Australian Industry Group

Modern Awards Review 2023 – 24
Making Awards Easier to Use

Reply Submission
(AM2023/21)

19 February 2024

AM2023/21 MODERN AWARDS REVIEW 2023 – 24

MAKING AWARDS EASIER TO USE

1. INTRODUCTION

1. This submission of the Australian Industry Group (**Ai Group**) concerns the Award Review 2023 – 24 (**Review**). Specifically, it responds to submissions filed by other interested parties concerning the issue of *'making awards easier to use'*, in relation to the following awards:

   (a) The *Clerks – Private Sector Award 2020* (**Clerks Award**);

   (b) The *Fast Food Industry Award 2020* (**FF Award**);

   (c) The *General Retail Industry Award 2020* (**GRIA**);

   (d) The *Social, Community, Home Care and Disability Services Industry Award 2010* (**SCHCDS Award**); and

   (e) The *Children's Services Award 2010* (**CS Award**).

   (**Relevant Awards**)

2. Our submissions in respect of the FF Award and GRIA have been prepared in consultation with the National Retail Association.

3. This submission should be read in conjunction with the material we filed on 22 December 2023 (**December Submission**).

4. Finally, in a statement dated 17 January 2024, the Commission indicated that:

   (a) It does not intend to consider a submission filed by the Business Council of Australia (**BCA**) on 22 December 2023.[1] Accordingly, we do not propose to respond to it. We note that the BCA has not filed any further submission in this matter.

   (b) A submission filed by the Australian Workforce Compliance Council (**AWCC**) on 22 December 2023 was *'largely lacking in any specific proposals for resolution of the identified issues'*.[2] The Commission invited

[1] *Modern Awards Review 2023 – 24* [2024] FWCFB 6 at [6].

[2] *Modern Awards Review 2023 – 24* [2024] FWCFB 6 at [7].

the AWCC to file a further submission. In response, it did so, on 2 February 2024 (**AWCC Submission**). However, large parts of that submission suffer from the very deficiency that was identified by the Commission in respect of its first submission. It has not been practicable to develop a considered response to those aspects of the submission.

2. ACCI'S SUBMISSION

5. In the submissions that follow, we respond to various aspects of the submission filed by the Australian Chamber of Commerce and Industry (**ACCI**), dated 22 December 2023 (**ACCI Submission**), which relate to all or most of the Relevant Awards.

A. Superannuation

6. We refer to the ACCI Submission at pages 9 – 15.

7. ACCI proposes various changes to the model superannuation clause. It does so primarily on the basis that the proposed amendments would render the provision simpler and easier to understand, including by reducing its length.

8. However, we note that the Commission has very recently decided to vary the model superannuation clauses.[3] During the course of those proceedings, the Commission also considered the interaction between the relevant award terms and recently introduced provisions in the National Employment Standards (**NES**) concerning superannuation.

9. In the circumstances and in the interests of ensuring a stable safety net[4], we suggest that it is not necessary or appropriate to reconsider the drafting of the relevant provisions in the absence of cogent reasons at this stage.

10. Further, we are concerned that some aspects of the proposal are potentially problematic. For instance, ACCI argues that provisions that expressly permit salary sacrificing should be deleted, because such arrangements are permitted by the Act irrespective of whether an award provides for them.

[3] *Variation on the Commission's own motion – Modern award superannuation clause review* [2023] FWCFB 264.

[4] Section 134(1)(g) of the Act.

11. Self-evidently, the inclusion of award terms dealing with salary sacrificing provide certainty that such arrangements are permitted, as contemplated by s.324(1)(c) of the Act. Moreover, there is potentially some doubt as to whether s.324(1)(a) absolves an employer from award-derived obligations to pay certain amounts.

B. Time off in Lieu of Overtime

12. We refer to the ACCI Submission at pages 16 – 20.

13. ACCI has proposed that the current time off in lieu of overtime (**TOIL**) clauses in the Relevant Awards should be replaced with new model clauses. It has proposed one model clause for the Clerks Award, CS Award and SCHCDS Award and another for the FF Award and the GRIA.

14. In broad terms, we support the variations proposed and their intent, subject to the following matters.

15. *First,* at paragraphs [162] – [172] of the December Submission, Ai Group advanced a proposal that all clauses containing *'Writing-Related Obligations'* in the Relevant Awards be varied to clarify that electronic forms of communication can be used to meet any such obligations. For the reasons advanced in that submission, we propose that the words '*(including by electronic means)*' are inserted into paragraph (a) of ACCI's suggested model TOIL clauses to clarify that electronic means of communication can be utilised by employers and employees to make TOIL agreements.

16. *Second,* the proposed clause X.1(a) provides that an employer and employee may agree to the employee taking in time in lieu, *'provided that no undue influence or undue pressure is exerted on either party'*. It appears that this is intended to reflect the extant clause X.1(i), which is in the following terms:

> An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to make, or not make, an agreement to take time off instead of payment for overtime.

17. We oppose this element of ACCI's proposal. It would potentially call into question the validity of an agreement reached in respect of time off in lieu of overtime payments where undue influence or pressure has been exerted (or, in a practical sense, even where such influence or pressure has *potentially* been exerted). This is to be contrasted to the existing clause, under which an agreement to take time off in lieu would not be undermined where clause X.1(i) is breached. Put another way, an agreement to take time off in lieu pursuant to the existing model clause is not *subject to* undue influence or pressure being exerted. If, however, that occurs, the employer would be in breach of the relevant award term.

18. It is not clear that this change is intended by ACCI. Its submissions do not expressly address it.

19. *Third,* under the proposed clause, the *rate* at which an employee is to be paid pursuant to clause X.1(c) would no longer be apparent. By comparison, the extant clauses X.1(f), X.1(g) and X.1(k) each clearly state that the requisite payment is to be made at the overtime rate that would have applied to the overtime when worked.

20. *Fourth,* the proposed clause X.1(c)(i) states that an employer must pay an employee for accrued time in lieu where the employee *'decides to cancel the agreement'*. The proposed provision does not, however, make clear that an employee in fact has the right to *'cancel'* the agreement.

21. *Fifth,* the proposed provision would result in an employee being able to accumulate time in lieu for up to 12 months (as compared to six months under the existing clause). In our submission, any extension to the period during which untaken time off in lieu can be *'banked'* should operate only where agreed between an employer and employee. In some circumstances, accumulating time off in lieu over a longer period of time may increase an employer's regulatory burden and their liability.

C. Excessive Annual Leave

22. We refer to the ACCI submission at pages 29 – 32.

23. ACCI has proposed replacing the excessive annual leave clauses in the five Relevant Awards with a new model clause. We agree that the existing clauses are lengthy and complex, and support the principle underlying this submission; that these clauses require simplification. However, we prefer the model for simplifying these clauses that has been proposed by ABI.

D. Consultation

24. We refer to the ACCI Submission at pages 33 – 35.

25. ACCI proposes that the current model consultation clauses appearing in the Relevant Awards (which relate to major workplace changes and changes to rosters or hours of work) be replaced by a single model clause.

26. Whilst we acknowledge that the premise underpinning the proposal is to make the provisions simpler; it would in fact create a materially more onerous framework for employers required to consult about changes to regular rosters or ordinary hours of work in the following respects.

27. *First,* ACCI's proposal would require an employer to consult '*as soon as practicable*', where it proposes to change regular rosters or ordinary hours of work. The extant model clause does not contain any such temporal requirement.

28. *Second*, the proposed provision would require employers to provide certain information to employees *'in writing'*. The existing provision does not require the provision of any information in writing.

