



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

**AM2008/7**

**AWARD MODERNISATION**

**AFEI**  
Australian Federation of  
Employers & Industries

# **BEFORE THE AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

## **AWARD MODERNISATION**

### **AM2008/7 – PRIVATE SECTOR CLERICAL OCCUPATION**

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. It is the submission of AFEI that it is appropriate for a modern Private Sector General Clerical Occupation Award to be made by the Commission ("a modern Clerical Award"). Further it is our submission that the award should cover all private sector general clerical employees. These submissions will deal with why it is appropriate for there to be a Clerical Occupation Award which applies generally to clerical employees and make some observations about the content of a modern Clerical Award.

### **INDUSTRY v OCCUPATIONAL AWARD**

6. s4 of the *Workplace Relations Act 1996* ("the Act") defines industry as follows:

*"industry includes:*

- (a) any business, trade, manufacture, undertaking or calling of employers; and*
- (b) any calling, service, employment, handicraft, industrial occupation or vocation of employees; and*
- (c) a branch of an industry and a group of industries."*

7. The definition of industry obviously contemplates occupations. Further the Award Modernisation Request states that:

*"3. When modernising awards, the Commission is to create modern awards primarily along industry lines, but may also create modern awards along occupational lines as it considers appropriate."* (our emphasis).

8. The Commission is therefore not precluded from making an occupational award. Further we submit that a Clerical Award could also be considered an industry award given the definition in the Act, and the nature of clerical work and the broad circumstances to when clerical work can apply. It is appropriate for the Commission to make a separate Clerical Occupation Award for the following reasons:

- Clerical employees are not necessarily part of a broader industry. They are part of the system of office administration. The nature of work of clerical employees naturally evolves over time but rarely does it evolve along the lines of a broader industry in terms of specific industry characteristics;
- The system of office administration provides a typical career path in itself. This is recognised by the classification structures of the various clerical and administration awards that apply in all the States which provide for clerical career paths;
- The career path of a clerical employee is generally not into an operational role which would be the natural progression of an employee in a broader industry award;
- By virtue of the career path inherent in the system of office administration, clerical employees tend to move in and out of different industries as they follow their career. It is therefore appropriate that a single modern award apply to their employment, rather than a number of different industry awards as they move from employer to employer;

- Historically clerical employees have been covered by a general clerical award which has operated in each state. Where there has been an issue in the past as to the inclusion of clerical employees into broader awards, this has been dealt with. There is no need for the Commission take a broader approach to that which is already settled.
- Within a business itself office administration can be quite separate. Office employees may be located at a different site or on the same site but in a different location – essentially separating the office administration from the core part of the business. Hours of work are often different as the operating hours of a production floor for example can often be different to that of the office. Certainly clerical employees see themselves as quite different and separate from other employees who form the broader industry.
- There can sometimes be tension between clerical employees in the office and employees on the shop floor. Clerical employees align themselves more with management. Strategically employers have frequently maintained a separation between production employees and clerical employees to avoid possible disruption to their business.

## **THE SYSTEM OF OFFICE ADMINISTRATION**

9. It has long been recognised that the work of a “clerk” has evolved from mere recording with a pen and paper to a more integrated occupation that can fairly be said to fall within the system of office administration.

10. The Clerical and Administrative Employees (State) Award, which now operates as a NAPSA applies to employees engaged in *"any clerical capacity whatsoever"*. This phrase has been the subject of much judicial consideration in NSW. Sheldon J considered the work of clerical employees in the context of a demarcation dispute between the Federated Clerks' Union of Australia, NSW Branch and the Australian Workers Union with respect to purchasing officers (1971 AR 419) ("the Purchasing Officers Case").
11. In that decision, His Honour made the observation that clerical work is ever evolving and referred to their work as being part of the system of office administration. His Honour made the following statement at page 421:

*"Clerical work in industry has long since moved from the Dickensian era of the high stool and the quill pen. The voice and mind are now part of clerical stock-in-trade. So is the acceptance of responsibility and the exercise of discretion. The conception is fluid and progressive... Obviously all employees in an office are not engaged in a clerical capacity. It is clear that professional employees are not nor are those who are truly and basically executive officers. But an employee does not cease to be employed in a clerical capacity merely because his work includes many administrative and non-recording functions. No doubt there are cases near the border which would be difficult to determine but in general, and subject to some special categories, those who are in a subordinate position but are engaged in the ordinary work of office administration are, in my opinion, prima facie covered by this constitution rule."* (our emphasis).

