Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Reply Submission

Revised Exposure Drafts:
Subgroups 1C – 1E

7 December 2015

4 YEARLY REVIEW OF MODERN AWARDS

EXPOSURE DRAFTS: SUBGROUPS 1C – 1E

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1. INTRODUCTION

1. On 23 October 2015, a Full Bench of the Fair Work Commission (Commission) issued a decision[1] in respect of awards allocated to subgroups 1C – 1E of the award stage of 4 Yearly Review (Review). We hereafter refer to it as the October 2015 Decision.

2. Of the awards allocated to subgroups 1C – 1E, the Australian Industry Group (Ai Group) has an interest in the following:

    1. The *Black Coal Mining Industry Award 2010* (Black Coal Award);
    2. The *Gas Industry Award 2010* (Gas Award);
    3. The *Hydrocarbons Industry (Upstream) Award 2010* (Hydrocarbons Award);
    4. The *Manufacturing and Associated Industries and Occupations Award 2010* (Manufacturing Award);
    5. The *Maritime Offshore Oil and Gas Award 2010* (Maritime Award);
    6. The *Meat Industry Award 2010* (Meat Award);
    7. The *Mining Industry Award 2010* (Mining Award);
    8. The *Oil Refining and Manufacturing Award 2010* (Oil Refining Award);
    9. The *Pharmaceutical Industry Award 2010* (Pharmaceutical Award);
    10. The *Poultry Processing Award 2010* (Poultry Processing Award);
    11. The *Rail Industry Award 2010* (Rail Award);
    12. The *Stevedoring Industry Award 2010* (Stevedoring Award);
    13. The *Textile, Clothing and Footwear Industry Award 2010* (TCF Award);
    14. The *Timber Industry Award 2010* (Timber Award);

[1] [2015] FWCFB 7236.

15. The *Vehicle Manufacturing, Repair, Services and Retail Award 2010* (Vehicle Award); and

16. The *Wool Storage, Sampling and Testing Award 2010* (Wool Award).

3. This reply submission relates to each of the aforementioned awards and is filed pursuant to the Commission's directions at paragraph [358] of the October 2015 Decision.

2. ISSUES OF GENERAL CONCERN

4. We refer to section 2 of our submissions dated 20 November 2015. Ai Group continues to rely upon those submissions.

2.1 Schedules summarising hourly rates of pay

5. The AMWU submits in respect of certain exposure drafts,[2] that the note contained in the schedule summarising hourly rates of pay does not properly reflect paragraph [63] of the October 2015 Decision.

6. Ai Group does not oppose the amendment sought by the AMWU and notes that this is an issue that should be rectified in all relevant exposure drafts. That is, the issue identified by the AMWU may not be isolated to those exposure drafts that it has named.

7. In any event, Ai Group continues to rely upon section 2.7 of our 20 November 2015 submission and remains of the view that the note should be amended as proposed at paragraph 83 of those submissions.

3. EXPOSURE DRAFT – BLACK COAL MINING INDUSTRY AWARD 2015

8. The submissions that follow relate to the *Exposure Draft – Black Coal Mining Industry Award 2015* (Exposure Draft) published on 4 November 2015. They are in response to submissions filed by the:

[2] See AMWU submission re Maritime Award, Hydrocarbons Award, Oil Refining Award, Timber Award and Mining Award.

- CFMEU, dated November 2015;
- CFMEU, dated 3 December 2015;
- APESMA, dated 20 November 2015; and
- CMIEG, dated 20 November 2015.

Clause 9.2(a) – Paid meal break – non-rostered overtime

9. We refer to the question contained in the Exposure Draft, the CMIEG's submission at paragraph 3(c); the CFMEU's submission at paragraphs 7 – 12; and the joint submission filed by the CFMEU and CMIEG dated 20 October 2015.

10. As we understand it, there has been no proposal made by an interested party or the Commission to amend clause 9.2(a) of the Exposure Draft. Should a variation be sought, Ai Group requests an opportunity to make submissions in respect of it, once the nature of the amendment and the terms of the proposal is known.

Clause 9.2(c) – Paid meal break – non-rostered overtime

11. The Commission has asked the parties to consider whether the length of the crib break provided for in clause 9.2(c) should be specified (see page 13 of the Exposure Draft).

12. In an earlier joint submission filed by the CFMEU and CMIEG, they submitted that it would be 'convenient' if the provision specified that the break is 30 minutes in length. The October 2015 Decision identified this as an 'unresolved issue' and directed any party wishing to pursue a variation to file a formal application to vary the Award within 21 days of the decision, including a draft determination and the grounds in support of the variation proposed. The decision states that any such application would then be allocated for hearing.[3]

[3] [2015] FWCFB 7236 at [13] – [14].

We note that no such application, draft determination or reasons have been filed by the CFMEU or the CMIEG since the decision was handed down.

13. In its submission of 20 November 2015, in respect of the revised Exposure Draft, the CMIEG states that it continues to rely upon the earlier joint submission filed by the CFMEU and the CMIEG.

14. Ai Group opposes a variation to clause 9.2(c) such that is specifies that the break is to be for 30 minutes in duration. No such prescription currently exists; that is, the Award does not presently mandate that after each four hours of overtime worked, the break to be taken by an employee must be 30 minutes in length. The clause does not preclude an employee from taking a crib break that is shorter and as such the introduction of a requirement that the break must be 30 minutes is a substantive change that could impact upon current arrangements in place. We note that it is not uncommon for an award to *not* regulate the length of a subsequent break to be taken during overtime.[4]

15. In the absence of any material before the Commission that might satisfy it that the proposed prescription is *necessary* to the meet the modern awards objective, the Commission should not remove an existing flexibility under the Award.

Clauses 14.3(a) and (b) – Six day and seven day roster employees

16. Ai Group does not oppose the variations proposed by the CFMEU to clauses 14.3(a) and (b) on the basis that they would reflect the current Award.

Clauses 14.3(c) and (d) – Six and seven day roster employees

17. Ai Group opposes the proposed insertion of new clauses 14.3(c) and (d) in the Exposure Draft as we do not agree with the CFMEU's interpretation of the current Award. The proposed provisions are based on the unions' understanding of the interaction between clause 22.2 and clause 27.4; that is, the payment of shift penalties where an employee is performing work on a public holiday. These are contentious matters and have led to Ai Group's

[4] See for example *Road Transport and Distribution Award 2010*.

proposal to vary clause 18.4 of the Exposure Draft (see correspondence filed by Ai Group dated 13 November 2015).

18. In light of Ai Group's proposal, a consideration of whether clauses 14.3(c) and (d) should be inserted ought to be deferred until our proposal is heard and determined.

Clause 18.3(b) – Employee not required to work on a public holiday

19. We agree with the CFMEU and CMIEG's submissions that clause 18.3(b) should be deleted. We refer to paragraph 96 of our submissions dated 20 November 2015 in this regard.

Clause 18.4(b) – Employee required to work on a recognised public holiday

20. We agree with the CFMEU and CMIEG's submissions that clause 18.4(b) of the Exposure Draft should be retained. We refer to our correspondence dated 13 November 2015 in this regard.

Clause 18.4(b) – Employee required to work on a recognised public holiday

21. We refer to the matters we have raised above regarding the proposed insertion of clauses 14.3(c) and (d). For the reasons there articulated, the amendment proposed by the CFMEU to clause 18.4(b) should also be deferred until our proposal to vary clause 18.4 is heard and determined.

Schedule B.2.1 – Staff employees – Minimum rates

22. Ai Group does not oppose the insertion of 'undermanager' in Schedule as proposed by APESMA.

Schedule B.2.1 – Staff employees – Minimum rates

23. We do not oppose the amendment proposed by APESMA in respect of the typographical error found under group I.

Schedule C.2 – Casual employees

24. We do not oppose the CFMEU's submission that the tables contained at Schedule C.2 should be deleted. We refer to paragraph 102 of our submissions dated 20 November 2015 in this regard.

Schedules C and D – Summary of Hourly Rates of Pay

25. The CFMEU has called for the insertion of various additional rates in the Exposure Draft. If such rates are published, Ai Group requests that the parties be given an opportunity to review and provide comment on them. To the extent that those rates relate to work performed on a public holiday, they may be impacted by Ai Group's proposal to vary clause 18.4 of the Exposure Draft.

Accident Pay

26. We do not oppose the submissions of the CFMEU and CMIEG that the current accident pay clause should be retained. We refer to paragraph 104 of our submissions dated 20 November 2015 in this regard.

4. EXPOSURE DRAFT – GAS INDUSTRY AWARD 2015

27. The submissions that follow relate to the *Exposure Draft – Gas Industry Award 2015* (Exposure Draft) published on 30 October 2015. They are in response to submissions filed by:

- the AWU, dated 23 November 2015; and
- Business SA, dated 27 November 2015.

Clause 5.2 – Facilitative provisions

28. Ai Group agrees with the amendment proposed by the AWU. The reference to 'clause 8.30' should be amended to read 'clause 8.3(b)'.

Clause 6.5(c) – Casual loading

29. We agree with Business SA and the AWU that clause 6.5(c) of the Exposure Draft should be deleted. We refer to paragraph 106 of our submissions dated 20 November 2015 in this regard.

Clause 9.1(b) – Meal breaks

30. Ai Group supports Business SA's proposal to insert a reference to the minimum hourly rate in clause 9.1(b). We refer to paragraph 107 of our 20 November 2015 submissions in this regard.

Clause 9.1(c) – Meal breaks

31. Ai Group supports Business SA's proposal to insert a reference to the minimum hourly rate in clause 9.1(c). We refer to paragraph 108 of our 20 November 2015 submissions in this regard.

Clause 9.1(d) – Meal breaks

32. Ai Group supports Business SA's proposal to insert a reference to the minimum hourly rate in clause 9.1(d). We refer to paragraph 109 of our 20 November 2015 submissions in this regard.

Clause 9.2 – Breaks

33. We do not oppose the amendment proposed by the AWU to clause 9.2. In the alternate, the provision should be deleted. As highlighted by the union, clause 13.6 does not relate to breaks during overtime.

