

**SUBMISSION TO FAIR
WORK AUSTRALIA**

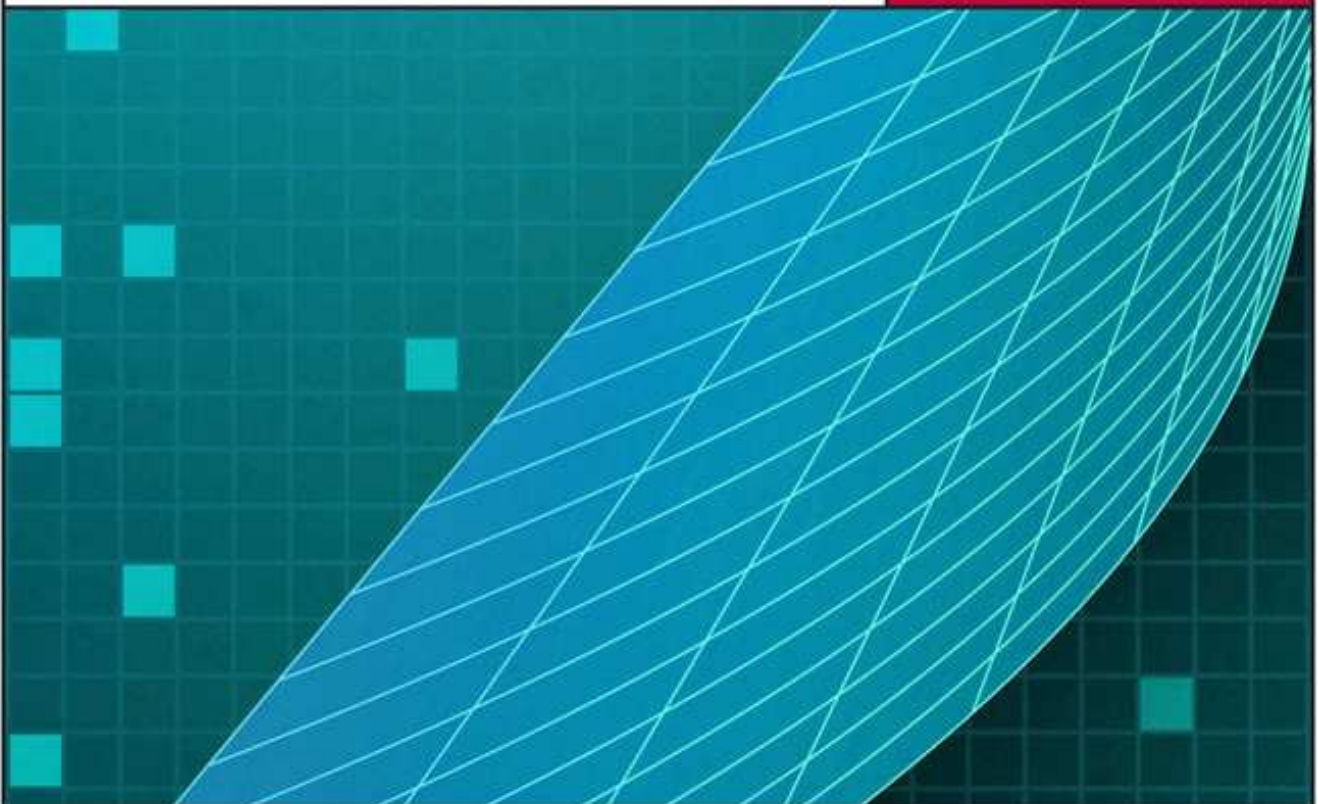


**EM2009/1
BANK OF QUEENSLAND AGENTS AWARD 2010**



AUSTRALIAN INDUSTRY GROUP

26 March 2010



EM2009/1

BANK OF QUEENSLAND AGENTS AWARD 2010

1. Overview

1. The decision which the Full Bench makes in response to the application by Molanka Pty Ltd and others for a modern enterprise award to replace the Bank of Queensland Agents Award 2004 will be very important. The application is the first one made under the *Fair Work Act* seeking the making of a modern enterprise award.
2. In its Decision of 24 February 2010 ([2010] FWAFB 1543), the Full Bench invited interested parties to make submissions on the following matters:
 - The operation of the modern enterprise awards objective, and the interaction between that objective, the modern awards objective and the minimum wages objective;
 - The factors required to be taken into account under Item 4 of Schedule 6 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (“the Transitional Act”), both in relation to whether a modern enterprise award should be made and if so, the content of any such award;
 - The matters of principle raised by the ACTU in its submission of 27 November 2009.
3. These issues are discussed in some detail below.

