Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Group 4C

Construction Industry Exposure Drafts

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AiGROUP

4 YEARLY REVIEW OF MODERN AWARDS

GROUP 4A – 4C

CONSTRUCTION INDUSTRY EXPOSURE DRAFTS

	Title	Page
1.	**Introduction**	3
2.	**Issues of General Concern**	4
2.1	Matters that have been determined by the Commission	4
2.2	The characterisation of premiums payable pursuant to an award	6
2.3	The manner in which the premium is expressed	9
2.4	The application of penalties and loadings to the ordinary hourly rate	11
2.5	The application of penalties and loadings to over-award payments	17
2.6	Schedules summarising hourly rates of pay	17
2.7	Commencement clause	19
2.8	Wage rates and allowances	20
3.	**Exposure Draft – Building and Construction General On-Site Award 2016**	21
4.	**Exposure Draft – Electrical, Electronic and Communications Contracting Award 2016**	23
5.	**Exposure Draft – Joinery and Building Trades Award 2016**	32
6.	**Exposure Draft – Mobile Crane Hiring Award 2016**	49
7.	**Exposure Draft – Plumbing and Fire Sprinklers Award 2016**	54

1. INTRODUCTION

1. On 10 May 2016, the Fair Work Commission (Commission) published revised directions in respect of awards allocated to Group 4 of the award stage of the 4 yearly review of awards (Review). Specifically, parties were directed to file submissions on technical and drafting issues in Group 4A - 4C exposure drafts.

2. Ai Group filed a submission dated 30 June 2016 addressing several exposure drafts in Group 4A, 4B and 4C. Ai Group was granted an extension to file its submission on the following five construction industry exposure drafts and this submission deals with such exposure drafts:

   a. *Exposure Draft – Building and Construction General On-Site Award 2016;*

   b. *Exposure Draft – Electrical, Electronic and Communications Contracting Award 2016;*

   c. *Exposure Draft – Joinery and Building Trades Award 2016;*

   d. *Exposure Draft – Mobile Crane Hiring Award 2016;*

   e. *Exposure Draft – Plumbing and Fire Sprinklers Award 2016*.

3. This submission first deals with issues of general concern. Those issues will be familiar to the Commission, as many of them were also raised in our submissions of 7 December 2015 in respect of Group 1C – 1E revised exposure drafts, and in our submissions of 14 April 2016 regarding Group 3 exposure drafts. The issues were also raised in our submission of 30 June 2016 regarding various other exposure drafts in Groups 4A - 4C. As the Commission is yet to make a ruling on these issues, and given their relevance to the exposure drafts that we have here reviewed, we repeat those submissions for the benefit of the Full Bench and other interested parties.

4. The submission subsequently goes on to identify issues specific to the exposure drafts identified above.

2. ISSUES OF GENERAL CONCERN

2.1 Matters that have been determined by the Commission

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

- An amendment to the title of the exposure drafts by substituting '2014' with '2015';[1]
- The terms of the commencement clause;[2]
- The deletion of the proposed supersession clause;[3]
- The removal of the absorption clause;[4]
- The retention of the take-home pay order provision;[5]
- An amendment to the provision that provides that the National Employment Standards (NES) and the relevant award provide the minimum conditions of employment;[6]
- A variation to the provision that imposes an obligation on an employer to ensure that a copy of the relevant award and NES is available to its employees;[7]
- An amendment to the text of the facilitative provisions;[8]

[1] [2015] FWCFB 4658 at [4].
[2] [2014] FWCFB 9412 at [11]; [2015] FWCFB 4658 at [4] and [2015] FWCFB 4658 at [8].
[3] [2014] FWCFB 9412 at [9].
[4] [2015] FWCFB 4658 at [9 – [20] and [2015] FWCFB 6656 at [74].
[5] [2014] FWCFB 9412 at [16] and [2015] FWCFB 6656 at [81].
[6] [2014] FWCFB 9412 at [23] – [25].
[7] [2014] FWCFB 9412 at [29].
[8] [2014] FWCFB 9412 at [42].

- The application of the casual loading to the minimum hourly rate or the ordinary hourly rate, which is to be determined on an award by award basis;[9]
- The deletion of the proposed clause that would list award provisions that do not apply to casual employees;[10]
- The inclusion of a table in the 'minimum wages' clause in the body of an award that contains the minimum weekly rate and minimum hourly rate;[11]
- The consequential removal of any columns from such a table that prescribe the 'casual hourly rate' or 'ordinary hourly rate' (where relevant);[12]
- The deletion of the proposed clause that would impose obligations on an employer regarding pay slips;[13]
- The insertion of a note that refers to Regulations 3.33 and 3.46 of the *Fair Work Regulations 2009*;[14]
- The deletion of summaries of the NES;[15]
- The insertion of a note in the annual leave provision of an award that refers to ss.16 and 90 of the *Fair Work Act 2009* (Act);[16]
- The definition of 'all purpose';[17]

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[9] [2015] FWCFB 4658 at [70] – [72] and [2015] FWCFB 6656 at [109].
[10] [2014] FWCFB 9412 at [69].
[11] [2015] FWCFB 4658 at [54].
[12] [2015] FWCFB 4658 at [54];
[13] [2014] FWCFB 9412 at [35] – [36].
[14] [2015] FWCFB 4658 at [55] – [56].
[15] [2014] FWCFB 9412 at [35] – [36].
[16] [2015] FWCFB 4658 at [94].
[17] [2014] FWCFB 9412 at [44] – [53] and [2015] FWCFB 4658 at [91].

- The definition for and use of the terms 'minimum hourly rate' and 'ordinary hourly rate';[18]

- The application of penalties and loadings to the minimum rate prescribed by an award to the exclusion of over-award payments;[19]

- The restoration of the tables containing rates of pay in the National Training Wage Schedule;[20]

- The inclusion of tables that summarise hourly rates of pay in schedules attached to an award, noting that a 'one size fits all' approach may not be appropriate;[21] and

- The insertion of a note in the schedules summarising hourly rates of pay, which states that an employer meeting their obligations under the schedule is meeting their obligations under the award.[22]

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

2.2 The characterisation of premiums payable pursuant to an award

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

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[18] [2014] FWCFB 9412 at [44] – [53] and [2015] FWCFB 9412 at [47].

[19] [2015] FWCFB 4658 at [95] – [96].

[20] [2014] FWCFB 9412 at [67].

[21] [2014] FWCFB 9412 at [58] and [2015] FWCFB 4658 at [62].

[22] [2015] FWCFB 4658 at [63].

8. We have identified instances in which the characterisation of a particular premium payable under an award has been altered in the corresponding provision of an exposure draft. For instance, where a current award mandates the payment of a shift *allowance*, the exposure draft may instead refer to it is a shift *loading*.

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

10. For instance, the *Workers Compensation Act 1987* (NSW) defines an employee's 'pre-injury average weekly earnings' to include 'overtime and shift allowance payments'.[23] We are concerned that if a shift premium presently labelled as a shift loading is subsequently characterised as a shift allowance, or vice versa, that may have some implication for the calculation to be performed under the aforementioned legislation.

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

12. We anticipate that employers who have had some interaction with such legislation would have determined the amounts payable to their employees, in accordance with the relevant provisions. Altering the terminology used in modern awards in respect of certain entitlements may have unintended consequences for such employers and their employees, in circumstances

[23] Section 44C.

where they are not necessarily aware of the change, given its subtlety. The alterations could disturb existing arrangements in a way that is not readily apparent to employers or employees. It is for these reasons that we submit that caution should be taken in retitling an entitlement in the awards system.

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

14. A further example arises from those award provisions that state that any payments prescribed by a particular clause are "in substitution for any other loadings or penalty rates". If a payment presently characterised as a shift penalty were redrafted such that it was referred to as a shift *allowance* in the exposure draft, that may have unintended consequences for the application of a provision such as the above.

15. In these submissions, we have endeavoured to identify circumstances in which there has been a relevant change of this nature. Should the Commission accept the proposition that an alteration to the characterisation of a premium payable under an award may have unintended consequences for the calculation of entitlements due under other award provisions and/or legislation, it is our submission that the terminology currently used should, in each case, be restored. We note that our submissions to this effect in respect of the *Exposure Draft – Timber Industry Award 2014* have been accepted by the Commission in the October 2015 Decision.[24]

[24] [2015] FWCFB 7236 at [299].

2.3 The manner in which the premium is expressed

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

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

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

19. We raise this issue out of concern that it too may have the types of unintended consequences that have been outlined above. Whilst we appreciate and acknowledge that the manner in which the exposure drafts express the relevant penalty rates or loadings may make it easier to determine the calculation to be performed to ascertain the quantum due, the portion of the amount paid that is in fact the penalty or loading is not clear on the terms of the proposed provisions.

20. We point to an example that we have previously relied upon in respect of the Group 1C – 1E Exposure Drafts. In doing so, we note that similar instances arise from the Group 4 Exposure Drafts.

