian Workers' Union (AWU), dated 15 July 2015;

- The Shop, Distributive and Allied Employees Association (SDA), dated 15 July 2015; and

- Business SA, dated 15 July 2015.

15.1 Exposure Draft – Storage Services and Wholesale Award 2014

Clause 6.4(c)(i) – Types of employment – Casual employment – Casual loading

524. The AWU's submissions at paragraphs 1 – 4 are, in essence, the same as those they have earlier made.[45] As per our submissions of 4 March 2015, at paragraph 156, we do not oppose the reinstatement of the word "ordinary" as proposed by the AWU.

[45] See AWU's submissions dated 28 January 2015 at paragraph 3.

Clause 8.2 – Hours of work – Spread of hours

525. We do not agree with the SDA or AWU's interpretation of clause 8.2 of the Exposure Draft or the amendment that the AWU has earlier proposed. We refer to our submissions of 4 March 2015 at paragraphs 159 – 160 in this regard.

526. Should either union seek to pursue an amendment to this clause which would restrict the current flexibility it affords, this would amount to a substantive change. In such circumstances, parties should be given an opportunity to file detailed submissions and call evidence such that the Commission is able to determine whether any proposed provision is 'necessary' in order to achieve the modern awards objective.

Clause 8.2 – Hours of work – Spread of hours

527. Ai Group does not oppose the amendment proposed by Business SA to the heading of clause 8.2.[46]

Clause 10.1 – Minimum wages – Minimum wage rates

528. As stated at paragraph 167 of our 4 March 2015 submissions, we do not oppose the proposed deletion of the words "full-time" from the preamble contained in clause 10.1 of the Exposure Draft.

Clause 10.2 – Minimum wages – Juniors

529. We agree with the SDA that clause 10.2 of the Exposure Draft requires amendment. We refer to paragraphs 186 – 188 of our submissions dated 28 January 2015 in this regard. We are, however, concerned that the inclusion of 'part-time rates' and 'casual rates' may result in a table that is somewhat unwieldy and unnecessarily complex. If the table is amended as proposed by various interested parties, Ai Group may seek an opportunity to provide further comment on the form of that table and the accuracy of the rates it contains.

[46] See Ai Group's submissions dated 4 March 2015 at paragraph 161.

Clause 12.3(b)(i) – Allowances – Expense related allowances – Travelling, transport and fares reimbursement

530. As stated at paragraph 171 of our 4 March 2015 submissions, we do not oppose the amendment proposed by the AWU.

Clause 13 – Higher duties

531. Our response to the AWU's proposal regarding clause 13 can be found at paragraphs 174 – 175 of our submissions dated 4 March 2015. We note that the change sought is a substantive one. The union should be put to the task of establishing why the proposed clause is 'necessary' to achieve the modern awards objective (s.138).

Clause 15.2 – Shiftwork

532. In response to the AWU's submission regarding clause 15.2, we refer the Commission to our submissions above regarding clause 8.2. The issue raised in each instance is the same.[47]

Clause 16.1(a) – Overtime and penalty rates – Payment for overtime

533. The AWU's submission at paragraph 16 is in the same terms as that earlier put at paragraph 10 of its 28 January 2015 submissions. The variation proposed is strongly opposed. Our reasons can be found at paragraphs 179 – 180 of our 4 March 2015 submissions.

Clause 16.6(a) – Overtime and penalty rates – Call-back – Mondays to Fridays

534. Ai Group's response to the question contained at clause 16.6(a) of the Exposure Draft can be found at paragraph 199 of our 28 January 2015 submissions. We note that no variation has been proposed by any interested party or the Commission.

[47] See also Ai Group's submission dated 4 March 2015 at paragraph 178.

15.2 The SDA's claim to vary Clause 22.4(a) – Rostered days off

535. The SDA are seeking a change to clause 22.4(a) (Rostered days off) by removing the current cap on 12 rostered days off that can be taken in any 12 month period.

536. The current clause 22.4(a) states:

> **22.4 Rostered days off**
>
> (a) Where a system of working is adopted to allow one rostered day off in each four weeks an employee will not be entitled to more than 12 such rostered days off in any 12 month period.

537. Ai Group does not support the variation. There is no material before the Commission that would enable the Commission to be satisfied that the term is necessary to achieve the modern awards objective (ss.138 and 134(1)).

16. TRANSPORT (CASH IN TRANSIT) AWARD 2010

538. The following submissions relate to the *Exposure Draft – Transport (Cash in Transit) Award 2014* and substantive claims made to vary the *Transport (Cash in Transit) Award 2010*. They are made in response to submissions filed by:

- The TWU, dated 23 July 2015.
- Linfox Armaguard Pty Ltd (Linfox), dated 15 July 2015;
- The Australian Security Industry Association (ASIAL), dated 14 July 2015; and
- Prosegur dated 10 July 2014.

16.1 Exposure Draft – Transport (Cash in Transit) Award 2014

Clause 3.5 – Coverage

539. We note that the TWU agrees with the typographical error identified by Ai Group in clause 3.5.

Clause 6.5(d)(ii) – Types of employment – Casual employees – Casual loading

540. Ai Group remains of the view that the reference to the 'ordinary hourly rate' in clause 6.5(d)(ii) should be amended to read 'minimum hourly rate'.[48] We note that the interaction between the casual loading and all purpose allowances has been the subject of further submissions and a Full Bench hearing. Ai Group may seek a further opportunity to comment on this clause once the Commission issues its decision in this regard.

Clause 6.5(e) – Types of employment – Casual employees

541. Ai Group opposes the insertion of clause 6.5(e). We refer to our submissions of 4 February 2015 at paragraphs 10.4 – 10.5.

Clause 9.1(c) – Hours of work – Ordinary hours and roster cycles

542. Ai Group agrees with the TWU that the words "Subject to the other provisions of this award" should be reinstated in clause 9.1(c) of the Exposure Draft.[49]

Clause 9.1(c) – Hours of work – Ordinary hours and roster cycles

543. We note that the TWU agrees with our submission[50] that the words "on any day" should be inserted in clause 9.1(c).

Clause 9.4(b) – Hours of work – Start times

544. Ai Group continues to rely on its earlier submissions in response to the TWU's arguments regarding the question contained in the Exposure Draft at clause 9.4(b).[51]

[48] See Ai Group's submissions dated 4 February 2015 at paragraphs 10.2 – 10.3.