29. *Third,* under the existing model clause, employers are required to provide employees with *'information about the proposed change'*. It goes on to give some examples of what that might include. By contrast, the proposed provision would require the provision of *'all reasonably relevant information'*. Thus, the scope of the information required to be provided would be broader.

30. *Fourth,* the proposed clause would require an employer to provide information to affected employees as to *'how the change is likely to affect'* them. The existing clause does not expressly require the provision of this information.

31. *Fifth,* the proposed clause would require an employer to invite affected employees and any representatives *'to discuss the change'*. By contrast, the extant provision simply requires the employer to invite employees to *'give their views'*. It does not require that this occur in the form of a discussion. Feedback could, for example, be provided in writing via email.

32. *Finally*, the proposed clause would require an employer to *'promptly'* consider any views expressed by employees. The existing provision does not expressly deal with *when* or *how soon* an employer must consider an employee's views.

33. ACCI's submissions in support of its proposal highlight various ways in which its proposed provision would improve the useability of the model clause concerning consultation about major changes. We agree with this characterisation of its claim; however in our submission, the adverse implications of the increased regulatory burden that would flow from the changes sought to the consultation process in relation to hours of work and rosters greatly outweigh the purported benefits of the proposed amalgamation of the consultation provisions. Thus, the proposal should not be adopted.

34. It is also relevant that the model term concerning changes to rosters and hours of work was developed in 2013[5], in circumstances where the model term regarding major workplace changes was already in operation. Despite this, the Commission decided to develop a separate clause, that differs in substance, from the former. Absent cogent reasons, this position should not be altered.

[5] *Consultation clause in modern awards* [2013] FWCFB 8728 and *Consultation clause in modern awards* [2013] FWCFB 10165.

E. Individual Flexibility Arrangements

35. We refer to the ACCI Submission at pages 36 – 41.

36. We share ACCI's concerns about Individual Flexibility Arrangements (**IFAs**) and the model flexibility clause, as expressed at [7.4] – [7.6] of its submission. We also agree, in principle, that there may be merit in clarifying the operation of the *'better off overall'* test (**BOOT**), as it appears in the model term. Nonetheless, we have some doubt as to whether the proposed clause X.6(a) would do so in a way that conforms with s.144(4)(c) of the Act.

37. For completeness; we consider that the application of the BOOT includes a consideration of financial and non-financial considerations, including whether the arrangement contemplated by the IFA would *'better meet [the employee's] genuine needs'*.[6]

F. Arrangement Schedules

38. We refer to the ACCI Submission at page 44.

39. To some extent, it is difficult to respond to this submission, in the absence of a specific proposed variation which sets out the content that ACCI contends should be inserted into the Relevant Awards. However, in broad terms, any proposal to insert such content would need to be carefully considered to ensure that it accurately and appropriately reflects the relevant award-derived rights and obligations.

40. Moreover, ACCI's proposal in respect of annualised wage arrangements may be particularly problematic. The calculation of an *'annual wage that would be necessary to satisfy the award requirements for standard full-time employee[s] in different classifications'* would be a very complex, if not impracticable, task. Indeed, the identification of what constitutes a *'standard full-time employee'* may itself be fraught with difficulty. Further, the calculation of an annual wage, as contemplated by ACCI, would require a number of assumptions to be made as

[6] Proposed clause X.6(b).

to the hours that the employee would work, which would potentially undermine its utility.

41. Should ACCI or the Commission propose specific content for inclusion in additional schedules (or the like), Ai Group may seek to be heard further.

3. THE CLERKS AWARD

A. Annualised Wages (ACCI)

42. We refer to pages 21 – 28 of the ACCI Submission.

43. We support the proposed changes to clause 18 of the Clerks Award; however, the provision should also be extended to apply to part-time employees, as sought by Ai Group in its December Submission.[7] If adopted in the context of ACCI's proposed model clause, this could be achieved simply by inserting a reference to part-time employees in the chapeau of clause X.1(a).

B. Rest Periods (ACCI)

44. We refer to the ACCI Submission at pages 42 – 43.

45. ACCI submits that its proposed variations to clause 22 are intended to simplify and clarify the clause; and would not alter its substantive meaning.

46. We disagree with the latter proposition. The proposed redrafting would substantively change the operation of the clause. For example:

    (a) The extant clause 22.2 requires that an employee must have at least 10 consecutive hours off duty between *'hours worked on successive days'*, *'when overtime is required to be worked'*. It may apply before or after overtime is worked. The proposed clause 22.2 would, by contrast, only require a minimum 10 hours off duty *after* overtime has been worked.

    (b) The existing clause 22.3 requires an employer to release an employee from duty and pay an employee at a certain rate in the prescribed circumstances. The proposed clause 22.3 purports to afford employers the *option* to do so, by using the word *'may'*.

47. In any event, respectfully, we do not consider that the redrafted provision simplifies the existing clause 22.

[7] December Submission at [220] - [226].

C. Continuous Hours (ABI)

48. We refer to the submission filed by ABI and the NSW Business Chamber, dated 22 December 2023 (**ABI Submission**) at [2.1] – [2.9].

49. Ai Group has sought various amendments to the Clerks Award in respect of employees working from home, as set out in the December Submission at [190] – [200]. We continue to rely on those submissions.

D. Part-time Hours (ABI)

50. We refer to the ABI Submission at [3.1] – [3.12].

51. We do not oppose the variation proposed. Indeed on one view, there is a need to introduce further flexibilities associated with setting and changing part-time hours.

E. Exemption Rate (ABI)

52. We refer to the ABI Submission at [5.1] – [5.28].

53. Ai Group has also proposed the insertion of an exemption rate provision, as set out in the December Submission at [233] – [249]. Our proposal should be preferred over that of ABI's. We have various concerns about ABI's proposal, including the following:

    (a) It is limited to full-time employees. In particular, it would not apply to part-time employees. In practice, many part-time employees are also remunerated by way of a salary that well-exceeds the minimum wages prescribed by the Clerks Award.

    (b) It is limited to classification levels 3 – 5. In practice, many employees classified at lower levels are also remunerated by way of a salary that well-exceeds the minimum wages prescribed by the Clerks Award.

    (c) It applies only where an employee is paid at least 55% above the minimum wage prescribed by the award. This threshold is excessively high and will exclude many employees and employers from the application of the clause.

(d) A number of award provisions would continue to apply, despite the payment of a significantly above-award salary. This includes, most problematically, provisions relating to hours of work. Typically, one of the key benefits to have flowed from exemption rate provisions has been the non-application of hours of work and rostering provisions, which ensures that employers and employees are able to enjoy considerably more flexible arrangements.

(e) The exemption rate proposed by ABI would remunerate employees for up to 50 hours of work per week. Beyond this, employees would be required to be paid 200% of the applicable base rate prescribed by the award. Thus, employers would be required to monitor employees' hours of work to identify when they reach the 50-hour threshold and to then pay employees by the hour – the very outcome that exemption rate provisions are otherwise designed to avoid.

54. Whilst ABI's proposal would provide some employers and employees with greater flexibility, it does not go far enough. The scope of the proposed clause is overly confined and it does not provide adequate relief from having to comply with the hours of work provisions contained in the award.

F. Excessive Leave (ABI)

55. We refer to paragraphs [6.1] – [6.4] of the ABI Submission.

56. ABI has proposed replacing clauses 32.6 - 32.8 of the Clerks Award, which deal with excessive annual leave accruals, with an alternate provision. We support the proposal advanced by ABI, noting that, contrary to its submissions, it is not in the same terms as the proposal advanced by ACCI.

G. Variations Proposed by the AWCC

57. The AWCC has advanced four specific proposals in relation to the Clerks Award. These are considered in more detail in sections H – K below. For the reasons explained at paragraph 4(b) of this submission, we do not propose to respond to the balance of its submission relating to the Clerks Award.

