

**AWARD MODERNISATION  
SUBMISSIONS AND DRAFT  
AWARD PROVISIONS**

**Stage 2 Industries / Occupations**



**13 February 2009**

# ARRANGEMENT

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# AWARD MODERNISATION SUBMISSIONS ON EXPOSURE DRAFTS

## Stage 2 Industries / Occupations 13 February 2009

### Chapter 1 - Introduction

1. When the award modernisation process started the economic outlook was relatively positive. Now award modernisation is proceeding in an immensely tough and challenging economic environment. The global financial crisis and economic slowdown are yet to be fully felt and businesses need to remain highly flexible and adaptable in order to survive the tough times ahead.
2. In the current environment, the Commission needs to take great care in modernising awards to avoid imposing additional costs or inflexibilities upon employers, which would be at the expense of jobs. Jobs need to be the priority, together with avoiding workplace relations turmoil through the implementation of inappropriate award structures or award content.
3. Ai Group commends the Commission on the huge amount of analysis and drafting work which it has done in preparing the Stage 2 exposure drafts. There are many aspects of the Stage 2 drafts which Ai Group strongly supports. For example:
  - The Commission's decision to base the scope of modern construction industry awards on the scope of the existing major awards, rather than the alternative approaches proposed by some other parties which would have been very harmful;

- The decision not to create an “off-site construction industry award” (which would have, in effect, deemed a large part of the manufacturing industry to be the construction industry) and to limit the modern Building and Construction Industry General Award to on-site work;
  - The Commission’s decision to roll the 11 sectors in the Stage 2 Manufacturing Group into the modern Manufacturing Industry Award, rather than rolling some of them into construction awards, as proposed by others;
  - The decision not to include the plastics manufacturing industry or the web design / development industry within the coverage of the modern Graphic Arts Industry Award; and
  - The decision to create a modern Telecommunications Services Industry Award.
- However, Ai Group is extremely concerned about some aspects of the Stage 2 exposure drafts, including the following:
    - The “broad brush” approach which the Commission has taken to dealing with the issue of “industry specific redundancy schemes”;
    - The proposition that the modern Electrical Contractors Award might be an appropriate award for business equipment technicians and other IT sectors workers – an award which contains construction industry conditions; an award which applies only to contractors; an award which is linked to construction industry portable long service leave and severance schemes; and an award which is linked to damaging industry-wide pattern bargaining agreements negotiated between the CEPU and NECA. It is hard to imagine a less appropriate award to impose upon IT companies;

- The lack of acceptance by the Commission, to date, that the Contract Call Centre Industry is a unique industry, which is very different to the industries in which client firms operate such as banking, telecommunications and aviation, and one which employs tens of thousands of employees on inbound work (eg. giving advice) and outbound work (eg. telemarketing). Unless the approach taken in the exposure drafts is changed, the jobs of a very large number of employees are at risk, and Australia risks losing a growing industry which could evaporate overseas very rapidly.
4. Ai Group's concerns about the above matters are dealt with in detail in these submissions. We have also proposed numerous other amendments to the exposure drafts to address various issues.
  5. Ai Group is devoting very substantial resources to the award modernisation process to ensure that industry's interests are well-represented; to ensure that the final outcome is a fair one for both employers and employees; and to ensure that the objectives of the award modernisation exercise are achieved. Notwithstanding our substantial efforts, the exercise is presenting huge challenges. Ai Group is a party in its own right to more than one hundred pre-reform awards in a wide range of industries and we have an interest in more than 500 awards.
  6. This submission is made on behalf of Ai Group and its affiliated organisation, the Engineering Employers Association, South Australia.

## **Chapter 2 – Matters of general importance arising from the AIRC’s Statement of 23 January 2009**

7. Accompanying the modern award exposure drafts of 23 January 2009 the AIRC issued a Statement identifying general issues and industry specific issues relevant to the manner in which the exposure drafts had been developed.
8. The following section reflects Ai Group’s views in relation to those matters which the AIRC has identified as matters of ‘general importance’. For ease of reference, the subject headings used by the AIRC in its Statement are adopted in relation to each matter.

### **Coverage, award flexibility and annual leave**

9. The coverage of awards, the award flexibility provision and annual leave are all matters for which the Full Bench received extensive submissions from the major industrial parties, including Ai Group, during Stage 1 of the Award Modernisation process.
10. In advancing those submissions, particular regard was had to the terms of the Act and the Award Modernisation Request as reflected in its consolidated form of 16 June 2008. As the Commission has noted, the Minister in accordance with s. 576C(4) of the Act varied the terms of the 16 June 2008 Request on 18 December 2008 and issued an updated Consolidated Modernisation Request. The terms of this Request affect the manner in which coverage provisions and award flexibility clauses need to be reflected in modern awards. Additionally, it may affect the terms of the annual leave provisions within a modern award depending on the manner in which a modern award supplements the National Employment Standards.

11. Ai Group submits that it is appropriate for modern awards made for Stage 2 of Award Modernisation to include provisions that accurately reflect the requirements of the Minister's updated Modernisation Request of 18 December 2008. We also endorse this approach for awards made as a result of Stage 3 and 4 of Award Modernisation.
12. In relation to any modification that may be required to modern awards created as part of Stage 1 we would submit that the most effective time to update the provisions of these awards is in conjunction with the inclusion of transitional provisions for those awards. The proposed timing of this is discussed later in this Chapter.

### **Coverage**

13. Clause 2(e) of the updated Modernisation Request now requires that modern awards must be expressed not to cover an *'employer who is bound by an enterprise award or a Notional Agreement Preserving a State Award (NAPSA) derived from a state enterprise award.'*<sup>1</sup>
14. This broadens the scope of the exclusion contained in the equivalent provision of the 16 June 2008 Modernisation Request which required that *'a modern award is to be expressed not to bind an employer who is bound by an enterprise award in respect of an employee to whom the enterprise award applies.'*<sup>2</sup>
15. The Full Bench, in reflecting this requirement in the exposure drafts, inserted a provision similar to the following in each of the awards:

*'4.5 This award does not cover an employer bound by an enterprise award with respect to any employee who is covered by the enterprise award.'*<sup>3</sup>

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<sup>1</sup> Award Modernisation Request – Consolidated Version 18 December 2008; at para. 2(e)

<sup>2</sup> Award Modernisation Request – Consolidated Version 16 June 2008; at para. 2(e)

<sup>3</sup> Exposure Draft (January 2009): Road Transport and Distribution Award 2010; Sub-clause 4.5

16. On the basis that an assumption can be made about provisions in the *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009* enabling NAPSAAs derived from State Enterprise Awards to continue to operate beyond 31 December 2009, we submit that the requirements of the updated Award Modernisation Request can be accommodated with modification to this model provision as follows:

*“X.x This award does not cover an employer bound by:*

- a. an enterprise award; or*
- b. a Notional Agreement Preserving State Awards (NAPSA) that is derived from a state enterprise award,*

*with respect to any employee who is covered by the enterprise award or NAPSA.”*

### ***Award flexibility***

17. The updated Modernisation Request provides greater prescription regarding the content of the model flexibility provision. This additional detail is found at paragraph 11AA of the Modernisation Request and requires the following:

*“11AA The Commission must ensure that the flexibility term:*

- identifies the terms of the modern award that may be varied by an individual flexibility arrangement;*
- requires that the employee and the employer genuinely agree to an individual flexibility arrangement;*
- requires the employer to ensure that any individual flexibility arrangement must result in the employee being better off overall;*
- sets out how any flexibility arrangement may be terminated;*



- *requires the employer to ensure that any individual flexibility arrangement be in writing and signed:*
  - (a) in all cases – by the employee and the employer;*
  - (b) if the employee is under 18 – by the parent or guardian of the employee;*
- *requires the employer to ensure that a copy of the individual flexibility arrangement be given to the employee; and*
- *prohibits an individual flexibility arrangement agreed to by an employer and employee from requiring the approval or consent of another person, other than the consent of a parent or guardian where an employee is under 18.”*

18. Of the matters listed in 11AA, none were reflected in the Minister’s Modernisation Request of 16 June 2008, nor the original Request of 28 March 2008. Despite this fact, we submit that with the exception of two propositions, the model clause that was determined by the Full Bench and reflected in the modern awards created for Stage 1 appropriately encompasses these additional conditions. Indeed, on one view of things, the terms of paragraph 11AA of the updated Modernisation Request merely seek to provide legislative force to the terms of the model clause already determined by the Commission as appropriate.

19. The two areas of exception are those matters which the Commission drew attention to in its Statement of 23 January 2009.<sup>4</sup> Specifically, that the model flexibility term:

- *“requires the employer to ensure that any individual flexibility arrangement must result in the employee being better off overall;”*

and,

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<sup>4</sup> Statement – Award Modernisation 23 January 2009 [2009] AIRCFB 50; at [6].

- *“prohibits an individual flexibility arrangement agreed to by an employer and employee from requiring the approval or consent of another person, other than the consent of a parent or guardian where an employee is under 18.”*

20. We submit that the following modifications to the model flexibility clause will accommodate the requirements of the updated Modernisation Request.

**“7. Award flexibility**

**7.1** *Notwithstanding any other provision of this award, an employer and an individual employee may agree to vary the application of certain terms of this award to meet the genuine individual needs of the employer and the individual employee. The terms the employer and the individual employee may agree to vary the application of are those concerning:*

- (a)** *arrangements for when work is performed;*
- (b)** *overtime rates;*
- (c)** *penalty rates;*
- (d)** *allowances; and*
- (e)** *leave loading.*

**7.2** *The employer and the individual employee must have genuinely made the agreement without coercion or duress.*

**7.3** *The agreement between the employer and the individual employee must:*

- (a)** *be confined to a variation in the application of one or more of the terms listed in clause 0; and*

(b) result in the employee being 'better off overall' than the employee would have been if no individual flexibility arrangement were agreed to.

**7.4** *The agreement between the employer and the individual employee must also:*

(a) *be in writing, name the parties to the agreement and be signed by the employer and the individual employee and, if the employee is under 18 years of age, the employee's parent or guardian;*

(b) *state each term of this award that the employer and the individual employee have agreed to vary;*

(c) *detail how the application of each term has been varied by agreement between the employer and the individual employee;*

(d) *detail how the agreement results in the individual employee being 'better off overall' in relation to the individual employee's terms and conditions of employment; and*

(e) *state the date the agreement commences to operate.*

**7.5** Except as provided by clause 7.5(a), an agreement shall not require the approval or consent of any other person or organisation other than the employer and individual employee to which the agreement relates.

**7.6** *The employer must give the individual employee a copy of the agreement and keep the agreement as a time and wages record.*

**7.7** *An employer seeking to enter into an agreement must provide a written proposal to the employee. Where the employee's understanding of written English is limited the employer must take measures, including translation into an appropriate language, to ensure the employee understands the proposal.*

**7.8** *The agreement may be terminated:*

- (a)** *by the employer or the individual employee giving four weeks' notice of termination, in writing, to the other party and the agreement ceasing to operate at the end of the notice period; or*
- (b)** *at any time, by written agreement between the employer and the individual employee.*

**7.9** *The right to make an agreement pursuant to this clause is in addition to, and is not intended to otherwise affect, any provision for an agreement between an employer and an individual employee contained in any other term of this award."*

21. The proposed wording in paragraph 7.3(b) above has been adapted from s.203 of the *Fair Work Bill 2008* which deals with the requirements for an individual flexibility arrangement entered into under the flexibility term of an enterprise agreement.

### **Annual leave**

22. The Full Bench in its decision of 19 December 2008 identified, in relation to the issue of annual leave:

**[95]** *As we noted in our statement of 12 September 2008, it has not been possible to develop a single model clause for annual leave...*

**[96]** *There are also some issues concerning the time of taking leave. The time of taking leave is referred to in para. 33 of the consolidated request and s.36(1)(b) of the NES...*

**[97]** *The provisions in awards and NAPSAs governing annual close-downs vary significantly. It is preferable that we do not alter provisions which have*

*been specifically developed for particular industries. We have adopted the approach of attempting to identify an industry standard in each case. This means there may be some variation in the closedown provisions.”*

23. The updated Modernisation Request modifies the terms of paragraph 33 which was referred to by the Full Bench in the above quote. Such modification has not however remedied the problems identified by the Commission with regard to the disparate annual leave provisions applying in different industries which precludes the development of a model clause.
24. Ai Group therefore submits that there is no uniform method of dealing with the additional requirements prescribed by the updated Modernisation Request with respect to the ability for an employer to direct an employee to take paid annual leave *‘but only if the requirement is reasonable.’*<sup>5</sup> Instead, the precise terms of how this requirement will be reflected in modern awards should be considered on an award by award basis.

### **Transitional provisions**

25. The Modernisation Request states in relation to the inclusion of transitional provisions that:

*“12. The Commission may include transitional arrangements in modern awards to ensure that the Commission complies with the objects and principles of award modernisation set out in the award modernisation request.”*<sup>6</sup>

26. From this language it is clear that the inclusion of transitional arrangements within modern awards is not a mandatory proposition but rather should be

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<sup>5</sup> Award Modernisation Request – Consolidated Version 18 December 2008 at para. 33

<sup>6</sup> Award Modernisation Request – Consolidated Version 18 December 2008 at para. 12.

included insofar as it is necessary to achieve the objectives of award modernisation.

27. On this basis, Ai Group, largely in unison with other major industrial parties, submitted in the context of the Stage 1 proceedings that consideration of the transitional provisions for those awards made as part of Stage 1 should only occur once the terms of the awards had been settled.
28. Ai Group continues to endorse the approach to transitional provisions advocated for Stage 1 and further submits that this approach should also be applied to Stages 2, 3 and 4 of the process. Additionally, however, we submit that prior to the drafting of any transitional provisions for any of the Stages, general proceedings should be conducted by the Commission to obtain the views of interested parties about principles and other general matters relating to the approach to be taken in formulating the terms of the transitional provisions.
29. We propose that such proceedings be scheduled for the second half of this year and once finalised could form the basis for discussions between industrial parties about the transitional provisions for particular modern awards.
30. Such an approach would also assist in facilitating the resolution of any necessary transitional provisions for Stage 4 awards given the limited time between the 4 December 2009 final date of publication of those awards and the 31 December 2009 deadline for the making of all modern awards.

#### **Other possible variations to modern awards**

31. In our submission of 31 October 2008, Ai Group did not seek to advance any further submissions of a general nature beyond those which were contained within our submissions for Stage 1, instead noting:

“5. Given that the Commission has not yet issued a final decision relating to many general matters pertaining to Stage 1 of award modernisation, and given that the Government’s substantive workplace relations Bill has not yet been released publicly, Ai Group has not sought to address any further general issues at the present time. However, Ai Group envisages that there will be a need at an appropriate time during Stage 2 proceedings to address various general issues, including the effect of the substantive workplace relations legislation as passed by parliament, on the content of modern awards.<sup>7</sup>”

32. Whilst a number of matters have developed since this submission was advanced by Ai Group, including the introduction of the Government’s *Fair Work Bill* into Parliament, the terms of the new legislative regime have not yet been settled. Accordingly, Ai Group believes that it would be inappropriate at this time to seek to amend the terms of the modern awards to reflect the provisions of the *Fair Work Bill* beyond those matters which were adopted by the Full Bench in their 19 December 2008 decision.

33. In this regard we support the approach suggested by the Commission whereby there would be ‘*an opportunity to make any necessary variations after the new legislative regime has been established by Parliament but before modern awards commence to operate*<sup>8</sup>.’

34. Should the Full Bench accept our submission with respect to the conducting of a general proceeding to establish principles for the creation of transitional provisions in the second half of this year, these proceedings could be used for the purpose of updating any modern awards already made to reflect the terms of the *Fair Work Bill* once it has been enacted.

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<sup>7</sup> Ai Group Stage 2 – Award Modernisation Submissions and Draft Award Provisions, at [5].

<sup>8</sup> Decision – Award Modernisation 19 December 2008 [2008] AIRCFB 1000; at [7]

35. Apart from any modifications to modern awards that are required by virtue of the final terms of the *Fair Work Bill*, the Commission has also envisaged<sup>9</sup> that variations to the wages provisions in the modern awards may be required subsequent to any wage setting decision of the Australian Fair Pay Commission this year.

## **Draft schedules**

### ***National Training Wage Schedule***

36. Ai Group supports the general approach the Commission has taken to national training wages as reflected in the exposure draft of the National Training Wage Schedule. In particular, the following aspects appear appropriate:

- Incorporating the relevant provisions in a schedule rather than as a separate modern award;
- Utilising a single, uniform schedule (ie. with all traineeships) for each modern award;
- Updating the lists of training packages to include all current Certificate I, II and III training packages;
- Retaining the status quo approach as reflected in the National Training Wage Award of only covering Certificate IV traineeships where there is a corresponding Certificate III qualification.

37. As the draft schedule recognises, from time to time new traineeships are developed which will not be listed in the schedule. The approach adopted in the draft schedule is to allocate traineeships (Certificate I, II or III) to Skill Level B (clause 7) as a default arrangement. This approach appears to be a workable way of dealing with new training packages and is supported by Ai Group provided that a mechanism exists which will allow a review of the default arrangement and appropriate changes where necessary. Presently,

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<sup>9</sup> Statement – Award Modernisation 23 January 2009 [2009] AIRCFB 50; at [12]



under the *Fair Work Bill 2008*, it appears that this function could be accommodated.

38. The draft schedule does not contain, in the wage tables, the lower rates applicable to arrangements with higher proportions of time spent in training (namely 33% and 50%, compared with the standard proportion of 20%) as appear in the *National Training Wage Award 2000*. Ai Group seeks the retention of these wage rates. While the extent (if any) of these types of non-standard traineeships is not known, Ai Group prefers that the existing provisions be retained to avoid disturbing any existing traineeship arrangements.
39. Ai Group is currently reviewing Appendix 6 (Allocation of traineeships to wage levels) of the draft schedule. To date no problems have been identified.

#### ***School Based Apprentices Schedule***

40. Ai Group has reviewed this draft schedule and has not identified any issues at this stage.

#### ***Supported Wage System Schedule***

41. The only issue with this draft schedule which Ai Group has identified relates to clause 6.2 which provides:

*“All SWS wage assessment agreements must be agreed and signed by the employee and employer parties to the assessment, provided that where a union which has an interest in the award is not a party to the assessment, the employer must refer the agreement to the union by certified mail and the agreement will take effect unless an objection is notified to the Commission within 10 working days. (Emphasis added)*

42. Ai Group is opposed to this new obligation being placed on employers which would more appropriately be placed on the Commission (or Fair Work Australia). Currently, the responsibility to notify relevant unions (ie. unions which are a party to the relevant award) where the union is not a party to the assessment rests upon the Registrar. There is no case for altering the status quo by transferring this responsibility to the employer.
43. As the Commission has earlier flagged, it would be sensible and worthwhile for the Commission (or Fair Work Australia) to develop lists of registered bodies with an interest in modern awards (see Para 22, Decision of the Full Bench of 19 December 2008). These lists could be utilised for the purpose of notifying unions in the situation described above.

