FAIR WORK COMMISSION
AM 305 of 2014

FOUR YEARLY REVIEW OF MODERN AWARDS
PENALTY RATES

OUTLINE OF SUBMISSION OF AUSTRALIAN INDUSTRY GROUP RELATING TO TAKE-HOME PAY ORDERS, TRANSITIONAL ARRANGEMENTS AND PROPOSED AMENDMENTS

1. By its decision published on 23 February 2017 (see [2017] FWCFB 1001 (the "**Penalty Rates Decision**")), the Full Bench determined to reduce the existing Sunday penalty rate for a full time and part-time level 1 employee in the *Fast Food Industry Award 2010* (the "**Fast Food Award**") from 150 per cent to 125 per cent (see Penalty Rates Decision at [1394]) and for a casual level 1 employee from 175 per cent to 150 per cent (see Penalty Rates Decision at [1394]).

2. By the Penalty Rates Decision, the Full Bench decided to:

   (a) afford the parties an opportunity to comment on the ability of the Commission to make a take-home pay order in respect of the reductions to the existing Sunday penalty rate (see Penalty Rates Decision at [2019]);

   (b) afford the parties an opportunity to comment on the ability of the Commission to make transitional arrangements that implement the reductions to the existing Sunday penalty rates in instalments that coincide with increases in modern wages arising from the Annual Wage Review decisions (see Penalty Rates Decision at [86], [2021], [2040], [2041]) and, if such an ability exists, the appropriate transitional arrangements, including the number of instalments (see Penalty Rates Decision at [86], [2021], [2040], [2041]);

   (c) direct the parties to give consideration to whether to include in the Fast Food Award a term similar to that contained in clause 34.1A of the *Restaurant Industry Award 2010* ("**Restaurant Award**") (see Penalty Rates Decision at [1397]);

   (d) afford the parties an opportunity to comment on a proposed amendment to the specification of the amount of the Saturday penalty rate for a casual employee (see Penalty Rates Decision at [1406], [2036]); and

(e) afford the parties an opportunity to comment on a proposed amendment to the overtime clause for work on a public holiday by a casual employee (see Penalty Rates Decision at [1408], [2037]).

3. In overview, Ai Group submits that:

(a) the Commission does not possess power to make take-home pay orders in respect of the reductions to the existing Sunday penalty rates;

(b) the Commission possesses power to make transitional arrangements in respect of the reductions to the existing Sunday penalty rates and the Commission should make transitional arrangements for the reductions to occur in two instalments as follows:

(i) the Sunday penalty rate in clause 25.5 of the Fast Food Award from 1 July 2017 to 30 June 2018 be a loading of 37.5 per cent for a full time or part time level 1 employee and a loading of 62.5 per cent for a casual employee; and

(ii) the Sunday penalty rate in clause 25.5 of the Fast Food Award from 1 July 2018 be a loading of 25 per cent for a full time or part time level 1 employee and a loading of 50 per cent for a casual employee;

(c) the Commission should not include in the Fast Food Award a term similar to that contained in clause 34.1A of the Restaurant Award as such a term is unnecessary;

(d) the Commission should conclude that, on the proper construction of clause 25.5(b) of the Fast Food Award, there is no alleged compounding effect in respect of the specification of the amount of the Saturday penalty rate and the casual loading but, in any event, should make the amendment as to the specification of the amount of the Saturday penalty rate for a casual employee; and

(e) the Commission should make the proposed amendment to the overtime clause for work on a public holiday by a casual employee.

4. Ai Group also opposes the introduction of a "red circling" approach to transitional arrangements (see Penalty Rates Decision at [2021](ii), [2040](ii)).

5. Ai Group proposes to address three issues in some detail:

   (a) the power of the Commission to make a take-home pay order in respect of the reductions to the existing Sunday penalty rate;

   (b) the power of the Commission to make transitional arrangements in respect of the reductions to the existing Sunday penalty rate; and

   (c) the factors relevant to exercising the power to make transitional arrangements in respect of the reductions to the existing Sunday penalty rate.

