



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

AM2008/13

AWARD MODERNISATION

**AFEI**  
Australian Federation of  
Employers & Industries

**BEFORE THE AUSTRALIAN INDUSTRIAL RELATIONS  
COMMISSION**

**AM2008/13 - HEALTH AND WELFARE SERVICES  
(EXCLUDING SOCIAL AND COMMUNITY SERVICES)**

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. AFEI supports grouping awards in the private sector as follows:
  - Aged Care
  - Aboriginal Health
  - Private Hospitals
  - Nurses (other than in Hospitals & c)
  - Pathology
  - Medical Imaging
  - Dental
  
6. We note that the Full Bench Statement of 3 September 2008 indicated that the Health and Welfare Services Industry Award would exclude social and community services from Stage 2 of the award modernisation process. The social and community services sector is to be considered in Stage 4. On this basis, AFEI has an interest in the NSW and federal awards listed in **Appendix A** for the Health and Welfare Services (excluding Social and Community Services):
  
7. It is only the private sector which is within the reach of modern awards that can be made. Such awards should be created only having regard to the private sector and should be expressed to only apply to the private sector.
  
8. In its 20 June 2008 statement, the Full Bench observed:

*“..., to the extent that employees are employed by the Crown they are beyond reach of modern Awards made under the WR Act as it presently stands. It is arguable that most of the public sector will not be covered by modern Awards in the aged and health (and nursing if it is determined that there should be a nursing occupational Award) sectors. On the other hand, the limits of the Commission’s jurisdiction in relation to the public sector in the future are yet to be determined. ”*

9. Further the Full Bench also observed that

*“– Aged care and the health sector more generally have a particular circumstance that applies to relatively few industries, namely the existence of a substantial public sector alongside a substantial private sector. In some parts of Australia there are significant differences between award/NAPSA conditions applying in the public and private sectors.”*

[Paragraphs 101 and 102 AIRCFB 500, 20 June 2008]

10. It is our submission that the public sector should not be included in any of the proposed health industry modern awards, nor used as a comparator.

**Relevant issues to be considered**

11. The relevant issues the Full Bench is to consider when undertaking the Award Modernisation are set out in the Request under section 576C(1) – Award Modernisation, issued by the Minister for Employment and Workplace Relations on 16 June 2008 and the relevant sections of the Act; s 576A, section 576B, section 576J, Subdivision B of Part 10A and 576T.

12. The relevant section from the Minister's Statement is as follows:

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

- (a) extend Award coverage to classes of employees that have traditionally not been covered by an Award;*
- (b) result in high income earners being covered by modern Awards;*
- (c) disadvantage employees;*
- (d) increase costs for employers"*

13. AFEI has proposed the above awards with the intention of seeking greatest conformity with the Ministerial intention to not

- extend award coverage to employees not traditionally covered by award
- result in high income earners being covered by modern awards
- disadvantage employees
- increase costs for employers

14. In our view, creating three or four macro awards which agglomerate the very large number and highly diverse skills and occupations in the health care sector can only result in a complex award restructuring and realignment of classifications. This will involve a major upheaval of existing pay and conditions, necessitating costly transitional arrangements.
15. Classification structures, pay rates and allowances, hours of work and forms of employment differ considerably throughout the industry and its different operating environments. Consolidating these into a minimal number of all encompassing awards may well fundamentally affect the economic sustainability of service providers.
16. Considerably broadening the scope and coverage of an award must inevitably introduce terms and conditions which differ in their history, content and the nature of the work regulated. This outcome can only be avoided if separate and distinct health services, which are delivered in a separate and distinct manner are grouped together, with attention being paid to the context in which these services are delivered.
17. Consequently we propose the formation of modern awards which seek to align the provision of similar services in comparable operating environments and which will reduce the number of awards individual employers will have to deal with in their workplaces.

### **Coverage/Exemptions from modern awards**

18. Under the coverage clause of a modernised award, coverage provisions should reflect the relevant pre-reform federal Awards and the coverage under the NAPSAs. We would seek to maintain any exclusions that are currently contained in the awards/NAPSAs.
19. Further, the Minister has indicated that modern awards will not apply employees in receipt of remuneration above \$100,000 per year.
20. There should also be consideration of additional exemption provisions in particular awards.
21. In the private sector, many occupational groups, particularly professional and para-professional groups (e.g. optometrists, physiotherapists, dentists, etc have traditionally been award free in the private sector having regard to the nature and seniority of their role and the different context in which they work(usually private practice).
22. The nature of the award modernisation process makes it difficult for the AIRC to conduct the type of inquiry into rates of pay and conditions which is appropriate when considering the application of an award to award free work.