21. Clause 13 of the *Exposure Draft – Poultry Processing Award 2015* (Exposure Draft) has altered the way in which additional payments made to shiftworkers are expressed.

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

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

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

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

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

26. As the shift rate or weekend are no longer separately identifiable, the Exposure Draft materially increases costs because employers could be required, pursuant to clause 15.4, to pay both the base rate referred to in clause 15.3 and the inflated rate referred to in clause 13.2 (rather than just the penalty or shift rate component).

27. We accept that those who have an understanding of the awards system and have participated in this process would possess an inherent understanding of

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

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

28. The Commission's decision of 13 July 2015[25] (July 2015 Decision) deals with the use of the term 'ordinary hourly rate', which has been defined as the hourly rate for the employee's classification as prescribed by a specific clause of the relevant award, plus any all purpose allowances. An issue arising from the use of this terminology is the calculation of various loadings and penalties. That is, whether the relevant penalty or loading is to be applied to the minimum rate or a rate that is inclusive of applicable all purpose allowances.

29. The Commission observed that allowances defined as applying 'for all purposes' "have historically been treated as part of an employee's wages for the purpose of calculating penalties and loadings"[26] but noted that "some issues have arisen concerning the methodology used in the exposure drafts" in this regard.[27]

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

> [44] In affected awards, penalties and loadings are expressed as a percentage of the ordinary hourly rate, for example "overtime is paid at 150% of the ordinary hourly rate" to make it clear that an all purpose allowance to which an employee is entitled must be added to the minimum rate <u>before</u> calculating the loaded rate, that is, there is a *compounding* effect.[28]

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[25] [2015] FWCFB 4658.

[26] [2015] FWCFB 4658 at [40].

[27] [2015] FWCFB 4658 at [41].

[28] [2015] FWCFB 4658 at [44].

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

> [45] Ai Group submit that the term 'ordinary hourly rate' could be "confusing" and is concerned that it could "extend existing entitlements". Ai Group submit that all purpose allowances should not necessarily be added to a minimum rate of pay before calculating any penalty or loading. <u>In some cases due to the wording of the current award, Ai Group submit that the allowance should be added after the loading is applied to the minimum rate, that is there should be a cumulative rather than compounding effect</u>.[29]

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

> [47] … Any issues as to whether a particular payment is payable for all purposes, and, in particular, whether an allowance should be added to a minimum rate before calculating a penalty or loading, will be dealt with on an award-by-award basis. <u>Ultimately the resolution of these issues will turn on the construction of the relevant award and the context in which it was made.</u>[30]

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

34. The submissions below, wherever relevant, deal with the appropriate construction of current award clauses that prescribe a penalty or loading in circumstances where we are of the view that the exposure draft ought to refer to the minimum hourly rate, rather than the ordinary hourly rate.

35. We do so on the basis that where a current award provision requires the application of a premium to a rate that does not include any all-purpose allowances, but the exposure draft deviates from this, the result is a substantive

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[29] [2015] FWCFB 4658 at [45].

[30] [2015] FWCFB 4658 at [47].

change that may have significant cost implications for an employer. We note that the Commission has repeatedly acknowledged that the redrafting process is not intended to create any substantive changes to the awards system.

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

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

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

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

39. Whilst we appreciate that the Commission has not sought further submissions regarding the definition of 'all purposes', we think it appropriate to here raise the matter, as it may become apparent that there is a need to modify the definition, or accommodate for it when re-drafting the relevant provisions that prescribe the penalty or loading.

Calculation of the casual loading

40. The question of whether the casual loading should be applied to the minimum hourly rate or ordinary hourly rate has also been the source of some controversy in the context of the exposure drafts. The Commission previously expressed

the provisional view that a general approach involving the application of casual loading to the minimum hourly rate should be adopted.

41. In its decision of September 2015[31], the Full Bench determined that the provisional view should not be adopted. It also indicated that:

> The general approach will remain as expressed in the exposure drafts, namely that the casual loading will be expressed as 25% of the ordinary hourly rate in the case of awards which contain any all purpose allowances, and will be expressed as 25% of the minimum hourly rate in awards which do not contain any such allowances.[32]

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

43. In the proceedings associated with the September 2015 decision, both employer and union parties either argued for, or at least accepted, the need for some deviation from the application of a uniform approach to such matters: (emphasis added)

> [103] The primary submission of the AWU, the CFMEU and the AMWU was that the proposed general rule should not be adopted, so that issue 3 did not arise. <u>The AWU submitted in the alternative that, if the proposed general rule was adopted, it should be on the basis that no employee suffered a reduction in remuneration as a result. The AMWU submitted that the *2008 decision* demonstrated that there may be departures from a general rule in relation to particular modern awards.</u>
>
> [104] <u>ABI declined to make a submission in relation to issue 3 beyond noting that the *On-Site Award* and the *Cotton Ginning Award* were examples of modern awards which might require individual consideration. The Ai Group submitted that there should generally be a consistent position across all awards, but accepted that there could be a justification for a departure from that position in relation to particular awards, in which case the party contending for the departure should carry the onus of demonstrating the requisite justification.</u>
>
> [105] The MBA and the HIA both contended that adoption of the provisional decision in the *On-Site Award* would resolve the existing dispute concerning the interpretation of that award, but that if it was not considered appropriate to resolve the dispute in that way, the problem should be given specific consideration by the Commission as expeditiously as possible.[33]

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[31] [2015] FWCFB 6656.

[32] [2015] FWCFB 6656 at [110].

[33] [2015] FWCFB 6656 at [103] – [105].

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

> [106] The obligation in s.134(1) of the FW Act to ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions carries with it a requirement (in s.134(1)(g)) to take into account "the need to ensure a simple, easy to understand, stable and sustainable modern award system …". We accept that the adoption of a clear and consistent approach in relation to whether the casual loading should apply to all purpose allowances is desirable in the interests of simplicity and ease of understanding, although the particular circumstances of some awards may require special consideration. The question is whether the approach proposed by the provisional decision is the one which should be preferred in this respect.[34]

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

46. To the extent that it is necessary, we point out that the inclusion of an all-purpose allowance in an award does not prevent the instrument from potentially providing that any applicable casual loading is to be calculated by reference to an amount not including any all-purpose allowance.

47. To require that the casual loading be applied to a rate that includes one or more all-purpose allowances in an exposure draft where that is not the approach under the current award would be a substantive change and would significantly increase employer costs. Ai Group opposes such redrafting of the relevant award provisions on this basis.

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

> [109] The concern which underlay the provisional decision was whether it was appropriate for certain allowances currently expressed as all-purpose allowances to be paid at an increased level for casual employees by reason of the application of the casual loading. Ultimately however we have concluded that to deal with this concern in the manner proposed by the provisional decision is too broad-brush an approach and involves conducting the analysis from the wrong starting point. We consider that

[34] [2015] FWCFB 6656 at [106].

> the preferable approach is to permit reconsideration, on an award-by-award basis during the course of the 4-yearly review, as to whether any existing allowance should retain its "all purpose" designation or should be payable on some different basis.[35]

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

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

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

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

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

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[35] [2015] FWCFB 6656 at [109].

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

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

54. The Commission rejected the unions' arguments in this regard and in doing so, accepted Ai Group's contention that penalties and loadings stipulated by an award do not require an employer to apply them to over-award rates. The decision states that the exposure drafts will therefore express the relevant loadings and penalties as a percentage of the minimum rate prescribed by the award, rather than using the terms 'time and a half' or 'double time'.[36]

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

2.6 Schedules summarising hourly rates of pay

56. In its July 2015 Decision[37], the Commission decided that a note would be inserted in all exposure drafts that contain a schedule summarising the hourly rates payable under the award. It is in the following terms: (emphasis added)

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

57. Whilst we understand that it is the Commission's intention that the schedules attached to the exposure drafts be legally enforceable,[38] we are concerned that this is not achieved by the note.

[36] [2015] FWCFB 4658 at [95] – [96].

[37] [2015] FWCFB 4658 at [63].

[38] [2015] FWCFB 4658 at [63].

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

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

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

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

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

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

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

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

63. Further, in our view, the schedules should not, and indeed cannot, provide a substitute for reading the terms of an award itself. That is, the schedules must be read in the context of the award. This is because the award contains provisions that explain the circumstances in which a particular rate is payable. Similarly, an award may provide for exceptions or caveats around the

application of a particular monetary entitlement. Indeed these complexities were acknowledged by the Full Bench in its July 2015 Decision: (emphasis added)

> [61] In submissions to the Review, a number of parties have raised general and specific issues about the inclusion of such detailed schedules. In their submission of 6 March 2015, Ai Group supports the inclusion of such schedules but states that the Commission's approach must be considered on an award-by-award basis and "be guided by the submissions of the parties and outcomes of the conferencing process". While most parties support the inclusion of schedules of hourly rates, there is concern about adopting a 'one size fits all' approach. While rates including penalties and loadings can be clearly summarised in some awards, others are more complex due to the inter-relationship between loadings or the incidence of all purpose allowances payable to only some employees.[39]

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

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

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

2.7 Commencement clause

66. Clause 2.1 of current modern awards states as follows:

> This award commenced operation on 1 January 2010

67. At clause 1.2 of the exposure drafts this has been changed to:

> This modern award, as varied, commenced operation 1 January 2010

[39] [2015] FWCFB 4658 at [61].

