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

AWARD MODERNISATION

MATTER NO. AM2008/21

AM2008/21 – PRIVATE TRANSPORT INDUSTRY

(ROAD, NON-PASSENGER)

ROAD TRANSPORT AND DISTRIBUTION AWARD 2010
('THE DRAFT AWARD')

ROAD TRANSPORT LONG DISTANCE OPERATIONS AWARD 2010
('THE DRAFT LONG DISTANCE AWARD')

1. AFEI makes submissions regarding the following matters in accordance with the invitation contained in the Statement of the Full Bench on 23 January 2009 ('The Statement'):

   - The coverage clause of the draft award having regard to the changes in the Minister's Request of 18 December 2008 (paragraphs 4 to 9 of the Statement);
   - The majority provisions of the draft award (paragraph 100 of the Statement); and
   - The transition to the NSW rates of pay (paragraph 102 of the Statement).

2. AFEI also makes submissions as to the following:

   - Dispute Resolution Leave
   - Majority clause
   - NSW rates of pay
   - Classification structure
   - Weekend work
   - Superannuation
   - Long distance work

Coverage

3. Clause 4, coverage, of the draft award should be amended to include the following:

   "An employer previously bound by a Notional Agreement Preserving a State Award (NAPSA) or a state award is now covered by this award unless it was a NAPSA derived from a state enterprise award".

4. We propose this clause for two reasons.

5. First, clause 2(e) the Minister's Request was amended to require the exclusion of a NAPSA derived from a State enterprise award. Accordingly, the coverage clause of the award should make it clear that employers so bound are excluded from the coverage of the modern award.

6. Second, given that the position of NAPSAs derived from State enterprise awards are to be dealt with under the coverage clause, it could create confusion if no mention is made to the position of other NAPSAs derived from State awards.

7. Given that such NAPSAs and state awards (if any) currently operating in transport and distribution would cease to bind employees upon the commencement of the modern award this should be stated in the coverage clause. This would assist in avoiding confusion about whether any such instruments can continue to apply to national system employees. In NSW, for example, there is an award known as the Transport Industry – Mutual Responsibility for Road Safety (State) Award. This state award is not a NAPSA as it was made post 27 March 2006 (after reform commencement). The clause we propose in the modern award would avoid any confusion regarding whether such an award can also apply to an employer covered by the modern award.

Majority clause

8. In paragraph 100 of the Statement, it is noted that the wording of the majority clause in the Transport Workers (Mixed Industries) Award 2002 requires re-consideration. AFEI proposes the following majority clause:

   "Where:

(a) *The activities described in the definition of road transport and distribution are ancillary only to the principal business, undertaking or industry of the employer; and*

(b) *The employer and employee are not covered by another modern award.*

The award applying to the principal business, undertaking or employer may be applied to employees if it is more appropriate to the work performed by the employee and the environment in which the employee normally performs the work."

9. It will be noted that this clause is drafted having regard to clauses 4.3 and 4.6 of the draft award.

10. AFEI notes the wording of the AIRC reflected in clause 4.3 of the draft award in including driver classifications in some non-transport industry awards.

11. AFEI also notes, however, that there will be other industry awards where there are not specific transport and distribution classifications but under which such work is still performed. For example, in the restaurant industry, employees predominantly engaged in the home delivery of meals, should be covered by the award applying to restaurants, as those employees work exclusively in the business of the restaurant and only work within the hours of the other restaurant employees. In such circumstances, the award for the restaurant industry is most appropriate to the work performed by the employee and the environment in which the employee normally performs the work. Caterers also may prepare food at central locations and transport/distribute it to various locations.

12. There will be other circumstances where, despite the industry not being in 'transport or distribution' it suits for transport and distribution to be performed in a similar way to a transport company. For example, distribution may commence early in the morning before the majority of non-transport and distribution employees start work.

13. In NSW, the Transport Industry – Mixed Enterprises (State) Award (now NAPSA) contains particular majority clauses in respect of hours of employment (Clause 8) and shift work (clause 11.8), which enable an employer to elect to observe the provisions that apply to the majority of employees in the establishment. Accordingly, employers in NSW currently have the option to elect whether of not to observe the majority provision depending upon whether such

provisions are suitable for that particular circumstance. Indeed, for some employers it would create difficulties if they had no choice but to apply the award applying to the majority of employees, even where such an award was not appropriate to the work performed in the environment in which it is worked.

14. It is submitted that the clause AFEI proposes has sufficient flexibility to cater for the broad range of circumstances in which transport and distribution occurs, and will take into account the existing position in NSW. Employers and employees will have the benefit of being able to apply a modern award of the AIRC which is most appropriate to the work performed and the environment in which it is worked.

