Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Group 1 Awards:
Revised Exposure Drafts

11 July 2017

4 YEARLY REVIEW OF MODERN AWARDS

GROUP 1 AWARDS: REVISED EXPOSURE DRAFTS

CONTENTS

1. INTRODUCTION

1. On 9 June 2017, a Full Bench of the Fair Work Commission (**Commission**) issued a decision that dealt with technical and drafting issues arising from two group 1 awards, including the *Manufacturing and Associated Industries and Occupations Award 2010* (**Manufacturing Award**) and outlined the following process for dealing with other group 1 awards:

> **[123]** Revised exposure drafts for all awards in Group 1 (except the Manufacturing and Vehicle awards), along with updated summaries of submissions on the exposure drafts will be published for comment early next week.
>
> ...
>
> **[125]** Parties are directed to review the revised exposure drafts and the summaries of submissions and provide any comments in writing to amod@fwc.gov.au by **4.00 pm on Friday 30 June 2017** outlining:
>
> - any errors in the exposure drafts or summaries; and
> - any outstanding issues in the summaries of submissions that they wish to press.
>
> **[126]** Following receipt of any comments, further directions will be issued to deal with the outstanding issues.[1]

2. The decision outlines the following process in relation to the Manufacturing Award and *Vehicle Manufacturing and Repair, Services and Retail Award 2010*:

> **[119]** The exposure draft based on the Manufacturing award will be republished shortly to reflect the outcome of this decision. Any errors identified in the revised exposure draft should be sent to amod@fwc.gov.au by 4.00 pm on **Friday 30 June 2017**.
>
> **[120]** This decision resolves all outstanding technical and drafting issues in the Manufacturing award other than the changes arising from the decision to incorporate the manufacturing stream from the *Vehicle Manufacturing Repair, Services and Retail Award 2010* into this award. (A substantive claim to insert an electrical licence allowance in this award was determined in the decision issued on 3 March 2016.)
>
> **[121]** If any party considers there are further outstanding technical and drafting issues in this award details of the outstanding issues should be forwarded to amod@fwc.gov.au by 4.00 pm on **Friday 30 June 2017**.[2]

[1] *4 yearly review of modern awards – Award stage – Group 1* [2017] FWCFB 3177 at [123] – [126].

[2] *4 yearly review of modern awards – Award stage – Group 1* [2017] FWCFB 3177 at [119] – [121].

3. This submission is filed in accordance with the above directions (and an extension of time subsequently sought and granted) in relation to a number of group 1 awards.

'General' Technical and Drafting Issues

4. On 6 July 2017, the Commission issued a decision (**July 2017 Decision**) regarding a number of group 3 awards. That decision also deals with various 'general' technical and drafting issues, that are relevant to most if not all exposure drafts. In some instances, the decision will necessitate amendments being made to the relevant provisions in the group 1 exposure drafts, including:

    - The commencement clause;[3]
    - The coverage clause and/or the definitions clause in relation to the location of the definition of the relevant industry;[4] and
    - Any references to the *Fair Work Act 2009*.[5]

5. We understand that the relevant amendments will be made to the exposure drafts that are the subject of this submission in due course. We have not raised these issues in the context of specific awards in the submissions that follow.

6. During the course of this award review, Ai Group has raised an additional general technical issue, which relates to the manner in which premiums payable pursuant to the relevant awards are expressed. In relation to that issue, the Full Bench stated as follows in the July 2017 Decision: (emphasis added)

> **[369]** Ai Group contend that a change of terminology may have implications for calculation of entitlements governed by State and Territory legislation, such as workers' compensation and long service leave. They cite the examples of Workers Compensation Act 1987 (NSW) which defines employee's 'pre-injury average weekly earnings to include 'any overtime and shift allowances'.
>
> **[370]** We consider the clause in this instance is suitably broad ('any…shift allowance') to cover payment for shiftwork whatever terminology used. At this stage we are not

[3] *4 yearly review of modern awards – Award stage – Group 3* [2017] FWCFB 3433 at [327] – [328].

[4] *4 yearly review of modern awards – Award stage – Group 3* [2017] FWCFB 3433 at [339] – [340].

[5] *4 yearly review of modern awards – Award stage – Group 3* [2017] FWCFB 3433 at [350].

convinced that there is any detrimental impact in standardising the terminology around payment to compensate shiftwork.

…

[377] We are satisfied that a consistent approach on shift penalties is appropriate. While Ai Group proffers a return to existing terminology, an examination of the current award provisions shows there is no consistency between or even within modern awards. The Ai Group submissions on inconsistencies within the exposure drafts of the awards are noted and we will provide provisional views as to how these may be resolved.

[378] In addition to the claim, Ai Group put in a further submission, seeking that the Commission to address the impact of inconsistent use penalties and rates in relation to shift payments on annual leave loading provisions. (sic) It appears that these submissions are new and that other parties may like an opportunity to reply prior to the Full Bench forming its views on the issues.

[379] Parties will be provided with an opportunity to respond to Ai Group's contention that the interaction between the annual leave payment clauses and shiftwork payment clauses creates issues, as identified in paragraph 10 of their 31 August 2016 submission.[6]

7. As we understand it, the Commission has noted our concerns regarding the use of inconsistent terminology and the potential interaction with annual leave loading provisions; and that both of these matters will be considered and dealt with in due course. Accordingly, where any such issue arises in the submissions that follow, we have identified them as outstanding issues that, we assume, will be dealt with in accordance with the above decision. We hereafter refer to this issue as the '**Inconsistent Terminology Issue**'.

[6] *4 yearly review of modern awards – Award stage – Group 3* [2017] FWCFB 3433 at [369] – [379].

2. EXPOSURE DRAFT – ALUMINIUM INDUSTRY AWARD 2015

8. The submissions that follow relate to the *Exposure Draft – Aluminium Industry Award 2015* published on 13 June 2017. As at the time of drafting this submission, an updated summary of submissions has not been published.

Clause 1.5 – Title and commencement

9. In our submission of 23 September 2016, at paragraph 8, we stated:

> Consistent with the Commission's earlier decision[7] regarding the absorption clause, clause 1.5 should be deleted.

10. Notwithstanding our submission, clause 1.5 has not been deleted from the exposure draft. Its inclusion is inconsistent with the Commission's earlier decisions and on this basis it should be removed.

Clause 10.1 – Adult employees

11. In our submission of 23 September 2016, at paragraphs 9 – 11, we stated:

> 9. The preamble in clause 10.1 is not confined to full-time employees. As a result, a literal reading of it appears to require the payment of the minimum weekly rate to all adult employees, including part-time and casual employees. We proceed on the basis that this is not the intended effect of the provision.
>
> 10. In order to rectify this, it may be sufficient to include the words "(full-time employees)" below the heading of the second column of the table. This amendment has been made in various group 3 exposure drafts in light of the issue we have identified.
>
> 11. We acknowledge that clause 6.5(j) may be argued to provide that part-time employees are in fact only entitled to receive terms and conditions on a pro-rata basis equivalent to full-time employees. We similarly acknowledge that clause 6.6(c) could be argued to clarify that a casual employee is entitled to the hourly rate. Nonetheless, the change we have proposed should be made in the interests of ensuring that the exposure draft is simple and easy to understand.

[7] [2015] FWCFB 4658 at [9] – [20] and [2015] FWCFB 6656 at [74].

12. Whilst the amendment we have proposed has been made in a number of group 2, 3 and 4 awards, it has not here been adopted. We continue to hold the view that the change sought should be made.

Clause 11.1(a) – All purpose allowances

13. In our submission of 23 September 2016, at paragraph 12, we stated:

> Consistent with the Commission's earlier decision regarding the definition of "all purpose",[8] clause 11.1(a) should be [amended] by inserting the word "annual" before "leave".

14. Although the aforementioned clause is clearly inconsistent with the Commission's previous decisions, the change proposed has not been made. We also note that clause 11.1(a) is inconsistent with the decision of "all purposes" in Schedule G.

15. This is an outstanding issue that we continue to press. We note that the AWU made a submission of the same effect on 23 September 2016.

Clause 13.2 – Weekend work penalties

16. In addition to the submissions we have earlier made regarding the Inconsistent Terminology Issue, we note that clause 13.2 requires the payment of "the following penalties for ordinary hours worked on a Saturday or Sunday":

> **(a)** 150% of the ordinary hourly rate of pay for ordinary hours worked on a Saturday; and
>
> **(b)** 200% of the ordinary hourly rate of pay for ordinary hours worked on a Sunday.

17. To describe the amounts prescribed at clauses 13.2(a) and 13.2(b) as "penalties" is problematic, because those provisions may be read to require the payment of the amounts there prescribed *in addition to* the minimum rates prescribed by the award (i.e. 250% and 300% respectively). This is clearly inconsistent with the current clause 21.11, which requires the payment of 50% and 100% of the hourly rate in addition to the hourly rate (i.e. 150% and 200%).

[8] [2014] FWCFB 9412 at [44] – [53] and [2015] FWCFB 4658 at [91].

18. The amounts prescribed by clauses 13.2 of the exposure draft would more appropriately be described as the *rates* payable, instead of the *penalties* payable.

Clause 13.3 – Public holiday penalties

19. The submissions made about regarding clause 13.2 are also relevant to clause 13.3 of the exposure draft.

Clause 14.4(c) – Rest period after overtime

20. In our submission of 23 September 2016, at paragraph 13, we stated:

> Consistent with the Commission's earlier decision that penalties and loadings contained in the awards are to be applied to the minimum rate prescribed by an award (to the exclusion of over-award payments)[9], clause 14.4 should be varied by inserting "ordinary hourly rate" after "200%".

21. Although the aforementioned clause is clearly inconsistent with the Commission's previous decisions, the change proposed has not been made. This is an outstanding issue that we continue to press.

Clause 15.1(b)(iii) – Annual leave

22. In our submission of 23 September 2016, at paragraphs 14 – 16, we stated:

> 14. Clause 15.1(b)(iii) of the exposure draft operates in a similar vein to provisions previously found in many modern awards that required the accrual of annual leave to shiftworkers on an incremental basis, rather than progressively. An example is the previous clause 41.3(b) of the *Manufacturing and Associated Industries and Occupations Award 2010*:
>
> (b) Where an employee with 12 months continuous service is engaged for part of the 12 month period as a seven day shiftworker, that employee must have their annual leave increased by half a day for each month the employee is continuously engaged as a seven day shiftworker.
>
> 15. Such provisions have been removed in multiple awards, pursuant to a decision of the Commission earlier in the Review regarding NES inconsistencies.[10] At that time, the *Aluminium Industry Award 2010* was not identified as an award that contains such a provision.

[9] [2014] FWCFB 9412 at [44] – [53] and [2015] FWCFB 4658 at [47]

[10] [2015] FWCFB 3023 at [5] – [13].

16. Having regard to the operation of clause 15.1(b)(iii) of the exposure draft, it appears to us that the provision is similarly inconsistent with s.87(2) of the NES and should therefore be deleted.

23. Clause 15.1(b)(iii) has not been deleted from the exposure draft. This is an outstanding issue that we continue to press for the reasons outlined in our earlier submission cited above.

Clause 15.9 – Payment on termination of employment

24. The current award contains the following provision regarding payment in relation to annual leave on termination:

> **22.10 Payment (including proportionate leave) on termination**
>
> On termination of employment, an employee must be paid for annual leave accrued that has not been taken (including pro rata leave for part of a year). Payment will be made in accordance with the NES.

25. The provision creates an obligation to pay an employee for accrued untaken annual leave upon termination. The award does not, however, prescribe the *amount* due. This is left to the NES.

26. The exposure draft instead contains the following:

> **15.9 Payment on termination of employment**
>
> **(a)** The NES provides for payment of accrued annual leave upon termination of employment. For the full NES entitlement see s.90(2) of the Act.
>
> **(b)** Where an employee is paid out accrued annual leave upon termination of employment, the employee will be paid the annual leave loading set out in clause 15.5(b).

27. Clause 15.9(b) creates an express obligation regarding the amount due to an employee upon termination. It requires that annual leave loading be paid upon termination; a matter that is *not* prescribed by the award. In this way, the exposure draft deviates substantively from the current award.

28. The Commission is no doubt aware that the issue of whether annual leave loading is due on termination has been the subject of much controversy, including decisions of the Courts regarding the proper interpretation of s.90(2)

of the *Fair Work Act 2009*, proposed legislative change and an application by the ACTU to introduce terms in a large number of modern awards similar to the impugned clause above, which was referred to the annual leave common issues Full Bench and is strongly opposed by Ai Group.

29. The insertion of clause 15.9(b) has the effect of determining the ACTU's claim and introducing an award-derived entitlement to annual leave loading upon termination. This is quite clearly a substantive change that must not be made in the context of this process, which is not intended to effect such change.

30. Accordingly, we submit that clause 15.9(b) should be deleted.

3. EXPOSURE DRAFT – ASPHALT INDUSTRY AWARD 2015

31. The submissions that follow relate to the *Exposure Draft – Asphalt Industry Award 2015* published on 13 June 2017. As at the time of drafting this submission, an updated summary of submissions has not been published.

Clause 1.5 – Title and commencement

32. In our submission of 23 September 2016, at paragraph 23, we stated:

> Consistent with the Commission's earlier decision[11] regarding the absorption clause, clause 1.5 should be deleted.

33. Notwithstanding our submission, clause 1.5 has not been deleted from the exposure draft. Its inclusion is inconsistent with the Commission's earlier decisions and on this basis it should be removed.

Clause 6.5 – Casual conversion

34. As the Commission is of course aware, the ACTU has pursued, in the context of this review, a major common claim in relation to casual conversion. Relevantly, it was seeking to replace all current casual conversion clauses with its proposed model clause. On 5 July 2017, a Full Bench issued its decision dismissing that element of the claim; that is, all pre-existing casual conversion clauses are to remain without amendment as sought by the ACTU.[12]

35. In light of the ACTU's claim, consideration of any concerns raised to date by interested parties regarding re-drafted casual conversion clauses in the exposure drafts has typically been deferred pending the aforementioned decision. In other instances, interested parties such as Ai Group did not make any submissions regarding the re-drafted clauses, however noted that we may seek an opportunity to make such submissions in due, once the outcome of the ACTU's claim was known.