H. IFAs (AWCC)

58. We refer to pages 106 – 109 of the AWCC Submission.

59. At the outset, we note that the IFA clause was the subject of extensive consideration in the plain language re-drafting process.[8] The language used in the clause was simplified in various ways. The vast majority of changes proposed by the AWCC do not clarify or simplify the existing clause in any meaningful way. Thus, they do not appear to be necessary.

60. The AWCC also proposes the insertion of several new subclauses, which, for the reasons that follow, should not be adopted.

61. *First,* the AWCC proposes inserting a new paragraph 5.6(f), with a view to clarifying when an employee will be better off overall under an IFA.

62. The proposed paragraph creates an award-derived requirement for a discussion to take place between the employee and employer in relation to the proposed IFA. Although in practice, an employer and employee would generally have a discussion about a proposed IFA, it is not necessary that this be mandated. Moreover, the proposed provision also requires that various specific subjects are discussed. It is overly prescriptive.

63. *Second,* the AWCC proposes a new clause 5.6(g) requiring the employee's classification under an IFA '*to be agreed upon*' between the employee and employer.

64. An employee's classification as either full-time, part-time or casual is a matter for an employer to determine, in accordance with the relevant definitions prescribed by the award. It is therefore inappropriate to require that it be the subject of agreement in the context of an IFA.

[8] See, for example, *4 yearly review of modern awards – Plain language – standard clauses* [2017] FWCFB 3745 at [9] – [63].

65. Further, the second sentence of the proposed clause 5.6(g), which purports to require '*part-time hours to be both written and agreed upon in the agreement*', is already provided for under clause 10.2 of the Clerks Award and does not need to be repeated in clause 5.6(g).

66. Further, the final sentence of proposed clause 5.6(g) is entirely unclear.

67. *Third,* the AWCC proposes a new clause 5.6(h), which purports to import a requirement to comply with '*other legal instruments outside of this award'*, including in relation to taxation, into clause 5.

68. It is plainly not appropriate to insert award-derived requirements to comply with such legislative schemes into the model IFA clause. Further, we are not aware of any specific issues arising from the operation of IFAs in respect of tax law or superannuation legislation.

69. *Finally*, the AWCC proposes the insertion of a new clause 5.6(i) which states that (emphasis added): '*the employer <u>should</u> seek advice or clarification'* in particular circumstances.

70. It is not appropriate for award terms to deal with aspirational standards. Further, it is not appropriate that an award suggest that an *employer 'should'* seek advice where an *employee* is *'uncertain'* about an IFA.

I. Facilitative Provisions (AWCC)

71. We refer to pages 110 – 112 of the AWCC Submission.

72. The AWCC's submission misunderstands the purpose of clause 7. It simply *identifies* the provisions in the Clerks Award that are facilitative in nature. It is those clauses that then deal with the relevant substantive matters, including the matters about which agreement may be reached between an employer and employee(s).

73. For this reason, it would not be appropriate to insert any examples or guidance of the nature proposed into clause 7. Further, we are not aware of any confusion arising from, or lack of clarity in, the relevant clauses.

74. Accordingly, the changes proposed are not necessary.

J. Breaks (AWCC)

75. We refer to pages 113 – 115 of the AWCC Submission.

76. We do not support the proposed variation. We first make the obvious point that *employees* do not arrange rest breaks – it is a matter for the employer.[9] Further:

    (a) All the matters listed in the proposed clause 5 would ordinarily be understood as falling within the meaning of '*business requirements*' in the extant note and it is therefore unnecessary to expressly set them out.

    (b) We are not aware of any confusion arising regarding the scope of the existing note.

    (c) The proposed clause risks narrowing the scope of matters that can currently be taken into account when considering an employer's *'business requirements'*.

K. Cashing Out Annual Leave (AWCC)

77. We refer to pages 116 – 118 of the AWCC Submission.

78. We note that like the IFA clauses, provisions dealing with cashing out annual leave were recently given extensive consideration by the Commission in the plain language re-drafting process, which led to the development of model clauses.[10]

79. The AWCC proposes the inclusion of a new clause 32.9(j) titled '*Guidance*'. All of the matters set out in the AWCC's proposed new clause would unnecessarily duplicate matters already set out in clause 32.9. Further, the template agreement to cash out annual leave contained at Schedule G to the Clerks Award further aids the interpretation and application of this clause.

[9] Clause 15.2 of the Clerks Award.

[10] See, for example, *4 yearly review of modern awards – Annual leave* [2015] FWCFB 3406 and *4 yearly review of modern awards – Annual leave* [2016] FWCFB 3177.

80. The AWCC also proposes including a new note following clause 32.9, which would provide as follows:

> Note 4: As outlined in 23.11, upon termination of employment, time off for overtime worked by the employee to which clause 23 applies has not been taken, the employer must pay the employee for the overtime at the overtime rate applicable to the overtime when worked.

81. The AWCC's submissions in support appear to confuse the operation of the TOIL provision contained in the award and the concept of cashing out annual leave. They are separate and distinct entitlements, and should be treated as such in the award. The proposed note should not be adopted.

82. Finally, the AWCC proposes some additional minor wording changes in clauses 32.9(d)(ii) and 32.9(f). It is not apparent why these changes are necessary and moreover, the proposed wording for clause 32.9(d)(ii) is confusing and unclear.

4. THE FF AWARD

A. Variations Proposed by the AWCC

83. The AWCC has advanced two specific proposals in relation to the FF Award. These are considered in sections B – C below. For the reasons explained at paragraph 4(b) of this submission, we do not propose to respond to the remaining claims made in relation to the FF Award.

84. Although in places, Chapter 4 of the AWCC Submission refers to the *Restaurant Industry Award 2020*, we have read it on the basis that these are typographical errors and the intention is to refer to the FF Award throughout.

B. National Training Wage (AWCC)

85. We refer to page 26 of the AWCC Submission, at [4.2](a)(v).

86. Clearly, clause 15.4 has an important legal effect; incorporating Schedule E to the *Miscellaneous Award 2020* into the FF Award and clarifying how it should be interpreted. The AWCC's proposal to delete this clause from the FF Award would change the existing legal position under the award such that the national training wage would no longer be provided for. This would amount to a significant substantive change, which would bring the FF Award out of step with the vast majority of other modern awards that incorporate the national training wage schedule by reference to the *Miscellaneous Award 2020*.[11]

87. Accordingly, we oppose the AWCC's proposal.

C. TOIL Clause (AWCC)

88. We refer to pages 26 – 27 of the AWCC Submission, at [4.2](a)(xi).

89. The relevant note was recently considered by a Full Bench of the Commission in the context of varying awards to align with recent legislative amendments to the

[11] *4 yearly review of modern awards – National Training Wage* [2017] FWCFB 3176.

NES.[12] The Full Bench set out the history of the relevant note as follows: (emphasis added)

[9] During the 4 yearly review of modern awards (4 yearly review), a model TOIL clause was inserted into most modern awards. The model clause includes a provision stating that an employee may, under s 65 of the FW Act, request to take time off instead of being paid for overtime worked and that where an employer agrees to such a request, the terms of the model TOIL clause apply. The precise drafting of the provision varies between awards, but in all cases bar the three dealt with at paragraph [15] below, it is accompanied by the following note:

> NOTE: If an employee makes a request under section 65 of the Act for a change in working arrangements, the employer may only refuse that request on reasonable business grounds (see section 65(5) of the Act).

[10] The Full Bench decided to include the provision with its accompanying note in the model TOIL clause 'out of an abundance of caution', to make the relationship between an award TOIL clause and s 65 of the FW Act clear and to avoid any uncertainty about an employer's obligations where a request for TOIL is made in circumstances where s 65 also applied.

