

AWARD MODERNISATION SUBMISSIONS AND DRAFT AWARD PROVISIONS

Stage 4 Industries / Occupations

Post-Exposure Drafts



16 October 2009

CONTENTS

<i>Chapter No.</i>	<i>Title</i>	<i>Page</i>
1	Introduction	3
2	Dry Cleaning and Laundry Services;	5
3	Firefighting Services	6
4	The Miscellaneous Award	7
5	Grain Handling	24
6	Health and Welfare Services (Remainder) – Social and Community Services	25
7	Industries not Otherwise Assigned - Accounting Practices	33
8	Industries not Otherwise Assigned – Building Services	34
9	Industries not Otherwise Assigned – Correctional Facilities	36
10	Industries not Otherwise Assigned – Labour Hire	37
11	Industries not Otherwise Assigned – Legal Services	38
12	Industries not Otherwise Assigned – Salt Industry	40
13	Local Government Administration	41
14	Maritime Industry – Seagoing	42
15	Water, Sewerage and Drainage Services	43
16	National Training Wage Schedule.	44
Annexure A:	Ai Group’s Proposed amendments to the Exposure Draft – Miscellaneous Award 2010	
Annexure B	Agreed amendments to Appendix 1 of the National Training Wage Schedule	

AWARD MODERNISATION

STAGE 4 INDUSTRIES / OCCUPATIONS

POST – EXPOSURE DRAFTS

1. Introduction

1. Ai Group commends the Commission on the substantial analysis and drafting which have gone into the preparation of the Stage 4 exposure drafts. There are many aspects of the Stage 4 drafts which Ai Group supports, including:
 - The exclusion from coverage under the Miscellaneous Modern Award, of employees “in an industry covered by a modern award who are not within a classification in that modern award”;
 - The exclusions in several of the exposure drafts for maintenance work carried out under the Modern Manufacturing Award;
 - The decision not to make a separate award for the labour hire industry;
 - The fact that the Legal Services Modern Award does not cover practicing solicitors.
2. However, Ai Group is extremely concerned about the coverage of the Miscellaneous Modern Award, as it relates to professionals and managers in award-free industries.
3. Ai Group is also very concerned about the title, coverage and provisions of the proposed *Employment Services Industry Award 2010*.
4. This submission deals with the following Stage 4 industries / occupations:
 - Dry Cleaning and Laundry Services;

- Firefighting Services;
- The Miscellaneous Award:
 - A main Ai Group submission, together with:
 - A joint submission of Ai Group, the Institute of Chartered Accountants, CPA Australia and the National Institute of Accountants.
 - A joint submission of Ai Group and the Recruitment and Consulting Services Association (RCSA).
- Grain Handling;
- Health and Welfare Services (Remainder) – Social and Community Services:
 - An Ai Group submission focussing upon the Group Training Sector;
 - A joint Ai Group / RCSA submission relating to the *Employment Services Industry Award 2010*;
- Industries not Otherwise Assigned - Accounting Practices (A joint submission of Ai Group, the Institute of Chartered Accountants, CPA Australia and the National Institute of Accountants);
- Industries not Otherwise Assigned – Building Services;
- Industries not Otherwise Assigned – Correctional Facilities;
- Industries not Otherwise Assigned – Labour Hire Services (A joint submission of Ai Group and the RCSA);
- Industries not Otherwise Assigned – Legal Services;
- Industries not Otherwise Assigned – Salt Industry;
- Local Government Administration;
- Maritime Industry – Seagoing;
- State and Territory Government Administration;
- Water, Sewerage and Drainage Services;
- National Training Wage Schedule.

2. Dry Cleaning and Laundry Services

5. Ai Group provides the Secretariat for the following associations:
 - Textile Rental and Laundry Association (Australia) Limited; and
 - Textile Rental and Laundry Association (Victoria) Inc
6. Ai Group is aware of, and has had input into, the submission prepared and filed by the Textile Rental and Laundry Associations of Australia (TRLAA), regarding the *Exposure Draft – Dry Cleaning and Laundry Industry Award 2010*.
7. Ai Group supports the TRLAA's submissions.
8. Ai Group submits that the model transitional provisions, including the phasing-in schedule, should be included in the Dry Cleaning and Laundry Industry Modern Award.

3. Firefighting Services

9. It is important that maintenance contractors, installers and manufacturers (eg. of fire extinguishers and equipment) bound by the following awards are excluded from coverage:
- *Manufacturing and Associated Industries and Occupations Award 2010;*
 - *Electrical, Electronic and Communications Contracting Award 2010;*
 - *Plumbing and Fire Sprinklers Award 2010;*
 - *Building and Construction General On-site Award 2010; and*
 - *Joinery and Building Trades Award 2010.*
10. These exclusions are especially important given the very generous nature and inflexibility of various provisions in the *Exposure Draft – Fire Fighting Award 2010*, which would be crippling for any company not currently applying them.
11. Ai Group submits that the model transitional provisions, including the phasing-in schedule, need to be included in this award.

