Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Further Submission

Plain Language Re-Drafting –

Clerks – Private Sector Award 2010

(AM2016/15)

20 February 2018

4 YEARLY REVIEW OF MODERN AWARDS

AM2016/15 PLAIN LANGUAGE RE–DRAFTING

– CLERKS – PRIVATE SECTOR AWARD 2010

1. The Australian Industry Group (**Ai Group**) makes this submission in response to the statement[1] issued by the Fair Work Commission (**Commission**) on 19 January 2018 (**Statement**). It relates to the matters considered in the Statement and certain additional technical and drafting issues arising from the *Exposure Draft – Clerks – Private Sector Award 2017* (**Exposure Draft**) published on 1 December 2017.

2. The submission also seeks to respond to certain submissions filed by other interested parties on 15 February 2018. Whilst we understand that the directions issued by the Commission do not contemplate the filing of reply submissions, we are concerned about some of the submissions made and have endeavoured to deal with them in this submission so as to alleviate the need to request a further conference before the Commission[2].

3. All references in this submission to 'item numbers' relate to the revised summary of submissions published by the Commission on 19 January 2018. All references to clause numbers relate to the Exposure Draft of 1 December 2017.

Item 5 – Clause 4.1 of the Exposure Draft

4. Having reviewed clause 4.1 of the Exposure Draft, Ai Group considers that no outstanding issue remains in relation to item 5[3].

[1] [2018] FWC 411.

[2] *4 yearly review of modern awards – Plain language re-drafting – Clerks – Private Sector Award 2010* [2018] FWC 411 at [85]

[3] *4 yearly review of modern awards – Plain language re-drafting – Clerks – Private Sector Award 2010* [2018] FWC 411 at [8] and [25].

Response to MTA's Submissions[4]

5. The MTA's submissions unnecessarily reagitate matters already raised, considered and resolved in relation to clause 4.1.

6. The proposed amendment to clause 4.1 is opposed. In particular:

- The added reference to the classification structure is opposed for the reasons articulated by Ai Group during the conference before the Commission on 15 September 2017[5].
- The form of words proffered do not extend coverage of the Exposure Draft to any employees; only to employers of employees who are wholly or principally engaged in clerical work. This is self-evidently problematic.
- The draft clause proposed includes a reference to "administrative duties of a clerical nature" which is not necessary given the proposed definition of "clerical work" at clause 2.

Item 8 – Clauses 2 and 4 – definition of 'clerical work'

7. Having reviewed the amended definition of 'clerical work' at clause 2 of the Exposure Draft, Ai Group does not seek to make further submissions in relation to item 8[6] on the basis that it appears to resolve the concerns previously raised by Ai Group in this regard.

Item 9 – Clause 4.4 of the Exposure Draft

8. Ai Group has identified the following outstanding issues in relation to item 9[7].

[4] MTA's submissions dated 15 February 2018 at paragraph 1.

[5] Transcript of proceedings on 15 September 2017 at PN117 – PN122.

[6] *4 yearly review of modern awards – Plain language re-drafting – Clerks – Private Sector Award 2010* [2018] FWC 411 at [9].

[7] *4 yearly review of modern awards – Plain language re-drafting – Clerks – Private Sector Award 2010* [2018] FWC 411 at [11]

9. **Firstly,** the underlined words in the preamble at clause 4.4 of the Exposure Draft are unclear:

> **4.4** Without limiting clause 4.3, this occupational award does not cover employers covered by any of the following modern awards that contain clerical classifications <u>for employees covered by the award</u>:

10. Having regard to clause 4.6 of the Clerks Award, the purpose of the above clause is to ensure that the Clerks Award does not cover employers covered by the other awards there listed, *with respect to employees covered by those awards*. The Clerks Award may nonetheless cover an employer in relation to other employees who are not covered by the awards specifically listed (assuming none of the other exclusions apply).

11. We do not consider that the phrase "for employees covered by the award" is sufficiently clear or that it unambiguously conveys the meaning of clause 4.6 of the Clerks Award.

12. We accordingly submit that clause 4.4 of the Exposure Draft be amended as follows:

> **4.4** Without limiting clause 4.3, this occupational award does not cover employers covered by any of the following modern awards that contain clerical classifications ~~for~~ <u>in relation to</u> employees covered by <u>those awards</u> ~~the award~~:

13. **Secondly,** the addition of awards to the list at clause 4.4 is not necessary. There is no evidence before the Commission that the provision in its current form (absent the proposed additions) is giving rise to confusion or uncertainty.