[11] The note references s 65(5) of the FW Act, which the Amending Act repealed. Section 65(5) had provided that an employer may refuse a request for flexible working arrangements on reasonable business grounds. The Amending Act also inserted s 65A, which sets out the obligations now applicable to employers when responding to requests for flexible working arrangements.

…

[12] Thus, an employer may still refuse a request for flexible work arrangements on reasonable business grounds (s 65A(3)(d)). However, the employer must first have discussed the request with the employee and have genuinely tried to reach an agreement (s 65A(3)(a)) and must now also have regard to the consequences of any refusal for the employee (s 65A(3)(c)).

[13] We have determined to vary all 109 modern awards containing the note by replacing the reference to repealed s 65(5) with a reference to s 65A(3) of the FW Act …This variation removes a potential source of confusion and uncertainty — a reference to a provision of the FW Act that no longer exists — and instead directs the readers to the current provision.[13]

[12] *Variation on the Commission's own motion – flexible work amendments and unpaid parental leave* [2023] FWCFB 107.

[13] *Variation on the Commission's own motion – flexible work amendments and unpaid parental leave* [2023] FWCFB 107.

90. The TOIL clause in the FF Award was one of the three identified by the Full Bench in paragraph [9] of the extract above, as containing a differently drafted note.[14] In its decision, the Full Bench determined to vary the note in the FF Award (and the two other awards with the differently worded note) so it would be identical to the note in other modern awards.[15]

91. Given the relevant note was considered and varied so recently by a Full Bench of the Commission, and the purpose it serves in directing users of the FF Award to the relevant part of the Act, it is clear that the note is not *'random'*.

[14] *Variation on the Commission's own motion – flexible work amendments and unpaid parental leave* [2023] FWCFB 107 at [15].

[15] *Variation on the Commission's own motion – flexible work amendments and unpaid parental leave* [2023] FWCFB 107 at [16]-[17].

5. THE GRIA

A. Alphabetised Index (MGA)

92. We refer to the Master Grocers Australia (**MGA**) submission, dated December 2023 (**MGA Submission**) at [14] – [16].

93. Although an alphabetised list may assist with navigating the content of the award, any assessment of what is (and is not) a '*key*' entitlement is prone to difficulty. The inclusion of some but not all entitlements may lead to an erroneous conclusion by a person using the award that any matter not listed is not dealt with in the GRIA.

B. Summaries (MGA)

94. We refer to the MGA Submission at [17] – [21].

95. Ai Group does not support the proposed change. The Commission has generally not been inclined to insert summaries of award entitlements. In addition to adding to the length of the award (which may of itself diminish the usability of the award), summaries are prone to potential conflict with the actual terms of an award, unless precisely drafted. Ultimately, they may, in effect, result in an unnecessary and unhelpful repetition of award terms.

C. Overtime Outside Span of Hours (MGA)

96. We refer to the MGA Submission at [22] – [24].

97. As a general proposition, Ai Group does not object to the inclusion of notes in the GRIA as an aide to usability. However, [22] of the MGA Submission identifies only one of a number of circumstances in which overtime rates are payable pursuant to clause 21 of the award. A note that mentions only the span of hours would potentially be misleading and confusing.

98. Further, MGA has not proposed any specific wording for the note and proposes only that it '*clarifies*' whether ordinary or overtime rates are payable. If it or the Commission proposes draft wording, we may seek to be heard further in response.

D. Higher Duties (MGA)

99. We refer to the MGA Submission at [25] – [29].

100. Ai Group does not oppose the inclusion of a note in Appendix A referring to clause 17.5.

101. The MGA has not provided any proposed wording for the note, but has suggested the note explain that an employee can '*temporarily*' perform duties in a higher classification.

102. Any note in Appendix A should do no more than direct the reader to clause 17.5 of the GRIA. It should not seek to characterise or describe the entitlement arising therein. Such an approach risks giving rise to confusion.

E. Hyperlinked Definitions (MGA)

103. We refer to the MGA Submission at [30] – [33].

104. Subject to the following qualifiers, Ai Group agrees that hyperlinks to terms defined in the GRIA may be of utility:

    (a) *First*, that hyperlinks should only be used in a consistent manner such that *all* terms defined in clause 2 of the GRIA are hyperlinked. The MGA proposal that '*key*' defined terms be hyperlinked leaves unanswered the question of what is (and is not) a *'key'* definition. Further, hyperlinking some but not all defined terms may lead a reader into error by believing that a non-hyperlinked term is not a defined term (when this may not be the case).

    (b) *Second*, careful consideration would need to be given to where any hyperlinks are introduced. For example, in clause 28.2(b), the term *'shiftworker'* is referring the reader to clause 28.2(a). It would not be

appropriate for the reader to be directed to the definition of *'shiftworker'* in clause 2.

(c) *Third*, hyperlinks should only be used for terms defined in clause 2 and not for general concepts dealt with in the GRIA. For example, Ai Group objects to the MGA's recommendation that the phrase *'higher duties'* be hyperlinked since this describes the subject matter of a clause in the award and is, in fact, not a defined term.

F. Special Clothing (MGA)

105. We refer to the MGA Submission at [34] – [38].

106. We agree that there may be merit in clarifying the existing definition of '*special clothing*'. The meaning of the same term was the subject of consideration (and ultimately, revision) by the Commission in relation to the *Restaurant Industry Award 2010* and *Fast Food Industry Award 2010* as part of the plain language re-drafting process of the 4 yearly review.[16] It does not appear to have been the subject of consideration as part of the plain language re-drafting of the GRIA.[17]

107. As such, Ai Group considers that this proposal would benefit from further discussion during the conferencing stage. The form of words used in the aforementioned awards may provide some examples of the approach that could be adopted in the GRIA.

[16] See *4 yearly review of modern awards – Plain language re-drafting –Restaurant Industry Award 2010* [2018] FWCFB 6709; *4 yearly review of modern awards—Plain language re-drafting—Fast Food Industry Award 2010* [2022] FWCFB 48.

[17] There is no reference to '*special clothing'* in the statement issued by the Commission summarising matters discussed in the initial conference concerning the plain language re-drafting of GRIA: See *4 yearly review of modern awards – Plain language re-drafting – General Retail Industry Award 2010* [2017] FWC 5589. Nor is it referred to in subsequent decisions concerning the plain language re-drafting of the GRIA: See *4 yearly review of modern awards – Plain language re-drafting – General Retail Industry Award 2010* [2018] FWC 4046, *4 yearly review of modern awards – Plain language re-drafting – General Retail Industry Award 2010* [2018] FWC 6075, and *4 yearly review of modern awards – Plain language re-drafting – General Retail Industry Award 2010* [2018] FWCFB 6850.

G. Cold Work Allowance (MGA)

108. We refer to the MGA Submission at [39] – [42].

109. In our view, the meaning of clause 19.9 is tolerably clear. It applies where, on any given day, the employee's *principal* (or *main*, or *primary*) task is to enter cold chambers or to stock or refill refrigerated storages such as dairy cases or freezer cabinets.

110. On that basis, we do not consider that the provision requires amendment.

H. Recall Allowance (MGA)

111. We refer to the MGA Submission at [43] – [45].

112. Ai Group does not consider a note of the nature contemplated by MGA is necessary. In the examples provided by MGA to support its proposal, both clauses 10.6 and 15.9(e) have the effect of changing the employee's regular pattern of work or permanent roster (respectively); in which case, the amended pattern of hours becomes the employee's '*normal roster*' for the purpose of clause 19.11(a)(i). It is reasonably clear that clause 19.11 would not apply in these circumstances.

