

New South Wales Government

**Supplementary Submission to the
Australian Industrial Relations Commission**

Award Modernisation

June 2008

1. The principal NSW Government submission to the Full Bench regarding the award modernisation process was filed on 27 May 2008, and counsel for the NSW Government spoke to that submission at the hearing on 28 May. During the course of that hearing, particular questions arose firstly in relation to NSW State enterprise awards, and secondly in relation to wage rates in NSW awards. This supplementary submission of the NSW Government addresses those questions.

Enterprise Awards

2. On a number of occasions at the hearing on 28 May, reference was made to NSW State enterprise awards and whether they are, or should, fall within the scope of the award modernisation process¹. The NSW Government is firmly of the view that instruments that were NSW State enterprise awards prior to 26 March 2006 are not within the scope of award modernisation, however the NSW Government is concerned that the current status of these instruments may not be clearly understood. The succeeding paragraphs are offered by way of clarification.

3. The *Industrial Relations Amendment Act 2006* (the Amendment Act) was introduced into NSW parliament on 7 March 2006. After passing both Houses, it was assented to on 13 March 2006.

4. The Amendment Act specifically amended Schedule 4 of the *Industrial Relations Act 1996* (NSW) (the Principal Act), which deals with Savings, Transitional and Other provisions. The Amending Act inserted a new Part 8A with following application:

44C Certain agreed awards to have effect as enterprise agreements

(1) This clause applies to an award that was in force immediately before the relevant time:

(a) that applies to a group of employees that is constituted wholly or partly by employees of any constitutional corporation and in respect of which an enterprise agreement could have been made (as referred to in section 30), and

(b) the parties to which are limited to the kinds of persons or bodies that could have been parties to an enterprise agreement (as referred to in section 31) in respect of those employees, and

¹ Ms Taylor for Aust Manufacturing Workers Union - PN 1259; Ms Angus for Aust Workers Union - PN 1306; Mr Thomas for Rail Tram and Bus Union - PN 1342 & 1365; Mr Maxwell for CFMEU - PN 1396 and 1405; Mr Calver for Master Builders Australia - PN 1496; Mr Grozier for ABI - PN 1612 – 1615.

(c) that binds only the parties to the award and the employees for whom the award was made, and

(d) that was made by the Commission so as to give effect to an agreement of the parties to the award.

(2) Without limiting subclause (1) (d), an award was made so as to give effect to an agreement of the parties if:

(a) the award was made with the consent of the parties, or

(b) the award substantially gives effect to conditions of employment agreed to, or jointly proposed to the Commission, by the parties.

(For the purposes of Part 8A, 'the relevant time' was defined to be 'the beginning of the day that occurs immediately before the day on which Part 2 of Schedule 4 to the *Workplace Relations Amendment (Workchoices) Act 2005* of the Commonwealth commences.)

5. The operative provisions of that section were as follows

(3) On and from the relevant time:

(a) an award to which this clause applies ceases to have effect as an award, but only to the extent to which it applies to employees of a constitutional corporation (the "relevant award"), and

(b) an enterprise agreement (with the features referred to in subclause (4) (a)-(d)) has effect instead of the relevant award in respect of those employees even though the formalities under Part 2 of Chapter 2 for the making of an enterprise agreement may not have been complied with.

(4) Part 2 of Chapter 2 applies to any enterprise agreement given effect to by subclause (3) (b) in the same way as that Part applies to any other enterprise agreement, subject to the following:

(a) the agreement is taken to have been duly made and to have been duly approved by the Commission at the relevant time,

(b) the agreement binds the same employees of a constitutional corporation and parties as the relevant award,

(c) the conditions of employment for which the agreement provides are taken to be the same conditions of employment for which the relevant award provided,

(d) the agreement has a nominal term commencing at the relevant time and ending at the same time as the nominal term of the relevant award,

(e) the provisions of section 45 (Register and publication of enterprise agreements) apply to the agreement as if the agreement were approved at the relevant time,

(f) such modifications of that Part as may be prescribed by the regulations.

6. The effect of that legislation was to deem existing consent or enterprise awards to be enterprise agreements within the meaning of the Principal Act, with effect immediately prior to the commencement of *Workplace Relations Amendment (Workchoices) Act 2005*.

