



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

AM2008/20

AWARD MODERNISATION

AFEI
Australian Federation of
Employers & Industries

**BEFORE THE AUSTRALIAN INDUSTRIAL RELATIONS
COMMISSION**

AM2008/20 - CLEANING SERVICES GROUP

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.
5. We note that the General Services Award (now NAPSA) is not on the AIRC's list of awards in the 'cleaning services' group. This NAPSA has the following coverage:

"This award shall apply to caretakers and cleaners employed in or in connection with any place of business, in and about Strata Title units and Company Title units, in schools of arts, literary institutes, lodge rooms (including building used for lodge meetings), museums, schools, excepting female school cleaners employed in schools under the control of the Department of Education, and caretakers and cleaners (as distinguished from groundsmen) in sports grounds, also caretakers and cleaners employed in the Botanic Gardens, in the Sydney Domain, caretakers of racecourses, agricultural grounds and recreation grounds, and cleaners employed in cleaning building, other than grand and public stands, stables and animal pavilions on racecourses, agricultural grounds and recreation grounds, office cleaners, tea attendants, caretakers and lift attendants in the State, but shall not apply to persons employed in or in connection with retail stores, excluding the County of Yancowinna, within the jurisdiction of the Security and Cleaning, &c. (State) Industrial Committee." (See clause 43, Area, Incidence and Duration).

6. Cleaning services should distinguish between directly employed cleaners and those of contract cleaners. In particular, the conditions applicable to contract cleaners in NSW would not form an appropriate basis for a modern award.

7. Cleaning in NSW has been covered by two awards (now NAPSAs) – the *Miscellaneous Workers' General Services (State) Award* (the "General Services Award") and the *Cleaning and Building Services Contractors (State) Award* (the "Contract Cleaning Award"). The Contract Cleaning Award applies to contract cleaners. The General Services Award applies to directly employed cleaners not covered by other industry awards (such as those applying to hospitals or clubs).

8. The two Awards have developed differently. In particular, the Contract Cleaning Award has been the subject of a number of 'industry settlements'. Such settlements were industry deals between the major cleaning contractors and the Union for wage increases and sometimes changes to other conditions of employment which would be approved as consent awards by the Industrial Relations Commission of NSW. The increases agreed upon were generally over and above safety net adjustments, and presumably took account of the extent to which the agreed wage increases could be passed on to clients through the contract cleaner's commercial arrangements.

9. As a result the Contract Cleaning Award has traditionally operated as more as a paid rates award in the sense that it reflects the actual rates payable to contract cleaners. Also, these rates of pay are well ahead of the rates fixed as part of the Minimum Rates Adjustment process. As such, the Award would not constitute a minimum safety net.

10. The General Services Award, is, however, a genuine minimum safety net award. The rates of pay have been fixed according to the minimum rates adjustment process and has not been the subject of industry settlements.
11. There would be danger that if the rates of pay for cleaners not engaged by contract cleaning companies were fixed by reference to the rates payable by contract cleaning companies that this could cause substantial cost increases. Such cost increases would be inconsistent with paragraph 2(d) of the Ministers' Request as it would increase costs for employers.
12. Another area of difficulty is that rates of pay under the Contract Cleaning Award for part-time employees have incorporated a part-time loading into the rates of pay. This loading (10% for most part-time employees under the two awards) was removed from the General Services Award in arbitrated proceedings before Tabbaa C (IRC1522 of 1999; *Application by the Employers Federation of NSW for variation re hours and other matters*).
13. The role of part-time work under this Award is particularly important. As Tabbaa C noted in that decision:

“Ms Marshall argued that the evidence tendered before the Full Bench included many who were covered, or could have been covered, by the *Miscellaneous Workers General Services (State) Award* in relation to their cleaning staff and that evidence lent weight to her claim that permanent part-time work is predominant for those covered by the award a “and is required by both employers and employees”. She drew the attention of

the Commission to the labour force estimates for the August quarter of 1999 provided by the Australian Bureau of Statistics (part "IJ" of the Exhibit M1) which revealed that, of the 54,900 cleaners employed in New South Wales, 34,600 were employed in a part-time capacity. It was also revealed that of those 34,600 part-time cleaners, 35,800 were female – a situation identified by the full Bench in its decision:

"The part-time workforce in this state is predominantly female, although the pattern differs depending upon the industry, geographical location and occupation concerned. Family responsibilities is one predominant reason for the part-time working arrangements made by many women in the workforce." (at p.8)

14. The Commission should not, in our respectful submission, re-introduce a part-time loading through the award modernisation process.
15. Both the Australian Industrial Relations Commission and the Industrial Relations Commission of NSW have considered in detail the provision of part-time employment in awards. Both tribunals have firmly come to the position that part-time employment does not warrant the payment of a penalty. So much is clear from the decision of the Australian Industrial Relations Commission in the "Parental Leave Case" (1989-1991) 36 IR 1 at 14 and the decision of the Industrial Relations Commission of NSW in the "State Part-Time Work Case" (1998) 78 IR 172 at 202.

