

New South Wales Government

**Submission to the Australian Industrial
Relations Commission**

**Award Modernisation in the
Textile, Clothing and Footwear Industry**

July 2008

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Overview

1. In its 20 June 2008 decision, the Full Bench determined that:

in relation to pre-drafting consultations for the priority modern awards all written submissions, draft modern awards and other proposals concerning the scope, content and transitional arrangements should be lodged with the Commission by 25 July 2008.¹

2. This submission of the NSW Government addresses the content of a potential modern award in the textile, clothing and footwear industry, principally from the position of advocating that it reflect community standards and award entitlements contained in NSW awards and legislation. Those employed in the textile, clothing and footwear industry in NSW whose conditions of employment are no higher than those set by an industrial instrument, overwhelmingly receive conditions set by NSW awards (now NAPSAs). Given the enjoiner not to disadvantage employees or increase costs for employers (Ministerial Request, paragraph 2(c) and (d)), the Australian Industrial Relations Commission (the Commission) will have a particular need to examine carefully the NAPSA conditions that currently apply in NSW to such employees.
3. All modern awards should contain conditions that reflect and preserve well-established community standards. While they may differ to some extent, they would be largely consistent across modern awards. It is submitted that in determining those general conditions the Commission would have careful regard of the standards created by the Industrial Relations Commission of New South Wales (IRC) and contained in State awards, and standards contained in NSW legislation. It is important to ensure that the creation of modern awards does not undermine existing conditions of employment. Part 1 of this submission, which is common to the submissions being filed for all fourteen priority industries, identifies the community standards created by NSW awards and legislation. It is submitted that all modern awards would contain terms that reflect, and preserve these standards.
4. Specifically this submission:
 - In **Parts 1.1 and 1.2**, identifies the principles and community standards found in NSW awards and legislation that the NSW Government contends should be preserved in modern awards
 - In **Part 1.3**, sets out reasons why specific provisions found in NSW awards, now NAPSAs, that currently apply in certain industries, should be maintained
 - In **Part 1.4**, describes why it is important that modern awards are drafted with the intention that they be capable of being updated
 - In **Part 1.5**, advocates that modern awards should be drafted in a manner that promotes training and skills development

¹ AIRC Print No PR062008 20 June 2008, para 195

- In **Part 2**, identifies the relevant NSW State awards (including NSW State Awards that the Commission has not previously identified as relevant) and lists in a table the types of clauses found in those awards by reference to the matters that can be dealt with under the National Employment Standards or as matters that can be contained in an award pursuant to s576J on the understanding that the Commission when making a modern award would, in respect of each subject, refer to the relevant State award provision;
- In **Part 3**, provides some further information relevant to this industry
- In **Part 4**, identifies specific NSW State award conditions that should be maintained in a modern award applying to this industry

Background

5. In its first submission to the Full Bench, the NSW Government said:

A strong, effective and relevant award system, together with an independent tribunal with broad powers, are the key elements of the NSW industrial relations jurisdiction. The NSW Government is concerned to ensure that the employees and employers who currently enjoy the benefits of that system are not left worse off by the award modernisation process.²

6. This remains the NSW Government's broad objective. 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.

² NSW Govt Submission to the AIRC Award Modernisation para 9

Part 1 NSW Community Standards

7. The NSW award system has been in place for over a century, with the current legislative framework being set by the *Industrial Relations Act 1996* (IR Act). During this period, decisions of the IRC have created what have become recognised as community standards, reflected in award provisions found generally in NSW State awards. In addition, the legislature has set various minimum conditions for NSW employees, in some cases irrespective of whether those employees are subject to a particular award.
8. Broadly speaking, the policy objective of the NSW Government has been to give primacy to the award system as the means of setting conditions that are fair and just. Most NSW community standards are therefore the result of State decisions which have been subsequently applied to NSW awards at large. A minority of standard conditions are contained in legislation.
9. For many employers and employees, NSW common rule awards are the sole means of regulating their industrial relations, apart from the general law. In this sense, NSW awards are more than a base from which employees are expected to bargain.
10. Common rule awards also supply a level playing field for employers, ensuring that they need not compete on the price of labour, rather focusing their energies on competing on the quality of their products and services.
11. The next two sub-sections set out the NSW community standards which in turn appear in awards and legislation.
12. As set out above, while they might differ in their detail, all modern awards should contain conditions that reflect and preserve well-established community standards. In determining those general conditions the Commission would have careful regard of the following standards created by the IRC and contained in State awards and contained in NSW legislation. It is submitted that all modern awards would contain terms that reflect, and preserve these standards.

