



SUBMISSIONS ON BEHALF OF THE AUSTRALIAN FEDERATION OF
EMPLOYERS AND INDUSTRIES (AFEI)

(AM2008/1)

AWARD MODERNISATION

AFEI

Australian Federation of
Employers & Industries

1. The Australian Federation of Employers and Industries (AFEI), formed in 1904, is one of the oldest and most respected independent business advisory organisations in Australia. AFEI has been a peak council for employers in NSW and has consistently represented employers in matters of industrial regulation since its inception.
2. With over 3,500 members and over 60 affiliated industry associations, our main role is to represent, advise, and assist employers in all areas of workplace and industrial relations and human resources. Our membership extends across employers of all sizes and a wide diversity of industries.
3. AFEI provides advice and information on employment law and workplace regulation, human resources management, occupational health and safety and workers compensation. We have been the lead employer party in running almost every major test case in the New South Wales jurisdiction.
4. AFEI is a key participant in developing employer policy at national and state (NSW) levels and is actively involved in all major workplace relations issues affecting Australian businesses.

AWARD MODERNISATION

5. On 28 March 2008 a request was made by the Minister for Employment and Workplace Relations regarding award modernisation.

6. The Commission has been asked to undertake a mammoth task, taking industrial instruments that have been borne from extensive negotiations between employer groups and unions and/or through arbitration. We make this point simply to alert the Commission to the long history of industrial regulation in NSW in creating state awards that have traditionally applied to employers in NSW.
7. AFEI, as a state peak council for employers in NSW has been involved in the making of the vast majority of significant NSW awards which are the antecedents of NAPSAs. This reflects our significant interest in this award modernisation process but also presents an opportunity for our knowledge and understanding of NSW employers to assist in developing awards that are suitable for particular industries.
8. We note that the Commission, at point 20 of the request, is asked to identify a list of priority industries or occupations for award modernisation. In developing the priority list *"...the Commission will have regard to those industries and occupations with high numbers of Australian Workplace Agreements and Notional Agreements Preserving State Awards (NAPSAs)."*
9. In our view, the particular emphasis on NAPSAs means the Commission is required to have regard to the industrial regulation that has developed in each state in creating modern awards that meet the objects set out in s576A of the *Workplace Relations Act 1996*, balanced with the requirements set out in point 2 of the request, in particular

that modern awards are not intended to disadvantage employees or to increase costs of employers.

10. This poses a particular challenge for the Commission particularly having regard to the requirement to remove state based differentials (s576T) and highlights the need for the Commission to be cautious in developing awards that will effectively amalgamate Federal awards and NAPSAs. For example, there is potential for this process to re-agitate old demarcation and coverage disputes relevant to a particular industry or particular sector of an industry which could result in an otherwise settled area being disrupted.
11. There also is the clear potential for considerable additional costs to employers, despite paragraphs 2(c) and 2 (d) of the request providing that the creation of modern awards not disadvantage employees or increase costs for employers. Firstly, section 576T of the Act provides that five years after a modern award is made any terms that are based on state or territory boundaries cease to have effect. The elimination of state differentials in wages and conditions even over a period of time or via mechanisms such as grandfathering will not remove additional costs, only delay their impact. Secondly, whilst the scope and structure of modern awards is as yet unknown, even with awards which meet the objectives of simplicity, ease of compliance, productivity, efficiency and flexibility, employers face the task of realigning their workforces, workplace practices and payroll administration systems with new classification structures and award conditions.

12. A further concern that AFEI has is the potential for award coverage to be extended to cover managerial employees. This is particularly dealt with in point 2(a) of the Request. In our submission the Commission should be very careful to ensure that awards do not extend into those areas. For example, the ACTU and the ASU in their submission to the Commission squarely raise this issue in their proposed definition of the coverage of a Clerical Occupation award (transcript 26 May 2008 PN87 and PN510). To quote the ASU, the proposed scope of a general Private Sector Clerical Award is:

“This award shall apply to the employment.....of employees engaged in work which is of the nature of clerical, customer service, administrative, supervisory, para professional and/or managerial or office work generally.....”.

13. This very definition illustrates the potential for a modern award to extend into coverage of those managerial employees specifically referred to in point 2(a) of the Request. This further illustrates the need for the scope and coverage of industries to be carefully considered before any modern award is made.
14. Continuing consultation with parties who represent particular industries will be fundamental to ensure that this process does not create unintended consequences for both employers and employees. It is our submission that the Commission also be available for parties to apply to be heard on any matter that may arise throughout the process that affects a modern award, including to the extent that proceedings in any

priority industry may have implications for another industry and/ or modern award, whether or not that other industry or modern award is in a priority area.

15. This is particularly important considering the difficulties in the absence of finalised National Employment Standards (“the NES”) and the unknown substance of the forthcoming legislation proposed by the Government. We are facing a highly uncertain environment in relation to what the industrial landscape might look like by 2010. It is therefore important that the Commission ensure that parties are able to address issue that might arise and make further submissions after the extent of the legislation and the NES is known. This first have significance in relation to the modern awards that will be created for the priority industries.

16. We also note in the Request at point 4, the Minister states:

“...In creating modern awards...the Commission must have regard to the desirability of reducing the number of awards operating in the workplace relations system.”

