Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Exposure Drafts: Subgroups 2C and 2D

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4 YEARLY REVIEW OF MODERN AWARDS

EXPOSURE DRAFTS: SUBGROUPS 2C & 2D

CONTENTS

		Page
1.	**Introduction**	
2.	**Preliminary issues**	3
3.	**Issues common to all exposure drafts**	3
4.	**Exposure Draft - Corrections and Detention (Private Sector) Award 2014**	4
5.	**Exposure Draft - Horse and Greyhound Training Award 2014**	7
6.	**Exposure Draft - Passenger Vehicle Transportation Award 2014**	12
7.	**Exposure Draft - Racing Industry Ground Maintenance Award 2014**	16
8.	**Exposure Draft - Road Transport (Long Distance Operations) Award 2014**	21
9.	**Exposure Draft - Road Transport and Distribution Award 2014**	21
10.	**Exposure Draft - Transport (Cash in Transit) Award 2014**	21
11.	**Exposure Draft - Waste Management Award 2014**	30

1. INTRODUCTION

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

1.2 This submission is made in accordance with the Commission's Statement of 8 December 2014.

2. PRELIMINARY ISSUES

2.1 Ai Group is generally supportive of changes to modern awards to make them easier to understand. However, Ai Group is not supportive of changes that alter employment terms and conditions to the detriment of employers

2.2 Ai Group has considered the exposure drafts for sub-groups 2C and 2D. We note that these exposure drafts:

- Generally provide a clearer structure for modern awards; and
- Are intended to describe award conditions in plain English.

2.3 However, some of the altered wording, at first glance, appears to be minor but when carefully considered it is apparent that some provisions alter the effect and meaning of award terms and would impose substantial additional costs upon employers.

2.4 Any changes to entitlements need to be assessed against relevant statutory provisions including the modern awards objective in s.134 of the *Fair Work Act 2009* (FW Act) and the requirement in s.138 that award terms be necessary to achieve the modern awards objective.

2.5 The requirement that awards be simple and easy to understand (s.134(1)(g)) should not be placed ahead of other critical requirements such as taking into account the impact on business, including on productivity, employment costs

and the regulatory burden (s.134(1)(f)), and promoting flexible modern work practices and the efficient and productive performance of work (s.134(1)(d)).

3. ISSUES COMMON TO EACH EXPOSURE DRAFT

3.1 We note that many of the general drafting and technical issues have been determined by the Commission in its decision of 23 December 2014.[1]

3.2 We also note that further proceedings have been scheduled to deal with the definitions of "all-purposes" and "ordinary hourly rate".[2]

3.3 Ai Group's position on the definition of "all-purposes" is set out in our submission of 26 September 2014.

3.4 Further observations about the definitions of "all-purposes" and "ordinary hourly rate" are included in our submission of 28 January 2015 on the exposure drafts for sub-groups 2A and 2B.

3.5 Ai Group intends to make further submissions about these matters in accordance with the timeframe determined by the Full Bench in its decision of 23 December 2014.[3]

4. EXPOSURE DRAFT – CORRECTIONS AND DETENTION (PRIVATE SECTOR) AWARD 2014

Clause 6.4(b)(i) – Types of employment – Part-time employees

4.1 The words "ordinary hours" should be inserted after "38" in clause 6.4(b)(i). This is consistent with clause 6.3.

Clause 7.1 - Classifications

4.2 Ai Group refers to the question contained at clause 7.1 of the Exposure Draft. We do not oppose the variation made to clause 7 and submit that the

[1] *4 Yearly Review of Modern Awards* [2014] FWCFB 9412.

[2] *4 Yearly Review of Modern Awards* [2014] FWCFB 9412, para [53].

[3] *4 Yearly Review of Modern Awards* [2014] FWCFB 9412, para [53].

reference to it in clause 3.1 is correct. It is clear from the Commission's decision[4] varying the Award to insert the current Schedule D, that catering employees as classified in that schedule are to be covered by the Award. It appears that the consequential amendment necessary to the current clause 13 was not made at the time.

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

4.3 In clause 8.2(a), the words "any day of the week", as found in the current clause 20.2, should be reinserted to make clear that the ordinary hours of work can be worked on any day.

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

4.4 Ai Group refers to the question contained in the Exposure Draft at clause 8.2(a). Based upon the text of the current clause 20.2 and clause 8.2(a) of the Exposure Draft it appears that the span of hours does not apply to part-time employees.

Clause 9 - Breaks

4.5 Ai Group refers to the question contained at clause 9 of the Exposure Draft and submits that the rest breaks provided in clause 9.7 are in substitution for the unpaid meal breaks prescribed in clause 9.1. This is made clear by the words "unless clause 9.7 applies" in clause 9.1 of the exposure draft and similar wording in clause 21.1 of the current award.

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

4.6 Clause 11.2(b) introduces a new obligation on employers. It expressly requires in 11.2(b)(i) that an employer provide all the services listed, whereas the existing clause only requires the employer to pay for the costs of

[4] *Application by United Voice* [2013] FWC 2482.

maintaining the animal or to pay the allowance if the employee provides all the listed services. This is a substantive change which should not be adopted.

4.7 Also, the final bullet point of clause 11.2(b)(i) should be amended by inserting the words "and security" after "safety". This is consistent with the current clause 15.5(a).

4.8 Clause 11.2(b) should be amended to reflect the current provision.

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

4.9 Ai Group refers to the question contained at clause 11.2(b)(ii) of the Exposure Draft. We have not identified any difficulties arising from the proposed approach.

