Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Storage Services and Wholesale Award 2010

(AM2014/214)

7 July 2016

4 YEARLY REVIEW OF MODERN AWARDS

AM2014/214 – STORAGE SERVICES AND WHOLESALE AWARD 2010

1. INTRODUCTION

1. The Australian Industry Group (**Ai Group**) makes this submission in response to the Directions issued by the Deputy President (**Commission**) on 14 June 2016 in relation to the review of the *Storage Services and Wholesale Award 2010*.

2. The submission responds to the joint submissions of the Australian Workers' Union, Shop Distributive & Allied Employees' Association and the National Union of Workers ("the unions") dated 22 January 2016.

2. ISSUE 72: DEFINITION OF FULL-TIME EMPLOYEE

3. The current award and Exposure Draft define a full-time employee in the following way:

   "A full-time employee is one engaged and paid by the week"

4. The AWU proposes that the definition be amended to provide that;

   "A full-time employee is an employee who is engaged to work an average of 38 ordinary hours per week"

5. The only arguments in support of the proposed variation are assertions that:

   - The variation will ensure that the award is consistent with s.147;
   - The variation should be adopted, "…because it achieves the modern awards objective of providing a modern award, which is simple and easy to understand".

6. The unions' submissions regarding s.147 are misguided and should be disregarded. The second argument falls well short of establishing that the change is necessary, as contemplated by s.138.

7. The AWU proposal risks giving rise to unintended consequences and should not be adopted.

8. The Exposure Draft already meets the requirements of s.147 through clause 8 – Hours of Work, and clause 15 - Shift Work.

9. Clause 6.2 of the Exposure Draft and clause 11.2 of the current award provide a definition of full-time employment. The purpose of these provisions is not to set or provide for the determination of ordinary hours of work.

10. Although it is common for award terms dealing with types of employment to define particular types by reference to the number of hours an employee is engaged for, this is not a mandatory approach. For example, a casual employee is commonly defined as an employee, "*engaged and paid as such*."

11. Clause 11.2 of the Exposure Draft does provide a very broad definition of a full-time employee. However, there is nothing inherently problematic about this as the other types of employment recognised under the award are very specifically defined.

12. Under clause 11.3 of the current award a part-time employee is distinguished from a full time employee by reference to characteristics that include working "…fewer than full-time hours of 38 per week."

13. A casual employee is defined by clause 11.4(a) as an employee who is, "…*engaged and paid as such*." There is nothing controversial about such a definition.

14. At paragraph 4 the unions allege that Ai Group has argued that clause 6.2 should contain the words "*and paid the weekly wage as per cl.10."* The wording was a product of the conferencing process and attempts to reach a compromise position. It is not a claim that is being pressed by Ai Group. We

do not propose any particular variation to the current definition of full-time employment.

15. The wording referred to in paragraph 4 of the unions' submissions arose out of a suggestion that there was a potential tension between the reference to being paid "by the week" and the capacity to pay fortnightly under the award.

16. Ai Group suggests that the words "paid by the week" is a reference to the fact that employees are entitled to a weekly wage under the award, rather than the frequency with which any such payment is processed. This distinguishes such employees from casual employees who are, in effect, paid by the hour. We accordingly do not perceive that any variation is required for the purposes of consistency with the payment of wages provisions in the award; although we agree that there may be merit in clarifying this issue, if suitable wording can be identified. Nonetheless, the AWU proposed wording is problematic.

17. We note that the award does not currently require that a full-time employee work any particular number of hours. Nor does it require that a full-time employee will work 38 ordinary hours per week. Accordingly, the AWU's proposed variation would be a substantive change to the operation of the award. The unions have not identified any legitimate reason for such a change.

18. The definition of full-time employee in the current award establishes that employees are engaged "by the week". This is relevant because the award contains provisions that only apply to weekly employees. Relevantly, the higher duties provisions, currently only apply to "weekly employees." The AWU's proposed definition does not provide that employees are employed "by the week" and as such makes it less clear that full-time employees are weekly employees.

19. If the AWU wording is adopted the higher duties clause should be amended to clarify that the clause does not apply to casual employees.