[49] See Ai Group's submissions dated 4 February 2015 at paragraph 10.10 and Ai Group's submissions dated 4 March 2015 at paragraph 131.

[5050] See Ai Group's submission dated 4 February 2015 at paragraphs 10.11 – 10.12.

[51] See Ai Group's submissions dated 4 February 2015 at paragraphs 10.14 – 10.18 and Ai Group's submissions dated 4 March 2015 at paragraphs 133 – 134.

Clause 10.1(d) – Meal breaks – Unpaid meal breaks

545. The TWU has made submissions regarding the reference to the 'ordinary hourly rate' in clause 10.1(d). Ai Group remains opposed to these submissions. We refer to our earlier submissions of 4 February 2015 at paragraphs 10.21 – 10.22 in this regard.

546. We note that the Commission recently published its decision regarding the articulation of rates of pay generally and has indicated that the Exposure Drafts will be republished in order to give effect to its decision. Ai Group requests that parties be given an opportunity to review the relevant Exposure Draft and provide any comment regarding the terminology adopted in specific clauses once published.

Clause 11.1 – Minimum wages – Minimum rates

547. The TWU submits that certain rates contained in the table at clause 11.1 are incorrect and should be recalculated, although it has not explained the basis for this submission. Ai Group has previously made submissions regarding the casual hourly rate.[52]

548. It is our understanding that the Commission's recent decision regarding the articulation of rates of pay generally will involve amendments to the minimum wages clause in the Exposure Drafts. Ai Group requests that parties be given an opportunity to review the clause once amended and provide any further comments regarding the accuracy of the rates published.

Clause 14.2(b) – Shiftwork – Shiftwork rosters

549. We provide the following submissions in addition to those made at paragraphs 10.28 – 10.29 (dated 4 February 2015) in response to the TWU's submissions at paragraph 26:

[52] See A Group's submissions dated 4 February 2015 at paragraph 10.25.

- Clause 14.2(b) refers to clause 9. It requires that the hours of work of employees on shiftwork will be implemented in the manner provided for in clause 9 and will be subject to the provisions of that clause.

- Clause 9 contains four subclauses. We submit that the reference to clause 9 in clause 14.2(b) should be amended to read 'clauses 9.1 – 9.3'.

- Clause 14.2(b) corresponds with clause 25.2(b) of the current award. It cross references clause 23.

- Clause 23 contains three subclauses. Those three subclauses correspond with clauses 9.1 – 9.3 of the Exposure Draft. This is the basis for our submission. An amendment to the cross-reference would ensure that the Exposure Draft properly reflects the current clause 25.2(b).

- Further, clause 14.2(d) deals with start times for shiftworkers. A reference to clause 9.4, which also deals with start times, is potentially confusing.

- We note that clause 24 correspondence with clause 9.4 of the Exposure Draft, which is a standalone provision. The equivalent of clause 14.2(d) can be found at clause 25.2(d). It relates specifically to shiftworkers.

Clauses 14.4 and 14.14(a) – Shiftwork – Rest break and Shiftworkers' meal break

550. Ai Group has considered the submissions made by the TWU and ASIAL regarding the aforementioned clauses. Ai Group submits that the operation of these provisions should be the subject of discussions between interested parties.

Clause 14.8 – Shiftwork – Penalty rates - shiftworkers

551. Ai Group continues to rely on its previous submissions regarding the table contained in clause 14.8.[53]

Clause 15.1 – Overtime – Payment for overtime

552. We note that the TWU no longer presses its earlier submissions regarding clause 15.1 of the Exposure Draft.

Clause 15.3(b) – Overtime – Rest period after overtime

553. As set out in our submission of 4 February 2015, the word "ordinary" needs to be reinserted before the words "work on one day". The change in the Exposure Draft changes the meaning of the clause. Similar clauses appear in many other awards; like the existing clause in this Award, the entitlement relates to the period between the completion of *ordinary* work on one day and the commencement of *ordinary* work on the next day.

Clause 15.4 – Overtime – Call-back

554. We note the submissions made by the TWU regarding clause 15.4 of the Exposure Draft and proceed on the basis that neither the TWU nor the Commission, has proposed that the clause be varied.

16.2 The TWU's Claim to vary Clause 3.1 – Definitions and Interpretation

555. The TWU have proposed that the definition of "armoured vehicle" set out in the award be amended. Further variations have been proposed by Prosegur.

556. The TWU appears to be proposing a variation with the intent of imposing requirements relating to vehicle specifications upon employers.

557. A variation to the definition clause should not; and arguably would not, require that an employer utilise a certain form of vehicle or that the vehicle utilised

[53] See Ai Group's submissions dated 4 February 2015 at paragraph 10.32.

meet set specifications. It may simply mean that the definition of "armoured vehicle" is narrowed. The proper purpose of a definition is not to impose an obligation on a party. If we are wrong and the Commission determines that the definitions clause can impose substantive obligations on employers, we contend that is not approach to drafting awards that should be adopted. Including substantive obligations in the definitions clause is not consistent with the need to ensure award system is, "*simple and easy to understand*".[54]

558. The regulation of vehicle standards is not properly a matter for award regulation. It is not a matter that can be included in an award pursuant to s.139 of the Act. If this is the effect of the proposed award clause the instrument should not be varied in the terms proposed. The current definition of armoured vehicle should also be reworded to clarify that it does not impose any requirement relating to vehicle specifications on employers.

559. Ai Group holds similar concerns in relation to the proposed variation to the definition of non-armoured (soft skin) vehicle.

560. The proposed variations would likely result in the operation of the classification clause being disturbed. This is the only award provision that appears to relate to the award definitions.

561. Given the coverage of the award is linked to the classification structure; the proposed variations could also result in the coverage of the instrument being disturbed.

562. The TWU have made almost no attempt to set out submissions properly establishing that the proposed variations are *necessary* to meet the modern awards objective.

