Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Reply Submission
Group 4D – 4F Exposure Drafts

22 February 2017

4 YEARLY REVIEW OF MODERN AWARDS

EXPOSURE DRAFTS: GROUP 4D – 4F AWARDS

REPLY SUBMISSION

1. INTRODUCTION

1. On 21 December 2016, the Fair Work Commission (**Commission**) published amended directions in respect of all awards allocated to Group 4D – 4F of the award stage of the 4 yearly review of modern awards. Specifically, parties were directed to file reply submissions on technical and drafting issues related to the exposure drafts by 22 February 2017.

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

    - *Exposure Draft – Book Industry Award 2016;*
    - *Exposure Draft – Fast Food Industry Award 2016;*
    - *Exposure Draft – Food, Beverage and Tobacco Manufacturing Award 2016*;
    - *Exposure Draft – Hair and Beauty Industry Award 2016;*
    - *Exposure Draft – Professional Employees Award 2016;* and
    - *Exposure Draft – Water Industry Award 2010*.

3. Our submission in relation to the *Exposure Draft – Hair and Beauty Industry Award 2016* is filed jointly with the Hair and Beauty Australia Industry Association (**HABA**).

2. EXPOSURE DRAFT – BOOK INDUSTRY AWARD 2016

4. It appears that no interested party apart from Ai Group has filed submissions in relation to the *Exposure Draft – Book Industry Award 2016*. As a result, we need not here make any reply submissions in this regard.

3. EXPOSURE DRAFT – FAST FOOD INDUSTRY AWARD 2016

5. The submissions that follow relate to the *Exposure Draft – Fast Food Industry Award 2016*. They are in response to submissions filed by:

- The SDA;
- The AWU;
- ABI and the NSW Business Chamber; and
- Business SA.

Minimum hourly rate

6. The SDA and AWU have made a brief submission regarding their concerns associated with the use of the term 'minimum hourly rate'. We do not agree that the term is either confusing or inappropriate. Its insertion is consistent with the approach taken by the Commission in all exposure drafts published during this Review. It is our understanding that the minimum hourly rate is simply the rate prescribed by the award for the relevant classification.

7. If the SDA or the AWU continues to hold a concern about the use of the term in specific provisions of the exposure draft, this is a matter that may be the subject of discussion during any conferences listed before the Commission.

Clause 1.2 – Title and commencement

8. We agree with the issue raised by the SDA. This is a matter of general significance, as the relevant clause appears in all exposure drafts. Ai Group has previously raised the issue in relation to other awards, however the Commission has not, to date, made a determination in relation to this matter.

Clause 15 – Breaks

9. We agree with the submissions of the SDA and AWU that the redrafting of the current clause 27 is problematic in certain respects. We refer to paragraphs 102

– 110 of our submission dated 18 January 2017 in this regard, and commend the variations we have there proposed to the Commission.

Clause 16.1 – Minimum wage

10. We do not agree with the SDA's submission regarding the insertion of the words "adult" and "minimum". Similarly, we do not agree with the AWU's submission regarding the word "adult". The preamble in clause 16.1 does not preclude an employer from electing to pay a junior employee the rates there set out, or to pay an adult employee an amount higher than that which is there prescribed.

11. To the extent that the SDA's complaint relates to the payment of overtime and penalty rates, we note that the preamble in clause 16.1 refers expressly to ordinary hours of work and as a result, the issue identified by the SDA does not arise.

Clause 16.4 – Supported wage system

12. In response to the SDA's submission, we would not oppose an amendment to the clause such that it states only as follows:

    Schedule C – Supported Wage System.

Clause 17.2(a)(i) – Meal allowance

13. We do not oppose the amendment proposed by the SDA on the basis that is consistent with the current clause 19.1(a).

Clause 17.2(d)(ii) – Travelling time reimbursement

14. We agree with Business SA's submission that the exposure draft has altered the legal effect of the current provision and support the retention of the wording found in the current clause. We refer to paragraphs 125 – 127 of our submission dated 18 January 2017 in this regard.