1.1 NSW Community Standards in Awards

13. Legal authority to make State decisions arises out of Ch 2 Part 3 of the IR Act, and primarily s51 of that Act, which provides:

51 Making of State decisions

- (1) A Full Bench of the Commission may, if satisfied that it is consistent with the objects of this Act and that there are good reasons for doing so, make a State decision setting principles or provisions for the purposes of awards and other matters under this Act.
- (2) A Full Bench of the Commission may make a State decision only on the application of a State peak council or on its own initiative.

- (3) A State decision may apply generally to all awards or other matters under this Act or only to particular awards or other matters under this Act.
- (4) The principles or provisions of a State decision may be varied by a Full Bench of the Commission.

14. State decisions may apply to particular awards either on application (see for example *State Wage Case 2008* [2008] NSWIRComm 103 (27 June 2008), para 336(2)), or by means of a general order pursuant to s52 of the IR Act (see for example *Family Provisions Case 2005* [2005] NSWIRComm 478 (Decision para 2)).

15. The IR Act provides for some minimum conditions to apply to all awards, in relation to:

- Maximum ordinary hours of employment (s22)
- Equal Remuneration and other conditions (s23)
- Employment protection provisions (s24)
- Provisions relevant to technological change (s25)
- Minimum sick leave entitlements (s26)

16. In this regard, it should particularly be noted that s27 prohibits the cashing-out of sick leave in all NSW awards.

17. State Decisions relevant to the priority awards are listed in the subsequent paragraphs.

Secure Employment Test Case

18. The *Secure Employment Test Case* decision was handed down by the IRC on 28 February 2006³. The decision deals with the ability of casuals to choose to convert to permanent employment after a period of six months of employment.

19. In its decision, the IRC established a right for casuals with a regular and systematic work history to seek conversion to permanent full-time or part-time employment.

20. Employers must give casual employees written notice of their right to become permanent within four weeks of their completing a six month period of employment. Employees must reply in writing within four weeks or will be regarded as not wishing to convert.

21. The decision also requires employers who engage a labour hire or contract business to perform work on the employer's premises to (either directly or through the labour hire/contract business) consult with those employees regarding OHS arrangements and ensure the provision of induction training and protective equipment.

³ Secure Employment Test Case [2006] NSWIRComm 38

22. The provisions within the test case decision were required to be applied for on an award by award basis by the relevant state industrial organisation(s).

Family Provisions Test Case

23. The IRC flowed on (with modifications) the Commission's *Family Provisions Case 2005*⁴ by general order in December of that year.

24. The *NSW Family Provisions Case 2005*⁵ model award clause concerns caring and parental leave rights and responsibilities and affects employers and employees under NSW state awards.

25. Following the NSW decision the following conditions could be requested by employees who qualify for parental leave. These new award based conditions are in addition to the parental leave rights and responsibilities under the IR Act:

- increase their simultaneous unpaid parental leave to eight weeks
- extend their unpaid parental leave from 52 weeks to 104 weeks
- return from parental leave on a part-time basis until the child reaches school age.

26. The employer must consider requests of this type, having regard for the employee's circumstances and may only refuse the request on reasonable grounds.

27. The IRC also broadened the reasons for use of sick leave for caring responsibilities to include occasions where an employee has to care for a family or household member due to an unexpected emergency.

28. The decision also made certain provisions for casual employees. Subject to appropriate evidence, casuals can be absent from work in order to care for a relevant person who is ill, has given birth to a child or because of some unexpected emergency. The period of the absence is by agreement and is unpaid. If agreement cannot be reached the casual worker is entitled to be absent for up to 48 hours (two days).

29. Casual employees are also entitled to be absent from work in the case of the death in Australia of a person with whom they had a relationship of the type defined in the personal/carers leave clause of the applicable award.

Equal Remuneration Principle

30. Community standards in regard to pay equity and equal remuneration are well established in the NSW industrial relations system.

31. The *2000 Pay Equity Case (Re Equal Remuneration Principle [2000]* NSWIRComm 113) resulted in the establishment of a Wage Fixing Principle

⁴ [PR802005]

⁵ Family Provisions Case 2005 [2005] NSWIRComm 478

(currently Principle 14) which specifically permitted claims to be made ‘for an alteration in wage rates or other conditions of employment on the basis that the work, skill and responsibility required or the conditions under which the work is performed have been undervalued on a gender basis’.

