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Cleaning Services Award 2010

Agenda for Conference – 9.30 am, 27 September 2018

This document sets the agenda for items to be discussed during the conference on 27 September 2018.

Attachment A to this Agenda sets out a revised list of outstanding items at in detail (in order of this agenda).

A. Confirming *provisionally* resolved items:

Parties should attend the conference in position to state whether any of the proposed actions in A1 – A4 are opposed. In the absence of opposition from parties, the proposed actions will be adopted.

Ref	Item description and status	Proposed action
A1	Item 3 – clause 9—Full-time employment • Parties joint position filed 24 July 18 (Ai Group, UV, ABI) • Expert proposed minor amendment – set out in background paper • Ai Group do not oppose experts amendment	Adopt joint position with expert amendment in terms set out in draft list of outstanding items.
A2	Item 4 – clause 10.1—Part-time employment • Parties joint position filed 24 July 18	Adopt joint position as per draft list of outstanding items.
A3	Item 18 • Not discussed during June conference. • Revised PLED updated in accordance with expert's proposed revision (see Revised agenda and list of outstanding items, 19 June 2018) • No party made further submissions on the revised PLED	Adopt changes to clause 14 as *provisionally* applied updated in revised PLED.
A4	Item 19 • Amendments proposed by Commission (see [2018] FWC 3842 at [13]). • Ai Group did not oppose, no other party made a submission.	Adopt 14.3(a) and 14.4(c) as per [2018] FWC 3842 at [13].
A5	Cross-referencing errors (see Ai Group submission 24 Sept 2018): • Clause 13.3 should refer to clause 13.1(b), not 1.1(a). • Clause 13.4 should refer to clause 13.1(b), not 1.1(a). (Also see United Voice submission 13 July 2018) • The second clause 17.6(a) should be renumbered "clause 17.6(b). • The reference to "clause 17" in Note 2 under clause 17.6 should be replaced with "clause 17.6".	Correct cross references as listed in next version of PLED.

B. Items to be determined on the Submissions before the Commission (see [2017] FWC 5874, [2018] FWC 3842), transcript 22 June 2018)

Parties should attend the conference in position to state whether any of the proposed actions in B1 – B3 are opposed. In the absence of opposition from parties, the proposed actions will be adopted.

Ref	Item description and status	Proposed action
B1	Item 25 (in part)—clause 20.1—Allowances • United Voice seeks retention of current award wording of clause 20.1. • Ai Group disagrees with United Voice	Adopt PLED clause 20.1. Lead-in words are consistent with other PLEDs.

Ref	Item description and status	Proposed action
B2	Item 12 – clause 12—Classifications • Ai Group submits there is no obligation to classify an employee in a classification in Schedule A in current award. UV disagrees, and submits obligation arises in relation to clauses 15 and 12.2. • The Commission indicated this would be determined on papers	Commission to deal with on papers (transcript 22 June 2018).
B3	Item 40 – clause 32.8—Consultation about change of contract • United Voice seek retention of words 'including a relevant union' in clause 32.8 of PLED. Ai Group submits words not necessary. • Parties content to deal with item on material before Commission.	Commission to deal with on papers (see Transcript, 8 November 2018, PN 229.)

C. Outstanding items:

Parties should attend the conference in a position to answer the questions in red.

C1. Item 9 – clause 11.3—Casual employment

- Ai Group submits the words 'for each ordinary hour' should be deleted to reflect current clause.
- *Does United Voice, ABI or Business SA oppose Ai Group's submission?*

C2. Item 13 – clause 13—Ordinary hours of work

- Interested parties invited to make submissions on Commission's proposed amendment (see [2018] FWC 3842 at [33]).
- **13.3**: United voice seek amendment:
    - "**13.3** Except in an emergency and subject to clause 30.1 consultation about changes to rosters or hours of work, an arrangement agreed by the employer and employee under clause 13.2(b) may only be changed on giving a minimum of one week's notice."
    - Does Ai Group, Business SA or ABI oppose UV's submission?
- Cross-reference in **13.4** – agreed – see **A5**.

C3. Item 32 – clause 22.6—Call back for non-cleaning purposes

- Ai Group sought amendment, and made a submission in support of it on 24 July 2018.
- United Voice made a submission in support of retaining PLED clause.
- Expert proposed amendment – see Draft list of outstanding items.
- Ai Group does not oppose proposed amendment.
- *Does any other party oppose proposed amendment? If there is no opposition, the expert's proposed amendment will be adopted. If position is contested, Commission will determine on submissions put* (see [2018] FWC 3842 at [40]).

C4. Item 35 – clause 25.3—Payment for annual leave

- Parties filed joint report – can agree on entitlement to payment on annual leave but not on how it should be worded. Disagree on payment on termination of employment.
- Ai Group: submits it understands that:
    - Parties do not believe that the current award entitles an employee to be paid the relevant shift, weekend or public holiday penalties twice in relation to a period of leave that is taken.
    - It is common ground that the Award should only provide that an employee receives either the relevant penalties or the 17.5% loading.
    - The contest is whether drafting of the PLED accurately reflects 1 and 2.

- *Can United Voice confirm this is agreed? Do any other parties oppose this?*
- "Double dipping" issue:
  - United Voice submits clause 25.3 accurately reflects clauses 29.3 and 29.4.
  - Ai Group's proposed amendment:

    25.3 Payment for annual leave

    (a) For the purpose of calculating the amount that the employer is required by section 90 of the Act to pay an employee for a period of paid annual leave, the employee's base rate of pay for the employee's ordinary hours of work in the period must be taken to include any of the following that are payable to the employee:

    (i) a leading hand allowance; and

    (ii) a first aid allowance; and

    ~~(iii) penalty rates paid for shiftwork or rostered ordinary hours of work on a Saturday or Sunday; and~~

    (iv) (iii) a part-time allowance for part-time employees working shiftwork (Monday to Friday) or rostered ordinary hours on a Saturday or a Sunday.

  - *Does any party oppose the Ai Group's proposed amendment to clause 25.3?*
- Annual leave on termination issue:
  - United Voice seek to retain the current award clause.
  - Ai Group proposes to delete clause 25.3(c).
  - *What are the views of other parties in relation to Ai Group's proposed deletion of clause 25.3(c)?*

C5. Items 36 and 37 – clause 24.4—Annual leave (temporary close down)

- Commission has previously indicated that annual leave close down will be considered by the plain language full bench as a separate issue. Ai Group submits issue referred to in statement [2017] FWC 5861 only relates to continuity of service issue.
- Ai Group continues to press submission.
- *Does United Voice continue to press their submission (item 36)?*
- *Does any party oppose the submissions of Ai Group or United Voice?*
- *Should items 36 and 37 be dealt with in these proceedings or the annual leave close down proceedings?*

A1. ITEM 3 – CLAUSE 9—FULL-TIME EMPLOYMENT –*Commission to publish a background paper* (see [2018] FWC 3842 at [41]-5 and amended directions).

BACKGROUND PAPER

Full-time employment and hours of work

Item 3 concerns work arrangements for full-time employment. Clause 9 intersects with clause 13.1–Ordinary hours and rosters cycles—full-time employees.

This item relates to two issues:

1. the omission of the notion that full-time employees are ongoing; and
2. the introduction of a requirement that the hours of work arrangements for full-time employees be agreed.

This item was first raised at the conference held on 8 November 2017. The Commission identified the two issues and indicated that the matter would be determined on the papers.

At the conference held on 22 June 2018, the Commission indicated a background paper would be prepared and the matter would be referred to the plain language expert. The parties would have a further opportunity to make submissions on any amendments the plain language expert may make.[1]

COMPARISON OF RELEVANT CLAUSES

Current clause	PLED clause
12.3 Full-time employment A full-time employee is an ongoing employee engaged to work an average of 38 ordinary hours per week. Such hours are to be arranged in accordance with clause 24—Ordinary hours of work.	**9. Full-time employment** An employee who is engaged to work an average of 38 ordinary hours per week in accordance with an agreed hours of work arrangement is a full-time employee. NOTE: The hours of work arrangement is agreed between the employer and the employee. See clause 13—Ordinary hours of work and rostering.

SUBMISSIONS

ABI & NSWBC – 12 October 2017 submission

16.1 The PLED clause is repetitive and unclear. Our clients propose the following alternative wording:

> *An employee who is engaged to work an average of 38 ordinary hours in accordance with an hours of work arrangement in accordance with clause 13—Ordinary hours is a full-time employee.*

Ai Group – 12 October 2017 submission

[1] Transcript, 22 June 2018, paragraphs 82 - 87

5. The redrafted clause 9 states:

> *9. Full-time employment*
>
> *An employee who is engaged to work an average of 38 ordinary hours per week in accordance with an agreed hours of work arrangement is a full-time employee.*
>
> *NOTE: The hours of work arrangement is agreed between the employer and the employee. See clause 13—Ordinary hours of work and rostering.*

6. The redrafted clause requires that a full-time employee work under an ***agreed*** hours of work arrangement in all circumstances. This is not a requirement of the current Award and is not appropriate. The current award gives the employer the right to set the hours of work within defined boundaries, with additional flexibility available by agreement.

7. Also, the above wording does take account of the fact that many casual employees would work 38 hours in some weeks, even if they work irregularly overall, and should not be deemed to be full-time employees.

BSA – 13 October 2017 submission

2. Business SA submits this draft differs significantly to the current clause. The PLED clause requires that a full-time employee work under an **agreed** hours of work arrangement in all circumstances rather than referring to clause 13.1 regarding arrangement of hours. The PLED clause does not take into account the fact that casual employees may also work 38 hours in a week.

United Voice – 20 October 2017 reply submission

2. ABI, AIG and BSA have objected to the definition of full time employment in Clause 9. We disagree. We support the wording in the plain language draft.

3. The wording in clause 9 of the plain language draft reflects existing award entitlements in the current award.

4. Clause 9 references clause 13—Ordinary hours of work and rostering, which is clause 24 under the current award. The wording in clause 9 of the plain language draft regarding an *'agreed'* hours of work arrangement is in accordance with existing entitlements under clause 24 of the current award.

5. Clause 24.1(e) states:

> *'The ordinary hours of work having been determined by the employer and employee in accordance with clause 24.1(c) will not be altered without the giving of one week's notice except in the case of emergency.'*

6. Clause 24.1(f) states:

> *'Once a cycle has been agreed upon and implemented, it must not be varied until that cycle has been completed.'*

7. It is envisioned in clauses 24.1(e) and (f) that the ordinary hours of work will be determined by the employer and employee and agreed upon.

8. Under the current award, the arrangement of ordinary hours of work is not a unilateral decision of the employer.

9. As such, the wording in clause 9 of the plain language draft that there is an 'agreed' hours of work arrangement between the employer and employee appropriately reflects existing entitlements.

Ai Group – 24 July 2018 submission

2. We understand that the Commission intends to issue a background paper setting out the issues in relation to clause 9 of the Exposure Draft, unless a resolution is reached between the parties present at the Conference.

3. Ai Group has discussed the issue with United Voice and Business SA. We understand that neither party opposes the following form of words to replace clause 9:

> *9. A full-time employee is an ongoing employee engaged to work an average of 38 ordinary hours per week. Those hours are to be arranged in accordance with clause 13.1 – clause 13.4.*

4. The proposed words maintain the substance of the current definition of a fulltime employee. It is our submission that the proposed words would resolve the various issues raised by interested parties regarding clause 9.

