



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

AM2008/79

AWARD MODERNISATION

**AFEI**  
Australian Federation of  
Employers & Industries

**BEFORE THE AUSTRALIAN INDUSTRIAL RELATIONS  
COMMISSION**

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

**Exposure Draft: Social, Community, Home Care and Disability  
Services Industry Award 2010**

1. AFEI represents a significant number of large social and community service employers in New South Wales. AFEI also represents a large number of medium to small employers in the social and community sector.
2. AFEI has made earlier submissions in respect of the Health and Welfare Services (Remainder) Social and Community Services industry, and continues to rely on these earlier submissions. These submissions provide significant detail as to describing the industry and also the nature of the work undertaken by employees (for example, the service basis of the industry and unpredictable hours). The industries' heavy reliance on funding is also described.
3. AFEI has reviewed the draft exposure document for the Social, Community, Home Care and Disability Services Industry Award 2010 ("the proposed Award") and has canvassed the views of members in relation to that document. As a result, AFEI makes the following submissions in respect of the proposed Award.

## Clause 4 – Coverage

4. AFEI submits that the modern award coverage of the family day care scheme sector needs to be clarified. The proposed modern Award covers employers in various sectors, including the family day care scheme sector. An appropriate classification scale related to Family Day Care is provided in the proposed Award at Schedule D. This classification scale has been derived from the Family Day Care Services Award, 1999.
  
5. The Commission also provided for the classification of a Family Day Care Co-ordinator within the exposure draft for the Children's Services Award 2010 at Level 5 of the Children's Services Employees (CSE) classification structure. Further, the proposed Childcare Award applies to employers providing services including family based childcare and in-home care. The Award in its current terms would create uncertainty as to the industrial obligations of employers in the family day care scheme sector. This would be contrary to the Ministerial request, where it is provided that modern Awards "must be simple to understand and easy to apply". AFEI submits that the current coverage terms of both exposure drafts have the potential for overlap, which should be rectified. Employers must be sure of their award coverage. Accordingly, AFEI submits that the classification of "family day care co-ordinator" be removed from the exposure draft of the Children's Services Award 2010.

## Clause 10.4 – Casual Employment

6. This clause provides for casual employment. Subclause 10.4(c) of the exposure draft document provides for a minimum engagement for casual employees of three hours at the appropriate rate for each engagement. Under the Social and Community Services Employees (State) Award [NAPSA – NSW], the minimum engagement for casual employees is two hours. AFEI submits that it is necessary and appropriate given the nature of the work undertaken that the minimum casual engagement for employees in this sector be two hours.
7. Employers within the Home Care Industry warrant special consideration for a lesser minimum engagement for casuals. It is a settled industrial arrangement across Australia that casual employees within the Home Care sector have a short engagement. The majority of Awards and NAPSAs in this sector in operation throughout Australia provide for a minimum casual engagement of 1 hour or less:

Casual Minimum Engagement	Instrument
1 hour	Miscellaneous Workers Home Care Industry (State) Award [NAPSA – NSW] *
	Attendant Care – Victoria Award 2004
	Community Services (Home Care) (ACT) Award 2002
	Community Services (Home Care Service of New South Wales) Care Workers Award 2002 **
No minimum engagement	Home and Community Care Award 2001

\* For casual employees engaged other than Live-In houseworkers

\*\* For employees engaged in personal care services, and respite care services to personal care clients.

8. AFEI submits that in addition to the existing industrial arrangements, the requirements of the industry within the Home Care sector mandate the provision of a one-hour minimum engagement for casual employees. The increase from a one-hour minimum engagement to a 3-hour minimum engagement will have a detrimental impact on the ability of organisation to provide care for people in their own home. By the very nature of the work, respite care and in-home care services require absolute flexibility in respect of rostering arrangements. For example, shorter shifts are necessary to support clients getting out of bed, complete personal care tasks and take medication. Generally, an employee may only need to visit the client for an hour to assist with such tasks. In the event an employer needs to pay to the casual employee three hours for work that can be done in an hour, this would impact on the affordability of such services, especially in regional or remote areas. Any negative impact on the affordability of such services may result in a decline in the number of clients home care operators are able to assist.
9. In the event that the Commission is minded to not include a minimum one hour casual engagement for home care employees under the modern Award, AFEI would seek special transitional arrangements to allow the one hour minimum engagement to be preserved for the full 5 year transitional period. This is essential so as to not disrupt home care operations on 1 January 2010. Employers in this industry would have less than one month to prepare for a 3-hour minimum engagement. This task completed in such a short space of time is likely to lead to significant disruption to services.

