Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Revised Exposure Drafts:
Subgroups 1C – 1E

20 NOVEMBER 2015

AiGROUP

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EXPOSURE DRAFTS: SUBGROUPS 1C – 1E

CONTENTS

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 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.

4. This submission first deals with some issues of general concern. The submission goes on to identify issues specific to particular exposure drafts.

5. One of those issues is the introduction of the term 'applicable rate of pay' (as defined) in the exposure draft for the Manufacturing Award. Ai Group is extremely concerned about the content of paragraphs [95] to [106] of the October 2015 Decision in this regard.[2] If the proposal in these paragraphs is proceeded with for nearly all of the clauses identified in paragraph [105] of the Commission's decision, there will be huge cost implications, unworkable outcomes and other adverse consequences for employers covered by this Award.

6. The Commission's proposal to replace the terms 'ordinary hourly rate' and 'ordinary time rate' in the current Manufacturing Award with the term 'applicable rate of pay' (defined to include penalties and loadings) in the clauses identified in paragraph [105] has, in effect, come 'out of the blue'. That is, the use of the term as defined was not sought by any interested party, nor has it been previously put to parties by the Commission. This is despite the sweeping effects of the proposal and the disturbance of very longstanding industry practice and existing award entitlements.

7. The effects of the proposal on each relevant clause are outlined in this submission. If the Full Bench remains unconvinced of the major problems and unfairness for employers that would result from replacing the terms 'ordinary hourly rate' and 'ordinary time rate' with 'applicable rate of pay', we submit

[2] [2015] FWCFB 7236.

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.

2. ISSUES OF GENERAL CONCERN

2.1 Matters that have been determined by the Commission

8. A number of issues arising from the exposure drafts have been determined by the Commission over the course of the Review thus far. Such matters include:

- An amendment to the title of the exposure drafts by substituting '2014' with '2015';[3]
- The terms of the commencement clause;[4]
- The deletion of the proposed supersession clause;[5]
- The removal of the absorption clause;[6]
- The retention of the take-home pay order provision;[7]
- An amendment to the provision that provides that the National Employment Standards (NES) and the relevant award provide the minimum conditions of employment;[8]
- A variation to the provision that imposes an obligation on an employer to ensure that a copy of the relevant award and NES is available to its employees;[9]
- An amendment to the text of the facilitative provisions;[10]

[3] [2015] FWCFB 4658 at [4].
[4] [2014] FWCFB 9412 at [11]; [2015] FWCFB 4658 at [4] and [2015] FWCFB 4658 at [8].
[5] [2014] FWCFB 9412 at [9].
[6] [2015] FWCFB 4658 at [9 – [20] and [2015] FWCFB 6656 at [74].
[7] [2014] FWCFB 9412 at [16] and [2015] FWCFB 6656 at [81].
[8] [2014] FWCFB 9412 at [23] – [25].
[9] [2014] FWCFB 9412 at [29].

- The application of the casual loading to the minimum hourly rate or the ordinary hourly rate, which is to be determined on an award by award basis;[11]

- The deletion of the proposed clause that would list award provisions that do not apply to casual employees;[12]

- The inclusion of a table in the 'minimum wages' clause in the body of an award that contains the minimum weekly rate and minimum hourly rate;[13]

- The consequential removal of any columns from such a table that prescribe the 'casual hourly rate' or 'ordinary hourly rate' (where relevant);[14]

- The deletion of the proposed clause that would impose obligations on an employer regarding pay slips;[15]

- The insertion of a note that refers to Regulations 3.33 and 3.46 of the *Fair Work Regulations 2009*;[16]

- The deletion of summaries of the NES;[17]

- The insertion of a note in the annual leave provision of an award that refers to ss.16 and 90 of the *Fair Work Act 2009* (Act);[18]

- The definition of 'all purpose';[19]

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[10] [2014] FWCFB 9412 at [42].
[11] [2015] FWCFB 4658 at [70] – [72] and [2015] FWCFB 6656 at [109].
[12] [2014] FWCFB 9412 at [69].
[13] [2015] FWCFB 4658 at [54].
[14] [2015] FWCFB 4658 at [54];
[15] [2014] FWCFB 9412 at [35] – [36].
[16] [2015] FWCFB 4658 at [55] – [56].
[17] [2014] FWCFB 9412 at [35] – [36].
[18] [2015] FWCFB 4658 at [94].
[19] [2014] FWCFB 9412 at [44] – [53] and [2015] FWCFB 4658 at [91].

- The definition for and use of the terms 'minimum hourly rate' and 'ordinary hourly rate';[20]

- The application of penalties and loadings to the minimum rate prescribed by an award to the exclusion of over-award payments;[21]

- The restoration of the tables containing rates of pay in the National Training Wage Schedule;[22]

- The inclusion of tables that summarise hourly rates of pay in schedules attached to an award, noting that a 'one size fits all' approach may not be appropriate;[23] and

- The insertion of a note in the schedules summarising hourly rates of pay, which states that an employer meeting their obligations under the schedule is meeting their obligations under the award.[24]

9. Whilst reviewing the revised exposure drafts, we have endeavoured to identify any instances in which they do not reflect the aforementioned matters.

2.2 The characterisation of premiums payable pursuant to an award

10. Modern awards variously characterise premiums that are payable to an employee as penalties, loadings or allowances. For example, the additional amount payable to an employee for work performed on a public holiday may be characterised in an award as a penalty rate. Further, an employee may be entitled to a shift loading in respect of work performed during a shift at a particular time.

[20] [2014] FWCFB 9412 at [44] – [53] and [2015] FWCFB 9412 at [47].
[21] [2015] FWCFB 4658 at [95] – [96].
[22] [2014] FWCFB 9412 at [67].
[23] [2014] FWCFB 9412 at [58] and [2015] FWCFB 4658 at [62].
[24] [2015] FWCFB 4658 at [63].

11. We have identified instances in which the characterisation of a particular premium payable under an award has been altered in the corresponding provision of an exposure draft. For instance, where a current award mandates the payment of a shift *allowance*, the exposure draft may instead refer to it is a shift *loading*. This is a matter that has come to our attention whilst reviewing the exposure drafts published by the Commission in respect of awards allocated to group 2. As a result, prior submissions filed by Ai Group regarding group 1 awards may not have exhaustively identified this issue.

12. We are concerned that a change to the terminology used to describe a particular payment may have implications for the calculation of entitlements that are governed by State and Territory legislation, such as workers' compensation and long service leave. Such legislation prescribes the amount payable to an employee by reference to certain components of an employee's remuneration that is to be included or excluded from the relevant calculations. This is often done by reference to entitlements such as penalties, loadings and the like.

13. For instance, the *Workers Compensation Act 1987* (NSW) defines an employee's 'pre-injury average weekly earnings' to include 'overtime and shift allowance payments'.[25] We are concerned that if a shift premium presently labelled as a shift loading is subsequently characterised as a shift allowance, or vice versa, that may have some implication for the calculation to be performed under the aforementioned legislation.

14. We do not here intend to deal comprehensively with the proper interpretation of statutory provisions in relation to long service leave, workers' compensation or otherwise. We are, however, concerned that an alteration to the characterisation of an award derived entitlement may inadvertently alter the effect of a provision in other legislation and as such, have some unintended consequence for the quantum of an entitlement there prescribed.

[25] Section 44C.

15. We anticipate that employers who have had some interaction with such legislation would have determined the amounts payable to their employees, in accordance with the relevant provisions. Altering the terminology used in modern awards in respect of certain entitlements may have unintended consequences for such employers and their employees, in circumstances where they are not necessarily aware of the change, given its subtlety. The alterations could disturb existing arrangements in a way that is not readily apparent to employers or employees. It is for these reasons that we submit that caution should be taken in retitling an entitlement in the awards system.

16. We additionally note that the re-characterisation of an entitlement may also have implications for other award derived entitlements. For instance, certain awards contain provisions that prescribe the amount payable during a period of annual leave and/or the amount to which the annual leave loading is to be applied. They stipulate the amounts that are to be included and/or excluded by referring to penalties, loadings and the like. The effect of such provisions may be altered.

17. A further example arises from those award provisions that state that any payments prescribed by a particular clause are "in substitution for any other loadings or penalty rates". Such a clause is not uncommon (see for instance, clause 13.2 of the *Exposure Draft - Oil Refining and Manufacturing Award 2015*). If a payment presently characterised as a shift penalty were redrafted such that it was referred to as a shift *allowance* in the exposure draft, that may have unintended consequences for the application of a provision such as the above.

18. In these submissions, we have endeavoured to identify circumstances in which there has been a relevant change of this nature. Should the Commission accept the proposition that an alteration to the characterisation of a premium payable under an award may have unintended consequences for the calculation of entitlements due under other award provisions and/or legislation, it is our submission that the terminology currently used should, in each case, be restored. We note that our submissions to this effect in respect

of the *Exposure Draft – Timber Industry Award 2014* have been accepted by the Commission in the October 2015 Decision.[26]

2.3 The manner in which the premium is expressed

19. There is one additional matter relating to the issues canvassed above, which we here seek to raise. It relates to the manner in which the various loadings and penalties have been expressed in the exposure drafts.

20. The modern awards system typically prescribes a premium payable as a percentage of the relevant hourly rate. For example, a shift loading may be described as 30% of the minimum hourly rate. In such circumstances, the relevant loading is readily identifiable as being 30% of the relevant rate. In practice, to determine the total amount payable, an employer would multiply the relevant hourly rate by 130%.

21. The exposure drafts have altered the way in which such premiums are expressed. The proposed provisions stipulate that an employee is to be paid 130% of the relevant rate. This is, of course, the calculation that must be undertaken, in practical terms, to ascertain the quantum payable. However, by expressing the amount due in this way, the component of the total amount payable that is to be characterised as the loading is no longer readily apparent. That is, the instrument would no longer separately identify that the shift loading equates to 30% of the relevant minimum rate. As a corollary of this, the amount that equates to the 'base rate' (that is, the component of the total amount payable that is stripped of any premium) is also no longer separately identified.

22. We raise this issue out of concern that it too may have the types of unintended consequences that have been outlined above. Whilst we appreciate and acknowledge that the manner in which the exposure drafts express the relevant penalty rates or loadings may make it easier to determine the calculation to be performed to ascertain the quantum due, the

[26] [2015] FWCFB 7236 at [299].

portion of the amount paid that is in fact the penalty or loading is not clear on the terms of the proposed provisions.

23. By way of an example, we point to clause 13 of the *Exposure Draft – Poultry Processing Award 2015* (Exposure Draft), which has altered the way in which additional payments made to shiftworkers are expressed.

24. Clause 24.4 of the Poultry Processing Award provides that employees receive "an additional amount" for ordinary hours worked on a particular shift. Similarly, clause 24.5 provides certain additional amounts to be paid for working on weekends or public holidays.

25. In contrast, clause 13.2 of the Exposure Draft simply sets a higher hourly rate for such shifts or for work on a weekend or public holiday. That is, the Exposure Draft expresses the amount due as a total to be calculated by reference to the ordinary hourly rate (for example, 115% of the ordinary hourly rate), rather than stipulating that a portion of the hourly rate is to be added to it (for example, an additional amount of 15% of the hourly rate).

26. The proposed change is problematic when read in conjunction with clause 15.4 of the Exposure Draft, which deals with annual leave loading. It provides that, "in addition" to the amounts prescribed by clause 15.3, a shiftworker is to paid the greater of either a loading of 17.5% calculated on the base rate of pay or:

> " (ii) the shift rate including the relevant weekend penalty rate payments the employee would have received in respect of ordinary hours of work, where the employee would have worked shift work had the employee not been on leave during the relevant period."

27. Clause 13.2 provides that, "An employee will be paid annual leave at the base rate of pay as prescribed by the NES".

28. As the shift rate or weekend are no longer separately identifiable, the Exposure Draft materially increases costs because employers could be required, pursuant to clause 15.4, to pay both the base rate referred to in

clause 15.3 and the inflated rate referred to in clause 13.2 (rather than just the penalty or shift rate component).

29. We accept that those who have an understanding of the awards system and have participated in this process would possess an inherent understanding of the rationale for altering the way in which these penalties and loadings are expressed and would therefore, appreciate that the intention is not to re-characterise the premium as 130% of the relevant rate. However, for abundance of caution and for the purpose of ensuring that there is no unintended change, we raise this as a matter that may be relevant to the Commission's consideration of the final form of the exposure drafts.

2.4 The ordinary hours of work and s.147 of the Act

30. Section 147 of the Act requires that a modern award must include terms specifying, or providing for the determination of, the ordinary hours of work for each classification of employee covered by the award and each type of employment permitted by the award.

31. We have identified various instances in which a modern award does not satisfy s.147 in respect of casual employees. That is, the award does not specify or provide for the determination of the ordinary hours of work for casual employees covered by it. This is a matter that has primarily come to our attention whilst reviewing exposure drafts in respect of group 2 awards, particularly where they purport to (erroneously) limit the application of the ordinary hours of work provision to full-time employees.[27]

32. We acknowledge that this is not, as such, a difficulty borne out of the Commission's redrafting of the current awards. Nonetheless, we raise it wherever relevant as an issue that the Commission may decide to rectify so as to ensure that the relevant awards meet the requirements of s.147.

[27] See for example Ai Group's submissions dated 4 February 2015 regarding subgroup 2C and 2D exposure drafts at paragraphs 6.8 and 10.9. See also Ai Group's submissions dated 28 January 2015 regarding subgroup 2A and 2B exposure drafts at paragraphs 149 and 181.

33. We note that this issue was identified by Ai Group during a conference before Commissioner Bull (as he then was) regarding the *Gas Industry Award 2010*. Our submission was accepted and the Commission has proposed to vary the relevant provision of the exposure draft accordingly.[28]

2.5 The application of penalties and loadings to the ordinary hourly rate

34. The Commission's decision of 13 July 2015[29] (July 2015 Decision) deals with the use of the term 'ordinary hourly rate', which has been defined as the hourly rate for the employee's classification as prescribed by a specific clause of the relevant award, plus any all purpose allowances. An issue arising from the use of this terminology is the calculation of various loadings and penalties. That is, whether the relevant penalty or loading is to be applied to the minimum rate or a rate that is inclusive of applicable all purpose allowances.

35. The Commission observed that allowances defined as applying 'for all purposes' "have historically been treated as part of an employee's wages for the purpose of calculating penalties and loadings"[30] but noted that "some issues have arisen concerning the methodology used in the exposure drafts" in this regard.[31]

36. The Commission stated that the exposure drafts, as at the time that the decision was issued, dealt with penalties and loadings in the following way:

> [44] In affected awards, penalties and loadings are expressed as a percentage of the ordinary hourly rate, for example "overtime is paid at 150% of the ordinary hourly rate" to make it clear that an all purpose allowance to which an employee is entitled must be added to the minimum rate <u>before</u> calculating the loaded rate, that is, there is a *compounding* effect.[32]

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[28] [2015] FWCFB 7236 at [23] – [25].

[29] [2015] FWCFB 4658.

[30] [2015] FWCFB 4658 at [40].

[31] [2015] FWCFB 4658 at [41].

[32] [2015] FWCFB 4658 at [44].

37. The Full Bench went on to accurately summarise Ai Group's contentions as follows: (emphasis added)

> [45] Ai Group submit that the term 'ordinary hourly rate' could be "confusing" and is concerned that it could "extend existing entitlements". Ai Group submit that all purpose allowances should not necessarily be added to a minimum rate of pay before calculating any penalty or loading. <u>In some cases due to the wording of the current award, Ai Group submit that the allowance should be added after the loading is applied to the minimum rate, that is there should be a cumulative rather than compounding effect</u>.[33]

38. The Commission declined to alter the exposure drafts such that they do not use the term 'ordinary hourly rate' or define the term 'all purposes'. In doing so, however, it had regard to our argument, that the specific terms of a clause must be given consideration in determining whether an all purpose allowance is to be added before or after a penalty or loading is applied: (emphasis added)

> [47] … Any issues as to whether a particular payment is payable for all purposes, and, in particular, whether an allowance should be added to a minimum rate before calculating a penalty or loading, will be dealt with on an award-by-award basis. <u>Ultimately the resolution of these issues will turn on the construction of the relevant award and the context in which it was made.</u>[34]

39. The decision clearly contemplates the need to look to the specific drafting of a provision in order to determine the arithmetic exercise that must be undertaken to properly calculate an employee's entitlement. We took from the above passage that an opportunity would be afforded to interested parties to make submissions that go to how such a provision is to be applied on an award-by-award, clause-by-clause basis.

40. The application of penalties and loadings prescribed by an award to the ordinary hourly rate, which is defined to incorporate any all purpose allowances, has been a contentious issue throughout the course of this Review. Various parties made submissions generally and in some cases, regarding specific provisions, during the early stages of the exposure draft process. Some such submissions were filed regarding subgroup 1C – 1E exposure drafts in October 2014 and November 2014.

[33] [2015] FWCFB 4658 at [45].

[34] [2015] FWCFB 4658 at [47].

41. Preliminary consideration was given to the relevant issues by the Commission in its decision of December 2014, noting that the matters raised required further consideration.[35] Interested parties were given a further opportunity to make submissions, in writing and orally. These submissions dealt generally with the definition of 'all purpose' and did not, as such, turn on the construction of specific provisions found in the subgroup 1C – 1E exposure drafts. The matters were ultimately determined by the July 2015 Decision cited above.

42. That decision indicated that all exposure drafts published to date would be republished to reflect the changes outlined in it.[36] The revised exposure drafts of subgroup 1C – 1E awards recently published by the Commission are the first iteration to be made available since the July 2015 Decision. We therefore take this opportunity to make submissions, wherever relevant, as to the appropriate construction of current award clauses that prescribe a penalty or loading in circumstances where we are of the view that the exposure draft ought to refer to the minimum hourly rate, rather than the ordinary hourly rate.

43. We do so on the basis that where a current award provision requires the application of a premium to a rate that does not include any all-purpose allowances, but the exposure draft deviates from this, the result is a substantive change that may have significant cost implications for an employer. We note that the Commission has repeatedly acknowledged that the redrafting process is not intended to create any substantive changes to the awards system.

44. Specific consideration was given to whether the casual loading should be applied to the minimum hourly rate or the ordinary hourly rate in the Commission's decision of 30 September 2015: (emphasis added)

> [109] The concern which underlay the provisional decision [that the casual loading should be calculated on the minimum hourly rate in all exposure drafts] was whether it was appropriate for certain allowances currently expressed as all purpose allowances to be paid at an increased level for casual employees by reason of the

[35] [2014] FWCFB 9412 at [44] – [55].

[36] [2015] FWCFB 4658 at [97].

> application of the casual loading. <u>Ultimately however we have concluded that to deal with this concern in the manner proposed by the provisional decision is too broad-brush an approach and involves conducting the analysis from the wrong starting point. We consider that the preferable approach is to permit reconsideration, on an award-by-award basis during the course of the 4-yearly review, as to whether any existing allowance should retain its "all purpose" designation or should be payable on some different basis.</u>
>
> [110] The general approach will remain as expressed in the exposure drafts, namely that the casual loading will be expressed as 25% of the ordinary hourly rate in the case of awards which contain any all purpose allowances, and will be expressed as 25% of the minimum hourly rate in awards which do not contain any such allowances.