5. The above proposal is however put on the basis that interested parties will be granted an opportunity to revisit it during the course of this process if variations are made to other aspects of the Exposure Draft that have a substantive bearing on the definition. One such example is clause 13.1 of the Exposure Draft, which 1 4 yearly review of modern awards – Plain language re-drafting – Cleaning Services Award 2010 [2018] FWC 3842. 2 Statement at [19]. 4 Yearly Review of Modern Awards – Plain Language Re-Drafting – Cleaning Services Award 2010 Australian Industry Group 3 remains unresolved and we understand will be the subject of further consideration by the Commission.

6. Finally, whilst we provided our proposal to ABI and the NSW Business Chamber on 27 June 2018 we have not received a response and accordingly, for the purposes of this submission, we are unable to advise of their position in relation to it.

ABI & NSWBC – 24 July 2018 submission

We refer to the AiG correspondence attached to Ms Bhatt's email below.

We confirm the proposed wording at [3] and [8] is not opposed by ABI and the NSW Business Chamber.

Note: The reference to [3] in this submission relates to Ai Group's submission of 24 July 2018.

Ai Group – 21 September 2018 submission

Item 3: Clause 9 of the Exposure Draft

4. In a submission dated 24 July 2018, Ai Group proposed a form of words for clause 9 of the Exposure Draft.

5. Ai Group has considered the amendments proposed by the drafter to Ai Group's proposal. We do not oppose the changes proposed.

RELEVANT TRANSCRIPT – 22 June 2018 conference:

PN82 JUSTICE ROSS: Yes. I wonder if we can come back to paragraph (b) of agenda item one, which is attachment A and if we can deal with the other items on the agenda and just work our way through them. Look in relation to full time employment, just bear with for a moment, there are a range of employer concerns in respect of the current clause nine of the PLED, both in terms of repetition, et cetera, and also the proposition that it differs from the current award.

PN83 United Voice supports the PLED and I think – look, my preference in relation to that item is I would prefer to prepare a background paper simply setting out in more detail the respective positions of the parties, comparing the two, the current award and the PLED clause. I'll invite the plain language expert to reflect on that and see what they want to say about it then I'd publish that background paper with whatever the plain language expert comes back with, invite the parties to comment if there are any proposed changes and then have a further conference in respect of it.

PN84 I just think, look I'll make a similar point when we get to casual employment, that these are, not to suggest that the others are not important, but these are particularly important clauses and I just think we may need another iteration of it and it's probably better to, perhaps not from your perspective, but I think it's better to deal with these in bite size pieces because on occasion also you have a change in one part that has a ripple effect on something else.

PN85 Arising out of this conference, you'll end up with a revised PLED that'll capture the agreed items, there'll be some provisional views, as I've discussed, and we'll indicate what matters are to be the subject of further discussion and when a background paper will be available and when the next conference will be, so you'll see the sequencing of events, okay, but having said all that, of course, if suddenly peace breaks out in relation to, say for example, this full time employment, if, on reflection, anyone has a different view to the one they've already put in, then now would be the time to say something about that. No? All right.

PN86 MS DABARERA: I don't know, your Honour.

PN87 MS BHATT: (Indistinct), your Honour. In fact, my instructions are that this is something that we would wish to put something further about. We consider that this is quite a significant issue. I wonder if I might respectfully inquire whether that background paper will also deal with the ordinary hours and rostering provisions which, I think, are clause 13 and also item 13 which is very closely tied up with the definition of full time employment. It deals with this idea of whether or not a full time employee's hours must be agreed and if so, what is it that has to be the subject of agreement.

PN88 JUSTICE ROSS: Well yes, I can do. I'll just wait. I wanted to make some observations about 13 and come to that - - -

PN89 MS BHATT: Sorry, I jumped ahead of you.

PN90 JUSTICE ROSS: - - - but that's fine. Why don't we see where we go with that - - -

PN91 MS BHATT: Of course.

PN92 JUSTICE ROSS: - - - and if we don't get anywhere, then certainly I'll capture that in the background document.

EXPERT'S COMMENTS:

The expert made minor amendments to the Ai Group's proposed amendment, which was supported by ABI, United Voice and Business SA.

> **9.** A full-time employee is an ongoing employee engaged to work an average of 38 ordinary hours per week.
>
> NOTE: Those hours of work are to be arranged in accordance with clause 13.1 – clause 13.4.

A2. ITEM 4 – CLAUSE 10.1—PART-TIME EMPLOYMENT – *Ai Group submitted that this item was not discussed at the June 2018 conference.*

COMPARISON OF RELEVANT CLAUSES

Current award clause	PLED clause
12.4(a) A part-time employee is an employee who: (i) is engaged to work less than the full-time hours of 38 per week; (ii) has reasonably predictable hours of work; and (iii) receives, in addition to the hourly rate for a full-time employee, an allowance of 15% of the hourly rate. This allowance allows the employer to roster a part-time employee to work up to 7.6 hours per day, five days per week or 38 ordinary hours per week without the payment of overtime.	**10.1** An employee who is engaged to work for fewer than an average of 38 ordinary hours per week and whose hours of work are reasonably predictable is a part-time employee.

SUBMISSIONS

Ai Group – 24 July 2018 submission

7. It appears that Ai Group's submission summarised at item 10 of the summary of submissions was not discussed at the Conference. Ai Group continues to press that submission.

8. Ai Group has discussed the issue with United Voice and Business SA. We understand that neither party opposes the following form of words to replace clause 10.1:

> *10.1 A part-time employee is an employee who is engaged to work for fewer than an average of 38 ordinary hours per week and whose hours of work are reasonably predictable.*

9. The proposed words maintain the substance of the current definition of a part-time employee. It is our submission that the proposed words would resolved issues raised regarding clause 10.1.

10. Whilst we provided our proposal to ABI and the NSW Business Chamber on 27 June 2018 we have not received a response and accordingly, for the purpose of this submission, we are unable to advise of their position in relation to it.

ABI & NSWBC – 24 July 2018 submission

We refer to the AiG correspondence attached to Ms Bhatt's email below.

We confirm the proposed wording at [3] and [8] is not opposed by ABI and the NSW Business Chamber.

Note: The reference to [8] in this submission relates to Ai Group's submission of 24 July 2018

Ai Group – 21 September 2018 submission

Item 4: Clause 10.1 of the Exposure Draft 6. The Draft List identifies that item 4 remains outstanding.

7. In addition to the submissions previously made in relation to this issue, Ai Group notes that the Commission recently issued a decision concerning the plain language redrafting of the Clerks – Private Sector Award 2010, in which the Full Bench considered a similar issue raised by Ai Group:

> [40] Following the January Statement Ai Group raised concerns about clause 10.1 of the revised PLED.37 Ai Group submitted that clause 10.1 is substantively different to clause 11.1 of the current award.
>
> [41] Clause 11.1 of the current award provides: '11.1 A part-time employee is an employee who is engaged to perform less than the full-time hours at the workplace on a reasonably predictable basis.'
>
> [42] Clause 10.1 of the revised PLED provides: '10.1 An employee who is engaged to work for fewer ordinary hours than 38 per week (or the number mentioned in clause 9.2 (Full-time employment)) and whose hours of work are reasonably predictable is a part-time employee.'
>
> [43] In correspondence dated 16 October 2017,38 Ai Group submitted that the current award clause defines an employee as a part-time employee if the employee is engaged to work less than full-time hours on a reasonably predictable basis. Ai Group submitted that clause 10.1 deems that an employee engaged to work less than full-time hours on a reasonably predictable basis is a part-time employee. Ai Group submitted that an employee who works less than full-time hours on a reasonably predictable basis may also be a casual employee. The distinction that Ai Group raise is that the part-time employee must be engaged to work that pattern whereas a casual employee may happen to work that pattern, but is not specifically engaged to do so. A casual employee is engaged to work on a casual basis. Ai Group submitted this distinction is blurred by the re-drafting.
>
> [44] Ai Group submitted that clause 10.1 should be amended as follows (changes in red):
>
>> '10.1 A part-time employee is an An employee who is engaged to work for fewer ordinary hours than 38 per week (or the number mentioned in clause 9.2 (Full-time employment)) and whose hours of work are on a reasonably predictable basis is a part-time employee.'
>
> [45] ABI supported the amendment proposed by Ai Group.
>
> [46] We agree that the plain language re-drafting may subtly affect the meaning of clause 10.1. We propose to adopt the amendment to clause 10.1 proposed by Ai Group as set out in paragraph [44].

8. We submit that, consistent with the approach there adopted by the Commission, the Full Bench should adopt the changes we have proposed to clause 10.1 of the Exposure Draft.

A3 and A4. ITEMS 18 AND 19 – CLAUSE 14—BREAKS – *Item 18 was not discussed during the June 2018 conference. The Commission proposed a solution **Item 19** by amending clauses 14.3(a) and 14.4(c). See [2018] FWC 3842. Parties were invited to inform the Commission if they opposed the proposed variations by 6 July 2018. No party opposed the proposed variations. Item 19 is resolved.*

COMPARISON OF RELEVANT CLAUSES

Current award clause	PLED clause
26. Breaks **26.1 Shift workers** Shift workers (being employees who work a shift that attracts a shift penalty in clause 27) are entitled to a paid meal break of not less than 20 minutes. This break shall be given and taken not earlier than four hours, nor later than five hours, after the start of the employee's shift. Full-time shiftworkers working a straight shift are entitled to a further 10 minute paid tea break. **26.2 Non-shift workers** Non–shift workers are entitled to an unpaid meal break of not less than 30 minutes, and not more than one hour. An employee will not be required to work for more than four and one half hours without a meal break, except in cases of emergency, when the time may be extended to five hours. All day workers and broken shift workers are entitled to a 10 minute paid morning tea break and a 10 minute paid afternoon tea break.	**14. Breaks** **14.1 Persons employed to do shiftwork** **(a)** Clause 14.1 applies to employees who are employed to do shiftwork that attracts a shift penalty under clause 24—Penalty rates and gives them an entitlement to paid meal breaks and paid rest breaks. **(b) Paid meal breaks** An employee is entitled to one 20 minute paid meal break per shift which is to be taken not earlier than 4 hours, and not later than 5 hours**,** after the start of the shift. **(c) Paid rest breaks** A full-time shiftworker working a straight shift is entitled to one further 10 minute paid rest break per shift. **14.2 Employees other than persons employed to do shiftwork** **(a)** Clause 14.2 applies to employees, other than employees mentioned in clause 14.1, and gives them an entitlement to meal breaks and rest breaks. **(b) Unpaid meal breaks** An employee is entitled to an unpaid meal break of not less than 30 minutes, and not more than one hour. An employee cannot be required to work for more than 4½ hours (or 5 hours in an emergency) without a meal break. **(c) Paid rest breaks** An employee is entitled to two 10 minute paid rest breaks (one to be taken in the first half of the period of duty and one in the second half).

SUBMISSIONS

ABI & NSWBC – 12 October 2017 submission

21.1 The requirement in clause 26.1 of the current Award that an employee is entitled to a 'further' paid ten minute break only if they are a 'full-time shift worker working a straight shift' has been omitted from clause 14.1(c). This wording appears intended to ensure that only employees who have qualified for a paid meal break receive a further paid tea break. The word 'further' should be re-inserted.

21.2 Generally, whilst the definitions at clause 14.1(a) and clause 14.2(a) operate to mean that the effect of the provisions is still the same, it cannot be said that the provisions are clearer than the existing clauses. Our clients respectfully propose that the Drafter reconsider whether the existing provisions can be more accurately captured by the PLED.

