



**Australian Education Union**  
**Submission**  
**to the**  
**Australian Industrial Relations Commission**  
**on**  
**Award Modernisation**  
**Educational Services (excluding Higher Education)**

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**Angelo Gavrielatos**  
Federal President

**Australian Education Union**  
Ground Floor  
120 Clarendon Street  
Southbank VIC 3006

**Susan Hopgood**  
Federal Secretary

Telephone: 61 3 9693 1800  
Facsimile: 61 3 9693 1805  
E-mail: [aeu@aeufederal.org.au](mailto:aeu@aeufederal.org.au)



# AWARD MODERNISATION: AM2008/33 EDUCATION SERVICES

## (OTHER THAN HIGHER ED) SUBMISSION

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## **A. SUMMARY**

1. The Australian Education Union is a major registered organisation of employees covering the interests of all employees in the Government Education Services industry as defined.
2. This submission to the Australian Industrial Relations Commission for consideration in the process of making a modern award or awards to apply in the Education Services industry generally advances a number of propositions.
3. The Commission should refrain from proceeding to make a modern award or awards applying to employers and employees in the Government Education Services sector as part of Stage 3 of its Award Modernisation process. The reason for so doing concerns the substantial uncertainties surrounding the issue of ‘referral of powers’ by state governments and the consequent inability of the Commission to determine with any degree of certainty the employers and employees who would be covered by any such award or awards, if made prematurely.
4. This proposition has been supported by the Victorian Government, the ACTU and the CPSU in submissions already made in correspondence to the President of the Commission and placed on the Commission’s website.
5. The submission presents the distinctive historical and current patterns of establishment, regulation and financial management which differentiate the ‘government’ and ‘non-government’ sectors of the industry.
6. The AEU submits that these patterns clearly establish a clear and appropriate basis for establishing different modern awards for these sectors.

7. The submission then delineates the distinctive features of the teaching profession in pre-schools, schools TAFE and AMES which justify a creation of an occupational award for teachers and an industry award for non-teaching classifications of employees in the Government Education Services Industry.
8. Due to the issues referred to in the first of the above propositions (para 3), the AEU submits that it is unable to provided detail, at this stage, as to the content of any Modern Award/s which would apply to employees in the Government Education Services Industry. It does however advance a number of general or preliminary matters for consideration by the Commission:
  - A definition the industry, relevant coverage with appropriate exclusions, and definitions of teaching and teacher;
  - Difficulties associated with establishing an appropriate safety net with respect to rates of pay and career or classification structures;
  - The necessity to supplement the relevant National Employment Standards in relation to hours of work and parental leave;
  - How the Commission should deal with the particular issue of payment for the supervision of student teachers; and
  - Considerations pertaining to the implied constitutional limitation as found by the High Court in *Re AEU*.

**B. ADJOURNMENT SOUGHT IN RELATION TO GOVERNMENT EDUCATIONAL SERVICES INDUSTRY (GESI)**

9. The Federal Secretary of the AEU wrote to the President of the Australian Industrial Relations Commission on 17 February 2009 seeking adjournment of these proceedings in relation to the Government Education Services Industry for reasons which included the following:
10. *“In sum our view is that it would be premature to make a Modern Award in the government school, preschool and TAFE sectors until the scope of the jurisdiction is known. Until it is known to whom the Modern Award would apply, we submit that it is not possible to know what is relevant in establishing a fair minimum safety net of terms and conditions or the scope of the Award. Thus we suggest that the Commission adjourn the government schools, preschools and TAFE aspect of the Stage 3 process at this stage.*
11. *The jurisdiction underpinning the proposed Fair Work Act does not extend to state government employees so any decision of the Commission will be ineffective short of the referral of powers, something which no state government other than Victoria has indicated its willingness to do. Some have definitely said they will not refer powers and even the terms of any referral by Victoria will be unknown until the passage of the Fair Work Bill.*
12. *The Minister has made it clear that a Modern Award will not apply where an enterprise award exists. Enterprise awards exist in all states and territories in relation to employment in schools (including preschools) and TAFE colleges, save and except for TAFE colleges and Kindergartens in Victoria.*

13. *Our view is that these exceptions are still within the scope of public provision, broadly defined, as they are either established and/or funded by government in accordance with its policies and directions. These exceptions to the general application of enterprise awards should not, in our view, provide the basis for the making of a Modern Award in this sector.*
14. *As far as the Territories are concerned, in our view it would be inappropriate to make a Modern Award which purports to operate on a national basis when they make up only a small minority of employees in the two smallest government educational systems. Additionally, enterprise awards apply to territory employees so the Modern Award would not apply in any case.”*
15. The primary submission of the AEU is thus that the Commission should adjourn its consideration of government educational services, other than higher education, at this stage.
16. The following provides an outline of the scope of government educational services and the nature of Modern Awards which the AEU submits should be made in relation to them. This may assist the Commission in determining how to proceed in relation to the non-government sector.

**C. THE INTERESTS OF THE AEU IN THE GOVERNMENT EDUCATIONAL SERVICES INDUSTRY (GESI)**

17. The AEU, and its Associated Bodies provided for in its rules, is the sole union representing teaching staff in the GESI. The AEU has enrolled as members 175,051 employees in the Government Educational Services Industry (GESI) who are engaged in the provision of educational services in a variety of classifications in all states and territories. Teaching staff may be employed in a range of classifications including Teacher, Principal, Deputy Principal and a range of classifications for leadership roles in educational institutions as well as specialist roles such as counsellors, librarians and career advisers. Government teachers are employed in schools, preschools, TAFE and Adult Multicultural Education (AMES) settings.
  