45. In addition, we make the following observations regarding the definition of 'all purpose' that has been inserted in the revised exposure drafts, in accordance with the July 2015 Decision. It is in the following terms: (emphasis added)

> all purpose means the payment that will be included in the rate of pay of an employee who is entitled to the allowance, <u>when calculating any penalties or loadings</u> or payment while they are on annual leave.

46. We are concerned that, even if the Commission accepts our submission in respect of any particular clause that the relevant loading or penalty is to be applied to the minimum hourly rate (rather than a rate that includes an all purpose allowance), there would remain an apparent tension between a clause that refers explicitly to the minimum hourly rate and the above definition. This is because the definition suggests that an all purpose allowance is to be *included* in the relevant rate of pay when calculating a loading or penalty.

47. If a clause that requires the payment of, for example, 150% of the minimum hourly rate, when read in conjunction with the definition of 'all purposes', is interpreted to require that the loading or penalty is to be calculated on a rate that includes all purpose allowances, it would clearly run contrary to the intention of referring expressly to the minimum hourly rate.

48. Whilst we appreciate that the Commission has not sought further submissions regarding the definition of 'all purposes', we think it appropriate to here raise the matter, as it may become apparent that there is a need to modify the

definition, or accommodate for it when re-drafting the relevant provisions that prescribe the penalty or loading.

Calculation of the casual loading

49. As already identified, the question of whether the casual loading should be applied to the minimum hourly rate or ordinary hourly rate has been the source of some controversy in the context of the exposure drafts. The Commission previously expressed the provisional view that a general approach involving the application of casual loading to the minimum hourly rate should be adopted.

50. In its decision of September 2015[37], the Full Bench determined that the provisional view should not be adopted. It also indicated at paragraph [110] that:

> The general approach will remain as expressed in the exposure drafts, namely that the casual loading will be expressed as 25% of the ordinary hourly rate in the case of awards which contain any all purpose allowances, and will be expressed as 25% of the minimum hourly rate in awards which do not contain any such allowances.[38]

51. This is the first opportunity that parties have been afforded to consider the application of the September decision to this subgroup of awards.

52. Ai Group does not understand the Full Bench's September decision to amount to a determination that the 'general approach' would necessarily be applicable in all awards.

53. In the proceedings associated with the September decision, both employer and union parties either argued for, or at least accepted, the need for some deviation from the application of a uniform approach to such matters: (emphasis added)

> [103] The primary submission of the AWU, the CFMEU and the AMWU was that the proposed general rule should not be adopted, so that issue 3 did not arise. <u>The AWU submitted in the alternative that, if the proposed general rule was adopted, it should be on the basis that no employee suffered a reduction in remuneration as a result.</u>

[37] [2015] FWCFB 6656.

[38] [2015] FWCFB 6656 at [110].

The AMWU submitted that the *2008 decision* demonstrated that there may be departures from a general rule in relation to particular modern awards.

[104] ABI declined to make a submission in relation to issue 3 beyond noting that the *On-Site Award* and the *Cotton Ginning Award* were examples of modern awards which might require individual consideration. The Ai Group submitted that there should generally be a consistent position across all awards, but accepted that there could be a justification for a departure from that position in relation to particular awards, in which case the party contending for the departure should carry the onus of demonstrating the requisite justification.

[105] The MBA and the HIA both contended that adoption of the provisional decision in the *On-Site Award* would resolve the existing dispute concerning the interpretation of that award, but that if it was not considered appropriate to resolve the dispute in that way, the problem should be given specific consideration by the Commission as expeditiously as possible.[39]

54. In relation to this point the Full Bench stated: (emphasis added)

[106] The obligation in s.134(1) of the FW Act to ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions carries with it a requirement (in s.134(1)(g)) to take into account “the need to ensure a simple, easy to understand, stable and sustainable modern award system …”. We accept that the adoption of a clear and consistent approach in relation to whether the casual loading should apply to all purpose allowances is desirable in the interests of simplicity and ease of understanding, although the particular circumstances of some awards may require special consideration. The question is whether the approach proposed by the provisional decision is the one which should be preferred in this respect.[40]

55. Ai Group has previously identified that numerous awards, as currently drafted, expressly require that the casual loading be calculated on the applicable minimum award rate of pay rather than compounding the benefits of any allowance, including ‘all purpose’ allowances.

56. To the extent that it is necessary, we point out that the inclusion of an all-purpose allowance in an award does not prevent the instrument from potentially providing that any applicable casual loading is to be calculated by reference to an amount not including any all-purpose allowance. This is consistent with the reasoning adopted by Deputy President Gostencnik in the context of a dispute concerning the proper interpretation of an enterprise agreement that included a casual loading clause that was almost identical to the provisions of the four awards in subgroups 1C to 1E where this is a

[39] [2015] FWCFB 6656 at [103] – [105].

[40] [2015] FWCFB 6656 at [106].

contentious issue. [41] This decision was ultimately upheld on appeal to a Full Bench.

57. The four awards are the Hydrocarbons Award, the Manufacturing Award, the Rail and the TCF Award.

58. Relevantly, consistent with this interpretation of the Full Bench's reasoning, several exposure drafts in group 1 have not applied the general approach but have instead been drafted so as to maintain the existing entitlements. That is, they continue to apply the casual loading to the applicable minimum rate.

59. However, four of the exposure drafts now inappropriately require that the casual loading is to be applied to a rate that includes an 'all purpose' allowance. In each instance this represents a substantive change to the current entitlements of relevant employees that we maintain should not be made. Each is dealt with in the section of these submissions relating to the particular exposure draft. Ai Group contends that the circumstances of each of the four exposure drafts warrant special consideration. Each exposure draft should be amended so that the current entitlement is maintained in preference to the 'general approach'.

60. There is nothing before the Commission to suggest that the approach currently adopted in the identified awards is causing any difficulty. To require that the casual loading be applied to a rate that includes one or more all-purpose allowances would be a substantive change.

61. The approach in the relevant exposure draft for each of these awards would increase employer costs and it is opposed on this basis.

62. The approach would unjustifiably compound the benefits of either the relevant allowance or loading. There is no basis in the text of any of the relevant awards for concluding that this reflects the purpose for which either the casual loading or relevant allowances in the award is paid. Such issues were, to an extent, acknowledged by the Full Bench:

[41] [2014] FWC 9163

> [109] The concern which underlay the provisional decision was whether it was appropriate for certain allowances currently expressed as all-purpose allowances to be paid at an increased level for casual employees by reason of the application of the casual loading. Ultimately however we have concluded that to deal with this concern in the manner proposed by the provisional decision is too broad-brush an approach and involves conducting the analysis from the wrong starting point. We consider that the preferable approach is to permit reconsideration, on an award-by-award basis during the course of the 4-yearly review, as to whether any existing allowance should retain its "all purpose" designation or should be payable on some different basis.[42]

63. Ai Group agrees that the Full Bench's concern is an important matter that must be addressed. In circumstances were an award did not previously require the compounding of such entitlements it is difficult to understand how the Full Bench can be satisfied that such a term is now necessary to meet the modern awards objective, as required by s.138.

64. The Full Bench has indicated that it would permit a reconsideration of whether any allowance should retain its all-purpose designation on an award by award basis. One approach to this matter would be to amend any exposure draft that purports to contain an 'all purpose' allowance. This may be particularly applicable to the Rail Award, as it does not label the relevant allowance as an 'all purpose allowance' however the relevant exposure draft has characterised it as such.

65. The approach identified in the September decision also fails to address the circumstances where the allowance may be applied in the calculation of all relevant penalties and loadings etc., other than the casual loading.

66. Ultimately, these issues may need to be addressed differently in the context of particular awards. However, one potentially appropriate approach to addressing this matter would be to maintain the practice in a particular award of specifically defining or articulating the way in which the casual loading is to be calculated in a manner that expressly deals with, and precludes, any compounding of the relevant all-purpose allowance and to slightly modify the definition of 'all purpose' adopted in the context of that instrument.

[42] [2015] FWCFB 6656 at [109].

67. This is necessary as there will, as already identified, be a tension between the proposed 'all purpose' definition and the clause specifying what a casual employee is to be paid if there is not to be a compounding effect. In the interests of ensuring the award is simple and easy to understand this should be expressly dealt with. There may be a different means of addressing this within different awards. However, one way would be to modify the proposed definition of 'all purpose' so that, in relevant awards, it states:

> Allowances paid for all purposes are included in the rate of pay of an employee who is entitled to the allowance, when calculating any penalties, loadings <u>(except for the casual loading provided for in clause x)</u> or payment while they are on annual leave…

68. Importantly, in the context of the four awards dealt with in these submissions, the retention of the existing entitlement could not be said to be adding to any complexity in the awards. It is merely maintaining the status quo in this respect. Such an approach is appropriate given that the Review is proceeding on the basis that, prima facie, the awards meet the modern awards objective.

69. Moreover, the definition of "all-purpose allowance" is a new provision in awards. Accordingly, any difficulty reconciling the wording of the new definition with a current entitlement should not be considered a reason for varying the current award entitlements.

70. Amending the relevant exposure drafts would of course also be consistent with the maintenance of a *stable* modern award system and the need to take into consideration the impact on employment costs, as contemplated by s.134.

2.6 The application of penalties and loadings to over-award payments

71. The July 2015 Decision also considered arguments made by various parties as to whether a penalty or loading prescribed by an award is to be applied to the minimum award rate or a rate that incorporates over-award payments.

72. The Commission rejected the unions' arguments in this regard and in doing so, accepted Ai Group's contention that penalties and loadings stipulated by an award do not require an employer to apply them to over-award rates. The decision states that the exposure drafts will therefore express the relevant loadings and penalties as a percentage of the minimum rate prescribed by the award, rather than using the terms 'time and a half' or 'double time'.[43]

73. Despite this, there are certain instances in which the exposure drafts do not reflect this aspect of the Commission's decision. We have endeavoured to identify any such examples in the submissions that follow.

2.7 Schedules summarising hourly rates of pay

74. In its July 2015 Decision[44], the Commission decided that a note would be inserted in all exposure drafts that contain a schedule summarising the hourly rates payable under the award. It is in the following terms: (emphasis added)

> NOTE: Employers <u>who meet their obligations under this schedule</u> are meeting their obligations under the award.

75. Whilst we understand that it is the Commission's intention that the schedules attached to the exposure drafts be legally enforceable,[45] we are concerned that this is not achieved by the note.

76. The schedules do not, as such, impose any *obligation* on an employer. Rather, they merely summarise the rates that are payable to an employee by virtue of various clauses found in the body of the award including:

- The minimum wages provision that prescribes the rate of pay for each classification; and
- Any penalties, loadings, allowances or other premiums.

[43] [2015] FWCFB 4658 at [95] – [96].

[44] [2015] FWCFB 4658 at [63].

[45] [2015] FWCFB 4658 at [63].

77. The obligation to pay an employee a particular rate arises from the terms of the award itself. For instance, clause 10.1 of the *Exposure Draft – Rail Industry Award 2015* states that: (emphasis added)

> An employer must pay adult employees the following minimum wages for ordinary hours worked by the employee …

78. That is, clause 10.1 requires that an employer pay an employee the rates there prescribed for ordinary hours of work. Similarly, clause 13 states: (emphasis added)

> An employee will be paid the following penalty rates for all ordinary hours worked by the employee.

79. The provision then goes on to state various penalties payable for shiftwork and work performed on weekends or pubic holidays.

80. Neither the terms found in the body of the exposure drafts, nor the terms of the schedules itself, impose an obligation on an employer to pay the rates summarised in the schedules. That is, neither the exposure drafts nor the schedules purport to require the employer to pay the rates prescribed by the schedules. Therefore, the reference in the note to an employer meeting its "*obligations* under [the] schedule" appears somewhat erroneous.

81. Further, in our view, the schedules should not, and indeed cannot, provide a substitute for reading the terms of an award itself. That is, the schedules must be read in the context of the award. This is because the award contains provisions that explain the circumstances in which a particular rate is payable. Similarly, an award may provide for exceptions or caveats around the application of a particular monetary entitlement. Indeed these complexities were acknowledged by the Full Bench in its July 2015 Decision: (emphasis added)

> [61] In submissions to the Review, a number of parties have raised general and specific issues about the inclusion of such detailed schedules. In their submission of 6 March 2015, Ai Group supports the inclusion of such schedules but states that the Commission's approach must be considered on an award-by-award basis and "be guided by the submissions of the parties and outcomes of the conferencing process". While most parties support the inclusion of schedules of hourly rates, there is concern about adopting a 'one size fits all' approach. While rates including penalties

and loadings can be clearly summarised in some awards, others are more complex due to the inter-relationship between loadings or the incidence of all purpose allowances payable to only some employees.[46]

82. In our view, it would be prudent to alert a reader of the award to the need to make reference to the corresponding award provisions in order to ascertain the relevant entitlement. Indeed this is a practice that is often adopted by industrial organisations that provide summaries of rates of pay to their membership. The intention is to ensure that an employer and employee are aware of the need to consider the text of the relevant provisions, rather than to assume that a rate prescribed by the schedules is applicable in all circumstances.

83. For this reason, we propose that the note determined by the Commission be amended as follows:

NOTE: This schedule should be read in conjunction with the terms of the award. Employers who pay the relevant rates contained in ~~meet their obligations under~~ this schedule are meeting ~~their~~ the corresponding obligations under the award.

3. EXPOSURE DRAFT – BLACK COAL MINING INDUSTRY AWARD 2015

84. The submissions that follow relate to the *Exposure Draft – Black Coal Mining Industry Award 2015* (Exposure Draft), published on 4 November 2015.

Clause 7 – Classifications

85. The opening paragraph ("The classifications in which employees …") should be numbered clause 7.1. We note that the subsequent subclause (headed "Employer and employee duties") is numbered as subclause 7.2.

Clause 8.1 – Ordinary hours of work

86. At section 2.4 of these submissions, we have set out our concerns in respect of s.147 of the Act. It is our view that in many instances, the ordinary hours of work provisions in an award do not meet the requirements of s.147. The Black

[46] [2015] FWCFB 4658 at [61].

Coal Award is one such award. Should the Commission determine that it is appropriate to rectify this issue, we propose that clause 8.1 of the exposure draft be amended as follows:

> An employee's ordinary hours of work are <u>up to</u> 35 hours per week, or an average of <u>up to</u> 35 hours per week over a roster cycle.

Clause 8.7(f)(ii) – RDO falling on a recognised public holiday

87. Clause 8.7(f)(ii) of the Exposure Draft should be amended by inserting "such" after the words "for each" to make clear that the provision relates only to those public holidays that coincide with a RDO. This is consistent with the current clause 23.6(f)(ii).

Clause 13.1 – Penalty rates

88. Clause 13.1 deals specifically with shiftwork rates. It corresponds with the current clause 22.2.

89. Clause 22.2 does not characterise the shift premium as a penalty, loading or otherwise. We note however, that clause 25.7(b), which deals with payment for annual leave, refers expressly to 'shift allowances'. Given that there are no other provisions that provide for a shift premium, this must necessarily be a reference to the payments prescribed by clause 22.2.

90. Clause 15.9(b) of the Exposure Draft relates to payment for annual leave. It too refers to 'shift allowances'. However, clause 13.1, which specifies the shiftwork rates, currently appears below a heading that states 'Penalty rates'. We are concerned that this may result in the characterisation of the relevant shift premiums as 'penalties'.

91. We refer to our submissions at section 2.2 above. Consistent with the concerns we have there raised, a new subheading should be inserted above clause 13.1 as follows:

> **13.1 Shift allowances**

Clause 13.3(a)(i) – Change of shift for permanent day shift employees – For at least three consecutive days

92. The reference to clause 14.3 in the clause 13.3(a)(i) should be substituted with a reference to clause 14.2. This appears to be a drafting error.

Clause 14.1 – Overtime

93. The current clause 17.1 includes an exemption for clause 17.7 (Call-back). The cross reference contained in clause 14.1 of the Exposure Draft should therefore be amended to refer to clause 14.8, which corresponds with the current clause 17.7.

Clause 14.2(b) – Payment for overtime

94. Consistent with the Commission's July 2015 decision at paragraphs [95] – [96], clause 14.2(b) of the Exposure Draft should be amended by inserting the words "of the minimum hourly rate" after the reference to "200%".

Clause 15.8(c) – Paid leave in advance of accrual

95. The reference to clause 15.2(b) should be replaced with a reference to clause 15.3. This is consistent with the current clause 25.9(c).

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

96. The parties agreed that clause 18.3(b) of the Exposure Draft should be deleted. We refer to the amended exposure draft filed by Ai Group on 14 January 2015. This should be amended in the Exposure Draft.

Clause 18.4 – Employee required to work on a public holiday

97. Pursuant to paragraph [13] of the October 2015 Decision, Ai Group is seeking to vary clause 18.4 of the Exposure Draft. We refer to correspondence filed on 13 November 2015.

Schedule A.8.2 – Wage related allowances and reimbursements

98. The third column of the table should be amended to include the frequency with which the allowance is payable. For instance, with respect to the washery allowance, the third column should read "0.63 per day or per shift". This is to make clear how the allowance in the third column is derived.

Schedule B.2.1 – Minimum rates – adults

99. Consistent with the Commission's July 2015 Decision[47], the casual hourly rate column should be deleted from Schedule B.2.1.

Schedule B.3.1 – Wage related allowances and reimbursements

100. We make the same observation regarding the third column in Schedule B.3.1 as we have above regarding Schedule A.8.2.

Schedule C – Summary of Hourly Rates of Pay – Production and Engineering Employees

101. Schedule C should be amended to include the note as determined in the July 2015 Decision.[48]

Schedule C.2 – Casual employees

102. The Black Coal Award does not currently permit the engagement of production and engineering employees on a casual basis. Schedule C.2 is therefore unnecessary and should be deleted.

Schedule D – Summary of Hourly Rates of Pay – Staff Employees

103. Schedule D should be amended to include the note as determined in the July 2015 Decision.[49]

[47] [2015] FWCFB 4658 at [54].
[48] [2015] FWCFB 4658 at [63].
[49] [2015] FWCFB 4658 at [63].

Accident Pay

104. It appears that clause 18 of the current award has been omitted from the Exposure Draft.

4. EXPOSURE DRAFT – GAS INDUSTRY AWARD 2015

105. The submissions that follow relate to the *Exposure Draft – Gas Industry Award 2015* (Exposure Draft), published on 30 October 2015.

Clause 6.5(c) – Casual loading

106. Clause 6.5(c) should be deleted. Such a provision does not appear in the Gas Award and is both unnecessary and problematic. We understand that the ACTU and other unions' have also raised concerns about such provisions appearing in other exposure drafts and have commonly agreed that they should be removed.

Clause 9.1(b) – Meal breaks

107. Consistent with the Commission's July 2015 Decision at paragraphs [95] – [96], clause 9.1(b) of the Exposure Draft should be amended by inserting the words 'of the minimum hourly rate' after the reference to '200%'.

Clause 9.1(c) – Meal breaks

108. Consistent with the Commission's July 2015 Decision at paragraphs [95] – [96], clause 9.1(c) of the Exposure Draft should be amended by inserting the words 'of the minimum hourly rate' after the reference to '150%'.

Clause 9.1(d) – Meal breaks

109. Consistent with the Commission's July 2015 Decision at paragraphs [95] – [96], clause 9.1(b) of the Exposure Draft should be amended by inserting the words 'of the minimum hourly rate' after the reference to '150%'.