68. There is obviously a need to include such a clause to reflect that the awards have been in operation since 1 January 2010. However, the words, “as varied” in the sentence contained at clause 1.2 are misleading. The awards, as varied, did not commence operation on 1 January 2010.

69. We nonetheless suggest that there may be merit in alerting the reader to the fact that the award has been varied since its commencement. While this observation may seem trite to industrial relations practitioners, it may not be apparent to all lay employers and employees. We suggest the following clause, or comparable wording, should be included in all modern awards:

> This modern award commenced operation on 1 January 2010. The award has been varied since that date.

2.8 Wage rates and allowances

70. The wage rates and wage-related allowances contained in the group 4A – 4C exposure drafts require updating in light of the Annual Wage Review 2015 – 2016 decision. Accordingly, we have not, at this time, undertaken a comprehensive review of these rates/allowances.

71. We respectfully request that a further opportunity be afforded to interested parties to review and comment on revised rates/allowances prior to the exposure drafts replacing the current modern awards.

3. EXPOSURE DRAFT – BUILDING AND CONSTRUCTION GENERAL ON-SITE AWARD 2016

73. The submissions that follow relate to the *Exposure Draft – Building and Construction General On-Site Award 2016* (Exposure Draft).

Clause 2 – Definitions

74. The definition of “ordinary hourly rate” has been inserted to replace the current award definition of “ordinary time hourly rate”. The deletion of the word “time” is not a contentious issue.

75. However, the following words have been added:

> “**ordinary hourly rate means** the hourly rate for an employee’s classification specified in clause 19.1(a) plus the industry allowance. Where an employee is entitled to an additional all-purpose allowance, this allowance forms part of that employee’s ordinary hourly rate.”

76. The additional words are likely to create confusion and should be deleted.

77. The award outlines clearly the allowances which should be treated as all-purpose and the how this interacts with the hourly rate of pay. These terms are contained within the body of the award and, in particular, in clauses 20 and 21.

78. We propose that the paragraph should read:

> “**ordinary hourly rate** means:
>
> - for daily hire employees the hourly rate calculated in accordance with clause 19.3(a);
> - for weekly hire employees the hourly rate calculated in accordance with clause 19.3(b);
> - for apprentices the weekly rate (determined in accordance with clause 19.7 or **Error! Reference source not found.**) divided by 38;
> - for trainees the weekly rate (determined in accordance with clause 19.10(b) or 19.10(c)) divided by 38;
> - for employees covered by clause 40 — Lift industry, includes the all-purpose amounts specified in clause 40 are included;
> - for forepersons and supervisors in the metal and engineering construction sector the relevant weekly rate specified in clause 41.2(a) divided by 38;

- for leading hands the amount calculated in accordance with clause 19.2(a) or 19.2(b) is included.

Clause 7 – Facilitative provisions for flexible working arrangements

79. The table at paragraph 7.2 requires amendments as follows :

    - In relation to clause 23.14(a), in the last column, delete the words “The majority of employees” and insert the words “The employees”. This is consistent with the current award.

    - In relation to clause 24.7(f)(vi), in the first column add the words “and (vii)”.

Clause 12.1 – Casual Employment

80. Clause 12.1 is a critical provision which defines casual employment. The removal of the word “one” could have a major impact on how casuals are defined under the award. The existing wording in clause 12.1 needs to be retained.

Clause 14.1- Apprentices

81. The definition of adult apprentice is found in both clause 2 and in clause 14.1. the clauses are slightly different. In clause 2, the definition includes at the end of the sentence the words “in a specified trade”. These words are missing in clause 14.

82. The current award does not provide any guidance, as it contains the same inconsistency.

83. To avoid confusion, we propose that the definition in clause 2 is removed and the definition in clause 14.1 is retained.

4. EXPOSURE DRAFT – ELECTRICAL, ELECTRONIC AND COMMUNICATIONS CONTRACTING AWARD 2016

84. The submissions that follow relate to the *Exposure Draft – Electrical, Electronic and Communications Contracting Award 2016* (Exposure Draft).

Clause 7.2 – Facilitative provisions for flexible working practices

85. Clause 7.2 refers to clause 16.6(b)(i), which allows for agreement between an employer and the majority of employees or an agreement between an employer and an individual employee. Despite this, clause 7.2 states that clause 16.6(b)(i) only allows for agreement between an employer and the majority of employees.

86. The final column in respect of clause 16.6(b)(i) should be amended by inserting the words "An individual or" before "the majority".

Clause 10.5(b) – Part-time employment – public holidays

87. We refer to the question posed at clause 10.5(b) of the Exposure Draft, as to whether the provision should instead refer to clause 13.15 and 19.4(b). Ai Group supports the proposed approach, as the provision would thereafter refer to the public holiday rates payable to an employee performing continuous shiftwork, non-continuous shift work or overtime, as relevant.

Clause 12.10 – Apprentices

88. Ai Group agrees that the reference to clause 16.2 should instead be to clause 16.4.

Clause 12.14 – Employment of juniors

89. Clause 12.14 of the exposure Draft differs from that of clause 12.14 of the current award in the following respects:

- In the heading, the reference to "minors" has been replaced with "juniors";

- In clause 12.14(a), the reference to “minors” has been replaced with “a person under 21 years of age”; and
- In clause 12.14(b), the reference to “minor” has been replaced with “junior”.

90. It is our submission that “a person under 21 years of age” is not the same as a “minor”. The term “minor” refers to a person under 18 in Australian law.[40] Similarly, the term “junior”, which under the Act refers to a person under the age of 21[41], is not the same as a “minor”.

91. Accordingly, these changes to the wording substantially effect the application of the provisions by altering the threshold age. Therefore, the current wording should be retained.

Clause 13.8(d)(ii) – Substitution of rostered day off

92. Consistent with the Commission’s July 2015 decision at paragraphs [95] – [96], clause 13.8(d)(ii) of the Exposure Draft should be amended by inserting the words “of the ordinary hourly rate” after “200%”. This is consistent with the approach taken earlier in the clause regarding the 50% penalty.

Clause 13.13(a) – Shift allowances

93. The word “employee’s” in the second line is unnecessary and should be deleted.

94. Further, the “ordinary hourly rate” is a defined term in the Exposure Draft. It is a reference to the minimum hourly rate prescribed by the award and any all purpose allowances to which an employee is entitled under the terms of the award. We are concerned that the inclusion of the word “employee’s” may be interpreted as requiring the application of the shift allowance to the ordinary

[40] See for example s.5 of the *Marriage Act 1961*, s.219ZJJ (5) of the *Customs Act 1901,* and under State law such as the *Interpretation Act 1987* (NSW) – s.21

[41] At s.12

hourly rate ascribed to a particular employee, which may include over award payments.

95. Therefore, the word “employee’s” should be deleted.

Clause 13.13(b) – Shift allowances

96. Consistent with the Commission’s July 2015 decision at paragraphs [95] – [96], clause 13.13(b) of the Exposure Draft should be amended by inserting the words “of the ordinary hourly rate” after “200%”. This is consistent with the approach taken earlier in the clause regarding the 50% allowance.

Clause 13.13(d) – Shift allowances

97. The word “employee’s” in the second line is unnecessary and should be deleted.

98. Further, the “ordinary hourly rate” is a defined term in the Exposure Draft. It is a reference to the minimum hourly rate prescribed by the award and any all purpose allowances to which an employee is entitled under the terms of the award. We are concerned that the inclusion of the word “employee’s” may be interpreted as requiring the application of the shift allowance to the ordinary hourly rate ascribed to a particular employee, which may include over award payments.

99. Therefore, the word “employee’s” should be deleted.

Clause 13.16(a)(ii) – Overtime on shiftwork

100. Consistent with the Commission’s July 2015 decision at paragraphs [95] – [96], clause 13.16(a)(ii) of the Exposure Draft should be amended by inserting the words “of the ordinary hourly rate” after “200%”. This is consistent with the approach taken earlier in the clause regarding the 50% penalty.

Clause 17.2(f)(ii) – Rate for ordering materials

101. The cross reference to clause 17.2(f)(ii) should be replaced with a reference to clause 17.2(f)(iii). This appears to be a drafting error.

