

Submissions in relation to the Model Award Flexibility Clause

1. Of the flexibility clauses that have been put forward, First IR Consultancy endorses and supports that variant from ACCI. We further submit that the issue of flexibility is patently the key to this exercise being a worthwhile one for all concerned. A modern industry that has to respond quickly to the demands made upon it, needs the flexibility that the ACCI model allows.
2. We also believe that it is in the issue of consent that most of the force of this clause should reside. If consent is gained in any way other than by above board means, then it is not freely given and the change to the Award (the flexibility) must lapse.
3. We also believe that the no disadvantage test must be against the entire employment arrangement, and not on a narrow clause by clause comparison. To force that on industry would run counter to the intentions expressed by the Minister in her request to the President to remove unnecessary verbiage and regulation
4. Paragraph 10 of the Award Modernisation Request provides instructions for the award flexibility clause:
5. *10. The Commission will prepare a model flexibility clause to enable an employer and an individual employee to agree on arrangements to meet the genuine individual needs of the employer and the employee. The Commission must ensure that the flexibility clause cannot be used to disadvantage the individual employee.*

(Emphasis added)

6. It is the submission of First IR Consultancy that there are three key components to this aspect of the award modernisation request and these are;
 - 1) The flexibility clause must be accessible to an employer and an employee.
 - 2) The flexibility clause must allow individual arrangements to enable the employer and the employee to meet genuine individual needs.
 - 3) That the arrangement must not disadvantage the employee.

The flexibility clause must be accessible to an employer and an individual employee.

7. It is clear from the text of the Award Modernisation Request (“AMR”) that there should not be impediments within the clause itself that restrict an employer and an individual employee from accessing the flexible arrangements. The AMR specifically uses the words “to enable” to ensure that the Commission allows a very wide scope to the accessibility of an individual flexible arrangement.
8. The word “enable” when given its ordinary and natural meaning means: to authorise, to facilitate, to make possible¹. Attempts to restrict or impede the availability of this provision would run counter to the explicit terms of the AMR. Accordingly the Commission when drafting the award flexibility clause must not put artificial constraints in place to restrict its application.
9. The AMR explicitly provides for an “individual employee” to enter an arrangement to meet “genuine individual needs”. It is our contention that the AMR has a clear focus on individual arrangements, and not on collective arrangements as part of the model award flexibility provision. Any requirements for a majority or collective activation deviate from these mandated objectives.

Section 576G(2) requires the AIRC to make an award consistent with the AMR:

“A modern award must be consistent with the award modernisation request to which the modern award relates.”

10. Accordingly if the AMR requires a clause *to enable an employer and an individual employee to agree on arrangements* then the modern award must be consistent with the AMR. Page 8 of the explanatory memorandum of the Transition to Forward with Fairness legislation supports this conclusion:

As part of the award modernisation process all awards will contain a flexibility clause enabling arrangements to meet the genuine individual needs of employers and employees.

(emphasis added)

¹ (no author), (2005), Macquarie Concise Thesaurus, p251

11. This is further confirmed in the Minister's Second Reading speech, on page 10, where she stated:

As part of the award modernisation process the Australian Industrial Relations Commission will be required to develop an award flexibility clause for inclusion in all awards. This clause will, in combination with a simple, modern award arrangements enable employers and individual employees to make arrangements to meet their genuine individual needs so long as the employee is not disadvantaged."

A simple, modern award system with opportunities for individual flexibilities will remove the need for any individual statutory employment agreements and the associated complexity and bureaucracy attached to those agreements."

(emphasis added)

12. The oral submissions of some of the major parties to this process including the ACCI, AIG, the ACTU and the Victorian Government, also support the contention that the primary focus must be on the ability of an employer and an individual employee to enter into these arrangements. The following paragraphs taken from the proceedings in the week commencing 26 May 2008 support this:

ACCI Oral Submissions

At PN237:

"It's quite clear to ACCI that the form and operation of the clause is to be an individual one. We take that from various of the Forward With Fairness statements and from various statements of the Minister and indeed the legislative materials. We say that when you examine the proposed clauses, the employers' draft meets this requirement. Ours is a clause which operates on an individual basis."

(emphasis added)

AIG Oral Submissions:

At PN352-353:

The government has made it clear that in the new workplace relations system AWAs will not be available. Whilst the manner in which AWAs stripped away the safety net had been advanced as part of the reason for their removal it was also said that in a modern flexible award system AWAs would be unnecessary and in this regard we note the comments that were made in Labor's Forward with Fairness Policy implementation plan of August 2007, specifically comments in relation to the availability of common law agreements that would be underpinned by an award safety net that was simple, modern, fair and flexible.

We submit that these comments in mind not only suit the model flexibility for it to allow for broad and individual flexibilities but additionally none of the current flexibilities that exist in the award system either through enterprise flexibility clauses or facilitative provisions should be reduced. We say this because the ACTUs clause appears to be designed around the proposition that award flexibility clauses replace the existing facilitative provision structures within awards. Such an approach in our submission is highly unworkable and is not an intended consequence of the introduction of a flexibility clause.

(emphasis added)

ACTU Oral Submissions:

At PN57:

The flexibility clause is not just about enabling individual flexibility. It is also about protecting individuals from disadvantage

(emphasis added)

Victorian Government Oral Submissions:

At PN421

First, plainly it applies exclusively to particular employment relationship and accordingly depends on individual agreement making.

And again at

At PN430:

The agreement making contemplated by the model clause is individual in character. It is not nor should it serve to undermine bargaining for collective workplace agreements.

13. First IR Consultancy adopts the oral submissions in relation to the individual nature of the flexibility provision as made by AI Group, ACCI, the ACTU, The Victorian Government and a wide variety of other organisations.

The flexibility clause must allow individual arrangement to enable the employer and the employee to meet genuine individual needs.

14. The second objective concerns the “genuine individual needs” of the employer and the employee. In is our contention that the use of these words implies a very broad scope of flexible arrangements. This means that flexible provisions should be able to be made about any provision of an award, not just a limited list. Accordingly, the requirement is expansive in nature rather than restrictive. The obvious restriction to this proposition is that the parties to such an agreement can not agree to a provision that disadvantages an employee. We discuss the need to construe disadvantage in wide terms below.
15. The need for genuine consent is clearly required in any arrangement, and we note and adopt the oral submissions of the Victorian Government again in relation to this matter which are cited below.