Clause 13.8 – Overtime rates and penalties

110. We refer to our submissions at section 2.2 above. Consistent with the concerns we have there raised, clause 13.8 should be amended to make clear that the additional amounts payable for work performed on an afternoon or night shift are *loadings*, rather than *penalties*. This is consistent with the current clause 21.6(a) and (b). This might be best achieving by removing the relevant rates from the table in clause 13.8 and creating a new subclause headed 'shift loadings'.

Clause 14.5(a)(i) – Annual leave loading

111. Consistent with our submission above, clause 14.5(a)(i) should be amended by inserting the word 'loading' after 'shift'. This is to make clear that the reference contained in that clause is to the shift premiums currently prescribed in clause 13.8.

Clause 14.5(a)(ii) – Annual leave loading

112. Consistent with our submission above, clause 14.5(a)(ii) should be amended by substituting 'allowance' with the word 'loading'. This is to make clear that the reference contained in that clause is to the shift premiums currently prescribed in clause 13.8.

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

113. In accordance with the Commission's decision to remove NES summaries from the exposure drafts, clause 14.6(a) should be deleted. Such a provision does not appear in the Gas Award.

Clause 19.2 – Notice of termination by an employee

114. There appears to be a drafting error in clause 19.2 which should be amended as follows:

> … the employer may withhold <u>from</u> any money due to the employee …

‘Availability Duty’ Claim

115. The AWU is seeking the insertion of new provisions in respect of ‘availability duty’. This is a substantive variation to the current Award. We note that the AWU filed submissions and evidence in support of its proposal on 5 November 2015.

116. Ai Group intends to have discussions with the AWU about its claim, but this has not yet occurred.

117. We assume that the Commission intends to deal with this issue separately from the Exposure Draft issues, and that directions for filing submissions and evidence in reply will be issued at a later stage.

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

118. The submissions that follow relate to the *Exposure Draft – Hydrocarbons Industry (Upstream) Award 2015* (Exposure Draft), published on 30 October 2015.

Clause 5.1 – Facilitative provisions

119. In clause 5.2(a), the words “clauses 0” should be replaced with “clause 8.2(b)”.

Clause 6.4(c) – Casual loading

120. The October 2015 Decision deals with the issue of whether the casual loading applies to the minimum hourly rate or the ordinary hourly rate by reference to the relevant earlier decisions of the Commission. Based on those decisions, and the absence of any submissions about the interpretation of the relevant ‘all purpose allowance’ clauses, the Commission expressed the view that the

casual loading in the Exposure Draft is to be applied to the ordinary hourly rate.[50]

121. In the earlier decisions referred to, the Commission determined that whether the casual loading is to be applied to the minimum hourly rate or the ordinary hourly rate will be determined on an award by award basis.[51] We refer also the July 2015 Decision, which we have earlier set out. The Full Bench there concluded that whether a particular loading or penalty is to be applied before or after any all purposes allowances is a matter that ultimately turns on the construction of the current award provisions. Accordingly, we here propose to make submissions that deal specifically with the construction of the casual loading provision, which does not appear to have been put to or considered by the Commission.

122. Clause 6.4(c)(i) of the Exposure Draft corresponds with the current clause 10.4(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 14, plus a casual loading of 25%. The minimum engagement for a casual will be one day.

123. Clause 14 of the Hydrocarbons Award is headed 'Minimum wages'. Clause 14.1 contains the weekly award wage payable for each of the classifications/skill levels 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 10.4(b) to the "minimum weekly rate of pay for their classification in clause 14" is clearly to the rates there prescribed.

124. A plain reading of clause 10.4(b) suggests that a casual employee is to be paid:

- 1/38th of the minimum weekly rate for their classification set out in clause 14; and

- 25% in addition to the above amount.

[50] [2015] FWCFB 7236 at [57] – [59].

[51] [2015] FWCFB 4658 at [70] – [72] and [2015] FWCFB 6656 at [109].

125. That is, clause 10.4(b) entitles a casual employee to 125% of 1/38th of the minimum weekly rate set out in clause 14.1 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.

126. Clause 10.4(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' must, therefore, be read subject to the specific terms of clause 10.4(b).

127. The reference to the 'minimum weekly rate in clause 14' contained in clause 10.4(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 on clause 14. The approach adopted in the Exposure Draft disregards the very specific wording of clause 10.4(b).

128. It is on this basis that Ai Group contends that clause 6.4(c)(i) of the Exposure Draft should be amended as follows:

> For each ordinary hour worked, a casual employee must be paid no less than:
>
> - the ordinary hourly rate; and
> - a loading of 25% of the ~~ordinary~~ minimum hourly rate,
>
> for the classification in which they are employed.

Clause 11.2(a) – All purpose allowances

129. Consistent with the Commission's decision[52], clause 11.2(a) should be amended as follows:

> Allowances paid for all purposes are included in the rate of pay of an employee who is entitled to the allowance, when calculating any penalties, loadings or payment while they are on annual leave. …

[52] [2014] FWCFB 9412 at [44] – [53] and [2015] FWCFB 4658 at [91].

Clause 20.2 – Notice of termination by an employee

130. There appears to be a drafting error in clause 20.2 which should be amended as follows:

> … the employer may withhold from any money due to the employee …

Schedule B.3 – Casual employees

131. We refer to our submissions above in respect of clause 6.4(c). If our contention is accepted, the rates in Schedule B.3 will require recalculation.

Schedule B.3 – Casual employees

132. Clause 26.3(b) of the Hydrocarbons Award states as follows:

> **(b)** Any payments under this clause are in substitution of any other loadings or penalty rates.

133. This provision is replicated at clause 14.5(b) of the Exposure Draft.

134. The casual loading is a loading as contemplated by the above clause. As a result, where a casual employee is paid overtime, shiftwork penalties, weekend penalties or public holiday penalties, they are not entitled to the casual loading. Schedule B.3 should be amended accordingly.

135. We note that the issue of whether the casual loading is payable during *overtime* has been referred to the Casual Employment Full Bench.[53] For the reasons we have here set out, the issue is not confined to the payment of overtime rates.

[53] [2015] FWCFB 7236 at [36].

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

136. The submissions that follow relate to the *Exposure Draft – Manufacturing and Associated Industries and Occupations Award 2015* (Exposure Draft), published on 4 November 2015.

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

137. **Ai Group is extremely concerned about the content of paragraphs [95] to [106] of the Full Bench's October 2015 Decision regarding the Manufacturing Award.** [54] **If the proposal in these paragraphs is proceeded with for nearly all of the clauses identified in paragraph [105] of the Commission's decision, there will be huge cost implications, unworkable outcomes and other adverse consequences for employers covered by this Award.**

138. **The Commission's proposal to replace the terms 'ordinary hourly rate' and 'ordinary time rate' in the current award with the term 'applicable rate of pay' (defined to include penalties and loadings) in the clauses identified in paragraph [105] has, in effect, come 'out of the blue'. That is, the use of the term as defined was not sought by any interested party, nor has it been previously put to parties by the Commission. This is despite the sweeping effects of the proposal and the disturbance of very longstanding industry practice and existing award entitlements.**

139. **The October 2015 Decision directs parties to "consider the proposed changes including if there are any clauses incorrectly identified as requiring the change or not identified that do require the change". Such submissions are to be made in accordance with paragraphs [357] – [358]**

[54] [2015] FWCFB 7236

of the decision, where the Full Bench stated its expectation that "these matters will be finalised on the papers".

140. **It is Ai Group's contention that all but one of the provisions identified by the Commission should not be changed to adopt the term 'applicable rate of pay'. In accordance with the Commission's directions, the effects of the proposal on each relevant clause are outlined in this submission. If the Full Bench remains unconvinced of the major problems and unfairness for employers that would result from replacing the terms 'ordinary hourly rate' and 'ordinary time rate' with 'applicable rate of pay', 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.**

141. 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.[55] Indeed the preamble to the Exposure Draft[56] states:

> This exposure draft does not seek to amend any entitlements under the Manufacturing Award but has been prepared to address some of the structural issues identified in modern awards.

142. Further, the October 2015 Decision was the first handed down in respect of the subgroup 1C – 1E exposure drafts. The introductory paragraphs of that decision state that it deals with "technical and drafting issues".

143. Whilst the intention of introducing the term 'applicable rate of pay' and its definition in the Exposure Draft may not be to alter the entitlement under the relevant provisions of the Manufacturing Award, for the reasons that follow, this will undoubtedly be the case for nearly all of provisions identified by the Commission. This effectively amounts to a substantive change and therefore one that falls beyond the scope of a mere redrafting of the current instrument 'to address some of the structural issues identified in modern awards'. Nor is it merely a technical or drafting issue. We therefore contend that if, despite the

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[55] See for example, [2014] FWCFB 5537 at [11] and [2014] FWCFB 9412 at [140].

[56] See p.2 of 4 November 2015 exposure draft.

submissions that follow, the Commission is minded to adopt the proposed terminology, directions should be issued for the filing of submissions and evidence in support of the proposed variations to the relevant award terms, material in reply, and a hearing thereafter. In particular, Ai Group would seek an opportunity to call evidence that goes to industry practice in respect of these provisions.

144. It should also be noted that the term ‘applicable rate of pay’ and the proposed definition was not one that was sought by any interested party, including the AMWU.

145. In its earlier submissions, the AMWU proposed that the term ‘ordinary time rate’ be retained in certain provisions or, in the alternate, that the definition of ‘ordinary hourly rate’ be amended.[57]

146. In its most recent submissions regarding the Exposure Draft, the union again argued that the term ‘ordinary time rate’ should be retained in certain provisions of the Exposure Draft.[58] The following day, Ai Group wrote to Commissioner Bissett, as she had assisted the parties by chairing multiple conferences in respect of the Exposure Draft. In that letter, we highlighted that various issues regarding the expression of rates of pay in the Manufacturing Award remained a live issue. This included the definition of ‘all purpose’ and the use of the term ‘ordinary hourly rate’ which, at that stage, remained a matter to be determined by the Commission. We requested that an opportunity be provided to parties to review and make comment on any revised exposure draft published once those matters were determined and reflected in an updated exposure draft. We did not receive a response to that correspondence, however the relevant decision was handed down in July 2015. The most recent iteration of the Exposure Draft, dated 4 November 2015, is the first exposure draft to be published since that decision was issued.

[57] See AMWU’s submissions dated 29 October 2014 at paragraphs 58 – 60 and AMWU’s submissions dated 6 March 2015, filed in the context of proceedings regarding the definition of ‘all purpose’ and the definition of the ‘ordinary hourly rate’.

[58] See AMWU submissions dated 21 April 2015 at paragraph 49.

147. Ai Group strongly opposes the use of the term 'applicable rate of pay' in the following clauses identified in paragraph [105] of the Full Bench's October 2015 Decision:[59]

- Clause 14.1(b) – Meal breaks
- Clause 14.5(a) & (b) – Working through meal breaks
- Clause 23 – Extra times not cumulative
- Clause 27.4(e)(i) – Travelling time payment
- Clause 30.10 – Rest break
- Clause 30.13 – Standing by
- Clause 34.5 – Rostered day off falling on public holiday
- Clause 39.3 – Transfer to lower paid duties

148. Ai Group does not oppose the use of the term 'applicable rate of pay' in clause 15 – Ship trials.

149. The Commission has proposed the following definition of 'applicable rate of pay' which we submit would be highly inappropriate and unworkable for the clauses identified in paragraph [105] of the Commission's decision, except for clause 15 – Ship trials:

> **Applicable rate of pay** means the ordinary hourly rate plus penalties and relevant loadings.

150. The reason why the terms 'ordinary hourly rate' and 'ordinary time rate' are used in the existing Manufacturing Award (and its predecessors) is to make it clear that penalties and loadings are not applied to the rate. By replacing these terms in the Award with 'applicable rate of pay' (defined as including

[59] [2015] FWCFB 7236

penalties and loadings), the entitlements in the Award would be subject to major disturbance at great cost to employers.

151. The effects of using the term ‘applicable rate of pay’ in the clauses identified in paragraph [105] of the Commission’s October 2015 Decision are outlined below.

Clause 14 - Meal breaks

152. The relevant provisions in the existing meal breaks clause (clause 38) in the Manufacturing Award are structured as follows:

- Clause 38.1(a) contains the main entitlement, i.e. an entitlement to a meal break within five hours.

- Clause 38.1(b) is a facilitative provision that enables the five hour period to be extended to six hours by agreement. The use of the term ‘ordinary time rate’ in this paragraph is intended to ensure that the 150% penalty in clause 38.5 does not apply in such circumstances.

- Clause 38.4 is a provision that requires that work be carried out during meal breaks in limited, specified circumstances. The use of the term ‘ordinary time rate’ in this paragraph is intended to ensure that the 150% penalty in clause 38.5 does not apply in such circumstances.

- Clause 38.5 contains a 150% penalty for all work done during meal breaks and thereafter until a meal break is taken, except as otherwise provided in clause 38.

153. The Exposure Draft replaces the term ‘ordinary time rate’ in clauses 38.1(a) and 38.1(b) with ‘applicable rate of pay’. Given that the definition of ‘applicable rate of pay’ includes penalties, the entire structure of clause 14 of the Exposure Draft would become unworkable:

- The flexibilities in clauses 14.1(b) and 14.4(a) would become meaningless because the ‘applicable rate of pay’ would potentially include the penalty in clause 14.4(b); and

- The 150% rate in clause 14.5(b) would be applied to a rate that included penalties, resulting in double penalties.

154. The term 'ordinary hourly rate' needs to be used in clauses 14.1(b), 14.4(a) and 14.4(b). This would ensure that the entitlements are no less generous than those in the current Award. Arguably the entitlements would be more generous because the Commission has included all purpose allowances in the definition of 'ordinary hourly rate'.

155. In its October 2015 Decision, the Commission said:

> **[99]** Clause 14.5 provides for payment when working through a meal break:
>
> > **14.5 Working through meal breaks**
> >
> > **(a)** Subject to clause 14.1, an employee must work during meal breaks at the <u>ordinary hourly rate</u> whenever instructed to do so for the purpose of making good any breakdown of plant or for routine maintenance of plant which can only be done while the plant is idle.
> >
> > [emphasis added]
>
> **[100]** The effect of clause 14.5 in conjunction with the definition of "ordinary hourly rate" means that an employee who receives a loading or penalty for ordinary hours of work (e.g. 150% for a day worker working ordinary hours on a Saturday) will receive a *lesser* amount when working through a meal break as they are only entitled to the ordinary hourly rate during such a period.
>
> **[101]** The wording of the equivalent clauses in the *Manufacturing and Associated Industries and Occupations Award 2010* indicate that an employee is required to be paid the same rate when working through a meal break that they would otherwise receive for working ordinary hours.[60]

156. If the Commission wishes to ensure that employees are not paid at a lower rate when working through a meal break in the circumstances identified in clause 14.5(a) in the Exposure Draft, this could be resolved be replacing the words 'at the ordinary hourly rate' with the words 'without deduction of pay'. This would ensure that the employee does not receive a lower rate of pay during the meal break, but it would not entitle the employee to the penalty in clause 14.5(b) which clearly is not intended. The term 'without deduction of pay' has been used in the overtime rest break clause of the Award (current clause 40.10(a)) for many decades without difficulties.

[60] [2015] FWCFB 7236 at [99] – [101].

157. For the reasons identified above, the use of the term ‘ordinary hourly rate’ needs to be used in clause 14.5(b). The use of ‘applicable rate of pay’ in clause 14.5(b) would be unworkable.

Clause 15 – Ship trials

158. Clause 39.4 of the existing award states:

> “The employee must be paid 25% extra for time on duty while the vessel is at wharf and 50% extra for time on duty while the vessel is at harbour or at sea”.

159. The clause only applies to an employee in the technical field (i.e. a draughting, planning or technical employee) and only when the employee is engaging in sea trials.

160. Clause 39.4 is derived from clause 9.10.4 of Part II (Draughting, Planning and Technical Employees) of the *Metal, Engineering and Associated Industries Award 1998*. Clause 9.10.4 of the pre-modern award stated:

> “9.10.4(a) Whilst a vessel is at wharf – the rate payable pursuant to Part II for work performed on the days and at the time in question, plus 25 per cent of the ordinary daily rate for such work.
>
> 9.10.4(b) Whilst a vessel is in harbour or at sea – the rate payable pursuant to Part II for work performed on the days and at the time in question, plus 50 per cent of the ordinary daily rate for such work.

161. It is clear from the relevant clause in the pre-modern award and the clause in the existing Manufacturing Award that the employee is entitled to receive whatever penalties and loadings apply to the work in question, as well as an additional 25% or 50%.

162. Accordingly, unlike all the other clauses identified in paragraph [105] of the Commission’s October 2015 Decision, the use of the term ‘applicable rate of pay’ is workable within clause 15 of the Exposure Draft.

163. The wording of the Ship Trials clause in the existing Award and in the pre-modern award is informative. It highlights the very different wording that is used in the Award when it is the intention for an employee to receive the ‘ordinary time rate’ as well as the relevant penalties and loadings. The

wording in this clause contrast starkly with the wording used in the other clauses identified in paragraph [105] of the October 2015 Decision.

Clause 23 - Extra rates not cumulative

164. The ‘Extra Rates not Cumulative’ clause in the Award has a long history.

165. Clause 23 of the *Metal Industry Award 1984 – Part I* was worded as follows:

> “23. EXTRA RATES NOT CUMULATIVE
>
> Extra rates in this award except rates prescribed in clause 17 and in clause 22 as to work on public holidays, are not cumulative so as to exceed the maximum of double the ordinary time.”

166. Clause 5.10 of the *Metal, Engineering and Associated Industries Award 1998* was worded as follows:

> “5.10 EXTRA RATES NOT CUMULATIVE
>
> Extra rates in this award except rates prescribed in 5.9.3 (Special Rates) and rates for work on public holidays, are not cumulative so as to exceed the maximum of double the ordinary rates.”

167. The purpose of this clause is to prevent one penalty or loading being applied on top of another penalty of loading resulting in the employer paying more than 200% of the ordinary time rate. The reason why public holidays are referred to specifically is that in some cases, employees who work on a public holiday are entitled to 250% of the ordinary time rate.

168. The replacement of the term ‘ordinary hourly rate’ in clause 23 of the Exposure Draft with ‘applicable rate of pay’ would make the clause unworkable and meaningless.

169. The clause is intended to, for example, prevent a shiftworker who works overtime receiving both the overtime penalty and the shift loading. The use of the term ‘applicable rate of pay’ (defined to include penalties and loadings) would facilitate penalties and loadings being applied on top of other penalties and loadings – the very outcome that the clause is intended to prevent.

170. The term ‘ordinary hourly rate’ needs to be used in clause 23. This would

ensure that the entitlements are no less generous than those in the current Award. Arguably the entitlements would be more generous because the Commission has included all purpose allowances in the definition of 'ordinary hourly rate'.

171. **Clause 27.4(e)(i) – Travelling time payment**

172. Travelling time is paid at a standard rate that is understandably lower than the rate paid for work carried out at nights, weekends etc because the employee is often sitting on a plane, bus, train, etc when travelling, rather than working.

173. The replacement of the term 'ordinary time' in existing clause 32.4(e) with 'applicable rate of pay' (defined to include penalties and loadings) would make the clause unworkable, and impose significant cost increases on employers:

- The intended lower rate applicable to travelling would become meaningless because the 'applicable rate of pay' would potentially include all the penalties that would apply if the employee was at work; and

- The 150% rate in clause 27.4(e)(i) of the Exposure Draft would be applied to a rate that includes penalties, resulting in double penalties.

