

New South Wales Government

**Submission to the Australian Industrial
Relations Commission**

Exposure Draft Modern Awards

October 2008

Introduction

1. On 12 September 2008, the Australian Industrial Relations Commission (the Commission) released exposure draft modern awards for the fourteen priority industries. In addition, the Commission published a Statement that dealt with matters of general interest, as well as some aspects of the draft modern awards.
2. This submission of the NSW Government focuses on matters of general interest and as such is not directed at a particular exposure draft award, nor a particular pay rate or condition in a draft modern award.
3. Specifically, the matters dealt with in this Submission are as follows:
 - Application of Modern Awards
 - Loss/Diminution of NSW Community Standards and Award Conditions
 - Natural Justice Issues
4. These matters are dealt with below.

Application of Modern Awards

5. In its Statement¹ on 12 September 2008, the Commission raised the question of whether modern awards should be binding on organisations, in the following terms:

[9] A further question arises as to the basis for binding, or not binding, a particular organisation to a particular modern award. A number of matters are capable of being relevant including bare constitutional coverage of employers or employees to whom the modern award will apply, membership among employers or employees to whom the modern award will apply and the history of the organisation's involvement with a relevant predecessor award. The matters to be taken into account will determine not only the organisations to be bound but also the organisations which will not be bound. Debate on these matters so far has been extremely limited.

[10] Another dimension to this question is that we cannot know at this stage what status the legislation will give to a party bound by a modern award. Legislation might confer rights of award enforcement, rights of entry to premises and/or bargaining rights. It is also unknown what if any formal role awards will have in relation to union rights of representation more generally. We add that based on our experience so far it seems that organisational coverage has a strong influence on views as to industry boundaries. In some cases proposals for modern awards reflect historical demarcations between employer and employee organisations rather than differences in the nature of work or the conditions with which the modern award should deal.

[11] On one view the preferable course is not to make modern awards binding on organisations at all. We think it is desirable to give interested parties the opportunity to make further suggestions and submissions on the matters we have raised before deciding this important question. Taking all of the matters into account we have not made the draft awards binding on organisations.

6. It is the NSW Government's submission that relevant industrial parties can and should be bound to modern awards. The basis of this position is not a matter of either coverage or demarcation, but – as will be elaborated on in succeeding paragraphs – the operation of the system of industrial regulation in a fair and just manner.

7. Section 576V of the *Workplace Relations Act* 1996 (WR Act) relevantly provides that:

Who is bound by a modern award

¹ Available at <http://www.airc.gov.au/awardmod/databases/general/decisions/2008aircfb717.htm>

A modern award binds employers, employees etc. that it is expressed to bind

(1) A modern award binds, in accordance with its terms, the employers, employees, organisations and eligible entities that it is expressed to bind.

Modern award must be expressed to bind specified employers and employees

(2) A modern award must be expressed to bind the following:

(a) specified employers;

(b) specified employees of employers bound by the modern award, in respect of work that is expressed to be regulated by the modern award.

.....

Modern award may be expressed to bind organisations

(4) A modern award may be expressed to bind one or more specified organisations in respect of all or specified employees or employers who are bound by the modern award.

.....

Modern award must be in accordance with award modernisation request

(6) The power of the Commission under subsections (2), (3), (4) and (5) must be exercised in accordance with the award modernisation request to which the modern award relates.

Specification of employers, employees etc. by name or class

(7) For the purposes of subsections (2), (3), (4) and (5):

(a) employers may be specified by name or by inclusion in a specified class or specified classes; and

(b) employees must be specified by inclusion in a specified class or specified classes; and

(c) organisations must be specified by name; and

(d) eligible entities may be specified by name or by inclusion in a specified class or specified classes.

8. The Award Modernisation Request is silent on the matter of persons or organisations bound by a modern award.

9. It is clear from the quoted provisions that the Commission may make modern awards that are expressed to bind organisations (s576V(4)), with the final decision as to whether that should be done being a matter of discretion for the Commission. Thus, while modern awards are to have common rule application in the relevant industry, there is nothing to prevent them from setting out the persons bound by the award.

