



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

AM2008/79

AWARD MODERNISATION

AFEI
Australian Federation of
Employers & Industries

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

AWARD MODERNISATION

AM2008/79 HEALTH AND WELFARE SERVICES (REMAINDER) – SOCIAL AND COMMUNITY SERVICES

SUBMISSION IN REPLY TO ASU FURTHER SUBMISSIONS RE TRANSITIONAL PROVISIONS

1. The Australian Federation of Employers and Industries (“AFEI”) makes these submissions in reply to the Australian Services Union’s (“ASU”) further submissions in relation to special transitional provisions for the proposed Social, Community, Home Care and Disability Services Award 2010 (“the modern Award”).

Background

2. An exposure draft of the modern Award was released by the Australian Industrial Relations Commission (“the Commission”) on 25 September 2009. AFEI responded to the exposure draft by way of written submission on 16 October 2009 and appeared before the Full Bench during the consultation hearings on the exposure draft in Melbourne on 5 November 2009. During these consultation hearings, the ASU produced a Heads of Agreement between the ASU and the Commonwealth Government. This Agreement had not been raised or even foreshadowed at any earlier stage of the Award Modernisation process in this industry.
3. The Agreement states the ASU’s intention to lodge a pay equity/work value claim for the social and community sector under the relevant provisions of the *Fair Work Act, 2009* and the Commonwealth Government’s support for such a claim. The Agreement provides that given the pending ASU pay claim, the

timeline requirements for the award modernisation process and the uncertainty in the sector regarding coverage, the Commission should make a modern award for the sector, however set rates of pay on an interim basis.

Impact on transitional arrangements

4. During the consultation hearings in relation to the exposure draft, the ASU submitted that the Commission should continue to make a modern Award for the sector in line with the timeframe already set. However this modern Award, unlike all other Awards across each industry in Australia, should not substantively apply to employees covered by the Award until the ASU's foreshadowed pay claim for the sector is resolved. Essentially, the ASU position in respect of transitioning for this sector is the preservation of existing terms and conditions that relate to classifications, rates of pay, allowances, penalty rates, overtime rates and weekend and shift work penalties. It is important to note however that not all NAPSA and pay scale or Award conditions are preserved under the ASU proposal

5. In making our initial submissions on transitional arrangements, AFEI proposed a standard transitional arrangement clause in very similar terms to the one currently proposed by the ASU. Specifically, AFEI's transitional provisions submission concerned matters that had the potential to increase costs of employment. These matters included:
 - casual loadings and minimum engagements;
 - part-time minimum engagements and new obligations to pay overtime for additional ordinary hours;
 - shift, weekend, and overtime penalty rates;
 - span of ordinary hours;
 - apprentice and junior rates;
 - wages and allowances;
 - exemption rates;

- piecework; and
 - superannuation
6. AFEI's transitional arrangements proposal advocated the preservation of the award terms listed above (subject to any upward adjustment to wages and allowances by Fair Work Australia's annual wage review) for the full five-year transitional period. In rejecting the position proposed by AFEI and other parties, the Commission stated:

We have decided that any cost increases resulting from the introduction of modern awards should be spread over a lengthy period, as contemplated by s.576T of the WR Act¹

7. The Commission has made its decision in respect of transitional arrangements and has consequently rejected the proposal of significantly delaying the operation of clauses that relate to, or affect, pay. AFEI has major concerns in allowing the ASU application to delay the operation of a wide range of "pay related entitlements" under the modern Award. Such an application, if granted, may consequently be sought by other parties who desire a similar outcome in other industries.
8. The Award Modernisation process has resulted in significant changes in terms and conditions across all industries. The Commission received a large number of submissions concerning these changes when the model transitional provisions were created. These submissions and concerns were considered by the Full Bench of the Commission in July of this year. In the event the Commission is minded to grant the ASU application, AFEI submits that this would ultimately serve to undermine the entire transitional provisions decision of the Commission of 2 September 2009.

¹ Australian Industrial Relations Commission Decision – Award Modernisation [2009] AIRCFB800 paragraph 17

9. This outcome would likely lead to other parties in other industries seeking similar special treatment to delay any cost increases or entitlement reductions for employers and employees affected by the Award Modernisation process generally. Such a circumstance would only serve to create uncertainty for those across industry and would be inconsistent with the statutory objects of the Award Modernisation process.
10. AFEI submits that the Commission has already rejected the proposal to significantly delay the operation of a modern Award and this should not be revisited for this sector. Further, AFEI submits that the foreshadowed pay claim and the Heads of Agreement with the Commonwealth Government are insufficient reasons to depart of the model transitional clause. Accordingly, the ASU application to attach a large number of schedules to the modern Award should be rejected.