174. The term 'ordinary hourly rate' needs to be used in clause 27.4(e)(i). This would ensure that the entitlements are no less generous than those in the current Award. Arguably the entitlements would be more generous because the Commission has included all purpose allowances in the definition of 'ordinary hourly rate'.

175. **Clause 30.10 – Rest break**

176. The overtime rest break provision in the existing Award (clause 40) is structured as follows, consistent with very longstanding provisions in predecessor metal industry awards:

- Clause 40.10(a) – provides that rest breaks during overtime are generally to be given 'without deduction of pay'. This includes relevant loadings and penalties that would be payable if the employee was working at the time in question.

- Clause 40.10(b) – entitles an employee to a lower rate of pay (i.e. the 'ordinary time rate') than the relevant overtime rate for the first rest break where overtime is worked on a weekend or public holiday. Subsequent breaks must be provided 'without loss of pay' in accordance with clause 40.10(a).

- Clause 40.10(c) – entitles an employee to a lower rate of pay (i.e. the 'ordinary time rate') than the relevant overtime rate for the first rest break, where overtime is worked immediately after the completion of ordinary hours. Subsequent breaks must be provided 'without loss of pay' in accordance with clause 40.10(a).

177. The Exposure Draft replaces the term 'ordinary time rate' in clauses 30.10(b) and (c) with 'applicable rate of pay'. Given that the definition of 'applicable rate of pay' includes penalties, the whole structure of clause 30.10 would become unworkable.

178. The reason why the employee is entitled to the 'ordinary time rate' (without any loadings or penalties) for the rest break in 40.10(b) is because the employee is not working. Most meal breaks under the award are unpaid. The meal break in this clause is paid, but at a lower rate than some other paid breaks. It is a very longstanding provision that is very widely applied in industry.

179. The reason why the employee is entitled to the ordinary time rate (without any loadings or penalties) for the rest break in 40.10(c) is because the employee has not yet started any overtime. This is a very longstanding provision in the metal industry awards that is very widely applied in industry. Once the overtime commences, the employee receives 150% or 200% for all overtime worked, and the following break is paid 'without loss of pay' (see 30.10(a)).

180. The break in clause 30.10(c) (existing clause 40.10(c)) is not regarded as overtime, but rather a break before overtime commences. This was clarified in a 1943 decision[61] of O'Mara J in relation to the Metal Trades Award.

181. If the term 'applicable rate of pay' was used in clauses 30.10(b) and (c), the flexibilities in these clauses would become meaningless because the 'applicable rate of pay' would have the same effect as the term 'without loss of pay' in clause 30.10(a).

182. The term 'ordinary hourly rate' needs to be used in clauses 30.10(b) and (c). This would ensure that the entitlements are no less generous than those in the current Award. Arguably the entitlements would be more generous because the Commission has included all-purpose allowances in the definition of 'ordinary hourly rate'.

30.13 – Standing by

183. The reason why time spent standing by is paid at a standard rate that is lower than the rate paid for work carried out at nights, weekends etc is that the employee is often watching television, enjoying time with family etc, rather than working.

184. The entitlement to the 'ordinary time rate' has caused some difficulties for employers because it is excessively generous in an era when technology has removed the need for employees to wait at home next to a fixed telephone. For this reason, many employers have negotiated allowances and other more appropriate provisions in enterprise agreements. Despite the difficulties with the current clause, Ai Group is not seeking a change to the provision at this time.

185. Replacing the term 'ordinary time rate' in existing clause 40.6 with 'applicable hourly rate' (defined to include penalties and loadings) would make the clause so generous that it would be completely unworkable. A major cost increase would be imposed on the large number of employers who need to use the

[61] (1943) 49 CAR 153, at 154.

standing by provisions because of the nature of their operations.

186. The term 'ordinary hourly rate' needs to be used in clause 30.13. This would ensure that the entitlements are no less generous than those in the current Award. Arguably the entitlements would be more generous because the Commission has included all purpose allowances in the definition of 'ordinary hourly rate'.

34.5(a)(i) – Rostered day off falling on a public holiday

187. Clause 44.3 of the current Award was the subject of extensive negotiation between Ai Group and the Metal Trades Federation of Unions (MTFU) during the award simplification process in 1996-98. Eventually the wording of the provision was agreed upon and the Australian Industrial Relations Commission included the agreed clause in the *Metal, Engineering and Associated Industries Award 1998*. In 2008-09, Ai Group and the MTFU agreed that the clause should be inserted into the Manufacturing Award.

188. The use of the term 'ordinary time rate' in existing clause 44.3(a)(i) was intended to mean that loadings and penalties did not apply to the rate. Ai Group submits that it was the intention of the industrial parties that a full-time employee receive significant compensation when a public holiday falls on a non-working day (other than a weekend), but not necessarily the same compensation as would apply had the employee worked on the day.

189. The replacement of the term 'ordinary time rate' in existing clause 44.3(a)(i) with 'applicable rate of pay' (defined to include penalties and loadings) would impose significant cost increases on employers and make the option in existing clause 44.3(a)(i) far less attractive.

190. The term 'ordinary hourly rate' needs to be used in clause 34.5(a)(i) of the Exposure Draft. This would ensure that the entitlements are no less generous than those in the current Award. Arguably the entitlements would be more generous because the Commission has included all purpose allowances in the definition of 'ordinary hourly rate'.

Clause 39.3 – Transfer to lower paid duties

191. The origin of clause 39.3 in the Exposure Draft can be traced back to the decision of the Australian Conciliation and Arbitration Commission in the 1984 *Termination, Change and Redundancy Case*:

> "…We are of the opinion that, in general, employers do try to minimize retrenchments and to accommodate the displacement effects in relevant cases through natural wastage and retraining, and we do not think it necessary, or desirable, to make award prescriptions to cover these matters. However consistent with the remainder of our decision, we are prepared to provide that where an employee is transferred to lower paid duties because the employer no longer wishes the job the employee is has been doing, done by anyone, then the employee should be entitled to the same period of notice of the change in employment as he would have been entitled to if his/her employment has been terminated. Alternatively, the employer shall pay to the employee maintenance of income payments calculated to bring the rate up to the rate applicable to his/her former classification."[62]

192. The wording in the clause reflects an agreed position reached between the ACTU, Ai Group and ACCI during the course of proceedings associated with the 2004 *Redundancy Case*.[63]

193. The compensation in the clause is not intended to reflect shift loadings or overtime penalties applicable to work that might have been carried out in the former role.

194. The term 'ordinary hourly rate' needs be used in clause 39.3 of the Exposure Draft. This would ensure that the entitlements are no less generous than those in the current Award. Arguably the entitlements would be more generous because the Commission has included all purpose allowances in the definition of 'ordinary hourly rate'.

[62] *Termination, Change and Redundancy Case*, Print F6230; (1984) 8 IR 34 at p.67

[63] *Redundancy Case*, 26 March 2004, PR032004.

'Ordinary pay' has a generally understood and accepted meaning in industrial usage

195. As identified by a Full Bench of the Commission in *Fonterra Brands v AMWU,*[64] the term 'ordinary pay' has a generally understood and accepted meaning in industrial usage, namely remuneration for an employee's weekly hours but excluding any amount paid for shiftwork, overtime or other penalties.

196. The following extract from the Full Bench's decision is relevant (emphasis added, footnotes omitted):

> **[16]** The term 'ordinary pay' has a well-established and common industrial meaning and usage, namely remuneration for an employee's weekly hours but excluding any amount paid for shift work, overtime or other penalty. Giving the words of the Agreement their ordinary and 'industrial context' meaning, we consider there is no room for a conclusion such as that which was reached by the Commissioner.
>
> **[17]** The meaning of 'ordinary pay' in an award context was considered by Madgwick J in *Kucks v CSR Ltd* where it was held, having regard to the High Court decision in *Scott v Sun Alliance*, that terms like "ordinary rate of pay" and "standard hours" have well-known meanings in the sphere of industrial relations in this country. His Honour also referred to the definition in the Macquarie Dictionary:
>
>> "In Australia, the term "ordinary pay" has, according to the Macquarie Dictionary, 2nd edn, entered the language, as meaning:
>>
>>> "ordinary pay .... remuneration for an employee's normal weekly number of hours fixed under the terms of his employment but excluding any amount payable to him for shift work, overtime, or other penalty."
>
> **[18]** The award provision in that case dealt with the payment to be made to employees on termination of employment in respect of untaken long service leave. His Honour said that the adoption of the generally accepted meaning of 'ordinary pay' in the provision was even more apt in the context of the award that was before the Court. In this regard reference was made to other provisions of the award dealing with matters such as annual leave and sick leave where it was provided that such leave shall be granted "on full pay". It was said that when "the framer(s) of the award wished to indicate that full, usual pay should be paid, they had no difficulty in making their meaning plain."
>
> **[19]** The term 'ordinary pay' is not defined in the Agreement. In these circumstances, and unless there are strong contextual or other reasons for adopting a different approach, we consider that 'ordinary pay' as it is used in the Agreement should be given its generally understood and accepted meaning in industrial usage. This is also the meaning which can be construed from a consideration of the Agreement as a

[64] *Fonterra Brands (Australia) Pty Ltd v "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)* [2015] FWCFB 3423.

whole and which is generally in line with the purpose of providing redundancy entitlements.

197. The insertion of the term ‘applicable rate of pay’ in any of the following clauses would conflict with the generally understood and accepted meaning of the existing award provisions:

- Clause 14.1(b) – Meal breaks
- Clause 14.5(a) & (b) – Working through meal breaks
- Clause 23 – Extra times not cumulative
- Clause 27.4(e)(i) – Travelling time payment
- Clause 30.10 – Rest break
- Clause 30.13 – Standing by
- Clause 34.5 – Rostered day off falling on public holiday
- Clause 39.3 – Transfer to lower paid duties

198. Ai Group does not oppose the use of the term ‘applicable rate of pay’ in clause 15 – Ship trials, because unlike the other clauses above, the wording of the clause in the existing award and in the relevant pre-modern clause specify that the penalties and loadings are to be paid at the time in question.

6.2 Other matters arising from the Exposure Draft

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

199. The reference to clause 14.1(a) should be substituted with ‘clause 14.1(b)’. This is consistent with the current clause 8.3(a) and appears to be a drafting error.

Clause 5.4(a) – Facilitation by majority agreement

200. The reference to clause 13.3(b) should be substituted with ‘clause 13.3(d)’. This is consistent with the current clause 8.4(a) and appears to be a drafting error.

Clause 5.4(a) – Facilitation by majority agreement

201. The reference to clause 13.4(a) should be substituted with ‘clause 13.4(b)’. This is consistent with the current clause 8.4(a) and appears to be a drafting error.

Clause 5.4(c) – Additional safeguard

202. The reference to clause 13.3(b) should be substituted with ‘clause 13.3(d)’. This is consistent with the current clause 8.4(c)(i) and appears to be a drafting error.

Clause 5.4(c) – Additional safeguard

203. The reference to clause 13.4(a) should be substituted with ‘clause 13.4(a)’. This is consistent with the current clause 8.4(c)(i) and appears to be a drafting error.

Clause 6.3(ii) – Public holidays

204. The cross references should be replaced with: ‘clauses 13.2(g), 29.2(i) and 30.6’.

Clause 6.4(b)(i) – Casual loading

205. Consistent with clause 16.1 and the second bullet point, the first bullet point under clause 6.4(b)(i) should be amended by substituting ‘rate’ with ‘wage’.

Clause 7.11(c)(i) – Travel payment for block release training

206. A full stop should be inserted between ‘training’ and ‘Provided’. This appears to be a drafting error.

Clause 9.2(i) – Technology cadets

207. There should be a space between 'clause 9.2(h)' and 'termination'.

Clause 13.3(d) – Ordinary hours of work – continuous shiftwork

208. The word 'are' in the third line should be replaced with 'is'. This appears to be a drafting error.

Clause 14.1(a) – Meal breaks

209. The words 'a break for' should be deleted from the last line. This appears to be a drafting error.

Clause 14.5(b) – Working through meal breaks

210. The word 'employees' should be substituted with 'an employee'. This appears to be a drafting error.

Clause 16.1(a) – Adult employee minimum wages

211. Clause 16.1 of the Exposure Draft contains the minimum weekly and hourly wages payable under it. Clause 16.1(a) in earlier iterations of the Exposure Draft was in the following terms:

> An employer must pay an adult employee, other than one specified in clause 16.1(c), the following wages for ordinary hours worked by the employee: …

212. The corresponding provision of the Manufacturing Award states: (clause 24.1(a)):

> The classifications and minimum wages for an adult employee, other than one specified in clause 24.1(c), are set out in the following table: …

213. Clause 16.1(a) of the Exposure Draft has been amended, pursuant to the Commission's consideration of a proposal from the AMWU: (emphasis added)

> [73] <u>The AMWU submits that the text at clause 16.1(a) of the Exposure Draft may be misleading.</u> They propose that the clause in the Exposure Draft be amended to read:
>
> 16.1 Adult employee minimum wages

> (a) An adult employee, other than one specified in clause 16.1(d), within a level specified in the following table will be paid not less than the rate per week assigned to the appropriate classification, as defined in Schedule A — Classification Structure and Definitions, in which the employee is working:
>
> …
>
> (b) The rates in clause 16.1(a) prescribe minimum classification rates only. The payment of additional allowances may be required by other clauses of this award in respect of both weekly and hourly payments.
>
> with the remaining paragraphs re-numbered accordingly.

[74] These changes are supported by the unions with an interest in the award.

[75] Business SA have proposed that an additional sentence be included in the text of the Exposure Draft at clause 16.1(a) directing the reader's attention to Schedule A for definitions of the classifications referred to in the wages table. The AMWU proposal would obviate the need for this amendment.

[76] <u>We have considered the change put forward by the AMWU and consider that the proposal retains the appropriate reference to the classification structure while clearly indicating to the reader of the award that there other payments in addition to those in the clause that may be applicable.</u> With a minor amendment to paragraph (b) we have adopted the AMWU proposal in respect of clause 16.1(a). Paragraph 16.1(b) will read:

> (b) The rates in clause 16.1(a) prescribe minimum classification rates only. Employees may also be entitled to allowances, loadings or penalties under other clauses of this award.

[77] Having adopted this proposal, the Business SA proposed change is no longer necessary.[65]

214. As a result of this decision, clause 16.1(a) now states: (emphasis added)

> (a) An adult employee, other than one specified in clause 16.1(c), <u>within a level specified in the following table will be paid not less than</u> the rate per week assigned to the appropriate classification, as defined in Schedule A – Classification Structure and Definitions, <u>in which the employee is working</u>: …

215. We raise three concerns in respect of the above clause.

216. The first relates to what now appears to be an obligation to pay *not less than* the weekly rate prescribed in the table.

217. In support of its proposal to insert such words, the AMWU submitted as follows: (emphasis added)

[65] [2015] FWCFB 7236 at [73] – [77].

57. The AMWU proposes that the proposed text at 16.1(a) be amended to reflect that the wages in the table are a minima. The exposure draft text is misleading in that it instructs employers that they "must pay" the minimum wages in the table below. In fact the minimum wages are just that, a level at which an employer must not pay less than. The AMWU proposes that the text in the wage table and headings in the wage schedules be amended to reflect that the rates shown are the minimum ordinary hourly rates for day workers. The ordinary hourly rates for shift workers include the shift loading. (Refer Attachment A, 16.1, p.33.)[66]

218. The union's concern appears to be that a provision that states that an employer must pay an employee the minimum wages prescribed by an award might lead an employer to believe that they are in some way precluded from making over award payments. It seems extremely unlikely to us that such a provision would be interpreted as suggested by the AMWU. The relevant clause quite clearly stipulates the *minimum* wages payable, which, in and of itself, means that an employer may choose to pay their employees a higher amount. Such a provision is therefore not necessary.

219. Indeed a similar submission made by the TCFUA with respect to the *Exposure Draft – Textile, Clothing, Footwear and Associated Industries Award 2010* in the October 2015 Decision:

[271] The TCFUA have also raised an issue in relation to the summary of hourly rates that are located at Schedule C to the Exposure Draft. The TCFUA further submit that there should be a note inserted to make clear that the tables are minimum wage rates only and that an employee may be entitled to higher rates of pay as part of their employment contract. They submit that without this note, employers may reduce the rate of pay for current employees where such employees receive over-award rates of pay. ABI and the NSWBC do not agree with the TCFUA that there is a requirement for such note to be inserted into the Exposure Draft. We agree with the submission of ABI and the NSWBC. …[67]

220. The Commission there appeared to conclude that it was not necessary to include a note as proposed by the TCFUA, which would be designed to clarify that an employer may provide (or continue to provide) an employee with a more generous entitlement than that afforded by the award. The decision to insert the relevant text in clause 16.1(a) of the Manufacturing Exposure Draft appears somewhat inconsistent with this.

[66] Submissions dated 24 October 2014.

[67] [2015] FWCFB 7236 at [271].

221. It should also be noted that given the way in which the obligation is now crafted at clause 16.1(a), the provision requires that an employer pay *not less than* the relevant amount prescribed. This clearly deviates from what we understood to be the intention of the previous version of clause 16.1(a), which imposed an obligation to pay the minimum rates. The newly drafted provision requires that an employer pay any amount so long as it exceeds (or is not less than) the award minima. This change arguably gives rise to a potential uncertainty or ambiguity as to whether it is the amount identified in the table in clause 16.1(a) or the amount paid by an employer in satisfaction of obligation flowing from clause 16.1(a) that constitutes the relevant rate for the purpose of calculating an employee's ordinary hourly rate.

222. Our second concern goes to the requirement to pay *'not less than the rate <u>per week</u>'*. This is inconsistent with the table in clause 16.1(a) which contains both weekly and hourly rates. Also, the clause is not confined in its application to full-time employees and therefore appears to require that a part-time and casual employee be paid the minimum weekly rate prescribed for the relevant classification. This is clearly inconsistent with clauses 6.3 and 6.4, which contemplate that part-time and casual employees are to be paid an hourly rate, which is a proportion of the minimum weekly wage.

223. Our third concern goes to the requirement to pay each adult employee *'not less than the rate per week <u>assigned to the appropriate classification</u>…..<u>in which the employee is working</u>'.*

224. The addition of the *words "in which the employee is working"* appears to have been proposed in the last set of submissions filed by the AMWU in respect of the Manufacturing Award, dated 21 April 2015.[68] The AMWU's earlier submissions, dated 24 October 2015, did not propose the insertion of that text. As a result, it is a matter that has not previously been addressed by Ai Group.

[68] See p.23.

225. This wording could disturb the higher duties provisions in the Award (see clause 16.2 of the Exposure Draft). When an employee performs higher duties for two hours of less during one day, the employee is not entitled to the rate of pay for the higher classification in which the employee is working.

226. Also, these words suggest that the rate payable to an employee is to be determined having regard entirely to the work that is being performed by an employee on the particular day or shift, or in a particular week. This ignores the fact that under the Manufacturing Award, an employee's training, qualifications and work performed are relevant in determining an employee's classification, not simply the work performed on a particular day or shift, or in a particular week.