RELEVANT TRANSCRIPT—8 November 2017 conference:

PN102 JUSTICE ROSS: All right. Thank you. Item 18?

PN103 MS THOMSON: I think this one, your Honour, was just a general comment about how the provisions have been translated and whether or not there was some value in having the drafter reconsider the manner of expression, but it's one of those ones that if the principles dictate that it must be so, then it's not something that we're going to press.

PN104 JUSTICE ROSS: I'll put it to the drafter and see what the drafter says. Mr Klepper, I'm sorry, were you saying something?

PN105 MR KLEPPER: No, I wasn't, your Honour.

EXPERT'S COMMENTS

Item 18 –*referred to the plain language expert following the 8 November 2017 conference.*

The expert proposed an amendment at Attachment A to the summary of agenda items:

14.1 Shiftworkers

(a) Paid meal break

An employee who works a shift that attracts a shift penalty under clause 24—Penalty rates is entitled to a paid meal break per shift of not less than 20 minutes. The meal break must be taken not earlier than 4 hours, and not later than 5 hours, after the start of the shift.

(b) Paid rest break

A full-time employee who is entitled to a paid meal break under paragraph (a) and who works a straight shift is entitled to a further 10 minute paid rest break per shift.

(c) A paid meal break and paid rest break provided for in clause 14.1 counts as time worked for the employee.

14.2 Non-shiftworkers

(a) Clause 14.2 applies to employees who are not entitled to a paid meal break under clause 14.1(a).

(b) Unpaid meal breaks

An employee is entitled to an unpaid meal break of not less than 30 minutes, and not more than one hour and cannot be required to work for more than 4½ hours (or 5 hours in an emergency) without a meal break.

(c) An unpaid meal break provided in paragraph (b) does not count as time worked for the employee.

(d) Paid rest breaks

An employee is entitled to a 10 minute paid morning rest break and a 10 minute paid afternoon rest break.

(e) A paid morning or afternoon rest break provided for in paragraph (c) counts as time worked for the employee.

ITEM 19 – Any party opposing the variation proposed at [13] of the July statement was invited to inform the Commission by 6 July 2018.

Ai Group – 6 July 2018 submission

In accordance with the direction at paragraph [14] of the Statement, we write to advise that the Australian Industry Group does not oppose the variations proposed at paragraph [13] of the Statement.

A5. Cross-referencing errors

Ai Group – 21 September 2018 submission

Cross-Referencing Errors

14. Ai Group has identified the following cross-referencing errors arising from the Exposure Draft:

- Clause 13.3 of the Exposure Draft should refer to "clause 13.1(b)" instead of "clause 1.1(a)".
- Clause 13.4 of the Exposure Draft should refer to "clause 13.1(b)" instead of "clause 1.1(a)".
- The second clause 17.6(a) should be renumbered "clause 17.6(b)".
- The reference to "clause 17" in Note 2 under clause 17.6 should be replaced with "clause 17.6".

United Voice – 13 July 2018 submission

Clause 13.4 of the proposal incorrectly references clause 13.1(a) and should reference clause 13.1(b), as clause 13.1(b) now refers to the different arrangements for working full time hours.

B1. ITEM 25 (PART – CLAUSE 21.1 (ALLOWANCES) – *to be determined by the Full Bench on submissions before the Commission [2017] FWC 5874*.

COMPARISON OF RELEVANT CLAUSES

Current award clause	PLED clause (renumbered to clause 20)
17. Allowances An employer must pay to an employee such allowances as the employee is entitled to under this clause at the following rates. (With the exception of expense related allowances, which are expressed as a monetary amount, allowances are expressed as a percentage of the standard rate being the minimum weekly wage for the Cleaning Services Employee (CSE) Level 1 classification set out in clause 16—Minimum wages):	**20. Allowances** 20.1 Clause 20 gives employees an entitlement to monetary allowances of specified kinds in specified circumstances. NOTE: Schedule C—Summary of Monetary Allowances contains a summary of monetary allowances and methods of adjustment.

SUBMISSIONS

United Voice – 6 October 2017 submission, paragraphs 24 – 27:

24. The plain language draft alters the language regarding the payment of allowances. The current award language regarding allowances is clearer and more direct than the proposed plain language draft. *[United Voice inserted comparison table of both clauses here… see below].*

25. The phrasing in the current clause 17, which states that '*an employer must pay to an employee such allowances*', is more direct and simple to understand than the words in the plain language clause 21.1, which states that '*clause 21 gives employees an entitlement to monetary allowances*'.

26. As stated in paragraph 3 of this submission, Cleaning Award employees tend to be low-paid and from non-English speaking backgrounds. As such, clear, direct and simple phrasing is particularly important for employees in this and similar industries. Stating that *'an employer must pay to an employee such allowances'* clearly identifies that there is an obligation on the employer to pay.

27. The current wording in clause 17 of the Cleaning Award should be retained.

Ai Group – 20 October 2017 reply submission, paragraph 15:

15. Ai Group does not agree with United Voice's view that the drafting of clause 21 is not sufficiently clear.

RELEVANT TRANSCRIPT—8 November 2017 conference:

PN150 JUSTICE ROSS: All right, thank you. That deals with items 23 and 24. Item 25?

PN151 MS DABARERA: Your Honour, this is again one of our items. Essentially this goes to again what is more clear and what's more direct.

PN152 JUSTICE ROSS: Yes.

PN153 MS DABARERA: So this is around the language for allowances, so the current award says in clause 17:

PN154 *An employer must pay to an employee such allowances as the employee is entitled to.*

PN155 MS DABARERA: It goes on, whereas clause 21.1 of the plain language draft says:

PN156 *Clause 21 gives employees an entitlement to monetary allowances of specified kinds in specified circumstances.*

PN157 JUSTICE ROSS: Yes.

PN158 MS DABARERA: Essentially our argument is that the current award is more plain language and that it's simpler for people without a background in industrial relations necessarily to understand.

PN159 JUSTICE ROSS: All right, well, in relation to that point are you content for us to resolve that or the full bench to resolve that matter on the submissions that have already been put?

B2. ITEM 12 – CLAUSE 12—CLASSIFICATIONS – *Ai Group sought an opportunity to make further submissions in support of its position.* See [2018] FWC 3482.

COMPARISON OF RELEVANT CLAUSES

Current award clause	PLED clause (renumbered to clause 20)
15. Classifications **15.1** Classifications are set out in Schedule D—Classifications. An employee, other than an excluded employee, must be employed in a classification in Schedule D and paid as such. **15.2** Despite an employee's classification, an employee is to perform all duties incidental to the tasks of the employee that are within the employee's level of skill, competence and training.	**12. Classifications** **12.1** An employer must classify an employee covered by this award in accordance with Schedule A—Classification Definitions. **12.2** Despite an employee's classification, an employee is to perform all duties incidental to the tasks of the employee that are within the employee's level of skill, competence and training.

SUBMISSIONS

Ai Group – 12 October 2017 submission

8. The redrafted clause requires that an employer classify all employees in accordance with the definitions in Schedule A. This is not a requirement of the current award. It is very common for employers to use in-house job titles rather than the award classification definitions. It is not appropriate to force employers to use the classification definitions in the Award. The Award is a safety net. The redrafted clause 12 is too prescriptive.

United Voice – 20 October 2017 submission:

13. ABI have submitted that clause 15.2 in the current award has been omitted from the plain language draft. As raised in paragraph 12 of our submission filed 6 October 2017 ('initial submission'), we support retaining the current clause 15.2.

14. AIG states that clause 12 contains a new requirement to classify employees in accordance with the definitions in Schedule A, and that this is not a requirement of the current award. We disagree.

15. Clause 15.1 of the current award already contains such a requirement:

> *"Classifications are set out in Schedule D—Classifications. An employee, other than an excluded employee, must be employed in a classification in Schedule D and paid as such."*

16. Clause 15.1 of the current award and clause 12 of the plain language draft both contain an obligation on the employer to classify an employee in accordance with the classifications within the award. This obligation should be retained.

Ai Group – 24 July 2018 submission

13. Ai Group does not wish to make any further submissions about item 12 but continues to rely on its submissions made earlier.

United Voice – 27 July 2018 submission:

2. United Voice objects to AiG's contention that there is no requirement in the current Cleaning Award to classify employees in accordance with the classification definitions in Schedule D- Classifications.

3. The obligation to classify employees within the current Cleaning Award arises from clause 15. Classifications, clause 12. Employment categories and Schedule D-Classifications.

4. Clause 15.1 states:

> *'Classifications are set out in Schedule D—Classifications. An employee, other than an excluded employee, must be employed in a classification in Schedule D and paid as such.'*

5. The words *'must be employed in a classification in Schedule D'*, on their ordinary meaning, clearly create an obligation for the employer to classify an employee in accordance with an award classification.

6. Clause 12.2 states:

> *'At the time of engagement, an employer will inform each employee of the terms of their engagement and in particular whether or not they are to be full-time, part-time or casual, their usual location of work and the employee's classification. This will then be recorded in the time and wages record of the employee.'*

7. Clause 12.2 requires an employer to inform an employee of their classification on engagement. This requirement can only be met if the employee has been classified in accordance with the award.

8. Schedule D –Classifications states:

> *'All employees will be classified according to the following classification definitions and paid as such.'*

9. Again, the words '*all employees will be classified according to the following classification definitions*' requires the employer to classify an employee in accordance with an award classification.

10. Classification in accordance with the award is a significant matter. Minimum rates of pay are paid according to an employee's classification. Without having a classification, an employee would be unable to identify if they were being paid the correct rates of pay. Similarly, an employer would be unable to identify if they were paying employees the correct rates of pay. This would lead to uncertainty and confusion for both employees and employers.

11. Clause 12.1 of the Plain language Exposure Draft of the Cleaning Services Award dated 25 January 2018 states:

> *'An employer must classify an employee covered by this award in accordance with Schedule A—Classification Definitions.'*

12. The wording in clause 12.1 of the Exposure Draft accurately reflects the current obligations in the Cleaning Award and should be retained.

RELEVANT TRANSCRIPT—22 June 2018 conference:

PN165 Can I go to item 12 and can I invite Ai Group to - now, the Full Bench was going to determine this issue having regard to the submissions put. Was there anything further anyone wanted to say about it?

PN166 MS BHATT: I have had the benefit of some further instructions on this issue overnight. I think in essence the concern from Ai Group is this: there is no express obligation in the current award to classify an employee. Last time we

appeared before your Honour, your Honour put to me, well, how else do you work out how you pay your employee; what the applicable rate is?

PN167 JUSTICE ROSS: Yes. Indeed, yes.

PN168 MS BHATT: Which I understand of course, but it may of course be that an employer takes the view that, "Well, this employee might be classified at a level 1 or a level 1 and I'm not sure but I'm going to pay them above the level 2 rate," and there's no need to definitively classify that employee under the award. As we discussed on the last occasion, there is no obligation under the Act or the regulations to do so either.

PN169 The insertion of a award-derived obligation to do so, it gives rise to the prospect (a) a possible breach of the award and (b) the prospect of dispute about, well, have you done so; why have you classified them at this level? It's not something that is required by the current award.

PN170 JUSTICE ROSS: No. How does the employee know whether they are being paid correctly under the award if they are not informed of the classification? The employer hasn't made a decision and informed them about which classification they're going to be employed in.

PN171 MS BHATT: I understand that concern, but I guess our position is that the introduction of this obligation is that it's a substantive change, which is how we have approached this process.

