Further Submissions of ACPET
Stage 3 of Award Modernisation
Educational services (other than Higher education) - AM 2008/33

The following submissions are the further submissions of the Australian Council for Private Education and Training (ACPET), the national industry association for independent (non-government funded) bodies providing post-compulsory education and training.

These submissions are in response to the Statement published by the Full Bench of the Australian Industrial Relations Commission (Commission) on 22 May 2009 ([2009] AIRCFB 450) regarding Stage 3 Award Modernisation, together with the relevant exposure draft award, the Educational Services (Post-Secondary Education) Award 2010 (Exposure Award). These submissions should be read in conjunction with submissions provided on behalf of ACPET to the Commission by letter dated 6 May 2009.

Summary of submmisions

ACPET submits generally that, should a modern award be made to cover post-compulsory education and training providers, there should be a stand alone modern award that applies to private post-compulsory education and training providers which does not include TAFE Colleges because of the very significant differences between private providers and TAFE Colleges.

More specifically, while ACPET recognises the utility provided under the award flexibility clause in relation to arrangements for when work is performed, overtime, penalties, allowances and leave loading, ACPET considers that there are clauses in the Exposure Award that, should they become the 'default position' in the absence of agreement, would be such as to make current operations of ACPET members, in many instances, no longer possible.

Of greatest concern, in this respect, are the clauses in the Exposure Draft that provide for the ordinary hours in which employees are to work, and the clauses in relation to overtime, shiftwork and penalties.

1. Introduction

1.1 As indicated in earlier submissions, ACPET represents approximately 1100 organisations and enterprises that deliver to both domestic and international students the full range of post-secondary education and training skill creation courses across all States and Territories, including:

(a) higher education (eg: post-graduate and undergraduate, diploma studies);

(b) English language;

(c) vocational and educational training;

(d) senior secondary studies; and

(e) foundation studies.

1.2 ACPET members operate within the private (non-government) 'post-compulsory' or 'post-school' sector, which requires them to be as responsive and flexible as possible to meet
the needs of students and business clients in a fast changing world of workforce need. To date, a number of ACPET members have been unregulated by awards.

1.3 This post-compulsory education and training sector is growing in size and importance to the Australian community and economy. Across industry there is an increasing demand for higher levels of professional, paraprofessional, technical and managerial skills and qualifications.

1.4 In addition, education services ranks as the third largest export for the year 2007-2008. Access Economics cites DFAT analysis assessing education services as an export earner of $14.164 billion, behind coal ($24,866 billion) and iron ore ($21.302 billion). International student expenditure is said to have generated more than 122,000 FTE positions in the Australian workforce (nearly 33,500 in the education sector). Of ACPET’s 1100 members, approximately 600 provide educational services to international students.

1.5 From 2006 to 2007 there was a 92.6% growth in enrolments of student enrolments with private sector higher education providers. ELICOS and VET sectors experienced significant growth in the 2006 to 2008 years with enrolments increasing by 63.7% and 112.65% respectively.

1.6 Over recent times it has been recognised that training systems must be responsive to the changing needs of the evolving labour market. The observations regarding the Exposure Award, which follow, are made bearing in mind the national need for private providers of post-secondary education and training to operate in a thoroughly user-focused, competitive environment.

2. Stand alone award for private providers

2.1 Notwithstanding the general intention of award modernisation to limit the number of modern awards, ACPET reiterates its earlier submission that there should be a stand alone modern award that applies to private post-compulsory education and training providers, and expressly exclude TAFE Colleges (schools or mainstream universities). While the Exposure Award is drafted so as not to include schools or any employer in respect of whom the Higher Education Industry Awards apply, the Exposure Award covers both independent bodies, many of whom are currently award free, and TAFE Colleges.

2.2 In ACPET’s earlier submission, ACPET expressed the view that a modern award that covers both independent bodies providing post-secondary education and training and TAFE Colleges is inappropriate. ACPET holds this view because it considers that a single award covering TAFE Colleges and private providers would:

(a) not be simple to understand nor easy to apply;

(b) not reduce the regulatory burden on business, but increase it;

(c) not be economically sustainable or promote flexible modern work practices and the efficient and productive performance of work;

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2 Ibid.
3 Ibid.
(d) increase costs for many of the private providers bound by it, which in turn would increase fees charged to students and clients; and

(e) potentially disadvantage employees, including by reducing employment opportunities consequent upon the loss of student numbers.