6. Ai Group also proposes to address the remaining issues briefly.

Power to Make Take-Home Pay Orders

7. The Commission, as a creature of statute, only has those powers expressly conferred upon it by statute (see, for example, *Macmahon Contractors Pty Limited v CFMEU* [2005] AIRC 1011 at [14] per Giudice J, Lawler VP, Raffaelli C; *Church v Eastern Health* [2014] FWCFB 810 at [16] per Ross J, Hatcher VP, Wilson C) or which are necessary and incidental to the exercise of its jurisdiction and powers (see, for example, *Sabanayagram v St George Bank Limited* [2016] NSWCA 145 at [123] per Sackville AJA).

8. In addressing the existence of power, Ai Group submits that it is necessary to consider an express conferral of power to make a take-home pay order and an implied conferral of power to make a take-home pay order.

9. Ai Group submits that there are four potential express conferrals of power to make a take-home pay order but none of those conferrals are available in respect of the reductions to the existing Sunday penalty rate.

10. Ai Group also submits that there is no implied conferral of power to make a take-home pay order.

Transitional Act Applications

11. An application for a take-home pay order may be made by, or on behalf of, an employee or outworker who believes that the introduction of a modern award has led, or will lead, to the reduction in their take-home pay (see, for example, item 32 of Schedule 3A, as well as item 9 of Schedule 5, to the *Fair Work (Transitional Provisions and Consequential Amendments) Act* 2009 (Cth) (the "**Transitional Act**"); see also item 12 of Schedule 6 to the Transitional Act (relating to enterprise awards) and item 14 of Schedule 6A to the

Transitional Act (relating to public sector modern awards); see further Penalty Rates Decision at [2011], [2013]).

12. A take-home pay order may only be made for an award "modernisation-related reduction in take-home pay" (see items 8 and 9 of Schedule 5, as well as item 12 of Schedule 6 and item 14 of Schedule 6A, to the Transitional Act) or a similar reduction (see item 31 of Schedule 3 to the Transitional Act).

13. The transitional arrangement contemplated by the Full Bench in this proceeding does not relate to the introduction of a modern award (such as the introduction of the Fast Food Award). The transitional arrangement contemplated by the Full Bench in this proceeding does not relate to an award "modernisation-related reduction in take-home pay". The transitional arrangement contemplated by the Full Bench in this proceeding relates to a variation of the Fast Food Award following a four yearly review pursuant to section 156 of the FW Act.

14. Accordingly, no application for a take-home pay order could be made, and no take-home pay order could be made by the Commission, pursuant to the Transitional Act in respect of the reductions to the existing Sunday penalty rate.

FW Act Applications

15. An application for a take-home pay order may be made by, or on behalf of, an employee who was covered by a copied State award that ceases to apply and is instead covered by a modern award (see section 768BS of the FW Act).

16. A take-home pay order (see section 768BS of the FW Act; see also section 12 of the FW Act) may be made in respect of a "reduction in take-home pay" (see section 768BR(3) of the FW Act), with the reduction attributable to the cessation of the State copied award (see section 768BR(3)(a) and 768BR(3)(d) of the FW Act).

17. The transitional arrangement contemplated by the Full Bench in this proceeding does not relate to the cessation of operation of a copied State award. The transitional arrangement contemplated by the Full Bench in this proceeding does not relate to a "reduction in take-home pay" attributable to the cessation of a copied State award. The transitional arrangement contemplated by the Full Bench in this proceeding relates to a variation of the Fast Food Award following a four yearly review pursuant to section 156 of the FW Act.

18. Accordingly, no application for a take-home pay order could be made, and no take-home pay order could be made by the Commission, pursuant to section 768BS of the FW Act in respect of the reductions to the existing Sunday penalty rate.

