



*FAIR WORK COMMISSION*

**4 Yearly Review of Modern Awards**

**Matter No: AM2014/281**

**Professional Employees Award**

**Submissions in reply from the Association of Professional Engineers,  
Scientists and Managers, Australia in response to the Exposure Draft**

**INTRODUCTION**

1. This submission by the Association of Professional Engineers, Scientists and Managers, Australia (APESMA) is made in accordance with the Amended Directions issued by His Honor the President Justice Ross on 21<sup>st</sup> December 2016.<sup>1</sup>
2. APESMA relies upon and reiterates its submission of 18<sup>th</sup> December 2016 which was made in response to the exposure draft released by the Fair Work Commission on 3<sup>rd</sup> November 2016<sup>2</sup>.
3. The Association notes the submissions in response to the exposure draft which have been made by the Australian Industry Group (AI Group)<sup>3</sup>; Australian Federation of Employers & Industries (AFEI)<sup>4</sup>; Australian Business Industrial and The NSW Business Chamber limited<sup>5</sup>; and, the Chamber of Commerce and Industry South Australia

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<sup>1</sup> [2016] FWC 6062

<sup>2</sup> APESMA Submission – Dec.2016

<sup>3</sup> AI Group Submission – Jan.2017

<sup>4</sup> AFEI Submission – Jan.2017

<sup>5</sup> Aust. Business Industrial & NSW Chamber limited – Jan.2017

(Business SA)<sup>6</sup>. Having considered the submissions made by the various parties the Association responds as follows;

### **AI Group**

#### **Clause 2.2 – Engineering stream – Experienced engineer**

4. The AI Group has expressed concern with the revised wording of this definition with the omission from the preamble the reference to the qualifications listed in sub-clauses (a), (b) and (c) and the requirement that the employee is engaged in employment where the adequate discharge of any portion of the duties requires the qualifications as listed. APESMA supports the proposal that the existing award definition of “*Experienced engineer*” should be retained.

#### **Clause 2.2 – Engineering stream – Graduate engineer.**

5. APESMA supports the proposal that the word “certificate” be replaced with the existing award reference of “*testamur*”.

#### **Clause 2.3 – Information technology and telecommunications services stream – Experienced information technology employee.**

6. The AI Group’s concerns are similar to those raised in respect of the exposure draft definition of “Experienced engineer”. APESMA supports the view that the existing definition contained in Clause 3.3 of the current award should be retained.

#### **Clause 2.3 – Information technology and telecommunications services stream – Telecommunications service.**

7. APESMA supports the AI Groups’ proposed variation to the definition of “Carrying”.

#### **Clause 2.4 – Scientist stream – Experienced scientist**

8. The AI Group raises 2 concerns in respect of the exposure draft definition.
  - (a) The first concerns the omission from the preamble of the requirement that the employee possesses the prescribed qualifications. Whilst it could be argued that

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<sup>6</sup> Business SA Submission – Jan. 2017

the AI Group's concerns are somewhat overstated it would be appropriate to restore the current preamble which states:

*"Experienced scientists means a Professional scientist possessing the following qualifications and engaged in any particular employment, the adequate discharge of any portion of the duties of which, requires the possession of such qualifications".*

The amended definition proposed by the AI Group poses its own difficulties with existing coverage under the Award by the deletion of the words *"any portion of the duties"*. On that basis APESMA opposes the AI Group definition.

- (b) The second concern raised by the AI Group which relates to an employee having the relevant number of years of experience after obtaining their degree or diploma once again could be resolved by the retention of the existing award definition for *"Experienced scientist"*.

#### **Clause 2.5(a)(ii) – Quality Auditing stream – Educational requirements**

9. The AI Group concern that the truncation of the existing award clause has resulted in the lack of specification of documentary evidence etc. would be resolved by the retention of the current award provision.

#### **Clause 4.1 – Coverage**

10. The Association does not share the AI Group's concern that the proposed amendments to Clause 4.1 are *"potentially confusing"*. Cross-referencing in Clauses 4.1 and 4.2 provide sufficient clarity in determining coverage under the Award and that Clause 4 in its totality should be understood in that context.

#### **Clause 7.2 – Facilitative provisions for flexible working practices.**

11. (a)The AI Group proposes the deletion from Clause 7.2 of the exposure draft of the inclusion of Clause 13.7 APESMA disagrees and supports the inclusion of Clause 13.7 on the basis that agreement for a lesser period of notice should be in writing.

(b)The AI Group also proposes the deletion from Clause 7.2 of the exposure draft the references to Clauses 17.5 and 17.6 on the basis that taking annual leave in advance and cashing out of annual leave are not a departure from *“the standard approach in an award provision”*. APESMA disagrees with the AI Group position on this and submits that both provisions are a departure from a general standard and both prescribe a process for the departure from that standard. The Association submits that such clauses fall within the parameters of *“Flexible provisions for flexible working practices”*.