2. Background to the development of Schedule 6 to the Transitional Act

4. During the development of the Transitional Act, Ai Group made several detailed submissions to the Government setting out our views on the approach which should be taken to the modernisation of enterprise awards. The content of Schedule 6 bears much similarity to the submissions which Ai Group made on the approach which should be taken.

Ai Group's February 2009 submission

5. In a submission to the Hon Julia Gillard MP, Deputy Prime Minister on 6 February 2009, Ai Group said:

"Dear Deputy Prime Minister

Re. Enterprise awards

Ai Group is writing to set out its views on the future of enterprise awards and enterprise NAPSAs.

Ai Group understands that the following are policy decisions of the Government:

- The parties to federal enterprise awards will be able to maintain them in the new workplace relations system provided that they are modernised;
- The parties to enterprise NAPSAs will be able to convert them into modern federal enterprise awards; and
- Employers who do not have an existing enterprise award or enterprise NAPSA will not be permitted to make one.

This correspondence sets out our views in the context of the above apparent policy decisions.

Ai Group can understand why the Government intends to require the parties to existing enterprise awards and enterprise NAPSAs to modernise them. Under the new workplace relations system, the National Employment Standards are a major part of the safety net and modern awards are drafted to reflect this fact.

Definition of the enterprise / coverage of an enterprise award

Many enterprise awards / NAPSAs are very old and the employers bound by them have often restructured since they were made.

Accordingly, FWA should have the power to amend the parties bound and/or the coverage of an enterprise award / NAPSA during the modernisation process, to include any of the following:

- The old employer named in the enterprise award / NAPSA;
- Any employer which is a transmittee of the old employer and has become bound by the enterprise award / NAPSA;
- Any employer which is in a joint venture with the old employer (or transmittee);
- Any employer which is a related body corporate to the old employer (or transmittee) and/or
- Any employer which is in the same franchise as the old employer (or transmittee).

FWA should only have the power to alter the previous coverage of an enterprise award / NAPSA if it decides that it is not contrary to the public interest to do so after hearing the views of the relevant parties.

Content of the enterprise award

Some enterprise awards / NAPSAs have conditions which are more favourable for the employer than the relevant industry award and hence provide a competitive advantage, others have conditions which are less favourable for the employer than the industry award and accordingly result in a competitive disadvantage. Some employers strongly oppose the abolition of their enterprise award, while others support the abolition of their enterprise award.

To cater for the various views and circumstances, Ai Group proposes that any party to an enterprise award / NAPSA should have the right to argue for the level of the conditions in the award to be amended during the modernisation process.

If such arguments are pursued, FWA should be required to determine the matter with reference to the “modern award objective” in s.134 of the *Fair Work Bill*. FWA should also be required to take into account the need for the relevant enterprise to remain profitable and competitive.

Modernisation process / timeframe

Ai Group proposes the following approach to modernising enterprise awards / NAPSAs:

- Up to 31 December 2013, any party to an enterprise award / NAPSA would be able to apply to FWA to have their award modernised. The consent of all parties would not be required. If such an application is received, FWA would be required to modernise the enterprise award;
- Enterprise awards and enterprise NAPSAs would continue to operate until modernised or cancelled;
- After 1 January 2014, FWA would notify all parties to enterprise awards / NAPSAs which had not been modernised that such instruments will be cancelled on a particular date. If any party to an enterprise award / NAPSA objects to the cancellation, it should be required to demonstrate that exceptional circumstances exist which justify an extension in the 31 December 2013 deadline for applying to modernise the award.

The four year timeframe proposed would ensure that all enterprise awards / NAPSAs are modernised (or are in the process of being modernised) or cancelled by the time of the first four yearly review of modern awards, as provided for in s.156 of the *Fair Work Bill*.

Cancellation of enterprise awards / NAPSAs

The above process will no doubt result in the cancellation of many enterprise awards / NAPSAs which are obsolete or no longer wanted by the parties.

However, an additional process needs to be available enabling a party to a pre-modernised enterprise award / NAPSA or a modern enterprise award to pursue its cancellation, if circumstances warrant this.

In considering such applications, FWA should be required to take into account:

- The modern award objective in s.134 of the *Fair Work Bill*;
- That enterprise awards are an important element of the new workplace relations system; and
- The need for the relevant enterprise to remain profitable and competitive.

We would be happy to provide you with any further information which you may require.