14. As observed by the Commission, "the addition of more awards to clause 4.4 should be weighed against advantages of a more general provision which may accommodate changes in classifications in other awards"[8]. In our view, the relevant considerations weigh in favour of maintaining the current approach of the Clerks Award; which is to maintain the general proposition at clause 4.1(a) and the awards expressly listed at clause 4.6 without more. That approach enables consideration to be given to any changes made to the coverage of

[8] *4 yearly review of modern awards – Plain language re-drafting – Clerks – Private Sector Award 2010* [2018] FWC 411 at [15].

other modern awards in relation to clerical work and avoids the risk of inadvertently substantially altering award coverage through this process.

15. To the extent that Business SA submits otherwise, its submissions are opposed.[9]

16. In the event that the Commission nonetheless decides to include additional awards at clause 4.6 of the Exposure Draft, we make the following submissions about two specific awards proposed for inclusion.

- ***Transport (Cash in Transit) Award 2010***: we oppose the insertion of a reference to the *Transport (Cash in Transit) Award 2010*. There are no clerical classifications in that award nor are the classification descriptors drafted sufficiently broadly to clearly encapsulate clerical work. We are not convinced that therefore employers covered by the award are presently excluded from the Clerks Award by virtue of clause 4.1(a). Therefore, to introduce an express exclusion would on its face amount to a substantive change to the coverage of the relevant employers and employees.

- ***Wool, Storage, Sampling and Testing Award 2010:*** we oppose the insertion of a reference to the *Wool, Storage, Sampling and Testing Award 2010*. Whilst its classification structure refers to clerical functions, such references are limited to the receipt, delivery, weighing etc of bales. They do not encompass general clerical and administrative duties of the nature covered by the Clerks Award, as per the definition of 'clerical work'. We do not consider that employers covered by the award are presently excluded from the Clerks Award by virtue or clause 4.1(a). Therefore, to introduce an express exclusion would on its face amount to a substantive change to the coverage of the relevant employers and employees.

[9] Business SA submission dated 15 February 2018 at paragraphs 1.1 – 1.2.

Item 11 – Clause 4.2(b) of the Exposure Draft

17. Ai Group raises the following concerns regarding clause 4.2(b) of the Exposure Draft.

18. **Firstly**, clause 4.5 of the Clerks Award is expressed to cover "employers which provide group training services for trainees". That expression has been abbreviated in clause 4.2(b) of the Exposure Draft as "group training employer". That is not a defined term and to a lay reader of the instrument, its meaning may not be clear.

19. We suggest that the current wording be retained as it would make the award simpler and easier to understand.

20. **Secondly,** the Clerks Award is expressed to cover a trainee who is e*ngaged* in any of the classifications at Schedule B of the Award.

21. The Exposure Draft deviates from this. It applies to employees who *work* in any of the classifications at Schedule A, but need not be *engaged* in that classification. The focus of the inquiry is on the work in fact performed rather than the classification in which they are engaged.

22. We suggest that "working" be replaced with "engaged".

Item 13 – Clause 4.5 of the Exposure Draft

23. By virtue of clause 4.7 of the Clerks Award, an employee will be covered by the award classification that is most appropriate to the work performed by the employee and to the environment in which *the employee* normally performs the work. That is, consideration must be given to the environment in which the employee in question normally performs the relevant work.

24. Clause 4.5 of the Exposure Draft potentially alters the position. By virtue of that clause, an employee will be covered by the award classification that is most appropriate to the work performed by the employee and to the environment in which in which *it (i.e. the work)* is performed. It is not clear that it is the relevant consideration is the environment in which *the employee* normally performs the

work as opposed to a consideration of the environment in which the work generally is performed. The practical effect of resulting from these two considerations may in a given case be different, thus resulting in a change to the legal effect of the Clerks Award.

25. Accordingly, clause 4.5 should be amended as follows:

> **4.5** If an employer is covered by more than one award, an employee of the employer who is engaged wholly or principally in clerical work is covered by the award containing the classification that is most appropriate to the work performed by the employee and to the environment in which ~~it is~~ the employee normally performs the work ~~performed~~.

Item 24 – Clause 11.1 of the Exposure Draft

26. Ai Group supports the provisional view expressed by the Commission at paragraph [21] of the Statement. If that provisional view is adopted, Ai Group considers that no outstanding issue remains in relation to item 24.

Item 26 – Clause 12.2 of the Exposure Draft

27. Having regard to the amended Schedule A and the current clause 15.2, clause 12.2 of the Exposure Draft should be amended as follows:

> The classification by the employer must be based on the ~~competencies~~ characteristics that the employee is required to have, and skills that the employee is required to exercise, in order to carry out the principal functions of the employment as determined by the employer.

