



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

AM2008/10

AWARD MODERNISATION

AFEI
Australian Federation of
Employers & Industries

BEFORE THE AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

AWARD MODERNISATION

AM2008/10 - RETAIL INDUSTRY

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. The Australian Federation of Employers and Industries (AFEI) represents a number of employers both large and small covered by the various different instruments that apply in the retail industry.
6. AFEI acknowledges that the retail industry is a priority industry for the purposes of the award modernisation process and makes the following submission in relation to appropriate provisions for a Retail Industry Award.

SCOPE

7. In the request to the Commission by the Minister for Education, Employment and Workplace Relations, the Commission is specifically required to consider the scope of modern awards. The request states at points 8 and 9:

"The Commission will identify the type of work, industry and/or occupations covered by a modern award and the application of each award."

The Commission is to have regard to the desirability of avoiding the overlap of awards and minimising the number of awards that may apply to a particular employee or employer. Where there is any overlap or potential overlap in the coverage of modern awards, the Commission will as far as possible include clear rules that identify which award applies.

8. Whilst a lot of clerical work is carried out in retail shops, most of it is done by shop employees at the beginning and end of their work periods. Most retail employers do not have clerical staff. There is not the volume of relevant work. From the very small number of employers whose retail businesses are large enough, their clerical workforce are generally employed remotely from the shops themselves, preparing clerical work more as part of the clerical industry than the retail industry. They are generally not within the four-walls of the shop. For the small number who are located at the same address, they are frequently physically segregated.
9. In our view, a modern retail industry award ought to exclude those employees who work for retail shops and outlets who work primarily in a clerical capacity. In this regard we rely on our submissions filed in AM2008/7 – Private Sector Clerical Occupation.

WEEKEND AND EVENING WORK

10. A common feature of the retail industry is its extended trading hours into the evening and particularly over the weekend.
11. The differing awards and Notional Agreements Preserving State Awards which currently apply to the retail industry have recognised this particular feature of the retail industry and provide for hours of work which extend into the evening and over the weekend, albeit with different penalty rates and loadings.

12. Having regard to the differences in the industrial instruments which apply to the retail industry and the underlying intention that employers will not experience cost increases, AFEI submits that the penalty rates regime applying under the Notional Agreement Preserving the Shop Employees (State) Award in New South Wales ought to be preserved.
13. This is based on the considerable judicial consideration given to this issue by industrial tribunals in New South Wales who have considered weekend work in the context of the retail industry.
14. In a decision of the Full Bench of the New South Wales Industrial Relations Commission regarding the Shop Employees (State) Award (No. 1682 of 1984), their Honours decided:

"We believe that there is a definite public interest in the added amenity of Saturday afternoon shopping and a direct industrial interest in the further employment opportunities that extended trading on Saturday afternoon implies. We are reluctant to impose a further cost burden such as would inevitably tend to discourage Saturday afternoon shopping, discourage its spread and limit employment opportunities"

15. Their Honours went on to say:

"We do not consider in any event, that in general, there should be further extension of penalty rates in relation to weekend work."

16. With regard to Sunday trading, a decision of the Full Bench of the Industrial Commission in the 1937 Shop Assistants (Metropolitan) Case (1937 AR 456 at page 476), decided that a rate of time and a half was appropriate:

“Sunday Work – Work on Sunday will be paid for at the rate of double time, except in the case of shop assistants employed in a shop on Sunday when the shop is lawfully open for the sale of goods by retail, when time so worked will be ordinary working hours and paid for at the rate of time and a half”

17. In the Hairdressers Case (No. 1232 and 1236 of 1987) of 30 November 1989, the NSW Commission in Court session observed:

“There is a well established line of authority in New South Wales in relation to special and confection shops which generally speaking are small businesses, that fixed proper compensation for any social disability in working in ordinary time on Saturdays at time and one quarter. The rates have been time and one-quarter since the early seventies. Time and one half and especially double time have no place as penalties in ordinary time in retailing and related areas”

18. In citing all of these cases, the Full Bench of the Industrial Relations Commission of New South Wales on 27 September 1991 in three matters concerning the Shop Employees (State) Award in New South Wales stated:

"We think that a conclusion that the rate in ordinary time for work done pursuant to lawful trading on Sunday should be, as it has since 1937, compensated at the rate of time and a half is irresistible.

...

This desirable change, introduced very creditably by the substantial agreement of the parties, will in our view prove beneficial to the economy and the growing tourist and leisure based industries."

19. AFEI believes, for the same reasons that have repeatedly convinced the Full Bench of the Industrial Relations Commission of New South Wales, that a modern Retail Industry Award should not restrict employers from opening on weekends. In this regard hours of work provisions should recognise the trading patterns of retail shops and provide for flexible hours provisions which permit seven-day trading and presently provide penalty rates which in our submission should remain at the current NSW level of time and one quarter for ordinary hours worked on Saturdays and time and one half for ordinary hours worked on Sundays.

20. AFEI makes no further submission in relation to the Retail Industry Award at this stage however, we reserve our rights in relation to a draft award which is to be published for comment. AFEI looks forward to participating in any future discussions between employers and unions in relation to the Retail Industry Award.

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