Clause 14.6(a) – Payment of accrued leave on termination of employment

34. We agree with Business SA's submission that clause 14.6(a) should be deleted. We refer to paragraph 113 of our 20 November 2015 submissions in this regard.

Clause 19.2 – Notice of termination by an employee

35. We agree with the amendment proposed by the AWU and Business SA to clause 19.2. We refer to paragraph 114 of our submissions dated 20 November 2015 in this regard.

Schedule B.2.2 – Casual employees – overtime rates

36. We do not oppose the amendment proposed by the AWU on the basis that it would properly reflect the current clause 23.3.

Schedule G – 2014 Part-day Public Holidays

37. We agree with Business SA's proposal that Schedule G be updated.

5. EXPOSURE DRAFT – HYDROCARBONS INDUSTRY (UPSTREAM) AWARD 2015

38. The submissions that follow relate to the *Exposure Draft – Hydrocarbons Industry (Upstream) Award 2015* (Exposure Draft), published on 30 October 2015. They are in response to submissions filed by the:

- AWU, dated 20 November 2015;
- AMWU, uploaded to the Commission's website on 20 November 2015;
- AMMA, dated 25 November 2015; and
- Business SA, dated 27 November 2015.

Clause 5.1 – Facilitative provisions

39. Ai Group supports the change proposed by AMMA and Business SA to clause 5.2(a), that is, the words "clauses 0" should be replaced with "clause 8.2(b)". The same change was proposed by Ai Group in our submission of 20 November at paragraph 119.

Clause 6.4(c) – Casual loading

40. Ai Group opposes the AWU's proposed change to clause 6.4(c). It is our understanding that this matter has been referred to the Casual Employment Full Bench and will therefore be dealt with by way of a separate process.

41. We continue to press for the change proposed by Ai Group in our submission of 20 November 2015 at paragraphs 120 - 128.

Clause 10.3(b)(i) – Apprentices

42. Ai Group does not oppose the AWU's proposed deletion of apprentice wage rates operative from 1 January 2014.

Clause 11.2(a) – All purpose allowances

43. Ai Group agrees with the AWU's proposed change to clause 11.2(a) to replace the word 'leave' with the words 'annual leave'. An identical change was proposed in Ai Group's submission of 20 November 2015 at paragraph 129.

Clause 14.1(c) – Definition of overtime

44. Ai Group opposes the AWU's proposed change to clause 14.1(c) as it could extend overtime payment obligations beyond those in the current award.

Clause 20.2 – Notice of termination by an employee

45. Ai Group agrees with the amendment proposed by Business SA to clause 20.2. The word 'from' should be added. An identical change was proposed in Ai Group's submission of 20 November 2015 at paragraph 130.

Schedule H – Definitions

46. Ai Group concurs with the amendment proposed by AMMA and Business SA to the definition of "permanent night shift". The numbering should be (a), (b) and (c) – not (b), (c) and (d).

6. EXPOSURE DRAFT – MANUFACTURING AND ASSOCIATED INDUSTRIES AND OCCUPATIONS AWARD 2015

47. The submissions that follow relate to the *Exposure Draft – Manufacturing and Associated Industries and Occupations Award 2015* (Exposure Draft), published on 4 November 2015. They are in response to submissions filed by the:

- AMWU, dated 20 November 2015;
- AWU, dated 24 November 2015;
- CEPU, dated 20 November 2015;
- ABI and NSW Business Chamber, dated 20 November 2015;
- AFEI, dated 23 November 2015;
- Business SA, dated 27 November 2015.

6.1 'Ordinary hourly rate' and 'applicable rate of pay'

48. Ai Group continues to press the very strong opposition that we expressed in our submission of 20 November 2015 to the content of paragraphs [95] to [106] of the Full Bench's October 2015 Decision regarding the Manufacturing Award.[5]

49. As identified in our submission of 20 November 2015, if the Commission proceeds with its proposal to replace the terms 'ordinary hourly rate' and 'ordinary time rate' with the term 'applicable rate of pay' (defined to include penalties and loadings) in nearly all of the clauses identified in paragraph [105] of the Commission's decision, there will be very substantial cost

[5] [2015] FWCFB 7236.

implications, unworkable outcomes and other adverse consequences for employers covered by the Award.

50. If the Full Bench remains unconvinced of the major problems and unfairness for employers that would result from the proposal, we submit that the need to afford procedural fairness dictates that Ai Group be given the opportunity to put forward detailed evidence and submissions, and to be heard on the matter. This is particularly relevant given that the Commission has repeatedly stated that the redrafting of the modern awards is not intended to result in any substantive changes.

51. Not content with the substantial increase in existing entitlements that would result from the proposal in the Commission's decision, the AMWU (supported by the AWU and CEPU) has proposed an even more generous and unworkable definition of 'applicable rate of pay'. Ai Group strongly opposes the unions' position.

52. Similar to Ai Group, other employer groups (ABI, the NSW Business Chamber and AFEI) have expressed opposition to the replacement of the terms 'ordinary hourly rate' and 'ordinary time rate' with 'applicable rate of pay' on the basis that this change would impose higher costs upon employers.

53. Ai Group concurs with the view put forward by ABI and NSW Business Chamber that if a party wishes to argue in support of the replacement of the terms 'ordinary hourly rate' and 'ordinary time rate' with 'applicable rate of pay', this is a substantive change and the party should make an application supported by probative evidence. The Commission should then give all interested parties the opportunity to be heard on the proposed changes.

54. Given the substantial negative implications of these changes, it would be very inappropriate for this matter to be determined on the papers.

55. The specific wording that Ai Group proposes for each of the relevant clauses in the Exposure Draft is outlined in section 6.1 of Ai Group's submission of 20 November 2015.

6.2 Other matters arising from the Exposure Draft

Time and wages record

56. The AMWU submits that references to 'time and wages record' should be substituted with 'pay record' on the basis that neither the Act nor the Regulations use the term 'time and wages record'. In so doing, the AMWU makes express reference to Regulation 3.33, which deals specifically with records an employer must make and keep in respect of an employee's pay.

57. In our view, 'pay record' does not provide an appropriate substitute in each of the eight instances in which the union states that the term 'time and wages record' is currently used. For instance, clause 4.5 states that an individual flexibility agreement must be kept 'as a time and wage record'. To substitute the reference to 'time and wage record' with 'pay record' in that context would not be appropriate, as an IFA is not necessarily a record about an employee's pay.

58. Should the Commission decide that the references to 'time and wages record' in the Exposure Draft should be altered, it may be appropriate to instead use the term 'employee record', which is consistent with the language used at s.535 of the Act and in the Regulations.

The casual loading and casual ordinary hourly rate

59. The AMWU seeks to vary clause 6.4(b) of the Exposure Draft and the definition of 'casual ordinary hourly rate'.

60. We refer to and rely upon our submissions of 20 November 2015, at paragraphs 49 – 50, where we deal generally with the calculation of the casual loading. We note however that at paragraph 57 of those submissions we refer to the Manufacturing Award. This should instead be a reference to the 'Oil Refining and Manufacturing Award'.

61. In light of our earlier submissions and the AMWU's proposals to vary the Exposure Draft we here propose to deal with the construction of the casual loading provision.

62. Clause 6.4(b) of the Exposure Draft deals with the casual loading. It states:

(b) Casual loading

(i) For working ordinary time, a casual employee must be paid:

- the minimum hourly rate as specified in clause 16.1 for the work being performed; plus
- a loading of 25% of the minimum hourly wage.

(ii) The casual loading constitutes part of the casual employee's all purpose rate.

63. The AMWU seeks to replace clause 6.4(b) with the following:

(b) Casual loading

(i) For working ordinary time, a casual employee must be paid:

- The casual ordinary hourly rate as defined in Schedule H – Definitions, for the appropriate classification inclusive of;
- A loading of 25% of the casual ordinary hourly wage.

(ii) The casual loading constitutes part of the casual employee's all purpose rate.

64. The AMWU also seeks to vary the definition of the 'casual ordinary hourly rate'. It is currently defined in the Exposure Draft to include the casual loading and "where an employee is entitled to an all purpose allowance, this allowance forms part of that employee's ordinary hourly rate". The effect of the union's proposal would be to re-define the 'casual ordinary hourly rate' as the employee's minimum hourly rate including all purpose allowances, *multiplied* by the casual loading. That is, it would require the application of the casual loading to a rate that incorporates any all purpose allowances. This deviates from the definition currently contained in the Exposure Draft and is opposed by Ai Group.

65. We understand that the AWMU's proposal to vary the definition is based on its understanding of how the casual loading is to be calculated. It is reflective of the unions' position that the casual loading should be calculated on a rate that includes all purpose allowances. We do not agree, and deal with our reasons for this position below.

66. If the union's proposed clause 6.4(b) is read with the union's proposed definition of "casual ordinary hourly rate", it would require that a casual employee must be paid:

- An hourly rate that includes all purposes allowances, the sum of which is multiplied by the casual loading;
- That rate includes 25% of the 'casual ordinary hourly *wage'*; a term that is not defined or used elsewhere in the Exposure Draft and for that reason, we are unclear as to what it refers to.

67. The proposed change to clause 6.4(b) is both ambiguous and confusing. Indeed if 'casual ordinary hourly wage' is read to have the same meaning as 'casual ordinary hourly rate', the provision would mean that an employee is to be paid 25% of a rate that already includes the casual loading. This is both absurd and clearly a departure from the current terms of the Award. Nonetheless, we proceed on the basis that the intent of the variation proposed is to require that the casual loading be applied to the 'ordinary hourly rate' rather than the 'minimum hourly rate'.

68. Clause 6.4(b) corresponds with clause 14.1 of the Manufacturing Award. It is in the following terms: (emphasis added)

> **14.1** A casual employee is one engaged and paid as such. A casual employee for working ordinary time must be paid an hourly rate calculated on the basis of one thirty-eighth of the minimum weekly wage prescribed in clause 24.1(a) for the work being performed plus a casual loading of 25%. The loading constitutes part of the casual employee's all purpose rate.