Clause 21.1 – Evening work Monday to Friday

15. The brevity of the SDA and AWU's submissions regarding this clause renders providing a proper response somewhat difficult. If it is contended by the unions that under the current award, the evening penalty and the casual loading are compounded, such an interpretation is strongly opposed by Ai Group. Clause 25.5(a)(i) and clause 25.5(a)(ii) of the current award quite clearly state that the relevant loading is to be applied "in addition to" the 25% casual loading. That is, a casual employee is entitled to 135% of the minimum hourly rate and 140% of the minimum hourly rate respectively.

16. Ai Group may seek a further opportunity to provide a comprehensive response to this issue in due course, once we better understand the unions' position and rationale.

Clause 21.2 – Saturday work

17. The brevity of the SDA and AWU's submissions regarding this clause renders providing a proper response somewhat difficult. If it is contended by the unions that under the current award, the Saturday loading and the casual loading are compounded, such an interpretation is strongly opposed by Ai Group. Clause 25.5(b) of the current award quite clearly states that the relevant loading is to be applied "on top of" the 25% casual loading. We interpret this to mean that a casual employee is entitled to the Saturday loading in addition to the 25% casual loading (i.e. 150% of the minimum hourly rate).

18. Ai Group may seek a further opportunity to provide a comprehensive response to this issue in due course, once we better understand the unions' position and rationale.

Clause 21.3 – Sunday work

19. We do not oppose the insertion of the words "ordinary hours worked" in clauses 21.3(a) and (b) as proposed by Business SA. This would also resolve the SDA and AWU's concerns; and is consistent with the submission of ABI and the NSW Business Chamber.

Clauses 21.3(a) and (b) – Sunday work

20. We agree with Business SA's submission that "A" should be deleted from the start of each subclause.

Clause 32 – Transfer to lower paid job on redundancy

21. We do not oppose the SDA's submission however note that this issue may more appropriately be dealt with by the plain language re-drafting Full Bench (AM2016/15), given that the provision is one of the 'standard clauses' that is there being considered.

Schedule A – Summary of Hourly Rates of Pay

22. We refer to our submissions above regarding clauses 21.1 and 21.2. For the reasons there set out, we oppose the SDA's submissions.

Schedule B.2.1 – Expense related allowances – Meal allowance

23. We do not oppose the amendment proposed by the SDA.

Schedule B.2.1 – Expense related allowances – Transport allowance

24. We do not consider that the amendments proposed by the SDA are necessary.

4. EXPOSURE DRAFT – FOOD, BEVERAGE AND TOBACCO MANUFACTURING AWARD 2016

25. The submissions that follow relate to the *Exposure Draft – Food, Beverage and Tobacco Manufacturing Award 2016*. They are in response to submissions filed by:

- The AMWU;
- The AWU;
- United Voice;
- The AFEI; and
- Business SA.

Applicable rate of pay

26. In relation to the submissions of Business SA and AFEI, we refer to paragraphs 139 – 144 of our 18 January 2017 submissions in this regard.

Clause 2 – Definitions – default fund employee

27. Contrary to the AMWU's submission, the definition of 'default fund employee' need not be retained, as the term is not used in the exposure draft.

Clause 4 – Coverage

28. We do not consider the amendments proposed by the AMWU are necessary.

Clause 4.2 – Coverage

29. Whilst we do not consider the relocation of the provision as proposed by the AMWU necessary, we do not oppose it.

Clause 7.2(a) – Facilitation by individual agreement

30. We do not oppose Business SA's submission regarding the order in which the relevant provisions appear.

Clause 7.2(a) – Facilitation by individual agreement

31. We agree with the submissions of the AMWU, United Voice, the AFEI and Business SA regarding the reference to clause 22.9. We refer to paragraph 147 of our submission dated 18 January 2017 in this regard.