32. This Principle has been subsequently applied in cases such as *Re Miscellaneous Workers Kindergartens and Child Care Centres &c (State) Award* [2006] NSWIRComm 73 (1 September 2006). It is clear from the operation of these provisions that parties to NSW awards currently have a mechanism to address issues of pay equity in relation to specific awards, and put in place particular measures to address those issues.

Redundancy

33. Sections 84 and 85 of the former *Industrial Relations Act 1991* (retained at s21 of the current IR Act) require the IRC upon application to insert employment protection provisions in awards by variation or otherwise. In 1994 the IRC directed that unions and employer organisations should agree on a redundancy clause which could be inserted into certain NSW state awards.⁶

34. The majority of NSW awards now include Termination Change and Redundancy (TCR) clauses which, amongst other matters, require the employer to notify and discuss proposed changes with affected employees and their union, and prescribe the following notice:

Period of continuous Service	Period of Notice
Less than one year	1 week
1 year and less than 3 years	2 weeks
3 years and less than 5 years	3 weeks
5 years and over	4 weeks

35. In addition to the notice above, employees over 45 years of age at the time of the giving of the notice, with not less than two years' continuous service, shall be entitled to an additional week's notice. Payment in lieu of the prescribed notice shall be made to the employee if the appropriate notice period is not given. Most NSW award TCR clauses also provide for employers to provide employees with three months notice of termination due to technological change.

36. Most NSW awards provide eligible employees with an entitlement to redundancy pay which is reflected in Schedule 1 of the Regulations to the *Employment Protection Act 1982*.⁷

37. If an employee is covered by a State award that contains a TCR clause, the employer is exempt from the provisions of the *Employment Protection Act 1982* (discussed further below).

⁶ Re application for redundancy awards [1994 AILR 301]

⁷ See para 58 of this submission re *Employment Protection Act 1982*

Hours of Work – Reasonable Hours Test Case

38. A Full Bench of the Australian Industrial Relations Commission handed down its decision in the *Reasonable Hours Test Case*⁸ on 23 July 2002, awarding a provision granting employees a right to refuse unreasonable overtime.
39. While the test case provision recognises the right of an employer to direct an employee to work 'reasonable' overtime, this is subject to the employee's right to refuse overtime that is unreasonable, having regard to the following factors:
- any risk to employee health and safety
 - the employee's personal circumstances including any family responsibilities
 - the needs of the workplace or enterprise
 - the notice (if any) given by both the employer of the overtime and by the employee of their intention to refuse it, and
 - any other relevant matter.
40. The Full Bench of the NSW IRC was satisfied the Australian Industrial Relations Commission's decision was a 'National Decision' as defined in the IR Act and was therefore required to consider its terms.⁹
41. The NSW IRC handed down similar provisions but also incorporated a reference to 'carer' responsibilities in order to achieve conformity with anti-discrimination clauses prevalent in NSW awards and enterprise agreements.
42. The Full Bench determined the proposed clause should be inserted upon application into awards.

1.2 NSW Community Standards in Legislation

43. As indicated above, NSW community standards primarily reside in awards, however some standards are to be found in general industrial legislation, or specific purpose legislation. This sub-section sets out the relevant NSW legislated minima.

Annual Holidays Act 1944

44. The *Annual Holidays Act 1944* (the AH Act) is the principal statutory source of annual leave for employees working in the NSW industrial relations system. It applies to all employees engaged on a full time or part time basis; and to a limited extent, casual employees.
45. Pursuant to Schedule 8, clause 34 of the *Workplace Relations Act*, the conditions set by the AH Act are currently conditions contained in NAPSAs applicable to almost all NSW employees employed by a constitutional

⁸ State Working Hours Case 2003 [2003] NSWIRComm 86

⁹ See ss48 and 50 of Industrial Relations Act 1996

corporation. They provide enhanced conditions over the conditions provided by Part 7 of the *Workplace Relations Act* (for instance as to the definition of 'ordinary pay' for the calculation of annual leave pay). In making a modern award the Commission would accordingly need to consider carefully the conditions contained in the AH Act to ensure that employees are not disadvantaged.

