Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Reply Submission

Group 3 Exposure Drafts

5 MAY 2016

4 YEARLY REVIEW OF MODERN AWARDS

EXPOSURE DRAFTS: GROUP 3

CONTENTS

1. INTRODUCTION

1. On 2 November 2015, the Fair Work Commission (Commission) published directions in respect of all awards allocated to groups 3 and 4 of the award stage of the 4 yearly review of modern awards (Review). Specifically, parties were directed to file 'comprehensive written submissions in reply on the technical and drafting issues related to exposure drafts in Group 3' by 7 April 2016. This deadline was subsequently extended to 5 May 2016[1].

2. The Australian Industry Group (Ai Group) files this reply submission in accordance with the aforementioned directions in respect of the following exposure drafts:

    1. *Exposure Draft – Banking, Finance and Insurance Award 2015;*
    2. *Exposure Draft – Business Equipment Award 2015;*
    3. *Exposure Draft – Clerks – Private Sector Award 2015;*
    4. *Exposure Draft – Commercial Sales Award 2015;*
    5. *Exposure Draft – Contract Call Centres Award 2015;*
    6. *Exposure Draft – Electrical Power Industry Award 2016;*
    7. *Exposure Draft – Horticulture Award 2016;*
    8. *Exposure Draft – Legal Services Award 2015;*
    9. *Exposure Draft – Local Government Industry Award 2015;*
    10. *Exposure Draft – Market and Social Research Award 2015;*
    11. *Exposure Draft – Miscellaneous Award 2015;*
    12. *Exposure Draft – Seagoing Industry Award 2016;*
    13. *Exposure Draft – Sugar Industry Award 2016;*
    14. *Exposure Draft – Telecommunications Services Award 2015;* and
    15. *Exposure Draft – Wine Industry Award 2016.*

[1] [2015] FWC 1838.

2. EXPOSURE DRAFT – BANKING, FINANCE AND INSURANCE AWARD 2015

3. The submissions that follow relate to the revised *Exposure Draft – Banking, Finance and Insurance Award 2015* (Exposure Draft) dated 27 April 2016 and the Commission's summary of submissions dated 27 April 2016. They are in response to submissions filed by:

- the AFEI (15 April 2016);
- Business SA (15 April 2016); and
- ABI and the NSW Business Chamber (15 April 2016).

4. The *Banking, Finance and Insurance Award 2010* has been the subject of conferences before Commissioner Roe on 21 April 2016 and 29 April 2016. The technical and drafting issues arising from the Exposure Draft as well as substantive variations sought to the award were discussed during those conferences. We refer to Commissioner Roe's reports to the Full Bench dated 22 April 2016 and 2 May 2016 in this regard.

5. The Commissioner's report of 2 May 2016 at paragraph [2] states as follows:

> "Unless parties advise otherwise in reply submissions due 5 May 2016 we proceed on the basis that the only matters outstanding from the submissions received in respect to the exposure drafts are set out below".

6. With respect, the report does not provide a complete list of outstanding matters arising from the Exposure Draft. As we identified during the aforementioned conferences, Ai Group was not in a position to deal with all matters arising from other parties' submissions at that time.[2] As a result, our concerns regarding certain proposals were not ventilated during those conferences. Having now had an opportunity to consider the material filed, we here provide our response to any such matters. We understand that the conduct of the conferences before Commissioner Roe were not intended to preclude parties from providing such a written response in accordance with

[2] See transcript of proceedings on 21 April 2016 at PN20 – PN25.

Justice Ross' directions of 23 March 2016.[3] As a result, the submissions that follow identify matters in respect of the Exposure Draft that, in Ai Group's view, remain outstanding.

7. Matters raised by other parties that have not been pressed during the conferences or are to be the subject of further submissions from such parties, at the invitation of Commissioner Roe, may not be addressed in these submissions. In light of the conduct of the conference we proceed on the basis that such matters will not be considered at this time, if at all.

Clause 3.1 – Coverage

8. Clause 4.1 of the current award is in the following terms: (emphasis added)

> 4.1 This industry award covers employers throughout Australia who are engaged in the banking, finance and insurance industry <u>in respect of work by their employees in a classification in this award and those employees</u> to the exclusion of any other modern award.

9. This was redrafted at clause 3.1 in the exposure draft of 18 December 2015 in the following terms:

> 3.1 This industry award covers employers throughout Australia who are engaged in the banking, finance and insurance industry in respect of work by their employees in a classification in this award to the exclusion of any other modern award.

10. Ai Group submitted, at paragraphs 74 – 78 of our 14 April 2016 submissions, that the above provision did not make reference to employees that are presently covered by the award. We submitted that the text of the current clause 4.1 should be restored.

11. Ai Group's concern was accepted by the Commissioner during the conference on 21 April 2016.[4] The clause has been amended such that it now reads: (emphasis added)

> 3.1 This industry award covers <u>employers throughout Australia who are engaged in the banking, finance and insurance industry and those employees in a classification in this award</u> to the exclusion of any other modern award.

[3] [2016] FWC 1838.

[4] See transcript of proceedings on 21 April 2016 at PN819.

12. As can be seen, clause 3.1 of the revised Exposure Draft does not properly reflect the current award. This is because it removes the connection between employers engaged in the banking, finance and insurance industry (as defined) and their employees who perform work that is defined by the classification structure of the award. The Exposure Draft now purports to cover:

- any employers engaged in the industry as defined; and
- any employees in a classification in the Exposure Draft.

13. This deviates substantively from the current provision according to which an employer is only covered by the award to the extent that it is engaged in the industry *and* its employees can be classified under the award. Similarly, an employee is only covered by the award if they can be classified in accordance with the classification structure *and* they are employed by an employer engaged in the industry as defined.

14. Contrary to the proposition put to Ai Group during the conference on 21 April 2016, the provision found in the revised Exposure Draft does not properly reflect the current clause and should not be adopted. We again submit that clause 3.1 should be substituted with the current clause 4.1.

Clause 7.7(a)(i) – Shiftwork

15. ABI and the NSW Business Chamber has sought a substantive change to the definition of "shiftwork". That change has been adopted in the revised Exposure Draft. Ai Group requests that we be given a further opportunity to consider the proposal for the purposes of ensuring that it does not give rise to any unintended consequences.

Clause 7.7(a)(ii) – Shiftwork

16. We understand that Business SA seeks a substantive change to the afternoon shift definition, which has been deferred for later consideration.

Clause 7.7(d) – Shiftwork penalties

17. Commissioner Roe's report of 2 May 2016 requests Ai Group to advise whether we continue to press our submission dated 14 April 2016 at paragraph 95.

18. The matter we have there raised is of relevance to the vast majority of exposure drafts published by the Commission to date. We first identified it in a submission filed regarding group 1C – 1E exposure drafts, dated 7 December 2015. We have again raised the matter in respect of group 3 exposure drafts. Our submissions of 14 April 2016 at paragraphs 7 – 15 set out the basis for our concerns. We note that the Commission is yet to make a ruling on this matter, as well as the other general issues we have identified at section 2 of our submission.

19. We are of course mindful that if the Commission accepted the concern we have raised, it would result in the need to revisit a number of provisions in various exposure drafts, which will necessarily involve the expenditure of further time and resources of both the Commission and interested parties. We also understand and appreciate the Commission's desire to develop greater consistency across the modern awards system. Nonetheless, as we have consistently submitted over the course of this Review, precedence should not be given to these considerations where the consequence is an unintended but substantive change to entitlements. As we understand it, the redrafting process is not intended to give rise to such changes.

20. On this basis, and for the reasons set out in our 14 April 2016 submission, we continue to seek the proposed amendment to clause 7.7(d).

Clause 9.1(a) – Adult employees

21. We refer to paragraphs 100 – 102 of our submission dated 14 April 2016. That issue appears at item 21 of the Commission's summary of submissions. This is a matter that we have raised in respect of various exposure drafts. We refer in this regard to section 2.8 of our 14 April 2016 submission. The

addition of minimum hourly rates to clause 9.1 does not, however, resolve the matter identified by Ai Group.

22. The submissions we have earlier made regarding the desire for consistency and the need to revisit such clauses are here apposite. We also note that in the context of at least one other group 3 exposure draft, our submission has been agreed by the relevant interested parties and the amendment proposed has been made in a revised exposure draft.[5]

Schedule B.2.1 – Full-time and part-time shiftworkers – ordinary hours and penalty rates

23. We refer to the submissions we have made above regarding clause 7.7(d), and the use of the term "penalties". For the reasons outlined above, we confirm that we continue to press paragraph 115 of our 14 April 2016 submission.

Schedule H – Definitions – minimum hourly rate

24. ABI has proposed that a definition of "minimum hourly rate" be inserted in the Exposure Draft. The revised Exposure Draft contains such a definition at Schedule H:

> **minimum hourly rate** means the minimum hourly rate prescribed in clause 9.1(c)

25. Clause 9.1(c) does not, as such, *prescribe* the minimum hourly rate. Rather, it provides the basis upon which the minimum hourly rate prescribed by clause 9.1(a) has been derived.

26. Clause 9.1(c) should be deleted and the definition should be replaced with the following:

> **minimum hourly rate** means the minimum weekly rate prescribed by clause 9, divided by 38

[5] *Exposure Draft – Local Government Industry Award 2015*.

27. This will also ensure that the definition is not confined to the minimum hourly rate payable to adult employees at clause 9.1(a). It also includes the minimum rate payable to junior employees under clause 9.2.

3. EXPOSURE DRAFT – BUSINESS EQUIPMENT AWARD 2015

28. The submissions that follow relate to the revised *Exposure Draft - Business Equipment Award 2015* (Exposure Draft) dated 27 April 2016 and the Commission's summary of submissions dated 27 April 2016. They are in response to submissions filed by:

- the AFEI (15 April 2016);
- Business SA (15 April 2016); and
- ABI and the NSW Business Chamber (15 April 2016).

29. The *Business Equipment Award 2010* has been the subject of conferences before Commissioner Roe on 21 April 2016 and 29 April 2016. The technical and drafting issues arising from the Exposure Draft as well as substantive variations sought to the award were discussed during those conferences. We refer to Commissioner Roe's reports to the Full Bench dated 22 April 2016 and 2 May 2016 in this regard.

30. The Commissioner's report of 2 May 2016 at paragraph [2] states as follows:

> Unless parties advise otherwise in reply submissions due 5 May 2016 we proceed on the basis that the only matters outstanding from the submissions received in respect to the exposure drafts are set out below.

31. With respect, the report does not provide a complete list of outstanding matters arising from the Exposure Draft. As we identified during the aforementioned conferences, Ai Group was not in a position to deal with all matters arising from other parties' submissions at that time.[6] As a result, our concerns regarding certain proposals were not ventilated during those conferences. Having now had an opportunity to consider the material filed, we here provide our response to any such matters. We understand that the conduct of the conferences before Commissioner Roe were not intended to preclude parties from providing such a written response in accordance with

[6] See transcript of proceedings on 21 April 2016 at PN20 – PN25.

Justice Ross' directions of 23 March 2016.[7] As a result, the submissions that follow identify matters in respect of the Exposure Draft that, in Ai Group's view, remain outstanding.

Clause 2.3 – The National Employment Standards and this award

32. Ai Group opposes the ASU proposed variation to this provision but notes that it understands the proposal is now not pressed.

Clause 5.2 – Facilitative provisions

33. A resolution to this matter was reached in the second conference.

Clause 6.3(c) – Casual loading

34. Ai Group has raised concerns relating to this clause in our 14 April 2016 submission. The amended Exposure Draft attempts to rectify these concerns by inserting an hourly rates column in clause 9.2. We have identified difficulties with this amendment in our submissions relating to that clause.

Clause 6.4(c)(ii) – Casual loading

35. The issue Ai Group has identified remains to be addressed by the Full Bench.

Clause 6.4(c)(ii) – Casual loading

36. Ai Group wishes to pursue this matter. We note that while this issue is characterised in the report as a substantive matter we maintain that we are not pursuing a substantive change to the current award derived entitlement. We are instead opposing what we contend would be a substantive change to existing entitlements if the Exposure Draft is made in the manner proposed.

[7] [2016] FWC 1838.

Clause 8.3(c) – Flexibility in relation to breaks

37. Ai Group notes that the matters we raise at paragraph 139 of our previous submissions will be dealt with by the Full Bench and are not specifically addressed in the Commissioner's report.

Clause 9.2 – Minimum wages for adult employees

38. ABI has suggested that a minimum hourly rate column be inserted into clause 9. This suggestion has been adopted in the amended Exposure Draft.

39. It is not appropriate for the award to require the payment of a minimum hourly rate in the context of the Commercial Travellers Stream (clause 9.2(a)). Such employees are paid by reference to a weekly wage or an annual salary. There has not previously been an obligation to provide payment for each hour worked. We also note that this stream of employee is exempt from clauses related to payment of overtime etc.