4. The Miscellaneous Award

Overview

12. Ai Group is very concerned about the coverage and conditions in the *Exposure Draft – Miscellaneous Award 2010*.
13. It is vital that the Miscellaneous Modern Award not impose award coverage on staff who are currently award free, such as professional and managerial staff.
14. The application of overtime penalties or shift loadings to professional or managerial staff who are currently award-free would be very harmful to both employers and employees. Such remuneration methods are completely inconsistent with the nature of professional and managerial employment in most private sector workplaces.
15. Ai Group submits that the *Exposure Draft – Miscellaneous Award 2010*:
 - Is inconsistent with the intended purpose of the Miscellaneous Modern Award;
 - Does not adhere to various mandatory requirements of the *Fair Work Act 2010*;
 - Does not conform with the Award Modernisation Request;
 - Would create huge problems for industry.

The intended purpose of the Miscellaneous Modern Award

16. In a media release dated 26 September 2009, the Deputy Prime Minister, the Hon Julia Gillard MP, stated:

“As part of the Rudd Government's agenda to reduce the number and complexity of awards, it was always intended that a new general modern award be drafted to apply to employees who perform work of a type that has traditionally been covered by awards but who are not covered by a new modern award.

The Transition to Forward with Fairness legislation, the Fair Work Act and the Minister's award modernisation request make it clear that the award modernisation process is not intended to extend awards to groups such as senior managers who have never been covered by awards.”

17. Ai Group concurs with the Deputy Prime Minister's view that the intent of the Miscellaneous Modern Award is that it cover *“employees who perform work of a type that has traditionally been covered by awards but who are not covered by a new modern award”*.
18. We submit that the intended purpose of the Miscellaneous Modern Award is that it cover the very small number of employees who were bound by a pre-modern award or NAPSA, and who have been omitted from coverage under a modern industry or occupational award.
19. It is not appropriate that the Miscellaneous Modern Award cover any industries which can be readily identified or any common occupations. If an industry or occupation can be identified then either:
 - the industry or occupation is award free, and should remain so; or
 - the industry or occupation was covered by pre-modern awards / NAPSA's and a new modern industry or occupational award should be made; or
 - the industry or occupation was covered by pre-modern awards / NAPSA's and the most relevant existing modern award should be varied.

20. During the Senate Inquiry into the *Fair Work Bill*, senior officials of the Department of Education, Employment and Workplace Relations (DEEWR) were asked a series of questions on notice by various Senators. One relevant written question and DEEWR's written answer is set out below:

“Senator Abetz asked in writing:

Question

Non-award industries

11. How will non-award industries such as aquaculture be dealt with under the new regime?

Answer

In an award modernisation request to the Australian Industrial Relations Commission on 28 March 2008, the Hon Julia Gillard MP, made clear that award modernisation is not intended to extend award coverage to classes of employees who, because of the nature or seniority of their role, have traditionally been award free. However, this does not preclude the extension of modern award coverage to new industries or occupations where the work performed by employees is of a similar nature to work that has historically been regulated by awards (including state awards). The Government has asked the Australian Industrial Relations Commission to create a modern award to provide minimum entitlements for employees who are not covered by another (industry or occupation based) modern award and who are performing work of a similar nature to that which has historically been regulated by awards.

There will be a national minimum wage for employees not covered by a modern award.

The 10 National Employment Standards (NES) will apply to all employees - whether they are covered by an award or not.

Simple and flexible 'default rules' will apply consistently to all employees not covered by a modern award or enterprise agreement to ensure the NES are effective."

21. As set out by DEEWR, the Act does not "*preclude the extension of modern award coverage to new industries or occupations where the work performed by employees is of a similar nature to work that has historically been regulated by awards (including state awards).*"
22. However, as demonstrated by the *Exposure Draft - Aquaculture Industry Award 2010* (which was the industry example used by Senator Abetz), where a new industry or occupation is identified and the work performed is of a similar nature to work that has historically been regulated by awards, the appropriate course of action is to make a new modern award or vary an existing one, not cover the work under the Miscellaneous Modern Award.

Requirements of the Fair Work Act

General requirements

23. The *Fair Work Act* requires that modern awards:
 - be "fair, relevant and enforceable" (s.3(b));
 - "promote flexible modern work practices and the efficient and productive performance of work" (s.134(1)(d));
 - be "simple" and "easy to understand" (s.134(1)g).

24. The Act also states that FWA must take into account “the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden” (s.134(1)(f)).
25. Ai Group submits that the *Exposure Draft – Miscellaneous Award 2010*:
- Has coverage provisions which are so vague that the proposed award would not be “fair” upon employers or employees, and would not be readily “enforceable”;
 - Would not promote “flexible modern work practices” but rather would apply rigid and inappropriate award conditions to many thousands of professional and managerial employees who are currently award-free, and would disturb the flexible and modern methods by which professional and managerial employees are currently employed;
 - Would not promote “the efficient and productive performance of work” but rather would hamper efficiency and productivity; and
 - Is not “simple” or “easy to understand” but rather is complex and hard to understand.

Mandatory provisions relating to coverage terms

26. Chapter 2, Part 2-3, Division 3, Subdivision C of the Act sets out the “Terms that **must** be included in modern awards”. Subdivision C includes s.143 – Coverage Terms.
27. Subsection 143(1) states:

“Coverage terms must be included

- (1) *A modern award **must** include terms (coverage terms) setting out the employers, employees, organisations and outworker entities that are*

covered by the award, **in accordance with this section**". (Emphasis added).