#### **Piece work**

44. Ai Group's position with respect to piece workers is reflected within our submissions relevant to the exposure drafts in which they are contained.

#### **Rationalisation of allowances**

45. Ai Group supports the proposition that consideration be given to the number and purpose of allowances that are to be included within modern awards and whether any rationalisation is desirable.
46. The Full Bench in its 23 January 2009 decision identified both the manufacturing industry and the building and construction industry as industries which could potentially benefit from the rationalisation of allowances. Ai Group agrees that consideration needs to be given to this issue.
47. However, given the limited time frames and resource challenges that the award modernisation process has presented we have not yet had an

opportunity to carry out an analysis of relevant allowances and consult with member companies and relevant unions about this issue.

48. It is important that rationalisation not result in increased costs for employers. This is a significant risk of rationalisation.
  
49. Ai Group hopes to have an opportunity to focus on allowances before modern awards come into operation, but if this proves to be impossible given the other demands of award modernisation then, we submit, the potential rationalisation of allowances should be considered during the first four yearly review of awards.<sup>10</sup>

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<sup>10</sup> *Fair Work Bill*; s156.

## Chapter 3 - Redundancy funds / industry specific redundancy schemes

### Summary of Ai Group's position

50. Ai Group submits that the Commission's Stage 2 exposure drafts, as they relate to "**industry specific redundancy schemes**", do not comply with the Award Modernisation Request, nor the clear policy intent of the Government as reflected in the *Fair Work Bill*.
51. We submit that only schemes which meet the criteria in the legislation and Modernisation Request, are able to be included in an award, and that any such scheme needs to be named in the award.
52. The concept of including any "*Approved Worker Entitlement Fund under the Fringe Benefits Tax Regulation 1992*", we submit, does not meet the requirements of the legislation or the Request, and such an approach is risky for both employers and employees, and potentially harmful.
53. This is a very important issue for employees and employers.
54. **To protect employees** it is essential that contributions cannot be made into funds which operate in a manner which are contrary to their interests. It is also important that contributions can only be made to a fund which relates to the industry in which the employee works. After all, an employee forgoes redundancy benefits under the NES when contributions are made to a fund included in the relevant award.
55. **To protect employers**, it is vital that the Commission ensure that its award modernisation decisions do not have the effect of promoting the expansion of redundancy funds, nor give perceived legitimacy and credibility to funds which do not meet the criteria set out in the legislation or Modernisation Request.

56. The Commission has been given an important responsibility under the *Fair Work Bill* and Modernisation Request as the body who decides which redundancy funds will be allowed to replace NES entitlements in particular industries. This responsibility includes:
- Assessing whether a fund which is being considered for inclusion in an award meets the criteria in the legislation and Request;
  - Ensuring that the coverage of each included fund is not extended; and
  - Varying awards to omit funds which no longer meet the required criteria.
57. It is essential that the Commission not avoid this important role by adopting the “broad-brush” approach which is currently reflected in the exposure drafts.
58. Including a fund in an award has major implications upon the entitlements of employees and the obligations of employers and it should not be done lightly.

## **The Stage 2 exposure drafts**

59. The following provision appears in the Exposure Drafts of: the *Building and Construction Industry General On-site Award 2010* (para 18.5(c)) and the *Electrical, Electronic and Communications Contracting Industry Award 2010* (para 16.7(c)):

### **“Redundancy pay schemes**

- (a) *An employer may choose to offset an employee’s redundancy pay entitlement in whole or in part by contributions to a redundancy pay scheme.*
- (b) *Provided that where an employee who is terminated receives a benefit from a redundancy pay scheme, the employee will only receive the difference between the redundancy pay specified in the NES and the amount of the redundancy pay scheme benefit the employee receives which is attributable to employer contributions. If the redundancy pay scheme benefit is greater than the amount payable under the NES then the employee will receive no redundancy payment under the NES.*
- (c) *The redundancy pay scheme must be an Approved Worker Entitlement Fund under the Fringe Benefits Tax Regulations 1992.”*

60. Ai Group submits that paragraph (c), as drafted, is inconsistent with the provisions of the *Fair Work Bill* and does not meet the Requirements of the Modernisation Request.

### **Relevant provisions of the *Fair Work Bill***

61. Section 141 of Part 2-3 (Modern awards), Division 3 (Terms of modern awards) of the *Fair Work Bill* provides that an award may include “an industry-specific redundancy scheme” in certain circumstances as follows:

#### **141 Industry-specific redundancy schemes**

*When can a modern award include an industry-specific redundancy scheme?*

- (1) A modern award may include an industry-specific redundancy scheme if the scheme was included in the award:
- (a) in the award modernisation process; or
  - (b) in accordance with subsection (2).

Note: An employee to whom an industry-specific redundancy scheme in a modern award applies is not entitled to the redundancy entitlements in Subdivision B of Division 11 of Part 2-2.

*Coverage of industry-specific redundancy schemes must not be extended*

(2) If:

- (a) a modern award includes an industry-specific redundancy scheme; and
- (b) FWA is making or varying another modern award under Division 4 or 5 so that it (rather than the modern award referred to in paragraph (a)) will cover some or all of the classes of employees who are covered by the scheme;

FWA may include the scheme in that other modern award. However, FWA must not extend the coverage of the scheme to classes of employees that it did not previously cover.

*Varying industry-specific redundancy schemes*

- (3) FWA may only vary an industry-specific redundancy scheme in a modern award under Division 4 or 5:
- (a) by varying the amount of any redundancy payment in the scheme; or
  - (b) in accordance with a provision of Subdivision B of Division 5 (which deals with varying modern awards in some limited situations)

- (4) In varying an industry-specific redundancy scheme as referred to in subsection (3), FWA:
- (a) must not extend the coverage of the scheme to classes of employees that it did not previously cover; and
  - (b) must retain the industry-specific character of the scheme.

*Omitting industry-specific redundancy schemes*

- (5) FWA may vary a modern award under Division 4 or 5 by omitting an industry-specific redundancy scheme from the award.
62. Paragraph 123(4)(b) of Part 2-2 (The National Employment Standards), Division 11 (Notice of termination and redundancy pay) of the *Fair Work Bill* provides that the redundancy pay provisions of the NES do not apply to “*an employee to whom an industry-specific redundancy scheme in a modern award applies*”.
63. The following extract from the Explanatory Memorandum provides further clarity about the Government’s intent:

**Clause 141 – Industry-specific redundancy schemes**

551. Clause 141 permits a modern award to include an industry-specific redundancy scheme in limited circumstances, and also provides rules about varying or omitting such a scheme. A legislative note reminds readers that an employee to whom an industry-specific redundancy scheme in a modern award applies is not entitled to redundancy entitlements under the NES.
552. Subclauses 141(1) and (2) allow a modern award to include an industry-specific redundancy scheme if the scheme was included in the modern award in the award modernisation process. The award modernisation request issued by the Minister for Education, Employment and Workplace Relations sets out the following factors relevant to whether such a scheme is included in a modern award:
- when considered in totality, whether the scheme is no less beneficial to employees in the industry than the redundancy provisions of the NES; and
  - whether the scheme is an established feature of the industry.
553. FWA may also include an industry-specific scheme in a modern award where it makes or varies another modern award so that it covers employees who were previously covered by a modern award that included such a scheme. In such a situation, FWA must ensure that the coverage of the scheme is not extended to classes of employees that it did not previously cover.
554. The intention is that the industry specific nature of such a scheme should be retained if it is to remain in a modern award. This is because industry-specific schemes, developed with the needs of employees and employers in the particular industry in

mind, operate to the exclusion of the general redundancy entitlements in the NES. If such a scheme no longer meets industry specific needs, the NES should apply.

555. Subclauses 141(3) and (4) set out the limited ways in which an industry-specific redundancy scheme may be varied – i.e., to vary the amount of redundancy payment in the scheme, or in the limited circumstances permitted by Subdivision B of Division 5 (e.g., to remove an ambiguity).
556. In varying an industry-specific redundancy scheme, FWA must retain the industry-specific character of the scheme.
557. FWA may also omit an industry-specific redundancy scheme (subclause 141(5)).
558. In addition to industry specific-schemes dealt with by clause 141, a modern award may also deal with redundancy by including terms that supplement the NES (see paragraph 55(4)(b)).

(Emphasis added)

64. It is evident from the wording of ss.123 and 141 of the Bill, together with the Explanatory Memorandum, that:

- The Government recognises the need to prevent double dipping and not impose NES redundancy pay obligations on companies which are paying into recognised “industry-specific” redundancy schemes;
- For a scheme to be included in an award it must have an “industry-specific character” and relate to the specific industry covered by the award in which it is to be included;
- The Commission must not extend the coverage of a scheme included in an award to classes of employees not covered when the scheme was first included.

## **The requirements of the Award Modernisation Request**

65. The amended Modernisation Request states that:

- “37. An ‘industry specific redundancy scheme’ is one identified as such in a modern award;
38. The Commission may include an ‘industry specific redundancy scheme’ in a modern award.
39. In determining whether particular redundancy arrangements constitute an ‘industry specific redundancy scheme’, the Commission may have regard to the following factors:



- When considered in totality, whether the scheme is no less beneficial to employees in that industry than the redundancy provisions of the NES; and
  - Whether the scheme is an established feature of the relevant industry”
66. It is clear from the above that any redundancy fund included in an award should:
- Be an *“industry specific redundancy scheme”* and identified as such in the award;
  - Be *“specific”*, to the industry covered by the relevant award;
  - Be assessed by the Commission before being included in the award and the Commission should be satisfied that the fund provides benefits which are *“when considered in totality...no less beneficial to employees in that industry than the redundancy provisions of the NES”*;
  - Be an *“established feature of the relevant industry”*.

## **Fringe Benefits Tax legislation and regulations**

67. It is important for the Commission to understand the background to the concept of an *“Approved Worker Entitlement Fund under the Fringe Benefits Tax Regulations 1992”* , given that the Commission has used this term in two of the Stage 2 exposure drafts.
68. In 1999, the ATO issued Tax Ruling TR 1999/9 which reversed the ATO’s previous position and deemed that all employer contributions to trust funds (including but not limited to worker entitlement trust funds) were subject to FBT.
69. The ATO Ruling would have doubled the cost of employer contributions into construction industry redundancy funds and Ai Group led a coalition of construction industry organisations in pursuing urgent legislative amendments.

70. In June 2003, the *Taxation Laws Amendment Bill (No. 4) 2003* passed through Parliament. The legislation amended the *Fringe Benefits Tax Assessment Act 1986* (“FBT Act”) to provide an FBT exemption for contributions to “*approved worker entitlement funds*” (ref. ss.58PA and 58PB of the Act).
71. Worker entitlement funds were given the opportunity to apply to be “prescribed” for the purposes of the FBT exemption.
72. If the ATO is satisfied that a Fund meets the criteria set out in s.58PB of the FBT Act then a regulation is able to be made prescribing the Fund as an “*approved worker entitlement fund*”. Approved funds are set out in Schedule 3 to the *Fringe Benefits Tax Regulations 1992*.
73. Section 58PB of the FBT Act and Schedule 3 of the *Fringe Benefits Tax Regulations 1992* are set out in **Annexure A** of this submission.
74. It can be readily seen that the list of “*approved worker entitlement funds*” is very diverse and includes:
- Construction industry redundancy funds;
  - Funds relating to the mining industry;
  - Funds relating to the coal industry;
  - Funds relating to the contract cleaning industry;
  - Funds relating to specific companies;
  - Discredited funds which have never got off the ground (eg. NEST);
  - Funds which deal with a broad range of entitlements;
  - Funds which deal only with sick leave;
  - Training funds; and
  - Funds for professional employees.

75. It can also be readily seen that the criteria which the ATO is required to be satisfied of, relates to financial and structural matters relating to the fund, not the matters set out in the *Fair Work Bill* and the Modernisation Request.
76. To be an “*approved worker entitlement fund*” for the purposes of the FBT exemption it does not matter whether the fund:
- Is “*an established feature of the relevant industry*”; or
  - Is “*industry specific*”; or
  - Is a “*redundancy scheme*”; or
  - “*when considered in totality...is no less beneficial to employees in that industry than the redundancy provisions of the NES*”; or
  - Has a significant number of employer contributors; or
  - Has a significant number of employee beneficiaries; or
  - Has the support of the major employer and employee representative bodies in the relevant industry’.
77. Ai Group strongly submits that the Commission must not base its decisions on which funds to include in awards on the basis of the funds which have been granted an FBT exemption. The reality is that all significant redundancy funds (and many worker entitlement funds which are not significant) have obtained an FBT exemption.

### **What approach should the Commission take?**

78. As set out above, Ai Group strongly submits that the Modernisation Request requires that the Commission assess every fund that is proposed for inclusion in an award against the criteria set out in the Request.
79. After carrying out such assessment, if and only if, the Commission is satisfied that it is appropriate to do, the fund should be specified in the award.

80. Fortunately, the Commission's task is made much simpler by the extensive analysis carried out into construction industry funds by the *Royal Commission into the Building and Construction Industry*. Indeed a 352 page volume of the Final Report issued in 2003 was devoted entirely to this topic (Volume 10).

81. Chapter 13 of Volume 10 of the Royal Commission's Final Report is included as **Annexure B** to this submission. In this extract all of the significant construction industry redundancy funds are analysed and discussed.

82. At paragraph 85 on page 268 of Volume 10, the Royal Commission reported:

*“There are presently eight principal schemes covering a range of sectors including civil construction, mechanical and engineering, electrical contracting, plumbing and allied services and general construction and building. They are:*

- *Australian Construction Industry Redundancy Trust (ACIRT);*
- *Building Employees Redundancy Trust (BERT);*
- *Building Industry Redundancy Scheme Trust (South Australia) (BIRST);*
- *Contracting Industry Redundancy Trust (CIRT);*
- *The Redundancy Payment Central Fund Ltd (trading as Incolink);*
- *Mechanical and Electrical Redundancy Trust (MERT);*
- *Electrical Industry Severance Scheme (trading as Protect); and*
- *Western Australian Construction Industry Redundancy Fund.”*

83. Ai Group submits that there are no other funds which operate in the construction or electrical contracting industry which could legitimately be regarded as “an established feature of the relevant industry” and an “industry specific redundancy scheme”, as referred to in the Modernisation Request.

84. Further, Ai Group submits that before the Commission includes any of the above funds in the modern Building and Construction Industry General Award

or modern Electrical Contracting Award, it should ensure that it is satisfied that the funds are appropriately included and meet all of the requirements set out in the *Fair Work Bill* and Modernisation Request.

## **Proposed wording for the modern Building and Construction Industry General Award and modern Electrical Contracting Award**

85. Ai Group submits that sub-clauses 18.5 and 16.7 respectively of the modern Building and Construction Industry General Award and modern Electrical Contracting Award should be reworded, as follows:

### ***Industry specific redundancy schemes***

**(a)** *An employer may choose to offset an employee's redundancy pay entitlement in whole or in part by contributions to one of the following industry specific redundancy funds:*

**(i)**            *(Insert)*

**(ii)**            *(Insert)*

**(b)** *Provided that where an employee who is terminated receives a benefit from a redundancy fund which is less than the amount otherwise payable under the NES, the employee will only receive the difference between the redundancy pay specified in the NES and the amount of the redundancy pay benefit the employee receives which is attributable to employer contributions. If the redundancy fund benefit is greater than the amount payable under the NES then the employee will receive no redundancy payment under the NES.*

## Chapter 4 – Agriculture Group

86. The Agriculture Sector in Australia is one of the country's most vulnerable to international competition. Any increase in labour costs imposed through modern awards will make the industry less competitive against overseas farmers and growers. Ai Group is concerned that flexibilities that have been enjoyed in some parts of Australia will be lost if the exposure draft awards become the final drafts. Ai Group supports the submissions being made by the National Farmers Federation in opposing additional cost burdens being imposed upon industry through the modern agriculture awards.

### Horticulture Award 2010

87. In the horticulture sector, the modern award which has been drafted is not in keeping with the current commercial environment in which the sector operates.
88. With seven day a week food and beverage manufacturing and supermarket/shop trading hours, horticulture businesses are required to provide fresh produce seven days a week. Due to the perishable nature of horticulture products, changing volume levels dependent on customer demands, and the seasonal nature of fruit and vegetables, the industry cannot limit its operations to Monday to Friday. Therefore, in developing a modern award for the sector, the Commission must carefully consider the cost implications for work outside day work on Monday to Friday.
89. Ai Group supports the submissions being made by the Horticulture Australia Council that the ambiguity in the current applicable awards and NAPSAs should not result in any additional costs being imposed on employers in this sector, including through more onerous piecework arrangements and higher penalty rates.

## Other specific changes to the exposure draft of the Horticulture Award 2010

### **Definitions**

90. In the definition of Horticulture Industry in Clause 4.2(b) the word “*planting*”, which is listed in Clause 4.2(a), has been omitted. This is important to include because preparatory work is done in connection with the planting of horticultural crops upon farms, orchards and plantations.
91. Also, the definition does not include “*storing, grading and despatching*” horticultural crops upon farms, orchards and plantations. The inclusion of these aspects is important because such tasks often have to be completed in order for the horticulture business to meet the customers’ needs for different qualities or standards of fruit and vegetables. These additional words would not extend the scope of the award to off-farm warehousing, transport or production facilities.

### **Shiftwork**

92. The Exposure Draft has omitted a shiftwork clause which would enable the industry to continue to use shiftwork arrangements where necessary to meet operational needs. As many of the current awards do not require a shift penalty to be paid, we submit that the shift loading should be 10% in this sector. The following clause should be inserted into the Exposure Draft:

#### **“22.5 Provisions for shiftworkers**

- (a) An employee who works on afternoon or night shift must be paid 10% extra for such shift.

- (b) No more than eight ordinary hours must be worked on each shift.
- (c) Any work beyond ordinary hours must be paid at the rate of 50% extra. The extra rate is in substitution for and not cumulative upon the shift premium prescribed.”

## **Skin, Hide and Wool Stores Award 2010**

93. The Manufacturing Group includes the Saddlery, Leather and Canvass Industry. The draft amendments to the *Manufacturing and Associated Industries and Occupations Award 2010*, which the AIRC has released, incorporate the scope of the following awards:

- The *Saddlery, Leather, Canvas and Plastic Material Workers' Award 1999*; and
- The *Tanning Industry Award 1999*.