Clause 19.1(a) – Payment for working overtime

102. Consistent with the Commission's July 2015 decision at paragraphs [95] – [96], clause 19.1(a) of the Exposure Draft should be amended by inserting the words "of the ordinary hourly rate" after "200%". This is consistent with the approach taken earlier in the clause regarding the 50% penalty.

Clause 30 – Transfer to lower paid job on redundancy

103. Clause 30 is headed "transfer to lower paid job on redundancy". It is followed by two subclauses, both of which deal with circumstances in which an employee is transferred to lower paid duties by reason of redundancy.

104. It is our submission that the use of the word "job" in the heading is anomalous and confusing. The relevant provisions relate to the *duties* performed by the employee. The notion of the employee's "job" is potentially a separate and distinct one.

105. Furthermore, the words "on redundancy" do not make sense. The following clauses apply where an employee, by virtue of a redundancy, have been transferred to lower paid duties. An employee is not generally said to be "on" redundancy.

106. For these reasons, the heading to clause 30 should be replaced with: "Transfer to lower paid duties by reason of redundancy".

Clause 31 – Employee leaving during redundancy notice period

107. Clause 15.4 of the current award deals with circumstances in which an employee terminates their employment during the notice period that follows the employee having been given notice of termination in circumstances of redundancy. The employee is entitled to receive the benefits and payments that they would have received under clause 15 had they remained in employment until the expiry of the notice, but is not entitled to payment instead of notice.

108. Clause 31 of the Exposure Draft corresponds with clause 13.3. It states that the employee is entitled to receive the benefits and payments they would have

received under clause 29. Clause 29 does not incorporate the provision for transfer to lower paid duties on termination, which is currently found at clause 15.3.

109. Accordingly, the cross reference in clause 31 should be replaced with references to clauses 29 and 30. This will ensure that the provision does not deviate substantively from the current clause 15.4.

Schedule B – Summary of hourly rates

110. We have identified a number of concerns arising from Schedule B to the Exposure Draft. The submissions that follow endeavour to articulate those issues. We suggest that these matters be the subject of a conference before a member of the Commission, so as to enable discussion as to how they can best be resolved.

Schedules B.1.1 – Ordinary hourly rate

111. B.1.1 purports to define the term "ordinary hourly rate" in terms that are inconsistent with the definition of "ordinary hourly rate" as found in clause 2. The definition found at B.1.1 is narrower in scope.

112. For the purposes of clarity, and to ensure that the Exposure Draft does not contain two inconsistent definitions for the same term, B.1.1 should be amended as follows:

> For the purposes of Schedule B, the ordinary hourly rate includes the industry allowance (clause 17.2(a)) and tool allowances as applicable (clause 17.2(g)) which are payable for all purposes.

Schedule B.1.1 – Ordinary hourly rate

113. Even if the amendment proposed above were made to B.1.1, we are concerned that the definition would remain problematic. This is because it states that the ordinary hourly rate includes the industry allowance "and tool allowances as applicable (clause 17.2(g))".

114. The tool allowance is payable to:

- electrical workers at grade 5 and beyond; and
- electrical workers performing the duties of television antenna/installer/erector or television/radio/electronic equipment serviceperson.

115. B.1.1 suggests that the rates set out in the schedule include the tool allowance wherever payable. This is not, however, the case. For instance, at B.2.1, the tool allowance has only been included in respect grade 5 and above. This is despite the fact that an employee engaged at a lower classification could be entitled to the tool allowance under the second limb of clause 17.2(g). The description at B.1.1 is, in this way, misleading.

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

116. B.2.1 requires that a full-time or part-time employee other than a shiftworker be paid at 250% of the ordinary hourly rate for the performance of ordinary hours of work on a public holiday. It appears that the award does not, however, stipulate a penalty payable for the performance of such work. We consider that clause 33.2(c), whilst applicable to day workers, is on its face limited to overtime. Accordingly, B.2.1 is inconsistent with the terms of the current award (and the Exposure Draft).

Schedule B.2.2 – Full-time and part-time employees other than shiftworkers – overtime rates

117. B.2.2 does not contain any explanation as to how the relevant rates have been derived. As a result, the difficulty expressed above regarding B.1.1 is exacerbated. The inclusion of the tool allowance in respect of some classifications (grade 5 and above) but not others has not been made explicit. This is likely to give rise to confusion.

Schedule B.2.3 – Full-time and part-time shiftworkers – ordinary and penalty rates

118. B.2.3 does not contain any explanation as to how the relevant rates have been derived. As a result, the difficulty expressed above regarding B.1.1 is exacerbated. The inclusion of the tool allowance in respect of some classifications (grade 5 and above) but not others has not been made explicit. This is likely to give rise to confusion.

Schedule B.2.4 – Full-time and part-time shiftworkers – overtime

119. We are concerned that the rates contained in Schedule B.2.4 are incorrect. We interpret the relevant provisions such that the following amendments should be made:

- For overtime performed on a public holiday, a continuous shiftworker is to be paid in accordance with the current clause 24.15(a)(i) (200% of the ordinary hourly rate); and

- For overtime performed on a Sunday, a non-continuous shiftworker is to be paid in accordance with the current clause 24.14(b)(i) (200% of the ordinary hourly rate).

Schedule B.2.4 – Full-time and part-time shiftworkers – overtime

120. B.2.4 is does not contain what otherwise appears as the second row in the rates tables (“% of the ordinary hourly rate”).

Schedule B.2.4 – Full-time and part-time shiftworkers – overtime

121. B.2.4 does not contain any explanation as to how the relevant rates have been derived. As a result, the difficulty expressed above regarding B.1.1 is exacerbated. The inclusion of the tool allowance in respect of some classifications (grade 5 and above) but not others has not been made explicit. This is likely to give rise to confusion.

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

122. B.3.1 does not contain any explanation as to how the relevant rates have been derived. As a result, the difficulty expressed above regarding B.1.1 is exacerbated. The inclusion of the tool allowance in respect of some classifications (grade 5 and above) but not others has not been made explicit. This is likely to give rise to confusion.

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

123. B.3.1 requires that a casual employee other than a shiftworker be paid at 275% of the ordinary hourly rate for the performance of ordinary hours of work on a public holiday. It appears that the award does not, however, stipulate a penalty payable for the performance of such work. We consider that clause 33.2(c), whilst applicable to day workers, is on its face limited to overtime. Accordingly, B.2.1 is inconsistent with the terms of the current award (and the Exposure Draft).

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

124. The second column in B.3.2 should be deleted (headed “day”). The purpose for its inclusion is unclear. We note that it does not appear in B.2.3.

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

125. B.3.2 does not contain any explanation as to how the relevant rates have been derived. As a result, the difficulty expressed above regarding B.1.1 is exacerbated. The inclusion of the tool allowance in respect of some classifications (grade 5 and above) but not others has not been made explicit. This is likely to give rise to confusion.

Schedule B.4 – Apprentice rates

126. Many of the concerns we have identified in respect Schedule B.2 and Schedule B.3 will also be relevant to the tables in respect of Schedule B.4. Rather than

reproduce them here, we suggest that this schedule also be the subject of discussion in respect of the matters earlier raised.

127. Consideration should also be given to whether the rates have been calculated accurately. For instance, we have been unable to identify the basis upon which the rates at B.4.9 have been derived. As an example, by our calculations, the hourly rate payable to a junior apprentice commencing before 1 January 2014 for ordinary hours is $9.56 (prior to the recent Annual Wage Review decision taking effect).

5. EXPOSURE DRAFT – JOINERY AND BUILDING TRADES AWARD 2016

128. The submissions that follow relate to the *Exposure Draft – Joinery and Building Trades Award 2016* (Exposure Draft).

Clause 2 – Definitions – all purpose

129. Clause 2 of the Exposure Draft contains a definition of "all purpose" which is consistent with that determined by the Commission earlier during this Review. In the context of this award, however, that definition is problematic.

130. The current clause 24.1(b)(ii) prescribes the all purpose industry allowance payable to a glazier or apprentice glazier engaged other than on factory glazing in the following terms:

> **(ii)** A glazier or an apprentice glazier, engaged other than on factory glazing, must be paid 3.8% of the standard rate per hour extra while engaged other than on factory glazing to compensate for the disabilities associated with the industry, provided that:
>
> - in respect of public holidays not worked (where payment is otherwise due), paid leave and attendance by apprentices at prescribed technical training, the disability allowance must also be paid for each hour the employee would have been engaged other than on factory glazing during such period; and
>
> - in the case of an employee proceeding on paid leave or receiving payment instead of leave on termination where it cannot be established to what extent they would have been engaged on other than factory glazing during the period, the disability allowance paid is to be pro rata of the disability allowance they were paid in the preceding 12 weeks.