28. The changes are proposed on the following bases:

- The schedule does not refer to "competencies" but rather, consistent with the current Award, refers to "characteristics"; and

- They make clear that the "principal functions of employment" are to be determined by the employer; they are not to be assessed in the abstract or determined by the employee.

Response to MTA's Submissions[10]

29. Ai Group opposes the MTA's submission that clause 12.2 should be deleted. It provides a concise guide as to how employees are to be classified and is not inconsistent with the more detailed guidance provided with Schedule A.

30. Ai Group also opposes the MTA's proposed amendment to clause 12.2 to the extent that it refers to "competency" for the reason articulated above.

Items 35 – 37 – Clause 13.5 of the Exposure Draft

31. With respect to the provisional view expressed by the Commission in relation to clause 13.5 of the Exposure Draft[11]; we note that the issue raised by Ai Group at paragraphs 184 – 185 of our 28 February 2017 submissions continues to reside in clause 13.5(b) of the Exposure Draft and as a result, we press those submissions.

Item 38 – Example at Clause 13.5 of the Exposure Draft – Response to MTA's Submissions[12]

32. Ai Group opposes the example proposed by the MTA's. It introduces notions of the maximum number of days over which ordinary hours may be worked which serves no purpose other than to confuse the application of clause 13.5.

33. To the extent that the proposed example purports to illustrate that the days of the week upon which ordinary hours can be worked is relevant to clause 13.5, this is already achieved by the examples contained in the Exposure Draft. Under the Exposure Draft, ordinary hours can be worked Monday – Saturday within specified hours, however the example refers to another award under which ordinary hours can only be worked on Monday – Friday.

[10] MTA's Submissions dated 15 February 2017 at paragraph 4.

[11] *4 yearly review of modern awards – Plain language re-drafting – Clerks – Private Sector Award 2010* [2018] FWC 411 at [34].

[12] MTA's submissions dated 15 February 2018 at paragraph 5.

Items 39 – 40 – Clause 13.6 of the Exposure Draft

34. Ai Group supports the provisional view expressed by the Commission[13] regarding clause 13.6 of the Exposure Draft on the basis that, if adopted, it will resolve the concerns we have previously raised.

Response to ASU Submission[14]

35. Ai Group strongly opposes the ASU's submission. The Clerks Award does not require agreement between an employer and employee in order for an employer to arrange ordinary hours such that the employee becomes entitled to a rostered day off. The change proposed by the ASU is therefore a substantive one; which is not a matter for this process.

Response to MTA's Submission[15]

36. Ai Group does not support the redrafted provisions proposed by the MTAs. The drafting is problematic in various respects and should not be adopted.

37. For example:

- Clause 14.2 purports to permit an employer to roster full-time employees "on any combination of ordinary hours of work". The meaning of this is unclear. If the intention is to highlight that employers have the prerogative to arrange ordinary hours in accordance with the Exposure Draft; this is self-evident.

- Clause 14.2 purports to limit the application of clause 14.2 (and potentially also clause 13.2 by implication) to full-time employees. This is a substantive change to the current Award. For example, it would potentially remove the ability for the ordinary hours of a casual employee to be averaged.

[13] *4 yearly review of modern awards – Plain language re-drafting – Clerks – Private Sector Award 2010* [2018] FWC 411 at [41].

[14] ASU submission dated 15 February 2017 at paragraph 19.

[15] MTA's submission dated 15 February 2017 at paragraph 6.

- Clause 14.4 introduces notions of "a rostered day cycle". It is unclear what that means.

Item 54 – Clause 15.4 of the Exposure Draft

38. Having reviewed the amended clause 15.4 of the Exposure Draft, Ai Group does not seek to make further submissions in relation to item 54[16] on the basis that it appears to resolve the concerns previously raised by Ai Group in this regard.

Response to the MTA's Submission[17]

39. Whilst Ai Group does not oppose the form of words proposed by the MTAs for clause 15.4 of the Exposure Draft, the submissions that follow regarding the entitlement of "shiftworkers … when they work a shift that is not an afternoon or night shift" are opposed.

40. We agree that employees can (and do) work a combination of day work and shiftwork under the Award. However, the concept of a "day shift" does not arise from the terms of the Award. Where an employee is not required to work ordinary hours in accordance with the definition of afternoon shift or night shift, they are necessarily a day worker. Their ordinary hours must be arranged in accordance with clauses 13 – 14 of the Exposure Draft and their entitlement to breaks is governed by clause 15.

41. Accordingly, contrary to the MTAs submissions, the award is not "silent regarding meal breaks for shiftworkers who work a shift that is not an afternoon or night shift". An employee whose ordinary hours do not meet the definitions for afternoon or night shift is *not* a shiftworker; they are a day worker and therefore are entitled to the breaks under clause 15 of the Exposure Draft.

