

AM2009/20

**APPLICATION BY APESMA TO VARY THE
PROFESSIONAL EMPLOYEES AWARD 2010**

**SUBMISSION OF THE AUSTRALIAN
INDUSTRY GROUP**



6 November 2009

AM2009/36

APPLICATION BY APESMA TO VARY THE PROFESSIONAL EMPLOYEES AWARD 2010

1. Ai Group submits that APESMA's application to vary the *Professional Employees Award 2010* should be viewed by the Commission in two parts.
2. The first part of APESMA's application deals with a series of apparent typographical errors. This part is reflected in APESMA's proposed Amendments 1, 2 and 3 in Annexure A to its application of 18 September. This part warrants the Commission's consideration.
3. The second part of the union's application (as reflected in proposed Amendment 4 relating to the coverage of the award), we submit, should be viewed as a thinly disguised attempt by APESMA to re-argue an issue which has been the subject of extensive consideration by the Commission, and consequently should be roundly rejected.

PART 1 – TYPOGRAPHICAL ERRORS IDENTIFIED BY APESMA

4. Ai Group concurs with APESMA's proposed Amendment 1 in Annexure A to its application of 18 September 2009 re. the definition of "experienced engineer". The definition in the modern award appears to contain a typographical error.
5. Ai Group agrees with APESMA's proposed Amendment 2 in Annexure A to its application re. the definition of "experienced scientist". The definition appears to contain a typographical error.

Classification definitions

6. With regard to Amendment 3 in Annexure A to APESMA's application, it appears that the union is not proposing any changes to the following clauses in Schedule A (Classification Structure and Definitions): A.1.1, A.1.2, A.1.3, A.1.4, A.1.5, A.1.8 and A.1.10.
7. Ai Group supports APESMA's proposed amendments to A.1.6, A.1.7, A.1.9 and A.1.11. The modern award appears to contain typographical errors in these clauses.

PART 2 – APESMA'S CLAIM TO EXPAND COVERAGE BEYOND ORGANISATIONS "PRINCIPALLY ENGAGED" IN THE INDUSTRIES

8. Ai Group submits that APESMA's application to vary the coverage provisions of the Award on the basis of alleged ambiguity or uncertainty is simply a thinly disguised attempt to re-argue the case for IT professionals employed outside the ICT industry to be covered under the modern award. This issue has been extensively dealt with in written submissions and public consultations, and a decision has been made by the Full Bench. It would be unfair upon employers to open this issue up again.
9. APESMA's proposed wording would also extend the award's coverage of professionals in the telecommunications services industry and quality auditing industry far beyond the coverage of the existing awards in these industries.
10. In its Statement of 26 June 2009, the Full Bench said:

“[3] Applications to vary the substantive terms of modern awards will be considered on their merits. It should be noted, however, that the Commission would be unlikely to alter substantive award terms so recently made after a comprehensive review of the relevant facts and circumstances including award and NAPSA provisions applying across the

Commonwealth. Normally a significant change in circumstances would be required before the Commission would embark on a reconsideration. A variation in the Minister's award modernisation request made after the modern award might constitute such a change. In that respect we repeat what the Full Bench said in its 22 May 2009 statement in relation to the Stage 3 awards:

"[7] Another more general issue arises in connection with the recent variation to the consolidated request. It is likely that the variation will have some significance in relation to modern awards made in the priority stage and in Stage 2. We do not intend, however, to initiate a review of those awards as that course would lead to considerable delay in completing modernisation. A party covered by a modern award who wishes to challenge terms in that award based on the variation to the consolidated request should make an appropriate application."

11. We submit that there has not been "a significant change in circumstances", and that the Commission should not reconsider the decision which it has made on the coverage of the *Professional Employees Award 2010*.