Dispute Resolution Training Leave

15. AFEI opposes this clause.

16. This is not an existing standard in the main NSW transport industry awards. Accordingly, its introduction will represent an additional cost, and increased regulatory burden, for employers in NSW.

17. Dispute Resolution Leave/ Trade Union Training Leave does not arise from a test case standard. The AIRC has taken a case by case approach to its inclusion in awards in the past and should not alter that position.

18. There has been no circumstance of need established before the AIRC that establishes, in the context of this industry, dispute resolution leave should be imposed upon employees to whom it has not traditionally applied. In particular, it is open for the AIRC to reach the same conclusion as it reached in the Leave Allowability Case (Q9399) that there is no evidence to sustain the proposition that in the absence of such a clause the awards would not operate effectively (at para 39).

19. The Dispute resolution clause in the award was introduced with the support of the parties to the Transport Workers Award on 15 April 2004 [PR945709] as being incidental to the dispute resolution clause of that Award. As a consequence, there was no real requirement to make out a case as to the merits of such a provision. Such a consent arrangement should not be imposed upon employers who have not consented to it.

20. Such provisions have their origins when different statutory schemes prevailed which reflected the different role of awards and the AIRC and its predecessor.

21. The objects of the Act were also different. For example, at paragraph 16, Mansfield C when varying the Transport Workers Award in 2004 considered that:

> *"Dispute Resolution Training Courses are for the purpose of improving the general competence of union workplace representatives in their dealings with employers on union-related matters."*

22. Such an approach found some support perhaps in the objects of the legislation at the time, the Industrial Relations Act 1988. That Act contained the following objects in s 3: -

    (a) "Encouraging the organisation of representative bodies of employers and employees and their registration under this Act; and

    (b) Encouraging and facilitating the development of organisations, particularly by reducing the number if organisations in an industry or enterprise..."

23. There is now no object in Part 10A of this concerning the encouragement of union organisation or membership that previously existed under statutory schemes operating when trade union training/dispute resolution leave was introduced.

24. The AIRC now has to consider the requirements of award modernisation, particularly those in S.576A (2) of the Act. These requirements are not furthered by such a provision.

25. Awards have traditionally had the role of settling industrial disputes. Indeed, an award could not be made if it did not settle, at least in part, an industrial dispute. This is not the role of a modern award which is directed at maintaining a 'fair minimum safety net of enforceable terms and conditions of employment for employees' (s 576A(2)(c)). Dispute resolution training leave provisions are not directed at providing such a safety net of minimum conditions for employees but to increasing the competence of workplace representatives on union-matters.

26. In the *Section 109 Review Case* [Print R2700] the AIRC found training in dispute resolution to be incidental to an award provision on dispute settlement. Mansfield C relied upon this decision in approving the parties agreed position to introduce trade union training leave in the Transport Workers Award [PR945709 at para 13].

27. That decision followed an earlier AIRC decision in the Leave Allowability Case [Q9399] in which the AIRC held that while such a clause may be incidental to the operation of the dispute resolution procedure it could not be regarded as "necessary" for the operation of the dispute resolution procedure. (at para 44).

28. At paragraph 44 the Commission held:

"We now turn to trade union training leave. The cases concerned with the development of trade union training leave to which we have earlier referred recognise the desirability of trade union training. They also indicate that it is not appropriate to include trade union training provisions in an award without an examination of the circumstances and the development of provisions tailored to the needs of the parties to the award - the case by case approach. We think this aspect of the history of trade union training leave is important. Although no-one would suggest that the operation of s.89A was contemplated prior to 31 December 1996, the adoption of the case by case approach tells against a conclusion that as a matter of principle trade union training leave provisions are necessary for the effective operation of dispute settling procedures in awards.

Whilst the existence of trade union training leave provisions might make it more likely that union members would receive training in the observance of dispute settling procedures, we are not persuaded that a trade union training leave clause is necessary for the operation of a grievance procedure in an award.

The evidence demonstrated that it is desirable to provide relevant training for those who may be required to participate in dispute settling procedures. But of course training can occur whether there is a trade union training leave provision in the award or not. Further, the relevant training may be provided other than through the Trade Union Training Authority (TUTA). Whilst the union witnesses gave evidence and expressed the view that the trade union training leave provisions were necessary for the effective operation of grievance procedures, the representatives of the employers disagreed. We have concluded that the evidence does not sustain the proposition that in the absence of the trade union training leave provisions the awards would not operate effectively either in relation to a dispute settling procedure or, for that matter, in relation to any of the other allowable matters in the paragraphs upon which the unions placed reliance. In light of these matters we cannot conclude that the clauses are "necessary" for the effective operation of the dispute settling procedures contained in the awards or any other part of the awards."

