Australian Industry Group

# 4 YEARLY REVIEW OF MODERN AWARDS

## Rates of Pay and Revised Exposure Drafts: Subgroups 1A & 1B

**6 MARCH 2015**

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# RATES OF PAY AND REVISED EXPOSURE DRAFTS: SUBGROUPS 1A & 1B

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# 1. INTRODUCTION

1. This submission is made by the Australian Industry Group (Ai Group) with respect to the revised subgroup 1A and 1B Exposure Drafts, published in February 2015. The submissions are filed pursuant to the decision handed down by the Fair Work Commission (Commission) on 23 December 2014.[1]

2. The submissions firstly deal with 'ordinary hourly rates', the definition of 'all purpose', and the interaction of such rates with penalties and loadings.[2] In addition, we address the need to amend awards such that penalty rates, overtime and loadings are referrable to the minimum rate prescribed by the award.

3. Our submissions also consider each of the revised Exposure Drafts published. In doing so, we have had regard to the Commission's decision of December 2014. We have also identified a number of additional concerns that have come to our attention whilst reviewing the revised Exposure Drafts, which have not previously been raised by interested parties.

4. Whilst we have endeavoured to review the rates of pay contained in schedules to the Exposure Drafts, until issues arising from section 2 of our submissions are determined, we are unable to make final submissions regarding the accuracy of the rates published. We respectfully request that the Commission grant parties a further opportunity to comment on any rates it intends to publish once those matters have been determined.

5. These submissions should be read in conjunction with earlier submissions filed by Ai Group on 26 September 2014, 15 October 2014 and 28 January 2015.

[1] [2014] FWCFB 9412.

[2] [2014] FWCFB 9412 at [44] – [53].

## 2. RATES OF PAY

6. Ai Group makes the following general comments in relation to the articulation of rates of pay in the Exposure Drafts. They should be read in the context of our previous submissions as identified above.

### 2.1 The treatment of all purpose allowances and the identification of ordinary hourly rates of pay

7. In releasing the Exposure Drafts, the Commission has proposed the use of the term "ordinary hourly rate" and the insertion of a new definition of "all purpose".

8. The term "all purpose" has generally been defined in the Exposure Drafts in the following terms:

> ***"all purposes** means the payment will be included in the rate of pay of an employee who is entitled to the allowance, when calculating any penalties, loadings or payment while they are on leave"*

9. Where an Exposure Draft contains an all purpose allowance, the term "ordinary hourly rate" has been used to denote the sum of the relevant minimum hourly rate prescribed by the award and any all purpose allowances to which the employee is eligible (see for example, Schedule G of the *Exposure Draft - Rail Industry Award 2014*).

10. Ai Group has reviewed the relevant Exposure Drafts and endeavoured to identify specific problems with the wording adopted to the extent that they relate to the use of the terms "all purpose" or "ordinary hourly rate". We are however concerned that it may not have been possible to identify all instances where the newly adopted definition has given rise to potential problems. Accordingly we make the following additional submissions concerning the approach the Commission should take to considering such matters in the context of the revised Exposure Drafts.

11. The logic adopted by the Commission was referred to in the Full Bench's decision of 23 December 2014:[3]

> *"**[45]** The use of the term 'ordinary hourly rate' has been used in affected awards to clarify that all purpose allowances must be added to the minimum rate of pay before calculating any penalty rate. When an all purpose allowance is payable to all employees in all circumstances, that amount has been added to the minimum rate in the wage rates clause and expressed as the ordinary hourly rate (see for example the industry allowance payable to all employees in the draft Salt Industry Award 2014). However many all purpose allowances are only payable to certain employees in certain qualifying circumstances so the amount cannot be included as a 'universal' ordinary hourly rate. In these exposure drafts, a note has been inserted to the effect that the "Ordinary hourly rate is the minimum hourly rate of pay for an employee plus any allowance payable for all purposes to which the employee is entitled" (see for example the leading hand allowance payable to certain employees in the draft Poultry Industry Award 2014).*
>
> ***[46]** Examples of issues that parties have identified in relation to all purpose provisions or issues concerning ordinary rates of pay that relate to all purpose allowances include:*
>
> - *The definition of 'ordinary rate' (or lack thereof) and/or which allowances have been included in the ordinary rate*
> - *The definition of 'all purposes'*
> - *Which allowances have been deemed to be for 'all purposes'*
> - *Whether ordinary rate or minimum rate should be used when calculating certain allowances, loaded rates, penalties, apprentice, and junior rates*
> - *Whether loadings (e.g. casual loading) should be included 'for all purposes' of the award"*

[3] [2014] FWCFB 9418.

12. Ai Group continues to have the following concerns arising from the approach adopted in the Exposure Drafts, as considered in further detail below:

- The definition of "all purpose" and its implications for payments due during periods of leave;
- The use of the term "ordinary hourly rate" could be confusing to the extent that it is commonly understood to simply mean the rate of pay to which an employee is ordinarily entitled;
- The potential confusion that may arise from payments due under other legislation using similar terminology, such as State and Territory Acts regulating long service leave, which commonly refer to "ordinary pay"; and
- The impact of referring to the calculation of award derived entitlements such as the casual loading, overtime, shift allowances/loadings and penalty rates to the "ordinary hourly rate" in circumstances where the award presently requires that such calculations be made referrable to the minimum rate prescribed by the award.

***The definition of "all purpose" and payments to be made to an employee during leave provided for by the NES***

13. In the above decision, the Full Bench identified an Ai Group submission addressing the way that terms such as "all purpose" have generally been interpreted or applied in awards and our proposed definition:

> *"**[48]** Ai Group submitted that historically, 'all purposes' has been commonly interpreted to mean 'for all purposes of the award' except where a particular clause states otherwise. Ai Group submitted that the proposed definition goes beyond 'for all purposes of the award' to include payments made to an employee, under the NES and that the proposed definition would expand the entitlements of employees, and increase costs for employers, in numerous areas including requiring that all purpose allowances be paid in respect of:*

- *Annual leave (s.90(1));*
- *Payments in lieu of annual leave on termination (s.90(2));*
- *Personal/carers leave (s.99);*
- *Compassionate leave (s.106);*
- *Leave for the purposes of attending jury service (s.111(2));*
- *Public holidays (s.116); and*
- *Paid no safe job leave (s.81A(2)).*

***[49]** Ai Group proposed an alternative definition of 'all purposes':*

*'**all purposes** means the payment will be included in the rate of pay of an employee who is entitled to the allowance when calculating any payments under this award, unless otherwise stated in a particular clause'."*

14. Ai Group maintains its previously articulated concerns regarding the use of the term and the associated definitions contained within the Exposure Drafts. Such concerns are explained further in these submissions.

15. In its December decision, the Full Bench also identified a contrary view regarding the meaning of "all purpose", which was expressed by the ACTU:

*"**[50]** The ACTU submitted that all purpose allowances have historically been paid to employees for all purposes of the award. Prior to the implementation of the FW Act, leave entitlements were prescribed by awards. Consequently, all purpose allowances were generally paid in respect of annual leave, personal/carers leave, bereavement leave, leave for the purpose of attending jury service and public holidays.*

***[51]** The ACTU highlighted in their submission that the NES currently provides that leave entitlements are payable at the base rate. A number of modern awards supplement the base rate by providing that all purpose allowances are payable while an employee is on annual leave. The ACTU submitted that it is appropriate for modern awards to supplement the base rate with respect to leave entitlements, including but not limited to annual*

*leave, to take into account all purpose allowances. The ACTU submitted that this is necessary to provide a fair and relevant safety net."*

16. It is important to note the ACTU's acceptance that all purpose allowances were only to be paid to employees *"…for all purposes of the award".* Ai Group agrees with this element of the ACTU's submissions. Unfortunately, in most if not all of the Exposure Drafts released to date, all purpose allowances have not been articulated such that they are confined to award derived purposes. In order to maintain the historical effect of such provisions this should be addressed in each Exposure Draft where it arises.

17. Ultimately, while accepting that a general definition of "all purpose" may not be appropriate and making other general observations, the Commission elected to afford the parties a further opportunity to address it in relation these matters:

*"**[52]** In our view these issues require further consideration. We acknowledge that the adoption of a general definition of 'all purposes' may not be appropriate as it may give rise to unintended consequences. However, it is important that the rate of pay to be paid to an employee while on a period of paid leave is clearly identified in the relevant modern award. While the definition of 'base rate of pay' included at s.16 of the FW Act excludes monetary allowances, a modern award may supplement the NES by, for example, providing that the rate payable to an employee while on annual leave or paid personal/carer's leave is higher than the employee's base rate of pay (see s.55(4)). We propose to provide parties with a further opportunity to make submissions in relation to these issues in response to the revised exposure drafts."*

18. Ai Group accepts that an award may supplement the NES, by providing that a higher rate of pay than the base rate of pay as defined in s.16 of the *Fair Work Act 2009* (FW Act) is applicable when an employee under that award is on a form of paid leave prescribed by the NES. However that acknowledgement does not of course constitute a concession or an argument that awards *should* supplement the NES.

19. Ai Group similarly appreciates the force of the Full Bench's indication that the rate of pay applicable to an employee during a period of leave should be clearly identifiable in the award. However, an employee's base rate of pay for the purposes of the legislation could be higher than the award prescribed minimum rate of pay. In any event, it is not appropriate for the award to simply replicate the legislative obligation. Rather, the award should operate to set a minimum rate of pay that would be applicable to an employee and this will be subject to the operation of s.55(6).

20. Moreover, awards should, and indeed can, only include terms to the extent that they are necessary to ensure the award meets the modern awards objective. [4] In considering the inclusion of a new term in an award, the Commission must consequently be satisfied that the term is necessary. In circumstances where an award has not previously prescribed the specific rate of pay during a period of leave, but instead left such matters to the legislation, it is difficult to see how such a term is necessary. A proposition to this effect would invariably lead to the conclusion that the award is not currently meeting the modern awards objective; a conclusion that would not be consistent with the Australian Industrial Relations Commission's decisions during the Part 10A process, or the Preliminary Issues Decision, in which the Commission stated that it would proceed on the basis that the awards achieved the modern awards objective at the time that they were made.[5]

21. In response to union contentions that, as a matter of merit, employees *should* receive all purpose allowances during periods of leave, we contend that there is nothing inherently *unfair* about an award covered employee receiving their base rate of pay while accessing a period of leave prescribed by the NES. Any consideration of what constitutes a "fair and relevant minimum safety net" must of course be informed by Parliament's election not to mandate any requirement that award reliant employees receive more than their base rate of pay when accessing leave. Moreover, aligning entitlements of award covered

[4] s.138 of the Act.

[5] [2014] FWCFB 9412 at [24].

and award free employees would assist in making the system simple and easy to understand and would reduce the regulatory burden on employers.

22. We note that the ACTU has argued that all purpose allowances should be payable during periods of leave. It is difficult to reconcile the historical basis of such provisions and the development of the current legislative framework giving effect to a safety net of modern award terms along with separate, and only recently introduced, legislative entitlements arising from the NES. Moreover, in many instances the introduction of the NES altered the nature of what may have previously been an award derived entitlement. For example, awards often provided for a lesser entitlement in terms of a period of personal/carers' leave (i.e. sick leave). Employees were credited with annual leave or personal/carers' leave on an annual rather than progressive accrual. It cannot be assumed that entitlements relating to rates of pay developed under previous regimes are applicable in the current context.

23. Regardless, such award provisions appear to have commonly been included in modern awards as a product of their existence in the relevant pre-reform award(s) upon which such instruments are based, rather than in express contemplation of their interaction with the NES or other sources of leave entitlements.

24. In considering the approach to the wording of the Exposure Drafts, the Commission should ensure that the instruments do not include imprecise terms that could be construed as meaning that an allowance is included in the calculation of payment during a period of leave provided for under separate legislation, in circumstances where this is not presently the case. If an award does not currently specify that the rate of pay for a period of leave to which an employee is entitled pursuant to the Act is to include any amount in excess of what would comprise the base rate of pay as defined by s.16, the Exposure Draft should be structured to ensure that such an entitlement does not arise.

***The special case of long service leave***

25. By virtue of s.155 of the Act, a modern award must not include terms dealing with long service leave. A clause, such as the proposed definition of "all purpose", which purports to deal with the amount payable to an employee during long service leave, falls foul of this provision and therefore, has no effect (ss.136 and 137).