23. The type of award that is created to cover award free employees in such circumstances has to be as minimalist as possible. Further, such awards should not extend those to classes of employees who, because of the nature or seniority of their role, have traditionally been award free. This position is made clear in clause 2(a) of the Minister's Request.

"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 or 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;"

and clause 4A of that Request:

"The Commission is to create a modern award to cover employees who are not covered by another modern award and who perform work of a similar nature to that which has historically been regulated by awards (including State awards). The Commission is to identify this award as such. This modern award is not to cover those classes of employees, such as managerial employees, who, because of the nature or seniority of their role, have not traditionally been covered by awards.

The modern award may deal with the full range of matters able to be dealt with by any modern award however the Commission must ensure that the award deals with minimum wages and meal breaks and any necessary ancillary or incidental provisions about NES entitlements.”

24. While the Minister’s Request makes it clear that modern award coverage can be extended in circumstances where the work is of a similar nature to work historically regulated by awards (including State awards) it does not operate on the basis that some existing comprehensive federal award should apply. As clause 4A makes clear, such employees are to be covered by a catch-all award for award free work in circumstances where this work is of a similar nature to that which has been historically regulated by awards (including State awards).
25. The type of award that would be made to cover such employees would be of a most minimalist kind, and would essentially be confined as required by clause 4A of the Minister’s Request, to “minimum wages and meal breaks and any necessary ancillary or incidental provisions about NES entitlements.”
26. The type of award for such employees is probably best considered towards the end of the award modernisation process.

## **Transitional Arrangements**

27. Paragraph 12 of the Minister's Award Modernisation Request states:

*"The Commission may include transitional arrangements in modern awards to ensure the Commission complies with the objects and principles of award modernisation set out in this award modernisation request."*

28. Section 576T(2) of the WR Act also provides that awards may contain geographical differences in terms and conditions for up to 5 years.
29. We are concerned that these provisions are not utilised for the purpose of allowing very broad groupings of awards which may at best have only tenuous linkages and consequently require employers to accept increased costs, even over a longer time frame. Regardless of the time frame, increased costs remain exactly that — an increase in cost. Transitional arrangements should not be used to avoid the intention of not increasing costs, nor detract from the initial task of properly comparing specific terms and conditions to assess the cost impact of any proposed changes. Where increased costs are to be incurred, an alternative method for modernising an award should be adopted.
30. AFEI submits that no transitional arrangements should be put in place until the final form of an award, its interaction with National Employment Standards and the as yet unseen substantive legislation are understood.

**Exclusion of enterprise specific NAPSAs and pre-reform enterprise awards**

31. The requirements of s576V (3) of the WR Act and the Minister's request at paragraph 2 (e) are to be met. Enterprise awards (whether a pre reform or NAPSA) should not be modified (the Minister's request at paragraph 2 (e)). In addition, a modern award should provide an express term excluding enterprise specific NAPSAs and pre-reform enterprise awards that apply in the particular industry sector.

**Flexibility required in health care operations**

32. We submit that the nature of health care operations, particularly those providing acute care, emergency care and 24/7 care require flexibility and simplicity in working arrangements. There should be a minimum of restrictions on flexible working arrangements including shifts, rostering and the form of employment (for example, restrictions on casual and part time employment) and recognition given to the fluctuating needs of patients and consequently, service providers.

**Aged Care**

33. AFEI seeks a separate award for the aged care industry which would cover direct and indirect aged care services (including support and administrative services) in accommodation for the aged, aged care hostel facilities, nursing home facilities, residential care for the aged facilities and home care services. AFEI supports the submissions and the draft Aged Care

Industry Award 2010 proposed by the Aged Care Industry Employer Association.

### **Aboriginal Health**

34. The Aboriginal Health Services Industry Award 2010 would cover aboriginal health workers (including dental) and support staff. Our members advise that the structure and content of a modern award which is specifically drafted for aboriginal health care needs is preferable to an award which is based on the provision of services to the general community. In particular the award should recognize the specialist qualifications of aboriginal health care workers.