7. Consequently, on the commencement of the Commonwealth legislation, such newly created enterprise agreements would in turn have been deemed to be Preserved State Agreements (PSAs) as a result of the operation of what has since become Part 2 of Schedule 8 of the *Workplace Relations Act 1996* (Cth).

As they were made to be collective State agreements, rather than State Awards, immediately before the 27 March 2006 amendments to the WRA took effect, no APCS's were created from such instruments: see definition of "pre-reform State wage instrument" in s178.

8. As far as the current award modernisation process is concerned, s576V(3) provides that:

A modern award must be expressed not to bind an employer who is bound by an enterprise award in respect of an employee to whom the enterprise award applies.

The expression 'enterprise award' is not defined. On one view it might be considered to refer only to federal enterprise awards, since the word 'award' in s4(1) does not include a State award, and given that as a consequence of s16 no State award currently applies to an employer as defined in s6. However the policy approach behind that section (and behind paragraph 2(e) of the Request) would be equally applicable to State enterprise awards.

9. However, even if the expression 'enterprise award' in s576V(3) does not refer to State enterprise awards, the NSW Government nevertheless submits that NSW enterprise and/or consent awards would not be considered in the award modernisation process. That is because:

(a) The requirement to consider all APCS's when making a modern award (see Request at paragraph 3(h)), does not apply since the rates and classifications contained in NSW State enterprise awards

did not become APCS's since they were not State awards as at the reform commencement date;

- (b) While the Commission has a requirement to take into account whether a modern award might disadvantage employees or employers (Request paragraph 2(c) and (d)), the Commission will conduct that exercise by reference to award conditions (and NAPSA's created from State awards), and not conditions contained in collective agreements, which reflect rates of pay and conditions struck by parties by agreement;

10. It should particularly be noted that some (former) consent awards, usually labelled 'project awards', fall within this class of awards so excluded from the award modernisation process: for examples of such awards see for example Epping to Chatswood Underground Rail Tunnel Construction Project Award, Sydney University Site Building Project Award 2005 Westlink M7 Project Award, Westmead Hospital Redevelopment Project Award.

Wage Rates in NSW Awards

11. In Sydney on 28 May 2008, during consultative hearings about the award modernisation process the following queries were raised by the Bench to Counsel for the NSW Government.

JUSTICE GIUDICE: Do the New South Wales awards provide a consistent set of rates and conditions for similar classifications, for example, drivers, store people, retail workers and so on?

.....

JUSTICE GIUDICE: Well, there have been two attempts in recent memory to introduce consistency across the federal award system. There was the 89 minimum rates adjustment and then the simplification of the late 90s. Have there been similar attempts in New South Wales to bring consistency to the rates of pay in the New South Wales awards?²

12. In response, Counsel advised the Bench that the matter would be addressed by way of supplementary submissions. The succeeding paragraphs in this section set out arbitral history in the NSW jurisdiction relevant to these questions.

13. The 1988 *National Wage Case* established a new Structural Efficiency Principle (SEP) which was to be a key component in a new system of wage fixation. The terms of the SEP afforded wage increases to workers on the condition that union(s) agree to co-operate in a fundamental review of awards 'with a view to implementing measures to improve the efficiency of industry and provide workers with fulfilling and better paid jobs'.³

² AIRC, Transcript: AM2008/1 – Award Modernisation, paras 1589 & 1591

³ ACAC, *National Wage Case: Reasons for Decision*, Print H4000, 1988, August 12.

14. Specifically, the measures to be considered included:

- establishing skill-related career paths which provide an incentive for workers to continue to participate in skill formation;
- eliminating impediments to multi-skilling and broadening the range of tasks which a worker may be required to perform;
- creating appropriate relativities between different categories of workers;
- ensuring that working patterns and arrangements enhance flexibility and the efficiency of the industry; and
- including properly fixed minimum rates for classifications in awards, related appropriately to one another.