Award Applications

19. In some instances, an application for a take-home pay order is able to be made pursuant to a right conferred by a modern award (see item 13B of Schedule 5 to the Transitional Act; see also Penalty Rates Decision at [2013]-[2014]).

20. The Fast Food Award contains a clause that enables an application by, or on behalf of, an employee who suffered a "reduction in take-home pay as a result of the making of this award or the operation of any transitional arrangements" (see clause 2.4 of the Fast Food Award). The Fast Food Award also contains a clause that addresses the "transitional arrangements" that specified "when particular parts of the award come into effect" (see clause 2.3 of the Fast Food Award). The transitional arrangements only relate to the first commencement of a clause in the Fast Food Award (see Schedule A to the Fast Food Award) and not a variation to a clause in the Fast Food Award.

21. Accordingly, no application for a take-home pay order could be made, and no take-home pay order could be made by the Commission, pursuant to clause 2.4 of the Fast Food Award in respect of the reductions to the existing Sunday penalty rate.

22. Additionally, it seems that the purpose of clause 2.4 of the Fast Food Award was to provide protection to new employees from reductions in take-home pay which might have otherwise resulted from the operation of transitional provisions in the Fast Food Award (see, for example, *Award Modernisation Decision* [2009] AIRCFB 800; (2009) 187 IR 146 at [20] per Guidice J, Watson VP, Watson, Harrison and Acton SDPP, Smith C); *Re Owens* [2016] FWC 1884 at [19]-[20] per Kovacic DP).

23. Accordingly, no application for a take-home pay order could be made, and no take-home pay order could be made by the Commission, which is consistent with this purpose in respect of the reductions to the existing Sunday penalty rate.

24. Initially, the clauses in the Fast Food Award concerning accident pay, redundancy and district allowances contained transitional arrangements operating until 31 December 2014 but such clauses were deleted from the Fast Food Award following the decision of a Full Bench in the *Transitional Provisions Decision* [2015] FWCFB 644 at [5], [10], [74], [77] per Boulton J, Kovacic DP, Bull C).

25. Accordingly, no application for a take-home pay order could be made, and no take-home pay order could be made by the Commission pursuant to deleted transitional arrangements.

Conferral of Power Generally

26. The Commission may include in a modern award terms that are incidental to a term that is permitted or required to be included in a modern award (see section 142(1) of the FW Act). One of the terms that is permitted to be included in a modern award is a term about penalty rates, including for employees working on weekends or public holidays (see section 139(1)(e) of the FW Act). An incidental term, however, must be essential for the purpose of making a particular term operate in a practical way (see section 142(1)(b) of the FW Act; see also *Absorption Clause Decision* [2015] FWCFB 6656 at [56] per Ross J, Hatcher VP, Hamberger SDP, Bull and Bissett CC; *Re Pastoral Award* [2015] FWCFB 8810 at [97] per Ross J, Kovacic DP, Saunders C).

27. A provision in a modern award permitting the making of a take-home pay order is a substantive term and is not an incidental term.

28. A provision in a modern award permitting the making of a take-home pay order is also not essential for the practical operation of a weekend penalty term.

29. Accordingly, no application for a take-home pay order could be made, and no take-home pay order could be made by the Commission, pursuant to section 142(1) of the FW Act.

Implied Conferral of Power

30. An implied conferral of power first requires the identification of the statutory provision or provisions from which the implied power is drawn.

31. An implied conferral of power must also be consistent with the statute as a whole.

32. The power to include terms in a modern award are set out in Part 2-3 of the FW Act. No provision in Part 2-3 permits the drawing of an implied power to permit the making of a take-home pay order (see also *Absorption Clause Decision* [2015] FWCFB 6656 at [77], [81] per Ross J, Hatcher VP, Hamberger SDP, Bull and Bissett CC).

33. The FW Act requires a modern award to only contain terms that are permitted or required by specified provisions (see section 136 of the FW Act). None of the specified provisions relate to the making of a take-home pay order. An implied conferral of power is inconsistent with section 136.