Clause 7.3(a) – Facilitation by majority or individual agreement

32. In response to the submissions of United Voice, we do not consider that any difficulty arises from the reference to clause 10.6(f).

Clause 7.3(a) – Facilitation by majority or individual agreement

33. In response to United Voice's submission regarding clause 13.1(b), we note that the exposure draft presently refers to clause 13.1(b) (and not clause 13.1 as asserted by the union).

Clause 8 – Full-time employment

34. We do not oppose the amendment proposed by the AMWU.

Clause 9.3 – Part-time employment

35. The proposals of the AWU amount to substantive changes to the award. The matters are ones that do not properly arise from the technical and drafting process. If adopted, they would have the effect of increasing the regulatory burden, which is contrary to s.134(1)(f) and on that basis, the proposals are strongly opposed. The AWU has not established that the provisions proposed are *necessary*, in the sense contemplated by s.138 of the Act.

Clause 10 – Full-time employment

36. The effect of the AWU's proposal would be to define a full-time employee as one who works between 0 – 38 ordinary hours a week. This is a substantive change to the current award for which a proper basis has not been made out.

Clause 10.1 – Casual employees

37. The proposal of the AWU is opposed. It would have the effect of precluding a casual employee from working 38 ordinary hours a week, which is a substantive change to the current award.

Clause 10.6 – Casual conversion to full-time or part-time employment

38. In response to the submissions of United Voice and Business SA, we refer to paragraph 160 of our submission dated 18 January 2017.

Clause 11 – Apprentices

39. Ai Group does not oppose the amendment proposed in paragraphs 19 – 20 of the AMWU's submission of 18 January 2017.

Clause 12 – Ordinary hours of work

40. We agree with the AMWU, United Voice and Business SA that a submission of 'shiftworker' is not necessary. Contrary to the AWU's submissions, the *Manufacturing and Associated Industries and Occupations Award 2010* does not contain a specific definition of 'shiftworker', apart from that which appears for the purposes of the NES.

Clause 12.3(a) – Ordinary hours of work – continuous shiftworkers

41. We agree with the AWU's submission. The word "worked" should be replaced with "work".

Clause 12.5(a) – Methods of arranging ordinary working hours

42. Whilst we do not consider it necessary, we do not oppose the AMWU's submission that "commencing" be replaced with "starting".

Clause 20 – Allowances

43. We do not consider that the amendments proposed by the AMWU are necessary. The approach taken in the exposure draft to the ordering of provisions under clause 20 is consistent with that taken by the Commission in other exposure drafts.

Clause 20.1(f)(iii) – Hot places

44. We do not oppose Business SA's submission.

Clause 20.1(f)(iv) – Wet places

45. We do not oppose Business SA's submission.

Clause 20.2(f)(i) – Excess travelling and fares

46. We do not oppose Business SA's submission.

Clause 20.2(f)(ii) – Distant work

47. We do not oppose Business SA's submission.

Clause 20.3 – Extra rates not cumulative

48. We agree with AFEI's submission. Clause 20.3 should appear as a standalone provision, independent of the allowances clause (i.e. clause 20).

Clause 22.2(b)(i) – Unrelieved shiftworker on a rostered day off

49. We agree with the AFEI's submission.

Clause 22.2(b)(ii) – Unrelieved shiftworker on rostered day off

50. We do not oppose the AFEI's submission.

Clause 22.4 – Saturday work – day worker

51. We agree with the AMWU's submission. We refer to paragraphs 174 – 176 of our 18 January 2017 submission in this regard.

Clause 22.13 – Transport of employees

52. We agree with the AMWU's submission.

Clause 23.1(b) – Special provisions for shiftworkers

53. Whilst we do not consider it necessary, we do not oppose the AMWU's submission that "commencing" be replaced with "starting".

Clause 23.1(c) – Special provisions for shiftworkers

54. Whilst we do not consider it necessary, we do not oppose the AMWU's submission that "commencing" be replaced with "starting".