69. Clause 24 of the Manufacturing Award is headed 'Classifications and adult minimum wages'. Clause 24.1 contains the weekly and hourly award rates payable for each of the classifications levels set out in Schedule B to the Award. In each case, the second column to the table containing the rates is headed 'minimum weekly wage'. The reference in clause 14.1 to the 'minimum weekly wage prescribed in clause 24.1(a) for the work being performed' is to the rates there prescribed.

70. A plain reading of clause 14.1 suggests that a casual employee is to be paid:

- 1/38th of the minimum weekly wage for their classification set out in clause 24.1(a); and
- 25% in addition to the above amount.

71. That is, clause 14.1 entitles a casual employee to 125% of 1/38th of the minimum weekly rate set out in clause 24.1(a) of the Award. The provision does not, either expressly or by implication, require that the 25% casual loading be calculated on a rate that incorporates any all purpose allowances. Rather, it makes specific reference to a rate that excludes such amounts.

72. Clause 14.1 serves a specific purpose. That is, it stipulates the amount payable to a casual employee and how that amount is to be calculated. Other award provisions that state that a particular allowance is to be paid for 'all purposes' must therefore be read subject to the specific terms of clause 14.1. It does not indicate that the casual loading will be applied to the ordinary hourly rate of pay, as defined in the Exposure Draft.

73. The reference to the 'minimum weekly wage prescribed in clause 24.1(a)' contained in clause 14.1 is important and should be given meaning. The reference to the loading in the second half of the sentence must be understood in the context of this express reference to the rates in clause 24.1(a).

74. It is on this basis that Ai Group contends that neither clause 6.4(b) nor the definition of the "casual ordinary hourly rate" should be amended as sought by the AMWU.

The requirement to consult – changes to regular rosters and ordinary hours of work

75. The October 2015 Decision dealt with an issue arising from the *Exposure Draft – Wool Storage, Sampling and Testing Award 2015* regarding the interaction between clause 8.6(a) and the model consultation clause. That

provision is headed 'Rostering – Employees other than shiftworkers'. It enables "an employer to vary an employee's days of work or starting and finishing times to meet the needs of the business, by giving 48 hours' notice or a shorter period as agreed between the employer and an individual employee". Thus, the clause provides an employer with the unilateral right to alter an employee's roster.

76. Clause 22.2 of that exposure draft is the model consultation clause that relates to changes to regular rosters or ordinary hours of work. It applies "where an employer proposes to change an employee's regular roster or ordinary hours of work". In such circumstances, the employer is required to consult with the employee or employees affected, and their representatives, about the proposed change. Such a provision is contained in all modern awards and was developed by the Commission pursuant to s.145A of the Act.

77. The exposure draft proposed the insertion of additional words at the commencement of clause 8.6(a), such that it would operate *subject to* clause 22.2 of the exposure draft. Ai Group contended that this would impose a precondition whereby an employer would be precluded from exercising its right to vary an employee's days of work or starting and finishing times under clause 8.6(a) unless it had fulfilled its obligations under clause 22.2. We argued that this amounted to a substantive variation to the Wool Award and therefore should not be adopted.

78. Having considered the legislative context in which the model term was introduced to the awards system, the Commission cited the Full Bench decision that dealt with the terms of the clause:

> [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 these

reasons the relevant term will make it clear that it is to be read in conjunction with other award provisions concerning the scheduling of work and notice provisions.[6]

79. The Commission then went on to state:

> [343] It is apparent from the above extract that the model consultation term was intended to impose an additional obligation on an employer to consult an employee in circumstances where the employer proposes to change the employee's regular roster or ordinary hours of work. Applying this proposition to clause 8.3(a) [sic] of the Exposure Draft, an employer may still vary an employee's days of work or starting and finishing times *but only if* the employer has consulted with the employees affected *before* implementing such a change. Such consultation must accord with the provisions of clause 22.2. It follows that the commencing words of clause 8.3(a) [sic] are appropriate and consistent with the intended interaction between the model consultation term and other provisions of the modern award. Accordingly, we reject Ai Group's contention. …[7]

80. The AMWU seeks to rely on the October 2015 Decision as 'confirmation' that an employer's right to change an employee's regular roster or ordinary working hours is subject to consultation requirements, The union states that the Exposure Draft "requires updating" and proposes that the following clauses be amended by inserting a reference to clause 40.2, which sets out the relevant obligation to consult:

- clause 13.2(d) – ordinary hours of work – day workers;
- clause 13.3(b) – ordinary hours of work – continuous shiftwork;
- clause 13.5(a) – methods of arranging ordinary working hours; and
- clause 29.2(a) – definitions – rostered shift.

81. Ai Group opposes the changes proposed by the AMWU. They are inconsistent with the approach taken by the Commission throughout the modern award system whereby it has generally decided not to include references to the consultation clause in the very large number of award clauses dealing with hours of work and rosters. Such references are unnecessary and hence conflict with s.138 of the Act. A similar approach has been taken by the Commission in relation to dispute settling. Even though

[6] [2013] FWCFB 10165 at [50].

[7] [2015] FWCFB 7236 at [343].

parties have access to the dispute settling clause in the relevant award, if a dispute arises in relation to the operation of any award clauses, it is unnecessary to include a reference to the dispute settling clause under each provision.

82. We deal with each of the above provisions in turn.

Clause 13.2(d) – ordinary hours of work – day workers

83. Clause 13.2(d) relates to how and when a day worker may be required to perform ordinary hours of work. It then goes on to provide a mechanism by which the spread of hours may be altered by agreement:

> (d) The ordinary hours of work are to be worked continuously, except for meal breaks, at the discretion of the employer between 6.00 am and 6.00 pm. The spread of hours (6.00 am to 6.00 pm) may be altered by up to one hour at either end of the spread, by agreement between an employer and the majority of employees concerned or, in appropriate circumstances, between the employer and an individual employee.

84. It is the first part of the clause that is here relevant. The AMWU proposes that it be varied as follows:

> (d) The ordinary hours of work are to be worked continuously, except for meal breaks, at the discretion of the employer, in accordance with clause 40.2, between 6.00 am and 6.00 pm. …

85. The relevant part of clause 13.2(d) serves three purposes:

- It requires that ordinary hours must be worked continuously (except for meal breaks);
- It makes clear that ordinary hours are to be worked at the discretion of the employer; and
- It stipulates that ordinary hours must be worked between the specified spread of hours.

86. The clause is not directed solely at an employer ability to *change* ordinary hours of work. Undoubtedly it permits this, by stating that ordinary hours are to be worked at the discretion of the employer. However the clause is not

confined in it operation to an employer's unilateral ability to change an employee's ordinary hours of work. It has broader work to do. To insert a reference to clause 40.2 in a provision where the consultation clause does not necessarily apply in all circumstances in both confusing and unnecessary. For this reason, the AMWU's submission should not be adopted.

Clause 13.3(b) – ordinary hours of work – continuous shiftwork

87. Clause 13.3(b) states that the ordinary hours of continuous shiftworkers are to average 38 hours per week and must not exceed 152 hours in 28 consecutive days, at the discretion of the employer. We refer to the reasons articulated above and submit that the insertion of a reference to clause 40.2 in this clause would be confusing and unnecessary.

Clause 13.5(a) – methods of arranging ordinary working hours

88. Clause 13.5(a) deals with the method of arranging ordinary hours. It states:

> (a) Subject to an employer's right to fix the daily hours of work for day workers from time to time within the spread of hours referred to in clause 13.2(d) and the employer's right to fix the commencing and finishing time of shifts from time to time, the arrangement of ordinary working hours must be by agreement between the employer and majority of employees …

89. The AMWU proposes the insertion of two references to clause 40.2:

> (a) Subject to an employer's right in accordance with clause 40.2 to fix the daily hours of work for day workers from time to time within the spread of hours referred to in clause 13.2(d) and the employer's right in accordance with clause 40.2 to fix the commencing and finishing time of shifts from time to time, the arrangement of ordinary working hours must be by agreement between the employer and majority of employees …

90. The proposed clause is unnecessarily cumbersome. The insertion of the relevant text as sought, read literally, appears to suggest that it is clause 40.2 that gives the employer the ability to fix the an employee's daily hours/commencing and finishing times. This is of course not the case; clause 40.2 is not a source of power. To this extent, the insertion of the reference to clause 40.2 is also misleading.

Clause 29.2(a) – definitions – rostered shift

91. Clause 29.2(a) contains a definition of 'rostered shift'. The AMWU seeks to vary it as follows:

> Rostered shift means any shift of which the employee concerned, in accordance with clause 40.2 has had at least 48 hours' notice.

92. The definition of 'rostered shift' is relevant for the purposes of clause 29.2(f). Where an employee works on a shift other than a rostered shift, they are to be paid certain penalties. We do not understand the need or utility for a reference to clause 40.2 in the definition. Indeed we cannot identify the purpose it would serve. The definition, when read with clause 29.2(a), goes to how much notice an employee has had of a shift and therefore, whether they are entitled to the relevant higher rates. It does not deal with an employer's proposal to *change* an employee's ordinary hours of work and therefore has no apparent direct link to clause 40.2.

93. The reference to the consultation clause should, therefore, not be adopted.

Clause 5.3(a) – Facilitation by majority or individual agreement

94. Ai Group supports the amendment proposed by Business SA and the AMWU to clause 5.3(a). We refer to paragraph 199 of our submission dated 20 November 2015 in this regard.

Clause 5.4(a) – Facilitation by majority agreement

95. Ai Group supports the amendment proposed by Business SA and the AMWU to the cross reference to clause 13.3(b). We refer to paragraph 200 of our submission dated 20 November 2015 in this regard.

Clause 5.4(a) – Facilitation by majority agreement

96. Ai Group supports the amendment proposed by the AMWU to the cross reference to clause 13.4(a).

97. Our 20 November 2015 at paragraph 201 contains a typographical error. The reference to 'clause 13.4(b)' should instead read 'clause 13.4(c)'.

Clause 6.3(i)(ii) – Public holidays

98. Ai Group supports the amendment proposed by Business SA to clause 6.3(i)(ii). We refer to paragraph 204 of our submission dated 20 November 2015 in this regard.