94. The LHMU is the union party to the *Saddlery, Leather, Canvas and Plastic Material Workers' Award 1999* and Ai Group appears to be the only employer association respondent. The LHMU is also the only union party to the *Tanning Industry Award 1999*. Both Ai Group and the LHMU have expressed support for the incorporation of the scope of the above awards into the scope of the *Manufacturing and Associated Industries and Occupations Award 2010* and the Commission has done this in paragraphs 4.2(a)(ii), 4.4(q) and 4.4(dd) of the amended scope clause.

95. The *Manufacturing and Associated Industries and Occupations Award 2010* applies to “*handling, sorting, packing, dispatching, distribution and transport in connection with...*”<sup>11</sup> all of the products manufactured under the Award.

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<sup>11</sup> Paragraph 4.2(a)(x)



96. A very large number of warehouse staff will be covered under the Modern Manufacturing Award. The NUW has been a party to the Metal Industry Award for many decades due to the Award's coverage of warehouse staff.
97. Ai Group submits that the overlap between the proposed *Skin, Hide and Wool Stores Award 2010* and the Modern Manufacturing Award should be addressed through the incorporation of the following new subclause in Clause 4 of the *Skin, Hide and Wool Stores Award 2010*:

*"The award does not cover employers covered by the Manufacturing and Associated Industries Award 2010".*

## Chapter 5 – Building, Metal and Civil Construction Group

98. The modernisation of awards in the construction industry is highly complex and risky.
99. The huge amount of analysis and drafting work which the Commission has carried out in preparing the Building, Metal and Civil Construction Group exposure drafts is impressive.
100. Ai Group is pleased with some major elements of the exposure drafts, including:
- The Commission’s decision to base the scope of modern construction industry awards on the scope of the existing major awards, rather than the alternative approaches proposed by some other parties which would have been very harmful;
  - The decision to limit the modern Building and Construction Industry General Award to on-site work;
  - The decision not to create an “off-site construction industry award” (which would have, in effect, deemed a large part of the manufacturing industry to be the construction industry)
101. However, Ai Group has some major concerns about aspects of the exposure drafts and these concerns are set out below, together with many proposed amendments.

## Building and Construction Industry General On-Site Award

### Award structures

102. As the Commission is aware, Ai Group has proposed separate awards for:
- Metal and Engineering Construction;
  - Civil Construction; and
  - Building Construction.
103. Ai Group continues to support separate awards for each of the above industry sectors.
104. As the Commission is also aware, during the award modernisation process Ai Group has argued at length for the Commission to specify the registered organisations which are a party to each award. Failing to include parties in modern awards, we submit, will increase demarcation disputes - particularly in the construction industry.
105. That said, Ai Group acknowledges that the *Fair Work Bill* has been drafted to remove the link between entry / representational rights and the parties bound by awards.

### Coverage

106. Ai Group strongly supports the phrase “*in all cases undertaken on-site*” in sub-clause 4.2. As Ai Group has vigorously argued in previous submissions, construction is an on-site industry.

107. Ai Group also strongly supports the exclusion in sub-clause 4.3(a) for work carried out under the *Manufacturing and Associated Industries and Occupations Award 2010*, and the modern Joinery Award. These exclusions are essential.

108. However, a further paragraph (iii) needs to be added to 4.7(c) along the lines of the existing subclause 4.1.3 in the *National Metal and Engineering On-site Construction Industry Award 2002* (“the MECA Award”) as follows:

“(iii) *Provided that it does not include any work which is incidental to or of a minor nature in relation to the work normally performed by an employee of an employer not engaged substantially in metal and engineering construction*”.

### **Clause 3 - Definitions**

109. In the definition of “*air-conditioning work*” in sub-clause 3.1, the words “*and the like*” have been omitted from the end. These words are important to ensure that similar equipment is included.

### **Clause 18 - Redundancy**

110. Ai Group strongly supports the application of the NES redundancy definition, rather than the definition which applied in former years under some of the construction industry awards.

111. To include a wider definition of redundancy, we submit, would have the effect of excluding a provision of the NES and, hence, would breach clause 30 of the Modernisation Request (together with s.55 of the *Fair Work Bill*).

112. The phrase “*or an award made under the Workplace Relations Act 1996 (Cth)*” should be deleted from paragraph 18.7(a) to avoid it being interpreted as reinstating the former wider definition of redundancy which operated in various construction industry awards. The wider definition still appears in some federal construction industry awards but has no effect. The above wording will create confusion and uncertainty.
113. Ai Group has major concerns about sub-clause 18.5 – Redundancy Pay Schemes. Our concerns and proposed amended wording are set out in Chapter 3.

### **Foreperson classifications**

114. The exposure draft extends award coverage to forepersons when most forepersons in the industry are award-free, salaried staff. The modern award should not apply to forepersons, consistent with subclause 2(a) of the Modernisation Request.

### **Fares and travelling time**

115. The existing MECA award contains a heavily utilised and very important provision which states that:

*“20.3 Payment shall not be made:*

*----*

*20.3.4 for any day employees are required to commence or cease work at the employer’s workshop, yard or depot other than on a construction site”.*

116. This important flexibility appears to have been removed in the exposure draft. It should apply to all employees under the award, or if that is not acceptable, then it should apply to employees involved in metal and engineering construction.

## **Payment of wages**

117. The payment of wage clause is drafted with some provisions which belong in another era. Sub-clause 33.2 is particularly outdated, given the wide use of EFT as a payment method, and should be deleted.

## **Hours of work**

118. The hours of work provisions of the exposure draft are highly inflexible. They appear to have been based upon those in the existing National Building and Construction Industry Award. They are far more inflexible than the hours of work provisions in many of the awards which will be superseded by the modern award (eg. the MECA Award) and this will create problems for employers.

119. More flexible hours of work provisions need to be included within the award.

## **Other content issues**

120. Ai Group is still analysing the content of the exposure draft of the *Building and Construction Industry On-site Award 2010* and preparing a document setting out the changes which we seek to specific clauses. We will provide the document to the Commission as soon as possible and seek the Commission's understanding in this regard.

## **Mobile Crane Hiring Industry**

121. Ai Group submits that it is appropriate that a modern Mobile Crane Hiring Industry Award be made.

122. A draft award and submissions in support of it will be filed separately.

## Electrical Contracting

### The modernisation options

123. In modernising awards, as they relate to electrical contractors, the Commission has a number of options:

1. Including electrical contractors in the construction industry under the modern *Building and Construction Industry On-site Award 2010* (NB. The exposure draft already covers electricians) with electricians in general industry being covered under the *Manufacturing and Associated Industries and Occupations Award 2010* (NB. The Stage 1 award has been drafted to operate as a general occupational award for electricians);
2. Creating a modern award to apply to Electrical Contractors in all industries other than where such contractors are covered under the relevant industry award;
3. Creating a modern award to apply to Electrical Contractors in all industries to the exclusion of other awards;
4. Creating a modern award with the scope of the existing *National Electrical, Electronic and Communications Contracting Industry Award 1998*;
5. Creating a modern *Electrical, Electronic and Communications Contracting Award 2010* with a scope which extends beyond the existing *National Electrical, Electronic and Communications Contracting Industry Award 1998*.

124. Ai Group strongly opposes Options 3 and 5 above.

125. Option 4 is only acceptable to Ai Group if the award contains appropriate exemptions for work carried out under other relevant awards such as the *Manufacturing and Associated Industries and Occupations Award 2010*, the *Telecommunications Services Industry Award 2010*, the proposed *Business Equipment Industry Award 2010* (see Chapter 10) and other relevant awards. Otherwise this option is also strongly opposed by Ai Group.

**The modern Manufacturing Industry Award is the general occupational award for electricians, not the modern Electrical Contracting Award**

126. In a number of places in its Statement of 23 January 2010, the Full Bench refers to the exposure draft of the *Electrical, Electronic and Communications Contracting Industry Award 2010* as “the Electrical Modern Award” (eg. para [45] and para [85]). Ai Group submits that such terminology is likely to lead to confusion because, as stated above, the *Manufacturing and Associated Industries and Occupations Award 2010* (as made in Stage 1) operates as a general occupational award for electricians. This role for the Manufacturing Award has been agreed upon between Ai Group, the CEPU and other MTFU unions. The parties agreed that the modern Manufacturing Award would supersede the *Metal, Engineering and Associated Industries Award 1998* (which contains an Electrical Stream) together with NAPSAs applicable to electricians such as the *NSW Electricians, &c. (State) Award*.

127. As set out in more detail in Chapters 10 and 11 below (relating to the ICT and Manufacturing Industries), in the early stages of award modernisation there were potentially conflicting views between the parties about the scope of any modern electrical contracting award.

128. Ai Group, the CEPU, the AMWU and NECA worked through the issues and eventually reached agreement on the following exemption for the modern Manufacturing Award which was intended to delineate coverage of the modern Manufacturing and modern Electrical Contracting Awards:



**“4.5 Manufacturing and Associated Industries and Occupations does not mean:**

.....

**(e) Employees of electrical contractors who are bound by and applying an electrical contracting award or an electrical contracting Notional Agreement Preserving State Awards (NAPSA), provided that this provision does not affect the application of this award to:**

- *electrical, electronic and communications employees who are not employed by an electrical contractor; and*
- *employees of employers who were legitimately and appropriately applying the Metal, Engineering and Associated Industries Award 1998 to such employees at the time when it was superseded by this award.”*

129. A number of aspects of the above exemption are noteworthy:

- The agreed exemption only applied to “electrical contractors” – other electricians and electrical workers are covered under the Modern Manufacturing Award;
- It was agreed that electricians and other employees currently within the scope of the Metal Industry Award should be covered under the Modern Manufacturing Award;
- The agreed exemption was not intended to affect the coverage of the *Manufacturing and Associated Industries and Occupations Award 2010* as a general occupational award for electricians.

130. Ai Group submits that the Commission should give great weight to the agreement reached between Ai Group, the CEPU, the AMWU and NECA and not extend the scope of any Electrical Contracting Award to cover additional employees, including employees covered under the Modern Manufacturing Industry Award, business equipment technicians, employees involved in TV, radio or home computer repairs, nor any other employees.
131. Various State Commissions have been mindful of the potential problems relating to the overlap between electrical contracting awards and manufacturing awards and have inserted exclusions into the state awards applicable to electrical contractors. For example, the NSW NAPSA provides an exclusion for:

*“Any entity who or which operates a business the primary purpose of which is the manufacture and/or vending of plant and equipment shall be exempt from this award solely in respect of those parts or divisions of the business which are predominantly engaged in the manufacture and/or vending of plant and equipment or the installation, assembly, refurbishment and maintenance of that plant and equipment.”*

**The nature of the existing Electrical Contracting Industry Award and the importance of ensuring that the modern award does not cover manufacturers, IT companies and others**

132. The existing Electrical Contracting Award was created in 1992 and was entitled the *Electrical Contracting Industry Award 1992*.
133. It has always been regarded as primarily a construction industry award. No doubt this is why the Commission allocated the award to the Building, Metal and Civil Construction Group for award modernisation.

134. The Electrical Contracting Award applies **only to contractors**. It has never been a general occupational award for electricians. Electricians who are not electrical contractors are covered under the federal Metal Industry Award or under NAPSAs such as the NSW *Electricians, &c. (State) Award*. Both of these industrial instruments have been incorporated within the *Manufacturing and Associated Industries and Occupations Award 2010*.
135. The Electrical Contracting Award is included within the coverage of construction industry portable severance schemes, and long service leave schemes such as CoINVEST in Victoria. The CoINVEST scheme applies to employees carrying out work within the scope of the Electrical Contracting Award and many Ai Group members have been involved in costly and disruptive disputes with CoINVEST about the extent of the scheme's coverage. It is very important that the Commission does not inflict portable severance schemes and portable long service leave schemes upon other industries, such as manufacturing and IT, through its award modernisation decisions. Such an outcome would be extremely harmful.
136. The Electrical Contracting Award has been negotiated over the years between the CEPU and NECA (an organisation which represents electrical contractors – not manufacturers or IT companies). The title and scope of the award have changed over the years based upon amendments agreed upon between the CEPU and NECA. The expansive title and expansive wording in the scope clause need to read in conjunction with the limitation that the award only applies to electrical contractors.
137. For this reason the award has not unduly intruded upon the coverage of manufacturing and IT industry awards. Representative bodies in other industries have not paid much attention to deals done between the CEPU and NECA on the title or scope of their award.

138. The CEPU and NECA also regularly negotiate what Ai Group and many others regard as highly damaging pattern bargaining agreements across the electrical contracting sector. The CEPU's attempts to impose these agreements on electrical contractors and other firms have led to lengthy strikes involving various Ai Group member companies. The CEPU / NECA pattern agreements were also at the centre of the union movement's attempts to establish bargaining agent's fees for non-union members. Such provisions were included in the CEPU / NECA agreements before bargaining agent's fees were outlawed.

139. We submit that the fact that a high proportion of electrical contractors are covered under comprehensive pattern agreements negotiated between the CEPU and NECA should be kept foremost in mind by the Commission in determining the scope and content of modern awards. The scope and content of any modern Electrical Contracting Award will have little significance for most electrical contractors because they are covered under pattern agreements with much more generous conditions. However, the scope and content of any modern Electrical Contracting Award could have a disastrous cost impact upon companies in the manufacturing, IT and other industries if the award covers them. This includes small, non-unionised repair businesses (eg. in the metal, business equipment and TV repair industries) as well as major corporations.

140. The additional costs for companies in the manufacturing, IT and other industries would include:

- Higher base wage rates including the provision of an 'industry allowance' when work is performed away from the employer's workshop;
- Additional allowances, including multi-storey allowances and construction industry fares and travel provisions;
- Restrictive hours of work;

- A requirement to pay day workers at overtime rates should they be required to work on Saturdays and Sundays;
- Higher overtime penalties (time and a half for the first two hours and double-time thereafter); and
- Inclement weather provisions.

**Specific changes proposed to the coverage provisions of the exposure draft of the modern Electrical Contracting Award (if the award is to be made)**

141. In this chapter, together with Chapters 10 and 11, Ai Group has expressed major concern about the scope of any modern Electrical Contracting Award.

142. If the Commission decides that it is appropriate to make a modern Electrical Contracting Award then, Ai Group submits that the title of the Award should be called the *Electrical Contracting Industry Award 2010*. The existing title of the exposure draft, we submit, has already caused significant confusion and concern about overlap with the Modern Manufacturing Award and coverage of workers in the IT and other industries.

143. It is also vital that the award contain exclusions for employers covered under:

- a. The *Manufacturing and Associated Industries and Occupations Award 2010*;
- b. The *Telecommunications Services Industry Award 2010*; and
- c. The *Business Equipment Industry Award 2010* (as proposed in Chapter 10).

144. Further, we submit that it is vital that the award not operate to “*the exclusion of any other award*” (as currently stated in subclause 4.1 of the exposure draft). This terminology will cause major problems given the extent of overlap between this award and many other awards in the manufacturing, IT, telecommunications and other industries.

145. Ai Group's preference is for the coverage provisions of the modern Electrical Contracting Award (if such an award is to be made) to be drafted in a similar manner to the *Clerks – Private Sector Award 2010*. That is the modern Electrical Contracting Award would not apply to an employer bound by any other modern award which covers electrical services provided by contractors. This is the safest approach for the Commission to take and the approach which is in the public interest.

### **Television, Radio and Electronics Service Industry**

146. As set out in some detail in Chapter 10, Ai Group proposes that the scope of the *Television, Radio and Electronics Service Industry Award 1998* be incorporated within the *Manufacturing and Associated Industries and Occupations Award 2010* – not the modern Electrical Contracting Award.

### **Redundancy provisions**

147. As covered in detail in Chapter 3, Ai Group submits that sub-clause 16.7 – Redundancy Pay Schemes, of the exposure draft of the modern Electrical Contracting Award conflicts with the provisions of the *Fair Work Bill* and the Award Modernisation Request. The changes which Ai Group proposes to this sub-clause are set out in Chapter 3.

### **Other content issues**

148. Ai Group is still analysing the content of the exposure draft of the Modern Electrical Contracting Award and preparing a document setting out the changes which we seek to specific clauses. We will provide the document to the Commission as soon as possible and seek the Commission's understanding in this regard.

## Plumbing and Fire Sprinklers

149. Ai Group has a number of concerns about the coverage provisions in the exposure draft of the *Plumbing and Fire Sprinklers Contracting Industry and Occupational Award 2010* (“Modern Plumbing Award”).
150. There is a substantial amount of overlap between the modern Plumbing Award, the Modern Manufacturing Award and the modern Building and Construction Industry On-site Award. Given the extent of this overlap it is highly inappropriate and would be very harmful for the modern Plumbing Award to operate “*to the exclusion of any other modern award*”, as currently drafted.
151. Also, to reduce overlap problems the award should be limited to work carried out by contractors as provided for in paragraph 4.1(a) of the award. Paragraph 4.1(b) should be deleted and the award should be renamed the *Plumbing and Fire Sprinklers Contracting Industry Award 2010*.

## Overlap with the modern Manufacturing Award

152. In its Statement of 23 January 2009, the Full Bench commented that the exposure draft of the Modern Plumbing Award was based, in part, on the *Plumbing Trades (Southern States) Construction Award 1999* (para [53]). However, sub-clause 4.2 of the Southern States Plumbing Award contains the following very important exclusion:

“4.2 This award will not apply to:

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*the employment of weekly engaged employees fully employed in workshops off site by employers respondent to the Metal Engineering and Associated Industries Award 1998”.*

153. The above exclusion aligns with the following exclusion which appears in the *Manufacturing and Associated Industries and Occupations Award 2010* (as made during Stage 1):

*“Manufacturing and Associated Industries and Occupations does not mean:  
(a) plumbers, unless employed in establishments covered by this award”*

154. There are many plumbers employed in the manufacturing industry on maintenance and fabrication work (eg. fabricating air-conditioning ductwork, refrigeration equipment, pipework, etc).

155. The existing *Metal, Engineering and Associated Industries Award 1998* and the modern *Manufacturing and Associated Industries and Occupations Award 2010* (as made during Stage 1) are drafted to apply to a considerable amount of work which over the years has been the subject of demarcation and award coverage issues relating to the plumbers, including:

- The manufacture, installation and repair of air-conditioning equipment and components (eg. manufacture of ductwork);
- The manufacture, installation and repair of refrigeration equipment and components;
- The manufacture and installation of metal roofing, guttering and other sheet metal products;
- The manufacture and installation of pipes made out of various materials; and
- The manufacture and installation of tanks, pipes, pumps, valves, meters and numerous other products associated with irrigation systems.