46. A full time or part time worker is entitled to four weeks annual holiday for each completed year of employment with an employer. A casual employee is effectively entitled to a payment in lieu of the leave entitlement determined on the basis of one-twelfth of the worker's ordinary pay for each hour worked (s 4(3)).
47. An employer may direct the worker to take annual leave in one or two consecutive periods, or up to four separate periods by agreement. An employer must give a worker their annual leave within a period of six months from the anniversary entitlement date unless the Industrial Registrar has granted, on application by the employer a postponement of the taking of the leave (s3(4)). A worker may also take annual holiday in advance of the entitlement date, but only with the agreement of the employer.
48. For employees mainly or wholly remunerated for their normal weekly number of hours by an ordinary time rate of pay this holiday pay will include weekend penalties and shift loadings the worker would have earned if they had not been on an annual holiday. An employer must give the worker at least one month's notice of the leave commencement date and an employee must be paid their holiday pay in advance of the taking of annual leave (s 3(6)(a)). On termination of employment the employee must be paid their ordinary rate of pay for their accumulated untaken leave entitlement.
49. Under s 4A of the AH Act an employer may temporarily close their business once a year by giving one month's notice, as part of a scheduled 'annual close down'. If a worker does not have sufficient leave entitlements to cover the entire close down period, the balance of that period must be taken as leave without pay.
50. The legislative intention of the AH Act is clearly to afford a worker a paid break from their employment, accordingly the cashing out of an employee's annual leave entitlement is prohibited except upon termination of employment. The NSW Government submits that annual leave is taken to allow an employee a proper respite from the work environment and should not be cashed out.
51. Most NSW common rule awards contain annual leave provisions although many of them merely make reference to the AH Act. Where awards do contain substantive leave entitlements they will only exclude the statutory provisions where the award gives workers an entitlement to annual leave benefits that is more favourable than the corresponding leave entitlements conferred by the AH Act.¹⁰

¹⁰ For example see clause 23 of the Private Hospital Industry Nurses' (State) Award

Long Service Leave Act 1955

52. The *Long Service Leave Act 1955* sets out minimum provisions for long service leave. The statute operates with respect to all eligible workers in NSW, including (since 1985) casual employees with continuous service as defined. The leave entitlement is expressed in months, with a month defined as four and one-third weeks.
53. A worker is entitled to two months paid long service leave after ten years of service with an employer and for each additional five years of service a worker is entitled to an additional one month. In the case of a worker who has completed ten years but less than fifteen years, the worker is entitled to a proportionate amount on the basis of three months for fifteen years of service
54. Where a worker has completed five years of service (but less than ten years), the worker is entitled to a pro rata payment on the basis of two months for ten years of service in the following circumstances as per s4(2)(a)(iii):
- whose services are terminated by the employer for any reason other than the worker's serious and wilful misconduct,
 - or by the worker on account of illness, incapacity or domestic or other pressing necessity,
 - or by reason of the death of the worker.
55. A worker is entitled to long service leave on ordinary pay as defined in s3 of the Act. Ordinary pay excludes shiftwork, other penalty rates and overtime but may include bonuses and commissions received by the worker. Cashing-out of long service leave is prohibited except upon termination.
56. The NSW jurisdiction also has specific long service leave provisions for the building industry that recognises portability of employment (*Building and Construction Industry Long Service Payments Act 1986*).
57. The NSW Government recognises that each of the States and Territories will work with the federal government to achieve harmonised national long service leave provisions. In the interim, the NSW Government submits that it is essential to maintain existing long service leave provisions.

Employment Protection Act 1982

58. The *Employment Protection Act 1982* and its Regulations provide an obligation upon employers to notify the NSW Industrial Registrar that an employee is to be or has been terminated. However, employers are not required to notify the Registrar where certain exemptions can be claimed which include the following:
- the employer employs less than 15 employees
 - the employee has been employed for less than 12 months
 - the employee is not covered by a New South Wales State Award or

- agreement
- the employee is a casual worker.

59. Where the termination does not fall under one of the exemptions the Industrial Registrar should be notified in accordance with ss 7 or 8 of the Act so that it may review the circumstances and make an appropriate order in line with the severance payment prescribed by the regulations

60. The *Employment Protection Regulation 2001* (Schedule 1) provides for severance payments based on the following scales:

Years of Service	Under 45 Years	45 Years of Ages & Over
Less than 1 year	Nil	Nil
1 year and less than 2 years	4 weeks	5 weeks
2 years and less than 3 years	7 weeks	8.75 weeks
3 years and less than 4 years	10 weeks	12.5 weeks
4 years and less than 5 years	12 weeks	15 weeks
5 years and less than 6 years	14 weeks	17.5 weeks
6 years and over	16 weeks	20 weeks

61. Where an employee is 45 years old or over the scale provides an additional 25 per cent entitlement.

62. If an employee is covered by a State award that does not contain redundancy provisions, the employer must apply the provisions of the *Employment Protection Act 1982*.