227. For all of the aforementioned reasons, we submit that the following wording in the earlier Exposure Drafts should be retained:

> An employer must pay an adult employee, other than one specified in clause 16.1(c), the following wages for ordinary hours worked by the employee: …

Clause 16.1(b) – Adult employee minimum wages

228. Pursuant to the October 2015 Decision, a new clause 16.1(b) has been inserted. The rationale for deleting the pre-existing clause 16.1(b) is not, however clear. Its deletion does not appear to have been sought by any party, including the AMWU, nor does the Commission's decision give any explicit consideration to its removal.

229. We proceed, therefore, on the basis that this is a drafting error and submit that it ought to be reinstated as subclause (c). The remaining subclauses will require renumbering.

Clause 17.2 – Minimum wage rates for apprentices commencing or continuing an apprenticeship prior to 1 January 2014

230. The '0' appearing in the first line should be replaced with '17.6'. This appears to be a drafting error.

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

231. The words 'Table A or B of' should be deleted as they are not relevant. Clause 17.6 only contains one table which is not labelled as Table A or B.

Clause 27.3(m)(ii) – Boiler repairs

232. The word "such" should be inserted before "boiler" in the last line. This is to make clear that the allowance is payable for each hour while working inside an oil fired boiler, as described earlier in the same subclause. The absence of the word "such" suggests that the allowance is payable to an employee "engaged on repairs to oil fired boilers" while working inside any boiler. This clearly deviates from the current provision and amounts to a substantive change to the award.

233. The amendment proposed is consistent with the current clause 32.3(m).

Clause 29.2(i)(i) – Rate for working on Sunday and public holiday shifts

234. Clause 29.2(i)(i) of the Exposure Draft corresponds with clause 37.5(a) of the Manufacturing Award, which stipulates the rate payable to a continuous shiftworker for work "on a *rostered* shift". A rostered shift is defined by clause 37.1(a) to mean any shift of which the employee concerned has had at least 48 hours of notice.

235. Clause 29.2(i)(i) deviates from this by extending the application of the clause to any shift, a major portion of which falls on a Sunday or public holiday. This is a substantive change from the current award term and should be rectified by inserting the word "rostered" before "shift".

Clause 29.2(i)(iv) – Rate for working on Sunday and public holiday shifts

236. The cross reference contained in clause 29.2(i)(iv) should be amended as follows to make clear that it is a reference to all three preceding paragraphs:

clauses 29.2(i)(i), (ii) and (iii).

Clause 29.2(i)(vi) – Rate for working on Sunday and public holiday shifts

237. There should be a space between “clause 29.2(i)” and “are” in the first line.

Clause 30.2(b) – Unrelieved shiftwork on rostered day off

238. Clause 40.1(e) of the Manufacturing Award applies in the following circumstances:

- Where 7.6 hours or more notice has been given to the employer by a relief shiftworker that he/she will be absent from work; and
- Where the shiftworker who was to be relieved by the relief shiftworker is not so relieved; and
- That shiftworker is then required to continue work on their rostered day off.

239. In such circumstances, the shiftworker is to be paid at a rate of double time.

240. It is important to note that the provision applies where a shiftworker is required to *continue* work. That is, the clause applies to circumstances in which a shiftworker is performing work and is required to *continue* doing so, because the relief shiftworker is absent. The clause does not apply where an employee is required to work on a rostered day off due to the absence of another shiftworker, where the performance of that work is not in continuation with the performance of work on their ordinary/rostered shift.

241. Clause 30.2(b)(i) deviates substantively from the current clause as its application is not confined to circumstances in which the shiftworker is *continuing* work as we have earlier described. In order to rectify this, clause 30.2(b) should be amended by inserting “continue” before “work” in the first line.

Clause 34.2 – Public holidays

242. The “0” should be replaced with “29.2(i)”. This appears to be a drafting error.

Clause 38.2 – Notice of termination by an employee

243. There appears to be a drafting error in clause 38.2 which should be amended as follows:

… the employer may withhold from any money due to the employee …

Schedule B.1.1 – Table of rates

244. Ai Group proposes the following changes to the table contained at B.1.1:

Working Hours	% of ~~Minimum~~ Ordinary Hourly Rate/~~Minimum~~ Casual Ordinary Hourly rate
Ordinary hours	100%
Ordinary hours on a Saturday	150%
Ordinary hours on a Sunday	200%
Work on a public holiday (other than continuous shift worker)	250%
Overtime – first 3 hours Monday to Saturday	150%
Overtime – after 3 hours Monday to Saturday	200%
Overtime on a Sunday	200%
Shiftworker – afternoon and night shift	115%
Shiftworker – permanent night shift	130%
~~Work on shift not rostered~~ Continuous shiftworker – work on shifts other than a rostered shift	200%
~~Work on shift not rostered~~ Non-continuous shiftworker – work on a shift other than a rostered shift – first 3 hours	150%
Non-continuous shiftworker – work on a shift other than a rostered shift – after 3 hours	200%
Shiftworker -–Ordinary hours on a Saturday	150%
Shiftworker -–Ordinary hours on a Sunday	200%
Continuous shiftworker – public holiday	200%
Overtime - Continuous shiftworker	200%
~~Non-continuous Shiftworker –~~Shift which does not continue for 5 or 6~~Non-~~successive afternoon or night shift – first 3 hours	150%
~~Non-continuous Shiftworker –~~Shift which does not continue for 5 or 6 ~~Non-~~successive afternoon or night shift – after 3 hours	200%
Overtime - Non-continuous shiftworker – first 3 hours Monday to Saturday	150%
Overtime - Non-continuous shiftworker – after 3 hours Monday to Saturday	200%
Overtime - Non-continuous shiftworker - Sunday	200%
Non-continuous shiftworker – public holiday	250%

Schedule B.1.2 - Other circumstances attracting penalty payment

245. In respect of the table in B.1.2, we propose the following amendments be made:

Other Circumstances Attracting a Penalty Payment	% of ~~Minimum~~ Ordinary Hourly Rate/~~Minimum~~ Casual Ordinary Hourly rate
Working through meal breaks (refer clause 14.5(b))	~~125~~150%
Ship Trials (refer clause 15.4)	125% or 150%
Travelling Time Payment Sunday or Public Holiday (refer clause 27.4(e)(i))	150%
Unrelieved non-continuous shiftworker for work on RDO (refer clause 30.2(b))	200%
Rest period after overtime (refer clause 30.11(c) ~~and (d)~~)	200%
Call Back - Day worker and Non-continuous shift worker (refer clause 30.12(a)(i))	150% for first 3 hours 200% thereafter
Call Back - continuous shift worker (refer clause 30.12(a)(ii))	200%

246. We propose that the amendments here identified, to the extent that they are not agreed, also be the subject of further discussion between the parties.

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

247. Consistent with the definition of 'all purpose' determined by the Commission, clause B.2.1 should be amended by inserting the word "annual" before "leave".

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

248. Ai Group has not identified any concerns with the *Exposure Draft – Maritime Offshore Oil and Gas Award 2015* published on 30 October 2015.

8. EXPOSURE DRAFT – MEAT INDUSTRY AWARD 2015

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

Clause 1.5 – Transitional take home pay clause

250. Clause 1.5 appears to replicate clause 1.4 in respect of employee take-home pay arrangements. Clause 1.5 should be deleted.

Clause 6.9 (b) – Casual loading

251. Clause 6.9(b) should be deleted. Such a provision does not appear in the current award and is both unnecessary and problematic. We understand that the ACTU and other unions' have also raised concerns about such provisions appearing in other exposure drafts and have commonly agreed that they should be removed.

Clause 25.2 – Notice of termination by an employee

252. Clause 25.2 should be amended as follows in order to rectify a drafting error:

> If an employee fails to give the required notice, the employer may withhold <u>from</u> any monies due to the employee …

Schedule B.4.1 – Cleaners (all establishments)

253. The table at B.4.1 sets out incorrect monetary rates for the minimum hourly rate and penalty rates for cleaners. Under the Award, cleaners are classified as Meat Industry 3 employees and receive a minimum hourly rate of $18.12 and not $19.03. The table should read:

	100% $	105% $	112.5% $
MI3	18.12	19.03	20.39

254. Similarly, at table B.4.3 – Casual adult employees – ordinary and penalty rates for cleaners, there appear to be incorrect monetary amounts appearing in the penalty rates columns. The table should read:

	125% $	130% $	137.5% $
MI3	22.65	23.56	24.92

B.6.1 – Public Holidays – Full time and part-time employees

255. Table B.6.1 displays incorrect public holiday penalty percentages that exceed what the relevant public holiday award term provides at clause 22.3.

256. Clause 22.3 requires the application of a penalty (150% and 200% of the minimum hourly rate) in respect of hours worked on a public holiday. This is in addition to the minimum weekly, daily or hourly rate of pay, as appropriate for all employees other than casual employees. That is, a full-time employee will, for instance, be entitled to the weekly wage and in addition, a higher hourly rate for the hours of work actually performed on a public holiday, in accordance with clauses 23.3(a) – (c). To express this entitlement as 300% or 350% of the minimum hourly rate does not properly reflect the amount payable under the clause.

257. For this reason, the penalty percentages of 300% and 250% should be replaced with the correct figures of 200% and 150%, and the hourly monetary amounts recalculated accordingly.

9. EXPOSURE DRAFT – MINING INDUSTRY AWARD 2015

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

Clause 11.2(d) – Rail allowance

259. Ai Group supports the provisional view reached by the Commission at paragraph [142] of its 23 October 2015 Decision[69] that the rail allowance should refer to 30% of the "minimum rate of pay". As identified by the Commission in paragraph [142], this reflects the intent of the Full Bench during the Part 10A award modernisation process.

Clause 14 – Overtime

260. Consistent with the existing award and the Summary of Hourly Rates of Pay tables in Schedule B of the Exposure Draft, the following amendments should be made:

- In the table in clause 14.1, the words "Overtime Rate" should be replaced with "% of ordinary hourly rate"; and

- In the table in clause 14.2, the words "Overtime Rate" should be replaced with "% of ordinary hourly rate".

Clause 20.2 – Notice of termination by an employee

261. There appears to be a drafting error in clause 20.2 which should be amended as follows:

> … the employer may withhold <u>from</u> any money due to the employee …

Schedule B.3 – Casual employees

262. Clause 20.3(b) of the Mining Award states as follows:

> **(b)** Any payments under this clause are in substitution of any other loadings or penalty rates.

263. This provision is replicated at clause 14.4(b) of the Exposure Draft.

[69] [2015] FWCFB 7236.

264. The casual loading is a loading as contemplated by the above clause. As a result, where a casual employee is paid overtime, shiftwork penalties, weekend penalties or public holiday penalties, they are not entitled to the casual loading. Schedule B.3 should be amended accordingly.

265. We note that the issue of whether the casual loading is payable during *overtime* has been referred to the Casual Employment Full Bench.[70] For the reasons we have here set out, the issue is not confined to the payment of overtime rates.

10. EXPOSURE DRAFT – OIL REFINING AND MANUFACTURING AWARD 2015

266. The submissions that follow relate to the *Exposure Draft – Oil Refining and Manufacturing Award 2015* (Exposure Draft), published on 2 November 2015.

Clause 5 – Facilitative provisions

267. Clause 5.2(d) of the Exposure Draft should be amended by deleting the 'e' at the end of the sentence. This appears to be a typographical error.

Clause 6.4(c)(i) – Casual loading

268. The October 2015 Decision deals with the issue of whether the casual loading applies to the minimum hourly rate or the ordinary hourly rate by reference to the relevant earlier decision of the Commission.[71]

269. In the earlier decision referred to, the Commission determined that whether the casual loading is to be applied to the minimum hourly rate or the ordinary hourly rate will be determined on an award by award basis.[72] We refer also the July 2015 Decision, which we have earlier set out. The Full Bench there concluded that whether a particular loading or penalty is to be applied before or after any all purposes allowances is a matter that ultimately turns on the

[70] [2015] FWCFB 7236 at [144].

[71] [2015] FWCFB 7236 at [146].

[72] [2015] FWCFB 4658 at [70] – [72] and [2015] FWCFB 6656 at [109].

construction of the current award provisions. Accordingly, we here propose to make submissions that deal specifically with the construction of the casual loading provision in this Award, which does not appear to have been explicitly considered by the Commission.

270. Clause 6.4(c)(i) 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 1/35th of the minimum weekly rate of pay for their classification in clause 14—Minimum wages, plus a casual loading of 25%.

271. Clause 14 of the Oil Refining and Manufacturing Award is headed 'Minimum wages'. Clause 14.1 contains the weekly award rate payable for each of the classifications/skill 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 rate'. The reference in clause 10.3(b) to the 'minimum weekly rate of pay for their classification in clause 14' is clearly to the rates there prescribed.

272. 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 14; and
- 25% in addition to the above amount.

273. That is, clause 10.3(b) entitles a casual employee to 125% of 1/38th of the minimum weekly rate set out in clause 14.1 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.

274. 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 rate of pay.

275. The reference to the 'minimum weekly rate in clause 14' 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 on clause 14. The approach adopted in the Exposure Draft disregards the very specific wording of clause 10.3(b).

276. It is on this basis that Ai Group contends that clause 6.4(c)(i) of the Exposure Draft should be amended as follows:

> For each ordinary hour worked, a casual employee must be paid:
>
> - the ordinary hourly rate; and
> - a loading of 25% of the ~~ordinary~~ <u>minimum</u> hourly rate,
>
> for the classification in which they are employed.

Clause 9.5 – Breaks during overtime

277. Clause 9.5 of the Exposure Draft should be amended by deleting '14.5' at the end of the sentence and replacing it with '14.6'. This appears to be a drafting error.

Clause 10.7(a)(v) – Annualised salaries – non clerical employees

278. Clause 10.7(a)(v) of the Exposure Draft should be amended by deleting '15.4 – Payment for annual leave' and replacing it with '15.4(b) – Annual leave loading'. This is consistent with the current clause 20.2(a)(iv).

Clause 11 – Allowances

279. A new subclause should be inserted under clause 11, which deals with the calculation of weekly allowances in respect of employees paid by the hour. This would be consistent with the current clause 15.1. Such a provision adds clarity and ensures certainty as to how the entitlement is to be computed.

280. A new subclause 11.2 should be inserted in the following terms:

> Where an employee is paid by the hour, the allowance will be 1/35th of the weekly allowance.

Clause 20.2 – Notice of termination by an employee

281. There appears to be a drafting error in clause 20.2 which should be amended as follows:

> … the employer may withhold <u>from</u> any money due to an employee …

Schedule B – Summary of hourly rates of pay

282. This Exposure Draft contains one all purpose allowance (namely, the industry allowance) that is payable to all employees covered by it, other than clerical employees. The ordinary hourly rate is defined to include this industry allowance.

283. The rates calculated in Schedule B are based on the ordinary hourly rate. Thus, the rates are of no relevance to clerical employees covered by the Oil Refining and Manufacturing Award. The schedule should be amended to make this clear. This could be achieved by inserting a new note in the following terms:

> NOTE: The rates contained in this schedule do not apply to clerical employees.

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

284. The table at clause B.2.1 of the Exposure Draft should be amended by correcting the percentage in the column marked 'Public Holiday' to 300%. The rates appear to be calculated correctly.

Schedule B.3.1 – Casual employees other than shiftworkers – ordinary and penalty rates

285. The table at clause B.3.1 of the Exposure Draft should be amended by correcting the percentage in the column marked 'Public Holiday' to 300%. This is consistent with the current clause 24.7 and importantly, clause 24.3(b), as a

result of which the public holiday penalty is paid in substitution for any other loading including the casual loading. The rates should be recalculated accordingly.

Schedule B.3.2 – Casual shiftworkers – ordinary and penalty rates

286. By virtue of clause 24.3(b) of the current Award, the shiftwork penalties, weekend penalties and public holiday penalties are paid in substitution for any other loading, including the casual loading. Accordingly, schedule B.3.2 should be amended by reducing the relevant percentages by 25 and recalculating the rates.

11. EXPOSURE DRAFT – PHARMACEUTICAL INDUSTRY AWARD 2015

287. The submissions that follow relate to the *Exposure Draft – Pharmaceutical Industry Award 2015* (Exposure Draft), published on 30 October 2015.

Clause 3.8 – Coverage

288. The text found at clause 3.8 is a Note and therefore, should not be given a clause number.

Clause 6.4(b)(ii) – Casual loading

289. Clause 6.5(b)(ii) should be deleted. Such a provision does not appear in the current award and is both unnecessary and problematic. We understand that the ACTU and other unions' have also raised concerns about such provisions appearing in other exposure drafts and have commonly agreed that they should be removed.

Clause 8 – Hours of work

290. At section 2.4 of these submissions, we have set out our concerns in respect of s.147 of the Act. It is our view that in many instances, the ordinary hours of work provisions in an award do not meet the requirements of s.147. The Pharmaceutical Award is one such award. Should the Commission determine

that it is appropriate to rectify this issue, we propose that clause 8.2(a) of the Exposure Draft be amended by inserting ‘up to’ after the words ‘average of’.

Clause 11.2 (a) – First aid allowance

291. Clause 11.2(a)(i) of the Exposure Draft should be amended by inserting ‘who is’ after the words ‘an employee’ to make clear that the employee is only entitled to the allowance during the period where the employee is appointed as a first aid officer in accordance with provisions of the clause. That is, the payment of the allowance does not extend to circumstances in which an employee was once appointed, but is no longer appointed.

Clause 11.2(d) – Respirator

292. Clause 11.2(d) of the Exposure Draft should be amended by inserting ‘is’ after the words ‘while the employee’. This appears to be a typographical error.

Clause 13 – Penalty rates

293. Clause 13 is headed ‘penalty rates’. It contains two subclauses; one that defines various shifts and the other contains the relevant shift allowances.

294. Consistent with the terminology used at clause 13.2 (which properly reflects the current clause 23.3(f)), the heading should instead be ‘Shiftwork’.

Clause 14.2 – Overtime rates

295. The first row of the second column of the table in clause 14.2 of the Exposure Draft should be amended:

- by deleting the word “time” after the word “Overtime”; and
- adding the words “% of the minimum hourly rate” after the words “Overtime rates”. This would ensure clarity as to how the rate is to be calculated and ensure that the intent of the current Award is retained.

Clause 15.3 – Payment for annual leave

296. Clause 15.3(e)(ii) of the Exposure Draft should be amended at the second dot point as follows:

> the <u>shift allowance including relevant weekend</u> penalty rate<u>s</u> ~~payments~~ the employee would have received …

297. This is to ensure that the clause properly identifies the shift premiums which are characterised as 'shift allowances' rather than 'penalties' under clause 13.2 of the Exposure Draft.

12. EXPOSURE DRAFT – POULTRY PROCESSING AWARD 2015

298. The submissions that follow relate to the *Exposure Draft – Poultry Processing Award 2015* (Exposure Draft), published on 2 November 2015.

Clause 6.5(c)(iii) – Casual loading

299. Clause 6.5(c)(iii) should be deleted. Such a provision does not appear in the current award and is both unnecessary and problematic. We understand that the ACTU and other unions' have also raised concerns about such provisions appearing in other exposure drafts and have commonly agreed that they should be removed.