Yours sincerely

Heather Ridout
Chief Executive”

6. It can be seen from the above submission that some of Ai Group’s key proposals were:

- That FWA should have the power to amend the parties bound and/or the coverage of an enterprise instrument during the modernisation process;
- That to cater for the various views and circumstances of employers and employees bound by enterprise instruments, any party to an enterprise instrument should have the right to argue for the level of the conditions in the instrument to be amended during the modernisation process;
- That if such arguments are pursued, FWA should be required to determine the matter with reference to the “modern award objective” and also be required to take into account:
 - That enterprise awards are an important element of the new workplace relations system; and
 - The need for the relevant enterprise to remain profitable and competitive.

The Transitional Bill 2009 and the Senate Inquiry

7. The *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (“the Transitional Bill”), was introduced into Parliament in mid-March 2009 and referred to the Senate Standing Committee on Education, Employment and Workplace Relations for an inquiry.
8. Ai Group was one of the major participants in the inquiry. We filed a comprehensive submission and appeared before the Committee at the public hearing.
9. The following is an extract from Ai Group’s submission to the Senate Committee setting out our views on Items 4, 5, 6 and 7 of Schedule 6.

<i>Provisions of the Bill</i>	<i>Ai Group's Position</i>	<i>Basis of Ai Group's Position</i>
<p>Division 2 – The enterprise instrument modernisation process</p> <p>4 – The enterprise instrument modernisation process; 5 – Enterprise instruments: termination by FWA; 6 – The modern enterprise awards objective; and 7 – Terms of modern enterprise awards</p>	<p>Amendment needed</p>	<p>Ai Group supports the proposed four year period for the enterprise instrument modernisation process. However, it is important that paragraph (3) be amended to enable applications to be made prior to the FW (safety net provisions) commencement day in exceptional circumstances. Such circumstances would include, for example, where an enterprise instrument applies to some but not all franchisees of the same franchisor and it is more appropriate for a modern enterprise award to apply to all franchisees, rather than the relevant modern industry award. If such enterprises are not able to modernise their enterprise instrument until after 1 January 2010 some of the franchisees will be put in an untenable position in being forced to apply the modern industry award. This would create uncertainty for both the employer and its employees.</p> <p>The criteria in Item 4 paragraph (5) and Item 6 are balanced and appropriate. A balanced approach is important because some employers strongly oppose the termination of their enterprise instrument, while others support its termination. Some enterprise instruments have conditions which are more favourable for the employer than the relevant industry award and hence provide a competitive advantage, others have conditions which are less favourable for the employer than the industry award and accordingly result in a competitive disadvantage. To cater for the different views and circumstances, any party to an enterprise instrument should have the right to argue for the retention or termination of an enterprise award and to argue for the level of the conditions in the award to be amended upwards or downwards during the modernisation process.</p>

10. In summary, the position that we submitted during the Senate Committee Inquiry was:

- We supported the proposed 4 year modernisation period but sought that the Bill be amended to enable applications to be made prior to 1 January 2010 in exceptional circumstances;
- We supported the criteria in Item 4, sub-item (5) and Item 6 on the basis that the criteria was balanced and appropriate.

11. The relevant section of the Senate Committee Majority's Final Report (dated 7 May 2009) dealing with the modernisation of enterprise awards is reproduced below:

Modernisation of enterprise awards

2.105 Schedule 6, Item 4 of the bill provides for a process to modernise or terminate existing enterprise awards.

2.106 The ACTU noted that while FWA has the discretion to terminate inferior enterprise awards and/or refuse to make a new modern enterprise award on substandard terms, the bill does not prohibit substandard enterprise awards. It submitted that FWA should be directed to terminate enterprise agreements that are substandard and should be prohibited from making modern enterprise instruments that are inferior to the modern award that would otherwise apply.

2.107 The ACTU were also concerned that the bill tolerates a double standard in relation to the treatment of franchises. It pointed out that, for the purposes of bargaining, the presumption is that franchises are not running a single enterprise and franchisees must apply to be treated as a single business by applying for a 'single interest employer declaration'. However, regarding the safety net, franchises are treated as a single enterprise and may be covered by a single enterprise award. It informed the committee that the major fast food chains have hundreds of franchises which together employ around one third of the sector and:

Most of these employees are covered by enterprise awards that are inferior to the general award. For example, the basic wage at McDonalds in Victoria is only \$14.18 per hour, compared to \$15.86 under the general award – a discount of 11 %. On Sunday's, the minimum adult wage at a McDonalds restaurant is \$15.50 compared to \$27.76 at other fast food establishments – a discount of 44%.

2.108 The ACTU explained that this is a disincentive for enterprise bargaining and submitted that enterprise awards should be restricted to closely linked employers.