113. Further, it may be difficult to develop a comprehensive list of circumstances in which clause 19.11 does not apply.

I. Optional Templates (MGA)

114. We refer to the MGA Submission at [46] – [49].

115. Ai Group has advanced proposals in Chapter 11 of the December Submission to permit written requests made pursuant to clauses 15.7(d) and 15.8(b) of the GRIA, and the requirement for agreement in writing at clause 21.3 of the GRIA, to be satisfied by the use of electronic means.

116. Ai Group is not opposed to the insertion of the additional templates (including notes within the GRIA to alert readers to the templates) in so far as they may assist employers to utilise the facilitative provisions contained in the GRIA, subject to:

    (a) Use of the templates being optional and not required by the GRIA; and

    (b) The award making clear that the templates, if used, may be adapted in electronic or hardcopy format.

117. If a specific form of words for the schedules proposed is advanced by MGA or suggested by the Commission, we may seek to be heard further in this regard.

J. Hours of Work (Nellers)

118. We refer to the submission filed by Nellers HR Consulting (**Nellers**) on 30 October 2023 (**Nellers Submission**).

119. It is not clear that clauses 15.7(d), 15.7(e) and 15.8(a) of the GRIA *'cannot coexist harmoniously'*, as alleged by Nellers. The key requirement in each of those clauses is:

    (a) A roster which schedules *ordinary* hours so as to provide two consecutive days off per week or three consecutive days off per two-week cycle, unless otherwise agreed (clause 15.7(d));

    (b) No more than six consecutive days of work per week, whether the hours worked on those days are ordinary or overtime in nature (clause 15.7(e)); and

    (c) An employee who regularly works Sundays is required to have three consecutive days off (including Saturday and Sunday) per four-week cycle, unless otherwise agreed (clause 15.8(a)).

120. Ai Group notes that clauses 15.7(d)(i) and 15.8(a) may also be the subject of facilitative agreements reached between an employer and an individual employee.

121. Nonetheless, we acknowledge that clause 15 generally and, in particular, the aforementioned provisions, are complex and potentially confusing. Moreover, they are overly prescriptive and their cumulative effect is to impose various restrictions on how employees' hours may be arranged. For this reason, in our December Submission, we proposed that clause 15 should be the subject of the discussion between the parties, with a view to simplifying its operation.[18]

K. Ordinary Hours of Work and Rostering (ABI)

122. We refer to the submission filed by ABI on 14 February 2024 and accompanying draft determination (**ABI GRIA Submission**).

123. As set out in the submission, clauses 15.7 – 15.8 of the GRIA historically applied only to full-time employees. ABI submits that they should be amended now to make clear that they do not apply to casual employees. We support this; however in our submission, the provisions should also be amended to clarify that they do not apply to part-time employees.

L. Part-time Employment (AHA)

124. We refer to a submission filed by the Australian Hotels Association (**AHA**), dated 21 December 2023 (**AHA Submission**) at [26].

125. We are generally supportive of measures to improve flexibility associated with part-time employment. To that end, we have also proposed variations that would have this effect in relation to the GRIA at [31] – [40] and [321] – [338] of the December Submission.

126. We have some reservations about simply replacing the extant provisions with clause 10 of the *Hospitality Industry (General) Award 2020*. In particular, it requires that part-time employees must be engaged for a minimum of eight hours per week. In the context of the GRIA, there may be employees who wish to work less than that (e.g. because they have study commitments). The GRIA should not preclude the engagement of such employees on a part-time basis.

[18] The December Submission at [339] – [340].

127. An appropriate model for increasing flexibility in the GRIA in relation to part-time employment should be properly explored during the upcoming conference before the Commission.

M. Salaries Absorption (AHA)

128. We refer to the AHA Submission at [27].

129. The GRIA should be varied to introduce some mechanism that allows for greater flexibility where an employee is paid an above-award salary. Ai Group has proposed the introduction of an exemption rate, at [380] – [384] of the December Submission.

130. During the upcoming conference, parties should be given an opportunity to discuss the most appropriate model for implementing a flexibility of the nature described above, including the AHA's proposal. In particular, we note that the AHA proposal is confined to levels 6 – 8 and contains various other *'safeguards'*. The appropriateness of these would need to be considered further.

N. Hours of work (AHA)

131. We refer to [28] of the AHA Submission.

132. We are generally supportive of measures that would simplify clause 15 of the GRIA, including the proposition that clause 15.6(i) should not continue to prohibit an employer from rostering full-time employees over more than 19 days.

133. We note that the provision drafted by the AHA goes beyond this (in particular, at clause 15.6(a)). Consideration would need to be given as to how the proposed provision would intersect with other parts of the award (e.g. how clause 15.6(a)(i) would operate alongside clause 15.7(d)(i).

134. As submitted in the December Submission at [339] – [340], a wholesale review of clause 15 is warranted, to streamline its operation and remove various complexities contained therein.

O. Rostering Arrangements (AHA)

135. We refer to [29] of the AHA Submission.

136. Consistent with the ABI GRIA Submission and our response to it, the requirements set out at the current clause 15.7 – 15.8 should not apply to part-time or casual employees. We also note that the proposed clause 15.7(f) appears to be dealt with at the current clause 16.6.

137. Noting the above matters; the proposal advanced by the AHA would substantially simplify the existing rostering provisions and to that extent, we support them. As noted above, careful consideration would need to be given to whether they operate effectively in conjunction with other relevant award provisions, including any variations made to them as a consequence of this Review.

P. Allowances (AHA)

138. We refer to [30] of the AHA Submission.

139. We consider that the issue raised would be best addressed by providing that the allowance is to be calculated on a pro-rata, hourly basis, for part-time and casual employees; as well as in the circumstances described in our December Submission at [385] – [388].

Q. Breaks (AHA)

140. We refer to [31] of the AHA Submission.

141. Ai Group supports the simplification of the meal breaks provision advanced by the AHA.

R. Apprentice Rates (AHA)

142. We refer to [32] of the AHA Submission.

143. We do not oppose the variation proposed.

S. Overtime (AHA)

144. We refer to [33] of the AHA Submission.

145. The deletion of existing clause 21.1 would have the effect of removing an award-derived right to require employees to work reasonable overtime. We do not support this change.

146. However, we would support the balance of the provision proposed by AHA. It would significantly improve flexibility and it would simplify the operation of the existing term.

T. Personal / Carer's Leave and Compassionate Leave (AHA)

147. We refer to [34] of the AHA Submission.

148. We would support the proposed changes.

U. Classification Definitions (AHA)

149. We refer to [35] of the AHA Submission.

150. We do not oppose, in principle, the proposal advanced. If this proposal is adopted, parties should be given an opportunity to comment on a draft of the proposal to ensure that it does not give rise to any inadvertent difficulties.

V. Variations Proposed by the AWCC

151. The AWCC has advanced nine specific proposals in relation to the GRIA. These are considered in detail in sections W – AE below. For the reasons explained at paragraph 4(b) of this submission, we do not propose to respond to the remaining submissions advanced regarding the GRIA in the AWCC Submission.

W. Variation to Regular Pattern of Work (AWCC)

152. We refer to pages 58 – 59 of the AWCC Submission.

153. The AWCC has not described the nature of the alleged confusion arising from the relevant provision or provided examples of the context in which such

confusion is arising. Moreover, the terms of the award are clear in relation to this issue. In the circumstances, the proposal should not be adopted. It would unjustifiably seek to prescribe the matters that must be dealt with in a written agreement between the employer and employee, thereby increasing the regulatory burden upon employers.