34. Accordingly, no application for a take-home pay order could be made, and no take-home pay order could be made by the Commission pursuant to an implied conferral of power.

Overall Result

35. In summary, the Commission does not possess power to make a take-home pay order in respect of the reductions to the existing Sunday penalty rate.

Power to Make Transitional Arrangements

36. In addressing the existence of power, Ai Group submits that it is necessary to consider an express conferral of power to make transitional arrangements and an implied conferral of power to make transitional arrangements.

Express Power

37. There is no express power conferred by the FW Act for the Commission to make transitional arrangements.

38. Whilst the Commission may include in a modern award terms that are incidental to a term that is permitted or required to be included in a modern award (see section 142(1) of the FW Act), a transitional provision for the variation of the penalty rates term in the Fast Food Award is not essential for the purpose of making the term operate in a practical way (see section 142(1) of the FW Act).

Implied Power

39. The Commission must specify in a determination that varies a modern award the day that the determination comes into operation (see section 165(1) of the FW Act).

40. It seems that the Commission could, pursuant to section 165(1) of the FW Act, specify that a new term about penalty rates comes into effect on a specified day ("Day One") and a different term about penalty rates comes into effect on a later specified day ("Day 366"). The Commission has so acted previously (see the Determination made 29 July 2016 (PR583001), especially paragraph B and C).

41. It also seems that the Commission could, pursuant to section 165(1) of the FW Act, specify that a new term about penalty rates comes into effect on a specified day ("Day One") and ceases on a later specified day ("Day 365").

Overall Result

42. In summary, the Commission possesses power to make transitional arrangements relating to the staggered introduction of the reductions to the existing Sunday penalty rate.

Exercise of Power to Make Transitional Arrangements

43. In considering whether to exercise the power, and the terms of the exercise of the power, to make transitional arrangements for the staggered introduction of the reductions to the existing Sunday penalty rate, Ai Group submits that the Full Bench must act consistently with:

(a) its statutory charter, including the exercise its powers under the FW Act in a manner that is fair and just (see section 577(a) of the FW Act);

(b) its principle that fairness is assessed from the perspective of both employer and employee (and not simply from the perspective of the employee) (see Penalty Rates Decision at [37], [117], [118], [151], [885], [1701], [1877], [1948]);

(c) the objects of the relevant Part (see section 578(a) of the FW Act);

(d) the merits of the matter (see section 578(b) of the FW Act);

(e) its findings and conclusions in the Penalty Rates Decision;

(f) the evidence in the proceedings;

(g) the extent of the reductions in the existing Sunday penalty rates; and

(h) the approach adopted by other Full Benches to the staggered introduction of reductions in penalty rates.

44. In the present proceeding, the relevant Part is Part 2-3 (headed "MODERN AWARDS") and the object is set out in the modern awards objective (see section 134(1) of the FW Act). The relevant object is the identification and provision of a fair and relevant safety net term (see chapeau in section 134(1) of the FW Act). The application of the relevant objective is that the existing Sunday penalty rate for a level 1 employee is not, as at 23 February 2017 (the date of publication of the Penalty Rates Decision), fair and relevant (see Penalty Rates Decision at [1388]) and overcompensates the employee for the disutility associated with Sunday work (see Penalty Rates Decision at [1388]).

45. The relevant merits include, from the perspective of both the employee and the employer, that, as at February 2017, the fair and reasonable level of penalty rates on a Sunday for employees covered by the Fast Food Award should be 125 per cent (for a full time or part time employee) or 150 per cent (for a casual employee). The relevant merits also includes not delaying unnecessarily the reductions in the Sunday penalty rates (see Penalty Rates Decision at [86](i)).