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[11] [2015] FWCFB 4658 at [9] – [20] and [2015] FWCFB 6656 at [74].

[12] *4 yearly review of modern awards – Casual and part-time employment* [2017] FWCFB 3541 at [368].

36. Given that the Full Bench has now issued its decision, we make the following submissions regarding the casual conversion clause in the exposure draft for the *Asphalt Industry Award 2010*.

Clause 6.5(a) – eligible casual employee – second bullet point

37. The current clause 10.4(e)(i) describes the circumstances in which a casual employee will be eligible to seek to convert. Relevantly, it requires that the casual employee must have been engaged "by a particular employer for a sequence of periods of employment under this award during a period of six months".

38. Clause 6.5(a) of the exposure draft does not contain the limitation underlined above. It appears to enable a casual employee to elect to convert in circumstances where they are employed under the award for a sequence of periods over six months by one *or more* employer. This is clearly a substantive change.

39. Accordingly, the second bullet point should be amended as follows:

> who is employed by a particular employer under this award for a sequence of periods over six months; and …

Clause 6.5(a) – eligible casual employee – third bullet point

40. The current clause 10.4(e)(i) enables a casual employee to elect to convert "if the employment is to continue beyond the conversion process". That is, the employee has the right to have their contract of employment converted to permanent employment if their employment is to continue after their proposed conversion.

41. By contrast, clause 6.5(a) of the exposure draft defines an eligible casual employee as one "whose employment is to continue beyond the period of six months". This is a different proposition to that which is contained in the current award. It does not require a consideration of whether the employee's employment would continue beyond conversion. Rather, the clause would be

satisfied if the employee's employment would continue for a period extending six months *as a casual employee*. This is clearly a substantive change.

42. Accordingly, the third bullet point should be amended as follows:

whose employment is to continue beyond the conversion process ~~period of six months~~.

Clause 10.1 – Adult employees

43. In our submission of 23 September 2016, at paragraphs 24 – 26, we stated:

> 24. The preamble in clause 10.1 is not confined to full-time employees. As a result, a literal reading of it appears to require the payment of the minimum weekly rate to all adult employees, including part-time and casual employees. We proceed on the basis that this is not the intended effect of the provision.
>
> 25. In order to rectify this, it may be sufficient to include the words "(full-time employees)" below the heading of the second column of the table. This amendment has been made in various group 3 exposure drafts in light of the issue we have identified.
>
> 26. We acknowledge that clause 6.5(j) may be argued to provide that part-time employees are in fact only entitled to receive terms and conditions on a pro-rata basis equivalent to full-time employees. We similarly acknowledge that clause 6.4(d) could be argued to clarify that a casual employee is entitled to the hourly rate. Nonetheless, the change we have proposed should be made in the interests of ensuring that the exposure draft is simple and easy to understand.

44. Whilst the amendment we have proposed has been made in a number of group 2, 3 and 4 awards, it has not here been adopted. We continue to hold the view that the change sought should be made.

Clause 11.1(a) – All purpose allowance

45. In our submission of 23 September 2016, at paragraph 27, we stated:

> Consistent with the Commission's earlier decision regarding the definition of "all purpose",[13] clause 11.1(a) should be [amended] by inserting the word "annual" before "leave".

46. Although the aforementioned clause is clearly inconsistent with the Commission's previous decisions, the change proposed has not been made.

[13] [2014] FWCFB 9412 at [44] – [53] and [2015] FWCFB 4658 at [91].

We also note that clause 11.1(a) is inconsistent with the decision of "all purposes" in Schedule F.

47. This is an outstanding issue that we continue to press.

Clause 15.2(b) – Seven day shiftworkers

48. In our submission of 23 September 2016, at paragraphs 28 – 30, we stated:

> 28. Clause 15.2(b) of the exposure draft operates in a similar vein to provisions previously found in many modern awards that required the accrual of annual leave to shiftworkers on an incremental basis, rather than progressively. An example is the previous clause 41.3(b) of the Manufacturing and Associated Industries and Occupations Award 2010: (b) Where an employee with 12 months continuous service is engaged for part of the 12 month period as a seven day shiftworker, that employee must have their annual leave increased by half a day for each month the employee is continuously engaged as a seven day shiftworker.
>
> 29. Such provisions have been removed in multiple awards, pursuant to a decision of the Commission earlier in the Review regarding NES inconsistencies.[14] At that time, the Asphalt Industry Award 2010 was not identified as an award that contains such a provision.
>
> 30. Having regard to the operation of clause 15.2(b) of the exposure draft, it appears to us that the provision is similarly inconsistent with s.87(2) of the NES and should therefore be deleted.

49. Clause 15.2(b) has not been deleted from the exposure draft. This is an outstanding issue that we continue to press for the reasons outlined in our earlier submission cited above.

Schedule F – Definitions – casual ordinary hourly rate

50. The definition of "casual ordinary hourly rate" refers to clause 8 (which deals with ordinary hours). This appears to be a drafting error. It should instead refer to clause 10 (which prescribes the minimum wages for each classification level).

[14] [2015] FWCFB 3023 at [5] – [13].

4. EXPOSURE DRAFT – CEMENT, LIME AND QUARRYING AWARD 2015

51. The submissions that follow relate to the *Exposure Draft – Cement, Lime and Quarrying Award 2015* published on 13 June 2017. As at the time of drafting this submission, an updated summary of submissions has not been published.

Clause 1.5 – Title and commencement

52. In our submission of 23 September 2016, at paragraph 33, we stated:

> Consistent with the Commission's earlier decision regarding the absorption clause, [15] clause 1.5 should be deleted.

53. Notwithstanding our submission, clause 1.5 has not been deleted from the exposure draft. Its inclusion is inconsistent with the Commission's earlier decisions and on this basis it should be removed.

Clause 6.6 – Casual conversion

54. As the Commission is of course aware, the ACTU has pursued, in the context of this review, a major common claim in relation to casual conversion. Relevantly, it was seeking to replace all current casual conversion clauses with its proposed model clause. On 5 July 2017, a Full Bench issued its decision dismissing that element of the claim; that is, all pre-existing casual conversion clauses are to remain without amendment as sought by the ACTU.[16]

55. In light of the ACTU's claim, consideration of any concerns raised to date by interested parties regarding re-drafted casual conversion clauses in the exposure drafts has typically been deferred pending the aforementioned decision. In other instances, interested parties such as Ai Group did not make any submissions regarding the re-drafted clauses, however noted that we may

[15] [2015] FWCFB 4658 at [9] – [20] and [2015] FWCFB 6656 at [74].

[16] *4 yearly review of modern awards – Casual and part-time employment* [2017] FWCFB 3541 at [368].

seek an opportunity to make such submissions in due, once the outcome of the ACTU's claim was known.

56. Given that the Full Bench has now issued its decision, we make the following submissions regarding the casual conversion clause in the *Exposure Draft – Cement, Lime and Quarrying Award 2015*.

57. It appears to us that the casual conversion clause in the *Cement and Lime Award 2010* and the *Quarrying Award 2010* are relevantly similar. Accordingly, for present purposes, we have used the clause in the *Quarrying Award 2010.* All references to clause numbers below relate to the provision found in that award.

Clause 6.6(a)(ii) – eligible casual employee

58. The current clause 13.4(a) states that an employee is eligible to seek to convert to permanent employment if they have been "engaged by a particular employer for a sequence of periods of employment under this award during a period of six months".

59. Clause 6.6(a)(ii) does not contain the limitation underlined above. It therefore appears to enable a casual employee to seek to convert in circumstances where the employee is employed for a sequence of periods of six months by one *or more* employer. This is quite clearly a substantive change.

60. Accordingly, clause 6.6(a)(ii) should be amended as follows:

> **(ii)** who is employed by a particular employer for a sequence of periods of six months; and …

Clause 6.6(a)(ii) – eligible casual employee

61. The current clause 13.4(a) states that an employee is eligible to seek to convert to permanent employment if they have been "engaged by a particular employer for a sequence of periods of employment under this award during a period of six months".

62. Clause 6.6(a)(ii) does not contain the limitation underlined above. It therefore appears to enable a casual employee to seek to convert in circumstances where the employee is employed for a sequence of periods of six months under one *or more* award. This is quite clearly a substantive change.

63. Accordingly, clause 6.6(a)(ii) should be amended as follows: (including the amendment proposed above)

> **(iii)** who is employed by a particular employer under this award for a sequence of periods of six months; and …

Clause 6.6(a)(iii) – eligible casual employee

64. The current clause 13.4(a) enables a casual employee to elect to convert "if the employment is to continue beyond the conversion process". That is, the employee has the right to have their contract of employment converted to permanent employment if their employment is to continue after their proposed conversion.

65. By contrast, clause 6.6(a)(iii) of the exposure draft defines an eligible casual employee as one "whose employment is to continue beyond the period of six months". This is a different proposition to that which is contained in the current award. It does not require a consideration of whether the employee's employment would continue beyond conversion. Rather, the clause would be satisfied if the employee's employment would continue for a period extending six months *as a casual employee*. This is clearly a substantive change.

66. Accordingly, clause 6.6(a)(iii) should be amended as follows:

> whose employment is to continue beyond the conversion process ~~period of six months~~.

Clause 6.6(a)(iii) – Full-time or part-time conversion

67. The current clause 13.4(g) relevantly states:

> **(g)** … an employee who has worked on a part-time basis during the period of casual employment has the right to elect to convert their contract of employment to part-time employment, on the basis of the same number of hours and times of work as previously worked, unless other arrangements are agreed on between the employer and employee.

68. As can be seen, the clause permits an employee to elect to convert to part-time employment on the basis of the same number of hours and times of work as previously worked, unless other arrangements are agreed.

69. The underlined portion of clause 13.4(g) is reproduced at clause 6.6(c)(iii) of the exposure draft. However, as it has been separated from clause 6.6(c)(ii), it is not clear what it in fact relates or refers to. We suggest that it be amalgamated with clause 6.6(c)(ii) such that it appears as the final sentence in that clause or, in the alternate, it is amended to make clear that it relates to that clause.

Clause 6.6(c)(iv) – Full-time or part-time conversion

70. The second reference to clause 6.6(v)(iii) should be replaced with a reference to clause 6.6(d)(i) (i.e. the employer's right to refuse an election to convert). This appears to be a drafting error.

Clause 6.6(f) – Casual conversion to full-time or part-time employment

71. Clause 6.6(f) of the exposure draft corresponds with clause 13.5 of the current award. It does not, as such, form part of the casual conversion clause. We suggest that it be renumbered clause 6.7.

Clause 10.1 – Cement and lime industry wages

72. In our submission of 23 September 2016, at paragraphs 34 – 36, we stated:

> 34. The preamble in clause 10.1 is not confined to full-time employees. As a result, a literal reading of it appears to require the payment of the minimum weekly rate to all adult employees, including part-time and casual employees. We proceed on the basis that this is not the intended effect of the provision.
>
> 35. In order to rectify this, it may be sufficient to include the words "(full-time employees)" below the heading of the second column of the table. This amendment has been made in various group 3 exposure drafts in light of the issue we have identified.
>
> 36. We acknowledge that clause 6.4(f) and clause 6.5(b) could be argued to clarify that part-time and casual employees are entitled to the hourly rate. Nonetheless, the change we have proposed should be made in the interests of ensuring that the exposure draft is simple and easy to understand.

73. Whilst the amendment we have proposed has been made in a number of group 2, 3 and 4 awards, it has not here been adopted. We continue to hold the view that the change sought should be made.

Clause 10.2 – Quarrying industry wages

74. In our submission of 23 September 2016, at paragraphs 37 – 39, we stated:

> 37. The preamble in clause 10.2 is not confined to full-time employees. As a result, a literal reading of it appears to require the payment of the minimum weekly rate to all adult employees, including part-time and casual employees. We proceed on the basis that this is not the intended effect of the provision.
>
> 38. In order to rectify this, it may be sufficient to include the words "(full-time employees)" below the heading of the second column of the table. This amendment has been made in various group 3 exposure drafts in light of the issue we have identified.
>
> 39. We acknowledge that clause 6.4(f) and clause 6.5(b) could be argued to clarify that part-time and casual employees are entitled to the hourly rate. Nonetheless, the change we have proposed should be made in the interests of ensuring that the exposure draft is simple and easy to understand.

75. Whilst the amendment we have proposed has been made in a number of group 2, 3 and 4 awards, it has not here been adopted. We continue to hold the view that the change sought should be made.

Clause 11.2(a) – All purpose allowances

76. In our submission of 23 September 2016, at paragraph 40, we stated:

> Consistent with the Commission's earlier decision regarding the definition of "all purpose",[17] clause 11.2(a) should be [amended] by inserting the word "annual" before "leave".

77. Although the aforementioned clause is clearly inconsistent with the Commission's previous decisions, the change proposed has not been made. We also note that clause 11.2(a) is inconsistent with the decision of "all purposes" in Schedule I.

[17] [2014] FWCFB 9412 at [44] – [53] and [2015] FWCFB 4658 at [91].

78. We note that the AWU made a similar submission on 23 September 2016. This is an outstanding issue that we continue to press.

Clause 11.2(a) – All purpose allowances

79. The word "allowanced" should be replaced with "allowances". This appears to be a drafting error.

Clause 14.1(e) – Overtime – cement and lime industry

80. In our submission of 23 September 2016, at paragraph 41, we stated:

> Consistent with the Commission's earlier decision that penalties and loadings contained in the awards are to be applied to the minimum rate prescribed by an award (to the exclusion of over-award payments)[18], clause 14.1(e) should be varied by inserting "ordinary hourly rate" after "200%".

81. This is an outstanding issue that we continue to press.

Clause 14.2(d) – Overtime – quarrying industry

82. In our submission of 23 September 2016, at paragraph 42, we stated:

> Consistent with the Commission's earlier decision that penalties and loadings contained in the awards are to be applied to the minimum rate prescribed by an award (to the exclusion of over-award payments)[19], clause 14.2(d) should be varied by inserting "ordinary hourly rate" after "150%".