28. Accordingly, in determining the coverage provisions of a modern award, the Commission **must** comply with the provisions of s.143.

29. The Explanatory Memorandum for the *Fair Work Bill* (para 565) explains that:

"FWA is required to include in a modern award terms that clearly identify the persons and bodies that are covered by the award (subclause 143(1))".

30. Subsection 143(2) states:

"Employers and employees

*(2) A modern award **must** be expressed to cover:*

*(a) **specified** employers; and*

*(b) **specified** employees of employers covered by the modern award."* (Emphasis added).

31. There is no discretion with regard to the requirements of paragraph 143(2). The Commission must ensure that the employers and employees covered by the award are "specified".

32. Subsection 143(5) goes on to state that for the purposes of subsections (2) to (4), *"employers may be specified by name or by inclusion in a specified class or specified classes"* and that *"employees must be specified by inclusion in a specified class or specified classes"*.

33. The term Macquarie Dictionary¹ defines the terms “specify” and “specified” in the following way:

“specify / v., -fied, -fying. –v.t. 1. to mention or name specifically or definitely; state in detail. 2. to give a specific character to. 3. to name or state as a condition. – v.i. 4. to make a specific mention or statement. [ME, from ML: specific, from L: sort kind]”

34. The term “specify” is defined in the Concise Oxford Dictionary² as to “name expressly, mention definitely”.

35. Accordingly, we submit that the Act requires that the employers and employees covered by the Miscellaneous Modern Award must be set out in a manner which is specific, definite and detailed. Such requirements include the manner in which the class or classes are defined, as referred to in subsection 143(5). We submit that the coverage provisions in the *Exposure Draft – Miscellaneous Award 2010* offend these requirements.

36. Subsection 143(7) of the *Fair Work Act* 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.*

¹ Third Edition, 1998

² Seventh Edition 1986

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

37. Again, this is a mandatory requirement.
38. However, while subsection 143(7) must be complied with by the Commission, it is not drafted in a manner which would exempt the classes of employees who fall outside those mentioned in paragraphs (a) and (b), should the Commission fail to adhere to the requirements of the Act.
39. The wording of subsection 143(7) can be contrasted with the wording of subsection 47(2). Clearly the term “*a modern award must not be drafted to cover*” (subsection 143(7)) does not have the same meaning as “*a modern award does not apply to an employees...at the time when the employee is a high income employee*” (subsection 47(2)). Subsection 47(2) operates to exclude a particular class of employee from the application (but not the coverage) of a modern award, whereas subsection 47(2) requires the Commission to draft coverage provisions in a particular manner.
40. A special rule relating to varying modern awards is articulated in subsection 163(1) of the Act in the following terms:

“Special rule about reducing coverage

- (1) *FWA must not make a determination varying a modern award so that certain employers or employees stop being covered by the award unless FWA is satisfied that they will instead become covered by another modern award (other than the miscellaneous modern award) that is appropriate for them.*

41. It can be seen that FWA is not permitted to reduce the coverage of a modern award that has already been made, if it results in an employee being covered under the Miscellaneous Modern Award. This clearly reinforces the argument that the Miscellaneous Modern Award is not designed to have a major role in the modern award system. It is there to simply to cover the very small number of employees who were covered under a pre-modern award or NAPSA, and who have been omitted from coverage under a modern industry or occupational award.
42. A further special rule relating to modern awards is set out in subsection 163(2) of the Act as follows:

Special rule about making a modern award

(2) *FWA must not make a modern award covering certain employers or employees unless FWA has considered whether it should, instead, make a determination varying an existing modern award to cover them.*"

43. Ai Group submits that this provision indicates that the appropriate course of action for the Commission would be to, firstly, determine the "certain employers and employees" who would potentially be covered under the Miscellaneous Modern Award, and, secondly, determine whether an existing modern award should be varied to cover such employees.

Award Modernisation Request

44. The Award Modernisation Request requires that the Commission create a Miscellaneous Modern Award. The coverage and purpose of this award is articulated in paragraph 4A of the Request in the following terms:

“4A The Commission is to create a modern award to cover employees who are not covered by another modern award and who perform work of a similar nature to that which has historically been regulated by awards (including State awards). The Commission is to identify the award as such. This award is not to cover those classes of employees, such as managerial employees, who, because of the nature or seniority of their role, have not traditionally been covered by awards. The modern award may deal with the full range of matters able to be dealt with by any modern award however the Commission must ensure that the award deals with minimum wages and meal breaks and any necessary ancillary or incidental provisions about NES entitlements.”

