



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

AM2008/21

AWARD MODERNISATION

AFEI
Australian Federation of
Employers & Industries

**BEFORE THE AUSTRALIAN INDUSTRIAL RELATIONS
COMMISSION**

**AM2008/21 - PRIVATE TRANSPORT INDUSTRY (ROAD,
NON PASSENGER)**

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 has a long history of representing employers in the transport industry, particularly in NSW where the industry has traditionally been regulated by a range of awards.
6. The transport industry in New South Wales is regulated by the Transport Industry (State) Award for general transport performed by transport companies and the Transport Industry – Mixed Enterprises (State) Award for transport performed by non-transport companies. There are also a number of awards covering specific types of transport, such as the transport of quarried materials.

Long Distance Rates

7. The Transport Industry (State) Award and Transport Industry – Mixed Enterprises (State) Award also contain long distance work rates. These rates are counterpart to the rates set for long distance work in federal awards, and are appropriate for inclusion in modern awards.

Modern Award Conditions

8. The federal Transport Workers Award is a logical basis for a modern award for transport companies in general transport except to the extent that it may alter current arrangements applying under the Transport Industry (State) Award.
9. For example, the Transport Industry (State) Award permits ordinary hours to commence at 5.00 am whereas the Federal award provides for ordinary hours to be worked from 5.30 am. It could cause operational difficulties for employers in New South Wales if they could no longer

commence the working of ordinary hours at 5.00 am and, in turn, for their customers whose delivery times may need to be altered if a later start time for drivers was implemented.

10. Also, under the New South Wales Award (NAPSA) employers can require that ordinary hours be worked on a Saturday. Under the federal award, ordinary time worked on a weekend is only available by agreement. The award should not prevent ordinary time worked on a Saturday as a right given that it is an existing provision in New South Wales and could cause considerable operational difficulties if employees could now elect not to work on a Saturday. In any event, ordinary time worked on a Saturday is a now commonly accepted and any inconvenience associated with such work is compensated for by a loading for such work.
11. The loading under a modern award for work on a Saturday should be time and one-quarter, and work should be able to be performed all day when it is part of a 5 day week (as compared to a 5 ½ day week).
12. The loading for Saturday work in the Federal Transport Workers Award is 50% where as under the Federal Transport Workers (Mixed Industries) Award there is no loading for work before midday on a Saturday. In NSW, the Transport Industry NAPSA contains a 50% penalty which arose from an agreement between the TWU and the NSW Road Transport Association as part of the 1996 industry settlement. This penalty was included with some misgivings by the Full Bench. It held:

“With the exception of a strong concern we have about the proposed rate of 50 per cent for the new Saturday work, to which we will now turn, we think the changes overall are of such a magnitude as to justify approval of the agreement as a common rule award for the industry.

We note that the TWU has reiterated its undertaking given the Mixed Industry Award was made in 1990 that this will not lead to an application for flow-on to that Award.

The Commission has a number of occasions stated the view that the appropriate rate for work performed in ordinary hours on Saturday is time and a quarter and not time and a half. For example, in *Re Crown Employees (Teachers, Education Teaching Services) Award and Other Awards* (unreported, matters Nos 515 of 1990, 566 of 1989 and 1619 of 1989, Fisher P, Bauer and Hungerford JJ, 7 August 1991) the Commission in Court Session refused to adopt time and a half for work to be done on Saturday s in a context where the relevant union was claiming overtime rates and the employer was willing to concede time and a half; the rate of time and a quarter was awarded. These cases demonstrate that, generally speaking, the correct rate for Saturday work in ordinary hours is time and a quarter.”: *Re Transport Industry (State) Award* (1996) 95 IR 126 at 131

13. Having regard to the general standard of time and one-quarter for work performed in ordinary time on a Saturday and the absence of any penalty for ordinary time Saturday work under the Transport Workers (Mixed Industries) Award and the Transport Industry – Mixed Enterprises NSW NAPSA, we submit that a penalty of time and one-quarter would be appropriate, particularly if the AIRC was to not to create separate modern awards applying to transport companies and mixed enterprise employers.

Modern Award Rates of Pay

14. The Transport Industry New South Wales NAPSA does not contain properly fixed minimum rates of pay in accordance with the Minimum Rates Adjustment process. The rates of pay under the NAPSA are substantially ahead of the rates of pay in the Federal award. While this has been the case for many years in New South Wales, the differential has been exacerbated of recent years due to 'industry settlements'.
15. These industry settlements have involved wage increases well ahead of safety net increases approved by the Industrial Relations Commission with the consent of the major parties, and were often accompanied by changes to conditions of employment. These industry settlements were processed as awards rather than by the making of enterprise agreements.

16. While such an approach was sought by the TWU in the federal jurisdiction, it was unable to obtain the AIRC's approval for the increases it sought (see Print P0926), and the 'industry settlement' approach was not easily accommodated within the 'safety net' approach of Federal legislation. The rates of pay in New South Wales are, accordingly, inappropriate for general adoption in a modern award.