Definition

2.109 The SDA expressed concern that the bill extends the definition of an enterprise award to include awards that apply to franchise systems or parts of a franchise. It pointed out that franchise systems predominate in the fast food industry and it has the most franchise brand specific awards. This change means:

...that employees of an employer affected by the extended definition, who today can aspire to be covered by the Modern Fast Food Award determined by the Australian Industrial Relations Commission and effective from 1 January 2010, will be denied this by the terms of this Bill.

2.110 The SDA also submitted that the inclusion of franchise system awards in the definition of enterprise awards is at odds with the provisions of the FWA which treat collective agreements made in relation to a franchise system as multiple employer agreement making. The SDA argued that the awards which the fast food industry seeks to be considered as enterprise awards were never intended to be awards in the usual sense of the term as each of the existing fast food industry brand specific awards was made as an enterprise agreement.

2.111 Further, the SDA argued that the reason some employers wish to retain their brand specific awards is that they have a package of wage rates and terms and conditions that are lower than the same package in the fast food industry modern award.

2.112 The SDA recommended that should awards applying to franchises be treated as enterprise awards, the definition of an enterprise award-based instrument should be amended so that only those existing awards which apply to the whole of a particular franchise should be considered an enterprise award.

2.113 The SDA was also concerned that the modernisation process does not guarantee that any modern enterprise award will be at least equal to the modern award for the industry. One of the criteria FWA must take into account is whether the modernisation of an enterprise award will have an effect on the continuing viability or competitiveness of the enterprise. The SDA believed that employers will use this to argue for the retention of substandard brand specific awards.

2.114 The SDA explained that the original statements indicating that enterprise awards would not be subjected to award modernisation were in the context of mining industry enterprise awards. To address these concerns, the SDA recommended the inclusion of a provision to ensure that modern enterprise awards do not fall below the total value of the safety net package of the relevant modern award for the industry.

Coverage

2.115 The SDA also pointed out that Clause 8 of Schedule 6 permits FWA to extend the coverage clause of a modern enterprise award to include franchisees or other businesses which were never covered by the original enterprise award. It permits a modern enterprise award to express the coverage clause as applying to a franchise name. SDA noted the effect is that a modern enterprise award can have a coverage clause that is far broader than the coverage clause of the existing enterprise award.

2.116 In summary, SDA proposed that the broad definition of 'franchise' in the corporation code, and the ability of the award modernisation process to permit modern enterprise awards to specify their cover as applying to all employers trading as the brand name, will permit some employers who currently have no relationship to the franchise to gain the benefit of the modern enterprise award by moving to that franchise system.

2.117 Yum! Restaurants, which owns KFC and Pizza Hut, sought to ensure that new or transmitted franchisees can continue to be covered by enterprise awards rather than move to the modern fast food industry award on 1 January 2010. To address this it recommended that the date for making applications to modernise enterprise awards be brought forward to 1 July 2009. Yum was also concerned that their managers, who have not traditionally been award covered, may become covered as the modern Fast Food Award proposed by the AIRC covers managers. Yum admitted that modernising their enterprise awards would mean that their awards are 'made so much like the industry awards that any practical benefit from having an enterprise award will be lost'.

Unmodernised awards

2.118 The SDA believed that the bill fails to consider the situation of unmodernised enterprise awards which may be substandard. The bill permits an enterprise agreement to be tested against unmodernised awards without regard to its status or content. It recommended that where the underpinning award has not been modernised then FWA should designate a modern award for the BOOT.

Committee view

2.119 The committee majority is concerned to ensure that as with other transitional instruments there are appropriate mechanisms to enable termination of enterprise awards. It notes that a person covered by an enterprise instrument will be able to make an application to FWA to terminate an enterprise instrument until 31 December 2013 (Item 5). However, it is concerned that employees could become locked into instruments that may have rates and terms lower than the modern award until that time.

2.120 The committee majority was also concerned that the bill may enable a modern enterprise award to have wider coverage than the existing enterprise award and the definition of franchise may allow employers who currently have no relationship to the franchise to gain the benefit of the modern enterprise award by moving to that franchise system. The committee majority notes that there should be a level playing field for employers and sees the potential for very large businesses to take advantage of this as troubling.

2.121 The committee majority notes the following advice from DEEWR that:

It is not the intention for modern enterprise awards to undercut the safety net for employees in an industry or to impact on the competitive environment in which business, in this case fast food operations, are carried out.

Recommendation 16

2.122 The committee majority recommends that the government ensure employers/franchises have no power under the bill to extend the reach of substandard enterprise awards to those not covered under the existing enterprise award, and that the government consider strengthening the criteria under Schedule 6 to ensure that enterprise awards not fall below the total value of the safety net package of the relevant modern award for the industry.