45. The requirements upon the Commission arising from Paragraph 4A of the Award Modernisation Request are clear. These include:

- *The Miscellaneous Modern Award must only “cover employees who are not covered by another modern award and who perform work of a similar nature to that which has historically been regulated by awards (including State awards)”*
- *The Commission must “identify the award” as only covering “employees who are not covered by another modern award and who perform work of a similar nature to that which has historically been regulated by awards (including State awards)”*
- *The award must not cover “those classes of employees, such as managerial employees, who, because of the nature or seniority of their role, have not traditionally been covered by awards.”*

46. Paragraph 8A of the Award Modernisation Request states that

*“8A In developing the modern award in accordance with paragraph 4A 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.” (Emphasis Added)

47. Paragraph 1(c) of the Award Modernisation Request, which the Commission is required to have “particular regard” to when developing the Miscellaneous Modern Award, states that modern awards “*must be economically sustainable and promote flexible modern work practices and the efficient and productive performance of work*”.
48. This provision includes similar concepts to s.134(1)(d) of the *Fair Work Act* which requires that modern awards “promote flexible modern work practices and the efficient and productive performance of work”.
49. As stated earlier, the *Exposure Draft – Miscellaneous Award 2010* would not promote “flexible modern work practices” but rather would apply rigid and inappropriate award conditions to many thousands of professional and managerial employees who are currently award-free, and would disturb the flexible and modern methods by which professional and managerial employees are currently employed. Further, the *Exposure Draft – Miscellaneous Award 2010* would not promote “the efficient and productive performance of work” but rather would hamper efficiency and productivity.

“Covers” versus “applies”

50. It is evident to Ai Group that there is widespread misunderstanding amongst employers and employees about the implications of a modern award “covering” particular employers and employees versus a modern award “applying” to particular employers and employees.

51. The wider implications of award “coverage”, as opposed to award “application”, are particularly relevant in respect of the Miscellaneous Modern Award.
52. Section 47 of the *Fair Work Act* states that a modern award “applies” to an employer, employee, organisation or outworker entity if:
- The modern award covers the employee, employer, organisation or outworker entity;
 - The modern award is in operation; and
 - No other provision of the Act provides, or has the effect, that the modern award does not apply to the employee, employer, organisation or outworker entity.
53. Subsection 47(2) states that “*a modern award does not **apply** to an employee.....at the time when the employee is a high income employee*”.
54. A “high income employee” is defined in s.329 of the Act as an employee who has a Guarantee of Annual Earnings and the annual rate in the Guarantee exceeds the “high income threshold” (currently \$108,300).
55. It is extremely important that the Commission remain very conscious of the fact that:
- Modern awards “cover” employees who are within the class of employees specified in the award, regardless of whether they are “high income employees”;
 - Modern awards “apply” to employees with earnings which exceed the high income threshold, unless they have a Guarantee of Annual Earnings which exceeds the high income threshold;

- Very few high income employees currently have a Guarantee of Annual earnings. Subclause 328(3) of the Act requires that before or at the time of giving the Guarantee “the employer must notify the employee in writing that a modern award will not apply to the employee”.

56. The effect of drafting the Miscellaneous Modern Award to “cover” a specified class or classes of employee will be to extend the unfair dismissal laws to all employees within such class or classes, regardless of whether they are “high income employees”.

57. Section 382 states that a person is protected from unfair dismissal if the person has completed the minimum employment period and

“(b) one or more of the following apply:

- (i) a modern award covers the person;*
- (ii) an enterprise agreement applies to the person in relation to the employment;*
- (iii) the sum of the person’s annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold”.*

58. With regard to the above provision, the Explanatory Memorandum states:

“1513 Paragraph 382(b) provides that a person will be protected from unfair dismissal if they are covered by a modern award or if an enterprise agreement applies to their employment. If neither of these criteria applies, a person will only be able to bring an unfair dismissal claim if their remuneration is less than the high income threshold”.

59. It would be highly inappropriate for the Miscellaneous Modern Award to have the effect of massively expanding the number of professional and managerial employees who are covered by the unfair dismissal laws.
60. A further effect of drafting the Miscellaneous Modern Award to “cover” employees who are currently award-free, such as most professional and managerial employees, will be to exclude the application of the “*simple and flexible ‘default rules’*” for the NES.

A large proportion of professional and managerial employees earn less than \$108,300

61. As pointed out above, almost all employees earning more than the high income threshold do not currently have a Guarantee of Annual Earnings, which meets the requirements of the Act. This means that the Miscellaneous Modern Award will “apply” to a very high proportion of the employees “covered” by the award, including those earning salaries which are far in excess of \$108,300.
62. Also, a large proportion of professional and managerial employees earn less than \$108,300. Indeed, recent graduates and professionals in the early stages of their career typically earn much less than this amount. The award will “apply” to all such employees who fall within the class of employees “covered” by the award.

Accounting practices

63. A joint submission has been filed by Ai Group, the Institute of Chartered Accountants, CPA Australia and the National Institute of Accountants.

64. The submission strongly opposes award-coverage for accounting professionals, including opposing coverage under the *Miscellaneous Award 2010*.

Recruitment and consulting services

65. A joint submission has been filed by Ai Group and the Recruitment and Consulting Services Association.

66. The submission strongly opposes award-coverage for professional and managerial employees in the recruitment and consulting services industry – including opposing coverage under the *Miscellaneous Award 2010*.