46. The relevant findings of the Full Bench include:

(a) the finding that, in terms of weekend work, more employees work on a Saturday than on a Sunday (see Penalty Rates Decision at [448] (table 6, last two rows), [462], [503], [1281], [1354]);

(b) the finding that a typical level 1 fast food industry employee working at McDonald's on a weekend worked a shift of four to five hours duration (see Penalty Rates Decision at [1307], [1309]);

(c) the finding that a typical fast food industry employee is a student aged 14 to 24 years (see Penalty Rates Decision at [1275], [1352], [1353]);

(d) the finding that a proxy for a typical level 1 fast food employee working at McDonald's is an employee aged 14 to 20 years (see Penalty Rates Decision at [1299], [1300]); and

(e) the finding that most fast food industry employees working in the quick service restaurants (QSR) major chains (with the QSR major chains being the employer of 86 per cent of all employees in the fast food industry) are non-career employees (see Penalty Rates Decision at [1282], [1284], [1285]; see also at [57], [1256], [1263]).

These findings emphasise that not all level 1 employees will be affected by the reduction in the existing Sunday penalty rates, that the amount of work on a Sunday of a level 1 employee is likely to be limited to four to five hours and that a level 1 employee is unlikely to be engaged in the industry on a long term basis as they are not career employees.

47. The relevant findings also include the finding that the reduction in Sunday penalty rates is likely to have some positive employment effects (albeit the precise effect is difficult to quantify but was to result in a modest increase) (see Penalty Rates Decision at [68], [1367]; see also [683], [783], [829], [1769], [1835]).

48. The relevant evidence in the proceedings includes the data in the Industry Profile – Accommodation and Food Services Report, including that approximately 60 per cent of employees in the accommodation and food services industry remain in employment with their employer for 0-2 years (see Industry Profile, p31, figure 5.1, first four columns). This data highlights that a level 1 employee is unlikely to be engaged in the industry on a long term basis.

49. The extent of the reductions in the existing Sunday penalty rates is 25 per cent (from 150 per cent to 125 percent or from 175 per cent to 150 percent) and not 50 per cent (as in the *General Retail Industry Award* 2010).

50. The approaches adopted by other Full Bench to the staggered introduction of reductions in penalty rates includes the use of transitional arrangements comprising two instalments (see *Re Restaurant and Catering Association of Victoria* [2014] FWCFB 1996; (2014) 243 IR 132 at [312] per Hatcher VP, Boulton J and McKenna C).

51. Ai Group submits that the staggered introduction of the reduction of the Sunday penalty rates in the Fast Food Award should occur over two instalments:

    (a) First, two instalments would result in the introduction of the reduction in a fair and just manner (and thus achieve the statutory charter) (see paragraph 43(a) of this outline) by balancing the perspective of employees and employers (see paragraph 43(b) of this outline) so as to (at the same time) minimise the financial impact of the reductions (the perspective of the employees) and remove the overcompensation (and thus cost burden) associated with the existing level of Sunday penalty rates (the perspective of employers) (and in contrast to an approach which prefers the perspective of employees by allowing a greater number of instalments (and thereby maintains the overcompensation and costs burden for a greater period of time));

    (b) Secondly, two instalments would permit the achievement of the modern award objective of a fair and relevant award in a timely manner (see paragraphs 43(c) and 44 of this outline);

    (c) Thirdly, two instalments would permit the implementation of the merits in a timely manner (including the achievement of a fair and reasonable level of penalty rates and the avoidance of unnecessary delay) (see paragraphs 43(d) and 45 of this outline);

    (d) Fourthly, two instalments would be consistent with the findings of the typical level of work performed on a Sunday by a level 1 employee in the fast food industry (see paragraphs 43(e) and 46(b) of this outline);

    (e) Fifthly, two instalments would be consistent with the findings and evidence on the length of participation by a level 1 employee in the fast food industry (see paragraphs 43(e), 43(f), 46 and 48 of this outline);

(f) Sixthly, two instalments would be consistent with the achievement of the positive employment effect of a reduction in Sunday penalty rates in a timely manner (see paragraphs 43(e) and 47 of this outline);