40. We further note that clause 10.1 exempts employees in receipt of a salary above a certain level from various clauses. This includes clauses dealing with the payment of overtime. It would similarly not be appropriate for the award to require that such employees receive a specific minimum rate per hour.

41. To the extent that the Exposure Draft appears to give rise to an additional obligation to pay employees a minimum hourly rate it represents a substantive change to award derived entitlements. Ai Group appreciates that the Full Bench has determined that it will include hourly rates in awards in the interests of making them simpler and easier to understand, but contends that this approach should not be adopted in the context of awards that provide for or permit atypical remuneration structures.

42. The minimum hourly rates columns should be deleted from clauses 9.2(a)(i) and 9.2(a)(ii).

43. Any perceived lack of clarity related to the rate of pay for casuals or part-time employees can be addressed in the clauses governing these types of employment, if an amendment is deemed necessary.

Clause 11.3(b)(i) – Motor vehicle allowance

44. Ai Group notes that this matter is being further considered by the parties and we accordingly do not respond at this time.

Clause 11.4(c) – Expenses and accommodation reimbursement

45. It was agreed at the last conference that the contentious words would be deleted.

Clause 15 – Special provisions for shiftworkers

46. At paragraph 4.7 ABI has indicated that "there is merit in including a definition of "shiftworker." Ai Group understands that this suggestion is not being pressed and proceeds on this basis.

Clause 15.4 – Daylight saving

47. Ai Group reiterates our strong opposition to the substantive amendment proposed by the ABI.

Clause 16.3(d)(iv) – Paid rest break during overtime

48. Ai Group opposes the ASU proposal but we understand that it is not pressed.

Clause 17.2(b) Annual leave loading – Annual leave loading

49. The position reached at the last conference was that the references to "ordinary hourly rate" were to be deleted.

Schedule B – Summary of hourly rates of pay

50. Ai Group proposes to review the schedule once amended in light of the observations made by the AMod team (see paragraph 6 of 2 May 2016 report to Full Bench).

Clause B.3.2 – Full-time and part-time shiftworkers – overtime rates

51. We addressed our concerns regarding this provision at paragraphs 179 - 183 of our 14 April 2016 submissions. The potential problem there identified persists in the most recent Exposure Draft. We advise that we wish to have this issue determined by the Full Bench, as contemplated in the Commissioner's report. We have considered the matters raised by the Commissioner in the conference but remain concerned that the approach adopted in the Exposure Draft will result in an increase in employee entitlements in a manner that is contrary to the intention of these proceedings and the note contained in the preamble to the Exposure Draft. The alteration of penalty rates would represent a significant amendment to the award.

52. Clause 28 – Special provisions for shiftworkers, deals with various matters associated with the ordinary hours of work for shiftworkers. There is no reference to overtime in clause 28.

53. The heading of clause 28.2(e) refers to the "Rate for Sunday <u>Shifts</u>." It consequently appears that the purpose of the clause is to regulate the rates of work on a *shift* that falls on a Sunday. In the context of clause 28, the word shift is used to refer to or encompass ordinary hours of work.

54. Clause 30 of the current award deals with overtime rates for all employees. It does not exclude 'shiftworkers' from its application. Rather, there is an express reference to clause 28 Shiftworkers contained within the Award. The provision states;

> An employee who works in excess of or outside the employee's ordinary hours established in accordance with clause 27 ordinary hours of work and rostering <u>or clause 28 – Special provisions for shiftworkers</u>, of this award will be paid at the rate of time and a half for the first three hours and double time thereafter, until the completion of overtime.

55. The clause very specifically indicates what an employee who works outside of ordinary hours specified in clause 28 <u>will be paid</u> at the rate of time and a half. The award should not be read so as to simply ignore this provision in order to

deliver a more generous entitlement to employees than that which is expressly and specifically provided.

56. Although within clause 30 there is express acknowledgement of the provisions of clause 28 there is no limitation on the application of clause 30 in the context of weekend work. Nor is there any recognition that a higher rate may apply pursuant to clause 28.

57. The text of clause 28.2(e), and the broader context of the entirety of clause 28 and clause 30, suggests that the award should be interpreted so that the rate of pay for overtime for a shift worker is as determined in clause 30.

Schedule H – Definitions – ordinary hourly rate

58. The matter raised at paragraph 185 of our 14 April 2016 submission is not resolved if the hourly rates column is not inserted. We note that we have earlier in these submissions identified why the inclusion of such a column is problematic. Ai Group suggests that this matter should be considered at a further conference, if one is to be convened for other purposes.

4. EXPOSURE DRAFT – CLERKS – PRIVATE SECTOR AWARD 2015

59. The submissions that follow relate to the *Exposure Draft – Clerks – Private Sector Award 2015* (Exposure Draft). They are in response to submissions filed by:

- Business SA (15 April 2016)
- the AFEI (15 April 2016); and
- ABI and the NSW Business Chamber (15 April 2016).

Clause 5.2 – Facilitative provisions

60. We agree with ABI and the NSW Business Chamber's submissions regarding clause 5.2. We refer to paragraph 187 of our submissions dated 14 April 2016 in this regard.

Clause 6.3(d) – Casual employment

61. We do not oppose Business SA, ABI and the NSW Business Chamber's proposal, in response to the question posed in the Exposure Draft, that clause 6.3(d) be amended to make clear that the minimum payment prescribed applies "for each engagement". As varied, the clause should read as follows:

> Casual employees are entitled to a minimum payment of three hours' work <u>for each engagement</u> at the appropriate rate.

Clause 8.2(b) – Altering span of hours

62. We agree with the amendment proposed by Business SA. We refer to paragraph 213 of our submissions dated 14 April 2016 in this regard.

Clause 8.2(b) – Altering the span of hours

63. We agree with ABI and the NSW Business Chamber's interpretation of clause 8.2(b). We note that no interested party has sought a variation to this clause.

Clause 9.1(a) – Unpaid meal break

64. We agree with Business SA, AFEI, ABI and the NSW Business Chamber's interpretation of clause 9.1(a). We refer to paragraph 216 of our submissions dated 14 April 2016 in this regard.

Clause 13.1(a) – Definition of overtime

65. We do not oppose the amendment proposed by ABI and the NSW Business Chamber, but suggest that the words "exclusive of meal breaks" be inserted after "10 hours" so as to ensure that the provision is consistent with clause 8.1(d).

Clause 13.4(b)(i) – Where the employee does not get a 10 hour rest

66. Ai Group does not oppose the amendment proposed by the Commission to clause 13.4(b)(i) of the Exposure Draft.

Clause 14.1 – Definitions

67. The Exposure Draft queries whether a definition of "shiftworker" should be included "to clarify circumstances when shift allowances apply". Ai Group submits that no such definition is necessary. We agree with AFEI's submission in this regard.

68. Clause 14.4(a) states that "notwithstanding any other provisions of this award an employee may be <u>employed on shifts</u>". It then goes on to set certain parameters around the ordinary hours of work for such an employee. In our view, where an employee is employed by their employer on shifts, the employee is a shiftworker.

69. Shift allowances under clause 14.4(c) are payable where an employee is employed on shifts, and that employee performs ordinary hours of work such that one of the three definitions at clause 14.1 are met. In this way, the award is sufficiently clear as to when shift allowances are payable.

70. Ai Group strongly opposes Business SA's proposed definition of "shiftworker". It introduces the notion of an employee "being engaged to work <u>in a system of shifts</u>". This is a substantive change to the award which should not be made without proper consideration of the circumstances in which employees are presently employed on shifts, whether "a system of shifts" is implemented by employers in respect of their employees covered by this award and the cost implications of the proposed definition.

71. A definition that limits the circumstances in which an employee is considered a shiftworker is detrimental to employers covered by the award, as it would remove a current flexibility. It could result in the payment of day worker overtime rates to an employee who would presently be entitled to a lower shift allowance.

72. ABI and the NSW Business Chamber submit that it "considers there to be merit in including a definition of 'shiftworker'". It has not, however, advanced a specific proposal. Should it elect to do so at a later stage, we respectfully request that we be given an opportunity to respond.

Clause 14.2 – Altering span of hours

73. Ai Group agrees with Business SA's submission that clause 14.2 permits an increase to the span of hours at both ends. We note that no party has sought a variation to this provision.

Clauses 14.5(b) and 14.5(c) – Overtime

74. We agree with ABI and the NSW Business Chamber that there is a drafting error at clauses 14.5(b) and 14.5(c). We propose that it be addressed as outlined at paragraph 240 of our 14 April 2016 submissions.

Schedule G – Definitions – minimum hourly rate

75. Whilst we do not consider that the definition proposed by ABI and the NSW Business Chamber is necessary, we do not oppose its inclusion.

5. EXPOSURE DRAFT – COMMERCIAL SALES AWARD 2015

76. The submissions that follow relate to the revised *Exposure Draft - Commercial Sales Award 2015* (Exposure Draft) dated 27 April 2016 and the Commission's summary of submissions dated 27 April 2016.

Clause 9.1 Classification and minimum wages (Item 5 of the summary)

77. Ai Group reiterates our submissions at paragraph 233 to 246.

78. The summary of submissions identifies that the matter has been "resolved – for consistency no change in ED". Ai Group has raise this issue in many awards. We appreciate the benefit of adopting a consistent approach and would support, as far as possible, it being made across all exposure drafts in which the issue arises. We also note that adopting the proposed approach within awards reduces the need to ensure that the same outcome is properly provided for within the part-time and casual clauses.

4. The Ai Group proposal is advanced in the interests of the ensuring the wording in awards is accurate as well as easy and simple to understand.

5. We understood from the conferences that the matter was to be the subject of further consideration.

Clause 16.3 Public holidays (Item 11 of the summary)

79. The exposure draft deletes the words "in soliciting orders" from clause 16.3.

80. The variation was raised and briefly discussed during the first conference. It relates to a proposal advanced by the ABI.

81. Ai Group has further considered the matter and submits that the words should remain within the award.

82. The variation will expand the application of clause 16.3. It accordingly gives rise to an expansion of the entitlement provided by the clause. In practical

terms, it will increase the circumstances in which employees will be entitled to receive a very generous penalty rate.

83. The current wording is appropriate for the occupations covered by the award.

84. Ai Group contends that the objections alone should justify the retention of the current provision. We nonetheless note that there is no material before the Commission to enable a proper consideration of the impact the variation could have. The substantive change should not be made,

Schedule F – Definition of headquarters and home (Clause 10.2) (Item 4 of the summary)

85. The amended exposure draft includes a proposed definition of 'home' and a new definition of 'headquarters.' The amendments flow from ABI proposed specific definitions which where the subject of limited discussion at the first conference.

86. The amendments will affect the application of significant monetary entitlements.

87. Ai Group has further considered the changes and submits that the new definitions should not be included in the exposure draft.

88. Ai Group suggests the word "home" has a well understood ordinary meaning. The inclusion of a specific definition within the award for such commonly used term is unnecessary.

89. Ai Group is not convinced that the specific wording is suitable. Regardless, on the material before the Commission it cannot be concluded that the proposed definition of "headquarters" is appropriate.

17. Such a substantive amendment to the award should not be made without proper justification and the matter being given thorough consideration. At the very least, a level of certainty as to the impact that they will have in practice should be established before the change is made.

18. The proposal advanced is not accompanied by any consideration of the history underpinning the adoption of these terms in the award; the application of the provision in practice or the needs/circumstances of industry.

19. The catalyst for the inclusion of these new definitions was a question in the exposure draft. There is no proper basis for the Commission to conclude that the current terms of the award are either operating or being applied in a problematic manner in practice.

6. EXPOSURE DRAFT – CONTRACT CALL CENTRES AWARD 2015

90. The submissions that follow relate to the revised *Exposure Draft – Telecommunications Services Award 2015* (Exposure Draft) dated 27 April 2016 and the Commission's summary of submissions dated 27 April 2016. They respond to submissions filed by:

- ABI and the NSW Business Chamber (15 April 2016); and
- the AFEI (15 April 2016).

91. The *Contract Call Centres Award 2010* has been the subject of conferences before Commissioner Roe on 21 April 2016 and 29 April 2016. The technical and drafting issues arising from the Exposure Draft as well as substantive variations sought to the award were discussed during those conferences. We refer to Commissioner Roe's reports to the Full Bench dated 22 April 2016 and 2 May 2016 in this regard.

92. The Commissioner's report of 2 May 2016 at paragraph [2] states as follows:

> "Unless parties advise otherwise in reply submissions due 5 May 2016 we proceed on the basis that the only matters outstanding from the submissions received in respect to the exposure drafts are set out below".

93. With respect, the report does not provide a complete list of outstanding matters arising from the Exposure Draft. As we identified during the aforementioned conferences, Ai Group was not in a position to deal with all matters arising from other parties' submissions at that time.[8] As a result, our concerns regarding certain proposals were not ventilated during those conferences. Having now had an opportunity to consider the material filed, we here provide our response to any such matters. We understand that the conduct of the conferences before Commissioner Roe were not intended to preclude parties from providing such a written response in accordance with

[8] See transcript of proceedings on 21 April 2016 at PN20 – PN25.