17. It is our submission that the Commission needs to balance this requirement with the particular needs of each industry. Reducing the number of awards which may apply to an industry does not necessarily equate to an appropriate or convenient system of industrial regulation for that industry. Creating one award that purports to cover an industry which is characterised by a diverse group of sectors within that industry will not necessarily meet the objects of Part 10A of the Act. It may be desirable and indeed necessary in some instances for a number of awards to apply to an industry

whilst maintaining a simple to understand and easy to apply fair minimum safety net.

18. An example of an unintended consequence which may arise through the creation of one award to cover an entire industry would be the increased burden on small employers where there is an expansion in the number of unions grouped in the award's coverage and consequent number of unions the small employer may have to deal with.
19. Whilst supportive of the notion that fewer awards would be desirable it is not always going to be so. For example, absorbing additional occupations or additional discrete industries into a broad manufacturing sector award is likely to create regulation which is increasingly less relevant to these additional employees and industries.
20. The fact that many awards exist does not, of itself, predict administrative complexity for an individual employer. Problems that create complexity and damage productivity, arise, for example, there are different awards applying to employees who work side by side, whose work is significantly interdependent, but who have different award conditions (span of hours, work breaks, overtime rates, etc.) or where the award provisions prevent aspects of the supply, production and distribution chains from meshing efficiently.
21. Modern awards should seek to remove problems of this nature and they should also recognise that employers need flexibility in the award itself to respond quickly to market demands. However, there are cases where strategic considerations suggest that more awards could be better than

fewer. If it not possible to reduce the number without raising employer costs (directly or indirectly) reduction should be rejected. If key occupational groups in a business are likely to be drawn simultaneously into the award /agreement renewal process in a disadvantageous way then reduction may not be a sound approach.

22. In some cases a single award would actually create inflexibilities at the human resource management level due to cultural clashes between different functional groups who would be covered by the one modern award.
23. It would be helpful to know that the number of modern awards, their content and scope will be developed having regard to each industry's needs and experience.
24. Importantly also, industries should not be confused with sectors of the economy (eg. all of manufacturing is not an industry but rather the manufacturing sector). The whole of the transport sector covers numerous specialised and significantly different industries. The airline rail and shipping industries could not be conceivably lumped together, nor could the bus and coach industry be "lumped" in with general road transport. The real estate industry is also unique and should likewise have its own modern award. The operating hours, remuneration systems, value of the assets offered for sale and the unique nature of the client/staff relationship requires unique treatment. The registered clubs industry should also be treated in the same manner. Its combination of services, operating hours and community foundations demand separate award coverage for a clearly identifiable industry. Restaurant and catering is another industry in its

own right, distinguishable from the food/beverage providers/industries. The commercial printing industry is also an industry in its own right. Further, aspects of design preparation which do not conveniently fit into other industries such as architecture, engineering and surveying etc. fall into this category. Each of these is significantly different from the other and the industries which purchase a significant (by no means all) proportion of their services. Particular occupations (eg. drafting) should not be drawn solely into one modern industry award as a means of expanding the boundaries of a particular industry or the actual or implied coverage of a particular modern award (or where that would be the outcome even if inadvertent).

25. The current NAPSA for the New South Wales Social and Community Services Employees (State) Award (the SACS Award) was several years in the making, involving significant research work and resulting in carefully crafted classifications and conditions. The history of this Award should be useful to the Commission in formulating a modern award specifically for the industry covered by that NAPSA.

The Priority Industry List

26. With the exception of the proposed Gardening and Sportsground Maintenance Industry and the Racing Industry, AFEI is not opposed to the industries listed. AFEI has an interest in all of the industries listed, with the exception of the Rail Industry, and is party to the relevant State awards and NAPSAs for those areas. Our interest in these areas and our long standing involvement in the NSW industrial system in relation to the NAPSAs provides us with a unique opportunity

to represent the interests of relevant employers and to assist the Commission in developing modern awards and we look forward to assisting the Commission throughout the process.

27. What is important is that the Commission has a full understanding of an "industry" before it decides on the scope and coverage of a modern award. Once the list is finalised parties should have an opportunity to assist the Commission in understanding the breadth of a particular industry, which NAPSAs may be relevant to that industry or should be excluded and what the consequences would be for employers and employees once the industry definition is determined.
28. In relation to the proposed Gardening and Sportsground Maintenance Industry and the Racing Industry, AFEI is of the view that these should not be included in the priority list. While some NAPSAs operate in those areas, the number of employees employed under them is relatively small compared to other industries listed on the proposed priority list. While we have no information in relation to the total number of AWAs which operate in these areas, we are advised by the industry that there are few AWAs, particularly in the Racing Industry.
29. It is our submission that greater effort should be concentrated on those industries which employ a large number of employees as priority industries, leaving the proposed Gardening and Sportsground Maintenance Industry and the Racing Industry to be dealt with after the priority awards are created.

30. It is not yet clear that in relation to the priority list of industries these awards will be intended to set the principles for determining all modern awards. To the extent that it is intended to formulate principles all interested parties (in a broad sense) should have a right to be heard on any proposed principles.
31. AFEI looks forward to participating in the creation of modern awards and ensuring that our members' views are properly considered.

Award Flexibility

32. AFEI supports the submission made by ACCI in relation to award flexibility and we support the clause proposed by ACCI as an appropriate clause for an employer and an individual employee to agree to arrangements to meet their genuine individual needs without disadvantaging the individual employee.

Draft Timetable

33. In relation to the draft timetable attached to the Statement of the President our submission is that it will be important for a continuing process of consultation or an avenue by which parties can approach the Commission at each stage of this process. This will assist the Commission and the parties in identifying potential issues that might arise and for those issues to be dealt with on a timely basis.