PN440

The model clause ought to contain provisions that facilitate the informed consent of the non-proposing party to the arrangements and the model clause or other modern award terms should provide the means for parties to a model clause arrangement or proposed arrangement to ventilate and settle a dispute. In relation to the questions of consent, in our submission it is axiomatic that the consent ought to be genuine [and] procured by genuine means. In the Victorian government’s submission, the model clause should through its provisions deal with the quality of consent required to support a model clause arrangement.

16. The notion and limitation of consent has been judicially considered in *Barton v Armstrong* [1973] 2 NSWLR 598; [1976] AC 104 at 104:

“Thus, out of the various means by which consent may be obtained – advice, persuasion, influence, inducement, representation, commercial pressure – the law has come to select some which it will not accept as a reason for voluntary action: fraud, abuse of relation of confidence, undue influence, duress or coercion.”

17. From this judicial statement we contend that any undue influence, duress or coercion, will result in consent not being properly given and accordingly any arrangement entered into would be invalid. So long as there is evidence of consent, the employer and the individual employee will “agree on arrangements” and those arrangements will be enforceable.

18. It is our submission that only a flexible arrangement can only be made between an employer and an existing employee. An employer is defined in section 6 of the WRA:

“employer” means:

(a) a constitutional corporation, so far as it employs, or usually employs, an individual; or

(b) the Commonwealth, so far as it employs, or usually employs, an individual; or

(c) a Commonwealth authority, so far as it employs, or usually employs, an individual; or

(d) a person or entity (which may be an unincorporated club) so far as the person or entity, in connection with constitutional trade or commerce, employs, or usually employs, an individual as:

(i) a flight crew officer; or

(ii) a maritime employee; or

(iii) a waterside worker; or

(e) a body corporate incorporated in a Territory, so far as the body employs, or usually employs, an individual; or

(f) a person or entity (which may be an unincorporated club) that carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person or entity employs, or usually employs, an individual in connection with the activity carried on in the Territory.

An employee is defined in section 5 of the WRA:

"employee" means an individual so far as he or she is employed, or usually employed, as described in the definition of employer in subsection 6(1), by an employer, except on a vocational placement.

19. Accordingly to be an employee, a person must be employed by an employer as defined in section 6(1). A person is not an employee until they have accepted employment. When these principles are applied to the AMR a person has to be employed by an employer to enter into a flexible arrangement. Accordingly a flexible arrangement cannot be offered as a condition of employment because the person being offered the arrangement is not an employee.

That the arrangement should not disadvantage the employee.

20. The third and final objective mandates that the flexibility arrangement should not disadvantage an individual employee. Whether an employee is disadvantaged will depend on the value that the individual places on entering into a flexible arrangement.
21. Advantage and Disadvantage in our submission should be given its widest scope and should extend beyond monetary advantage/disadvantage. The proposed NES allows for Flexible work for parents via the right to request flexible work arrangements, until children reach school age which may only be refused on reasonable grounds. This proposed standard is a clear example of value being placed on a non-monetary arrangement, and it is our contention that the AIRC should adopt a similar measure for the flexibility clause.
22. We note that there is no requirement for the flexible arrangements to be monitored by third parties such as unions or government organisations. This has raised questions concerning whether such unregulated arrangements may result in employees being disadvantaged. It is suggested on page 13 of the Transition to Forward with Fairness Policy Implementation Plan that Fair Work Australia will play an active role in the process:

"Fair Work Australia will publish Labor's new awards and will be required to provide employers and employees with information about what individual flexibilities are available under awards.

Fair Work Australia will also be available to provide advice to employers and employees about how particular award flexibility clauses can work.

If an individual flexibility arrangement is made, the employer and employee will have to put it in writing and a copy must be given to the employee.”

An employer or employee will be able to have Fair Work Australia check a proposed arrangement to ensure it has complied with the flexibility clause of the award.”

23. At present there is no legislation describing the powers that Fair Work Australia may have. Accordingly any suggestion that they will monitor this process is purely speculative.
24. We note that the relevant Department (DEEWR) in Senate hearings earlier this week confirmed that the drafting process for the substantive legislation is continuing apace, and that there is a reasonable expectation that the legislation in draft form will be available prior to the making of the first priority modern awards.

Part 10A of the Act and the requirements of section 576A

25. Along with the objectives in the award modernisation request, section 576A provides objectives of this Part. The flexibility clause is a term of a modern award and accordingly the AIRC must be mindful of these objectives when drafting the flexibility provision.

Section 576A states that modern awards:

(a) must be simple to understand and easy to apply, and must reduce the regulatory burden on business; and

(b) together with any legislated employment standards, must provide a fair minimum safety net of enforceable terms and conditions of employment for employees; and

(c) must be economically sustainable, and promote flexible modern work practices and the efficient and productive performance of work; and

(d) must be in a form that is appropriate for a fair and productive workplace relations system that promotes collective enterprise bargaining but does not provide for statutory individual employment agreements; and
(e) must result in a certain, stable and sustainable modern award system for Australia.

(a) must be simple to understand and easy to apply, and must reduce the regulatory burden on business

26. The flexibility clause should be simple and easy to understand. Long winded provisions, and restrictions placed on arrangements being made would hamper the flexibility clause from meeting this objective.
27. If clauses are difficult to understand and implement, employers and employees may be required to seek external advice. This results in additional costs being incurred in obtaining and acting on the advice. Similarly they would also have to seek outside advice to ensure that they are compliant with restrictions that have been put in place.
28. Third party intervention, and requirements to seek consent from not just the parties involved but also third parties who are outside of the employment relationship potentially increases the regulatory burden on employers and employees. It also potentially provides for an additional right of entry for these third parties beyond the scope of Part 15 of the Act in contravention of Section 576R.

(b) together with any legislated employment standards, must provide a fair minimum safety net of enforceable terms and conditions of employment for employees

29. One of the key areas in relation to the success or failure of award flexibility is with respect to the enforcement of awards and any arrangement that seeks to either vary a term or the operation of an award term. As noted in various oral submissions, the parties to this process are operating without knowing what the enforcement regime is going to be under the substantive legislation. Accordingly, we have not directly addressed the issue of enforcement, as that is a matter for the Parliament.