12. It can be seen from the above section of the Committee Majority's final report that:

- During the Senate Committee Inquiry, the ACTU and the SDA argued that enterprise awards should be terminated if they contain conditions which are less favourable than the modern industry or occupational award which would otherwise apply;
- The ACTU and SDA argued that in all cases conditions in existing enterprise awards and NAPSAs, which are more favourable than the modern industry or occupational award which would otherwise apply, should be preserved in the modern enterprise award;
- Labor Senators largely supported the ACTU and SDA's arguments in framing Recommendation 16. (Coalition Senators opposed this recommendation).

Ai Group's submission of 22 May 2009

13. Following the release of the Senate Committee's final report on 7 May 2009, Ai Group made the following submission to the Government on 22 May 2009:

"Dear Deputy Prime Minister

Re. Fast Food Industry – *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009*

We are writing to express our concern about the statements made by the Committee Majority about the fast food industry in the report arising from the inquiry into the *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009*, and to express our strong opposition to Recommendation 16.

Ai Group has considerable involvement in the fast food industry. For example, Ai Group represented the industry in the award modernisation proceedings, including representing McDonald's Australia Ltd, Hungry Jacks Pty Ltd, Yum Restaurants Australia Pty Ltd (which incorporates KFC and Pizza Hut), Australian Fast Foods Pty Ltd (which includes Red Rooster and Chicken Treat), Collins Food Group (which operates KFC outlets and Sizzler Restaurants) and Eagle Boys Dial-A-Pizza Australia Pty Ltd. We have presented extensive submissions and evidence on behalf of the industry during the modernisation process.

The fast food industry employs over 250,000 people, a high proportion of which are young people who are particularly vulnerable to periods of unemployment in the current recession. A

high proportion of the workers in the industry are award-dependent and therefore any increases in minimum wages and conditions would have a direct and substantial negative impact upon employers and employees in the industry.

Ai Group strongly supports the provisions of Schedule 6 – Modern Enterprise Awards, of the Bill. The provisions are fair and balanced.

The ACTU and Shop, Distributive and Allied Employees Association (SDA) submitted to the Senate Committee:

- that franchises should be removed from the definition of “enterprise award-based instrument” or, alternatively, only franchisees which are bound by an existing enterprise award should be permitted to be bound by a modern enterprise award; and
- that specific criteria should be included in the Bill compelling Fair Work Australia (FWA) to include in all modern enterprise awards terms and conditions of employment which are at least equal to those in the relevant modern industry award.

Ai Group strongly opposed these proposals both in oral submissions before the Committee and through written supplementary submissions.

We are concerned that the Committee Majority’s views and recommendations, as expressed in its report, appear to reflect an acceptance of the SDA’s views without sufficient evidence being placed before the Committee to enable a proper analysis to be made.

The SDA’s submissions and evidence focussed entirely upon the fast food industry and its proposals ignore the fact that there are a very large number of enterprise awards and enterprise NAPSAs in Australia in numerous industries.

The SDA’s proposals would result in the provisions of Schedule 6 becoming unworkable for employers in the fast food industry and other industries.

Termination of instruments

The concern expressed by the Committee Majority, that “employees could become locked into instruments that may have rates and terms lower than the modern award” until 31 December 2013, is unfounded. Such instruments are able to be terminated at any time after 1 January 2010 if an application is made to FWA and after a proper assessment is made of the instrument.

Franchise systems

The Committee Majority’s concerns that the “bill definition of franchise may allow employers who currently have no relationship to the franchise to gain the benefit of the modern enterprise award by moving to that franchise system” appears to be based upon a misunderstanding of how franchise systems operate. Employers, who are not party to the franchise system, would not be able to simply “move” to a franchise system.

The nature of the franchising system is to create a homogenous brand with commonalities in procedures and operations from one franchisee to the next. This creates an obvious benefit for the franchisor but also benefits existing franchisees through marketing, shared costs and brand awareness. It is a means by which many small businesses in Australia operate. The ability to grow a business of this type is largely through increasing the number of franchisees.

The Franchising Australia 2008 survey indicates that the growth rate of franchise systems from 2006 to 2008 was 14.6 percent.¹ Franchising is clearly a viable and growing business

¹ *Franchising Australia 2008* survey sponsored by the Franchise Council of Australia.

model, not just for the large players but for small businesses. The survey indicates that franchise systems represent 3.7% of all small businesses in Australia.

Franchise structures are not only prevalent within the fast food industry but can be found in many other industries, eg. retail chains, fitness centres, cleaning services and gardening businesses, to name a few.