10. In the NSW industrial relations jurisdiction, persons bound by an award are set out in s12 of the *Industrial Relations Act 1996 (NSW)* (IR Act). This section is reproduced below, together with s11, which provides relevant background:

When award may be made

11 When award may be made

- (1) An award may be made:
 - (a) on application to the Commission or on the Commission's own initiative, or
 - (b) in the course of an arbitration by the Commission under Chapter 3 to resolve an industrial dispute.
- (2) An application for an award may be made only by:
 - (a) an employer, or
 - (b) an industrial organisation of employers or employees, or
 - (c) a State peak council.
- (3) Anyone who can apply for an award may become a party to any proceedings for making an award.
- (4) An applicant for an award, or to become a party to the making of an award, is required to satisfy the Commission that it or any one or more of its members has a sufficient interest in the proposed award.

Persons bound by award

12 Persons bound by award

- (1) An award is binding on all employees and employers to which it relates, whether or not they were a party to the making of the award.
- (2) An award that applies to a particular industry is, subject to its terms, taken to bind all employees and employers engaged in the industry.
- (3) An award is, subject to its terms, binding on all industrial organisations that were a party to the making of the award.

11. NSW awards have common rule effect in their industry, while still having named parties who have certain rights and obligations in relation to the award. As noted by Wright P in *Health and Research Employees' Association of New South Wales v Baptist Community Services NSW and Act* [2002] NSWIRComm 32 (25 February 2002):

69 Although important parts of (section 12) are plainly expressed to be subject to the precise terms of any particular award, nevertheless the clear legislative intention is that awards are intended to be binding on those employers, employees and industrial organisations which were a party to the making of the award and although it is possible that the parties could agree that some of the parties to the award could, as it were, come and go by unilateral act, such a construction should only be concluded if the very plain words of the award permit that to occur.

12. In a broader and more critical sense however, the overall operation of these provisions, together with the rest of the IR Act mean that, in the NSW jurisdiction, it is the role and responsibility of the industrial parties to awards, with the assistance of the Industrial Relations Commission of NSW (NSW IRC), to determine what conditions should be contained in them. To this end, the industrial relations system in NSW provides for effective self regulation by the industrial parties and ensures awards remain relevant and practicable. In this sense, NSW awards are creatures of both the parties and the NSW IRC.

13. If modern awards do not have named parties in the manner suggested, such awards would become creatures of the tribunal alone, with reviews of award provisions and community standards to be conducted once every four years only, in accordance with the legislative scheme recently announced by the Deputy Prime Minister².

14. In the NSW Government's submission, such an arrangement would be a retrograde step, by comparison to the rights and obligations that apply to employers and employees in the NSW jurisdiction. In this connection, it is noted that corporate employers and their employees were subject to these rights and obligations before the awards that applied to them were converted to NAPSA's on 27 March 2006.

15. At the very least, the NSW Government takes the view that it is appropriate to formally recognise parties affected by the modern award and/or who have a substantive interest in its provisions. This will recognise that certain organisations have an ongoing role in ensuring the modern award remains appropriate to the industry.

16. Apart from the fact that identifying which organisations should be bound is potentially a difficult task, there does not seem to be any obvious disadvantage to making modern awards binding on appropriate organisations. This said, it is conceded that a full understanding of the way that modern awards will operate will not be available until the details of the statutory framework governing the federal jurisdiction are known. For example, matters such as how modern awards are to be varied, how modern awards are to be enforced and who will have the ability to do so, how disputes can be dealt with, and so on, will no doubt have a bearing on any final decision about organisations bound by modern awards.

² *A Strong and Simple Safety Net* Forward With Fairness Fact Sheet No. 3, available at http://www.workplace.gov.au/NR/rdonlyres/D1985F1D-649A-4059-B356-AE9BCDD56FE4/0/WRfactsheet_03.pdf

17. Notwithstanding this temporary legislative uncertainty however, the NSW Government would press the submission that it is appropriate for the Commission to formally acknowledge interested parties in relation to each modern award at this time so that any legislative provisions that depend upon there being organisations bound (eg a provision that entitles an organisation bound to enforce the award) can have effect. In the event that legislative changes or other relevant factors require further consideration of this issue, the matter could be revisited as necessary or appropriate.