[54] As contemplated by s134(1)

16.3 The TWU's Claim to vary Clauses 4.4 and 4.8 – Coverage

The claims

563. The TWU seeks variations to the Cash in Transit Award which, it says, are intended to, "vary the coverage" of the Award.[55] Having regard to its correspondence of 24 November 2014 and submissions dated 23 July 2015, it appears that there are three elements to the TWU's claim:

- To replace clause 4.4 of the Award with a new provision;
- To vary clause 4.8 such that it refers to its proposed clause 4.4; and
- A potential variation to the "description of the cash in transit industry". We assume that this is a reference to the definition of 'cash in transit' as found in clause 3.1 of the Award. No particulars have been provided by the union at this stage. Ai Group reserves its position in respect of this claim until the union details its proposal.[56]

564. These submissions deal with the TWU's proposed variations to clauses 4.4 and 4.8 of the Award. The TWU submits that the intention of the claim is to ensure that, "the same conditions as those in the [Cash in Transit] Award apply to security guards and couriers who undertake cash in transit work".[57]

565. The Cash in Transit Award is expressed to cover "employers throughout Australia in the cash in transit industry and their employees in classifications listed in Schedule A – Classifications *to the exclusion of any other modern award*."[58] The 'cash in transit industry' is defined by clause 3.1 as 'the transport of cash and other valuables'.

566. The following subclauses then deal with possible interaction between the coverage of this Award and other instruments. Relevantly, clause 4.4 states: (emphasis added)

[55] See TWU's submissions dated 23 July 2015 at paragraph 38.
[56] See TWU's submissions dated 23 July 2015 at paragraph 38.
[57] See TWU's submissions dated 23 July 2015 at paragraph 39.
[58] Clause4.1.

> 4.4 This award does not cover employees carrying out any cash in transit work as a minor or incidental part of other security work covered by a modern award, modern enterprise award, or an enterprise instrument (within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)), or employers in relation to those employees.

567. The effect of this provision is to exclude employees carrying out any cash in transit work *as a minor and incidental part of other security work covered by a modern award*, from the coverage of the Cash in Transit Award.

568. The TWU seeks to replace clause 4.4 with a new provision, which appears intended to invert the position under the current clause. Its proposal reads as follows: (emphasis added)

> 4.4 Where employees carrying out cash in transit work as a minor or incidental part of other security and/or courier work covered by another modern award, modern enterprise award, or an enterprise instrument within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth),* the employer will ensure that those employees completing such work are remunerated, at a minimum, in accordance with this award and that those employees related conditions are no less than those set out in this award.

569. If inserted, the proposed clause would require an employer to ensure that an employee carrying out cash in transit work as a minor or incidental part of other security and/or courier work covered by another modern award is remunerated in accordance with this Award as a minimum and their "related conditions" are no less than those set out in the Cash in Transit Award.

570. The TWU also seeks a consequential amendment to clause 4.8 of the Award. Clause 4.8 is a standard provision found in a significant number of awards and is designed to determine the award by which an employee will be covered where their employer is covered by more than one. The TWU seeks to insert a reference to its proposed clause 4.4, such that the provision would read as follows:

> 4.8 Where an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work. Such a determination must be made having regard to the requirements set out in clause 4.4 of this award.

NOTE: Where there is no classification for a particular employee in this award it is possible that the employer and that employee are covered by an award with occupational coverage.

571. Ai Group opposes the TWU's claim on the basis that the proposed clause 4.4 would not, by virtue of the Act, have the desired effect. Further, the proposed provisions are not *necessary* to achieve the modern awards objective, as required by s.138.

Whether the proposed clause 4.4 is capable of imposing an obligation on an employer or giving an employee an entitlement

572. It is important to properly understand the effect of what has been proposed by the TWU. The clause relates to an employee carrying out cash in transit work as a minor or incidental part of other security and/or courier work covered by another modern award, modern enterprise award or an enterprise instrument. That employee's employer, for the purposes of the work performed by the relevant employee, must necessarily be covered by another modern award.

573. The proposed clause does not purport to alter this position. That is, the effect of the clause is not to exclude the employer and/or employee from the coverage of the other modern award and encompass them within the coverage of the Cash in Transit Award. Rather, it would create an obligation on employer, who remains covered by another modern award, to meet certain conditions contained in the Cash in Transit Award in respect of a particular employee who is also not covered by this Award.

574. The drafting of the proposed provision is to be contrasted with the current clause 4.4, which expressly states that the Award *does not cover* employees carrying out cash in transit work as a minor or incidental part of other security work covered by a modern award, modern enterprise award or enterprise instrument, or employers in relation to those employees. Such employees and employers are effectively excluded from coverage of this Award and will instead be covered by another instrument.

575. Section 46 of the Act is headed 'the significance of a modern award applying to a person'. It states that:

- a modern award does not impose obligations on a person, and a person does not contravene a modern award, unless the award *applies* to the person; and

- a modern award does not give a person an entitlement unless the award *applies* to the person.

576. A modern award applies to an employee or employer where the modern award *covers* the employee or employer (s.47(1)(a)). By virtue of s.48(1), a modern award covers an employee or employer if it is expressed to cover the employee or employer. As we have earlier set out, the TWU's proposal, if adopted, would not result in an Award that is expressed to cover the relevant employees and their employers. Thus, the clause would not:

- impose an obligation on an employer;

- result in a contravention of the clause if the employer did not comply with it; or

- give an employee an entitlement.

577. As such, the proposed term is entirely ineffectual. The aforementioned provisions of the Act would deem the clause otiose. Quite clearly, such a term is not *necessary* to achieve the modern awards objective (s.138).

Section 138 and the modern awards objective

578. Even if the Commission decides against us regarding the above contentions, the TWU's claim lacks merit. It would require an employer to provide minimum entitlements in accordance with an Award that provides a fair and relevant minimum safety net for a particular industry even though the employer does not necessarily ordinarily or substantially operate in that industry.

579. The variation appears to require employers to apply two awards and to make an assessment of how much remuneration they would receive under each instrument in order to ensure they receive that which they would obtain under the Transport Industry (Cash in Transit) Award 2010. This would impose an

unreasonable regulatory burden and cost on employers that would be contrary to s134(1)(f).

580. It is unclear what the reference to "related conditions" as utilised in the proposed clause is intended to capture. It is also unclear precisely how an assessment of whether the related conditions are "no less" than those contained in the Cash in Transit award would be assessed. Not all conditions can be reduced to a monetary amount.

581. The variation would reflect a significant change to the award system. Unless a sound probative evidentiary case demonstrating the factual propositions said to support the variation is mounted, the claim should not be granted.

582. The proposed term runs contrary to the following considerations listed at s.134(1):

- the need to promote flexible modern work practices and the efficient and productive performance of work;
- the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
- the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards.