PN172 JUSTICE ROSS: That may be right, but - - -

PN173 MS BHATT: The point that your Honour puts, I understand, but I think that's a merit argument for why such an obligation should be contained in an award. Again that's now how we have approached this review of the exposure draft.

PN174 JUSTICE ROSS: Yes. Nevertheless, we are trying to make the award simple, easy to understand, so both parties know what their rights and obligations are. It sort of speaks to that proposition a bit.

PN175 MS DABARERA: Your Honour, we do have some strong views about this clause, as well. We do say that there is an obligation in the current award to classify an employee both in relation to clause 15 - which states that an employee must be employed in a classification - and the ordinary understanding of that would be that they are classified.

PN176 There is, further, the obligation in clause 12.2 of the current award which we were talking about earlier, which is about informing the employee of their classification when they begin their employment. We think if an employee is being paid on the award, they have to be classified in accordance with the award, as you've mentioned, to know what they're entitled to.

PN177 JUSTICE ROSS: Well, do you want a further opportunity to put any further written submissions?

PN178 MS BHATT: Yes.

PN179 JUSTICE ROSS: Perhaps if you can do that within seven days. If there is any reply or any party wishes to comment on those submissions, they can do that within seven days of the Ai Group filing its additional material. We will then determine that question ultimately on the papers.

PN180 MS BHATT: Yes, your Honour.

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B3. ITEM 40 – CLAUSE 32—CONSULTATION ABOUT CHANGE OF CONTRACT *– to be determined by the Full Bench on submissions before the Commission* 8 November 2017 conference ([225] – [231]).

COMPARISON OF RELEVANT CLAUSES

Current award clause	**PLED clause (renumbered to clause 31)**
9.5 The incoming contractor must, as soon as practicable after making any offer of employment to employees of the outgoing contractor, provide notification of the offer being made and the terms of the offer to the outgoing contractor and to any representative, including a relevant union, nominated by the employee.	32.8 The incoming contractor must, as soon as practicable after making any offer of employment to employees of the outgoing contractor, give written notice of the offer and its terms to the outgoing contractor and to any representative nominated by the employee.

SUBMISSIONS

United Voice – 6 October 2017 submission

52. The plain language draft has removed the words *'including a relevant union'* and in doing so, has removed direct acknowledgement that a union may be involved in the process regarding consultation about change of contract. *[United Voice inserted comparison table of both clauses here… see below]*

53. Unions play an important role in consultation processes within workplaces, and can provide crucial assistance to employees during consultations regarding change of contracts.

54. The current award recognises this, whereas the plain language draft award contains no equivalent provision.

55. The current clause 9.5 should be retained.

Ai Group – 20 October 2017 reply submission

20. Ai Group does not agree with United Voice's view that a specific reference to unions should be inserted in clause 32. The clause appropriately refers to "any representative nominated by the employee", which would include any union nominated by an employee.

RELEVANT TRANSCRIPT—8 November 2017 conference:

PN225 JUSTICE ROSS: Thank you. Item 40.

PN226 MS DABARERA: Your Honour, this is one of ours and we're arguing that in the plain language draft, it's removed the direct acknowledgement that a union may be involved in consultation about change of contract. Essentially the words 'including a relevant union' have been removed from the plain language draft, your Honour.

PN227 JUSTICE ROSS: Yes, Ms Bhatt?

PN228 MS BHATT: Ai Group simply says that the exposure draft still refers to any representative nominated by the employee, which would necessarily include a union if they were so nominated. So, the reference to a union is not necessary.

PN229 JUSTICE ROSS: Are you both content for that matter to be resolved on the basis of what you've each said?

PN230 MS DABARERA: Yes, your Honour.

PN231 MS BHATT: Yes, your Honour.

C1. ITEM 9 – CLAUSE 11.3—CASUAL EMPLOYMENT *Ai Group noted in their 21 September 2018 submission that their item 9 submission appears to be outstanding.*

COMPARISON OF RELEVANT CLAUSES

Current award clause	PLED clause
12.5(a) Casual loading Casual employees will be paid, in addition to the ordinary hourly rates and rates payable for shift, weekend and overtime work that apply to full-time employees, an additional loading of 25% of the ordinary hourly rate for the classification under which they are employed.	**11.3** An employer must pay a casual employee for each ordinary hour worked a loading of 25% in addition to the minimum hourly rate specified in column 3 of Table 2— Minimum rates.

SUBMISSIONS

Ai Group – 17 November 2018

Item 9: Clause 11.3 of the Exposure Draft 31. The words "for each ordinary hour" do not appear in the current clause 12.5(a). That is, the entitlement to the casual loading is not limited to ordinary hours of work and appears to arise during overtime. Their inclusion in clause 11.3 of the Exposure Draft creates an inconsistency between it and Table 5 (page 20 of the Exposure Draft). Accordingly, those words should be removed.

Ai Group – 21 September 2018

9. Ai Group's submission concerning clause 11.3 appears to remain outstanding, however it is not identified in the Draft List.

C2. ITEM 13 – CLAUSE 13—ORDINARY HOURS OF WORK *The commission proposed an amendment at [33] of [2018] FWC 3842*. Ai Group filed submissions on 24 July 2018.

Commission's proposed amendment [2018] FWC 3842 at [33]:

13.1 Ordinary hours of work and roster cycles – full-time employees

(a) *Ordinary hours may be worked on any day of the week.*

(b) *Full-time employees work an average of 38 ordinary hours per week in one of the following ways:*

(i) *working 5 days of 7.6 hours each per week; or*

(ii) *working 152 hours per 4 week cycle in workplaces at which employees work on a rostered day off basis in accordance with clause 13.2; or*

(iii) *working 19 days of 8 hours each per month; or*

(iv) *working up to 10 hours on any day or days by agreement between the employer and the majority of employees concerned (therefore enabling a weekday to be taken off more frequently than would otherwise apply).*

COMPARISON OF RELEVANT CLAUSES

Current award clause	PLED clause
24.1 Full-time employees **(a)** Subject to clause 24.3, the ordinary working hours for full time employees (as defined in clause 12.3) will not exceed 38 hours per week to be worked in periods of not more than 7.6 hours per day, in not more than five days, on any day Monday to Sunday inclusive. **(b)** However, ordinary hours can average 38 per week to be worked in not more than 152 hours over a four week cycle, on any day Monday to Sunday inclusive. **(c)** The average of 38 hours per week is to be worked in the following ways: **(i)** five days of not more than 7.6 hours per day; **(ii)** a 19 day month of eight hours per day; **(iii)** 152 hours within a work cycle not exceeding 28 consecutive days in establishments where the method of banking of rostered days off is implemented; or **(iv)** by mutual agreement between the employer and the majority of employees, employees may be rostered for up to 10 hours per day, thus enabling a week day off to be taken more frequently than would otherwise apply. **(d)** Where a system of working is adopted to allow	**13. Ordinary hours of work and rostering** **13.1 Ordinary hours and roster cycles—full-time employees** **(a)** The employer and a full-time employee must agree on the arrangement for working the average of 38 ordinary hours per week required for full-time employment. **(b)** Ordinary hours may be worked on any day of the week. **(c)** The following options are available: **(i)** working 5 days of 7.6 hours each per week; and **(ii)** working 152 hours per 4 week cycle in workplaces at which employees work on a rostered day off basis in accordance with clause 13.2; and **(iii)** working 19 days of 8 hours each per month; and **(iv)** working up to 10 hours on any day or days by agreement between the employer and the majority of employees concerned (therefore enabling a weekday to be taken off more frequently than would otherwise apply).

one rostered day off in each four week cycle or the banking of rostered days off, an employee will not be entitled to more than 12 such rostered days off in any 12 month period. **(e)** The ordinary hours of work having been determined by the employer and employee in accordance with clause 24.1(c) will not be altered without the giving of one week's notice except in the case of emergency. **(f)** Once a cycle has been agreed upon and implemented, it must not be varied until that cycle has been completed.	**13.2** An employee who works on a rostered day off basis over a 4 week cycle is entitled to up to 12 rostered days off over each 12 month period. **13.3** Except in an emergency and subject to clause 30.1 consultation about changes to rosters or hours of work, an arrangement agreed under clause 13.1(a) may only be changed on giving a minimum of one week's notice. **13.4** An arrangement agreed under clause 13.1(a) and in operation cannot be changed within the course of a cycle.

SUBMISSIONS

ABI & NSWBC – 12 October 2017 submission

20.1 The concept of 'agreement' regarding the arrangement of working hours has been added to clause 13.1. The only reference to 'agreement' is found at the current clause 24.1(c)(iv), regarding the working of hours up to 10 per day. The requirement to agree should be removed from the provision.

20.2 Clause 13.5(c)(i) has omitted the requirement that a single employee be rostered at the location, which is referred to at clause 24.2 of the current Award. This reference should be re-introduced.

Ai Group – 12 October 2017 submission

9. The redrafted clause requires that a full-time employee work under an *agreed* hours of work arrangement in all circumstances. This is not a requirement of the current Award and is not appropriate. The current award gives the employer the right to set the hours of work within defined boundaries, with additional flexibility available by agreement.

Business SA – 13 October 2017 submission

6. As in clause 9 the PLED, the drafter refers to an "**agreed** hours of work arrangement". This is not a current provision of the award.

United Voice – 20 October 2017 reply submission

17. ABI, AIG and BSA have objected to the wording of clause 13.1 of the plain language draft. We disagree. We support the wording in the plain language draft.

18. The wording in clause 13.1(a) of the plain language draft reflects existing award entitlements in both clause 24.1(e) and (f) of the current award.

19. We refer to paragraphs 5-8 of this submission.

20. The wording in clause 13.1 of the plain language draft that there is 'agreement' between the employer and employee appropriately reflects existing entitlements.

21. ABI have raised concerns regarding an omission in clause 13.5(c)(i) of the plain language draft. We do not object to retaining the current award provisions in clause 24.2(c).

United Voice – 13 July 2018 submission

United Voice has reviewed the proposal to amend clauses 13.1–13.4 as outlined in paragraph 33 of the Statement.

We maintain our position that the current award contains within clause 24.1(e) and (f) a requirement that the ordinary hours of work will be determined by agreement between the employer and the employee. To ensure the proposal in paragraph 33 reflects the existing award, and to ensure that it is clear that it is the employer and the employee who must reach agreement on the arrangement of work hours, clause 13.3 of the proposal should be amended to state:

'Except in an emergency and subject to clause 30.1 consultation about changes to rosters or hours of work, an arrangement agreed by the employer an employee under clause 13.2(b) may only be changed on giving a minimum of one week's notice.'

Clause 13.4 of the proposal incorrectly references clause 13.1(a) and should reference clause 13.1(b), as clause 13.1(b) now refers to the different arrangements for working full time hours.

Ai Group – 24 July 2018 submission

14. Ai Group considers that the proposed clauses 13.1 – 13.4 at paragraph [33] of the Statement is broadly consistent with the current clause 24.1, save for the following matter:

> A) We suggest that clause 13.4 is amended by replacing the reference to 'clause 13.1(a)' with 'clause 13.1'. Clause 13.4 refers to *an agreement arranged under clause 13.1(a)*, however subclause (a) states only that ordinary hours may be worked on any day of the week. Clause 13.4 should encapsulate all of clause 13.1.

RELEVANT TRANSCRIPT—22 June 2018 conference:

PN181 JUSTICE ROSS: All right. Item 13 seems to be a relatively short point. It deals with 13.1(a). As I understand the concern, it's this: 13.1(a) of the PLED provides that:

PN182 The employer and a full-time employee must agree on the arrangement for the working of an average of 38 ordinary hours per week.

