



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

AM2008/15

AWARD MODERNISATION

AFEI
Australian Federation of
Employers & Industries

**BEFORE THE AUSTRALIAN INDUSTRIAL RELATIONS
COMMISSION**

**AM2008/15 - BUILDING, METAL AND CIVIL
CONSTRUCTION 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.

AFEI's Interest

5. AFEI has a long history of representing employers in the building, metal and civil construction group. The main awards/NAPSAs in which it has traditionally had an interest in the AIRC's list of awards in this group are:

- Electrical, Electronic & Communications Contracting Industry (State) Award
- Electricians, &c (State)
- Plumbers and Gasfitters (State)
- Asphalt and Bitumen Industry (State)
- Brick and Paver Industry (State)
- Cement Mixers and Concrete Workers, Central Batch Plants (State)
- Building and Construction Industry (State)
- Building Employees, Planners, Technical Employees (State) Award
- Gangers (State)
- General Construction and Maintenance, Civil and Mechanical Engineering, &c (State)
- Joiners (State) Award
- Plant, &c, Operators on Construction (State)
- Professional Engineers and Professional Scientists (Private Industry) (State) Award
- Surveyors Field Hands (State)
- Landscape Gardeners on Construction (State) Award
- Professional Surveyors (Private Industry) (State) Award
- Engine Drivers, &c, General (State)
- Asphalt & Bitumen Industry (NSW & ACT Award)
- Draughting, Production Planners & Technical Workers Award
- Engine Drivers & Firemen's (General) Award

- Gas Industry (Contractors, Mains & Services) Interim Award
- Cement and Concrete Products Award
- Mobile Crane Hire Award
- National metal and Engineering on Site Construction Industry Award, 1989
- National Joinery and Building Trade Products Award
- National Building and Construction Industry Award
- Plumbing Industry (New South Wales) Award
- Technical Services professional Engineers (General Industries) Award
- Timber and Allied Industries Award
- Metal, Engineering and Associated Industries
- Metal, Engineering and Associated Industries
- Paint Industry – General
- Paint and Varnish makers, &c (State)

6. We 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.”

7. 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.

8. In AFEI's submission, award modernisation should only alter existing regulation to the extent that the award better reflects the requirements of the employers operating under it, and hence their employees. As such, any change should satisfy the requirements in s 576(A2) of the Act:

- “(a) must be simple to understand and easy to apply, must reduce the regulatory burden on business; and
- (b) together with any legislated employment standards, must provide a fair minimum safety net of enforceable terms and conditions of employment for employees; and
- (c) must be economically sustainable, and promote flexible modern work practices and the efficient and productive performance of work; and
- (d) must be in a form that is appropriate for a fair and productive workplace relations system that promotes collective enterprise bargaining but does not provide for statutory individual employment agreements; and
- (e) must result in a certain, stable and sustainable modern award system for Australia.”

9. It is these requirements that should be the overriding considerations when modernising awards. While we note the Minister's Request asks that the AIRC take account of

the desirability of reducing the multiplicity of awards operating in the workplace relations system, it should not be approached as an end in itself. We submit that reducing the number of awards is only desirable if, consistent with the objectives in s 576A(2), it will result in better awards for the employers and employees affected.

10. AFEI recognises that the industry has traditionally been considered to be separated into building, mechanical engineering and civil work. AFEI supports a continuation of this approach when creating modern awards for the industry. AFEI considers that a continuation of this approach to regulation of the industry is conducive to more productive work arrangements. It would also avoid disturbing existing demarcation arrangements giving rise to the possibility of industrial difficulties and disputation. Such an approach is consistent with paragraph 3 (j) of the Ministers Request:

“In accordance with section 576B of the Act, the Commission must have regard to the following factors when performing its functions under Part 10A of the Act and this award modernisation request:

- (j) the representation rights, under the Act or the Registration and Accountability of Organisations Schedule, of organisations transitionally registered associations.”

11. AFEI is concerned to avoid upsetting traditional areas of union coverage in the industry. It was this concern that led to AFEI putting a substantial case before the AIRC in the *CFMEU Rules* case. The Full Bench of the AIRC in its

decision of 13 June 2001 (Print 905003) extracted parts of AFEI's (then the Employers' Federation of NSW) written submission from the proceedings before Williams SDP as follows:

- "(1) Evidence was tendered by the EFNSW from ten witnesses, three of whom gave evidence by way of unchallenged statements to the Commission. That unchallenged evidence was given by Ms Barratt, Mr Ward and Mr Chadwick.*
- (2) Mr Chadwick's evidence expressed the concern of the EFNSW that the scope of the CFMEU application, if granted, could go to allow that union to cover employees engaged as security guards, cleaning contractors or toll collectors on roadways. Mr Sutton, the National Secretary of the CFMEU, gave evidence that the union does not seek to cover such employees nor did it seek to cover employees of landscape gardeners not employed on construction sites.*
- (3) Ms Barratt evidenced her extensive experience in representing the industrial interests of members of the EFNSW. Her evidence went to particular areas of industry concerning sporting complexes, entertainment complexes and showgrounds. Ms Barratt's evidence indicated that the AWU, along with the Media, Entertainment and Arts Alliance, had a long history of industrial coverage in these areas. Ms Barratt's evidence is that there is a clearly understood line of demarcation coverage between the CFMEU, the AWU and the Media, Entertainment*

and Arts Alliance at sports complexes, entertainment complexes and showgrounds. Ms Barratt expresses a concern that the CFMEU application in these proceedings seeks to apparently expand its coverage and intrude into areas traditionally covered by the AWU and the Media, Entertainment and Arts Alliance. She expresses concern that if there is competition for union membership generated by the CFMEU application then it could lead to industrial disputation.

- (4) Mr Ward's unchallenged evidence principally goes to a detailed examination of the industrial coverage in the quarry industry in New South Wales and the extent to which the AWU has played a pivotal role in representing employees in this industry. The unchallenged evidence is that the AWU has become the one union covering the operations of the quarry industry in New South Wales.*
- (5) Mr Ward evidences the FEDFA's limited involvement in the quarry industry and includes the details of an agreement which has been reached between the FEDFA and the AWU to formally demark the FEDFA out of the New South Wales quarrying industry.*
- (6) Mr Fisher gave extensive evidence on CSR's involvement in the quarry, cement and concrete products and concrete batching industries. On Mr Fisher's evidence, on which he was cross-examined, the AWU has a long established involvement in industrial coverage of CSR employees in these industries. CSR has been able to successfully negotiate with the AWU various enterprise bargains.*

- (7) *Mr Fisher gave evidence of 'a disturbing trend' which has emerged with the CFMEU attempting to gain access to premises where employees are engaged who have been historically covered by membership of the AWU. These efforts by the CFMEU have caused significant disruption to the CSR business in the Southern Region of New South Wales and included threats to block CSR products and materials to be supplied to the City-Link project in Melbourne. The CFMEU had also caused stoppages to occur in CSR's timber and building products business, apparently in support of a CFMEU dispute in the Northern Territory.*
- (8) *Mr Fisher gave extensive evidence on the CFMEU's involvement in attempting to dismantle an agreement negotiated between the company and the AWU concerning future employment in the company's Sydney concrete business.*
- (9) *Mr Schacht, Mr Bornstein and Mr Sindel all gave similar evidence of the long term, traditional and effective involvement of the AWU in the quarrying and concrete operations of their respective companies.*
- (10) *Mr Platt, the immediate past president of the Landscape Contractors Association of New South Wales, gave extensive evidence of the AWU's involvement in the landscape gardening industry and the negotiations with the AWU of a specific Landscape Gardeners Award to cover employees on building and construction sites.*

(11) *Mr Platt gave disturbing evidence of the involvement of the CFMEU in the landscape gardening industry which clearly indicated the significant disruption the CFMEU appeared to deliberately cause to otherwise industrially peaceful sites. Mr Platt evidenced how on a large Sydney unit development site a CFMEU official took employees engaged on behalf of Mr Platt's company away from their workplace and demanded they stay in the crib shed until they were all members of the CFMEU. Those employees some of whom were already members of the AWU were forced to join the CFMEU as well. Another claim made by the CFMEU towards Mr Platt's company on this site was associated with alleged 'safety issues'. Mr Platt describes how he was forced by the actions of the CFMEU to buy every employee nominated by the CFMEU a new pair of sunglasses, whether they already had sunglasses or not, and to provide an additional bottle of sunscreen although there was already sunscreen available on the site. These claims were made when Mr Platt's company was two days away from practical completion of his contract on the site and he was forced to accede to the CFMEU's demands for fear of suffering significant liquidated damages in accordance with his contract.*

(12) *Mr Wigmore, who is currently employed as Divisional Manager - Construction and Special Projects with the Federation, gave evidence of his long involvement in the construction industry and the significant use, and benefit to the industry, which flowed from the continued application of the 1986 and 1992*

demarcation agreements between the AWU and the CFMEU.

(13) Mr Wigmore gave evidence on the use that he has put, and continues to put, to the 1986 and 1992 demarcation agreements and the way in which those agreements have effectively maintained industrial peace on construction sites in New South Wales over many years.

(14) Mr Harridge gave evidence of the AWU's involvement in the negotiation of construction site agreements and the way in which the 1986 demarcation agreement stopped the ongoing demarcation problems between the AWU, the BWIU and the FEDFA. Mr Harridge's evidence was to the effect 'I cannot recall any major demarcation dispute between these unions since (that) agreement'.