83. This is an outstanding issue that we continue to press.

Clause 14.2(d) – Overtime – quarrying industry

84. In our submission of 23 September 2016, at paragraph 43, we stated:

> Consistent with the Commission's earlier decision that penalties and loadings contained in the awards are to be applied to the minimum rate prescribed by an award (to the exclusion of over-award payments)[20], clause 14.2(d) should be varied by inserting "ordinary hourly rate" after "200%" each time it appears.

85. This is an outstanding issue that we continue to press.

[18] [2014] FWCFB 9412 at [44] – [53] and [2015] FWCFB 4658 at [47].

[19] [2014] FWCFB 9412 at [44] – [53] and [2015] FWCFB 4658 at [47].

[20] [2014] FWCFB 9412 at [44] – [53] and [2015] FWCFB 4658 at [47].

Clause 14.2(e) – Overtime – quarrying industry

86. In our submission of 23 September 2016, at paragraph 44, we stated:

> Consistent with the Commission's earlier decision that penalties and loadings contained in the awards are to be applied to the minimum rate prescribed by an award (to the exclusion of over-award payments)[21], clause 14.2(e) should be varied by inserting "ordinary hourly rate" after "200%".

87. This is an outstanding issue that we continue to press.

Clause 15.2(b) – Seven day shiftworkers

88. In our submission of 23 September 2016, at paragraphs 45 – 47, we stated:

> 45. Clause 15.2(b) of the exposure draft operates in a similar vein to provisions previously found in many modern awards that required the accrual of annual leave to shiftworkers on an incremental basis, rather than progressively. An example is the previous clause 41.3(b) of the *Manufacturing and Associated Industries and Occupations Award 2010*:
>
> (b) Where an employee with 12 months continuous service is engaged for part of the 12 month period as a seven day shiftworker, that employee must have their annual leave increased by half a day for each month the employee is continuously engaged as a seven day shiftworker.
>
> 46. Such provisions have been removed in multiple awards, pursuant to a decision of the Commission earlier in the Review regarding NES inconsistencies.[22] At that time, the Cement and Lime Award 2010 and the Quarrying Industry Award 2010 were not identified as awards that contain such a provision.
>
> 47. Having regard to the operation of clause 15.2(b) of the exposure draft, it appears to us that the provision is similarly inconsistent with s.87(2) of the NES and should therefore be deleted.

89. Clause 15.2(b) has not been deleted from the exposure draft. This is an outstanding issue that we continue to press for the reasons outlined in our earlier submission cited above.

Clause 15.3(a) – Excessive leave accruals: general provision

90. The 'error' in clause 15.3(a) should be replaced with a reference to clause 15.2.

[21] [2014] FWCFB 9412 at [44] – [53] and [2015] FWCFB 4658 at [47].

[22] [2015] FWCFB 3023 at [5] – [13].

5. EXPOSURE DRAFT – CLEANING SERVICES AWARD 2015

91. The submissions that follow relate to the *Exposure Draft – Cleaning Services Award 2015* published on 13 June 2017. As at the time of drafting this submission, an updated summary of submissions has not been published.

Clause 1.5 – Title and commencement

92. In our submission of 23 September 2016, at paragraph 49, we stated:

> Consistent with the Commission's earlier decision regarding the absorption clause, [23] clause 1.5 should be deleted.

93. Notwithstanding our submission, clause 1.5 has not been deleted from the exposure draft. Its inclusion is inconsistent with the Commission's earlier decisions and on this basis it should be removed.

Clause 6.4(b) – Part-time employees

94. In our submission of 23 September 2016, at paragraph 50, we stated:

> Consistent with the Commission's earlier decision that penalties and loadings contained in the awards are to be applied to the minimum rate prescribed by an award (to the exclusion of over-award payments) [24], clause 6.4(b) should be varied by inserting "minimum hourly rate" after "15%". The "minimum hourly rate" is defined in Schedule G as the rate prescribed in clause 10 of the exposure draft.

95. The amendment proposed has not been made.

96. This is an outstanding issue that we continue to press.

Clause 10.1 – Minimum wages

97. In our submission of 23 September 2016, at paragraphs 51 - 53, we stated:

> 51. The preamble in clause 10.1 is not confined to full-time employees. As a result, a literal reading of it appears to require the payment of the minimum weekly rate to all adult employees, including part-time and casual employees. We proceed on the basis that this is not the intended effect of the provision.

[23] [2015] FWCFB 4658 at [9] – [20] and [2015] FWCFB 6656 at [74].

[24] [2014] FWCFB 9412 at [44] – [53] and [2015] FWCFB 4658 at [47].

52. In order to rectify this, it may be sufficient to include the words "(full-time employees)" below the heading of the second column of the table. This amendment has been made in various group 3 exposure drafts in light of the issue we have identified.

53. We acknowledge that clause 6.4(a)(iii) and clause 6.5 could be argued to clarify that part-time and casual employees are entitled to the hourly rate. Nonetheless, the change we have proposed should be made in the interests of ensuring that the exposure draft is simple and easy to understand.

98. Whilst the amendment we have proposed has been made in a number of group 2, 3 and 4 awards, it has not here been adopted. We continue to hold the view that the change sought should be made.

Clause 13.3 – Penalty rates

99. In our submission of 23 September 2016, at paragraph 54, we stated:

> The table at clause 13.3 does not specify the rate upon which the 'penalties' identified are to be calculated. Consistent with the Commission's earlier decision that penalties and loadings contained in the awards are to be applied to the minimum rate prescribed by an award (to the exclusion of over-award payments)[25], 13.3 should be varied by inserting a reference to the "minimum hourly rate"

100. The amendment proposed has not been made.

101. This is an outstanding issue that we continue to press.

Clause 15.2(b) – Definition of shiftworker

102. In our submission of 23 September 2016, at paragraphs 55 – 57, we stated:

> 55. Clause 15.2(b) of the exposure draft operates in a similar vein to provisions previously found in many modern awards that required the accrual of annual leave to shiftworkers on an incremental basis, rather than progressively. An example is the previous clause 41.3(b) of the *Manufacturing and Associated Industries and Occupations Award 2010*:
>
> (b) Where an employee with 12 months continuous service is engaged for part of the 12 month period as a seven day shiftworker, that employee must have their annual leave increased by half a day for each month the employee is continuously engaged as a seven day shiftworker.
>
> 56. Such provisions have been removed in multiple awards, pursuant to a decision of the Commission earlier in the Review regarding NES inconsistencies.42 At

[25] [2014] FWCFB 9412 at [44] – [53] and [2015] FWCFB 4658 at [47].

that time, the *Cleaning Services Award 2010* was not identified as an award that contains such a provision.

57. Having regard to the operation of clause 15.2(b) of the exposure draft, it appears to us that the provision is similarly inconsistent with s.87(2) of the NES and should therefore be deleted.

103. Clause 15.2(b) has not been deleted from the exposure draft. This is an outstanding issue that we continue to press for the reasons outlined in our earlier submission cited above.

Clauses 15.6 and 15.7 – Annual Leave

104. A conference should be convened in order to assist the parties to settle the specific wording required to give effect to the in principle agreement referred to in Commissioner Cribb's report of 7 May 2015.

6. EXPOSURE DRAFT – CONCRETE PRODUCTS AWARD 2015

105. The submissions that follow relate to the *Exposure Draft – Concrete Products Award 2015* published on 13 June 2017. As at the time of drafting this submission, an updated summary of submissions has not been published.

Clause 1.5 – Title and commencement

106. In our submission of 23 September 2016, at paragraph 61, we stated:

> Consistent with the Commission's earlier decision regarding the absorption clause[26], clause 1.5 should be deleted.

107. Notwithstanding our submission, clause 1.5 has not been deleted from the exposure draft. Its inclusion is inconsistent with the Commission's earlier decisions and on this basis it should be removed.

Clauses 2.2 and 2.3 – The National Employment Standards and this award

108. Clauses 2.2 and 2.3 of the exposure draft state:

> **2.2** The employer must ensure that copies of this award and the NES are available to all employees to whom they apply.
>
> **2.**3 Where this award refers to a condition of employment provided for in the NES, the NES definition applies, either on a notice board which is conveniently located at or near the workplace or through accessible electronic means.

109. The clause clearly contains a drafting error. It should be replaced with the following standard clause found in all exposure drafts:

> **2.2** Where this award refers to a condition of employment provided for in the NES, the NES definition applies.
>
> **2.3** The employer must ensure that copies of this award and the NES are available to all employees to whom they apply, either on a notice board which is conveniently located at or near the workplace or through accessible electronic means.

[26] [2015] FWCFB 4658 at [9] – [20] and [2015] FWCFB 6656 at [74].

Clause 6.6 – Casual conversion

110. As the Commission is of course aware, the ACTU has pursued, in the context of this review, a major common claim in relation to casual conversion. Relevantly, it was seeking to replace all current casual conversion clauses with its proposed model clause. On 5 July 2017, a Full Bench issued its decision dismissing that element of the claim; that is, all pre-existing casual conversion clauses are to remain without amendment as sought by the ACTU.[27]

111. In light of the ACTU's claim, consideration of any concerns raised to date by interested parties regarding re-drafted casual conversion clauses in the exposure drafts has typically been deferred pending the aforementioned decision. In other instances, interested parties such as Ai Group did not make any submissions regarding the re-drafted clauses, however noted that we may seek an opportunity to make such submissions in due, once the outcome of the ACTU's claim was known.

112. Given that the Full Bench has now issued its decision, we make the following submissions regarding the casual conversion clause in the *Exposure Draft – Concrete Products Award 2015*.

Clause 6.6(a)(ii) – eligible casual employee – second bullet point

113. The current clause 11.6(a) states that an employee is eligible to seek to convert to permanent employment if they have been "engaged by a particular employer for a sequence of periods of employment under this award during a period of six months".

114. Clause 6.6(a)(ii) of the exposure draft does not contain the limitation underlined above. It therefore appears to enable a casual employee to seek to convert in circumstances where the employee is employed for a sequence of periods of six months by one *or more* employer. This is quite clearly a substantive change.

[27] *4 yearly review of modern awards – Casual and part-time employment* [2017] FWCFB 3541 at [368].

115. Accordingly, the second bullet point should be amended as follows:

> who is employed by a particular employer under this award for a sequence of periods of six months; and …

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

116. The current clause 11.6(b) requires an employer to give an employee "notice in writing of the provisions of clause 11.6". Clause 11.6 is the casual conversion clause in its totality.

117. Clause 6.6(b)(i) of the exposure draft instead states that an employer is to give an employee "notice in writing of the provisions of clause 6.6(a)(ii)". Clause 6.6(a)(ii) is in the following terms:

> **(ii)** An eligible casual employee has the right, after six months, to elect to have their contract of employment converted to full-time or part-time employment.

118. As can be seen, the scope of the information required to be provided by an employer under the exposure draft is narrower than that which is required by the current award. This is a substantive change. It is particularly problematic because, for instance, an employee would not be advised that an employer has the right to refuse a request to convert on certain grounds.

119. Accordingly, the reference to clause 6.6(b)(ii) should be replaced with a reference to clause 6.6.

Clause 6.6(a)(iii) – Full-time or part-time conversion

120. The current clause 11.6(g) relevantly states:

> **(g)** … an employee who has worked on a part-time basis during the period of casual employment has the right to elect to convert their contract of employment to part-time employment, on the basis of the same number of hours and times of work as previously worked, unless other arrangements are agreed on between the employer and employee.

121. As can be seen, the clause permits an employee to elect to convert to part-time employment on the basis of the same number of hours and times of work as previously worked, unless other arrangements are agreed.

122. The underlined portion of clause 13.4(g) is reproduced at clause 6.6(c)(iii) of the exposure draft. However, as it has been separated from clause 6.6(c)(ii), it is not clear what it in fact relates or refers to. We suggest that it be amalgamated with clause 6.6(c)(ii) such that it appears as the final sentence in that clause or, in the alternate, it is amended to make clear that it relates to that clause.

Clause 6.6(c)(iv) – Full-time or part-time conversion

123. The second reference to clause 6.6(v)(iii) should be replaced with a reference to clause 6.6(d)(i) (i.e. the employer's right to refuse an election to convert). This appears to be a drafting error.

Clause 6.6(e) – Casual conversion to full-time or part-time employment

124. Clause 6.6(e) of the exposure draft is a new clause that does not correspond with any clause in the exposure draft. It imposes a substantive requirement that does not appear in the current award. This is a clear substantive change.

125. Clause 6.6(e) must therefore be deleted.

Current clause 11.6(j) – facilitative provision

126. Crucially, the current clause 11.6(j) has not been included in the exposure draft. It states:

> **(j)** By agreement between the employer and the majority of the employees in the relevant workplace or a section or sections of it, or with the casual employee concerned, the employer may apply clause 11.6(a) as if the reference to six months is a reference to 12 months, but only in respect of a currently engaged individual employee or group of employees. Any such agreement reached must be kept by the employer as a time and wages record. Any such agreement reached with an individual employee may only be reached within the two months prior to the period of six months referred to in clause 11.6(a).

127. Its absence is an obvious substantive change. The clause should therefore be reinserted.

Clause 8.4(a)(ii) – Rostered days off

128. Given the deletion of clause 8.4(a)(iii), clause 8.4(a)(ii) should be amended by deleting "; or" at the end of the clause and inserting a full stop.

Clause 9.1(c) – Unpaid meal breaks

129. In our submission of 23 September 2016, at paragraph 62, we stated:

> Consistent with the Commission's earlier decision that penalties and loadings contained in the awards are to be applied to the minimum rate prescribed by an award (to the exclusion of over-award payments)[28], clause 9.1(c) should be varied by inserting "150% of the ordinary hourly rate" instead of "time and a half".

130. The change proposed has not been made. This is an outstanding issue that we continue to press.

Clause 10.2 – Minimum wages

131. In our submission of 23 September 2016, at paragraphs 63 - 65, we stated:

> 63. The preamble in clause 10.2 is not confined to full-time employees. As a result, a literal reading of it appears to require the payment of the minimum weekly rate to all adult employees, including part-time and casual employees. We proceed on the basis that this is not the intended effect of the provision.
>
> 64. In order to rectify this, it may be sufficient to include the words "(full-time employees)" below the heading of the second column of the table. This amendment has been made in various group 3 exposure drafts in light of the issue we have identified.
>
> 65. We acknowledge that clause 6.4(b) and clause 6.5(e) could be argued to clarify that part-time and casual employees are entitled to the hourly rate. Nonetheless, the change we have proposed should be made in the interests of ensuring that the exposure draft is simple and easy to understand.