156. The existing plumbing and sprinkler pipe fitting awards have always been regarded as primarily construction industry awards. This is no doubt why the Commission has allocated the awards to the Building, Metal and Civil Construction Group for award modernisation.



157. The existing plumbing and sprinkler pipe fitting awards are included within the coverage of construction industry portable severance schemes, and long service leave schemes such as CoINVEST in Victoria. If the Commission were to inflict portable severance schemes and portable long service leave schemes upon the manufacturing industry through its award modernisation decisions the outcome would be very harmful.
158. The scope and content of any modern Plumbing Award will have little significance for most plumbing and sprinkler pipe fitting contractors because they are covered under pattern agreements with much more generous conditions. However, the scope and content of any modern Plumbing Award could have a disastrous cost impact upon companies in the manufacturing industry if the award covers them.
159. The exposure draft of the *Plumbing and Fire Sprinklers Contracting Industry and Occupational Award 2010* would result in huge cost increases for manufacturers should they be forced to apply it, including:
- Higher base wage rates;
  - Additional and higher allowances;
  - Construction industry fares and travel provisions;
  - A requirement to pay day workers at overtime rates should they be required to work on Saturdays and Sundays;
  - Higher overtime penalties; and
  - Inclement weather provisions.
160. The Modern Plumbing Award needs to contain a general exemption for work carried out under the *Manufacturing and Associated Industries and Occupations Award 2010*.

## **Overlap with the Building and Construction Industry General On-site Award 2010**

161. The Commission has drafted the *Building and Construction Industry General Award 2010* to cover work currently covered by the *National Metal, and Engineering On-site Construction Industry Award 2002* (“MECA Award”). There is currently considerable overlap between the coverage provisions in the exposure drafts of the modern Building and Construction Industry General Award (as it relates to areas currently covered under the MECA Award) and the modern Plumbing Award. The areas involved include:

- The installation of air-conditioning systems on construction sites;
- The installation of refrigeration systems on construction sites;
- The installation of metal roofs on construction sites;
- The installation of pipes made out of various materials.

162. At present the overlap is resolved within the exposure drafts by deeming that the modern Plumbing Award applies to the exclusion of the modern Building and Construction Industry General Award. Ai Group does not support this approach.

## **Specific changes proposed to the coverage provisions of the exposure draft of the modern Plumbing Award**

163. In accordance with the views set out above, Ai Group submits that the Modern Plumbing Award should be limited to work carried out by contractors as provided for in paragraph 4.1(a) of the award. Paragraph 4.1(b) should be deleted and the award should be renamed the *Plumbing and Fire Sprinklers Contracting Industry Award 2010*.

164. Ai Group also submits that the Modern Plumbing Award needs to contain exclusions for employers covered under:

- The *Manufacturing and Associated Industries and Occupations Award 2010*; and
- The *Building and Construction Industry On-site Award 2010*.

165. Further, we submit that it is vital that the award not operate to “*the exclusion of any other award*” (as currently stated in sub-clause 4.1 of the exposure draft). This terminology will cause major problems given the extent of overlap between this award, the modern Manufacturing Award and other awards.

166. Ai Group’s preference is for the coverage provisions of the modern Plumbing Award to be drafted in a similar manner to the *Clerks – Private Sector Award 2010*. That is the modern Plumbing Award would not apply to an employer bound by any other modern award which covers plumbing services provided by contractors. This is the safest approach for the Commission to take and the approach which is in the public interest.

### **Redundancy provisions**

167. The modern Plumbing Award does not currently provide the option for an employer to pay into a redundancy fund rather than to provide NES redundancy entitlements. Should the Commission decide to include such a provision the discussion and proposed wording in Chapter 3 are relevant.

### **Other content issues**

168. Ai Group is still analysing the content of the exposure draft of the Modern Plumbing Award and preparing a document setting out the changes which we seek to specific clauses. We will provide the document to the Commission as soon as possible and seek the Commission’s understanding in this regard.

## Joinery and Building Trades

169. In its Statement of 23 January 2009, the Commission did not express a final view on whether a modern Joinery Award was warranted but expressed the view that there was *“the need to consider a modern award or awards covering other work within the awards in the current building, metal and civil construction group, as they apply beyond the building and construction industry”*.

170. The Full Bench went on (in para [56]) to say:

*“We are conscious, however, of the need to avoid such an award or awards intruding into manufacturing activity, which would more appropriately be regulated by the Manufacturing Modern Award. The exposure draft of that award, as revised in Stage 2, incorporates elements of the draft off-site award initially proposed by the CFMEU, specifically clay articles, glazing and gypsum and plasterboard manufacturing. As noted above, at this stage, the cement and concrete products industry will be considered in Stage 3”*.

171. Ai Group has reviewed the terms of the exposure draft of the *Joinery and Building Trades Award 2010* and has identified numerous problems relating to the coverage of the proposed award, particularly with regard to its overlap with other modern awards already made or proposed to be created.

172. Subclause 4.1 of the draft award states that:

*“This industry award covers employers throughout Australia in the joinery and building trades products industry and their employees...”*

173. There are no exclusions at all in the draft award and the award applies *“to the exclusion of any other modern award”*.

174. The award as drafted would create major problems for manufacturers of many products used in the building and other industries. As set out in the above extract from the Commission’s Statement, the Full Bench has already decided that any modern Joinery Award must not intrude “*into manufacturing activity, which would more appropriately be regulated by the Manufacturing Modern Award*”.

175. Ai Group submits that a high proportion of the work covered by the scope of the exposure draft of modern Joinery Award already falls within the scope of the Manufacturing Award (as made during Stage 1) or within the draft amended scope released by the Commission for Stage 2. It is essential that all of this work be removed from the coverage of the modern Joinery Award.

176. Our concerns include:

- The definition of “*joinery shop*”;
- The definition of “*shop fitting*”;
- The inclusion of, and definition of, “*precast concrete manufacturing*”;
- The inclusion of, and definition of, “*maintenance*”;
- The inclusion of, and definition of, “*prefabricated building*”;
- The inclusion of, and definition of, “*mixed industry*”;
- The definitions of “*shop work*”, “*painter*” and “*shop work painting*” and the inclusion of this type of work;
- The definition of “*shop work signwriting*”;

- The award operating “to the exclusion of any other modern award”.
- The use of the term “*building trades products*” rather than the more appropriate term of “*building trades*”;
- The lack of an exclusion for work carried out under the modern Manufacturing Award despite Ai Group and the CFMEU agreeing that the award needs to contain such an exclusion. Indeed this was the basis upon which Ai Group agreed to accept the making of a modern Joinery Award (provided that the coverage and content were appropriate); and
- The use of the title “*Joinery and Building Trades Products Award 2010*” rather than the more appropriate “*Joinery and Building Trades Award 2010*”.

### **Joinery shops**

177. “*Joinery shop*” is defined to mean “*any establishment wherein joinery work is performed.....*”.
178. “**Joinery work** means all work performed in a joinery shop by the classifications contained in this award and includes the preparation, decoration and assembling of joinery or building components in timber or other recognized building and joinery material in the shop, factory or yard of the employer”.
179. To avoid problems of overlap with the Manufacturing Award, in addition to excluding work covered by the Manufacturing Award the above definition should be amended as follows:

*“Joinery work means all work performed in a joinery shop by the classifications contained in this award and includes the preparation, decoration and assembling of joinery or building components in timber. or other recognized building and joinery material in the shop, factory or yard of the employer”.*

## **Shop fitting**

180. *“Shopfitting” is defined to mean the manufacturing, installation, alteration, and/or repair of shopfronts, showcases, partitions involving wrap around glazing, partitions (including the insertion of glass panels where the glass is 6.35 millimetres or less in thickness, by beads or moulds or other dry glazing methods), exhibitor’s stands, and interior fittings and fixtures in or on buildings, other than small carpentry repair and renovation work carried out by a carpenter or joiner employed in a mixed industry”.*
181. The above definition is problematic in many respects.
182. For example, the definition includes The *“manufacturing..... of interior fittings and fixtures in or on buildings”*. There are a very large number of products manufactured under the existing Metal Industry Award which are fixed to buildings including metal shelving, taps, shower screens, aluminium windows, to name a few.
183. The definition also includes glazing work which is covered under the Stage 2 Manufacturing Award exposure draft, such as work on shopfronts, showcases, glass partitions and exhibitor’s stands.
184. Ai Group submits that if shopfitting is to remain in the Joinery Award, the definition needs to be amended as follows:

*“Shopfitting” is defined to mean the ~~manufacturing~~, installation or alteration, and/or repair of shopfronts, showcases, partitions involving wrap around glazing, partitions (including the insertion of glass panels where the glass is 6.35 millimetres or less in thickness, by beads or moulds or other dry glazing methods), exhibitor’s stands, and of interior fittings and fixtures in or on buildings. ~~other than small carpentry repair and renovation work carried out by a carpenter or joiner employed in a mixed industry”.~~*

## **Maintenance**

185. The award applies to “*maintenance*” which is defined to mean “*small carpentry, repair and renovation work but not including work involving structural alterations to buildings or structures.*”
186. The definition does not appear to limit “*repair and renovation work*” to carpentry work.
187. Numerous awards cover repair work including the Modern Manufacturing Award, the Electrical Contracting Award and the proposed Business Equipment Award.
188. Even if the definition of “*maintenance*” was amended to limit its application to carpentry work it would be necessary to include an exclusion for the Modern Manufacturing Award. The Metal Industry Award has contained a classification for carpenters and joiners for many decades. Up to 1989, classification number 138 in the list of 349 classifications was “*Carpenter or Joiner*”. Indeed, this is the reason why the CFMEU became a party to the Metal Industry Award. The Modern Manufacturing Award clearly applies to trade qualified carpenters and joiners, together with other carpentry and joinery workers carrying out work within its scope.



189. Ai Group proposes that paragraph 3.1(c) and the definition of “*maintenance*” in the exposure draft be deleted.

### **Precast concrete manufacturing**

190. In relation to the operation of the Joinery Award within the area of precast concrete manufacturing the exposure draft defines such work as:

*“all work performed in the preparation, or casting and/or machining of re-constituted granite, terrazzo, marble, mosaic or precast articles.”*

191. We submit that the nature of this work is similar to the work described in the awards being considered in Stage 3 of award modernisation which have been grouped under the “*Cement and Concrete Products Industry.*”

192. For example, the *Cement and Concrete Products Award 2000* has the following coverage:

*“This award shall apply to persons engaged in connection with the fabrication or manufacture of cement and/or concrete products and/or articles.”<sup>12</sup>*

193. Also, the *Concrete Products NAPSA (TAS)* expresses its coverage in the following terms:

*“This award is established in respect of the trade of making or selling concrete or articles made of concrete (not including the trade of a builder.)”<sup>13</sup>*

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<sup>12</sup> Clause 5

<sup>13</sup> Clause 2

194. We contend that it would be inappropriate at this time to pre-suppose the outcome of the Stage 3 modernisation process regarding the scope and content of modern awards for the Cement and Concrete Products Industry by including precast concrete manufacturing within the modern Joinery Award.
195. It is noteworthy that the existing *National Joinery and Building Trades Products Award 2002* only applies to precast concrete manufacturing in one state - South Australia.
196. Ai Group submits that the paragraph 3.1(d) and the definition of “*precast concrete manufacturing*” in the exposure draft should be deleted.

### **Prefabricated buildings**

197. Many Ai Group member companies prefabricate buildings, including supplying them in kit forms.
198. Indeed some of Australia’s largest manufacturers make and supply prefabricated metal sheds, workshops, garages, carports and other types of buildings.
199. Ai Group proposes that paragraph 3.1(e) and the definition of “*prefabricated building*” be deleted from the exposure draft.
200. If this approach is not supported by the Commission then the definition of “*prefabricated building*” should be amended as follows:

**“Prefabricated building** means any building principally made out of timber which is prefabricated in sections, modules or panels at a factory or yard prior to erection, including buildings or sections supplied in kit form”.

## Mixed industry

201. The “*joinery and building trades products industry*” is defined in clause 3.1 – Definitions, to include “mixed industry”.

202. “*Mixed industry*” is defined as:

*“**mixed industry** means an employer’s enterprise carried on for the purpose of the production, treatment, distribution or provision of articles, goods, merchandise and materials not mainly attributable to or mainly dependent on the work performed by employees covered by this award. Provided that this definition does not extend to employees engaged on construction work. For the purposes of this provision, **enterprise** means any factory, depot, premises or other place of the employer at which employees normally report for work or for the location of work or from which work is normally allocated to employees. Provided that any one or more such factories, depots, premises or other places of the employer in the same immediate vicinity are counted as one establishment.”*

203. We submit that by including the term “*mixed industry*” within the definition of the “*joinery and building trades products industry*”, any “*mixed industry*” by definition would be covered by the Modern Joinery Award. Coverage would not be limited to employees doing joinery work in mixed industries. Clearly this would be unworkable and could not possibly be the intent.

204. This problem is compounded by the fact that the classification structure which is found at Schedule A of the exposure draft contains broad skill descriptors as opposed to specific occupations or job titles. Therefore, the requirement that employees be engaged in ‘*the classifications in this award*’ as expressed in clause 4.1 does little to limit its application.

205. Should the definition of “*mixed industry*” remain within the award, we submit that this award could be held to override the operation of any number of other awards, including the Modern Manufacturing Award.
206. Such a situation would impose substantial increased costs on employers as a result of the costly and inflexible construction industry derived conditions which are in the modern Joinery Award as compared to the conditions in other awards, including the modern Manufacturing Award.
207. Ai Group submits that the paragraph 3.1(f) and the definition of “mixed industry” should be deleted from the Award.

### **Shop work, painting and shop work painting**

208. There are major problems with the scope and definitions in the exposure draft as it relates to painting work carried out in factories:
- “*Shop work*” is defined as work performed in a workshop or factory or yard;
  - “*Shop work painting*” is defined as “*shop work when performed by a painter*”; and
  - “*Painter*” is defined to mean “*an employee engaged in any manner whatsoever in the painting and/or decorating of or in connection with all buildings and structures, including prefabricated buildings and structures, plant, machinery and equipment (commercial, residential, industrial or otherwise) and any prefabricated or prepared parts of buildings or structures.*”
209. Many products and parts made under the Metal Industry Award and other awards which will be superseded by the modern Manufacturing Award are painted – either by hand, spray gun, or machine. The Manufacturing Award (as made during Stage 1) applies to the painting of a very long list of items (refer to 4.2(a)(i), 4.2(a)(ii) and 4.3). As drafted, the modern Joinery Award

would apply to such work and impose substantial cost increases and inflexibilities upon manufacturers.

210. Paragraph 3.1(h) should be deleted from the award, together with the definitions of “*shop work painter*” and “*painter*”.
211. If the Commission believes that there is a need for the award to cover painters, the following definition should be used:

*“Painter means an employee engaged in painting buildings”.*

### **Shop work signwriting**

212. “*Shop work signwriting*” is defined to mean “*shop work when performed by a signwriter*”.
213. The definition of a “*signwriter*” is extremely broad and includes, for example, the designing of posters, theatre displays and signs (including neon signs).
214. Companies involved in the design and manufacture of neon and other signs have long been covered under the Metal Industry Award (eg. see the reference to “neon signs” in item 26 in Schedule A of the award) and are covered by paragraph 4.3(k) in the modern Manufacturing Award.
215. If signwriting is to be retained in the modern Joinery Award the following definition of “*signwriter*” should be used:

*“Signwriter means an employee who does lettering applied by brush on buildings”.*

## **Exclusion for work carried out under the modern Manufacturing Award**

216. As the Commission has been informed by both Ai Group and the CFMEU, the parties have agreed that an exclusion must be inserted in the modern Joinery Award for work carried out under the Modern Manufacturing Award.

217. Ai Group submits that the exclusion should be worded as follows:

*'This award does not cover employers covered by the Manufacturing and Associated Industries and Occupations Award 2010.'*

218. Also, it is also essential that sub-clause 4.1 be amended to remove the reference to the award applying *"to the exclusion of any other modern award"*. This provision will potentially disturb award coverage in many industries.

### **Title**

219. As set out earlier, the use of the title *"Joinery and Building Trades Products Award 2010"* is not appropriate and would create confusion given that most building products will not be manufactured under the modern Joinery Award.

220. A more appropriate title is the *"Joinery and Building Trades Award 2010"*.

## Chapter 6 – Cleaning Services

221. Ai Group does not have a substantial involvement in the cleaning services industry and therefore will limit its submissions to one issue.

### Trolley collecting services

222. Ai Group submits that shopping trolley collecting services should not be covered under the Cleaning Services Industry Award. The terms and conditions of the Cleaning Award are inappropriate for this type of work, and the work is specifically covered under the *General Retail Industry Award 2010* (refer to Clause A.1.3 of the Retail Award).

223. The term “contract cleaning services industry” is defined in clause 3.1 of the exposure draft as follows:

*“contract cleaning services industry means the business of providing cleaning services under a contract”*

224. The term “**cleaning services**” is not defined. However, clause 4.2 provides:

**4.2** *To avoid doubt the **contract cleaning services industry** includes:*

- (a) cleaning (including event cleaning, trolley collection and hygiene and pollution control); and*
- (b) minor property maintenance which is incidental or peripheral to cleaning.”*

225. Further, the indicative tasks for a Cleaning Services Employee Level One, in Clause A.1.1 of Schedule A, include “*collecting, servicing and maintaining shopping and/or luggage trolleys*”.

226. The provisions of the exposure draft are a highly inappropriate safety net for employees in the shopping trolley collection industry.
227. The application of this award would result in substantial increases in costs for the employers of trolley collectors, which typically are contractors or sub-contractors of companies in the retail industry (generally supermarket chains).
228. Of particular concern are the provisions in the exposure draft concerning:
- Saturday penalty rates (time and one half);
  - Shift definitions, whereby any shift starting before 6.00am or finishing after 6.00pm attracts 15% loading for all hours of the shift;
  - The lack of junior wage rates.
229. Due to the high proportion of juniors employed in the contract trolley collecting industry, and the patterns of hours commonly worked, these features of the exposure draft would have massive cost implications for the industry, and negative employment effects on young people. These issues are examined in detail in the statutory declaration of Mr Stephen Hills, Director, Integrated Trolley Management Pty Ltd (***Annexure C***).
230. It is important to note that typically, employees engaged in shopping trolley collecting services do not perform any duties which would commonly be regarded as “cleaning” and are primarily (and even solely) responsible for the collection and return of shopping trolleys.
231. Ai Group submits that the reference to “trolley collection” in clause 4.2(a) of the Cleaning Services Industry Award should be deleted, so that it reads:

**4.2** *To avoid doubt **the contract cleaning services industry** includes:*

- (a)** *cleaning (including event cleaning, ~~trolley collection and hygiene and pollution control~~); and*



*(b) minor property maintenance which is incidental or peripheral to cleaning.*

232. Further, the indicative task in Schedule A, for Cleaning Services Employee Level 1 of “*collecting, servicing and maintaining shopping and/or luggage trolleys*” should be deleted.
233. Ai Group has member companies which manufacture and maintain metal shopping trolleys and these companies are covered under the *Manufacturing and Associated Industries and Occupations Award 2010*.
234. Ai Group has not yet investigated the existing award coverage of trolley collectors at airports, but urges the Commission to adopt a cautious approach in determining award coverage for such employees. Airport Operations have been allocated to Stage 3 of the award modernisation process.