### **Private Hospitals**

35. AFEI views private hospitals as a distinct area, and reserves its position in relation to any exposure draft award that may be issued for this sector.
36. AFEI submits that any award for this sector should not be extended to day procedure centres and the like. Nurses employed in such centres are more appropriately covered by an award applying to nurses other than in hospitals, (as would apply, for example, to nurses in medical centres) because working hours are arranged in a similar way. In particular, they do not operate as continuous process industries, like hospitals, making a traditional shift approach inappropriate.

**Nurses (Other Than In Hospitals & c)**

37. AFEI does not object to the establishment of an award for nurses not otherwise covered by an industry award. The coverage of such an award could be similar to the coverage to the Nurses Other Than In Hospitals (State) Award in NSW (now a NAPSA). It could conveniently also subsume the coverage of the Occupational Health Nurses & c (State) Award in NSW (now a NAPSA).
38. Nurses under these NAPSA's work in a very broad range of settings, and usually constitute a very small minority of the workforce. They also usually work in industries that would not be characterised as health. The main setting in which nurses under these awards that would be described as health would be medical centres, day procedure centres, doctor's practices and the like.
39. These types of operations do not operate as continuous process industries but do open for extended hours to provide service to patients/clients. Medical centres, for example, generally open until at least 7pm or 8pm of an evening and usually on weekends, often in shopping districts.
40. Obviously, there is a clear public interest in maximising the availability of such services, and providing for ordinary hours of work within these usual opening times. The NSW NAPSA for example, allows for ordinary hours to be worked by day workers on any day of the week between 7am and 7pm.

41. A similar approach to that taken by the AIRC in determining penalties for the Contract Call Centres Award (PR 961600) is appropriate in this context:

“We note that the shift approach does not apply in a number of other industries which have flexible hours of work geared to customer demand, such industries include the retail industry and the hospitality industry. Like the enterprises we are primarily concerned with in this case, those industries can be distinguished from industries in which workflow may be more stable and constant over the period of operation, particularly continuous process industries. In this sector an overwhelming factor is that the customer demand is immediate...”

“For these reasons we have decided that we should not continue the traditional shift approach for these enterprises and that some modification is required. We think that a system in which penalty payments are made only in relation to time worked during penalty hours is fairer in the businesses with which we are concerned and more conducive to providing opportunities for full-time employment.” (at paras 50, 51)

42. The penalty for work outside those hours is appropriately 15% - the night work loading currently in the Award.

43. On weekends, the penalty for ordinary working hours should be time and one-quarter and time and one-half on Saturday and Sunday. Such an approach would be consistent with the standards in NSW for work on these days; see for example shift employees.

44. We note that the AMA proposes similar conditions for doctor's practices in relation to casual employees the loading under the award are 10%. However, this loading is not payable when performing night and weekend work for which other penalties are payable, this position was determined by Maidment J of the Industrial Relations Commission of NSW of 24 September 1992 when he accepted the position at AFEI (then the Employers Federation of NSW) holding:

"I fail to see logic in the prescription, sought by the Association, of higher rates for casuals than for other employees performing night and weekend work unless a discouragement to their employment is necessary. The evidence discloses no need, either present or potential, for penalty rates for casuals to be a discouragement to their employment."

45. There is also a 2 hour minimum engagement for casual and part-time employees.

46. We note that the AIRC has determined that it will adopt a 25% casual loading. This will obviously be a substantial increase on the 10% loading currently payable. In our submission, the 25% loading should not be payable in addition to the weekend penalties for time and one-quarter and time and one-half. Also, the loading for night work should

not apply to casual employees, and the two hour minimum engagement should be retained.

### **Medical Imaging**

47. We note that there is an existing Federal Award and various State Awards for this industry. The industry prefers its own award as it has enabled all employees to be covered (including professional, technical and support staff). We support there being one award for this industry, and have no objection to the existing Federal Award (Health Services Union Of Australia (NSW/Act Private Medical Imaging) Award 2004) being used as a basis for such an award.

### **Pathology**

48. In New South Wales this industry has been regulated by an award known as the Private Pathology Laboratories (State) Award (now a NAPSA). This Award was made as a result of very extensive proceedings before Glynn J as a result of competing applications (including an application by AFEI's predecessor, the Employers' Federation of NSW) for a first award for the industry. These proceedings culminated in two decisions given on 17 June 1993 – one demarking union coverage in the industry (to the then FMWU in favour of the then HREA) and the other determining the terms of the Award.