[16] *4 yearly review of modern awards – Plain language re-drafting – Clerks – Private Sector Award 2010* [2018] FWC 411 at [47].

[17] MTA's submission dated 15 February 2018 at paragraph 8.

42. We note that consistent with our view, and in light of submissions we have earlier made, the "day shift" column has been deleted from B.2.1 and B.3.2.

43. The changes proposed by the MTAs should not be made. They misunderstand the interaction between the day work and shiftwork provisions.

Item 98 – Clause 25.3(b) of the Exposure Draft

44. The proposed clause 25.3(b) does not address the concerns previously raised by Ai Group in relation to it. As we understand it, clause 27.3(b) of the Clerks Award entitles an employee, in the relevant circumstances, to payment for ordinary hours that they would have worked were they not absent by virtue of that clause. The clause does *not* grant an entitlement to all hours deemed ordinary hours by the Award (e.g. all hours that fall within the spread of hours).

45. Clause 25.3(b) of the Exposure Draft provides that an employee must not suffer any loss of pay for "any ordinary hours not worked as a result of being released from duty". This is a substantial change to the Award and is potentially confusing. It should be amended to reflect the proper interpretation of the current clause.

Items 100 and 101 – Clause 25.4(c) of the Exposure Draft

46. The submissions made in relation to clause 25.3(b) are also relevant to clause 25.4(c) of the Exposure Draft.

Item 112 – Clause 28.3 of the Exposure Draft – Response to MTAs Submission[18]

47. Ai Group agrees that the performance of ordinary hours of work on a public holiday is governed by clause 28.4(d), which does not provide for a minimum four hour payment. Accordingly, clause 28.3 should be deleted. It amounts to a substantive change to the current Award.

48. By extension, clause 31.4 should also be deleted (see item 124).

[18] MTAs submissions dated 15 February 2017 at paragraph 13.

49. Ai Group withdraws the submissions it has previously made in this regard.[19]

Items 105 and 106 – Clause 27.1 of the Exposure Draft

50. At clause 27.1 of the Exposure Draft, Part 6 is expressed to apply to "employees who are required to work their ordinary hours on any of the following shifts". As a result, Part 6 of the Exposure Draft apparently applies to any employee who is ever required to work ordinary hours on an afternoon shift, night shift or permanent night shift, even when they are working day work (noting that the Award does not preclude an employee from working both day work and shiftwork).

51. Whilst we acknowledge that the entitlements prescribed by Part 6 (e.g. higher rates of pay and breaks) are drafted to arise only where an employee is working on a shift, the manner in which clause 27.1 has been drafted may nonetheless give rise to other concerns.

52. For example, a shiftworker is defined at clause 2 as "an employee to whom Part 6 applies". Part 6 is expressed to apply to any employee who ever works a shift as defined. Accordingly, read literally, clauses 13, 14, 15, 23, 24 and 26 cannot apply to an employee who was required to work ordinary hours in accordance with one of the shift definitions, even when they are performing day work. This is clearly an anomalous outcome that is inconsistent with the Award.

53. We suggest that this could be remedied by amending clause 27.1 such that the application of Part 6 is limited in a temporal sense to when an employee is in fact working a shift as defined.[20] For example:

> Part 6 applies to employees <u>when</u> ~~who are~~ required to work their ordinary hours on any of the following shifts: …

[19] Ai Group's submissions dated 28 February 2017 at paragraphs 449 – 453 and 505 – 505; Transcript of proceedings on 15 September 2017 at PN

[20] *4 yearly review of modern awards – Plain language re-drafting – Clerks – Private Sector Award 2010* [2018] FWC 411 at [78].

54. If Ai Group's suggested wording is adopted, we consider that items 3, 27, 45, 77, 84 and 110 are resolved.[21]

Item 131 – Clause 33.4(b) of the Exposure Draft

55. The proposed clause 33.4(b) does not address the concerns previously raised by Ai Group in relation to it. As we understand it, clause 27.3(b) of the Clerks Award entitles an employee, in the relevant circumstances, to payment for ordinary hours that they would have worked were they not absent by virtue of that clause. The clause does *not* grant an entitlement to all hours deemed ordinary hours by the Award (e.g. all hours that fall within the spread of hours).

56. Clause 33.4(b) of the Exposure Draft provides that an employee must not suffer any loss of pay for "any ordinary hours not worked as a result of being released from duty". This is a substantial change to the Award and is potentially confusing. It should be amended to reflect the proper interpretation of the current clause.