3. ISSUE 73: APPLICATION OF HIGHER DUTIES

20. Issue 73 relates to clause 19 of the Storage Services Award and clause 13 of the Exposure Draft. The provision currently is as follows:

> **13.1** Where a weekly employee performs work temporarily at a classification higher than that under which the employee is engaged or deemed to be working, the employee will be paid as follows:
>
> **(a)** up to three hours on any one day—the rate prescribed for such higher classification for the time worked at the higher level with a minimum of one hour;
>
> **(b)** over three hours on any one day—a full day's pay at the rate prescribed for such higher classification; or
>
> **(c)** over 20 hours in any one week—a full week's pay at the rate prescribed for such higher classification.
>
> **13.2** A weekly employee must not suffer any reduction in wages during any week by reason of the employee performing work for a part of such week at a classification lower than that under which the employee was engaged or deemed to be working

21. The unions propose that it be amended in the following manner;

> **13.1** Where an ~~a weekly~~ employee performs work temporarily at a classification higher than that under which the employee is engaged or deemed to be working, the employee will be paid as follows:
>
> **(a)** up to three hours on any one day—the rate prescribed for such higher classification for the time worked at the higher level with a minimum of one hour;
>
> **(b)** over three hours on any one day—a full day's pay at the rate prescribed for such higher classification; or
>
> **(c)** over 20 hours in any one week—a full week's pay at the rate prescribed for such higher classification.
>
> **13.2** ~~A weekly~~ An employee must not suffer any reduction in wages ~~during any week~~ by reason of the employee performing work for ~~a part of such week~~ at a classification lower than that under which the employee was engaged or deemed to be working

22. The clause does not currently apply to casual employees. In essence, the union proposes to amend the provision so that it applies to all employees.

23. Ai Group opposes the variation of the clause to extend its application to casual employees. This is a significant variation that will have adverse cost implications for employers.

24. The proposed clause would not operate appropriately in the context of casual employment.

25. The clause currently operates on the presumption that an employee is engaged to perform work in a particular classification. It gives rise to an entitlement in circumstances where an employee has been engaged or deemed to be working in a particular classification, but subsequently works in a higher classification. This may be appropriate in the context of permanent weekly employees, but it certainly cannot be assumed to be applicable to employees engaged on a casual basis. There is no express obligation under the award to engage casual employees in a particular classification.

26. It is completely unclear how clause 13.1(c) would apply if the union proposal was adopted. What would constitute a "week's pay" for a casual employee?

27. The variation to clause 13.2 would also be particularly inappropriate in the context of casual employment. Currently, the clause is transparently intended to operate in the context of employees having an entitlement to a particular weekly wage under the Award, or to give effect to such an outcome. Hence the prohibition on an employee receiving any "reduction" in wages during any week. It is unclear how the provision could sensibly operate in the context of a casual employee. A casual employee does not have any set weekly wages that could be "reduced". They do not have any entitlement to a weekly level of remuneration prescribed or guaranteed by the award. A casual employee is only entitled to an hourly rate of pay. This is reflected in the fact that clause 15.1 of the current award only prescribes weekly rates for full-time adult employees.

28. Clause 13.2 (or the comparable provision in the award) currently operates on the presumption that an employee is engaged in a particular classification for the entire week (if not permanently). There is no reason to assume that a

casual employee will be engaged to work in a particular classification over the course of a week. Nor can it be assumed that a casual employee will be engaged to perform the work of only one classification on any given day. A casual employee is engaged by the hour.

29. An employer should be able to engage a casual employee to perform different types of work from one day to the next without incurring any kind of financial penalty. Each engagement represents a distinct contract of employment. The nature of casual employment, at common law, was succinctly described by the Full Bench in *Sortland v Smiths Snackfood Company;*[1]

> **[10]** As a matter of the common law of employment, and in the absence of an agreement to the contrary, each occasion that a casual employee works is viewed as a separate engagement pursuant to a separate contract of employment. Casual employees may be engaged from week to week, day to day, shift to shift, hour to hour or for any other agreed short period. 4 In this sense no casual employee has a continuous period of employment beyond any single engagement. Moreover, it is common for a casual employee to transition between a period in which their engagements with a particular employer are intermittent and a period in which their engagements are regular and systematic and vice versa. It is against that background that s.384 must be construed.

30. There is no merit to introducing a restrictive and potentially costly obligation to calculate casual employee's remuneration by reference to a single classification over the course of a week. The Commission should be similarly cautious about penalising an employer who seeks to utilise a casual employee to perform work of multiple classifications on the same day.

31. The union's proposed clause would give rise to a perverse incentive for an employer to seek to avoid giving a particular casual employee additional work of a higher classification and to instead simply seek to utilise a different casual employee.