30. Our submissions in relation to enforcement are that the parties to a flexibility arrangement should have that arrangement recorded with the time and wage records, and that any arrangement operates to the exclusion of the award terms as provided for in the arrangement proper. This obviously highlights the importance of the quality of the consent, and the nature of disadvantage.
31. It is our submission that for the award flexibility provisions to have any impact, the key consideration must be the consent of the parties and a broad definition of disadvantage.
32. The way the National Employment Standards and the Award interact in setting the minimum safety net of enforceable terms and conditions means, in our submission that, the proposed Family Flexibility provisions in the draft NES should be a model in terms of their ease of use and broad acknowledgement of advantage for the award flexibility provision. Having a single flexibility provision that operates across both strands of the safety net also assists in meeting the objections in (a) above.

(c) must be economically sustainable, and promote flexible modern work practices and the efficient and productive performance of work

33. We submit that the parties to the employment relationship are the parties best able to assess this area, and that this objective is not directly applicable to the award flexibility arrangements.

(d) must be in a form that is appropriate for a fair and productive workplace relations system that promotes collective enterprise bargaining but does not provide for statutory individual employment agreements;

34. The flexible arrangement must not provide for a Statutory Individual Employment Agreement. A Statutory Individual Employment Agreement is not defined in the Workplace Relations Act. When one looks to common law definitions of "employment agreement" they are confined to the statutory definitions of various state workplace agreements. If these words are defined by their ordinary and natural meaning they are agreements covered by statute that govern the employment of an individual.
35. Agreements covered by the WRA:

The only agreements that are covered by Workplace Relations Act are "workplace agreements". Workplace agreements are defined by section 4 of the Workplace Relations Act:

workplace agreement" means:

(a) an ITEA; or

(b) a collective agreement

and includes a document that the Court has ordered under section 412A is to have effect as a workplace agreement

"collective agreement" means:

(a) an employee collective agreement; or

(b) a union collective agreement; or

(c) an employer greenfields agreement; or

(d) a union greenfields agreement; or

36. These Agreements generally come into operation by being lodged and approved by the Workplace Authority or by being approved by a court. Section 324A also allows for certain documents to be taken or to be deemed agreements under the Act.
37. The proposed model flexibility clause is a term of a modern award. A modern award must comply with the terms of the Act as in Part 10A and with the AMR pursuant section 576G(2) Accordingly the individual flexibility clause is a term of a modern award.
38. The individual agreement that arises out of the flexible arrangement is not a term of the award. It is a flexibility provision to give effect to either a term of the award or it is a provision that alters the operation of the award. The agreement is not itself a provision of the award, and accordingly is not a statutory individual employment agreement.

(e) must result in a certain, stable and sustainable modern award system for Australia.

39. We submit that the parties to the employment relationship are the parties best able to assess this area, and that this objective is not directly applicable to the award flexibility arrangements.

Submissions with respect to the Priority Industries

40. These submissions are made in relation to the proposed priority industries for the Award Modernisation process. These submissions are made with respect to including Cleaning as a priority industry, deleting the Rail Industry from the priority list and amending the Clerical Occupation to exclude the Customs Broking and Freight Forwarding industry.

41. The criteria for inclusion in the priority list is outlined in the Award Modernisation Request (AMR) at Paragraph 20:

“In developing its priority list, the Commission will have regard to those industries and occupations with high numbers of Australian Workplace Agreements and Notional Agreements Preserving State Awards (NAPSAs).”

42. This criteria is supported by the President’s statement at Paragraph 13:

“In developing the list regard is to be had to those industries and occupations with high numbers of Australian Workplace Agreements and NAPSAs.”

43. Accordingly for an industry to be included on the priority list, it must have a high incidence of AWAs and NAPSAs. We acknowledge that the process of selecting priority industries is a matter for the discretion of the Commission, and that the Commission is not bound to observe these strictures.

44. The Commission following consultation with the AIG, ACCI and the ACTU reproduced a draft priority list following these guidelines, which included the following industries:

- Aged Care Industry (excluding nursing)
- Clerical Occupation
- Coal Industry
- Electrical Occupation (other than electricians covered by relevant industry awards)
- Gardening and Sportsground Maintenance Industry
- Graphic Arts Industry
- Higher Education Industry
- Hospital Industry

- Information and Communication Technology (ICT) Industry
- Insurance Industry
- Metal Engineering and Associated Industries
- Nursing Occupation
- Poultry Processing
- Racing Industry
- Rail Industry
- Retail Industry
- Rubber, Plastic and Cablemaking Industry
- Technical Services – Engineers and Scientists Occupations (with appropriate exclusions)
- Textile, Clothing and Footwear Industry

The Cleaning Industry

45. The Cleaning Industry was not included in this list, however the President extended an invitation for submissions in Full Bench Proceedings on Monday the 26th of May.

“there are two industries which from our look at the matter appear to be ones in which there are significant numbers of NAPSA’s and significant numbers of AWAs which haven’t so far been mentioned and they’re cleaning and security and we would be interested to have people’s views about whether or not those two industries should be on the priority list.”

46. These submissions are made as a response to the President’s request.
47. It is our contention that the Cleaning Industry should be included in the priority industry list because it has a significant number of NAPSA’s.