Items 133 and 134 – Clause 33.5(c) of the Exposure Draft

57. The submissions made in relation to clause 33.4(b) are also relevant to clause 33.5(c) of the Exposure Draft.

Item 145 – Clause 37.3 of the Exposure Draft

58. Ai Group continues to rely on its submissions of 28 February 2017 at paragraphs 579 – 582 and its correspondence of 16 October 2017[22]. It also supports Business SA's submissions in this regard.[23]

[21] *4 yearly review of modern awards – Plain language re-drafting – Clerks – Private Sector Award 2010* [2018] FWC 411 at [79].

[22] *4 yearly review of modern awards – Plain language re-drafting – Clerks – Private Sector Award 2010* [2018] FWC 411 at [59].

[23] Business SA's submissions dated 15 February 2018 at paragraphs 4.1 – 4.4.

Item 146 – Schedule A of the Exposure Draft

59. Ai Group raises the following concerns regarding Schedule A of the Exposure Draft.

60. We note that at the outset that many of the issues identified relate to the typical duties and skills articulated in the Schedule. Whilst we appreciate that they are *indicative* (and therefore not definitive) in nature, they can nonetheless colour an assessment as to how an employee will be classified. Accordingly, it is important to ensure that those descriptors are not substantively altered.

a) **A.1.4, Note 2:** "ure" should be replaced with "are".

b) **A.2.1(a):** "supervision" should be replaced with "direction", consistent with the Award. The two are not synonymous. In a temporal sense, "supervision" connotes something that is ongoing. The term "direction" does not necessarily have the same effect.

c) **A.2.2(a):** the word "and" between "reception" and "switchboard" should be replaced with "or". The current clause A.1.2(i) lists "reception/switchboard" as a typical duty, however A.2.2(a) identifies "reception and switchboard" as a typical duty. The two are substantively different. The second contemplates that an employee would perform *both* duties.

d) **A.2.2(a)(i) – (iv):** the word "and" should be deleted from the end of each subclause. The current A.1.2(i) lists examples of specific duties performed by someone whose duties include reception or switchboard. The list of examples does not suggest or require that the employee would perform all of those duties. That is, however, the case in relation to A.2.2(a)(i) – (iv).

e) **A.3.1(d):** each "or" should be replaced with "and/or", consistent with the third paragraph of the current A.2.1. The absence of the word "and" self-evidently alters the characteristic there described.

f) **A.3.2(a):** the word “and” between “reception” and “switchboard” should be replaced with “or”. We refer to the submissions above regarding A.2.2(a).

g) **A.3.2(c)**: the words “such as” should be replaced with “for example”. The use of “such as” means that the types of documents listed thereafter colour the types of “text documents” there referred to, in circumstances where the current clause A.2.2(iii) does not contain any express or implied warrant for limiting the types of “text documents”.

h) **A.3.2(f):** the word “and” should be replaced with “and/or”. The current drafting gives rise to the same concern as that which we have raised in relation to A.2.2(a).

i) **A.3.2(f)(ii):** the first “and” should be replaced with “or”, consistent with the current A.2.2(vi). It is not uncommon for employees covered by the Clerks Award to be engaged in work related only to “accounts payable” or “accounts receivable” but not both.

j) **A.3.2(f)(iv):** the first “and” should be replaced with “or”, consistent with the current A.2.2(vi). It is not uncommon for employees covered by the Clerks Award to be engaged in work related only to “accounts payable” or “accounts receivable” but not both.

k) **A.3.2(i):** the words “such as” should be replaced with “for example”. The use of “such as” colours the method by which employees at this level typically provide general information and advice in circumstances where there is no such potential limitation in the current clause A.2.2(ix). For instance, there could be no suggestion under the current clause that such information could be provided online via a “live chat” function.

l) **A.4.2:** “skilss” should be replaced with “skills”.

m) **A.4.2(c):** the word “and” should be replaced with “or”. The current A.3.2(ii) describes the relevant typical duty as responding to client or public or supplier problems; whereas A.4.2(c) of the Exposure Draft

refers to responding to clients and the public and suppliers. These are self-evidently different propositions.

n) **A.4.2(d)(iv)**: the word “and” should be replaced with “or”. The current A.3.2(iii) describes the use of advanced word processing *or* keyboard functions as a typical duty/skill (noting that the two are not synonymous). Clause A.4.2(d)(iv) is clearly a different proposition.

o) **A.4.2(e):** the final “and” should be replaced with “or”, consistent with the current clause A.3.2(iv).

p) **A.6.2(b):** the first “and” should be replaced with an “or”, consistent with the current A.5.2(ii). It otherwise describes the relevant typical duty as involving the preparation of financial *and* tax schedules, as opposed to including the preparation of one or the other.

q) **A.6.2(b):** the second “and” should be deleted and “and/or” should be inserted before “wage”, consistent with the current A.5.2(ii).

r) **A.6.2(b):** the final “and” should be replaced with “or”, consistent with the current A.5.2(ii).

s) A.7.3: this clause should be moved so that it appears under A.7.4. Having regard to the current A.6.2, it is clear that it relates only to a call centre principal customer contact leader.