Justice Ross' directions of 23 March 2016.[9] As a result, the submissions that follow identify matters in respect of the Exposure Draft that, in Ai Group's view, remain outstanding.

94. Matters raised by other parties that have not been pressed during the conferences or are to be the subject of further submissions from such parties, at the invitation of Commissioner Roe, may not be addressed in these submissions. In light of the conduct of the conference we proceed on the basis that such matters will not be considered at this time, if at all.

Clause 6.3(a)(iii) – Part-time employees

95. Ai Group has sought the deletion of the words "who do the same work" from clause 6.3(a)(iii). The amended Exposure Draft has not been altered to reflect this proposal, but Ai Group has been permitted to make further submissions.

96. We continue to press for the deletion of these unnecessary and potentially problematic words. There is no reason to introduce a notion that the operation of this provision is based on parity of work. We have raised this concern in respect of various group 2 awards where it was agreed amongst interested parties that the change should be made.

Clause 6.3(a)(iii) – Part-time employees (new issue)

97. On reflection, we also note that the new clause in the exposure draft provides for pro-rata "<u>pay and conditions</u> to those of full-time employees who do the same work." (emphasis added) There is no reference to such pay and conditions being limited to award derived entitlements.

98. Ai Group suggests that the former clause 11.2(c) ought to be reinstated.

[9] [2016] FWC 1838.

Clause 8.1 – Ordinary hours of work and rostering

99. Set out below are supplementary submissions in support of our proposed variation to clause 8.1, as contemplated by the 2 May 2016 report to the Full Bench.

100. Section 147 mandates that awards regulate ordinary hours of work for each type of employment permitted by the awards:

> **Ordinary hours of work**
>
> A modern award must include terms specifying, or providing for the determination of, the ordinary hours of work for each classification of employee covered by the award and each type of employment permitted by the award.
>
> Note: An employee's ordinary hours of work are significant in determining the employee's entitlements under the National Employment Standards.

101. Clause 8 of the award specifies or provides for the determination of ordinary hours of work for all employees. It provides that "the ordinary hours of work are to be 38 per week." There is no contemplation in clause 8 that the ordinary hours of work for either casual or part-time employees may be less than an average of 38 hours per week.

102. The concept of 'ordinary hours' within the award system represents a category of hours of work that fall within certain award defined parameters, such as a specific or average maximum weekly number of hours as well as a defined daily spread or span of hours. The standard approach adopted within awards is for all hours of work that do not constitute ordinary hours of work to instead constitute overtime; although this is not always expressly articulated.

103. Clause 6.1 of the Exposure Draft deals with casual employment but does not specify or provide for the determination of ordinary hours of work. This matter is accordingly left to clause 8. Given that clause defines the ordinary hours of work for all employees, there is no inherent deficiency in this approach. However, a casual may or may not be required to actually work 38 ordinary hours. Clause 8 provides that the ordinary hours of work are to be an average of 38 per week. Accordingly, it may be argued that clause 8 does not specify or provide for the determination of ordinary hours of work for casual

employees or it does in a manner that is at the very least confusing given, in practice, the actual ordinary hours of work performed by such employees may commonly be less than 38.

104. Clause 6.3(a) defines who is a part-time employee. Clause 6.3(a)(i) specifies that a part-time employee "…is engaged to work less than 38 ordinary hours per week". Clause 6.3(c) provides particular circumstances in which a part-time employee is (or is not) entitled to overtime rates.

105. Ai Group suggests that clause 8 be amended to reflect that the ordinary hours of work will be an average of <u>up to</u> 38 hours per week.

106. Ai Group suggests that the variation is necessary to ensure compliance with s.147 or, in the alternative, to make the award simple and easy to understand as contemplated by modern awards objective.

Clause 14.7 – Remote service / support

107. Ai Group understands that this clause will not be amended. We concur with this approach.

108. In response to the question in the Exposure Draft, and the submissions of ABI in relation to this matter, we note that clause 14.1(b) will only apply when the time worked undertaking the relevant service or support contemplated by the clause amounts to 4 or more hours.

Schedule B.1.1 – Full-time and part-time adult employees – all employees – ordinary and penalty rates

109. We refer to paragraphs 290 and 294 of our 14 April 2016 submissions. The change proposed at paragraph 294 has been made at B.2.1 of the revised Exposure Draft, however B.1.1 has not been amended. The reason for this is unclear.

Schedule H – Definitions – minimum hourly rate

110. ABI has proposed that a definition of "minimum hourly rate" be inserted in the Exposure Draft. The revised Exposure Draft contains such a definition at Schedule H:

> **minimum hourly rate** means the minimum weekly rate in clause 10.1 divided by 38 and rounded to the nearest cent

111. The above definition refers specifically to the minimum weekly rate prescribed in respect of adult employees. It does not contemplate the lower weekly rate payable to junior employees under clause 10.2. The effect would be to increase substantive entitlements due to employees under various award clauses that refer to the "minimum hourly rate".

112. Accordingly, the definition should be replaced with the following:

> **minimum hourly rate** means the minimum weekly rate prescribed by clause 10, divided by 38 and rounded to the nearest cent

7. EXPOSURE DRAFT – ELECTRICAL POWER INDUSTRY AWARD 2016

113. The submissions that follow relate to the *Exposure Draft – Electrical Power Industry Award 2016* (Exposure Draft). They are in response to submissions filed by:

- the CEPU;
- the AWU (19 April 2016); and
- the CFMEU – Mining and Energy Division (April 2016).

Clause 5.2 – Facilitative provisions

114. Whilst we do not consider that the amendment proposed by the CFMEU – Mining and Energy Division is necessary, we do not oppose it on the basis that it properly reflects the terms of the relevant provisions.

Clause 6.3 – Full-time employees

115. The provision proposed by the AWU is not necessary and should not be inserted. It appears uncontroversial that where an employee works in excess or outside ordinary hours, overtime rates are payable under the award. In the case of a full-time employee, this is not limited to circumstances in which the employee works in excess of 37.5 ordinary hours in a week. For instance, overtime rates may also be payable for work performed outside the relevant spread of hours.

116. The insertion of a clause that describes some but not all of the circumstances in which overtime rates apply is potentially misleading and likely to lead to confusion. We also note that there is no evidence that the terms of the award as they presently operate have given rise to any ambiguity as to when overtime rates are payable to full-time employees.

117. On this basis, the AWU’s proposal should not be adopted.

Clause 6.4(c) – Part-time employment

118. We agree that the variation proposed by the AWU and CFMEU – Mining and Energy Division should be made. We refer to paragraph 301 of our 14 April 2016 submissions in this regard.

Clause 6.4(d) – Part-time employees

119. We agree that the variation proposed by the CFMEU – Mining and Energy Division should be made. We refer to paragraph 301 of our 14 April 2016 submissions in this regard.

Clause 6.5(d) – Casual employees

120. We agree with the AWU and CFMEU – Mining and Energy Division that "entitlements" should be replaced with "attributes". We refer to paragraph 303 of our 14 April 2016 in this regard.

Clause 6.5(e) – Casual employees

121. We agree with the AWU, CFMEU – Mining and Energy Division and CEPU's submission that "ordinary" should be replaced with "minimum". We refer to paragraph 304 of our 14 April 2016 in this regard.

Clauses 9.4 and 9.6 – Breaks

122. Ai Group does not disagree with the unions' proposition that clauses 9.4 and 9.6 may apply to day workers and/or shiftworkers in the circumstances there prescribed.

Clause 9.7(d) – Ten hour break

123. In response to the question contained at clause 9.7(d), we have not identified any difficulty arising from the drafting of this provision. This is consistent with the position of the AWU, CFMEU – Mining and Energy Division and CEPU.

Clause 10.1 – Minimum wages

124. We agree that 'pay level 8' should be amended as proposed by the CFMEU – Mining and Energy Division. We refer to paragraph 310 of our 14 April 2016 submissions in this regard.

Clause 10.2(b)(vi) – Apprentices

125. We do not oppose the CFMEU – Mining and Energy Division's proposal that the reference to Schedule D be removed on the basis that it does not appear in the current clause 17.2(b)(vi).

Clause 10.2(b)(vi) – Apprentices

126. Ai Group has considered the matter raised by the CFMEU – Mining and Energy Division. Having regard to the Commission's decision to insert the relevant provisions during the two year review[10], it is our view that the exclusion of school based apprentices properly reflects the Full Bench's intention.

Clauses 10.7(a) and (b) – Higher duties

127. The AWU seeks a substantive change to clauses 10.7(a) and (b). As we have repeatedly submitted, this redrafting process is not intended to give rise to substantive changes. Indeed we direct the AWU's attention to the cover page of the Exposure Draft which states, at the conclusion of the first paragraph, that the "exposure draft does not seek to amend any entitlements under the Electrical Power award but has been prepared to address some of the structural issues identified in modern awards".

128. Similarly, the directions issued by Justice Ross in respect of the group 3 exposure drafts required parties to file submissions regarding "technical and drafting issues". Despite this, the process has repeatedly been utilised by certain unions to seek substantive changes to various award provisions,

[10] *Modern Awards Review 2012 – Apprentices, Trainees and Juniors* [2013] FWCFB 5411, see in particular paragraph [288].

absent a proper merit case which would otherwise be necessary in order to achieve such an award variation.

129. The amendment sought by the AWU is opposed. Its submissions acknowledge that the intention of the change is to increase the breadth of the application of the clause. There is no material, in the form of either submissions or evidence, which might establish that the clause proposed is necessary to achieve the modern awards objective. The AWU's submissions should not be entertained.

Clause 10.7(b) – Higher duties

130. We agree with the CFMEU – Mining and Energy Division and AWU that references to accident pay should be deleted. We refer to paragraph 311 of our 14 April 2016 submissions in this regard.

Clauses 11.2(a)(i) and (ii) – Availability allowance

131. In light submissions made regarding the application of clause 11.2(a), the word "days" should be replaced with "weeks" in clauses 11.2(a)(i) and (ii).

Clause 13.1 – Overtime

132. The CFMEU – Mining and Energy Division and CEPU state that when calculating overtime rates, each day stands alone. Ai Group agrees. We submit that a provision to this effect should be inserted in clause 13.1 for the purposes of ensuring that the award is simple and easy to understand.

133. Ai Group concurs with the CFMEU – Mining and Energy Division's description as to the circumstances in which overtime rates are payable. That is, overtime rates are payable for work performed in excess or outside ordinary hours of work.

Clause 14.3(a) – Additional monetary entitlements

134. We do not oppose the amendment proposed by the AWU and CFMEU – Mining and Energy Division to clause 14.3(a).

Clause 14.7 – Payment on termination of employment

135. We agree with the AWU, CFMEU – Mining and Energy Division and CEPU's submission that "ordinary" should be replaced with "minimum". We refer to paragraph 313 of our 14 April 2016 in this regard.

Clause 14.7 – Payment on termination of employment

136. Ai Group agrees with the CFMEU – Mining and Energy Division and the AWU that clause 14.7 applies to accrued *annual* leave. We submit that the word "annual" should be inserted before "accrued" to make this clear.

Clause 14.7 – Payment of termination on employment

137. The AWU's submissions propose a substantive change to clause 14.7, which goes to the *rate* at which an employee is to be paid for accrued annual leave at the termination of employment. In doing so, it seeks to agitate a contentious issue (that being the proper construction of s.90(2) of the Act), which is also the subject of an ACTU claim (AM2014/47 Annual Leave). The variation proposed is opposed by Ai Group.

138. Contrary to the AWU's submissions, the *Electrical Power Industry Award 2010* is one of the awards that the ACTU seeks to vary.[11] Should the AWU press its proposed variation, the matter should be referred to the Full Bench that has been constituted to deal with the ACTU's claim.

Clause 15.2 – Personal/carer's leave and compassionate leave

139. We do not oppose the unions' submissions that clause 15.2 refers to personal/carer's leave.

Schedule G – 2015 Part-day public holidays

140. Whilst we do not necessarily oppose the AWU's proposal, we note that these provisions contain standard wording that appears in all modern awards.

[11] See correspondence and draft determinations filed by the ACTU dated 21 May 2016.

8. EXPOSURE DRAFT – HORTICULTURE AWARD 2016

141. The submissions that follow relate to the *Exposure Draft – Horticulture Award 2016* (Exposure Draft). They are in response to submissions filed by:

- the AWU (17 April 2016);
- United Voice (15 April 2016);
- the NFF (14 April 2016);
- the SA Wine Industry Association (14 April 2016);
- the AFEI (15 April 2016); and
- ABI and the NSW Business Chamber (15 April 2016).