29. S.576M (1) of the Act provides that a modern award may include terms that are:

    (a) Incidental to a term that is required or permitted to be in the modern award; and

    (b) Essential for the purpose of making a particular term operate in a particular way.

30. "Essential" is defined by the Macquarie Dictionary (Revised Third Edition, 2001) as follows:

"Absolutely necessary; indispensable"

It could not be said that dispute resolution training leave is either "absolutely necessary" or "essential" for the dispute resolution clause to operate in a practical way.

31. The dispute resolution provision can still operate in a practical way without the training provided by the clause. There are of course other modern awards containing dispute resolution clauses in which it has not been considered "essential" to provide dispute resolution training. Further, dispute resolution training can be provided whether or not it is contained in the award. (see the Leave Allowability Case [Q9399] at para 39.)

32. The other change of course has been the introduction of and emphasis given to bargaining. Conditions such as trade union training/dispute resolution leave are more appropriately matters for collective bargaining. To the extent that it is relevant, the Fair Work Bill contemplates a much broader range of matters that can be dealt with in bargaining than might be dealt with by awards. In particular, clause 172(1) (b) of the Bill enables enterprise agreements to also be made about matters pertaining to the relationship between an employer and a union. Also clause 186(6) of the Fair Work Bill, like the current Act, will require that there be a dispute resolution clause in agreements.

33. Dispute resolution training clauses had their origins in trade union training provisions introduced in the 1980's (see for example, *Re Business Equipment Industry (Technical Service) Award 1978* (1988) 25 IR 52 *Australian Timber Workers Union V Integrated Forest Products & Ors* (1989) 35 IR 106) before enterprise bargaining was part of the workplace relations system.

Long distance work

34. AFEI notes that the main transport industry NAPSAs in NSW provide for long distance work within the award. By providing for long distance work under the general awards, employers could use the long distance work provisions for longer trips if it suited and the usual hour's regime for other trips (that were not considered long distance work).

35. AFEI would be concerned if this flexibility was to be lost by the creation of separate awards for long distance and other work.

36. If there are to be separate awards both awards should make it clear that either award can be applied by an employer. That is an employer engaged in work in the transport and distribution industry (defined in the draft award) should also be able to apply the long distance draft award in respect of any long distance work undertaken.

37. If there are to be separate awards, it is submitted that the long distance award should include the same provision as clause 4, coverage as AFEI has proposed for the Road Transport and Distribution Award regarding the application of NAPSA's and state awards as follows:

> *"An employer previously bound by a Notional Agreement Preserving a State Award (NAPSA) or a state award is now covered by this award unless it was a NAPSA derived from a state enterprise award".*

NSW Rates of Pay

38. AFEI notes that modern awards are limited to providing properly fixed minimum rates of pay consistent with those of other states by 2015.

39. AFEI recognises that consideration will need to be given to this issue when transitional provisions are developed.

Classification Structure

40. AFEI's view is that the award modernisation process is not an appropriate one in which to consider the formulation of new classification structures.

Weekend Work

41. The draft award provided for weekend work on a voluntary basis whereas the NSW Transport Industry NAPSA provides for weekend work by right to suit the needs of the employer. We submit that an employer should not have to reach agreement with employees to work on weekends having regard to the potential dislocation of existing arrangements in NSW not only to transport companies but other businesses that rely upon being able to obtain deliveries on weekends.

42. The penalty that is proposed of time and one – half and double time on Saturday and Sunday is high compared to other service industries, and more closely resembles overtime penalties.

Accordingly, there could be no successful argument that transport workers are not adequately compensated for working weekends.

43. If the AIRC was not minded to remove the requirement for such work to be voluntary, then the penalty rates for such work should not be set at overtime penalty levels or at a level higher than other service industries. Penalty rates of time and one – quarter and time and one – half on Saturday and Sunday, respectively, would be more appropriate compensation for such work when it is performed voluntarily.

Superannuation

44. AFEI objects to the inclusion of clause 21.5 in the Award. This would significantly increase costs for NSW employers for whom this is currently not a requirement. This is consistent with the AIRC 19 December 2008 decision that:

> *"[92] The superannuation provision in some of the exposure drafts included an additional paragraph dealing with superannuation contributions during periods of paid leave or while an employee was absent from work due to injury or work-related illness. It is not our intention that the additional paragraph should be part of the standard clause. It may be appropriate, however, where it is necessary to maintain the pre-existing safety net."*