## Clause 19 – Allowances

10. The proposed Award contains provision for a tool allowance (clause 19.8) and a leading hand allowance (clause 19.11). AFEI would submit that the inclusion of these allowances within a modern Award covering this sector is inappropriate and unnecessary as:
- (a) there are insufficient occurrences of such allowances in the existing industrial instruments covering this sector;
  - (b) these allowances are not typically associated with work performed in this sector and are would generally be extraneous; and
  - (c) the requirement to supervise employees (being a leading hand) is generally encompassed or a characteristic of the level to which an employee is appointed.
11. The creation of these allowances would result in cost increases for employers within this sector and would generally result in confusion as to when these allowances are payable. For example, an employee may argue an entitlement to the leading hand allowance, where an employer believes that such responsibility is an inherent part of their classification under the Award. This is an entirely plausible outcome as employees as low as level 3 in the social and community services stream in the proposed Award “may be required to supervise lower classified staff...in their day-to-day work”<sup>1</sup>

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<sup>1</sup> Exposure Draft: Social and Community, Home Care and Disability Services Industry Award 2010, Schedule B, B.3.1(d)

12. AFEI submits that the leading hand allowance should be removed completely. In the event the Commission decides to retain such an allowance, AFEI submits that such allowance should be restricted in its application.

#### **Clause 24 – Ordinary hours of work and rostering**

13. The ordinary hours of work set out within the proposed Award is significantly more restrictive than existing State-based NAPSAs and federal Awards in the sector. The proposed Award provides for a span of ordinary hours limited to weekdays and Saturday mornings for all other employees other than home care employees. AFEI submits that a necessary span of hours within this industry is 6.00am to 8.00pm Monday to Sunday and is appropriately reflected in:

- (a) Social and Community Services Employees (State) Award [NAPSA – NSW];
- (b) Social and Community Services (Queensland) Award 2001 (“the Queensland Award”)

14. The federal Social and Community Services – Victoria – Award 2000 provides even greater operational flexibilities as to when work can be performed by providing no limitation as to the span of ordinary hours. There is clear industrial precedent for a span of hours greater than Monday to Friday and Saturday morning.

15. AFEI requests the Commission to have regard to the ordinary hours of work provision in the federal Queensland Award and the NSW NAPSA for social and community services employees. The Australian Industrial Relations Commission ("AIRC") adopted Queensland classification structure and wage rates for the proposed Award. AFEI submits that the Full Bench should therefore equally consider adopting the Queensland ordinary hours of work provisions. In the event the Commission does not consider it appropriate to adopt a Monday to Sunday, 6.00am to 8.00pm span for all employees who would be covered by the proposed Award, AFEI submits that, at a minimum, such a span be adopted for social and community service employees.
16. This industrial precedent has been recognised by parties within this sector during negotiations for Awards in this sector. The Queensland Award, when made, was a consent award (with the exception of the terms pertaining to classification structure, minimum rates and incremental progression, which were the subject of an arbitrated decision of the AIRC<sup>2</sup>). The Monday to Sunday span was agreed between the parties. Similarly, when the ASU made application for a new SACS Award in NSW, it was the union that sought a Monday to Sunday span of ordinary hours.<sup>3</sup>

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<sup>2</sup> Social and Community Service (Queensland) Award 1996, 4 July 2001, PR906088

<sup>3</sup> Social and Community Services Employees (State) Award, NSW IRC Matter No IRC 5544 of 1998