Conclusion

583. For the reasons stated above, the TWU's claim should be dismissed.

Alternate proposed variation to the Coverage of the Award

584. Ai Group is concerned that the coverage clause of the current award does not adequately reflect the reality that there are employers that carry out the transportation of cash or other valuables as a minor or incidental part of their operations. We are concerned that it may be so broad as to capture

businesses that undertake such work as a relatively minor part of their operations. Accordingly, we propose that it would be sensible to vary clause 4 of the current award to include the following provision.

> *"4.X. This award does not cover employers covered by another award that transport cash or valuables as a minor or incidental part of the employer's operations."*

585. The proposed clause is necessary, as contemplated by section s.138, having regard to the matters identified in s.134(1)(g).

586. In advancing this submission we are not advocating for any increased capacity for any party to undertake cash in transit work without complying with relevant security legislation in place throughout Australia or implementing appropriate measures to address workplace health safety considerations. However, we contend that it is not the proper function of an award to limit an employer's capacity to undertake any particular form of business operations. Rather the proper function of the award is to form part of a fair and relevant safety net of terms and conditions for employers. Indeed, awards can only include terms that they are necessary to meet the modern awards objective.[59] Provisions cannot be inserted into the award to address some other concern, regardless of whether such terms may be considered by some to be desirable.

16.4 The TWU's Claim to vary Clause 15.1 – Minimum Rates

587. In its submission of 24 November 2014, the TWU foreshadowed that it would seek an increase of the minimum wages prescribed in the Cash in Transit Award, having regard to what it considers to be comparable classifications found in the *Road Transport and Distribution Award 2010.* Since then, the TWU has advised that it no longer intends to pursue this claim.[60]

[59] S.138

[60] See TWU's submissions dated 23 July 2015 at paragraph 44.

588. We note that Armaguard has expressed its support for the TWU's proposal that minimum wages under the Cash in Transit Award be reviewed.[61] It is not clear whether it intends to pursue such a review despite the fact that the TWU has withdrawn its claim.

589. Ai Group opposes any increase to the minimum wages prescribed by the Cash in Transit Award. As identified by the union, the proponent of such a variation would need to establish that an increase is justified by work value reasons, as set out in ss.156(3) and (4). Should Armaguard, or any other interested party, later indicate that they intend to mount such a claim, we respectfully request that an opportunity be afforded to respond in due course.

16.5 The TWU's Claim to vary Clause 16.1(c) – Industry Allowance

590. In its submission of 24 November 2014, the TWU foreshadowed that it would seek an increase in the industry allowance prescribed by clause 16.1(c) in the Cash in Transit Award. Since then, the TWU has advised that it no longer intends to pursue this claim.[62]

591. We note that Armaguard has expressed its support for the TWU's proposal that the industry allowance be reviewed.[63] It is not clear whether it intends to pursue such a review despite the fact that the TWU has withdrawn its claim.

592. Ai Group opposes any increase in the industry allowance prescribed by the Cash in Transit Award. Should Armaguard, or any other interested party, later indicate that they intend to mount such a claim, we respectfully request that an opportunity be afforded to respond in due course.

[61] See Armaguard's submissions dated 15 July 2015 at paragraph 22.

[62] See TWU's submissions dated 23 July 2015 at paragraph 44.

[63] See Armaguard's submissions dated 15 July 2015 at paragraph 22.

16.6 The TWU's Claim to vary Clause 19 – Higher Duties

The claim

593. Clause 19 of the Award currently deals with circumstances in which an employee performs two or more classes of work on any one day. Where this occurs, for the purposes of assessing the rate of wages to be paid, the employee will be regarded as having worked throughout the whole of their working time on that day at the class of work for which the highest rate of wages is prescribed.

594. In its correspondence of 24 November 2014, the TWU identified the insertion of additional subclauses in clause 19, such that it would read:

> 19.1 Where an employee performs 2 or more classes of work on any one day, for the purposes of assessing the rate of wages to be paid, the employee will be regarded as having worked throughout the whole of their working time on that day at the class of work for which the highest rate of wages is prescribed.
>
> 19.2 Where an employee is required to perform two or more classes of work on a regular occasion then the employee's classification will be reviewed by the employer.
>
> 19.3 Any disputes arising from this clause will be dealt with in accordance with clause 9 of this Award.

595. The proposal would require an employer to *review* the employee's classification where the employee is required to perform two or more classes of work "on a regular occasion". A requirement to *review* a classification would not encompass an obligation to change the classification.

596. The reference to clause 9 in the proposed term relates to the model dispute resolution provisions. The proposed term is unnecessary. Such a dispute can already be dealt with in accordance with clause 9 of the Award.

597. We note that that the proposal is supported by Armaguard, but for an amendment to the proposed clause 19.2 such that it would operate where an employee is required to perform two or more classes of work on regular

occasions *over a period of 12 months*.[64] Prosegur has also provided an alternate clause, which is supported by ASIAL, in the following terms:

> 19.1 Where an employee performs 2 or more classes of work on any one day, for the purposes of assessing the rate of wages to be paid, the employee will be regarded as having worked throughout the whole of their working time on that day at the class of work for which the highest rate of wages is prescribed.
>
> 19.2 Where an employee is required for a period of at least 12 months to perform and does perform two or more classes of work on a regular occasion throughout that period, the employee may request in writing that the employer review that employee's classification. ~~then the employee's classification will be reviewed by the employer.~~
>
> 19.3 For the purposes of clause 19.2, "work on a regular occasion" is defined as work actually performed on a regular, ongoing and systematic basis, not occasional or irregular.
>
> 19.4 Any disputes arising from this clause will be dealt with in accordance with clause 9 of this Award.

598. The TWU subsequently filed submissions on 23 July 2015 in support of its proposed variations, which state that the current terms of the Award do not, "allow persons regularly completing work at a higher classification to elect to be remunerated at that rate for all work completed. The TWU variation seeks to ensure that all work completed is remunerated at appropriate rates and seeks to allow employees to *elect to be remunerated at a higher classification* in circumstances where that employee consistently completes work at that higher classification."[65]

599. We do not read the proposed clause as permitting an employee to *elect* to be remunerated at a higher rate of pay for all work where they perform work at a higher classification level. We therefore cannot understand the basis upon which the TWU makes this submission. Nonetheless, we proceed on the basis that the union continues to pursue the claim it foreshadowed in its correspondence of 24 November 2014. Should it have varied (or

[64] See Armaguard's submissions dated 4 February 2015 and Armaguard's submissions dated 15 July 2015 at paragraph 29.