Diminution of NSW Community Standards and Award Conditions

18. In its July 2008 submission, the NSW Government argued that:

5.In the context of considering the fourteen priority industries, the NSW Government is concerned to ensure that the modern awards should provide outcomes at least as beneficial as current NSW provisions.

Examination of the exposure draft awards suggests that this objective has not been met. A non-exhaustive list of instances where we believe this to be so is set out at Appendix A. This includes lists of provisions appearing in the relevant State award(s) that appear to be entirely absent from the corresponding draft modern award. The industries selected for these comparisons are industries that have historically been subject to significant levels of State industrial regulation.

19. Perhaps some of these matters might be considered more appropriate as the subject of bargaining processes (eg union dues, union facilities etc). However, the fact remains that a number of well-established award conditions will be removed once modern awards take effect. For award reliant employees, this is effectively a permanent loss.

20. The NSW Government reiterates the position quoted at para 18 above, and expresses its concern that some modern awards appear to provide a diminution of conditions currently existing in various NAPSAs. Prima facie, this would appear to be contrary to the direction given by the Minister in the Request to neither disadvantage employees nor increase employer costs³.

21. The impact that the Commission intends modern awards will have in respect of employees currently subject to NAPSAs is not clear. As is pointed out below, this is because of a lack of reasoning in the decisions made in this process, and in particular, the absence (thus far) of detailed explanations of why the draft modern awards have been crafted in the terms they have.

22. In the NSW Government's submission, the Commission should make clear whether modern awards are, in certain particular respects, intended to either disadvantage employers and/or employees. If that is not the case (and the NSW Government submits it should not be the case), then the draft award should be varied to remove the disadvantage, or alternatively, transitional provisions, either of the kind appearing at cl 35 of the draft retail industry award, or of the kind contemplated by s576T, should be put in place.

³ Consolidated Request paras 2(c) and 2(d)

Obligation to provide reasons

23. As noted in the previous section, there appear to be a number of instances where wages and/or conditions in modern awards are less (in some cases significantly less) than existing NSW community standards and award conditions, or have been omitted entirely from the modern award.

24. The absence of reasons for their proposed removal, a matter of real significance, raises fundamental issues in relation to the transparency and sustainability of the decisions made by the Commission in the award modernisation process.

25. Specifically, the NSW Government notes that these apparent diminutions or losses of conditions have not been identified and explained in the Commission's 12 September Statement. Indeed, the Statement does not set out a particular rationale for crafting any of the draft modern awards.

26. Further, a number of fundamental questions addressed by the parties in their submissions have not been dealt with in the Statement. For example, the ACTU⁴ and AMWU⁵ submissions squarely addressed the important question of what conditions constitute 'fair minimum safety net' in terms of s576A(2)(b) of the WR Act. There appears to be no direct response to these submissions in the Statement. Similarly, a number of matters addressed in the NSW Government's earlier submissions that went to both issues of process as well as the specifics of modern awards have not been expressly addressed in subsequent Statements of the Commission.

27. In its May 2008 Submission, the NSW Government submitted that:

21. It is well established that the Commission is bound to act in a judicial manner and required to apply principles of natural justice: *R v Commonwealth Conciliation and Arbitration Commission: Ex parte Angliss Group* (1969) 122 CLR 546 at 552-553; *R v Ludeke*; *Ex parte The Customs Officers' Association of Australia, Fourth Division* (1985) 155 CLR 513 at 519-520; *R v AIU: Ex parte Public Transport Commission* (1993) 67 ALJR 904 at 909; *Re Australian Bank Employees Union: Ex parte Citicorp Australia Ltd* (1989) 167 CLR 513 at 519. In this regard it is to be noted that the Parliament did not seek to confer the power on a purely administrative body.

