



THE AUSTRALIAN RETAILERS ASSOCIATION

SUBMISSION TO THE

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CONSULTATION ON

AWARD MODERNISATION

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Submission by:

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Costings comparison of current retail awards against exposure draft

1. INTRODUCTION

- 1.1 Further to previous oral and written submissions made to the AIRC in relation to a modern award for the retail industry, this submission focuses on the exposure draft for the retail industry released by the AIRC on 12 September 2008.
- 1.2 The ARA still maintains its primary position regarding the scope and content of a modern retail award as previously submitted. This submission provides further commentary and views on the exposure draft content as well as a costings comparison of different roster scenarios under current retail awards against the proposed modern retail award.
- 1.3 We are in full support of the positions advanced and submissions made by the Australian Chamber of Commerce and Industry (ACCI) so far as they relate to a modern award for the retail industry. However, the positions advanced by the ARA prevail to the extent of any inconsistency.
- 1.4 The ARA reserves its right to make further submissions in relation to matters dealt with by this paper as well as any other matters that may arise in connection with the modernisation process.

2. THE COST TO EMPLOYERS

- 2.1 Upon release of the exposure draft for the retail industry, the ARA became immediately concerned that the proposed content reflected an increase in costs for employers. However, to properly ascertain whether or not this was the case we costed the terms of the exposure draft against the main current retail awards and NAPSA in operation.
- 2.2 15 different roster scenarios have been created and applied for each jurisdiction against the exposure draft. The various scenarios are set out in the Appendices to this submission and cover an equal number of full-time, part-time and casual arrangements. The costings explore arrangements that are subject to ordinary hours with and without penalties, weekend and public holiday work as well as overtime. Where appropriate and relevant, benefits such as meal and laundry allowances have also been contrasted between the various instruments.
- 2.3 Every effort has been made to ensure the accuracy of calculations and all award and NAPSA rates include the most recent \$21.66 p/week (57 cents p/hour) increase as handed down by the Australian Fair Pay Commission on 8 July 2008.
- 2.4 The results of this exercise were startling to say the least and reflect significant cost increases for employers.

- 2.5 Out of a total of 120 different scenarios, employees are disadvantaged in only one case. Hence, there are 119 instances where employer costs have increased.
- 2.6 If we were to consider a small retailer who engaged 2 x full-time employees in accordance with categories B and D respectively and 4 x casual employees in accordance with categories L and O respectively – that business would face increased costs of between 14% and 30% as a result of the exposure draft terms.
- 2.7 We submit that allowing the terms of the exposure draft to form a modern award for the retail industry directly offends the objectives of the Minister’s request¹ as well as the requirement of the Act that modern awards must be economically sustainable².
- 2.8 The results of our exercise clearly indicate that employers would face payroll cost increases ranging from at least an additional 8% through to a staggering figure of almost 50% - this is unacceptable and we urge the AIRC to reconsider our previous submissions and those of other employer parties regarding what should be considered a reasonable safety net for modern award terms.
- 2.9 The community is aware of the current global financial crisis and the impact this has and will likely have on consumers and employers. The Reserve Bank of Australia has recognised the seriousness of this situation in the way it has addressed interest rate cuts.

¹ Award Modernisation Request, PN2(d), 2008

² Workplace Relations Act 1996, Part 10A, s576A(2)(c)

- 2.10 Even though modern awards will not operate until 1 January 2010, there is considerable uncertainty as to how long the current economic problems will continue for and how much more serious they may become.
- 2.11 We urge the AIRC to give consideration to this issue – particularly in light of the AIRC’s obligation to have regard to promoting the creation of jobs and high levels of employment³.

3. COMMENTARY REGARDING EXPOSURE DRAFT TERMS

Coverage of this Award and parties bound (Clause 4)

Coverage

- 3.1 The ARA is somewhat concerned that the submissions made by various parties regarding exclusions from modern retail award coverage have been ignored by the AIRC. This is particularly relevant to the apparent inclusion of community pharmacy and hairdressing as part of the “retail industry”.
- 3.2 The ARA maintains its support for the positions of the Pharmacy Guild of Australia and Hair and Beauty Australia regarding the exclusion of their respective sectors for the purpose of a single modern retail award.