132. Whilst the amendment we have proposed has been made in a number of group 2, 3 and 4 awards, it has not here been adopted. We continue to hold the view that the change sought should be made.

Clause 10.2(a) – Minimum wages

133. In our submission of 23 September 2016, at paragraph 66, we stated:

> Given that the fourth and fifth columns have been deleted, the footnote should also be deleted.

[28] [2014] FWCFB 9412 at [44] – [53] and [2015] FWCFB 4658 at [47].

134. The change proposed has not been made. This is an outstanding issue that we continue to press.

Clause 10.2(b) – Minimum wages

135. In our submission of 23 September 2016, at paragraph 67, we stated:

> Given that the fourth and fifth columns have been deleted, the footnote should also be deleted.

136. The change proposed has not been made. This is an outstanding issue that we continue to press.

Clause 11.1 – Allowances

137. In our submission of 23 September 2016, at paragraph 68, we stated:

> The "0" should be replaced with "Schedule [C]". This appears to be a drafting error.

138. The change proposed has not been made. We note that the AWU made a similar submission on 23 September 2016. This is an outstanding issue that we continue to press.

Clause 11.2(a) – All purpose allowances

139. In our submission of 23 September 2016, at paragraph 69, we stated:

> Consistent with the Commission's earlier decision regarding the definition of "all purpose"[29], clause 11.2(a) should be inserted by inserting the word "annual" before "leave".

140. Although the aforementioned clause is clearly inconsistent with the Commission's previous decisions, the change proposed has not been made.

141. This is an outstanding issue that we continue to press.

[29] [2014] FWCFB 9412 at [44] – [53] and [2015] FWCFB 4658 at [91].

Clause 13.3(e) – Hours – other than continuous work

142. Clauses 13.3(c) and 13.3(d) of the exposure draft are repeated at the commencement clause 13.3(e). This is unnecessary. Accordingly the following text should be deleted from clause 13.3(e):

> The ordinary hours will be worked continuously except for meal breaks at the discretion of the employer. An employee will not be required to work for more than six hours without a meal break.

Clause 13.6(b) – Afternoon or night shift allowances

143. Clause 13.6(b) of the exposure draft requires the payment of 150% of the "ordinary hourly rate of pay". Consistent with the terminology used elsewhere in the instrument and the definition found at Schedule G, this should be amended to refer to the "ordinary hourly rate".

Clause 13.6(c) – Afternoon or night shift allowances

144. Clause 13.6(c) of the exposure draft requires the payment of 125% of the "ordinary hourly rate of pay". Consistent with the terminology used elsewhere in the instrument and the definition found at Schedule G, this should be amended to refer to the "ordinary hourly rate".

Clause 13.7 – Saturday shifts

145. Clause 13.7 of the exposure draft requires the payment of 150% of the "ordinary hourly rate of pay". Consistent with the terminology used elsewhere in the instrument and the definition found at Schedule G, this should be amended to refer to the "ordinary hourly rate".

Schedule G – Definitions – all purpose

146. In our submission of 23 September 2016, at paragraph 71, we stated:

> Consistent with the Commission's earlier decision regarding the definition of "all purpose"[30], the definition in Schedule G should be varied by inserting the word "annual" before "leave".

[30] [2014] FWCFB 9412 at [44] – [53] and [2015] FWCFB 4658 at [91].

147. Although the aforementioned clause is clearly inconsistent with the Commission's previous decisions, the change proposed has not been made.

148. This is an outstanding issue that we continue to press.

7. EXPOSURE DRAFT – COTTON GINNING AWARD 2015

149. The submissions that follow relate to the *Exposure Draft – Cotton Ginning Award 2015* published on 13 June 2017. As at the time of drafting this submission, an updated summary of submissions has not been published.

Clause 1.5 – Title and commencement

150. In our submission of 23 September 2016, at paragraph 73, we stated:

> Consistent with the Commission's earlier decision regarding the absorption clause[31], clause 1.5 should be deleted.

151. Notwithstanding our submission, clause 1.5 has not been deleted from the exposure draft. Its inclusion is inconsistent with the Commission's earlier decisions and on this basis it should be removed.

Clause 6.6 – Casual conversion

152. As the Commission is of course aware, the ACTU has pursued, in the context of this review, a major common claim in relation to casual conversion. Relevantly, it was seeking to replace all current casual conversion clauses with its proposed model clause. On 5 July 2017, a Full Bench issued its decision dismissing that element of the claim; that is, all pre-existing casual conversion clauses are to remain without amendment as sought by the ACTU.[32]

153. In light of the ACTU's claim, consideration of any concerns raised to date by interested parties regarding re-drafted casual conversion clauses in the exposure drafts has typically been deferred pending the aforementioned decision. In other instances, interested parties such as Ai Group did not make any submissions regarding the re-drafted clauses, however noted that we may seek an opportunity to make such submissions in due, once the outcome of the ACTU's claim was known.

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[31] [2015] FWCFB 4658 at [9] – [20] and [2015] FWCFB 6656 at [74].

[32] *4 yearly review of modern awards – Casual and part-time employment* [2017] FWCFB 3541 at [368].

154. Given that the Full Bench has now issued its decision, we make the following submissions regarding the casual conversion clause in the *Exposure Draft – Cotton Ginning Award 2015*.

Clause 6.6(a)(i) – eligible casual employee – second bullet point

155. The current clause 10.5(a) states that an employee is eligible to seek to convert to permanent employment if they have been "engaged by a particular employer on a regular and systematic basis for a sequence of periods of employment under this award during a calendar period of 12 months".

156. Clause 6.6(a)(i) does not contain the limitation underlined above. It therefore appears to enable a casual employee to seek to convert in circumstances where the employee is employed for a sequence of periods during 12 months by one *or more* employer. This is quite clearly a substantive change.

157. Accordingly, the second bullet point should be amended as follows:

> who is employed by a particular employer for a sequence of periods under this award over 12 months; and …

Clause 6.6(a)(i) – eligible casual employee – third bullet point

158. The current clause 10.5(a) enables a casual employee to elect to convert "if the employment is to continue beyond the conversion process prescribed by this subclause". That is, the employee has the right to have their contract of employment converted to permanent employment if their employment is to continue after their proposed conversion.

159. By contrast, clause 6.6(a)(i) of the exposure draft defines an eligible casual employee as one "whose employment is to continue beyond the period of 12 months". This is a different proposition to that which is contained in the current award. It does not require a consideration of whether the employee's employment would continue beyond conversion. Rather, the clause would be satisfied if the employee's employment would continue for a period extending 12 months *as a casual employee*. This is clearly a substantive change.

160. Accordingly, the third bullet point should be amended as follows:

> whose employment is to continue beyond the conversion process ~~period of 12 months~~.

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

161. The current clause 10.5(b) requires an employer to give an employee "notice in writing of the provisions of this subclause". We understand that to mean that an employer must give notice in writing of the provisions of clause 10.5, that being the casual conversion clause in its totality.

162. Clause 6.6(b)(i) of the exposure draft instead states that an employer is to give an employee "notice in writing of the provisions of clause 6.6(a)(ii)". Clause 6.6(a)(ii) is in the following terms:

> **(ii)** An eligible casual employee has the right, after 12 months, to elect to have their contract of employment converted to full-time or part-time employment.

163. As can be seen, the scope of the information required to be provided by an employer under the exposure draft is narrower than that which is required by the current award. This is a substantive change. It is particularly problematic because, for instance, an employee would not be advised that an employer has the right to refuse a request to convert on certain grounds.

164. Accordingly, the reference to clause 6.6(b)(ii) should be replaced with a reference to clause 6.6.

Clause 6.6(c)(iii) – Full-time or part-time conversion

165. The current clause 10.5(f) relevantly states:

> … an employee who has worked on a part-time basis during the period of casual employment has the right to elect to convert their contract of employment to part-time employment, on the basis of the same number of hours and times of work as previously worked, unless other arrangements are agreed between the employer and the employee.

166. As can be seen, the clause permits an employee to elect to convert to part-time employment on the basis of the same number of hours and times of work as previously worked, unless other arrangements are agreed.

167. The underlined portion of clause 10.5(f)) is reproduced at clause 6.6(c)(iii) of the exposure draft. However, as it has been separated from clause 6.6(c)(ii), it is not clear what it in fact relates or refers to. We suggest that it be amalgamated with clause 6.6(c)(ii) such that it appears as the final sentence in that clause or, in the alternate, it is amended to make clear that it relates to that clause.

Clause 6.6(c)(iv) – Full-time or part-time conversion

168. The second reference to clause 6.6(v)(iii) should be replaced with a reference to clause 6.6(d)(i) (i.e. the employer's right to refuse an election to convert). This appears to be a drafting error.

Clause 11.2(a) – All purpose allowances

169. In our submission of 23 September 2016, at paragraph 74, we stated:

> Consistent with the Commission's earlier decision regarding the definition of "all purpose"[33], the definition in clause 11.2(a) should be varied by inserting the word "annual" before "leave".

170. Although the aforementioned clause is clearly inconsistent with the Commission's previous decisions, the change proposed has not been made.

171. This is an outstanding issue that we continue to press.

[33] [2014] FWCFB 9412 at [44] – [53] and [2015] FWCFB 4658 at [91].

8. EXPOSURE DRAFT – PREMIXED CONCRETE AWARD 2015

172. The submissions that follow relate to the *Exposure Draft – Premixed Concrete Award 2015* published on 13 June 2017. As at the time of drafting this submission, an updated summary of submissions has not been published.

Clause 1.5 – Title and commencement

173. In our submission of 23 September 2016, at paragraph 76, we stated:

> Consistent with the Commission's earlier decision regarding the absorption clause[34], clause 1.5 should be deleted.

174. Notwithstanding our submission, clause 1.5 has not been deleted from the exposure draft. Its inclusion is inconsistent with the Commission's earlier decisions and on this basis it should be removed.

Clause 6.6 – Casual conversion

175. As the Commission is of course aware, the ACTU has pursued, in the context of this review, a major common claim in relation to casual conversion. Relevantly, it was seeking to replace all current casual conversion clauses with its proposed model clause. On 5 July 2017, a Full Bench issued its decision dismissing that element of the claim; that is, all pre-existing casual conversion clauses are to remain without amendment as sought by the ACTU.[35]

176. In light of the ACTU's claim, consideration of any concerns raised to date by interested parties regarding re-drafted casual conversion clauses in the exposure drafts has typically been deferred pending the aforementioned decision. In other instances, interested parties such as Ai Group did not make any submissions regarding the re-drafted clauses, however noted that we may

[34] [2015] FWCFB 4658 at [9] – [20] and [2015] FWCFB 6656 at [74].

[35] *4 yearly review of modern awards – Casual and part-time employment* [2017] FWCFB 3541 at [368].

seek an opportunity to make such submissions in due, once the outcome of the ACTU's claim was known.

177. Given that the Full Bench has now issued its decision, we make the following submissions regarding the casual conversion clause in the exposure draft for the *Premixed Concrete Award 2010*.

Clause 6.6(a) – eligible casual employee – second bullet point

178. The current clause 10.6(a) describes the circumstances in which a casual employee will be eligible to seek to convert. Relevantly, it requires that the casual employee must have been engaged "by a particular employer for a sequence of periods of employment under this award during a period of 12 months".

179. Clause 6.5(a) of the exposure draft does not contain the limitation underlined above. It appears to enable a casual employee to elect to convert in circumstances where they are employed under the award for a sequence of periods over six months by one *or more* employer. This is clearly a substantive change.

180. Accordingly, the second bullet point should be amended as follows:

> who is employed by a particular employer under this award for a sequence of periods over 12 months; and …

Clause 6.6(a) – eligible casual employee – third bullet point

181. The current clause 10.6(a) enables a casual employee to elect to convert "if the employment is to continue beyond the conversion process". That is, the employee has the right to have their contract of employment converted to permanent employment if their employment is to continue after their proposed conversion.

182. By contrast, clause 6.6(a) of the exposure draft defines an eligible casual employee as one "whose employment is to continue beyond the period of six months". This is a different proposition to that which is contained in the current award. It does not require a consideration of whether the employee's

employment would continue beyond conversion. Rather, the clause would be satisfied if the employee's employment would continue for a period extending six months *as a casual employee*. This is clearly a substantive change.

183. Accordingly, the third bullet point should be amended as follows:

whose employment is to continue beyond the conversion process ~~period of 12 months~~

Clause 10.1 – Minimum wages

184. In our submission of 23 September 2016, at paragraphs 77 – 79, we stated:

> 77. The preamble in clause 10.1 is not confined to full-time employees. As a result, a literal reading of it appears to require the payment of the minimum weekly rate to all adult employees, including part-time and casual employees. We proceed on the basis that this is not the intended effect of the provision.
>
> 78. In order to rectify this, it may be sufficient to include the words "(full-time employees)" below the heading of the second column of the table. This amendment has been made in various group 3 exposure drafts in light of the issue we have identified.
>
> 79. We acknowledge that clause 6.4(f) and clause 6.5(b) could be argued to clarify that part-time and casual employees are entitled to the hourly rate. Nonetheless, the change we have proposed should be made in the interests of ensuring that the exposure draft is simple and easy to understand.

185. Whilst the amendment we have proposed has been made in a number of group 2, 3 and 4 awards, it has not here been adopted. We continue to hold the view that the change sought should be made.

Clause 11.2(a) – All purpose allowance

186. In our submission of 23 September 2016, at paragraph 80, we stated:

> Consistent with the Commission's earlier decision regarding the definition of "all purpose"[36], the definition in clause 11.2(a) should be varied by inserting the word "annual" before "leave".

187. Although the aforementioned clause is clearly inconsistent with the Commission's previous decisions, the change proposed has not been made. The definition is also inconsistent with that which is found at Schedule F.

[36] [2014] FWCFB 9412 at [44] – [53] and [2015] FWCFB 4658 at [91].