## Chapter 7 – Financial Services Group

### Proposed exclusion for call centre employees

235. Ai Group is opposed to the ***Banking, Finance and Insurance Industry Award 2010*** covering businesses in the contract call centre industry.
236. The reasons for this are set out in detail in Chapter 10 of this submission.

### Proposed exclusion for IT professionals

237. Also, as the Commission is aware, Ai Group has submitted, in conjunction with APESMA, a substantial amount of material in support of the making of an award for IT professionals.
238. At paragraph [89] of its Statement of 23 January 2009, the Commission said: *“We have decided to defer the consideration of awards covering such employees until Stage 3 of the award modernisation process”*.
239. Classification Level 6 of the Banking Award covers “information technology specialists” and this, we submit, conflicts with the decision referred to in paragraph [89].
240. It would be prejudicial to Ai Group and its members to include IT professionals in the Banking Award, at least at this stage. Fairness dictates that this issue be dealt with during Stage 3, and that an exclusion for IT professionals be inserted into the Banking Award which will be made during Stage 2.

## Proposed amendment to subclause 4.3

241. Accordingly, Ai Group proposes that subclause 4.3 be worded as follows:

### **4.3 Exclusion:**

*This award does not cover:*

- (a) an employer bound by an enterprise award with respect to any employee who is covered by the enterprise award;*
- (b) an employee excluded from award coverage by the Act;*
- (c) an employer whose principal function is to provide inbound and/or outbound customer contact services on a contractual basis to businesses in the banking, finance and insurance industry;*
- (d) information technology professional employees.*

## Chapter 8 – Graphic Arts Group

242. Ai Group is a party to the *Graphic Arts – General – Award 2000* and has had a long history of representing employers covered under this award including the major employers in the industry.
243. During the award modernisation process Ai Group has been involved in extensive discussions with the AMWU, and other employer parties.
244. Whilst we are generally supportive of the manner in which the Commission has sought to rationalise and reflect the terms of the various industries forming the Graphic Arts Group for Stage 2 of award modernisation, there are a number of areas where we submit amendments need to be made to the exposure draft. These areas are detailed below.

### Clause 4 – Coverage

245. As the Commission would be aware, Ai Group's primary position in the pre-exposure draft stages of consultation was to seek the rationalisation of awards in the graphic arts industry into the modern Manufacturing Industry Award. This submission was advanced for a variety of reasons however one of the most important justifications pressed by Ai Group related to concerns regarding overlapping coverage between the Manufacturing Award and the Graphic Arts Award.
246. In particular, the area in which such overlap was most concerning related to the plastics manufacturing industry and the imposition of the hefty Graphic Arts Award penalties on companies covered under the *Metal, Engineering and Associated Industries Award 1998*, the *Rubber, Plastic and Cablemaking Industry – General – Award 1998* and the *Saddlery, Leather, Canvas and*

*Plastic Material Workers' Award 1999* which had been absorbed into the Manufacturing Industry Award.

247. Importantly, the Commission has addressed this issue in the exposure draft through limiting the application of the award in respect of plastic manufacturing to *'the extent that such manufacturing or processes are incidental to printing.'*<sup>14</sup> Ai Group supports such limitation.
248. Additionally, Ai Group strongly supports the comments of the Full Bench in their Statement of 23 January 2009 in which the Commission identified that it would not be appropriate to extend coverage of the Graphic Arts Award to include web development and web design.
249. Ai Group has made detailed submissions about this very important issue.
250. As we previously submitted,<sup>15</sup> web design and development are areas which are predominantly award free. Employees in these areas are not currently covered by the terms of the Graphic Arts Award and to bring them within the auspices of the award would impose dramatically increased costs and inflexible working conditions in a manner contrary to the Award Modernisation Request.
251. In Ai Group's submission the approach to dealing with both plastics manufacturing and web design / development are critical considerations for the framing of the modern award and, we submit, the Commission has taken the right approach.

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<sup>14</sup> Exposure Draft, Clause 4.5(r).

<sup>15</sup> Ai Group Stage 2 – Award Modernisation Submissions and Draft Award Provisions – 31 October 2008; at [70] – [74]

252. Given the resolution of Ai Group’s concerns about the plastics industry and web design / development, the only amendment which Ai Group seeks to Clause 4 at this stage is to correct what appears to be unnecessary duplication of a range of the industry descriptors.

253. We contend that paragraphs (q) and (s) of sub-clause 4.5 should be deleted. The Commission will note that the substance of what is dealt with in those sub-clauses is already dealt with in paragraphs (d), (e) and (f) of sub-clause 4.5. Paragraphs (q) and (s) do nothing additional in assisting to determine the coverage of the award.

**Clause 18.2 – Junior artist and/or designer (including junior commercial artist)**

254. Ai Group opposes the increase to age based wage percentages that is reflected in the exposure draft at paragraph 18.2(a). The terms of this provision are taken from the Graphic Arts Award however the wage percentages have been increased without any apparent justification.

255. Ai Group seeks the reintroduction of the existing wage relativities found at 5.1.2(c)(i) of the existing Graphic Arts Award which provide the following:

**“5.1.2(c)(i) Wages**

... ..

<b>Age</b>	<b>%</b>
<i>Under 17 years of age</i>	<i>37.5</i>
<i>Between 17 and 18 years of age</i>	<i>47.5</i>
<i>Between 18 and 19 years of age</i>	<i>60</i>
<i>Between 19 and 20 years of age</i>	<i>72.5</i>
<i>Between 20 and 21 years of age</i>	<i>87.5”</i>

256. We submit that not only is maintenance of the status quo in this regard justified in accordance with the award modernisation principle of '*not increasing costs for employers*<sup>16</sup>' but furthermore, it also provides greater parity between the relativities being applied to all junior employees under the award when one has regard to the terms of sub-clause 18.3 and 18.4 of the exposure draft.

### **Sub-clauses 30.2, 30.3, 30.4 and 30.5 – Ordinary hours of work and rostering**

257. The Graphic Arts Award, much like many other federal awards, contains facilitative provisions which allow for agreement between employers and employees on how specific award provisions are to apply. These provisions allow for an employer to reach agreement either with individual employees (Level 1 facilitation), individual employees or a group of employees where a union may be involved (Level 2 facilitation), and only with a group of employees with a requirement that the union be advised (Level 3 facilitation).

258. The exposure draft, whilst reproducing the facilitative provisions structure from the existing Graphic Arts Award, has amended, in five key respects, the level of facilitation required to reach agreement. Ai Group strongly opposes this modification as it has occurred without justification but moreover it would result in more onerous levels of facilitation being put in place than currently exists.

259. The following summarises the changes made to the levels of facilitation within the exposure draft:

- **Clause 30.2(b)(iii) – Day Work hours in excess of 8.75 up to 10 hours.** Under the existing Graphic Arts Award: Level 1 facilitation. Under the exposure draft: Level 3 facilitation;

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<sup>16</sup> Award Modernisation Request – Consolidated Version 18 December 2008 at para. 2(d).

- **Clause 30.3(a)(iii) – Non-continuous shiftworkers hours in excess of 8.75 up to 10 hours.** Under the existing Graphic Arts Award: Level 1 facilitation. Under the exposure draft: level 3 facilitation;
- **Clause 30.4(b)(iii) – Continuous shiftwork hours in excess of 8 up to 10 hours.** Under the existing Graphic Arts Award: Level 2 facilitation. Under the exposure draft: Level 3 facilitation;
- **Clause 30.4(c) – Length of work cycles.** Under the existing Graphic Arts Award: Level 2 facilitation. Under the exposure draft: Level 3 facilitation.
- **Clause 30.5(a)(iii) – Non-daily newspaper office hours in excess of 8 up to 10 hours.** Under the existing Graphic Arts Award: Level 1 facilitation. Under the exposure draft: Level 3 facilitation.

260. We submit that such modifications reduce flexibility, and reduce it unnecessarily, given the long period in which these provisions have formed the safety net in the Graphic Arts Award. We seek that each of the above provisions be amended so that the facilitation level that currently applies to their operation is retained.

## Other amendments

261. In addition to the above modifications, Ai Group has identified a number of apparent typographical and/or drafting errors. For ease of reference the following table identifies the clause number, the exposure draft provision and the language that, we submit, should be inserted in lieu of what appears in the exposure draft.



Clause	Existing provision	Required provision
3.1	'non-daily newspaper office' includes every office in which a newspaper is printed and/or published on fewer than five days in a week and includes an office where, in addition to the printing and publishing of a newspaper, commerce is carried on.'	'non-daily newspaper office' includes every office in which a newspaper is printed and/or published on fewer than five days in a week and includes an office where, in addition to the printing and publishing of a newspaper, <u>commercial printing</u> is carried on.'
20.3	'When an apprenticeship authority in accordance with the requirements of State or rate, to have completed the period advanced.'	'Where <u>an adult apprentice has been adjudged by the</u> Apprenticeship Authority in accordance with the requirements of the State <u>or Territory legislation to have gained sufficient theoretical and practical knowledge the apprentice will be deemed, for the purposes of calculating the appropriate wage rate,</u> to have completed the period advanced.'
25.2(a)	<b>'(a) First aid allowance</b> An employee who has been trained to render first aid and who is the current holder of appropriate first aid qualifications such as a certificate from St John Ambulance or similar body must be paid 2.03% of the standard weekly rate per week if appointed by their employer to perform first aid duty.'	<b>'(a) First aid allowance</b> An employee who has been trained to render first aid and who is the current holder of appropriate first aid qualifications such as a certificate from St John Ambulance or similar body must be paid 2.03% of the <u>standard rate</u> per week if appointed by their employer to perform first aid duty.'

## Chapter 9 – Health and Welfare Services (Excluding Social and Community Services)

### Scientists working outside the health industry

262. The exposure draft of the *Health Professionals and Support Services Industry and Occupational Award 2010* defines a “health professional” as a “Scientist” (amongst other occupations).
263. The exposure draft applies to “health professionals” working in the health industry as well as “health professionals” working in other industries.
264. There are a large number of Scientists working in the manufacturing industry and other industries and these employees are currently employed under awards such as the *Scientific Services (Professional Scientists) Award 1998*, the *Metal, Engineering and Associated Industries (Professional Engineers and Scientists) Award 1998* and the *Information Technology (Professional Employees) Award 2001* (which includes professionals with a computer science degree).
265. Despite a large measure of agreement being reached between Ai Group and APESMA on award conditions for Scientists and award proposals being submitted to the Commission during Stage 1 and Stage 2 of modernisation, the Commission deferred consideration of the parties’ proposals until Stage 3.
266. It would be prejudicial and unfair to include Scientists (particularly those working outside the health industry) within the scope of the *Health Professionals and Support Services Industry and Occupational Award 2010* during Stage 2. The award should only apply to scientists who are “Medical Scientists”.

## Psychologists and Counsellors working outside the health industry

267. Many HR professionals have professional Psychology qualifications. Such qualifications are useful when recruiting and selecting staff as they enable HR Managers to utilise psychological tests.
268. Further, HR professionals often have Counselling qualifications and experience.
269. HR professionals are typically award free and it would be inconsistent with subclause 2(a) of the Award Modernisation Request to include such staff within the *Health Professionals and Support Services Industry and Occupational Award 2010*. The Award should only apply to Psychologists and Counsellors working in the health industry.

## Nurses

270. There are many nurses employed in the private sector. The 25 per cent loading in the exposure draft of the *Nurses Occupational Industry Award 2010* represents a huge increase in the loading paid by many organisations which employ nurses.
271. For example the *NSW Nurses, Other than in Hospitals, &c, (State) Award 2006* provides for a casual loading of 10 percent.
272. Ai Group's submits that the 25 per cent loading in the exposure draft is excessive and in conflict with subclause 2(d) of the Award Modernisation Request.
273. As set out in previous award modernisation submissions, Ai Group does not support the standardisation of casual loadings across industries.

## Chapter 10 – Information and Communications Technology Group

274. Ai Group is extremely concerned about the approach which the Commission has taken in the ICT industry exposure drafts.

275. Ai Group submits that if the approach is proceeded with, the viability of a large number of businesses and the jobs of thousands of employees would be threatened.

276. Ai Group does not make these submissions lightly.

277. We are very concerned that months of negotiations and drafting work between Ai Group, the ACTU and IT industry unions (ie. the ASU, CPSU, CEPU, NUW and APESMA) have, to date, in large part, been disregarded by the Commission.

278. Instead the Commission:

- Has proposed that consideration be given to whether the modern Electrical Contracting Award would be appropriate as a safety net for a large part of the IT Industry – an award which contains construction industry conditions; an award which applies only to contractors; an award which is linked to construction industry portable long service leave and severance schemes; and an award which is linked to damaging industry-wide pattern bargaining agreements negotiated between the CEPU and NECA. It is hard to imagine a less appropriate award to impose upon IT companies;
- Has not recognised that the Business Equipment Industry is a unique industry which is vastly different to the electrical contracting industry;

- Has failed to recognise that business equipment technicians are not electricians or mechanical tradespersons – they are IT industry staff with hardware and software skills;
- Has not, to date, accepted that the Contract Call Centre Industry is a unique industry, which is very different to the industries in which client firms operate such as banking, telecommunications and aviation, and one which employs tens of thousands of employees on inbound work (eg. giving advice) and outbound work (eg. telemarketing);
- Has not recognised that the *Manufacturing and Associated Industries and Occupations Award 2010* has been drafted to operate as an occupational award for electricians (other than those employed by electrical contractors), by agreement between Ai Group, the CEPU and the other MTFU unions;
- Has created significant friction between Ai Group and the CEPU; and
- Has created significant friction between different IT industry unions.

279. Notwithstanding the above, Ai Group agrees with the following comments by the Full Bench in its Statement of 23 January 2009 about awards in the ICT industries:

*[83] These industries cover telecommunication operations and servicing, market research, data processing, the operation of call centres and the servicing of business equipment and computers. Because of the disparate nature of the various types of businesses and the work of employees we consider that the scope for aggregation of awards within these industries is limited.*

[84] *Although some awards are of longstanding, award coverage of this sector is generally of relatively recent origin. A number of federal awards have been developed with a large measure of agreement in recent years.*”

**It is not sensible for the Commission to reject the award modernisation approach agreed upon by the major representative bodies in the IT industry**

280. Ai Group submits that the Commission should accept the award modernisation approach agreed upon between Ai Group and the ACTU, ASU, CPSU, CEPU, NUW and APESMA (the major employer association and unions involved in the ICT industry), after months of negotiations.

281. Ai Group and the IT industry unions have a deep knowledge of industry structures, work processes, employment conditions and industrial relations approaches in the IT industry. This knowledge has been gleaned over many decades of representing employers and employees in the industry.

282. Ai Group is the only employer association which has any significant involvement in the IT industry. We have hundreds of IT companies as members including most of the major organisations. Ai Group is a party to all of the major federal industry awards in the IT industry including:

- *The Business Equipment – Technical Service – Award 1999;*
- *The Telecommunications Services Industry Award 2002;*
- *The Contract Call Centre Industry Award 2003;*
- *The Information Technology (Professional Employees) Award 2001; and*
- *The Telecommunication Industry (Professional Employees) Award 2002.*

283. A very large measure of agreement was reached between Ai Group and the ACTU, ASU, CPSU, CEPU, NUW and APESMA on the structure, scope and content of modern awards for the IT industry. A substantial body of work was jointly submitted to the Commission. It consisted of:

- A draft *Business Equipment Industry Award 2010* which incorporated classifications covering technicians, clerical employees and commercial sales employees;
- A draft *Telecommunications Services Industry Award 2010*;
- A draft *Contract Call Centre Industry Award 2010*; and
- A draft *Information Technology and Telecommunications Industries Professional Employees Award 2010*.

284. There are compelling reasons why the above awards are appropriate and these reasons have been explained in detail in the submissions which Ai Group and the unions have made to the Commission and are further discussed in this Chapter.

285. Ai Group submits that the approach which the Commission has taken in the Exposure Drafts is inappropriate and risky. It would inflict significant harm upon both employers and employees. For the Commission to dismiss the views of the major representative bodies and to pursue a totally different approach to modernisation which is strongly opposed by the major employers and unions, we submit, is not sensible or in the public interest.

286. Many of the awards in the IT industry were only created in the last decade, after years of negotiations and AIRC proceedings. To sweep those awards aside and to impose, for example, a construction industry contracting award on IT companies is highly inappropriate and would be extremely damaging.

## The agreement reached between Ai Group, the CEPU, the AMWU and NECA on the scope of the modern Electrical Contracting Award

287. As the Commission has been informed, in the early stages of award modernisation there were potentially conflicting views between the parties about the scope of any modern electrical contracting award. Persuasive arguments could have been run by Ai Group and others that such an award is not desirable or necessary given the scope of the modern manufacturing award (including its role as an occupational award for electricians) and the scope of the modern construction industry award.
288. Ai Group, the CEPU, the AMWU and NECA worked through the issues and eventually reached agreement on arrangements which they believed were workable and consistent with the objectives of award modernisation.
289. The parties agreed that any modern electrical contracting award should not have a scope which extends beyond the scope of the existing award.
290. The parties also agreed on the following exemption for the *Manufacturing and Associated Industries and Occupations Award 2010*:

***“4.5 Manufacturing and Associated Industries and Occupations does not mean:***

.....

***(f) Employees of electrical contractors who are bound by and applying an electrical contracting award or an electrical contracting Notional Agreement Preserving State Awards (NAPSA), provided that this provision does not affect the application of this award to:***

- *electrical, electronic and communications employees who are not employed by an electrical contractor; and*
- *employees of employers who were legitimately and*



*appropriately applying the Metal, Engineering and Associated Industries Award 1998 to such employees at the time when it was superseded by this award.”*

291. A number of aspects of the above exemption are noteworthy:

- The agreed exemption only applied to “electrical contractors” – other electricians and electrical workers are covered under the Modern Manufacturing Award;
- It was agreed that electricians and other employees currently within the scope of the Metal Industry Award should be covered under the Modern Manufacturing Award;
- The agreed exemption was not intended to affect the coverage of the *Manufacturing and Associated Industries and Occupations Award 2010* as a general occupational award for electricians. Ai Group, the CEPU and the other MTFU unions agreed that the *Manufacturing and Associated Industries and Occupations Award 2010* should supersede the *NSW Electricians, &c. (State) Award* and other NAPSAs covering electricians (other than electrical contractors).