18. The AEU also represents classifications of non-teaching staff providing educational services in most states and territories of Australia excluding New South Wales, Queensland and Western Australia. The CPSU represents classifications of non-teaching staff in all states and territories and the LHMU represents teacher aides in some states in the GESI. The NTEU represents non-teaching staff in Victorian TAFE institutes and both teaching and non-teaching staff in adult and community education provision outside of TAFE.

#### **D. GOVERNMENT EDUCATIONAL SERVICES INDUSTRY (GESI) REPORT**

19. A recent report on government educational provision in Australia is found in the Productivity Commission's Steering Committee for the Review of Government Service Provision which released its annual *Report on Government Services* on January 30, 2009. The information in this submission contains key national data and information from the 2009 Report. The information is presented in respect of government school, preschool and TAFE provision. Together these services comprise a large, coherent and well-defined Government Educational Services Industry (GESI) which has always been regulated by discrete awards applying only to government educational services.

#### **E. GOVERNMENT PRESCHOOL SERVICES**

20. In 2008, 203,038 children attended State and Territory funded and/or provided preschool services. In 2007-08 State and Territory governments supported [funded and/or provided] at least 167,686 preschool places which is approximately equivalent to attendance by 203,038 children.
21. The provision of preschool services accounted for the largest proportion of total state/territory government expenditure across all forms of children's services: \$561.1 million or 81.9%.
22. In 2006-07 there were 16,392 primary contact staff employed in State and Territory government funded preschool services, excluding Tasmania for which data are not available.

## **F. GOVERNMENT SCHOOL SERVICES**

23. Government primary schools employed 121,289 teaching staff in 2007, and government secondary schools employed 95,392 teaching staff.
24. In 2007, there were 3.4 million full-time school students and 24,503 part-time students attending 9,579 schools in Australia. Of these 2.3 million students (full time and part time) attended 6,851 government schools.
25. Commonwealth and State/Territory government recurrent expenditure on school education was \$34.2 billion in 2006-07. Expenditure on government schools was \$26.9 billion, or 78.6% of the total.
26. The Report notes that “government schools account for most of the expenditure by State and Territory governments. These governments also contribute to the funding of non-government schools and provide services used by both government and non-government schools.”
27. Nationally, State/Territory governments provided 91.2% of total government recurrent expenditure on government schools in 2006-07, and the Commonwealth provided 8.8%.
28. In contrast, government expenditure on non-government schools in that year was mainly provided by the Commonwealth (72.5%), with State/Territory governments providing 27.5%.

## G. GOVERNMENT SCHOOLS

Govt Recurrent Expenditure	\$m	\$m	\$m	\$m	\$m	\$m	\$m	\$m	\$m
	NSW	VIC	QLD	WA	SA	TAS	ACT	NT	AUST
Commonwealth	790	529	480	244	177	62	34	57	2,373
State/Territory Governments	7,904	5,230	5,090	2,995	1,792	653	450	437	24,551
Total	8,694	5,759	5,570	3,240	1,969	715	483	494	26,924

## H. GOVERNMENT TAFE SERVICES

29. In 2007, 1.7 million people undertook VET programs, i.e., programs leading to the award of vocational certificates, diplomas and degrees recognised pursuant to the Australian Qualifications Framework.. Of these 1.2 million students (71.9%) participated in government recurrent funded programs. Government funded students completed over 307.4 million annual hours at 12,427 locations across Australia. 2,523 were TAFE and other government provider locations.
30. TAFE educational delivery is much broader than vocational education and training. TAFE colleges or institutions deliver education programs at senior secondary school level for both school age and adult students, technical education programs and a range of further education programs not directly vocational in focus.
31. The ABS estimated that there were 32,500 teachers working in all TAFE and other VET institutions nationally in 2006-07, and that 69 per cent were employed full time. This is significant in light of NCVET research in 2004 which reported a national estimate of 42,290 TAFE teachers for 2002, and indicated that there is 'no single accepted measure of employment levels' for the VET workforce.

32. The focus on VET services is due to providers receiving Commonwealth government funding directly related to training activity provided for under the *Commonwealth–State Agreement for Skilling Australia’s Workforce*. These services include the provision of VET programs in government owned technical and further education (TAFE) institutes and universities with TAFE divisions, other government and community institutions, and government funded activity by private registered training organisations (RTOs). Commonwealth funding for these purposes comprises approximately 30% of total government expenditure for TAFE.
33. Recurrent expenditure on VET by Australian, State and Territory governments totalled \$4.0 billion in 2007 — an increase of 1.0% (in real terms) from 2006. Government recurrent expenditure was equal to \$282.88 per person aged 15–64 years across Australia in 2007.
34. In 2007, 31.1% of Australians aged 15–64 years held a certificate or diploma as their highest level qualification. The VET sector is large and varied and these qualifications could have been completed in schools, VET institutions or higher education institutions.
35. Qualifications which students seek vary significantly by length, level and field, although the vast majority are national and portable across jurisdictions as they are recognised or accredited pursuant to the Australian Qualifications Framework. Approximately 1.7 million people were reported as participating in VET programs at 12,427 locations across Australia in 2007. This represented 11.3 per cent of the population aged 15–64.
36. The number of VET students decreased by 0.7% between 2006 and 2007, and decreased by 3.6 per cent between 2003 and 2007.