Item 148 – Schedule B of the Exposure Draft

61. Ai Group considers that the amended note at Schedule B addresses the concerns it has previously raised.[24]

[24] *4 yearly review of modern awards – Plain language re-drafting – Clerks – Private Sector Award 2010* [2018] FWC 411 at [61] – [62].

Item 155 – Clause 2 of the Exposure Draft – definition of 'minimum hourly rate'

62. Ai Group considers that the proposed definition of 'minimum hourly rate' resolves the concerns previously raised by it.[25]

Response to the MTA's Submissions[26]

63. Ai Group opposes the MTA's submissions regarding the definition of "minimum hourly rate". They raise the very issue that arose from the previous iteration of the Exposure Draft, which was explained by Ai Group at the conference on 15 September 2017[27] and has been resolved in the Exposure Draft.

Additional Item – Clause 10.1 of the Exposure Draft

64. For the reasons articulated in our correspondence of 16 October 2017 in relation to item 24, Ai Group remains concerned that clause 10.1 of the Exposure Draft is substantively different to the current clause 11.1.

65. We accordingly submit that clause 10.1 should be amended as follows:

> A part-time employee is an ~~An~~ employee who is engaged to work for fewer ordinary hours than 38 per week (or the number mentioned in clause 9.2 (Full-time employment)) ~~and whose hours of work are~~ on a reasonably predictable basis ~~is a part-time employee~~.

66. The amendment proposed also ensures that the assessment as to whether an employee is a part-time employee is based on whether the employee is *engaged* to work on a reasonably predictable basis (as per the current clause 11.1) as opposed to an assessment of the employee's *actual* hours of work (which is what is required by clause 10.1 of the Exposure Draft).

[25] *4 yearly review of modern awards – Plain language re-drafting – Clerks – Private Sector Award 2010* [2018] FWC 411 at [67].

[26] MTA's submissions dated 15 February 2018 at paragraph 11.

[27] Transcript of proceedings on 15 September 2017 at PN860 – PN871.

Additional Item – Clause 25.2 of the Exposure Draft

67. Clause 27.3(a) applies "when overtime work is necessary" and requires that in such circumstances, the overtime "must be so arranged that employees have at least 10 consecutive hours off duty between the work of successive day".

68. Clause 25.2 of the Exposure Draft has been amended, however the basis for this is unclear. Its application is no longer confined to circumstances in which overtime is required to be worked, nor does it relate to the arrangement of overtime. Rather, it now states that wherever reasonably practical, employees must have at least 10 consecutive hours off duty between ordinary hours worked on successive days. This is clearly a substantive change to the current requirement.

69. Accordingly, the commencing words of clause 25.2 which are proposed to be struck out should be retained.

Additional Item – Clause 25.4(a) of the Exposure Draft

70. We suggest that, consistent with the approach otherwise adopted throughout the Exposure Draft, the word "employee's" be deleted from clause 25.4(a). The term "minimum hourly rate" has been defined by reference to an individual employee.

Additional Item – Clause 33.5(a) of the Exposure Draft

71. We suggest that, consistent with the approach otherwise adopted throughout the Exposure Draft, the word "employee's" be deleted from clause 33.5(a). The term "minimum hourly rate" has been defined by reference to an individual employee.

Additional Item – Clause 34.2(a) of the Exposure Draft

72. Clause 29.2 of the Clerks Award defines a shiftworker for the purposes of the NES as "a seven day shiftworker who is regularly rostered to work on Sundays and public holidays in a business in which shifts are continuously rostered 24 hours a day for seven days a week".

73. Clause 34.2(a) does not define a shiftworker as a "seven day shiftworker". This amounts to a substantive change because a "seven day shiftworker" is one who is rostered to work ordinary hours of work across all seven days of the week[28]. Clause 34.2(a) no longer contains that requirement.

74. We note also that the term "seven day shiftworker" is consistently used across a number of modern awards[29] in relation to the provision of an extra week of annual leave.

Additional Item – Clauses 34.3(c) and (d) of the Exposure Draft

75. The current clause 29.3(b)(i) applies to an employee "who would have worked on day work only had they not been on leave". This is to be compared to clause 29.3(b)(ii), which applies to an employee "who would have worked on shiftwork had they not been on leave"; either exclusively, or in combination with day work.