The Cleaning Industry is composed on the following NAPSA’s and Federal Awards:

NAPSA’s:

1	Caretakers & Cleaners Award	SA
2	Cleaners and Caretakers Award, 1969	WA
3	Cleaning and Building Services Contractors (State) Award	NSW

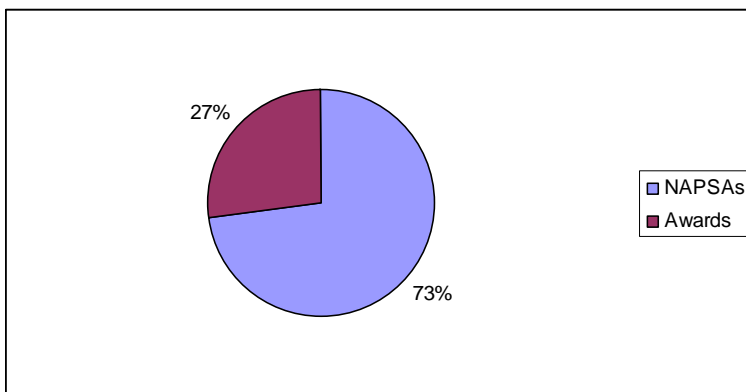
4	Cleaning and Property Services Award	TAS
5	Contract Cleaners Award, 1986	WA
6	Contract Cleaning (F.M.W.U.) Superannuation Award 1988, The	WA
7	Contract Cleaning Industry Award - State 2003	QLD
8	Thermal Ceramics Award	SA
9	Spotless Services Bluescope Steel Site Cleaning Award 2004	NSW
10	Contract Cleaners' (Ministry of Education) Award, 1990	WA
11	Hospital Workers (Cleaning Contractors - Private Hospitals) Award 1978	WA
12	Cleaners and Caretakers (Car and Caravan Parks) Award 1975	WA
13	Security Officers and Cleaners (West Australian Newspapers) Award	WA
14	Cleaners and Caretakers (Government) Award, 1975	WA
15	Metropolitan Health Service Engineering and Building Services Enterprise Award 1999	WA
16	WA Government Health Services Engineering and Building Services Award 2004	WA

Source: www.airc.gov.au

Awards:

1	Building Services (Victoria) Award 2003
2	Cleaning (Building and Property Services) (ACT) Award 1998
3	Linfoot Cleaning Services Award 2002
4	Cleaning Contractors (Hygiene and Pollution Control) Industry (Northern Territory) Award 2003
5	Industrial Catering, Cleaning and Incidental Services (AWU and LHMU) Award 2000
6	Industrial Catering and Cleaning (AWU and LHMU) Superannuation Award 1988, The

Proportion of NAPSAs and Awards in the Cleaning Industry:



48. The above data illustrates that NAPSAs account for 73% of the regulation of the industry and Awards make up 27% of that regulation. This high proportion of

NAPSAs relative to Awards fulfils the AMR's requirement that industries with a high number of NAPSAs should be included in the priority list.

49. The second requirement for inclusion in the priority list is that the industry should have a high incidence of AWAs. First IR Consultancy has obtained data from the Australian Bureau of Statistics and the Workplace Authority that supports the argument that Cleaning be included in the priority list.
50. The Cleaning industry falls under Division N (Administrative and Support Services), Group 731 (Building Cleaning, Pest Control and Gardening Services), Class 7311 (Building and Other Industrial Cleaning Services) of the Australian and New Zealand Standard Industrial Classifications (ANZSIC)².
51. The data that is available indicates that there are relatively low numbers of AWAs in the cleaning industry, and that accordingly if this was the only criteria then cleaning should not be included in the priority industries.
52. We encourage the Commission to include the Cleaning Industry in the priority list, as it clearly fulfils the criteria of an industry that is substantially regulated by NAPSAs.

Submissions in relation to the proposed priority industry of Rail

53. First IR Consultancy have had the opportunity to read the submissions filed by the relevant union, the Australian Rail, Tram and Bus Industry Union (the Union) and the submissions of QR Limited dated 27 May 2008.
54. First IR Consultancy endorse the submissions of QR in relation to the rail industry meeting the criteria of paragraph 20 of the Award Modernisation Request. Namely that there are very few employees who have their employment regulated by either AWAs or NAPSAs.
55. We note that neither the oral submissions of the union in Sydney on 28 May nor the written submissions of June 2008 provide much guidance to the Commission in terms of either the number of NAPSAs or AWAs in use in the rail industry or the number/proportion of employees covered by AWAs or NAPSAs.

² (no author), (2007), Australian and New Zealand Standard Industrial Classifications, available online at: www.abs.gov.au

56. There is simply an assertion that the Union wants the rail industry to be a priority industry without any attempt at addressing the criteria that guides the Commission in making its decision.
57. We note that the Awards listed in Attachment A to the Unions submission are overwhelmingly awards of this Commission, rather than State Awards. We note of the State Awards included in Attachment A, a large number of these State Awards do not regulate the employment of employees of an employer as defined at section 6 of the Act, as the employer is the Crown for these awards, rather than a trading corporation. Those State Awards that we submit are not NAPSAs include the following;
- Public Transport Construction Award (NSW)
 - Government Railways (Building Trades Maintenance Staff) Award (NSW)
 - Government Railways (Building Trades Construction Staff) Award (NSW)
 - Railways Employees Award No. 18 of 1969 (WA)
58. This leaves a list of 7 potential NAPSAs.
59. The submissions from QR make it clear that at least 2 of these NAPSAs are no longer NAPSAs but are rather Preserved State Agreements, and accordingly, are outside the scope of this process.
60. This leaves, in our submission, a potential total of 5 NAPSAs that may regulate employment in the rail industry. We submit that a total of 5 NAPSAs that may regulate an industry is not a high number of NAPSAs
61. With respect to the use of AWAs in the rail industry, we note that the submissions of QR in relation to their non use of AWAs.
62. Information on the use of AWAs is not provided on the basis of the rail industry per se, but rail is included in the Transport, Postal and Warehousing designation.
63. The latest figures available from the Workplace Authority indicate that in the Transport, Postal and Warehousing area, a total of 3,532 AWAs were lodged in the March quarter.

64. This figure compares with 7,332 AWAs for the Accommodation and Food Services area, 5,551 AWAs in Construction (which is not proposed as a priority industry), 3,345 AWAs in Financial Services (again, not proposed as a priority industry), 12,057 AWAs in Information Media and Telecommunications, 7077 AWAs in manufacturing, 7950 AWAs in mining and 6,311 AWAs in other services.
65. Without a precise breakdown of the AWAs within the Transport, Postal and Warehousing area, it is a matter of speculation as to whether most of these AWAs are in Transport, either road or rail, or in warehousing and postal services. Regardless of the breakdown, we submit that it is reasonably clear that the rail industry does not have extensive use of AWAs.
66. Accordingly, First IR Consultancy submit that rail as an industry does not meet the criteria of large numbers of NAPSAs nor does it contain large numbers of AWAs and that therefore rail should not proceed as a priority industry.