49. Her Honour's 161 page decision was the result of very extensive evidence from employers and employees in the industry. The Award that arose from those proceedings sets fair and reasonable rates of pay and other conditions of employment and we submit is an appropriate basis for the creation of a modern award for this industry.

### **Dental**

50. There are two awards (now NAPSAs) that have traditionally applied to this industry in New South Wales, the Dental Assistants and Secretaries (State) Award and the Dental Technicians (State) Award. While we would prefer that these areas remained separate, if the AIRC thought it appropriate to reduce the number of awards in this industry, their coverage could be combined.
51. The Dental Technicians NAPSA was the subject of a thorough review, particularly in relation to working hours by Glynn J of the Industrial Relations Commission of New South Wales (IRC 12696 of 1991; IRC 266 of 1992; 18/12/92; unreported). Upon application by AFEI (then the Employers Federation of NSW), Her Honour provided for a 38 hour week to be worked within a spread of hours of 7.00 am to 7.00 pm, Monday to Saturday with a penalty of time and one-quarter for ordinary time worked on a Saturday.

"I accept the submissions by the employers as to why the working of ordinary hours on Saturday would be of benefit to the industry.

Any penalty rate paid for the working of ordinary hours on Saturday is directed towards compensation for the social inconveniences of working at that time. Those inconveniences are not, as such, related to the work, skilled or unskilled, being undertaken by the employee.

In respect of hours, I decide that:

1. The award shall provide that the ordinary working hours per week shall average 38 hours per week;
  2. The daily spread of hours shall be from 7.00 am to 7.00 pm;
  3. Ordinary hours of work may be worked over the period Monday to Saturday;
  4. Payment for ordinary hours of work worked on Saturdays shall be at the rate of time and one quarter;" (at p. 37, 38)
52. The Dental Assistants and Secretaries Award, on the other hand, has a loading of \$13.40 payable for ordinary hours of work until midday on a Saturday (this equates to less than a 25% loading). The Award does, however, enable hours to be worked until 8.00 pm on three nights of the week with a loading of 25% for such hours.

53. The Dental (Private Sector Victoria) Award provides for ordinary hours to be worked between 7.00am and 9.30pm with a 12.5% loading for work performed after 6.30pm. On Saturdays, it provides for a loading of time and one-half for ordinary hours worked after 1.00pm but no loading for work performed prior to that time.
  
54. We propose that hours of work be between 7.00 am and 9.30 pm, Monday to Friday and 7.00am to 5.00pm on a Saturday. A 12.5% loading should apply to ordinary hours worked between 6.30 pm and 9.30 pm, Monday to Friday. On Saturdays we would have no objection to a loading of 25% after midday.
  
55. It is also appropriate that the exemptions clause in the Dental Assistants and Secretaries Award be continued. This clause effectively provides for an annualised wage or salary arrangement consistent with s 576J (1)(e) and forms the foundation for many existing salary arrangements in the industry.

## APPENDIX A

### HEALTH & WELFARE SERVICES GROUP

Aged Care General Services (State) Award  
Charitable Institutions (Professional-Paramedical Staff)(State) Award  
Charitable Institutions Professional Staff Social Workers (State) Award  
Charitable Sector Aged Care & Disability Services (State) Award  
Community Pharmacy (State) Award  
Dental Assistants and Secretaries (State) Award  
Dental Technicians (State) Award  
Divisions of General Practice (State) Award  
Hospital Employees (State) Award  
Miscellaneous Workers' - Home Care Industry (State) Award  
Nurses, &c., Other Than in Hospitals (State) Award  
Nurses, Non-Government Schools (State) Award  
Nursing Home Professional Employees (State) Award  
Nursing Homes &c Nurses (State) Award  
Occupational Health Nurses' (State) Award  
Private Hospitals, Aged Care and Disability Services Industry  
(Training)(State) Award  
Private Hospital Employees (State) Award  
Private Hospital Nurses (State) Award  
Private Hospital Professional Employees (State) Award  
Private Medical Imaging & Radiation Technology (State) Award  
Private Pathology Laboratories (State) Award  
Liquor, Hospitality and Miscellaneous Union Supported Employment  
Services Award 2005  
Community Employment Training Support Services Award  
Health Services Union of Australia (Aboriginal and Torres Strait Islander  
Health Services) Award 2002  
Health Services Union of Australia (NSW/ACT Private Medical Imaging)  
Award 2004