26. This is consistent with the Commission's recent decision that award provisions that list entitlements that do not apply to a casual employee, including long service leave, are terms that "deal with" long service leave and therefore, are contrary to s.155. The Commission has proposed that such clauses be deleted.[6]

27. Further, the amount payable to an employee during a period of long service leave is regulated by State and Territory legislation. Thus, regard must be had to the terms of the specific legislation in order to determine which, if any, allowances are payable during long service leave.

28. Section 29 of the FW Act determines the interaction between State and Territory legislation and modern awards. Should the award purport to require the payment of an all purpose allowance during a period of long service leave, to the extent that this is inconsistent with the relevant legislation, the award term will operate subject to the long service leave legislation (s.29(2)(b)). This is because such legislation is covered by ss.27(1)(c) and 27(2)(g).

29. It is apparent that an award cannot regulate the amount payable for a period of long service leave.

[6] [2014] FWCFB 9412 at [104] – [105].

***The calculation of award derived entitlements by reference to the "ordinary hourly rate"***

30. Ai Group does not accept that the Commission should adopt, as a general principle, the view that all purpose allowances are included in the calculation of all award derived entitlements. Nor should such an approach be reflected in the Exposure Drafts.

31. The Commission should be careful to ensure the Exposure Drafts do not adopt a definition of an "ordinary hourly rate" or "all purpose" (or any alternative term in substitution) that may operate to extend existing entitlements. In order to ensure this does not occur, due regard must be had to particular terms of each Exposure Draft and to corresponding provisions of the current award. Many awards prescribe a specific method of calculating various award derived entitlements that would preclude the inclusion of an all purpose allowance. We identify the following as examples:

- ***Casual loading***

  Clause 10.4(b) of the *Cotton Ginning Award 2010* requires that a casual employee be paid 1/38$^{th}$ of the minimum weekly rate prescribed by clause 14 of the award, "plus 25% of that amount". That is, the casual loading is to be calculated on the minimum rate prescribed by the award, which does not incorporate all purpose allowances. Clause 6.5(c)(ii) of the Exposure Draft, however, states that the 25% loading is to be applied to the "ordinary hourly rate", which is defined as including all purpose allowances.

- ***Overtime and penalty rates***

  The *Aluminium Industry Award 2010* expresses overtime and penalty rates, at clause 21 of the award, as a percentage of the "ordinary hourly rate". That term is defined in the award as 1/38th of the weekly wage rate of pay in clause 13. The rate there prescribed is the minimum rate payable under the award, and does not include any all

purpose amounts. The Exposure Draft, at clauses 13 (Penalties) and 14 (Overtime), uses the same terminology (i.e. "ordinary hourly rate"), but the term is defined by the Exposure Draft to have a different meaning, as it now contemplates the inclusion of all purpose allowances.

32. Under the current awards in the above examples, the all purpose allowance is to be added to the minimum rate loaded with the casual loading or penalty. The effect of Exposure Draft provisions such as those described above, is to require the application of the relevant penalty to a rate that is higher than the award minima. The penalty is calculated on a rate which includes the all purpose allowance, which will result in an amount greater than what is payable under the current award.

***The proper approach to interpreting award terms***

33. As identified by the AWU in its submissions of 17 November 2014, a Full Court of the Federal Court recently re-stated well known principles for interpreting awards and agreements in *Transport Workers' Union of Australia v Coles Supermarkets Australia Pty Ltd [2014] FCAFC 148* (TWU v Coles)[7]:

> *"In Kucks v CSR Ltd (1996) 661R 182 ("Kucks J") Madgwick J said (in a passage, the first part of which is frequently quoted, but the second part less so):*
>
> ***Legal principles***
>
> *It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon. Thus, for example, it is justifiable to read the*

[7] At [39] to [44].

*award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading. And meanings which avoid inconvenience or injustice may reasonably be strained for. For reasons such as these, expressions which have been held in the case of other instruments to have been used to mean particular things may sensibly and properly be held to mean something else in the document at hand.*

*But the task remains one of interpreting a document produced by another or others. A court is not free to give effect to some anteriorly derived notion of what would be fair or just, regardless of what has been written into the award. Deciding what an existing award means is a process quite different from deciding, as an arbitral body does, what might fairly be put into an award. So, for example, ordinary or well-understood words are in general to be accorded their ordinary or usual meaning.*

*Although those observations were made in relation to the construction of awards they have been treated as a useful statement about the construction also of industrial agreements. …*

*It is in accordance with those circumstances, and authority binding on this Court, to bear steadily in mind the second element of the passage quoted above from Kucks.*

*In Amcor Ltd v Construction, Forestry, Mining and Energy Union [20051HCA10; (2005) 222 CLR 241, the High Court dealt with the proper approach to the construction of an industrial agreement, made under the previous statutory arrangements, between an employer and two unions. Gleeson CJ and McHugh J said:*

> *2. The resolution of the issue turns upon the language of the particular agreement, understood in the light of its industrial context and purpose, ...*

*Gummow, Hayne and Heydon JJ emphasised that a contentious provision of the agreement could be properly construed only if:*

> *... due account is taken of each of the matters we have mentioned: the other provisions found in cl 55 and elsewhere in the Agreement, and the matters of legislative background to which we have referred.*

*Kirby J said:*

> *66. ... In the interpretation of the Constitution and of legislation, Australian courts have passed beyond the age of the magnifying glass. No longer do courts (or industrial tribunals) seek to give meaning to contested language considered in isolation from the context in which the words are used and the purpose for which the words were apparently chosen. Nowadays, the same insistence on context, as well as text, permeates the approach to interpretation that is taken to legally binding agreements. Indeed, before this approach became normal in the courts, in the interpretation of contested instruments it was often the approach adopted for the construction of industrial texts. This was in keeping with an inclination of such tribunals towards practical, as distinct from purely verbal, constructions in that area of the law's operation."*

34. Paragraphs 77 and 78 of the AWU's submission of 17 November 2014 refer to that element of the Full Federal Court decision in *TWU v Coles* that emphasised the need, when interpreting an award, to "bear steadily in mind the second element of the passage quoted above from Kucks" and asserts that this element includes a statement that "ordinary or well-understood words are in general to be accorded their ordinary or usual meaning". They go on to assert that the Ai Group and AFEI position constitutes a "pedantic, narrow and opportunistic interpretation which the Commission should reject in favour of applying the longstanding and well known approach to all purpose allowances whereby they effectively become part of an employee's base rate of pay and are included in all loading and penalty calculations".

35. The AWU submission simply ignores the reality that a "base rate of pay" is a concept flowing from the introduction of the FW Act. Given this context, it cannot sensibly be maintained that award terms such as an "all-purpose rate",

which have their origins in a time long predating the current legislative regime, are understood to form part of an employee's "base rate of pay". Regardless, the terms of s.16 of the Act precludes the possibility that such amounts could form part of a "base rate of pay".

36. For clarity, Ai Group does not contend that all purpose allowances are necessarily irrelevant to the calculation of penalty rates or loadings applicable under a particular award. Rather, we contend that regard must be had to all of the terms of the award when determining whether such allowances are to be included in the calculation of a particular entitlement. In adopting this approach, the Commission must give effect to the specific current award terms that articulate the approach to calculating an award entitlement. This will include circumstances where an ordinary reading of the terms will operate to exclude an amount that is characterised in general terms as an all purpose allowance from the calculation of the entitlement. We submit that it is not open to the Commission to simply ignore such award terms.

37. 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.

38. Further, when regard is had to the historical origins and the purpose of such provisions, they should not be interpreted so as to give effect to an intent that such allowances or payments would operate to supplement the NES entitlements to paid leave. It simply cannot have been their purpose.

39. We reject any contention that Ai Group is advocating an approach that is pedantic or inappropriately applying a magnifying glass to existing award provisions. In supporting a proposed definition of "all purposes" that would require an allowance to be included in the calculation of any penalties, loadings or payments while on leave, the AWU and other unions are adopting an approach that fails to have due regard to the terms of the award. Such an approach would, as the Full Bench has already acknowledged, result in

potentially unintended consequences.[8] It fails to have due regard to the actual written terms of many awards, but instead seeks to advance an approach to interpreting an award based on what they regard as fair.

40. At paragraph 80 of the AWU submission there is an assertion that awards can be described as beneficial and remedial instruments that should be given a fair, large and liberal interpretation, in accordance with the High Court decision in *IW v City of Perth*.[9] Ai Group rejects this proposition.

41. Beneficial or remedial legislation is generally legislation that grants a benefit to a person or is remedying some "mischief" for which the legislation was designed to overcome.[10] Identifying legislation or particular legislative provisions as "beneficial legislation" is an aid to the interpretation of statutory provisions which are ambiguous.

42. The concept of "beneficial legislation" is typically associated with legislation which has a relatively narrow focus upon conferring a substantial entitlement upon persons (as beneficiaries) such as workers' compensation, social security and land title legislation (for Indigenous persons). The FW Act is much broader in its objectives, purpose and provisions. Some sections of the Act provide benefits to employees and some sections provide benefits to employers. Much of the Act deals with regulatory issues (e.g. the operation of the Commission, the Fair Work Ombudsman and the Courts).

43. There is nothing in the words of the FW Act, Explanatory Memorandum or Minister's Second Reading Speech that would support the characterisation of the FW Act as beneficial or remedial legislation for a class of beneficiaries, or of the characterisation of instruments made under the Act in this way. Further, there is no persuasive judicial authority on this issue.

[8] [2014] FWCFB 9412 at [52].

[9] (1991) 191 CLR 1.

[10] Pearce, *Statutory Interpretation in Australia,* 6th Ed 2001, pp 48 – 49.

44. We acknowledge that in the *DP World* case[11], a Full Bench described the anti-bullying provisions in Part 6-4B of the FW Act as remedial or beneficial provisions the Full Bench did so because of its view that the provisions *"analogous to legislative provisions dealing with occupational health and safety".*[12]

45. Ai Group rejects the argument that the statutory interpretation principle relating to "beneficial legislation" has any application to awards. Regardless, the application of such an approach to the construction of award terms does not enable an interpretation that would be squarely inconsistent with the current express provisions.

***Interaction between casual loadings and all purpose allowances***

46. A specific issue flowing from the Exposure Draft's adoption of the terms "ordinary hourly rate" and "all purpose" is the question of how all purpose allowances apply to the calculation of casual rates of pay. Some unions, including the AWU in particular, seek to assert that such allowances should be added to the minimum rate before applying the casual loading. Such an approach cannot be adopted in circumstances where the plain terms of the award clause specifically articulating how to calculate the casual loading would provide for a different outcome. To simply ignore the terms of an award specifically dealing with casual loading would result in an unreasonable outcome. Moreover, even considering the context behind the casual loading, there is no inherent reason why a casual employee should receive a greater amount in relation to such allowances than other employees as a consequence of the multiplier effect that flows from applying the casual loading after the relevant all purpose allowance, rather than applying the all-purpose allowance to the rate *in addition* to the casual loading. We note that our contentions in this regard are consistent with the approach recently adopted by Deputy President Gostencnik in considering a similar issue

[11] *Sharon Bowker; Annette Coombe; Stephen Zwarts v DP World Melbourne Limited T/A DP World; Maritime Union of Australia, The Victorian Branch and Others*, [2014] FWCFB 9227

[12] para [24].

regarding the interpretation of an enterprise agreement incorporating various award terms.[13]

47. The publishing of Exposure Drafts should not result in an alteration of existing entitlements. To adopt a different approach would undermine the need to maintain a stable modern award system. Consequently, given the above comments in relation to the approach to interpreting current awards, where the method of identifying the calculation of a particular penalty or loading in an award provides, in effect, for this to occur without the inclusion of all purpose allowances, this subtlety must be reflected in the Exposure Draft.

## 2.2 The utility of schedules summarising hourly rates of pay

48. As identified by the Fair Work Ombudsman's (FWO) submission of 23 February 2015, while Group 1 and Group 2 modern award Exposure Drafts contain tables with minimum rates of pay for work performed during ordinary hours, "…there is a high degree of variation between the exposure drafts regarding the range of pay rates, if any, which are included in the rates tables." Consequently, the FWO has called for awards to include comprehensive pay rates tables.

49. There are potential complexities within individual awards that, in some instances, limit the utility of schedules that exhaustively set out the rates payable for each classification in respect of ordinary hours, overtime, and where various penalties and loadings apply. For example, as already identified by the Full Bench, some all purpose allowances only apply to some employees covered by an award[14] (see for example, the allowances listed at 27.1 of the *Exposure Draft – Manufacturing and Associated Industries and Occupations Award 2014* and clause 11.2 of the *Exposure Draft – Poultry Processing Award 2014*).