[1] [2010] FWAFB 5709

Response to Specific Union arguments

32. At paragraph 11, the Unions' submissions imply that the higher duties clause is confined to weekly employees for no apparent reason. Such assertion should be given no weight. The unions do not appear to have undertaken a thorough analysis of the history of the provision. Regardless, for the reasons we have already set out, the current clause can only be sensibly applied in the context of "weekly" or permanent employment.

33. At paragraph 12 the unions assert that they, "…*see the impacts of the variation as negligible.*" They have not however sought to advance any evidence in support of this factual assertion. It should accordingly be given no weight.

34. More broadly, the unions have not sought to lead any evidence in support of their claim. There is simply no material that establishes the manner in which casuals are utilised in the industry or the impact that the variation would have on the Industry. For this reason alone the Commission should conclude that a case for the variation proposed has not been made out.

35. The unions' submission regarding "*the principle of equal remuneration for work of equal or comparable value*" should similarly be disregarded. Ai Group addressed comparable arguments in detail in our submissions regarding the Pharmaceutical Industry Award Exposure Draft. [2] We rely on those submissions rather than repeating them in this context.

36. We also note that the union has not established in an evidentiary sense that casual employees in this award are disproportionately women; let alone sought to establish that casual employees covered by this award and "performing higher duties" are disproportionately women. The union's bald assertions should be given no weight.

37. At paragraph 13 the union contends that employers are "…*obliged to pay*

[2] See Ai Group Reply submissions of 24 April 2015 regarding the Pharmaceutical Industry Award 2010. Paragraphs 18 to 38 deal with the indirect discrimination issue. Paragraphs 75 to 78 address principle of equal remuneration for work of equal or comparable value as contemplated by s.134(1)(e).

casual employees the appropriate rate for the work that they are performing from time to time." If this is correct the proposed clause would operate in a very unfair manner in the context of casual employees. It would result in employers having to pay casual employees by reference to the work they are actually performing (as opposed to a rate based on the classification in which they are engaged or deemed to be working in on an ongoing basis) and would also need to pay such employees at a rate higher than that applicable to work that they are performing for part of a day, in circumstances where the operation of the higher duties clause is triggered.

38. At paragraph 16 the unions contend that there is, "no reason why a casual employee should not receive a higher rate of pay when they undertake higher duties." This submission is largely irrelevant as the union claim is not limited to seeking that casual employees receive a higher rate of pay when they perform higher duties. It seeks a potentially more beneficial outcome, depending on individual circumstances, through the application of the higher duties clause. Regardless, we would contend that the very nature of a casual employee's engagement means that the application of the current form of higher duties clause is not appropriate to that type of employment.

Ai Group Proposal – Advanced in the Alternative

39. If, contrary to the submissions advanced by the Ai Group, the Commission decides that a change is warranted, Ai Group suggests that the following provision would be more appropriate in the context of casual employment;

> 13.4 If, at the direction of their employer, a casual employee performs the work of two or more classifications on the same day or shift, they will be entitled to the hourly rate applicable for the classification relevant to the work that the employee spends the largest proportion of their time undertaking on that day or shift.
>
> 13.5 A casual employee will only be entitled to receive the hourly rate applicable to a particular classification if they have the required skills referred to in the appropriate classification and are utilising those skills.

42. The above proposal is intended to better and more fairly address the possibility of a casual employee performing 'mixed functions' on a particular day. It is also intended to reflect the fact that the classification structure

operates by reference to both the skills and functions undertaken by employees.

Response to the Unions' submissions relating to the Pharmaceutical Exposure Draft

40. In support of their claim the union point to the Full Bench's decision to vary a similar provision in the Pharmaceutical Industry Exposure Draft.

41. Ai Group contends that the Full Bench should not simply adopt the same provision for the following reasons;

- Ai Group has advanced different arguments in relation to Storage Services and Wholesale Industry Award Exposure Draft and an alternate clause.

- The specific variations made to the Pharmaceutical Industry Award Exposure Draft are problematic in ways not specifically dealt with by the Full Bench. Our concerns in this regard primarily relate to the application of the provisions to casual employees. We note that the variation ultimately made did not reflect the views of either the union or employers. In that matter the AWU ultimately modified its proposed clause, but the alternate clause does not appear to be addressed in the reasoning set out in the Full Bench decision. [3]

- The focus of much of the contest between the parties in the context of the Pharmaceutical Industry Award was on whether a higher duties clause ought to only apply to full-time employees or be extended to part-time employees and casual employees. Not all of the potential difficulties associated with the application of the clause in the context of casual employment were addressed in the reasoning of the Full Bench. Nor were such issues dealt with in as much detail by the parties as they are now, in the context of the Storage Services Award 2010.