Customs Broking and Freight Forwarding Industry

67. These submissions are made for and on behalf of the Customs Broking and Forwarding Council of Australia Inc (CBFCA). These submissions are only in relation to the proposed priority industry/occupation of the clerical industry and whether or not customs broking and freight forwarding properly belong in the general occupationally based clerical industry.
68. The CBFCA represents all respondents to the industry's Awards, apart from Federal Express. Accordingly, these submissions are not made on behalf of Federal Express. The Freight Forwarding and Customs Broking Industry is currently regulated by two federal awards, the *Clerical and Administrative Staff (International Freight Forwarding and Customs Clearing Industry) Award* (the 'Clerical Award') – AW526032 and the *Transport Workers (Air Freight Forwarders and Customs Clearance) Award 2000* (the 'Transport Award') AW801394.
69. The CBFCA directs its submission to the "clerical occupation" in the Priority list appended to the Presidents statement of 29 April, and seeks to have the Full Bench see that the industry of customs broking, and freight forwarding, is not an industry within the purview of some (possibly notional) 'clerical industry', but is rather an industry in its own right. It is the submission of the CBFCA that the idea

of a clerical industry, runs counter to the very well established principles followed in the Federal Jurisdiction, that what invokes that jurisdiction is the industry of the employer.

70. That said we are aware of occupationally based Awards of this Commission, and note they really are exceptions to an overwhelming rule.
71. This industry employs clerks, just as it employs drivers, storemen, compilers and customs brokers and a host of other classifications, as an adjunct to the actual industry of the employer, which is as stated below.
72. This industry provides a service to its clients by way of facilitating the movement of both imports and exports, and it does this in accordance with very real strictures from the relevant Customs and Quarantine legislation and attendant regulation including; *The Customs Act 1901*, *The Customs Administration Act 1985* and the *Quarantine Act 1908*.
73. The industry is identified and regulated by specific agencies and has specific requirements of its employees that differ from the general occupational category of clerical and administrative employees.
74. This is explicitly recognised by the two major employee organisations, the ASU and the TWU as evidenced by the making of the two industry awards referred to above.
75. Clause 16.4 of the Transitional Clerical Award provides the classification structure and descriptors for employees in this industry. These classifications and their relevant descriptors go well beyond the standard occupational based coverage of the various clerical and administrative NAPSAs. Clause 16.4 is appended to these submissions as Appendix A.
76. This is a tightly regulated, and strictly overseen area of business, and it could not reasonably be held to be part of some generic 'clerical' industry.
77. We note that paragraph 4 of the Award Modernisation Request states that:

“When modernising awards, the Commission is to create modern awards primarily along industry lines, but may also create awards along operational lines as it considers appropriate”

78. We submit this clause makes it clear the primacy is given to the industry of the employer, and not the occupation of the employee.

79. The ASU state in oral submissions at PN518:

“Now, I mentioned before that there are a number of sectors where there are existing clerical awards, federal clerical awards, the Clerks Road Transport Award, the Freight Forwarding and Customs Clearing Award, Clerks Oil, Aluminium, Vehicle and Breweries Award. Now, there's about 20 of those federal clerical awards, your Honour, and we say that those industries a separate clerical award is no longer necessary. For the reasons mentioned earlier, your Honour, there is a lot of commonality between those federal awards. So that a broad based more modern award underpinning award is appropriate and sufficient.”

80. We submit that this industry of customs broking, is a different industry and that the ASU in previous matters has made submissions supporting the contention that in fact customs broking and international freight forwarding is a separate identifiable industry. We refer the Full Bench to the background of this industry's Awards, and say that prior to the oral submissions made by the ASU, this distinction was recognised by the ASU in submissions to SDP Lacy in AMACSU and ABX Logistics (Australia) Pty Ltd and Others in C no 2004/3308. In those submissions, the ASU noted:

The log of claims was served in relation to clerical employees of the employers concerned. The ASU submits these employers are in the customs clearing and international freight forwarding industry and that in terms of the employees intended to be covered by the alleged dispute finding, there is a community of interest at two levels. Primarily there is the industry they work in, and secondly as employees employed in a clerical capacity whatsoever. (emphasis added)

81. The Minister in her request to the President stipulated that a key outcome from the Government's perspective was to achieve a simplified and a more user friendly form of industrial regulation than that which it is to replace. That of itself almost rules out the idea of an occupational award for clerks, as virtually every employer, regardless of the industry of his/her business will in most cases employ some

people on some aspect of clerical work. To establish an Award for clerical work, then condemns employers everywhere to having at least two awards before anything else happens. We say that is not a good or desirable result.

82. We note that Section 576A(2)(a) states that modern awards:
“must be simple to understand and easy to apply, and must reduce the regulatory burden on business”
83. By roping employers into a Clerical Award the employer’s regulatory burden would increase because of an increase in the number of awards covering their employee’s employment. Additional costs for obtaining advice and applying the correct awards are also likely to result.
84. We recognise that this procedure, this consultation, is unlike any other procedures held by this Commission, and accept that the Full Bench has an obligation to deliver “modern awards’ in a particularly tight timeframe, and essentially in a way that the Full Bench may decide itself, having been informed, (by varying degrees) by the submissions of those contributing to these consultations, we urge the Full Bench to be mindful of those things that have worked well for all Australians in the mechanisms that have been developed in the long history of this Commission, and we say that one of the most important and successful has been to look to the industry of the employer, in preference to the occupation of the employee.
85. That said, we would urge that the “clerical industry” be dropped from the priority list, and failing that we urge that the industry of customs broking and freight forwarding be deemed to be not in the clerical industry and that it be permitted to retain its separate Award identity.

May it please the Commission.

First IR Consultancy Pty Ltd

Appendix A

Reproduction of Clause 16.4 from the *Clerical and Administrative Staff (International Freight Forwarding and Customs Clearing Industry) Award*

16.4 Classification Structure

16.4.1 All employees, employed in the international freight forwarding and customs clearing industry who perform general clerical and administrative functions, will be graded by each respective employer in one of the following classifications. Employees may be required to possess and use skills at the required skill level of the previous grade(s) as a condition of their being retained at the relevant level within the structure, unless the context of the position otherwise requires, for example, Finance Officer, Sales Clerk.

