Submission to the
Australian Industrial Relations Commission

Supplementary submission on exposure drafts of Stage 4 modern awards

27 October 2009
Overview

1. The Australian Government (the Government) wishes to provide the Australian Industrial Relations Commission (the Commission) with a supplementary submission in relation to Stage 4 of the award modernisation process.

2. The submission should be read in conjunction with the Government’s submission of 16 October 2009 which was also made in relation to Stage 4 of the award modernisation process.

3. This submission seeks to assist the Commission in developing modern awards consistent with the policy intent underpinning the award modernisation request as well as the provisions of the Fair Work Act 2009 (FW Act), the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (FW (T&C) Act) and the Fair Work Amendment (State Referrals and Other Measures) Bill 2009 (the referral bill).

4. Specifically, the submission addresses issues concerning:
   - the Local Government Industry Award 2010;
   - the Fire Fighting Industry Award 2010; and
   - salary sacrificing arrangements in modern awards.

5. In addressing these issues, the submission highlights a number of matters that the Commission may wish to consider in determining the final form of modern awards.

Coverage of state public sector and local government employers by modern awards

6. In a submission of 16 October 2009, the Government committed to further consider the treatment of local government and firefighting authorities within the award modernisation process in the context of referrals of power from the states.

7. The Government is aware of questions about whether or not state public sector and local government employers (whether constitutional corporations or those covered by a State reference) and their employees should be covered by a modern award, an enterprise award or a State reference public sector modern award (SRPSMA).
8. The Government notes the comments of the Full Bench in its decision of 25 September 2009 ([2009] AIRCFB 865) that the award modernisation process under Part 10A of the WR Act only applies to constitutional corporations.

9. The Government’s general intention in this area is that state public sector and local government employers and organisations within the scope of a referral of power should be able to be covered by a modern award or (where the relevant prerequisites in the FW (T&C) Act are met) a SRPSMA.

10. Following careful consideration, the Government respectfully contends that under Part 10A of the WR Act as preserved by Schedule 5 to the FW (T&C) Act, it is open to the Commission to make a modern award that is capable of covering a state public sector or local government employer and their employees, whether the employer is a constitutional corporation or not.

11. The Government takes this view because the effect of Regulation 5.10 of Part 5 of the Fair Work (Transitional & Provisions and Consequential Amendments) Regulations 2009 is that Part 10A of the WR Act as preserved by Schedule 5 to the FW (T&C) Act operates in relation to national system employers (including constitutional corporations and employers that are not constitutional corporations but fall within the definitions of these terms because of a State reference, such as Victorian local governments) and national system employees (being the employees of such employers).

12. The Government does not express any view as to which instrument should cover the relevant parties as a matter of merit. However, the Government wishes to bring to the attention of the Commission and the parties that there is nothing to prevent the Commission from making a modern award that covers the full range of national system employees and national system employers within the meaning of the FW Act as described above, provided the modern award is expressed not to cover employees covered by an enterprise instrument, a State reference public sector transitional award (SRPSTA) or a SRPSMA.

13. The Government notes that under Schedule 6A to the FW (T&C) Act, FWA cannot terminate a SRPSTA unless satisfied that the parties will be covered by a modern award that is appropriate and is in operation.

14. While such an order could be made prior to 1 January 2010 (notwithstanding that modern awards only commence operation on 1 January 2010), a termination order cannot take effect until 1 January 2010 (at which point there could be a modern award that is in operation).
15. The Government intends to seek amendments to the FW (T&C) Act in the near future to streamline the process by making clear that the Commission (as well as Fair Work Australia) may terminate a SRPSTA and may do so pending creation of a modern award that is, or is likely to be, in operation.

**Fire Fighting Industry Award 2010**

16. The Government is supportive of the development of modern award for the Fire Fighting industry and notes the exposure draft of the Fire Fighting Industry Award 2010 published by the Commission on 25 September 2009.

17. The Government notes that the award is unlikely to have broad application, given that most state-run fire services will not be within the federal workplace relations system. This means that the Victorian public sector employers, the Victorian Metropolitan Fire and Emergency Services Board (MFESB) and the Country Fire Authority (CFA) will employ the overwhelming majority of the employees in this industry who are within the federal system. The Government is mindful of the need to also provide appropriate award coverage for the small number of Victorian private sector employees and their employers in the industry, who are not covered by enterprise awards.