(15) The CFMEU should not now be rewarded with an expanded coverage, particularly into the construction and associated industries, on the back of their repudiation of demarcation agreements which stood the test of time and which acted to benefit all participants in the industries concerned.

(16) To grant the application will lead to an inevitable continuance of the industrial disruption demonstrated on the evidence in industries and businesses where the CFMEU have had little or no involvement and which businesses would clearly be significantly and detrimentally effected by the ensuing industrial unrest which follows the CFMEU claim for membership.

(17) *The EFNSW submits that the application by the CFMEU should be rejected in total.*" (at 192)

Extending the building and construction industry coverage beyond building and construction sites

12. AFEI would be concerned by any attempt to extend the scope of these industries beyond the traditional areas currently covered by the applicable awards. Areas not traditionally falling within the industry include, amongst many others: furniture manufacturing, the manufacturing of products which may be used in building (eg, concrete, concrete products, terracotta products, gypsum/plaster products and asphalt and bitumen products); haulage of pre-mixed concrete, bitumen, quarried materials, excavated materials, bricks etc; fabrication of trusses, frames, windows, doors, etc; and quarries, sand or gravel pits.
13. AFEI would not support an award for work not performed on building and construction sites. We understand that some building and construction industry participants have been considering such an extension calling it "off-site construction work". Reliance is placed upon the definition of "building work" in the BCII Act to justify such a change.
14. In our submission work performed off-site is not construction work and should not be treated as such. Reliance upon the definition in the *Building and Construction Industry Improvement Act* (BCII Act) to extend the scope of awards beyond building work (as

these terms are understood in an industrial context) is misplaced.

15. The broad definition of building work in the BCII Act and the meaning giving to these terms in industrial context are different because the purpose of the BCII Act is different to that of an award. The BCII Act is intended to cure unlawful industrial behaviour while awards are intended to regulate terms and conditions of employment in an industry. The BCII Act has a broader definition of building work to ensure that the jurisdiction of the BCII extends beyond commonly understood definitions of building work. Such an extension enables the ABCC to deal with other industries which, while not in the building industry, could be affected by unlawful from or by the building industry.

16. The broad definition in the BCII Act was not intended to extend existing industrial arrangements beyond traditional building and construction work on the basis that they were a model appropriate for adoption by industry more generally. On the contrary, the definition was broad to enable the ABCC to ensure that the industrial practices in the building industry could not be extended beyond work on-site. This is made clear in the explanatory memorandum accompanying the *Building and Construction Industry Improvement Bill 2005*:

“The scope of the BCII Bill reflects the need to capture the unlawful and inappropriate conduct identified by the Royal Commission. The provisions of the BCII Bill will apply to employees, contractors, employers, employer organisations and unions in the

commercial sector of the building and construction industry. Although the scope and definitions of the BCII Bill have been developed to cover the commercial sector, there will be businesses whose operations are not limited to the commercial construction sector that will in some cases also be covered by aspects of the new laws. This will ensure that all inappropriate conduct is caught.”

17. The broad definition of building work under the BCII Act was intended to maximise the scope of the ABCC’s jurisdiction and powers to ensure that the unsatisfactory industrial practices in the industry identified by the Cole Commission could be effectively outlawed and policed. Further, the definition was intended to be broad enough to permit the ABCC to intervene to ensure that if pressure was placed upon suppliers, etc to the industry that it would be within the powers of the ABCC to stop that from occurring. In these circumstances, there is no basis for extending the meaning that the AIRC has traditionally considered as being appropriate for the industry.

Electrical Contracting, etc

18. In its Statement of 3 September 2008 the AIRC noted:

‘While we have included the electrical contracting industry in the building metal and civil construction group in Stage 3, this does not prejudice consideration of the proposal for an electricians and electrical contracting occupational modern award.’
(at para 5).

19. AFEI would not support the electrical contracting industry award being subsumed by another industry award without the electrical contractor's agreement. This industry is an industry itself and has a long history of having its own industrial arrangements. Further, electrical contractors are and is not limited to working in construction but also perform maintenance, servicing etc. For the industry to move from being covered by one award to potentially a number (depending upon the type of work performed) would seem counter to the concept of rationalising the number of awards applying to any one employing enterprise AFEI puts no specific submission as to how the painting and plumbing industries should be dealt with in the award modernisation process at this stage but is open to discussion with the relevant representative organisations

Conclusion

20. In conclusion it is appropriate that there be three modern awards dealing with building construction work, civil construction work and engineer's construction work. These awards should not extend to electrical contractors, nor should their coverage extend beyond building and construction work.