Unfortunately the restrictions on award variations in the WorkChoices legislation do not allow franchises to be as homogenous as they often choose to be in respect of labour costs. This has resulted in the anomalous situation, whereby franchisees who happened to have commenced operations prior to commencement of an enterprise award, are covered by the award, whilst those that commenced operations later either as new franchisees or through transmission, are excluded from the enterprise award. Such outcomes are being imposed by the legislation and not through the choices of the parties.

Schedule 6 of the Bill enables such anomalies to be rectified and facilitates the maintenance of a modern workplace relations framework, allowing franchise businesses to grow.

The inclusion of franchise arrangements in Schedule 6 is consistent with the agreement making provisions of the *Fair Work Act*, in particular the “single interest employer” stream. (See s.247(2) of the Act).

Level playing field

The Committee Majority commented that “there should be a level playing field for employers and sees the potential for very large businesses to take advantage”. Other than the SDA’s submissions there was no evidence placed before the Committee to reach this conclusion.

The advantage that is purported to be gained by the large businesses is belied by the fact that the enterprise awards primarily apply to franchisees and not franchisors. These franchisees are often small employers.

In its submission, the SDA ignored its own role in the creation and maintenance of enterprise awards in the fast food industry. The enterprise awards in the industry contain different terms, some lower and some higher, than the industry awards / NAPSAs. Over the years, in its pursuit of award coverage for the fast food industry, the SDA has not sought to develop a “level playing field” as it now proposes. The SDA has recognised that different terms and conditions are appropriate for different enterprises / brands in the fast food industry.

Since the development of the National Fast Food Award, the SDA had not sought to include within the Award any of the franchisees not covered by their brand’s enterprise award.

Recommendation 16

It is essential that the Government reject Recommendation 16 of the Committee Majority.

Extension of enterprise awards to include additional franchisees

Any concerns that the ACTU, SDA or any other party have about extending enterprise awards to include additional franchisees are able to be pursued before FWA when applications are made to modernise relevant enterprise awards.

The criteria against which enterprise awards are assessed

The criteria in Item 4, paragraph (5) and Item 6 of Schedule 6 of the Bill are balanced and appropriate.

A balanced approach is important because some employers strongly oppose the termination of their enterprise award, while others support termination. Some enterprise awards have conditions which are more favourable for the employer than the relevant industry award and hence provide a competitive advantage, others have conditions which are less favourable for the employer than the industry award and accordingly result in a competitive disadvantage.

To cater for the different views and circumstances that may arise, any party to an enterprise award should have the right to argue for the retention or termination of an enterprise award and to argue for the level of conditions in the award to be maintained, or amended upwards or downwards during the modernisation process. The Bill provides for this.

Enterprise awards have passed the test of being a fair and appropriate safety net when they were made, not in comparison to some industry award, but in their own right. The modernisation of enterprise awards should not be subject to a mandatory No Disadvantage Test against an industry award.

The criteria in Schedule 6 require FWA to weigh-up all of the different interests and issues and to make a fair decision.

If the SDA has concerns about the fairness of any conditions in enterprise awards in the fast food industry then these concerns should be raised with FWA when applications are made to modernise them. Its proposed amendments to the legislation are clearly designed to pre-determine the outcome in the SDA's favour.

Amendment to Schedule 6 proposed by Ai Group

Whilst strongly opposing the SDA's proposed amendments, an amendment should be made to Item 4, paragraph (3) in Schedule 6 to enable applications to be made prior to the FW (safety net provisions) commencement day in exceptional circumstances. Such circumstances would include, for example, where an enterprise instrument applies to some but not all franchisees of the same franchisor and it is more appropriate for a modern enterprise award to apply to all franchisees, rather than the relevant modern industry award.

With the exception of this amendment, Ai Group urges the Government to maintain the provisions of Schedule 6 of the Bill.

We would be happy to provide any further information which you may require.

Yours sincerely

Heather Ridout
CHIEF EXECUTIVE"

14. As can be seen from the above, in Ai Group's submission to Government after the Senate Committee had released its recommendations, and before the Government introduced amendments to the Bill into Parliament, Ai Group argued:

- That the criteria in Item 4, sub-item (5) and Item 6 of Schedule 6 of the Bill were balanced and appropriate;

- That any party to an enterprise instrument should have the right to argue for the retention or termination of the instrument and to argue for the level of conditions in the instrument to be maintained, or amended upwards or downwards during the modernisation process, as provided for in the Bill;
- That enterprise instruments had passed the test of being a fair and appropriate safety net when they were made, not in comparison to some industry award, but in their own right;
- That the modernisation of enterprise instruments should not be subject to a mandatory No Disadvantage Test against an industry award;
- That the criteria in Schedule 6 require FWA to weigh-up all the different interests and issues and to make a fair decision.
- That the SDA's proposed amendments to the legislation were designed to pre-determine the outcome in the union's favour; and
- That the Government should reject Recommendation 16.