188. This is an outstanding issue that we continue to press.

Clause 15.2(b) – Seven day shiftworkers

189. In our submission of 23 September 2016, at paragraphs 81 - 83, we stated:

> 81. Clause 15.2(b) of the exposure draft operates in a similar vein to provisions previously found in many modern awards that required the accrual of annual leave to shiftworkers on an incremental basis, rather than progressively. An example is the previous clause 41.3(b) of the *Manufacturing and Associated Industries and Occupations Award 2010*:
>
> **(b)** Where an employee with 12 months continuous service is engaged for part of the 12 month period as a seven day shiftworker, that employee must have their annual leave increased by half a day for each month the employee is continuously engaged as a seven day shiftworker.
>
> 82. Such provisions have been removed in multiple awards, pursuant to a decision of the Commission earlier in the Review regarding NES inconsistencies.[37] At that time, the *Premixed Concrete Award 2010* was not identified as an award that contains such a provision.
>
> 83. Having regard to the operation of clause 15.2(b) of the exposure draft, it appears to us that the provision is similarly inconsistent with s.87(2) of the NES and should therefore be deleted.

190. Clause 15.2(b) has not been deleted from the exposure draft. This is an outstanding issue that we continue to press for the reasons outlined in our earlier submission cited above.

Clause 15.5(e) – Excessive leave accruals: request by employee for leave

191. The 'error' in clause 15.5(e) should be replaced with a reference to clause 15.2.

[37] [2015] FWCFB 3023 at [5] – [13].

9. EXPOSURE DRAFT – SALT INDUSTRY AWARD 2015

192. The submissions that follow relate to the *Exposure Draft – Salt Industry Award 2015* published on 13 June 2017. As at the time of drafting this submission, an updated summary of submissions has not been published.

Clause 1.5 – Title and Commencement

193. In our submission of 23 September 2016, at paragraph 85, we stated:

> Consistent with the Commission's earlier decision regarding the removal of the absorption clause[38], clause 1.5 should be deleted.

194. Notwithstanding our submission, clause 1.5 has not been deleted from the exposure draft. Its inclusion is inconsistent with the Commission's earlier decisions and on this basis it should be removed.

Clause 10.1 – Adult employees

195. In our submission of 23 September 2016, at paragraphs 86 – 87, we stated:

> 86. The same problem identified in previous sections of this submission in relation to other Group 1A-1B Revised Exposure Drafts arises in clause 10.1 of the *Exposure Draft – Salt Industry Award 2015*. That is, as the preamble in clause 10.1 is not confined to full-time employees, a literal reading of the clause appears to require the payment of the minimum weekly rate to all adult employees, including part-time and casual employees.
>
> 87. In order to rectify the issue, the words "(full-time employees)" should be included below the heading "Minimum weekly rate" in the second column of the table. This would be consistent with the amendments that have been made in various group 3 exposure drafts in response to this issue.

196. Whilst the amendment we have proposed has been made in a number of group 2, 3 and 4 awards, it has not here been adopted. We continue to hold the view that the change sought should be made.

[38] [2015] FWCFB 4658 at [9] – [20] and [2015] FWCFB 6656 at [74].

Clause 10.2 – Junior employees

197. In our submission of 23 September 2016, at paragraph 88, we stated:

> Consistent with the approach taken in clause 10.1, the rates expressed in clause 10.2 should be the minimum weekly rate and the minimum hourly rate (rather than rates that incorporate the all purpose allowances). This is also consistent with the Commission's earlier decision[39] in this regard.

198. The change proposed has not been made. This is an outstanding issue that we continue to press.

Clause 11.3(a) – All purpose allowances

199. In our submission of 23 September 2016, at paragraph 89, we stated:

> Consistent with the Commission's earlier decision regarding the definition of "all purpose"[40], clause 11.3(a) should be amended by inserting the word "annual" before "leave".

200. Although the aforementioned clause is clearly inconsistent with the Commission's previous decisions, the change proposed has not been made. The definition is also inconsistent with that which is found at Schedule H.

Clause 13.1(a) – Shiftwork penalties

201. In our submission of 23 September 2016, at paragraphs 90 – 91, we stated:

> 90. The words "ordinary hourly base rate of pay" should be replaced with "minimum hourly rate".
>
> 91. We note that "base rate of pay" is defined term in the exposure draft as per s.16 of the Act. This would exclude separately identifiable amounts. It would also include overaward payments, the effect of which would be inconsistent with an earlier decision[41] of the Commission in this regard.

202. The change proposed has not been made. This is an outstanding issue that we continue to press.

[39] [2015] FWCFB 4658 at [54].

[40] [2014] FWCFB 9412 at [44] – [53] and [2015] FWCFB 4658 at [91].

[41] [2015] FWCFB 4658 at [95] – [96].

Clause 13.1(b) – Shiftwork penalties

203. In our submission of 23 September 2016, at paragraphs 92 – 93, we stated:

> 92. The words "ordinary hourly base rate of pay" should be replaced with "minimum hourly rate".
>
> 93. We note that "base rate of pay" is defined term in the exposure draft as per s.16 of the Act. This would exclude separately identifiable amounts. It would also include overaward payments, the effect of which would be inconsistent with an earlier decision[42] of the Commission in this regard.

204. The change proposed has not been made. This is an outstanding issue that we continue to press.

Clause 13.2(a) – Weekend work

205. In our submission of 23 September 2016, at paragraphs 94 – 95, we stated:

> 94. The words "ordinary hourly base rate of pay" should be replaced with "minimum hourly rate".
>
> 95. We note that "base rate of pay" is defined term in the exposure draft as per s.16 of the Act. This would exclude separately identifiable amounts. It would also include overaward payments, the effect of which would be inconsistent with an earlier decision[43] of the Commission in this regard.

206. The change proposed has not been made. This is an outstanding issue that we continue to press.

Clause 13.2(b) – Weekend work

207. In our submission of 23 September 2016, at paragraphs 96 – 97, we stated:

> 96. The words "ordinary hourly base rate of pay" should be replaced with "minimum hourly rate".
>
> 97. We note that "base rate of pay" is defined term in the exposure draft as per s.16 of the Act. This would exclude separately identifiable amounts. It would also include overaward payments, the effect of which would be inconsistent with an earlier decision[44] of the Commission in this regard.

[42] [2015] FWCFB 4658 at [95] – [96].

[43] [2015] FWCFB 4658 at [95] – [96].

[44] [2015] FWCFB 4658 at [95] – [96].

208. The change proposed has not been made. This is an outstanding issue that we continue to press.

Clause 13.3 – Public holidays

209. In our submission of 23 September 2016, at paragraphs 98 – 99, we stated:

> 98. The words "ordinary hourly base rate of pay" should be replaced with "minimum hourly rate".
>
> 99. We note that "base rate of pay" is defined term in the exposure draft as per s.16 of the Act. This would exclude separately identifiable amounts. It would also include overaward payments, the effect of which would be inconsistent with an earlier decision[45] of the Commission in this regard.

210. The change proposed has not been made. This is an outstanding issue that we continue to press.

Clause 14.2(a)(i) – Overtime payments – employees other than continuous shiftworkers

211. In our submission of 23 September 2016, at paragraphs 100 – 101, we stated:

> 100. The words "ordinary hourly base rate of pay" should be replaced with "minimum hourly rate".
>
> 101. We note that "base rate of pay" is defined term in the exposure draft as per s.16 of the Act. This would exclude separately identifiable amounts. It would also include overaward payments, the effect of which would be inconsistent with an earlier decision[46] of the Commission in this regard.

212. The change proposed has not been made. This is an outstanding issue that we continue to press.

Clause 14.2(a)(ii) – Overtime payments – employees other than continuous shiftworkers

213. In our submission of 23 September 2016, at paragraphs 102 – 103, we stated:

> 102. The words "ordinary hourly base rate of pay" should be replaced with "minimum hourly rate".

[45] [2015] FWCFB 4658 at [95] – [96].

[46] [2015] FWCFB 4658 at [95] – [96].

103. We note that "base rate of pay" is defined term in the exposure draft as per s.16 of the Act. This would exclude separately identifiable amounts. It would also include overaward payments, the effect of which would be inconsistent with an earlier decision[47] of the Commission in this regard.

214. The change proposed has not been made. This is an outstanding issue that we continue to press.

Clause 14.2(a)(iii) – Overtime payments – employees other than continuous shiftworkers

215. In our submission of 23 September 2016, at paragraphs 104 – 105, we stated:

104. The words "ordinary hourly base rate of pay" should be replaced with "minimum hourly rate".

105. We note that "base rate of pay" is defined term in the exposure draft as per s.16 of the Act. This would exclude separately identifiable amounts. It would also include overaward payments, the effect of which would be inconsistent with an earlier decision[48] of the Commission in this regard.

216. The change proposed has not been made. This is an outstanding issue that we continue to press.

Clause 14.3 – Overtime payments – employees other than continuous shiftworkers

217. In our submission of 23 September 2016, at paragraphs 106 – 107, we stated:

106. The words "ordinary hourly base rate of pay" should be replaced with "minimum hourly rate".

107. We note that "base rate of pay" is defined term in the exposure draft as per s.16 of the Act. This would exclude separately identifiable amounts. It would also include overaward payments, the effect of which would be inconsistent with an earlier decision[49] of the Commission in this regard.

218. The change proposed has not been made. This is an outstanding issue that we continue to press.

[47] [2015] FWCFB 4658 at [95] – [96].

[48] [2015] FWCFB 4658 at [95] – [96].

[49] [2015] FWCFB 4658 at [95] – [96].

Clause 14.5(b) – Time off instead of overtime payment

219. In our submission of 23 September 2016, at paragraphs 106 – 107, we stated:

> 106. The words "ordinary hourly base rate of pay should be replaced with "minimum hourly rate".
>
> 107. We note that "base rate of pay" is defined term in the exposure draft as per s.16 of the Act. This would exclude separately identifiable amounts. It would also include overaward payments, the effect of which would be inconsistent with an earlier decision[50] of the Commission in this regard.

220. The change proposed has not been made. This is an outstanding issue that we continue to press.

[50] [2015] FWCFB 4658 at [95] – [96].

10. EXPOSURE DRAFT – SECURITY SERVICES INDUSTRY AWARD 2015

221. The submissions that follow relate to the *Exposure Draft – Security Services Industry Award 2015* published on 13 June 2017. As at the time of drafting this submission, an updated summary of submissions has not been published.

Clause 1.5 – Title and commencement

222. In our submission of 23 September 2016, at paragraph 111, we stated:

> Consistent with the Commission's earlier decision regarding the absorption clause[51], clause 1.5 should be deleted.

223. Notwithstanding our submission, clause 1.5 has not been deleted from the exposure draft. Its inclusion is inconsistent with the Commission's earlier decisions and on this basis it should be removed.

Clause 6.5(c)(ii) – Casual loading

224. In our submission of 23 September 2016, at paragraphs 113 – 114, we stated:

> 113. The words "base rate" should be replaced with "minimum hourly rate", consistent with the approach adopted by the Commission elsewhere in the exposure draft, including the preceding subclause.
>
> 114. We note that "base rate" is not a defined term in the exposure draft. If it were read to adopt the meaning of "base rate of pay" in s.16 of the Act, this would include overaward payments, the effect of which would be inconsistent with an earlier decision[52] of the Commission in this regard.

225. The change proposed has not been made. This is an outstanding issue that we continue to press.

Clause 9.3(c) – Minimum break – overtime

226. In our submission of 23 September 2016, at paragraph 115, we stated:

> The reference to "200% ordinary time" should be replaced with "200% of the minimum hourly rate", consistent with the Commission's earlier decision that penalties and

[51] [2015] FWCFB 4658 at [9] – [20] and [2015] FWCFB 6656 at [74].

[52] [2015] FWCFB 4658 at [95] – [96].

loadings contained in the awards are to be applied to the minimum rate prescribed by an award (to the exclusion of over-award payments).[53]

227. The change proposed has not been made. This is an outstanding issue that we continue to press.

Clause 10.1 – Minimum wages

228. In our submission of 23 September 2016, at paragraphs 116 - 118, we stated:

> 116.. The preamble in clause 10.1 is not confined to full-time employees. As a result, a literal reading of it appears to require the payment of the minimum weekly rate to all adult employees, including part-time and casual employees. We proceed on the basis that this is not the intended effect of the provision.
>
> 117. In order to rectify this, it may be sufficient to include the words "(full-time employees)" below the heading of the second column of the table. This amendment has been made in various group 3 exposure drafts in light of the issue we have identified.
>
> 118. We acknowledge that clause 6.4(a)(iii) and clause 6.5(c) could be argued to clarify that part-time and casual employees are entitled to the hourly rate. Nonetheless, the change we have proposed should be made in the interests of ensuring that the exposure draft is simple and easy to understand.

229. Whilst the amendment we have proposed has been made in a number of group 2, 3 and 4 awards, it has not here been adopted. We continue to hold the view that the change sought should be made.

Clause 13 – Penalty rates

230. In our submission of 23 September 2016, at paragraph 119, we stated:

> The table at clause 13 does not specify the rate by reference to which the penalty rates are to be calculated. Consistent with the Commission's earlier decision that penalties and loadings contained in the awards are to be applied to the minimum rate prescribed by an award (to the exclusion of over-award payments)[54], clause 13 should be varied by inserting a reference to the "minimum hourly rate".

231. The change sought has not been made. This is an outstanding issue that we continue to press.

[53] [2014] FWCFB 9412 at [44] – [53] and [2015] FWCFB 4658 at [47].

[54] [2014] FWCFB 9412 at [44] – [53] and [2015] FWCFB 4658 at [47].

Clause 14.3 – Penalty rates

232. In our submission of 23 September 2016, at paragraph 119, we stated:

> The table at clause 14.3 does not specify the rate by reference to which the penalty rates are to be calculated. Consistent with the Commission's earlier decision that penalties and loadings contained in the awards are to be applied to the minimum rate prescribed by an award (to the exclusion of over-award payments)[55], clause 14.3 should be varied by inserting a reference to the "minimum hourly rate".

233. The change sought has not been made. This is an outstanding issue that we continue to press.

[55] [2014] FWCFB 9412 at [44] – [53] and [2015] FWCFB 4658 at [47].

11. EXPOSURE DRAFT – BLACK COAL MINING INDUSTRY AWARD 2015

234. The submissions that follow relate to the *Exposure Draft – Black Coal Mining Industry Award 2015* published on 13 June 2017 and a summary of submissions published on the same date.