17. AFEI further submits that the ordinary hours of work span within the proposed modern Award does not contemplate the nature of the industry. Both the structure of how the ordinary hours of work are to be worked and also the span of ordinary hours for 'all other employees' would render important social services conducted on the weekend unviable with the requirement to pay overtime penalties. For example, homeless services in the industry operate on a 7 day per week basis. Within NSW for example, these services currently attract weekend penalties for work performed on the weekend. Under the proposed Award such services would now incur overtime penalties, which represents an increase of 25 per cent from the third hour onwards on Saturday and all day Sunday. In a number of circumstances, employers engage non-shift workers to work their ordinary hours on the weekend. Under the proposed Award, these employees would not be able to work ordinary hours on a Saturday afternoon or Sunday, and employers would be forced to engage these employees as shift workers. This would result in a fundamental change in the employment practices of employers within this sector.
18. AFEI relies upon its earlier submissions made in this matter (AM2008/79) in respect of the diversity of work undertaken in this sector. A common aspect of the work undertaken however, is that it is predominately service based. Employers need to provide a service to the clients when the client requires this service. This may often be in the evenings or on the weekend. AFEI would urge the Commission to consider its approach in modern awards already made for other service based industries. For example, ordinary hours may be worked on the weekend under:

- General Retail Industry Award 2010;
  - Cleaning Services Award 2010;
  - Hair and Beauty Industry Award 2010;
  - Fast Food Industry Award 2010;
19. AFEI would submit that the Social and Community Services sector, in light of the absolute necessity to provide services to clients in need, when the clients need it, warrants a Monday to Sunday span of ordinary hours. It is certainly arguable that the need for such a span of hours would be equally as pressing and deserved from a social service viewpoint than any of the other industry based awards listed above.

#### **Clause 24.7 – Sleepovers**

20. The proposed Award provides for sleepover arrangements at clause 24.7. The provisions contained in the proposed Award are significantly more expensive and restrictive than any other sleepover provision contained in any other Award or NAPSA currently in operation in the industry.
21. Under the proposed Award, sleepovers attract an overtime penalty for any and all work performed during a sleepover, in addition to the sleepover allowance of 4.9 per cent of the standard rate (currently \$36.01) per shift. It is unclear from the terms of the proposed Award whether there would be a minimum payment for any work performed during a sleepover attracting overtime rates.

22. The sleepover provisions proposed in the modern Award have the potential to cause significant cost increases and operational difficulties for employers currently using the sleepover provisions under the Social and Community Services Employees (State) Award [NAPSA – NSW]. Under this NAPSA, employees receive payment for the sleepover of three hours, which incorporates a requirement that, if necessary, work up to two hours duration will be performed.
23. An example of an unplanned occurrence would be a client needing assistance to the toilet twice a night, which arguably would fall within the definition of an emergency in the proposed Award. Under the NSW NAPSA, this work would be incorporated into the three-hour payment, as potentially, the time spent assisting the client would be less than two hours. However, under the proposed Award, such circumstances would attract not only the sleepover allowance, plus overtime for all time worked by the employee.

#### **Clause 24.8 – 24 hour care**

24. AFEI submits that the 24-hour care provisions contained within the proposed Award may result in severe operational difficulties for employers providing this type of service and may ultimately cause such a service to become unviable. Live in care is where a paid carer lives at the clients home for 2 or more days per week. The Miscellaneous Workers – Home Care Industry [NAPSA – NSW] currently covers this type of work in New South Wales and has provision for a ‘Live-In Houseworker’<sup>4</sup>. This classification is defined as an employee

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<sup>4</sup> Miscellaneous Workers Home Care Industry (State) Award [NAPSA – NSW], clause 5(b)(iv)

would normally live at the client's premises for a period in excess of 48 hours.

25. By way of an example, a typical day for a live-in houseworker may involve assisting the client out of bed into shower and dress. The houseworker may then make the client's breakfast and prepare the medication. The times at which this may occur will vary from client to client. Some housekeeping may be required, as well as transporting the client to appointments or social outings. The houseworker may make dinner and then assist the client to bed.
26. The 24-hour care provisions in the proposed Award have the potential to significantly disrupt this type of service. In the case where an employee is a live-in houseworker who may sleep 9 hours during the night and then provide 8 hours of care during the day as per the proposed Award time allowance, that employee would have 7 hours in the day remaining where the employee may refuse to provide care. The proposed Award allows no flexibilities in circumstances where this amount may need to be varied.
27. AFEI submits that the Commission should adopt the live-in house worker provisions set out within clause 5 of the Miscellaneous Workers Home Care Industry (State) Award [NAPSA – NSW].