292. Ai Group submits that the Commission should give great weight to the agreement reached between Ai Group, the CEPU, the AMWU and NECA and not extend the scope of the Electrical Contracting Award to cover additional persons, including business equipment technicians and other employees in the IT industry.

## Business Equipment Industry

293. Since the 1970s, the *Business Equipment Industry Technical Service Award* has been the most significant award in the IT industry. It has applied to members of Ai Group which fall within its scope, plus approximately 1000 individual respondents, together with additional companies bound through the common rule declarations.

294. The companies bound by the award include huge global IT companies such as IBM, Apple, Canon, Fuji Xerox, NCR and Konica Minolta, as well as small dealerships which service office equipment such as computers, photocopiers, fax machines, printers and multi-function devices.

295. In its Statement on 23 January 2009, the Full Bench stated at paragraph [85]:

*“The servicing of business equipment has undertaken many changes in the computer age. We consider that the establishment of an award for electrical contractors with a broad definition of the types of business covered and the work of their employees, combined with the vocational reach of the Manufacturing Modern Award into maintenance activities, probably makes it unnecessary that there be an additional award covering the servicing of business equipment. As already mentioned, an exposure draft of an Electrical Modern Award is published with this statement. A key question to be explored in the consultations is whether that award would be an appropriate safety net for employee engaged in servicing business equipment.”(Emphasis added)*

296. In responding to the Bench’s key question, Ai Group on behalf of its affected members:

- Strongly opposes any application of the modern Electrical Contractors Award to the business equipment industry; and

- Advocates the creation of a modern *Business Equipment Industry Award*.

297. Ai Group has updated the draft modern *Business Equipment Industry Award 2010* previously submitted to the Commission (**Annexure D**). Our latest draft incorporates:

- The *Business Equipment Industry – Technical Services Award 1999*;
- The *Business Equipment Industry – Clerical Officers Award 2000*; and
- The *Business Equipment Industry (Commercial Travellers) Award 2000*;

298. A number of large IT companies currently bound to the *Business Equipment Industry Technical Service Award* have provided Statements in support of this position. These companies, all of which are Ai Group Members, are

- NCR Australia Pty Ltd,
- Fuji Xerox Australia Pty Ltd,
- Canon Australia Pty Ltd, and
- Konica Minolta Business Solutions Australia Ltd.

The Statements are contained in **Annexure E**.

299. Whilst younger than the industries of electrical contracting and manufacturing, the business equipment industry is nonetheless an established and distinct industry. Emerging as an industry in the 1960s, the business equipment industry has evolved with rapid technological developments giving the industry a pervasive presence in the information, communications and technology sector, not just as a provider of office equipment, but as a provider of professional and consulting services relating to business equipment products.

300. Modern business equipment is now linked to information technology infrastructure. Whilst IT companies still produce stand-alone photocopiers, printers and transmission device, these days analogue technology is no longer

used; it has been replaced by digital technology. The equipment is designed to be connected to, and integrated with, clients IT systems.

301. Business equipment products combine traditional office equipment functions of duplication and transmission into multi-functional imaging devices. Such devices can now readily be integrated into client IT systems through the development and application of computer software and web-based programs. Consequently the traditional service and repair work once performed by business equipment technicians has expanded into the field of information technology where technicians are required to interact with computer hardware, software, programs and applications used in connecting business equipment to IT systems.

302. As supported by the attached statements, business equipment technicians are not electricians. They are employees who provide a combination of on and offsite maintenance and IT support to business equipment customers with an increasing emphasis on computer-based knowledge.

303. For example customer engineers at NCR perform work on

*“large servers and mainframe computers and peripherals, large system printers and plotters, enterprise level servers, networks and software, item processing reader/sorters and networking issues on imaging systems, networking/communications equipment, network and systems management/protocols (Ethernet, Token-Ring, StarLAN, NetBIOS, X.25)”*  
*[Para 7, Statement of Richard Sams, NCR Australia Pty Ltd].*

304. Customer Service Representatives at Fuji Xerox Australia:

*“carry out work activities including hardware/Operating System Software maintenance as prescribed in service manuals..”*  
*[Para 9, Statement of Melinda Bevan, Fuji Xerox Australia].*

305. The Service Engineers at Konica Minolta do not undertake any repair work at the component level as their products carry a module design which means that the sub-assembly or assembly of the equipment can be simply removed and replaced in accordance with procedures. Further the equipment contains diagnostic software requiring technicians to *“resolve customer problems by working solely on the IT infrastructure.”* As such Konica now require technicians with skills in software and systems, as well as soft skills in consulting and effective communication. *[Para 13, Statement of Michael Holroyd of Konica Minolta Business Solutions Australia Pty Ltd].*
306. A lap-top and a vehicle are now the essential tools of trade for these technicians, rather than the traditional ‘tool box’ once carried by a photocopier mechanic. *[See Para 15, Statement of Michael Holroyd of Konica Minolta Business Solutions Australia Pty Ltd].*
307. Many of these employees are not required to be trade-qualified or possess external licenses, but generally have long tenure with the one company in the industry. Such employees however are provided with extensive internal training and up-skilling by their employers so as to adapt to the changing technology behind their business equipment products. For example technicians at Canon are about to embark on a competency program that will *“provide in –house, hardware, software and networking skills that will be recognised internationally... in addition to undertaking courses in Microsoft, adapted Novell courses and MAC courses.”* *[Para 14, Statement of Jacqui O’Leary, Canon Australia Pty Ltd].*
308. Business equipment companies are typically not contractors. Many companies sell equipment to clients and then service such equipment. Commonly, the equipment is not sold to the client but leased. The equipment is often placed on clients’ premises in conjunction with a lease / service agreement which is negotiated between the company and its client. As such, repair and support

services performed by technicians are secured through these ongoing service agreements with clients that relate to the original purchase or leasing of the equipment.

309. Regardless of the business model implemented, business equipment companies bear no similarity to electrical contractors. The two industries are completely different.
310. There has never been any relationship between business equipment industry awards and electrical contracting industry awards. Ai Group cannot recall any disputes arising over competing coverage between these awards.
311. The Electrical Contracting Award contains construction industry conditions (eg. inclement weather provisions, multi-storey building allowances, construction industry fares and travel provisions etc) and has always been regarded as primarily a construction industry award. No doubt this is why the Commission allocated the award to the Building, Metal and Civil Construction Group for award modernisation.
312. The Electrical Contracting Award applies **only to contractors**. It has never been a general occupational award for electricians. Electricians who are not electrical contractors are covered under the federal Metal Industry Award or under NAPSAs such as the NSW *Electricians, &c. (State) Award*. Both of these industrial instruments have been incorporated within the *Manufacturing and Associated Industries and Occupations Award 2010*.
313. The Electrical Contracting Award is included within the coverage of construction industry portable severance schemes, and long service leave schemes such as CoINVEST in Victoria. The CoINVEST scheme applies to employees carrying out work within the scope of the Electrical Contracting Award and many Ai Group members have been involved in costly and disruptive disputes with CoINVEST about the extent of the scheme's

coverage. It is very important that the Commission does not inflict portable severance schemes and portable long service leave schemes upon the IT industry through its award modernisation decisions. Such an outcome would be extremely harmful to the industry.

314. The Electrical Contracting Award has been negotiated over the years between the CEPU and NECA (an organisation which represents electrical contractors – not IT companies). The scope of the award has developed over the years based upon amendments agreed upon between the CEPU and NECA. The expansive wording in the scope clause needs to read in conjunction with the limitation that the award only applies to electrical contractors. For this reason the award has not intruded upon the coverage of IT industry awards. Representative bodies in other industries have not paid much attention to deals done between the CEPU and NECA on the scope of their award.
315. The CEPU and NECA also regularly negotiate what Ai Group and many others regard as highly damaging pattern bargaining agreements across the electrical contracting sector. The CEPU's attempts to impose these agreements on electrical contractors and other firms have led to lengthy strikes involving various Ai Group member companies. The CEPU / NECA pattern agreements were also at the centre of the union movement's attempts to establish bargaining agent's fees for non-union members. Such provisions were included in the CEPU / NECA agreements before bargaining agent's fees were outlawed.
316. There are substantial differences between the terms of the Electrical Contracting Award and the current *Business Equipment Industry Technical Service Award*.
317. The Electrical Contracting Award exposure draft does not and should not contain a classification structure applicable to business equipment technicians. Business equipment technicians are not electricians and do not

perform electrical work. Rather their work is stemmed in information technology and customer service competencies.

318. The enterprise agreements which exist in the business equipment industry are typically underpinned by the *Business Equipment Industry Technical Service Award* and cover technicians, warehouse and despatch employees. The relevant union parties to these certified agreements are predominantly the ASU which represents employees engaged as business equipment technicians (through the Technical Service Guild section of the ASU's eligibility rules), and the NUW which covers storespeople and dispatch. Details of these certified agreements are contained in the respective statements.

319. If business equipment companies are required to exit the *Business Equipment Industry Technical Service Award* and use the Electrical Contracting Award they would face an unsustainable increase in their labour costs.

320. The statements of affected IT companies have detailed some of the additional costs if they were required to observe the Electrical Contracting Award as a safety net for employees:

- Canon Australia Pty Ltd has calculated a 22% increase to their labour costs as a result of complying with more onerous conditions that have never been observed in the business equipment industry. [*Para 19, Statement of Jacqui O'Leary of Canon Australia Pty Ltd*];
- NCR Australia Pty Ltd has calculated a 12% increase in costs [*Para 13, Statement of Richard Sams of NCR Australia Pty Ltd*];
- Fuji Xerox Australia Pty Ltd states that the approximate labour cost increase of 5.94% "*in the current economic environment with increased market competition would be unsustainable for our business...*". and may



result in a reduction to its workforce. [*Third last Para, Statement of Melinda Bevan, Fuji Xerox Australia*].

321. These amounts only represent an increase to labour costs based on new conditions of employment which have never been applied to the business equipment industry. They do not include other costs which would be incurred.
322. Ai Group submits that the Commission should take account of these additional costs and the requirements of clause 2(d) of the Award Modernisation Request and decide to create a modern *Business Equipment Industry Award 2010*, in the terms proposed by Ai Group.
323. It is extremely difficult for Ai Group and these member companies to understand why the Commission is entertaining the idea of IT companies being covered under the Electrical Contracting Award. In the pre-exposure draft submissions, none of the representative bodies of employers or employees sought such an outcome, not even the CEPU. To the best of Ai Group's knowledge no industrial party has ever proposed such an outcome, and it is very important that the idea be abandoned.
324. Ai Group strongly urges the Commission to distinguish the work of electrical contracting and the servicing of business equipment. The servicing of business equipment requires computer-based knowledge and interaction with computer hardware, software and other IT systems. Technicians who perform this work are not electricians, do not possess electrical licenses and are not employed by companies that can be described as "contractors." Rather such employees provide support services for business equipment products, often pursuant to on-going service agreements which business equipment companies enter into with clients upon the sale or leasing of their business equipment products.

325. Accordingly Ai Group strongly submits that the business equipment industry is a unique and separate industry within the IT sector. The business equipment industry is deserving of its own modern Business Equipment Industry Award, with the scope and content Ai Group has proposed.
326. Ai Group further submits that in response to the question of the Full Bench; the Electrical Contracting Award is in no way or circumstance, an appropriate award and safety net for business equipment industry employees.
327. If, *and only if*, the Commission does not accept Ai Group's arguments about the need for a separate Business Equipment Industry Award, the *Manufacturing and Associated Industries and Occupations Award 2010* is a far more appropriate award to cover business equipment technicians, than the Electrical Contracting Award. The modern Manufacturing Industry Award applies widely to the repair of electronic equipment (refer to subclause 4.3(k)) and is drafted to operate as a general occupational award for electricians (refer to para 4.2(c)(i) and the definition of "engineering streams"). We stress that this is not our preferred outcome – it is simply a less damaging outcome for the industry than inflicting the Electrical Contracting Award upon it. There are compelling reasons why a modern Business Equipment Industry Award should be created.
328. The amendments which Ai Group proposes to the Exposure Draft of the *Electrical, Electronic and Communications Contracting Industry Award 2010* are set out in Chapter 5 relating to the Building, Metal and Civil Construction Group.

## Television, Radio and Electronics Service Industry

329. As stated in our 31 October 2008 submission:

*“Ai Group and the CEPU have discussed the Television, Radio and Electronics Service Industry Award 1998 and have formed a preliminary view that most of the work carried out under this award would belong under the Manufacturing and Associated Industries and Occupations Award 2010 (which has relatively wide coverage of radio and electronic work), rather than under an ICT industry award.”*

330. Ai Group proposes that the scope of the *Television, Radio and Electronics Service Industry Award 1998* be incorporated within the *Manufacturing and Associated Industries and Occupations Award 2010*.

331. Clause 1.6 – Coverage of Award, of the *Television, Radio and Electronics Service Industry Award 1998* states:

### **“1.6 COVERAGE OF AWARD**

**1.6.1** *This award shall apply throughout the Commonwealth of Australia, except in the State of Western Australia.*

**1.6.2** *This Award shall apply to employee engaged in installing, servicing, diagnosing and rectifying faults in any of the following items of equipment used in a domestic and/or home entertainment application:*

**1.6.2(i)** *Television signal receiving, recording and/or reproduction devices and associated equipment.*

**1.6.2(ii)** *Visual recording and/or reproduction devices and associated equipment.*

**1.6.2(iii)** *Radio signal receiving, recording and/or reproduction devices and associated equipment.*

- 1.6.2(iv)** *Sound recording and/or reproduction devices and associated equipment.*
- 1.6.2(v)** *Electronic clocks which may form part of any of the preceding devices.*
- 1.6.2(vi)** *Electronic musical instruments.*
- 1.6.2(vii)** *Any combination of the preceding devices.*
- 1.6.2(viii)** *Domestic and/or Home Computers.*
- 1.6.2(ix)** *Other domestic electronic devices and equipment, and*
- 1.6.2(x)** *Ancillary devices, equipment and/or apparatus.*

**1.6.3** *This Award shall not apply to:*

- 1.6.3(i)** *Work of any nature concerned directly with the manufacture or production of the equipment specified in 1.6.2.*
- 1.6.3(ii)** *Employers bound by the Federal-Business Equipment Industry (Technical Services) Award, 1978 [(1) Print D7070 [B018]; (1978) 205 CAR 949] or by any subsequent Award superseding or replacing that Award in respect of the employment by them of employees performing work covered by that Award.”*

332. Most likely the reason why the *Television, Radio and Electronics Service Industry Award 1998* does not apply in Western Australia is due to the existence of the *WA Electronics Industry Award*. During Stage 1 of award modernisation, Ai Group, the CEPU and the other MTFU unions agreed to incorporate the scope of the *WA Electronics Industry Award* into the *Manufacturing and Associated Industries and Occupations Award 2010*.

333. The *Manufacturing and Associated Industries and Occupations Award 2010* covers “the repair, refurbishment, reconditioning, maintenance, installation, testing and fault finding of:”<sup>17</sup>

*4.3(k) electrical, electronic, telecommunications, lighting, radio, and X-ray products, equipment, apparatus, installations, appliances, devices and signs”.*

334. The above provision was drafted based upon the scope of the Metal Industry Award and the *WA Electronics Industry Award*.

335. Arguably the scope of the *Television, Radio and Electronics Service Industry Award 1998* is already encompassed within the scope of the *Manufacturing and Associated Industries and Occupations Award 2010* – certainly nearly all of the scope is already covered.

336. For clarity purposes, Ai Group proposes the following minor amendment to paragraph 4.3(k):

*4.3(k) electrical, electronic, telecommunications, lighting, radio, television, and X-ray products, equipment, apparatus, installations, appliances, devices and signs”.*

## **Contract Call Centre Industry**

337. Ai Group is very concerned about the approach which the Commission has taken in the ICT industry exposure drafts, as it relates to the contract call centre industry. Unless the approach is changed, Ai Group submits that the jobs of a very large number of employees are at risk, and Australia risks losing a growing industry which could evaporate overseas very rapidly.

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<sup>17</sup> Paragraph 4.2(a)(iii)

338. The contract call centre industry employs thousands of employees. The three largest companies in the industry in Australia are Salmat Salesforce, TeleTech and Stellar.
339. Each of the above companies is an Ai Group Member. Additionally, there are a large number of other companies in the contract call centre industry, many of which are Ai Group Members.
340. Between them Salmat SalesForce, TeleTech and Stellar employ thousands of employees who manage many millions of customer transactions every year.
341. Contract call centre staff are typically located at the premises of the contract call centre company and handle inbound (eg. advice) and outbound (eg. sales) calls for clients from a wide range of industries such as banking, insurance, telecommunications and airlines.
342. The contract call centre industry is a recognised, separate industry which is deserving of its own award.
343. In its Statement of 23 January 2009, the Full Bench stated:

*[90] Parties subject to the Contract Call Centre Industry Award 2003 (Contract Call Centre Award) proposed the establishment of a modern award which largely reflects the scope and content of that award. Call centres are operated by a range of employers in different industries and on a contract basis by specialist call centre service providers. Some employers operate a call centre with respect to their own operations and undertake contract work for other clients. It is a growing industry and subject to intense domestic and international competition.*

*[91] We have included call centre operations within some draft industry awards where appropriate. Those draft awards include the drafts for the Banking Modern Award and the Telecommunications Modern Award. Currently direct, contract and hybrid call centres are covered by common rule clerical awards and NAPSAs and in some cases by the federal Contract Call Centre Award.*

*[92] A range of submissions were put to us as to the future coverage of call centres. We consider that it would be desirable that industry awards cover call centres where appropriate and where not covered, one safety net award apply uniformly to all other contract and direct call centres. Common rule clerical NAPSAs coverage was described as appropriate by operators who made submissions to us. A uniform safety net which also consistently applies appropriate flexibilities to this growing industry would ensure that all competition is on an even base and that international competitiveness can be maximised.*

*[93] We have decided to amend the Clerks—Private Sector Award 2010 (Clerks Modern Award) on an exposure draft basis, to cater for all call centres not covered by an industry award. The changes reflect flexibilities and additional classifications contained in the contract call centre award. The proposed amendments are marked up in the draft of the Clerks Modern Award we publish with this statement.”*

344. Ai Group and its Members in the contract call centre industry find it very hard to understand how the Commission could form a view that contract call centre companies should general apply the conditions in the award which applies to their customers. This issue was the subject of four to five years of hotly contested AIRC proceedings and a number of Full Bench decisions. These proceedings only concluded a relatively short period ago.