Clause 13.1(b) – Hours of work

99. We do not oppose the amendment proposed by the AMWU, however if a reference to clause 5.4 is to be inserted, we submit that the words "as relevant" should be added to the end of the clause to make clear that clause 5.3 and/or clause 5.4 will be relevant to a particular provision in clauses 13.2 – 13.5, depending upon the terms of the provision itself. Clause 13.1(b) should not be read to suggest that both clauses 5.3 and 5.4 apply in all cases.

Clause 14.1(a) – Meal breaks

100. Ai Group supports the amendment proposed by Business SA to clause 14.1(a). We refer to paragraph 209 of our submission dated 20 November 2015 in this regard.

Clause 27.1(c)(iv) – Tool allowances – tradesperson and apprentices

101. Ai Group supports the amendment proposed by Business SA to clause 27.1(c)(iv). We refer to paragraph 231 of our submission dated 20 November 2015 in this regard.

Clause 34.2 – Public holidays

102. Ai Group does not oppose the amendment proposed by the AMWU to clause 34.2 and the related amendment to 6.3(b)(i).

Clause 34.6 – Part-day public holidays

103. Ai Group supports the amendment proposed by Business SA and the AMWU to clause 34.6.

Clause 38.2 – Notice of termination by an employee

104. Ai Group supports the amendment proposed by the AWU and Business SA to clause 38.2. We refer to paragraph 243 of our submission dated 20 November 2015 in this regard.

Schedule B.1.1 – Table of rates

105. Ai Group does not oppose the amendment proposed by the AWU to the text preceding the table at B.1.1, although we do not consider such a variation necessary.

Schedule B.1.1 – Table of rates

106. We agree with the AWU's submission that the table of rates may be simplified by inserting subheadings for day work and shiftwork.

Schedule B.1.1 – Table of rates

107. Ai Group does not oppose the insertion of references to the relevant clauses in B.1.1, however we respectfully request that parties be given an opportunity to review any such amendment.

Schedule B.1.1 – Table of rates

108. We do not oppose the AMWU's proposal to insert the rate payable to a non-continuous shiftworker for work on a shift other than a rostered shift after 3 hours. We refer to paragraph 244 of our 20 November 2015 submissions in this regard.

Schedule B.1.1 – Table of rates

109. We do not oppose the AMWU's suggested relocation of the rate for non-continuous shiftworkers on a public holiday.

Schedule B.1.2 – Other circumstances attracting a penalty payment

110. We agree with the AWU that the rate for working through meal breaks should be amended. We refer to paragraph 245 of our submission dated 20 November 2015 in this regard.

Schedule B.1.2 – Other circumstances attracting a penalty payment

111. The AWU submits that B.1.2 should be amended to reflect the introduction of the term 'applicable rate of pay'. This matter is highly contested and strongly opposed by Ai Group. B.1.2 should not be amended.

Schedule B.2.1 – Full-time and part-time employees hourly rates

112. We agree with the AWU's submission that the definition of 'all purpose' requires amendment. We refer to paragraph 247 of our 20 November 2015 submission in this regard.

Schedules B.2.2 and B.3.2 – Hourly rates

113. Contrary to the AWU's submission, the reference to 'minimum hourly rate' in B.2.2 and B.3.2 should not be amended to read 'ordinary hourly rate'. The rates set out in the relevant tables are calculated on the minimum hourly rate (see B.2.2 and B.3.2). To refer to the 'ordinary hourly rate' in the tables would be misleading as it would suggest that the rates there set out have been calculated on the ordinary hourly rate. The AWU's submission therefore should not be adopted.

Schedule C.1.2 – Wage related allowances – special rates

114. The AMWU seeks the insertion of a reference to the second-hand work allowance in Schedule C.1.2. We raise the following matters in respect of this proposal:

- The allowances set out at C.1.2 are wage related allowances that are determined by reference to the standard rate. The second hand allowance is, however, calculated by reference to the employee's minimum hourly rate applicable to their classification. If inserted, it should be made clear that the allowance is not calculated on the standard rate.

- The allowance is described as 'an extra 25% of the minimum wage applicable to the employee's classification while engaged on such work'. Thus, the quantum of the allowance is derived by calculating 25% of the relevant hourly rate. It is erroneous to describe the allowance as '125% of the minimum wage', as that is the *total* amount payable to the employee for the time spent so working. Schedule C.1.2 sets out the amount of the *allowance* that is due and therefore, should refer to 25% of the minimum wage.

- To set out the dollar amounts payable would clearly be cumbersome, as it would be necessary to do so for various classifications. In our view, this is not necessary and would add significantly to the length of C.1.2.

Schedule G – 2014 Part-day public holidays

115. Ai Group supports the amendment proposed by Business SA and the AMWU to Schedule G.

Examples

116. The examples previously proposed by the AMWU are contentious and have not been agreed between the parties or been the subject of detailed submissions. We would be willing to engage in further discussion with the union should it continue to pursue their inclusion.

7. EXPOSURE DRAFT – MARITIME OFFSHORE OIL AND GAS AWARD 2015

117. The submissions that follow relate to the *Exposure Draft – Maritime Offshore Oil and Gas Award 2015* (Exposure Draft) published on 30 October 2015. They are in response to submissions filed by the:

- AWU, dated 22 November 2015; and
- AMWU, dated 20 November 2015.

Clause 7.1(c) – Ordinary hours

118. Ai Group opposes the change proposed by the AWU to clause 7.1(c) which would specify that ordinary hours of work must be exactly 8 hours per day. Such a provision has the potential to make various flexibilities in the Award meaningless, including the flexibility to average hours over a period of up to 52 weeks (clause 7.1(b)) and the flexibility to work 12 hour days / shifts (clause 7.1(c)).

Clause 7.1(c) – Ordinary hours

119. Ai Group opposes the change proposed by the AMWU. It seeks to make the employer's ability to extend the employee's ordinary hours to 12 hours in a day subject to the consultation requirements in clause 21.2. The proposed change is inconsistent with the approach taken by the Commission throughout the modern award system whereby it has generally decided not to include references to the consultation clause in the very large number of award clauses dealing with hours of work and shifts. Such references are unnecessary and hence conflict with s.138 of the Act. A similar approach has been taken by the Commission in relation to dispute settling. Even though parties have access to the dispute settling clause in the relevant award if a dispute arises in relation to the operation of any award clauses, it is unnecessary to include a reference to the dispute settling clause under each provision.

120. The AMWU describes the standard wording in clause 21.2(d) as "inadequate" but this wording was determined to be appropriate by a Full Bench in its 23 December 2013 decision in relation to the *Consultation Clause in Modern Awards.*[8]

8. EXPOSURE DRAFT – MEAT INDUSTRY AWARD 2015

121. The submissions that follow relate to the *Exposure Draft – Meat Industry Award 2015* (Exposure Draft), published on 2 November 2015.

122. Ai Group has considered the submissions made by the Australian Meat Industry Council and to the extent its submissions deal with items not in Ai Group's submissions, Ai Group does not oppose the proposed amendments to the Exposure Draft.

9. EXPOSURE DRAFT – MINING INDUSTRY AWARD 2015

123. The submissions that follow relate to the *Exposure Draft – Mining Industry Award 2015* (Exposure Draft), published on 2 November 2015. They are in response to submissions filed by the:

- CFMEU, dated 20 November 2015;
- AWU, dated 20 November 2015;
- AMWU, dated 20 November 2015;
- AMMA, dated 25 November 2015; and
- Business SA, dated 27 November 2015.

Clause 6.3(d) – Part-time employees

124. Ai Group opposes the AWU's proposal to replace the reference to "minimum hourly rate" in clause 6.3(d) with "ordinary hourly rate". The current wording reflects existing award entitlements (see clause 10.2(b)).

[8] [2013] FWCFB 10165 at paras [50] and [107].

125. Further, clause 6.3(d) refers to the 'minimum hourly rate of pay for the relevant classification in clause 9'. Clause 9 sets out the minimum weekly rates and minimum hourly rates. As a consequence of the July 2015 Decision, the 'ordinary hourly rate' column is to be deleted. Thus, if the AWU's proposal were adopted, clause 6.3(d) would be misleading as clause 9 does not in fact stipulate the ordinary hourly rates for each classification.

Clause 6.4(c) – Casual employees

126. Ai Group opposes the AWU's proposal to replace the reference to "minimum hourly rate" in clause 6.3(c) with "ordinary hourly rate". The current wording reflects existing award entitlements (see clause 10.3(b)). The AWU's proposal would increase employers' costs. We refer to section 2.5 of our submission of 20 November 2015 on this issue.

127. Clause 6.4(c) of the Exposure Draft corresponds with the current clause 10.3(b), which states: (emphasis added)

> **(b)** For each hour worked, a casual employee will be paid no less than 1/38th of the minimum weekly rate of pay for their classification in clause 13—Classifications and minimum wage rates, plus a casual loading of 25%. The loading constitutes part of the casual employee's all purpose rate.

128. Clause 13 of the Mining Award is headed 'Classifications and minimum wage rates'. Clause 13.1 contains the weekly award rate payable for each of the classifications set out in Schedule B to the Award. In each case, the third column to the table containing the rates is headed 'minimum weekly rate'. The reference in clause 10.3(b) to the 'minimum weekly rate of pay for their classification in clause 13' is clearly to the rates there prescribed.

129. A plain reading of clause 10.3(b) suggests that a casual employee is to be paid:

- 1/38th of the minimum weekly rate for their classification set out in clause 13; and
- 25% in addition to the above amount.

130. That is, clause 10.3(b) entitles a casual employee to 125% of 1/38th of the minimum weekly rate set out in clause 13.1 of the Award. The provision does not, either expressly or by implication, require that the 25% casual loading be calculated on a rate that incorporates any all purpose allowances. Rather, it makes specific reference to a rate that excludes such amounts.

131. Clause 10.3(b) serves a specific purpose. That is, it stipulates the amount payable to a casual employee and how that amount is to be calculated. Other award provisions that state that a particular allowance is to be paid for 'all purposes' or, more relevantly in the current context, that it forms part of the ordinary rate of pay must therefore be read subject to the specific terms of clause 10.3(b). Clause 10.3(b) does not indicate that the casual loading will be applied to the ordinary hourly rate of pay.