The obligation to act judicially requires the Commission to provide reasons for its decisions, so the outcome is both transparent and readily understandable. A decision should address the submissions made by the parties and set out the reasoning for the Commission's final decision.

⁴ ACTU Submission to the AIRC – Award Modernisation Pre-drafting consultations 1 August 2008, paras 16-35

⁵ AFMEPKIU Submission to Award Modernisation Consultation 1 August 2008, paras 11-15

28. This approach, which is both necessary and appropriate, provides:
- Transparency, so that parties can understand the reasoning process;
 - Legitimacy, since the parties can see that their submissions have been considered properly, making it more likely that the outcome is accepted; and
 - Durability; that is, in any future consideration of the award, the tribunal (or any replacement tribunal) and the parties will have an understanding of what matters were considered and what reasoning process was applied.

29. In *Judicial Review of Administrative Action*, 3rd Edition, Aronson, Dyer and Groves, at page 554, the authors state the following:

According to Kirby P in Osmond v Public Service Board [1984] 3 NSWLR 447 at 463 a duty to provide reasons serves several functions. First, it enables the recipient to see whether any appealable or reviewable error has been committed, with a view to assisting the decision whether to appeal, challenge or let the matter lie. Secondly, it answers the frequently voiced complaint that good and effective government cannot win support or legitimacy unless it accounts for itself to those whom it affects. Thirdly, it is said that the prospect of public scrutiny will provide officials with a disincentive to be "arbitrary". Fourthly (and perhaps this merges with the last point), it is claimed that the discipline of giving reasons will make administrators more careful and more rational. And fifthly, it is said that the provision of the reasons gives guidance for future cases.

30. The NSW Government submits that when modern awards are made, the Commission should hand down a decision of the kind described in the foregoing paragraphs. That is, the decision should address the relevant submissions of the parties, and set out the reasoning for the Commission's decision in full.

Diminution of NSW Community Standards and/or Award Conditions

Annual Leave

The NES provides that an employee only receives their base rate of pay for the purposes of annual leave. By contrast the Annual Holidays Act (NSW), provides that penalty rates and shift allowances the employee would have earned over the relevant leave period are included in the leave payment calculation.

Under the terms of the NES, a modern award may include provisions dealing with the taking of paid annual leave. In some instances within the exposure drafts of the priority modern awards (Security and Manufacturing) annual leave provisions of the NES have been supplemented. Instead of the base rate of pay (as per the NES) an employee, prior to the taking of annual leave, must be paid the wages they would have received in respect of ordinary hours worked.

Other modern awards appear to be silent on this matter and therefore annual leave at the base rate of pay, as determined by the NES, will apply in these instances. This is a diminution of entitlements these employees have previously enjoyed.

Hospitality Industry (General) Award 2010

Rates of pay and casual loadings

Under the draft modern award the minimum weekly wage for a Cook grade 3 (tradesperson) is \$637.60. The comparable rate of pay under the APCS derived from the *Restaurants, &c., Employees (State) Award* would appear to be the grade 5 restaurant employee classification which equates to \$646.40.

Penalty rates and overtime

Should a casual employee perform work on a public holiday he/she will receive a penalty of double time and one half under the *Restaurants, &c., Employees (State) Award (NAPSA-NSW)*. The draft modern award provides for a penalty of 175 per cent in addition to 1/38th of the weekly rate prescribed for the work performed.

This means a casual Cook grade 3 (tradesperson) working under the modern award would receive an hourly payment of \$46.12 for work performed on a public holiday.

The comparable rate of pay for a casual employee tradesperson under the APCS derived from the *Restaurants, &c., Employees (State) Award* would be an hourly payment of \$51.03 per hour plus \$1.70 holiday pay for work performed on a public holiday.