Clause 11.3(c)(iv) – Allowances – Expense related allowances – Travelling – transport and fares

4.10 The current clause 15.4(d) requires the payment of an allowance where "an employee is <u>required</u> to perform duty away from the employee's normal place of work". Clause 11.3(c)(iv) does not specify that the allowance is payable only where the employee is so *required.* It thus potentially expands the entitlement to circumstances where an employee chooses to be away from the employee's normal place of work, but is not so required by their employer.

4.11 This change is a substantive one, that would impose additional costs on employers (s.134(1)(f)). The wording of the current clause should be retained.

Clause 14.3 – Overtime – Time off instead of payment

4.12 Ai Group refers to the question contained at clause 14.3 of the Exposure Draft and submits that an employee is entitled to one hour off for one hour worked.

4.13 The absence of specification regarding the calculation of time off supports this proposition. This interpretation is consistent with the test case standard clause determined by the AIRC in the *Personal/Carer's Leave Test Case* (Print L6900 and M6700).

Clause 14.5 – Overtime – Call-back

4.14 Ai Group refers to the question contained at clause 14.5 of the Exposure Draft. The "appropriate rate" is the rate payable based on the employee's classification, to be determined in accordance with when the work is performed. If the work is performed as overtime, as defined by the award, the appropriate rate will be the overtime rate.

Clause 15.2(a) – Annual leave – Shiftworkers for the purposes of the NES

4.15 Clause 15.2(a) of the Exposure Draft refers to clause 15.1. We refer to the Commission's decision that summaries of the NES will not be included in modern awards.[5]

4.16 In light of this decision, the reference to clause 15.1 should be amended to read "s.87(1)(b) of the Act".

5. EXPOSURE DRAFT – HORSE AND GREYHOUND TRAINING AWARD 2014

Clause 6.1 – Types of employment

5.1 The current clause 10.1 states that employment must be "by the week", however this is subject to the casual employment clause. Clause 6.1 of the Exposure Draft omits that exception, and this should be reinstated.

Clause 6.2 – Types of employment

5.2 Clause 6.2 of the Exposure Draft deviates from the current clause 10.1 and in doing so, imposes an additional award obligation on employers. It requires an

[5] *4 Yearly Review of Modern Awards* [2014] FWCFB 9412 at [35] – [36].

employer to inform an employee of the "terms of their engagement". This extends further than the current obligation to inform an employee of their category of employment. The "terms of engagement" could involve any of the terms and conditions that apply to an employee.

5.3 The reference to an employee's "terms of engagement" should be deleted.

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

5.4 Clause 6.4(a)(iii) deviates from the current clause 10.3, as it is not confined to "the terms of this award". Its application therefore potentially extends to over-award pay and entitlements. This is a substantive change which imposes additional costs on employers and therefore, should not be adopted.

5.5 Additionally, the proposed clause gives rise to an ambiguity. It is not clear what the words "same kind of work" mean. The application of the clause is unclear where part-time employees are engaged to perform a "kind of work" which is not performed by any full-time employees.

5.6 The words of the current clause should be retained.

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

5.7 Ai Group refers to the question contained in the Exposure Draft at clause 6.5(a) and submits that no amendment to the clause is necessary.

5.8 The relevant words simply refer to an employer's ability to terminate the employment of a casual employee without the requirement to give notice. This is by virtue of s.123(1)(c) of the FW Act. The clause does not purport to preclude a casual employee from accessing the unfair dismissal or general protections provisions under the Act. Those provisions continue to operate alongside the Award.

Clause 6.5(e)(i) – Types of employment – Casual employees – Casual loading

5.9 Clause 6.5(e)(i) requires the payment of the "ordinary hourly rate" and a 25% loading on the "ordinary hourly rate". However, the term "ordinary hourly rate"

is not defined in the Exposure Draft, nor is it used in the minimum wages clause to describe the rates there prescribed.

5.10 Ai Group submits that the term "ordinary hourly rate" should be replaced with "minimum hourly rate". The existing award uses the term "minimum wage".

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

5.11 Clause 6.5(e)(i) introduces the notion of a casual employee being engaged in a specific classification. This deviates from the current award and removes a current flexibility that is presently available to both employers and employees and is contrary to clause 6.5(b), which reinforces the notion that a casual employee may be engaged to perform work in varying classifications.

5.12 Ai Group submits that the words "for the classification in which they are employed" should be deleted.

Clause 6.5(e)(ii) – Types of employment – Casual employees – Casual loading

5.13 Clause 6.5(e)(ii) deviates from the current clause 10.4(c), as it states that the casual loading is paid "instead of" leave or public holidays. The current clause simply states that a casual employee will be paid the loading but will not be entitled to leave or public holiday benefits to which a full-time employee is entitled.

5.14 Ai Group opposes the insertion of provisions that state that the casual loading is paid "instead of" certain entitlements. Such a clause is not necessary to achieve the modern awards objective. We refer to our submissions regarding the stage 1A and 1B Exposure Drafts, dated 26 September 2014, at section 3.5.

5.15 We note that the ACTU has also raised concerns regarding the inclusion of such a provision.[6]

[6] See submissions dated 15 October 2014.

Clause 7.3 – Ordinary hours of work and rostering

5.16 Clause 7.3 should be amended by substituting "work" the second time it is used, with "ordinary hours".

5.17 The current clause 20.2 stipulates that an employee cannot be required to work ordinary hours past 12 noon in the circumstances there described. The use of the term "work" in clause 7.3 however, potentially encompasses overtime, which deviates from the current award and would be problematic.

Clause 7.4 – Ordinary hours of work and rostering

5.18 In clause 7.4 the words "each employee's roster" at the commencement of the clause suggests that a separate roster for each employee must be posted up. This deviates from the current clause 20.3, which requires *a* roster that sets out the details there prescribed for each employee.

5.19 The changes made in the Exposure Draft impose an additional regulatory burden on employers and should not be adopted. Clause 7.4 of the Exposure Draft should be substituted with the current clause 20.3.