## **I. HISTORY OF GOVERNMENT EDUCATIONAL SERVICES PROVISION**

37. Government educational provision evolved from elementary education provided by the state in Australia commencing with the adoption of the Irish National School System in NSW in 1848. One system besieged by sectarianism was transferred to another colony together with the provision of state funds to employ school teachers by religious societies and private institutions.
38. This dual system was conducted under a National Education Board but as the 19<sup>th</sup> century progressed, competition between church and national schools led to a vociferous challenge to the principle of public subsidy of church schooling. The Victorian Education Act of 1872 introduced a provision unique in the British Empire, that schooling provided by the state should be secular, compulsory and free, a provision which still exists in that state's relevant Act today.
39. Departments of Education were established by the states under Ministers for Education and these "state" schools attracted not only the children of working class families but of the middle class as well. The state school systems were administered by departmental bureaucracies and extended to educational provision in provincial and rural centres. Curriculum expanded from the elementary to a broader curriculum and state secondary schools began to be established before the First World War. State junior technical schools were established between the wars and proved highly popular.

**J. POST-WAR II GOVERNMENT EDUCATIONAL SERVICES INDUSTRY (GESI)**

40. In the post-war boom of the 1950s a 'tidal wave' of expansion occurred in state, Catholic and independent schools which placed huge demands upon them for new teaching staff and resources. The Commonwealth was called upon to provide funding and from 1964 funding was extended to church schools, abandoning the previous principle embodied in the policy, "separation of church and state".
41. Following the Karmel Inquiry in 1973, financial assistance was given by the Commonwealth to private schools, especially Catholic systems, intensive funding given to state primary and secondary schools and grants provided to disadvantaged students.
42. Government educational services have thus evolved over the course of Australian history from the earliest days in tandem with non-government provision but having distinctive features as products of government legislation and departmental management and control.
43. The funding of the sectors is provided differently principally by state and territory governments to government schools on the one hand and by the Federal Government to non-government schools on the other.

44. The basis for distinguishing the Government Educational Services Industry (GESI) from the non-government education services industry is thus the differences in mechanisms of establishment, funding arrangements and bureaucratic or regulatory regimes. The differences between the two sectors justifies separate Modern Awards for Government schools, including preschools, and TAFE/VET colleges and for non-Government or private providers of educational services.

**K. INDUSTRIAL REGULATION OF GOVERNMENT AND NON-GOVERNMENT EDUCATION SERVICES**

45. Awards which apply to educational services outside Higher Education have never crossed the divide between the public and private sectors and no award has been created which binds government and non-government educational service employers (outside higher education) in the one instrument.

46. The only Federal award which applies to school teachers in both government and non-government sectors is the *Australian Higher Education Practice Teaching Supervision Award*, but the employers in this case are universities.

47. On the application for registration by the then Australian Teachers Union in 1984 a large number of objections were lodged by employers and unions among which some of the most vociferous were private schools both Catholic and Independent from various denominations. These objections went to the undesirability of having an industrial association of public school employees with the potential to create awards in the private sector of education. A prior application had been lodged by the Teachers Association of Australia and the matter was heard by the Australian Industrial Relations Commission and the High Court.
48. In finally registering the Australian Teachers Union and the Independent Education Union of Australia the Commission settled objections by creating a clear line of demarcation in the rules of the two organisations.
49. With the exception of the *Australian Higher Education Practice Teaching Supervision Award* and the *Co.As.It Award* covering Italian language centres in NSW, there are no awards applying in the Government Educational Services Industry which have been made to which both the AEU and the IEUA are respondents. Modern Awards in the Educational Services industry should follow this distinct and separate mode of regulation.
50. It is inappropriate that the fair minimum safety net which is determined to operate for one industry – or a sub-sector of it – should operate for another.

**L. GOVERNMENT TEACHERS COMPRISE A DISCRETE PROFESSIONAL OCCUPATION**

51. The overwhelming majority of school teachers entering the workforce in Australia have either completed a four year higher education course in teacher training or completed a three year higher education course with a further one year higher education course in teacher training and a practical component. Completing four years of higher education study is effectively a standardised qualification to begin teaching in public schools and public preschools in Australia.
52. Graduates employed as school teachers in the public education sector across Australia enter the employment of the various Departments of Education at the graduate entry point.
53. There are some circumstances where permission to teach is granted to new applicants where a qualified teacher is not available. However, these circumstances are limited in scope and duration and normally apply to schools in remote locations which are difficult to staff. This is known as “Special Authority” in South Australia for example.
54. In each State and Territory in Australia there are statutory schemes governing who can become a school teacher. Though there are some differences between the schemes they each contain the following central elements:
1. No person can be employed to teach in schools without being registered.
  2. To be registered it is necessary to possess requisite qualifications.

55. The required qualifications are either:
- a) a four year higher education course in teacher training; or
  - b) a three year higher education course with a further one year higher education course in teacher training and a practical component.
56. In the existing teaching workforce there are some minor exceptions to the above, mainly concerning teachers who either originally obtained qualifications in the 1960's to 1980's, teachers who have practiced as teachers meritoriously for many years despite not possessing sufficient qualifications to be registered should they apply today. In the ACT and NT there are as yet no registration schemes, but Departmental policy operates on the same standards. In NSW and WA there is a different statutory scheme, as noted below.
57. Subject to those minor exceptions, to become a teacher in Australia it is necessary for a person to have completed 4 years of tertiary study.