[3] See AWU correspondence and submissions dated 7 April 2015 in relation to the Pharmaceutical Industry Award proceedings

- The Full Bench is not bound to adopt its former reasoning in the context of the current claim. Indeed there may be cogent reasons for reconsidering its previous decision in the Pharmaceutical Exposure Draft, in light of submissions advanced in the context of this award. We note that the previous decision only relates to an alteration to the exposure draft. It has not yet resulted in a change to actual award.

4. ISSUE 75 - CLASSIFICATION DEFINITION

42. Ai Group's submissions of 8 April 2016 set out proposed variations to the definition of wholesale employee level 3 and wholesale employee level 4.

43. The SDA, AWU, NUW, ABI and NSW Business Chamber agree to the proposed variations. The changes constitute an element of a package of agreed matters resulting from discussions between the parties.

44. The Exposure Draft, consistent with relevant provisions of the current award, identifies indicative tasks for a wholesale employee level 4 as including "management of a defined section/department." The word *managemen*t is capable of being read in a very broad manner, so as to mislead a reader into perceiving that the classification could have application to an employee not properly covered by the classification or indeed the award, such as a professional manager.

45. The replacement of the phrase "*management of a defined section/department*" within clause B.8.2, coupled with the newly proposed clause B.8.3, is intended to clarify that the classification does not capture an individual whose principal purpose is the performance of managerial work. If the variation is granted clause B.8.3 will state;

"B.8.3 The level 4 classification shall not apply to employees principally engaged in managerial work including the performance of tasks other than those identified in B.8.2"

46. The variation is not intended to result in a substantive variation to the application or operation of the classification structure.

47. The variation to B.8.2 is in part a consequential amendment flowing from the change to B.8.3.

48. The variations will assist to ensure the award is simple and easy to understand, as contemplated by s.134(1).

49. Given that the variation reflects a consent position and that the issue has been the subject of discussion in conference we do not proposed to make detailed written submissions in support of the claim. We would however seek an opportunity to address the Full Bench in further detail, in the event that that it is not satisfied that the variation is necessary.

5. ISSUE 76 - OVERTIME RATE ON A SATURDAY

50. Issue 76 relates to the rates specified in Schedule B. Specifically, the rates in B1.3 have been incorrectly calculated on the basis that the rate for working overtime on a Saturday will be 'double time'. Ai Group contends that the table should be amended to reflect the requirement under clause 24.5(a)(i) that, "all time worked on a Saturday must be paid for at the rate of time and a half."

51. In contrast, the unions appear to argue that the award currently requires that rates for overtime worked on a Saturday be paid at time and a half for the first two hours and that at double time. They also request that clause 24.5(a)(i) of the current award be amended so that it reflects their view. The variation they propose is the insertion of the word 'ordinary' in the clause as follows:

"24.5 Penalty rates for weekends and public holidays

i. All <u>ordinary</u> time worked on a Saturday must be paid for at the rate of time and a half."

52. Ai Group's position is based on a desire to ensure that the tables in the relevant schedule are consistent with current award obligations. We contend that the Full Bench should be mindful that the variations are being pursued by the unions in the context of the Commission's preparation of an exposure draft addressing technical and drafting issues. Such a process should not result in a substantive change to entitlements.

53. Clause 24 - Overtime and penalty rates, contains provisions dealing with the payment of overtime (cl.24.1), TOIL (cl.24.3), rest periods after overtime (cl.24.4) and penalty rates for weekends and public holiday (cl.24.5) and the rates that apply in the context of a call back (cl.24.6). In its entirety the clause provides as follows:

24. Overtime and penalty rates

24.1 Payment for overtime

All time worked by an employee in excess of or outside the ordinary hours of work prescribed by this award will be paid at the rate of time and a half for the first two hours and double time after that.

24.2 Calculation of overtime

For the purpose of this clause:

(a) each day or shift worked will stand alone;

(b) day means all the time between the normal commencing time of one day and the normal commencing time of the next succeeding day;

(c) Saturday means all the time between midnight Friday and midnight Saturday; and

(d) Sunday means all the time between midnight Saturday and midnight Sunday.

24.3 Time off instead of payment for overtime

(a) An employee may elect, with the consent of the employer, to take time off instead of payment for overtime at a time or times agreed with the employer.