132. The reference to the 'minimum weekly rate in clause 13' contained in clause 10.3(b) is important and should be given meaning. The reference to the loading in the second half of the sentence must be understood in the context of this express reference to the rates in clause 13. The approach adopted in the Exposure Draft properly reflects the very specific wording of clause 10.3(b).

133. It is on this basis that Ai Group contends that the AWU's proposal should not be adopted.

Clause 6.4(e) – Casual employees

134. The CFMEU seeks to retain the existing reference to "attributes" rather than "entitlements" in clause 6.4(e). We do not oppose the CFMEU's proposal on the basis that it reflects the current award.

135. In Ai Group's view, however, clause 6.4(e) is best deleted as it refers to only some of the entitlements/attributes of full-time and part-time employment that the casual loading is paid instead of, and hence the clause is misleading.

Clause 10.1(a)(v) – Annualised salaries

136. Ai Group does not oppose the provisional view reached by the Commission at paragraph [140] of October 2015 Decision[9] regarding the replacement of the words "Annual leave" with the words "Annual leave loading". We note that AMMA, the AWU and the AMWU have expressed a similar position.

Clause 13.1 – Shiftwork and penalty rates, and Schedule H

137. As identified by AMMA and the AWU, there is a problem with the definition of "permanent night shift" in clause 13.1 and Schedule H. A permanent afternoon shift is clearly not a permanent night shift, and should not be included in the definition.

138. If a definition of "permanent night shift" is to be included in this Award, the definition that is found in many other awards should be used. This definition is found in Schedule H of the *Exposure Draft - Hydrocarbon Industry (Upstream) Award 2015*. This definition is consistent with very longstanding provisions in the Manufacturing Award and pre-modern Metal Industry Award.

Clause 14.1 - Overtime

139. Ai Group has not identified any problem with the AWU's proposal to delete the cross-reference to clause 13 in clause 14.1.

Clause 20.2 – Notice of termination by employee

140. Ai Group agrees with the amendment proposed by the AWU and Business SA to clause 20.2. The word 'from' should be added. An identical change was proposed in Ai Group's submission of 20 November 2015 at paragraph 261.

Schedule B – Summary of hourly wage rates

141. The AWU and Business SA have highlighted the absence of overtime rates for casual employees in the Exposure Draft. If such rates are later published, Ai Group requests that the parties be given an opportunity to review them.

[9] [2015] FWCFB 7236

Schedule G – Part-day public holidays

142. Ai Group does not oppose the amendment proposed by Business SA.

10. EXPOSURE DRAFT – OIL REFINING AND MANUFACTURING AWARD 2015

143. The submissions that follow relate to the *Exposure Draft – Oil Refining and Manufacturing Award 2015* (Exposure Draft) published on 2 November 2015. They are in response to submissions filed by:

- the AWU, dated 20 November 2015; and
- AMMA, dated 25 November 2015.

Clauses 5.2(d) – Facilitative Provisions

144. Ai Group agrees with the submission of the AWU and refers to paragraph 267 of Ai Group's submissions dated 20 November 2015.

Clause 10.7(a)(v) – Annualised salaries

145. Ai Group agrees with the submission of the AWU and refers to paragraph 278 of Ai Group's submissions dated on 20 November 2015.

Clause 13.1 – Shiftwork definitions

146. Clause 13.1 of the Exposure Draft contains a new definition of 'permanent shift'. It is in red text which, as per the cover page of the Exposure Draft, is intended to indicate that the variation is agreed between the parties.

147. An earlier iteration of the Exposure Draft contained a question as to whether a definition of 'permanent shift' should be included and proposed such a definition. We understood that such a definition would be directed to addressing the circumstances in which the shiftwork penalties at clause 13.3(b) and (c) would be payable. Those clauses require the payment of a penalty for work performed on a 'permanent afternoon shift' or a 'permanent night shift'.

148. In a submission dated 24 October 2014, Ai Group submitted at paragraph 149 that *if* such a variation was to be made, two separate definitions should be inserted; one for 'permanent afternoon shift' and one for 'permanent night shift'. This is because the term 'permanent shift' is not in fact used in the Exposure Draft. We reiterated our position in reply submissions dated 12 November 2014.

149. The October 2015 Decision states that a number of changes had the broad agreement of interested parties and that those changes would be made. In doing so, the Full Bench made reference to an Ai Group submission of 25 November 2015.[10] That submission does not make any reference to the issue we are here addressing. The Commission's October 2015 Decision does not otherwise deal with the insertion of the definition in the Exposure Draft.

150. Whilst we appreciate that the Commission has determined in the context of various other exposure drafts that definitions of 'permanent night shift' and the like should be included the relevant instruments, in our view the drafting of the definition inserted in this Exposure Draft should be revisited. As we have earlier stated, a definition of 'permanent shift' is superfluous given that the term is not in fact used in the Exposure Draft.

151. Rather, if the Commission has decided that the terms 'permanent afternoon shift' and 'permanent night shift' as found in clauses 13.3(b) and (c) should be defined, two separate definitions, specific to those terms, should be inserted. We concur with AMMA's submission that the definitions should reflect that adopted in the exposure draft of the Hydrocarbons Award.

Clause 14.1 (b) – Definition of overtime

152. Ai Group does not oppose the submission of the AWU.

Clause 14.1 (c) – Definition of overtime

153. Ai Group agrees with the submission of the AWU and refers to paragraph 4, item 21 of Ai Group's submission dated 24 November 2014.

[10] [2015] FWCFB 7236 at [145] – [146].

Clause 18.3 – Substitution of public holidays by agreement

154. Ai Group does not oppose the submission of the AWU.

Clause 20.2 – Notice of termination by an employee

155. Ai Group agrees with the submission of the AWU and refers to paragraph 281 of Ai Group's submissions dated 20 November 2015.

Clause B.2.1 – Full-time and part-time employees – other than shiftworkers – ordinary and penalty rates

156. The AWU submits that by virtue of clause 8.2(c), there may be circumstances in which a day worker performs ordinary hours of work on a weekend. Ai Group agrees that an alteration to the spread of hours could encompass both an alteration to the times of day and the days per week when ordinary hours can be worked. Therefore, Ai Group agrees that the rates should not be deleted.

Clause B.2.1 – Full-time and part-time employees – other than shiftworkers – ordinary and penalty rates

157. Ai Group agrees with the AWU's submission that the public holiday penalty rate percentage should be 300% in the clause and we refer to paragraph 284 of our dated 24 November 2014.

Clause B.3.1 – Casual Employees other than shift workers – ordinary and penalty rates

158. In response to the AWU's submissions regarding the weekend penalty rates in Schedule B.3.1, we refer to our submissions above in respect of Schedule B.2.1.

Clause B.3.1 – Casual Employees other than shift workers – ordinary and penalty rates

159. Ai Group opposes the AWUs submission as it relates to Schedule B.3.1 as it miscasts the entitlements available to casual employee and otherwise refers to paragraph 285 of our submissions dated 20 November 2015.

The interaction between the casual loading, overtime and other penalties

160. Ai Group and the AWU have raised issues regarding the payment of the casual loading during the performance of overtime and work on weekends and public holidays that remain unresolved. Consistent with the approach taken in respect of other exposure drafts, these matters should be referred to the Casual Employment Full Bench and parties should be given an opportunity to file submissions regarding their respective contentions.

11. EXPOSURE DRAFT – PHARMACEUTICAL INDUSTRY AWARD 2015

161. The submissions that follow relate to the *Exposure Draft – Pharmaceutical Industry Award 2015* (Exposure Draft) published on 30 October 2015. They are in response to submissions filed by the:

- AWU, dated 5 November 2015;
- AWU, dated 23 November 2015; and
- AMWU, dated 19 November 2015.

Clause 6.3(c) – Part-time employees

162. Clause 6.3(b) of the Exposure Draft requires that at the time of engagement, an employer and part-time employee will reach an agreement as to the hours worked each day, which days of the week the employee will work and the actual starting and finishing times each day. Subclause (c) contemplates that the 'regular pattern of work' may be varied by agreement and requires that such agreement be recorded in writing.

163. The AMWU submits that "any right of employers to alter an employee's ordinary working hours is subject to consultation requirements within the Award" and that therefore, a reference to clause 22.2 should be added to clause 6.3(c).

164. Clause 22.2 applies where an *employer* proposes to change an employee's regular roster or ordinary hours of work. We do not consider that clause 22.2 will necessarily apply in every instance that subclause 6.3(c) operates. For instance, if an employee proposes a change to their regular pattern of work, and this is agreed to by the employer, clause 22.2 does not apply. For these reasons, it is confusing and potentially misleading to insert a reference to the consultation clause in clause 6.3(c). The provision is clearly distinguishable from that which was varied by the Commission in the exposure draft for the Wool Award, which enables an employer to *unilaterally* change an employee's roster.

165. Further, the AMWU's proposal is inconsistent with the approach taken by the Commission throughout the modern award system whereby it has generally decided not to include references to the consultation clause in the very large number of award clauses dealing with hours of work and rosters. Such references are unnecessary and hence conflict with s.138 of the Act. A similar approach has been taken by the Commission in relation to dispute settling. Even though parties have access to the dispute settling clause in the relevant award, if a dispute arises in relation to the operation of any award clauses, it is unnecessary to include a reference to the dispute settling clause under each provision.

166. For these reasons, clause 6.3(c) should not be varied to insert a reference to clause 22.2.

Clause 8.2(c) – Ordinary hours – day workers

167. Ai Group continues to oppose the AMWU's claim to vary alter clause 8.2(c). We understand that the matter will be dealt with at the end of the award stage of the Review.[11]

Clause 8.2(c) – Ordinary hours – day workers

168. Clause 8.2(c) of the Exposure Draft is in the following terms:

> (c) Where the employer and the majority of employees in the affected plant, work section or sections agree, the spread of hours may be altered by up to one hour at either end of the spread.

169. The clause is a facilitative provision that enables agreement to be reached as to a variation to the spread of hours. The impact of such a change would be to enable an employer to require some or all of its employees to perform ordinary hours of work at a time that might otherwise constitute overtime.