Clause 1.2 – Title and commencement

142. Ai Group shares the NFF's concern relating to the wording of clause 1.2.

Clause 2.1 – The National Employment Standards and this award

143. We do not oppose the NFF's submission regarding the references to the NES in full.

Clause 2.3 – The National Employment Standards and this award

144. The NFF raises a salient point about the possibility that there may be circumstances where it is not appropriate or feasible to make the award and NES available through the use of either a notice board or by electronic means. Nonetheless, we do not support the specific amendment proposed by the NFF given the proposed deletion of a reference to "electronic means". There is merit in the terms of the award expressly clarifying that it is sufficient to make the document available electronically.

145. Ai Group suggests the following clause substituted for the provision:

> The employer must ensure that copies of the award and the NES are available to all employees to whom they apply. This may be achieved by making them available electronically, on a noticeboard which is conveniently located at or near the workplace, or through some other reasonable accessible means.

146. If the clause is to be amended a consistent approach should be adopted across all awards.

Clause 3.2 - Coverage

147. The NFF has identified the duplication of the definition of “horticulture industry” in clause 3.2 and Schedule H. We do not oppose the NFF’s proposal in this regard.

Clause 3.4(a) – Coverage

148. We do not oppose the amendment proposed by the NFF.

Clause 3.5 – Coverage

149. We do not oppose the amendment proposed by the NFF.

Clause 3.6 – Coverage

150. The change proposed by the NFF would result in the deletion of the words “and/or parts of industry”. To this extent, we do not agree that the amendment sought should be made. We consider that those words make clear that to be covered by the award, the apprentices and/or trainees need not be engaged in all or every part of the industry as defined or described by the award. Rather, it is sufficient that such apprentices and/or trainees are engaged in parts of it.

151. We are concerned that the deletion of the relevant words may result in the provision being interpreted such that the apprentices and/or trainees must necessarily be engaged in every part of the industry. This would be a substantive change to the current award. We also note that this is a standard clause that appears in similar if not identical terms in the very vast majority of modern awards.

Clause 5.1 – Facilitative provisions

152. Whilst we do not oppose the changes proposed by the NFF, we do not consider that they are necessary. We note that this the text of this provision reflects the Commission's earlier decision[12] and has been adopted in most, if not all, exposure drafts.

Clause 5.2 – Facilitative provisions

153. We do not consider that the clauses 4.1 – Award flexibility, 16.7 – Paid leave in advance of accrued entitlement or 24.3 Dispute resolution are facilitative provisions in the sense contemplated by clause 5.1 and therefore the references to such provisions should not be inserted in clause 5.2 as proposed by the NFF.

Clause 6.4 – Part-time employees

154. The AWU has indicated support for amending the provision based on the amendment proposed by the NUW in the context of the context of the separate casual and part-time employment common claims proceedings. This proposal should be left to the Full Bench conducting those proceedings.

Clause 6.5(c)(i) – Casual loading

155. Ai Group does not oppose the NFF proposed amendments to this provision. In the event that the AWU's claim to amend the award in order to provide casual employees with access to overtime rates is successful there may be a need to revisit this matter.

Clause 8.1(a)(iii) – Ordinary hours and roster cycles

156. The AWU has proposed the replacement of the word "should" with "shall."

157. The Exposure Draft's use of the word *should* is consistent with the approach in the current award.

[12] [2014] FWCFB 9412 at [37] – [43].

158. Ai Group agrees with the union's submissions to the extent that they appear to infer that the word "*should*" arguably does not create "a binding legal obligation" to limit ordinary hours to 12 per day.

159. The union suggests, in effect, that the intent of the clause is to specify the maximum hours of work. Whilst we doubt the purpose of the clause is to restrict hours of work to 12 hours per day, we accept that it *may* be intended to limit *ordinary* hours of work to 12 per day. Nonetheless, there is no material before the Commission that would substantiate this proposition.

160. The AWU proposed change should not be made absent consideration of the historical basis for the current wording and/or evidence of the practical application of the current provision.

Clause 8.1(a)(iv) – Ordinary hours and roster cycles

161. We do not have any opposition to the AWU proposed change to this clause.

Clause 9.2 – Rest Break

162. Ai Group opposes the AWU's proposed amendment to the clause. It would result in a substantive increase to employee entitlements and as such is not appropriately considered as part of this process.

163. Ai Group addressed the question contained in the Exposure Draft at paragraph 329 of our 14 April 2016 submissions.

Clause 9.3(a) – Ten hour break after ceasing work for the day

164. The AWU suggests amendment to clause 9.3(a) is required in order to eliminate an ambiguity which could arise in certain stated circumstances. Ai Group is unaware of any practical problem arising from the current wording of the award.

165. No ambiguity could be said to arise where a shift worker finished work on one day and then recommenced work later that day. The circumstance is simply not caught by the clause so as to provide an entitlement.

166. Regardless, it is not clear that the AWU proposal would clarify anything. The wording still appears to require a 10 hour break between working on one day and commencing work on the next day.

167. Instead the proposal appears to simply be an attempt to introduce a new requirement that there be a 10 hour break between "shifts". The AWU proposed amendment should not be made.

168. However, if the Commission is concerned about a possible ambiguity, clause 9.3 could simply be amended to clarify that it does not apply to shift workers.

Clause 10.2 – Pieceworkers

169. Business SA suggests that pieceworkers should be paid their standard rate when accessing annual leave. We are uncertain what they contend constitutes the standard rate.

170. The NFF contends that permanent employees receive the "…applicable base rate for ordinary hours".

171. At paragraph 10.2 the AWU points, not unfairly, to a lack of clarity around what rates are paid to a pieceworker when accessing relevant paid leave. They then proceed to suggest a clause that would appear to establish a new entitlement for employees. Putting aside the matter of whether such a term would by appropriate or necessary, we note that it fails to address the real deficiency in the current clause; the absence of a meaningful definition of "base rate of pay" and "full rate of pay" for piece workers.

172. To the extent that the Full Bench intends to clarify the drafting of the award provisions, Ai Group suggests that the starting point is the identification of what amount would currently be required to be paid. The Exposure Draft should then be amended to clearly express this.

173. Clause 15 deals with piece workers. It does not indicate that the piecework rate is paid when an employee accesses any form of leave under the NES. Nor does it limit the application of the rate to the working of ordinary hours of

work. Rather, it is paid for all work performed in accordance with the piecework arrangement.

174. Section 21 of the Act defines a pieceworker. Put simply, an employee to whom an award applies is a pieceworker if an award defines or describes them as such. Clause 15.1 of the award defines who constitutes a pieceworker for this purpose.

175. Section 148 of the Act sets out a requirement that award either specifies or provides for the determination of the base rate of pay and full rate NES purposes provides:

> If a modern award defines or describes employees covered by the award as pieceworkers, the award must include terms specifying, or providing for the determination of, base and full rates of pay for those employees for the purpose of the National Employment Standards**.**

176. Section 16 defines the term 'base rate of pay'. Section 16(1) provides a general meaning and s.16(2) effectively provides that for the purposes of determining entitlements under the NES a substituted meaning derived from an award must be adopted when "…*a modern award applies to employees and specifies the employee's base rate of pay for the purposes of the NES*."

177. Section 18 defines the term "full rate of pay", and provides for both a general and pieceworker meaning in a comparable manner to that adopted under section 16 in relation to base rates.

178. The NES does not define the terms "base rate of pay" or "full rate of pay." The terms are nonetheless used in the provisions setting out the NES.

179. Clause 15.10 of the award purports to define the base rate of pay and full rate of pay of a shift worker for the purposes of the NES. However, the definition is somewhat circular. It also assumes that the NES defines the base rate of pay. The clause states:

> For the purpose of the NES:
>
> (a) The base rate of pay for a pieceworker is the full rate of pay as defined in the NES

(b) The full rate of pay for a pieceworker is full rate of pay as defined in the NES.

180. Nonetheless, it appears that the intent of the clause's framers *may* have been to adopt the general meaning of either the term base rate of pay or full rate of pay.

181. The NES provides that paid annual leave, compassionate leave and personal/carers leave are paid at the "base rate of pay".

182. Paid annual leave would be required to be paid in accordance with clause 25.5 of the current award. However, if it is assumed that the reference to wages in this clause included piece rates, it is doubtful that this could always be sensibly applied. It would require knowledge of the amount of piece work that would notionally have been performed had the employee worked.

183. Clause 25.5 is a common set of words found in many awards. It is not apt to address the operation of piece rates. There is no indication in the relevant award modernisation decisions to suggest that its application to piece rate workers was expressly contemplated. It nonetheless does not exclude such workers from its application.

184. It appears that, subject to the operation of clause 25.5 (which deals with payment for a period of annual leave), the rates contained in clause 14.1 of the current award would be the minimum rate applicable when an adult employee accesses paid personal/carers leave, compassionate leave or jury service leave.

185. The award does not expressly require that piece rates be applied when an employee accesses paid leave. Instead clause 15.2 provides that the rates are paid for. "…all work performed…"

186. It is doubtful that the piece rates contemplated by the award could constitute the "base rate of pay" as defined in s.16(1) of the Act. They are arguably incentive based payments. They are also payable for "work performed" rather than for ordinary hours of work, as contemplated by s.16(1). Regardless, it is

unclear how they could be applied in the context of NES entitlements referable to an hourly rate of pay.

187. Clause 10.2(j)(i) replicates clause 15.10(a) of the current award.

188. Ai Group suggests that clause 10.2(j)(i) should be amended to state:

> The base rate of pay for a pieceworker is the applicable minimum hourly rate specified in clause 10.1.

189. This would remove any doubt about the award's conformity with the requirements of s.148. It would appear to be consistent with the intent of the current award terms.

190. The proposals advanced by the AWU would reflect a substantive alteration to award entitlements. There is no basis for suggesting that an employee should receive the "full rate of pay" for annual leave or jury service leave. The suggested reference to the relevant regulations cannot be justified by reference to the current terms of the award.

191. To the extent that the Commission may be concerned about the operation of clause 25.5 of the current award (clause 16.4 in the Exposure Draft) it should referred to a conference for further discussion between the parties. Alternatively, the clause ought to be amended to exclude pieceworkers from its application.

192. The newly inserted note does not properly reflect the circumstances of pieceworkers. Whether this requires amendment will depend in part on whether there is to be any other alteration to the clause 10.2(j)(i).

Clause 11.2 – Wage related allowances

193. Ai Group agrees with the submissions of other parties that indicate that the allowances for tools and equipment and travelling should not be characterised as all purpose allowances.

Clause 11.3 – Expense related allowance

194. Ai Group does not oppose the variation proposed by the NFF.

195. Ai Group does not oppose the variation proposed by the Voice of Horticulture at paragraph 3(a).

196. The concern raised by the Voice of Horticulture at paragraph 3(b) is valid. There is merit in amending clause 11.3 to clarify that the exclusion provided by 11.3 only applies to the operation of 11.3(a).

Clause 14 – Shift work

197. Ai Group does not believe the definitions proposed in point 4 of the Voice of Horticulture submissions are necessary or appropriate.

198. The definitions are somewhat circular. It is unhelpful to include a reference to loadings in the definition of day shift. Whether a loading is paid or payable should not govern what constitutes a particular type of shift, the time at which it is performed should.

199. We are also concerned that the inclusion of the proposed “day shift” definition combined with the proposed shift definition may lead parties to believe that people engaged on day shifts, as defined, are shift workers.

Clause 15 – Overtime

200. The NFF raises concerns about the content of clause 15.1 of the Exposure Draft. Ai Group has addressed this clause at paragraphs 332 and 333 of our 14 April 2016 submissions.

Clause 15.2 – Time off instead of payment for overtime

201. We do not oppose the addition of the word “hours” as proposed by the Voice of Horticulture at paragraph 5(a) of their submissions. However, the amendments proposed by the Voice of Horticulture at paragraphs 5(b), 5(c) and 5(d) appear unnecessary.

202. The AWU has raised concerns about clause 15.2. Such concerns should be dealt with as part of the relevant common claims proceedings.

203. We are unaware of any outcome of the NFF and AWU discussions referred to in clause 20 of the AWU submissions. We request an opportunity to comment on any material put to the Commission as a product of those discussions.

Clause 15.4 – Meal allowance

204. Ai Group does not oppose the deletion of clause 15.4 as proposed by both the NFF and AWU. This would remove any need for the amendment proposed by the Voice of Horticulture at paragraph 5(e) of their submissions.

Clause 16.8 – Proportionate leave on termination

205. The AWU proposes that clause 16.8 is inconsistent with the operation of s.90(2) of the Act. This concern overlaps with a matter being dealt with as part of the annual leave common issues proceedings and should be considered by the Full Bench dealing with that matter. We accordingly do not propose to comprehensively address the flaws in the AWU's proposed amendment.

206. The AWU proposal should not be adopted. It seeks to create an award derived obligation to pay annual leave at a rate that is higher than the award previously required. No merit based case for such a variation has been advanced for such a change other than conformity with the requirements of the NES.

207. If the Full Bench determines it is appropriate to address a deficiency in the provision it should merely delete clause 16.8 in its entirety. We note clause 16.1 directs readers to the fact that annual leave is provided for in the NES.