Clause 8.1 – Ordinary hours of work (item 3 of summary document)

235. Ai Group no longer presses its submission at item 3 of the summary document.

Clause 9.2(a) – Paid meal break – non-rostered overtime (item 5 of summary document)

236. In its decision of 23 October 2015, the Commission identified various outstanding issues arising from the exposure draft, including the issue identified at item 5 of the summary document. The decision contained the following direction:

> **[14]** If any party wishes to pursue any of these issues, they should file a formal application to vary the award within 21 days of this decision including a draft variation determination and setting out the grounds in support of the variation proposed. Any such application will then be allocated for hearing.[56]

237. No such application has been made. Accordingly, we consider that this is no longer an outstanding issue. We note that the relevant question originally posed by the Commission in the exposure draft has now been removed.

238. Should the Commission nonetheless intend to vary the clause in accordance with the 'agreed position' put by the CFMEU and CMIEG regarding its interpretation of the relevant clause, Ai Group may seek an opportunity to be heard.

[56] [2015] FWCFB 7236 at [14].

Clause 9.2(c) – Paid meal break – non-rostered overtime (item 6 of summary document)

239. In its decision of 23 October 2015, the Commission identified various outstanding issues arising from the exposure draft, including the issue identified at item 6 of the summary document. The decision contained the following direction:

> **[14]** If any party wishes to pursue any of these issues, they should file a formal application to vary the award within 21 days of this decision including a draft variation determination and setting out the grounds in support of the variation proposed. Any such application will then be allocated for hearing.[57]

240. No such application has been made. Accordingly, we consider that this is no longer an outstanding issue. We note that the relevant question originally posed by the Commission in the exposure draft has now been removed.

241. Should the Commission nonetheless intend to vary the clause in accordance with the 'agreed position' put by the CFMEU and CMIEG regarding its interpretation of the relevant clause, Ai Group may seek an opportunity to be heard.

Clause 12.1(d) – Definitions (item 7 of summary document)

242. In its decision of 23 October 2015, the Commission identified various outstanding issues arising from the exposure draft, including the issue identified at item 7 of the summary document. The decision contained the following direction:

> **[14]** If any party wishes to pursue any of these issues, they should file a formal application to vary the award within 21 days of this decision including a draft variation determination and setting out the grounds in support of the variation proposed. Any such application will then be allocated for hearing.[58]

[57] [2015] FWCFB 7236 at [14].

[58] [2015] FWCFB 7236 at [14].

243. No such application has been made. Accordingly, we consider that this is no longer an outstanding issue. We note that the relevant question originally posed by the Commission in the exposure draft has now been removed.

Clause 13.1 – Penalty rates (item 8 of summary document)

244. Item 8 remains an outstanding issue. It relates to the Inconsistent Terminology Issue that we have addressed earlier in this submission.

Clause 13.3(a)(i) – For at least three consecutive working days (item 10 of summary document)

245. Item 10 appears to be an outstanding matter. Whilst the change proposed by Ai Group was initially agreed, it appears that the CFMEU has subsequently proposed an alternate amendment.

Clause 14.3 – Six day or seven day roster employees (item 14 of summary document)

246. Item 14 appears to be an outstanding matter. Ai Group maintains its opposition to the variation proposed by the CFMEU.

Clause 15.3 – Accrual of annual leave (item 15 of summary document)

247. Ai Group does not seek to pursue this issue at this time. Accordingly, this is no longer an outstanding issue for the purposes of the current process.

Clause 16.2 – Entitlement (item 17 of summary document)

248. Ai Group does not seek to pursue this issue at this time. Accordingly, this is no longer an outstanding issue for the purposes of the current process.

Clause 18.4 – Employee required to work on a recognised public holiday (item 19 of summary document)

249. Item 19 appears to be an outstanding matter. Ai Group continues to seek an amendment to clause 18.4. We may seek an opportunity to be heard further in relation to this matter.

Clauses A.8.2 and B.3.1 – Allowances (item 21 of summary document)

250. Ai Group no longer presses its submission. Accordingly, this is no longer an outstanding issue.

Schedules C and D – Summary of hourly rates of pay (item 26 of summary document)

251. The CFMEU's submission is linked to items 14 and 19, both of which have been identified as outstanding issues above. By extension, we consider that item 26 is also an outstanding item.

12. EXPOSURE DRAFT – GAS INDUSTRY AWARD 2015

252. The submissions that follow relate to the *Exposure Draft – Gas Industry Award 2015* published on 13 June 2017 and a summary of submissions published on the same date.

Clauses 9.1(b), (c) and (d) – Meal Breaks (item 3 of Summary Document)

253. Ai Group's submission at item 3 remains an outstanding issue.

254. Ai Group strongly opposes the AWU's assertion that the term "applicable rate of pay" be introduced to these provisions.

Clause 10.1 – Adult employee minimum wages

255. The preamble in clause 10.1 is not confined to full-time employees. As a result, a literal reading of it appears to require the payment of the minimum weekly rate to all adult employees, including part-time and casual employees. We proceed on the basis that this is not the intended effect of the provision.

256. In order to rectify this, it may be sufficient to include the words "(full-time employees)" below the heading of the second column of the table. This amendment has been made in various group 2, 3 and 4 exposure drafts in light of the issue we have identified.

257. We acknowledge that clause 6.4(a)(iii) and clause 6.5(b)(i) could be argued to clarify that part-time and casual employees are entitled to the hourly rate. Nonetheless, the change we have proposed should be made in the interests of ensuring that the exposure draft is simple and easy to understand.

Clause 13.8 – Overtime and Penalty Rates (item 5 of Summary Document)

258. Ai Group's submission at item 5 remains an outstanding issue. It relates to the Inconsistent Terminology Issue that we have addressed earlier in the submission.

Clauses 14.5(a)(i) and (ii) – Annual Leave Loading (item 6 of Summary Document)

259. Ai Group's submission at item 6 remains an outstanding issue. It relates to the Inconsistent Terminology Issue that we have addressed earlier in the submission.

Clause 14.6(a) – Payment of Annual Leave on Termination (item 7 of Summary Document)

260. Ai Group's submission at item 7 remains an outstanding issue and has been referred to Annual Leave Full Bench (AM2014/47).

261. We note that the amendment proposed by Ai Group has not been opposed by any interested party, including the AWU.

Schedule H – Definitions – availability duty

262. The definition of "availability duty", currently appearing at clause 3.1 of the *Gas Industry Award 2010* has been removed from the exposure draft. It should be re-inserted; it is to be read with clause 11.3 of the exposure draft which requires the payment of an "availability duty" allowance.

13. EXPOSURE DRAFT – HYDROCARBONS INDUSTRY (UPSTREAM) AWARD 2015

263. The submissions that follow relate to the *Exposure Draft – Hydrocarbons Industry (Upstream) Award 2015* published on 13 June 2017 and a summary of submissions published on the same date.

Clause 6.4(c) – Casual Employees (Item 3 of the Summary Document)

264. Ai Group no longer presses its submission at item 3. Accordingly, it appears that this is no longer an outstanding issue.

Clause 10.1 – Adult employees

265. The preamble in clause 10.1 is not confined to full-time employees. As a result, a literal reading of it appears to require the payment of the minimum weekly rate to all adult employees, including part-time and casual employees. We proceed on the basis that this is not the intended effect of the provision.

266. In order to rectify this, it may be sufficient to include the words "(full-time employees)" below the heading of the second column of the table. This amendment has been made in various group 2, 3 and 4 exposure drafts in light of the issue we have identified.

267. We acknowledge that clause 6.3(b) and clause 6.4(c)(i) could be argued to clarify that part-time and casual employees are entitled to the hourly rate. Nonetheless, the change we have proposed should be made in the interests of ensuring that the exposure draft is simple and easy to understand.

Clause 14.1(c) – Overtime (Item 7 of the Summary Document)

268. Ai Group maintains its opposition to the AWU's submission at item 7 and relies upon the written submissions it has previously filed in this regard.

269. We are content for the Full Bench to determine this matter on the papers, based on that which has already been filed.

Schedule B – Summary of hourly rates of pay (Item 9 of the Summary Document)

270. Item 9 is linked to item 3. Given that we have withdrawn our submission at item 3, item 9 is no longer an outstanding issue.

Schedule B – Summary of hourly rates of pay (Item 10 of the Summary Document)

271. Ai Group's submission at item 10 remains an outstanding issue. It appears that the matter has been referred to the casual and part-time employment Full Bench.

14. EXPOSURE DRAFT – MANUFACTURING AND ASSOCIATED INDUSTRIES AND OCCUPATIONS AWARD 2015

272. The submissions that follow relate to the *Exposure Draft – Manufacturing and Associated Industries and Occupations Award 2015*. As at the time of drafting this submission, an updated summary of submissions has not been published.

273. Ai Group has been involved in lengthy and detailed discussions with the AMWU and other interested parties regarding the introduction of vehicle manufacturing provisions in the Manufacturing Award. Whilst discussions to date have been productive, there remain many outstanding matters of detail. As at the time of drafting this submission, discussions between parties are continuing.

274. The vehicle manufacturing provisions contained in the most recent iteration of the exposure draft (highlighted in yellow) do not reflect the progress of the discussions that the parties are currently undertaking. We anticipate that, if the Commission adopts the changes that will instead be proposed by interested parties in due course in order to give effect to the Commission's decision to introduce vehicle manufacturing provisions from the Vehicle Award in the Manufacturing Award, numerous and substantial changes will need to be made to the exposure draft.

275. Accordingly, for the purposes of this submission, we have not undertaken a comprehensive review of the exposure draft. Rather, we have reviewed:

- those provisions affected by the "applicable rate of pay" issue to ensure that they properly reflect the Commission's decision in this regard[59];
- those provisions that the parties had agreed should be amended to address various technical and drafting issues[60];

[59] *4 yearly review of modern awards – Award stage – Group 1* [2017] FWCFB 3177 at [41] – [78].

[60] *4 yearly review of modern awards – Award stage – Group 1* [2017] FWCFB 3177 at [79].

- the casual conversion clause.

Clause 6.4(b)(i) – Casual loading – second bullet point

276. The word "wage" should be replaced with "rate". This change would be consistent with the Commission's decision of 9 June 2017[61] regarding the Manufacturing Award and the terminology used elsewhere in the exposure draft.

Clause 6.5 – Casual conversion

277. As the Commission is of course aware, the AMWU has pursued, in the context of this review, a major common claim in relation to casual conversion. Relevantly, it was seeking to replace the current casual conversion clause in the Manufacturing Award with its proposed model clause. On 5 July 2017, a Full Bench issued its decision dismissing that element of the claim.[62]

278. In light of the AMWU's claim, consideration of any concerns raised to date by interested parties regarding re-drafted casual conversion clauses in the exposure draft has been deferred pending the aforementioned decision.

279. Given that the Full Bench has now issued its decision, we make the following submissions regarding the casual conversion clause in the *Exposure Draft – Manufacturing and Associated Industries and Occupations Award 2015*.

Clause 6.5(a)(ii) – eligible casual employee

280. The current clause 14.4(a) states that an employee is eligible to seek to convert to permanent employment if they have been "engaged by a particular employer for a sequence of periods of employment under this award during a period of six months".

281. Clause 6.5(a)(ii) does not contain the limitation underlined above. It therefore appears to enable a casual employee to seek to convert in circumstances

[61] *4 yearly review of modern awards – Award stage – Group 1* [2017] FWCFB 3177 at [38].

[62] *4 yearly review of modern awards – Casual and part-time employment* [2017] FWCFB 3541 at [394].

where the employee is employed for a sequence of periods of six months by one *or more* employer. This is quite clearly a substantive change.

282. Accordingly, clause 6.5(a)(ii) should be amended as follows:

> **(ii)** who is employed by a particular employer for a sequence of periods of six months; and …

Clause 6.5(a)(ii) – eligible casual employee

283. The current clause 14.4(a) states that an employee is eligible to seek to convert to permanent employment if they have been "engaged by a particular employer for a sequence of periods of employment under this award during a period of six months".

284. Clause 6.5(a)(ii) does not contain the limitation underlined above. It therefore appears to enable a casual employee to seek to convert in circumstances where the employee is employed for a sequence of periods of six months under one *or more* award. This is quite clearly a substantive change.

285. Accordingly, clause 6.5(a)(ii) should be amended as follows: (including the amendment proposed above)

> **(iii)** who is employed by a particular employer under this award for a sequence of periods of six months; and …

Clause 6.5(a)(iii) – eligible casual employee

286. The current clause 14.4(a) enables a casual employee to elect to convert "if the employment is to continue beyond the conversion process". That is, the employee has the right to have their contract of employment converted to permanent employment if their employment is to continue after their proposed conversion.

287. By contrast, clause 6.5(a)(iii) of the exposure draft defines an eligible casual employee as one "whose employment is to continue beyond the period of six months". This is a different proposition to that which is contained in the current award. It does not require a consideration of whether the employee's employment would continue beyond conversion. Rather, the clause would be

satisfied if the employee's employment would continue for a period extending six months *as a casual employee*. This is clearly a substantive change.

288. Accordingly, clause 6.5(a)(iii) should be amended as follows:

whose employment is to continue beyond the conversion process ~~period of six months~~.

Clause 6.5(d)(i) – Full-time or part-time conversion

289. Clause 14.4(g) of the current award is in the following terms:

(g) An employee who has worked on a full-time basis throughout the period of casual employment has the right to elect to convert their contract of employment to full-time employment and an employee who has worked on a part-time basis during the period of casual employment has the right to elect to convert their contract of employment to part-time employment, on the basis of the same number of hours and times of work as previously worked, unless other arrangements are agreed on between the employer and employee.

290. In essence the clause states that:

- An employee who has worked on a full-time basis has the right to elect to convert to full-time employment; and
- An employee who has worked on a part-time basis has the right to elect to convert to part-time employment on the basis of the same number of hours and times of work as previously worked, unless other arrangements are agreed.

291. The underlined portion of the clause does not, in our view, relate to those employees who have worked on a full-time basis. It relates only to part-time employees.