PN183 United Voice supports the current PLED wording, but I don't think it's in dispute that there is no existing obligation in the current award that requires the employer and employee to agree on the working arrangement for a full-time employee.

PN184 MS DABARERA: Your Honour, we do say that there is an obligation in the current award to come to an agreement.

PN185 JUSTICE ROSS: Where is that?

PN186 MS DABARERA: In clauses 24.1(e) and 24.1(f).

PN187 JUSTICE ROSS: Yes, but 24.1(e) is:

PN188 The ordinary hours of work having been determined –

PN189 I see –

PN190 by the employer and employee in accordance with 24.1(c).

PN191 Yes, but that is probably a reference to (c)(vi) which talks about by mutual agreement they can do certain things.

PN192 MS DABARERA: Your Honour, we would say that it is in reference to the whole of the clause (c) which talks about how that arrangement of 38 hours per week can be worked. It could be worked five days of not more than 7.6 or a 19-day month and so on.

PN193 JUSTICE ROSS: Where does it say in 24.1(c), other than in (vi), that the parties are to agree; the employer and the employee are to agree on how it is to be worked?

PN194 MS DABARERA: We say that in 24.1(e) it says - - -

PN195 JUSTICE ROSS: I see (e).

PN196 MS DABARERA: Yes, but 24.1(e), your Honour, doesn't limit the agreement - - -

PN197 JUSTICE ROSS: No, no, but 24.1(e) becomes a bit circular because it talks about:

PN198 The ordinary hours of work having been determined by the employer and employee in accordance with –

PN199 yes, I see. You say that that is the substantive provision that goes to they have to have agreed; it's not a cross-reference. Yes, okay, I follow your argument now.

PN200 MS DABARERA: Then (f) goes on to say once that cycle has been agreed upon and implemented, it must not be varied until that cycle has been completed.

PN201 JUSTICE ROSS: Yes.

PN202 MS DABARERA: So there is a concept of agreement in the current award which needs to be retained in the plain language draft.

PN203 JUSTICE ROSS: Yes. There are two potential pathways to this. One, we can, after hearing you or providing you with any further opportunity, resolve whether or not 13.1(a) is retained in its current form. An alternative would be to more closely draft clause 13.1, 2 and 3 to link that more closely to 24.1 of the current award.

PN204 Now, that leaves a degree of ambiguity and it doesn't require the employers to agree with United Voice's construction, but you could, for example, in the PLED - and I'm happy to have a go at this and see what you think - change 13.1(a) so it simply says, "Full-time employees work an average of 38 ordinary hours," then you go into (b) and (c), and you pick up at some point the language of 24.1(e) and (f). It goes in as is and it can be dealt with that way.

PN205 I accept that that may leave some ambiguity around whether it's agreed or not, but it's - it can be - it's really your choice whether you leave it for another day, that proposal, or we have the fight now. You don't have to commit to which part in the sense that all I'm really asking you is whether you think it would be useful if I had a go at redrafting it along those lines, then you can have a look at it and see what you want to do.

PN206 MS BHATT: Of course, we'd have no opposition to the course that your Honour has just proposed. It won't surprise your Honour to know that we don't accept United Voice's construction and I understand the two possible courses of actions are probably the two that are available to us. We'd be grateful for an opportunity to consider whatever your Honour puts. If we form the view that it mirrors what exists in the current award, then in our mind that's an argument that if necessary, we can put off till another day.

PN207 JUSTICE ROSS: Yes.

PN208 MS DABARERA: Yes your Honour, that seems suitable.

PN209 JUSTICE ROSS: All right, anyone else have any objection to that course? The idea is I'll have a go at drafting it and then you can all attack it. But you'll have an opportunity to comment on it and if that resolves the issue then so be it. If after further consideration you want the issue conclusively determined then you'll be able to say that too. I'm not wanting to force you down a particular path at this stage. I just want to put the options in front of you.

C3. ITEM 32 – CLAUSE 23.6(C)—CALL BACK FOR NON-CLEANING PURPOSES – *to be determined by the Full Bench on submissions before the Commission* [2017] FWC 5874.

COMPARISON OF RELEVANT CLAUSES

Current award clause	PLED clause (renumbered to clause 22.6)
24.6 **(a)** Despite anything else to the contrary elsewhere in this award, an employee directed by the employer to attend the employer's premises and/or the premises of a client of the employer to perform administrative duties or for disciplinary or counselling interviews, after leaving the place of employment (whether notified before or after leaving the place of employment), must be paid as specified below: **(i)** where such attendance is required on a Monday to Friday, the employee must be paid a minimum payment of two hours at the appropriate ordinary time rate plus any applicable shift penalty for each such attendance; **(ii)** where such attendance is required on a Saturday, the employee must be paid a minimum payment of three hours at the appropriate Saturday rate for each such attendance; **(iii)** where such attendance is required on a Sunday the employee must be paid a minimum payment of four hours at the appropriate Sunday rate for each such attendance. **(b)** This clause will only apply where the employee is specifically directed by the employer to attend the employer's premises and/or the premises of a client of the employer to perform duties contemplated by clause 24.6(a). It will not apply where a period of attendance is continuous with the completion or commencement of ordinary working time or overtime in clause 28.	**22.6** (a) Clause 22.6 applies to an employee who is required by the employer to return to work after completing their ordinary hours to perform administrative duties or for the purposes of a disciplinary or counselling interview. (b) Clause 22.6 applies: (i) whether the employee is required to attend at the employer's premises or at the premises of a client of the employer; and (ii) irrespective of whether the employee is notified of the requirement before or after leaving the workplace. **(c)** The employer must pay the employee at the rate of pay otherwise applicable (including overtime and penalty rates) for the minimum number of hours specified in paragraph 22.6(d). **(d)** The minimum number of hours is: **(i)** 2 if attendance is required on a Monday to Friday; and **(ii)** 3 if attendance is required on a Saturday; and **(iii)** 4 if attendance is required on a Sunday.

SUBMISSIONS

Ai Group were directed to file a submission in support of its proposed amendment by **24 July 2017**. Ai Group filed submissions on 24 July 2018. Reply submissions are due by **14 August 2018.** See [2018] FWC 3842.

Ai Group – 12 October 2017 submission

22. The following amendment needs to be made to clause 23.6(c) to reflect the existing entitlements:

> (c) The employer must pay the employee at the rate of pay ~~otherwise applicable (including overtime and penalty rates)~~ and for the minimum number of hours specified in paragraph 23.6(d):
>
> (d) The rate of pay and minimum number of hours is:

(i) 2 hours at the ordinary hourly rate plus any applicable shift penalty, if attendance is required on a Monday to Friday; and

(ii) 3 hours at the appropriate Saturday rate, if attendance is required on a Saturday; and

(iii) 4 hours at the appropriate Sunday rate, if attendance is required on a Sunday.

United Voice – 20 October 2017 reply submission

31. AIG have proposed amendments to clause 23.6(c). We disagree with the proposed amendment, which seeks to remove an employee's entitlement to overtime. The wording in the plain language draft more accurately reflects the existing award entitlements.

Ai Group – 24 July 2018 submission

15. Clause 24.6 of the award is in the following terms: [*Ai Group inserted clause 24.6 of the current award with certain emphases*]

16. Clause 24.6(a) of the award:

A) Expressly states that it applies despite anything else to the contrary elsewhere in this award. This statement clearly means that the provision overrides any other award provision that might apply in the relevant circumstances. This necessarily includes any award provisions that prescribe an alternate rate of pay for the performance of overtime or 'callbacks' in other circumstances.

B) Requires payment on Monday – Friday at the appropriate ordinary time rate plus any applicable shift penalty. This clearly excludes, for example, overtime rates.

C) Requires payment on Saturday and Sunday at the appropriate Saturday rate and appropriate Sunday rate, respectively.

17. Clause 23.6(c) of the Exposure Draft, by contrast, requires payment where an employee is called back for non-cleaning purposes at the rate of pay otherwise applicable (including overtime and penalty rates), regardless of the day of the week on which the work is performed. Self-evidently, this is a different proposition to that which is contained in the current award clause and amounts to a substantive change.

18. The changes proposed by Ai Group to clause 23.6 of the Exposure Draft (as set out at paragraph [37] of the Statement) are intended to address our concerns and maintain the substantive operation of the current clause, whilst clearly articulating the rate of pay that is due in the circumstances listed at clause 23.6(d).

United Voice – 27 July 2018 submission:

13. AiG have submitted that that the wording '*despite anything else to the contrary elsewhere in this award'* in clause 24.6 dealing with call backs for non-cleaning purposes overrides any entitlement to overtime.

14. This is a narrow and inaccurate reading of the current award and does not take into account the matter that clause 24.6 was intended to address nor s62 of the *Fair Work Act 2009* ('the Act').

15. Clause 28.8 sets out the minimum payments for employees who are recalled to duty for cleaning purposes. Overtime payments apply, with a minimum payment of 2 hours.

16. In contrast, clause 24.6 sets out the minimum payments for employees who are directed by their employer to return to work to perform non-cleaning tasks such as administrative duties or for disciplinary or counselling interviews. Unlike in clause 28.8, overtime does not always apply but overtime will apply where an employee has worked over their maximum weekly or maximum daily hours.

17. Clause 24.6 was inserted into the Cleaning Award as a result of the Decision dated 21 October 2013[2] and the subsequent Determination[3] made on the same date as part of proceedings in the Modern Award Review 2012. The Decision reflected a consent position between the parties.

18. The application for a clause for call backs for non-cleaning purposes was made by United Voice on 6 March 2012 ('the Application').

19. Current clause 24.6 of the Cleaning Award is in similar terms, though not the exact terms, as proposed in the draft determination (Attachment A) of the Application. Notably, the words currently in dispute 'despite anything else to the contrary elsewhere in this award' appear in the draft determination.

20. In paragraph 4 of the grounds of the Application (Attachment B), United Voice submitted that: 'The Modern award makes no provision for minimum payments for employees called back to work, outside of normal rostered hours. United Voice believes this was an unintended oversight in the Award-making process.'

21. Clause 24.6 was proposed and inserted in an attempt to address the lack of minimum payments for employees who were called back to work for non-cleaning purposes, given that there were no minimum payment or minimum engagement period in the Cleaning Award for employees when the call back was not for cleaning.

22. The clause was intended to confer a benefit on employees, not to remove any entitlement to overtime. In this context, the words 'despite anything else to the contrary elsewhere in this award' should be read as differentiating the provisions for call back for non-cleaning purposes from the provisions for call back for cleaning purposes in clause 28.8.

23. Further, clause 24.6 applies where an employee is directed by an employer to return to work for non-cleaning purposes. An interpretation that this clause overrides the overtime provisions in clause 28 would be inconsistent with s 62 of the Act regarding maximum weekly hours of work.

24. The purpose of s62 of the Act is to ensure that in most situations an employee[4] works no more than 38 ordinary hours a week and any additional hours will generally be paid at some premium as overtime. The section also provides a mechanism to assess whether any direction to work additional hours is reasonable.

25. Clause 28 of the Cleaning Award states that 'An employer may require an employee to work reasonable overtime at overtime rates. An employee may refuse to work overtime in circumstances where the working of such overtime would result in the employee working hours which are unreasonable…'

26. Clause 28 provides that reasonable overtime will be paid at overtime rates and that an employee can refuse to work overtime if the additional hours are unreasonable. This is in reflection of the National Employment Standards ('NES') in relation to maximum weekly hours in section 62 of the Act.