(b) Overtime taken as time off during ordinary working hours will be taken at the ordinary time rate; that is, one hour for each hour worked.

24.4 Rest period after overtime

(a) Wherever reasonably practicable overtime will be arranged so that employees have at least 10 consecutive hours off duty between the work of successive days.

(b) Where an employee works so much overtime that there are fewer than 10 hours between finishing overtime on one day and commencing ordinary work on the next day, the employee will be released until the employee has had at least 10 consecutive hours off without loss of pay for ordinary working time occurring during such absence.

(c) If, on the instructions of the employer, an employee resumes work or continues work without having had 10 consecutive hours off duty, the employee

will be paid at the rate of double time until released from duty and will then be absent until the employee has had 10 consecutive hours off duty without loss of pay for ordinary working time occurring during such absence.

24.5 Penalty rates for weekends and public holidays

(a) Saturdays

(i) All time worked on a Saturday must be paid for at the rate of time and a half.

(ii) An employee required to work overtime on a Saturday must be afforded at least three hours' work or must be paid for three hours at the appropriate rate, except where such overtime is worked immediately prior to or at the conclusion of ordinary hours of work.

(b) Sundays

(i) All time worked on a Sunday must be paid for at the rate of double time.

(ii) An employee required to work overtime on a Sunday must be afforded at least four hours' work or must be paid for four hours at the appropriate rate, except where such overtime is worked immediately prior to or at the conclusion of ordinary hours of work.

(c) Public holidays

(i) All work performed on any of the holidays prescribed or substituted must be paid for at the rate of double time and a half.

(ii) An employee required to work on a public holiday will be afforded at least four hours' work or be paid for four hours at the appropriate rate.

24.6 Call-back

(a) Mondays to Fridays

An employee called back to work after the employee has left work for the day must be paid for a minimum of four hours' work calculated at the appropriate rate for each time the employee is called back.

(b) Saturdays

An employee called back to work after 12 noon on a Saturday must be paid for a minimum of four hours' work calculated at the rate of double the appropriate rate.

(c) Sundays

An employee called back to work on a Sunday must, for the first call-back, be paid for a minimum of four hours' work at the rate of double the appropriate rate. Each subsequent call-back must be paid at the rate of double time for the actual time worked.

(emphasis added)

54. Clause 24 must be read as a whole. Adopting this approach Ai Group contends that the award requires that all time worked on a Saturday, Sunday or Public holiday must be paid at the rate specified in clause 24.5.

55. Clause 24.1 can be characterised as providing a general obligation relating to the payment of overtime. This general obligation must however be read subject to the specific circumstances dealt with in clauses 24.3, 24.4, 24.5 and 24.6. In support of this position, we contend that the rule or principle *generalia specialibus non derogant* is relevant to the interpretation of an award. That is, where there is an inconsistency, the specific provisions should be read as prevailing over other more general provisions of the award, unless the context dictates otherwise. The relationship between each of the subclauses in clause 24 is addressed in the below paragraphs.

56. Notwithstanding the obligation imposed by clause 24.1, clause 24.3 sets out circumstances where work performed during overtime will not attract an overtime payment. The employee is instead entitled to time off. Clause 23.3 effectively operates to the exclude the operation of clause 24.1

57. Clause 24.4(c) specifies circumstances in which an employee will receive payment at “double time” rates due to not having had a 10 hour break. This would apply regardless of cl 24.1. Clause 24.4(c) is to be read to the exclusion of clause 24.1.

58. Similarly, clause 24.6(b) and 24.6(c) effectively require payment at ‘double time rates’ where an employee is called back to work on a Saturday or Sunday. Again, these provisions effectively exclude the operation of 24.1.

59. Consistent with the approach in clauses 24.3, 24.4 and 24.6, we contend that rates specified in clause 24.5 are to be read to exclusion of the rates in 24.1

60. The Ai Group interpretation of the relationship between clause 24.5(a) and clause 24.1 is also consistent with a view that clauses 24.5(b)(i) and 24.5(c)(i) are read to the exclusion of clause 24.1. These provisions set out a higher penalty for working on a Sunday or Public Holiday than the rate of pay for working overtime. Put another way, Ai Group interprets clauses 24.5(a)(i),

24.5(b)(i) and 24.5(b)(i) as operating in a consistent manner.

61. In contrast, the unions' interpretation amounts to blatant cherry picking. They do not assert that overtime worked on a Sunday or Public Holiday is paid at the rate specified in clause 24.1. In that context they appear to be content to accept that the provisions of clause 24.5 are read to the exclusion of clause 24.1.