³ Workplace Relations Act 1996, Part 10A, s576B(2)(a)

- 3.3 It is curious that that the AIRC has published three exposure draft awards for the “racing industry” and two exposure drafts for the “higher education industry” yet there appears to be no substantive reasoning for these decisions or as to why the retail industry has not been separated in a similar fashion.
- 3.4 The ARA urges the AIRC to carefully consider its approach here regarding the retail industry and recognise the clear need for appropriate exclusions or separation of community pharmacy and hair and beauty.

Exclusions

- 3.5 It is noted that the AIRC has elected to address exclusions from the definition of the “retail industry” in clause 3 of the exposure draft. We suggest that a separate exclusions clause regarding award coverage would be clearer and simpler to understand – consistent with the objectives of the Minister’s request.
- 3.6 In relation to the issue of award overlap, we note that the exposure draft for the retail industry omits a provision that is commonplace amongst the majority of exposure drafts released – that being:

*'Where an employer is engaged in more than one industry to which an industry award applies, an employee of that employer will be deemed to be in the classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work, regardless of the industry award in which the classification appears.'*⁴

- 3.7 The ARA submits that the above clause should be inserted into the retail industry exposure draft consistent with common practice in other industries.

Parties bound

- 3.8 The ARA has previously submitted to the AIRC that it sees no need for including lists of employer respondents to modern awards. It is understood that modern awards are intended to operate with common rule effect and hence, there is no need to include lengthy provisions regarding respondency.
- 3.9 Whether or not trade unions or employer associations should be named in modern awards is an issue to be considered carefully. As the federal government is yet to introduce its proposed substantive reforms to the Workplace Relations Act 1996 ("the Act"), there is uncertainty as to what effect the naming of such parties bound would have. This is particularly relevant to the issue of union rights of entry.

⁴ Mining Award 2010 – Exposure Draft, Clause 4.4

- 3.10 The ARA is a recognised registered organisation under the Act and has appeared before the AIRC on numerous occasions over the years in relation to matters affecting the retail industry. The ARA seeks to maintain its position as a key industry body involved in matters affecting the retail sector such as a modern award.
- 3.11 In relation to whether employer associations or unions should be named parties to modern awards, we submit that the AIRC should consider the appropriateness of deferring this issue until the federal government's substantive reforms pass as legislation to enable interested parties to make more informed submissions regarding this matter.
- 3.12 This would also allow the AIRC to make a more informed decision as to the appropriateness of including such provisions or otherwise.

Award flexibility (Clause 7)

- 3.13 The ARA has reviewed the proposed flexibility clause contained in the exposure draft and is satisfied that it reflects the model clause set out in Attachment C of the AIRC's decision of 20 June 2008.
- 3.14 The ARA submits that there is no need to adapt the model clause to the modern retail award in any other way.

Consultation (Clause 8)

- 3.15 The ARA has compared the proposed consultation clause in the retail industry exposure draft to those of other drafts published by the AIRC and has noted some clear inconsistencies despite the AIRC suggesting this be a standard provision in modern awards⁵.
- 3.16 In contrasting clause 8.1(a) of the retail industry exposure draft with clause 9.1(a) of the Manufacturing Industry exposure draft we see an inconsistency regarding union or representative notification. The ARA submits that all modern awards should acknowledge the possibility of there being no union or other representation at a given workplace and where this is the case, the employer should not be obliged to notify a third party of any change. It is noted that this approach is recognised under other exposure drafts including that applicable to the Mining industry.
- 3.17 For these reasons, the ARA submits that the clause proposed by the Manufacturing Industry exposure draft is preferred and should substitute clause 8.1 of the Retail Industry exposure draft.
- 3.18 The ARA further submits that where relevant union or other representation exists, then employees should formally request that their representative be notified by the employer. The representative should also then be required to demonstrate their authority to act on behalf of the employee(s) concerned to the satisfaction of the employer.