The final outcome of the Parliamentary process

15. Following the Senate Committee Inquiry, the Government introduced a series of amendments to Schedule 6 which were subsequently passed by Parliament. These amendments:
 - Implemented Ai Group's proposal to allow applications to be made to FWA prior to 1 January 2010 to modernise an enterprise award; and
 - Made various technical amendments to the Bill.

16. The only amendments made to the criteria in sub-item (5) of Item 4 were:
- Some minor consequential amendments to paragraphs (5)(b) and (c) which were necessary due to the amendment which permitted applications to modernise awards to be made prior to 1 January 2010; and
 - The insertion of the wording in brackets in paragraph (5)(c) plus the associated note which appears after sub-item (5), relating to the final AFPC Wage Review etc.
17. Senate Committee Recommendation 16 was not adopted by the Government or Parliament, neither was the amended criteria which had been sought by the ACTU and SDA adopted.
18. As Ai Group submitted to the Government on 22 May 2009, the unions' proposed amendments were designed to predetermine the outcome in the unions' favour. This approach was rejected by the Government and Parliament, and the balanced approach in the Bill was preserved.

The submissions made by the ACTU in this case are an attempt to re-argue issues which have been rejected by the Government and Parliament

19. It is very evident from the events which occurred during the development of the Transitional Act, including during its passage through Parliament, that during these proceedings the ACTU is endeavouring to convince FWA to accept the arguments that have been rejected by the Government and Parliament.
20. Clearly, the unions are trying to achieve a set of FWA Principles which implement the proposals that the unions failed to achieve in the legislation.

21. The unions' proposed principals are one-sided and unfair upon employers. The proposals are rightfully rejected by FWA, for the same reasons that the proposals were rejected by the Government and Parliament.

Ai Group's views on the ACTU's proposed principles

22. In paragraph 4 of its submission of 27 November 2009, the ACTU proposed six principles for the modernisation of enterprise awards. Ai Group's views on the ACTU's principles are outlined below.

23. An important preliminary point is that Ai Group does not see a need for any principles to be enunciated. We submit that sufficient detail is included in the Transitional Act to guide the enterprise award modernisation process.

- **ACTU Proposed Principle 1:** *"If a modern award is made it should not result in a reduction in employee entitlements arising from the existing enterprise award."*

A principle in this area is not appropriate as it would place the issue of employee entitlements ahead of the equally important issue of employer costs and the ongoing viability and competitiveness of businesses. Item 4, sub-item (5) plus Item 6 of the Transitional Act reflects a balanced approach which requires FWA to take into account factors which include:

- "the likely impact of the persons covered by the enterprise instrument, and the persons covered by the modern award referred to in paragraph (b), of the decision to make, or not make, the modern enterprise award, including any impact on the ongoing viability or competitiveness of any enterprise carried on by those persons" (Item 4, paragraph (5)(f)); and

- “the views of the persons covered by the enterprise instrument” (Item 4, paragraph (5)g).
- **ACTU Proposed Principle 2:** *“FWA should not exercise its discretion to terminate an enterprise award and replace it with a modern industry award where this would disadvantage employees”*

Again, a principle in this area is not appropriate as it would position the issue of employee entitlements ahead of the equally important issue of employer costs and the ongoing viability and competitiveness of businesses. The balanced approach reflected in Item 4, sub-item (5) plus Item 6 of the Transitional Act need to guide FWA’s discretion.

- **ACTU Proposed Principle 3:** *“Where the enterprise award contains conditions in excess of those in the relevant industry modern award prime facie there should be an assumption that the enterprise award should be made, in particular where the parties support modernisation”.*

This proposed principle is not consistent with the Transitional Act which requires all of the relevant factors to be considered and weighed up, unencumbered by any additional *prime facie* assumptions.

- **ACTU Proposed Principle 4:** *“In all other cases, that the enterprise award exists is not, in itself, grounds for modernising the enterprise instrument”.*

Such a principle is not necessary or desirable. The Transitional Act deals with the matters to which the unions’ proposed principle is directed, by requiring consideration of such factors as:

- “the circumstances that led to the making of the enterprise instrument rather than an instrument of more general application” (Item 4, paragraph (5)(a)); and

- “the extent to which the enterprise instrument provides enterprise-specific terms and conditions of employment” (Item 5, paragraph 5(e)).
- **ACTU Proposed Principle 5:** *“In determining if the making of a modern enterprise award will disadvantage employees covered by an enterprise instrument consideration of the content of the relevant Part 10A industry and/or occupation award(s) is relevant”.*