Clause 23.5(c) – Rate for working on Sunday and public holiday shifts

55. Whilst we do not consider it necessary, we do not oppose the AMWU's submission that "commence" be replaced with "start".

Clause 23.5(d) – rate for working on Sunday and public holiday shifts

56. Whilst we do not consider it necessary, we do not oppose the AMWU's submission that "commencing" be replaced with "starting".

Clause 24.5 – Annual leave loading

57. We agree with United Voice and Business SA that the relevant assessment is to be made by reference to the entire period of leave.

5. EXPOSURE DRAFT – HAIR AND BEAUTY INDUSTRY AWARD 2016

58. The submissions that follow relate to the *Exposure Draft – Hair and Beauty Industry Award 2016*. They are filed jointly on behalf of Ai Group and HABA. They are in response to submissions filed by:

- The SDA; and
- The AWU;
- Business SA.

Minimum hourly rate

59. The SDA has made a brief submission regarding its concerns associated with the use of the term 'minimum hourly rate'. We do not agree that the term is either confusing or inappropriate. Its insertion is consistent with the approach taken by the Commission in all exposure drafts published during this Review. It is our understanding that the minimum hourly rate is simply the rate prescribed by the award for the relevant classification.

60. If the SDA continues to hold a concern about the use of the term in specific provisions of the exposure draft, this is a matter that may be the subject of discussion during any conferences listed before the Commission.

Casual employment

61. The AWU has proposed various changes to the exposure draft in respect of casual employees, which are opposed by Ai Group and HABA.

62. These changes are substantive in nature, in the sense that they would significantly alter the terms and conditions applying to casual employees under the award at present. If made, the variations would have the effect of imposing significant cost increases on employers. It is not appropriate that such changes be considered through the technical and drafting process associated with the exposure draft. We also note that the matters raised by the AWU overlap, to

some degree, with the SDA's claim to extend the entitlement to overtime rates to casual employees, which has been referred to the casual and part-time common issues Full Bench (AMA2014/196 and AM2014/197). The Commission has received written submissions from the parties regarding the SDA's claim and has reserved its decision in this regard.

63. Accordingly, the matters raised by the AWU, if pressed, should be dealt with in accordance with any separate process implemented by the Commission in relation to other substantive variations sought to the award by interested parties.

Clause 1.2 – Title and commencement

64. We agree with the issue raised by the SDA. This is a matter of general significance, as the relevant clause appears in all exposure drafts. Ai Group has previously raised the issue in relation to other awards, however the Commission has not, to date, made a determination in relation to this matter.

Clause 2 – Definitions – hair and beauty industry

65. Whilst we do not consider that the consequence described by Business SA necessarily arises from the exposure draft, we do not oppose the retention of "and/or" at the end of subclause (a).

Clause 2 – Definitions – hair and beauty industry

66. We agree with the amendments proposed by Business SA and the AWU regarding use of commas and semicolons.

Clause 2 – Definitions – hair and beauty industry

67. In response to the AWU's submission, we have not identified any difficulty arising from the inclusion of the definition in clause 2 rather than clause 4. We do not consider that any change is necessary.

Clause 2 – Definitions – hair and beauty industry

68. Whilst we do not consider it necessary, we do not oppose the reinsertion of the words "(but not limited to)" in paragraph (b).

Clause 4.3 – Coverage

69. We do not consider that the amendment proposed by the AWU is necessary.

Clause 4.4 – Coverage

70. We do not consider that the amendment proposed by the AWU is necessary.

Clause 7.2 – Facilitative provisions for flexible working practices

71. We do not oppose the AWU's submission.

Clause 9 – Full-time employees

72. We do not oppose the AWU's submission.

Clause 10.1(a) – Part-time employees

73. We do not oppose the AWU's submission.

Clause 10.2(e) – Part-time employees

74. We do not oppose the AWU's submission.

Clause 10.10 – Part-time employees

75. Clause 10.10 does not have the effect alleged by the AWU. The change proposed is not necessary.

Clause 11 – Casual employment

76. We do not agree with the SDA's submission regarding the reference to clause 23, nor do we understand the rationale for its opposition to it.