Grade 1 Administration Clerical Employee

Grade 2 Administration Clerical Employee/Level 2

Grade 3 Administration Clerical Officer/Customs Clerk

Grade 4 Senior Administration Clerical Officer/Import Clerk

Grade 5 Administration Clerical Officer (Level 5)/Import Clerk

Grade 6 Administration Clerical Officer –(Level 6)/Export Clerk/Import Operations Supervisor

Grade 7 Export Operations Supervisor/Customs Compiler

Grade 8 Customs Agent/Financial Controller

16.4.2 Descriptors

The descriptors relevant to the above Grades are as follows:

Grade Description

1 A Clerical or administrative employee who works under direct supervision and who performs routine repetitive duties requiring a basic level of skills and knowledge. An employee at this level may be required to perform duties out of office, which duties may include driving a motor vehicle.

2 A Clerical employee who performs the work of a Grade 1 employee under supervision but requiring greater level of basic skill in communication, information, using equipment and interpersonal relationships, principally as a result of experience and on-the-job instruction; fundamental knowledge of company activities and business procedures. Expected to accept limited responsibility and accountability, and to exercise minor decision making within assigned tasks and routines.

With respect to performing duties specifically required for International Freight Forwarders/Customs Brokers, an employee at this level will be required to have a basic knowledge of Customs, Quarantine and associated clearance/export processes and procedures and shall be able to exercise minor decision-making within the assigned area of work, subject to direction.

Grade Description

An employee at this level can handle information requests and communication and apply a basic level of enterprise knowledge to the tasks performed. The employee is able to operate basic office equipment and file a standard work schedule, including calculating and dealing with basic money problems.

An employee at this level will be expected to have completed, or be undertaking, the Certificate II in Business (Small Business Traineeship in Australian and International Trade Facilitation) or equivalent module "International Trade and Export Procedures" in Certificate IV Australian and International Trade Facilitation.

3 An employee engaged at this level to perform clerical/administrative work shall be classified as a Clerical Officer, and shall largely work under routine supervision, and shall demonstrate a level of skill above that required of a Grade 2 employee.

An employee at this level shall be able to perform the duties of a Grade 2 employee, and in addition shall be able to demonstrate skills in the following areas:

An employee at this level is able to perform audio typing, word processing, data entry and processing work, stenography, administrative assistance, cashier/teller duties, business machine operation, payroll clerical functions, receiving and dispatching clerical functions, and general clerical duties requiring some advanced level of skill.

An employee at this level provides information and responds to an act of communications. The employee is able to apply enterprise knowledge to performance of work and is able to establish his or her own work schedule and by responsible for his or her own output. The employee is able to identify and solve routine problems, and to calculate numerical and related information. The employee has superior information technology operating skills, using common enterprise programmes.

With respect to duties required in connection with duties in an International Freight Forwarding/Customs Brokerage establishment, employees at this level shall be required to have completed or have partially completed, the Certificate III in Business (Office Administration) or Certificate IV in Australian and International Trade Facilitation and to demonstrate the relevant level of competency within the following modules:

Managing Operations – Customer Service
Presenting Reports
International Trade and Export Procedures
Customs Authorities and Functions
Permit Issuing Authorities AQIS ANCA GST

Grade Description

Such an employee shall be classified as a Customs Clerk or Junior Import/Export Clerk.

An employee at this level works under routine supervision and may be required to provide leadership and direction for up to five employees.

A person who has a knowledge of software systems and who is able to undertake basic design and testing services and provide technical training of other clerical staff, shall be classified at no less than this grade.

4 An employee classified at this level works under occasional supervision and shall be able to demonstrate that he/she can perform all of the duties applying to a Grade 3 employee, and may be described under any of the following job classifications:

Secretary

Engaged as a Secretary/Personal or Administrative Assistant to a management person. Employees at this level shall be required to have completed or have partially completed,

the Certificate IV in Business (Administration) and competencies within Certificate IV in Australian and International Trade Facilitation modules:

Managing Operations – Customer Service
Managing and Organising Work – Goal Achievement
Presenting reports

and a combination of:

International Trade and Export Procedures
Customs Authorities and Functions
Permit Issuing Authorities AQIS ANCA GST

Clerical/Administrative Officer

Being an employee engaged in computer operating (requiring a greater degree of skill than simple data entry), administrative and/or research personnel.

Employees at this level shall be required to have completed or have partially completed, the Certificate IV in Business Administration and Certificate IV Australian and International Trade Facilitation modules:

Managing Operations – Customer Service
Presenting Reports
International Trade and Export Procedures
Customs Authorities and Functions
Permit Issuing Authorities AQIS ANCA GST

Grade Description

Import Clerk

Being an employee engaged in an International Freight Forwarding/Customs Brokerage establishment to be responsible for co-ordinating progression of documents through clearance process from registration to final clearance.

With respect to duties required in connection with duties in an International Freight Forwarding/Customs Brokerage establishment, employees at this level shall be required to have completed equivalent competencies in the Certificate III in Business (Office Administration) or Certificate IV in Australian and International Trade Facilitation and to demonstrate the relevant level of competency within the following modules:

Managing Operations – Customer Service
Managing and Organising Work – Goal Achievement
Accounting for Non-Accountants
Commercial Law
Presenting reports
International Trade and Export Procedures
Customs Authorities and Functions
Permit Issuing Authorities AQIS ANCA GST
Customs Clearance Practices
Tariff 1

Export Clerk

Being an employee engaged in an International Freight Forwarding/Customs Brokerage establishment to be responsible for co-ordinating progression of documents from receipt of shipping requests to final export of consignments.

With respect to duties required in connection with duties in an International Freight Forwarding/Customs Brokerage establishment, employees at this level shall be required to have completed equivalent competencies in the Certificate III in Business (Office Administration) or Certificate IV in Australian and International Trade Facilitation and to demonstrate the relevant level of competency within the following modules:

Managing Operations – Customer Service
Managing and Organising Work – Goal Achievement
Accounting for Non-Accountants
Commercial Law
Presenting reports
International Trade and Export Procedures
Customs Authorities and Functions
Permit Issuing Authorities AQIS ANCA GST

Grade Description

Customs Clearance Practices
Dangerous Goods
International Trade Finance
International Freight Forwarding I

An employee classified at this level may be required to manage the work of three and up to eight employees.