[65] See TWU's submissions dated 23 July 2015 at paragraph 45.

subsequently seek to vary) its proposal such that it would in fact enable an employee to elect to be remunerated at a higher classification, Ai Group requests that an opportunity be granted to respond in due course.

600. The proposals do not reflect terms that could be considered necessary to meet the meet the modern awards objective. The Award requires that employees performing work of a higher classification be paid the applicable higher rate for such work.

601. If the intent of any of the claims is to require that an employer reclassify an employee who consistently performs work of two classifications this could have negative consequences for employees and employers. We will seek to elaborate on this point if the TWU confirms that it is advancing such a claim.

602. The contention that the clause would reduce an employer's administrative burden is illogical.[66] If employers want to pay people at higher rates for reason of administrative ease they are always free to do so. The award does not need to allow this. However, imposing an obligation to review an employee's classification, as proposed by some parties, would increase the administrative burden on business.

603. We see little utility in an award provision allowing employees to request a review of their classification. At a practical level this is a matter that employees could raise with their employer independent of any such an award term. The clause is not necessary, as contemplated by s.138.

16.7 The TWU's Claim to insert a new Clause 29 – Chain of Responsibility

The claim

604. The TWU seeks to insert a new clause 29 in the Cash in Transit Award, headed 'Contract Work – chain of responsibility'. The proposed clause can be found in its submissions of 24 November 2014. It is in the following terms:

[66] Paragraph 46 of the TWU's 23 July 2012 Submission

29. Contract Work – chain of responsibility

29.1 An employer may, under certain circumstances set out below, give out work to:

(a) another employer, whose employees will carry out all of the work so given;

(b) another employer, whose employees will not carry out any or all of the work so given;

(c) another entity that does not engage employees which will not carry out any or all of the work so given;

(d) another person or other persons, who alone will personally carry out all of the work so given;

(e) another person or other persons, who will not personally carry out any or all of the work so given.

29.2 An employer must not give out work to that other employer, entity or person(s) (as provided in paragraphs 29(a) to 29(e) of subclause 29.1 of this clause) unless the employer giving out the work makes a record in writing of the following details:

(a) The name of the other employer (or the entity or person(s)) to whom the work is given and the Australian Business Number and/or Australian Company Number of the other employer (or the other entity or person(s) to whom the work is given.

(b) The address of the other employer (or the other entity or person(s) to whom the work is given.

(c) The date of giving out the work and the date for completion or cessation of the contract or arrangement under which the work is performed.

(d) A description of the nature of the work to be performed, in particular the destination from which the cash and valuables are to be transported and the destination to which the cash and valuables are to be transported and the value of the cash and valuables to be transported.

Where an employer gives out work to more than one employer, entity or person(s), the employer must keep an up to date consolidated list of those employers, entities or persons which contains all of the information required to be kept by this subclause.

29.3 Where the work is given out to an employer whose employees will not carry out any or all of the work (as provided in paragraph 29.1(b) of subclause 29.1 of this clause), a copy of any record kept in accordance with subclause 29.2 of this clause shall be given to each person who performs part or all of the work given out, unless the person who performs part or all of the work given out is an employee of the employer or person

who has been given the work as provided in paragraph 29.1(b) of subclause 29.1 of this clause.

29.4 Where the work is given out to another entity or person(s) who will not carry out any or all of the work (as provided in paragraphs 29.1(c) and 29.1(e) of subclause 29.1 of this clause), a copy of any record kept in accordance with subclause 29.2 of this clause shall be given to each person who performs part or all of the work given out.

29.5 Where the work is given out to another person or other persons who alone will personally carry out the work (as provide in paragraph 29.1(d) of subclause 29.1 of this clause), a copy of any record kept in accordance with subclause 20.2 of this clause shall be given to that person or those persons doing the work.

29.6 Where work has been given out to another employer, entity or person(s) as provided in paragraphs 29.1(a) to 29.1(e) of subclause 29.1 of this clause), any record kept in accordance with subclause 29.2 of this clause shall be available for inspection by a person duly authorised as if it was a record permitted to be inspected in accordance with the Act.

29.7 If an employer contracts with another person or persons who alone will carry out the work (as provided in paragraph 29.1(d) of subclause 29.1 of this clause), the employer shall contract to provide and shall provide conditions that are the same as those prescribed by this award.

29.8 An employer must not enter into a contract or arrangement with another employer, entity or person(s) (hereinafter called "the second person") as provided in paragraphs 29.1(b) or 29.1(e) of subclause 29.1 of this clause unless:

(a) the contract or arrangement contains a term which provides that any work performed by a person other than the second person is carried out pursuant to a written agreement between the second person and the person who will actually perform the work; and

(b) the written agreement specifies each of the matters set out in paragraphs 29.1(a) to 29.2(d) of subclause 29.2 of this clause; and

(c) the written agreement provides for conditions that are the same those prescribed this award.

For the purposes of this subclause, a "contract or arrangement" means a contract or arrangement for the performance of work as provided in clauses 29.1(a), 29.1(b), 29.1(c) or 29.1(e) of this clause.

605. The effect of the proposed clause is to introduce award obligations that relate to commercial relationships entered into between an employer covered by the Cash in Transit Award and another employer, entity or person in respect of certain work. Such employers, entities or persons are participants in the supply chain and do not necessarily form part of the cash in transit industry,

as defined in the Award. It also purports to regulate the conditions afforded to those who ultimately perform work that is 'given out' by the employer to another employer, entity or person. That is, it would impact upon the conditions under which work may be contracted out by other supply chain participants.

606. The clause would:

- Regulate who the work can be given out to;
- Regulate the circumstances in which such an arrangement may be entered into;
- Impose record keeping obligations in respect of such arrangements;
- Mandate that an employer must provide conditions that are the same as the Cash in Transit Award where it contracts with another person or persons who alone will carry out the work;
- Introduce requirements pertaining to a contract or arrangement between an employer and another employer, entity or person under clauses 29.1(b), (c) or (e). The effect of the clause is to require the extension of conditions provided by the Cash in Transit Award to the person who actually performs the work pursuant to an agreement with the employer, entity or person to whom the employer covered by the Award has given out the work.