208. Ai Group has advanced submissions in the relevant common claims proceedings in support of this approach being adopted whenever such a situation arises in modern awards.

Schedule G – Definitions – all purposes

209. At paragraph 14 of their submissions the NFF suggest alterations to the definition of all purposes. They suggest that the defined term be "all purpose allowance." We do not see why this particular amendment is necessary. The proposed definition of "all purpose" contained within the exposure draft is consistent with the approach determined by the Full Bench.

210. Nonetheless, the NFF submission does highlight a related issue. The definition of "all purpose" included in the schedule is inconsistent with the first sentence of clause 11.2. That sentence defines what an "all-purpose allowance" is, but does so using the term "all purpose". It does not appear that the term "all purpose" is used elsewhere in the award. Using the defined term "all purpose" in a sentence that defines what an "all-purpose allowance" is represents a somewhat cumbersome and arguably anomalous approach. Accordingly we suggest that either the first sentence of 11.2(a) or the definition of all purposes included in the relevant schedule should be deleted.

211. We do not oppose the NFF's proposed inclusion of the words "(other than the casual loading)" in the definition of all purposes. Under the current award the casual loading is calculated on the minimum hourly rate excluding any allowance and the Exposure Draft should be amended to reflect this. The approach in the Exposure Draft will increase employer costs. However, we suggest that this should also be addressed through making a corresponding amendment to clause 11.2 and an amendment to clause 6.5(c)(ii). We refer to paragraphs 320 – 321, as well as section 2.5 of our 14 April 2016 submissions.

Schedule G – Definitions – horticultural crops

212. The AWU has indicated that the definition of "horticultural crops" will need to be revisited following the change to the definition of "broader field crops" made during the review of the *Pastoral Award 2010*. It is unclear what variation the AWU is proposing.

213. Ai Group nonetheless notes that it also holds concerns over the interaction between the coverage of the *Pastoral Award 2010* and *Horticultural Award 2010* in light of the variation made to *the Pastoral Award 2010*.

Schedule H – Definitions – standard rate

214. The NFF submits that the definition of "standard rate" is of limited relevance under the Exposure Drafts and should be deleted. We respectfully disagree.

215. Various allowances in the *Horticulture Award 2010* are calculated by reference to the standard rate. They are expressed in the body of the award as a percentage of the standard rate. The Exposure Draft takes a different approach to the manner in which the allowances are set out. The body of the award contains the monetary amount payable, whilst the formula for deriving the quantum has been relocated to a schedule to the Exposure Draft.

216. The effect of each approach is the same. The allowance is calculated and adjusted using the same method; that is, by reference to the standard rate. During the Part 10A award modernisation process, the AIRC expressly considered the rationale for adopting this approach.[13]

217. For this reason, the definition remains relevant and should be retained.

Schedule H – Definitions - wine industry

218. At paragraphs 14 and 16 the NFF suggest amendment to the definition of *wine industry*.

219. The change proposed represents a substantive alteration to the award provisions that could impact upon award coverage. The Commission should accordingly only make the variation if satisfied that it is appropriate in practice.

220. Ai Group is not aware of any difficulties flowing from the current award terms.

[13] [2008] AIRCFB 1000 at [74] – [78].

9. EXPOSURE DRAFT – LEGAL SERVICES AWARD 2015

221. The submissions that follow relate to the *Exposure Draft – Legal Services Award 2015* (Exposure Draft). They are in response to submissions filed by:

- K&L Gates on behalf of its clients (13 April 2016);
- Business SA (15 April 2016)
- the AFEI (15 April 2016); and
- ABI and the NSW Business Chamber (15 April 2016).

Clause 3.2 – Coverage

222. Whilst we understand the issue that ABI and the NSW Business Chamber seek to address, we do not support the proposed amendment to clause 3.2. When read with clause 3.1, it would have the effect of requiring that in order to be covered by the award, the relevant employer must be "in the industry engaged in the business of providing legal and legal support services". This is because the "legal services industry" would be defined as the "industry engaged in the business of" providing the services there described.

223. It is both anomalous and confusing to define an industry by reference to the industry itself. Further, it is unclear how an assessment would be made as to whether a particular employer is in the "*industry* engaged in the business of legal and legal support services". This gives rise to questions regarding the parameters of that industry; the very issue that the definition is intended to address.

224. The intention of the current coverage clause and definition, as we understand it, is to include those employers who are engaged in the business of providing legal and legal support services. Such employers constitute the "legal services industry". We consider that the meaning of clauses 3.1 and 3.2 are sufficiently clear. Notably, no interested party has identified any practical difficulty arising

from them. In light of this, we submit that ABI and the NSW Business Chamber's proposal should not be adopted.

Clause 11.2(b) – Meal allowance

225. We support the amendment proposed by ABI and the NSW Business Chamber.

Clause 13.4(c) – Calculating shift penalties

226. The Exposure Draft queries whether there is an inconsistency between clauses 13.4(c)(ii) and 13.4(c)(iii). Ai Group submits that the relevant provisions are not inconsistent and that they should not be varied.

227. Provisions in the form found at clause 13.4(c) are not uncommon. We refer for example to clauses 37.5(d) and (e) of the *Manufacturing and Associated Industries and Occupations Award 2010*, which are in virtually identical terms. See also clauses 25.9(b) and (c) of the *Concrete Products Award 2010*; clauses 55.6(d) and (e) of the *Vehicle Manufacturing, Repair, Services and Retail Award 2010*; and clauses 31.5(c) and (d) of the *Food, Beverage and Tobacco Manufacturing Award 2010* for further examples.

228. Each of the subclauses under 13.4(c) serve a separate purpose.

229. Clause 13.4(c)(i) applies where a shift commences between 11pm and midnight *on a Sunday or public holiday*. In this case, the time worked before midnight does not entitle the employee to the Sunday or public holiday rates.

230. Clause 13.4(c)(ii) applies where a shift commences before midnight *the day before a Sunday or public holiday*. Where that shift extends into the Sunday or public holiday, the employee is entitled to the Sunday or public holiday rate for the entire shift.

231. Clause 13.4(c)(iii) corresponds with the current clause 31.4(d). It applies "where shifts fall partly on a public holiday"; that is, where an employee works two shifts, both of which fall partly on a public holiday. In such circumstances, only one of those shifts will be regarded as a public holiday shift. The

provision stipulates that of those shifts, it will be that of which the major portion falls on the public holiday that will be regarded as the public holiday shift. The “major portion” is to be assessed by reference to the number of hours worked on the public holiday. The intention of the clause is to limit the benefit of public holiday entitlements such that they are not payable to an employee whilst working both into and out of a public holiday. Clause 13.4(c)(ii) effectively operates subject to clause 13.4(c)(iii).

232. For the reasons we have here outlined, we agree with the submission of ABI and the NSW Business Chamber. Clause 13.4(c)(iii) should be amended by replacing the opening words with “where shifts fall …”.

233. The changes proposed by Business SA, AFEI and K&L Gates would amount to substantive changes to the award and ignore the underlying intent of the current clauses. Their proposals should not be adopted.

Schedule G – Definitions – legal services industry

234. Whilst we have not identified any difficulty arising from the duplication of the definition, we do not oppose its deletion from Schedule G as proposed by AFEI.

10. EXPOSURE DRAFT – LOCAL GOVERNMENT INDUSTRY AWARD 2015

235. Ai Group filed submissions in reply regarding the *Exposure Draft – Local Government Industry Award 2015* on 26 April 2016. Further written advice was also provided on 4 May 2016.

11. EXPOSURE DRAFT – MARKET AND SOCIAL RESEARCH AWARD 2015

236. Ai Group has a significant interest in the *Market and Social Research Award 2010*. We have filed submissions in relation to the *Exposure Draft – Market and Social Research Award 2015* (Exposure Draft), dated 14 April 2016.

237. It appears that no other organisation has filed submissions regarding the Exposure Draft. As a result, the need to make submissions in reply does not arise.

12. EXPOSURE DRAFT – MISCELLANEOUS AWARD 2015

238. The submissions that follow relate to the *Exposure Draft – Miscellaneous Award 2015*. They are in response to submissions filed by:

- the AFEI (15 April 2016); and
- ABI and the NSW Business Chamber (15 April 2016).

Clause 7.1(d) – Classifications

239. We agree with the submissions of AFEI, ABI and the NSW Business Chamber that a definition of “sub professional employee” is not necessary.

13. EXPOSURE DRAFT – SEAGOING INDUSTRY AWARD 2016

240. The submissions that follow relate to the *Exposure Draft – Seagoing Industry Award 2016* (Exposure Draft). They are in response to submissions filed by:

- MIAL (14 April 2016); and
- the MUA (14 April 2016).

Clause 6.2 – Effect of Temporary Licences

241. Ai Group would in principle support a re-wording of clause 6.2 as suggested by MIAL to confirm that Schedule A applies to vessels *operating* under a temporary license that has been granted, rather than simply being granted a licence.

New Schedule A – Vessels Granted a Temporary Licence

242. Ai Group does not oppose the retention of the current Part B as sought by MIAL, instead of the proposed Schedule A. Ai Group confirms that the reference to "Part B" as applying to vessels operating under a temporary license is well understood in the industry.

Clause 7.2 – Full-time employees

243. Ai Group shares the view of MIAL and the MUA that clauses 7.2 and 14.2(e) are not inconsistent.

Clause 9 – Breaks

244. Ai Group shares the views of MIAL and the MUA that clause 9 does not require clarification in respect of whether or not the break is paid or unpaid, given the payment of annual salaries under the award.

Clause 10.2 – Classifications and minimum wage rates

245. Ai Group does not oppose MIAL's suggestion that clause 10.2 be updated to refer to the relevant regulation given the current reference is no longer relevant.

Clause 10.3 – Classifications and minimum wage rates

246. Ai Group does not oppose the MUA's view that no overtime formula is needed to clarify clause 10.3 of the award.

Clause 12.9(b) – Trappings

247. While Ai Group understands the MUA's proposed general definition of "trappings" as "articles of equipment or dress", if the award were to adopt such a definition, then it would create potential overlap with the allowances already provided for required uniforms and protective clothing in clauses 12.9(a) and (c) respectively. Clause 12.9 also deals with industrial clothing as referred by the title of the sub-clause. Clothing does not cover the broad use of 'equipment'. For this reason we do not support defining "trappings" using the MUA's definition.

Clause 14.2 – Calculation of leave entitlement

248. Ai Group does not seek the clarification of clause 14.2 (in respect of "other things") as queried by the Exposure Draft. This view is also shared by MIAL and the MUA.

Schedule A.3.1 – Ordinary hours of work

249. Ai Group considers that clause A.3.1(a) is not inconsistent with the NES. In addition to Ai Group's earlier submission dated 25 June 2015, Ai Group notes the following.

250. The relevant NES provision is s.62 of the Act, which deals only with maximum hours of work. Specifically under s.62(1):

> An employer must not request or require an employee to work more than the following number of hours in a week unless the additional hours are reasonable:

(a) for a full-time employee – 38 hours; and

(b) for an employee who is not a full-time employee – the lesser of:

(c) 38 hours; and

The employee's ordinary hours of work in a week.

251. Section 62 does not deal with whether or not hours are ordinary or overtime hours, but regulates maximum weekly hours at 38 and conditions any additional hours required as being reasonable. Section 62(3) provides a number of factors that are to be taken into account in determining what is reasonable.

252. Clause A.3.1(a) states only that "the ordinary hours of work will be eight hours per day from Monday to Friday." It does not provide that an employer can request or require an employee to work more than 38 hours per week.

253. The effect of the NES (s.62) on clause A.3.1(a) would be that if an employer were to direct an employee to work eight hours per day Monday to Friday such that the total weekly hours were greater than 38 hours, then the additional 2 hours must be reasonable additional hours as informed by s.62(3).

254. Accordingly, Ai Group considers that prima facie there is no inconsistency between s.62 and the terms of clause A.3.1(a) and that there is no sound basis on which to vary the award.

255. Relevant of course to s.62(3) is subsection (g): the usual patterns of work in the industry, or the part of an industry, in which an employee works. Industry practice of 8 hour days has formed the basis of calculating and setting the minimum wages prescribed for employees on temporary licensed vessels in A.1.1, where such wages are calculated on a 40 hour week.

256. Added to this would be the matter we raised in our earlier submission on 25 June 2015 that vessels operating under a temporary license are not covered by the Act or the award for long, ongoing periods throughout their sea journey.

257. In summary, Ai Group’s position is that no inconsistency arises between the terms of clause A.3.1. and s.62 of the Act and therefore no variation is required.

258. Ai Group strongly opposes the amendment sought by the MUA

259. The MUA’s amendment is to the award provision regulating the payment of overtime, not to sub-clause A.3.1(a). It does not address the relationship between A.3.1(a) and s.62, but instead creates a new entitlement to an overtime penalty after 38 hours per week, being a substantive change from the current 40 hour week threshold.

260. As referred toabove, s.62 does not require employers to pay overtime after 38 hours, but only limits the number of maximum hours to 38 per week.