Sales Clerk

An employee engaged in selling customs broking and International freight forwarding services.

With respect to duties required in connection with duties in an International Freight Forwarding/Customs Brokerage establishment, employees at this level shall be required to have completed equivalent competencies in the Certificate III in Business (Office Administration) or Certificate IV in Retail and to demonstrate the relevant level of competency within the following modules:

Managing Operations – Customer Service
Managing and Organising Work – Goal Achievement
Accounting for Non-Accountants
Commercial Law
Presenting reports
International Trade and Export Procedures

and a combination of competency within modules:

International Trade and Export Procedures
Customs Authorities and Functions
Permit Issuing Authorities AQIS ANCA GST
Customs Clearance Practices
Dangerous Goods
International Trade and Export Procedures

International Trade Finance
International Freight Forwarding I

An employee classified at this level shall be responsible for his/her own work performance and output, consistent with the Statement of Duties provided.

5 An employee classified at this level shall work largely unsupervised and shall be able to demonstrate that he/she can perform all of the duties applying to a Grade 4 employee. Such employee may be described under any of the following job classifications:

Grade Description

Finance/Credit Officer
Book-keeper
Accounts Clerk
Payroll Officer

With respect to duties required in connection with duties in an International Freight Forwarding/Customs Brokerage establishment, employees at this level shall be required to have completed or partially completed relevant competencies within the Certificate IV in Business (Administration) or Certificate IV in Accounting.

Senior Administration, Clerical Officer

With respect to duties required in connection with duties in an International Freight Forwarding/Customs Brokerage establishment, employees at this level shall be required to have completed or partially completed relevant competencies within the Certificate IV in Business (Administration) or competencies within Certificate IV in Australian and International Trade Facilitation International Freight Forwarders Strand modules:

Managing Operations – Customer Service
Managing and Organising Work – Goal Achievement
Accounting for Non-Accountants
Commercial Law
Presenting reports
International Trade and Export Procedures
Customs Authorities and Functions
Permit Issuing Authorities AQIS ANCA GST

And a combination of Customs Broking Strand or International Freight Forwarding Strand modules:

Customs Clearance Practices
Tariff 1
Tariff 2
Valuation
Customer Review Practices
Dangerous Goods
International Trade Finance
International Freight Forwarding I
International Freight Forwarding 2

Special Cargo's or equivalent within:

Frontline Management Standards – Level IV
Diploma of Business (Administration) Certificate V

Grade Description

Senior Import Clerk

An employee classified at this grade shall be engaged specifically in connection with the importation of international freight and shall have completed the following modules in Certificate IV in Australian and International Trade Facilitation and to demonstrate the relevant level of competency within the following modules:

Managing Operations – Customer Service
Managing and Organising Work – Goal Achievements
Accounting for Non-Accountants
Commercial Law
Presenting Reports
International Trade and Export Procedures
Customs Authorities and Functions
Permit Issuing Authorities AQIS ANCA GST
Customs Clearance Practices
Tariff 1
Tariff 2

Senior Export Clerk

An employee classified at this grade shall have been engaged specifically in connection with the exportation of International Freight and employees at this level shall be required to have completed the following modules in Certificate IV in Australian and International Trade Facilitation and to demonstrate the relevant level of competency within the following modules:

Managing Operations – Customer Service
Managing and Organising Work – Goal Achievements
Accounting for Non-Accountants
Accounting
Commercial Law
Presenting Reports
International Trade and Export Procedures
Customs Authorities and Functions
Permit Issuing Authorities AQIS ANCA GST
Customs Clearance Practices
Dangerous Goods
International Trade Finance
International Freight Forwarding 1
International Freight Forwarding 2

Grade Description

Cartage Clerk

An employee responsible for co-ordinating and costing transport of import or export cargo.

An employee at this level shall be required to have completed the following modules in Certificate IV in Australian and International Trade Facilitation and to demonstrate the relevant level of competency within the following modules:

Managing Operations – Customer Service
Managing and Organising Work – Goal Achievements
Accounting for Non-Accountants
Commercial Law
Presenting Reports
International Trade and Export Procedures
Customs Authorities and Functions
Permit Issuing Authorities AQIS ANCA GST
Customs Clearance Practices
Dangerous Goods
International Trade Finance
International Freight Forwarding 1

Ramp Clerk

An employee engaged at ports in connection with forwarding or receipt of international freight.

Employees at this level shall be required to demonstrate the relevant level of competency within the following completed modules in Certificate IV in Australian and International Trade Facilitation or to demonstrate the relevant level of competency within the following modules:

Managing Operations – Customer Service
Managing and Organising Work – Goal Achievements
Accounting for Non-Accountants
Commercial Law
Presenting Reports
International Trade and Export Procedures
Customs Authorities and Functions
Permit Issuing Authorities AQIS ANCA GST
Customs Clearance Practices
Dangerous Goods
International Trade Finance
International Freight Forwarding 1

Grade Description

Customer Service Clerk

An employee engaged to provide customer services to clients and to undertake associated duties in, or in connection therewith.

Employees at this level shall be required to demonstrate the relevant level of competency within the following completed modules in Certificate IV in Australian and International Trade Facilitation:

Managing Operations – Customer Service
Managing and Organising Work – Goal Achievements
Accounting for Non-Accountants
Commercial Law
Presenting Reports

International Trade and Export Procedures
Customs Authorities and Functions
Permit Issuing Authorities AQIS ANCA GST
Customs Clearance Practices
Dangerous Goods
International Trade Finance
International Freight Forwarding 1

An employee at this level shall exercise a high degree of skill in relation to providing information and responding and acting on communications, applying an advanced level of enterprise knowledge and knowledge of Company procedures to task. This employee to organise his or her own work schedule and be responsible for the achieving of targets set in relation to achieving those targets. The employee should be able to identify and solve problems and to clarify issues as they arise. The employee shall be able to calculate numerically related information and to undertake complicated and non-routine tasks. The employee shall have advanced information technology skills and be able to effectively use basic specialised packages. The employee shall be able to operate office equipment and produce documents relating to the business to an advanced level.

An employee engaged at this level may be required to co-ordinate and supervise eight employees and shall, in addition to being responsible for his or her own work output, be responsible for the work performance and output of a section within the Company.