292. Clause 6.5(d)(i) of the exposure draft deviates substantively from the award, by including the underlined part of the clause at its conclusion, such that it applies to casual employees who have worked on a full-time basis. This should be amended as follows:

(i) An eligible casual employee who has worked on a full-time basis throughout their period of employment has the right to elect to convert their contract of employment to full-time employment ~~on the basis of the same number of hours and times of work as previously worked~~.

Clause 6.5(a)(iii) – Full-time or part-time conversion

293. Clause 14.4(g) of the current award is in the following terms:

> **(g)** An employee who has worked on a full-time basis throughout the period of casual employment has the right to elect to convert their contract of employment to full-time employment and an employee who has worked on a part-time basis during the period of casual employment has the right to elect to convert their contract of employment to part-time employment, on the basis of the same number of hours and times of work as previously worked, unless other arrangements are agreed on between the employer and employee.

294. As can be seen, the clause permits an employee to elect to convert to part-time employment on the basis of the same number of hours and times of work as previously worked, unless other arrangements are agreed.

295. The underlined portion of clause 14.4(g) is reproduced at clause 6.5(d)(iii) of the exposure draft. However, as it has been separated from clause 6.5(d)(ii), it is not clear what it in fact relates or refers to. We suggest that it be amalgamated with clause 6.5(d)(ii) such that it appears as the final sentence in that clause or, in the alternate, it is amended to make clear that it relates to that clause.

Clause 6.5(c)(iv) – Full-time or part-time conversion

296. The reference to clause 5 should be replaced with a reference to clause 6.5(e)(i) (i.e. the employer's right to refuse an election to convert). This appears to be a drafting error. The amendment proposed is consistent with the current clause 14.4(f).

Clause 6.5(f)(i) – Variation of the casual conversion six-month eligibility period

297. Clause 6.5(f)(i) of the exposure draft erroneously states that "clause 6.5(a) may be varied as if the reference to six months is a reference to 12 months" where agreement is reached between an employer and employees. In such circumstances, per the current clause 14.4(j), the clause may be *applied* by an employer such that the references to six months are instead to be read references to 12 months, however the clause itself is not, as such, varied.

298. Consistent with the current clause, clause 6.5(f)(i) of the exposure draft should be amended as follows:

> **(i)** Clause 6.5(a) may be ~~varied~~ applied by an employer as if the reference to six months is a reference to 12 months …

Clause 14.5(b)(iv) – Working through meal breaks

299. The word "a" should be inserted before "shift". This appears to be a drafting error.

Clause 29.2(i)(iv) – Rate for working Sunday and public holiday shifts

300. The reference to "clauses 29.2(i)(ii) and (iii)" should be replaced with "clauses 29.2(i)(i), (ii) and (iii). This is an 'agreed change' documented at Attachment B of the 9 June 2017 decision[63], however it has not been made.

[63] *4 yearly review of modern awards – Award stage – Group 1* [2017] FWCFB 3177 at Attachment B.

15. EXPOSURE DRAFT – MARITIME OFFSHORE OIL AND GAS AWARD 2015

301. The submissions that follow relate to the *Exposure Draft – Maritime Offshore Oil and Gas Award 2015* published on 13 June 2017 and a summary of submissions published on the same date.

Clause 7.1(c) – Ordinary Hours (Item 2 of the Summary Document)

302. Ai Group maintains its opposition to the AMWU's submission at item 2 and relies upon the written submissions it has previously filed in this regard.

303. We are content for the Full Bench to determine this matter on the papers, based on that which has already been filed.

Clause 7.1(c) – Ordinary Hours (Item 3 of the Summary Document)

304. Ai Group maintains its opposition to the AWU"s submission at item 3 and relies upon the written submissions it has previously filed in this regard.

305. We are content for the Full Bench to determine this matter on the papers, based on that which has already been filed.

16. EXPOSURE DRAFT – MINING INDUSTRY AWARD 2015

306. The submissions that follow relate to the *Exposure Draft – Mining Industry Award 2015* published on 13 June 2017 and a summary of submissions published on the same date.

Clause 6.3(d) – Part Time Employees (item 1 of Summary Document)

307. Ai Group maintains its opposition to the AWU's submission at item 1 and relies upon the written submissions it has previously filed in this regard.

308. We are content for the Full Bench to determine this matter on the papers, based on that which has already been filed.

Clause 6.4(c) – Part Time Employees (item 2 of Summary Document)

309. Ai Group no longer opposes the AWU's submission at item 2.

Clause 9.1 – Adult employee minimum wages

310. The preamble in clause 9.1 is not confined to full-time employees. As a result, a literal reading of it appears to require the payment of the minimum weekly rate to all adult employees, including part-time and casual employees. We proceed on the basis that this is not the intended effect of the provision.

311. In order to rectify this, it may be sufficient to include the words "(full-time employees)" below the heading of the second column of the table. This amendment has been made in various group 2, 3 and 4 exposure drafts in light of the issue we have identified.

312. We acknowledge that clause 6.3(a)(ii) and clause 6.4(c) could be argued to clarify that part-time and casual employees are entitled to the hourly rate. Nonetheless, the change we have proposed should be made in the interests of ensuring that the exposure draft is simple and easy to understand.

Schedule B.2.3 (Item 13 and 14 of Summary Document)

313. Items 13 and 14 remains an outstanding issue. If casual overtime rate tables are inserted, Ai Group requests that we be granted an opportunity to review them.

Schedule H – Definitions – ordinary hourly rate

314. The exposure draft defines the ordinary hourly rate as follows:

> **ordinary hourly rate** means the hourly rate for the employee's classification specified in clause B.1.3, inclusive of 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

315. Clause B.1.3 prescribes the minimum hourly rate payable to adult employees. The effect of referring to it in the definition for "ordinary hourly rate" is to require the payment of a higher rate than would what presently fall due under the current award in the context of, for instance, a junior employee (see clause 9.2 of the exposure draft).

316. For instance, clause 13.3 of the exposure draft requires that an employee working a public holiday be paid 250% of the ordinary hourly rate. Read with the definition at Schedule H, a 16 year old employee would be entitled to 110% of the adult rate instead of 110% of 75% of the adult rate. This is quite clearly a substantive change from the current award and an unintended consequence flowing from the definition of "ordinary hourly rate".

317. Similar consequences would arise in relation to apprentices and trainees (see clause 9.4).

318. Accordingly, the definition of ordinary hourly rate should be amended as follows:

> **ordinary hourly rate** means the hourly rate for the employee's classification specified in clause 9 ~~B.1.3~~, inclusive of 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

17. EXPOSURE DRAFT – OIL REFINING AND MANUFACTURING INDUSTRY AWARD 2015

319. The submissions that follow relate to the *Exposure Draft – Oil Refining and Manufacturing Industry Award 2015* published on 13 June 2017 and a summary of submissions published on the same date.

Clause 6.4(c) – Casual Loading (Item 2 of the Summary Document)

320. Ai Group maintains that casuals are not entitled to casual loading when working overtime and agree with the AWU that this is yet to be resolved.

Clause 6.4(c)(i) – Casual Loading (Item 3 of Summary Document)

321. Ai Group no longer presses its submission at item 3. Accordingly, this is no longer an outstanding issue.

Clause 10.1 – Adult employee minimum wages

322. The preamble in clause 10.1 is not confined to full-time employees. As a result, a literal reading of it appears to require the payment of the minimum weekly rate to all adult employees, including part-time and casual employees. We proceed on the basis that this is not the intended effect of the provision.

323. In order to rectify this, it may be sufficient to include the words "(full-time employees)" below the heading of the second column of the table. This amendment has been made in various group 2, 3 and 4 exposure drafts in light of the issue we have identified.

324. We acknowledge that clause 6.3(b) and clause 6.4(c) could be argued to clarify that part-time and casual employees are entitled to the hourly rate. Nonetheless, the change we have proposed should be made in the interests of ensuring that the exposure draft is simple and easy to understand.

Clause 11.1 – Allowances

325. The reference to “0” should be replaced with “Schedule C”. This appears to be a drafting error.

Clause 13.1(c) – Ordinary Hours (Item 7 of the Summary Document)

326. Ai Group maintains its position at item 7. This appears to remain an outstanding issue.

NOTE: The following Submissions are made on the basis that references to Schedule B are in fact a reference to Schedule C of the current exposure draft. We note that there does not appear to be a Schedule A.

Schedule B – Hourly Rates of Pay (Item 13 of the Summary Document)

327. Ai Group’s submission at item 13 remains an outstanding issue.

328. We are content for the Full Bench to determine this matter on the papers, based on that which has already been filed.

Schedule B.3.1 – Ordinary Hours (Item 16 of the Summary Document)

329. Ai Group’s submission at item 16 remains an outstanding issue.

330. We are content for the Full Bench to determine this matter on the papers, based on that which has already been filed.

Schedule B.3.2 – Ordinary Hours (Item 17 of the Summary Document)

331. Ai Group’s submission at item 17 remains an outstanding issue.

332. We are content for the Full Bench to determine this matter on the papers, based on that which has already been filed.

18. EXPOSURE DRAFT – PHARMACEUTICAL INDUSTRY AWARD 2015

333. The submissions that follow relate to the *Exposure Draft – Pharmaceutical Industry Award 2015* published on 13 June 2017 and a summary of submissions published on the same date.

Clause 8.2(a) – Ordinary hours – day workers (item 3 of summary document)

334. Ai Group's submission at item 3 remains an outstanding issue.

335. We note that the AWU does not oppose Ai Group's submission. We are content for the Full Bench to determine this matter on the papers, based on that which has already been filed.

Clauses 6.3(c) and 8.2(c) – Part-time employees (item 4 of summary document)

336. Ai Group maintains its opposition to the AMWU's submission at item 4 and relies upon the written submissions it has previously filed in this regard.

337. We are content for the Full Bench to determine this matter on the papers, based on that which has already been filed.

Clause 9.1(b) – Unpaid meal breaks (item 5 of summary document)

338. Ai Group maintains its strong opposition to the AWU's submission at item 5.

339. The Full Bench recently issued its decision regarding the proposed use of the term "applicable rate of pay" in the Manufacturing Award. After many months of discussions between various interested parties including the AWU, an agreed position was reached in relation to clause 14.1(b) of the *Exposure Draft – Manufacturing and Associated Industries and Occupations 2015*, which is in relevantly similar terms to clause 9.1(b) of the *Exposure Draft – Pharmaceutical Industry Award 2015*.

340. The Full Bench has since accepted the parties' proposal, such that the exposure draft for the Manufacturing Award will be amended as follows:

14.1(b) by agreement between an employer and an individual employee or the majority of employees in an enterprise or part of an enterprise concerned, an employee or employees may be required to work in excess of five hours but not more than six hours without a meal break. Employees will be paid for the sixth hour at the rate applying immediately prior to the end of the fifth hour of work. [64]

341. In response to the concern raised by the AWU in the current context, we would not oppose an amendment similar to the one above being made. For instance, clause 9.1(b) could be amended as follows:

(b) the employer and an employee or the majority of affected employees in the plant, work section or sections concerned may agree that employees work in excess of five hours, but not more than six hours, without a meal break. Employees will be paid for the sixth hour at the rate applying immediately prior to the end of the fifth hour of work; …

Clause 10.1 – Adult employee minimum wages

342. The preamble in clause 10.1 is not confined to full-time employees. As a result, a literal reading of it appears to require the payment of the minimum weekly rate to all adult employees, including part-time and casual employees. We proceed on the basis that this is not the intended effect of the provision.

343. In order to rectify this, it may be sufficient to include the words "(full-time employees)" below the heading of the second column of the table. This amendment has been made in various group 2, 3 and 4 exposure drafts in light of the issue we have identified.

344. We acknowledge that clause 6.3(a)(iii) and clause 6.4(b) could be argued to clarify that part-time and casual employees are entitled to the hourly rate. Nonetheless, the change we have proposed should be made in the interests of ensuring that the exposure draft is simple and easy to understand.

Clause 11.2(a) – First aid allowance (item 7 of summary document)

345. Ai Group no longer presses this submission. Accordingly, it is no longer an outstanding issue.

[64] *4 yearly review of modern awards – Award stage – Group 1* [2017] FWCFB 3177 at

Clause 13 – Penalty rates (item 9 of summary document)

346. Item 9 remains an outstanding issue. It relates to the Inconsistent Terminology Issue that we have addressed earlier in this submission.

Clause 14.2 – Overtime rates

347. The table at clause 14.2 identifies the various rates payable however does not prescribe the amount by reference to which the overtime rate is to be calculated. Consistent with the approach otherwise taken in the exposure draft, we suggest that the words "(% minimum hourly rate)" be inserted under the heading "Overtime rate".

Clause 15.3(e)(ii) – Annual leave loading (item 12 of summary document)

348. Item 12 remains an outstanding issue. It relates to the Inconsistent Terminology Issue that we have addressed earlier in this submission.

19. EXPOSURE DRAFT – POULTRY PROCESSING INDUSTRY AWARD 2015

349. The submissions that follow relate to the *Exposure Draft – Poultry Processing Award 2015* published on 13 June 2017 and a summary of submissions published on the same date.

Clause 8.1(b)(i) – Ordinary hours (item 3 of summary document)

350. Ai Group's submission at item 3 remains an outstanding issue.

351. We note that the AWU does not oppose Ai Group's submission. We are content for the Full Bench to determine this matter on the papers, based on that which has already been filed.

Clause 8.2(b) – Ordinary hours – day workers (item 4 of summary document)

352. Ai Group maintains its opposition to the AMWU's submission at item 4 and relies upon the written submissions it has previously filed in this regard.

353. We are content for the Full Bench to determine this matter on the papers, based on that which has already been filed.

Clause 10.1 – Adult employee minimum wages

354. The preamble in clause 10.1 is not confined to full-time employees. As a result, a literal reading of it appears to require the payment of the minimum weekly rate to all adult employees, including part-time and casual employees. We proceed on the basis that this is not the intended effect of the provision.

355. In order to rectify this, it may be sufficient to include the words "(full-time employees)" below the heading of the second column of the table. This amendment has been made in various group 2, 3 and 4 exposure drafts in light of the issue we have identified.

356. We acknowledge that clause 6.4(a)(ii) and clause 6.5(c)(i) could be argued to clarify that part-time and casual employees are entitled to the hourly rate.