#### **Clause 11.1 (a) – Casual employment**

12. The AI Group proposes that 11.1(a) of the exposure draft be amended to refer to the *“appropriate annual rate for the classification prescribed”* for there to be consistency with Clause 10(b) which specifies the rate of pay for part-time employees. APESMA agrees with this proposal.

#### **Clause 11.1(a) – Casual employment – Definition.**

13. The AI Group proposal that the *“standard definition”* of casual employee as an *“employee engaged and paid as a casual employee”* is opposed by APESMA. It would be appropriate to consider an appropriate definition in the context of Decisions in respect of AM2014/197 – *Casual employment*.

#### **Clause 13.5 – Ordinary hours of work**

14. The insertion of the words *“time to time”* after *“from”* as per the current Clause 18.3 is supported.

#### **Clause 14.1 – Minimum Wages**

15. The issue raised by the AI Group in respect of the wording in Clause 14.1 is in the submission of APESMA clarified by Clauses 10(b) and 11.1(a).

#### **Clause 14.1 – Minimum wages**

16. The AI Group proposes the deletion of the final column in Clause 14.1 which sets out casual rates. APESMA submits that the actual rates for casual employees should be

prescribed in the award. This is on the basis that the provisions of awards should be easily understood. Casual rates should either be left in Clause 14.1 or placed in a separate Schedule as is the case in other modern awards. For example, the latest Plain English draft of the Pharmacy Industry Award includes rates for casuals in a *Schedule B- Schedule of Hourly Rates of Pay*.

### **Clause 15.3 – Vehicle Allowance**

17. The AI Group has raised concerns with the redrafted vehicle allowance provision.

APESMA supports the wording of the minimum standard as set out in the exposure draft which is unambiguous in its intent. The claim by the AI Group that the deletion of the reference to *“reasonable compensation”* removes flexibility is difficult to follow. Reference in paragraph 302 of their submission to the payment of a monthly or annual car allowance or a higher salary that *“takes this requirement into account”* confuses the issue of establishing a minimum entitlement. It is open to employers to pay a car allowance so long as it is at least equal to the award provision. The value of car allowances paid by employers would usually be more than the minimum award provision. Further, APESMA disputes the proposition that the payment of a higher salary would be sufficient. The current award provision does not permit the *“rolling”* into salary of a vehicle allowance unless it can be once established that the amount is at least equal to the award provision.

### **Clause 17.2 (a) – Annual leave**

18. In its submission on this issue APESMA answered the question which was asked differently to that of the AI Group. However, the retention of a flexible clause relating to the payment of annual leave loading is supported. The AI Group in paragraph 305 of their submission make the claim that *“The intent of this provision in the modern award.....is that an employee will not be entitled to be paid a separate annual leave loading if the total “amount” that they are paid for the relevant period of annual leave is greater than “the ABS average weekly earnings”*. In making this statement the AI Group has juxtaposed the payment of annual leave loading with the payment of total

salary. APESMA rejects this interpretation as the current provision uses the words in the preamble to Clause 19.2 *“An employee must be paid a loading”* etc. followed by the provision that the entitlement to the loading is capped. Therefore, APESMA supports the new redrafted 17.2 as removing any potential ambiguity.

#### **Clause 17.4(a) – Annual close-down**

19. It is APESMA’s view that the concerns raised by the AI Group in respect of the Annual close-down provision are comprehended by the re-drafted clause. The re-drafted clause makes it clear that the *“same conditions which apply to the other employees of the enterprise (or sections) also apply to employees covered by this award.”* The *“same conditions”* would include the processes used to facilitate the *“close-down”*.

#### **Business SA**

20. Additional matters raised by Business SA in addition to matters addressed elsewhere include an omission in Clause 7 – Facilitative provisions for flexible working practices and Clause 13 – Ordinary hours of work. Business SA notes that the requirement that facilitative provisions are not to be used to avoid award obligations or result in unfairness, has not been reproduced. APESMA would submit that it should be included in the exposure draft.

#### **AFEI**

21. The AFEI raised concerns regarding the omission of existing Clause 18.1 from the list of facilitative provisions in Clause 7.2 of the exposure draft. APESMA submits that this provision which is now Clause 13.2 should be included. The AFEI also raised concerns with Clause 17.4 – Annual close-down in similar terms to that of the AI Group.

#### **Additional Matters**

22. Clause 13.2 – Ordinary hours of work

In its submission at paragraph 3 the Association indicated that in its view the lack of a limit in a cycle for the averaging hours of work required clarification and was a

substantive issue. This matter has also been referred to by the AFEI, Australian Business Lawyers and Business SA. APESMA formally proposes that Clause 13.2 be amended as follows;

*“13.2 An employee who by agreement with their employer is working a regular cycle (including shorter or longer hours) must not have ordinary hours of duty which exceed an average **of 152 hours in 28 days** “.*

**MICHAEL BUTLER**

**DIRECTOR INDUSTRIAL RELATIONS**

**22<sup>nd</sup> February 2016**