345. The *Contract Call Centre Industry Award 2003* arose from more than three years of negotiations between Ai Group, the ACTU, ASU, CPSU and NUW, and complex AIRC proceedings. The FSU was also involved in the negotiations over the scope of the award. The award applies to named respondents and on a common rule basis in Victoria.
346. The proceedings were linked to developments in two other lengthy and significant AIRC cases which were continuing at the same time:
- Full Bench proceedings involving Global Telesales – a contract call centre company which had a contract to provide outsourced call centre services to Lufthansa Airlines;
  - The development of the Telecommunications Services Industry Award.
347. A number of AIRC Members on the Award Modernisation Full Bench were involved in these proceedings.
348. Finally, after years of debate, all of the industrial parties accepted that the contract call centre industry was a unique industry which needed to have its own award and that it was inappropriate to apply banking industry etc awards to contract call centre companies.
349. It is not in the public interest to open the issue up again.
350. Ai Group presses for a modern *Contract Call Centre Industry Award 2010* and relies on the draft award filed in the Commission on 19 December 2009. The draft award was filed with the support of the ACTU, the ASU, the CPSU and NUW, with the exception of certain provisions highlighted in the document.
351. Ai Group understands that the relevant union parties still support the making of a modern Contract Call Centre Industry Award.



352. Ai Group submits that:

- The contract call centre industry is a distinct and separate industry and deserving of its own modern award; and
- It is not appropriate for industry awards such as the modern Banking, Finance and Insurance Award to have application to contract call centres.

353. In support of this position, two contract call centre companies, both Ai Group Members – Salmat SalesForce and TeleTech International Pty Ltd – have supplied Statements (***Annexure F***).

354. As set out earlier, Salmat SalesForce and TeleTech are two of the largest contract call centre companies operating in Australia with operations also overseas. The companies engage approximately 4000 and 638 employees respectively in Australia and have considerable market share in the customer contact service industry. Both companies are respondent to the *Contract Call Centre Industry Award 2003*.

355. The third major player in the industry – Stellar – has a federal enterprise award which it negotiated with the CPSU. The award contains flexible and cost-competitive conditions. It is important that the Commission be mindful of this and avoid placing the other companies in the industry in an uncompetitive position.

356. Salmat SalesForce and TeleTech are in the business of providing inbound and outbound customer contact services and “back of house” administrative services. These services are referred to as “business services” [*Para 21, Salmat Sales Force Statement*] and whilst some of these services are capable of being performed via in-house operations, the external supply of such services is an expanding and growing industry.

357. In the external supply of these business services contract call centre companies utilise and specialise in sophisticated technology. Traditional or “mainstream” call centre services include fielding customer enquires and engaging in telemarketing or telesales. However customer contact services are now extending to other forms of communication such as SMS text messaging, email and through traditional natural language IVR self-service systems.
358. Contract call centre companies invest substantially in newer forms of communication technology as the contact services offered to clients are the core business of contract call centres.
359. Ai Group has previously submitted that the contract call centre companies face intense competitive pressures both domestically and internationally and this is confirmed in the respective Statements [*Paras 9-10, Statement of Salmat SalesForce and Paras 7-8, Statement of TeleTech*]. As such it is crucial for contract call centre companies to offer competitive service contracts because cost is a key determining factor. Costs associated with rostering arrangements directly affect call centre company’s service contracts.
360. An essential feature of the contract call centre industry is the ability of call centre companies to contract with a variety of business in different industries. For example Salmat SalesForce contracts with customers in the industries of telecommunications, banking, infrastructure, government, energy, entertainment, technology, consumer electronics and home appliances, travel, loyalty programs and insurance [*Para 5, statement of Ian Bolinger of Salmat SalesForce*] at any one time.
361. It is Ai Group’s position that it is vital that the contract call centre industry retain its own modern award. The existing award facilitates competitive and flexible conditions necessary for rostering arrangements and forms a modern safety net for contract call centre employees.

362. Ai Group is strongly opposed to the application of industry awards to contract call centre companies. This includes opposition to the application of the modern Banking Award to the contract call centres who contract with banking, finance and insurance companies. Many contract call centres have a strong client base in the banking and finance industry (eg. TeleTech).
363. Ai Group submits that the modern Banking Award is not in any way conducive to maintaining a viable contract call centre industry in Australia. Despite purporting to cover an industry that includes “telephone enquires, financial consulting, data processing and transaction processing” (being functions and services that many contract call centre companies provide) the terms of the Banking Award if applied to the contract call centres would cripple the Australian contract call centre industry and the operations of these very large employers.
364. Salmat SalesForce and TeleTech have detailed the more damaging provisions of the modern Banking Award in their Statements [*see Para 25, Statement of Salmat SalesForce and Para 22, Statement of TeleTech*].
365. One area of cost is that the modern Banking Award seeks to cover more senior classes of employees such as human resource managers, accountants, information technology specialists, senior analysts and provisional managers. These categories of staff are engaged by contract call centre companies but are currently award-free, as they are in most industries. Contract call centre companies required to apply the Banking Award to such senior employees would face unreasonable and onerous costs and restrictions in providing additional monetary payments for the pattern of hours worked by these senior people.

366. A second area of concern is the lack of parity between the modern Banking Award and the *Contract Call Centre Award 2003* in terms of classification structures and corresponding rates of pay, resulting in higher labour costs for contract call centre companies required to pay in accordance with the Banking Award.
367. A third concern is the more restrictive hours of work provisions in the Banking Award when compared with the *Contract Call Centre Award 2003* and details of this are set out in Para 25 of Salmat SalesForce’s Statement and Para 22 of TeleTech’s statement. The Banking Award’s hours of work provisions do not contain the necessary flexibilities for competitive rostering arrangements required for contract call centres to solicit business.
368. Ai Group objects to the application of industry awards to contract call centres on the basis that many such awards are not appropriate for or conducive to a viable domestic contract call centre industry. Ai Group therefore seeks a specific exemption in the coverage provisions of the Banking Modern Award for contract call centre companies.
369. In these submissions Ai Group has focussed upon the modern Banking Award but similar issues arise regarding the awards in numerous private and public sector industries where contract call centre operators’ customers are based.
370. The general observation that the Commission has made that “appropriate”<sup>18</sup> industry awards should apply to contract call centres is simply unworkable.
371. As supported by the relevant Statements, and raised in earlier Ai Group submissions, the requirement that contract call centre companies observe particular industry awards would result in the continuous change of award coverage depending on the industries with whom call centre companies contract. As such, award coverage could change for employees every shift

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<sup>18</sup> Para [91]

cycle or within the shift itself depending on which customers they are servicing. This is unworkable and contradictory to the principle of award modernisation (s1(a)) which requires modern awards to be “*simple to understand and easy to apply, and must reduce the regulatory burden on businesses.*”

372. If the Commission does not accept Ai Group’s arguments for the creation of a modern contract call centre award, then Ai Group, in the alternative, contends that the *Clerks – Private Sector Award 2010* be amended to:

- Firstly, preserve the current and necessary flexibilities contained in the *Contract Call Centre Industry Award 2003* and relied upon by the contract call centre industry; and
- Secondly, ensure that the Clerks Award applies to contract call centre companies regardless of the industry in which their customers are based.

373. The *Clerks – Private Sector Award 2010*, in its current terms, poses significant costs for contract call centre companies and these are detailed in the Statements of Salmat SalesForce at Para 26 and TeleTech at Para 23.

374. We stress that this is not the approach which Ai Group is seeking. Ai Group submits that a modern Contract Call Centre Industry Award should be made, in the terms which we have sought.

## **Telecommunications Services Industry**

375. Ai Group filed a draft *Telecommunications Services Industry Award 2010* on 10 December 2008 followed by an amended scope clause on 6 January 2009. The draft award (with the exception of some specific clauses) and the amended scope clause were supported by the CPSU and the CEPU – the two union parties to the existing industry award.

376. Ai Group supports the creation of the *Telecommunications Services Industry Award 2010* in the terms of the Commission's Exposure Draft, with some important exceptions as set out below. These amendments have been marked up on the draft award in **Annexure G**.

## **Clause 4 – Coverage**

### **Subclause 4.1      *Definition of telecommunications services industry***

377. Ai Group submits that the coverage provisions in the exposure draft of the *Telecommunications Services Industry Award 2010* have been considerably narrowed from the draft which Ai Group, the CPSU and CEPU submitted and from the scope of the current award.

378. This may not have been intentional. Clause 4.1 appears to provide for a cumulative definition of a business in the telecommunications services industry such that a business in the industry would need to satisfy all the descriptions from 4.1(a) to (e) in order to be covered. Few if any companies in the industry would meet every descriptor and, hence, from 2010 they would be excluded from this modern award's coverage.

379. Accordingly Ai Group seeks a straightforward amendment to clause 4.1 as contained in **Annexure G**. That is, the word "and" should be replaced with the word "or" at the end of each statement in 4.1 (a) to (d).

### **Subclause 4.2      *Exclusions***

380. Ai Group opposes subclause 4.2(d) – the exemption for employees covered by the scope of the *Electrical, Electronic and Communications Contracting Industry Award 2010*.

381. As set out elsewhere in this submission, the proposed coverage of the modern Electrical Contracting Award is of great concern to Ai Group. It is essentially a construction industry award. If telecommunications companies were required to apply the terms of this award there would be huge cost increases, and they would be caught up in claims relating to the coverage of construction industry portable severance and long service leave schemes.
382. Subclause 4.2(d) should be deleted. If the modern Electrical Contracting Award is drafted to apply only to electrical contractors, as it should be, then issues are unlikely to arise regarding overlapping coverage and, if they do, the principle in subclause 4.3 would apply.
383. If the deletion of subclause 4.2(d) is not acceptable to the Commission, then the exclusion should be worded in a similar manner to the wording that the Commission has drafted for the modern Manufacturing Industry Award. That is:

*“(d) employees of electrical contractors.”*

#### **Proposed subclause 4.4 – annual salary arrangement for higher classifications**

384. The *Telecommunications Services Industry Award 2002* was eventually achieved via consent with the substantial involvement of Commissioner Smith after more than two years of negotiations and AIRC proceedings, involving approximately 40 telecommunications companies most of which were represented by Ai Group.
385. A key element of the consent position reached was that overtime penalties, shift allowances etc would not apply to the highest classifications in the award. This agreement is reflected in clause 8.2 of the current award.
386. The clause exempts the classifications of:

- Principal Customer Contact Leader;
- Telecommunications Associate; and
- Clerical and Administrative Employee – Level 5

from various award provisions such as:

- Mixed functions
- Allowances
- Payment of wages
- Hours of work
- Meal breaks
- Overtime
- Annual leave loading; and
- Payment for time worked on a public holiday

by allowing the employer and the staff member to reach agreement on the manner in which these entitlements will be compensated for.

387. The annual salary arrangement applicable to these senior classifications provides essential flexibility for higher classifications in the telecommunications industry. The removal of the provisions (as has occurred in the exposure draft) would disadvantage those employers who have relied on the ability to negotiate and compensate senior staff through the payment of an annual salary which takes into account the number and pattern of hours worked. Such employers would be exposed to substantial additional costs if from 2010 they were required to apply prescriptive penalties and allowances on top of the employee's salary.

388. A similar negotiation and lengthy AIRC process, again involving Commissioner Smith, occurred shortly after the *Telecommunications Services Industry Award 2002* was made, in finalising the terms of the *Contract Call Centre Industry Award 2003*. In this matter a very similar clause was agreed upon between the



Ai Group, the ASU, the CPSU and the NUW, but particularly at the ASU's insistence, the clause was entitled "*Annual Salary Arrangements for Higher Classifications*".

389. Ai Group submits that it is essential that the wording from subclause 8.2 of the *Telecommunications Services Industry Award 2002* be incorporated into the modern Telecommunications Services Industry Award at subclause 4.4 but proposes that the abovementioned title from the call centre award be used, as set out in **Annexure G**.

#### **Clause 14 - Classifications and minimum wage rates**

390. Ai Group notes that the Commission has adopted and aligned the classification structure and corresponding rates of pay contained in the *Clerks – Private Sector Award 2010* into the classification structure for the three streams of customer contact, clerical and administrative, and technical in the *Telecommunications Services Industry Exposure Draft*.
391. Ai Group is concerned about the impact of additional costs on employers in the telecommunications industry as a result of what will be a significant increase in the minimum weekly rates for key and commonly used classifications. For example, an employer of a Clerical and Administrative Level 1, Year 3, full-time employee is currently required to pay a minimum weekly rate of \$582.92 per week. In addition to any increase awarded by the Australian Fair Pay Commission this year such an employer would, in 2010, be required to increase that rate of pay to \$630.00 per week – an increase of some \$47.08 per week per employee.
392. Ai Group can see no merit in amending the rates of pay in the award from the structure agreed upon by consent (with the substantial involvement of the AIRC) in the *Telecommunications Services Industry Award 2002*, and proposes that the existing rates be retained.

## Other minor amendments

393. Ai Group proposes some other minor amendments which appear to be typographical errors. These amendments are highlighted in **Annexure G**.

## Market and Social Research Industry

394. There is potential for confusion about the coverage of some of the work carried out by employees of contract call centre companies and market research organisations.

395. For this reason, Ai Group proposes that an the following exclusion be inserted into subclause 4.2 of the Market and Social Research Industry Award 2010:

*“an employer covered by the Contract Call Centre Industry Award 2010”.*

396. This proposed exclusion aligns with Ai Group’s position that a modern *Contract Call Centre Industry Award 2010* should be made, as explained earlier in this Chapter.

## Information Technology and Telecommunications Industry

### Professional Employees

397. Ai Group and APESMA have reached agreement that there should be a modern *Information Technology and Telecommunications Industries Professional Employees Award 2010* based upon the terms of the *Information Technology (Professional Employees) Award 2001* and the *Telecommunication Industry (Professional Employees) Award 2002*. Ai Group and APESMA are parties to these two existing awards.

398. Ai Group and APESMA have reached agreement on nearly all of the content of the proposed modern award.
399. At paragraph [89] of its Statement of 23 January 2009, the Commission said:  
*“We have decided to defer the consideration of awards covering such employees until Stage 3 of the award modernisation process”.*
400. Accordingly, Ai Group intends pursuing the making of the proposed award during Stage 3.

## Chapter 11 – Manufacturing Group

401. The following submissions relate to the draft amendments to the *Manufacturing and Associated Industries and Occupations Award 2010*.

### Clause 4 - Coverage

402. In our Stage 2 submission of 31 October 2008, Ai Group supported the inclusion of the industries comprising the Manufacturing Group for Stage 2, within the *Manufacturing and Associated Industries and Occupations Award 2010* (“the Manufacturing Award”).

403. In so doing, Ai Group provided to the Commission a redrafted version of the coverage clause which it had advanced for the Manufacturing Award in Stage 1 of Award Modernisation. The redrafted coverage clause was one that was developed following extensive discussions and negotiations with the Metal Trades Federation of Unions (MTFU – ie. the AMWU, AWU, CEPU, CFMEU, LHMU and NUW).

404. In reviewing the terms of Clause 4 of the exposure draft, Ai Group notes that much of the content and structure of the provision reproduces the clause that was jointly advanced by Ai Group and the Manufacturing Unions.

405. Accordingly, with respect to the terms of sub-clauses 4.1, 4.2 and 4.3 of the exposure draft, Ai Group supports the approach adopted by the Commission in incorporating the industries identified within the Manufacturing Group of Stage 2 into the Manufacturing Award.

406. The reasons for this support have been set out in detail in our 31 October submission and during the pre-exposure draft consultations.

407. The terms of Clause 4, however, do not identically reproduce that which was submitted to the Commission by Ai Group. In particular, the manner in which the definition of ‘manufacturing and associated industries and occupations’ operates by virtue of the exclusions expressed in sub-clause 4.4 has been substantially modified.

408. Ai Group opposes the exclusion expressed within sub-clause 4.4(h) which exempts ‘*employees of electrical contractors*’. We contend that an exclusion drafted in this way substantially disrupts the industrial regulation of the manufacturing industry and disregards the historical coverage that many of the awards which have been subsumed into the Manufacturing Award through Stage 1, have had in regulating this work.

409. This contention is most apparent when one reviews the coverage of the *Metal, Engineering and Associated Industries Award 1998* (“the Metal Industry Award”), an award that we submit has substantial application to employers that are contractors including those who employ electrical workers. Specifically, Schedule A of the Award, which identifies the ‘industries’ in which the Award will apply, lists the following relevant industries where electrical workers are often engaged:

*“22. The manufacture, erection and installation, maintenance and repair of all forms of electrical machinery, apparatus and appliances, including valve - and globe manufacturing.*

*23. Radio, telephone and X-ray manufacturing, maintaining and repairing.*

... ..

*26. Manufacture, erection, installation, maintenance and repair of electrical advertising equipment including neon signs.*

*27. Manufacture, erection, installation, maintenance and repair of fluorescent lighting.*

*28. The drawing and insulation of wire for the conducting of electricity.*

... ..

*36. Lift and elevator making, repairing and maintenance.*

... ..

*39. Refrigerator manufacturing, maintaining and repairing.*

... ..

*41. Making, manufacture, installation, maintenance and repair of ventilating and air-conditioning plant and equipment.*

... ..

*50. Making, repairing, reconditioning and maintenance of motor engines, and/or parts thereof, and of the mechanical and electrical parts including the transmission and chassis of motor cars, motor cycles and other motor driven vehicles.*

... ..

*58. Generation and distribution of electric energy.*

... ..

*62. Making, manufacture, installation, construction, maintenance, repair and reconditioning of plant, equipment, buildings and services (including power supply) in establishments connected with the industries and callings described herein and maintenance work generally.”*

410. The Metal Industry Award unequivocally covers the work of maintenance contractors – including those who employ electrical workers. The overlap with electrical contracting awards and NAPSAs is only resolved with deference to electrical contracting instruments in very limited circumstances. These circumstances are detailed in Schedule B of the Metal Industry Award as follows:

***“SCHEDULE B - PERSONS, ORGANISATIONS, INDUSTRIES AND EMPLOYERS EXEMPTED FROM COVERAGE***

*The following persons, organisations, industries and employers are exempted from coverage under this award:*

... ..