⁵ AIRC Statement, Award Modernisation, 12 September 2008, PN18

Part-time employees (Clause 12)

- 3.19 The ARA submits that clause 12 of the retail industry exposure draft sets out unnecessarily complex and lengthy provisions regarding part-time employment. The provisions are reflective of those contained in the SDAEA Victorian Shops Interim Award 2000 and in our view do not satisfy the objective that modern awards must be simple to understand and easy to apply⁶.
- 3.20 In contrast, clause 10.2 of the Mining Industry exposure draft sets out very clear and simple provisions regarding part-time employment which we submit should substitute clause 12 of the Retail Industry exposure draft.

Casual employment (Clause 13)

- 3.21 In the interests of standardising modern award provisions so far as possible, the ARA submits that clause 10.3 of the rail industry exposure draft should be used as the basis for a model clause which would substitute clause 13 of the retail industry exposure draft. We note that a similar clause formulation has been applied in the mining industry exposure draft and we are unable to see why this cannot be applied consistently across all modern awards.

⁶ Workplace Relations Act 1996, Part 10A, s576A(2)(a)

- 3.22 The decision of the AIRC to apply a 25% casual loading as a common standard amongst the exposure drafts is of great concern. The retail industry heavily relies on casual employment and employers in all states and territories outside of Victoria will now see casual loading increases of between 5-10% which we strongly oppose.
- 3.23 Should the AIRC position remain unchanged regarding the quantum of casual loading, then the ARA submits that consideration should be given to staggering casual loading obligations for employers across the full length of a 5 year transitional period.
- 3.24 We are also of the view that the exposure draft does not provide sufficient clarity regarding the treatment of casual loading when other penalty payment obligations arise. We have previously submitted that any other penalty entitlements for casuals should be in lieu of the applicable casual loading. The ARA maintains this position and seeks for this principle to be clearly reflected in any modern award for the retail industry.

Classifications (Clause 17)

- 3.25 Consistent with our position regarding the coverage and scope for a modern retail award, the ARA submits that clause 17 of the exposure draft is a far cry from achieving the objective of simplicity set out in the Minister's request. A 12 level classification structure spanning some 11 pages in length is overly complex and undesirable.

- 3.26 We submit that most retail employers are accustomed to applying classifications that fit on less than one page in current retail awards and NAPSAs. The approach taken by the AIRC in the exposure draft is unnecessarily complex and could easily be avoided by allowing for appropriate exclusions or separation from award coverage such as community pharmacies and hair and beauty.
- 3.27 The ARA has previously made submissions regarding a simple classification structure that would comply with the objectives of award modernisation and reiterates the appropriateness of such an approach.

Payment of wages (Clause 21)

- 3.28 Clause 21 of the retail industry exposure draft provides for the frequency of payment of wages. We note that pay frequency is confined to weekly or fortnightly only. In effort to promote flexibility in accordance with the objectives of the Minister's request, we seek for any retail industry modern award to also allow for pay frequency of one month or less.
- 3.29 The ARA acknowledges that monthly pay frequencies are currently dealt with by the AFPCS and we would seek for the existing principles here to be reflected in a modern award for retail – essentially only by agreement between an individual employee and employer.

Allowances (Clause 24)

Meal allowance (Clause 24.1)

- 3.30 The proposed meal allowance provision in the retail industry exposure draft omits an important exemption where employers should not have to make payment. This relates to situations where employers supply a meal to employees and therefore secure an exemption from having to pay the allowance.
- 3.31 This is a feature of many current awards and we are unable to see why the AIRC has not standardised this concept for the purpose of all modern awards. The ARA submits that this approach should be taken regarding the retail industry exposure draft at the very least.

38 hour week rosters (Clause 27)

- 3.32 The ARA has previously made submissions regarding the importance of flexibility for hours of work arrangements in the retail industry. Many retail businesses are seasonal in nature and should be able to retain the ability to average ordinary hours over a period not exceeding 12 months in duration that was made available under the Australian Fair Pay and Conditions Standard (“the AFPCS”).