67. Typical award-free roles in the recruitment and consulting services industry include:

- On-Hire Recruitment Consultants
- Recruitment Placement Consultants
- Branch Managers
- Operations Managers
- Regional Managers
- Financial Controllers
- Accountants (in-house)
- Account Managers
- Business Development Officers or Managers
- Candidate Resourcers
- Human Resource Coordinators / Manager / Consultants
- Workplace Relations Managers / Consultants
- Industrial Relations Managers / Consultants
- Employee Relations Managers / Consultants
- OHS Managers / Coordinators / Consultants

- Outsourcing Consultants
- Environment Managers
- Environmental Services Consultants
- EEO Managers
- EEO Consultants
- Training Coordinators / Managers

APESMA's apparent proposal to expand the coverage of Professional Employees Award

68. Ai Group understands that APESMA proposes that the coverage of the *Professional Employees Award 2010* be expanded to cover additional professional employees, rather than such employees being covered under the the Miscellaneous Modern Award.
69. Ai Group opposes this proposal. Whilst the terms of the *Professional Employees Award 2010* are far more appropriate for professional employees than the *Exposure Draft – Miscellaneous Award 2010*, professional and managerial employees who are currently award-free need to remain so, as required by the Act and the Award Modernisation Request.
70. Despite the expansive title (which Ai Group opposed) the *Professional Employees Award 2010* only covers a few award-covered professions (eg. engineers and scientists). Most professionals are award-free.

Ai Group's proposed changes to the Exposure Draft – Miscellaneous Award 2010

71. An amended version of the *Miscellaneous Award 2010* is included as ***Annexure A***.

72. The most important amendments are:
- To amend the coverage provisions to ensure that the award clearly specifies who the award covers and to limit the award's coverage to those employees who Ai Group submits the award was intended to cover;
 - To prevent the award applying to any employee who earns more than the high income threshold (ie. \$108,300) regardless of whether the employee has a Guarantee of Annual Earnings which meets the requirements of the Act;
 - To remove the professional classification for the reasons explained above.
73. It would highly inappropriate and damaging to industry for the award to contain any classification above the base trade level.
74. In the event that the professional classification is retained despite Ai Group's strong objections, the following clauses should not apply to any employee engaged at this level and provisions reflecting Clause 18 (Ordinary Hours of Work and Rostering) in the *Professional Employees Award 2010* should apply to professional employees covered by the *Miscellaneous Award 2010*:
- Clause 15 – Allowances;
 - Clause 16 – District allowance;
 - Clause 20 – Hours of work;
 - Clause 22 – Overtime and penalty rates;
 - Subclause 23.2 – Additional week of annual Leave for shiftworkers
 - Subclause 23.3 – Annual leave loading;

5. Grain Handling

75. In its 25 September 2009 Statement, the Full Bench announced its decision not to publish an exposure draft for this industry.
76. Ai Group supports this position and we rely on our submissions lodged on 24 July 2009. Such submissions set out the reasons why a modern industry award should not be created for this industry.

6. Health and Welfare Services (Remainder) – Social and Community Services

Employment Services Industry Award 2010

77. Ai Group has filed a joint submission with the RCSA relating to the *Exposure Draft – Employment Services Industry Award 2010* which deals with:

- An amendment which has been agreed upon between Ai Group, the RCSA and the National Employment Services Association (NESA) regarding the coverage of the Award; and
- The title of the modern award. We submit that the use of the term “employment services” in the award is not appropriate and would lead to a great deal of confusion and uncertainty.

78. The submissions below relate to the Group Training Sector in which Ai Group has a major interest.

Group Training Sector

79. Ai Group is very concerned that group training organisations have been included within the *Exposure Draft – Employment Services Award 2010*.

80. The exposure draft covers the full range of employees of group training organisations, with the exception of apprentices and trainees on placements.

81. Ai Group strongly supports the exclusion of apprentices and trainees on placement. Such apprentices and trainees should be bound by the industry and occupational awards which apply to the work that they are performing, as currently applies.
82. However, Ai Group strongly opposes the making of a modern award for group training organisations.
83. Ai Group submits that there is no basis for an industry award being made to cover employees of group training organisations.
84. Clerical and administrative employees of such organisations should be covered by the *Clerks – Private Sector – Award 2010* given that most group training organisations currently apply clerical industry NAPSAs.
85. Award-free employees of group training organisations need to remain award-free, consistent with the requirements of the Act and Award Modernisation Request.
86. There is no logical reason for group training organisations to be covered under the same modern award as an award covering employers who deliver labour market assistance programs.
87. In the pre-drafting stage, the Group Training Association of Victoria (“GTAV”) submitted that the *Group Training (Victoria) Award 1999* should be included in the list of awards considered as part of the health and welfare services (remainder) – social and community services group. It later submitted that a separate modern award should be created for the group training industry and provided a draft “*Group Training Industry Award 2010*” based on the Victorian award.

88. As the later submission of the GTAV indicates, there are two current awards/NAPSAs which specifically cover the employees of group training organisations (other than their apprentices and trainees). These are:
- The Victorian award, which is residency based and lists 23 respondents;
 - A Queensland NAPSA, the *Group Training Organisations Award – State 2003*, which applies to group training organisations in Queensland.
89. According to DEEWR, there are about 150 group training organisations operating in Australia³. The majority of the relevant employees of group training organisations in Australia, we submit, would not be covered by either the abovementioned award or NAPSA.
90. In states and territories outside of Victoria and Queensland, there is no specific award which covers the “group training industry”. A NAPSA in Tasmania applies only to apprentices and trainees of group training organisations (the effect of which is that the host employer’s award applies to apprentices and trainees) and is not relevant for present purposes. Administrative and clerical staff would typically be covered by the common rule clerical award/NAPSA applying in the relevant state or territory. Professional and managerial employees would in many cases be award-free at present.
91. Ai Group operates a wholly owned registered Group Training Organisation - Ai Group Training Services (“AiGTS”).
92. AiGTS currently employs nearly 700 apprentices and trainees who are placed with host employers.