131. Clause 24.1(b)(ii) qualifies the circumstances in which the industry allowance is payable during periods of paid leave, including annual leave. The first point requires the payment of the allowance during a period of paid leave in respect of only those hours that the employee would have been engaged on other than factory glazing during such period. The second point deals with circumstances where the extent to which the employee would have been engaged on other than factory glazing cannot be ascertained. It provides a mechanism by which the quantum of the allowance due is to be calculated.

132. The definition of "all purpose" in clause 2 is inconsistent with the terms of clause 24.1(b)(ii). The definition, read with clause 20.2 of the Exposure Draft, has the effect of requiring the payment of any all purpose allowance, including the aforementioned industry allowance during annual leave, without any further qualification. This is a substantive increase to the entitlement currently afforded under the award. It would require the payment of the full quantum of the industry allowance for every hour of annual leave taken, in circumstances where such an entitlement may not presently arise.

133. This issue is also relevant in the context of Schedule B to the Exposure Draft, which purports to prescribe the ordinary hourly rate payable to employees including those eligible for the allowance prescribed by clause 24.1(b)(ii). The schedule is misleading to the extent that it stipulates the payment of a rate that incorporates the all purpose allowance without qualifying that the amount payable to an employee during annual leave may, in fact, be less than that set out in the schedule.

Clause 11.4 – Casual employment

134. Clause 11.4 specifies that: (emphasis added)

> A casual employee for working ordinary hours must be paid the ordinary hourly rate per hour prescribed in clause 19 – Minimum wages, for the employee's classification plus a casual loading of 25%.

135. This is a substantive change from the current award terms that should not be made. We refer to our contentions at section 2.4 of this submission.

136. We also observe that the cover page of the Exposure Draft states: (emphasis added)

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

137. Clause 12.5 of the current award states:

> A casual employee for working ordinary time must be paid an hourly rate calculated on the basis of 1/38th of the minimum weekly wage prescribed in clause 18 –

Classifications and minimum wages, for the employee’s classification plus a casual loading of 25%.

138. The reference to “minimum weekly wage prescribed” must be read in the context of the award as a whole. We contend that the reference to “minimum weekly wage prescribed” is transparently a reference to the rates in clause 18. Our view in this regard is reinforced by the words “for the employee’s classification” Not all of the all-purpose allowances contained in the award are referrable to the employee’s classification.

139. Clause 11.4 cannot be read in a manner the enables any allowance to be taken into account in the calculation of a casual employee’s rate of pay. The 25% is directly linked to the minimum weekly rate.

140. Adopting the wording in the Exposure Draft would significantly increase the monetary obligations imposed upon employers by the award. Accordingly, it is important that the Commission not vary the entitlements of casual employees in the manner proposed. It is not the kind of change that should be made purely in support of a desire to achieve greater consistency between awards in order to purportedly make the system “simpler and easier to understand”.

141. If the Commission accepts the concerns that we have raised, there will need to be consequential amendments to the tables in Schedule B relating to casual employees.

Clause 11.5 – Casual employment

142. Clauses 12.6(a) – (c) of the current award require that the relevant rates there prescribed be applied to the “minimum weekly wage prescribed in clause 18 – Classifications and minimum wages for the employee’s classification”. This is clearly a reference to the minimum rates prescribed in clause 18 absent the addition of any all purpose allowances.

143. Clause 11.5 deviates substantively from the current award by requiring the application of the relevant rates to the ordinary hourly rate, which includes any all purpose allowances. The effect of this is to increase the entitlement of casual employees under this clause.

144. We refer to our submissions at section 2.4 above. Whilst the Commission has previously determined that the term "ordinary hourly rate" will generally be adopted in the exposure drafts, it accepted Ai Group's argument that the specific terms of a clause must be given consideration in determining whether an all purpose allowance is to be added before or after a penalty or loading is applied: (emphasis added)

> [47] … Any issues as to whether a particular payment is payable for all purposes, and, in particular, whether an allowance should be added to a minimum rate before calculating a penalty or loading, will be dealt with on an award-by-award basis. Ultimately the resolution of these issues will turn on the construction of the relevant award and the context in which it was made.[42]

145. Clause 12.6(a) – (c) provides a clear example of a provision that expressly requires that the relevant penalty be applied to a rate that does not incorporate all purpose allowances. To adopt the wording in the Exposure Draft would be to substantively deviate from these terms, which as we understand it, is not the Commission's intention in redrafting the awards.

146. For these reasons, the table in clause 11.5 should be amended by substituting "% ordinary hourly rate" with "% minimum hourly rate".

147. If the Commission accepts the concerns that we have raised, there will need to be consequential amendments to the tables in Schedule B relating to casual employees.

Clause 13.11(c) – Apprentice training

148. Clause 13.11 of the current award deals with apprentice training. It contains two subclauses. The first requires the employer to provide training and/or access to training consistent with the training agreement without loss of pay. The second subclause relates to time spent by an apprentice in attending any training and assessment specified in or associated with the training contract. The final sentence of that provision states that the clause operates subject to the school-based apprentices schedule.

[42] [2015] FWCFB 4658 at [47].

149. Clause 13.11 of the Exposure Draft separates the final sentence of the current clause 13.11(b) as a standalone subclause at clause 13.11(c). The effect is that the entire provision (i.e. clauses 13.11(a) and 13.11(b)) would now operate subject to the school-based apprentices schedule. We are concerned that this potentially impacts upon the interaction between clause 13.11(a) and the schedule.

150. For the purposes of ensuring that the terms of the Exposure Draft do not give rise to an inadvertent substantive change, clause 13.11(c) should be amalgamated with clause 13.11(b), as per the current provisions.

Clause 13.19 – Trainees

151. Clause 13.19 relates specifically with trainees. It appears at the end of a clause that is headed “apprentices” and deals otherwise with employees undertaking an apprenticeship.

152. Traineeships and apprenticeships are of course not synonymous. We are concerned that the placement of this clause under clause 13 will render it difficult to locate. The provision should be renumbered as a separate clause (i.e. clause 14) or, in order to avoid the consequential renumbering that would thereafter become necessary, the heading to clause 13 should be amended such that it reads “Apprentices and Trainees”.

Clause 17 – Rostering arrangements – day workers

153. Clause 17 is headed “rostering arrangements – day workers”. This heading does not appear in the current award.

154. The subclauses that follow the heading do not, as such, relate to the *rostering* by an employer of an employee’s hours of work. That is, they do not require or create any obligation to prepare or provide a roster. Rather, the provisions deal with the manner in which an employee’s ordinary hours of work may be arranged, irrespective of whether a roster is in fact prepared. We are concerned that the introduction of a heading in these terms may, however, give rise to a suggestion that the employee’s ordinary hours of work must be rostered.

155. Accordingly, in order to better reflect the content of the relevant provisions, the heading should be amended to read: "Arrangement of ordinary hours of work – day workers".

Clause 19.1 – Minimum wages

156. Clause 19.1 states that an employer must pay an employee the minimum wages that follow, which includes the minimum weekly wage and the minimum hourly wage for each classification. This represents a change from the drafting of the current award.

157. As the preamble to the table in clause 19.1 is not confined to full-time employees, a literal reading of the provision appears to require the payment of the minimum weekly wage to all employees, including part-time and casual employees. This is of course not the intended effect of the provision. Further, a potential inconsistency also arises with 19.2 of the Exposure Draft.

158. We propose that the drafting of clause 19.1 be amended to reflect the intent that the minimum weekly rate only applies to full-time employees. It may be sufficient to include the words "(full-time employees)" below "minimum weekly rate" in the second column of 19.1. We note that this is an amendment that has now been made in several group 3 Exposure Drafts in which Ai Group raised this concerned.

159. We acknowledge that clause 10.7 may be argued to provide that part-time employees are in fact only entitled to receive terms and conditions on a pro-rata basis. We similarly acknowledge that clause 11.4 could be argued to clarify that a casual employee is entitled to the hourly rate. Nonetheless, we suggest the proposed variation in the interests of ensuring that the Exposure Draft is simple and easy to understand.

Clause 19.5(a)(ii) – Three year apprenticeship (nominal term)

160. The second column in respect of "Stage 2" should be amended by inserting a bullet point before "12 months after commencing …". This appears to be a drafting error.

Clause 21.8 – Accident pay

161. As the definition of "accident pay" has been replicated at clause 21.3(a), the reference in clause 21.8 to clause 2 should be substituted with a reference to clause 21.3(a). This would be simpler and easier to understand. It also improves the readability of the instrument as it removes the need to refer to a separate clause in the instrument.

Clause 23.2(a)(i) – Payment for working overtime

162. Consistent with the Commission's July 2015 decision at paragraphs [95] – [96], clause 23.2(a)(i) of the Exposure Draft should be amended by inserting the words "of the ordinary hourly rate" after "200%". This is consistent with the approach taken earlier in the clause regarding the 50% penalty.

Clause 23.2(a)(ii) – Payment for working overtime

163. The text at clause 23.2(a) refers specifically to day workers. Clause 23.2(a)(i) prescribes the relevant rate payable to day workers for the performance of overtime.