3.33 On 17 September 2008, the Minister for Employment and Workplace Relations released a statement titled 'Introducing Australia's New Workplace Relations System' which was accompanied by a number of fact sheets. Page 3 of Fact sheet 3 titled 'A Strong and simple safety net' provides for the following:

'To ensure that the National Employment Standards operate effectively, simple and flexible 'default rules' will apply consistently to all employees not covered by an award or enterprise agreement. The default rules will set out how the National Employment Standards will apply to such employees, by:

...

- *allowing the averaging of working hours, by written agreement, over a maximum period of six months; ...'*

3.34 There is great level of inconsistency between how the Minister intends to treat non-award/agreement employees and how the AIRC intends to treat employees covered by modern awards. Furthermore, neither the Minister nor the AIRC have afforded any justification or reasoning for the approaches taken and resulting inconsistency.

3.35 Below is a table further illustrating the level of inconsistency between some of the exposure drafts released to date:

Exposure Draft Award Title	Maximum duration of roster cycle
Clerks – Private Sector Award 2010	4 weeks
Manufacturing and Associated Industries and Occupations Award 2010	12 months (by majority agreement)
Mining Industry Award 2010	12 weeks
Retail Industry Award 2010	4 weeks
Security Services Industry Award 2010	8 weeks

3.36 The Minister’s request released on 13 February 2008 explicitly states that one of the objectives of modernisation is to ‘... *promote flexible modern work practices...*’⁷. Clearly, this has not been achieved in terms of what is proposed as clause 27 of the retail industry exposure draft.

3.37 We are unable to see the necessity for such inconsistent treatment of hours averaging between the various awards and proposed minimum standards and see no reason why roster cycles of 12 or even 6 months should not be a term of any modern award for the retail sector.

⁷ Award Modernisation Request, PN1(c), 2008

Sunday work (Clause 28) & Overtime (Clause 29)

- 3.38 Clause 28.1 of the exposure draft refers to '200%' being the '*special rate*' for Sunday work. However, in contrast, clause 29.2(d) provides for a '*100% loading*' for such work. This reflects an unacceptable inconsistency in the phrasing of the entitlement and one which would likely cause employers to incorrectly interpret their obligations here.
- 3.39 We submit that penalties for working ordinary hours or overtime should be phrased as "penalties" – not loadings or special rates. The inconsistency in the quantum of the percentage penalties also needs to be clearly rectified. We suggest that adopting this approach would result in consistency for employers and minimise instances of any non-compliance with the award.
- 3.40 We further submit that penalty rates for overtime should be set out in an entirely separate clause to penalty rates applicable for ordinary hours. It is clearly undesirable for any confusion to be created for employers regarding their obligations between ordinary and overtime hours. As it stands, the exposure draft fails to provide the sufficient clarity employers require.

Difference between the weekly total of the current award and the draft modern award

Positive figure = better off under the modern award and negative figure = worse off

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
NSW	\$41.28	\$84.46	\$31.84	\$185.60	\$41.25	\$81.70	\$42.18	\$223.66	\$40.67	\$80.70	\$71.39	\$53.43	\$157.08	\$53.35	\$151.61
VIC	\$36.52	\$35.93	\$26.51	\$149.70	\$36.46	\$37.62	\$37.78	\$129.04	\$36.04	\$36.23	\$57.23	-\$4.53	\$94.44	\$6.75	\$113.08
Qld	\$46.37	\$45.78	\$25.41	\$165.48	\$46.31	\$48.62	\$48.18	\$144.78	\$46.44	\$46.08	\$120.33	\$67.64	\$159.81	\$66.35	\$148.64
WA	\$48.56	\$40.86	\$30.30	\$188.53	\$40.44	\$55.37	\$50.18	\$150.99	\$39.89	\$54.29	\$78.14	\$87.69	\$93.97	\$82.25	\$82.75
SA	\$23.86	\$85.23	\$81.75	\$189.38	\$23.32	\$89.44	\$37.18	\$157.00	\$28.34	\$85.05	\$53.38	\$58.05	\$130.14	\$58.85	\$128.82
Tas	\$49.70	\$59.42	\$57.96	\$159.73	\$61.55	\$61.43	\$50.78	\$159.18	\$59.07	\$47.78	\$122.14	\$89.21	\$140.57	\$83.45	\$127.11
ACT	\$40.88	\$74.06	\$31.44	\$175.73	\$40.85	\$82.30	\$44.68	\$217.36	\$43.17	\$73.20	\$81.50	\$63.53	\$134.11	\$61.85	\$125.43
NT	\$32.60	\$17.95	\$25.88	\$137.63	\$32.54	\$29.30	\$41.78	\$136.02	\$35.64	\$19.58	\$85.71	\$72.11	\$89.95	\$69.95	\$85.28