³ See <www.deewr.gov.au/Skills/Grouptraining/Pages/finding_organisations.aspx>

93. AiGTS employs and manages apprentices in all states and in the ACT. In addition to full time apprentices and trainees, AiGTS also employs school-based apprentices in Albury, Bendigo, Brisbane and Melbourne and Sydney.
94. The vast majority of AiGTS apprentices fall within the industries and occupations covered by the *Metal, Engineering and Associated Industries Award 1998 – Part 1*.
95. AiGTS has around 40 staff.
96. Many AiGTS positions would appear to be covered by the exposure draft which are currently award-free (including in Victoria, since AiGTS is not a respondent to the Victorian award), such as:
- General manager;
 - Finance and business manager;
 - OHS/workcover adviser;
 - Area managers;
 - Team leaders;
 - Employment and training advisers;
 - Employment and training support officers;
 - Apprentice/trainee recruitment officers;
 - Business development coordinator;
 - Finance officer (professional qualified);
 - Business consultant.
97. Ai Group is particularly concerned about the extent to which the classification structure for the group training sector extends to cover professional and managerial employees, and applies prescriptive and inappropriate conditions to such staff.

98. The classification structure in the exposure draft extends up to a Group Training Manager – Level 3, with *“extensive managerial control of one or many project areas which have both a company wide scope and high level complexity”*.
99. Employees of group training organisations in professional and managerial roles clearly fall within the group of employees which, in the terms of the Award Modernisation Request, *“because of the nature or seniority of their role, have traditionally been award free”* and to whom the creation of modern awards is not intended to cover⁴.
100. While the Request also states that this does not preclude the extension of modern award coverage to new industries or new occupations where the work performed is of a similar nature to work that has historically been regulated by awards, in Ai Group’s view, the work performed by the award-free employees covered by the exposure draft is not of a relevantly similar nature to work which is currently widely award-covered.
101. In particular, it is not similar to the work performed by employees in the labour market assistance sector. Group training organisations operate in a very different environment to the labour market assistance sector.
102. Ai Group understands that even where, broadly speaking, a community not-for-profit organisation operates a group training organisation, the group training organisation typically remains a distinct, legally separate entity.
103. The Australian Taxation Office describes the activities of a group training scheme in the following way:

In relation to a typical Group Training Scheme, a Group Training Company (“Group Training Company”):

⁴ Clause 2(a) of the consolidated request.

- *Employs apprentices and trainees, placing them into group training schemes for the duration of their apprenticeship or traineeship;*
- *Coordinates the training and industry placements of the apprentices and trainees and is responsible for the administration and compliance aspects of the employment;*
- *Is the legal employer of the apprentices and trainees;*
- *Places apprentices or trainees with a host employer where they receive on the job training which is complemented by formal training provided by registered training organisations etc; and*
- *Invoices the Host Employer for the time the apprentices or trainees are placed with its business. The fee to the Host Employer is based on: basic wage, Superannuation Guarantee Charge, Work Cover, administrative fee less any government incentives.⁵*

104. As is evident from the above, the principal role of a group training organisation is to coordinate the training of apprentices. Such role has absolutely nothing to do with the activities of organisations which conduct Labour Market Assistance Programs, and there is simply no valid rationale for covering the two very different types of organisations under the same modern award.

105. Ai Group submits that:

- The Employment Services Modern Award (which Ai Group proposes should be called the *Labour Market Assistance Programs Award 2010*) should not cover the group training sector;

⁵ Australian Taxation Office, Goods and Services Tax Determination, 2007

- Clerical and administrative employees employed by group training organisations should be covered by the *Clerks – Private Sector – Award 2010*, given that most group training organisations currently apply clerical industry NAPSAs.
- Award free employees of group training organisations, such as AiGTS, need to remain award-free, as required by the *Fair Work Act* and the Award Modernisation Request.

Other changes proposed to the draft award

106. In addition to the abovementioned changes to the title and coverage, Ai Group submits that the following amendments should be made to the Employment Services Modern Award (which Ai Group proposes should be called the *Labour Market Assistance Programs Award 2010* and should not cover the group training sector:

- **10.4(a) – Delete the paragraph and replace with:**

“A casual employee is an employee engaged and paid as such”.

The clause in the exposure draft is overly restrictive.

- **10.4(d) – Delete.** This clause is unnecessary and unwarranted.
- **13.2 – Delete.** This clause does not include a modern or progressive approach to promotion / classification.
- **23.2 – Delete.** Most organisations covered by this award are unlikely to have a formal 10 minute morning rest break and hence this provision should be deleted.