164. Clause 23.2(a)(ii) then relates to shiftworkers. The placement of this subclause such that it follows the preamble at clause 23.2(a), which refers expressly to day workers, is anomalous.

165. Accordingly, clause 23.2 should be redrafted to reflect the format of the current clause 30.2.

Clause 23.3(a) – Saturday

166. Consistent with the Commission's July 2015 decision at paragraphs [95] – [96], clause 23.3(a) of the Exposure Draft should be amended by inserting the words "of the ordinary hourly rate" after "200%". This is consistent with the approach taken earlier in the clause regarding the 50% penalty.

Clause 24.4(d) – Shift rates

167. Consistent with the Commission's July 2015 decision at paragraphs [95] – [96], clause 24.4(d) of the Exposure Draft should be amended by inserting the words "of the ordinary hourly rate" after "200%". This is consistent with the approach taken earlier in the clause regarding the 50% penalty.

Clause 24.4(e) – Shift rates

168. The current clause 28.3(d)(ii) refers to clause 28.3(d)(i), which stipulates the rates payable for an afternoon/night shift and for an early morning/afternoon shift. As a result, where a job finishes after proceeding on shiftwork for more than one week, or the employee terminates their services during the week, the employee must be paid at the relevant rate specified in clause 28.3(d)(i) for the time worked.

169. Clause 24.4(e) of the Exposure Draft refers only to clause 24.4(a), which does not include the rates payable for early morning/afternoon shifts. This substantively affects the entitlement under clause 24.4(e), as it now requires that where a job finishes after proceeding on shiftwork for more than one week, or the employee terminates their services during the week, the employee must be paid at the afternoon/night shift rate, even where the employee is working an early morning/afternoon shift.

170. In order to ensure that the effect of the provision is not substantively altered in this way, the reference to clause 24.4(a) should be substituted with a reference to clauses 24.4(a) and 24.4(b).

Clause 26.3(a)(iii) – Annual leave loading

171. The words "adult apprentice minimum wages" at the commencement of the clause should be deleted. This appears to be a drafting error.

Clause 26.3(a)(vi) – Annual leave loading

172. Clause 26.3(a)(vi) includes a reference to clause 20.3(c), which prescribes the first aid allowance. This reference does not appear in the corresponding clause

32.3 of the current award. The effect is to require the calculation of the annual leave loading on an amount that would include the first aid allowance (where relevant) in circumstances where that allowance does not presently form part of the relevant calculation. This is a substantive change.

173. Accordingly, the reference to clause 20.3(c) should be deleted from clause 26.3(a)(vi).

Clause 36 – Transfer to lower paid job on redundancy

174. Clause 36 is headed "transfer to lower paid job on redundancy". It is followed by two subclauses, both of which deal with circumstances in which an employee is transferred to lower paid duties by reason of redundancy.

175. It is our submission that the use of the word "job" in the heading is anomalous and confusing. The relevant provisions relate to the *duties* performed by the employee. The notion of the employee's "job" is potentially a separate and distinct one.

176. Furthermore, the words "on redundancy" do not make sense. The following clauses apply where an employee, by virtue of a redundancy, have been transferred to lower paid duties. An employee is not generally said to be "on" redundancy.

177. For these reasons, the heading to clause 30 should be replaced with: "Transfer to lower paid duties by reason of redundancy".

Clause 37 – Employee leaving redundancy during notice period

178. Clause 17.4 of the current award deals with circumstances in which an employee terminates their employment during the notice period that follows the employee having been given notice of termination in circumstances of redundancy. The employee is entitled to receive the benefits and payments that they would have received under clause 17 had they remained in employment until the expiry of the notice, but is not entitled to payment instead of notice.

179. Clause 37 of the Exposure Draft corresponds with clause 17.4. It states that the employee is entitled to receive the benefits and payments they would have received under clause 35. Clause 29 does not incorporate the provision for transfer to lower paid duties on termination (currently clause 17.3) or the job search entitlement (currently clause 17.5).

180. Accordingly, the cross reference in clause 37 should be replaced with references to clauses 35, 36 and 38.2. This will ensure that the provision does not deviate substantively from the current clause 15.4.

Clause 28.2 – Job search entitlement – redundancy

181. The current clause 17.5(c) has not been included in the Exposure Draft. We submit that it should be retained in order to make clear that where clause 38.2 of the Exposure Draft applies, an entitlement under clause 38.1 does not arise. This will assist in ensuring that the award is simple and easy to understand.

Schedule B – Summary of hourly rates

182. We have identified a number of concerns arising from Schedule B to the Exposure Draft. The submissions that follow endeavour to articulate those issues. We suggest that these matters be the subject of a conference before a member of the Commission, so as to enable discussion as to how they can best be resolved.

Schedule B.1.2 – Ordinary hourly rate

183. Clause B.1.2 states that the rates in the tables that follow are based on the minimum hourly rates in accordance with clause 19.1. Clause 19.1 prescribes the minimum hourly rates payable under the award, without the addition of any all purpose allowances.

184. B.1.2 suggests that the rates set out in the schedule are calculated on the minimum hourly rate. That is, that the relevant loadings or penalties have been applied to the minimum hourly rate rather than the ordinary hourly rate. An

examination of the rates in fact prescribed reveals, however, that this is not the case.

185. For instance, B.3.1 sets out the hourly rates payable for full-time and part-time employees engaged on joinery work, shopfitting, stonemasonry, outside work or other factory glazing during ordinary hours of work. It appears that the rates in the second column (titled "ordinary hours") include the relevant all purpose industry allowance payable to such employees under the current clause 24.1(b). That rate is the ordinary hourly rate payable to employees entitled to the industry allowance (assuming, for present purposes, that they are not entitled to any other all purpose allowance).

186. The public holiday rate in the next column has been calculated based on the rate in the second column (that is, on the ordinary hourly rate). The rate of 250% has been calculated by reference to a rate that incorporates an all purpose allowance. This is also true of the rates in the remaining tables under B.3.

187. B.1.2 is therefore erroneous. The rates in some tables in Schedule B are not calculated on the minimum hourly rate. They are instead based on the ordinary hourly rate.

Schedule B.2 – Full-time, part-time and casual employees (not engaged on joinery work, shopfitting, stonemasonry, outside work, or engaged on factory glazing)

188. Clause 24.1(b) of the current award prescribes two industry allowances. The first is payable to an employee engaged on joinery work, shopfitting, stonemasonry or outside work. The other allowance, which differs in quantum, is payable to a glazier or apprentice glazier while engaged other than on factory glazing.

189. The rates in B.2 appear to be based on the base hourly rate prescribed in clause 19.1, absent the addition of any all purpose allowances (noting that the industry allowance is one such allowance). We assume therefore that the heading at B.2 is intended to describe those groups of employees that are not entitled to an industry allowance under the award.

190. We understand that the intention at B.2 of the heading is to capture those employees who are not entitled to the industry allowance payable under the current clause 24.1(b)(ii). In order to ensure that the heading accurately refers to those groups of employees, the heading should be amended by inserting the word “glazier” before “or engaged”.

Schedule B.2 – Full-time, part-time and casual employees (not engaged on joinery work, shopfitting, stonemasonry, outside work, or engaged on factory glazing)

191. The second row in the in the tables in B.2 suggest that the rates there contained are calculated on the ordinary hourly rate. As we have earlier observed, this is not the case. Those rates are in fact based on the minimum hourly rate prescribed by the award, absent the inclusion of any all purpose allowances. The second row in the tables is therefore confusing. It is likely to lead a reader to believe that the rates in that table include all purpose allowances.

192. We acknowledge that it could be argued that the tables should not be considered inaccurate when read in the context of B.1. Relevantly, B.1.1 defines the ordinary hourly rate and B.1.2 specifies that the tables below are based on the minimum hourly rates.

193. Nonetheless, we are concerned that the structure of each table is likely to mislead readers who may assume that the rates specified reflect the percentage of the ordinary hourly rate applicable in all circumstances and may not appreciate that a determination of the actual rate payable will depend on whether the body of the award dictates that an additional allowance (or allowances) must be included in the calculation of the relevant rates. Put simply, we suggest it is likely that some readers will refer directly to the numbers in the tables and fail to read B.1 or otherwise appreciate the special meaning ascribed to the phrase “ordinary hourly rate” within the award. This risk is amplified in exposure drafts such as this one where there are many pages of tables included in Schedule B.

194. Ai Group has raised similar issues in a number of exposure drafts. We intend to make a separate submission in order to highlight this as a matter of general application and to identify the awards in which we contend that the issue arises.