76. By comparison, clause 34.3(c) of the Exposure Draft is expressed to apply to "an employee other than a shiftworker" and clause 34.3(d) is expressed to apply to "a shiftworker". The provisions ignore the fact that an employee could work both day work and shiftwork over a period of time had they not been on leave. In such circumstances, it is not clear how clauses 34.3(c) and (d) apply.

77. It is also relevant that an employee who works shifts is not deemed a "shiftworker" for the purposes of the award throughout the course of their employment. Rather, an employee is a shiftworker whilst employed on shifts and is otherwise a day worker. For the purposes of annual leave loading, the

[28] *Re Iron and Steel Works Employees (Australian Iron and Steel Ltd) Conciliation Committee* [1941] AR (NSW) 445; *John Fairfax & Sons Ltd v NSW Sales Representatives & Commercial Travellers' Guild* [1988] 25 IR 125 and *Re Hospital Employees Conditions of Employment (State) Award* 1976 AR 275.

[29] See for example the *Manufacturing and Associated Industries and Occupations Award 2010; Food, Beverage and Tobacco Manufacturing Award 2010; Airline Operations – Ground Staff Award 2010; Cement and Lime Award 2010; Electrical, Electronic and Communications Contracting Award 2010; Graphic Arts, Printing and Publishing Award 2010; Pharmaceutical Industry Award 2010; Poultry Processing Award 2010; Premixed Concrete Award 2010; Road Transport and Distribution Award 2010; Sugar Industry Award 2010; Storage Services and Wholesale Award 2010; Textile, Clothing and Footwear Industry Award 2010; Timber Industry Award 2010; Vehicle Manufacturing, Repair, Services and Retail Award 2010 and Wine Industry Award 2010.* This is not intended to be an exhaustive list.

relevant assessment is whether they would have performed day work or shift work had they not been on leave during the relevant period.

78. Accordingly, we submit that:

- Clause 34.3(c) should be amended as follows:

  For an employee ~~other than a shiftworker~~ who would have worked on day work only had they not been on leave, the additional payment is the greater of: …

- Clause 34.3(d) should be amended as follows:

  For an employee who would have worked on shiftwork had they not been on leave, ~~shiftworker~~ the additional payment is the greater of: …

Additional item – Clauses 34.3(c)(i), (c)(ii), (d)(i) and (d)(ii) of the Exposure Draft

79. Annual leave loading is not payable for "all ordinary hours of work" during the period of leave, as required by clauses 34.3(c)(i) and (ii) of the Exposure Draft. Rather, it is payable for *the employee's* ordinary hours of work in the period. That is, the ordinary hours that the employee would have worked had they not been on leave. This is consistent with s.90 of the *Fair Work Act 2009* and clause 34.3(a) of the Exposure Draft.

80. Accordingly, we submit that:

- Clause 34.3(c)(i) should be amended as follows:

  17.5% of the employee's minimum hourly rate for ~~all~~ the employee's ordinary hours of work in the period; or …

- Clause 34.3(c)(ii) should be amended as follows:

  The employee's minimum hourly rate for ~~all~~ the employee's ordinary hours of work in the period …

- Clause 34.3(d)(i) should be amended as follows:

  17.5% of the employee's minimum hourly rate for ~~all~~ the employee's ordinary hours of work in the period; or …

- Clause 34.3(d)(ii) should be amended as follows:

  The employee's minimum hourly rate for ~~all~~ the employee's ordinary hours of work in the period …

Additional item – Clause 34.3(c)(ii) of the Exposure Draft

81. Under the current clause 29.3(b)(i), dayworkers are entitled to the "relevant weekend penalty rates". As we understand it, this means that an employee is entitled to any weekend penalty rates that would have been payable had the employee not been on leave during that period. Further, the quantum payable is only the amount additional to the employee's minimum hourly rate (i.e. for a Saturday that is 25% and for a Sunday that is 100%). This is because the employee has a separate entitlement to payment at the base rate of pay for the employee's ordinary hours (which equates to the minimum hourly rate prescribed by the Award for present purposes).

82. Having regard to the above, clause 34.3(c)(ii) is problematic in various respects:

- It requires the payment of "the employee's minimum hourly rate". This would be in addition to the NES entitled under s.90 of the *Fair Work Act 2009*. There is currently no award-derived entitlement to the minimum hourly rate in addition to the annual leave loading. It is trite to observe that if the provision were to remain unamended, the comparison required by clause 34.3(c) between (i) and (ii) would have no work to do; as the amount due under (ii) would always be greater than the amount due under (i).

- We have already dealt with the phrase "all ordinary hours of work" above.