27. If, as AiG argue, clause 24.6 overrides any other award provision that might apply in the relevant circumstances, then employees could be directed to work additional hours without the payment of overtime, and without the ability to refuse to work such additional hours. This would be inconsistent with the NES and such an interpretation should be rejected.

28. The wording in clause 23.6 of the Exposure Draft accurately reflects the current obligations in the Cleaning Award and should be retained.

Ai Group – 21 September 2018 submission

Item 40: Clause 23.6 of the Exposure Draft (clause 23.6 relates to item 32)

12. The Draft List identifies that item 40 remains outstanding.

13. Ai Group has considered the amendments proposed by the drafter. We do not oppose the changes proposed.

RELEVANT TRANSCRIPT—8 November 2017 conference:

PN186 JUSTICE ROSS: … Item 32.

PN187 MS BHATT: I think the view is simply taken by Ai Group that the provision in the current award is in fact, simpler and easier to understand because it specifies the rates that might be payable. If I can just give your Honour a brief example.

PN188 JUSTICE ROSS: Sure.

PN189 MS BHATT: 23.6(c) of the exposure draft in brackets says (including overtime). I'm not sure that an entitlement to overtime would ever arise, because I think this deals only with ordinary hours of work.

PN190 JUSTICE ROSS: Yes.

PN191 MS BHATT: Similarly, I'm not sure that an issue about shift loading would arise on a Saturday or Sunday, because if you work on a Saturday or Sunday, you're paid a higher rate and you're not paid a shift loading. Shift loadings are only payable Monday to Friday. The way that's articulated in the current award at 24.6, we think makes that - all of those issues abundantly clear.

PN192 JUSTICE ROSS: We'll put your views to the drafter and see what he says about them, and then each party will have an opportunity to comment on that.

PN193 MS BHATT: Thank you.

EXPERT'S COMMENTS:

23.6

(a) Clause 232.6 applies to an employee who is required by the employer to return to work after completing their ordinary hours to perform administrative duties or for the purposes of a disciplinary or counselling interview.

(b) Clause 22.6 applies:

(i) whether the employee is required to attend at the employer's premises or at the premises of a client of the employer; and

(ii) irrespective of whether the employee is notified of the requirement before or after leaving the workplace.

(c) The employer must pay the employee at the rate of pay and for the minimum number of hours as shown in the following table.

Table X: Rates and hours of pay when employee called back for administrative duties or for a disciplinary or counselling interview.

Day on which the employee's attendance is required	**Rate of pay**	**Minimum number of hours paid for**
Monday to Friday	Ordinary hourly rate plus any applicable shift penalty	2 hours

Saturday	Appropriate Saturday rate	3 hours
Sunday	Appropriate Sunday rate	4 hours

~~**(c)** The employer must pay the employee at the rate of pay otherwise applicable (including overtime and penalty rates) for the minimum number of hours specified in paragraph 23.6(d).~~

~~**(d)** The minimum number of hours is:~~

~~**(i)** if attendance is required on a Monday to Friday; and~~

~~**(ii)** if attendance is required on a Saturday; and~~

~~**(iii)** if attendance is required on a Sunday.~~

C4. ITEM 35 – CLAUSE 24.3—ANNUAL LEAVE – *During the June 2018 conference parties agreed that Ai Group and United Voice would have further discussions in respect of this issue and provide a joint report on the outcome. An extension was granted and the report is due 13 August 2018. Replies are due by 24 August 2018.*

COMPARISON OF RELEVANT CLAUSES

Current award clause	PLED clause (renumbered to clause 24.3)
29.3 Definition of ordinary pay For the purposes of payment of annual leave, an employee's ordinary pay means remuneration for the employee's normal weekly number of hours of work calculated at the ordinary time rate of pay and in addition will include: (a) leading hand allowance; (b) first aid allowance; (c) penalty rates paid for shiftwork or rostered ordinary hours of work on Saturday and/or Sunday; and (d) part-time allowance for part-time employees working shiftwork (Monday to Friday) or rostered ordinary hours on a Saturday and/or a Sunday. **29.4 Payment of annual leave** (a) The terms of the NES prescribe the basis for payment for annual leave, including payment for untaken leave upon the termination of employment. In addition to the terms of the NES, an employer is required to pay an additional leave loading of 17.5% calculated on an employee's ordinary time rate of pay. (b) Provided that where the employee would have received a saved or transitional rate of pay, or shift, weekend (Saturday or Sunday), or public holiday penalty payments according to the roster or projected roster, had the employee not been on leave during the relevant period, and such saved, transitional or penalty payments would have entitled to employee to a greater amount than the loading of 17.5% on the rates set out in clause 16—Minimum wages of this award, then such rates will be paid instead of the 17.5% loading.	**24.3 Payment for annual leave** (a) For the purpose of calculating the amount that the employer is required by section 90 of the Act to pay an employee for a period of paid annual leave, the employee's base rate of pay for the employee's ordinary hours of work in the period must be taken to include any of the following that are payable to the employee: (i) a leading hand allowance; and (ii) a first aid allowance; and (iii) penalty rates paid for shiftwork or rostered ordinary hours of work on a Saturday or Sunday; and (iv) a part-time allowance for part-time employees working shiftwork (Monday to Friday) or rostered ordinary hours on a Saturday or a Sunday. (b) The employer must pay an employee for the employee's ordinary hours of work in a period of paid annual leave an additional payment that is the greater of the following amounts: (i) 17.5% of the employee's ordinary hourly rate (that is the employee's rate of pay for ordinary hours of work not including any shift, weekend or public holiday penalties); (ii) the shift, weekend or public holiday penalty rates that the employee would have received for ordinary hours of work for which the employee would have been rostered in the period had the employee not been on leave. (c) Clause 24.3 also applies in calculating the amount payable to an employee by the employer for a period of untaken paid annual leave when the employment of the employee ends.

SUBMISSIONS

Ai Group – 12 October 2017 submission

23. Clause 25.3(c) needs to be amended. The award currently requires that a 17.5 per cent loading be paid on annual leave on termination of employment; not any higher shift loading etc. See existing clause 29.7.

United Voice – 20 October 2017 reply submission

32. AIG have submitted that clause 25.3(c) should be amended and argue that the plain language draft expands the entitlements under this clause. We disagree.

33. Clause 25.3 of the plain language draft actually reduces the entitlements of employees. Under the current award, in clause 29.7, employees should receive a loading of 17.5% on their *'ordinary time rate of pay'* which includes penalty rates for shift work as well as other entitlements as outlined in clause 29.3. Under clause 25.3 of the plain language draft, an employee would only receive the greater of the two options in 25.3(b). This could substantially reduce an employee's entitlements. We support retaining the current award clause.

Joint report – United Voice and Ai Group – 13 August 2018

2. United Voice and Ai Group have had further discussions regarding Item 35. Item 35 relates to clause 29. Annual leave of the *Cleaning Services Industry Award 2010* ('Cleaning Award') and clause 25 of the Cleaning Services Award Plain Language Exposure Draft ('PLED'). The parties have had discussions regarding the payment of annual leave when taken and the payment of annual leave on termination.

3. United Voice and Ai Group are in agreement on the interpretation of how annual leave is paid when taken in accordance with clause 29.3 and clause 29.4 of the Cleaning Award. However, the parties have not been able to reach agreement on the appropriate form of words to reflect this agreement in the PLED.

4. The parties are in dispute regarding how the PLED should reflect how annual leave is paid on termination in accordance with clause 29.7 Payment of accrued annual leave on termination.

5. United Voice will file a submission in support of its position on 13 August 2018. Ai Group will file a submission in reply by 24 August 2018. Such submissions will address the respective organisations' positions in relation to clause 25 of the PLED.

United Voice – 13 August 2018 submission re: Joint report

The payment of annual leave when taken (Clauses 29.3 and 29.4)

4. Clause 25.3 Payment for annual leave of the PLED dated 25 January 2018 accurately reflects clauses 29.3 Definition of ordinary pay and 29.4 Payment of annual leave of the Cleaning Award.

The payment of annual leave on termination (Clause 29.10)

5. We refer to paragraphs 32-33 of our reply submission dated 20 October 2017 and also make the following additional statements.

6. The proposed amendment in relation to Item 35: Clause 25.3(c) in the document titled 'AM2016/15 – summary- agenda items for conference –Cleaning Award' dated 28 February 2018 ('Proposed Amendment') states:

> *'(c) The employer must pay an employee for a period of untaken paid annual leave when the employment of the employee ends, a loading of 17.5% calculated on the employee's base rate of pay as defined in paragraph (a).'*

7. The employee's base rate of pay in clause 25.3(a) of the PLED is defined as:

> *'…the employee's base rate of pay for the employee's ordinary hours of work in the*

period must be taken to include any of the following that are payable to the employee:

(i) a leading hand allowance; and

(ii) a first aid allowance; and

(iii) penalty rates paid for shiftwork or rostered ordinary hours of work on a Saturday or Sunday; and

(iv) a part-time allowance for part-time employees working shiftwork (Monday to Friday) or rostered ordinary hours on a Saturday or a Sunday.'

8. The Proposed Amendment is an accurate reflection of clause 29.7 of the Cleaning Award.

9. The language of clause 29 in the Cleaning Award is complex. This complexity is compounded by the fact that there is no definition of *'ordinary time rate of pay'* within the Cleaning Award. In terms of the background to the clause, the entitlement to annual leave on termination varied in the pre-modern awards that informed the Cleaning Award. The NSW *Cleaning and Building Services Contractors (State) Award* was one of the key awards incorporated into the modern Cleaning Award.

10. Under clause 20.(i) of the *Cleaning and Building Services Contractors (State) Award,* an annual leave loading of 17.5% was paid *'in addition to the rates of pay paid for the applicable period of leave and in addition to the benefits prescribed by clause 19, Annual Leave.'*

11. Under clause 19.(i) of the *Cleaning and Building Services Contractors (State) Award,* annual leave was paid in accordance with the *Annual Holidays Act* 1944 (NSW).

12. Under section 2(2) of the *Annual Holidays Act* 1944, *'ordinary time rate of pay'* was defined as:

> *'(a) the term **"ordinary time rate of pay"** in the case of a worker who is remunerated in relation to an ordinary time rate of pay fixed by the terms of the worker's employment means the time rate of pay so fixed for the worker's work under the terms of the worker's employment, including shift allowances relating to ordinary time and weekend penalties relating to ordinary time the worker would have worked on days other than public holidays if the worker had not been on annual holidays, but does not include any other amount payable to the worker in respect of shift work, overtime or penalty rates, and where two or more time rates of pay are so fixed means the higher or highest of those rates,*
>
> *(a1) where a worker is remunerated otherwise than in relation to an ordinary time rate of pay so fixed, or partly in relation to an ordinary time rate of pay so fixed and partly in relation to any other manner, or where no ordinary time rate of pay is so fixed for a worker's work under the terms of the worker's employment, the worker's ordinary pay shall be deemed to be the average weekly wage earned by the worker during the period actually worked by the worker during the period of twelve months immediately preceding the annual holiday or, as the case may be, during the period of employment in respect of which a right to payment under section 4 (3) or under section 4A accrues. For the purposes of this paragraph the average weekly wage earned by a worker shall be the average of the amounts received by the worker each week under the terms of the worker's employment including shift allowances relating to ordinary time and weekend penalties relating to ordinary time the worker would have worked on days other than public holidays if the worker had not been on annual holiday, and excluding any other amount payable to the worker in respect of shift work, overtime or penalty rates,*

13. *'Ordinary time rate of pay'* referred to an amount that was inclusive of '*shift allowances relating to ordinary time and weekend penalties relating to ordinary time the worker would have worked on days other than public holidays if the worker had not been on annual holidays'*. In accordance with clause 20.(i) of the

Cleaning and Building Services Contractors (State) Award, the annual leave loading of 17.5% was paid on this amount, which was inclusive of shift allowances and weekend penalties.