2.3 ACPET submits that there are important differences between TAFE Colleges and private providers, such that they should not be covered under the same modern award. Unlike TAFE Colleges, private providers:

(a) have a different industrial history to TAFE Colleges with their public-sector derived safety-net conditions of employment;

(b) have a substantial reliance upon international student enrolments, as a result of which private post-compulsory education and training providers are more vulnerable to changes in immigration regulations and changes in the world markets, which can negatively impact upon student enrolments;

(c) have compliance and administrative costs which, unlike TAFE Colleges, are borne by private providers without government subsidies or funding;

(d) rely on student enrolments and fees as the primary source (and for many providers the only source) of funding and revenue, meaning that speedy measures for the management of costs are of paramount importance, including measures in relation to flexible work practices;

(e) offer courses that are generally short and practical in nature, tailored to flexible student demand and client need;

(f) attract more mobile students, who sometimes do not complete courses when employment opportunities arise before completion, causing uncertainty in enrolments and, consequently, in the viability or duration of certain courses from time to time;

(g) vary in the number and type of employees they require, having regard to the courses that are being offered (which are impacted by student enrolments) and the time at which courses are being delivered;

(h) require flexible work practices for employees in the sector who may have outside employment and use teaching as a secondary employment (particularly so for providers of post-graduate courses who may engage industry experts on a one off or irregular basis for the delivery of course material);

(i) often operate outside of standard working hours, at night and on weekends (which for some providers constitute peak periods in accordance with the dictates of student demand); and

(j) do not utilise traditional term and semester arrangements and offer courses outside of these times, which requires flexibility in relation to how and when employees can be engaged and the consequences that follow from the cessation of engagements once course delivery is complete.

2.4 A characteristic difference between private providers and TAFE Colleges is that private providers are geared to be rapidly responsive to opportunities, student demand and client needs in a manner that is not characteristic of TAFE Colleges, which in most States are
large institutions subject to central bureaucracy. An award tailored as a suitable safety net for a large institution such as a TAFE College, may bind a smaller private provider by regulation which makes it impossible for that private provider to continue to exercise the agility necessary to make necessarily quick responses to the evolving needs of industry in the competitive market place. The potential consequences of such an outcome include pressure for rising fees, a loss of choice for students and a loss of diversity and specialisation among providers of post-secondary education and training.

2.5 ACPET agrees with the observation of the Full Bench (at paragraph [62] of the Full Bench Statement) that the range of organisations offering education and instruction to adults in post-secondary education is extremely diverse. In ACPET's submission the diversity between TAFE Colleges and independent bodies providing post-secondary education and training is such that, presuming that each is to be covered by modern awards, a separate modern award should cover TAFE Colleges as distinct from independent providers.

3. Exposure Award

3.1 Apart from ACPET's submission regarding the inappropriateness of a modern award that covers both independent bodies providing post-secondary education and training and TAFE Colleges, ACPET has further submissions in relation to specific aspects of the Exposure Award, which follow.

3.2 ACPET recognises that the award flexibility clause (clause 7) of the Exposure Draft, by which an employer and an individual employee may agree to vary the application of certain terms of the Exposure Award to meet the genuine needs of the employer and the individual employee, may allow for some of its concerns to be addressed by members of ACPET and their employees. The terms that may be varied are:

(a) arrangements for when work is performed;
(b) overtime rates;
(c) penalty rates;
(d) allowances; and
(e) leave loading.

3.3 Nevertheless, ACPET has concerns that clauses in the Exposure Award, should they become the 'default position' in the absence of agreement, would be such as to make current operations of members, in many instances, no longer possible. As such, these clauses, which are discussed in the submissions below, have the potential to make the businesses of many ACPET members unsustainable. This potential is stark when one is conscious of the fact that many of the employers in this market are smaller employers that do not have the advantage of employing sophisticated human resources practitioners.

3.4 ACPET submits that Part 5 of the Exposure Award, if applied to private providers, would make current modes of operation unsustainable in many instances. In other instances, the clauses contemplated, if they were to become requirements, would be such as to raise the real possibility that private providers would need to address increased costs by introducing larger student/teacher ratios, or providing less investment in innovative technology and equipment, or offering fewer courses.
3.5 Clause 21.1 provides for a span of ordinary hours for 'support staff' from Monday to Friday between 7.00am and 7.00pm, with variation to 8.00pm up to a maximum of eight weekdays within a 28 day period (with potential, by agreement, for alteration by up to one hour at either end of the spread). This spread of ordinary hours does not recognise that the standard hours of operation of many private providers are at nights and weekends, when students, many of whom work in forms of paid employment, wish to access courses, and when necessary capital equipment for many courses is available and not otherwise in use. This clause in relation to the span of ordinary hours, and the clauses in relation to overtime, shiftwork and penalties from which obligations flow consequently, are not sustainable for private providers.