Clause 9.4(e) – Classifications and minimum wages – Apprentice minimum wages

5.20 Clause 9.4(e) should be reformatted to make clear that it applies only to the circumstances dealt with in clause 9.4(d), as per the current clause 13.6(d).

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

5.21 A drafting error appears in clause 9.5(a). It should be replaced with the current clause 13.7(a).

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

5.22 The reference to clause 9.5(a) in clause 9.5(b) should be replaced with "clause 9.5(b)". This appears to be a drafting error.

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

5.23 Clause 9.5(f) should be amended to make clear that where there is unsatisfactory progress, an employer is not required to reimburse the cost of fees charged by the RTO and of prescribed textbooks, in accordance with either clause 9.5(f)(i) or (ii). The current wording of the Exposure Draft may give rise to the interpretation that the exemption applies only to 9.5(f)(ii). Ai Group proposes the following amendment:

> "Unless there is unsatisfactory progress, all fees charged by an RTO and the cost of all prescribed textbooks for the apprenticeship, which are paid by an apprentice, will be reimbursed by the employer:
>
> (i) within six months of the commencement of the apprenticeship or the relevant stage of the apprenticeship; or
>
> (ii) within three months of the commencement of the training provided b the RTO,
>
> whichever is the later."

5.24 The cross-reference in clause 9.5(g) should be "clause 9.5(f)".

Clause 11.1(b) – Allowances – Expense related allowances – Transport allowance

5.25 The reference to clause 11.1 in clause 11.1(b) should be substituted with "clause 11.1(a)". This appears to be a drafting error.

Clause 14.4 – Annual leave – Requirement to take annual leave

5.26 A typographical error appears in the heading to clause 14.4. The word "lave" should be replaced with "leave".

6. EXPOSURE DRAFT – PASSENGER VEHICLE TRANSPORTATION AWARD 2014

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

6.1 Clause 6.4(a)(iii) deviates from the current clause 10.4(h), as it is not confined to "the terms of this award". Its application therefore could potentially extend to over-award pay and entitlements. This is a substantive change which could impose additional costs on employers and therefore, should not be adopted.

6.2 Additionally, the proposed clause gives rise to an ambiguity. It is not clear what the words "same kind of work" mean. The application of the clause is unclear where part-time employees are engaged to perform a "kind of work" which is not performed by any full-time employees.

6.3 Ai Group submits that, based on the above, the words of the current clause should be retained.

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

6.4 The reference in clause 6.4(e) to clause 6.4(b)(i) should be amended to read "clause 6.4(b)(i)-(iii)".

6.5 The current clause 10.4(c) states that additional hours to those specified in clause 10.4(b)(i) may be offered and worked by agreement. The effect of this provision is that the number of hours, the days upon which they are worked and the commencing and finishing times may be varied. This is not reflected in clause 6.4(e) of the Exposure Draft.

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

6.6 There is a drafting error in clause 6.4(f) which currently states "for employee's the classification" instead of "for the employee's classification".

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

6.7 Clause 21.1 of the current award is not confined to full-time employees. It applies to full-time and casual employees. The relevant words should therefore be deleted from clause 8.1(a).

6.8 The clause should also be amended by inserting the words "up to 38 hours per week". Without this amendment, the clause purports to require casual employees to work 38 ordinary hours a week, which is contrary to clause 6.4(a).

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

6.9 Ai Group refers to the question contained at clause 8.1(a) of the Exposure Draft. Clauses 10.5(a) and (c), as referred to in the question, deal with the payment of wages. It is unclear whether this is intended to be a reference to other provisions of the Exposure Draft.

6.10 In any event, Ai Group submits that the Exposure Draft should not be amended to insert a span of hours. To do so would amount to a substantive change, which is not necessary to achieve the modern awards objective (s.138). There is no specific proposal, submissions or evidence before the Commission which establish that the current award is failing to provide a fair and relevant minimum safety net. The insertion of a span would impose inflexibilities on employers and additional costs to the extent that it would require the payment of overtime rates for time worked outside that span. Where appropriate to a particular enterprise and its operations, a span may be included in an enterprise agreement.

6.11 The insertion of a span of hours would therefore run contrary to ss.134(1)(b), (d), (f) and (h). On this basis, Ai Group opposes any variation to clause 8.1 in this regard.

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

6.12 A typographical error found at clause 8.1(c)(i) of the Exposure Draft should be amended as follows:

> "… by agreement between the employer and employee …".

Clause 10.5(a) – Minimum wages – Payment of wages

6.13 The words "pay week" at the conclusion of clause 10.5(a) should be substituted with "pay period", as per the current cause 19.1. This is because the award provides for a weekly or fortnightly pay cycle.

Clause 11.3(d) – Allowances – Expense related allowances and reimbursements – Living away from home allowance

6.14 The current clause 15.2(c)(i) requires an employer to pay an employee whose employment necessitates absence from home and who is unable to conveniently return home as follows:

- A minimum of eight hours per day, Monday to Friday; and
- A minimum of eight hours per day on Saturday or Sunday, plus penalty rates for actual time worked on a Saturday and Sunday, in accordance with clause 23.

6.15 The Exposure Draft differs from this, by requiring the payment of penalty rates for actual time worked on any day of the week. Ai Group opposes this interpretation of the current clause. The separate reference to a minimum payment of eight hours on Saturday and Sunday in the current provision would be redundant if the interpretation adopted in the Exposure Draft were correct.

6.16 Ai Group submits that clause 11.3(d) should be substituted with the following:

(d) Living away from home allowance

(i) An employee whose employment requires them to be absent from home and who is unable to conveniently return home will be paid:

- A minimum of eight hours per day, Monday to Friday;
- A minimum of eight hours per day, Saturday and Sunday, plus penalty rates for actual time worked on such days in accordance with Part 5 – Penalties and Overtime.