Whether the proposed clause is permitted to be included by s.136(1)

607. Section 136(1) must be the starting point in determining whether a proposed clause can be included in a modern award. It deals with terms that may, must or must not be included in a modern award. To the extent that a term is inserted in contravention of s.136, it would have no effect (s.137). We note at the outset that the TWU has not made any attempt to address the basis upon which the clause it has proposed can be included in an award.

608. The proposed clause is self-evidently not one that must be included in an award pursuant to Subdivision C of Division 3, Part 2-3 of the Act (s.136(1)(b)). Nor is the clause one that is permitted by Subdivision B (s.136(1)(a)).

609. Relevantly, s.139(1) (which forms part of Subdivision B), provides that a term may be included in a modern award if it is *about* one or more of the matters listed at ss.139(1)(a) – (j).

610. In our view, the proposed term is not one that is *about* any of the matters listed at s.139(1). Rather, it is about the commercial relationship that may exist between an employer covered by the Award and a third party; either another employer, an entity or person.

611. The various subclauses can be characterised as follows:

- Clause 29.1 is about who (i.e. another employer, an entity or person) an employer may enter into a commercial relationship with so as to give them certain work.

- Clause 29.2 is about the written records that must be made and kept in order for an employer to give out work to another employer, an entity or person.

- Clause 29.3 is about an obligation on an employer to provide a written record where it gives out work to another employer whose employees will not carry out any or all of the work so given.

- Clause 29.4 is about an obligation on an employer to provide a written record where it gives out work to another entity or person(s) who will not carry out any or all of the work so given.

- Clause 29.5 is about an obligation on an employer to provide a written record where it gives out work to another person or persons who alone will personally carry out the work so given.

- Clause 29.6 is about an obligation on an employer to make written records made in accordance with clause 29.2 available for inspection in certain circumstances.

- Clause 29.7 is about an obligation to contract to provide (and in fact provide) conditions that are the same as those prescribed by the Cash in Transit Award where an employer contracts with another person or persons who alone will carry out the work.

- Clause 29.8 is about the obligation to enter into a written agreement and the content of that written agreement where an employer enters into a contract or arrangement for the performance of work under clauses 29.1(b), (c) or (e).

612. Quite clearly, neither the proposed clause as a whole, nor any element of the claim, is permitted by ss.139(1)(a) – (j) of the Act as it is not about any of the matters there listed. By virtue of s.136(1), the term cannot be included in a modern award.

Whether the proposed term gives a person an entitlement

613. The proposed clause purports to impose obligations on an employer covered by the Award in relation to:

- Another employer;

- Another entity;

- Another person or persons;

- In circumstances where work is given out to an employer whose employees will not carry out any or all of the work; or another entity or person(s) who will not themselves carry out any or all of the work – the person who will actually perform the work; and

- A “person duly authorised”, as referred to in clause 29.6.

614. Even if the clause were inserted, the Award would not necessarily give an entitlement to the aforementioned.

615. Section 46(2) of the Act states that a modern award does not give a person an entitlement unless the award *applies* to the person. A modern *applies* to an employee, employer or organisation if it *covers* the employee, employer or organisation (s.47(1)(a)). Pursuant to s.48(1), a modern award *covers* an employee, employer or organisation if the award is expressed to cover the employee, employer or organisation. This necessitates a consideration of the coverage clause of the Award.

616. Clause 4.1 of the Award stipulates that it covers *employers* throughout Australia in the *cash in transit industry* and *their employees* in the classifications listed at Schedule A. The 'cash in transit' industry is defined by clause 3.1 of the Award as 'the transport of cash and other valuables'. Further, 'employee' is said to mean 'national system employee within the meaning of the Act' and 'employer' is said to mean 'national system employer within the meaning of the Act'.

617. A national system employer is relevantly defined as a constitutional corporation so far as it employs, or usually employs, an individual (s.14(1)(a)). A national system employee is defined as an individual so far as he or she is employed or usually employed, as described in the definition of 'national system employer' (s.13).

618. It is our contention that the employers, entities and individuals to whom the proposed clause purports to give an entitlement would not in fact be afforded the relevant entitlement by virtue of the aforementioned provisions of the Act.

619. In order for an award to give a person an entitlement, the award must cover them. Having regard to the definition of 'cash in transit industry' as contained at clause 3.1 of the Award, 'national system employee' and 'national system employer', it becomes apparent that the clause would not provide an entitlement to:

- Another employer if, for example, the employer does not meet the definition of 'national system employer' and is not in the 'cash in transit industry' as defined;

- Another entity (noting that 'entity' is not defined by the clause); or

- Another person(s) if they are not a 'national system employee' employed by a 'national system employer' in the cash in transit industry.

620. On this basis, it is our submission that the proposed clause would not in fact give an entitlement to the employers, entities and individuals to whom the proposed clause purports to give an entitlement. In such circumstances, it cannot be said that the clause is 'necessary' to achieve the modern awards objective (s.138).

Whether the proposed term is enforceable

621. Section 45 requires that a person must not contravene a term of a modern award. This is a civil remedy provision.

622. The question as to whether an employer has contravened a term of a modern award only arises where the relevant term imposes an obligation on the employer. That is, it is a relevant consideration if the award term requires the employer to do something in compliance with it. Where a clause purports to require an employer to meet an obligation, however by virtue of the Act, the clause does not in fact give a person the corresponding entitlement, the non-compliance of an employer cannot be said to constitute a contravention of the term.

623. In this way, the proposed clause would not be enforceable in the sense that a relevant person could not institute proceedings under s.538 of the Act in the absence of an entitlement given to that person by the Award.

Section 138 and the modern awards objective

624. Even if it were established that the proposed term is permitted by s.136(1), the TWU's claim lacks merit. The clause is not necessary to achieve the modern awards objective, as required by s.138.

625. We note that the TWU's submissions do not address s.134(1) of the Act in any detail other than to assert that the proposal "would provide a fair and relevant minimum safety net" to all employees in the [cash in transit] sector".[67]

626. It is our primary contention that a clause that does not give a person an entitlement and is consequentially unenforceable is not 'necessary' in the sense contemplated by s.138 of the Act. We also note that the proposed term runs contrary to the following considerations listed at s.134(1):

- the need to promote flexible modern work practices and the efficient and productive performance of work;
- the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
- the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards.

627. Ai Group may seek to raise additional merit based arguments in response to the claim, should the TWU continue to press the matter notwithstanding these submissions.