[13] [2014] FWC 9163.

[14] [2014] FWCFB 9412 at [45].

50. Further, in the context of shiftwork or work performed on a public holiday, some awards contain relatively complex arrangements for setting different rates depending upon the particular circumstances in which the work is performed. We refer, as an example, to Schedule B.1.4 and B.1.5 of the *Exposure Draft – Manufacturing and Associated Industries and Occupations Award 2014*. These tables have been the subject of discussion between interested parties over several Conferences, due to concerns raised by Ai Group as to whether they accurately reflect clause 29.2.

51. In considering the extent to which the Exposure Drafts incorporate comprehensive tables, the Commission should be mindful that it is potentially misleading for schedules to include *some* penalty rates but fail to reflect all possible circumstances. If there is an attempt to summarise applicable rates of pay, there is a strong likelihood that some employers will not look to the substantive terms of the award, but merely refer to the schedules on the assumption that they provide a complete summary of entitlements. Ai Group acknowledges that the Exposure Drafts seek to overcome some of these difficulties through the use of mechanisms such as footnotes. There is some utility in this approach. However, there is also the risk that this will simply result in unnecessary detail and complexity. The Commission will need to weigh up such matters in the context of each particular award. A relevant example can be found in the *Exposure Draft – Vehicle Manufacturing, Repair, Services and Retail Award 2014*. The Exposure Draft does not contain a schedule of rates and many parties have raised concerns about the inclusion of such a schedule, given the complexity of the award and its various remuneration structures. The voluminous Excel spreadsheet prepared by the Commission and provided to the parties for consideration exemplifies our concerns.

52. Although the Commission may broadly seek to clarify the operation of the awards through the inclusion of more detailed wage rates schedules, it is prudent to adopt a flexible approach in relation to such matters. In the context of the approach to be adopted in relation to individual awards, the

Commission should be guided by the submissions of the parties and outcomes of the Conferencing process in this regard.

### 2.3 The rate to which penalties and loadings are referrable

53. The Exposure Drafts currently adopt a range of differing approaches to the articulation of penalties and loadings. Penalties and loadings are presently expressed as being referable to various amounts described as:

- The minimum weekly rate (e.g. clause 17.3 of the *Exposure Draft - Textile, Clothing and Footwear Award 2014*);
- The minimum hourly rate (e.g. clauses 13 – 15 of the *Exposure Draft – Meat Industry Award 2014);*
- The employee's ordinary rate (e.g. clause 20.4 of the *Exposure Draft - Textile, Clothing and Footwear Award 2014*); or
- The ordinary hourly rate (e.g. clauses 13 and 14 of the *Exposure Draft – Premixed Concrete Award 2014*).

54. However in many instances, the Exposure Drafts simply identify that a particular award penalty or loading is payable, without *expressly* articulating that it is to be applied to the award prescribed minimum rates (however described). As an example, we refer to clause 14.2 of the *Exposure Draft – Pharmaceutical Industry Award 2014*.

55. The Commission should clarify, in any award where it is currently unclear, that penalties and loadings are to be calculated upon minimum award rates (including any relevant allowance where it is appropriate in the context of the instrument as currently in force) rather than based on any over-award payment. We understand there to be tacit adoption of this approach reflected in the Commission's decision of 23 December 2014[15] and the updated version of the *Exposure Draft – Vehicle Manufacturing, Repair, Services and Retail Award 2014*, dated 19 February 2015.

[15] [2014] FWCFB 9412 at [45].

56. Awards, together with the NES, now operate as a safety net of terms and conditions. Awards cannot validly contain terms that operate to provide entitlements that exceed a "*fair and relevant*" minimum safety net.[16] Accordingly it is not appropriate for awards to mandate minimum conditions that reflect or inappropriately interact with actual paid rates. For example, clauses that provide an entitlement to be paid for at "double time" or "time and a half" should be amended to make it clear that the method of calculating such entitlements is referrable to the minimum rates contained in the instrument.

57. To some extent, the aforementioned matters will be addressed through the inclusion of tables setting out the minimum rates payable, if the FWO's submission is accepted. However, even if such tables are included, it is also appropriate that the substantive terms of the award dealing with such matters are simple and easy to understand, rather than being open to multiple interpretations.

58. The view that penalty rates contained in awards should be calculated on minimum award rates should not be contentious, although we understand that some unions may suggest that award prescribed penalties should be applied to over award payments. Ai Group does not accept that this position can be maintained. It is not reasonable to argue that it is necessary, as part of a fair and relevant minimum safety net, to require employers that already provide over award payments to pay such employees even greater amounts of remuneration than comparable award reliant individuals, in circumstances when they perform shiftwork, or work on a weekend, public holiday or perform overtime.

59. Moreover, award provisions must be read in the context of the instrument as a whole. When viewed in this context it is reasonable to accept that references are intended to be calculated based on the award rate and not some other unknown amount.

[16] Section 138

60. The importance of reflecting the role of awards as a safety net in the articulation of penalties or loadings is amplified by the operation of enterprise agreements under the framework of the Act. It is trite to observe that enterprise agreements typically provide for rates of remuneration that are above the minimum rates prescribed by awards. If awards were to provide a discrete obligation to apply penalty rates or loading to above award rates of pay, it is unclear how an enterprise agreement seeking to amend such penalty rates by offsetting the entitlements with a higher base rate of pay would ever pass the better off overall test applied by the Commission.

### 2.4 The insertion of minimum hourly rates

61. The Commission has previously indicated that it will consider specifying hourly rates in awards which currently only contain annual or weekly rates.[17] As previously identified by Ai Group, there is no legal requirement arising from the Act that awards prescribe hourly rates. Historically, many awards have regulated remuneration by reference to a minimum weekly wage. Such an approach is then commonly supplemented by the inclusion of a methodology for calculating the rates of pay for employees engaged on a casual or part-time basis.

62. Ai Group is not convinced that it is *necessary* for awards to specify minimum hourly rates of pay. To be included, they must meet the requirement of s.138. It is difficult to reconcile the absence of such provisions in awards both historically and as made during the Part 10A Award Modernisation Process, with a contention that this level of detail could now be regarded as necessary, in the relevant sense.

63. Nonetheless, if such rates are to be included in awards, the Commission should ensure that they do not result in any substantive change to the obligations imposed upon employers. In considering whether to insert such provisions in awards the Commission should adopt a flexible approach to this

[17] *4 Yearly Review of Modern Awards: Guide to Award Stage*, page 9.

issue as there are likely to be award specific complexities that will need to be addressed.

64. Some awards contain penalties or entitlements that are calculated based on the assumed operation of a weekly wage. This most commonly arises in the context of public holiday payments, where the entitlement is crafted to specify a particular rate of pay for work performed on a public holiday in addition to the weekly wage. For example, this approach is adopted in the *Waste Management Award 2010*, the *Road Transport and Distribution Award 2010* and the *Black Coal Mining Industry Award 2010*.

65. The Commission must also be mindful that some awards contain atypical remuneration structures that may not be easily converted to a minimum hourly rate. This would include, for example, awards that contain piece rates, kilometre based rates of pay and commission based payments. Similarly, some awards provide for annualised salary arrangements. The Commission should ensure that the utility of such provisions is not undermined by the inclusion of minimum hourly rates.

66. It is not necessary to pursue the insertion of hourly rates as a uniform outcome. Instead the Commission should be guided by the parties and the outcomes of any conferences conducted in the review of the awards in determining the approach to be adopted in particular instances.

## 3. EXPOSURE DRAFT – ALUMINIUM INDUSTRY AWARD 2014

### Issues relating to rates of pay

We refer to section 2 of these submissions, which addresses the way in which rates of pay, penalty rates, and overtime are expressed, as well as issues pertaining to the definition of "all purpose" in the Exposure Draft.

With respect to the *Exposure Draft – Aluminium Industry Award 2014*, we have identified the following as examples of provisions that require further consideration in light of our submissions:

- **Clause 6.6(c) - Casual loading.** The casual loading should be applied to the minimum hourly rate prescribed by the award, not an hourly rate that incorporates all purpose allowances.

- **Clause 10.1 – Minimum wages – Adult employees.** We do not agree with the use of the term "ordinary hourly rate" and the method by which the casual ordinary hourly rate has been calculated.

- **Clauses 13 and 14 – Penalties and Overtime.** We oppose the use of the phrase "ordinary hourly rate" throughout these clauses. Penalty rates and overtime in the current award are referrable to the "ordinary hourly rate", however that term is specifically defined as 1/38$^{th}$ of the minimum weekly wage prescribed by the award. That rate does not include all purpose allowances. The same term however, as defined in the Exposure Draft, does incorporate such allowances.

- **Clause 15.5(a) – Annual leave – Annual leave loading.** The current award does not prescribe the rate payable to an employee during a period of annual leave; it is left to the NES. Clause 15.5(a) requires payment at the "ordinary hourly rate", which includes all purpose allowances.

- **Schedule B – Summary of Hourly Award Rates of Pay.** Each of the above issues is relevant to the rates contained in Schedule B.

- **Schedule G – Definitions.**

**Clause 3.1 – Coverage**

67. Clause 3.1 should be amended by inserting the full title to Schedule A: "Schedule A – Classifications definitions".

**Clause 3.5 – Coverage**

68. In accordance with the Commission's decision of 23 December 2014,[18] the note following clause 3.5 should be removed.

**Clause 5.2 – Facilitative provisions**

69. The third column of the table should be amended with respect to clause 10.4(a)(ii) to reflect the terms of that provision, which permit agreement between an employer and the majority of employees or an individual employee.

**Clause 6.5(b)(iv) – Types of employment – Part-time employees**

70. The word "on" should be deleted from the start of the clause. This appears to be a typographical error.

**Clause 6.5(f) – Types of employment – Part-time employment**

71. The current clause 10.3(b) allows an employer and employee to agree to a minimum engagement period of less than three hours. Such agreement may be in relation to a particular shift or it could operate on an ongoing basis. The insertion of the words "on any shift" in clause 6.5(f) of the Exposure Draft, may be read to confine its application to a specific shift and imply that separate agreement is required between an employer and employee with respect to each shift where the employee is engaged for a shorter period.

72. In order to avoid the unintended change in meaning, the relevant words should be deleted from clause 6.5(b).

**Clause 7.4(b)(vi) – Classification – Flexible working**

73. Clause 7.4(b)(vi) should be amended by inserting the words "and ancillary activities" as found at the conclusion of the current clause 13.3(f). The absence of this text potentially amounts to a substantive change, as it narrows

[18] [2014] FWCFB 9412 at [30] – [36].

the operations, tasks and activities in which an employee may work under clause 7.4.

**Clause 8.2 – Ordinary hours of work and rostering – Maximum 12 hour ordinary day**

74. Clause 8.2 states that agreement may be reached to work a shift in excess of 12 hours in length "in accordance with clause 8.8". Clause 8.8, however, does not relate to such an agreement being reached. The reference is thus confusing.

75. Clause 8.2 should be amended so as to commence with the words "Subject to clause 8.8 …". This is consistent with the current clause 19.3. The absence of these words gives rise to a substantive change. The provision no longer makes exception for circumstances in which an employee is required to perform handover work.

**Clause 8.3 – Ordinary hours of work and rostering – Work cycle or fly-in-fly-out/drive-in-drive-out**

76. We refer to the comment found below clause 8.3 of the Exposure Draft. The parties have agreed that no change should be made to clause 8.1 or 8.3 in this regard.[19] The comment should be deleted.

**Clause 8.4(a) – Ordinary hours of work and rostering – Rosters**

77. The words "for an employee" should be removed from clauses 8.4(a)(i) – (iv). The current clause imposes restrictions regarding the way in which the roster cycle and shifts may be rostered. It does not regulate the roster cycle or the rostering of shifts for a specific employee. The Exposure Draft deviates from this by using the words "for an employee".

[19] See Commissioner Bull's Report to the Full Bench of 9 December 2014.

**Clause 8.5(c) – Ordinary hours of work and rostering – Change of roster**

78. The reference to clause 8.5(a) should be amended to read "clause 8.5(b)". This appears to be a drafting error.

**Clause 10.1 – Minimum wages – Adult employees**

79. The footnote to the table in clause 10.1 refers to other all purpose allowances that may also be payable. Clause 11, however, does not provide for any other allowance that is payable for all purposes of the award. Therefore, the second sentence contained at the footnote should be deleted.