Industrial Relations Act 1996

63. Chapter 2, Pt 4, Divisions 1 & 2 provides for parental leave for all employees except for irregular casuals and seasonal employees. These Divisions provide detailed prescriptions of eligibility, entitlements and obligations.

64. Chapter 2, Pt 4 Div 4B, provides for leave for victims of crime, and prescribes eligibility, entitlements and obligations in detail.

65. Chapter 2, Pt 5 provides for part-time work agreements which allows employees and employers to contract out of an award or agreement in relation to part time work. The Division also provides for a State Decision which, inter alia, sets minimum standards (s79(3)), and makes some prescriptions in relation to additional hours of work, leave and replacement employees (ss80-82). This Decision was made in 1998¹¹. Some of the matters in the Decision were revisited in the *Secure Employment Test Case*, but the Commission declined to make any change to the 1998 decision¹².

¹¹ *State Part-Time Work Case* [1998] NSWIRComm 142 (26 March 1998)

¹² *Secure Employment Test Case* [2006] NSWIRComm 38 (30 March 2006)

66. Many NSW common rule awards prescribe for the payment of superannuation guarantee contributions to a nominated industry fund (or funds) although in some instances choice of fund is permitted to any complying fund. However under the IR Act, superannuation choice is available to workers under NSW awards. Section 124, provides that despite the provisions of an industrial instrument, contributions may be made to a complying superannuation fund nominated by the employee and approved by the employer.
67. The preceding material submitted by the NSW Government is intended to assist the Commission in its deliberations by outlining existing NSW legislation and community standards. The Award Modernisation process should not disadvantage employees by undermining these existing standards.

1.3 Why specific NSW Award provisions should be preserved

68. As noted above at para 8, awards are the primary means of setting fair and just conditions in the NSW industrial relations jurisdiction. The common rule nature of NSW awards ensures that they set the industry standard deployed by all industrial parties within the scope of the award. The broad scope of matters capable of being regulated by NSW awards means that the NSW awards in priority industries, contain a large range of matters above and beyond the community standards described in the previous section.
69. Given the nature of the NSW award-making process, these provisions have been subject to extensive processes of evidence, submissions, testing and deliberation by the IRC, the parties, and other interested bodies prior to their inclusion in the relevant award. They have become an accepted and necessary part of the machinery of regulating the industry and should therefore be respected as such by the award modernisation process.
70. The NSW Government submits that protections provided to workers under existing NSW award provisions should not be undermined by the Award Modernisation process.
71. In support of this contention, a number of observations should be made. Firstly, most such award provisions demonstrate that, characteristic of State awards, both the awards themselves and the respective clauses under consideration have a long history. This suggests that these awards and provisions are both durable and relevant.
72. In addition, most of these clauses have seldom been the subject of applications for variation, have remained in the respective instruments over a very long time and more often than not, deal with matters which are of some practical real significance to the employment of persons in the respective industries.
73. It will be noted that, save for test case provisions, many such provisions are not uniform although they may deal with similar subject matters. They arise at

different times in different industries. When combined with the fact that the provisions were inserted by consent, it is reasonable to conclude that the provisions have a particular resonance in the industry or occupational area in which the award operates. Despite their longevity, these provisions plainly have a practical relevance to the particular industries and have arisen from enterprise bargaining within those industry sectors. That bargaining process, however, is consistent with the operation of the New South Wales system. Many such clauses would have been the subject of an application by a party or parties and often times the subject of quite extensive negotiation and conciliation processes before the IRC before an agreement is reached which resulted in a consent award.

74. It should also be remembered that the IRC reviews awards at regular intervals. That review is undertaken under s 19 of the IR Act. That section sets out the factors the IRC must have regard to in reviewing the award. Furthermore, the IRC has given various decisions over time elaborating upon the factors relevant to the review of the awards. Most NSW awards, and therefore the provisions which they contain, have been the subject of many reviews since the inception of s 19. That has a real significance at two levels. Firstly, in terms of the New South Wales criteria, these are relevant and ongoing provisions. Secondly, it demonstrates that the clauses have a vitality in that they are seen to be clauses that are not obsolete and which satisfy the criteria set out in s 19. It is equally relevant that the parties have actively participated in those review processes and the clauses have, nonetheless, survived.