15. In that year's NSW *State Wage Case (August 1988)* the Industrial Relations Commission of New South Wales (IRC) adopted the new principle in the NSW jurisdiction but noted, that except in special circumstances, it was not envisaged that during the course of 1988-1989 any increases arising from the implementation of the SEP should be available.⁴

16. In its February 1989 *Review*, the AIRC confirmed its intention that the SEP should canvass a broad agenda and amended the Principle and established a new Minimum Rates Adjustment (MRA) provision of the Wage Adjustments Principle. Both of these Principles were subsequently adopted by the IRC in its 1989 NSW *State Wage Case*.⁵

17. Under the new MRA provision, rates of wages in awards were to be split up into two components, minimum rates and supplementary payments, which when added together would represent the minimum amount employers were required to pay to employees of particular classifications. Such supplementary payments had never been a significant feature of wage fixing in the NSW industrial system. The IRC in the 1989 *State Wage Case* expressed some misgivings regarding the adoption of MRA but decided to do so in the interests of comity between the industrial tribunals and the importance of consistency in a system of centralised wage fixation.⁶

18. The MRA evolved from and was intrinsic to the SEP and facilitated the introduction of skills based classifications in the NSW jurisdiction. The objective of the MRA/SEP process was to provide a framework of consistent minimum award wage rates. It was to be achieved by fundamental award restructuring including the rescinding of obsolete job classifications, and in its place, the implementation of multi skilling via the broadbanding of work classifications to create skills based career paths.

19. The 1989 *National Wage Case* set the metal industry tradesperson (currently C10 classification) as the benchmark for comparison within the MRA/SEP process. Accordingly minimum classification rates and supplementary payments for other classifications throughout awards were set

⁴ 26 IR 34

⁵ 30 IR 107, 35 IR 183

⁶ 35 IR194

in relation to the metal tradesperson rate on the basis of relative skill, responsibility and the conditions under which the work is performed.

20. In its 1989 *State Wage Case* decision the IRC noted the Metal Industry Award and others had recently been varied to reflect the SEP in the federal jurisdiction. It proposed that counterpart awards may be varied in similar terms as the relevant federal award in the NSW jurisdiction provided the terms of the SEP and other commitments were met.⁷

21. This course was duly adopted in the NSW jurisdiction and in 1990 a new *Metal and Engineering Industry (New South Wales) Interim Award* (Metals Award) was made including a Structural Efficiency clause facilitating the implementation of a restructured fourteen level wage classification structure throughout the metal and engineering industry.⁸

22. While the extent of NSW award restructuring thereafter varied across industries, numerous industrial parties upon application to the IRC, implemented structural efficiency by reviewing the wage classification structures in particular State awards. To facilitate this process, comparable skill based classifications were aligned with the tradesperson classification under the Metals Award.

23. The legacy of this process is evident in a number of current state awards in the NSW jurisdiction. For example, a tradesperson currently classified at a level C10 in the Metals Award is entitled to the same minimum weekly rate of pay as a level 1 hairdresser employed under the *Hairdressers', &c (State) Award*.

24. The following are other examples of current NSW State Awards that contain skill based classifications and rates of pay aligned to the level C10 classification in the Metals Award:

- *Building and Construction Industry (State) Award*
- *Hairdressers', &c (State) Award*
- *Clerical and Administrative Employees (State) Award*
- *Coachmakers, &c., Road Perambulator Manufacturers (State) Award*
- *Storemen and Packers, General (State) Award*
- *Motels, Accommodation and Resorts (State) Award*
- *Joiners (State) Award*

25. Thus, as a consequence of the MRA/SEP process there certainly are incidences of comparable skill based classifications across disparate awards and industries that have consistent minimum rates of pay in the NSW jurisdiction. However, not all awards stand in such a relationship, as a not all awards have been subject to such an MRA/SEP process.

26. It should further be noted that no process to excise allowable award matters similar to that conducted pursuant to s150 of the *Workplace Relations*

⁷30 IR 113

⁸ NSW Industrial Gazette – Vol 264, 2 August, 1991

and Other Legislation Amendment Act 1996 (Cth), has ever been undertaken in the NSW jurisdiction.