**Clause 11.3 – Allowances – Leading hand allowance**

80. Clause 11.3 appears to contain a typographical error. It should be amended such that it is consistent with the definition of "leading hand" in Schedule G:

> "A leading hand allowance is payable to an employee who is required to be ~~performing work is~~ in charge of other employees as follows: …".

**Clause 13.1 – Penalties – Shiftwork penalties**

81. In accordance with the Commission's decision of 23 December 2014,[20] the question contained in the Exposure Draft at clause 13.1 should be deleted.

**Clauses 13.1(a) – Penalties – Shiftwork penalties**

82. Clause 13.1(a) should be amended as follows, consistent with the current clause 21.10(a):

- By substituting "per hour" with "for each ordinary hour worked". The clause, as presently drafted, would require the payment of the penalty during overtime. This is a substantive change and a clear deviation from the current provision.

- By substituting the words "who works" with "whilst". This makes clear that the allowance is payable only while the employee is on an

[20] [2014] FWCFB 9412 at [155]].

afternoon or rotating night shift on Monday to Friday. It is not payable to an employee on an ongoing basis simply because they have performed some work on an afternoon or rotating night shift.

**Clauses 13.1(b) – Penalties – Shiftwork penalties**

83. Clause 13.1(b) should be amended as follows, consistent with the current clause 21.10(b):

- By substituting "per hour" with "for each ordinary hour worked". The clause, as presently drafted, would require the payment of the penalty during overtime. This is a substantive change and a clear deviation from the current provision.

- By substituting the words "who works" with "whilst". This makes clear that the allowance is payable only while the employee is on a permanent night shift on Monday to Friday. It is not payable to an employee on an ongoing basis simply because they have performed some work on a permanent night shift.

**Clauses 13.2 – Penalties – Weekend work penalties**

84. The use of the term "penalties" in clause 13.2 implies that the rate prescribed is to be applied to the employee's minimum rate. However, the clause now contains rates expressed as a percentage of the hourly rate, which incorporates the minimum hourly rate. The word "penalties" should be substituted with "rates".

**Clause 13.3 – Penalties – Public holiday penalties**

85. For the reasons stated above, clause 13.3 should be amended by substituting "penalty" with "rate".

**Clause 13.4 – Penalties – Extra rates not cumulative**

86. No interested party has sought a change to this provision and there does not appear to be a dispute as to its application.[21] The question should therefore be deleted.

**Clause 14.4(b) – Overtime – Rest period after overtime**

87. A typographical error found in clause 14.4(b) should be amended as follows:

> " ... ordinary hours occurring during <u>such</u> absence."

**Clause 14.4(c) – Overtime – Rest period after overtime**

88. A typographical error found in clause 14.4(c) should be amended as follows:

> " … released from duty for <u>such</u> period. …".

**Clause 14.9 – Overtime – Extra rates not cumulative**

89. Interested parties have agreed to retain this clause here and as it appears at clause 13.4.[22] The question should therefore be deleted.

**Clause 15.5(b)(i) – Annual leave – Annual leave loading**

90. We refer to our submissions above regarding clause 15.5(a). That provision should be deleted. A consequential amendment should be made to clause 15.5(b)(i) as follows, such that it is consistent with the current award:

> "(a) a loading of 20% of the <u>minimum hourly rate of pay for the rostered ordinary hours falling within the period of annual leave</u> ~~amount payable under clause 15.5(a)~~"

[21] See Commissioner Bull's Report to the Full Bench of 9 December 2014.

[22] See Commissioner Bull's Report to the Full Bench of 9 December 2014.

**Clause 15.7(a) – Annual leave – Payment on termination of employment**

91. In accordance with the Commission's decision of 23 December 2014,[23] clause 10.2(d) should be deleted. The text of the current clause 22.8 should be reinserted.

**Clause 18.2 – Public holidays**

92. The cross reference in clause 18.2 should be amended to read "clause 13.3 and 14". This ensures that overtime rates payable for work performed on a public holiday are also referred to.

**Clause 19 – Community service leave**

93. In accordance with the Commission's decision of 23 December 2014,[24] the second sentence to clause 19.1 and clause 19.2 should be deleted.

**Schedule C – Summary of monetary allowances**

94. The following drafting errors should be amended in schedule C:

- C.1: the reference to clause 9 should be amended to clause 10.1.
- C.1: the reference to clause 11.1 in the table should be amended to clause 11.1(b).
- C.3: "… based on a percentage …".
- C.4: " … with ~~the~~ clause 11 …".

**Schedule G – Definitions – standard rate**

95. The definition of the standard rate should, consistent the definition currently found in clause 3.1, be amended as follows:

> " … means the minimum weekly wage for …".

[23] [2014] FWCFB 9412 at [30] – [36].

[24] [2014] FWCFB 9412 at [30] – [36].

# 4. EXPOSURE DRAFT – AMBULANCE AND PATIENT TRANSPORT INDUSTRY AWARD 2014

**Issues relating to rates of pay**

96. We refer to section 2 of our submissions, which addresses the way in which rates of pay, penalty rates, and overtime are expressed, as well as issues pertaining to the definition of "all purpose" in the Exposure Draft.

97. With respect to the *Exposure Draft – Ambulance and Patient Transport Industry Award 2014*, we have identified the following as examples of provisions that require further consideration in light of our submissions:

- **Clause 6.5(c) – Casual loading.** The casual loading should be applied to the minimum hourly rate prescribed by the award, not an hourly rate that incorporates the all purpose allowance.
- **Clause 11.2(a) – All purpose allowances.**
- **Clauses 13 and 14 – Penalty rates and Overtime.** As per our submissions, these rates should be referrable to the minimum hourly rate prescribed by the award.

**Clause 1.3 – Title and commencement**

98. The reference to Schedule D in clause 1.3 should be amended to "Schedule E". This appears to be a drafting error.

**Clause 3.5 – Coverage**

99. In accordance with the Commission's decision of 23 December 2014,[25] the note following clause 3.5 should be removed.

[25] [2014] FWCFB 9412 at [30] – [36].

**Clause 5.2 – Facilitative provisions**

100. The third column with respect to clause 10.9(c) should be amended by deleting the reference to majority agreement. Having regard to the text of that provision, it does not provide for agreement between the employer and majority of employees.

**Clause 6.4 – Types of employment – Part-time employees**

101. The current clause 10.4(c) of the award has been omitted. We note that it appeared at clause 14.1 in an earlier Exposure Draft, however that provision has since been redrafted, and the relevant clause does not appear to have been retained.

**Clause 7 – Classifications and training plans**

102. The words "and training plans" should be deleted from the heading to clause 7. That provision deals only with the classification structure under the award.

**Clause 8.4(a) – Rosters**

103. In clause 8.4(a), the words "Hours of duty will be worked Monday to Sunday" should be replaced with "Hours of work will be worked on any days between Monday and Sunday (inclusive)." This makes clear that ordinary hours are not required to be worked on each day, Monday to Sunday.

**Clause 14.1 – Overtime – Overtime rates**

104. Clause 6.5(c) prescribes rates payable to a casual employee for work performed on a Saturday, Sunday and public holiday, which apply to "all work performed" on such days. This necessarily includes overtime.

105. We propose that clause 14.1 be amended to make clear that the overtime rates it contains with respect to Saturday, Sunday and public holidays, do not apply to casual employees. This is consistent with the approach adopted in clause 13.1 (penalty rates).

**Clause 14.5(g) – Overtime – On call**

106. The description of the circumstances in which the on call allowance is payable in clause 14.5(g) differs from the terms of clause 11.2(h). Clause 14.5(g) states that the allowance is payable to an employee rostered to be on call. Clause 11.2(h) however, applies to an employee who is rostered off duty but is required to be ready to respond to a call.

107. So as to avoid any ambiguity or inconsistency arising from the application of these provision, clause 14.5(g) should be amended as follows:

> "An employee who, in accordance with an on call roster, is rostered off duty but is required to be ready to respond to a call is entitled to …"

**Clauses 15.2(b) and (c) – Annual leave – Quantum of annual leave**

108. It appears that the current clause 30.2(b) has been replaced by the terms of the draft determination published by the Commission in proceedings relating to alleged inconsistencies between the NES and modern awards. We note that those proceedings are not yet concluded and a final determination with respect to this clause has not been made.

**Clause 15.5(a) – Payment for annual leave**

109. The current clause 30.4 requires that, for a period of annual leave, an employee be paid the amount that would have been paid had they not taken the period of leave. The clause then goes on to list the relevant components of an employee's earnings which are to be included in such payment.

110. Clause 15.5(a) of the Exposure Draft deviates from this by requiring payment at a specific rate – that is, the ordinary hourly rate (which is defined as the relevant minimum hourly rate, plus any all purpose allowances). It then states that "this includes" the same components as those that are listed in the current provision. The provision is anomalous and confusing. Clause 15.5(a) should be replaced with the current clause 30.4.

**Clause 15.6(a) – Annual leave – Payment of accrued annual leave on termination of employment**

111. In accordance with the Commission's decision of 23 December 2014,[26] clause 15.6(a) should be deleted.

**Schedule A.1.3 – Classification definitions – Operational classifications – Intensive care paramedic**

112. The cross reference to clause 11.2(a) in A.1.3 should be amended to read "11.2(b)".

## 5. EXPOSURE DRAFT – ASPHALT INDUSTRY AWARD 2014

**Issues relating to rates of pay**

113. We refer to section 2 of our submissions, which addresses the way in which rates of pay, penalty rates, and overtime are expressed, as well as issues pertaining to the definition of "all purpose" in the Exposure Draft.

114. With respect to the *Exposure Draft – Asphalt Industry Award 2014*, we have identified the following as examples of provisions that require further consideration in light of our submissions:

- **Clause 6.5(d) - Casual loading.** With reference to the question contained in the Exposure Draft, the minimum hourly rate does not include all purpose allowances. This is consistent with the current clause 10.4, which requires the calculation of the casual loading on the minimum wage prescribed by the award. That rate does not include all purpose allowances.

- **Clause 10.1 – Minimum wages.** We do not agree with the calculation of the casual ordinary hourly rate, which applies the casual loading to an hourly rate that incorporates the all purpose allowance. We refer to submissions above regarding clause 6.5(d).

[26] [2014] FWCFB 9412 at [30] – [36].

- **Clause 11.1(a) – Definition of "all purpose".**

- **Clause 11.1(b) – Industry allowance.** Clause 15.3(a) of the current award specifies that the allowance is payable for "all purposes of the award." This is relevant to our arguments regarding the payment of such allowances during periods of paid leave, which are provided for in the NES. Regardless of whether our broader arguments regarding the definition of "all purpose" are accepted, this provision should be amended to reinsert the words "of this award". The absence of such text in light of the definition proposed for "all purpose" in the Exposure Drafts, would amount to a substantive change.

- **Clause 11.1(c)(v) – Inclement weather.** We refer to the current clause 15.3(b)(i), which is the relevant corresponding provision. Similar concerns to those expressed above regarding clause 11.1(b) arise. The provision should be amended to state that the allowance is payable for all purposes of the award.

- **Schedule A – Summary of hourly rates.** The issues articulated above are relevant to the rates contained in Schedule A. Specifically, we remain of the view that the casual rates are incorrectly calculated.

**Clause 1.2 – Title and commencement**

115. Clause 1.2 of the Exposure Draft should be amended such that it is consistent with the decision of the Full Bench:[27]

> "A variation to this award does not affect any right, privilege, obligation or liability that a person acquired, accrued or incurred under the ~~superseded~~ award as it existed prior to that variation."

**Clause 3.5 – Coverage**

116. In accordance with the Commission's decision of 23 December 2014,[28] the note following clause 3.5 should be removed.

[27] [2014] FWCFB 9412 at [10] – [11].

**Clause 8.3(d) - Ordinary hours of work and rostering – Rostered days off – employees other than shiftworkers**

117. Clause 8.3(d) refers to "a shift worked", which is confusing in the context of a clause that applies employees other than shiftworkers. The word "shift" should be substituted with "day". This is consistent with clause 21.2(f).

**Clauses 11.1(c)(ii) and (iii) – Allowances – Wage related allowances – Inclement weather allowance**

118. Clauses 11.1(c)(ii) and (iii) should be reformatted such that they appear as subclauses to 11.1(c)(i).

**Clause 11.2(a)(i) – Allowances – Expense related allowances – Meal allowance**

119. The redrafting of the current clause 15.4(a)(i) would lead to an anomalous outcome whereby the meal allowance would not be payable if an employee is advised of the requirement to work overtime on the previous day, however the employee would be entitled to the allowance if the employee was advised earlier than the previous day.