3.6 Clause 21.2 provides for ordinary hours of work of academic teachers. The clause requires that, for the purposes of determining the number of hours worked by an academic teacher, a lecture, being the main presentation of course material in a subject, will count as three hours' work for each hour of delivery, and will include associated preparation, assessment and student consultation (which is also reflected in clause 14 - casual rates for academic teachers). This provision does not recognise that private providers operate in a diverse environment in which it is common for academic teachers to teach, and only teach, while assessment is done by assessors, who do only assessment. Nor does it recognise that such academic teachers may be teaching from units of study that are developed by other specialists. Nor does it recognise that, in certain courses, full time academic teachers are employed to teach for 38 hours per week and are not given any ancillary or administrative duties: such duties are performed by clerical or para-professional staff. A model by which an academic teacher has three hours work counted for each hour of delivery is a traditional academic model that may work in some traditional areas of education delivery, but such a model does not work in the range of diverse courses and modes of learning conducted by private providers.

3.7 Clause 21.3 provides for an arrangement in relation to teachers and tutor/instructors by which each contact hour of teaching delivery counts as 1.9 or 1.4 hours of work, respectively, including administration, assessment and consultation. Similar to the observation in the paragraph above, this arrangement does not cater for arrangements, common among private providers, where teachers and tutor/instructors deliver instruction only and do not have duties associated with administration, assessment and consultation. Take, for example, the modes of learning used by private providers of hair dressing education and training. This mode is usually one of demonstration and 'learning by doing'. Teachers operating in this mode of instruction do not engage in lengthy pre-demonstration preparation. The intensity of their work is in the personal delivery by example and direct supervision of student work. Their hours of work are spent in direct teaching, rather than any ancillary activities. The effect of such a prescription in relation to hours would mean that such modes of learning could not be sustained.

3.8 Such prescriptive clauses further do not recognise that persons employed as teachers, by whatever name, in private post-secondary education are often working as flexible, industry based trainers who have daily tasks including travel between client sites (catered for in a variety of ways), facilitation of on-line or open learning, providing one-on-one personal instruction, assessing workplaces, managing customers and consulting on technical matters.

3.9 Generally speaking, the prescriptive clauses in relation to teaching hours, whether in relation to the defined groups of academic teachers, teachers, or tutor/instructors fail to recognise the flexible arrangements that have operated in relation to private providers of post-secondary education since the inception of such education.
3.10 A simple illustration is that educators, who have always been flexible enough to engage students in such events as fashion week or the opera, or any of the myriad other extension activities that may arise as part of 'classroom activity', would be precluded from doing so by reason of the prohibitive expense to employers arising from the restrictive working hours clauses in the Exposure Award.

3.11 Take another example, this one in relation to technical training in film, animation and other specialist resource intensive programs. Private providers in such 'niche' areas operate flexible hours where expensive industry standard capital equipment is made available within the seven day week, thereby ensuring that students have important 'hands-on' training. Training is often conducted late at night and relies upon the availability of resources and flexibility in the hours of delivery of instruction by teachers.

3.12 A further example arises in relation to training for security screening. The timing of such training, conducted at airports, is dictated by the flow of passengers and is done at times that are less busy – which is necessarily often outside the span of ordinary hours identified in the Exposure Award.

3.13 Other matters that require mention are:

(a) clause 10.4(d), which specifies minimum payments for engagements, would discourage the common practice among private providers of engaging guest presenters and others for short periods of duration, often approximately only an hour, to present or instruct on discrete topics;

(b) clause 10.5(a) states that sessional employees are engaged for a specified period or periods of not less than eight weeks, provided that if the employee is engaged to replace an employee absent on approved leave, the engagement may be for a minimum of four weeks - this clause does not reflect the session lengths (sometimes up to 13 weeks) that some members of ACPET use in delivering courses and is inappropriately restrictive in allowing for replacement of staff on leave;

(c) clause 10.5(d) states that subject to satisfactory conduct and performance, where an equivalent position exists at the expiry of the employee's sessional engagement, the employer will offer a further engagement to the employee – this clause is unnecessarily restrictive and does not reflect the dynamic and changing nature of private post-secondary education provision;

(d) while casual employees are engaged and paid by the hour (clause 10.4(a)), there is an inconsistent requirement to provide notice, or pay in lieu, to a casual teaching member with continuous service of not less than four weeks (clause 11.2);

(e) notice is also required for sessional teachers under clause 11(a), even though the periods of their engagement are of specified duration (clause 10.5(a));

(f) clause 11.2(c) provides that an employer must give notice of termination (albeit of reduced length) in circumstances where a course has to be cancelled because of a failure of students to attend, which in the usual course of events, would be outside of the control of the employer;

(g) given the circumstances of small private providers, it is appropriate that the National Employment Standards alone provide for periods of notice of termination;
(h) clause 19, provides for training wage arrangements contained in Schedule E, although Schedule E has no content yet.

Minter Ellison on behalf of ACPET

12 June 2009