- **24.1 – Amend.** It is essential that overtime penalties not apply to professional and managerial employees.
- **24.2 – Amend.** Double time after two hours is a substantial increase for some employers. Numerous awards / NAPSAs allow time and one half to be paid for the first three hours.
- **Schedule C – Delete.** This award should not cover group training organisations such as AiGTS. In the event that the Commission decides to make a modern award covering group training organisations, despite Ai Group’s strong objections:
 - The following classification levels should be deleted as they apply to managers:
 - Group training employee – level 7;
 - Group training manager;
 - Group training manager – level 1;
 - Group training manager – level 2;
 - Group training manager – level 3.
 - An annualised salary arrangement, similar to paragraph 24.1(g) of the Manufacturing Modern Award, should apply to the classification of Group Training Employee – Level 3 and all higher classifications. The pay rate for Group Training Employee – Level 3 is roughly the same as a C7 employee under the Manufacturing Modern Award.

107. Ai Group submits that the model transitional provisions, including the phasing-in schedule, should be included in this award.

7. Industries not Otherwise Assigned – Accounting Practices

108. A joint submission has been filed by Ai Group, the Institute of Chartered Accountants, CPA Australia and the National Institute of Accountants.
109. The submission strongly opposes award-coverage for accounting professionals, including opposing coverage under the *Miscellaneous Award 2010*.

8. Industries not Otherwise Assigned – Building Services

Car Parking

110. In the *Exposure Draft – Car Parking Award 2010*, the car parking industry is defined as:

“**car parking industry** means the provision of parking and related services for cars and other vehicles on a commercial basis but does not include the provision of such services which are incidental or ancillary to the operations of an employer primarily engaged in another industry.”

111. Ai Group supports this definition and the corresponding limitation on coverage of the award. There are many industries where the parking of cars is incidental or ancillary to the operations of employers in the industry, eg. vehicle repairs, vehicle sales and hotels.

112. Ai Group submits that the model transitional provisions, including the phasing-in schedule, should be included in this award.

Pest Control

113. Ai Group has held discussions with the LHMU regarding the relationship between the Manufacturing Modern Award and the *Pest Control Award 2010*.

114. Joint Ai Group / Union Correspondence was forwarded to the Commission on 12 October 2009 setting out the position of Ai Group and the MTFU unions (ie. the AMWU, AWU, CEPU, CFMEU, LHMU and NUW) on amendments to the Manufacturing Modern Award to reflect the Commission’s Stage 3 decision of 4 September 2009.

115. The correspondence included the outcome of the discussions between Ai Group and the LHMU on the relationship between the Manufacturing Modern Award and the *Pest Control Award 2010*. An agreed new paragraph 4.3(bb) was proposed for the coverage clause of the Manufacturing Modern Award, as set out in the following extract from the correspondence which included explanatory notes:

4.3(aa) artificial fertilizers, chemicals, alkalis, and all processes involving chemical synthesis.

4.3(bb) fungicides, insecticides, vermin destroyer and weed destroyer (except for spraying, fumigating, poisoning or otherwise applying such substances).

<p>THE ABOVE AMENDMENT IS SUPPORTED BY Ai GROUP AND EACH OF THE MTFU UNIONS <u>NOTE:</u> These products are covered by the <i>Manufacturing Chemists Award 1998</i> and/or the <i>AWU Drug and Pharmaceutical Industry Award 2000</i> but are not covered by the <i>Pharmaceutical Modern Award</i>. Refer to para [163] of the AIRC's Statement of 22 May 2009 and para [211] of the AIRC's Decision of 4 September 2009.</p>

116. The intention of the agreement reached between Ai Group and the LHMU is that the manufacture of fungicides, insecticides, vermin destroyer and weed destroyer would be covered by the Manufacturing Modern Award while the spraying / application of such substances to fumigate buildings etc would be covered under the Pest Control Modern Award.

117. To avoid any uncertainty regarding the manufacture of fungicides, insecticides, vermin destroyer and weed destroyer, Ai Group submits that a new paragraph 4.1(c) should be added to the Pest Control Modern Award as follows:

(c) *Manufacturing and Associated Industries and Occupations Award 2010*.

118. It is important that the model transitional provisions, including the phasing-in schedule, be included in this award.

9. Industries not Otherwise Assigned – Correctional Facilities

119. Importantly, the *Exposure Draft – Corrections and Detention (Private Sector) Award 2010* excludes contractors covered by the Manufacturing Modern Award and various other listed awards. Ai Group supports this approach. Mechanical maintenance contractors engaged to perform work at prisons and correctional facilities are currently typically covered under the *Metal, Engineering and Associated Industries Award 1998*, and should be covered under the Manufacturing Modern Award.
120. Ai Group submits that the model transitional provisions, including the phasing-in schedule, should be included in this award.

10. Industries not Otherwise Assigned – Labour Hire Services

- 121. The labour hire industry is a major sector of Ai Group's membership and most of the major players in the industry are Ai Group members.
- 122. Ai Group has filed a joint submission with the RCSA for this sector.
- 123. The submission argues that modern awards should generally cover labour hire employees who work in industries covered by modern awards.
- 124. We have also proposed a model clause and amendments to the coverage provisions of Stage 1, 2 and 3 modern awards to reflect this principle.

11. Industries not Otherwise Assigned – Legal Services

125. The submissions in this chapter are made by Ai Group and Ai Group Legal Pty Ltd.

126. Ai Group Legal Pty Ltd is an incorporated legal practice which was established in 2007. It operates in New South Wales, Victoria and Queensland. The firm employs a team of lawyers who provide workplace relations legal services, mainly to members of the Australian Industry Group. The firm is controlled by a Board of Directors consisting of seven senior officers of the Australian Industry Group.