18. In its statement accompanying the release of expose drafts for Stage 4 industries on 25 September 2009 ([2009] AIRCFB 865), the Commission noted that the modern award would apply to the MFESB as well as a small number of private sector employers but would not apply to the CFA, as it would be covered by a SRPSTA.

19. The Commission went on in paragraphs [68] to [70] to acknowledge the unusual situation in respect of this award given that it overwhelmingly covers just one employer, the MFESB. The Commission therefore determined to largely reflect the content of the Victorian Fire Award.

20. The Government supports this approach. The Government also notes that an option open to the Commission is to set out schedules within the award, or to otherwise apply particular conditions differently between the public and private sector employers, where it is persuaded this is an appropriate means of meeting the award modernisation objectives.

**Status of referrals**

21. To assist the Commission, the following update is provided on progress towards the creation of a uniform national workplace relations system:
- **Victoria** has referred workplace relations matters relating to public sector and local government sector employment under the *Fair Work (Commonwealth Powers) Act 2009* (Vic);
- it is anticipated that **Tasmania** will refer workplace relations matters relating to local government employment but not public sector employment under the *Industrial Relations (Commonwealth Powers) Bill 2009* (Tas);
- it is anticipated that **South Australia** and **Queensland** will exclude workplace relations matters relating to public sector employment and local government sector employment from their references under (respectively) the *Fair Work (Commonwealth Powers) Bill 2009* (SA) and the *Fair Work (Commonwealth Powers) and Other Provisions Bill 2009* (Qld);
- the **New South Wales** Government has not yet confirmed whether it intends to refer power to the Commonwealth to extend the application of the FW Act in NSW; and
- the **Western Australian** Government has advised that it will not refer power to the Commonwealth to extend the application of the FW Act in WA.

22. In addition, the referral bill seeks to amend section 14 of the FW Act to allow a state or territory to declare that certain public sector bodies and any local government body (or wholly-owned or wholly-controlled subsidiaries of local government bodies) that would otherwise be within Commonwealth jurisdiction are not national system employers.

## Salary sacrificing arrangements

23. The Government is aware that a number of parties have raised concerns regarding the ongoing availability of salary sacrifice arrangements for employees. These concerns are particularly important to the community and aged care sectors, where the concessions in respect of Fringe Benefits Tax that are available to charitable bodies make salary sacrifice a particularly important issue.

24. The Government notes that the Commission is continuing to give consideration to including salary sacrifice provisions in modern awards. In its statement of 25 September 2009 ([2009] AIRCFB 865), the Commission stated:

   “...we would not be inclined to include such provisions without more information about the incidence of salary packaging in the relevant industries and a more detailed explanation of the relative benefits for employers and employees.”
25. Given that a number of interested parties, particularly in the social and community services industry, have expressed concern about the scope available for employers and employees to enter into salary sacrifice arrangements, the Government makes the following observations about the operation of the FW Act.

26. Section 324 of the FW Act deals with deductions from salary and provides that employees can authorise deductions from their salary in accordance with the relevant terms of a modern award or enterprise agreement. Alternatively, provided the deduction is principally for the employee’s benefit, the necessary authorisation can be provided in writing by the employee even if the applicable instrument contains no terms dealing with deductions.

27. The provisions relating to deductions specifically contemplate salary sacrifice arrangements as an appropriate authorised deduction.

28. In the event that the Commission does not include salary sacrifice provisions in particular modern awards, it is the Government’s view that it will still be possible for employers covered by those modern awards to enter into salary sacrifice arrangements with their employees. This is because section 324 of the FW Act will continue to provide a means for employers (to whom a modern award applies) to put in place salary sacrifice arrangements that are beneficial to their employees and to which the employees agree.

29. The Government does not consider that the FW Act precludes legitimate salary sacrifice arrangements that cause an employee to be paid less than the minimum wage payable to the employee under a modern award - provided that the value of the benefit received in lieu of salary is at least of the same or greater value to the employee as the salary foregone and the arrangement is authorised as required by the FW Act.

30. The Government considers that it is open to the Commission to include salary sacrifice arrangements in modern awards. We respectfully submit that in doing so, the Commission should consider: the views of the parties; whether such arrangements are included in the relevant pre-reform awards and NAPSAs; whether such arrangements are appropriately considered a safety net entitlement in the context of the particular industry under consideration (for example, having regard to the rate of uptake of such arrangements and the benefits to employees given the taxation treatment); and the need to ensure clarity and certainty of arrangements, particularly in sectors with community-run organisations.