Comparison of employee weekly totals

	A	B	C	D	E	F	G	H	I	J	K	L
1	Type of Employee		NSW	VIC	QLD	WA	SA	TAS	ACT	NT	Modern award	
2												
3	Full time											
4	A	Mon - Fri: 38 hrs	\$610.72	\$615.48	\$605.63	\$603.44	\$628.14	\$602.30	\$611.12	\$619.40	\$652.00	
5	B	Wed - Sun, inc late night trade: 38 hours	\$695.86	\$744.40	\$734.55	\$739.46	\$695.09	\$720.90	\$706.26	\$762.37	\$780.32	
6	C	Mon - Fri, inc late night trade: 44 hours	\$794.86	\$800.19	\$801.29	\$796.40	\$744.95	\$768.74	\$795.26	\$800.82	\$826.70	
7	D	Supervisor: Tues - Sat: 38 hours	\$651.97	\$687.87	\$672.09	\$649.04	\$648.19	\$677.84	\$661.84	\$699.94	\$837.57	
8	E	Mon - Fri, inc late night trade: 38 hours	\$622.60	\$627.39	\$617.54	\$623.41	\$640.53	\$602.30	\$623.00	\$631.31	\$663.85	
9												
10	Part time											
11	F	Thurs, Sat & Sun: 15 hours	\$317.68	\$361.76	\$350.76	\$344.01	\$309.94	\$337.95	\$317.08	\$370.08	\$399.38	
12	G	Tues - Fri: 20 hours	\$325.60	\$330.00	\$319.60	\$317.60	\$330.60	\$317.00	\$323.10	\$326.00	\$367.78	
13	H	Supervisor: Thurs inc late night trade, Fri & Sun: 24 hours	\$455.70	\$550.32	\$534.58	\$528.37	\$522.36	\$520.18	\$462.00	\$543.34	\$679.36	
14	I	Mon - Thurs, inc late night trade: 30 hours	\$493.90	\$498.53	\$488.13	\$494.68	\$506.23	\$475.50	\$491.40	\$498.93	\$534.57	
15	J	Wed - Sun: 35 hours	\$632.50	\$676.98	\$667.13	\$658.91	\$628.15	\$665.43	\$640.00	\$693.63	\$713.21	
16												
17	Casual											
18	K	Mon - Fri, inc late night trade: 44 hours	\$958.96	\$973.13	\$910.03	\$952.22	\$976.98	\$908.22	\$948.86	\$944.65	\$1,030.36	
19	L	Mon - Fri: 38 hrs	\$758.54	\$816.50	\$744.33	\$724.28	\$753.92	\$722.76	\$748.44	\$739.86	\$811.97	
20	M	Wed - Sun, inc late night trade: 38 hours	\$825.20	\$887.84	\$822.47	\$888.31	\$852.14	\$841.71	\$848.18	\$892.33	\$982.28	
21	N	Mon - Thurs: 30 hours	\$600.70	\$647.30	\$587.70	\$571.80	\$595.20	\$570.60	\$592.20	\$584.10	\$654.05	
22	O	Thurs, inc late night trade, Sat & Sun: 22 hours	\$504.97	\$543.50	\$507.94	\$573.82	\$527.76	\$529.47	\$531.14	\$571.29	\$656.57	