The effect of APESMA's proposed variation

12. Sub-clause 4.2 of the modern award is worded as follows:

"This award covers employers throughout Australia principally engaged in the information technology industry, the quality auditing industry or the telecommunications services industry.....". (*Emphasis added*)

13. APESMA's application seeks to delete the word "principally" in subclause 4.2.
14. The concept of an employer being "*principally engaged*" in the relevant industry, or "*whose principal function is.....*", or whose "*primary purpose is.....*", is used in a number of modern awards, including, for example:
 - The *Contract Call Centres Award 2010* (subclause 4.2(a));

- The *Electrical, Electronic and Communications Contracting Award 2010* (subclause 4.2(b));
 - The *Manufacturing and Associated Industries and Occupations Award 2010* (paragraphs 4.4(h) and 4.4(i)); and
 - The *Telecommunications Services Award 2010* (subclause 4.1).
15. Far from creating ambiguity or uncertainty, the use of the term “principally engaged” increases certainty. If the word “principally” was removed, as sought by APESMA, an employer could be covered by the award even if engaged in the IT, telecommunications or quality auditing industry on an infrequent basis and where such work is merely incidental or ancillary to its main functions.
16. Further, if the Commission was to decide that the term “principally engaged” is ambiguous or uncertain in the coverage clause of the *Professional Employees Award 2010* it would invite a raft of applications to vary other awards where similar terminology has been used.
17. The use of the term “principally engaged” is consistent with the main federal awards applying to IT, telecommunications and quality auditing professionals:
- The existing *Information Technology Industry (Professional Employees) Award 2001* only applies to IT professionals who work for an employer whose “principal function” is set out in the definition of the IT industry;
 - The existing *Telecommunications Industry (Professional Employees) Award 2002* only applies to telecommunications professionals who work for an employer whose “principal function” is the operation of a business in the telecommunications industry (defined in a similar manner to the modern award);

- The existing *Quality Auditing and Assessment Award 1999* only applies to a very small number of companies, all of which appear to be principally engaged in the quality auditing industry.
18. It is relevant and noteworthy that in 1996 the AIRC held that the coverage clause of the *Information Technology Industry (Professional Employees) Award 2001* was ambiguous or uncertain and varied the award to insert subclause 6.3 which specifies that the award only applies to those employers whose “principal function“ is described in the definition of the information technology industry. The background to this variation is set out later in this submission.

Coverage of IT professionals

19. The issue of whether or not the modern award should cover IT professionals in all industries, or just IT professionals who are principally involved in the IT industry has been the subject of extensive consideration by the Commission.
20. This issue was dealt with at some length in the following Ai Group submissions:
- 31 October 2008 – Stage 2 pre-exposure draft submission, pages 39 to 41;
 - 11 December 2008 – public consultations before VP Watson;
 - 6 January 2009 – Further Stage 2 pre-exposure draft submission, pages 13 to 15;
 - 13 February 2009 – Stage 2 post-exposure draft submission, pages 106 and 107;
 - 6 March 2009 – Stage 3 pre-exposure draft submission, pages 75 to 80 and Annexure I;
 - 26 March 2009 – public consultations before C Smith;
 - 28 April 2009 – Stage 3 pre-exposure draft submission, pages 47 and 48;

- 12 June 2009 – Stage 3 post-exposure draft submission, pages 104 to 112;
- 24 June 2009 – public consultations before the Full Bench.

21. Set out below is a section from Ai Group’s submission of 12 June 2009, which explains the importance of the coverage of the modern award being limited to professionals who are “principally engaged” in the ICT industry:

“ICT Professionals

As set out in the submissions which Ai Group made during Stage 2 of the modernisation process, we strongly support the making of an award covering ICT professionals.

In its Statement of 23 January 2009, the Full Bench said:

“[88].....The parties to the current award agree that the nature of professional employment in the sector makes it more appropriate that there be a separate award for professional employees. The employers proposed an information technology and telecommunications industry award confined to professional employees engaged in those industries. The Association of Professional Engineers, Scientists and Managers, Australia proposed an occupational award covering information technology and telecommunications professionals.

[89] We have decided to defer the consideration of awards covering such employees until Stage 3 of the award modernisation process. The nature of awards covering professional employees generally will be considered in Stage 3 and the alternative approaches can be considered in that broader context.”

The development of the *Information Technology Industry (Professional Employees) Award 2001*

Award coverage of ICT professionals can be traced back to a log of claims which APESMA served on more than 500 IT companies in mid-1996.

Over the next three years, Ai Group represented the employers in very lengthy and exhaustive AIRC proceedings and negotiations with APESMA. Mr Chris Jessup QC and Mr Frank Parry were briefed by Ai Group.