**M. REQUIREMENTS FOR REGISTRATION, CERTIFICATION OR LICENSING FOR TEACHING IN GOVERNMENT EDUCATION SERVICES**

58. The qualifications for school teacher registration in each State and Territory are contained in:
- a) Section 8 of the *Education (Queensland College Of Teachers) Act 2005* and section 4 of the *Education (Teacher Registration) By Law 1999*.

- b) Section 2.6.8 of the *Education and Training Reform Act 2006* (Vic);
- c) Section 12 of the *Teachers Registration Act 2000* (Tas);
- d) Section 31 of the *Teacher Registration (Northern Territory) Act* (NT); and
- e) Section 20 of the *Teachers Registration and Standards Act 2004* (SA) and Regulation 4 of the *Teachers Registration and Standards Regulations 2005*;

Section 235(2) of the *School Education Act 1999* (WA) states that:

“A person is not to be employed as a member of the teaching staff unless the person holds a qualification recognized by the chief executive officer as being an appropriate qualification.”

Section 47(1) of the *Teaching Service Act 1980* (NSW) provides as follows:

“The Director-General may, subject to section 47A, appoint to positions in the Teaching Service such persons who, in the opinion of the Director-General, have the appropriate qualifications to be employed in the Teaching Service.”

- 59. As a matter of practice, in WA and NSW almost every new teacher has either;
  - a) Completed a four year tertiary course in teacher training; or
  - b) A three year tertiary course with a further one year tertiary course in teacher training and a practical component.
- 60. As the completion of four years of tertiary study is effectively a standardised qualification, graduates from one State are able to obtain school teaching employment elsewhere in Australia.

61. In TAFE the qualification pre-requisites for employment as a teacher originate from a variety of different sources than that of registration for government school teaching and stem from the practical requirement to have either trade or academic qualifications, teaching qualifications and recent practical or industrial experience.
62. Federal funding and governance arrangements under the Australian Quality Training Framework (AQTF) ensure that registered training organisations (RTOs) comply with staff teaching qualification standards in order to maintain their status as an RTO. Teachers must have vocational or academic qualifications to at least the level of the qualification being taught. For teachers engaged in workplace, rather than campus based, training and assessment, the AQTF currently effectively sets these standards at the Certificate 4 level in the Training and Assessment Training Package.
63. Industrial Awards also provide a standard. The current federal award for Victorian TAFE teachers for example requires a teacher to undergo an approved course in teacher training involving supervised teaching practice and studies in teaching methodologies in order to be considered fully qualified.
64. Individual state or territory government and college employers also set their own additional qualification requirements when recruiting teachers as employees.
65. Preschool teachers in government educational services are required to have formal qualifications similar to those of primary school teachers, that is, a four year degree in early childhood education. In government educational systems preschool teachers are required to have such qualifications as a condition of funding and therefore of employment and pre-school centres are prohibited from offering such programs unless their staff are so qualified.

## **N. TEACHING IS A FEMINISED OCCUPATION**

66. Teaching is an occupation which attracts a high percentage of women employees. Approximately 70% of teachers are women in government education systems. S576B (2) (e) requires the Commission have regard to gender inequality and promote equal remuneration for work of equal value. Addressing the gender pay gap has long been an objective of the AEU. This objective will be pursued through collective bargaining processes under the Act, but it is important that the award pattern facilitates rather than cuts across enterprise collective bargaining.
67. In most government education systems in Australia, and in all those which operate in the Federal jurisdiction, teachers enterprise bargaining occurs separately from the agreements which are concluded for educational support staff. Thus an occupational award and an industry award in government education services is the appropriate way to facilitate bargaining which can best address the needs of women teachers and support staff.

## **O. INTERFACE WITH CHILDREN'S SERVICES**

68. The development of child care as an industry involving organised and regulated provision with government subsidies in one form or another has occurred in recent decades. Child Care and Long Day Care services are increasingly employing and training staff who can deliver children's educational programmes of one kind or another. This is a welcome development which should be supported by the industrial system of regulation. The Federal Government has established pilot schemes in a number of states to integrate 15 hours of educational programmes with child care and long day care programmes.

69. Government preschools generally do not deliver care which is largely provided on an after-school basis by private operators, sometimes on school grounds. However, in local government and the community sectors, care and educational programmes are often provided together.
70. The Modern Awards to be established in the Children's Services and Educational Services (other than Higher Education) areas will inevitably apply to the business of employers who provide both care and education programmes.
71. This question faced the AIRC when it considered the terms in which it would make a Common Rule Declaration for Awards applying in Victoria to centres which provided both care and educational programmes.
72. In November 2004 Commissioner Smith (PR953236) made a Declaration of Common Rule which contained mutually-exclusive award provisions to determine the applicability of the Children's Services (Victoria) Award 1998 and the Early Childhood Teachers Interim Award in the following terms:
73. "1.4 the industry means the industry in the performance of all work in or in connection with or incidental to, the industries and/or industrial pursuits of child care and early childhood education except where a necessary condition of employment is to be qualified as an early childhood teacher."
74. The AEU submits that the interface or overlap between the two proposed Modern Awards for Children's Services and Teachers in Government Educational Services be dealt with in similar terms.