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

6.17 Ai Group submits that, by virtue of clause 23.6(b) of the current award, the rates prescribed in clause 13.2 of the Exposure Draft are in substitution for the casual loading. Thus, the "casual rate" column should be deleted.

6.18 In addition, the current clause 23.6(b) should be included in the Exposure Draft as it establishes the relationship between the penalty rates prescribed for employees on two-driver operations and other penalties and loadings contained in the Exposure Draft.

Clause 14.1(a)(i) – Overtime – Definition of overtime

6.19 Clause 14.1(a)(i) should refer to clauses 8.1(a) and (b). This properly reflects the reference to clause 21.1 in the current clause 23.1.

Clause 15.2 – Annual leave – Additional leave for certain shiftworkers

6.20 Clause 15.2 of the Exposure Draft refers to clause 15.1. We refer to the Commission's decision that summaries of the NES will not be included in modern awards.[7]

6.21 In light of this decision, the reference in clause 15.2(a) to 15.1 should be amended to read "s.87(1)(b) of the Act".

[7] *4 Yearly Review of Modern Awards* [2014] FWCFB 9412 at [35] – [36].

Schedule A.6(b)(ii) – (iv) – Classifications – Grade 6

6.22 Ai Group submits that clause A.6(b)(ii) – (iv) of Schedule A to the Exposure Draft should be substituted with the following, to properly reflect the current award:

> (iii) is required:
>
> - to have a customer service focus; and
>
> - to provide support to operations officers at special events including supervision and co-ordination of transport movements; and is responsible for routine probationary service monitoring and assessment of new drivers.

6.23 The proposed amendment makes clear that both of the above elements are required of the employee for the employee to classify as a grade 6 employee.

Schedule G – Definitions – shiftworker

6.24 The Exposure Draft contains a new definition for "shiftworker", which is in the same terms as the definition of a shiftworker for the purposes of the additional week of annual leave provided for in the NES, at clause 15.2 of the Exposure Draft.

6.25 Ai Group submits that the definition should be deleted. That definition applies only for the purposes of the additional annual leave entitlement and it is defined for this purpose at clause 15.2.

7. EXPOSURE DRAFT – RACING INDUSTRY GROUND MAINTENANCE AWARD 2014

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

7.1 Ai Group submits that the words "ordinary hours" should be inserted after "38" in clause 6.4(b)(i). This is consistent with clause 6.3.

Clause 8.2(a)(ii) – Ordinary hours of work and rostering – Water restrictions

7.2 Clause 8.2(a)(ii) requires the payment of a penalty calculated on the ordinary hourly rate. Ai Group submits that this should be amended to refer to the minimum hourly rate.

7.3 Clause 21.2(a)(ii) of the current award refers to the "appropriate minimum wage plus a penalty of 50%". That minimum wage is the rate prescribed by the minimum wages clause, which does not include all purpose allowances. The change adopted by the Exposure Draft imposes additional costs on an employer and amount to a substantive change to the award. Ai Group submits that such a variation is contrary to the modern awards objective and should not be adopted.

Clause 9.1(c) – Breaks – Meal breaks

7.4 Clause 9.1(c) requires the payment of a higher rate calculated on the ordinary hourly rate. Ai Group submits that this should be amended to refer to the minimum hourly rate.

7.5 Clause 22.1(b) of the current award refers to the "appropriate minimum wage calculated hourly". That minimum wage is the rate prescribed by the minimum wages clause, which does not include all purpose allowances. The change adopted by the Exposure Draft imposes additional costs on an employer and amount to a substantive change to the award. Ai Group submits that such a variation is contrary to the modern awards objective and should not be adopted.

Clause 9.3(a) – Breaks – Paid breaks during overtime

7.6 The concluding words of clause 9.3(a) should be amended to read "after <u>such</u> a break" or "after <u>the</u> break". The current wording is unclear and ambiguous.

Clause 9.3(b) – Breaks – Paid breaks during overtime

7.7 Clause 9.3(b) requires the payment of a higher rate calculated on the ordinary hourly rate. Ai Group submits that this should be amended to refer to the minimum hourly rate.

7.8 Clause 22.3(b) of the current award refers to the "appropriate minimum wage calculated hourly". That minimum wage is the rate prescribed by the minimum wages clause, which does not include all purpose allowances. The change adopted by the Exposure Draft imposes additional costs on an employer and amount to a substantive change to the award. Ai Group submits that such a variation is contrary to the modern awards objective and should not be adopted.

Clause 10.7(c) – Payment of wages – Late payment of wages

7.9 Ai Group refers to the question contained in the Exposure Draft at clause 10.7(c) and submits that the provision should be amended as proposed. The reason for the redrafting of the provision, as it appeared in the September 2008 Exposure Draft, is unclear. The clause was not dealt with explicitly by the Full Bench in its decision regarding the making of the award.[8]

7.10 It is both unfair and illogical to penalise an employer for the late payment of wages due to circumstances beyond the employer's control. The amendment proposed is consistent with similar clauses contained in other awards including the *Building and Construction General On-Site Award 2010* (clause 31.5), *Graphic Arts, Printing and Publishing Award 2010* (clause 28.4), *Joinery and Building Trades Award 2010* (clause 26.3), and *Supported Employment Services Award 2010* (clause 18.6).

Clause 14.1(a) – Overtime

7.11 Clause 14.1(a) of the Exposure Draft should be amended such that it refers to "38 ordinary hours a week". This is consistent with clause 8.1(a).

[8] *Award Modernisation* [2008] AIRCFB 1000.