Clause 11.2(b) – Casual employment

77. We oppose the deletion of the word "minimum" as sought by the SDA. We refer to our submission above regarding the use of the term "minimum hourly rate" in the exposure draft generally.

Clause 11.3 – Casual employment

78. We do not consider that the renumbering proposed by the SDA is necessary, however we do not oppose it.

Clause 11.5(b) – Casual employment

79. We do not oppose the amendment proposed by the SDA and AWU on the basis that it is consistent with the current award.

Clause 13.1(a) – Ordinary hours

80. We oppose the change proposed by the AWU. It is not necessary for an award to prescribe the period of time over which ordinary hours may be averaged. This is a matter that is presently left to the prerogative of the employer. To introduce a limitation as to the period over which ordinary hours may be averaged amounts to a substantive change. There is no material before the Commission that might satisfy it that such a change is necessary.

81. Accordingly, the AWU's submission should not be adopted.

Clause 13.2(b)(ii) – Maximum hours on a day

82. The amendment proposed by the SDA is not necessary. The provision expressly states that the employer and employee "may agree" that the employee may work a second 10.5 hour day.

Clause 14.1(f) – Rostering

83. We oppose the amendment proposed by the SDA. We refer to paragraphs 206 – 210 of our submission dated 18 January 2017 in this regard.

Clause 15.3(a) – Paid rest breaks – part-time and casual employees

84. We would not oppose the retention of the current clause 32.2(a) in order to resolve the concern raised by the SDA. This would also resolve the matter raised by the AWU.

Clause 15.4 – Breaks between shifts

85. We do not oppose the change proposed by the SDA.

Clause 15.4 – Breaks between shifts

86. It is unclear whether the AWU is seeking a substantive change to the award. If so, it should be put to the task that any provision it proposes is necessary to achieve the modern awards objective (s.138).

Clause 16.1 – Minimum wage

87. We do not agree with the SDA's submission regarding the insertion of the words "adult" and "minimum". The preamble in clause 16.1 does not preclude an employer from electing to pay a junior employee the rates there set out, or to pay an adult employee an amount higher than that which is there prescribed.

88. To the extent that the SDA's complaint relates to the payment of overtime and penalty rates, we note that the preamble in clause 16.1 refers expressly to ordinary hours of work and as a result, the issue identified by the SDA does not arise.

Clause 16.4 – Supported wage system

89. In response to the SDA's submission, we would not oppose an amendment to the clause such that it states only as follows:

> Schedule C – Supported Wage System.

Clause 17 – Junior rates

90. We refer to our submissions above regarding clause 16.1.

Clause 18.4(a) – Adult apprentices

91. We do not consider that the amendment proposed by the AWU should be made. Its current form makes clear the manner in which the amount payable is to be derived and is consistent with many other modern awards.

Clauses 18.7 and 18.8 – Hairdressing trainees and graduates and Beauty therapy graduates

92. The exposure draft asks parties to comment on whether the terms "trainee" and "graduate" should be defined for the purposes of clauses 18.6 and 18.7. Ai Group and HABA are not aware of any difficulties arising from the absence of definitions for these terms in the current award.

93. We note however that the SDA has proposed a definition in relation to each of the following terms:

- Hairdressing trainee;
- Hairdressing graduate; and
- Beauty therapy graduate.

94. We have not identified any problems flowing from the proposed definitions for:

- Beauty therapy graduate; and
- Hairdressing graduate.

95. In respect of the definition proposed for "hairdressing trainee"; whilst we consider that it is appropriate that any definition should encompass a traineeship relating to a Certificate III in training, we consider that the SDA should establish whether there is a proper basis for so limiting the reference and/or whether the definition should also encompass any other qualifications. Interested parties should subsequently be given an opportunity to respond to any submissions filed by the union in this regard.