120. Clause 11.2(a)(i) should be amended as follows, consistent with the current approach:

> " … employee was notified the previous day or earlier of the requirement …".

**Clauses 11.2(a)(ii) and (iii) – Allowances – Expense related allowances – Meal allowance**

121. Under the current provisions, an employee is to be paid the meal allowance where five and a half hours or more of overtime is worked, beyond their usual ceasing time, and every four hours thereafter (see clause 15.4(a)(ii)).

[28] [2014] FWCFB 9412 at [30] – [36].

122. The separation of the words “every four hours thereafter” in clause 11.2(a)(iii) is confusing, as it is no longer clear whether the allowance is payable for every four hours after the allowance is payable under subclause (i) or (ii).

123. The provision should be amended such that it is consistent with the current clause 15.4(a)(ii).

**Clause 11.2(d) – Allowances – Expense related allowances – Country and distant work – travelling allowances**

124. Consistent with clause 15.4(c), the following amendments should be made to clause 11.2(d):

- The heading should be amended to reflect that the provision relates only to “Travelling to Country Work”.

- Clause 11.2(d)(i) is anomalous. It requires the reimbursement of “fares back to the place of employment” in circumstances where an employee is sent by an employer “from city to the country, or from one country centre to another country centre, or from a country centre to the city”. The clause should instead require reimbursement of fares for such travel.

- The first bullet point in clause 11.2(d)(ii) should be amended by deleting the words “distant work”. This provision does not relate to distant work. Further, their inclusion suggests that the allowance there prescribed is payable in addition to those required by clauses 11.2(e) and (f).

- Clause 11.2(g) should be deleted and re-inserted as a new clause 11.2(d)(iii). The words “distant work” should be deleted from the heading.

**Clause 11.2(e) – Allowances – Expense related allowances – Distant work – accommodation and incidental allowances**

125. The first bullet point to clause 11.2(e) should be amended by inserting the words "for seven days" after "per week" to make clear that the allowance is intended to compensate an employee for a period of seven days, as opposed to a working week of, for instance, five days.

**Clause 13.1(a) – Shiftwork and penalties – Definitions**

126. We make the following comments regarding clause 13.1(a):

- The definition of "non-successive afternoon or night shift" is derived from the terms of the current clause 22.2(b). It should, however, define the shift, rather than the work performed on any shift, as is presently the case under clause 13.1(a). The definition should be amended by deleting the words "work on".

- The definition of "permanent night shift" should be deleted. The relevant shift allowance is payable where an employee is working night shifts (as defined) in accordance 22.2(c)(i) – (iii). The allowance is thus associated with the performance of work by an employee in the circumstances outlined in the relevant provisions. It is not linked to an employee working a particular shift, that can be defined by reference to the time at which that shift commences/finishes or its frequency.

  On this basis, the definition proposed is anomalous. It should be removed and consequently, clause 13.2(b)(iv) should be substituted with the current clause 22.2(c).

**Clause 13.1(b) – Shiftwork and penalties – Afternoon and night shift penalties**

127. The following submissions are made with respect to clause 13.1(b):

- Clause 22.2 of the current award describes the additional amounts payable to employees working on the various shifts defined as an "allowance". The heading to clause 13.2(b) however, refers to it as a

penalty. The change in terminology could have implications for the calculation of workers compensation and long service leave entitlements under State and Territory legislation. For this reason, a cautious approach should be taken in altering the language presently used.

- Clause 13.1(b)(i) should be amended by inserting the word "whilst" before "working", as found in the current clause 22.2(a). This makes clear that the allowance is only payable while the employee is working an afternoon or night shift. The Exposure Draft provision, as presently drafted, arguably requires payment of the allowance to an employee who works afternoon or night shifts from time to time, even when the employee is working, for example, during the day.

- Clause 13.1(b)(ii) should be amended by substituting the words "who works" with "who is required to work". This is consistent with clause 22.2(b), which requires payment of the penalty rate where the employee is required to perform such shiftwork, as compared to circumstances where an employee may voluntarily does so.

- We have raised concerns above regarding the definition of "permanent night shift" and consequential amendments that should be made to clause 13.2(b)(iv). In addition, this provision does not confine the payment of the higher rate to ordinary hours, as is the case in the current clause 22.2(c).

**Clause 13.3(i) – Shiftwork and penalties – Hours of work**

128. The reference to clause 13.6 should be substituted with a reference to clause 14.2. This appears to be a drafting error.

**Clause 13.7(a) – Shiftwork and penalties – Sundays and public holidays**

129. It is not apparent that a shiftworker is paid the Sunday overtime rate for ordinary hours performed on a Sunday under the current award. If that is the case, the clause should be deleted.

**Clause 14.5(a) – Overtime – Rest period after overtime**

130. Clause 14.5(a) of the Exposure Draft does not reflect the current provision to the extent that it removes an important element of "practicability", thus losing an important flexibility. Clause 14.5(a) should be substituted with the terms of the current clause 24.6(a).

**Clause 15.4(c) – Annual leave – Close-down**

131. The cross references in clause 15.4(c) should be amended to read "clauses 15.4(a) or (b)". This appears to be a drafting error.

## 6. EXPOSURE DRAFT – CEMENT, LIME AND QUARRYING AWARD 2014

**Issues relating to rates of pay**

132. We refer to section 2 of our submissions, which addresses the way in which rates of pay, penalty rates, and overtime are expressed, as well as issues pertaining to the definition of "all purpose" in the Exposure Draft.

133. With respect to the *Exposure Draft – Cement, Lime and Quarrying Award 2014*, we have identified the following as examples of provisions that require further consideration in light of our submissions:

- **Clause 6.5(b) – Casual employees.** The casual loading should be calculated on the minimum hourly rate, not the rate inclusive of all purpose allowances. This is consistent with the approach taken under the current awards.

- **Clause 10 – Minimum wages.** Please see submissions below regarding the industry disability allowance. In light of this, the "ordinary hourly rate" should be deleted and the "casual hourly rate" will require recalculation.

- **Clause 11.2(a) – the definition of all purpose.**

- **Clauses 11.2(a)(i) and 11.2(b) – industry disability allowance.** The industry disability allowance is not an allowance for all purposes of the award. Clauses 15.1 of the *Cement and Lime Award 2010* and 18.1 of the *Quarrying Award 2010* state that the allowance is to be regarded "as part of the standard rate for all purposes". The standard rate is defined by the award and forms part of the calculation of various wage related allowances, but is not relevant to the calculation of most award entitlements. By listing it as an all purpose allowance, as defined at clause 11.2(a), the Exposure Draft deviates substantively from the current award. Clauses 11.2(a)(i) should be deleted and 11.2(b) should be amended accordingly. The necessary amendments should also be made to Schedule C and the calculation of other allowances.

- **Clauses 11.2(a)(iii) and 11.2(d) – first aid allowance.** The first aid allowance is not an allowance for all purposes of the award. Clauses 15.3 of the *Cement and Lime Award 2010* and 18.4 of the *Quarrying Award 2010* state that the allowance is to be regarded "as part of the standard rate for all purposes". The standard rate is defined by the award and forms part of the calculation of various wage related allowances, but is not relevant to the calculation of most award entitlements. By listing it as an all purpose allowance, as defined at clause 11.2(a), the Exposure Draft deviates substantively from the current award. Clauses 11.2(a)(iii) should be deleted and 11.2(d) should be amended accordingly. The necessary amendments should also be made to Schedule C and the calculation of other allowances.

- **Clause 11.3(p)(i) – Payment for wet weather.** Clause 11.3(p)(i) requires payment at the ordinary hourly rate, as defined. This is inconsistent with clause 15.8(a) of the *Cement and Lime Award 2010* and clause 18.6(a) of the *Quarrying Award 2010*, which specify that payment is to be made at the minimum rate prescribed by the award.

- **Schedules A and B –** In light of our submissions regarding the industry allowance, the rates in Schedule A and B will require recalculation.

- **Schedule I – Definitions.**

**Clause 1.2 – Title and commencement**

134. Clause 1.2 of the Exposure Draft should be amended such that it is consistent with the decision of the Full Bench:[29]

> "A variation to this award does not affect any right, privilege, obligation or liability that a person acquired, accrued or incurred under the ~~superseded~~ award as it existed prior to that variation."

**Clause 3.6 – Coverage**

135. In accordance with the Commission's decision of 23 December 2014,[30] the note following clause 3.6 should be removed.

**Clause 6.4 – Types of employment – Part-time employees**

136. The current clauses 10.4(f) of the *Cement and Lime Award 2010* and 12.6 of the *Quarrying Award 2010* have not been included in the Exposure Draft. The provisions clarify how an employee should be paid if he/she does not meet the definition of full-time or part-time employment. The clause should be reinserted.

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

137. Clause 6.4(a) of the Exposure Draft should be amended as follows:

> *"(a) A part-time employee is an employee who works ~~is employed to work an agreed number of hours of work per week which is~~:*
>
> *(i) less than 28 ordinary hours per week; and*

[29] [2014] FWCFB 9412 at [10] – [11].

[30] [2014] FWCFB 9412 at [30] – [36].

*(ii) ~~works~~ a regular number of ordinary hours each week."*

138. The text struck out in the preamble does not appear in the current award. The words are superfluous and should be removed. Further, the clause as presently drafted, when read with subclause (ii), is confusing.

**Clause 9.5 – Breaks – Overtime meal break**

139. The redrafting of the current clauses 23.6 of the *Cement and Lime Award 2010* and 28.6 of the *Quarrying Award 2010* has changed the nature of the break provided for. The break is not a meal break and therefore, the word "meal" should be deleted from clause 14.8 each time it appears.

**Clause 13.2(b) – Penalty rates – Night shift – permanent night shift**

140. In releasing the Exposure Draft of this award the Commission inserted a new definition of permanent night shift.[31] The definition is as follows:

> *"Permanent night shift means when an employee who:*
>
> *(i) during a period of engagement on shiftwork, works night shift only; or*
>
> *(ii) remains on night shift for a longer period than four consecutive weeks; or*
>
> *(iii) works on a night shift which does not rotate or alternate with another shift or with day work so as to give him or her at least 1/3rd of his or her working time off night shift in each shift cycle."*

141. This is a substantive change that was not supported by the parties. Ai Group continues to have reservations or concerns about the impact of a substantive change being implemented absent any evidence about current practices within industry. For example, there is no reason to assume that industry regards a permanent shift as one that merely operates for four weeks.

[31] [2014 FWCFB] 9412 at [182].

142. The Macquarie Dictionary defines the word "permanent" to mean *"lasting or intended to last indefinitely; remain unchanged; not temporary; enduring; abiding."*

143. The proposed definition of a permanent night shift sets out a number of situations where a period of work by an individual employee will be regarded as a permanent night shift. Ai Group is concerned that the arbitrary definition proposed in the Exposure Draft may extend the circumstances where a higher penalty than that applicable for an ordinary night shift will be payable. When regard is had to the ordinary meaning of the word permanent, the variation arguably changes the trigger for the payment for the higher penalty from night shifts that are performed on an indefinite, enduring and not temporary basis to one that occurs when specific circumstances are met. Significantly, the new definition would potentially include work done by employees on a night shift for only a relatively short period of time.

144. Ai Group submits that the variation should not be made. There is no evidence of the need for the variation. It should not be sufficient in the course of the Review to rely on parties not identifying a practical problem with a proposed variation as a justification for varying the substantive entitlements provided in an award. Given the tight timeframes during which the Review is being undertaken and the massive workload being placed upon parties given the widespread re-drafting by the Commission of existing provisions in every award, it is impossible for parties to confidently or conclusively confirm that a particular substantive variation would not be problematic.

145. Regardless, the redrafting of award provisions by the Commission in the context of preparing Exposure Drafts should not ordinarily result in substantive variations to award entitlements. Consistent with the approach foreshadowed in the Preliminary Issues Decision[32], there should not be a change made to an award absent cogent reasons for the variation and, to the extent that it is appropriate, probative evidence supporting the change. No case for the substantive variation proposed has been made out.

[32] [2014] FWCFB 1788.

146. Ai Group acknowledges that the proposed amendment contained in the Exposure Draft is intended to add clarity, absent a separate definition of permanent night shift. Although the Commission is required to ensure that awards are simple and easy to understand, such consideration should not lightly be pursued at the risk of imposing additional costs on employers.