14. In the modern Cleaning Services award, the entitlement to receive shift loadings *and* the annual leave loading was separated when annual leave is taken during employment in clause 29.4 of the Cleaning Services award; however this entitlement was not separated in clause 29.7 of the award. As such the Proposed Amendment is an accurate reflection of the current entitlement and should be adopted.

Ai Group – 24 August 2018 reply submission re: Joint report

6. In short, these submissions relate to whether 25.3 of the PLED requires amendment in order to clarify:

- That employees do not receive the penalty rates for shift work and weekend work twice when accessing annual leave
- That employees do not receive penalties for shift work and weekend work as well as the 17 ½ percent loading on termination
- The rate that the 17 ½ loading should be applied to when an employee is paid out upon termination
- The description, or characterisation, of various premiums payable under the PLED

The relevant provisions of the Current Award and PLED regarding payment of annual leave

7. Before identifying our concerns relating to clause 23.5 of the PLED, it is appropriate to address the current award provisions relating payment of annual leave. Relevantly, Clauses 29.3 and 29.4 of the Cleaning Services Award 2010 (the Current Award) provide as follows:

> **29.3 Definition of ordinary pay**
>
> For the purposes of payment of annual leave, an employee's ordinary pay means remuneration for the employee's normal weekly number of hours of work calculated at the ordinary time rate of pay and in addition will include:
>
> (a) leading hand allowance;
>
> (b) first aid allowance;
>
> (c) penalty rates paid for shiftwork or rostered ordinary hours of work on Saturday and/or Sunday; and
>
> (d) part-time allowance for part-time employees working shiftwork (Monday to Friday) or rostered ordinary hours on a Saturday and/or a Sunday.
>
> **29.4 Payment of annual leave**
>
> (a) The terms of the NES prescribe the basis for payment for annual leave, including payment for untaken leave upon the termination of employment. In addition to the terms of the NES, an employer is required to pay an additional leave loading of 17.5% calculated on an employee's ordinary time rate of pay.
>
> ***(b)*** *Provided that where the employee would have received a saved or transitional rate of pay, <u>or shift, weekend (Saturday or Sunday), or public holiday penalty payments according to the roster or projected roster, had the employee not been on leave during the relevant period</u>, and such saved, transitional or penalty payments would have entitled to employee to a greater amount than the*

loading of 17.5% on the rates set out in clause 16—Minimum wages of this award, then such rates will be paid instead of the 17.5% loading.

8. The terms of the Current Award are problematic in that, while clause 29.3 purports to defines the term "ordinary pay" for the purpose of payment of annual leave, the provisions of clause 29.4 dealing with payment of annual leave do not actually refer to the term "ordinary pay".

9. Clause 29.4(a) appears to proceed on the assumption that employees will be paid for a period of annual leave in accordance with the NES (which would not include any separately identifiable amounts 1) but affords an employee an additional entitlement to a 17.5% loading calculated on an employee's ordinary time rate of pay. The phrase "ordinary time rate of pay" is not defined.

10. Clause 29.5(b) appears to deliver an employee an entitlement to receive certain shift, weekend and public holiday rates that they would have worked, if the payment of such amounts is greater than the relevant 17.5% loading.

11. Read together, these clauses imply that penalties for shiftwork and ordinary hours worked on a weekend could be paid under both cl. 29.3(c) and 29.4(b) in connection with a single period of annual leave where the relevant penalties under cl. 29.4(b) are higher than the 17.5% annual leave loading. This results in 'double dipping' and cannot be considered the intention of the AIRC during the Award modernisation process, or justiciable in the context of a fair and relevant minimum safety net of terms and conditions.

12. Ai Group suggest that the current award provisions should properly be read as entitling an employee to a payment for annual leave that reflects the employee's minimum wages under the award and the relevant allowances (i.e. the leading hand allowance, first aid allowance and the part-time allowance), plus either applicable penalties or the relevant 17.5% loading.

Payment of annual leave under the revised PLED – *the potential for double dipping*

13. The revised PLED clarifies some of these matters but also gives rise to a potential issue of 'double dipping' with regard to the penalties paid for shift work and ordinary hours worked on weekends. Relevantly, cl. 25.3 of the PLED provides as follows:

> **25.3 Payment for annual leave**
>
> (a) For the purpose of calculating the amount that the employer is required by section 90 of the Act to pay an employee for a period of paid annual leave, the employee's base rate of pay for the employee's ordinary hours of work in the period must be taken to include any of the following that are payable to the employee:
>
> > (i) a leading hand allowance; and
> >
> > (ii) a first aid allowance; and
> >
> > (iii) penalty rates paid for shiftwork or rostered ordinary hours of work on a Saturday or Sunday; and
> >
> > (iv) a part-time allowance for part-time employees working shiftwork (Monday to Friday) or rostered ordinary hours on a Saturday or a Sunday.
>
> (b) The employer must pay an employee for the employee's ordinary hours of work in a period of paid annual leave an additional payment that is the greater of the following amounts:
>
> > (i) 17.5% of the employee's ordinary hourly rate (that is the employee's rate of pay for ordinary hours of work not including any shift, weekend or public holiday penalties);

(ii) the shift, weekend or public holiday penalty rates that the employee would have received for ordinary hours of work for which the employee would have been rostered in the period had the employee not been on leave.

(c) Clause 25.3 also applies in calculating the amount payable to an employee by the employer for a period of untaken paid annual leave when the employment of the employee ends.

14. Clause 25.3(a)(iii) includes "penalty rates paid for shiftwork or rostered ordinary hours of work on a Saturday or Sunday" in the base rate of pay to be used to calculate the amount that an employer is required to pay an employee for a period of annual leave by s. 90 of the *Fair Work Act 2009* (Cth) (**the Act**).

15. However, cl. 25.3(b)(ii) requires an employer to pay an employee for the employee's ordinary hours of work in a period of paid annual leave, the "shift, weekend or public holiday penalty rates that the employee would have received for ordinary hours of work for which the employee would have been rostered in the period had the employee not been on leave" where this amount would be greater than the 17.5% annual leave loading. The revised PLED has therefore not resolved the issue of 'double dipping' with regard to payment of shift and weekend penalty rates during a period of annual leave.

16. Put simply, because 25.3(b) is worded so as to provide for a payment that is "*an additional payment*" it appears to suggest that employees get both the payments under s25.3(a) and 25.3(b). This results in a level of unjustifiable (and we presume unintended) double dipping.

17. The submissions filed by United Voice on 13 August 2018 do not address payment for annual leave that is taken in any detail. Nonetheless, Ai Group understands that United Voice does not believe that the current award entitles an employee to be paid the relevant shift, weekend or public holiday penalties twice in relation to a period of leave that is taken. Moreover, we understand that it is common ground between the parties that the Award should only provide that an employee receives either the relevant penalties or the 17% loading. As such, we understand that the contest between the parties relates to whether the drafting of PLED properly reflects this position. Ai Group contend that the proposed provisions require amendment.

Ai Group's Proposed Amendment to the PLED

18. Ai Group proposes rectifying the issue of double dipping with regard to the penalties payable for shift work and ordinary hours worked on a weekend as well as the inadvertent provision for payment of both annual leave loading as well as these rates, during a period of annual leave, by deleting cl. 25.3(a)(iii) of the revised PLED as follows:

25.3 Payment for annual leave

(a) For the purpose of calculating the amount that the employer is required by section 90 of the Act to pay an employee for a period of paid annual leave, the employee's base rate of pay for the employee's ordinary hours of work in the period must be taken to include any of the following that are payable to the employee:

(i) a leading hand allowance; and

(ii) a first aid allowance; and

~~**(iii)** penalty rates paid for shiftwork or rostered ordinary hours of work on a Saturday or Sunday; and~~

~~**(iv)**~~ **(iii)** a part-time allowance for part-time employees working shiftwork (Monday to Friday) or rostered ordinary hours on a Saturday or a Sunday.

19. This suggested amendment preserves the entitlement to the rates listed in cl.25.3(b)(ii) where these are collectively higher than the 17.5% annual leave loading payable under cl. 25.3(b)(i).

Clause 25.3(c) of the revised PLED – Payment on termination

20. Clause 29.7 of the Current Award currently provides for payment of the 17.5% annual leave loading where an employee is entitled to payment of untaken annual leave on termination of employment under the NES. As opposed to the situation where payment is made with respect to a period of annual leave which is taken, no provision is made for payment of the penalties referred to in cl.29.4(b). The Current Award states:

29.7 Payment of accrued leave on termination

Where an employee is entitled to payment of untaken annual leave on termination of employment under the terms of the NES, the employer must also pay the employee a loading of 17.5% calculated on an employee's ordinary time rate of pay.

21. United Voice has stated in its submission that the proposed amendment in relation to Item 35: Clause 25.3(c) in the document titled 'AM2016/15 – summary – agenda items for conference – Cleaning Award dated 28 February 2018 (Proposed Amendment) accurately reflects clause 29.7 of the Current Award.

22. The Proposed Amendment mandates calculation of the 17.5% loading payable for periods of untaken annual leave owing on termination on a 'base rate of pay' which is taken to include "penalty rates paid for shiftwork or rostered ordinary hours of work on a Saturday or Sunday". This is not required by the current award.

23. Clause 29.7 of the Current Award states that the annual leave loading is calculated on an "employee's ordinary time rate of pay". As outlined above, there is currently no definition of "ordinary time rate of pay" in the Current Award. However, given the fact that this is the same wording used to describe the rate on which the loading in clause 29.4(a) is calculated, Ai Group submits that the correct reference rates to be used are the applicable minimum wages in clause 16 of the revised PLED.

24. Ai Group therefore submits that the Proposed Amendment does not reflect clause 29.7 of the Current Award with regard to the calculation of the annual leave loading.

25. United Voice argues at [8] – [14] of its Submission dated 13 August 2018 that entitlements to receive shift loadings and annual leave loading with respect to payment for annual leave were not separated in clause 29.7 of the Current Award and that this reflected the benefits which applied under the *Cleaning and Building Services Contractors (State) Award (NSW)*. In response, Ai Group notes that United Voce has not identified any basis for asserting that terms of the *Cleaning Services Award 2010* dealing with payment of annual leave on termination were intended to mirror those previously applicable to NSW employees covered by the *Cleaning and Building Services Contractors (State) Award*.

26. Ai Group nonetheless acknowledges that the NES now deals with payment of annual leave on termination. Relevantly, Section 90(2) of the Act states:

> If, when the employment of an employee ends, the employee has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave.

27. Given this provision, it appears that a simple replication of the Current Award provisions in the PLED may lead to instances where the award delivers an entitlement that is below that mandated by the NES. We accordingly suggest that an appropriate option may be the deletion of clause 25.3(c) of the revised PLED. This would not result in any diminution of current employee entitlements.