## Clause 27 – Overtime

28. Overtime under the proposed Award is paid at time and one half for the first two hours and double time thereafter. This is inconsistent with the predominant industry standard within the social and community sector, which is time and one half for the first three hours and double time thereafter. AFEI submits that the Awards and NAPSAs set out within the table below demonstrate the prevailing standard across all states for overtime penalties in this industry:

Overtime penalty	Instrument
Time and one half for the first <b>three</b> hours and double time thereafter	Social and Community Services Employees (State) Award [NAPSA – NSW]
	Social and Community Services Employees (Queensland) Award 2001
	Social and Community Services Award [NAPSA – SA]
	Social and Community Services (ACT) Award 2001
	Social and Community Services – Western Australia – Award 2002
	Social and Community Services Industry – Community Services Workers – Northern Territory Award 2002
	Home and Community Care Award 2001
	Family Day Care Services Award 1999
	Health Services Employees Award [NAPSA – SA]
	Crisis Assistance Supported Housing (Queensland) Award 1999
	Crisis Assistance Supported Housing (South Australia) Award 2000
	Crisis Assistance Supported Housing Industry – Western Australian Award 2001
	Disability Support Workers Award – State 2003 [NAPSA – QLD]
	Disability Services Award [NAPSA – SA]

29. In fact, the only States in which social and community services workers receive payment for overtime worked at time and a half for the first two hours and double time thereafter are Victoria and Tasmania. Consequently, in the event that the Commission decides not to use the prevailing 'three hour standard' for the modern award, AFEI submits that this overtime penalty provision should be at least preserved for the social and community services employees and crisis accommodation employees stream under the proposed Award.
  
30. Generally, the Commission has adopted an award modernisation approach where it has been guided by the most prevalent standard for a particular entitlement (such as overtime, for example). AFEI would submit that time and one half for the first three hours and double time thereafter is the most prevalent overtime condition in the social and community services sector as set out in Clause 4 – Coverage of the proposed Award and should be adopted by the Commission for this Award.
  
31. AFEI further submits that the Commission should have regard to the fact that federal Queensland classifications and rates were adopted for the proposed Award, and should therefore have equal regard to the Queensland overtime provisions, those being, time and one half for the first three hours and double time thereafter.

32. As referenced earlier in this submission, the modern Award contains significantly more restricted ordinary hours of work provisions than a number of key jurisdictions. Importantly, it has been proposed to restrict the ordinary hours for community service workers in New South Wales and Victoria to Monday to Friday and Saturday morning, where currently there ordinary hours may be worked Monday to Sunday. These restricted ordinary hours under the proposed Award, and coupled with a more expensive overtime penalty provision would ultimately combine to create unreasonable costs increases for employers. In the absence of any special ruling in this regard, these costs increases may not be able to be transitioned.
33. AFEI submits that at least 31 modern awards already made have overtime provisions of time and one half for the first three hours and double time thereafter.

### **Salary Packaging Provisions**

34. In making its decision not to incorporate salary packaging provisions in the proposed modern award, the Commission stated:

*We do not have a clear indication of the extent to which employees in the industry need or use the award provisions. Nor do we have a clear indication of the extent to which salary packaging provides a net benefit to employees...Submissions should also cover whether such a term can be included in a modern award.*<sup>5</sup>

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<sup>5</sup> Australian Industrial Relations Commission Award Modernisation Statement 25 September 2009 para 13

35. In response to the Commission's request for further information, AFEI submits that the inclusion of salary packaging provisions is uncontested amongst the employer and union parties in this matter. All parties recognise the benefits provided to employees in terms of increased earning potential and the benefits provided to employers regarding attraction and retention.
36. Further, in respect of whether such a term can be included in a modern Award, AFEI refers the Commission to the Black Coal Mining Industry Award 2010, clause 16.8, which provides:

*Subject to all relevant laws, an employer and an individual employee may agree to a salary sacrifice arrangement. The obligations of the employer in respect of payment of remuneration will be satisfied by the employer complying with such an arrangement provided that the salary sacrificed amount and the residual wages combined are not less than the classification rate otherwise payable.*

37. Accordingly, AFEI submits there is a precedent with the Award Modernisation process that permits the insertion of salary packaging arrangements in Modern Awards.