147. If the Commission is minded to insert a definition of permanent night shift, it would be better to adopt a definition that more closely accords with the ordinary meaning of the word "permanent". That is, the penalty should only be payable where the shift is intended to operate indefinitely and not on a temporary basis.

## 7. EXPOSURE DRAFT – CLEANING SERVICES AWARD 2014

**Issues relating to rates of pay**

148. We refer to section 2 of our submissions, which addresses the way in which rates of pay, penalty rates, and overtime are expressed, as well as issues pertaining to the definition of "all purpose" in the Exposure Draft.

149. With respect to the *Exposure Draft – Cleaning Services Award 2014*, we have identified the following as examples of provisions that require further consideration in light of our submissions:

- **Clause 6.5(b) - Casual loading.** Specifically, the use of the term "ordinary hourly rate", which in this Exposure Draft means the minimum hourly rate.

- **Clause 10.1 – Minimum wages.** Our concerns with respect to this clause also arise from the use of the term "ordinary hourly rate".

- **Clause 10.2 – Junior rates.** This provision also refers to the "ordinary hourly rate".

- **Clause 13.1 – Shiftwork penalties.** The shiftwork penalty prescribed by this clause is referrable to the "ordinary hourly rate".

- **Clause 13.3 – Penalty rates.** Under the current award, penalty rates are to be applied to the ordinary hourly rate, which is defined as the minimum hourly rate prescribed by the current award. Clause 13.3 of the Exposure Draft does not refer the penalties prescribed to the minimum award rate. Even if our arguments above are rejected, this clause must be amended to reinsert references to the minimum award rate, so as to avoid any potential disputation as to whether it interacts with over-award rates.

- **Clause 14.3 – Overtime rates.** Clause 14.3 refers to the "ordinary hourly rate".

- **Schedule B – Summary of hourly rates**. The schedule refers to the "ordinary hourly rate" throughout.

- **Schedule G – Definitions.**

**Clause 3.6 – Coverage**

150. In accordance with the Commission's decision of 23 December 2014,[33] the note following clause 3.6 should be removed.

**Clause 6.5(b)(iii) – Types of employment – Casual employees – Casual loading**

151. Ai Group opposes the insertion of clause 6.5(b)(iii). 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.

152. We note that the ACTU has also raised concerns regarding the inclusion of such a provision.[34]

[33] [2014] FWCFB 9412 at [30] – [36].

[34] See submissions dated 15 October 2014.

**Clause 8.1(e) – Ordinary hours of work and rostering – Ordinary hours and roster cycles – full-time employees**

153. The commencing words to this provision ("Subject to clause 22.2") are not contained in the current award (clause 24.1(e)). The words should be deleted as they amount to a substantive change.

154. Clause 24.1(e) of the current award allows an employer to vary an employee's ordinary hours of work in accordance with that provision.

155. Clause 8.2 of the current award is a standard provision. It was inserted by a Full Bench of the Commission in response to s.145A of Act. That provision was introduced via the *Fair Work Amendment Act 2013*.

156. The clause requires an employer to consult with an employee about a proposed change to an employee's regular roster or ordinary hours of work. It prescribes various obligations regarding the process of consultation that must be met by an employer.

157. Clause 24.1(e) and clause 8.2 give rise to separate and distinct rights and obligations. Undoubtedly, there will be circumstances in which the utilisation of clause 24.1(e) will give rise to an obligation under clause 8.2, however this will not necessarily be the case.

158. By inserting the words "Subject to clause 22.2", clause 8.1(e) of the Exposure Draft deviates in its meaning and application from the current award. It imposes a precondition whereby an employer is precluded from exercising its right to vary an employee's ordinary hours of work under that provision, unless and until it has fulfilled its obligations under the consultation clause.

159. In considering the form and content of the standard provision found at clause 22.2 of the Exposure Draft, a Full Bench of the Commission made the following observations:

> [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."[35]

160. The above passage demonstrates that the Commission explicitly determined that provisions such as clause 8.1(e) and the consultation clause are to be read in conjunction with one another. Award terms that provide a facility to vary working days and hours were not determined to operate subject to the obligation to consult.

**Clause 8.2(b) – Ordinary hours and rostering – Ordinary hours and roster cycles – part-time and casual employees**

161. The word "engagement" in the top left cell should be in bold.

162. The phrase "total cleaning area", as it appears in the table, should be in bold or otherwise amended to indicate that it is a defined term in the award. The current award does this by stating that the term is "(as defined)" (see clause 24.2(d) – (f)).

**Clauses 11.2(a) and 13 – Broken shift allowance and penalty rates**

163. In our submissions of 26 September 2014, we proposed an amendment to clause 13 of the Exposure Draft, with respect to the payment of shift loadings where an employee performs a broken shift. We note that this matter has been the subject of ongoing discussions between the parties and remains unresolved.

[35] Consultation Clause in Modern Awards [2013] FWCFB 10165.

**Clause 11.2(e) – Allowances – Wage related allowances – First aid allowance**

164. Clause 17.5 of the current award entitles an employee who currently holds appropriate first aid qualifications to the allowance. Clause 11.2(e) deviates from this, as it is not confined to an employee who holds a current qualification. This potentially broadens the scope of the clause, amounting to a substantive change.

165. Clause 11.2(e) should be amended as follows:

> " … and who ~~holds~~ is the current holder of appropriate first aid qualifications …".

**Clause 11.3(c) – Allowances – Expense related allowances – Travel time and fares**

166. Clause 11.3(c) applies where an employee is required by the employer to travel from one place to another, but then goes on to state that all time spent travelling will be deemed to be working time. It is not clear that this is limited to time spent travelling from one place to another, as required by the employer, as per the current clause 17.10.

167. Given the potentially broader interpretation that arises from the language of this provision, clause 11.3(c) should be substituted with the current clause 17.10.

**Clause 13.3 – Penalty rates**

168. In addition to the submission made above regarding clause 13.3, this provision should also be amended by deleting the word "penalty" from the preamble. The use of the term "penalty" implies that the rate prescribed is to be applied to the employee's minimum rate. However, the clause contains rates expressed as a percentage of the hourly rate, which includes the minimum hourly rate.

**Example 2 – Overtime Monday to Friday (casual employee)**

169. The example should be amended to refer to the "casual loading" rather than the "part-time allowance".

**Clause 15.5(a) – Annual leave – Payment for annual leave**

170. The current clause 29.4(a) leaves it to the NES to prescribe the rate at which annual leave is to be paid. Clause 15.5(a) deviates significantly from this, by requiring that the amount due to an employee for a period of annual leave is as per clause 15.6, which prescribes a rate higher than the "base rate of pay". Given the substantive change that results from this, clause 15.5(a) should be deleted.

**Clause 15.5(b) – Annual leave – Payment for annual leave**

171. Consequential amendments should be made to clause 15.5(b). It should be substituted with the second sentence of the current clause 29.4(a) and all of 29.4(b).

**Clauses 15.5, 15.6 and 15.7 – Annual leave**

172. Clause 15.6 provides a definition for the relevant rate upon which the annual leave loading is to be calculated under clauses 15.5 and 15.7. The clauses currently use inconsistent terminology ("ordinary time rate", "rate of pay" and "ordinary hourly rate as defined by clause 15.6"), such that this purpose is not served.

173. Each of these clauses should be amended such that, consistent with the current award, they use the term "ordinary pay" wherever relevant, as per clause 29.3.

**Clause 15.7(a) – Annual leave – Payment of accrued annual leave on termination of employment**

174. In accordance with the Commission's decision of 23 December 2014,[36] clause 15.7(a) should be deleted.

## 8. EXPOSURE DRAFT – CONCRETE PRODUCTS AWARD 2014

**Issues relating to rates of pay**

175. We refer to section 2 of our submissions, which addresses the way in which rates of pay, penalty rates, and overtime are expressed, as well as issues pertaining to the definition of "all purpose" in the Exposure Draft.

176. With respect to the *Exposure Draft – Concrete Products Award 2014*, we have identified the following as examples of provisions that require further consideration in light of our submissions:

- **Clause 6.5(b) – Casual loading.** Consistent with the current award, the casual loading should be applied to the minimum hourly rate, not the ordinary hourly rate which includes an all purpose allowance.

- **Clause 10.1 – Minimum wages.** This clause includes the "ordinary hourly rate" and the "casual hourly rate", both of which include the relevant all purpose allowances. For the reasons above, the casual hourly rates are incorrect.

- **Clause 11.2(a) – All purpose allowances.** As earlier raised, we oppose the definition proposed.

- **Clause 15.6 – Payment for annual leave.** The annual leave loading is to be calculated on the minimum hourly rate, plus the leading hand, industry and first aid allowances where appropriate. The redrafting of this provision at clause 15.6 and the term "ordinary hourly rate" is confusing.

[36] [2014] FWCFB 9412 at [30] – [36].

- **Schedule B – Summary of hourly rates of pay.** The concerns raised above are relevant to the rates published in Schedule B.

- **Schedule G – Definitions.**

**Clause 1.2 – Title and commencement**

177. Clause 1.2 of the Exposure Draft should be amended such that it is consistent with the decision of the Full Bench:[37]

> "A variation to this award does not affect any right, privilege, obligation or liability that a person acquired, accrued or incurred under the ~~superseded~~ award as it existed prior to that variation."

**Clause 3.1 – Coverage**

178. Clause 3.1 of the Exposure Draft deviates from the current clause 4.1 by adding the words *"*to the exclusion of any other modern award*"* at the end of the provision. Those words should be deleted.

179. Clause 4.1 of the current award establishes the coverage of the award but does not deal with the interaction between it and other modern awards. It is clause 4.7 that address this issue.

180. Clause 3.1 should go no further than the current clause 4.1. The insertion of the relevant words may, in some circumstances, be at odds with clause 3.6. Any such amendment to the coverage of this award would be a substantive change and should not be adopted.

**Clause 3.4 – Coverage**

181. In accordance with the Commission's decision of 23 December 2014,[38] the note following clause 3.5 should be removed.

[37] [2014] FWCFB 9412 at [10] – [11].

[38] [2014] FWCFB 9412 at [30] – [36].

**Clause 6.4 – Types of employment – Part-time employees**

182. The current clause 11.4(e) has not been included in the Exposure Draft. The provision clarifies how an employee should be paid if he/she does not meet the definition of full-time or part-time employment. The clause should be reinserted.

**Clause 8.4(a)(iii) – Rostered days off**

183. Clause 8.4(a)(iii) appears in the current award as a standalone subclause, at clause 22.6(d). Unlike the Exposure Draft, it applies generally to the method by which ordinary hours are worked. Clause 8.4(a)(iii) however, is confined to the implementation of rostered days off and more specifically, how the rostered day off is to be nominated by an employer.

184. The relocation of the current provision reduces its scope and effect. In doing so, a significant flexibility is removed from the award. Clause 8.4(a)(iii) should be deleted and the text of the current clause 22.6(d) should be reinstated as a new clause 8.3(c), with consequent renumbering to follow.

**Clause 9.1(a) – Breaks – Unpaid meal breaks**

185. We refer to the question contained in the Exposure Draft and submit that the change proposed should not be made. The clause currently permits a break to commence between the fourth and sixth hour. If the variation were made, the break would have to be taken in full, between the fourth and sixth hour. The introduction of this inflexibility amounts to a substantive change and therefore, should not be adopted.

**Clauses 11.2(f)(i) – (iii) – Allowances – Wage related allowances – Bituminous sprayer allowance**

186. Consistent with the current clauses 16.5(a) – (c), clauses 11.2(f)(i) – (iii) should be amended to specify that the allowances are payable "whilst so engaged". In the absence of these words, the provisions may be read to suggest that the allowances are payable to an employee who performs the

activities described from time to time for all hours of work, including those during which the employee is not engaged in the relevant activities. This is a clear deviation from the approach taken in the current award.

**Clause 11.3(b) – Allowances – Expense related allowances – Accommodation allowance**

187. The accommodation allowance corresponds with the current clause 16.3(b), which sits under the "Distant Work" heading. Clause 11.3(b) should be amended to make clear that it operates in circumstances where an employee is performing distant work. This could be achieved by reformatting clauses 11.3(b) and (c) such that they appear in the same form as the current clause 16.3.

**Clause 13.2(d) – Shiftwork and penalties – Hours – continuous work shifts**

188. We make the following comments regarding clause 13.2(d):

- Clause 13.2(d) refers to clause 8.3(a) twice. This should be amended by deleting either reference.