Conclusion

628. For the reasons stated above, the TWU's claim should be dismissed.

[67] See TWU's submissions dated 23 July 2015 at paragraph 49.

16.8 Claims made by Armaguard and Prosegur to insert a new Clause 29 – Contract Work – chain of responsibility

629. Both Armaguard and Prosegur have proposed alternate clauses dealing with contracting of work and/or the chain of responsibility. For reasons similar to those identified in relation to the TWU proposal, such clauses should not be adopted.

17. WASTE MANAGEMENT AWARD 2010

630. The following submissions relate to the *Exposure Draft – Waste Management Award 2014* (Exposure Draft) and substantive claims made to vary the *Waste Management Award 2010*. They are made in response to submissions filed by:

- The Transport Workers' Union (TWU), dated 22 July 2015;
- The Waste Contractors' and Recyclers Association (WCRA), dated 9 June 2015; and
- The Australian Manufacturing Workers' Union (AMWU), dated 15 July 2015.

17.1 Exposure Draft – Waste Management Award 2014

Clause 6.5(h) – Breaks – Overtime meal breaks

631. Ai Group continues to rely upon its submissions at paragraphs 11.4 – 11.5 of 4 February 2015. The insertion of a table, as proposed by the AMWU, is not necessary. There is no suggestion that the relevant Award clause, as presently drafted, has given rise to any ambiguity or confusion. Our concerns simply arise from the redrafting of the clause in the Exposure Draft.

632. We note that the WCRA has also raised concerns regarding this clause. We do not oppose the amendment it has proposed.

Clause 9.2(c) – Breaks – Overtime meal breaks

633. We note that whilst the TWU has previously sought that clause 9.2(c) of the Exposure Draft be varied, this is no longer pressed. Ai Group has not identified any difficulties arising from the provision.

Clause 13.4 – Payment of wages

634. We refer to the TWU's submission regarding clause 13.4 of the Exposure Draft. We are of the view that the absence of the words "at its discretion" does not alter the substance of the clause. The clause should, however be amended by deleting the word "at". This appears to be a drafting error.

Clause 16.3(b)(i) – Overtime

635. Despite the AMWU's submission, Ai Group continues to rely on the concerns it has identified in respect of clause 16.3(b)(i) of the Exposure Draft at paragraph 11.10 of its 4 February 2015 submissions. The need to call evidence, as suggested by the AMWU, does not arise as Ai Group's submissions relate to substantive variations that have been made to the clause as a result of the redrafting process – a consequence that is not intended.

Clause 16.6 – Overtime – Sunday work and Clause 16.8 – Overtime – Call back on a Saturday or Sunday

636. At paragraphs 5 – 8 of its submissions, the TWU has raised various arguments as to why clauses 16.6 and 16.8 apply to work performed on all days of the week. An amendment to give effect to the TWU's contentions would give rise to a substantive change, which falls well beyond the scope of the redrafting process. There is insufficient material before the Commission so as to enable it to determine that the proposal is *necessary* to achieve the modern awards objective (s.138). The union's mere assertion that the relevant clauses *should* have equal application on any day of the week is not, in and of itself, a sufficient justification for a variation that would significantly increase employment costs.

637. We also note that the current award provisions appear to have their origins in clauses 34.2 and 34.3 of the *Transport Workers' (Refuse, Recycling and Waste Management) Award 2001* – the primary pre-reform federal award in this industry – which provided employees with the same or similar entitlements for work performed on Saturdays and Sundays only. We have not been able to identify any equivalent provisions that provided a similar entitlement to employees for work performed on other days of the week.

638. We continue to rely on submissions we have earlier made in this regard[68] and agree with WCRA's concerns.

Clause 20.6(a) – Public holidays – Payment for work on public holidays

639. Ai Group does not oppose the AMWU's submission that the term "weekly employees" be replaced with "full-time or part-time employees".[69] The WCRA has also proposed a similar amendment.

Clause 20.6(b) – Public holidays – Payment for work on public holidays

640. Ai Group has previously made submissions regarding the accuracy of the rates contained in clause 20.6(b) of the Exposure Draft, which we continue to rely upon.[70]

Schedule A.2.1 – Summary of Hourly Rates of Pay – Full-time and part-time employees – Full-time and part-time employees – ordinary and penalty rates

641. The amendment proposed by the WCRA to Schedule A.2.1 is not necessary given the definition of 'ordinary hourly rate' found at Schedule A.1.

[68] See Ai Group's submissions dated 4 February 2015 at paragraph 11.12 and 11.16; Ai Group's submissions dated 4 March 2015 at paragraphs 160 – 161 and 164 – 165.

[69] See Ai Group's submissions dated 4 February 2015 at paragraph 11.21 and Ai Group's submissions dated 4 March 2015 at paragraph 168.

[70] See Ai Group's submissions dated 4 February 2015 at paragraphs 11.23 – 11.24 and Ai Group's submissions dated 4 March 2015 at paragraphs 172 – 173.

Schedule E – 2014 Part-day Public Holidays

642. Schedule E should not be deleted as proposed by the WCRA. It is our understanding that the Schedule will be updated by the Commission such that it applies in 2015.

Schedule F – Definitions – waste management

643. In respect of the AMWU's submission that the definition of 'waste management' should not be included in both clause 3.2 and Schedule F, we refer to our earlier submissions of 4 March 2015 at paragraph 174.

17.2 The WCRA's claim to vary Clause 23.1 – Higher duties

644. The WCRA proposes to vary clause 23.1 of the Waste Management Award. Ai Group supports the variation in principle, but notes that some variation to the drafting of the provision may be desirable.

17.3 The WCRA's claim to insert a new subclause in 27.3(a) – Hours of work – Providing for a rostered day off

645. The WCRA proposes that a new subclause be inserted under clause 27.3(a), which would enable an employer and employee to agree to cash out RDOs where the employee has accumulated more than 10.

646. Ai Group does not, in principle, oppose the insertion of a clause that would enable the cashing out of RDOs. We note that the WCRA has not yet proposed a final form of words. Ai Group respectfully requests that an opportunity be granted to comment on the terms of any draft clause in due course.

17.4 The TWU's claim to insert a new Clause 28.9 – Meal breaks

The claim

647. Clause 28 of the Waste Management Award deals with shiftwork. It sets out various entitlements that are specific to an employee engaged on shiftwork

including shift loadings, overtime rates and penalty rates payable for work performed on a Saturday, Sunday or public holiday. The clause does not make any reference to breaks that are to be afforded to an employee whilst working an afternoon or night shift.