(g) Seventhly, two instalments would be consistent with the size of the reduction in Sunday penalty rates (25 per cent not 50 per cent) (see paragraph 43(g) of this outline);

(h) Eighthly, two instalment approach of the Full Bench to a staggered introduction of a reduction in penalty rates in *Re Restaurant and Catering Association of Victoria* [2014] FWCFB 1996; (2014) 243 IR 132 at [312] (see paragraphs 43(h) and 50 of this outline) (and noting that this Full Bench has found it appropriate to align the entitlements of the Fast Food Award with those in the Restaurant Award (see Penalty Rates Decision at [1327], [1332], [1333], [1335]) in circumstances where the typical fast food employee is similar to a typical restaurant employee (see Penalty Rates Decision at [1275] and *Re Restaurant and Catering Association of Victoria* [2014] FWCFB 1996; (2014) 243 IR 132 at [308]); and

(i) Ninthly, two instalments (as opposed to a greater number of instalments) results in a simpler, easier to understand and more stable modern award system (consistent with section 134(1)(g) of the FW Act).

52. To the extent that other parties or interveners have submitted (or intend to submit) that the reduction in Sunday penalty rates should occur by instalments of 5 per cent (compare, for example, submission of David Wedgwood dated 14 March 2017, par 9), Ai Group opposes such a submission:

(a) First, such transitional arrangements would result in five instalments, even though the Full Bench intended a maximum of four instalments (see Penalty Rates Decision at [2021](iv)).

(b) Secondly, such transitional arrangements would delay the reductions beyond the likely length of engagement of the typical level 1 employee in the fast food industry (see paragraph 46 and 48 of this outline);

(c) Thirdly, such transitional arrangements would delay the achievement of the positive employment effect of the reduction in Sunday penalty rates (see paragraph 47 of this outline); and

(d) Fourthly, such transitional arrangements fail to achieve the matters achieved by two instalments (compare paragraph 51 of this outline).

Red Circling

53. Ai Group opposes the introduction of a red circling transitional arrangement:

(a) First, such an arrangement introduces the potential for disharmony and conflict between employees performing the same work (including those working adjacent to each other) but on different conditions (see Penalty Rates Decision at [2012](ii), [2040](ii)) and thereby undermines the object of the FW Act of promoting a framework for "cooperative and productive workplace relations" (see chapeau to section 3 of the FW Act)) and is inconsistent with the exercise of powers in manner that "promotes harmonious and cooperative workplace relations" (see section 577(d) of the FW Act);

(b) Secondly, such an arrangement would increase the "regulatory burden" (and the "employment costs") of the Fast Food Award (compare section 134(1)(f) of the FW Act; see also Penalty Rates Decision at [2021](ii), [2040](ii));

(c) Thirdly, such an arrangement would undermine a simpler and easier to understand modern award system (compare section 134(1)(g) of the FW Act); and

(d) Fourthly, such an arrangement would preserve for existing fast food employees a Sunday penalty rate that has been found to be neither fair nor relevant and which overcompensates for the disutility for working on a Sunday (see also paragraph 44 of this outline).

Clause 34.1A

54. Ai Group opposes the introduction of a term similar to clause 34.1A of the Restaurant Award on the basis that such a term is not necessary:

(a) First, sufficient protections to redress the potential for discrimination or disadvantage from the reduction in existing Sunday penalty rates is contained in the general protections provisions of the FW Act (see section 340 of the FW Act), noting that the Fast Food Award is a workplace instrument (and thus a workplace right) (see sections 12 and 341 of the FW Act); and

(b) Secondly, it is not "necessary" (and at best, only "desirable") to include such a term in the Fast Food Award in order to achieve the modern awards objective (see section 138 of the FW Act; see also Penalty Rates Decision at [36], [134], [135], [136]; see further at [1996], [1997]).