261. As the award provides for minimum weekly rates for Part B employees calculated on a 40 hour week, the MUA’s amendment would result in additional costs for employers in respect of creating a new penalty obligation for the two hours worked beyond 38 hours per week.

262. The MUA’s amendment would also disturb the quantum of minimum rates set for Part B employees which are calculated on a 40 hour week, and any associated wage relativities with the minimum wages in other awards.

263. The MUA’s amendment should be rejected. Ai Group submits that the current wording is appropriate and should be retained.

Schedule A.4.1 – Leave

264. Ai Group refers to its earlier submission dated 25 June 2015 in respect of the reference to leave and the NES leave entitlements. Our position is consistent with that expressed by both the MUA and MIAL.

Schedule B – Summary of Hourly Rates of Pay

265. Ai Group does oppose the view of MIAL or the MUA; that there is little utility in publishing a schedule of hourly rates in this award. Employees are generally remunerated by way of an annual salary.

Schedule F – Definitions - repatriation

266. Ai Group does not oppose the removal of “repatriation” from the definitions schedule as suggested by MIAL and the MUA.

14. EXPOSURE DRAFT – SUGAR INDUSTRY AWARD 2016

268. The submissions that follow relate to the *Exposure Draft – Sugar Industry Award 2016* (Exposure Draft). They are in response to submissions filed by:

- the AWU (17 April 2016);
- ABI and the NSW Business Chamber (15 April 2016);
- NFF (14 April 2016); and
- the Australian Sugar Milling Council (10 March 2016).

Clause 1.2 – Title and commencement

269. We agree with the NFF's submission. The proposed amendment should be made.

Clause 2.1 – The National Employment Standards and this award

270. We do not oppose the NFF's submission regarding the references to the NES in full.

Clause 2.3 – The National Employment Standards and this award

271. The NFF raises a salient point about the possibility that there may be circumstances where it is not appropriate or feasible to make the award and NES available through the use of either a notice board or by electronic means. Nonetheless, we do not support the specific amendment proposed by the NFF given the proposed deletion of a reference to "electronic means". There is merit in the terms of the award expressly clarifying that it is sufficient to make the document available electronically.

272. Ai Group suggest the following clause substituted for the provision:

> The employer must ensure that copies of the award and the NES are available to all employees to whom they apply. This may be achieved by making them available electronically, on a noticeboard which is conveniently located at or near the workplace, or through some other reasonable accessible means.

273. If the clause is to be amended a consistent approach should be adopted across all awards.

Clause 3.2(a) – Coverage

274. Ai Group does not oppose the updating of the terms “Cane Protection and Productivity Boards” and “Bureau of Sugar Experiment Stations” as suggested by ASMC, ABI and the NFF.

Clauses 3.2(b) – (e) – Coverage

275. The AWU’s view that there is no need to link the coverage of the award to sector definitions in Schedule I is not opposed. The sector definitions in Schedule I relate to defining the specific sectors where referred to in the award and are expressed in different terms to the coverage provisions of the exposure draft at clause 3.2. In Ai Group’s view the coverage provisions serve to define the *sugar industry* for the purpose of determining the award’s coverage (including in relation to other industries), while the Schedule I definitions are further sectorial definitions on the basis that an employer and employee are in the sugar industry and award’s coverage.

276. Ai Group would be strongly opposed to any transferring of the Schedule I definitions to the award’s coverage terms that would change the definition of the *sugar industry* and therefore the coverage of the award. For instance, the adoption of the Schedule I definition of *milling sector* in the coverage term definition of *sugar industry*, would broaden the meaning of *sugar industry* to include “*the operations of transporting and processing cane including rail construction, maintenance and operation…*”. Whereas the award’s definition of *sugar industry* in respect of sugar milling is “*cane railway construction, maintenance, repair and operation*” confined to the operations of the sugar miller. The result could be a substantial change to existing award coverage for the functions of rail construction, maintenance and operations of an employer who is not sugar miller and covered by another existing and more appropriate industry award.

277. The desire to achieve consistency should not prevail over disturbing the award's coverage with the other industry awards.

278. A better approach would be to preserve the coverage terms and align the Schedule I definitions accordingly.

Clause 3.4 – Coverage

279. Ai Group does not oppose the NFF's proposal that this clause be relocated as a draft subclause under 3.7.

Clause 3.5 – Coverage

280. We do not oppose the amendment proposed by the NFF.

Clause 3.6 – Coverage

281. The change proposed by the NFF would result in the deletion of the words "and/or parts of industry". To this extent, we do not agree that the amendment sought should be made. We consider that those words make clear that to be covered by the award, the apprentices and/or trainees need not be engaged in all or every part of the industry as defined or described by the award. Rather, it is sufficient that such apprentices and/or trainees are engaged in parts of it.

282. We are concerned that the deletion of the relevant words may result in the provision being interpreted such that the apprentices and/or trainees must necessarily be engaged in every part of the industry. This would be a substantive change to the current award. We also note that this is a standard clause that appears in similar if not identical terms in the very vast majority of modern awards.

Clause 3.7(b) – Coverage

283. We do not oppose the amendment proposed by the NFF.

Clause 3.8 – Coverage

284. Ai Group does not consider there to be conflict between clauses 3.3 and 3.8 as suggested by the NFF. Clause 3.3 clarifies that where a sugar industry employer also operates in another industry, then the other industry award applies to the employer and employee for work in that other industry. In other words, it clarifies that the *Sugar Industry Award 2010* does not extend to operations in other industries from sugar industry employers.

285. Clause 3.8 is a standard provision in all modern awards that provides general instruction to specific circumstances where both and employer and the employee are covered by more than one award. Both clauses are directed at different circumstances in determining award coverage. In many instances, the application of clause 3.3 may obviate the need to apply clause 3.8, although clause 3.8 would still have work to do if clause 3.3 did not apply. Ai Group supports the retention of the two clauses.

Clause 5.2 – Facilitative provisions

286. We do not consider that the model flexibility term is a facilitative provision in the sense contemplated by clause 5.1 and therefore, a reference to it should not be inserted in clause 5.2 as proposed by the NFF.

Clause 5.2 – Facilitative provisions

287. We do not consider that clause 6.6(g) is a facilitative provision and therefore, a reference to it should not be inserted in clause 5.2 as proposed by the NFF.

288. That is, it does not provide "that the standard approach in an award provision may be departed from by agreement between an employer and an individual employee". Rather, it provides an employee with the ability to seek to alter their type of employment under certain circumstances, which is constrained by the employer's ability to refuse that request if the condition prescribed in the award is met. It is not a provision that enables a departure from the standard approach contained in another award provision.

Clause 6.1(a) – Full-time employment

289. The AWU has proposed the deletion of the term “maximum”. We are concerned that this may substantively affect the interaction between clauses 6.1 and 6.2. Further, the AWU has not explained the basis upon which it seeks this variation, nor has it particularised the facilitative provisions that might be necessary.

290. The change proposed by the AWU should therefore not be made.

Clause 6.1(b) – Full-time employment

291. Ai Group opposes the deletion of the term “seasonal” as proposed by the AWU. Clause 6.1(b) deals with the form of employment rather than the respective entitlements and conditions. Employing an employee on a seasonal basis reflects the purpose of the employee’s employment notwithstanding that seasonal employees may also receive terms and conditions relevant to full-time employees. The Exposure Draft wording should be retained. The AWU’s amendment would result in a substantial change to the award.

Clause 6.2(e)(ii) – Part-time employment

292. Ai Group does not oppose the ASMC’s position that the award provision regulating the maximum number of ordinary hours should be set at 38 hours, and further endorses the submissions of the NFF in respect of s.139(1)(c).

Clause 6.2(g) – Part-time employment

293. Ai Group does not view the AWU’s proposed addition of “at least” in respect of the minimum hourly rate paid to part-time employees, as necessary. Additional penalties and loadings are applicable to the employee based on the terms of other award provisions, such as overtime and shiftwork.

Clause 6.3(d)(i) – Casual loading

294. Ai Group does not view the AWU's proposed addition of "at least" in respect of the minimum hourly rate paid to part-time employees, as necessary. Additional penalties and loadings are applicable to the employee based on the terms of other award provisions, such as overtime and shiftwork.

Clause 10.2(c) – Field sector

295. Ai Group does not consider there to be conflict between clause 10.2(c) and clause 25.2(b). Clause 10.2(c) regulates ordinary time worked on a Sunday, while clause 25.2(b) is dealt with as overtime. This view appears to be shared by all other parties, including the AWU.

296. If further clarity is required, Ai Group would not oppose the amendment sought by ABI and the NSW Business Chamber or the NFF.

Clause 10.3(d) – Work outside the spread

297. The AWU has proposed a substantive change to clause 10.3(d) of the Exposure Draft. We consider that there may be merit in inserting some limitation on the application of the clause as presently drafted. It is not clear to us, however, that the provisions highlighted by the AWU as 'examples' are necessarily appropriate in the context of this award. Accordingly, we submit that this matter should be the subject of discussion between interested parties during any future conferences before the Commission.

Clause 10.3(e)(iii) – Notice on rostered days off

298. We agree that the change proposed by the NFF should be made. We refer to paragraph 422 of our 14 April 2016 submissions in this regard.

Clause 11.1(d) – Meal breaks

299. Ai Group strongly opposes the AWU's proposed amendment that the phrase "minimum hourly rate" should be replaced with "applicable rate of pay" based on the Full Bench decision in the *Manufacturing and Associated Industries & Occupations Award [2015] FWCFB 7236.*

300. We understand that the AWU is pursuing the insertion of the term 'applicable rate of pay' and an accompanying definition. In doing so, the union makes reference to a decision[14] of the Commission in respect of the *Exposure Draft – Manufacturing and Associated Industries and Occupations Award 2015*. Ai Group strongly opposes this proposal. In a submission dated 20 November 2015, we ventilated our concerns at length and requested an opportunity to file submissions and evidence, and to be heard on the matter, given the significant impact that would result if the relevant changes were made. It is our view that the definition proposed is inherently problematic and should not be adopted. Further, the proposed definition will result in a substantive change to current entitlements. The matter remains a contentious one and has not yet been determined by the Commission in the Manufacturing Award proceedings.

301. In addition, we note that the effect of the AWU's proposal would be to require the application of the relevant penalty upon a rate that already incorporates other penalties and loadings. That is, the penalty would be compounded on other separately identifiable amounts. The terms of the current clause 30.1(a) do not lend themselves to such an interpretation. Nor is there any apparent justification or rationale for the application of the loading upon other penalties or loadings.

Clause 11.2 – Crib breaks – shiftworkers

302. Ai Group is not opposed to the AWU's view that the term "crib" be replaced with the term "meal break" to avoid confusion between the two.

Clause 11.5 – Meal breaks on overtime

303. Ai Group does not oppose the view of other employer parties to provide an alternative to employers for the provision of a meal allowance, but notes that the existing quantum of meal allowance provided by bulk terminal employers is different to the allowance provided by distillery, milling and refining employers.

[14] [2015] FWCFB 7236 at [95] – [106].

Clauses 14.3 and 17.5 – Higher Duties

304. Ai Group does not oppose the AWU suggestion of relocating clauses 14.3 and 17.5 as one higher duties clause in *Part 7 – Other Wage Related Provisions* where the explicit exclusion of bulk sugar terminal employees is retained.

Clause 14.1, 17.1 and 20.1 – Payment of Wages

305. Ai Group does not consider the proposed AWU amendment in respect of deleting "ordinary hours" is necessary and has not identified any problems with the operation of the current clause.

Clauses 14.1 and 14.2, 17.1 and 17.2, 20.1 and 20.2 – Payment of Wages

306. Ai Group does not oppose the AWU's suggestion that the above clauses in the exposure draft need only appear once in *Part 7 – Other Wage Related Provisions.* It appears that in restructuring the award the above provisions have been unnecessarily duplicated for different streams of employees. We note that the NFF have raised a similar concern.

Clause 14.3 – Payment of Wages

307. Ai Group does not oppose the change from "highest" to "higher" as suggested by the NFF.

Clause 15.4 (d) – Junior rates

308. Ai Group does not oppose the view of ASMC in respect of juniors and allowances under the award.

Clause 16.1(c) – Bagasse bins

309. The AWU submits that the reference to the "minimum hourly rate" in clause 16.1(c) should be replaced with "applicable rate of pay". For the reasons we have earlier set out, Ai Group opposes the introduction of this terminology.

310. The effect of the AWU's proposal would be to require the application of the allowance to a rate that incorporates penalties and loadings. It would be

compounded on other separately identifiable amounts. The terms of the current clause 22.3 do not lend themselves to such an interpretation. Nor is there any apparent justification or rationale for adopting this method of calculation. The AWU has not established any reason for why the performance of the work described in clause 16.1(c) should be compensated at a higher rate during, for instance, a weekend.