X. Minimum Engagement Periods (AWCC)

154. We refer to page 60 of the AWCC Submission.

155. We do not agree that the existing clauses 10.9 and 11.2, which refer to the '*minimum daily engagement*' period for part-time and casual employees, are confusing or unclear as to whether payment is required. Accordingly, the proposed variations are not necessary.

Y. Banking RDOs (AWCC)

156. We refer to page 61 of the AWCC Submission.

157. The AWCC has proposed a variation to clause 15.6(m) of the GRIA which provides that full-time employees can bank up to five rostered days off (**RDOs**) each year. The AWCC submits that the extant clause 15.6(m) is unclear regarding what happens if banked RDOs are not taken during the year in which they are banked. It proposes clarifying that the five-day cap is a maximum by inserting the words *'a maximum'* into clause 15.6(m)(i). We submit that this variation is unnecessary, because the extant clause is clear that the maximum number of RDOs that can be banked is five. In particular, we refer to the words '*up to*'.

158. The AWCC also proposes the addition of a new clause 15.6(m)(iii), which would provide as follows:

> **(iii)** Banked rostered days off must be used within 12 months from date of inception, any unused days remaining after 12 months will be forfeited.

159. We agree that there may be merit in making clear that RDOs will be forfeited after a specified period of time. Careful consideration would need to be given to how this mechanism operates and its practical impact. We anticipate that the conferencing process will provide a useful opportunity to discuss this further.

Z. Meaningful Breaks (AWCC)

160. We refer to page 62 of the AWCC Submission.

161. The AWCC's submission is not clear. On the one hand, it appears to suggest that clause 16.4 of the GRIA should be deleted, on the basis that it does not create a '*direct financial consequence*' and it is not clear what '*meaningful breaks*' are.

162. Alternatively, the AWCC is contending that clause 16.4 would be *'better placed as an introduction to clause 16'*.

163. We do not oppose either proposal.

AA. Payment on Termination of Employment (AWCC)

164. We refer to page 63 of the AWCC Submission.

165. We would support the proposal to provide an employer and employee the scope to agree that the employee will be paid after the current seven day timeframe. This would provide employers with greater flexibility and may allow them to process termination payments more efficiently (e.g. in the course of the usual pay cycle).

AB. Superannuation Funds (AWCC)

166. We refer to pages 64 – 65 of the AWCC Submission.

167. The superannuation clauses in all modern awards have been the subject of recent consideration by a Full Bench of the Commission in proceedings to ensure, amongst other objectives, that these clauses accurately reflect

applicable legislative requirements, including stapled fund requirements.[19] The Full Bench issued a decision on 22 December 2023 which proposed variations to all modern award superannuation clauses.[20] No submissions were received opposing the proposed variations and we therefore expect the Commission will issue determinations varying awards in the relevant terms in due course.

168. In light of this, we do not consider any further variation to superannuation clauses is necessary.

AC. Payment for Overtime (AWCC)

169. We refer to page 65 of the AWCC Submission.

170. We suggest that this issue is explored further during the conferencing stage, having regard to the views expressed by all interested parties.

AD. Overtime Rate (AWCC)

171. We refer to page 66 of the AWCC Submission.

172. The extant clause 21.2 makes clear that overtime hours worked on particular days attracts specific overtime rates. Therefore, the proposed note is not necessary.

AE. Annual Leave Loading (AWCC)

173. We refer to pages 67 – 68 of the AWCC Submission.

174. The AWCC has proposed amendments to clause 28.3 of the GRIA, which relate to an additional payment for annual leave. Ai Group has advanced various proposals in relation to clause 28.3 of the GRIA in the December Submission[21]. We continue to rely on those submissions, which overlap with the concerns raised by the AWCC.

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[19] *Modern awards superannuation clauses review* (AM2022/29); *Variation on the Commission's own motion – Modern award superannuation clause review* [2023] FWCFB 264 at [2].

[20] *Variation on the Commission's own motion – Modern award superannuation clause review* [2023] FWCFB 264.

[21] See in particular [124] – [134].

6. THE SCHCDS AWARD

A. Equal Remuneration Order (ERO) Rates (ASU)

175. We refer to the Australian Services Union's (**ASU's**) submission, dated 21 December 2023 (**ASU Submission**), at [11].

176. We do not, in principle, oppose variations being made to clause 15 which make the existence of the ERO rates clearer. We nonetheless have some concerns about the proposal advanced by the ASU. In particular, simply rearranging the order in which the relevant provisions appear, without more, may not in fact render clause 15 clearer. Further, it is not apparent how the ASU proposes to have clauses 15.2 – 15.8 refer to the ERO rates.

B. Transitional Provisions (ASU)

177. We refer to the ASU Submission at [17].

178. Ai Group also advanced this proposal in the December Submission at [414].

C. Work Performed Before and After a Sleepover (CCIWA)

179. We refer to the submission of the Chamber of Commerce and Industry Western Australia (**CCIWA**), dated 20 December 2023 (**CCIWA Submission**) at [12] – [21].

180. The concerns expressed by the CCIWA overlap squarely with the those arising from Ai Group's application to vary the SCHCDS Award in matter AM2023/28 and the December Submission at [403] – [406].

D. Meal Breaks (CCIWA)

181. We refer to the CCIWA Submission at [22] – [26].

182. It appears that in the circumstances contemplated by CCIWA, clause 27.1(c), as presently drafted, can apply. To that end, on the basis of the submissions advanced, it is not clear that the variation proposed is necessary.

183. We anticipate that a discussion about the intention underpinning the change sought may better illuminate the perceived need for the variation and in turn, may enable us to consider and respond to the proposal.

E. Part-Time Employees' Hours of Work (CCIWA)

184. We refer to the CCIWA Submission at [27] – [30].

185. Whilst we agree that the part-time employment provisions cited are unduly inflexible; the variations proposed would not appear to in fact result in any material change. Clause 10.3(f) permits an employer and part-time employee to agree to perform additional hours of work. Unless the requirements in clause 28.1(b) are met, the employee would not be entitled to overtime rates for that work.

F. Notice of Roster Changes (CCIWA)

186. We refer to the CCIWA Submission at [31] – [33].

187. We oppose the variation proposed. It would have the effect of radically increasing the period of notice required to be given to employees to change a roster. This would significantly restrict an employer's ability to revise rosters and would give rise to a raft of detrimental operational consequences.

188. Further, the proposed change is not necessary to deal with the concerns raised by CCIWA. There is no conflict between clause 8A and clause 25.5(d)(i), as alleged. Clause 8A requires an employer to consult employees in the circumstances described by clause 8A.1. As clause 8A.5 expressly states, clause 8A is to be read in conjunction with any provisions of the award *'concerning the scheduling of work or the giving of notice'*. Thus, clauses 8A and 25.5(d) operate in parallel. Where a roster change would result in a change to the regular roster or ordinary hours of work of an employee (except in relation to those who are excluded by clause 8A.1), an employer must comply with clause 8A.

189. We agree that there is potentially some tension between clause 10.3(e) and clause 25.5(d)(i). A similar tension arises between clauses 10.3(g) and 25.5(d)(i). This could be addressed by adding a new clause 25.5(d)(ii)(C), as follows:

> **(ii)** However, a roster may be changed at any time:
>
> …
>
> **(C)** to reflect an agreement reached between an employer and part-time employee pursuant to clause 10.3(e) or 10.3(g).

G. Break Between Shifts (CCIWA)

190. We refer to the CCIWA Submission at [34] and [36].

191. Ai Group supports the proposed change.

H. Cashing Out Annual Leave (CCIWA)

192. We refer to the CCIWA Submission at [35] and [37].

193. Ai Group supports the proposed change.

I. Remote Training (CCIWA)

194. We refer to the CCIWA Submission at [38] – [39].

195. Ai Group supports the proposed change in principle. We suggest that the proposed provision could be more clearly expressed as a new clause 25.10(c)(iv):

> **(iv)** Notwithstanding clause 25.10(c), where the remote work involves participating in staff meetings or staff training remotely, an employee is not entitled to any minimum payment.