Clause 19 – Payment of wages

96. We agree with the submissions of Business SA.

Clause 20.3(a)(i) – Meal allowances

97. We do not oppose the amendments proposed by the SDA on the basis that they are consistent with the current clause 21.2. This would also resolve the AWU's submission.

Clause 20.3(b) – Transport allowance

98. We do not oppose the variation proposed by the SDA.

Clause 20.3(f)(ii) – Travelling time reimbursement

99. We agree with Business SA's submission that the exposure draft has altered the legal effect of the current provision and support the retention of the wording found in the current clause. We refer to paragraphs 230 – 232 of our submission dated 18 January 2017 in this regard.

Clause 20.3(f)(iii) – Travelling time reimbursement

100. We strongly oppose the deletion of the word "minimum" as sought by the SDA. We refer to our submission above regarding the use of the term "minimum hourly rate" in the exposure draft generally.

101. The brevity of the SDA's submission regarding "penalty hours and overtime rates" renders providing a proper response somewhat difficult. Ai Group may seek a further opportunity to provide a comprehensive response to this issue in due course, once we better understand the SDA's position and rationale.

Clause 22.2 – Overtime rates

102. In response to the SDA, we refer to our submission above regarding the use of the term "minimum hourly rate" in the exposure draft generally. We do not consider that any change to clause 22.2 is necessary in this regard.

Clause 22.2 – Overtime rates

103. We do not agree with the position of the SDA and AWU regarding the question contained at clause 22.2 of the exposure draft. Clause 31.2(a) of the current award and clause 22.2 of the exposure draft quite clearly state that overtime rates are payable where an employee works in excess of the *number* of hours of work prescribed by clause 28.2. Neither the aforementioned provisions nor any other provide an entitlement to overtime rates for work performed outside ordinary hours generally.

104. Any variation to the exposure draft to reflect the position of the unions would amount to a significant substantive change and would increase costs for employers. It is not appropriate that such a change be made through the technical and redrafting process. The unions should be put to the task of mounting a case in support of any such variation sought.

Clause 23 – Penalty rates

105. In response to the SDA, we refer to our submission above regarding the use of the term "minimum hourly rate" in the exposure draft generally. We do not consider that any change to clause 23 is necessary in this regard.

Clause 23.1 – Saturday work

106. For the reasons set out above in response to the question contained at clause 22.2 of the exposure draft, we also oppose the submissions of the SDA and AWU regarding clause 23.1.

Clause 23.1(b) – Saturday work

107. The SDA "opposes the new 23.1(b) as it lends itself open to ambiguity, particularly in relation to overtime". It has not, however, identified the alleged ambiguity or how it proposes that it be remedied.

108. Ai Group may seek a further opportunity to respond in due course once we better understand the SDA's position and rationale.

Clause 23.2 – Sunday work

109. In response to the SDA, we refer to our submission above regarding the use of the term "minimum hourly rate" in the exposure draft generally. We do not consider that any change to clause 23.2 is necessary in this regard.

Clause 27.3(a) – Public holidays

110. We do not oppose the amendments proposed by Business SA and the AWU. We refer to paragraphs 235 – 236 of our 18 January 2017 in this regard.

Clause 27.4 – Public holidays

111. In response to the SDA, we refer to our submission above regarding the use of the term "minimum hourly rate" in the exposure draft generally. We do not consider that any change to clause 27.4 is necessary in this regard.

Clause 27.4 – Public holidays

112. We do not oppose the submissions of the SDA, AWU and Business SA that "200%" should be replaced with "250%" on the basis that this is consistent with the current clause 35.3.

Clause 35 – Transfer to lower paid job on redundancy

113. The AWU's submission should be referred to the Full Bench constituted to deal with the plain language redrafting of 'standard clauses' (AM2016/15).