6 An employee engaged at this level shall be engaged principally in, or in connection with, performance of work associated with the business of an International Freight Forwarder/Customs Brokerage enterprise, in the following areas:

Grade Description

Compiler Class 1

Employees classified as Compiler Class 1 shall be required to have completed the following modules in the Certificate IV Australian and International Trade Facilitation - Customs Brokers Strand.

Managing Operations – Customer Service
Managing and Organising Work – Goal Achievements
Accounting for Non-Accountants
Commercial Law
Presenting Reports
International Trade and Export Procedures
Customs Authorities and Functions
Permit Issuing Authorities AQIS ANCA GST
Customs Clearance Practices
Dangerous Goods
International Trade Finance
International Freight Forwarding 1

Import Operations Supervisor

Employees classified as Import Operations Supervisor shall be required to have completed the relevant modules in the Certificate IV Australian and International Trade Facilitation Customs Strand or the International Freight Forwarding Strand as follows:

Managing Operations – Customer Service
Managing and Organising Work – Goal Achievements

Accounting for Non-Accountants
Commercial Law
Presenting Reports
International Trade and Export Procedures
Customs Authorities and Functions
Permit Issuing Authorities AQIS ANCA GST
Customs Clearance Practices
Tariff 1
Tariff 2
Valuation
Customs Review Practices

Export Operations Supervisor

Employees classified as Export Operations Supervisor shall be required to have completed the relevant modules in the Certificate IV Australian and International Trade Facilitation Customs Strand or the International Freight Forwarding Strand with achievement of competencies in the following:

Grade Description

Managing Operations – Customer Service
Managing and Organising Work – Goal Achievements
Accounting for Non-Accountants
Commercial Law
Presenting Reports
International Trade and Export Procedures
Customs Authorities and Functions
Permit Issuing Authorities AQIS ANCA GST
Dangerous Goods
International Trade Finance
International Freight Forwarding 1 & 2
Special Cargo's
Advanced International Freight Forwarding

An employee engaged at this level shall be responsible for his/her own work output and shall work without supervision. Such employee may be responsible for the work performance and output of the section of the business if so directed.

7 An employee classified at this level shall be employed in an International/ Freight Forwarder/ Customs Brokers establishment and shall otherwise be able to demonstrate that he/she can perform all of the duties applying to a Grade 6 employee, and shall be described under the following job classification:

Compiler Class 2

An employee classified as a Compiler Class 2 shall be required to have completed relevant modules in Certificate IV in Australian and International Trade Facilitation Customs Brokers Strand with achievement of competencies in the following:

Managing Operations – Customer Service
Managing and Organising Work – Goal Achievements
Accounting for Non-Accountants
Commercial Law
Presenting Reports
International Trade and Export Procedures

Customs Authorities and Functions
Permit Issuing Authorities AQIS ANCA GST
Customs Clearance Practices
Tariff 1
Tariff 2
Valuation
Customs Review Practices
Advanced Customs Broking

Grade Description

An employee engaged at this level shall be responsible for his/her own work output and shall work without supervision. Such employee may be responsible to manage the work performance and output of the section of the business if so directed.

Export Operator

Employees classified as Export Operations Supervisor shall be required to complete relevant modules in the Certificate IV Australian and International Trade Facilitation – International Freight Forwarding Strand, with achievement of competencies in the following:

Managing Operations – Customer Service
Managing and Organising Work – Goal Achievements
Accounting for Non-Accountants
Commercial Law
Presenting Reports
International Trade and Export Procedures
Customs Authorities and Functions
Permit Issuing Authorities AQIS ANCA GST
Dangerous Goods
International Trade Finance
International Freight Forwarding I & 2
Special Cargo's
Advanced International Freight Forwarding

Plus Certification for

International Dangerous Goods

An employee at this level is able to collate information, and to provide an advice and response relevant to that information to others, including directing subordinates in relation to such information. The employee is able to provide advice associated with that information to such other persons, and to act on the information on his or her own initiative. The employee is able to design and implement workplace documents and reports and to maintain and operate systems for the effective running of the Division and Section in which the employee works. The employee is able to prepare and maintain work schedules of others and to monitor performance of teams undertaking work as part of work assignments. The employee, in addition to identifying and solving problems is able to assist others with solving problems beyond their level of skill. The employee is able to interpret numerically related information and calculate and perform tasks requiring an advanced level of skill. The employee has advanced information technology skills and is able to use highly specialised packages in relation to information technology.

Grade Description

8 An employee classified at this level shall be able to demonstrate that he/she can perform all of the duties applying to a Grade 7 employee, and may be described under the following job classifications:

Customs Broker

Employees so classified must be licenced under Part XI of the Customs Act 1901 (as amended to-date) and have attained certification under Certificate IV in Australian and International Trade Facilitation – customs Brokers Strand and hold a current ACS Licence.

Accountant/Financial Controller

The Financial Controller must have completed a Diploma in Business Administration/Accounting or equivalent thereof.

An employee at this level is able to undertake research and to provide relevant information in relation to overall issues. In this respect, the employee will be able to apply and implement changes to the enterprise and the enterprise systems, using acquired knowledge and to supervise and manage the overall office management systems. The employee will establish and implement plans for the performance of work of subordinates and for the operation of work teams within the business environment and to devise, implement and co-ordinate plans for the work of the teams and individual tasks designed to achieve ultimate business goals. An employee at this level will have limited authority to select and train staff, and to perform staff evaluations and act on such evaluations. The employee will be able to interpret numerical and related information and to provide advice and reports in relation to such information. The employee has an advanced level of skill in information technology and is able to organise and upgrade specialised packages to accommodate the needs of the specific business.

An employee classified at this level shall accept responsibility for his/her own work performance and output and the performance output of the Company in respect to the overall work performed.

Note 1. Employees who are graded under the above structure are required to acquire, within a reasonable period of time acceptable to all parties, the level of skill and/or knowledge determined with respect to the classification before they become eligible for advancement to a higher level.

Note 2. Employees who are engaged as managers and accept the responsibility of the manager of the Company or Division of the Company, shall not be classified within the above structure, provided that their Contract provides for benefits and conditions of employment at least equal to, or better than, those prescribed for an employee classified at Grade 8.