55. Ai Group understands that the introduction of clause 34.1A of the Restaurant Award was not the subject of submissions in hearings that gave rise to the *Re Restaurant and Catering Association of Victoria* [2014] FWCFB 1996; (2014) 243 IR 132 (and thus the submissions in the previous paragraph were not addressed by the Full Bench).

Specification of Amount of Saturday Penalty Rate for Casual Employees

56. Ai Group submits that, on the proper construction of clause 25.5(b) of the Fast Food Award, there is no compounding of the Saturday penalty rate and the casual loading.

57. Ai Group notes that it has made submissions on this issue as part of its response to the Exposure Draft of the *Fast Food Industry Award 2016* published on 16 November 2016 ("**Exposure Draft**") in proceedings AM 267 of 2014 and notes that the Exposure Draft is drafted differently to clause 25.5(b) of the Fast Food Award. Ai Group also notes that a separate Full Bench has not ruled on the submissions on this issue nor finalised the Exposure Draft.

58. However, Ai Group supports the provisional view of the Full Bench that clause 25.5(b) of the Fast Food Award should be amended to avoid the argument of compounding (see Penalty Rates Decision at [1406], [2036]).

59. (As an aside, Ai Group notes that some passages of the Penalty Rates Decision mis-describe (inadvertently) the lettering of clause 25.5 of the Fast Food Award (see Penalty Rates Decision at [1403] (reference to clauses 25.5(c) should be to clause 25.5(b) and reference to clause 25.5(d) should be to clause 25.5(c)), [1406] (reference to clause 25.5(a) should be to clause 25.5(b)).)

Removal of Overtime Rate for Casual Employees

60. Ai Group supports the provisional view of the Full Bench that the last sentence of clause 26 of the Fast Food Award (relating to the specification of the overtime rate on a public holiday for a casual employee) be deleted (see Penalty Rates Decision at [1408], [2037]).

61. Ai Group notes that the Exposure Draft in proceedings AM 267 of 2014 is drafted differently to clause 26 of the Fast Food Award and addresses the overtime rate on a public holiday for a casual employee in two places (see clause 20.2(c)(ii) and clause 25.3 of the Exposure Draft).

62. (As an aside, Ai Group notes that it intends to submit in proceedings AM 267 of 2014 that the duplication in the Exposure Draft should be removed by deleting either clause 20.2(c)(ii) or clause 25.3 of the Exposure Draft).

Other matters

63. To the extent that some submissions seek the setting aside or reconsidering of the Penalty Rates Decision (see, for example, the submission of Mr Foley MP dated 23 March 2017, Mr Rau MP dated 23 March 2017 and Ms White MP dated 23 March 2017), Ai Group opposes the submissions:

(a) The submissions amount to a mere expression of a disagreement with the outcome in the Penalty Rates Decision and a mere plea for reassessment;

(b) The submissions do not identify a proper basis to set aside or reconsider the Penalty Rates Decision;

(c) The submissions repeat earlier submissions or the effect of earlier submissions made before the publication of the Penalty Rates Decision (and which have already been considered and addressed by the Full Bench);

(d) One of the submissions relies on evidence (modelling by McKell Institute) which has limited credibility according to Professor Markey, an expert witness called by United Voice, and to which limited weight should be attached according to Professor Markey (see Transcript, 28 October 2015, PN20080 to PN20088);

(e) The submissions only address the perspective of employees and do not mention or recognise the perspective of employers (contrary to the approach articulated by the Full Bench);

(f) The submissions ignore other findings and evidence that support the conclusions reached by the Full Bench in the Penalty Rates Decision; and

(g) The submissions do not address any relevant issue on which Full Bench sought assistance.

Oral Submissions

64. Ai Group wishes to supplement this outline orally.

65. Ai Group has not seen the submissions of the SDA or United Voice and anticipates that it wishes the opportunity to respond to those submissions in writing and orally.

24 March 2017