Characterisation of premiums payable pursuant to the Award

28. Ai Group expresses concern regarding the manner in which various premiums payable in respect of annual leave are expressed in the revise PLED. Clause 25.3(a)(iii) refers to "penalty rates paid for shiftwork or rostered ordinary hours of work on a Saturday or Sunday". Similarly, clause 25.3(b) refers to "shift, weekend or public holiday penalty rates". The characterisation of these premiums as 'penalty rates' as opposed to a loading or allowance has the potential to cause confusion and lead to incorrect payment of employees. The 'penalty rates' applicable for shiftwork under the revised PLED are expressed in Table 6 – Penalty Rates as percentages of the "minimum hourly rate", spanning 115% (in the case of a full-time employee working a Monday to Friday shift that starts before 6.00 am or finishes after 6.00 pm excluding a public holiday) to 275% (in the case of a casual employee working on a public holiday). Taking the lowest of these, a literal reading of cl. 25.3(a)(iii) appears to require payment, where applicable, of these rates, on top of the minimum hourly rates of pay during periods of annual leave.

29. A similar issue arises in cl. 25.3(b) of the revised PLED which requires a comparison between the 17.5% loading and "shift, weekend or public holiday penalty rates" which, as demonstrated above, may rise to 275% of the minimum hourly rate. Where an employer is required to compare the applicable premiums in clauses 25.3(b)(i) and 25.3(b)(ii), in order to determine which is the greater, such wording renders this comparison nonsensical as the annual leave loading would never be paid under circumstances where any of the rates described in cl. 25.3(b)(ii) are payable.

30. The characterisation of these premiums as 'rates' as opposed to 'loadings' or 'allowances', gives rise to sufficient ambiguity to warrant amending the revised PLED to ensure greater consistency in the terminology which is used.

31. Ai Group previously raised concerns regarding the terminology used in the exposure drafts of numerous modern awards to describe the particular premiums payable in its Submission dated 31 August 2016. Ai Group stated at [9]:

- An award provision which requires that shiftworkers be paid 15% extra can legitimately be called a "loading" or an "allowance", but cannot legitimately be called a "penalty rate" or a "shift rate".
- An award provision which stated that shiftworkers are to be paid 115% of the ordinary time rate cannot legitimately be referred to as a "loading" or an "allowance", but it can be referred to as a "penalty rate" or a "shift rate".
- Other clauses in awards (e.g. annual leave clauses) which refer to entitlements in the shiftwork cannot legitimately refer to the "loadings" or "allowances" in the shiftwork clause if the loadings / allowances (e.g.15%) have been replaced with penalty rates of pay (e.g. 115%).
- The terminology within each award should be consistent.

32. In the Group 3 decision [2017] FWCFB 5536, this matter, applicable to a large number of exposure drafts, was referred to the Plain Language Full Bench. In a Statement dated 21 March 2018, President Justice Ross stated that the Plain Language Full Bench will issue directions dealing with these issues in due course. Ai Group will seek to ventilate these issues in relation to the PLED once directions are issued.

RELEVANT TRANSCRIPT—22 June 2018 conference:

PN279 MS DABARERA: Your Honour, in relation to clause 25 Annual Leave, it was our view that item 33 and 34 were resolved by the proposed amendment. In relation to item 35, I have had a discussion with AiG just prior to this conference.

PN280 JUSTICE ROSS: Yes.

PN281 MS DABARERA: We believe that there was some - neither of us was involved in this work, but we understand that there was some work involved between the parties in looking at providing some clarification on the current clause, because there is some complexity with the current clause. In translating that to the plain language clause, that's complexity is retained. It was our view that there would be some value in going back and having a look at what those previous discussions were in relation to item 35 and seeing whether the parties could resolve it via some further discussions.

PN282 JUSTICE ROSS: Item 35 is the leave loading issue and payment question. Is it broader than that?

PN283 MS BHATT: Your Honour, I think it's an issue that is similar to - under the payment of wages, the Full Bench dealt with in manufacturing and contracting.

PN284 JUSTICE ROSS: I think we dealt with a number of specific awards that Ai Group had identified where there was some, and sometimes the awards were clumsily framed about whether you get the shift premium. But do I take it that you support the idea of there being further discussions between you? Or perhaps adopting the two and two, perhaps then if we have four weeks in which you can discuss that and if you come to a view then provide it in a joint report and then that will provide the other parties with an interest, with an opportunity to have a look at what you've come up with and they can comment on it.

PN285 MS BHATT: There was a lengthy conciliation process some time ago before Cribb C, who was dealing with this award when it was first redrafted. I think we might have come quite close to resolving the issue but it was never bed down. There are others in my office who are much close to the issue than I am, so we will put our heads together and deal with that in the time that your Honour has provided to us.

C5. ITEM 36 and 37 – CLAUSE 25.4—Annual leave *Commission has previously indicated that annual leave close down will be considered by the plain language full bench as a separate issue. Ai Group submits issue referred to in statement [2017] FWC 5861 only relates to continuity of service issue. Ai Group continues to press submission.*

COMPARISON OF RELEVANT CLAUSES

Current award clause	PLED clause (renumbered to clause 24.2)
29.6 Annual close-down Where the client of an employer in the contract cleaning industry intends temporarily to close or reduce to a nucleus the establishment or a section thereof for the purposes of allowing annual leave to that client employer's employees the following provisions may apply: (a) The employer may give in writing to such employees one month's notice (or in the case of an employee engaged after the giving of such notice, on engagement) of their intention to apply the provisions of this clause. (b) Where an employee has been given notice pursuant to clause 29.6(a) and the employee has: (i) accrued sufficient annual leave to cover the full period of closing, the employee must take paid annual leave for the full period of closing; (ii) insufficient accrued annual leave to cover the full period of closing, the employee must take paid annual leave to the full amount accrued and leave without pay for the remaining period of the closing; or (iii) no accrued annual leave, the employee must take leave without pay for the full period of closing. (c) Where practicable an employee with insufficient or no accrued annual leave will be employed at another of the employer's sites for the period that would otherwise be a period of leave without pay. (d) The close-down period will be limited to four weeks, plus any public holidays that fall during the period of the close down. (e) Public holidays that fall within the period of close-down will be paid as provided for in this award and will not count as a day of annual leave or leave without pay. (f) In this clause date of closing in relation to each employee means the first day of the employees annual leave pursuant to this clause.	**24.4 Temporary close down** (a) Clause 24.4 applies if an employer: (i) intends to close down its operations at all or part of a workplace for a particular period (temporary close down period); and (ii) wishes to require affected employees to take leave during that period. (b) The employer must give the affected employees at least 4 weeks' notice of a temporary close down period. (c) The employer may require any affected employee to take a period of paid annual leave during a temporary close down period.

SUBMISSIONS

United Voice – 6 October 2017

Clause 25. Annual leave (temporary close-down)

43. The plain language draft removes entitlements for employees in regards to a temporary closedown period. The relevant clauses are set out in the table below:

Current Cleaning Award	Cleaning Award plain language draft
29.6 Annual close-down (d) The close-down period will be limited to four weeks, plus any public holidays that fall during the period of the close down.	25.4 Temporary close-down N/A
(e) Public holidays that fall within the period of close-down will be paid as provided for in this award and will not count as a day of annual leave or leave without pay.	N/A

44. The current award provides that the close-down period will be limited to four weeks. The plain language draft has removed any reference to this.

45. Having no set limitation on the length of a temporary close-down period would disadvantage employees, as they could be required to use their annual leave entitlements or be on leave without pay for a longer period of time. Having a set limitation of four weeks on a temporary close-down period provides a measure of protection and certainty for employees.

46. Under the plain language draft award, a temporary close-down period could continue for an indefinite time period.

47. The current clause 29.6(d) should be retained.

48. The current award, in clause 29.6(e), provides that public holidays that fall within the period of the close-down period will be paid. There is no equivalent entitlement in the plain language draft.

49. Whilst the National Employment Standards do provide that public holidays that fall within a period of annual leave will be paid as a public holiday, there is no such provision regarding public holidays that fall within a period of leave without pay.

50. If the entitlement in clause 29.6(e) is removed from the Cleaning Award, an employee who is on a period of leave without pay during a temporary close-down period would lose their entitlement to be paid for public holidays during that period.

51. The current clause 29.6 (e) should be retained.

Ai Group – 12 October 2017

Clause 25.4 – Temporary close-down 24. Clause 25.4 contains numerous major differences to the existing entitlements and obligations. 25. No attempt appears to have been made in the drafting to reflect the current entitlements and obligations. 26. The existing wording in clause 29.6 should be retained.

Ai Group – 17 November 2017

Items 36 and 37: Clause 25.4 of the Exposure Draft 32.

As identified by Ai Group during the Conference, multiple issues arise from clause 25.4 of the Exposure Draft. Specifically, it deviates from clause 29.6 of the Award in various substantive ways.

33. Firstly, the circumstances in which the clause applies has been fundamentally altered.

- Clause 29.6 of the Award applies where "the client of an employer … intends temporarily to close or reduce to a nucleus the establishment or a section thereof for the purposes of allowing annual leave to that client employer's employees" (emphasis added).

- Clause 25.4(a) of the Exposure Draft makes no reference to the employer's client. It is instead drafted such that the following provisions would apply where the employer intends to close down its operations.

34. This is a substantive change to the application of the shutdown clause.

35. Secondly, the provision in the Exposure Draft does not deal with circumstances in which an employee commences their employment with the employer after the employer has provided notice of a temporary close down period to its preexisting employees. That is, the underlined words in the current clause 29.6(a) reproduced below (or words to that effect) do not appear in the Exposure Draft:

> (a) The employer may give in writing to such employees one month's notice (or in the case of an employee engaged after the giving of such notice, on engagement) of their intention to apply the provisions of this clause.

36. Accordingly, clause 25.4(b) the Exposure Draft does not make clear how much notice is to be given to an affected employee who commences their employment after notice has otherwise been given. In this way, the Exposure Draft is not simple and easy to understand.

37. To the extent that the absence of underlined words above lead to a suggestion that an employee who commenced their employment after notice has been given cannot be required to take annual leave during a temporary close down, this would quite clearly amount to a substantive change.

38. Thirdly, the clause in the Exposure Draft does not contain any ability for an employer to require an employee to take unpaid leave as contemplated by the current clauses 29.6(b)(ii) and 29.6(b)(iii). This is a significant substantive change.

39. Fourthly, we accept United Voice's contention that the current clauses 29.6(d) and 29.6(e) do not appear in the Exposure Draft.

40. Ai Group submits that clause 25.4 of the Exposure Draft should be amended to address the above issues.

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PN211 JUSTICE ROSS: Thank you. We'll put that to the drafter as well and we'll - no doubt United Voice has noted the citation and we'll see what issues the parties might have once we see the comments. Item 36.

PN212 MS DABARERA: Your Honour, this is one of our items in relation to the temporary close-down period. In the plain language draft, there's no requirement that the close-down period will be limited to four weeks. Also, there's no provision that somebody who's on leave without pay during that period receives the public holiday entitlement.

PN213 JUSTICE ROSS: Yes. Any other party wish to comment on that?

PN214 MS BHATT: Your Honour, I think Ai Group has to accept that the current clause 29.6(d) and 29.6(e) do not appear in the exposure draft. I should note - we've said this at item 37, we think there are numerous other issues that arise from the redrafting of the close-down provision, but we haven't articulated all of those. May I have until next Friday again to spell out what those concerns are.

PN215 JUSTICE ROSS: Certainly.

PN216 MS BHATT: Perhaps they too can be put to the drafter.

PN217 JUSTICE ROSS: It's also likely that all of the close-down provisions in awards will be referred to a separate Full Bench for review following the Black Coal decision in recent weeks.

PN218 MS BHATT: That's right.

PN219 JUSTICE ROSS: But certainly forward the comments in relation to it. Item 38, the consultation clause.