38. Notwithstanding this precedent, AFEI submits that nothing contained within the Award Modernisation statutory framework (Part 10A of the *Workplace Relations Act, 1996*) prevents the inclusion of salary packaging provisions. Section 576J(1) of the *Workplace Relations Act, 1996* (Matters that may be dealt with by modern Awards) permit a modern award to include terms pertaining to annualised wage or salary arrangements.
39. Further, section 324 of the *Fair Work Act, 2009* allows 'permitted deductions' in certain circumstances. AFEI submits that Salary packaging falls within the scope of section 324 in that; the deduction will be authorised in writing by the employee and is principally for the employees benefit; the deduction will be authorised by a modern Award<sup>6</sup>
40. When the provisions of section 324 of the *Fair Work Act* are read in conjunction with Note 1 attached to this section, the situation becomes clearer:

*A deduction in accordance with a salary sacrifice or other arrangement, under which an employee chooses to:*

- (a) forgo an amount payable to the employee in relation to the performance of work; but*
- (b) receive some other form of benefit or remuneration*

*will be permitted if it is made in accordance with this section and the other provisions of this Division.*

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<sup>6</sup> Section 324(1)(a) and (c) Fair Work Act 2009

41. AFEI submits that it is the intention of the legislation to allow salary packaging provisions within modern awards. This intention is demonstrated in the terms of section 326 of the *Fair Work Act, 2009*. Relevantly, section 326 prevents certain terms of a modern from having effect:

*A term of a modern award, an enterprise agreement or a contract of employment has no effect to the extent that the term:*

- (a) permits, or has the effect of permitting, an employer to deduct an amount from an amount that is payable to an employee in relation to the performance of work; or*
- (b) requires, or has the effect of requiring, an employee to make a payment to an employer or another person;*

*if either of the following apply:*

- (c) the deduction or payment is:
  - i. directly or indirectly for the benefit of the employer, or a party related to the employer;*
  - and*
  - ii. unreasonable in the circumstances;**
- (d) if the employee is under 18 – the deduction of payment is not agreed to in writing by a parent or guardian of the employee*

42. AFEI submits that the salary packaging provisions proposed by parties prior to the release of the exposure draft do not offend the provisions set out within section 326 of the Act and accordingly, would be permitted in a modern Award as a consequence of the explanatory Note 1 set out above.
43. In response to the Commission's question whether a salary packaging term in a modern Award would be consistent with the provision of fair minimum safety net, AFEI submits that it is settled law that the definition of wages, remuneration, earnings etc is more than simply a cash payment. For example, the employees earnings has been defined in the Fair Work Act, 2009 to encompass the employees wages, amounts on the employees behalf and non-monetary benefits.<sup>7</sup>

### **Exemption rate**

44. The proposed Award does not contain an exemption rate for employees that earn a defined percentage above the top classification level. AFEI submits that a modern Award in this sector should provide for such an exemption rate for employees classified at the top classification.

### **Transitional Arrangements – Clause 2 and Schedule A**

45. AFEI submits that the inclusion of appropriate transitional arrangements is a necessary inclusion in the Modern Award for this sector. Generally, the model transitional provisions set down by the Commission in their decision of 2 September 2009 are acceptable for this sector.

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<sup>7</sup> Fair Work Act section 332(1)

46. In the event that the Commission is minded not to change the more restrictive sleepover provisions contained with the proposed Award, AFEI submits that appropriate transitional arrangements are necessary for the sleepover provisions within the Award. AFEI submits that the operative date of the new sleepover provisions should be delayed for the full five year transitional period to ensure an employer can prepare for the change.
  
47. Furthermore, in the event the Commission is minded not to reduce the minimum casual engagement for Home Care employees to one hour, AFEI submits that the new casual minimum engagement should be transitioned for employers who are currently only obliged to offer a one hour minimum engagement. AFEI seeks to utilise the full five year transition period for this entitlement by delaying the operative date of the higher minimum casual engagement.

**16 October 2009**