648. Clause 29 pertains to breaks. Specifically, clause 29.1 deals with 'regular meal breaks'. The clause is of general application; that is, it relates to all employees, whether engaged on shiftwork or otherwise. By virtue of clause 29.1(a), an employee must be allowed an unpaid meal break of not less than 30 minutes and not more than one hour within five and a quarter hours of commencing duty. Importantly, subclause (b) states that an employer and employee will agree on the time and length of the meal break having regard, among other things, to the fatigue management regulations made by the National Transport Commission from time to time.

649. The TWU seeks to insert a new subclause, which would entitle "all shift workers while working on afternoon or night shift" to a paid meal break of 20 minutes. The proposed clause is in the following terms:

> 28.9 All shiftworkers while working on afternoon or night shift will be entitled to a paid meal break of 20 minutes. An employee must not be allowed to work more than five and quarter hours without a meal break.[71]

650. The effect of the proposed provision is to provide an employee engaged on shiftwork with an entitlement to two types of meal breaks:

- An unpaid meal break pursuant to clause 29.1(a); and
- A paid meal break under the proposed clause 28.9.

651. We note that the TWU's originating proposal also sought the insertion of a subsequent subclause which related to an employer performing shiftwork who works overtime.[72] That subclause does not appear in the draft clause

[71] See TWU's submissions dated 22 July 2015 at paragraph 16.

[72] See TWU's submissions dated 25 November 2015.

proposed by the TWU in its most recent submissions. We proceed on the basis that that aspect of the TWU's claim is not pressed.[73]

652. Ai Group opposes the TWU's claim.

Section 138 and the modern awards objective

653. It is of course incumbent upon the TWU to demonstrate that the clause proposed is 'necessary', in the sense contemplated by s.138, to achieve the modern awards objective. At this stage, it has not mounted any such arguments in support of its proposal.

654. We note that the Commission has determined that this Review is to proceed on the basis that the Award, when it was made, achieved the modern awards objective.[74] The relevant provisions (being clauses 28 and 29) were in relevantly identical terms when the Award was made. Thus, it is for the TWU to justify why the Commission to depart from the current approach.

655. It is our submission that the proposed term runs contrary to the following considerations listed at s.134(1):

- the need to encourage collective bargaining;
- the need to promote flexible modern work practices and the efficient and productive performance of work;
- the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
- the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards.

[73] See TWU's submissions dated 22 July 2015 at paragraph 13.

[74] [2014] FWCFB 1788 at [24].

17.5 The TWU's claim to vary Clause 29.2 – Overtime meal breaks

656. Clause 29.2 of the Award deals specifically with the entitlement to a meal break where an employee performs overtime. Clause 29.2(a) requires that an employee be allowed an unpaid meal break of not less than 15 minutes and not more than 30 minutes after two hours of overtime. The drafting of the provision suggests that the entitlement would arise where an employee performs overtime before or after working ordinary hours and in circumstances where an employee performs only overtime on a given day (e.g. Saturday or Sunday). Subclause (b) provides some flexibility, providing that an employee and supervisor will agree on the time and length of the meal break, having regard, among other things, to the fatigue management regulations.

657. Clauses 29.2(c) and 29.2(d) deal with circumstances in which an employee is entitled to a meal allowance or is to be supplied with a suitable meal.

658. The TWU seek to have clause 29.2(a) replaced with the following provision:

> (a) An employee required to work overtime for two hours or more after working ordinary hours must be allowed a paid break of twenty minutes before commencing overtime work or as soon as practicable thereafter. A further rest break must be allowed upon completing each four-hour period until the overtime work is finished. Any rest breaks shall be paid for at the ordinary time rate.

659. The proposed clause would apply only where an employee works overtime after working ordinary hours. It would entitle an employee to a set break of 20 minutes (which would call into question the utility of clause 29.2(b) to the extent that it allows an employee and their supervisor to reach agreement as to the *length* of the meal break) before the employee commences overtime and every four hours thereafter, until the period of overtime is complete. Such breaks are to be paid at the ordinary time rate.

660. The TWU's claim is opposed on the same bases as those set out above in respect of the proposed clause 28.9.

17.6 The WCRA's claim to vary Clause 31.2 – Saturday and Sunday work

661. The WCRA has proposed an amendment to clause 31.2 of the Waste Management Award, with respect to an employee's entitlement when they are required to hold themselves in readiness for work after ordinary hours. Ai Group supports the variation proposed.

17.7 The TWU's claim to insert a new Clause 33.1(b) – Annual leave

662. Section 87 of the Act sets out the amount of annual leave to which an employee is entitled. Relevantly, s.87(1)(b)(i) provides that if a modern award applies to an employee and defines or describes them as a shiftworker for the purposes of the NES, that employee is entitled to five weeks of paid annual leave.

663. The Waste Management Award does not contain such a definition. The TWU seeks to remedy this by inserting a new clause 33.1(b):

> (b) For the purposes of the additional week of annual leave provided for in the NES a shift worker is a seven-day shift worker who is regularly rostered to work on Sundays and public holidays.

664. The TWU's claim is opposed on the same bases as those set out above in respect of the proposed clause 28.9.

665. We note that the Award Modernisation Request, made by the then Minister for Employment and Workplace Relations, expressly required that the AIRC "have regard to whether it is appropriate to include a definition of shift worker in a modern award that applies to these types of employees for the purposes of the NES annual leave entitlements." This was acknowledged by the AIRC when considering whether model terms in respect of annual leave should be developed.[75] The TWU must be put to the task of demonstrating that there are cogent reasons for departing from the AIRC's determination that it was not

[75] [2008] AIRCFB 717 at [30] and [2008] AIRCFB 1000 at [95].

appropriate to include a definition of ‘shiftworker’ for the purposes of the NES in the Waste Management Award.

17.8 The WCRA’s claim to vary Schedule B Classifications – Level 3 and 7

666. A proper justification for the proposed variations has not yet been made out. Ai Group is not convinced that the proposed variations are necessary and is concerned that they could have unintended consequence, including potentially expanding the coverage of the Award and disturbing the coverage of other awards. If the WRCA intends to pursue the claim, there may be merit in further discussions being held between interested parties.