NSW awards are modern and up to date

27. Awards in the NSW jurisdiction are subject to regular review as required by s19 of the Industrial Relations Act, which provides that:

- (1) The Commission is required to review each award before September 2001 and subsequently at least once in every 3 years.
- (2) The purpose of a review is to modernise awards, to consolidate awards relating to the same industry and to rescind obsolete awards...

When conducting a review the Commission is required to consider the following matters, as set out in s19(3)-(6):

- (3) The Commission must take account of the following matters in the review of awards:
 - (a) any decision of the Commission under Part 3 or any other test case decision of the Commission,
 - (b) rates of remuneration and other minimum conditions of employment,
 - (c) part-time work, casual work and job-sharing arrangements,
 - (d) dispute resolution procedures,
 - (e) any issue of discrimination under the awards, including pay equity,
 - (f) any obsolete provisions or unnecessary technicalities in the awards and the ease of understanding of the awards,
 - (g) any other matter relating to the objects of the Act that the Commission determines.
- (4) The Commission must also take account of the effect of the awards on productivity and efficiency in the industry concerned.
- (5) During a review of awards, relevant industrial organisations and any other parties to the awards may make submissions on any of the matters being reviewed.
- (6) The Commission is to make such changes to awards as it considers necessary as a result of a review.

Note: In addition to submissions of relevant industrial organisations, the Minister, the President of the Anti-Discrimination Board and State peak councils may make

submissions in pursuance of their general right of intervention in Commission proceedings under section 167.

28. Since the commencement of the Industrial Relations Act in 1996, such reviews have been conducted on a three year cycle. For convenience, awards are grouped by industry and/or party and reviewed during a six month period. A further grouping of awards is reviewed in the succeeding six month period, and so on. Prior to the reform commencement date all NSW State awards (apart from new State awards) had been the subject of at least one s19 review to make them modern awards.

29. A table showing the numbers of awards reviewed via the s19 process is set out below:

Year	Award Review - s.19
1996	0
1997	0
1998	5
1999	1094
2000	108
2001	591
2002	0
2003	233
2004	431
2005	74
2006	0
2007	578
2008 to 31 May	88

Rates of pay and classifications in some NSW Awards were recently reviewed and set

30. The APCS's derived from certain NSW State awards will be of particular relevance in making modern awards. These are those awards which were the subject of a major review (in some cases involving arbitration) in the period leading up to the reform commencement. The classifications and rates of pay set for those awards (now APCS's that the AIRC must consider in making a modern award), are of particular importance because they reflect extensive consideration by the parties (and in some cases detailed consideration by the NSW IRC in arbitration) of what rates and classifications are most appropriate for an industry. In particular, any award that was the subject of a major arbitration by the NSW IRC would be given particular weight.

31. State awards that were the subject of such a major review include the following:

(a) *Social and Community Services Employees (State) Award* [2006] NSWIRComm 87 – by consent – variation of award

(b) *Miscellaneous Workers – Kindergartens and Childcare Centres (State) Award* [2006] NSWIRComm 102 - by arbitration - making of a new award

The industrial parties will no doubt be able to identify further examples during the course of the award modernisation process.

Conclusion

32. The NSW Government reaffirms the contentions put in its Principal Submission.

33. The NSW Government notes that a number of other the parties have also made submissions about the desirability of being able to further address the Full Bench following this round of consultations⁹, and reiterates its contention that the best approach to achieve that would be to have a process that enables the Commission to receive and consider submissions from all interested parties as to the proper approach to making modern awards. In particular it is submitted that the Commission might adopt the following approach:

(a) determine one modern award before the others;

(b) the President or Full Bench identify in a Statement particular questions that the Full Bench will determine when making that first modern award and invite submissions from interested parties on the proper approach to take to those questions;

(c) further, or in any event, before the first modern award is determined, all parties who may be affected by modern awards be given an opportunity to put submissions as to the approach to be taken to making modern awards (including, for example, the way by which wage rates and classifications are to be set, and how employees and employers currently subject to NAPSAs are to be protected from disadvantage).

⁹ 26 May – Melbourne: ACTU at PNs - 127, 141, 142, 146 and 147; ACCI at PNs - 173, 175, 191 and 192; AIG at PNs - 322, 325, 347 and 348.