Schedule B.2.3 – Full-time and part-time shiftworkers – ordinary and penalty rates – day

195. The second column in B.2.3 should be deleted (headed "day"). The purpose for its inclusion is unclear.

Schedule B.2.3 – Full-time and part-time shiftworkers – ordinary and penalty rates – early morning or early afternoon

196. The early morning and early afternoon shift rate is payable for work other than on a Saturday, Sunday or public holiday (see current clause 28.3(d)(i)). This should be made clear at B.2.3.

Schedule B.2.3 – Full-time and part-time shiftworkers – ordinary and penalty rates – afternoon or night

197. The afternoon and night shift rate is payable for work other than on a Saturday, Sunday or public holiday (see current clause 28.3(d)(i)). This should be made clear at B.2.3.

Schedule B.2.3 – Full-time and part-time shiftworkers – ordinary and penalty rates – non-continuous shiftwork

198. The non-continuous shiftwork rates prescribed by the current clause 28.3(d)(ii) are payable for work performed on Monday to Friday (see current clause 28.2(d)(ii)). This should be made clear at B.2.3.

Schedule B.2.4 – Full-time and part-time shiftworkers – overtime

199. Clause B.2.4 sets out the rates payable on Monday – Saturday in the specific circumstances described in clause 30.2(b) ("work performed by a shiftworker employed on the second or third shifts of a day when two or three shifts are worked"). The overtime rates stipulated at 30.2(a), which are otherwise

payable, are not included at B.2.4. We are concerned that this may be misleading and could give rise to confusion.

200. Accordingly, an additional column should be included in B.2.4 with the rates payable in accordance with the current clause 30.2(a).

Schedule B.2.6 – Casual shiftworkers – ordinary and penalty rates - day

201. The second column in B.2.6 should be deleted (headed “day”). The purpose for its inclusion is unclear.

Schedule B.2.6 – Casual shiftworkers – ordinary and penalty rates – early morning or early afternoon

202. The early morning and early afternoon shift rate is payable for work other than on a Saturday, Sunday or public holiday (see current clause 28.3(d)(i)). This should be made clear at B.2.6.

Schedule B.2.6 – Casual shiftworkers – ordinary and penalty rates – afternoon or night

203. The afternoon and shift rate is payable for work other than on a Saturday, Sunday or public holiday (see current clause 28.3(d)(i)). This should be made clear at B.2.6.

Schedule B.2.6 – Casual shiftworkers – ordinary and penalty rates – non-continuous shiftwork

204. The non-continuous shiftwork rates prescribed by the current clause 28.3(d)(ii) are payable for work performed on Monday to Friday (see current clause 28.2(d)(ii)). This should be made clear at B.2.6.

Schedule B.2.6 – Casual shiftworkers – ordinary and penalty rates – public holiday

205. The public holiday rates in the final column are payable during continuous and non-continuous shiftwork. Despite this, the final column appears as a subset

under the "non-continuous shiftwork" section of the table. This should be amended consistent with the approach taken in B.2.3.

Schedule B.3 – Full-time, part-time and casual employees (engaged on joinery work, shopfitting, stonemasonry, outside work or other than factory glazing)

206. Clause 24.1(b) of the current award prescribes two industry allowances. The first is payable to an employee engaged on joinery work, shopfitting, stonemasonry or outside work. The other allowance, which differs in quantum, is payable to a glazier or apprentice glazier while engaged other than on factory glazing.

207. The rates in B.3 appear to be based on the base hourly rate prescribed in clause 19.1 with the addition of the relevant industry allowance. That is, the rates in B.3 are based on the ordinary hourly rate for those employees that are entitled to the industry allowance but are not entitled to any other all purpose allowance.

208. The heading errs in referring to "employees engaged on … factory glazing". We understand that the intention of the heading is to capture those employees who are entitled to the industry allowance payable under the current clause 24.1(b)(ii). That clause provides an entitlement to an allowance to *glaziers* or *apprentice glaziers* while engaged other than on factory glazing. That is, the payment of the allowance is limited to a specific subset of employees (i.e. glaziers).

209. The heading at B.3 should be amended to properly reflect this.

Schedule B.3.3 – Full-time and part-time shiftworkers – ordinary and penalty rates

210. The second column in B.3.3 should be deleted (headed "day"). The purpose for its inclusion is unclear.

Schedule B.3.3 – Full-time and part-time shiftworkers – ordinary and penalty rates – early morning or early afternoon

211. The early morning and early afternoon shift rate is payable for work other than on a Saturday, Sunday or public holiday (see current clause 28.3(d)(i)). This should be made clear at B.3.3.

Schedule B.3.3 – Full-time and part-time shiftworkers – ordinary and penalty rates – afternoon or night

212. The afternoon and shift rate is payable for work other than on a Saturday, Sunday or public holiday (see current clause 28.3(d)(i)). This should be made clear at B.3.3.

Schedule B.3.3 – Full-time and part-time shiftworkers – ordinary and penalty rates – non-continuous shiftwork

213. The non-continuous shiftwork rates prescribed by the current clause 28.3(d)(ii) are payable for work performed on Monday to Friday (see current clause 28.2(d)(ii)). This should be made clear at B.3.3.

Schedule B.3.4 – Full-time and part-time shiftworkers – overtime

214. Clause B.3.4 sets out the rates payable on Monday – Saturday in the specific circumstances described in clause 30.2(b) ("work performed by a shiftworker employed on the second or third shifts of a day when two or three shifts are worked"). The overtime rates stipulated at 30.2(a), which are otherwise payable, are not included at B.2.4. We are concerned that this may be misleading and could give rise to confusion.

215. Accordingly, an additional column should be included in B.3.4 with the rates payable in accordance with the current clause 30.2(a).

Schedule B.3.6 – Casual shiftworkers – ordinary and penalty rates

216. The second column in B.3.6 should be deleted (headed "day"). The purpose for its inclusion is unclear.

Schedule B.3.6 – Casual shiftworkers – ordinary and penalty rates – early morning or early afternoon

217. The early morning and early afternoon shift rate is payable for work other than on a Saturday, Sunday or public holiday (see current clause 28.3(d)(i)). This should be made clear at B.3.6.

Schedule B.3.6 – Casual shiftworkers – ordinary and penalty rates – afternoon or night

218. The afternoon and shift rate is payable for work other than on a Saturday, Sunday or public holiday (see current clause 28.3(d)(i)). This should be made clear at B.3.6.

Schedule B.3.6 – Casual shiftworkers – ordinary and penalty rates – non-continuous shiftwork

219. The non-continuous shiftwork rates prescribed by the current clause 28.3(d)(ii) are payable for work performed on Monday to Friday (see current clause 28.2(d)(ii)). This should be made clear at B.3.6.

Schedules B.4 and B.5 – Apprentices

220. Many of the concerns we have identified in respect Schedule B.2 and Schedule B.3 will also be relevant to the tables in respect of Schedules B.4 and B.5. Rather than reproduce them here, we suggest that this schedule also be the subject of discussion in respect of the matters earlier raised.

6. EXPOSURE DRAFT – MOBILE CRANE HIRING AWARD 2016

221. The submissions that follow relate to the *Exposure Draft – Mobile Crane Hiring Award 2016* (Exposure Draft).

Clause 7.2 – Facilitative provisions for flexible working arrangements

222. The table at paragraph 7.2 should be amended in respect of the reference to clause 9.7(g). Agreement may be reached under the terms of clause 9.7(g) between an employer and the majority of employees or between an employer and an individual employee. This should be reflected in clause 7.2 by inserting the words “or individual employee” after “majority of employees” in the final column of the second row.

Clause 7.2 – Facilitative provisions for flexible working arrangements

223. Clause 14 of the Exposure Draft applies where the majority of employees at a workplace have agreed to introduce make-up time. Where there is such agreement, an employer and an individual employee may elect, with the consent of the employer, to work make-up time. Accordingly, the clause provides for two forms (or tiers) of facilitation.

224. We are concerned that the sole reference to the “majority of employees” in clause 7.2 may be misleading. It should be amended to reflect the application of clause 14 as described above.

Clause 7.2 – Facilitative provisions for flexible working arrangements

225. Clause 21.9 of the Exposure Draft applies where the majority of employees at a workplace have agreed to introduce time off in lieu of payment for overtime. Where there is such agreement, an employer and an individual employee may elect, with the consent of the employer, to work make-up time. Accordingly, the clause provides for two forms (or tiers) of facilitation.

226. We are concerned that the sole reference to the "majority of employees" in clause 7.2 may be misleading. It should be amended to reflect the application of clause 21.9 as described above.

Clause 17.2(b) – Multi crane lift allowance

227. Clause 14.2(a) of the current award provides for a multi crane lift allowance. It applies where more than one crane is engaged on any single lift. Pursuant to subclauses (i) – (iv), the relevant allowance is payable "for each day so occupied".

228. Clause 17.2(b) of the Exposure Draft does not specify that the relevant allowance is payable "for each day so occupied". Rather, it could be read such that wherever an employee engages more than one crane on any single lift, the employee is thereafter to be paid the relevant allowance, irrespective of whether the employee is so occupied on that day.