This principle simply restates, using different words, the following factors which the Transitional Act requires FWA to take into account:

- “whether there is a modern award (other than the miscellaneous modern award) that would, but for the enterprise instrument, cover the persons who are covered by the instrument” (Item 4, paragraph (5)(b));
 - “the content of the modern award referred to in paragraph (b); and
 - “the likely impact on the persons covered by the enterprise instrument....of a decision to make, or not make, the modern enterprise award..” (Item 4, paragraph (5)(f)).
- **ACTU Proposed Principle 6:** *“Terms and conditions tailored to reflect employment arrangements that have been developed in relation to the relevant enterprise must not undermine the requirement to provide for appropriately established skill based classification structures relevant to the minimum standards applicable to the industry in which the enterprise operates”.*

This principle is not appropriate. The Transitional Act requires that FWA consider the terms of the modern industry award which would otherwise apply to persons covered by the enterprise instrument (Item 4, paragraphs (5)(b), (c) and (f)), including the classification structure in such modern industry award.

To elevate this issue ahead of other considerations would conflict with the balanced approach enshrined within the Act.

24. In short, the ACTU's proposed principles are appropriately characterised as a thinly disguised attempt to rewrite the criteria in Item 4, sub-item 5.
25. The criteria in the Transitional Act are balanced and appropriate, and should not be constrained by principles which elevate some considerations ahead of others. The Act requires that all factors be considered and weighed up in a balanced and fair manner, taking into account the interests of the both employers and employees.

What approach should FWA take in modernising enterprise awards?

26. Ai Group submits that the approach which FWA needs to take is clearly articulated in the Transitional Act.
27. The Explanatory Memorandum provides guidance, including the following extract relating to Schedule 6:

"220. In exercising its functions and powers under this Schedule, FWA must consider specified criteria.

221. The modern awards objective and the minimum wages objective (see clauses 134 and 284 of the FW Bill) also apply to enterprise instrument modernisation (see item 6). This ensures that FWA considers the broader issues included in those objectives.

222. However, in considering these objectives, FWA must recognise the particular role and nature of enterprise awards (see item 6).

223. FWA is able to inform itself as it sees fit in conducting the modernisation process (see Schedule 2). This enables FWA to seek and consider submissions not only from those with a direct interest in the award, but also other interested parties (e.g., other employers in the relevant industry)."

(Emphasis added)

28. It can be seen from the above extract from the Explanatory Memorandum, that it is intended that the criteria in Item 4 be considered by FWA when the Tribunal exercises its functions and powers under Schedule 6. In doing so, the Act requires that FWA not lose sight of the broader issues included in the modern awards objective and the minimum wages objective. However, when considering the modern awards objective and the minimum wages objective, in the context of enterprise award modernisation, the Act requires that FWA recognise the particular role and nature of enterprise awards (Item 6, sub-item (2)).

29. The Explanatory Memorandum is very informative regarding the approach which FWA is required to take when applying the criteria in Item 4, sub-item 5:

“241. Paragraph (5) lists the factors that FWA must take into account when deciding whether or not to modernise an enterprise instrument.

242. These criteria are broad and require FWA to consider and balance all relevant matters in deciding whether to make a modern enterprise award.

243. For example, the criteria require FWA to consider the circumstances that led to the making of the enterprise instrument and the extent to which the instrument provides enterprise specific terms and conditions of employment.

244. However, FWA is required to assess these matters in light of the content of any relevant modern award that would otherwise apply (which would allow consideration of whether the relevant modern award provides terms and conditions that should be included in the modern enterprise award as an appropriate safety net), and the views of the persons covered by the enterprise instrument.

245. Paragraph (5)(f) also provides that FWA must have regard to the competitive position of both the enterprise covered by an enterprise instrument and of the enterprises covered by a modern award which, but for the enterprise instrument, would otherwise apply to that enterprise.

246. This means, for example, that FWA is to give consideration to whether an enterprise instrument should be modified if it would otherwise provide the enterprise covered by it with a significant cost advantage (or disadvantage) compared to other employers in the industry and so lessen the competitiveness of that enterprise or of other enterprises in the industry.

247. As noted above, FWA must also consider the broader factors listed in the modern enterprise awards objective, and modern awards and minimum wages objectives.”

(Emphasis added)

30. Accordingly, when FWA is considering the factors in Item 4, sub-item 5, the appropriate approach is to “consider and balance all relevant matters”.
31. It is not necessary or appropriate for principles to be enunciated by FWA which would have the effect of requiring FWA to give more weight to one factor over another. Different factors may have greater or lesser relevance in particular circumstances.