In a Full Bench appeal decision of 23 June 1998 (Print Q2179) APESMA's right to represent engineers in the IT industry was confirmed.

Following this decision Ai Group negotiated the *Information Technology Industry (Professional Engineers) Award 1999* with APESMA, and the award was made by consent.

Subsequently, APESMA and Ai Group consented to the scope of the award being widened to cover IT professionals with a relevant degree incorporating a major in information technology (eg. computer science). At that time the title of the award was changed to the *Information Technology Industry (Professional Employees) Award 2001*.

The scope clause of the 2001 award defines the Information Technology Industry in the following manner:

“6.2 The Information Technology Industry is defined as:

6.2.1 the design and manufacture of computers and computer peripherals;

6.2.2 the design and manufacture of telecommunications equipment;

6.2.3 the design and manufacture of computer software;

6.2.4 computer system installation, repair and maintenance;

6.2.5 computer consultancy services;

6.2.6 computer programming; and

6.2.7 systems analysis services.

6.2.8 activities which are incidental, ancillary or complimentary to the activities set out in 6.2.

6.3 For the purposes of this award, the Information Technology Industry only includes those employers whose principle function is set out in 6.2.1, 6.2.2, 6.2.3, 6.2.4, 6.2.5, 6.2.6 and/or 6.2.7 and not other employers.” (Emphasis added)

Subclause 6.3 above was inserted from 1 January 2006, following an application by Ai Group to remove ambiguity and uncertainty, given doubt which had arisen regarding whether the award applied only to IT professionals working for IT companies, or IT professionals working for all companies.

Ai Group made a similar application to vary the Victorian Common Rule Declaration but Commissioner Smith decided that it was appropriate for the Declaration to have a wider scope than the main award (PR968123).

Ai Group submits that there was a clear understanding when the award was made that it only applied to IT professionals working for IT companies. All of the companies served with the original log of claims were IT companies.

Since 2001, the *Information Technology Industry (Professional Employees) Award 2001* has become the most important and widely applied award in the ICT industry.

The Telecommunications Industry (Professional Employees) Award 2002

In 2002, a mirror award to the *Information Technology (Professional Employees) Award 2001* was created entitled the *Telecommunication Industry (Professional Employees) Award 2002*. The two awards are identical except for the coverage clause and list of respondents.

Proposed Information Technology and Telecommunications (Professional Employees) Award 2010

Ai Group and APESMA have agreed upon the terms of an *Information Technology and Telecommunications Industries Professional Employees Award 2010*, with the exception of the coverage clause (**Annexure I**).

Ai Group seeks an award covering IT and telecommunications professional employees who are:

- **Principally engaged** in the IT industry (as defined in similar terms to the *Information Technology (Professional Employees) Award 2001*); or
- **Principally engaged** in the Telecommunications Industry (as defined in similar terms to the *Telecommunication Industry (Professional Employees) Award 2002*).

APESMA seeks an award covering IT and telecommunications professional employees who are:

- **Engaged** in the IT industry (defined more broadly than the *Information Technology (Professional Employees) Award 2001*); or
- **Principally engaged** in the Telecommunications Industry (as defined in similar terms to the *Telecommunication Industry (Professional Employees) Award 2002*).

Ai Group submits that when both of the existing awards were made there was a clear understanding that they only applied to IT professionals working for IT / Telecommunications companies. Ai Group negotiated both awards with APESMA and is a party to each award. Ai Group opposes any extension in the scope of award coverage.

To extend the scope, as sought by APESMA, would breach the Award Modernisation Request because it would result in many thousands of employees who have traditionally been award free becoming award-covered. A high proportion of medium to large companies employ IT professionals.

Apart from the coverage clause the rest of the proposed modern award has been agreed upon between Ai Group and APESMA. The content is heavily based upon the *Information Technology (Professional Employees) Award 2001* and the *Telecommunication Industry (Professional Employees) Award 2002*.”

22. The issue of whether or not the modern award should extend to IT professionals in all industries or be limited to IT professionals in the ICT industry, was referred to in the Commission’s Statement of 23 January 2009 which accompanies the Stage 2 exposure drafts:

“**[88]**.....The parties to the current award agree that the nature of professional employment in the sector makes it more appropriate that there be a separate award for professional employees. The employers proposed an information technology and telecommunications industry award confined to professional employees engaged in those industries. The Association of Professional Engineers, Scientists and Managers, Australia proposed an occupational award covering information technology and telecommunications professionals.