J. Time Off In Lieu of Overtime (CCIWA)

196. We refer to the CCIWA Submission at [40] – [41].

197. Ai Group supports the proposed change.

K. Part-time Hours (ABI)

198. We refer to the ABI Submission at [3.1] – [3.12].

199. We do not oppose the variation proposed. Indeed on one view, there is a need to introduce further flexibilities associated with setting and changing part-time hours.

L. Classifications (ABI)

200. We refer to the ABI Submission at [4.1] – [4.14].

201. The introduction of any guidance as to how an employee is to be classified under the SCHCDS Award must be given careful consideration, taking into account the nature of the classification structure, the manner in which the framework is expressed to operate and whether the classification structure lends itself to the application of the *'principal purpose'* test.[22] These complexities are compounded in the context of the SCHCDS Award, which contains various classification streams, each it with its own classification structure.

202. An examination of ABI's proposal should include a consideration of existing industry practice of classifying employees and the extent to which the variation sought would disturb extant arrangements. There would be merit in discussing the matter further during the upcoming conference before the Commission.

M. Excessive Leave (ABI)

203. We refer to paragraphs [6.1] – [6.4] of the ABI Submission.

204. ABI has proposed replacing clauses 31.6 - 31.8 of the SCHCDS Award, which deal with excessive annual leave accruals, with an alternate provision. We support the proposal advanced by ABI, noting that, contrary to its submissions, it is not in the same terms as the proposal advanced by ACCI.

[22] See for example observations made by the Commission in relation to the *Professional Employees Award 2020* in *Variation of the Professional Employees Award 2020 on the Commission's Own Motion* [2023] FWCFB 13 at [4] and [75] – [81].

N. Variations Proposed by the AWCC

205. The AWCC has advanced 13 specific proposals in relation to the SCHCDS Award in Chapter 8 of the AWCC Submission. These are considered in detail in sections O – AA below. For the reasons explained at paragraph 4(b) of this submission, we do not propose to respond to the remaining claims advanced regarding the SCHCDS Award.

O. IFAs (AWCC)

206. We refer to page 83 of the AWCC Submission.

207. We would support changes to the model clause that enable an employer and employee to strike an IFA before the employee commences employment.

P. Descriptions of Full-time and Part-time Employment (AWCC)

208. We refer to page 84 the AWCC Submission.

209. We do not consider that the proposed variations are necessary. It is clear that clause 25.1 stipulates the maximum period over which ordinary hours may be averaged.

Q. Minimum Engagement Periods (AWCC)

210. We refer to page 85 of the AWCC Submission.

211. We strongly oppose the proposed change. It would increase the existing minimum engagement entitlement for SACS employees undertaking disability services work from two hours to three hours. Any difficulties associated with automating the application of the clause is not of itself a reason that would justify a substantive change of this nature.

R. Clothing and Equipment Allowance (AWCC)

212. We refer to page 87 of the AWCC Submission.

213. The proposed variations would change the substantive operation of the clause. For example, currently, it is clear that an employee is entitled to the allowances only once in respect of a shift that straddles two calendar days. If the variations proposed by the AWCC were adopted, this would no longer be clear. It may be argued that an employee is entitled to the allowances twice, in respect of each day. Moreover, we are not aware of the existing provision giving rise to any relevant confusion in practice.

214. Accordingly, the proposed changes are opposed.

S. Meal Allowance (AWCC)

215. We refer to page 87 of the AWCC Submission.

216. We agree and support the proposed change.

T. First Aid Allowance (AWCC)

217. We refer to page 88 of the AWCC Submission.

218. We raise the following concerns about the proposal advanced, which tell against adopting it.

219. *First,* removing the formula for deriving the first aid allowance from the award would effectively result in the clause stipulating a dollar amount that is not automatically adjusted when the '*standard rate*' is increased (e.g. as a consequence of the next Annual Wage Review). We doubt this is the AWCC's intention.

220. *Second,* the proposed variation to clause 20.6(a)(ii) would expand the entitlement under clause 20.6(a), such that the allowance would be payable to *any* employee who is *'responsible for the provision of'* first aid, even if they are not directly involved in providing it.

221. *Third,* currently, home care employees are entitled to the allowance only if required to provide first aid to other employees. The proposed changes would render them eligible where they are required to provide first aid *'at their workplace'* including, for example, to the employer's clients.

U. Broken Shift Allowance (AWCC)

222. We refer to page 89 of the AWCC Submission.

223. We would not oppose variations to the award that enable the performance of work on a broken shift with two breaks without the need for agreement with the employee. We note, however, that clause 20.12(b) is consistent with clause 25.6(b). Thus, the change proposed by AWCC would not render the allowance an *'automatic entitlement'*.

V. Ordinary Hours of Work (AWCC)

224. We refer to page 90 of the AWCC Submission.

225. We would not oppose the introduction of greater flexibility in clause 25.1 as to how ordinary hours may be arranged. We would question, however, whether the use of the word *'between'* in clause 25.1(b) would result in shifts that are 10 hours in length no longer being permitted.

W. RDOs (AWCC)

226. We refer to page 91 of the AWCC Submission.

227. Neither of the proposed variations should be made.

228. The proposed definition of *'rostered day off'* is very confusing. It would not properly address any ambiguity arising from the extant provisions.

229. Further, the AWCC's proposed penalty clause would introduce a new entitlement. No justification for it is provided by the AWCC. It is also not clear when the penalty would apply; that is, the meaning of *'days off are not rostered'* is not apparent.

X. Change in Roster (AWCC)

230. We refer to page 92 of the AWCC Submission.

231. The proposed variation is not necessary. Should rosters be changed without providing an employee with seven days' notice and outside the scope of the existing exceptions in clause 25.5(d)(ii), the employer would be in breach of the award and the employee would be at liberty to seek to have this addressed through various means.

232. The AWCC also proposes deleting clause 25.5(e). We would not oppose this.

Y. Sleepovers (AWCC)

233. We refer to pages 94 – 95 of the AWCC Submission.

234. The AWCC's submissions on this point potentially overlap with issues arising from Ai Group's application to vary the SCHCDS Award in matter AM2023/28. We would oppose any variation to clause 25.7 that states or suggests that work can only be performed on one end of a sleepover.

235. Further, we cannot see how the drafting changes proposed to clauses 25.7(a) – 25.7(e) would make the provision simpler or easier to understand in a material way.

Z. Rest Breaks Between Rostered Work (AWCC)

236. We refer to page 96 of the AWCC Submission.

237. To the extent that the AWCC's proposal concerns sleepover shifts, we note that this issue overlaps squarely with Ai Group's application to vary the SCHCDS Award in matter AM2023/28 and should be dealt with in that context instead. The application was recently the subject of a conference before Deputy President Wright and has been listed again on 6 March 2024.

AA. Cashing Out Annual Leave (AWCC)

238. We refer to pages 97 – 100 of the AWCC submission.

239. We note that provisions dealing with cashing out annual leave were recently given extensive consideration by the Commission in the plain language re-drafting process, which led to the development of model clauses.[23]

240. The AWCC has proposed the inclusion of a new clause 31.5(h) titled '*Guidance*'. All of the matters set out in the proposed new clause, however, unnecessarily duplicate matters already set out in clause 31.5. Further, the template agreement to cash out annual leave contained at Schedule I to the SCHCDS Award further aids the interpretation and application of this clause.