**P. AN OCCUPATIONAL (TEACHERS) AWARD AND AN INDUSTRY (NON-TEACHING STAFF) AWARD**

75. Teachers have a strong occupational identity as a consequence of the nature of their qualifications and employment. The pattern of awards throughout the regulation of educational services has recognised teachers as a distinct occupation which justified separate award regulation in the government educational services. This is the case in both the Federal and state jurisdictions where enterprise awards are virtually universal.
76. ‘Teacher’ is thus a generic descriptor that includes a range of classifications which require teaching qualifications but also covers the performance of roles in educational settings involving a high level of experience in or knowledge of classroom teaching and extending to managerial and administrative roles in institutions. For example a Principal or Deputy Principal of a school always holds a teaching qualification but may perform managerial roles.
77. Similarly, there are classifications located between that of principal and classroom teacher which involve curriculum leadership, professional knowledge and mentoring, administrative accountability and responsibilities. These may be known as Executive Teachers or Heads of Department or other titles but in essence their role is to promote educational outcomes as part of the institutional management drawing upon their professional knowledge and experience. Employees in these classifications generally can be required to perform teaching duties as part of their role.

78. The classification “Teacher” or in the TAFE sector sometimes “Lecturer” have much in common regardless of the sector of government educational provision in which they are engaged.
79. The qualifications and pedagogy employed by preschool teachers are distinct but have a high level of similarity with those for primary teaching. In addition, preschool teachers are able to be and often are employed as teachers in primary schools in government education services.
80. Non-teaching staff in government schools, preschools and TAFE colleges perform a range of roles which contribute to the purposes and operation of the respective institutions. These include classifications such as School Services Officer, Teacher Aide and Teacher Assistant where classroom-based roles involving interaction with students and assisting the role of teachers, administrative roles involving clerical, administrative and financial management functions and other related roles involving the physical infrastructure of educational institutions. Awards for non-teaching staff often include levels for the performance of roles requiring increasing complexity and qualifications.

81. An example is the South Australian School Services Officers (Government Schools) Award Part 5. The award contains five levels within the School Services Officer classification. At the first level employees “work under close direction with limited requirement for exercising initiative, discretion and judgement in the provision of support to school based administrative and education programs. Typically, employees are responsible for routine clerical and/or keyboard related work and/or basic para-professional support in classrooms, laboratories or resource/computing centres.” “It is expected at this level employees will develop a range of skills and knowledge including written and numeric skills, practical equipment skills (e.g. keyboard), interpersonal and other work skills.”
82. At levels 2 and 3 employees are expected to work under general direction, at level 4 under limited direction and exercise considerable initiative. At level 5 employees are responsible for the management and provision of complex administrative and financial functions and supervise other non-teaching employees.
83. The School Services Officers (State Government Schools), Victoria, Award 2000 similarly contains seven levels of increasing responsibility, roles and discretion.
84. Awards regulating the employment of teaching and non-teaching staff have always been separate and distinct in the Government Education Services Industry. They have applied discretely to the roles of teachers and support staff respectively and in the creation of Modern Awards in the educational services industry it continues to be an appropriate division.

85. Consequently, the AEU submits that there should be two awards created for employees in the Government Educational Services Industry (being the business of the employer) which reflect an appropriate division of employee roles and responsibilities. The scope of the two awards should be respectively:
1. An occupational award for teachers in the Government Educational Services Industry including schools, preschools, and government technical and further education institutions.
  2. An industry award for employees engaged as support and administrative staff in the Government Educational Services Industry.

**Q. CONSIDERATIONS FOR PROPOSED SCOPE OF MODERN AWARDS FOR THE GOVERNMENT EDUCATION SERVICES INDUSTRY**

86. As a consequence of the above, the AEU submits a Modern Award/s for government educational services should include the following definitions for the purpose of delimiting the scope of the Awards.
87. **Government Education Services Industry** means employers who are established pursuant to state or territory legislation, substantially regulated by state or territory legislation and/or substantially funded by state or territory government and engaged in the business and/or activity of providing educational services who employ teachers and other staff for that purpose and includes early childhood education centres, government schools, TAFE Institutes, Colleges or Institutions with TAFE divisions and Adult Multicultural Education Services settings.

88. **‘Substantially regulated’** means where state or territory regulation requires employers to provide prescribed curricula, prescribed student welfare and discipline standards and prescribed employee employment standards and **‘substantially funded’** means where state or territory governments purchase educational services from the employer through funding and service agreements or other contractual arrangements

89. This occupational award [or industry, as the case may be] covers employers throughout Australia in the Government Education Services industry and their employees in the classifications listed in clauses XYZ to the exclusion of any other modern award. The award does not cover employers in the following industries:

Non-government education services;

Children’s Services except in respect of their employees for whom a necessary condition of employment is to be qualified as an early childhood teacher or who directly assists the work of such employees.

90. Further the following definition of ‘teacher’ and ‘teaching’ drawn from awards applying in Victorian, ACT and Northern Territory government education services are required:

“Teacher” means any person employed to teach or lecture or to directly manage and/or develop an educational program or programs in the Government Education Services Industry.

“Teaching” means sessions of instruction and/or supervision and/or assessment of a student or students whether delivered on-site at an employer’s educational setting or elsewhere or whether delivered in person or by other means.”