170. A change to the spread of hours does not, in and of itself, constitute a change to a particular employee's ordinary hours of work. As we have explained above, it rather provides employers with the flexibility to require employees to work ordinary hours over a greater period of time than would otherwise apply.

171. Further, it the spread is varied, it does not necessarily follow that an individual employee's ordinary hours will be varied. It may be the additional flexibility available to an employer is only utilised in respect of a confined number of its employees. The consultation obligations under clause 22.2 would not arise in respect of those employees for whom there is no actual change. For these reasons, it is confusing and potentially misleading to insert a reference to the consultation clause in clause 8.2(c). The provision is clearly distinguishable from that which was varied by the Commission in the exposure draft for the Wool Award, which enables an employer to *unilaterally* change an employee's roster.

[11] [2015] FWCFB 7236 at [159].

172. Further, the AMWU's proposal is inconsistent with the approach taken by the Commission throughout the modern award system whereby it has generally decided not to include references to the consultation clause in the very large number of award clauses dealing with hours of work and rosters. Such references are unnecessary and hence conflict with s.138 of the Act. A similar approach has been taken by the Commission in relation to dispute settling. Even though parties have access to the dispute settling clause in the relevant award, if a dispute arises in relation to the operation of any award clauses, it is unnecessary to include a reference to the dispute settling clause under each provision.

173. For these reasons, clause 8.2(c) should not be varied to insert a reference to clause 22.2.

Clause 9.1(b) – Paid meal break – non-rostered overtime

174. Ai Group strongly opposes the insertion of the term 'applicable rate of pay' and accompanying definition proposed by the Commission, as sought by the AWU. We refer to the concerns we have raised at section 6.1 of our 20 November 2015 submission in this regard.

175. Ai Group does not oppose the AWU's alternate proposition, being the retention of the words "ordinary time rates", as found in clause 24.1(b) of the current award.

Clause 10.6(a) – Higher Duties

176. Ai Group agrees with the AWU's submission and proposed amendment on the basis that reference to "full time employee" is not in accordance with the October 2015 Decision.[12]

[12] [2015] FWCFB 7236 at [170] – [171].

Clause 13.1(a)(iv) – Non-successive afternoon/night shift

177. We do not oppose the AWU submission made by letter dated 5 November 2015 that the references to "six successive afternoons or nights" should be deleted. Appropriate amendments would be:

> "(iv) non-successive afternoon/night shift means an employee is required to work an afternoon or night shift which does not continue for at least five successive afternoons or nights in a five day workshop.
>
> ~~• for at least five successive afternoons or nights in a five day workshop; or~~
>
> ~~• for at least six successive afternoons or nights in a six day workshop."~~

Clause 20.2 – Notice of termination by an employee

178. We agree with the AWU's submission that the word "from" should be inserted after the word "withhold" and before the word "any". This appears to be a typographical error.

12. EXPOSURE DRAFT – POULTRY PROCESSING AWARD 2015

179. The submissions that follow relate to the *Exposure Draft – Poultry Processing Award 2015*, published on 2 November 2015. They are in response to submissions filed by:

- Business SA, dated 27 November 2015;
- AFEI, dated 23 November 2015; and
- the AMWU, dated 19 November 2015.

Clause 1.2 – Title and commencement

180. Ai Group agrees that the amendments proposed by Business SA to clause 1.2 should be made.

Clause 6.5(c)(iii) – Casual loading

181. Ai Group supports Business SA's contention that clause 6.5(c)(iii) should be deleted. We refer to paragraph 299 of our 20 November 2015 submission in this regard.

Clause 8.2(b) – Ordinary hours

182. We refer to the submissions we have made in respect of the AMWU's proposal to vary clause 13.2(d) of the exposure draft for the Manufacturing Award. For the reasons there articulated, the union's proposal to vary clause 8.2(b) should not be adopted.

Clause 10.5 – Payment of wages

183. Ai Group supports AFEI's proposal to vary clause 10.5(a) such that it allows for a fortnightly pay cycle.

Clause 14.2 – Overtime rates

184. Ai Group concurs with Business SA and AFEI that the Exposure Draft should contain a provision that states that 'each day stands alone' for the purposes of calculating overtime rates. We refer to paragraph 302 of our submission dated 20 November 2015 in this regard.

Clause 20.1 – Notice of termination by an employee

185. The typographical error identified by Business SA in respect of clause 20.1 was also identified by Ai Group at paragraph 303 of our 20 November 2015 submissions.

Schedule B – Summary of hourly rates

186. Business SA's submission in respect of Schedule B is in virtually identical terms to that articulated by Ai Group at paragraphs 304 – 305 of our submissions dated 20 November 2015. The amendments proposed should be made.

Schedule G – Part-day public holidays

187. We agree with the amendment proposed by Business SA in respect of Schedule G.

13. EXPOSURE DRAFT – RAIL INDUSTRY AWARD 2015

188. The submissions that follow relate to the *Exposure Draft – Rail Industry Award 2015* (Exposure Draft), published on 2 November 2015. They are in response to submissions filed by the AWU, dated 24 November 2015.

Clauses 2.2 and 2.3 - The National Employment Standards and this award

189. Ai Group agrees that the additional words regarding the location of copies of the NES and the award have been incorrectly added to clause 2.3 instead of clause 2.2.

Clause 6.3(b) – Part-time employees

190. The AWU suggests that the term 'minimum hourly rate' be replaced with 'ordinary hourly rate' in clause 6.3(b). Ai Group disagrees.

191. The wording of clause 6.3(b) of the Exposure Draft reflects the current clause 10.2(b): (emphasis added)

> (b) For each hour worked, a part-time employee will be paid no less than 1/38th of the minimum weekly rate of pay for their classification in clause 14—Classifications and minimum wage rates.

192. The Rail Award and the Exposure Draft contain a tool allowance which 'must be included in and forms part of the employee's ordinary rate of pay'. The allowance is not, as such, characterised as an all purpose allowance.

193. The Full Bench's October 2015 Decision does not expressly indicate whether the tool allowance in the current Award is properly an 'all-purpose allowance'.

194. Clause 6.3(b) deals only with identifying the minimum amount payable to a part-time employee for each hour of work. Any additional amounts payable are dealt with in other provisions of the Exposure Draft (such as the relevant

allowances provisions). These additional amounts are to be applied to the rate of pay for such an employee in accordance with the specific words of those clauses and taking into account the individual circumstances of the employee.

195. Clause 6.3(b) therefore, should not be amended. This is particularly relevant in circumstances where the Commission has not explicitly considered or ruled on whether the tool allowance is in fact an all purpose allowance.

Clause 11.4(a) - All purpose allowances

196. Ai Group identified the absence of the word "annual" in clause 11.4(a) in our submission dated 20 November 2015 at paragraph 323.

Clause 20.2 - Notice of termination by an employee

197. Ai Group identified the absence of the word "from" in clause 20.2 in our submission dated 20 November 2015 at paragraph 346.

14. EXPOSURE DRAFT – STEVEDORING INDUSTRY AWARD 2015

198. The submissions that follow relate to the *Exposure Draft – Stevedoring Industry Award 2015* (Exposure Draft), published on 2 November 2015. They are in response to submissions filed by the Stevedoring Employers, dated 24 November 2015.

Clause 5.2(a) – Facilitative provisions

199. Ai Group concurs with the amendment proposed by the Stevedoring Employers to clause 5.2(a) of the Exposure Draft.

Clause 11.1(a) – All purpose allowance

200. The Stevedoring Employers have proposed that the first sentence of clause 11.1(a) be deleted. It is Ai Group's submission that the relevant text should be retained. This would reflect the approach taken by the Commission in all

exposure drafts that contain all purpose allowances. Further, it makes clear to the reader of the Exposure Draft that 'all purpose' is now a defined term.

201. We agree with the Stevedoring Employer's that clause 11.1(a), as presently drafted, is inconsistent with the Commission's July 2015 Decision and the definition of 'all purpose' contained in Schedule H to the Exposure Draft. This should be rectified by inserting the word 'annual' before 'leave' in clause 11.2(a). We refer to paragraph 356 of our 20 November 2015 submission in this regard.

Clause 22.2 – Notice of termination by an employee

202. We support the amendment proposed by the Stevedoring Employers to clause 22.2 of the Exposure Draft. We also draw the Commission's attention to an additional drafting error contained in the same provision, as identified at paragraph 359 of our 20 November 2015 submissions.

Clause 10.1 – Minimum wages

203. Ai Group supports the amendment proposed by the Stevedoring Employers to the footnote found in clause 10.1.

Clause 14.6(c) – Maximum duration of overtime

204. Ai Group submits that the typographical error highlighted by the Stevedoring Employers in clause 14.6(c) should be amended as proposed.

Clause 19 – Public holidays

205. Ai Group submits that the amendments proposed by the Stevedoring Employers to clause 19 should be made.

Schedule A.4.2 and Schedule H

206. We do not oppose the amendment proposed by the Stevedoring Employers in respect of the definition of 'maintenance tradesperson'.

Schedule H – Definitions

207. The Stevedoring Employers' proposal regarding the definition of 'ordinary hourly rate', as found in Schedule H to the Exposure Draft, is consistent with Ai Group's submissions at paragraph 360 – 362 of 20 November 2015.

15. EXPOSURE DRAFT – TEXTILE, CLOTHING, FOOTWEAR AND ASSOCIATED INDUSTRIES AWARD 2015

208. The submissions that follow relate to the *Exposure Draft – Textile, Clothing, Footwear and Associated Industries Award 2015* (Exposure Draft). They are in response to submissions filed by:

- Business SA, dated 27 November 2015;
- the TCFUA, dated 24 November 2015; and
- the AWU, dated 20 November 2015.

Clauses 2.2 and 2.4 – The National Employment Standards and this award

209. We agree that the amendments proposed by the TCFUA to clauses 2.2 and 2.4 of the Exposure Draft. We refer to paragraph 364 of our submission dated 20 November 2015 in this regard.

Clause 3.4(c) – Coverage

210. We agree that the amendment proposed by Business SA and the TCFUA should be made to clause 3.4(c). We refer to paragraph 366 of our submission dated 20 November 2015 in this regard.

