



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

AM2008/74 - EXPOSURE DRAFT MISCELLANEOUS AWARD 2010

AWARD MODERNISATION

AFEI
Australian Federation of
Employers & Industries

**BEFORE THE AUSTRALIAN INDUSTRIAL RELATIONS
COMMISSION
AWARD MODERNISATION**

**MATTER NO. AM2008/74 – SUBMISSION CONCERNING
EXPOSURE DRAFT MISCELLANEOUS AWARD 2010**

1. The Australian Federation of Employers and Industries (AFEI) has earlier provided written and oral submissions to the Commission concerning AM 2008/74. AFEI make the following submissions concerning the Exposure Draft Miscellaneous Award 2010 (the Exposure Draft).

Award Coverage

2. In oral submissions dated 7 August 2009, AFEI raised concerns that the proposed award must comply with Section 143(2) of the Fair Work Act (the Act), which states:

- (2) A modern award must be expressed to cover:
 - i. specified employers; and,
 - ii. specified employees of employers covered by the modern award.*

3. Further, modern awards should comply with the requirements of Section 143(7) of the Act which states:

Employees not traditionally covered by awards etc.

- (7) A modern award must not be expressed to cover classes of employees:
 - (a) who, because of the nature or seniority of their role, have traditionally not been covered by awards (whether made under laws of the Commonwealth or the States); or
 - (b) who perform work that is not of a similar nature to work that has traditionally been regulated by such awards.*

Note: For example, in some industries, managerial employees have traditionally not been covered by awards.

4. The Consolidated Ministerial Request at paragraph 8 requires that:

The Commission will identify the type of work, industry and/or occupations covered by a modern award and the application of each award.

5. During the consultation on 7 August, the Commission referred to its obligations under Section 163 of the Fair Work Act. AFEI submits that the Commission should have regard to the context in which Section 163 is located. The section is located in Part 6—*General Provisions Relating to Modern Award Powers* and is concerned with the special criteria for changing the coverage of modern awards. Section 163 is not primarily concerned with making a modern award, and, in any case, should not be read so that it is inconsistent with the provisions of s 143 (2).
6. AFEI supports the pre-exposure draft submission of the Australian Chamber of Commerce and Industries (ACCI) which proposed the following coverage clause:

“This award covers employers throughout Australia and their employees.

“It is not intended that this award extend award coverage into areas of work that have not previously been regulated by awards or NAPSAs”

7. The proposed award should contain the following exclusions from award coverage, as submitted by ACCI:

“This award does not cover:

- (a) an employee excluded from award coverage by the Act;*

- (b) *employees who perform work that has traditionally or historically not been regulated by an award or NAPSA as of 31 December 2009;*
- (c) *managerial or executive employees;*
- (d) *an employee who is a high income employee or earning above the high income threshold;*
- (e) *an employer bound by an enterprise award based instrument with respect to any employee who is covered by the enterprise award based instrument;*
- (f) *an employee of an employer that is covered by another modern award;*
- (g) *an employee who is a pieceworker."*

8. In addition to the coverage proposed by ACCI, for clarity concerning the application of the proposed Miscellaneous Award and compliance with s143(2), the proposed award should include the following:

"This award shall apply to an employer only on application to Fair Work Australia in which the employer and its employees to whom the award is to apply are identified and with an operative date no earlier than 14 days after a decision of Fair Work Australia to cover a specific employer and its employees."

Exposure Draft Award

9. The Exposure Draft's proposed coverage is inconsistent with s143(2) of the Act as it applies by exception rather than by specification, and it is in part ambiguous and inconsistent.
10. Clause 4 of the Exposure Draft provides that the award covers employees in the classifications listed, but will not cover employees "in an industry covered by a modern award who are not within a classification in that award". Clause 4 also states that the award

does not cover employees “in a class exempted from the operation of a modern award”.

11. Where the proposed Miscellaneous Award applies to employees in industries not covered by a modern award, it will inevitably apply to some employees in industries who have already been specifically excluded from modern award coverage.
12. In the Commission’s decision of 25 September 2009, it stated that the Commission decided not to publish an exposure draft award for accounting practices, as the regulation of this industry through NAPSAs and pre-reform awards is very limited. AFEI supports that decision. The Exposure Draft, however, potentially covers employees in the accounting industry. If this is the effect it will be contrary to Award Modernisation Request.
13. Clause 2(a) of the Minister’s Request provides that the extension of modern award coverage to new industries or occupations is directed to those employees ‘who perform work of a similar nature to work that has historically been regulated by awards (including state awards).’
14. Awards have not historically regulated the accounting practices industry, nor is it similar in nature to other industries that have been regulated by such instruments. As indicated in our previous submissions, AFEI opposes the creation or expansion of any modern award to cover employees in the accounting practices industry who do not perform work that would be covered by an occupational modern award, such as the Clerks – Private Sector Award 2010.
15. The Exposure Draft will also lead to inconsistencies in application to occupations and industries.