*7.0 Electrical Trades: Employers in the State of New South Wales as to the employment of persons in connection with wiring contracting and the installation of electric light and power plants are exempt from this award. This exemption shall not apply to employers who are manufacturers or vendors of plant or equipment who install or maintain the said plant and equipment in high and low tension power stations and/or substations for the generation and/or transmission of electric power.”*

411. Ai Group contends that the approach adopted by the Commission through its drafting of Clause 4.4(h) would result in a large number of employers who employ electrical workers being forced to apply vastly different terms and conditions to their employees as a result of the modernisation process.
412. These conditions will expose them to significant increased costs due to the more onerous construction industry derived conditions within the exposure draft of the *Electrical, Electronic and Communications Contracting Industry Award 2010* (“the Electrical Contracting Award”), as compared to the Manufacturing Award.
413. These increased costs include:
- Higher base wage rates including the provision of an ‘industry allowance’ when work is performed away from the employer’s workshop;
  - Additional allowances, including multi-storey allowances and construction industry fares and travel provisions;
  - Restrictive hours of work;
  - A requirement to pay day workers at overtime rates should they be required to work on Saturdays and Sundays;
  - Higher overtime penalties (time and a half for the first two hours and doubletime thereafter); and
  - Inclement weather provisions.
414. Additionally, the Electrical Contracting Award is linked to construction industry redundancy schemes, and portable long service leave schemes such as CoINVEST in Victoria. These schemes are very costly and do not reflect the redundancy and long service leave arrangements which companies covered by the Metal Industry Award are applying.

415. Ai Group submits that the appropriate means of preventing these substantial increased costs for employers is to redraft clause 4.4(h) in accordance with the exclusion advanced by Ai Group for electrical contracting in our 31 October submission as follows:

***“4.5 Manufacturing and Associated Industries and Occupations does not mean:***

*.....*

***(g) Employees of electrical contractors who are bound by and applying an electrical contracting award or an electrical contracting Notional Agreement Preserving State Awards (NAPSA), provided that this provision does not affect the application of this award to:***

- electrical, electronic and communications employees who are not employed by an electrical contractor; and*
- employees of employers who were legitimately and appropriately applying the Metal, Engineering and Associated Industries Award 1998 to such employees at the time when it was superseded by this award.”*

416. As mentioned earlier in this submission, the terms of this exclusion were extensively negotiated with representatives of the CEPU, AMWU and NECA and were drafted in such a way as to ensure that existing industrial arrangements were not disturbed. It was with this understanding that Ai Group did not seek to oppose the making of an electrical contracting modern award.

417. We submit that the agreement reached between the industrial parties should not be disregarded as to do so would create unquestionable disruption and prejudice to employers who are currently not required to apply conditions derived from electrical contracting awards.



## Clause 23 – Redundancy

418. In its decision of 23 January 2009, the Full Bench noted that it had amended the redundancy provisions of the Manufacturing Award exposure draft to include small business redundancy provisions saying:

*“[94]... The redundancy clause of the Manufacturing Modern Award has also been amended to reflect the small employer redundancy provisions of the Furnishing Industry National Award 2003.<sup>19</sup>”*

419. This decision arose from conclusions reached by the Full Bench on the issue of small business redundancy in the 19 December 2008 decision where they said:

*“[60] Seen in the context of the history we have set out, the terms of the NES indicate an intention to adopt the Commission’s 1984 decision in relation to small business – that employees of employers of fewer than 15 employees should not be entitled to redundancy pay... We shall make an exception for federal awards and industries in which there was no small business exemption prior to the Redundancy Case 2004.<sup>20</sup>”*

420. The *Furnishing Industry National Award 2003* (“the Furnishing Award”) includes an entitlement to severance pay for small businesses. On this basis, and in accordance with the Full Bench’s conclusions on this matter in its decision of 19 December 2008, Ai Group is not opposed to the inclusion within the Manufacturing Award of small business severance pay provisions covering employees that were previously covered by the Furnishing Award.

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<sup>19</sup> Statement – Award Modernisation 23 January 2009 [2009] AIRCFB 50; at [94].

<sup>20</sup> Decision – Award Modernisation 19 December 2008 [2008] AIRCFB 1000; at [60]

421. That being said, Ai Group contends that sub-clause 23.3 goes beyond this proposition and beyond the principles espoused by the Full Bench in its decision of 19 December 2008. Significantly, the terms of sub-clause 23.3 will extend the application of small business redundancy pay to employers currently respondent to a range of federal awards which contained the small business exemption prior to the *Redundancy Test Case 2004*.
422. Rather than expressing the operation of the small business severance pay provisions in the context of those who were bound to the terms of the Furnishing Award, sub-clause 23.3(b) instead relies on the concept that the provision will apply to any ‘small employer who performs any of the work in clauses 6.1 to 6.6 of the *Furnishing Industry National Award 2003*.’
423. Ai Group submits that the ‘work’ described in clauses 6.1 to 6.6 of the Furnishing Award is extremely wide ranging. As a result there are numerous areas of overlap with a range of federal awards which have been absorbed into the Manufacturing Award and which do not provide an entitlement to severance pay for employees of small employers. In such circumstances, sub-clause 23.3(b) creates an obligation to provide severance pay to employees of small employers where such an entitlement does not currently exist and indeed historically has never existed.
424. Awards such as the federal Metal Industry Award provide a relevant example of this as its coverage includes, refrigerator manufacture, maintenance and repair<sup>21</sup>, the manufacture and repair of baby carriages<sup>22</sup>, manufacturing and repairing any furniture made from metal<sup>23</sup>, and manufacture and repair of clocks and clock cases<sup>24</sup>. Each of these matters also expressly falls within the coverage of the Furnishing Award as reflected by Clause 6 of the Award<sup>25</sup>. We submit, that should the Manufacturing Award contain any provisions with

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<sup>21</sup> *Metal, Engineering and Associated Industries Award 1998* – Schedule A; Item 39

<sup>22</sup> *Metal, Engineering and Associated Industries Award 1998* – Schedule A; Item 40

<sup>23</sup> *Metal, Engineering and Associated Industries Award 1998* – Schedule A; Item 42

<sup>24</sup> *Metal, Engineering and Associated Industries Award 1998* – Schedule A; Item 49.

<sup>25</sup> See *Furnishing Industry National Award 2003*; sub-clauses 6.1.1, 6.1.8, 6.1.25 and 6.5.

respect to small business redundancy, it must only be limited to those employers where a current obligation exists.

425. We have drafted a revised provision as follows to reflect this proposition:

*“(b) Despite the terms of s.62(1)(b) of the NES and subject to clause 23.3(c), the remaining provisions of Subdivision B and C of Division 10 of the NES apply in relation to an employee of a small employer who immediately before the making of this Award was covered by the terms of the Furnishing Industry National Award 2003, except that the amount of redundancy pay to which such an employee is entitled must be calculated in accordance with the following table:*

*[SEVERANCE TABLE]”*

426. We submit that should clause 23.3(b) not be redrafted either as we have outlined, or in a manner that gives rise to the same effect, small business severance pay in the Manufacturing Award will be extended beyond the circumstances identified by the Full Bench in their 19 December 2008 decision and contrary to the terms of the Modernisation Request<sup>26</sup>.

### **Small business redundancy for engine drivers**

427. Similar considerations arise in relation to the inclusion of small business redundancy provisions derived from the terms of the *Engine Drivers’ and Firemen’s (ACT) Award 2000*.

428. Ai Group strongly opposes the inclusion of such a provision within the Award and does so on the basis that it is a provision that currently has limited application and does not represent an industry standard when one considers the NAPSAs and other federal awards that regulate similar work.

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<sup>26</sup> Award Modernisation Request – Consolidated Version 18 December 2008 at para. 32

429. Most notably and relevantly in this regard is its absence from the terms of Part III – Engine Drivers of the federal Metal Industry Award, an award which has application in New South Wales, Victoria, South Australia, Queensland and Tasmania.
430. We submit that to include such a provision on the basis of its existence in a single federal award, particularly when the primary federal award - the Metal Industry Award - does not reflect the obligation, inappropriately elevates the relevance and importance of the conditions in the Engine Drivers ACT Award. Furthermore, its absence from the primary federal award also in our submission supports the conclusion that it is not a condition that is required to ensure *‘the maintenance of a fair minimum safety net’* as required by the terms of the Modernisation Request.<sup>27</sup>

## **Clause 32 – Allowances and special rates**

431. Ai Group sees substantial merit in considering whether the allowances in the Award can be rationalised.
432. Regrettably, due to the substantial resourcing challenges that award modernisation has presented to date we have not had an opportunity to fully consider such rationalisation.
433. As set out in Chapter 2 of this submission, Ai Group hopes to have an opportunity to focus on allowances before modern awards come into operation, but if this proves to be impossible given the other demands of award modernisation then, we submit, the potential rationalisation of allowances should be considered during the first four yearly review of awards.<sup>28</sup>

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<sup>27</sup> Award Modernisation Request – Consolidated Version 18 December 2008 at para. 32

<sup>28</sup> Fair Work Bill; s156.

## Chapter 12 – Private Transport Industry (Road, Non-passenger)

434. In its Statement of the 23 January 2009 the Commission published three exposure draft awards covering the Private Transport Industry (road, non-passenger):

- *The Road Transport and Distribution Award 2010* (RT&D Modern Award),
- *The Road Transport (Long Distance Operations) Award 2010* (RT Long Distance Modern Award) and
- *The Transport Industry (Cash in Transit) Award 2010* (CIT Modern Award).

435. Ai Group broadly supports the Commission's delineation of the industry but we wish to raise some specific issues regarding the scope and application of aspects of the RT&D Modern Award and the RT Long Distance Modern Award. Our submission will not address the CIT Modern Award.

### Road Transport and Distribution Award 2010

436. Ai Group's redrafted version of the *Road Transport and Distribution Award 2010* is set out in **Annexure H**.

#### Clause 4 - Coverage

437. The Full Bench in its Statement of 23 January 2009 identified the following, in relation to the coverage provisions of the RT&D Modern Award:

*“[98] The RT&D Modern Award covers the road transport and distribution industry as defined in the exposure draft. The definition is broad and is intended to incorporate the scope of the pre-reform Transport Workers Award 1998 (Transport Workers Award) and NAPSA’s operating in each state as the general industry transport award.”<sup>29</sup>”*

438. Whilst Ai Group concurs that the coverage of the RT&D Modern Award is broad, we are concerned that the manner in which the coverage clause has been drafted has the potential to create uncertainty, particularly in relation to the interface between the RT&D Modern Award and the RT Long Distance Modern Award.
439. We submit that it is a feature of the industry that from time to time employees who are engaged as long distance drivers may be required to transport goods or materials a distance which is shorter than that which is defined as ‘long distance’. In such circumstances, those employees are remunerated federally in accordance with the *Transport Workers Award 1998*, and by equivalent NAPSAs in the relevant State jurisdictions.
440. Accordingly, employers are rarely exclusively engaged in long distance operations and ordinarily can be both in the industry of general road transport (ie. non-long distance transportation) and long distance transportation.
441. Ai Group has amended sub-clauses 4.1 and 4.2 to reflect this situation and to clarify the manner in which the two modern awards relate. As a corollary to these amendments a definition of ‘long distance operation’ and ‘interstate operation’ have been inserted into sub-clause 3.1. We do not believe that our modifications broaden the scope of the awards as drafted by the Commission or vary the manner in which the existing instruments are applied.

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<sup>29</sup> Statement – Award Modernisation 23 January 2009 [2009] AIRCFB 50; at [98]

442. In addition to clarifying the interrelationship of the RT&D Modern Award and the RT Long Distance Award, Ai Group also seeks the inclusion of a provision that recognises the manner in which the *Transport Workers (Mixed Industries) Award 2002* (“the *Mixed Industries Award*”) currently operates.

443. The Full Bench in its January Statement also made specific comment in relation to the incorporation of the *Mixed Industries Award* into the RT&D Modern Award saying:

*“[100] The coverage of the award also extends to the transport of goods, etc. where the work performed is ancillary to the principal business, undertaking or industry of the employer. This reflects the scope of the pre-reform Transport Workers (Mixed Industries) Award 2002. That award contained a majority clause. The wording of that clause is not suitable for a modern award. We have included a draft provision in clause 4.3 of the RT&D Modern Award designed to operate in circumstances where the principal business of the employer is not road transport or distribution and that employer is covered by another award will regulate the employee’s terms and conditions. This issue has not arisen in any significant way during the making of the priority awards and we invite the parties’ submissions in relation to the wording of this clause and any related matters.<sup>30</sup>”*

444. Ai Group urges the Commission to reconsider their determination that ‘majority clauses’ are not appropriate for inclusion within the RT&D Award. We submit that the very nature of the *Mixed Industries Award* which essentially operates as an occupational award, and is capable of operating in a vast array of industries, requires that there be a mechanism for alignment of conditions such as hours of work, shift definitions and the like with those that operate for the majority of the business.

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<sup>30</sup> Statement – Award Modernisation 23 January 2009 [2009] AIRCFB 50; at [100]

445. We contend that to do otherwise would potentially create significant increased costs for employers who currently utilise this provision within the *Mixed Industries Award* and its equivalent provision in the various mixed industry NAPSA's that apply to transport work.
446. Ai Group has also considered the effect of clause 4.3 of the RT&D Modern Award. We believe that it does not protect against the detrimental effects resulting from precluding an employer from applying the conditions that apply to the majority of their employees to their transport drivers when the drivers are performing work of an ancillary nature to the primary operation of business.
447. Indeed, it is only a clause that has any work to do in circumstances where a modern award contains classifications that cover the work being performed by the employee. In some of the major awards in which the transport function is ancillary to the primary operations of the employer such as the modern *Manufacturing Award*, the *Textile, Clothing, Footwear and Associated Industries Award 2010* and the *Graphic Arts, Printing, Publishing and Associated Industries and Occupations Award 2010* no such classification exists and historically never has.
448. The effect of preventing a 'majority clause' from being inserted into the RT&D Modern Award would require insertion of a range of new conditions not only in these modern awards, but also any other modern award which may utilise transport drivers in an ancillary capacity so as not to disturb the existing terms and conditions of employees. We respectfully submit, that such an approach is highly unnecessary and can be avoided by simply retaining the status quo and inserting a provision in the following terms within the RT&D Modern Award:

**“4.4** *Where this award covers an employer and employee and the work performed is ancillary to the principal business, undertaking or industry of the employer, the terms of the modern award that apply to the*



majority of employees of the employer (“the Majority Award”) shall apply to employees covered by this award save and except for the following provisions which shall override any conflicting provisions within the Majority Award:

<b>Part/Clause</b>	<b>Subject</b>
Part 1	Application and Operation
Clause 15 of Part 4	Classification and minimum wage rates
Clause 16.3	Expense related allowances
Clause 19	Higher duties”

#### **Clause 12.6 - Casual employment and clause 27 - Overtime**

449. The terms of the *Transport Workers Award 1998*, in relation to the payment of overtime for casual employees, provides that whilst a casual employee is entitled to a casual loading of 25%<sup>31</sup>, when working overtime their rate of pay is to be calculated in accordance with the following:

*“12.5.4 In addition to normal overtime rates a casual employee while working overtime or outside of ordinary hours, shall be paid on an hourly basis one thirty-eighth of the appropriate weekly wage rate prescribed by the award, plus 10% of ordinary time earnings for the work performed.”*

450. The terms of the RT&D Modern Award have the effect of conferring upon the casual employee an entitlement to a 25% loading when they work overtime in addition to their overtime rate<sup>32</sup>. Ai Group submits that the provisions of the RT&D Modern Award, in relation to payment of casuals whilst working overtime, is in excess of current standards.

<sup>31</sup> *Transport Workers Award 1998*; Cl 12.5.3

<sup>32</sup> *Exposure Draft (January 2009): Road Transport and Distribution Award 2010*; Cl 12.6(c) and Cl 27.1.

451. We propose the retention of existing penalty arrangements for casual employees as set out in the *Transport Workers Award 1998* as it provides for an adequate safety net. Furthermore, an increase to the casual loading payable when an employee works overtime clearly increases costs for employers in a manner contrary to the terms of the Modernisation Request.
452. Attached to these submissions (***Annexure I***) are statutory declarations from Mr Michael Cronin, Mr Roger Duckett, Mr Tim Holmes, Mr Jeff Newton and Mr Dale Tacono. Each reflect amongst other things the potentially damaging effects of any increased cost pressures on their businesses.

#### **Clause 24 - Shiftwork**

453. On the same basis as has been articulated above regarding maintenance of existing provisions from the primary federal award within the RT&D Modern Award, Ai Group also presses for retention of the existing shift work provisions from the *Transport Workers Award 1998* in lieu of the modifications made in the exposure draft.
454. The relevant provisions we seek have been included within our redrafted version of the award and are marked up accordingly. Specifically, we have incorporated a definition of day shift, and sought the notice periods for change of rosters to be 48 hours rather than 7 days.
455. These provisions merely reflect existing entitlements and we contend are an appropriate safety net which has not caused any hardship to employees.

### **Clause 26.3 - Overtime rest break**

456. Ai Group has inserted additional words within this clause to create greater clarity in its operation. The provision now makes explicit that overtime rest breaks are to be paid at ordinary time.

### **Clause 26.4 - Meal allowance**

457. Ai Group seeks amendment to the terms of the exposure draft which effectively limit the payment of a meal allowance in circumstances where an employee has been provided prior notification of the requirement to work overtime.

458. We have sought to include this as it is a feature of the mixed industries award and contend that this is an appropriate safety net condition. We submit that the rationale that underpins the requirement for a meal allowance in circumstances where an employee works overtime is so that an appropriate meal may be purchased when the employee has not been able to appropriately cater for themselves due to not knowing that they would be required to work overtime.

459. We submit that an employee who has prior notification, is able to obtain and organise their meals, therefore a meal allowance is not justified.

### **Savings provisions**

460. The Commission has sought at paragraph 102 of its statement, for the parties to confer about the NSW rates. Ai Group is opposed to the incorporation of the rates as they do not reflect a minimum standard but instead reflect the high water mark.

461. Whilst there may be a need for transitional provisions or savings provisions in some instances we submit that these are more appropriately discussed once the terms of the modern award have been finalised.

## **The Road Transport (Long Distance Operations) Award 2010**

462. Ai Group's redrafted version of the *Road Transport (Long Distance Operations) Award 2010* is set out in ***Annexure J***.

463. Ai Group supports the creation of the RT Long Distance Operations Modern Award and the retention of current industrial standards applying to this industry. We submit that the coverage provision of the RT Long Distance Operations Modern Award is appropriate for the industry provided that the amendments sought to the coverage provisions of the RT&D Modern Award are adopted.

464. In addition we seek to amend the schedules at clause 13.4 and clause 13.5, as they do not reflect actual distances and time. We note that the schedules reflect times, distances and journeys which are not current. Ai Group will continue discussions with relevant parties about this.

465. Finally, for clarity we have also added definitions of GVM and GCM, as found in the RTD modern award.