State Award/NAPSA provisions not included in the draft modern award

Clauses currently contained in a number of state awards within the hospitality industry have been compared with the exposure draft of the modern award. The following clauses appear to have been omitted from the draft modern award:

Restaurants, &c., Employees (State) Award (NAPSA - NSW)

- Make Up Time
- Working Together
- Work Clothes and Safety Equipment
- Secure Employment (Occupational Health and Safety)
- Blood Donors
- Employee Representative and Union Business
- Traineeships

Motels, Accommodation and Resorts (State) Award (NAPSA - NSW)

- Transmission of Business
- Enterprise Flexibility Provisions
- Employer Duties
- Standing Down Employees

- Accident Pay
- Leave for Consultation Meetings
- Union Dues

Textile, Clothing, Footwear and Associated Industries Award 2010

Rates of pay and casual loadings

The rates of pay within the general classification/skill levels in the modern award are broadly similar to those noted within the APCS derived from the *Clothing Trades (State) Award* (Clothing APCS). However, the casual loading in the modern award is 25 per cent compared with a 33.33 per cent loading afforded to such employees under the Clothing APCS.

This means under the modern award a casual level 3 machinist would be entitled to an hourly payment of \$19.87, compared to \$21.19 under the Clothing APCS.

State Award/NAPSA provisions not included in the draft modern award

Clauses currently contained in a number of state awards within the textile, clothing and footwear industry have been compared with the exposure draft of the modern award. The following clauses appear to have been omitted from the draft modern award:

- Demarcation of work
- Aged, infirm or slow workers
- Deduction of union membership fees
- Entry and inspection by officers of industrial organisations
- Seating accommodation
- Amenities
- First aid ambulance chest
- Industrial committee
- Shop stewards and representatives
- Notice boards
- Accident pay
- Blood donors
- Enterprise bargaining
- Deductions from wages
- Proportion of juniors
- Limitations
- Right of entry
- Union conference delegates
- Certificate of service
- Emergency electricity provisions
- State training wage
- Technical college fees for apprentices
- Damage to clothing and physical aids
- Commitment to training and careers

Clerks – Private Sector Award 2010

Penalty rates and overtime

Under the modern award there is a 15 per cent shift loading for working an afternoon or non-permanent night shift. These shift premiums are lower than the *Clerical and Administrative Employees (State) Award (NAPSA-NSW)* derived rates of 17 per cent for afternoon shift and 20 per cent for night shift.

State Award/NAPSA provisions not included in the draft modern award

Clauses currently contained in a number of state awards within the clerical industry have been compared with the exposure draft of the modern award. The following clauses appear to have been omitted from the draft modern award:

- exemptions clause
- labour flexibility provisions
- enterprise consultative arrangement
- provisions imposing general training obligations
- salary packaging arrangements

Manufacturing and Associated Industries and Occupations Award 2010

Rates of pay and casual loadings

The following are examples of conditions of employment applicable to junior employees currently provided in certain NSW NAPSAs which are potentially more favourable than what has been proposed in the draft modern award.

The draft modern award provides for unapprenticed juniors to be paid at a particular percentage of the adult classification level C13 rate. By contrast, the APCS derived from the *Rubber Workers (State) Award* and *Gelatine and Glue Industry (State) Award* provide for a junior to be paid at a percentage of the adult rate for the corresponding classification in which work is being performed.

Further, the percentages for calculating the junior rates derived from the *Gelatine and Glue Industry (State) Award* and *Engine Packing Manufacture (State) Award* are higher when compared to those in the draft modern award. The tables below illustrate the percentages for juniors provided in the relevant APCS:

<i>Gelatine and Glue Industry (State) Award</i>	
Age	Percentage
At 16 years of age and under	70
At 17 years of age	85
At 18 years of age	100

<i>Engine Packing Manufacture (State) Award</i>	
Age	Percentage
Under 18 years of age	75
At 18 years of age	85
At 19 years of age	95
At 20 years of age	The appropriate adult weekly rate

The APCS derived from the *Draughting Employees, Planners, Technical Employees, & c. (State) Award* provides junior tracers with a rate based on the C12 level compared to the draft modern award which is based on the C13 level. The table below illustrates the outcome:

Age	APCS	Modern Award	Difference
16 years of age and under	\$314.64	\$302.67	\$11.97
At 17 years of age	\$343.90	\$330.70	\$13.20
At 18 years of age	\$390.64	\$375.54	\$15.10
At 19 years of age	\$443.08	\$425.98	\$17.10
At 20 years of age	\$483.74	\$465.22	\$18.52

State Award/NAPSA provisions not included in the draft modern award

Clauses currently contained in a number of state awards within the manufacturing industry have been compared with the exposure draft of the modern award. The following clauses appear to have been omitted from the draft modern award:

- Enterprise flexibility
- Standing down employees
- Right of entry
- Shop stewards and notice board
- Deduction of union membership fees
- Training
- Payment by results

Retail Industry Award 2010

Hours of Work

Clause 26.2 of the draft modern award provides an extended spread of ordinary hours when compared to those currently provided for in the *Shop Employees (State) Award (NAPSA-NSW)*, in particular Monday to Wednesday for certain types of shops. The NSW NAPSA spread of hours is: Monday to Wednesday from 9.00 a.m. to 6.00 p.m. rather than 7.00 a.m. to 9.00 p.m. in the modern award.

Hours worked beyond 6.00 p.m. Monday to Wednesday under the NSW NAPSA would attract an overtime penalty of time and one half for the first two hours and double time thereafter. However, under the draft modern award hours worked beyond 6.00 p.m. up until 9.00 p.m. on any of those days will only attract a penalty rate of 25 per cent on ordinary hours.

In particular circumstances an employee working overtime under the draft modern award will be paid at the rate of time and one half for the first three hours whereas the NSW NAPSA provides for time and one half for the first two hours and double time thereafter.

Public Holidays

Clause 34.3 of the draft modern award provides that work on a public holiday must be compensated by either:

- (a) payment at the rate of 250 per cent;
- (b) an equivalent day or equivalent time off in lieu without loss of pay;
- or
- (c) an additional day or equivalent time as annual leave.

This clause appears to be less beneficial than the provisions in clause 17 of the NSW NAPSA.

For example it appears that where work is performed on a public holiday an employer can elect to add an additional day to the employee's annual leave as compensation for time worked. This would only be possible under the NSW NAPSA in limited circumstances provided in clause 17A(b).

Termination of Employment

Clause 14.2 of the draft modern award provides that the notice of termination required to be given by an employee is the same as that required of an employer except that there is no requirement on the employee to give additional notice based on the age of the employee. The notice requirements are more onerous than those provided for in the NSW NAPSA where an employee has to provide one weeks notice or forfeiture of one weeks pay.

State Award/NAPSA provisions not included in the draft modern award

Clauses currently contained in a number of state awards within the retail industry have been compared with the exposure draft of the modern award. The following clauses appear to have been omitted from the draft modern award:

- Secure employment
- Training
- Mixed enterprise
- Blood donor leave
- Facilities
- Renovations in retail shops
- Deduction of union membership fees
- Agricultural, Pastoral or Horticultural Societies' Shows, etc.

The omission of the secure employment clause is of particular significance given the number of casual employees in the retail industry. This clause is present in the NSW NAPSA and its omission would cause a significant diminution in rights for long-term casual employees.

Security Services Industry Award 2010

Rates of pay and casual loadings

The APCS derived from the *Security Industry (State) Award* provides more favourable weekly rates of pay than those in the modern award. The following table illustrates the differences in the weekly wage at various classifications.

Classification	APCS	Modern Award	Difference
Level 1	\$622.82	\$614.40	\$8.42
Level 2	\$641.06	\$632.70	\$8.36
Level 3	\$652.46	\$644.00	\$8.46
Level 4	\$663.48	\$655.20	\$8.28
Level 5	\$685.90	\$677.05	\$8.85

State Award/NAPSA provisions not included in the draft modern award

Clauses currently contained in a number of state awards within the security industry have been compared with the exposure draft of the modern award. The following clauses appear to have been omitted from the draft modern award:

- Transitional Arrangements
- Secure Employment Provisions
- Attendance at Repatriation Centres
- Deduction of Union Dues