16. Furthermore it is submitted that to impose a penalty by way of loading on the employment of part-time employees would be to discourage the employment of such employees, particularly employees with family responsibilities, contrary to the object of s3(1) of the *Workplace Relations Act 1996* which calls for a workplace environment supportive of employees balancing work and family responsibilities. Particular attention is directed to the decision of the Australian Industrial Relations Commission in the "Parental Leave Case" (ibid) at page 13.

17. Unlike employees of contract cleaning companies, employees under the General Services Award do not generally employ large numbers of cleaners at each location. Usually employers under the General Services Award would only employ one cleaner and usually do so on a part-time basis. The extent to which cleaners are employed will depend, in large part, as to how much cleaning is required. This needs to be factored into any award that is made. For example under the General Services Award small businesses can engage a cleaner for a two hour minimum engagement and dentists' and doctors' surgeries can engage a cleaner for a one hour minimum engagement (see clauses 16(ii) and 17(ii)).

18. Also, unlike contract cleaning companies, employees under General Services are often employed by religious and other charitable institutions. There is scope for such organisations to offer beneficial tax treatment to employee remuneration through salary packaging arrangements where this is allowed by the relevant award. These salary packaging arrangements generally benefit the employer and employee, and it would be appropriate for a provision facilitating such arrangements to

be included in any modern awards. The clause in the General Services Award is in the following terms:

"42. Salary Packaging

- (i) Where agreed between the employer and a full-time or part-time employee, an employer may offer salary packaging in respect of salary. Neither the employer nor the employee may be compelled to enter into a salary packaging agreement.
- (ii) Salary packaging shall mean that the employee will have part of their salary packaged into a fringe benefit which does not constitute a direct payment to the employee but is payable to bona fide third party.
- (iii) The terms and conditions of such a package shall not, when view objectively, be less favourable than the entitlements otherwise available under this award and shall be subject to the following provisions:
 - (1) the employer shall ensure that the structure of any agreed remuneration package complies with taxation and other relevant legislation;
 - (2) where there is an agreement to salary package, the agreement shall be in writing and made available to the employee;

- (3) the employee shall have access to details of the payments and transactions made on their behalf. Where such details are maintained electronically, the employee shall be provided with a printout of the relevant information;
- (4) the employer has the right to vary or withdraw from a salary packaging agreement and/or withdraw from offering salary packaging in the event of changes to the operation of legislation that are detrimental to, or increase the costs of, salary packaging arrangements;
- (5) prior to entering into any salary packaging agreements, the employee will be given the opportunity by the employer to seek independent advice in respect of salary package arrangements including advice from the union;
- (6) in the event that the employer withdraws from a salary packaging agreement, the individual employee's salary will revert to whichever is the higher of:
 - (1) the ordinary time rate of pay that applied to the employee prior to the commencement of the salary packaging agreement; or
 - (2) the applicable rate specified in Table 1, Rates of Pay of this Award.

- (3) notwithstanding any of the above arrangements, the employer or employee may cancel any salary packaging agreements by the giving of one month's notice of cancellation to the other party;
- (4) Superannuation Guarantee Contributions will be calculated with reference to the ordinary time rate of pay the employee would have been entitled to receive but for the salary packaging arrangement;
- (5) any allowance, penalty rates, overtime, payment for unused leave entitlements shall be calculated by reference to the ordinary time rate of pay which would have applied to the employee but for the salary packaging arrangement;
- (6) unless there is an agreement between the employer and the employee to the contrary, all salary packaging arrangements shall cease during any period of leave without pay, including periods of unpaid sick leave."

19. We do not say that the General Services Award cannot be made more flexible. The General Services Award operates as a range of settings and should operate in a true safety net in order that it can accommodate the wide range of settings in which cleaners are engaged. As outlined in paragraph 8A of the Minister's Request consideration should be given to provisions appropriate for application to employers and employees in a range of industrial and/or occupations.

20. Nor do we say that contract cleaners should not be able to have a contract cleaning award, or that such an award should not be in terms that suit contract cleaners.

21. We do point out, however, that the awards are different and that if there was to be a single cleaning award it would not be appropriate to base it upon the terms of the Contract Cleaning Award.