Clause 8.1(b)(i) – Ordinary hours

300. At section 2.4 of these submissions, we have set out our concerns in respect of s.147 of the Act. It is our view that in many instances, the ordinary hours of work provisions in an award do not meet the requirements of s.147. The Poultry Processing Award is one such award. Should the Commission determine that it is appropriate to rectify this issue, we propose that clause 8.1(b)(i) of the exposure draft be amended as follows:

> the ordinary hours of work for an employee are an average of <u>up to</u> an average of 38 per week

Clause 14 – Overtime rates

301. Clause 14.2 should be amended to clarify what the relevant overtime rate is calculated on. That is, it should refer to the ordinary hourly rate. This could be done by replacing the reference to 'ordinary time rate' in the second column of the table to instead read '% of ordinary hourly rate'.

302. In response to the question at page 16, we suggest that the Exposure Draft should include a provision confirming that for the purpose of determining the applicable overtime rate 'each day stands alone.' There is otherwise no clear way of determining when the higher rate applies. The omission of a provision of this nature is anomalous and should be rectified.

Clause 20.1 – Notice of termination by an employee

303. There appears to be a drafting error in clause 20.1 which should be amended as follows:

> … the employer may withhold <u>from</u> any money due to the employee …

Schedule B – Summary of hourly rates of pay

304. The relevant hourly rates contained in Schedule B are expressed as a "% of the ordinary hourly rate." In reality the amounts are all calculated on the minimum hourly rate of pay for an employee, consistent with clause B.1.2. The current wording of the tables is misleading in circumstances where an employee receives an allowance paid for all purposes of the award (that is, the leading hand allowance).

305. The reference to "% of ordinary hourly rate" should be replaced with "% of minimum hourly rate" in each of the tables contained in Schedule B.

13. EXPOSURE DRAFT – RAIL INDUSTRY AWARD 2015

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

Clause 6.4(c) – Casual loading

307. The October 2015 Decision deals with the issue of whether the casual loading applies to the minimum hourly rate or the ordinary hourly rate by reference to the relevant earlier decision of the Commission. Based on that decision, the Commission expressed the view that the casual loading in the Exposure Draft is to be applied to the ordinary hourly rate.[73]

308. In the earlier decision referred to, the Commission determined that whether the casual loading is to be applied to the minimum hourly rate or the ordinary hourly rate will be determined on an award by award basis.[74] We refer also the July 2015 Decision, which we have earlier set out. The Full Bench there concluded that whether a particular loading or penalty is to be applied before or after any all purposes allowances is a matter that ultimately turns on the construction of the current award provisions. Accordingly, we here propose to make submissions that deal specifically with the construction of the casual loading provision, which does not appear to have been explicitly considered by the Commission.

309. 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 <u>minimum weekly rate of pay for their classification in clause </u>14, plus a casual loading of 25%.

310. Clause 14 of the Rail Award is headed ‘Classifications and minimum wage rates’. Clause 14.1 contains the weekly award rate payable for each of the classifications/skill levels set out in Schedule A 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 14’ is clearly to the rates there prescribed.

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[73] [2015] FWCFB 7236 at [242].

[74] [2015] FWCFB 4658 at [70] – [72] and [2015] FWCFB 6656 at [109].

311. 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 14; and
- 25% in addition to the above amount.

312. That is, clause 10.3(b) entitles a casual employee to 125% of 1/38th of the minimum weekly rate set out in clause 14.1 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.

313. 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 rate of pay.

314. The reference to the 'minimum weekly rate in clause 14' 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 on clause 14. The approach adopted in the Exposure Draft disregards the very specific wording of clause 10.3(b).

315. It is on this basis that Ai Group contends that clause 6.4(c) of the Exposure Draft should be amended as follows:

For each ordinary hour worked, a casual employee must be paid:

- the ordinary hourly rate; and
- a loading of 25% of the ~~ordinary~~ <u>minimum</u> hourly rate,

for the classification in which they are employed.

316. In advancing this contention we have proceeded on the basis that the tool allowance is now identified as an 'all-purpose allowance'. Nonetheless, it is relevant that the current Award does not identify the allowance as an all-purpose allowance or indicate that it is applied for all-purposes. Nor is there any express indication in clause 15.1 that the allowance should be applied to an individual's rate of pay prior to the application of the casual loading. Rather, the Award merely provides that it '…must be included in and form part of the employee's ordinary rate of pay'. Consequently, the terms of the current Award would be satisfied if an employee received their ordinary hourly rate (as defined in the Exposure Draft) and a loading of 25% calculated on what is termed the 'minimum hourly rate' in the Exposure Draft.

317. 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'. Instead the reasoning outlined at paragraph [241] appears to merely proceed on the assumption that the Exposure Draft's characterisation of the tool allowance as an all purpose allowance is correct.

318. It is not clear that the characterisation of the tool allowance in the current Award as an all purpose allowance is consistent with the nature of that allowance in the current Award. Regardless, the definition of an 'all purpose allowance' adopted within the context of the Exposure Draft should not impact upon the determination of whether the current Award requires that the casual loading is calculated on a rate that includes the tool allowance. This is a matter that should turn primarily on the construction of that instrument's terms.

319. A further complication flows from the fact the tool allowance is paid on a weekly basis. It is not applied on an hourly basis. Accordingly, there is no mechanism in the current terms of the Award that would explain how the casual loading is to be applied. We again note that the hourly rate identified in respect of a casual employee is 'no less than 1/38th of the minimum weekly rate of pay for their classification in clause 14, plus a casual loading of 25%". The approach in the Exposure Draft simply assumes that the value of the loading would be determined by dividing the allowance by 38 and applying the

loading to it, but there is no justification for this in the terms of either clause 10 or clause 15 of the instrument.

320. For completeness, we note that clause 10.4 of the current award identifies the purpose for which the casual loading in this award is paid. There is no indication in this clause that the intent is to provide casual employees with a greater entitlement to a tool allowance, as would now be provided for under the approach adopted in the Exposure Draft.

321. When the specific provisions of the Rail Award are considered it should be accepted that the casual loading is currently calculated on the relevant minimum rates. Accordingly the Exposure Draft will result in substantive change to the current award provisions.

Clause 10.3 – Apprentices and trainees

322. Apprentice conditions of employment currently provided for in the Rail Award[75] have not been included in the Exposure Draft.

Clause 11.4 – All purpose allowances

323. Consistent with the Commission's decision,[76] clause 11.2(a) should be amended as follows:

> Allowances paid for all purposes are included in the rate of pay of an employee who is entitled to the allowance, when calculating any penalties, loadings or payment while they are on <u>annual</u> leave. …

Clause 13 – Penalties

324. The following text appears below the heading for clause 13 (Penalties):

> An employee will be paid for the following penalty rates <u>for all ordinary hours worked</u> by the employee.

325. Such a provision does not appear in the current award. It is both anomalous and unnecessary and should therefore be deleted.

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[75] See PR559297.

[76] [2014] FWCFB 9412 at [44] – [53] and [2015] FWCFB 4658 at [91].

326. The text quoted above suggests that the penalty rates prescribed by clause 13 are payable in respect of *all ordinary hours of work* performed by an employee. This is clearly untrue. We give the following as examples of instances in which a penalty prescribed by clause 13 is not payable in respect of ordinary hours of work or is in some way limited such that it is not payable for *all* ordinary hours of work performed by an employee:

- The relevant shift allowances are due only where an employee performs a particular shift as defined in clause 13.1. If that employee performed ordinary hours of work that did not fall within any of the shift definitions, the shiftwork penalties there prescribed are not payable for *all ordinary hours worked* by the employee.

- The Saturday penalty is not payable for ordinary hours of work performed by an employee at any time other than Saturday. It is clearly not payable for *all ordinary hours worked* by the employee.

327. The clause is self-evidently confusing and should be removed.

Clauses 13.2 and 13.3 – Shiftwork penalties and Schedule C.2 – Wage related allowances

328. We refer to our submissions at section 2.2 above.

329. In respect of this award, the exposure draft has re-characterised the shift loadings in clause 23.4 of the current award as penalties (in the title of clauses 13.2 and 13.3) and as ‘wage related allowances’ in Schedule C.2.

330. Using the terms penalties and allowances to describe shift loadings will confuse readers of the Award and could lead to the unintended consequences described in section 2.2 above.

331. Accordingly, Ai Group proposes the following variations:

- The heading to clause 13.2 should be amended by substituting ‘penalties’ with ‘loadings’.

- Clause 13.2(a) should be amended by deleting ‘$2.66’ and replacing ‘$2.66’ with the words ‘a loading of 13.23% of the standard rate per hour ($2.66)’. This is consistent with clause 23.4(a) of the current award.

- Clause 13.2(b) should be amended by deleting ‘$3.17’ and replacing ‘$3.17’ with the words ‘a loading of 15.73% of the standard rate per hour ($3.17)’. This is consistent with clause 23.4(b) of the current award.

- Clause 13.2(c) should be amended by deleting ‘$6.01’ and replacing ‘$6.01’ with the words ‘a loading of 29.86% of the standard rate per hour ($6.01)’. This is consistent with the clause 23.4(c) of the current award.

- The heading of clause 13.3 should be amended by substituting ‘penalties’ with ‘loadings’.

- Clause 13.3 should be amended by substituting ‘penalties’ with ‘loadings’.

- Clause 14.2(b) should be amended by substituting “penalty” with ‘loading’.

- The references to early morning, afternoon shift, night shift and permanent night shift should be deleted from the table in Schedule C.2.

Clause 13.2(d) – Shiftwork penalties

332. Clause 13.2(d) repeats the definitions of afternoon shift, early morning shift and night shift and therefore should be deleted. These definitions are included in the earlier clause 13.1, which also includes the new definition of permanent night shift.

333. It is unnecessary for the definition of afternoon shift, early morning shift and night shift to be repeated in clause 13.2(d) which immediately follows 13.1.

Clause 13.3 – Exclusion from shiftwork penalties

334. Clause 13.3 contains an erroneous reference to 13.1(d)(i). This reference should be deleted and a reference to 13.2 should be inserted in its place.

Clauses 13.4 – Sunday work

335. We refer to our submissions at section 2.2 above. Consistent with the concerns we have there raised, clause 13.4 should be replaced with:

> An employee will be paid a loading of 100% of the ordinary hourly rate for any hours, ordinary or overtime, worked on a Sunday.

336. This reflects the current clause 23.5 of the current award.

Clauses 13.5 – Public holidays

337. We refer to our submissions at section 2.2 above. Consistent with the concerns we have there raised, clause 13.5 should be replaced with:

> An employee will be paid a loading of 150% of the ordinary hourly rate for any hours, ordinary or overtime, worked on a public holiday.

338. This reflects the current clause 23.6 of the current award.

Clauses 13.6 – Saturday work

339. We refer to our submissions at section 2.2 above. Consistent with the concerns we have there raised, clause 13.6 should be replaced with:

> An employee will be paid a loading of 50% of the ordinary hourly rate for any hours, ordinary or overtime, worked on a Saturday.

340. This reflects with the current clause 23.2(b) of the current award.

Clause 14.1(a) – Definition of overtime

341. Clause 14.1(a) contains a reference to clauses 8.1(d) and 8.1(e). This clause should also contain a reference to clause 8.1(f) to alert the reader to consider whether the span of hours described in clauses 8.1(d) or 8.1(e) has been altered by agreement between the employer and a majority of affected employees.

Clause 14.3 – Overtime rates

342. Clause 14.3 includes a table setting out when overtime rates are payable.

343. The cell of the first row of the first column sets out the conditions for overtime for full-time employees working in the Clerical, Administrative and Professional classifications and the Technical and Civil Infrastructure Classifications, that is any time worked after 6.00pm and before 6.00am Monday to Friday (see clause 14.1(a)).

344. However the table overlooks any reference to the conditions for which overtime applies for full-time employees working in the Operations classifications. For full-time employees working in the Operations classifications, overtime is payable for any time worked in excess of the employee's ordinary hours (see clause 14.1(b)).

345. The below proposed changes to the table at clause 14.3 would rectify the problem identified by Ai Group above:

For overtime worked on:	**% of ordinary hourly rate**
~~Any time after 6.00 pm and before 6.00 am~~ Monday to Friday: • First 3 hours • After 3 hours	150% 200%
Saturday – all hours	150%
Sunday – all hours	150%
Public holiday – all hours	250%

Clause 20.2 – Notice of termination by an employee

346. There appears to be a drafting error in clause 20.2 which should be amended as follows:

… the employer may withhold <u>from</u> any money due to an employee …

Schedule A – Classification definitions

347. Ai Group has identified a formatting error within Schedule A – Classification definitions which should be rectified.

348. The third, fourth and fifth dot points at Level 5 of the Operations classification should be indented as these dot points are subsets of the second dot point.

Schedule B – Summary of hourly rates of pay

349. The hourly rates contained in schedule B are expressed as a '% of the ordinary hourly rate'. In reality the amounts are all calculated on the minimum hourly rate of pay for an employee, consistent with clause B.1.2. The current wording of the tables is misleading in circumstances where an employee receives an allowance paid for all purposes of the award.

350. The reference to '% of ordinary hourly rate' should be replaced with '% of minimum hourly rate' in each of the tables contained in Schedule B.

14. EXPOSURE DRAFT – STEVEDORING INDUSTRY AWARD 2015

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

Clause 6.5(c)(iv) – Casual Loading

352. Ai Group considers that the inclusion of clause 6.5(c)(iv) is contrary to the Commission's decision of December 2014[77] where it decided to remove all clauses listing provisions that do not apply to casual employees from the exposure drafts.

353. Ai Group did not agree to the inclusion of clause 6.5(c)(iv) in earlier versions of the Exposure Draft and submits that it should be removed, consistent with other exposure drafts. Whilst we understand that the provision has been included on the basis of agreement between certain organisations, we are not

[77] [2014] FWCFB 9412 at [69].

a party to that agreement. We also observe that this clause is not in the current award.

354. The clause also omits other terms that do not apply to casual employees, such as clauses 17.2 and 17.3 which deal with paid personal/carers leave in certain circumstances. The clause is not an exhaustive list of exclusions and could therefore mislead award users about the correct entitlements and obligations relating to casual employees.

Clause 6.5(c)(iii) – Casual loading

355. Clause 6.5(c)(iii) should be deleted. Such a provision does not appear in the current award and is both unnecessary and problematic. We understand that the ACTU and other unions' have also raised concerns about such provisions appearing in other exposure drafts and have commonly agreed that they should be removed.

Clause 11.1(a) – All purpose allowances

356. The exposure draft's definition of *all purpose* allowances at clause 11.1(a) is incorrect and not aligned to the correct definition of *all purposes* used in Schedule H – Definitions. The Schedule H definition is correct based on the Commission's decision in July 2015. The definition in clause 11.1(a) should be replaced with the correct definition in Schedule H and should read as follows:

> Allowances paid for all purposes are included in the rate of pay of an employee who is entitled to the allowance, when calculating any penalties, loadings or payments while they are on annual leave.

Clause 13.2 – Payment for shiftworkers

357. Ai Group still considers that the reference in clause 13.2 to 'penalty rates' is not quite accurate and could be confusing for award users. Specifically, day shift on Monday to Friday at sub-clause 13.2(a) refers to 100% of the ordinary hourly rate, which is not a penalty rate. Ai Group suggests that the term 'penalty' be removed from the first sentence in clause 13.2 to avoid confusion and restore accuracy. Further, the heading of clause 13 should be amended

to read 'Shiftwork' as the provision only deals with that subject matter. This is consistent with the current clause 18.5, which does not characterise the relevant rates as 'penalties'.

Clauses 18.1 and 18.2 – Parental leave and related entitlements

358. Consistent with the Commission's decision to remove summaries of NES entitlements, clauses 18.1 and 18.2 should be deleted.[78]

Clause 22.2 – Notice of termination by an employee

359. There appears to be a drafting error in clause 22.2 which should be amended as follows:

> … the employer may withhold <u>from</u> any money due to the employee …

Schedule H – Definitions

360. Ai Group considers the definition of *ordinary hourly rate* in Schedule H to be the incorrect definition, based on the Commission's July 2015 Decision. The current Exposure Draft definition should be replaced with the correct definition below:

> **ordinary hourly rate** means the hourly rate for the employee's classification specified in clause X, plus any allowances specified as being included in the employee's ordinary hourly rate or payable for all purposes.

361. The definition above relates to awards providing for all purpose allowance(s) only applying to some employees. In this Award, there are two all purpose allowances:

- Electrician's license allowance (clause 11.1(b) of the Exposure Draft); and
- Specialist functions allowance (clause 11.1(c) of the Exposure Draft).

[78] [2014] FWCFB 9412 at [35] – [36].

362. The all purpose allowances only apply to some employees. They only apply to those employees who qualify for the allowance as per the relevant term. They are not industry allowances applying to all employees. Therefore a definition of *ordinary hourly rate* which contemplates that all purpose allowances only apply to some employees, should be inserted in Schedule H. The current definition incorrectly assumes that there is an all purpose industry allowance that is payable to all employees.

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

363. The submissions that follow relate to the *Exposure Draft – Textile, Clothing, Footwear and Associated Industries Award 2015* (Exposure Draft), published on 4 November 2015.

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

364. The text added at the end of clause 2.4 should be moved to the end of clause 2.2. This appears to be a drafting error.

Clause 3.1 – Coverage

365. Clause 3.1 should be amended by substituting the word ‘an’ in the third line with ‘and’. This appears to be a drafting error.

Clause 3.4(c) – Coverage

366. The reference to ‘2014’ in clause 3.4(c) should be replaced with ‘2015’.

Clause 6.3(h) – Part-time employees

367. The reference to ‘clause 6.3(c)’ should be replaced with ‘clauses 6.4(d) and (e)’. This appears to be a drafting error.

Clause 6.4(i) –Casual loading

368. The Commission has determined that whether the casual loading is to be applied to the minimum hourly rate or the ordinary hourly rate will be determined on an award by award basis.[79] We refer also the July 2015 Decision, which we have earlier set out. The Full Bench there concluded that whether a particular loading or penalty is to be applied before or after any all purposes allowances is a matter that ultimately turns on the construction of the current award provisions.

369. Clause 6.4(i) of the Exposure Draft corresponds with the current clause 14.3, which states:

> **14.3** A casual employee will be paid per hour 1/38th of the weekly award wage prescribed for the relevant classification plus a loading of 25%.

370. Clause 20 of the TCF Award is headed 'Classifications'. The various subclauses thereunder contain the weekly award wage payable for each of the classifications/skill 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 14.3 to the 'weekly award wage prescribed for the relevant classification' is clearly to the rates there prescribed.

371. A plain reading of clause 14.3 suggests that a casual employee is to be paid:

- 1/38th of the minimum weekly wage for the relevant classification set out in clause 20; and
- 25% in addition to the above amount.

372. That is, clause 14.3 entitles a casual employee to 125% of 1/38th of the minimum weekly wage set out in clause 20 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.

[79] [2015] FWCFB 4658 at [70] – [72] and [2015] FWCFB 6656 at [109].

373. Clause 14.3 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 14.3.

374. It is on this basis that Ai Group contends that clause 6.4(i) of the Exposure Draft should be amended as follows:

> For each ordinary hour worked, a casual employee must be paid:
>
> (i) the ordinary hourly rate; and
>
> (ii) a loading of 25% of the ~~ordinary~~ minimum hourly rate,
>
> prescribed for the relevant classification in which they are employed.

Clauses 8.4(c) and (d) – Arrangement of working hours including rostered days off

375. The October 2015 Decision states that 'where the parties have reached agreement, the agreed position will be adopted and published in a revised version of the Exposure Draft'.[80]

376. We refer to item 10 of the Commission's summary of submissions dated 17 February 2015. It indicates that the parties agreed to amend clauses 8.4(c) and (d), however this has not been reflected in the Exposure Draft. Consistent with the Commission's decision, the provisions identified should be amended accordingly.