Schedule A – Summary of hourly rates of pay

114. We agree with the AWU's submission. We refer to paragraphs 237 – 239 of our submission dated 18 January 2016 in this regard.

Schedule A – Summary of hourly rates of pay

115. The issue of the rate payable to casual employees during overtime is a contentious one, that has been referred to the casual and part-time employment common issues Full Bench (AM2014/196 and AM2014/197). The SDA has

sought various amendments to the award in this regard. Ai Group and HABA oppose the claim.

116. On this basis, consideration as to whether casual overtime rates should be inserted, as sought by the AWU, should be deferred until the aforementioned Full Bench issues its decision.

6. EXPOSURE DRAFT – PROFESSIONAL EMPLOYEES AWARD 2016

117. The submissions that follow relate to the *Exposure Draft – Professional Employees Award 2016*. They are in response to submissions filed by:

- APESMA;
- ABI and the NSW Business Chamber;
- The AFEI; and
- Business SA.

Clause 2.1 – Definitions – communications

118. We agree with the submission of the AFEI.

Clause 2.2 – Engineering stream – Professional engineering duties

119. We agree with the submission of ABI and the NSW Business Chamber.

Clause 2.4 – Scientist stream

120. There could be significant cost implications associated with APESMA's proposed changes to the definitions, depending upon the alignment between the proposed grades of membership and the grades currently referred to in the Award.

121. To date, APESMA has provided little or no information regarding the alignment between the proposed membership grades and the grades currently referred to.

122. Ai Group is happy to have discussions with APESMA about this issue but in the absence of any agreement being reached, this issue should be dealt with as a substantive claim, rather than a technical or drafting matter.

Clause 7 – Facilitative provisions for flexible working practices

123. We acknowledge, as highlighted by Business SA, that the current clause 8.4 does not appear in the exposure draft. However we understand that this is consistent with the Commission's decision of December 2014 such provisions:

> **[42]** We acknowledge that the last sentence in the exposure draft clause may have unintended consequences and may give rise to an additional legal obligation. Further, fairness issues are more appropriately addressed in the context of the particular facilitative provisions, which specify the extent of facilitation and the manner in which it is accessed. For these reasons we will delete the sentence: 'Facilitative provisions are not to be used as a device to avoid award obligations nor should they result in unfairness to an employee or employees covered by the award'.[1]

124. Consistent with that decision, the exposure drafts published to date do not include a provision in the terms found at clause 8.4 of the current award. This includes circumstances in which the current award contains such a provision (see for example the *Exposure Draft – Business Equipment Award 2016*).

125. Accordingly, the current clause 8.4 should not be inserted in the exposure draft.

Clause 7.2 – Facilitative provisions of flexible working practices

126. We do not oppose the AFEI's submission.

Clause 13 – Ordinary hours of work

127. We agree with the submission of the AFEI, ABI and the NSW Business Chamber. The submissions of Business SA and APESMA are opposed.

128. The Act does not impose any requirement that an award prescribe the period of time over which ordinary hours of work are to be averaged. This may be left by an award term to the prerogative of the employer, as is here the case. The introduction of any period of time would be a substantive change that may have the effect of restricting the flexibility currently available under clause 13. Therefore, such a change should not be made.

[1] 4 yearly review of modern awards [2014] FWCFB 9412 at [42].

129. Should any party seek to pursue a variation in this regard, it should be treated as a substantive claim to vary the award and should not be dealt with through the redrafting process.

Clause 14.2 – Minimum wages

130. We note the submissions of APESMA and suggest that the matter be discussed further during any conference listed before the Commission in due course.

Clause 15.3 – Vehicle allowance

131. We do not oppose the retention of the current clause 16.2, as proposed by Business SA. We agree that the redrafting of that provision is problematic, as set out at paragraphs 300 – 303 of our submission dated 18 January 2017 in this regard.

Clause 17.4(a) – Annual close-down

132. We agree with the submissions of AFEI. We refer to our submissions of 18 January 2017 at paragraphs 310 – 312 in this regard.