Heads of Agreement and the Award Modernisation Request

11. The Heads of Agreement does not have any statutory force within the Award Modernisation process. AFEI submits that the Commission should lend no more weight to the Heads of Agreement than it does to any other submission by any other party.
12. There is an inconsistency between the Heads of Agreement and the Ministerial Award Modernisation Request ("the Request"). The Heads of Agreement submits that the rates of pay for the modern award should be established on an interim basis only, whilst the ASU lodges and runs a pay claim before Fair Work Australia. The Request however, requires that the Award Modernisation process be completed by 31 December 2009 and that modern awards are to contain a comprehensive range of fair minimum wages for all

employees.² AFEI submits that the setting of award wage rates on an interim basis, however the way these rates have been positioned as “transitional arrangements” by the ASU, is not completing the Award Modernisation process as required, and as such, is inconsistent with the Request.

13. The Heads of Agreement provide that *rates of pay* should be established on an interim basis. However, upon making their verbal and written submissions in respect of transitional arrangements, it is clear the ASU are seeking to preserve significantly more than simply rates of pay. When questioned by the Bench during the verbal submissions by the Commonwealth Government in relation to the meaning of rates of pay, the response provided by the Government representative did not provide a great degree of certainty in respect of its meaning.³

Pay claim and the Award Modernisation process

14. In its decision on 2 September 2009 regarding transitional arrangements, the Commission was clear that the intention was to have the model transitional provisions apply generally throughout modern Awards, and that departures from the model provisions should be limited.⁴ In AFEI’s view, the indication that a party will run a pay equity or work value claim at some stage in the future is insufficient reason to warrant a departure from the model transitional clause. Again, if such reason for a departure were upheld, one could ask whether others across industry may reasonably seek to make a similar claim to avoid the operation of the new Award.

² Paragraphs 19 and 25 of the Request under Section 576C(1) – Award Modernisation Consolidated Version, issued by the Minister for Employment and Workplace Relations on 9 November 2009.

³ Transcript, RODDAM, 5 November 2009 PN2949: “*The Commonwealth doesn’t have a specific view on that, your Honour, but I think the proposals tendered by Mr Harvey provide a practical way for those rates to be preserved so we would not have any objection to that*”

⁴ Australian Industrial Relations Commission Decision – Award Modernisation [2009] AIRCFB 800 paragraph 18

15. AFEI submits that the Union's intention to lodge a pay claim in of itself is separate to the creation of a modern Award and should not impact the process presently before the Commission.

The ASU transitional arrangements proposal

16. As noted in paragraph 4 of this submission, the ASU's transitional arrangements proposal is restricted in its application. Whilst the unions and the Commonwealth Government have repeatedly framed their submissions as preserving the status quo within the industry, the ASU does not mention other matters that are likely to affect pay and result in cost increases for employers within the sector.
17. Notably, the ASU does not, in any of its proposed schedules, seek to preserve the hours of work clause within each NAPSA or pre-reform Award. In NSW for example, the Social and Community Services Employees (State) Award [NAPSA – NSW] provides a span of ordinary hours of Monday to Sunday, 6.00am to 8.00pm. This has been significantly restricted under the exposure draft of the modern Award to Monday to Friday and Saturday morning. Cost increases for employers arise in this circumstance where an employer, previously paying a Sunday penalty of 75 per cent, may now be required to pay overtime penalties (set at double time for Sunday in the exposure draft).
18. Another example of cost increases for employers would be within the Home Care Industry. Under the Miscellaneous Workers Home Care Industry (State) Award [NAPSA – NSW], casual employees may currently be engaged for a minimum of one hour. Under the exposure draft, a casual minimum engagement is 3 hours. AFEI notes that the union's proposal does not seek to maintain the one-hour minimum, notwithstanding the fact that it could be considered a matter that affects pay.

19. AFEI submits that these two examples demonstrate how hours (and potentially other award conditions) are certainly matters that affect pay, however the ASU has been selective in not including such matters in their proposed schedules. If the ASU's proposal was accepted, employers within the sector would be disadvantaged by having certain matters preserved and others not preserved. This would result in employment cost increases within the industry and uncertainty regarding which clauses may be applicable.

20. AFEI is opposed to the union application for schedules to the modern Award, which represents a significant departure from the model transitional provisions set down by the Commission on 2 September 2009. If however, the Commission were minded to consider the ASU application, AFEI would expect the same opportunity to have matters that employers seek to preserve also considered by the Commission. These matters would include hours of work (including by not limited to span of hours and minimum engagements).

21. AFEI notes the material the ASU NSW and ACT (Services) Branch has produced for its members in respect of the creation of the modern Award and the foreshadowed pay claim. Relevantly, AFEI refers to the 8-page flyer entitled "Historic Agreement on Equal Pay". In this document, the ASU advises its members that an agreement has been reached with the Commonwealth Government to run a pay equity case for employees within the industry. The document goes further to advise the members of the ASU:

"The provisions of the SACS NAPSA that relate to rates of pay will continue to operate until the Equal Pay case is determined. These include things like penalty rates, overtime and allowances".

22. The ASU makes no mention of the role of the Australian Industrial Relations Commission in determining the continued application of SACS NAPSA provisions. AFEI submits that no decision has yet been made by the Commission in respect of the modern Award transitional arrangements.

20 November 2009