**R. AWARDS IN THE GOVERNMENT EDUCATIONAL SERVICES INDUSTRY**

91. Awards made by Federal and State industrial authorities in the GESI have traditionally taken the form of actual rates or paid rates prescription rather than operate as minimum rates awards. More recently, awards made by the Federal commission have been made as minimum rates awards, e.g. those awards for Victorian government school teachers and for Victorian TAFE teachers. However it has also made awards which have operated as actual rates awards e.g., those for GESI employees in South Australian, Western Australian and Tasmanian schools, preschools and TAFE colleges pursuant to former s170 MX of the Workplace Relations Act 1996.
92. In the state jurisdictions, awards have either been made on the basis of arbitration or by consent to provide actual rates prescription. The result has been actual rates regulation, not minimum regulation. Enterprise bargaining processes which overlaid these awards proceeded to incorporate and replace the award provisions in actual employment. An example is the ACT Awards for school and TAFE teachers which were largely incorporated in the Certified Agreements in that territory.
93. Almost universally these awards have been enterprise awards, that is, applying to the Department of Education and its employees in the respective areas of provision only. Some exceptions exist mainly in the state of Victoria where government funded and regulated educational services exist provided by legally discrete employers conducting institutions such as kindergartens and TAFE colleges.

94. As these awards are the only awards which exist in the industry, the Modern Award which is created should reflect these conditions. It would be inappropriate to base a Modern Award in the GESI on the terms of awards in the non-government sector for example. And it would be inappropriate to base a modern award in the GESI without taking into account the standards which operate for the relevant employees nationally.

**S. ISSUES FOR CONSIDERATION FOR CONTENT OF GESI MODERN AWARDS**

95. The primary submission of the AEU is that the Commission at this stage should refrain from making a modern award or award which will cover employers in the Government Education Services Industry due to the uncertainties flowing from the absence of referral of power by state governments. The proper point for the Commission to exercise its obligations to make a relevant modern award for the GESI is in Stage 4 when state governments will have made at least in principle decisions as to referral.
96. In the alternative, while the AEU is as a consequence not in a position to make detailed submissions, including those of a draft award/s, on the issue of content, the AEU submits that the following are relevant considerations for the Commission to take into account.

## **T. DEFINITION OF INDUSTRY, COVERAGE AND OCCUPATION**

97. The AEU refers to and repeats the submissions contained in Section Q, paragraphs 86-89 above.
98. In essence the AEU submits the Government Education Services Industry can be properly defined by reference to the distinguishing characteristics of its establishment for public purposes demonstrated by state or territory acts of parliament, the statutory pattern of regulation of its operations and by the bureaucratic or administrative patterns of the funding arrangements of its service providers.
99. Coverage issues are appropriately addressed through reference to the industry as defined and to the specification of appropriate exclusions.
100. The AEU further submits it is appropriate to use a generic definition of ‘teacher’ and ‘teaching’ to delineate the occupational classes of employees to whom the Awards are to apply.

## **U. CLASSIFICATIONS, CAREER STRUCTURES AND RATES OF PAY**

101. The Commission in making Modern Awards pursuant to the Ministerial Request must make those Awards in accordance with the Objects of the Act. Those Objects as set out in s576A of the Act relevantly include that such Awards must:

*s576A(2)(b) ... provide a fair minimum safety net of enforceable terms and conditions of employment ...;*

*s576A(2)(c) ... promote flexible modern work practices and the efficient and productive performance of work;*

*s576A(2)(d) ... be in a form that is appropriate for a fair and productive workplace relations system that promotes collective enterprise bargaining; and*

*s576A(2)(e) ... result in a certain, stable and sustainable modern award system for Australia.*

102. As a matter of simple logic, a set of wages set at a standard too far below the actual rates cannot operate in the way provided for in the Objects referred to above. A classification structure providing classifications that do not reflect the actual classifications which pertain to the industry cannot operate as a safety net.
103. Currently employees in the Government Education Services Industry in early childhood education centres, schools, TAFEs and the Adult Multicultural Education Service in Victoria, the ACT and the NT are covered by federal awards.
104. For those employees in the ACT and the NT and for government school and AMES teachers in Victoria, those awards are enterprise awards and excluded from modern award coverage by the terms of s576V(3) of the Act.
105. Any modern award therefore will apply to GESI employees in Victorian TAFEs and early childhood settings and to non-teaching staff in Victorian government schools.
106. Not being able to make a modern award with terms that are determined by reference to state or territory boundaries or which do not have effect in each state or territory [see s576T(a) and (b) of the Act], the Commission necessarily must take account of the terms of relevant state and territory awards.

107. The Commission in its Statement of 30 January 2009, [2009] AIRCFB 100, appended as Attachment A an indicative list of potentially relevant awards.
108. That list contains Awards, NAPSAs and some state awards covering GESI employees, including in government schools, TAFEs and in pre-schools in most states and territories as follows:

*A.C.T. Government Technical and Further Education Teachers' Salaries and Conditions Award 1999*

*A.C.T. Government Technical and Further Education Teachers' Salaries and Conditions Award 1999 [Transitional]*

*Aboriginal Education Workers (DETE) Interim Award (SA)*

*Adult and Community Education Professional Administrative Clerical Computing and Technical (PACCT) Staff Award 1999 [Transitional]*

*Australian Capital Territory Government School Teachers' Award 1999*

*Australian Higher Education Practice Teaching Supervision Award 1990*

*Australian Higher Education Practice Teaching Supervision Award 1990 [Transitional]*