127. The Australian Industry Group and Ai Group Legal Pty Ltd employ approximately 25 lawyers.

128. In its Statement of 25 September 2009, the Full Bench said:

“[141] We publish an exposure draft of the Legal Services Award 2010. The award will cover employees up to and including articulated clerks / graduates at law. We have not included classifications for lawyers admitted to practice. There is some award coverage for lawyers in the private sector but this is limited and does not appear, in our view, to satisfy the criteria necessary for the making of a modern award....”

129. We strongly concur with the Full Bench. It would be inconsistent with the requirements of the *Fair Work Act* and the Award Modernisation Request for the Legal Services Modern Award to cover lawyers admitted to practice.

130. We also submit that it would be inconsistent with the legislation and Request to include classification Level 7 in the award. This level could apply to degree-qualified managerial employees who are currently overwhelmingly award-free.
131. In addition to the proposed exclusions in the Legal Services Modern Award, it is vital that lawyers admitted to practice and managers in legal firms are not covered by the Miscellaneous Modern Award.
132. The Commission has said that the limited award coverage for lawyers in the private sector *“does not appear, in our view, to satisfy the criteria necessary for the making of a modern award.”* This finding should apply both to coverage under the Legal Services Modern Award, as well as to coverage under the Miscellaneous Modern Award.
133. It is essential that paragraph 4.2(a) in the *Exposure Draft – Miscellaneous Award 2010* remain in the Award. This will ensure that all employees in the “legal services industry”, who are not covered under the Legal Services Modern Award, are also excluded from the Miscellaneous Modern Award.
134. Ai Group submits that the model transitional provisions, including the phasing-in schedule, should be included in this award.

12. Industries not Otherwise Assigned – Salt Industry

135. It appears that the intent of paragraph 4.1(b) is that only maintenance employees of employers who are principally engaged in the activities in 4.1(a) would be covered by the award, but this is far from clear.

136. It is important that mechanical maintenance contractors are excluded from the award. Such contractors are currently covered under the *Metal, Engineering and Associated Industries Award 1998* and are appropriately covered under the Manufacturing Modern Award.

137. Paragraph 4.1(b) should be reworded as follows:

“The servicing, maintaining (including mechanical, electrical, fabricating or engineering) or repairing of plant and equipment or camp facilities used in activities set out in clause 4.1(a) by employees employed by ~~the employer~~ employers principally engaged in the salt industry.”

138. This amendment is particularly important given that the exclusion for work covered by the Modern Manufacturing Award in paragraph 4.2(c) does not apply to work covered by subclause 4.1.

139. An exclusion is also needed for work covered by the *Food, Beverage and Tobacco Manufacturing Award 2010*. There is a large quantity of salt used in food products and major food companies are involved in activities such as storing and handling salt. We submit that a new paragraph 4.2 should be added, as follows:

“(d) employers in respect of their operations or activities covered by the Food, Beverage and Tobacco Manufacturing Award 2010.”

13. Local Government Administration

140. As drafted, the *Exposure Draft – Local Government Industry Award 2010* would not apply to maintenance contractors, ICT contractors, external consultants and other parties not directly employed by a Local Government entity. It is essential that this approach be maintained in the final modern award.

14. Maritime Industry – Seagoing

141. Ai Group supports the exclusion which the Commission has inserted into the *Exposure Draft – Seagoing Industry Award 2010* for work covered by the Manufacturing Modern Award (paragraph 4.2(e)).
142. We rely on our Stage 3 submissions dated 12 June 2009 in support of this exclusion. (Refer to Chapter 17 – Maritime Industry, pages 74 – 79, of those submissions).

15. Water, Sewerage and Drainage Services

143. Several of the major employers in the water industry are members of Ai Group.

144. After consulting with the employers about the *Exposure Draft – Water Industry Award 2010*, we propose the following amendments:

- **Clause 14 – Minimum Wages**

The award covers professional and managerial staff and some of the prescriptive conditions in the award (eg. the overtime provisions) are problematic for such staff.

We submit that an annualised salary arrangement, similar to paragraph 24.1(g) of the Manufacturing Modern Award, should apply to Band 7 and above. Band 7 is the entry level for graduate professional employees.

- **Clause 22 – Higher Duties**

The one day period for which employees can perform higher duties at their current rate of pay should be increased to five days. The award extends to professional and managerial staff and a one day period is not practicable for these staff.

145. The exclusion of contractors under paragraph 4.4(b) is supported. There are a large number of maintenance contractors which carry out work in the water industry.

146. Ai Group submits that the model transitional provisions, including the phasing-in schedule, should be included in this award.

16. National Training Wage Schedule

147. Ai Group has not detected any problems with Clauses 1 to 6 of the *Exposure Draft – National Training Wage Schedule*.
148. We support Subclause 5.4 – Default Wage Rate. The concept of Wage Level B becoming the default wage level is sensible and pragmatic.
149. Ai Group has had discussions with the ACTU and an agreed position has been reached on amendments to Appendix 1 (Allocations of Traineeships to Wage Levels) of the Schedule. The agreed wording for Appendix 1 is set out in **Annexure B** to this submission.