Clause 8.4(g) – Rostered day off falling on public holiday

377. The reference to 'clause 23' should be replaced with a reference to 'clause 24'. This appears to be a drafting error. Item 11 of the Commission's summary of submissions dated 17 February 2015 indicates that the amendment was agreed to by the relevant parties.

[80] [2015] FWCFB 7236 at [262].

Clause 14.2(a)(i) – All purpose allowances

378. Clause 14.2(a)(i) should be amended to make reference to the exemption for incentive payments. This is to avoid any ambiguity or tension arising between the terms of clause 14.2(a) and clause 14.2(b). This could be achieved by varying clause 14.2(a)(i) as follows:

> **(i)** Instructor allowance, <u>except for the purposes of incentive payments</u> (clause 14.2(b); and

Clause 17.3 – Payment for shiftwork

379. We refer to our submissions at section 2.2 above. Consistent with the concerns we have there raised, the heading to clause 17 should be amended by deleting the words ‘and penalties’. This is consistent with the current clause 35.1, which does not characterise the additional payment as a loading, penalty or otherwise. To do so now may have an unintended consequence as we have set out at section 2.2.

Clause 18.4(a) – Employees under 18 years

380. The reference to ‘clause 18.3’ should be substituted with ‘clause 17.3’. This is consistent with the current clause 36.6.

Clause 20.3(a)(i) – Payment for working overtime

381. Consistent with the Commission’s July 2015 decision at paragraphs [95] – [96], clause 20.3(a)(i) of the Exposure Draft should be amended by inserting the words ‘minimum hourly rate’ after ‘150%’.

Clause 20.3(a)(ii) – Payment for working overtime

382. Consistent with the Commission’s July 2015 decision at paragraphs [95] – [96], clause 20.3(a)(ii) of the Exposure Draft should be amended by inserting the words ‘minimum hourly rate’ after ‘200%’.

Clause 24.2 – Public holidays

383. The reference to 'clause 22.4' should be substituted with a reference to 'clause 24.3'. This appears to be a drafting error.

Clause 24.3(c)(i) – Work on public holidays

384. Clause 24.3(c)(i) should be amended to make clear that the loading applies in addition to the employee receiving the regular Saturday or Sunday penalty rates *for all ordinary hours worked on 25 December*, with a minimum of four hours payment. This is consistent with the current clause 43.2(b).

Clause 26.3 – Notice of termination by an employee

385. Clause 24.3 should be amended as follows in order to rectify a drafting error:

> If an employee fails to give the required notice, the employer may withhold from any money due to the employee …

Schedule C – Summary of hourly rates of pay

386. The Note contained in the summary indicates that the rates contained in it relate only to the general stream. Wage rates for employees classified as 'wool and basil employees' or 'storeworker employees' have not been calculated.

387. The Schedule should be amended in order to make clear that that is the case. This might be achieved by amending the heading to the Schedule such that it reads:

> Schedule C – Summary of Hourly Rates of Pay - General

388. Additionally, a note should be inserted below the heading as follows:

> This schedule only contains hourly rates of pay for employees to whom clause 10.1 applies.

Schedule C.2.2 – Full-time and part-time employees – shiftworkers other than in the textile industry – ordinary and penalty rates

389. The amount payable in respect of a permanent night shift and afternoon & night shift are expressed as 130% and 115% (respectively) of the minimum weekly rate. This is inaccurate, as the amounts there stated has been derived by calculating 30% and 15% of the relevant minimum weekly rate. Therefore, 130% and 115% should be replaced with “30%” and “15%”. This is consistent with Schedule C.4.1.

Schedule C.2.2 – Full-time and part-time employees – shiftworkers other than in the textile industry – ordinary and penalty rates

390. A footnote has been omitted from Schedule C.2.2 (see headings ‘permanent night shift’ and ‘afternoon & night shift’. This should be amended by inserting a footnote as follows:

> 1. Payment per shift in addition to the applicable minimum hourly rate

Schedule C.2.2 – Full-time and part-time employees – shiftworkers other than in the textile industry – ordinary and penalty rates

391. The table suggests that the public holiday penalty in the final column is calculated on the minimum weekly rate. This is not correct; the penalty is applied to the minimum hourly rate. This should be amended.

16. EXPOSURE DRAFT – TIMBER INDUSTRY AWARD 2015

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

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

393. Clauses 2.2 and 2.3 contain an obvious drafting error. The provisions should be redrafted to reflect the relevant Full Bench decision.

Clause 7.4(c)(ii) – Casual loading

394. Clause 7.4(c)(ii) should be deleted. Such a provision does not appear in the Timber Award and is both unnecessary and problematic. We understand that the ACTU and other unions' have also raised concerns about such provisions appearing in other exposure drafts and have commonly agreed that they should be removed.

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

395. The wording included in 12.2(c) is not in the current award. The wording reflects a claim by the CFMEU that was included in an earlier Exposure Draft. This proposed variation was opposed by the Ai Group and ultimately rejected by a separately constituted Full Bench.[81] Consistent with that decision, clause 12.2(c) of the Exposure Draft should be deleted.

Clause 14 – Minimum Wages

396. At paragraph [287] of its October 2015 Decision, the Full Bench set out the reasons for its conclusion that, contrary to the submissions of Ai Group and the CFMEU (F&FP Division), clause 17.10 of the current award should not be retained in the Exposure Draft.

397. The Full Bench's reason for not retaining paragraph (a) of clause 17.10 was a concern that paragraph (a) is misleading having regard to the provisions concerning the payment of pieceworkers which are contained in clause 8.2 of the Exposure Draft.

398. Ai Group does not seek to re-agitate for the inclusion of 17.10 in its previous form. We do not now raise any submission in relation to the removal of paragraph (b) of clause 17.10.

399. However, given a provision in the nature of clause 17.10(a) has not been included in the Exposure Draft, there is nothing in clause 14 to clarify that the minimum hourly rates do not apply to an employee remunerated under a

[81] [2015] FWCFB 2856 at [153].

system or method of payment by results. The Exposure Draft does not expressly clarify the interaction between clause 14 and clause 8.2. Consequently there is a potential tension between clause 14 and clause 8. Indeed clause 14 could now be argued to suggest that employees remunerated in accordance with clause 8.2 would have an entitlement pursuant to clause 14.

400. Clause 8.2 provides for an alternate form of remuneration to that contemplated in clause 14. In contrast to clause 14, the system of remuneration is not directly linked to the ordinary hours worked. The rates in clause 14 should only be relevant to employees remunerated under a system of payment by results for the purposes of, and indeed by force of, clauses 8.2(a) and 8.2(b).

401. Clause 14 should be amended as follows:

> 14.7 The minimum prescribed by this clause will not apply to employees remunerated under any system or method of payment by results but may be relevant to such employees for the purposes identified in clause 8.1 and 8.2.

402. Clauses 8.2(a) and (b) sets out circumstances where the relevant weekly rate will be applicable. Otherwise, the only relevance of the minimum wages in clause 14.1(b) is in the context of the mandatory definition of base rate of pay and full rate of pay applicable for pieceworkers contained in the Award for the purposes of the NES.

403. In advancing this submission we acknowledge that clause 8.1 specifies the clauses that apply to pieceworkers and, in so doing, does not include a reference to clause 14.

Clause 20.1 – All purpose allowances

404. Consistent with the Commission's July 2015 Decision, the definition of 'all purpose' at clause 20.1 should be amended by inserting the word 'annual' before 'leave'.

Clause 25.10 – Transfer of business

405. Pursuant to the Commission's decision regarding alleged inconsistencies between the NES and modern awards, the provision corresponding to clause 25.10 of the Exposure Draft has been removed from the Timber Award.[82] Accordingly, clause 25.10 should be deleted.

Deletion of substitute shift clause – 23.2(b)(v)

406. In accordance with paragraph [300] of the Full Bench's October 2015 Decision, clause 23.2(b)(v) of the award has been deleted. The relevant paragraph of the decision stated:

> [300] The CFMEU (F & FP Division) submitted that clause 23.2(b)(v) of the Exposure Draft, concerning the substitution by agreement of shifts rostered off, is superfluous because a provision to the same effect appears in clause 12.8(b)(i). We agree. The only real difference between the two provisions is that the former adds the words "without incurring a penalty" at the end. The meaning of this is obscure, and we do not consider that any question of attracting a "penalty" arises. Clause 23.2(b)(v) shall be deleted. The reference to clause 23.2(b)(v) in clause 6.2(i) will also be deleted.[83]

407. Ai Group has not identified any error in the drafting of the relevant amendments flowing from the decision. However, we respectfully suggest this change should be reconsidered. Although it is clear that the Full Bench did not intend to implement any substantive change in the Timber Award through the variation, this is what will occur as a result of the amendment.

408. Clause 12.8 and clause 23.2(b)(v) deal with different subject matter. Clause 12.8 deals with 'rostered days or shifts off' taken in accordance with the implementation of a particular system for the arrangement of ordinary hours. Clause 23.2(b)(v) deals with substitute shifts. The two concepts are different. Relevantly, clause 23.2(b)(v) will potentially have application in circumstances where an employer is not implementing a method of arranging ordinary hours through a system of RDO's as contemplated by clause 12.8.

[82] PR568862.

[83] [2015] FWCFB 8236 at [300].

409. We also note that clause 23.2(b)(v) deals with substituted ‘shifts’ while clause 12.8(b)(i) applies to substituted ‘days’. Again, they are dealing with different subject matter.

410. Further, although the meaning of the words, ‘without incurring a penalty’ appearing in clause 23.2(b)(v) do have work to do when considered in the context of the relevant clause as a whole, absent the flexibility afforded by clause 23.2(b)(v), an employer will be required to comply with the requirement under clause 23.2(b)(iii) to provide a penalty payment where they have not provided the employee with 48 hours’ notice of the change to the employee’s shift roster. Nothing in the wording of clause 22.2(b)(iii) removes this obligation because there is agreement pursuant to clause 12.8(b)(i).

411. We further contend that maintaining a clause dealing with substitution of shifts in the clause dealing with ‘shiftwork arrangements’ and, more specifically, in a subclause dealing with ‘changes to shifts’ will better achieve the objective of ensuring the Award is simple and easy to understand, when compared to a requirement to read clause 23.(b) in conjunction with 12.8(b)(i),

412. The reference to 23.2(b)(v) should be reinserted to avoid implementing an unintended substantive change. As a consequential amendment, we suggest the wording in clause 6.2(i) should also be reinserted.

23.3 – Allowances for shift workers

413. The Exposure Draft has been amended, in accordance with the Full Bench’s October 2015 Decision, so that it is headed ‘Allowances’ for shift workers, rather than penalties rates for shiftworkers.

414. However, the actual rates or ‘allowances’ specified as being payable pursuant to clause 23.3 are not expressed as separately identifiable amounts in the exposure draft. Instead, the clause now provides that a higher rate of pay is applicable. Accordingly, the form of the exposure draft gives rise to the kind of difficulty identified at section 2.3 of these submissions. Relevantly, the wording of the Exposure Draft makes it difficult to determine the appropriate amount payable pursuant to clause 25.2(ii) (i.e. the loading on annual leave

for shift workers). It is not possible to identify the quantum of the allowance from the text of the Exposure Draft.

Clause 30.2 Notice of termination by an employee

415. As identified in the context of other awards, the word ‘from’ has been omitted from the last sentence. It should be inserted between the words ‘withhold’ and ‘any’.

Summary of Hourly Rates of Pay – Schedule D

416. The tables included in schedule D incorrectly indicate that the rates are a ‘% of ordinary hourly rate’ when, as indicated in D.1.2 they are actually based on the minimum hourly rates. The reference to ‘ordinary hourly rate’ is misleading and should therefore be amended to read ‘minimum hourly rate’.

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

417. The submissions that follow relate to the *Exposure Draft – Vehicle Manufacturing, Repair, Services and Retail Award 2015*.

17.1 Coverage issues

418. On 2 November 2015, a Full Bench of the Commission issued a Statement[84] in which the Full Bench:

- Expressed the view that the Vehicle Award ‘is unduly complicated and difficult to understand’;
- Expressed the view that the inclusion of the vehicle manufacturing sector in the Vehicle Award ‘causes significant problems in the drafting and structure’ of the Award;

[84] [2015] FWCFB 7275

- Advised that it had provisionally formed the view that the vehicle manufacturing sector should be removed from the Vehicle Award and placed within the Manufacturing Award;

- Advised that new exposure drafts of the Vehicle Award and Manufacturing Award would be issued.

419. During the Award Modernisation Process between 2008 and 2009, there was a great deal of debate about whether or not the manufacture of vehicles and components should be covered by the Manufacturing Award or the Vehicle Award. The four main parties involved in the debate were Ai Group, the VACC/MTAs, the AMWU (as a whole union), and the AMWU (Vehicle Division).

420. Ai Group's position at the time is set out in the following extract from Ai Group's Stage 3 – Pre-exposure Draft submission of 6 March 2009:

> **Chapter 26 – Vehicle Industry (Repair, Service and Retail)**
>
> 294. Ai Group is a party to the *Vehicle Industry (Repair, Services and Retail) Award 2002* and has a substantial membership in this sector. Our members include car dealerships, service stations, motor vehicle repair outlets, national car hire firms and others.
>
> 295. Over many decades Ai Group has played a major role in industry negotiations with the AMWU (Vehicle Division) and in AIRC proceedings relating to the *Vehicle Industry (Repair, Services and Retail) Award 2002.*
>
> 296. Ai Group supports the retention of a separate *Vehicle Industry (Repair, Services and Retail) Award 2002.* The award's current scope reflects the supply chain and the key sectors of the industry. For example, a motor dealership typically sells cars as well as servicing and repairing them.
>
> 297. An appropriate coverage clause for a modern *Vehicle Industry – Repair, Services and Retail – Award 2010* is set out below. The coverage is largely similar to the coverage of the existing award but the wording has been simplified somewhat:
>
> ***4. Coverage***
>
> ***4.1*** *This award covers employers throughout Australia in the Vehicle Industry Repair Services and Retail Industry and their employees in the classifications listed in this award.*

4.2 ***Vehicle Industry Repair Services and Retail Industry*** *means:*

(a) *Businesses whose principal function is selling, distributing, repairing, maintaining, towing, wrecking, servicing and parking of motor vehicles, caravans, trailers of all kinds and the like, together with equipment, parts or components thereof and the supply of running requirements;*

(b) *Repair and servicing of motor vehicles in businesses engaged in the motor vehicle rental business; and*

(c) *Retailing, handling, retreading, storing, distribution, fitting and repairing of tyres or the like.*

4.3 *The* ***Vehicle Industry Repair Services and Retail Industry*** *does not mean:*

(a) *Work covered under the Manufacturing and Associated Industries and Occupations Award 2010*

(b) *Work covered under the Vehicle Industry Manufacturing Award 2010.*

4.4 *Where an Employer is covered by more than one award, an Employee of that Employer is covered by the award classification which is most appropriate to the work performed by the Employee and to the environment in which the Employee normally performs the work.*

298. Ai Group opposes any expansion in the coverage of the award to include manufacturing activities. Ai Group has a large number of member companies which manufacture a wide range of vehicle components, parts, and accessories, including:

- Major components of vehicles, such as brake systems, steering systems, engine parts, seats, instruments etc;
- Fasteners and other small parts;
- Agricultural vehicle components and implements[85];
- Trailers;
- Bull bars and tow bars;
- Tray backs; and
- Vehicle bodies, to name a few.

299. Some of Ai Group's members carry out the above work under the *Metal,*

[85] The Agricultural Implement Making Award was incorporated within the *Metal, Engineering and Associated Industries Award 1998* in 1998. The award contains specific provisions relating to this industry in Schedule C.

Engineering and Associated Industries Award 1998 whilst others apply the *Vehicle Industry Award 2000*. Manufacturing work is not currently covered under the *Vehicle Industry (Repair Services and Retail) Award 2002* and Ai Group strongly opposes such work being covered under any modern Vehicle Industry Repair Services and Retail Award.

300. Ai Group is a party to the *Clerks (Vehicle Industry – Repair, Services and Retail) Award 2003* which applies only in Queensland. There is merit in considering the inclusion of clerical classifications in a modern Vehicle Industry Repair Services and Retail Award given the nature of car dealerships, tyre outlets and the like. However, Ai Group strongly opposes the inclusion of clerical classifications in awards which apply to manufacturing.

Chapter 27 – Vehicle Manufacturing Industry

301. The vehicle manufacturing industry is one of the largest sectors of Ai Group's membership. Our membership includes the car assembly firms as well as virtually all of the significant manufacturers of automotive components.

302. The assembly firms have enterprise awards. The component companies apply either the *Metal, Engineering and Associated Industries Award 1998* or the *Vehicle Industry Award 2000*. Far more of the first and second tier suppliers use the *Metal, Engineering and Associated Industries Award 1998*, than use the *Vehicle Industry Award 2000.*

303. The *Rubber, Plastic and Cablemaking Industry – General – Award 1998* also applies to many automotive component companies (ie. those that make components out of plastic or rubber).

304. The coverage of the Stage 1 Modern Manufacturing Award applies widely to the manufacture and repair of vehicles, as specified in paragraph 4.3(j):

> *"4.3 (j) motor engines, motor cars, motor cycles and other motor driven vehicles and components".*

305. During Stage 1 of award modernisation the parties were asked to consider the modernisation of awards in the vehicle manufacturing industry in conjunction with the modernisation of awards in the metal and engineering industry, the rubber, plastic and cablemaking industry, and the glue and gelatine industry.

306. Awards applicable to the metal and engineering industry, the rubber, plastic and cablemaking industry, and the glue and gelatine industry were all incorporated within the Modern Manufacturing Industry. The issue of whether a separate award should be made for vehicle manufacturing was deferred until Stage 3.

307. Ai Group supports the creation of a Modern Vehicle Industry Manufacturing Award, given the support expressed for such award by the car assemblers and some component suppliers who are currently using the *Vehicle Industry Award 2000*. However, such award would

need to be drafted in a manner which does not disturb the award coverage of automotive component companies currently bound by the *Metal, Engineering and Associated Industries Award 1998* or the *Rubber, Plastic and Cablemaking Industry – General – Award 1998.* These automotive component companies are now covered by the Modern Manufacturing Award, as made at the conclusion of Stage 1 of the modernisation process.

421. When it released the *Exposure Draft – Vehicle Manufacturing, Repair, Services and Retail Award 2010* on 22 May 2009, the Award Modernisation Full Bench said:

"Vehicle industry (repair, service and retail)

Vehicle manufacturing industry

[224] We publish a draft Vehicle Manufacturing, Repair, Services and Retail Award 2010. The proposed award is intended to deal comprehensively with the vehicle manufacturing sector and the repair, services and retail sector. It is our preliminary view that there will be operational benefits in having one industry award as there are many common conditions. Where necessary separate provision is made for distinct parts of the industry. Given the nature of much post-production and after-sale modification of specialised vehicles, it is anticipated that access to a single source of industrial regulation will assist employees and employers alike.

[225] The draft award does not markedly depart from the provisions of the existing pre-reform awards and existing conditions for employees involved in the sale of fuel and other vehicle related retailing have been adopted. We have decided not to include the pay and classification provisions from the Clerks Modern Award or from any other award. It is our view at this stage that clerks should not be covered by the vehicle industry award.