Clause 5.1 – Facilitative provisions

211. We do not consider that the variation proposed by the TCFUA to clause 5.1 is necessary. Clause 5.1 reflects the approach taken by the Commission in respect of all exposure drafts, but for those awards that currently contain a clause that lists facilitative provisions with a specific preamble. We can identify no reason why the Exposure Draft should deviate from this general approach.

Clause 6.3(h) – Part-time employees

212. We do not agree with the TCFUA and AWU's proposed amendment to clause 6.3(h). The cross reference should be to both clauses 6.3(d) and (e). If the unions' proposal were adopted, this could expand the circumstances in which overtime rates are payable. That is, even if a part-time employee's agreed hours were varied by consent, clause 6.3(h) would continue to require the payment of overtime for any work performed outside the hours that were agreed prior to the variation.

213. Consistent with our submission dated 20 November 2015 at paragraph 367, the correct cross reference is to clauses 6.3(d) *and (e)*.

Clause 6.4(h) – Casual employees

214. Ai Group does not oppose the retention of clause 6.4(h) on the basis that it reflects the current clause 14.7.

Clause 6.5(e) – Variation of the casual conversion six-month eligibility period

215. Ai Group does not oppose the deletion of clause 6.5(e) on the basis that such a clause does not appear in the TCF Award.

Clause 6A – Outwork and related provisions

216. We do not oppose the TCFUA's proposal to alter the numbering of the subclauses that appear under clause 6A.

Clause 6.1 – Outwork and related provisions

217. Ai Group does not oppose the TCFUA's proposal to alter the text of clause 6.1.

Clause 8.3(a) – Changes to hours

218. Ai Group does not oppose the TCFUA's and AWU's submission regarding clause 8.3(a).

Clause 8.5(b) – Substitution of rostered day off

219. We do not oppose the amendment sought by the TCFUA to clause 8.5(b) on the basis that the wording proposed is consistent with clause 33.1 of the TCF Award, although we do not consider the variation necessary.

Clause 9.5 – Minimum break between overtime shifts

220. Ai Group does not oppose the TCFUA's proposed change to the heading of clause 9.5, on the basis that it reflects the current clause 40.3.

Clauses 9.5(b)(i) and (ii) – Minimum break between overtime shifts

221. We do not oppose the TCFUA's proposed changes to clauses 9.5(b)(i) and (ii) on the basis that they are intended to reflect the current clauses 40.3(b)(i) and (ii).

Part 4 – Wages and Allowances

222. Ai Group does not oppose the TCFUA's submission that the heading to Part 4 should include a reference to 'Superannuation', although we do not consider the change necessary.

Clause 18.4(a) – Employees under 18 years

223. We agree with the amendment proposed by the TCFUA to clause 18.4(a). Ai Group identified the same cross referencing error at paragraph 380 of our submissions dated 20 November 2015.

Clause 24.1 – Public holidays

224. Although we do not agree that clause 24.1 of the Exposure Draft deviates substantively from the TCF Award, we do not oppose the amendment proposed by the TCFUA.

Clause 24.2 – Public holidays

225. We do not oppose the amendments proposed by the TCFUA to clause 24.2. We refer to paragraph 383 of our submission dated 20 November 2015, where we identified the same cross referencing error.

Clause 26.3 – Notice of termination by an employee

226. We agree that the amendment proposed by Business SA should be made to clause 26.3. We refer to paragraph 385 of our submission dated 20 November 2015 in this regard.

Schedule C.3.2 – Casual employees – ordinary and penalty rates

227. Ai Group strongly opposes the TCFUA's position in respect of the calculation of public holiday penalty rates for casual employees. As we understand it, the union contends that the public holiday penalty is to be applied to an hourly rate that incorporates the casual loading. That is, the public holiday penalty compounds on the casual loading. The TCFUA has not explained the reasons for its position or its interpretation of the relevant award provisions.

228. We refer to the AIRC's decision during the Part 10A Award Modernisation process, where it considered the appropriate quantum of the casual loading. In its decision, the Full Bench stated: (emphasis added)

> **[50]** In all the circumstances we have decided to confirm our earlier indication that we would adopt a standard casual loading of 25 per cent. We make it clear that the loading will compensate for annual leave and there will be no additional payment in that respect. Also, as a general rule, where penalties apply the penalties and the casual loading are both to be calculated on the ordinary time rate.[13]

229. As indicated in the above passage, when modern awards were made, the general approach was to require the payment of the casual loading and any penalty on the minimum hourly rate, rather than the compounding of the casual loading and the penalty. This has been the longstanding position under the vast majority of awards. The TCFUA has not pointed to any provision of

[13] [2008] AIRCFB 1000 at [50].

the TCF Award that would establish a departure from the aforementioned 'general rule'.

230. To adopt the TCFUA's approach to the calculation of the relevant rates departs from the terms of the TCF Award and would result in a significant cost increase that is unjustified and inconsistent with the obligation that arises from the terms of the Award itself. The union's approach must be rejected.

Schedule C.3.3 – Casual employees – overtime rates

231. Ai Group strongly opposes the TCFUA's position in respect of the calculation of overtime rates for casual employees. We rely upon the submissions above in this regard.

Schedule C.3.3 – Casual employees – overtime rates

232. We do not oppose the TCFUA's proposal to include a reference to clause 20.3(c) in respect of employees paid under a system of payment by results.

Schedule C.4 – Casual employees – shiftworkers

233. We do not oppose the TCFUA's proposal to number the paragraph found below the heading of Schedule C.4.

Schedule C.4.1 – Casual employees – shiftworkers other than in the textile industry – ordinary and penalty rates

234. Ai Group strongly opposes the TCFUA's position in respect of the calculation of public holiday rates for casual employees. We rely upon the submissions above in this regard.

Schedule C.4.2 – Casual employees – shiftworkers in the textile industry – ordinary and penalty rates

235. Ai Group strongly opposes the TCFUA's position in respect of the calculation of rates for casual employees in Schedule C.4.2. We rely upon the submissions above in this regard.

Schedule C.4.3 – Casual employees – shiftworkers in the textile industry – seven day continuous shiftworkers – ordinary and penalty rates

236. Ai Group strongly opposes the TCFUA's position in respect of the calculation of rates for casual employees in Schedule C.4.3. We rely upon the submissions above in this regard.

Schedule C.4.4 – Casual employees – shiftworkers in the textile industry – ordinary and penalty rates

237. Ai Group strongly opposes the TCFUA's position in respect of the calculation of rates for casual employees in Schedule C.4.4. We rely upon the submissions above in this regard.

Schedule C.4.4 – Casual employees – shiftworkers – overtime rates

238. We do not oppose the TCFUA's proposal to include a reference to clause 20.3(c) in respect of employees paid under a system of payment by results.

Schedule D.3 – Expense related allowances

239. We agree with the TCFUA's proposed amendment to the cross reference in Schedule D.3.

Schedule F.5.8 – Minimum conditions for workers

240. We do not oppose the amendment proposed by the TCFUA to the cross references contained in F.5.8.

Schedule F.5.10 – Minimum conditions for workers

241. We agree with the TCFUA that the cross-reference contained in F.5.10 is incorrect however we do not agree with the amendment proposed. Consistent with the TCF Award, the correct cross-reference is to clauses 29.3 – 29.5.

Schedule F – Appendix

242. Ai Group does not oppose the amendments proposed by the TCFUA to the appendix to Schedule F.

Schedule G – Apprentices

243. We agree with the TCFUA that Schedule G should be updated to reflect various amendments made to the TCF Award by the apprentice conditions common claim.

Schedule E – 2014 Part-day public holidays

244. We agree that the amendment proposed by Business SA should be made to Schedule G.

16. EXPOSURE DRAFT – TIMBER INDUSTRY AWARD 2015

245. The submissions that follow relate to the *Exposure Draft – Timber Industry Award 2015* (Exposure Draft). They are in response to submissions filed by:

- Business SA, dated 27 November 2015;
- AFEI, dated 23 November 2015;
- the AWU, dated 20 November 2015; and
- the AMWU.

Clauses 2.2 and 2.3 – The National Employment Standards and this award

246. Business SA has correctly identified a drafting error in clauses 2.2 and 2.3. This issue was addressed in our submission of 20 November 2015 at paragraph 393.

Clause 7.4 – Casual employees

247. The AWU has correctly identified that clause 12.2(b) of the current Award has been omitted from the Exposure Draft.

248. Clause 12.2(b) identifies specific circumstances in which a casual employee will be paid the appropriate overtime rate prescribed by clause 30 of the Timber Award. That is, it specifies that the relevant overtime rate will be applied when a casual employee works in excess of the ordinary hours fixed for a weekly employee on any given day.

249. Clause 12.2(b) also identifies that, in the specific circumstances identified in the provision, the overtime rate is to be applied, "…based on the ordinary rate of pay, including the casual loading".

250. Ai Group accepts that the omission of clause 12.2(b) appears to be a substantive change and that the provision should be inserted into the Exposure Draft.

Clause 7.4(c)(ii) – Casual loading

251. Business SA has identified that this provision should be deleted. This issue was identified in our previous submission at paragraph 394.

Clause 12.2(c) – Ordinary hours and roster cycles – day workers

252. Ai Group agrees with Business SA's contention that the clause should be deleted. Ai Group has previously identified and provided an explanation as to why the provision needs to be deleted at paragraph 395 of our submission dated 20 November 2015.

Clause 20.1 – All purpose allowances

253. Ai Group agrees with the submission of Business SA. The issue was addressed in our 20 November 2015 submissions at paragraph 404.

Clause 23.3(c) – Day work – rates for ordinary hours on Saturday and Sunday

254. With reference to a submission of the CFMEU – FFPD regarding clause 23.3(c), the Full Bench has indicated that the entire clause is problematic and

will need to be restructured.[14] It has also indicated that it will invite further submissions from parties in relation to this.

255. We note that neither the CFMEU – FFPD nor the Commission have, at this stage, proposed a new structure or variation to the clause. Should the Commission develop a proposed variation, Ai Group respectfully requests an opportunity to review it and make submissions if need be.