Clause 14.1(a) – Overtime

7.12 Clause 14.1(a) requires the calculation of overtime on the ordinary hourly rate. Ai Group submits that this should be amended to refer to the minimum hourly rate.

7.13 Clause 23.1(a) of the current award refers to the "appropriate minimum wage calculated hourly". That minimum wage is the rate prescribed by the minimum wages clause, which does not include all purpose allowances. The change adopted by the Exposure Draft imposes additional costs on an employer and amount to a substantive change to the award. Ai Group submits that such a variation is contrary to the modern awards objective and should not be adopted.

Clause 14.2(c) – Overtime – Rest period after overtime duty

7.14 Clause 14.2(c) requires the calculation of a higher rate on the ordinary hourly rate. Ai Group submits that this should be amended to refer to the minimum hourly rate.

7.15 Clause 23.2(c) of the current award refers to the "appropriate minimum wage". That minimum wage is the rate prescribed by the minimum wages clause, which does not include all purpose allowances. The change adopted by the Exposure Draft imposes additional costs on an employer and amount to a substantive change to the award. Ai Group submits that such a variation is contrary to the modern awards objective and should not be adopted.

Clause 13.1 – 13.5 – Penalty rates

7.16 Clause 13.1 – 13.5 requires the calculation of penalty rates on the ordinary hourly rate. Ai Group submits that this should be amended to refer to the minimum hourly rate.

7.17 Clause 23.4 of the current award refers to the "appropriate minimum wage calculated hourly". That minimum wage is the rate prescribed by the minimum wages clause, which does not include all purpose allowances. The change

adopted by the Exposure Draft imposes additional costs on an employer and amount to a substantive change to the award. Ai Group submits that such a variation is contrary to the modern awards objective and should not be adopted.

Clause 13.5 – Penalty rates – Public holidays

7.18 In addition to the amendment proposed above, Ai Group submits that clause 13.5 should be varied by deleting the words "calculated hourly on a public holiday". This appears to be a drafting error.

Clause 15.5 – Annual leave – Payment for annual leave

7.19 Clause 15.5(b) requires the calculation of annual leave loading on the ordinary hourly rate. Ai Group submits that this should be amended to refer to the minimum hourly rate.

7.20 Clause 23.4 of the current award refers to the "minimum rate prescribed in clause 14 – Minimum wages". That minimum wage does not include all purpose allowances. The change adopted by the Exposure Draft imposes additional costs on an employer and amount to a substantive change to the award. Ai Group submits that such a variation is contrary to the modern awards objective and should not be adopted.

Schedule B.2.1 – Summary of hourly rates of pay

7.21 In accordance with the submissions made above, references to the "ordinary hourly rate" in the tables contained in Schedule B should be amended to read "minimum hourly rate":

7.22 Further, the rates published in the schedule have been calculated on the minimum hourly rate (see B.1.2). The reference to the "ordinary hourly rate" is therefore misleading.

Schedule C.1 – Summary of monetary allowances – Wage related allowances

7.23 Ai Group submits that the following amendments should be made to C.1:

- The "0" in the second column regarding the leading hand allowance should be substituted with "11.2(b)". This appears to be a drafting error.
- The final entry regarding the late payment of wages should be deleted. This is not a monetary allowance. Rather, the clause purports to impose a penalty on employers for the late payment of wages.

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

8.1 Ai Group intends to file a separate submission on the exposure draft for this Award.

9. EXPOSURE DRAFT – ROAD TRANSPORT AND DISTRIBUTION AWARD 2014

9.1 Ai Group intends to file a separate submission on the exposure draft for this Award.

10. EXPOSURE DRAFT – TRANSPORT (CASH IN TRANSIT) AWARD 2014

Clause 3.5 – Coverage

10.1 A typographical error in clause 3.5 should be amended as follows:

" … set out at clauses 3.1 and 3.2 and those trainees …".

Clause 6.5(d)(ii) – Types of employment – Casual employment – Casual loading

10.2 Clause 6.5(d)(ii) of the Exposure Draft, states that the casual loading must be applied to the ordinary hourly rate, which is defined as including any all

purposes allowances payable to the employee. The current award, at clause 11.5(c), requires the payment of a 25% casual loading of the ordinary hourly rate but that term is not presently defined.

10.3 Ai Group submits that the wording in the exposure draft would make a substantive change and impose additional costs on employers. Ai Group submits that the reference to the ordinary hourly rate should be substituted with the words "minimum hourly rate".

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

10.4 Ai Group opposes the insertion of clause 6.5(e). The clause is not necessary to achieve the modern awards objective. We refer to our submissions regarding the stage 1A and 1B Exposure Drafts, dated 26 September 2014, at section 3.5.

10.5 We note that the ACTU has also raised concerns regarding the inclusion of such a provision.[9]

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

10.6 Ai Group notes that the current clause 11.6 has been significantly redrafted. We have identified various concerns arising from this redrafting, which are similar to those we have identified with respect to Group 1 Exposure Drafts. We note that such issues have been referred to the Casual Employment Common Issues Full Bench. Ai Group intends to make submissions before that Full Bench regarding the redrafting of these provisions.

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

[9] See submissions dated 15 October 2014.

Clause 9.1(a) – Hours of work – Ordinary hours and roster cycles

10.8 Clause 23.1(a) of the current award is not confined to full-time employees. It also applies to part-time and casual employees. The relevant words should therefore be deleted from clause 9.1(a).

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

Clause 9.1(c) – Hours of work – Ordinary hours and roster cycles

10.10 Clause 9.1(c) of the Exposure Draft deviates from the current clause 23.1(b), as it does not include the words "subject to other provisions of this award". That text is important as it alerts the reader to other provisions of the Exposure Draft that deal with ordinary hours of work and deals with the interaction between such clauses and clause 9.1(c) (see for example, clause 14.1(a)).