Schedule A.1.2(a) – Pay point 1.1

133. The following question is asked at A.1.2 of the exposure draft:

Given clause 14.1 provides a rate of pay for a 5 year degree, parties are asked whether it should be included in A.1.2(a).

134. A.1.2(a) aligns with Pay Point 1.1. AFEI says it does not oppose the proposal. Similarly, Ai Group supports the proposal.

135. APESMA makes the following submission:

Historically the entry rate for a Professional Engineer (4-year degree) or Professional Scientist (4 or 5-year degree) was higher than that of the Professional Scientist (3-year degree). To correct this omission the Association submits that the entry rate for the holder of a 4 or 5-year degree should be Pay Point 1.2.

136. The alignment of the classification with Pay Point 1.1 is consistent with the current award. If APESMA wishes to pursue a change to align the classification with Pay Point 1.2 this should be dealt with as a substantive claim, and not as a technical or drafting matter.

7. EXPOSURE DRAFT – WATER INDUSTRY AWARD 2016

137. The submissions that follow relate to the *Exposure Draft – Water Industry Award 2016*. They are in response to submissions filed by:

- The AMWU;
- The AWU; and
- United Voice.

Clause 2 – Definitions – default fund employee

138. Contrary to the AMWU's submission, the definition of 'default fund employee' need not be retained, as the term is not used in the exposure draft.

Clause 2 – Definitions – shiftworker

139. We do not oppose the Commission's proposal; that the words "for the purposes of the NES" be replaced with "for the purposes of s.87(1)(b) of the Act.

Clause 8.2 – Types of employment

140. Whilst we do not consider that the amendment proposed by the AWU is necessary, we do not oppose it.

Clause 10.4 – Part-time employment

141. We do not consider that the AWU's proposed amendment is necessary.

Clause 11.2 – Casual loading

142. We agree with United Voice that the redrafting of the current clauses 10.5(b) and 10.5(c) is problematic. We refer to paragraphs 324 – 326 of our submission dated 18 January 2017 in this regard. For the reasons there set out, we do not agree with the submissions of the AWU.

Clause 16.3(c)(iv) – Normal starting point – Transfers, travelling and working away from normal starting point

143. We agree with the AWU's submission.

Clause 18.5 – Shiftwork

144. Clause 18 of the Exposure Draft deals with shiftwork and shiftwork rosters. Specifically, clause 18.4 prescribes the manner in which an employer may structure its roster:

> An employer may implement 12 hour shifts as part of a two shift, 24 hour continuous roster but an employee must not be rostered for more than five 12 hour shifts in any nine day period.

145. Clause 18.5 then specifies the circumstances in which an employer must not change the structure of a roster or implement a new roster. The provision relates to changes to the roster structure generally, which may or may not in fact result in a change to a specific employee's regular roster.

146. Clause 26 of the exposure Draft sets out an employer's obligation to consult before making changes to an individual employee's regular roster. It requires that an employer must consult with any employee affected by the proposed change.

147. It would be erroneous to introduce the provision proposed by the AMWU. It purports to require that an employer undertake the relevant consultation process irrespective of whether the obligation in fact arises under clause 26. We that the insertion of a reference to a provision that may not in fact be relevant is unhelpful and runs contrary to the Commission's objective of making the award simpler and easier to understand.

148. Accordingly, the AMWU's proposal should not be adopted.

Clause 19.4(c) – Rest period after overtime

149. The brevity of the AMWU's submission regarding clause 19.4(c) renders providing a proper response somewhat difficult. Ai Group may seek a further

opportunity to provide a comprehensive response to this issue in due course, once we better understand the union's position and rationale.

Clause 23.2 – Public holidays

150. The brevity of the AMWU's submission regarding clause 23.2 renders providing a proper response somewhat difficult. Ai Group may seek a further opportunity to provide a comprehensive response to this issue in due course, once we better understand the union's position and rationale.