- While we appreciate that the reference to clause 8.3(a) is intended to avoid repetition of that provision, its terms do not reflect the corresponding clause 25.2(b). Importantly, it uses the term "day" (rather than "shift"). In addition, clause 8.3(a)(i) provides for agreement between the employer and majority of employees in the plant/section/sections, whereas the current award requires agreement with the majority of employees concerned. This flexibility is important in circumstances where the arrangement of ordinary hours differs for various groups of employees within a section of employees in the plant.

  For these reasons, clause 13.2(d) should be replaced with the current clause 25.2(b).

**Clause 13.3(a) – Shiftwork and penalties – Hours – other than continuous work**

189. Clause 13.3(a) should be amended to state that the ordinary hours "are an average of 38 hours per week". This is consistent with clause 25.3(a) of the current award.

**Clause 13.3(e)(i) – Shiftwork and penalties – Hours – other than continuous work**

190. Clause 13.3(e)(i) should be amended by replacing the reference to "rostered hours" with "ordinary hours". The reference to "rostered" hours could include rostered overtime. This clearly differs from the current clause 25.3(c).

**Clause 13.3(e)(ii) – Shiftwork and penalties – Hours – other than continuous work**

191. We refer to the submission made earlier regarding clause 13.2(d). Similar concerns arise regarding this provision. Therefore, the clause should be replaced with clauses 25.3(c)(ii) and (iii) of the current award.

**Clauses 13.4(c) and (d) – Shiftwork and penalties – Variation by agreement**

192. Clauses 13.4(c) and (d) should be deleted. The reason for their inclusion under the above heading is unclear. The provisions are relevant to clauses 13.2 and 13.3 are referred to above. Additionally, the terminology used in these provisions is problematic. For instance, it refers to "rostered" hours, whilst the current clauses deal with ordinary hours.

**Clause 13.9(b)(i) – Shiftwork and penalties – Sundays and public holidays – Shiftworkers on other than continuous work**

193. The reference to clause 10.1 should be substituted with a reference to clause 10. This appears to be a drafting error.

**Clauses 15.2(b) and (c) – Annual leave – Seven day shiftworkers**

194. It appears that the current clause 26.2 has been replaced by the terms of the draft determination published by the Commission in proceedings relating to

alleged inconsistencies between the NES and modern awards. We note that those proceedings are not yet concluded and a final determination with respect to this clause has not been made.

**Clause 18.2 – Public holidays**

195. The reference to clause 13.8 should be substituted with a reference to clause 13.9. This appears to be a drafting error.

**Clause 20.2 – Termination of employment – Notice of termination by an employee**

196. We make the following comments regarding clause 20.2:

- A typographical error should be amended as follows:

  " … may withhold <u>from</u> any money due …".

- Substituted "the NES" in the last line with "this clause". This amendment has been noted in the Exposure Draft, however the change has not been made.

**Schedule C.3 – Summary of monetary allowances – Expense related allowances**

197. The meal allowance is payable, under the current clause 11.3(a) for each instance upon which an employee is required to overtime as described. That is, the payment of the allowance is associated with the performance of such overtime. It is not referrable to the consumption of a meal, as suggested by the words "per meal", in Schedule C.3. The retention of those words could suggest that an employee would be entitled to the allowance twice if they consumed two meals upon completing two or more hours of overtime. Therefore, the words should be deleted.

# 9. EXPOSURE DRAFT – COTTON GINNING AWARD 2014

**Issues relating to rates of pay**

198. We refer to section 2 of our submissions, which addresses the way in which rates of pay, penalty rates, and overtime are expressed, as well as issues pertaining to the definition of "all purpose" in the Exposure Draft.

199. With respect to the *Exposure Draft – Cotton Ginning Award 2014*, we have identified the following as examples of provisions that require further consideration in light of our submissions:

- **6.5(c) – Casual loading**. The casual loading should be applied to the minimum hourly rate prescribed by the award, not an hourly rate that incorporates all purpose allowances.

- **10.1 – Minimum wages**. In particular, the use of the phrase "base rate", the term "ordinary hourly rate" and the calculation of the casual hourly rate.

- **11.2(a) – All purpose allowances**.

- **13.1 – Penalty rates**. The penalty rate should be applied to the minimum hourly rate prescribed by the award, not an hourly rate that incorporates all purpose allowances.

- **14.2 – Overtime rates**. The same issues arise here as with respect to clause 13.1.

- **15.2(a) – Annual leave**. We refer specifically to the question contained in the Exposure Draft.

- **Schedule A – Summary of hourly rates**. Each of the issues articulated above are relevant to the rates contained in Schedule A.

- **Schedule E – Definitions** of "all purpose" and "ordinary hourly rate".

**Clause 3.1 – Coverage**

200. Clause 3.1 of the Exposure Draft deviates from the current clause 4.1 by adding the words *"*to the exclusion of any other modern award*"* at the end of the provision. Those words should be deleted.

201. Clause 4.1 of the current award establishes the coverage of the award but does not deal with the interaction between it and other modern awards. It is clause 4.7 that address this issue.

202. Clause 3.1 should go no further than the current clause 4.1. The insertion of the relevant words may, in some circumstances, be at odds with clause 4.7. Any such amendment to the coverage of this award would be a substantive change and should not be adopted.

**Clause 3.4 – Coverage**

203. In accordance with the Commission's decision of 23 December 2014,[39] the note following clause 3.4 should be removed.

**Clause 5.2 – Facilitative provisions**

204. The third column of the table in clause 5.2, with respect to clause 6.5(f), states that agreement may be reached under that provision between an employer and an individual employee or the majority of employees. Having regard to the text of the current clause 10.4(c) and clause 6.5(f) of the Exposure Draft, it appears that it does not allow for agreement between an employer and the majority of employees. Clause 5.2 should be amended accordingly.

**Clause 6.5(d) – Types of employment – Casual employees – Casual loading**

205. Ai Group opposes the insertion of clause 6.4(b)(iii). 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.

[39] [2014] FWCFB 9412 at [30] – [36].

206. We note that the ACTU has also raised concerns regarding the inclusion of such a provision,[40] and in that in the context of various other Exposure Drafts, the AWU has also sought the deletion of this provision.

**Clause 8.3(a)(i) – Ordinary hours of work and rostering – Rostered days off**

207. The words "that is one hour accrues for every additional hour worked", as found in clause 8.3(a)(i) of the Exposure Draft, should be deleted. That text does not appear in the corresponding clause 22.1(a) of the current award. We propose that the words be removed for two reasons:

- The RDO provisions do not necessarily operate on the basis that RDOs are accrued on an hourly basis. That is, an RDO may be accrued as a result of time worked that is of an increment less than one hour in length.

- The use of the word "additional" gives rise to an ambiguity. It is unclear what those hours are in fact in addition to.

**Clause 9.4(b) – Breaks – Minimum break after ceasing work for the day**

208. Clause 23.4(b) of the current award requires the payment of overtime rates where an employee has not had a 10 hour break and is required to work. Clause 9.4(b) refers instead to an employee "resuming" work, which would apply in circumstances where an employee returns to work in the absence of there being a direction from their employer to do so. The clause thus deviates substantively from the current provision and potentially expands the application of the clause.

209. Clause 9.4(b) should be substituted with the text of the current clause 23.4(b).

[40] See submissions dated 15 October 2014.

**Clause 10.1 – Minimum wages**

210. The footnote to the table in clause 10.1 refers to the industry allowance. This should be amended to read "disability allowance" to ensure that the terminology used is consistent with clause 11.2(b).

**Clause 10.2(d) – Minimum wages – Payment of wages**

211. In accordance with the Commission's decision of 23 December 2014,[41] clause 10.2(d) should be deleted.

**Clauses 11.2(a)(ii) and 11.2(c) – Allowances – Wage related allowances – Leading hand**

212. The characterisation of the leading hand allowance as an all purpose allowance is disputed. Clause 17.3 of the current award provides that the allowance "will form part of the ordinary wage rate". The term "ordinary wage rate" is not defined by the award. It is only used in clause 25.2 of the award, which specifies the rate payable to an employee during a period of annual leave. The necessary amendments should be made to clauses 10.1, 11.2(a)(ii) and 11.2(c).

**Clause 11.2(f) – Allowances – Wage related allowances – Special contingency payment**

213. We understand that this matter has been referred to a Full Bench of the Commission dealing with matter AM2014/190. Ai Group reserves its right to make submissions with respect to the ongoing operation of this provision and its terms, at the appropriate stage of those proceedings.

**Clause 13.1 – Penalty rates**

214. We have identified the following concerns with respect to clause 13.1 of the Exposure Draft:

[41] [2014] FWCFB 9412 at [30] – [36].

- Clause 21.2(c) of the current award describes the additional 15% payable to night workers as a “loading”. Clause 13.1 however, refers to it as a penalty. This has important ramifications for how the loading interacts with other amounts payable under the award, as evidenced by clause 6.5(e). Furthermore, the change in terminology could have implications for the calculation of workers compensation and long service leave entitlements under State and Territory legislation. For this reason, a cautious approach should be taken in altering the language presently used.

- The second sentence of clause 21.2(c) of the current award does not appear in the Exposure Draft. This provision must be reinserted in order to ensure that the interaction between the night work loading and penalties payable for overtime, weekend work and work performed on a public holiday is made clear.

**Clause 14 – Overtime**

215. The Exposure Draft notes that the overtime provision does not state whether overtime performed on each day stands alone. We point to clause 24.1 of the current award, which requires the payment of overtime rates for work performed in excess of or outside the ordinary working hours “on any one day”. This implies that overtime performed on each day stands alone. Clause 14 should be amended to reinsert the relevant words.

**Clause 14.2(b) – Overtime – Overtime rates**

216. The current award deals with the penalty applicable to work performed on a public holiday at clause 28.2. The clause makes no distinction between ordinary hours and overtime. Thus, the minimum of four hours payment applies where an employee works any combination of ordinary hours and overtime on a public holiday. The performance of work during overtime, as defined by the award, on a public holiday, does not attract a separate entitlement to four hours of minimum pay.

217. The Exposure Draft deals with the rate payable to an employee in clauses 13 and 14.2. An unnecessary distinction is made between ordinary hours of work and overtime, as the rate payable and the requirement for 4 hours of work, applies to both. The approach taken in the current award should be reinstated in order to ensure that there are no unintended consequences arising from this.

**Clause 15.2(a) – Annual leave – Payment for annual leave**

218. Clause 15.2(a) of the Exposure Draft is a new provision. There is no such corresponding clause in the current award. It appears that it was inserted as part of the summary of NES provisions that the Commission initially proposed to include in all Exposure Drafts. Consistent with the Commission's decision of 23 December 2014,[42] clause 15.2(a) should be deleted.

**Clause 18.2 – Public holidays**

219. If the amendments we have earlier proposed regarding clause 14.2(b) are not adopted, the reference to clause 14.2 in clause 18.2, should be substituted with a reference to clauses 13 and 14.

**Clause 20.2 – Termination of employment – Notice of termination by an employee**

220. The following typographical error in clause 20.2 should be amended:

" … "the employer may withhold <u>from</u> any money due …".

[42] [2014] FWCFB 9412 at [30] – [36].

# 10. EXPOSURE DRAFT – PREMIXED CONCRETE AWARD 2014

**Issues relating to rates of pay**

221. We refer to section 2 of our submissions, which addresses the way in which rates of pay, penalty rates, and overtime are expressed, as well as issues pertaining to the definition of "all purpose" in the Exposure Draft.

222. With respect to the *Exposure Draft – Premixed Concrete Award 2014*, we have identified the following as examples of provisions that require further consideration in light of our submissions:

- **6.5(b)(ii) – casual loading.** In accordance with the current award, the casual loading should apply to the minimum hourly rate prescribed by the award, rather than a rate that includes all purpose allowances.

- **10.1 – minimum wages.** For the reasons stated above, we do not agree with the calculation of the casual hourly rate. Further, the inclusion of an "ordinary hourly rate" is particularly confusing in this award where, in addition to the industry disability allowance, there are additional all purpose allowances that are payable to certain employees and must be added to the rate prescribed.

- **11.2(a) – the definition of "all purpose".**

- **Schedule B – Summary of hourly rates.** The above issues are relevant to the calculation of rates in Schedule B. In particular, we question of the utility of rates expressed as a percentage of the ordinary hourly rate, where the award contains other all purpose allowances that may also be payable to a particular employee.