311. For these reasons, clause 16.1(c) should not be amended.

Clause 16.1(r) – Height money

312. Ai Group does not oppose the rounding of measurements identified in the clause that appear to be conversions from imperial measurement, and does not oppose the rounding amounts suggested by ABI.

Clause 16.1(t)(i) – Hot work etc.

313. The AWU submits that the reference to the “minimum hourly rate” in clause 16.1(t)(i) should be replaced with “applicable rate of pay”. For the reasons we have earlier set out, Ai Group opposes the introduction of this terminology.

314. The effect of the AWU’s proposal would be to require the application of the allowance to a rate that incorporates penalties and loadings. It would be compounded on other separately identifiable amounts. The terms of the current clause 20.20(a) do not lend themselves to such an interpretation. Nor is there any apparent justification or rationale for adopting this method of calculation. The AWU has not established any reason for why the performance of the work described in clause 16.1(t) should be compensated at a higher rate during, for instance, a weekend.

315. For these reasons, clause 16.1(t)(i) should not be amended.

Clause 16.1(t)(iii) – Hot work etc

316. Ai Group does not oppose the clarifying amendments proposed by ASMC in respect of the phrases “member of the gang” with “crew” and “spelling time” with “recovery time”.

Clause 16.1(v)(iii) – Insulation work

317. Ai Group does not oppose the AMSC's view and proposed amendments in respect of the reference to "additional rates prescribed".

Clause 16.1(dd) – Work in rain

318. The AWU submits that the reference to the "minimum hourly rate" in clause 16.1(dd) should be replaced with "applicable rate of pay". For the reasons we have earlier set out, Ai Group opposes the introduction of this terminology.

319. The effect of the AWU's proposal would be to require the application of the allowance to a rate that incorporates penalties and loadings. It would be compounded on other separately identifiable amounts. The terms of the current clause 22.34 do not lend themselves to such an interpretation. Nor is there any apparent justification or rationale for adopting this method of calculation. The AWU has not established any reason for why the performance of the work described in clause 16.1(dd) should be compensated at a higher rate during, for instance, a weekend.

320. For these reasons, clause 16.1(dd) should not be amended.

Clause 17.4 – Absences under averaging system

321. Ai Group agrees that the Exposure Draft inadvertently confines clause 17.4 only to Milling, Distillery, Refinery and Maintenance employees, contrary to the current award. Ai Group considers this a substantial change and suggests that clause 17.4 be relocated to *Part 7 – Other Wage Related Provisions* for general application to all employees covered by the award.

322. Ai Group strongly supports the retention of clause 17.4 and disagrees with the AWU about its unclear practical effect. Ai Group submits that this clause provides clarity to payroll processing for employers and mirrors a corresponding award term in the *Manufacturing and Associated Industries and Occupations Award 2010* (clause 34.6).

Clause 26.2 – Shiftworker definitions

323. Ai Group opposes the AWU's suggested removal of the definition of shiftworker at clause 26.2(a) as it defines a shiftworker for the purpose of the award and clarifies the basis on which an employee may be engaged by an employer. The removal would amount to a substantial change to the award. The definition of a shiftworker in clause 27.2 is only for the purpose of the additional week of annual leave under the NES.

Clause 26.5 (b) – Afternoon and night shift allowances – other than field sector

324. Ai Group does not consider that clause 26.5(b) prohibits continuous night shift work for an employee as suggested by the AWU.

Clause 26.10(g) – Nominal slack season – shiftwork

325. Ai Group does not oppose the AWU's amendment to the reference to "one fifth" appearing instead as 20%, so as to be consistent with other changes made in the Exposure Draft.

Clause 27.6(c) – Calculation of annual leave – bulk terminal operations

326. Should clause 27.6(c) be amended pursuant to the AWU's submission, Ai Group respectfully requests that parties be given an opportunity to review and provide comments in respect of it.

Clause 33.5(f) – Bulk terminal employees

327. Ai Group does not oppose the AWU amendment that reference to "severance payment" be changed to "notice payments", with the latter being the entitlement referred to at clause 32 – Termination of Employment.

Clause 35.6 – Dispute resolution

328. Ai Group does not oppose the view of ASMC and NFF in respect of preserving the terms of the dispute resolution term.

Schedule D – Summary of hourly rates of pay

329. Ai Group does not oppose the amendment sought by the NFF in respect of clarifying when overtime is payable for the purpose of applying the weekend overtime rates.

Schedule D.3.1 – Full-time and part-time bulk terminal operations employees other than shiftworkers – ordinary and penalty rates

330. Ai Group does not oppose the AWU's proposal that a footnote be added clarifying when the penalty rate for Monday to Friday work is payable.

Schedule D.3.2 – Full-time and part-time bulk terminal operations employees – ordinary and penalty rates

331. Ai Group does not oppose the reference to shift work in Schedule D.3.2 as referred by the AWU.

Schedule E.2.2 – Adjustment of expense related allowances

332. We have dealt with the NFF's submissions regarding the definition of the "standard rate" below.

Schedule I – Definitions

333. We refer to the NFF's submissions regarding the relocation of the definitions to a schedule attached to the Exposure Draft. We note that this is the approach adopted by the Commission in all Exposure Drafts. We have not identified a difficulty arising from this.

Schedule I – Definitions – standard rate

334. The NFF submits that the definition of "standard rate" is of limited relevance under the Exposure Drafts and should be deleted. We disagree.

335. Various allowances in the *Sugar Industry Award 2010* are calculated by reference to the standard rate. They are expressed in the body of the award as a percentage of the standard rate. The Exposure Draft takes a different

approach to the manner in which the allowances are set out. The body of the award contains the monetary amount payable, whilst the formula for deriving the quantum has been relocated to a schedule to the Exposure Draft.

336. The effect of each approach is the same. The allowance is calculated and adjusted using the same method; that is, by reference to the standard rate. During the Part 10A award modernisation process, the AIRC expressly considered the rationale for adopting this approach.[15]

337. For this reason, the definition remains relevant and should be retained.

[15] [2008] AIRCFB 1000 at [74] – [78].

15. EXPOSURE DRAFT – TELECOMMUNICATIONS SERVICES AWARD 2015

338. The submissions that follow relate to the revised *Exposure Draft – Telecommunications Services Award 2015* (Exposure Draft) dated 27 April 2016 and the Commission's summary of submissions dated 27 April 2016. The respond to submissions filed by ABI and the NSW Business Chamber (15 April 2016).

339. The *Telecommunications Services Award 2010* has been the subject of conferences before Commissioner Roe on 21 April 2016 and 29 April 2016. The technical and drafting issues arising from the Exposure Draft as well as substantive variations sought to the award were discussed during those conferences. We refer to Commissioner Roe's reports to the Full Bench dated 22 April 2016 and 2 May 2016 in this regard.

340. The Commissioner's report of 2 May 2016 at paragraph [2] states as follows:

> "Unless parties advise otherwise in reply submissions due 5 May 2016 we proceed on the basis that the only matters outstanding from the submissions received in respect to the exposure drafts are set out below".

341. With respect, the report does not provide a complete list of outstanding matters arising from the Exposure Draft. As we identified during the aforementioned conferences, Ai Group was not in a position to deal with all matters arising from other parties' submissions at that time.[16] As a result, our concerns regarding certain proposals were not ventilated during those conferences. Having now had an opportunity to consider the material filed, we here provide our response to any such matters. We understand that the conduct of the conferences before Commissioner Roe was not intended to preclude parties from providing such a written response in accordance with Justice Ross' directions of 23 March 2016.[17] As a result, the submissions that follow identify matters in respect of the Exposure Draft that, in Ai Group's view, remain outstanding.

[16] See transcript of proceedings on 21 April 2016 at PN20 – PN25.

[17] [2016] FWC 1838.

342. Matters raised by other parties that have not been pressed during the conferences or are to be the subject of further submissions from such parties, at the invitation of Commissioner Roe, may not be addressed in these submissions. In light of the conduct of the conference we proceed on the basis that such matters will not be considered at this time, if at all.

Clause 6.3(a)(iii) Part-time employees (new issue)

343. Clause 6.3(a)(iii) now provides that a part-time employee will be paid the ordinary hourly rate for ordinary hours worked. Clause 11.2(a) previously provided that the relevant hourly rate was paid, "…for work performed." This change will likely give rise to difficulties if an employee may be require to work overtime at ordinary rates pursuant to clause 6.3(b)(ii). It appears that no rate will be payable.

Clause 6.3(a)(iv) – Part-time employees

344. Ai Group has sought the deletion of the words "who do the same work" from clause 6.3(a)(iv). The amended Exposure Draft has not been altered to reflect this proposal, but Ai Group has been permitted to make further submissions.

345. We continue to press for the deletion of these unnecessary and potentially problematic words. There is no reason to introduce a notion that the operation of this provision is based on parity of work. We have raised this concern in respect of various group 2 awards where it was agreed amongst interested parties that the change should be made.

Clause 6.3(a)(iv) – Part-time employees (new issue)

346. On reflection, we also note that the new clause in the Exposure Draft provides for pro-rata "<u>pay and conditions</u> to those of full-time employees who do the same work" (emphasis added). There is no reference to such pay and conditions being limited to award derived entitlements.

347. Ai Group suggests that the former clause 11.2(c) ought to be reinstated.

Clause 6.3(b) – Overtime

348. We understand that ABI is to provide further comment in relation to their proposal. We may seek to reply once this is filed.

Clause 6.3(b)(ii) – Overtime

349. The restructuring of the provision in the Exposure Draft, coupled with the removal of the word "however" from the current provision has made it less clear that the entitlement provided in clause 6.3(b)(i) is subject to clause 6.3(b)(ii). The two paragraphs are simply inconsistent with no express articulation of which provision prevails. The new approach also makes it less apparent that the time contemplated in 6.3(b) is overtime notwithstanding it not being paid at overtime rates.

350. This issue has not been addressed in the Exposure Draft but Ai Group was invited to make further submissions on the point.

Clause 6.4(b)(ii) – Casual loading

351. Ai Group wishes to pursue this matter. We note that while this issue is characterised in the report as a substantive matter we maintain that we are not pursuing a substantive change to the current award derived entitlement. We are instead opposing what we contend would be a substantive change to existing entitlements if the Exposure Draft is made in the manner proposed.

Clause 8.1 – Hours of work

352. Ai Group refers to our submissions above in the context of the *Exposure Draft – Contract Call Centres Award 2015*. A relevantly similar issue arises in this Exposure Draft and a comparable amendment should be made.

Clause 8.8 – Daylight saving

353. The ABI proposal is opposed, as indicated in the report.

Clause 10.1 Minimum wage rates

354. At paragraphs 466 – 469 of our submissions dated 14 April 2016, we raised a concern about the redrafting of clause 10.1 and suggested a minor amendment to clarify the employees to whom the minimum weekly rate table applies. Put simply, we are seeking a textual indication that the weekly rates only apply to full-time employees. This issue arises in several awards.

355. These submissions have not been addressed in the exposure draft or reports to the Full Bench.

356. We apprehend from the conferences conducted by the Commissioner that the Full Bench may have been inclined to the view that the inclusion of the minimum rates table adequately addresses this issue but that further consideration was going to be given to such matters.[18]

357. We raise this issue so that the matter is not overlooked and so that a consistent approach can be adopted, as far as possible. We also note that in the context of at least one other group 3 exposure draft, our submission has been agreed by the relevant interested parties and the amendment proposed has been made in a revised exposure draft.[19]

Clause 14 – Penalty rates

358. The relevant penalties or loadings referred to in the current award have now, in effect, been converted to a total payable rate. However the wording of the clause has not been consistently amended to accommodate this. We refer to paragraphs 479 - 480 of our 14 April 2016 submissions.

359. The problem can be demonstrated by looking at clause 14.2(c) of the Exposure Draft. What was previously a 30% loading is now an entitlement to 130% of the ordinary hourly rate. This leads to a problematic outcome when read in the context of the last sentence of 14.2(c), which provides that, "*This*

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[18] See transcript of proceedings on 21 April 2014 at PN757 – 793, although this related to the same issue in the *Commercial sales Award 2010*.

[19] *Exposure Draft – Local Government Industry Award 2015*.

loading is in substitution for and not cumulative upon the night shift loading prescribed in clause 14.2(b).” It suggests that the 130% <u>is a loading</u> and payable in addition to the employee’s ordinary hourly rate.

360. The reference to, “…the shift loading prescribed in clause 14.2(b)” is also problematic. It is no longer a loading that is payable pursuant to 14.2(b) but a higher rate.

361. There may be other ramifications or unintended consequence from removing the separately identifiable component of the amount that a person will receive as a penalty or loading rolled into a single rate. We have previously raised such matters in earlier submissions.

Clause 14.2(a) – Shiftwork penalties

362. The Exposure Draft has been amended to remove the word “penalty”. We appreciate that the Commission is likely attempting to address a general issue that we have raised about the restructuring of the shift loading/penalty provisions in awards. However, we did not actually call for this change in the context of this particular award. In the current award this particular entitlement is referred to as a penalty. The change is unnecessary, however the issue we have identified above is relevant to this subclause.