[226] Submissions were put seeking that the pay and conditions of sales staff in the car rental industry be aligned with those of console operators. We have not accepted this proposal. To do so would segment the sales office staff from the purely administrative/clerical staff of the car rental companies who, with the car rental employers' call-centre staff, will also be covered by the Clerks Modern Award. At this stage it is our view that the sales staff should also be covered by that award.

[227] We draw attention to a number of draft provisions, and seek comment on them. Clause 4.2(a)(ii) has been included in the draft but both its utility and its legal effect are open to question. Clause 51.4 deals with the five day week and is on one view out of date. Clause 13.1 deals with prohibited work for juniors and may be inappropriate in a modern award. We invite any party to submit reasons why the provision might be included. We have not included a payment by results provision.

[228] We accept that the elimination of the differentials from several of the pay rates, casual loadings and shift premiums payable under Queensland and Western Australian NAPSAs will require staged implementation and note the arrangements proposed by the Motor Trades Association of Australia. These will be considered at a later stage.

> **[229]** The relevant pre-reform awards contain different terms for conversion of casuals who have worked full-time hours, for four and six weeks respectively. Such provisions have the capacity to operate inflexibly against the interests of the casual employee and the employer. We have included the conversion provision found in the Manufacturing Modern Award.
>
> **[230]** Finally we note that appropriate exclusions may be necessary in the coverage clauses of the Manufacturing Modern Award and the RT&D Modern Award."

422. In response to the exposure draft, Ai Group and the AMWU (as a whole union, represented by its then President Julius Roe) expressed major concerns about the content of the exposure draft.

423. The following extract from Ai Group's Stage 3 Post-exposure draft submission of 12 June 2009 is relevant:

> **"CHAPTER 36 – VEHICLE INDUSTRY (REPAIR, SERVICE AND RETAIL) (AM2008/61) & VEHICLE MANUFACTURING INDUSTRY (AM2008/62)**
>
> 466. Ai Group is extremely concerned about the preliminary views that the Commission has expressed regarding the modernisation of awards in the Vehicle Industry, as set out in the following extract from the Full Bench's Statement of 22 May:
>
> > **"[224]** We publish a draft Vehicle Manufacturing, Repair, Services and Retail Award 2010. The proposed award is intended to deal comprehensively with the vehicle manufacturing sector and the repair, services and retail sector. It is our preliminary view that there will be operational benefits in having one industry award as there are many common conditions. Where necessary separate provision is made for distinct parts of the industry. Given the nature of much post-production and after-sale modification of specialised vehicles, it is anticipated that access to a single source of industrial regulation will assist employees and employers alike."
>
> 467. Ai Group urges the Commission to reconsider its preliminary view and substantially amend the coverage of the *Exposure Draft – Vehicle Manufacturing, Repair, Services and Retail Award 2010*. The Commission's preliminary view:
>
> - Does not recognise that the vast majority of vehicle manufacturing organisations (leaving aside the car assembly firms all of which have enterprise awards) are covered under the *Metal, Engineering and Associated Industries Award 1998* and the *Rubber, Plastic and Cablemaking Award 1998*, and are now appropriately covered under the Modern Manufacturing Award;

- Fails to recognise that vehicle manufacturing is one of the largest sectors (in fact, arguably the largest sector) of the metal and engineering industry and the rubber, plastic and cablemaking industry;

- Fails to recognise that relatively few vehicle manufacturing organisations are covered by the *Vehicle Industry Award 2000*, when compared against the number covered by the *Metal, Engineering and Associated Industries Award 1998* or the *Rubber, Plastic and Cablemaking Award 1998;*

- Does not take account of the numerous references to vehicle component manufacturing through the Coverage clause of the Modern Manufacturing Award;

- Disregards the importance of consistent award conditions for the many organisations which have substantial involvement in the vehicle components sector, but also have substantial involvement in other sectors of the Metal and Engineering and/or Rubber, Plastic and Cablemaking Industry (eg. manufacturers of fasteners, instruments and friction materials)

- Does not take account of developments in the industry training system, including the recent decision of the Deputy Prime Minister, the Hon Julia Gillard MP in March this year to move the regulation of training for the vehicle industry into the Manufacturing Skills Council;

- Does not display an understanding of career paths and apprenticeship structures of employees in the automotive components sector of the metal, and engineering and the rubber, plastic and cablemaking industries;

- Overstates the links between vehicle manufacturing and vehicle repair, service and retail. Few organisations of any size are involved in manufacturing as well as repair, service or retail;

- Overstates the significance of the typically very small organisations which carry out after-sale modifications to vehicles in determining appropriate award structures for the vehicle manufacturing industry;

- Fails to take account of the fact that all of the major manufacturers of earthmoving equipment are covered under the *Metal, Engineering and Associated Industries Award 1998* and are appropriately covered under the Modern Manufacturing Award;

- Fails to take account of the fact that the major manufacturers of agricultural machinery and implements are covered under the *Metal, Engineering and Associated Industries Award 1998* (which superseded the *Agricultural Implement Making Award from 1998*) and are appropriately covered under the Modern Manufacturing Award;

- Does not recognise that the vehicle industry is experiencing very tough times and the last thing that the industry needs is for huge and unnecessary changes to be made to existing award conditions and award coverage patterns.

468. As stated, Ai Group is very concerned about this issue. If the Commission proceeds with its preliminary view the operations of hundreds of vehicle component, earthmoving and agricultural machinery companies covered by the *Metal, Engineering and Associated Industries Award 1998*, the *Rubber, Plastic and Cablemaking Award 1998,* Metal Industry NAPSAs plus numerous other federal awards and NAPSAs will be negatively impacted.

469. In several other industries, the Commission has changed the preliminary view which it has expressed at the exposure draft stage and substantially altered the coverage of particular modern awards. Ai Group urges the Commission to adopt a similar level of flexibility in this industry.

470. The changes which Ai Group submits need to be made to the exposure draft are set out below and in ***Annexure F***.

Vehicle Manufacturing, Repair, Services and Retail Award 2010

Title

471. Ai Group submits that the title of the award needs to be amended to the ***Vehicle Repair, Services and Retail Award 2010***. The existing title is not appropriate when the vast majority of vehicle and component manufacturing is currently carried out under *Metal, Engineering and Associated Industries Award 1998*, the *Rubber, Plastic and Cablemaking Award 1998* and enterprise awards.

472. Throughout our various written and oral submissions relating to the modernisation of awards for the Vehicle Manufacturing Sector ("the VM Sector") and the Vehicle Repair, Services and Retail Sector ("the RS&R Sector"), Ai Group has expressed serious concerns about overlap between any modern awards created for these sectors and the Modern Manufacturing Award which covers the manufacture of vehicles and components.

473. Ai Group has reviewed the terms of the *Exposure Draft – Vehicle Manufacturing, Repair, Services and Retail Award 2010* and clearly there is substantial overlap between this exposure draft and the Modern Manufacturing Award. This overlap has the potential to disrupt the existing industrial arrangements of hundreds of Ai Group member companies in addition to potentially creating increased costs and industrial disputation.

474. Accordingly, Ai Group has entered into discussions with the AMWU in an effort to devise an appropriate means of removing, or at the very least substantially reducing, the level of overlap between the two awards. Ai Group also intends further discussing the issue with the other major vehicle industry unions including the AWU, NUW and

LHMU.

475. The latest discussion between Ai Group and the AMWU occurred on Friday 12 June 2009, and further discussions are scheduled between the parties on Monday 15 June and it is hoped that an agreed position will be able to be reached to resolve the overlap between the Modern Manufacturing Award and the *Exposure Draft – Vehicle Manufacturing, Repair, Services and Retail Award 2010,* which Ai Group and the AMWU would submit for the Commission's consideration.

476. Ai Group has prepared a substantial Chapter of this submission which deals in detail with the exposure draft but, given the discussions which are underway between the parties, Ai Group is not in a position to finalise the Chapter today. We expect to be in a position to file our submissions on the vehicle industry exposure draft by Tuesday 16 June. We apologise for the delay and respectfully ask for the Commission's understanding, and for our vehicle industry materials to be considered despite them being filed a few days late."

424. On 16 June 2009, Ai Group filed another detailed submission on the AIRC's *Exposure Draft – Vehicle Manufacturing, Repair, Services and Retail Award 2010*. The submission relevantly stated:

"7. Ai Group acknowledges that there are some vehicle component manufacturers (albeit a small number) who are currently covered under the *Vehicle Industry Award 2000* and who do not wish to be bound by the Modern Manufacturing Award. Some of the issues here relate more to relationships and politics concerning the Metals and Vehicle Divisions of the AMWU, rather than concerns about inappropriate award conditions. However, given the views of these employers, Ai Group supports the Modern Vehicle Repair Service and Retail Award applying to:

- Vehicle Repair, Service and Retail operations; and
- <u>Vehicle manufacturing - but only for those employers who were bound by and applying the *Vehicle Industry Award 2000* as at 31 December 2009</u>."

425. Ultimately, the Award Modernisation Full Bench largely adopted Ai Group's proposal and excluded from the Vehicle Award those employers who on 31 December 2009 were engaged in the manufacture and/or assembly of metal parts or accessories and were bound to observe the *Metal, Engineering and Associated Industries Award 1998*. The following extract from the AIRC's Stage 3 Award Modernisation Decision is relevant:

“Vehicle industry (repair, service and retail)

Vehicle manufacturing industry

Vehicle Manufacturing, Repair, Services and Retail Award 2010

[270] There has been widespread support for an integrated vehicle industry award to apply as reflected in the exposure draft – the *Vehicle Manufacturing, Repair, Services and Retail Award 2010* (the Modern Vehicle Award). In adopting that course we have accepted a number of changes in the exposure draft arising from the parties' submissions, so that the modern award generally accords with the structure and content of the antecedent awards.

[271] Consistent with unification of the vehicle awards, and notwithstanding the representations of the Shop, Distributive and Allied Employees Association, we have preserved the existing classification structures, including provisions as to the retailing of fuel and other commodities through the console operations which characterise modern service/petrol stations and which have been the subject of review in several earlier Commission proceedings. Similarly, we have accepted the need, given the specialised functions of the award requiring driving, for the retention of the current driving classifications. An appropriate exclusion will appear in the RT&D Modern award.

<u>**[272]** As to coverage it is important that the making of the new award not unsettle the relationship which has existed satisfactorily for many years between the awards of the vehicle industry and the award regulating manufacturing. The fact of complementary exclusion provisions in the Modern Vehicle and the Manufacturing Modern awards is intended to have this effect. Where claims have been made for additions to the scope of coverage of the Modern Vehicle Award, to include, for example, boats and bicycles, our approach has been to maintain the status quo</u>.

[273] Further submissions were made as to the existing record keeper classifications and as to the specialised skills and industry specific functions required of employees so classified. As it remains our view that such employment comes within the scope of the Clerks Modern Award these classifications have been removed from the award.

[274] We have been assisted by the parties' further submissions as to apprenticeships and the obsolescence of several provisions. The parties have also advised that it is their intention, after the Modern Vehicle Award comes into operation, to seek the assistance of Fair Work Australia in dealing with a number of outstanding issues, including finalising levels 7 and 8 of the repair, services and retail classification structure. “

426. The abovementioned events and issues are relevant to the Commission's further consideration of the matters identified in the 2 November 2015 Statement[86] of the Full Bench.

[86] [2015] FWCFB 7275

17.2 Other matters arising from the Exposure Draft

Clause 11.2(a)(i) – Working during or without a meal break

427. The current clause 26.3 provides for the payment of a penalty in certain circumstances in which an employee is required to work during or without a meal break: (emphasis added)

> **26.3** Subject to the exceptions provided below, an employee will not be required to work more than five hours without a break for a meal. An employee will be paid at the rate of time and one half for all time worked:
>
> **(a)** where the employee is required to work beyond five hours without a break for a meal; or
>
> **(b)** during meal breaks and thereafter until a meal break is allowed.

428. Clause 26.4 provides for circumstances in which an employee may be required to work for more than five hours without a break for a meal, as contemplated by the commencing words of clause 26.3:

> **26.4** Where the employer and the majority of employees in an establishment agree that six hours can be worked without a meal break being taken, this arrangement will apply to all employees within that establishment.

429. Neither clause 26.3 nor 26.4 require the payment of the penalty prescribed by clause 26.3 where an employee works beyond six hours where there is an agreement between the employer and majority of employees, as contemplated by clause 26.4. Despite this, clause 11.2(a)(i) of the Exposure Draft, which corresponds with the current clause 26.3, requires the payment of the relevant penalty in such circumstances. This is clearly a deviation from the current award and would impose a significant additional financial obligation on an employer.

430. Clause 11.2(a)(i) should therefore be amended by deleting the text that appears in parentheses.

Clause 35 – Shiftwork penalties

431. We refer to our submissions at section 2.2 above. Consistent with the concerns we have there raised:

- The heading to clause 35 should be amended to read ‘shift loadings’; and

- The preamble in clause 35.1 should be amended to read ‘This clause will not apply to’, such that the reference to ‘penalties’ is removed;

432. This is consistent with the current clause 42.2, which characterises the relevant shift premiums as loadings rather than penalties.

Clause 41.2 – Minimum wages

433. Consistent with the Commission’s July 2015 Decision,[87] the ‘casual hourly rate’ column’ should be deleted from clause 41.2. The corresponding footnote should also be deleted.

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

434. The Exposure Draft should be amended to replacing the words ‘highest rate’ with ‘highest minimum rate’ in clauses 41.3(a) and (b).

435. It is not appropriate for awards to regulate over-award payments, consistent with the Commission’s July 2015 Decision[88] at paragraphs [95] – [96] (emphasis added):

> **“[95]** The AMWU and TCFUA, supported by a number of other unions submitted that replacing terms such as ‘time and a half’ and ‘double time’ with ‘150% of the minimum hourly rate’ or ‘200% of the minimum hourly rate’ (or ‘200% of the ordinary hourly rate’ in awards where there is an all purpose payment) reduces an employee’s entitlements under the award. <u>They argue that where an employee is receiving an overaward payment, it is the higher rate that should be multiplied to calculate the amount payable</u>.
>
> **[96]** <u>Modern awards provide a safety net of minimum entitlements. The modern award prescribes the minimum rate an employer must pay an employee in given circumstances. Overaward payments, while permissible, are not mandatory</u>. Further, if an employer chooses to pay an employee more than the minimum amount payable for ordinary hours worked, the employer is not required to use that higher rate when calculating penalties or loadings. We are not persuaded by the submissions advanced by union parties and do not propose to replace the terms 150% and 200% with time and a half or double time, etc.

[87] [2015] FWCFB 4658 at [63].

[88] [2015] FWCFB 4658

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

436. Clause 43.2(b) should be amended by replacing "152 *days*" with "152 *hours*". This appears to be a drafting error and is inconsistent with the current clause 54.2(a).

Clause 43.3(d) – Penalty rates for shiftworkers

437. Consistent with the terminology used elsewhere in the Exposure Draft, clause 43.3(d) should be amended to read 'minimum hourly rate'.

Clause 43.3(e) – Penalty rates for shiftworkers

438. Consistent with the terminology used elsewhere in the Exposure Draft, clause 43.3(e) should be amended to read 'minimum hourly rate'.

Clause 44.1(a) – Crib break

439. Consistent with the terminology used elsewhere in the Exposure Draft, clause 44.1(a) should be amended to read 'minimum hourly rate'.

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

440. The submissions that follow relate to the *Exposure Draft – Wool Storage, Sampling and Testing Award 2015* (Exposure Draft) published on 30 October 2015.

Clause 14.1 – Definition of overtime

441. The current clause 25.1 stipulates the circumstances in which an employee, whether engaged on a full-time, part-time or casual basis, is entitled to overtime rates. It applies to day workers and some shiftworkers. The provision states that "an employee will be paid the following additional payments for all work done *in addition to their ordinary hours*". Clause 25.3 relates specifically to continuous shiftworkers. It requires the payment of a higher rate "for all work done in addition to ordinary hours".

442. The ordinary hours of work of an employee are to be determined having regard to clause 22. Further, in respect of part-time and casual employees, clauses 10.2(d) and 10.3(a) are also relevant. That is, they too must be considered in ascertaining the ordinary hours of work and thereby the circumstances in which such an employee is to be paid overtime rates.

443. In effect, the conditions upon which overtime rates are payable are determined by the relevant provisions of the Wool Award, which define or provide for the determination of the ordinary hours of work.

444. Clause 14.1(a) of the Exposure Draft deviates from this. It introduces notions of “rostered hours on any shift” and “the total ordinary hours in the work cycle”. We are concerned that this may amount to a substantive change to the application of the overtime provision. That is, it may result in eligibility to the overtime rates arising in circumstances that are different from the current clause. In particular, it is our view that the current clauses 25.1 and 25.3 do not necessarily entitle an employee to overtime rates where the employee performs work outside the hours that they have been *rostered* to work by their employer. We also note that the Award does not mandate that an employer implement a roster for the ordinary hours of work of its employees.

~~445.~~ ‘Ordinary hours of work’ is a distinct and well understood concept that is deeply embedded in the award system. This is reaffirmed by s.147 of the Act, which states that a modern award ‘must include terms specifying, or providing for the determination of, ordinary hours of work for each classification of employee covered by the award and each type of employment permitted by the award’. Clauses 10.2, 10.3 and 22 are in accordance with this mandatory requirement.

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

> [146] I agree with the Ai Groups' submission about the meaning of the term "ordinary hours of work" in "industrial parlance". The manner in which that term has developed and been understood in awards does not suggest it is synonymous with what an employee's usual or regular hours may be.[89]

447. The reference to “shifts” in clause 14.1(a) is also confusing; it may give rise to an argument that the provision is confined in its application to shiftworkers.

448. We note that the words found at clause 14.1(a) appear to have been taken from the current clause 22.4(c) of the Award, which applies only where an employee is engaged to work on a work cycle made up of working and non-working days. That clause has been reproduced at 8.4(c) of the Exposure Draft and properly identifies the circumstances in which overtime rates are payable to employees *working on a work cycle*. The criteria there stipulated does not apply to all employees generally.

449. For the reasons stated above, and in the interests of ensuring that the entitlement to overtime is not substantively different from the current Award, clause 14.1(a) should be substituted with the following:

> (a) For a full-time or casual employee, overtime is any time worked in addition to the employee’s ordinary hours of work.

450. This is consistent with the current clauses 25.1 and 25.3.

Clause 14.2 – Overtime rates

451. The word “time” should be deleted from the first row of the second column in clause 14.2. This appears to be a drafting error.

Clause 20.2 – Notice of termination by an employee

452. There appears to be a drafting error in clause 20.2 which should be amended as follows:

> … the employer may withhold <u>from</u> any money due to an employee …

[89] [2014] FWC 3529.

Schedule A – Classification and Progression Principles

453. Ai Group has identified a formatting error within Schedule A – Classification and Progression Principles which should be rectified.

454. The dot points should be removed from the words "*[t]he following tasks are indicative of the tasks which an employee at this level may be required to perform*:"

- A.3.5 – Wool Industry Worker Level 5 (Wool Storage)
- A.3.13 – Wool industry Worker Level 2 (Skin and Hide Stores)
- A.3.15 – Wool Industry Worker Level 4 (Skin and Hide Stores)