Clause 9.1(c) – Hours of work – Ordinary hours and roster cycles

10.11 The current clause 23.1(b) states that ordinary hours will be worked "on any day Monday to Friday". The words "on any day" have been removed in clause 9.1(c) of the Exposure Draft. The Exposure Draft clause may give rise to the argument that ordinary hours must be worked on each day, Monday to Friday inclusive. This is not in fact required by the award if ordinary hours are arranged in accordance clause 9.2(a). Additionally, clause 9.1(c) applies to part-time and casual employees. The award does not require that casual employees be required to work on each day, Monday to Friday.

10.12 On these bases, Ai Group submits that the relevant words be reinserted.

Clause 9.2(b)(i) – Hours of work – Method of working ordinary hours – Providing for other than a normal rostered day off

10.13 Clause 9.2(b)(i) substitutes the words "three or less" in the current clause 23.2(b)(i) with "up to three". Ai Group submits that the words of the current clause should be retained to avoid any ambiguity.

Clause 9.4(b) – Hours of work – Start times

10.14 Ai Group refers to the question contained in the Exposure Draft at clause 9.4(b).

10.15 Clause 23.2 of the Exposure Draft is a standard provision. It was inserted by a Full Bench of the Commission in response to s.145A of the *Fair Work Act 2009*. That provision was introduced the *Fair Work Amendment Act 2013.*

10.16 The interaction between award terms that provide a facility to vary working days/hours and the consultation term was explicitly dealt with by the Full Bench when it determined the form and content of the standard term found at clause 23.2:

> "[50] Section 145A is intended to impose a new, additional obligation to consult employees in circumstances where their employer proposes to change their regular roster or ordinary hours of work. There is no conflict between the imposition of such an obligation and existing modern award provisions permitting the variation of a regular roster or ordinary hours of work on the giving of a specified period of notice or pursuant to a facilitative provision. There is no impediment to the employer complying with both provisions. The employer may still implement the proposed change on the giving of the requisite notice, but will now be required to consult the employees affected before implementing such a change. As we have mentioned such consultation must provide the affected employees with a genuine opportunity to attempt to persuade the employer to adopt a different course of action. For those reasons the relevant term will make clear that it is to be read in conjunction with other award provisions concerning the scheduling of work and notice provisions."[10]

10.17 Clause 23.2 and clause 9.4(b) give rise to separate and distinct rights and obligations. Undoubtedly, there will be circumstances in which the utilisation of clause 9.4(b) will give rise to an obligation under clause 23.2, however this will not necessarily be the case.

[10] *Consultation Clause in Modern Awards* [2013] FWCFB 10165.

10.18 The above passage demonstrates that the Commission determined that provisions such as clause 9.4(b) and the consultation clause are to be read in conjunction with one another.

Clause 10.1(d) – Meal breaks – Unpaid meal break

10.19 Clause 10.1(d) of the Exposure Draft deals with circumstances where an employee is "unable" to take a meal break whereas the current clause 26.1(c) requires an additional payment where an employee is "not allowed" a meal break.

10.20 Ai Group submits that the words of the current clause should be retained. The language of the Exposure Draft extends the application of the clause to any circumstances where an employee is unable to take a meal break, including those that are beyond the employer's control. Such a variation could result in a significant increase in costs incurred by an employer. As the Exposure Drafts are not intended to incorporate any substantive changes[11], the current clause should be retained.

Clause 10.1(d) – Meal breaks – Unpaid meal break

10.21 The current clause requires payment at the rate of ordinary time in addition to "any payment due in respect of a weekly or casual wage". That wage is the minimum rate prescribed by the award, which does not include all purpose allowances.

10.22 The use of the term "ordinary hourly rate" in clause 10.1(d) therefore deviates from the current award. It requires a higher rate of pay by including all purpose allowances in the calculation of the penalty. This change imposes additional costs on employers and should not be adopted.

[11] *4 Yearly Review of Modern Awards* [2014] FWCFB 9412 at [140].

Clause 10.2(a) – Meal breaks – Break inside armoured vehicle

10.23 Clause 26.2(a) of the current award specifies that the higher rate there prescribed is payable "for the time spent inside the vehicle". The omission of these words from clause 10.2(a) of the Exposure Draft may give rise to the argument that the higher rate is payable for the entire meal break.

10.24 Ai Group submits that the relevant words should be retained.

Clause 11.1 – Minimum wages – Minimum rates

10.25 If Ai Group's submissions regarding clause 6.5(d)(ii) are accepted, the casual hourly rates in clause 11.1 will require recalculation.

Clause 11.4 – Minimum wages – Higher duties

10.26 Clause 11.4 is ambiguous and may give rise to the argument that, where an employee performs two or more classes of work on any one day, they must be paid at the highest rate prescribed under the award. The insertion of the word "applicable" does not adequately summarise the effect of the current clause 19. It should be substituted with the word "relevant".

Clause 12.2(f)(i) – Allowances – Wage related allowances – Travelling allowances

10.27 Clause 12.2(f)(i) of the Exposure Draft omits the words "on work" as found in clause 16.2(a)(i) of the current award. Ai Group submits that the words should be reinserted to make clear that the allowance is payable only where an employee travels on work, and the employee is unable to return home.

Clause 14.2(b) – Shiftwork – Shiftwork rosters

10.28 The reference in clause 14.2(b) of the Exposure Draft to clause 9 should be amended to read "clause 9.1 – 9.3". This properly reflects the cross reference in the current clause 25.2(b).

10.29 Further, clause 9.4 deals with start times (current clause 24). However, clause 14.2(c) of the Exposure Draft deals specifically with starting and finishing

times with respect to shiftworkers. A reference that includes clause 9.4 is therefore likely to give rise to confusion.