229. For the purposes of ensuring that an unintended consequence of this nature does not arise from the redrafting of the provision, we propose that the preamble in clause 17.2(b) be amended as follows:

> Where more than one crane is engaged on any single lift the following additional payments will be made to the drivers for each day so occupied: …

Clause 21.7(b) – 10 hour break

230. Consistent with the Commission's July 2015 decision, at paragraphs [95] – [96], clause 21.7(b) of the Exposure Draft should be amended by replacing the words "double rates" with "200% of the ordinary hourly rates".

Schedule B – Summary of Hourly rates of pay

231. Earlier in this Review, the Commission decided to insert a note in the schedules summarising hourly rates of pay, which states that an employer meeting their obligations under the schedule is meeting their obligations under the award.[43]

[43] [2015] FWCFB 4658 at [63].

This note does not appear in Schedule B to the Exposure Draft. Consistent with the Commission's decision, it should be inserted.

Schedule B.2.2 – Full-time shiftworkers – shiftwork rates

232. The day shift column in this table is potentially misleading because the 15% loading does not apply to day workers. Rather it only applies to employees who are working shiftwork. This is evident from clauses 22.1 and 22.10 in the current award and the Exposure Draft which state:

> "**22.1** An employee may be required to work shiftwork.
>
> …
>
> **22.10** A day worker required to work shiftwork will receive one week's notice or payment of penalty rates"

233. We propose that the footnote for the day shift column be amended as follows to clarify this issue:

> "**Day shift** means any shift starting at or after 6.00 am and before 10.00 am. A day worker who does work shiftwork is not entitled to the day shift loading".

Schedule B.2.2 – Full-time shiftworkers – shiftwork rates

234. Schedule B.2.2 does not contain the rates payable for work performed on a Saturday (see current clause 22.6). We are concerned that this may be misleading. Accordingly, an additional column with Saturday rates should be included.

Schedule B.2.3 – Full-time employees – overtime

235. Clause 22.6 of the current award states that all time worked on Saturdays will be paid at overtime rates. Clause 24.2 specifies that those rates are as follows:

- time and a half for the first two hours and double time thereafter;
- provided that after 12 noon on a Saturday, all overtime worked will be paid at double time.

236. Schedule B.2.3 does not properly reflect this. It provides only for the rate payable before 12 noon on a Saturday for the first two hours and then provides for a rate payable for "all time worked" on a Saturday.

237. In order to address this, we propose that an additional column be inserted to the right of the "Saturday before 12 noon – first 2 hours" column, which sets out the relevant rates for "Saturday before 12 noon – after 2 hours". Those rates should be calculated at 200% of the ordinary hourly rate. Additionally, the words "all time worked" as they currently appear under "Saturday" should be replaced with "after 12 noon".

Schedule B.2.3 – Full-time employees – overtime

238. For completion, and consistent with the Sunday rates column, the words "all time worked" should be inserted below "public holidays".

Schedule B.3.2 – Casual shiftworkers – shiftwork rates

239. The day shift column in this table is potentially misleading because the 15% loading does not apply to day workers. Rather it only applies to employees who are working shiftwork. This is evident from clauses 22.1 and 22.10 in the current award and the Exposure Draft which state:

> "**22.1** An employee may be required to work shiftwork.
>
> …
>
> **22.10** A day worker required to work shiftwork will receive one week's notice or payment of penalty rates"

240. We propose that the footnote for the day shift column be amended as follows to clarify this issue:

> "**Day shift** means any shift starting at or after 6.00 am and before 10.00 am. <u>A day worker who does work shiftwork is not entitled to the day shift loading</u>".

Schedule B.3.2 – Casual shiftworkers – shiftwork rates

241. Schedule B.3.2 does not contain the rates payable for work performed on a Saturday (see current clause 22.6). We are concerned that this may be

misleading. Accordingly, an additional column with Saturday rates should be included.

Schedule C.1 – Wage-related allowances

242. The multi crane lift allowance is payable “per day or part thereof”. The words “part thereof” are not included in the table at C.1. This is inconsistent with the terms of clause 17.2 and the approach taken in respect of the pile driving allowance in C.1.

243. The words “per day or part thereof” should be inserted in the final column in respect of the multi crane lift allowance.

7. EXPOSURE DRAFT – PLUMBING AND FIRE SPRINKLERS AWARD 2016

244. The submissions that follow relate to the *Exposure Draft – Plumbing and Fire Sprinklers Award 2016* (Exposure Draft).

Clause 12 – Casual Employment - Definition

245. The current clause 14.1 defines a casual employee as "an employee engaged as such on an hourly basis". The Exposure Draft, at clause 12.1, does not include the words "as such".

246. These words carry an important meaning. They clarify that if an employee is engaged as a casual employee, for the purposes of the award, that employee is a casual employee. They appear in the very vast majority of modern award clauses that define casual employment and have been relevant to the determination of disputes as to whether an employee is a casual employee.[44] Their absence substantively alters the definition of casual employment under this award. That is, an employee would not necessarily be defined as a casual employee by virtue of having been engaged as one.

247. In order to preserve the current definition of casual employment, clause 11.1 should be amended by inserting the words "as such" after "engaged".

Clause 12.2 – Casual Employment

248. Clause 12.2 specifies that: (emphasis added)

> For ordinary hours worked, a casual employee will be paid the ordinary hourly rate for a weekly hire employee appropriate to the type of work, plus a loading of 25% of the ordinary hourly rate with a minimum payment as for three hours of employment.

249. This is a substantive change from the current award terms that should not be made. We refer to our contentions at section 2.4 of this submission.

[44] See for example *Telum Civil (QLD) Pty Limited v CFMEU* [2013] FWCFB 2434.

250. We also observe that the cover page of the Exposure Draft states: (emphasis added)

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

251. Clause 14.2 of the current award states:

> In addition to the hourly minimum wage for a weekly hire employee appropriate for the type of work, a casual employee must be paid an additional 25% of the hourly minimum wage with a minimum payment as for three hours of employment. …

252. The reference to the “hourly minimum wage” must be read in the context of the award as a whole. We contend that the reference to the “hourly minimum wage” is transparently a reference to the rates in the third column of clause 20.1, headed “hourly minimum wage”.

253. Clause 12.2 of the Exposure Draft cannot be read in a manner the enables any allowance to be taken into account in the calculation of a casual employee’s rate of pay. The 25% is directly linked to the minimum weekly rate.

254. Adopting the wording in the Exposure Draft would increase the monetary obligations imposed upon employers by the award. Accordingly, it is important that the Commission not vary the entitlements of casual employees in the manner proposed. It is not the kind of change that should be made purely in support of a desire to achieve greater consistency between awards in order to purportedly make the system “simpler and easier to understand”.

255. If the Commission accepts the concerns that we have raised, there will need to be consequential amendments to the tables in Schedule B relating to casual employees.

Clause 13 – Apprenticeship

256. With refer to the query raised in the Exposure Draft about whether clause 13.14(d)(ii) is permitted in an Award. The clause reads:

> “Adult apprentices will not be employed at the expense of other apprentices”

257. Ai Group is of the view that this term could lead to discriminatory practices and should be deleted.

Clause 22.1 – Weekend work

258. The table in clause 22.1 needs to be amended to reflect that the penalty payable is on the minimum hourly rate of pay and not the ordinary hourly rate, consistent with the current award.

Clause 22.2 - Shiftwork

259. Clause 22.2(a) in the Exposure Draft should be amended as the entitlements would be substantially changed from those in the current award.

260. The wording *"midnight on Sunday and midnight on Friday"* should not be replaced with *"Monday to Friday".* The existing wording should be retained.

261. Paragraph (a)(ii) of the Exposure Draft provides a higher penalty if the employee works for <u>five or more consecutive shifts and</u> receives less than 48 hours' notice. Clause 32.2(b) of the current award provides that the higher penalty is to be paid when the employee is required to work for <u>less than 5 consecutive shifts</u> or is provided less than 48 hours' notice. This needs to be corrected.

262. Also, the penalties should be paid on the minimum hourly rate and not the ordinary hourly rate. This is in accordance with the entitlements in the current award.

263. We propose that the wording of the current provisions be restored.

Schedule C – Summary of Hourly Rates – Plumbing and mechanical Services Employees and Irrigation Installer Employees

264. The tables at C.1.6, C.1.7, D.1.6 and D.1.7 should reflect that the casual loading is calculated on the minimum hourly rate and not the ordinary rate.

265. In tables C.1.6, C.1.7, D.1.6 and D.1.7 the penalty rates and shiftwork rates are calculated by adding them to the casual loading. However, clause 22.4

provides that all loadings are exclusive of each other and that loadings will not apply when overtime is paid. It follows that when calculating a shift loading or overtime penalty for a casual, the casual receives the loading or penalty exclusive of the casual loading.