[89] We have decided to defer the consideration of awards covering such employees until Stage 3 of the award modernisation process. The nature of awards covering professional employees generally will be considered in Stage 3 and the alternative approaches can be considered in that broader context.” (Emphasis added)

23. In its Statement of 22 May, which accompanied the exposure draft of the *Professional Employees Award 2010*, the Full Bench said:

“[196] Finally, we have prepared a draft award for professional employees. This is an amalgamation of three proposed awards. In examining the proposed awards we saw a number of common conditions and similarity in the wage rates. We have sought to amalgamate these proposals. This has involved an exercise in judgment particularly in relation to the treatment of hours of work and overtime in professional employment. It may be that there are reasons not yet advanced why this amalgamation should not occur and we invite comment. Our objective is to simplify the regulation of these areas consistent with the provision of an appropriate safety net for professional employees.”

24. In response to the AIRC’s exposure draft released on 22 May 2009, on 12 June Ai Group submitted:

“The definition of the *“information technology industry”* in the exposure draft is based upon the definition in the *Information Technology Industry (Professional Employees) Award 2001*, but there are two substantial amendments, both of which Ai Group opposes.

Firstly, the exposure draft uses the words - “information technology industry means:” - whereas the *Information Technology Industry (Professional Employees) Award 2001* uses the words - “information technology industry means a business whose principal function is:” The change in terminology would massively expand award coverage of IT professionals in all States other than Victoria, contrary to the terms of the Award Modernisation Request. Ai Group submits that the existing wording needs to be retained.

The use of the existing wording would ensure consistency between the definition of *“information technology industry”* and *“telecommunications services industry”*, which requires that the business be *“principally engaged”* in the industry to be covered by the award.” (Emphasis added).

25. In its Stage 3 Decision of 4 September 2009, the Full Bench said:

“Professional Employees Award 2010

[232] There have been a number of variations to the exposure draft. To begin, we have now included quality auditors in the scope and coverage of the modern award. At the exposure draft stage we were of the view that there was not sufficient coverage of these persons to warrant a separate award. APESMA agreed and submitted that they could be incorporated into the *Professional Employees Award 2010*.

[233] We have also decided to leave the name of the award as it was in the exposure draft. AiGroup expressed concern it could be misunderstood as applying to all professional employees. There is some force to this submission. But the alternative would be to adopt a title which would be too cumbersome and might require further alteration in the future.

[234] The Association of Consulting Engineers Australia (ACEA) suggested some changes to the definition of professional employees. APESMA was unable to assess the impact of those changes in the time available. We have not made the changes proposed as it would disturb longstanding definitions. However, this does not mean that the parties cannot examine these matters and make application to update the definitions in the future.

[235] The ACEA submitted changes to a number of standard clauses. We have decided to maintain consistency with other modern awards. However, there were other changes sought by AiGroup and ACEA which have been included.

[236] An important change sought by AiGroup related to the way in which employers would consider a total remuneration package for employees having regard to patterns of work. We have retained the provision contained in the exposure draft. In our view this is not prescriptive but nonetheless alerts employers to the need to take into consideration the demands placed upon professional employees when fixing remuneration.”

26. As stated earlier, APESMA’s application to vary the coverage provisions of the *Professional Employees Award 2010* on the basis of alleged ambiguity or uncertainty is simply a thinly disguised attempt to re-argue the case for IT professionals employed outside the ICT industry to be covered under the modern award. This issue has been extensively dealt with in written submissions and public consultations, and a decision has been made by the Full Bench. It would be most unfair upon employers to open this issue up again.
27. Whilst the Full Bench has rejected APESMA’s attempts to expand award coverage beyond employers principally engaged in the relevant industries, the Full Bench has adopted some of APESMA’s proposals to expand existing award coverage (which Ai Group opposed) including:

- an expansion in existing award coverage to include “the design, development and maintenance of on-line internet architecture and the facilitation of on-line content management”; and
- coverage of quality auditing professionals (NB. The existing federal award applies to only a handful of companies).