12. The work of clerical employees was again considered in 1996 by Glynn J of the Industrial Relations Commission of NSW (unreported decision of Glynn J; 25 October 1996; IRC No.'s 2335 of 1992; 384 of 1993; 1651 of 1994; 1871 of 1994 and 2367 of 1994). In that case the classification structure in the Clerks' (State) Award was sought to be replaced. In her decision Her Honour stated (at page 10):

*"Since the first grading structure was inserted into the Clerks (State) Award in by Dey J in 1978 (1978 AR 724) (the 1978 Case), there have been massive and fundamental changes to the processes by which employees engaged in any clerical capacity carry out their work: in brief, the development of information technology and of multi-skilling of the employees."*

13. The evolving nature of clerical and administrative work and its general acceptance as an occupation that required its own regulation was also recognised by the Full Bench of the Industrial Relations Commission of NSW in *Kingmill Aust v Federated Clerks' Union* (106 IR 217). The Full Bench made the following observation at page 230:

*"It is apposite, in this respect, to observe that the industry in which the Award operates has continued to experience considerable change since the time of decisions discussed earlier in these reasons. This is a significant consideration as the phrase "in any clerical capacity whatsoever" is, in our view, ambulatory in nature and will generally reflect changes in the nature of the work of persons performing clerical and administrative functions in the workplace."*

14. Clerical work was therefore evolved and is sufficiently broad to warrant its own award. Almost every business employs a clerical employee in one form or another. In other areas clerical work can be considered an industry of itself. For example, the Clerical Temporary Employment Industry and Call Centres.
15. It is our submission that the broad scope of clerical work should be considered by the Commission and in the making of a clerical award that is sufficiently flexible that it can adapt as the nature of clerical work evolves. Industry awards that contain clerical employees would generally be restrictive for both employers and employees. A modern clerical award should recognise this end should provide maximum flexibility for both employers and clerical employees.

#### **THE CAREER PATH OF A CLERICAL EMPLOYEE**

16. The evolution of the work of clerical employees has been recognised in the development of career-path based classification structures that allow employees to move within the system of office administration.
17. Placing clerical employees within broader industry awards has the potential to dilute the career path of clerical employees. Clerical employees are unlikely to move into operational roles which require qualifications or skills that they are unlikely to acquire while performing work within the system of office administration.

18. It is our submission that it would be inappropriate for the Commission to depart from history in relation to clerical employees and remove them from a general clerical award. To do so would diminish the career opportunities that might otherwise have been available to employees via progression through an appropriate classification structure designed specifically for clerical employees.
19. In the past where industry has considered it appropriate to include clerical employees in a broader award this has been dealt with. For example, front office administration employees in certain sectors of the hospitality industry have been included in broader awards (see Hospitality Industry – Accommodation, Hotels, Resorts and Gaming Award 1998, Motels, Accommodation and Resorts Award 1998) for clerical employees has been developed and the Club Employees (State) Award. In these instances, a classification structure with an appropriate career path has been developed.
20. There is no reason for the Commission to depart from these exceptions to a general clerical award that have already been dealt with. In our submission where an industry already includes clerical employees that should not be disturbed. But, in our view, it is inappropriate for a further dilution of clerical employees into broader industry awards unless a particular industry can establish good reason for doing so, in this regard we support the submissions of the Real Estate Employers Federation.

21. The Award Modernisation Request requires the Commission at point 9:

*"...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."*

22. Given the career path that clerical employees already enjoy by virtue of the respective clerical awards that have traditionally applied to their employment, these employees are more likely to move from industry to industry as they progress through that career path. In our submission it is appropriate then for the Commission to maintain one award that would apply to these employees rather than multiple industry awards could potentially create confusion as well as disturbing their natural career path.