Clause 14.8 – Shiftwork – Penalty rates – shiftworkers

10.30 The current award characterises the higher rate payable to shiftworkers as an allowance. A change to the characterisation could have implications for the calculation of workers' compensation and long service leave entitlements under State and Territory Acts.

10.31 Ai Group submits that, for this reason, a cautious approach should be taken in altering the language presently used to describe a shiftwork allowance or penalty. The heading to clause 14.8 should be amended to read "Shiftwork allowances" and the preamble to the table should also be amended by deleting the words "penalty rates" with "shift allowances".

Clause 14.8 – Shiftwork – Penalty rates – shiftworkers

10.32 Ai Group makes the following submissions regarding the table contained at clause 14.8:

- The current award requires the shift allowances to be calculated on the "rate prescribed for their respective classifications". This is a reference to the minimum rate prescribed by the award, which does not include all purpose allowances. The reference to the "ordinary hourly rate", which includes all purpose allowances, imposes additional costs on employers and is a substantive change to the award. On this basis, the reference should be substituted with the words "minimum hourly rate".

- The table should be amended to make clear that the shift allowances payable to shiftworkers who work on an afternoon or night shift which does not continue for at least five consecutive afternoons or nights, applies only to work on Saturday, Sundays and Public Holidays (see clause 25.9(c)). We note that the corresponding current award clause does not appear in the Exposure Draft.

Clause 15.3(b) – Overtime – Rest period after overtime

10.33 Clause 28.3 of the current award deals with circumstances where an employee does not have eight consecutive hours off duty between "the termination of their ordinary work on one day and the commencement of ordinary work on the next day". The omission of the word "ordinary" from clause 15.3(b) of the Exposure Draft could result in an interpretation of the clause that deviates from the current award. That is, the clause could be read as dealing with the need to have eight consecutive hours off duty between the end of work (which could include overtime) and the commencement of ordinary hours the following day.

10.34 Ai Group submits that, on this basis, the word "ordinary" should be reinserted.

Clause 15.4(a) – Overtime – Call-back

10.35 Ai Group refers to the question contained at clause 14.5 of the Exposure Draft. The "appropriate rate" is the rate payable based on the employee's classification, to be determined in accordance with when the work is performed. If the work is performed during overtime, as defined by the award, the appropriate rate will be the overtime rate.

10.36 The term "appropriate rate" should be retained, as work on different days may attract differing rates (see for example, clauses 15.5 and 15.6 of the Exposure Draft).

Clause 16.2 – Annual leave – Additional leave for certain shiftworkers

10.37 Clause 16.2 of the Exposure Draft refers to clause 16.1. We refer to the Commission's decision that summaries of the NES will not be included in modern awards.[12]

10.38 In light of this decision, the reference in clause 15.2(a) to 15.1 should be amended to read "s.87(1)(b) of the Act".

[12] *4 Yearly Review of Modern Awards* [2014] FWCFB 9412 at [35] – [36].

Clause 19.5(a) – Public holidays – Substitution of public holidays by agreement

10.39 Clause 30.2(a) of the current award requires agreement between the employer and "the majority of affected employees". Clause 19.5(a) of the Exposure Draft deviates from this by requiring agreement between the employer and "the majority of employees in an enterprise". Ai Group submits that this amounts to a substantive change which should not be adopted. The wording of the current clause should be retained.

Clause 19.5(b) – Public holidays – Substitution of public holidays by agreement

10.40 The reference to clause 19.1 in clause 19.5(b) of the Exposure Draft should be amended to read "clause 19.5(a)". This appears to be a drafting error.

Schedule A.2.1 – Summary of hourly rates of pay – Full-time and part-time employees – Full-time and part-time employees other than shiftworkers – ordinary, overtime and penalty rates

10.41 If the terminology of "ordinary hourly rate" is to be used in this award, the table at A.2.1 should be amended to use the same term rather than "ordinary rate of pay".

Schedule A.2.2 – Summary of hourly rates of pay – Full-time and part-time shiftworkers – ordinary and penalty rates

10.42 The rates prescribed for non-continuous afternoon or nights shifts only apply to work on Saturday, Sunday or a public holiday (see current clause 25.9(c)). This should be made clear in the table.

Schedule A.2.3 – Summary of hourly rates of pay – Full-time and part-time shiftworkers – overtime

10.43 A shiftworker is to generally be paid at the same overtime rates on public holidays, as those that apply to overtime performed on any other day. A 250% penalty is currently only payable to shiftworkers on a "rostered shift" which

falls on a public holiday (see existing clauses 25.9 and 30.3). The "public holiday" column from this table should be removed.

Schedule A.3 – Summary of hourly rates of pay – Casual employees other than shiftworkers

10.44 Based on our submissions above regarding clause 6.5(b)(ii), the rates in Schedule A.3 require recalculation.

Schedule A.3.2 – Summary of hourly rates of pay – Casual shiftworkers – ordinary and penalty rates

10.45 The rates prescribed for non-continuous afternoon or nights shifts only apply to work on Saturday, Sunday or a public holiday (see current clause 25.9(c)). This should be made clear in the table.

11. EXPOSURE DRAFT – WASTE MANAGEMENT AWARD 2014

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

11.1 Clause 6.4(a)(ii) deviates from the current clause 13.6, as it is not confined to "the terms of this award". Its application therefore extends to over-award pay and entitlements. This is a substantive change which imposes additional costs on employers and therefore, should not be adopted.

11.2 Additionally, the proposed clause gives rise to an ambiguity. It is not clear what is meant by the words "same kind of work". The application of the clause is unclear where part-time employees are engaged to perform a "kind of work" which is not performed by any full-time employees.