Schedule B – Summary of hourly rates of pay

363. Ai Group intends to review the amended schedule once the next version of the exposure draft is released and advise the Commission if we identify any concerns with the changes.

16. EXPOSURE DRAFT – WINE INDUSTRY AWARD 2016

364. The submissions that follow relate to the *Exposure Draft – Wine Industry Award 2016* (Exposure Draft). They are in response to submissions filed by:

- the AWU (17 April 2016);
- United Voice (15 April 2016);
- the NFF (14 April 2016);
- the SA Wine Industry Association (14 April 2016);
- the AFEI (15 April 2016); and
- ABI and the NSW Business Chamber (15 April 2016).

Clause 1.2 – Title and application

365. We agree with the NFF's submission. The proposed amendment should be made.

Clause 1.4 – Title and commencement

366. We refer to the NFF's submissions regarding the relocation of the definitions to a schedule attached to the Exposure Draft. We note that this is the approach adopted by the Commission in all Exposure Drafts. We have not identified a difficulty arising from this.

Clause 2.1 – The National Employment Standards and this award

367. We do not oppose the NFF's submission regarding the references to the NES in full.

Clause 2.3 – The National Employment Standards and this award

368. The NFF raises a salient point about the possibility that there may be circumstances where it is not appropriate or feasible to make the award and NES available through the use of either a notice board or by electronic

means. Nonetheless, we do not support the specific amendment proposed by the NFF given the proposed deletion of a reference to “electronic means”. There is merit in the terms of the award expressly clarifying that it is sufficient to make the document available electronically.

369. Ai Group suggest the following clause substituted for the provision:

> The employer must ensure that copies of the award and the NES are available to all employees to whom they apply. This may be achieved by making them available electronically, on a noticeboard which is conveniently located at or near the workplace, or through some other reasonable accessible means.

370. If the clause is to be amended a consistent approach should be adopted across all awards.

Clause 3.2 - Coverage

371. The NFF, AWU and United Voice have identified the duplication of the definition of “wine industry” in clause 3.2 and Schedule H. We do not oppose the deletion of the definition from one of those provisions.

Clause 3.2 – Coverage

372. The NFF’s submission about the definition of “wine industry” in other awards should be dealt with in the context of those awards.

Clause 3.3 – Coverage

373. We do not oppose the amendment proposed by the NFF.

Clause 3.4 – Coverage

374. The change proposed by the NFF would result in the deletion of the words “and/or parts of industry”. To this extent, we do not agree that the amendment sought should be made. We consider that those words make clear that to be covered by the award, the apprentices and/or trainees need not be engaged in all or every part of the industry as defined or described by the award. Rather, it is sufficient that such apprentices and/or trainees are engaged in parts of it.

375. We are concerned that the deletion of the relevant words may result in the provision being interpreted such that the apprentices and/or trainees must necessarily be engaged in every part of the industry. This would be a substantive change to the current award. We also note that this is a standard clause that appears in similar if not identical terms in the very vast majority of modern awards.

Clause 3.5(a) - Coverage

376. We agree that the amendment proposed by the NFF, United Voice, and ABI and the NSW Business Chamber should be made.

Clause 5.1 – Facilitative provisions

377. Whilst we do not oppose the changes proposed by the NFF, we do not consider that they are necessary. We note that this the text of this provision reflects the Commission's earlier decision[20] and has been adopted in most, if not all, exposure drafts.

Clause 5.2 – Facilitative provisions

378. We do not consider that the model flexibility term is a facilitative provision in the sense contemplated by clause 5.1 and therefore, a reference to it should not be inserted in clause 5.2 as proposed by the NFF.

Clause 5.2 – Facilitative provisions

379. We do not consider that clause 6.6(a) is a facilitative provision and therefore, a reference to it should not be inserted in clause 5.2 as proposed by the NFF.

380. That is, it does not provide "that the standard approach in an award provision may be departed from by agreement between an employer and an individual employee". Rather, it provides an employee with the ability to seek to alter their type of employment under certain circumstances, which is constrained by the employer's ability to refuse that request if the condition prescribed in the

[20] [2014] FWCFB 9412 at [37] – [43].

award is met. It is not a provision that enables a departure from the standard approach contained in another award provision.

Clause 6.4(a)(i) – Part-time employees

381. We agree that the amendment proposed by the AWU should be made. We refer to paragraph 495 of Ai Group's submissions dated 14 April 2016 in this regard.

Clause 6.4(c) – Part-time employees

382. Ai Group supports the NFF's proposed amendment.

Clause 6.5(a) – Casual employees

383. Ai Group does not oppose the NFF's proposed amendment.

Clause 6.5(b) – Casual employees

384. Ai Group does not oppose the NFF's proposed amendment.

Clause 6.6(a) – Eligible casual employee

385. We agree with the NFF and AWU that the reference to "six months" should be replaced with "12 months". We refer to paragraph 505 of Ai Group's submissions dated 14 April 2016 in this regard.

Clause 6.6(a)(i) – Eligible casual employee

386. We refer to the NFF's submission. We do not oppose a reversion to the current definition of "irregular" casual employee on the basis that this would reflect the approach presently found in the award.

Clause 6.6(b)(i) – Notice and election of casual conversion

387. We agree with the NFF and AWU that the reference to "six months" should be replaced with "12 months". We refer to paragraph 507 of Ai Group's submissions dated 14 April 2016 in this regard.

Clause 6.6(b)(iii) – Notice and election of casual conversion

388. We do not consider that a change needs to be made to clause 6.6(b)(iii) of the Exposure Draft, as proposed by the NFF. The word “may” makes clear that an employee is not *required* to give notice to elect. The provision is permissive; an employee has the ability to elect to convert should they so choose. In our view, the provision makes sufficiently clear that should the employee seek to convert, four weeks’ notice must be given.

Clause 8.5(b)(i) – Vineyard employees during the vintage

389. We refer to the NFF’s submission that the definition of “vintage” should be moved to Schedule H. We do not agree. The term is also used elsewhere in the award (see for example the classification definitions). Presently, the definition of “vintage” only applies to the term as it appears in clause 8.5(b)(i). If moved to the definitions clause, it would be attributed to the term wherever else it appears in the award. This would amount to a substantive change.

Clause 8.5(b)(iii) – Vineyard employees during the vintage

390. Ai Group does not oppose the submissions of the SA Wine Industry Association, United Voice, and ABI and the NSW Business Chamber that clause 8.5(b)(iii) should be deleted.

Clause 9.3 – Overtime meal break

391. We refer to the NFF’s submission. We do not oppose the retention of the current terms.

Clause 9.3(a) – Overtime meal break

392. The AWU submits that the reference to the “minimum hourly rate” in clause 9.3(a) should be replaced with “applicable rate of pay”.

393. Clause 29.3 of the current award requires that the relevant break be paid at “the rate then applying to the employee for ordinary hours of work”. We ppose the use the phrase “applicable rate of pay” but we accept that where an

employee is entitled to payments in addition to the minimum hourly rate for the performance of ordinary hours, those payments will also be due during such break. On this basis, we do not oppose the retention of the relevant text of the current clause, such that clause 9.3(a) reads as follows:

> (a) prior to commencing overtime – paid at the ~~employee's minimum hourly~~ rate <u>then applying to the employee for ordinary hours of work</u>;

394. We consider that this amendment adequately addresses the AWU's concerns.

395. We understand that the AWU is pursuing the insertion of the term 'applicable rate of pay' and an accompanying definition. In doing so, the union makes reference to a decision[21] of the Commission in respect of the *Exposure Draft – Manufacturing and Associated Industries and Occupations Award 2015.*

396. Ai Group strongly opposes this proposal. In a submission dated 20 November 2015, we ventilated our concerns at length and requested an opportunity to file submissions and evidence, and to be heard on the matter, given the significant impact that would result if the relevant changes were made. It is our view that the definition proposed is inherently problematic and should not be adopted. Further, the proposed definition will result in a substantive change to current entitlements. The matter remains a contentious one and has not yet been determined by the Commission in the Manufacturing Award proceedings.

397. In light of these circumstances, it is our view that the issue arising in respect of this provision should be resolved by adopting the amendment we have proposed above.

Clause 9.4 – Working through break

398. The AWU submits that the reference to the "minimum hourly rate" in clause 9.4 should be replaced with "applicable rate of pay". For the reasons we have earlier set out, Ai Group opposes the introduction of this terminology.

[21] [2015] FWCFB 7236 at [95] – [106].

399. In addition, we note that the effect of the AWU's proposal would be to require the application of the 50% loading upon a rate that already incorporates other penalties and loadings. That is, the 50% loading would be compounded on other such separately identifiable amounts. The terms of the current clause 29.4 do not lend themselves to such an interpretation. Nor is there any apparent justification or rationale for the application of the loading upon other penalties or loadings.

400. For these reasons, clause 9.4 should not be amended.

Clause 10.2 – Minimum wages

401. We do not oppose the amendment proposed by the AWU.

Clause 12 – Piecework rates

402. United Voice has made submissions regarding the process by which an issue raised by the FWO regarding clause 12 should be dealt with. At the relevant time, Ai Group may seek an opportunity to be heard as to whether the award should be varied and if so, the terms of such a variation.

Clause 16.2(d) – Boilers and flues

403. The AWU submits that the reference to the "minimum hourly rate" in clause 16.2(d) should be replaced with "applicable rate of pay". For the reasons we have earlier set out, Ai Group opposes the introduction of this terminology.

404. The effect of the AWU's proposal would be to require the application of the allowance to a rate that incorporates penalties and loadings. That is, the 50% allowance would be compounded on other such separately identifiable amounts. The terms of the current clause 24.6(a) do not lend themselves to such an interpretation. Nor is there any apparent justification or rationale for adopting this method of calculation. The AWU has not established any reason for why the performance of the work described in clause 16.2(d) should be compensated at a higher rate during a weekend or shiftwork.

405. For these reasons, clause 9.4 should not be amended.

Clause 16.3(a)(ii) – Travel and expenses

406. We agree with the NFF's submissions. We refer to paragraphs 546 - 548 of Ai Group's submissions dated 14 April 2016 in this regard.

Clause 19.1(b) – Definition of overtime

407. We note the AWU's submission regarding clause 19.1(b). Should the union seek a substantive change in this regard, it should not be dealt with through the redrafting process. Rather, the union should be put to the task of mounting a case in support of its claim. Respondent parties should thereafter be afforded an opportunity to respond.

Clause 19.3(a) – Length of rest period

408. We agree with the NFF's submissions. We refer to paragraph 551 of Ai Group's submissions dated 14 April 2016 in this regard.

Clause 19.3(b)(ii) – Where the employee does not get a 10 hour rest

409. We agree with the amendment proposed to the first bullet point by ABI and the NSW Business Chamber. We refer to paragraph 552 of Ai Group's submissions dated 14 April 2016.

Clause 19.5 – Time off instead of payment for overtime

410. The AWU's submission regarding clause 19.5 is to be dealt with by the award flexibility common issues Full Bench.

Clause 20 – Annual leave

411. The AWU's submission regarding clause 20 is to be dealt with by the annual leave common issues Full Bench.

Clause 20.9 – Transfer of business

412. We agree with the submission of the AWU, the SA Wine Industry Association, AFEI, the NFF, and ABI and the NSW Business Chamber. We refer to paragraph 557 of Ai Group's submissions dated 14 April 2016 in this regard.

Clause 24.3(a)(i) – Rostered day off falling on public holiday

413. For the reasons stated above, we oppose the AWU's proposal. We do not, however, oppose the substitution of the term "minimum hourly rate" with "ordinary time rate", such that the Exposure Draft reflects the current clause 34.3(a)(i).

Schedule B.2 – Casual adult employees

414. If casual overtime rates are published, as sought by the AWU, we respectfully seek an opportunity to review and make comment regarding the rates.

Schedule H – Definitions – standard rate

415. The NFF submits that the definition of "standard rate" is of limited relevance under the Exposure Drafts and should be deleted. We respectfully disagree.

416. Various allowances in the *Wine Industry Award 2010* are calculated by reference to the standard rate. They are expressed in the body of the award as a percentage of the standard rate. The Exposure Draft takes a different approach to the manner in which the allowances are set out. The body of the award contains the monetary amount payable, whilst the formula for deriving the quantum has been relocated to a schedule to the Exposure Draft (see C.2).

417. The effect of each approach is the same. The allowance is calculated and adjusted using the same method; that is, by reference to the standard rate. During the Part 10A award modernisation process, the AIRC expressly considered the rationale for adopting this approach.[22]

[22] [2008] AIRCFB 1000 at [74] – [78].

418. For this reason, the definition remains relevant and should be retained.

Schedule H – Definitions – wine industry

419. The NFF, AWU and United Voice have identified the duplication of the definition of “wine industry” in clause 3.2 and Schedule H. We do not oppose the deletion of the definition from one of those provisions.