Industry Specific Awards

17. Some industry specific transport workers' awards may be appropriate for inclusion in industry awards where this suits the operational requirements of the industry. For example, the cartage of quarried material can be comfortably dealt with under a Quarry Industry Award given the level of engagement of such trucks in the quarry itself rather than simply being on the open road as in general transport.

Enterprise Awards

18. We also note that some employers in New South Wales have agreed upon their own awards. In our submission, it is unnecessary to disturb existing mutually satisfactory arrangements against the parties' wishes. In such circumstances, it is appropriate that they be treated in a similar way to Federal Enterprise Awards and to be excluded from any modern awards made.

Mixed Industries

19. The regulation of transport work of mixed enterprises should take account of the different circumstances that can often pertain to such work and the desirability of common conditions between the minority performing transport work and the majority performing non-transport work. For this reason, a mixed enterprise employer should be able to elect to adopt the same provisions for their transport workers as for the majority of their other workers. This could operate in a similar way to clause 9, the Majority Clause, of the Federal Transport Workers Mixed Industries Award, preferably in a separate award for mixed enterprise employers. The majority clause states:

“This award applies in a limited way if employees covered by it are a minority of employees in a individual enterprise.

9.1 Employees covered by this award are a minority of employees in an individual enterprise if:

9.1.1 their employer’s main business or undertaking is other than the transport of materials upon public highways; and

9.1.2 the majority of their employer’s employees are covered by an award made, or an agreement approved, by the Australian Industrial Relations Commission or a State arbitrator.

9.2 If employees covered by this award are a minority of employees, then:

9.2.1 the award or agreement that applies to the majority of their employer's employees applies to them as a result of the clause to the extent that the award deals with allowable award matters and provisions incidental to such matters and necessary for the effective operation of the award; and

9.2.2 the following provisions of this award will continue to apply to them and will override any conflicting provisions in the award or agreement that apply to the majority of the employer's employees:

1. Title
2. Arrangement
4. Definitions
6. Incidence of award
7. Parties bound and area of operation
10. Exemptions and modifications
- 11.2 Union notice board
- 14.5 Gear to be provided
- 15 Contract of employment
- 19 Rates of pay
- 20 Juniors

22 Highest Function

23.4 Housing

23.6 Log Books

9.3 The majority award provisions which apply pursuant to clause 9.2.1 will not apply where inconsistent with legislation applicable to drivers of motor vehicles."

20. Such an approach would be consistent with paragraph 8A of the Minister's Request as it would reflect a consideration of "how the modern award will include provisions appropriate for application to employers and employees in a range of industries and/or occupations."

21. Awards applying to mixed enterprise employers should otherwise be no less flexible or conducive to the efficient and productive performance of work than awards that apply to transport companies. For example, the federal transport Workers Mixed Industries Award allows the working of ordinary hours between 5.30am and 6.00pm with the ability to extend the span of hours by one hour on either or both ends of the span whereas the Mixed Industries Award only allows for work between 6.30am and 6.00pm with no ability to extend that span of hours by agreement. Such differences can make it cheaper to contract and work to take advantage of the coverage of the other award. In our respectful submission, the AIRC should avoid any anomalies which could create a positive incentive on a cost basis to contract-out work.

Clerical Employees

22. We note that on the list of relevant awards prepared by the AIRC for this industry that the following clerical awards have been included: the Clerical and Administrative Staff – International Freight – Forwarding and Customs Clearing Industry Award 2003 and the Clerks (Road Transport Industry) Award 2002.
23. In our submission, there is no justification for including clerical employees in a transport award.
24. There are no operational reasons in this industry as to why clerical employees need be under a transport award given the operationally distinct functions performed (i.e. the drivers are on the road while the clerks are in the office). This is clear on the face of the classification structures of the respective awards. The Clerks (Road Transport Industry) Award has no reference in its detailed descriptors to any duties or skills in relation to transport work but reflects generic clerical and administrative employee competencies. Also in the International Freight Forwarding and Custom Clearing Award classifications, while specific to that industry, there are no duties which require any direct interaction with transport workers.
25. There is also a potential for increased costs to employers in New South Wales if clerical employees were aligned to the rates paid to transport workers as a result of the industry settlements under their award. Such cost increases would be contrary to paragraph 2(d) of the Ministers' Request.

26. The inclusion of clerical employees in their own award assists with their career path, and they could be disadvantaged by more limited career path opportunities by being included in a transport industry award.
27. The reasons clerical employees should be covered by their own award is dealt with in detail in AFEI's submissions regarding the Clerks – Private Sector Award. Some of the more salient parts of that submission are extracted below:
28. 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).
29. 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.
30. 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.
31. 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.

32. 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.
33. 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.
34. 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.”

35. 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.