16. The Legal Services Award 2010 exposure draft covers the legal services industry, but limits the classification structure to the coverage of graduates and senior legal administration employees at its highest classifications. The proposed Legal Services Award 2010 will not apply to qualified solicitors. As this award covers the legal services industry, but the classifications do not extend to solicitors, the proposed Miscellaneous Award will have no application to solicitors.
17. The situation concerning award coverage for solicitors can be contrasted with qualified accountants, which have been excluded from any industry-based modern awards, but will be covered by the proposed Miscellaneous Award by default.
18. Further inconsistencies are apparent when considering other industries, such as Information Technology (IT). The Professional Employees Award 2010 applies to the employers in the information technology industry, amongst others, and their employees. The classification structure in the Professional Employees Award will extend to experienced information technology professionals in the IT industry. This award does not apply to IT employees generally, rather such employees must be engaged by an employer in the IT industry.
19. Inconsistencies will occur for IT professionals engaged by employers in other industries. An IT professional working for an accounting practice will not be covered by the Professional Employees Award, but covered by the proposed Miscellaneous Award, as there is no other industry-based modern award that would be applicable. Such employer would also be subject to substantially different terms and conditions of employment as a consequence of the application of different awards.

20. Stage 4 of the award modernisation process also includes a proposed Aquaculture Industry Award. The aquaculture industry, as described in the coverage clause of the Aquaculture Industry Award, does not include the wild-catch fishing industry, such as open-sea fishing or prawn trawling, etc. Employees in that industry have work patterns that are peculiar to that industry and have been excluded from the proposed aquaculture award.
21. As a consequence of the coverage terms of the Exposure Draft, however, employees engaged in the wild-catch industry will be covered by the proposed Miscellaneous award, and as proposed, is even less appropriate than the proposed aquaculture award.
22. The above examples illustrate the inconsistencies that will be created by the Exposure Draft. The examples also demonstrate an extension of award coverage to occupations and industries that have not historically been regulated by awards and are not similar in nature to other industries or occupations that are currently regulated by awards.

Award Conditions

23. AFEI submits that the provisions of a Miscellaneous Award should be minimal given its potentially diverse application, consistent with Clause 8A of the Request which states '...the Commission must have particular regard to paragraph 1(c) and consider how the modern award will include provisions appropriate for application to employers and employees in a range of industries and/or occupations.'

24. The award should not include any penalty rates or overtime penalties. The Exposure Draft, however, includes a penalty rate of 120% of the relevant minimum wage for work outside the hours of 7am to 7pm Monday to Friday and on Saturday. Further, the Exposure Draft also includes overtime penalty rates of time and a half and double time. These penalty rates, combined with the inconsistencies in award coverage as outlined previously, will create significant and unjustifiable cost increases for employers.
25. The example of award coverage inconsistencies for an IT professional in the IT industry, compared to an IT professional in other industries, demonstrates the disparities in terms and conditions of employment and cost increases for employers, potentially resulting from the Exposure Draft.
26. The Professional Employees Award, which covers IT employees in the IT industry, provides for ordinary hours of 38 per week, with no span of daily hours. The Exposure Draft restricts ordinary hours for IT professionals in other industries between 7am and 7pm. Penalty rates are applicable to time worked outside those hours.
27. The example of wild-catch fishing industry employees (an industry which may work substantially at night), who are currently award-free and not within the proposed coverage of the Aquaculture Industry Award, also demonstrates the cost increases that will occur as a result of the Exposure Draft. Wild-catch employees, whom have been excluded from the industry-based modern award, will be subject to more restrictive penalty rates and daily span of hours under the Miscellaneous Award. The Aquaculture Industry Award proposed a daily span of 5am to 7pm, over any five days of the week. The proposed Miscellaneous Award not only provides for additional penalties for ordinary hours prior to 7am, but also provides for higher weekend penalties.

28. The examples demonstrate that the Miscellaneous Award, as currently proposed by the Commission, will create significant cost increases for employers, particularly when considering the expanded coverage of the proposed Miscellaneous Award. Industries that have been specifically excluded by the Commission from modern award coverage are likely to be included in a Miscellaneous Award with significantly more restrictive terms and conditions.

16 October 2009