11.3 Ai Group submits that, based on the above, the words of the current clause should be retained.

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

11.4 Clause 14.5 of the current award exhaustively provides for the payment to be made to a casual employee while performing overtime. It is unambiguously provides that casual loading is not payable during overtime.

11.5 Ai Group submits that clause 6.5(h) of the Exposure Draft may give rise to confusion as to whether the overtime rates and additional 10% are paid in addition to the casual loading. The words of the provision should be restored so as to avoid any potential ambiguity.

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

11.6 Ai Group notes that the current clause 15 has been significantly redrafted. We have identified various concerns arising from this redrafting, which are similar to those identified with respect to Group 1 Exposure Drafts. We note that such issues have been referred to the Casual Employment Common Issues Full Bench. Ai Group intends to make submissions before that Full Bench regarding the redrafting of these provisions.

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

Clause 10.1 – Minimum wages – Adult rates

11.8 The reference to clause 11.2(a) should be substituted with “clause 11.2(b)”. This appears to be a drafting error.

Clause 16.3(a) – Overtime

11.9 Clause 16.3(a) should be amended to make clear that the ten hour break is to be taken between the cessation of overtime and the commencement of ordinary hours on the next day. The clause, as currently drafted, refers to the commencement of “work”, which would encompass overtime. This is a deviation from the current award and should not be adopted.

Clause 16.3(b)(i) – Overtime

11.10 The current clause 30.3(b) requires payment at the rate of 200% from the time that the employee resumes or continues work on the instruction of the employer, without having had 10 consecutive hours off, until released from duty. Clause 16.3(b)(i) is ambiguous as to the time from which the rate of 200% is payable. Ai Group submits that the preamble to clause 16.3(b)(i) and the provision itself should be substituted with the words of the current clause to cure this ambiguity.

Clause 16.3(b)(ii) – Overtime

11.11 Clause 16.3(b)(ii) should be amended to make clear that an employee is not to suffer a loss of pay for ordinary hours that occur during the 10 consecutive hours off duty to which they are entitled this subclause. The words "during such absence", as found at the conclusion of the current clause 30.3(b), should be reinstated.

Clause 16.6 - Overtime

11.12 Ai Group refers to the question contained in the Exposure Draft at clause 16 and submits that the provision is limited in its application to Saturday and Sunday work. This is evident from the current clause 31. A subheading should be inserted above clause 16.6 of the Exposure Draft to clarify this.

Clause 16.7(a) – Overtime – Call-back

11.13 With reference to the question contained in the Exposure Draft, the rate of pay for work under clause 16.7 is to be determined based upon the time at which the employee is recalled. For instance, if the recall occurs during overtime as defined by the award, overtime rates will apply. If however, the recall occurs on a Sunday, the rate under clause 16.5 would apply.

Clause 16.7(d) – Overtime – Call-back

11.14 The reference to clause 16.7(a) in clause 16.7(d) should be substituted with a reference to clauses 16.7(a) – (c). This properly reflects the current approach in clause 30.4(b).

Clause 16.8 – Overtime – Call-back on a Saturday and Sunday

11.15 In response to the question in the Exposure Draft, the preface is essential in this award and in the many other awards where similar wording appears. Many employers have longstanding alternative customs as has been the focus of various Commission and Court cases over the years regarding the meaning of the wording in the preface.

11.16 Ai Group submits that, consistent with clause 31 of the current award, this clause applies only to Saturday and Sunday work.

Clause 16.9(c) – Overtime – Time off instead of payment for overtime

11.17 By moving the phrase "if requested by the employee" from the start of clause 16.9(c) to its conclusion, the Exposure Draft gives rise to a potential anomaly. Ai Group submits that the current provision should be retained.

11.18 Under the current clause 30.5(c), an employer is required to pay the employee for the overtime accrued if requested by the employee. Clause 16.9(c) may, however, give rise to the interpretation that an employer must make payment if the time off has not been taken within four weeks. The element of an employee's request now appears to be associated with the rate at which payment is to be made. This is a clearly anomalous outcome and one that should be avoided.

Clause 20.5 – Public holidays – Substitution of public holidays by agreement

11.19 It appears that the current clause 36.3 of the award contains a typographical error. It should refer to an agreement "between an employer and employee or employees".

11.20 Clause 20.5 of the Exposure Draft deviates from this by mandating agreement between the employer and the majority of employees in an enterprise. This removes the flexibility presently available to employers and employees. Ai Group submits that the current clause, subject to amending the typographical error it contains, should be retained.

Clause 20.6(a) – Public holidays – Payment for work on public holidays

11.21 Ai Group refers to the question at clause 20.6(a) of the Exposure Draft and submits that the reference to "weekly employees" includes full-time and part-time employees but not casual employees.

Clause 20.6(b) – Public holidays – Payment for work on public holidays

11.22 Ai Group submits that the reference to clause 8 should be substituted with a reference to clause 16. This is consistent with the current clause 32.5.

Clause 20.6(b) – Public holidays – Payment for work on public holidays

11.23 Ai Group submits that the rates in clause 20.6(b) should be amended such that they are consistent with the current clause 32.5. It appears that the Exposure Draft erroneously adopts the same approach taken to calculating the relevant rates as clause 20.6(b). However in this case, the current clause 32.4 does not apply.

11.24 Additionally, the casual rates found at the current clause 32.6 apply to "all time worked" by a casual employee on a public holiday. This necessarily includes overtime. Ai Group submits that clause 20.6(b) should be amended by inserting a column with casual rates consistent with clause 32.6 of the current award.

Clause 20.6(d) – Public holidays – Payment for work on public holidays

11.25 Ai Group submits that the reference to clause 20.6(a) should be substituted with a reference to clause 20.6(c). This appears to be a drafting error.