- **Schedule F – Definitions.**

**Clause 1.2 – Title and commencement**

223. Clause 1.2 of the Exposure Draft should be amended such that it is consistent with the decision of the Full Bench:[43]

> "A variation to this award does not affect any right, privilege, obligation or liability that a person acquired, accrued or incurred under the ~~superseded~~ award as it existed prior to that variation."

**Clause 2.1 – The National Employment Standards and this award**

224. Clause 2.1 should be amended by deleting the word "in".

**Clause 3.6 – Coverage**

225. In accordance with the Commission's decision of 23 December 2014,[44] the note following clause 3.6 should be removed.

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

226. Ai Group opposes the use of the words "paid instead of" in clause 6.5(c). We refer to our submissions regarding the stage 1A and 1B Exposure Drafts, dated 26 September 2014, at section 3.5. The clause should be deleted or, if it is to be retained, it should use the current terminology at clause 10.5(c).

227. We note that the ACTU has also raised concerns regarding the inclusion of such a provision.[45]

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

228. For clarity, clause 8.1(b) should be amended by inserting "(inclusive) at the end of the clause.

[43] [2014] FWCFB 9412 at [10] – [11].

[44] [2014] FWCFB 9412 at [30] – [36].

[45] See submissions dated 15 October 2014.

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

229. The current clause 20.1 defines ordinary hours of work. By inserting the words "for a full-time employee" in clause 8.1(c), the Exposure Draft removes casual employees from the application of the clause. This deviates from the current award and potentially results in a contravention of s.147 of the Act. The words "for a full-time employee" should be deleted.

230. 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 6.5(a).

**Clause 11.2(c) – Allowances – Wage related allowances – Leading hand allowance**

231. Clause 15.2(a) of the current award requires payment of the leading hand allowance to employees in charge of "more than 2" employees. Clause 11.2(c) of the Exposure Draft should be amended to reflect this. The second row the table should be varied by deleting "2" and substituting it with "3".

**Clause 11.3(a)(i) – Allowances – Expense related allowances – Meal allowance for overtime**

232. The meal allowance is payable, under the current clause 15.7(a) for each instance upon which an employee is required to work two or more hours after their normal finishing time. That is, the payment of the allowance is associated with the performance of such overtime. It is not referrable to the consumption of a meal, as suggested by the words "per meal", in clause 11.3(a)(i). The retention of those words could suggest that an employee would be entitled to the allowance twice if they consumed two meals upon completing two or more hours of overtime.

233. The necessary amendment should also be made to Schedule B.

**Clause 14.4(b) – Overtime – Minimum break between shifts**

234. The current clause 23.3(b) applies where an employee has performed overtime and, as a result, has not had 10 consecutive hours off duty between the end of their ordinary work on one day and the commencement of their ordinary work on the following day. Thus, the calculation of the 10 hours does not include overtime. Clause 14.4(b) deviates from this by simply referring to 10 hours off between "shifts", which is not exclusive of overtime. The language of the current provision should be restored.

**Clause 14.8 – Overtime breaks**

235. The redrafting of the current clause 23.6 has changed the nature of the break provided for. The break is not a meal break and therefore, the word "meal" should be deleted from clause 14.8 each time it appears.

**Schedule F – Definitions**

236. We refer to the question contained at Schedule F to the Exposure Draft. The insertion of a definition for "permanent night shift" is opposed. There is no evidence before the Commission to suggest that, as a result of the absence of a definition, the award is not achieving the modern awards objective. Further, no specific proposal has been put for the parties to consider.

237. If it is determined that a definition is to be inserted, parties should be given a proper opportunity to respond. This may involve the consideration of evidence as to how the term is understood in the industry and the current application of the relevant award terms. Ai Group opposes the insertion of a definition that would impose additional employment costs on employers or introduce inflexibilities.

# 11. EXPOSURE DRAFT – SALT INDUSTRY AWARD 2014

## Clause 1.2 – Title and commencement

238. Clause 1.2 of the Exposure Draft should be amended such that it is consistent with the decision of the Full Bench:[46]

> "A variation to this award does not affect any right, privilege, obligation or liability that a person acquired, accrued or incurred under the ~~superseded~~ award as it existed prior to that variation."

## Clause 6.4(c)(ii) Casual Loading

239. Ai Group notes the decision of the Full Bench at [2014] FWCFB 9412 at [211] in relation to the calculation of the casual loading, and its decision to refer this matter to the Casual and Part-time Employment Full Bench. Ai Group still presses its position that the Exposure Draft should adopt the approach in the current award to calculate the 25% casual loading on the minimum, rather than ordinary hourly rate.

240. Despite this, Ai Group notes that Table B.2.1 Casual employee – ordinary and penalty rates appears to adopt the correct approach in the calculation of shift penalties and the industry allowance for casual employees, where the industry allowance is added at the end of the calculation. However, we also note that many, but not all of the actual rates in Table B.2.1 appear to be incorrect and inconsistent with the Exposure Draft's stated approach for the casual rate calculation.

## Clause 10.2 – Junior Employees

241. Most of the minimum rates appearing in clause 10.2(a) for junior employees appear to be incorrect and inconsistent with the stated percentage calculation of a Level 2 classification rate inclusive of industry allowance. Alternatively, it is unclear how the rates were derived despite the relevant award terms.

[46] [2014] FWCFB 9412 at [10] – [11].

242. Ai Group has calculated the following:

| Age | % of Level 2 adult rate | Junior ordinary weekly rate | Junior ordinary hourly rate |
|---|---|---|---|
| | % | $ | $ |
| 16 years or less | 65 | 461.21 | 12.13 |
| At 17 years | 80 | 567.65 | 15.04 |
| At 18 years | 90 | 638.60 | 16.85 |
| At 19 years | 100 | 709.56 | 18.67 |

**Clause 11.3(b) – Industry allowance**

243. Ai Group notes that the matter of all purpose allowances will be dealt with by the Full Bench. For clarity, Ai Group seeks the addition of the words "under this award" at the end of clause 11.3(b)(ii) to ensure consistency with the terms of the final sentence in clause 11.3(a).

**Schedule B – Summary of Hourly Rates of Pay**

244. For consistency with clause 11.3(a) as stated above, Ai Group seeks the inclusion of "under this award" at the end of sentence defining **ordinary hourly rate** for the purpose of Schedule B. We note that the concept of all purpose allowances will be dealt by the Full Bench as stated above.

245. Ai Group considers the casual rates in Table B.2.1 – Casual employees – ordinary and penalty rates to be mostly incorrect, or inconsistent with how the Exposure Draft has stated the rates are calculated. Ai Group agrees with the Exposure Draft's approach of calculating the shift penalty for casuals to be consistent with current award terms: $ base hourly rate x 1.25; x shift loading (eg 1.15); + $0.49 industry allowance. It appears this approach has only be adopted for the Level 1 – Introductory calculations and not others. Alternatively, Ai Group is unable to identify how the rates have been derived.

246. Ai Group considers the overtime casual rates in Table B.2.2 – Casual employees – other than continuous shiftworkers – overtime rates and Table B.2.3. – Casual continuous shiftworkers – overtime rates to be incorrect and inconsistent with other award terms. Clause 23.3 of the current award and as restored in clause 14.4(b) in the Exposure Draft (see [2014] FWCFB 9412 at [213]) states that:

> "Any overtime payments are in substitution of any other loadings or penalty rates."

247. This is an exception to the rule in clause 6.4(c)(ii) (of the Exposure Draft) that the casual loading constitutes part of the casual employee's rate of pay for all purposes. Accordingly, casual employees receive an overtime penalty for overtime worked, but not in addition to the 25% casual loading which is a "loading" for the purpose of clause 14.4(b). Therefore the rates in Tables B.2.2 and B.2.3 should reflect the overtime rates for permanent employees in Table B.1.2.

**Schedule C – Summary of Monetary Allowances**

248. Ai Group considers that the phrase "per week" would be helpful in the allowance table at C.1 to make it clear that the allowances described in that table are weekly allowances. This approach has been adopted in other Exposure Drafts.

## 12. EXPOSURE DRAFT – SECURITY SERVICES INDUSTRY AWARD 2014

**Clause 1.2 – Title and Commencement**

249. Clause 1.2 of the Exposure Draft should be amended such that it is consistent with the decision of the Full Bench:[47]

[47] [2014] FWCFB 9412 at [10] – [11].

> "A variation to this award does not affect any right, privilege, obligation or liability that a person acquired, accrued or incurred under the ~~superseded~~ award as it existed prior to that variation."

**Clause 3 – Coverage**

250. Ai Group notes that the current clause 4.3 of the award has still been omitted from the Exposure Draft.

251. Clause 4.3 reads:

> "To avoid doubt, this award does not apply to an employer merely because the employer, as an incidental part of a business that is covered by another modern award, has employees who perform functions referred to in clause 4.2"

252. In its original Exposure Draft submission (Ai Group submission, 26 September 2014, p 48). Ai Group argued that clause 4.3 was a critical clause that avoided disturbing award coverage in numerous industries. For example, a construction company that also provided security service functions as an incidental part of its business would generally be covered by the Building & Construction General Onsite Award 2010, being the relevant industry award for that business. Clause 4.3 clarifies that the *Security Services Industry Award 2010* is an industry award relevant to the security services industry, and not an award with occupational reach in other industries.

253. The exposure draft's removal of clause 4.3 was raised during a Conference before Vice President Hatcher on 5 December 2014. His Honour referred the matter to the Full Bench as its re-inclusion was impacted by various substantive claims pursued by ASIAL, United Voice and MSS Security regarding the award's coverage.

254. The Full Bench recently handed down its decision regarding substantive changes to the Award (see [2015] FWCFB [620]) rejecting substantive claims to extend the Award's industry coverage to occupational coverage. Ai Group submits it is now appropriate to determine that the current clause 4.3 should remain in the award and argues that clause 4.3 plays a necessary role in

clarifying award coverage as described above. Indeed, its inclusion is consistent with the outcome of the Full Bench's decision ([2015] FWCFB [620])

255. Ai Group notes that clause 3.3 remains in the Exposure Draft as a new clause, presumably to replace current clause 4.3. However, clause 3.3 deals with a very different concept to clause 4.3. Clause 3.3 references award coverage to an employee's occupation, not the industry of the employer. As the *Security Services Industry Award 2010* has clearly been confirmed as an industry award by the Full Bench, clause 3.3 should be deleted and replaced with clause 4.3 in the current award.

**Clause 8.1 – Ordinary hours and roster cycles**

256. The updated reference to clause 8.1(b) in clause 8.1(b)(i) relating to rest breaks, should be 9.1(b). This appears to be a typographical error.

**Clause 10 – Minimum wages**

257. Ai Group considers that the reference to "ordinary hourly rate" should be "minimum hourly rate."

**Clause 13 – Penalty rates**

258. The definition of "permanent night shift" in clause 13 still changes the current definition in the award so that working hours, including rotating day work, could be considered part of permanent night shift, attracting the higher 30% shift loading.

259. Ai Group raised this issue in its earlier submission on 26 September 2014 (p.50) on the basis that the Exposure Draft change to the permanent night shift definition would impose greater costs on employers who would have to pay the higher shift loading to employees working hours other than during the night span. Under clause 22.2 of the current award, the 30% loading only applies to work on a "night span" throughout the roster cycle, however, the Exposure Draft definition covers circumstances where employees need only

work 2/3 of their ordinary hours between midnight and 6am. This could include circumstances where employees work shift work and day work, rather than exclusively working night shift as the current clause is presently worded.

260. The matter was raised during the Conference on 5 December 2014 before Vice President Hatcher, but it is unclear as to whether the matter has been determined.

261. The Exposure Draft's change of definition does not appear to be for an identifiable reason. Ai Group presses for the retention of the original definition of permanent night work as provided in clause 22.2. The definition should also be amended in Schedule B - Summary of Hourly Award Rates of Pay.

**Example – 5 Call back (full time employee)**

262. The call back example provides a useful overtime calculation to demonstrate how clause 14.5 applies where an employee is entitled to a minimum 3 hours payment. However, a typographical error appears where the reference to 1.5 (hours) in the 200% calculation, should be 1 (hour) and the consequent amount should be $39.64 and not $59.46.

**Clause 15.2(b) and (c) – Annual leave – Definition of shiftworker**

263. It appears that the current clause 24.2(b) has been replaced by the terms of the draft determination published by the Commission in proceedings relating to alleged inconsistencies between the NES and modern awards. We note that those proceedings are not yet concluded and a final determination with respect to this clause has not been made.