*Community College Principals (New South Wales) Award*

*Community Colleges Award, 1990 (WA)*

*Community Colleges Tutors (State) Award (NSW)*

*Community Education Counsellors Interim Award - State 2003 (Qld)*

*Early Childhood Education Award - State 2003 (Qld)*

*Early Childhood Workers Award (SA)*

*Education Services Community Colleges (Western Australia) Award 1999*

*[Transitional]*

*Education Services Industry Sector Order - Victoria 1998*

*Education Services Industry Sector Order - Victoria 1998 [Transitional]*

*Educational Services - Early Childhood Assistants - Victoria - Award 1999*

*Educational Services - Early Childhood Assistants - Victoria - Award 1999*

*[Transitional]*

*Pre-School (Kindergarten) Teaching Staff Award (SA)*

*Professional, Administrative, Clerical, Computing and Technical (PACCT)*

*Staff (Institutes of Technical and Further Education) Victoria Award 1999*

*School Services Officers (Government Schools) Award (SA)*

*School Services Officers (State Government Schools), Victoria, Award 2000*

*Senior College Teachers' Award - State 2003 (Qld)*

*TAFE (Education Staff) Interim Awards (SA)*

*TAFE Teachers' Conditions of Employment (Victoria) Award 2002*

*TAFE Teachers' Conditions of Employment (Victoria) Award 2002*

*[Transitional]*

*TAFE Victoria (Miscellaneous Workers) Award 1999*

*TAFE Teachers' Award - State 2003 (Tasmania)*

*Tasmanian TAFE Teachers' Award (Tasmania)*

*Teachers (Adult Multicultural Education Services (Victoria)) Award 1994*

*Teachers (Adult Multicultural Education Services (Victoria)) Award 1994  
[Transitional]*

*Teachers (Adult Multicultural Education Services (Victoria)) Redundancy  
Award 1999*

*Teachers (Adult Multicultural Education Services (Victoria)) Redundancy  
Award 1999 [Transitional]*

*Teachers (Co. AS.IT.) (State) Award (NSW)*

*Teachers (Decs) Award (SA)*

*Teachers (Public Sector Primary and Secondary Education) Award 1993  
(WA)*

*Teachers (Public Sector Technical and Further Education) Award 1993 (WA)*

*Teachers (Public Sector Technical and Further Education) Western Australia  
Award 2003*

*Teachers (Public Sector Technical and Further Education) Western Australia  
Award 2003 [Transitional]*

*Teachers' (Victorian Government Schools) Conditions of Employment Award  
2001*

*Teachers' (Victorian Government Schools) Conditions of Employment Award  
2001 [Transitional]*

*Teachers' (Victorian Government Schools) Conditions of Employment Award  
2001 [Transitional]*

*Teachers' Aides' Award, 1979 (WA)*

*Teachers' Award - State 2003 (Qld)*

*Teaching Service (Tasmanian Public Sector) Award*

109. The list, while identifying some state awards which are not NAPSAs, however does not identify the following awards made by the NSW Industrial Relations Commission:

*Australian Music Examination Board (New South Wales) Examiners,  
Assessors and Advisers Employed by the Office of the Board of Studies Award  
(NSW, 360 IG 959, 8 September 2006, Serial C4800)*

*Bradfield College (Department of Education and Training) Salaries and  
Conditions Award (NSW, 361 IG 1404, 26 January 2007, Serial C5267)*

*Community College Principals (New South Wales) Award (362 IG 825, 8 June  
2007, Serial C5594)*

*Community College Tutors (State) Award (NSW, 364 IG 354, 9 November  
2007, Serial C5957)*

*Crown Employees (Education Employees, Department of Corrective Services)  
Award (NSW, 360 IG 371, 28 July 2006, Serial C4875)*

*Crown Employees (Institute Managers in TAFE) Salaries and Conditions  
Award (NSW, 360 IG 384, 28 July 2006, Serial C4376)*

*Crown Employees (National Art School, Academic Staff) Salaries and Conditions Award (NSW, 359 IG 474, 2 June 2006, Serial C4654)*

*Crown Employees (Office of the Board of Studies – Education Officers) Salaries and Conditions Award (NSW, 361 IG 645, 3 November 2006, Serial C4798)*

*Crown Employees (Saturday School of Community Languages) Award (NSW, 359 IG 735, 16 June 2006, Serial C4547)*

*Crown Employees (Teachers in Schools and Related Employees) Salaries and Conditions Award: (NSW, 359 IG 1114, 30 June 2006, Serial C4345)*

*Crown Employees (Teachers in TAFE and Related Employees) Salaries and Conditions Award (NSW, 360 IG 500, 11 August 2006, Serial C4346)*

*Crown Employees NSW Adult Migrant English Services (Teachers and Related Employees) Award (NSW, 359 IG 169, 19 May 2006, Serial C4561)*

*Higher School Certificate and School Certificate Markers and Related Casual Employees Rate of Pay and Conditions Award (NSW, 360 IG 1002, 8 September 2006, Serial C4799)*

*NSW TAFE Commission (Teachers in TAFE Children's Centres) Salaries and Conditions Award (NSW, 359 IG 458, 2 June 2006, Serial C4358)*

*The Early Childhood Teachers Interim Award 1999 (Vic) [AP780883CRV];*

110. The AEU submits above awards in paragraph 108 are also relevant to the Commission's consideration of the content to apply in any Modern Award that covers employers in the GESI.

111. A simple example illustrates the basis for the AEU's submission and the issue of establishing the fair and minimum safety net with respect to at least rates of pay:

a teacher in a government school in Victoria at the top of the incremental scale has an award rate of pay, when adjusted for the amounts provided in the Commission's Wages and Allowance Review decisions, of approximately \$55,000 pa whereas a teacher in a similar position in NSW has an award rate of pay of approximately \$75,000 [Note: A new NSW Award not yet published will increase the rate to approximately \$78,703]. The incremental maximum is the most common position occupied by teaching staff in all government educational services.