Clause 30.2 – Notice of termination by an employee

256. Ai Group agrees with the submission of Business SA in relation to this clause. This issue was addressed in our submission of 20 November 2015 at paragraph 415.

Schedule G – Part-day public holidays

257. Ai Group agrees with Business SA's submission that Schedule G should be amended.

17. EXPOSURE DRAFT – VEHICLE MANUFACTURING, REPAIR, SERVICES AND RETAIL AWARD 2015

258. The submissions that follow relate to the *Exposure Draft – Vehicle Manufacturing, Repair, Services and Retail Award 2015* (Exposure Draft). They are in response to submissions filed by:

- AFEI, dated 23 November 2015;
- Business SA, dated 27 November 2015;
- the MTA Organisations, dated 27 November 2015; and
- the AMWU – Vehicle Division, dated 25 November 2015.

[14] [2015] FWCFB 7236 at [302].

17.1 Coverage issues

259. With regard to the submissions filed by the AMWU and the Motor Trades Organisations regarding the Commission's provisional view that the vehicle manufacturing sector should be removed from the Vehicle Award, we refer the Commission to relevant information about this issue at section 17.1 of Ai Group's 20 November 2015 submission.

17.2 Other matters arising from the Exposure Draft

Clause 6.6(c)(iv) – Full-time or part-time conversion

260. The amendment proposed by the AMWU – Vehicle Division to clause 6.6(c)(iv) is opposed.

261. Clause 6.6(c)(iv) of the Exposure Draft states that if an employee has elected to convert to full-time or part-time employment, the employee and employer must discuss and agree on certain matters, subject to clause 5, which deals with facilitative provisions contained in the Award. Importantly, the casual conversion provision is not one of the clauses there identified (nor are we submitting that it should be).

262. The cross reference to clause 5 is erroneous and does not appear in the current award. Consistent with the current clause 13.3(f), the cross reference should be amended to read "clause 6.6(d)(i)". We note that this is consistent with the MTA Organisations' submission.

Clause 8 – Apprentices

263. Ai Group does not oppose the substantive changes sought by the MTA Organisations' to clause 8 of the Exposure Draft and the corresponding Vehicle Award clauses.

Clauses 16.8 – Dirty work

264. We do not oppose the amendment proposed by the AMWU - Vehicle Division to clause 16.8, although we do not consider it necessary given the reference to 'the dispute resolution procedure' in that provision.

Clauses 16.10 – Wet places

265. We support the amendment proposed by the AMWU – Vehicle Division to clause 16.10. This appears to be a drafting error.

Clause 16.22 – Tyre fitting or tyre repairing and retreading – Thursday and Friday work

266. The allowance of $5.03 proposed by the MTA Organisations does not appear to reflect the amount payable under the current Award, particularly if the work is not carried out by a tradesperson. The proposed amendment should not be made.

Clause 18.1(f) – Protective clothing

267. Ai Group does not oppose the amendments proposed by the AMWU – Vehicle Division to clause 18.1(f).

Clause 21.3 – Overtime rates

268. Ai Group does not oppose the amendment proposed by the MTA Organisations to clause 21.3, although we do not consider it necessary.

Clause 21.7(b) – Standing by

269. Ai Group does not oppose the amendment proposed by the MTA Organisations to clause 21.7(b), although we do not consider it necessary.

Clauses 22.2 and 22.3 – Annual Leave

270. AFEI seeks the deletion of clauses 22.2 and 22.3 on the basis that they constitute summaries of the NES, which the Commission has determined will be removed from the exposure drafts.

271. Ai Group would not oppose the deletion of the aforementioned clauses however we note that they also appear in the Vehicle Award at clauses 29.2 and 29.3 and therefore, they are not new provisions that have been inserted in the Exposure Draft by the Commission.

Clause 27.2 – Notice of termination by an employee

272. Ai Group supports the amendment proposed by Business SA to clause 27.2.

Clause 34.1(a)(ii) – Saturday and Sunday work

273. We do not oppose the amendments proposed by the AMWU – Vehicle Division and the MTA Organisations to clause 34.1(a)(ii).

Clauses 35 – Shiftwork penalties

274. Ai Group agrees with the amendments proposed by Business SA to clause 35. We identified the same issues at paragraph 431 – 432 of our 20 November 2015 submissions.

Clause 38.1(b)(ii) – Part-time employees

275. Ai Group does not oppose the amendment proposed by the AMWU – Vehicle Division to clause 38.1(b)(ii).

Clause 39.2(b) – Classifications

276. We do not oppose the amendment proposed by the AMWU – Vehicle Division to clause 39.2(b), although we do not consider it necessary.

Clauses 40 – Ordinary hours of work, breaks and rostering and 41 – Minimum wages

277. Ai Group does not oppose the AMWU – Vehicle Division's proposal that clauses 40 and 41 be swapped, however we request that parties be given an opportunity to review a revised Exposure Draft if this change is implemented, as it may have consequences for cross references contained in other parts of the Exposure Draft etc.

Clauses 41.3(a) and (b) – Minimum wages

278. We concur with the amendments proposed by Business SA in respect of clauses 41.3(a) and (b). We sought the same change at paragraphs 434 – 435 of our 20 November 2015 submissions.

Clause 41.4(b) – Relationship of classification structure to definitions

279. We do not oppose the amendment proposed by the AMWU – Vehicle Division to clause 41.1(b), although we do not consider it necessary.

Clause 43.2(b) – Ordinary hours of work – other than continuous work shifts

280. We agree with the amendment proposed by Business SA to clause 43.2(b). Ai Group proposed the same variation at paragraph 436 of our submissions dated 20 November 2015.

Clause 43.3(b)(i) – Penalty rates for shiftworkers

281. We accept the AMWU – Vehicle Division's contention that clause 43.3(b)(i) is not the same as the current clause 54.3(b)(i). However, consistent with the Commission's July 2015 Decision at paragraphs [95] – [96] any amendment made should not use the term 'time and a half' but rather, should insert the phrase '150% of the minimum hourly rate'.

Clause 43.3(d) – Penalty rates for shiftworkers

282. The amendment proposed by Business SA to clause 43.3(d) was also sought by Ai Group at paragraph 437 of our submissions dated 20 November 2015.

Clause 43.3(e) – Penalty rates for shiftworkers

283. The amendment proposed by Business SA to clause 43.3(e) was also sought by Ai Group at paragraph 438 of our submissions dated 20 November 2015.

Clause 44.1(a) – Crib break

284. The amendment proposed by Business SA to clause 44.1(a) was also sought by Ai Group at paragraph 439 of our submissions dated 20 November 2015.

Schedule G – 2014 Part-day public holidays

285. Ai Group supports the amendment proposed by Business SA to Schedule G.

All purpose allowances

286. We understand that the AMWU – Vehicle Division is seeking a substantive variation to the Vehicle Award such that certain allowances would be characterised as 'all purpose allowances'. There are currently no all purposes allowances and this is properly reflected in the Exposure Draft. The unions' claim is opposed by Ai Group. It would have significant cost implications for employers.

287. To date, the Commission has not issued directions for the filing of written submissions or evidence in support of, or in response to the unions' claim. We await the publication of such directions after which Ai Group intends to respond to the union's application.

18. EXPOSURE DRAFT – WOOL STORAGE, SAMPLING AND TESTING AWARD 2015

288. The submissions that follow relate to the *Exposure Draft – Wool Storage, Sampling and Testing Award 2015* (Exposure Draft), published on 30 October 2015. They are in response to submissions filed by the AWU, dated 20 November 2015.

Clause 6.3(b) – Part-time employees

289. The AWU has identified a difference in wording between the current Award at clause 10.2(b) and the Exposure Draft at 6.3(b) with respect to the calculation of each ordinary hour worked by a part-time employee. They have sought the retention of the current clause, without explanation for their position.

290. The current calculation for each ordinary hour worked by a part-time employee is by reference to the 'minimum weekly rate of pay'. Clause 10.2(b) specifies that the calculation is performed by dividing the 'minimum weekly rate of pay' by 38 (i.e. $1/38^{th}$). The rationale for this is that the average number of weekly ordinary hours for a full-time employee under the Wool Award is 38 and thereby $1/38^{th}$ of the 'minimum weekly rate of pay' amounts to the 'minimum hourly rate'.

291. The Exposure Draft removes the reference to the 'minimum weekly rate of pay' and simply refers to the 'minimum hourly rate'.

292. We do not consider there to be any material difference between the outcome of the calculation of each ordinary hour worked by a part-time employee under the current wording of the Wool Award or the wording proposed in the Exposure Draft. The wording contained in the Exposure Draft is clearer and should be retained.

Clause 6.4(c) – Casual loading

293. Ai Group notes the AWU's submission at paragraphs 23 – 41 dealing with whether the casual loading is paid on overtime to casual employees. As noted by the AWU, this matter is being dealt with by the Casual Employment Full Bench (see paragraphs 40 - 41). Ai Group intends to respond in due course.

Clause 6.4(d) – Casual loading

294. Ai Group's primary position is that clauses such as 6.4(d) are not necessary and therefore, should be deleted. As we have submitted in respect of other

exposure drafts, the provision is inaccurate to the extent that it purports to exhaustively list the factors compensated for by the casual loading.

295. If the provision is to be retained, we would not oppose the retention of the current clause 10.3(c). This would include the words "provided in this award" at the conclusion of the clause as sought by the AWU.

Clauses 14.1(a) and (b) – Definition of overtime

296. The AWU proposes a number of variations to clauses 14.1(a) and (b) of the Exposure Draft. In our submission of 20 November 2015, Ai Group also identified concerns regarding clause 14.1 at paragraphs 441 - 450. We continue to rely upon those submissions.

297. We do not oppose the AWU's proposal to delete clause 14.1(b) on the basis that the circumstances in which a part-time employee is entitled to overtime is adequately dealt with at clause 6.3(d). However, we remain opposed to the AWU's proposed amendment to clause 14.1(a), as it would not cure the difficulties we have identified with the references to "rostered hours" and the "total ordinary hours in the work cycle".

298. For the reasons set out in our 20 November 2015 submission, the amendment proposed at paragraph 449 should be adopted.