- It requires the payment of "penalty rates as specified in clause 23", which prescribes weekend and public holiday penalty rates. This deviates substantively from the current clause 29.3(b)(i), which contemplates only weekend penalty rates. It thereby creates an additional entitlement that is not bestowed by the Award.

83. Accordingly, clause 34.3(c)(ii) should be amended as follows:

> Relevant weekend penalties specified in clause 23 – Penalty rates (employees other than shiftworkers) ~~The employee's minimum hourly rate~~ for ~~all~~ the employee's ordinary hours of work in the period ~~inclusive of penalty rates as specified in clause 23 – Penalty rates (employees other than shiftworkers).~~ For the purposes of this clause, the relevant weekend penalty does not include the minimum hourly rate for the employee's ordinary hours of work.

84. As the Commission is aware, Ai Group has consistently raised a concern in this review regarding the interaction of annual leave loading clauses such as the one here before the Commission and clauses that prescribe weekend/shift rates. This is because in many instances, the Exposure Drafts express the amount payable for weekends/shifts as a rate that includes the minimum hourly rate and the penalty, as opposed to a separately identifiable premium.

85. The proposed addition of the final sentence above seeks to remedy this issue. For completeness we note that the Commission has previously advised that this issue will be determined by the 'Plain Language Full Bench'.[30]

Additional item – Clause 34.3(d)(ii) of the Exposure Draft

86. Similar issues arise in relation to clause 34.3(d)(ii).

87. Under the current clause 29.3(b)(ii), shiftworkers are entitled to the "shift loading (including relevant weekend penalty rates)". As we understand it, this means that an employee is entitled to any weekend shift loadings that would have been payable had the employee not been on leave during that period. Further, the quantum payable is only the amount additional to the employee's minimum hourly rate (e.g. for an afternoon shift that is 15%). This is because the employee has a separate entitlement to payment at the base rate of pay for the employee's ordinary hours (which equates to the minimum hourly rate prescribed by the Award for present purposes).

[30] *4 yearly review of modern awards – Award stage – Group 3* [2017] FWCFB 5536 at [597] – [591].

88. Having regard to the above, clause 34.3(d)(ii) is problematic in various respects:

- It requires the payment of "the employee's minimum hourly rate". This would be in addition to the NES entitled under s.90 of the *Fair Work Act 2009*. There is currently no award-derived entitlement to the minimum hourly rate in addition to the annual leave loading. It is trite to observe that if the provision were to remain unamended, the comparison required by clause 34.3(d) between (i) and (ii) would have no work to do; as the amount due under (ii) would always be greater than the amount due under (i).

- We have already dealt with the phrase "all ordinary hours of work" above.

- It requires the payment of "penalty rates for shiftwork as specified in clause 28", which prescribes shift rates including public holiday penalty rates. This deviates substantively from the current clause 29.3(b)(ii), which contemplates only weekend penalty rates. It thereby creates an additional entitlement that is not bestowed by the Award.

89. Accordingly, clause 34.3(d)(ii) should be amended as follows:

> Relevant penalty rates for shiftwork (excluding public holiday penalty rates) as specified in clause 28 – Penalty rates for shiftwork) ~~The employee's minimum hourly rate~~ for ~~all~~ the employee's ordinary hours of work in the period ~~inclusive of penalty rates for shiftwork as specified in clause 28 – Penalty rates for shiftwork.~~ For the purposes of this clause, the relevant penalty rates for shiftwork do not include the minimum hourly rate for the employee's ordinary hours of work.

90. As the Commission is aware, Ai Group has consistently raised a concern in this review regarding the interaction of annual leave loading clauses such as the one here before the Commission and clauses that prescribe weekend/shift rates. This is because in many instances, the Exposure Drafts express the amount payable for weekends/shifts as a rate that includes the minimum hourly rate and the penalty, as opposed to a separately identifiable premium.

91. The proposed addition of the final sentence above seeks to remedy this issue. For completeness we note that the Commission has previously advised that this issue will be determined by the 'Plain Language Full Bench'.[31]

Additional Item – Clause 41 of the Exposure Draft

92. Clause 41 appears to have been inserted by error. It creates a requirement for an employer to consult where an employer "decides not to seek a renewal of a contract to perform security services work". It is clearly not relevant to the Clerks Award.

Additional Item – Schedule B to the Exposure Draft

93. In the time available, Ai Group has not had an opportunity to review the proposed schedule of rates filed by the MTAs. Should the Commission be minded to adopt it (noting that it includes rates for certain categories of work that are not currently provided for in Schedule B to the Exposure Draft), interested parties should be given an opportunity to review the before the Exposure Draft is finalised.

[31] *4 yearly review of modern awards – Award stage – Group 3* [2017] FWCFB 5536 at [597] – [591].