62. The unions appear to read the award as though there is an obligation to pay the highest penalty referred to in clause 24. There is however no basis for this approach in the text of the instrument. Indeed it appears inconsistent with the scheme of drafting that underpins clause 24.

63. Further textual support for the interpretation advanced by Ai Group is found within clause 24.5 itself. Relevantly, Clause 24.5 expressly contemplates the necessity to work overtime on a Saturday or Sunday. Clauses 24.5(a)(ii) and 24.5(b)(ii) set out an obligation to afford a minimum number of hours of work or a minimum number of hours of pay. There is however no indication that the immediately preceding paragraphs dealing with payment for time worked on these days (clauses 24.5(a)(i) & cl.24.5(b)(i)) do not have application to work performed outside of ordinary hours. Clause 24.5(ii) must be read in the context of clause 24.5(a)(i).

64. In support of their position the unions point to clause 22.1(d) of the current award. This provision enables the working of ordinary hours on a Saturday and Sunday. The provision does not regulate the rate at which payment must be made. It is about what hours can be considered ordinary hours. The clause does not assist the union.

Response to union submissions regarding "Industry Practice"

65. At paragraphs 40 to 43, under the heading "Industry Practice", the unions refer to the approach adopted in a number of predecessor instruments and the submissions of Ai Group in the award modernisation proceedings.

66. Curiously, the union submissions do not address what the current practice is

of those employers that apply the award. Consequently, they provide no basis for concluding that employers to whom the award applies remunerate employees in accordance with the interpretation advanced by the unions.

67. Ai Group reiterates that our position is based primarily on the basis that the schedule should reflect the current award entitlements.

68. An examination of the entitlements under certain predecessor instruments is of limited assistance. Table 2 demonstrates that there is a divergence of approaches to the regulation of payment for overtime worked on a Saturday under such awards. For example, several prescribe that the 150% rate can be payable for longer than 2 hours on a Saturday.

69. In none of the awards does it appear that the overtime clause in the various predecessor awards is necessarily read to the exclusion of a clause expressly dealing with the payment for Saturdays, Sundays or Public Holidays. Accordingly, it is not clear why the unions contend that a different approach to interpreting the award should now be adopted.

Award Modernisation Proceedings

70. Ai Group acknowledges that it appears that during the Part 10A Award modernisation proceedings it conceded that overtime worked on a Saturday *should* attract a penalty rate of time and a half for the first two hours and double time thereafter for overtime work performed on a Saturday. The NUW also sought that the then exposure draft be amended to reflect this proposition. Regardless, the Commission does not appear to have been moved by these submissions.

71. The unions have not identified reasoning in any decision arising from the Part 10A Award Modernisation proceedings that addresses the current controversy. Accordingly, it cannot be safely assumed that the Full Bench adopted the current wording because, "all parties understood that working ordinary time on a Saturday is 150% and working overtime on a Saturday is

150% for the first 2 hours and 200% thereafter…"[4]

72. Regardless of the position of particular parties in the context of the Award Modernisation proceedings, the current award wording has now been in operation for over 6 years.

73. Altering the penalty rate applicable for overtime worked on a Saturday is a major change. The unions' proposal is not a variation that ought to be made under the auspices of proceedings directed towards addressing technical or drafting issues. More importantly it is not a variation that should be made absent a solid merit based case and relevant evidentiary basis being established.

74. The unions have not advanced a substantial merit based case by reference to the Modern Awards Objective. Instead, their case rests largely on their perceived interpretation of the current award term and on the basis of a need to amend the Exposure Draft to "remove an ambiguity" so as to clarify that the instrument operates in the manner they envisage. This is unsurprising as they have never indicated an intent to pursue a substantive variation to the award.

75. The issues for consideration by the Full Bench in the current context are consequently:

- What is the proper interpretation of the current award obligation?
- Is a variation to the exposure draft necessary to ensure the Award is "simple and easy to understand"?

76. In short, the Ai Group position reflects the proper interpretation of the current award terms. We do not contend that any variation to the body of the Exposure Draft is necessary. We nonetheless acknowledge that any alleged uncertainty or ambiguity over the instrument's terms would be rectified by amending the schedules in the manner we propose.

77. In the event that the unions want to alter the terms of the award they should

[4] The joint union submissions at paragraph 39

make an application under s.157 and seek to mount a proper case in support of their claim.