## **MANAGERIAL EMPLOYEES**

23. Point 2 of the Award Modernisation Request states:

*"The creation of modern awards is not intended to:*

- (a) extend award coverage to those classes of employees, such as managerial employees, who, because of the nature and seniority of their role, have traditionally been award free. This does not preclude the extension of modern award coverage to new industries or new occupations where the work performed by employees in those industries or occupations is of a similar nature to work that has historically been regulated by awards (including State awards) in Australia;"*

24. It is clear from the request that modern awards should not be made to cover traditionally award free areas such as managerial employees. It is the submission of AFEI that in making a Clerical Award the Commission must be conscious not to extend the coverage of the Award to capture previously award free managerial roles.
25. The Clerical and Administrative Employees (State) Award, now a NAPSA ("the Clerical NAPSA"), has never applied to managerial employees. There are no classifications within the Award to cover managerial employees and the descriptors outlined in the classification structure do not extend to managerial functions. It is our submission that a modern Clerical Award should not be extended to cover those employees.
26. The Clerical NAPSA provides an exemptions clause which allows employers and employees to be paid an annualised salary of 15% above the weekly rate set out for the highest grade in the Clerical NAPSA which in turn exempts the employee from a number of provisions of the Clerical NAPSA. Historically the exemptions clause in the Clerical NAPSA recognised those clerical employees who were "*on the road to a degree of executive or supervisory responsibility*". (Re: Clerks (State) Award; 1978 AR 724).

27. This was recognised by Sheldon J in the *Purchasing Officers Case* and Dey J in *Re: Clerks' (State) Award* (1978 AR 724) In that decision His Honour stated at page 745:

*"Having regard to the fundamental changes which are being introduced into the structure of the award the present does not seem to me to be the appropriate time to contemplate the elimination of the exemption an making all, except those engaged in a managerial capacity, subject to full award coverage."*

### **AN EXEMPTIONS PROVISION IN A MODERN CLERICAL AWARD**

28. It is our submission that a modern Clerical Award should contain a provision as found in the Clerical NAPSA which provides for employees to be paid an annualised salary which exempts them from certain provisions in the Award.
29. An exemptions provision provides flexibility to employers and employees. In *Clerks' (State) Award* (unreported decision; IRC No.'s 21 and 391 of 1968; 25 March 1969) Burns CC stated (at page 57):

*"There are no bones made by either party about what is sought and why it is sought. It is to the point of attainment of a degree of seniority..."*

30. The current exemptions clause recognises the career path that is enjoyed by a clerical employee under the Clerical NAPSA and allows them to progress through the career path setting them on a path to seniority. It would be remiss for a modern award to not maintain such a provision.

### **PROVISIONS IN A MODERN AWARD**

31. AFEI reserves its position its relation to specific provisions which should be contained in a modern Clerical Award, however, we do make the following observations.

#### **Classification Structure**

32. Given the nature of clerical work and its constant evolution, a classification structure should not be overly restrictive and should provide maximum flexibility to allow a natural progression through the structure. A modern award should recognise the changing nature of clerical work and the environment that it operates within. As was noted by the Full Bench of the Industrial Relations Commission of NSW in Clerks (State) Award (unreported decision of Bauer and Cullen JJ and Redman CC; 11 May 1993; IRC No. 1194 of 1991) at page 17 just prior to the current classification structure being inserted into the Clerical NAPSA:

*“The award which existed before the introduction of the 1978 current structure was quite inflexible and almost Dickensian in its simplicity. Change in communications technology and recording technology which gathered momentum in the 1970s led to pressures for change in the award which had traditionally covered persons employed in*

*a clerical capacity. Further the comparatively rapid increases in the Australian population and industry required access to new management methods. As a result of these changes and consistent with the recognition that career paths should be put into awards as structures, The Clerks' Award commenced to be modernised by the agreement in 1978."*

33. It is our submission that a modern award in 2008 and beyond should maintain flexibility to allow it to be adapted to suit changes in the work and the environment in which the work is performed.

#### **Hours of Work**

34. A modern Clerical Award should recognise that businesses have shifted from the traditional Monday to Friday 9am to 5pm model and now operate on a more extended hours basis. Clerical employees no longer only work those traditional hours. An example is call centres which operate into the evening and on weekends to meet the needs of customers and medical centres to meet the needs of patients.
35. A modern Clerical Award should therefore contain flexible hours provisions without restrictive penalty rates to ensure those businesses who operate extended hours are not disadvantaged.

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