Nonetheless, the change we have proposed should be made in the interests of ensuring that the exposure draft is simple and easy to understand.

Clause 10.5 – Payment of wages (item 5 of summary document)

357. Should the AFEI maintain its position in relation to clause 10.5, this remains an outstanding matter.

358. Whilst Ai Group supports the AFEI's proposal, we do not otherwise seek to pursue the variation proposed.

Clause 14.2 – Overtime rates (item 6 of summary document)

359. Item 6 remains an outstanding issue. The agreed variation has not been made to the exposure draft.

Clause 14.2 – Overtime rates (item 7 of summary document)

360. The notes in the summary document in relation to item 7 indicate that the exposure draft has been amended in accordance with Ai Group's submission; that is, by inserting a reference to the "ordinary hourly rate". Notwithstanding, the exposure draft instead refers to the "ordinary time rate".

361. Consistent with the Commission's decision referred to in the summary document and Ai Group's submission, we submit that this should be amended to instead read "ordinary hourly rate".

Schedule B – Summary of Hourly Rates of Pay (item 9)

362. The Commission's July 2017 decision[65] resolves the matter raised by Ai Group at item 9. We suggest that the summary document be updated to reflect this.

[65] *4 yearly review of modern awards – Award stage – Group 3* [2017] FWCFB 3433 at [360] – [362].

Schedule G – Definitions – ordinary hourly rate

363. The exposure draft defines the ordinary hourly rate as follows:

> **ordinary hourly rate** means the hourly rate for the employee's classification specified in clause 10.1, plus any allowances specified as being included in the employee's ordinary hourly rate or payable for all purposes

364. Clause 10.1 prescribes the minimum hourly rate payable to adult employees. The effect of referring to it in the definition for "ordinary hourly rate" is to require the payment of a higher rate than would what presently fall due under the current award in the context of, for instance, an unapprenticed junior employee (see clause 10.4 of the exposure draft).

365. For instance, clause 13.2 of the exposure draft requires that an employee working an early morning shift be paid 110% of the ordinary hourly rate. Read with the definition at Schedule G, a 16 year old employee would be entitled to 110% of the adult rate instead of 110% of 70% of the adult rate. This is quite clearly a substantive change from the current award and an unintended consequence flowing from the definition of "ordinary hourly rate".

366. Similar consequences would arise in relation to trainees (see clause 10.3(a)) and employees receiving a supported wage (see clause 10.3(c)).

367. Accordingly, the definition of ordinary hourly rate should be amended as follows:

> **ordinary hourly rate** means the hourly rate for the employee's classification specified in clause 10 ~~10.1~~, plus any allowances specified as being included in the employee's ordinary hourly rate or payable for all purposes

20. EXPOSURE DRAFT – RAIL INDUSTRY AWARD 2015

368. The submissions that follow relate to the *Exposure Draft – Rail Industry Award 2015* published on 13 June 2017 and a summary of submissions published on the same date.

Clause 6.3(b) – Part-time employment (item 3 of summary document)

369. This issue remains outstanding. Ai Group is content for it be determined on the papers, based on that which has already been filed.

Clause 6.4(c) – Casual loading (item 2 of the summary document)

370. Ai Group does not press the issue identified at item 2.

Items, 7, 8, 12, 14, 15, 16 and 21 of the summary document

371. These items remain as outstanding issues. They relate to the Inconsistent Terminology Issue referred to above.

Schedule B – Summary of Hourly Rates (item 25 of the summary document)

372. The Commission's July 2017 decision[66] resolves the matter raised by Ai Group at item 25. We suggest that the summary document be updated to reflect this.

[66] *4 yearly review of modern awards – Award stage – Group 3* [2017] FWCFB 3433 at [360] – [362].

21. EXPOSURE DRAFT – TEXTILE, CLOTHING, FOOTWEAR AND ASSOCIATED INDUSTRIES AWARD 2015

373. The submissions that follow relate to the *Exposure Draft – Textile, Clothing, Footwear and Associated Industries Award 2015* published on 13 June 2017 and a summary of submissions published on the same date.

Various clauses (item 2 of summary document)

374. Item 2 is an outstanding issue. It relates to the Inconsistent Terminology Issue that we have dealt with earlier in this submission.

Clause 5 – Facilitative provisions (item 7 of summary document)

375. Ai Group maintains its opposition to the TCFUA's proposed change. To that extent, item 7 remains an outstanding issue. We are content for the Commission to decide the issue on the papers, based on that which has already been filed.

Clause 6.3(h) – Part-time employees (item 8 of summary document)

376. Ai Group continues to submit that clause 6.3(h) should refer to clauses 6.3(d) and 6.3(e). Accordingly, this remains an outstanding issue. We are content for the Commission to decide the issue on the papers, based on that which has already been filed.

Clause 6.4(i) – Casual loading (item 10 of summary document)

377. Ai Group no longer presses its submission at item 10. Accordingly, it is no longer an outstanding issue.

Clause 6.5 – Casual conversion to full-time or part-time employment

378. As the Commission is of course aware, the ACTU has pursued, in the context of this review, a major common claim in relation to casual conversion. Relevantly, it was seeking to replace all current casual conversion clauses with its proposed model clause. On 5 July 2017, a Full Bench issued its decision

dismissing that element of the claim; that is, all pre-existing casual conversion clauses are to remain without amendment.[67]

379. In light of the ACTU's claim, consideration of any concerns raised to date by interested parties regarding re-drafted casual conversion clauses in the exposure drafts has typically been deferred pending the aforementioned decision. In other instances, interested parties such as Ai Group did not make any submissions regarding the re-drafted clauses, however noted that we may seek an opportunity to make such submissions in due, once the outcome of the ACTU's claim was known.

380. Given that the Full Bench has now issued its decision, we make the following submissions regarding the casual conversion clause in the *Exposure Draft – Textile, Clothing, Footwear and Associated Industries Award 2015*.

Clause 6.5(a)(ii) – eligible casual employee

381. The current clause 14.10(a) states that an employee is eligible to seek to convert to permanent employment if they have been "engaged by a particular employer on a regular and systematic basis for a sequence of periods of employment under this award during a period of six months".

382. Clause 6.5(a)(ii) does not contain the limitation underlined above. It therefore appears to enable a casual employee to seek to convert in circumstances where the employee is employed for a sequence of periods of six months by one *or more* employer. This is quite clearly a substantive change.

383. Accordingly, clause 6.5(a)(ii) should be amended as follows:

> **(ii)** who is employed by a particular employer for a sequence of periods over six calendar months; and …

[67] *4 yearly review of modern awards – Casual and part-time employment* [2017] FWCFB 3541 at [368].

Clause 6.5(a)(ii) – eligible casual employee

384. The current clause 14.10(a) states that an employee is eligible to seek to convert to permanent employment if they have been "engaged by a particular employer on a regular and systematic basis for a sequence of periods of employment under this award during a period of six months".

385. Clause 6.5(a)(ii) does not contain the limitation underlined above. It therefore appears to enable a casual employee to seek to convert in circumstances where the employee is employed for a sequence of periods of six months under one *or more* award. This is quite clearly a substantive change.

386. Accordingly, clause 6.5(a)(ii) should be amended as follows: (including the amendment proposed above)

> **(iii)** who is employed by a particular employer under this award for a sequence of periods over six calendar months; and …

Clause 6.5(a)(iii) – eligible casual employee

387. The current clause 14.10(a) enables a casual employee to elect to convert "if the employment is to continue beyond the conversion process". That is, the employee has the right to have their contract of employment converted to permanent employment if their employment is to continue after their proposed conversion.

388. By contrast, clause 6.5(a)(iii) of the exposure draft defines an eligible casual employee as one "whose employment is to continue beyond the period of six months". This is a different proposition to that which is contained in the current award. It does not require a consideration of whether the employee's employment would continue beyond conversion. Rather, the clause would be satisfied if the employee's employment would continue for a period extending six months *as a casual employee*. This is clearly a substantive change.

389. Accordingly, clause 6.5(a)(iii) should be amended as follows:

> whose employment is to continue beyond the conversion process ~~period of six months~~.

Clause 6.5(c)(iii) – Full-time or part-time conversion

390. The current clause 14.10(g) relevantly states:

> **(g)** … an employee who has worked on a part-time basis during the period of casual employment has the right to elect to convert their contract of employment to part-time employment, on the basis of the same number of hours and times of work as previously worked, unless other arrangements are agreed between the employer and the employee.

391. As can be seen, the clause permits an employee to elect to convert to part-time employment on the basis of the same number of hours and times of work as previously worked, unless other arrangements are agreed.

392. The underlined portion of clause 14.10(g) is reproduced at clause 6.5(c)(iii) of the exposure draft. However, as it has been separated from clause 6.5(c)(ii), it is not clear what it in fact relates or refers to. We suggest that it be amalgamated with clause 6.5(c)(ii) such that it appears as the final sentence in that clause or, in the alternate, it is amended to make clear that it relates to that clause.

Clause 6.5(c)(iv) – Full-time or part-time conversion

393. The reference to clause 6.5(c)(iv) should be replaced with a reference to clause 6.5(d)(i) (i.e. the employer's right to refuse an election to convert). This appears to be a drafting error. The change proposed is consistent with the current clause 14.10(g).

Clause 6.5(e) – Variation to casual conversion six-month eligibility period (item 11 of the summary document)

394. This remains an outstanding issue. As stated in the summary document, we do not oppose its proposed deletion on the basis that a corresponding clause does not appear in the current award.

Clause 14.2(a)(i) – All purpose allowances (item 21 of the summary document)

395. Ai Group no longer presses its submission at item 21. Accordingly, it would appear that this is no longer an outstanding issue.

Clause 17 – Shiftwork and penalties (item 22 of the summary document)

396. Item 22 remains an outstanding issue. It relates to the Inconsistent Terminology Issue referred to above.

Clause 24.6(a) – Rostered day off falling on a public holiday

397. Consistent with the Commission's recent decision regarding the Manufacturing Award, clause 24.6(a) should be amended by replacing the words "ordinary time rate" with "ordinary hourly rate".

Schedule C – Summary of hourly rates of pay (item 29 of summary document)

398. Item 29 remains an outstanding issue. We are content for the Full Bench to determine the matter on the papers based on that which has already been filed.

Schedule C – Summary of hourly rates of pay (item 33 of summary document)

399. Ai Group maintains its opposition to the TCFUA's submission at item 33 of the summary document. Accordingly, this appears to be an outstanding issue. If the TCFUA continues to press its position, we may seek a further opportunity to be heard given the significant potential cost increases that would result from the amendment it has sought.

22. EXPOSURE DRAFT – TIMBER INDUSTRY AWARD 2015

401. The submissions that follow relate to the *Exposure Draft – Timber Award 2015* published on 13 June 2017 and a summary of submissions published on the same date.

Clause 8.2 and 14 – Payment by results (item 5 of summary document)

402. Ai Group does not press its submissions referred to in item 5 of the summary of submissions.

Clause 14.1 – Minimum wages

403. The preamble in clause 14.1 is not confined to full-time employees. As a result, a literal reading of it appears to require the payment of the minimum weekly rate to all adult employees, including part-time and casual employees. We proceed on the basis that this is not the intended effect of the provision.

404. In order to rectify this, it may be sufficient to include the words "(full-time employees)" below the heading of the second column of the table. This amendment has been made in various group 2, 3 and 4 exposure drafts in light of the issue we have identified.

405. We acknowledge that clause 7.3(e) and clause 7.4(c) could be argued to clarify that part-time and casual employees are entitled to the hourly rate. Nonetheless, the change we have proposed should be made in the interests of ensuring that the exposure draft is simple and easy to understand.

Clause 23 – Penalty rates and shiftwork arrangements (item 8 of summary document)

406. Item 8 identifies a submission that Ai Group has raised regarding an Inconsistent Terminology Issue. This remains an outstanding issue.

407. Ai Group also reiterates our request for an opportunity to review any restructure of the clause that may be proposed in accordance with [2015] FWCFB 7236.

Clause 23.2(b)(v) – Substitute shift (item 10 of summary document)

408. Ai Group does not press its submission referred to at item 10 of the summary of submissions.

Clause 23.3 – Allowances for shiftworkers (item 11 of summary document)

409. Item 11 identifies submissions that Ai Group has raised regarding the Inconsistent Terminology Issue. These remain as outstanding issues.

Schedule D – Summary of hourly rates of pay (item 13 of summary document)

410. The Commission's July 2017 decision[68] resolves the matter raised by Ai Group at item 13. We suggest that the summary document be updated to reflect this.

[68] *4 yearly review of modern awards – Award stage – Group 3* [2017] FWCFB 3433 at [360] – [362].

23. EXPOSURE DRAFT – WOOL STORAGE, SAMPLING AND TESTING AWARD 2015

411. The submissions that follow relate to the *Exposure Draft – Wool Storage, Sampling and Testing Award 2015* published on 13 June 2017 and a summary of submissions published on the same date.

Clause 6.3(b) – Part-time employees (item 1 of the summary document)

412. Ai Group maintains its position in relation to the AWU's submission. We are content for this matter to be determined on the papers based on that which has already been filed.

Clause 10.1 – Adult employee minimum wages

413. The preamble in clause 10.1 is not confined to full-time employees. As a result, a literal reading of it appears to require the payment of the minimum weekly rate to all adult employees, including part-time and casual employees. We proceed on the basis that this is not the intended effect of the provision.

414. In order to rectify this, it may be sufficient to include the words "(full-time employees)" below the heading of the second column of the table. This amendment has been made in various group 2, 3 and 4 exposure drafts in light of the issue we have identified.

415. We acknowledge that clause 6.3(b) and clause 6.4(c)(i) could be argued to clarify that part-time and casual employees are entitled to the hourly rate. Nonetheless, the change we have proposed should be made in the interests of ensuring that the exposure draft is simple and easy to understand.

Clause 14.1(a) – Definition of overtime (item 4 of the summary document)

416. The matters raised by Ai Group and the AWU appear to remain outstanding. We are content for these issues to be determined on the papers, based on that which has already been filed,

Clause 14.1(b) – Definition of overtime (item 2 of the summary document)

417. Ai Group does not oppose the amendment proposed at clause 14.1(b) of the exposure draft. In the absence of opposition from any other interested party, this is no longer an outstanding issue.