241. The AWCC also proposes inserting the following note following clause 31.5:

> NOTE 4: As outlined in 28.2(j), upon termination of employment, time off for overtime worked by the employee to which clause 28.2 applies has not been taken, the employer must pay the employee for the overtime at the overtime rate applicable to the overtime when worked.

242. The AWCC's submissions in support appear to confuse the operation of the TOIL provision contained in the award and the concept of cashing out annual leave. They are separate and distinct entitlements, and should be treated as such in the award. The proposed note should not be adopted.

243. Finally, the AWCC proposes some additional minor wording changes in clauses 31.5(d)(ii) and 31.5(f). It is not apparent why these changes are necessary and moreover the proposed wording for clause 31.5(d)(ii) is confusing and unclear.

[23] See, for example, *4 yearly review of modern awards – Annual leave* [2015] FWCFB 3406 and *4 yearly review of modern awards – Annual leave* [2016] FWCFB 3177.

7. THE CS AWARD

A. Continuous Hours (ABI)

244. We refer to the ABI Submission at [2.1] – [2.9].

245. We support the change proposed; but note that the award elsewhere already contemplates the performance of broken shifts (see clauses 15.1 and 21.3 of the award).

246. If the amendment proposed by ABI is adopted, consideration should be given to whether clause 15.1 should be varied to make clear that the broken shift allowance is not payable where an employee is performing work from home. The allowance is likely intended to compensate employees for having to *travel* to work on more than one occasion.

B. Part-Time Hours (ABI)

247. We refer to the ABI Submission at [3.1] – [3.12].

248. We do not oppose the variation proposed. Indeed on one view, there is a need to introduce further flexibilities associated with setting and changing part-time hours.

C. Classifications (ABI)

249. We refer to the ABI Submission at [4.1] – [4.14].

250. The introduction of any guidance as to how an employee is to be classified under the CS Award must be given careful consideration, taking into account the nature of the classification structure, the manner in which the framework is expressed to operate and whether the classification structure lends itself to the application of the *'principal purpose'* test.[24] We also note that the CS Award already contains some guidance as to how employees are to be classified and how some will

[24] See for example observations made by the Commission in relation to the *Professional Employees Award 2020* in *Variation of the Professional Employees Award 2020 on the Commission's Own Motion* [2023] FWCFB 13 at [4] and [75] – [81].

progress.[25]

251. Any examination of ABI's proposal should include a consideration of existing industry practice to classifying employees and the extent to which the variation sought would disturb extant arrangements. There would be merit in discussing the matter further during the upcoming conference before the Commission.

D. Excessive Leave (ABI)

252. We refer to paragraphs [6.1] – [6.4] of the ABI Submission.

253. ABI has proposed replacing clauses 31.6 – 31.8 of the CS Award, which deal with excessive annual leave accruals, with an alternate provision. We support the proposal advanced by ABI, noting that, contrary to its submissions, it is not in the same terms as the proposal advanced by ACCI.

E. Variations Proposed by the AWCC

254. The AWCC has advanced two specific proposals in relation to the CS Award in Chapter 7 of the AWCC Submission. These are considered in detail in sections F and G below. For the reasons explained at paragraph 4(b) of this submission, we do not propose to respond to the remaining claims advanced regarding the CS Award in the AWCC Submission.

F. IFAs (AWCC)

255. We refer to pages 75 – 77 of the AWCC Submission.

256. The AWCC proposes various changes to clause 7 of the CS Award which deals with IFAs, with a view to making the clause easier to understand and use. Its submissions in this regard are similar to those advanced regarding the Clerks Award which we have addressed earlier in this submission.

[25] Clause 14.2 and Schedule B.

257. At the outset, we note that the IFA clause was the subject of extensive consideration in the plain language re-drafting process.[26] The language used in the clause was simplified in various ways. The vast majority of changes proposed by the AWCC do not clarify or simplify the existing clause in any meaningful way. Thus, they do not appear to be necessary.

258. The AWCC also proposes the insertion of several new subclauses, which, for the reasons that follow, should not be adopted.

259. *First,* the AWCC proposes inserting a new paragraph 7.6(f), with a view to clarifying when an employee will be better off overall under an IFA.

260. The proposed paragraph creates an award-derived requirement for a discussion to take place between the employee and employer in relation to the proposed IFA. Although in practice, an employer and employee would generally have a discussion about a proposed IFA, it is not necessary that this be mandated. Moreover, the proposed provision also requires that various specific subjects are discussed. It is overly prescriptive.

261. *Second,* the AWCC proposes a new clause 7.6(g) requiring the employee's classification under an IFA '*to be agreed upon*' between the employee and employer.

262. An employee's classification as either full-time, part-time or casual is a matter for an employer to determine, in accordance with the relevant definitions prescribed by the award. It is therefore inappropriate to require that it be the subject of agreement in the context of an IFA.

263. Further, the second sentence of the proposed clause 7.6(g), which purports to require '*part-time hours to be both written and agreed upon in the agreement*', is already provided for under clause 10.4 of the CS Award and does not need to be repeated in clause 7.6(g).

[26] See, for example, *4 yearly review of modern awards – Plain language – standard clauses* [2017] FWCFB 3745 at [9] – [63].

264. The final sentence of the proposed clause 7.6(g) is entirely unclear.

265. *Third,* the AWCC proposes a new clause 7.6(h), which purports to import a requirement to comply with '*other legal instruments outside of this award'*, including in relation to taxation, into clause 7.

266. It is plainly not appropriate to insert award-derived requirements to comply with such legislative schemes into the model IFA clause. Further, we are not aware of any specific issues arising from the operation of IFAs in respect of tax law or superannuation legislation.

267. *Finally*, the AWCC proposes the insertion of a new clause 7.6(i) which states that (emphasis added): '*the employer <u>should</u> seek advice or clarification'* in particular circumstances.

268. It is not appropriate for award terms to deal with aspirational standards. Further, it is not appropriate that an award suggest that an employer *'should'* seek advice where an employee is *'uncertain'* about an IFA.

G. Cashing Out Annual Leave (AWCC)

269. We refer to pages 78 – 81 of the AWCC Submission.

270. The AWCC has proposed amendments to clause 24.9 of the CS Award in order to provide clarification and guidance. Its proposals in this regard are broadly similar to those made in relation to the same clause in the Clerks Award and the SCHCDS Award addressed earlier in this submission. We note that like the IFA clauses, provisions dealing with cashing out annual leave were recently given extensive consideration by the Commission in the plain language re-drafting process, which led to the development of model clauses.[27]

271. The AWCC proposes the inclusion of a new clause 24.9(j) titled '*Guidance'*. All of the matters set out in the AWCC's proposed new clause, however, unnecessarily duplicate matters already set out in clause 24.9. Further, the

[27] See, for example, *4 yearly review of modern awards – Annual leave* [2015] FWCFB 3406 and *4 yearly review of modern awards – Annual leave* [2016] FWCFB 3177.

template agreement to cash out annual leave contained at Schedule G to the CS Award further aids the interpretation and application of this clause.

272. The AWCC also proposes including the following note after clause 24.9:

> Note 4: As outlined in 23.3(k), upon termination of employment, time off for overtime worked by the employee to which clause 23 applies has not been taken, the employer must pay the employee for the overtime at the overtime rate applicable to the overtime when worked.

273. The AWCC's submissions in support appear to confuse the operation of the TOIL provision contained in the award and the concept of cashing out annual leave. They are separate and distinct entitlements, and should be treated as such in the award. The proposed note should not be adopted.

274. Finally, the AWCC proposes some additional minor wording changes in clauses 24.9(d)(ii) and 24.9(f). It is not apparent why these changes are necessary and moreover, the proposed wording for clause 24.9(d)(ii) is confusing and unclear.