112. The AEU submits there can be no question that it is appropriate to provide for a career or classification structure incorporating incremental scales as part of a fair minimum safety net. This question was considered and determined for school teachers as a matter of jurisdiction by a Full Bench of the Commission:-

- i) in relation to school teachers in Print Q0166 at 3.2.2 & 3.2.3; and
- ii) in relation to TAFE teachers in Print PR 940580 at 57.

## **V. HOURS OF WORK AND RELATED MATTERS**

113. The Commission may include terms in a modern award only to the extent that those terms provided a fair minimum safety net [see s576L of the Act]

114. The Ministerial Request at paragraph 32 makes it clear that a modern award may supplement the National Employment Standards [NES] where the Commission considers it necessary to do so to ensure the maintenance of a fair minimum safety net.
115. The NES provide a maximum weekly working hours of 38 and any reasonable additional hours.
116. It is common within Awards of the Commission and awards of state commissions applying to employers and employees in the GESI to find provisions which regulate:
- The number of hours of face-to-face teaching for a classroom teacher in schools, TAFEs and pre-schools. That number of hours may be either on a weekly and or annual basis or averaged over an intermediate term depending on the sub-sector of the industry concerned;
  - the pattern, or number of hours, of attendance at a work location per week or per annum for teachers in TAFE
117. These award provisions in awards of the federal commission have been determined to be safety net provisions as a result of both arbitral determination and the outcome of award simplification proceedings, including on appeal. Without such regulation, the bare provision of a 38 hr week cannot operate as a fair minimum safety net for these classes of employees. For example:
- in relation to Victorian government school teachers, see AIRC decisions Prints M3409, M9746, N2940, Q6318 and S3201;
  - in relation to Victorian TAFE teachers, see Prints L3494, Q5998 and PR921566.

118. The AEU submits that without a provision that regulates the amount or proportion of teaching time per week, any modern award covering employers in the GESI will severely disadvantage the relevant employees and would be inconsistent with the terms of the Ministerial Request especially at paragraph 2(c).

## **W. LEAVE**

### **Parental Leave**

The NES provides for a period of 12 months unpaid parental Leave.

119. The awards applying to employees in the GESI almost universally provide for a period of paid Leave. The minimum standard is:

- 12wks paid Maternity Leave;
- 6 wks paid Adoption Leave; and
- 1 wk paid Paternity Leave

### **Annual or Recreation Leave**

The NES provides in effect for a period of 4 weeks annual Leave.

120. A bare provision of this sort is incapable of operating as a safety net for employees in the GESI.

121. Employees in this industry, with some specified exclusions, universally access a further period of 6-8 wks per year without loss of pay during which they are not required to attend for duty.

122. Usually this period is determined by reference to school vacation periods as specified in the relevant government gazette even where the employer is not engaged in school provision. See, for example, the Victorian Early Childhood Teachers Interim Award 1999 [AP780883CRV] at clause 19.1.
123. Sometimes the access is facilitated by means of enabling employees to effectively ‘purchase’ additional Leave through schemes such as ‘48/52’ although this will only apply for non-teaching staff. For teaching staff the more usual provision is simply not to require employees to attend and there is no loss of pay.
124. The AEU submits that in making a modern award for employees in the GESI, the Commission must take account of this further period when determining the issue of Annual Leave. In the alternative, in order to be satisfied that a fair minimum safety net is established, the Commission should ensure that a provision is made which does not require employees to attend for duty for any such ‘extra’ period of time.

## **X. SUPERVISION OF STUDENT TEACHERS**

125. An award, the *Australian Higher Education Practice Teaching Supervision Award 1990* [AP765754], applies to teachers in both government and non-government schools teachers across Australia and provides an entitlement to monetary payments for the supervision of student teachers as part of those students’ academic or professional preparation or for the coordination of the work of such supervisory teachers. The obligation to make the payments is currently upon the Higher Education institutions who are said to be the employers of the teachers for those purposes.

126. The Award was not considered during the consultations for the making of Modern Awards in the Higher Education industry because of its impact upon employees in both the GESI and non-GESI.
127. It is appropriate in maintaining the safety net that the entitlement to those payments, as adjusted to reflect the Safety Net and Wages and Allowances Review decisions of the Commission, is maintained in a modern award applying to employees in the GESI and non-GESI.
128. The AEU submits that that provision could most conveniently be accommodated by way of a monetary allowance replicating the substantive provisions of the existing award.

**Y. THE IMPLICATIONS OF *Re AEU***

129. The implied constitutional limitation as found by the High Court in *Re AEU* [(1995) 184 CLR 188] to constrain the reach of Commonwealth power to make awards binding state governments and their agencies covering high office holders or with provisions concerning the number and identity of persons to be employed, the term of their appointment or the termination of their employment at least on the grounds of redundancy is an important consideration for the Commission in determining the content of any modern award to apply to employees in the GESI.

130. The exact content of any referral of powers legislation, including any subject matter covered by *Re AEU*, by state governments is not yet known.
131. In this context the AEU submits it would not be prudent for the Commission to proceed to determine the content of a modern award for employees in the GESI on a range of matters which would otherwise form terms of the Award pursuant to Division 3 of Part 10A of the Act.
132. In the alternative, if the Commission were to proceed to make an Award, its considerations must involve determining which class or classes of employers and their employees fall within reach of the implied limitation.
133. The AEU submits by way of a preliminary view that government schools and TAFEs and AMES are within reach but early childhood centres established and run by parental and community committees of management are outside the reach.