75. It is the NSW Government's submission that the *Workplace Relations Act* provides the Commission with ample scope to retain a wide range of NSW award provisions. Section 576J(2) of the *Workplace Relations Act* provides the Commission with a broad discretion to include 'terms about any other matter specified in the award modernisation request to which the modern award relates' among the terms of the modern award. Further, modern awards (together with the NES) '...must provide a fair minimum safety net of enforceable terms and conditions for employees...' ¹⁴, and the Request provides that the creation of modern awards is not intended to disadvantage employers or employees. ¹⁵

76. Further, the Request provides that 'a modern award may include industry-specific detail about matters in the NES' ¹⁶, and that 'a modern award may supplement the NES where the Commission considers it necessary to ensure the maintenance of a fair minimum safety net for employees covered by the modern award, having regard to the terms of this request and the existing award provisions (including under NAPSAs) for those employees..' ¹⁷.

¹⁴ WR Act s576(2)(b)

¹⁵ Consolidated Ministerial Request paras 2(c) & (d)

¹⁶ Consolidated Ministerial Request para 31

¹⁷ Consolidated Ministerial Request para 32

77. On this basis, the NSW Government submits that the full range of conditions in the relevant NSW awards be included in the modern industry award(s). With regard to the Commission's obligation to remove state-based differences¹⁸, the NSW Government reiterates its earlier submission that '...dealing with issues raised by differing State community standards would be most appropriately dealt with in the medium term, having regard to the five year transition period provided for by s576T(2)...'¹⁹.

1.4 Maintaining the Relevance of Modern Awards

78. In our initial submission regarding the award modernisation process the NSW Government urged the Commission to 'be cognisant of the need to make awards as relevant and contemporary as possible'²⁰. This point was intended to be made in the broadest possible sense, having regard to the fact that many matters unforeseen at the time of making an award may later become sufficiently important to the parties to prompt their inclusion in the relevant award. While the extent to which modern awards can adapt in the future to changes depends largely on future amendments to the *Workplace Relations Act*, the following submissions are nevertheless relevant.

79. As it stands, there appear to be a number of matters of increasing public and industrial importance which may be appropriately addressed by modern awards. Indeed, some of these matters are the subject of current Commonwealth Government review processes and it may be reasonably expected that these reviews will report prior to the effective date of modern awards on 1 January 2010.

80. The Productivity Commission is currently undertaking an Inquiry into improved support for parents of newborn children and is required to report its findings by February 2009. The Terms of Reference of the Inquiry require the Productivity Commission to identify paid maternity, paternity and parental leave models that could be used in the Australian context.

81. Depending on the administrative requirements of any potential paid parental scheme, modern awards will need to be responsive and flexible enough to deal with industry specific implementation issues.

82. The Commonwealth government has also initiated a number of concurrent reviews into 457 and other temporary working visas, to strengthen the integrity of these visa programs.

¹⁸ Workplace Relations Act, s576T.

¹⁹ NSW Govt Submission to the AIRC Award Modernisation para 142.

²⁰ NSW Govt Submission to the AIRC Award Modernisation para 173.

83. Outcomes of these reviews, particularly in relation to wages and conditions of employment will have significant industrial relations implications. Modern awards will need to be capable of accommodating and/or incorporating review outcomes with industrial relations implications as well as be responsive to future federal government policy in this growth area.
84. The potential consequences of measures designed to mitigate climate change appear to be far-reaching. Modern awards will need to be capable of being responsive to future workforce needs and changes in relation to climate change policies.
85. Changes in industry structures and organisation, occupations, skills, job design, production methods and technology, will require a flexible and adaptable system of awards. In particular, modern awards will need to accommodate new industries and classifications for climate change skills and occupations and re-evaluate existing occupational classifications.
86. The House of Representatives Employment and Workplace Relations Committee is currently conducting an inquiry into pay equity and other causes of potential disadvantage in relation to women's participation in the workforce.
87. The Terms of Reference of the Inquiry require the Committee to examine, among other matters, the adequacy of recent and current equal remuneration provisions in state and federal workplace relations legislation and the need for further legislative reform to address pay equity in Australia.
88. It is clear that the terms of modern awards and the proposed Forward with Fairness substantive legislation may ultimately reflect the recommendations of the Inquiry to the extent that they are adopted by the Commonwealth. The proposed Fair Work Australia will, in particular, need to have the capacity and flexibility to review and vary modern awards to ensure they facilitate equal opportunities and pay equity outcomes for women in their employment.

1.5 Support for Training Provisions as existing NSW standards

89. In accordance with sections 576B (2)(a) and (b) of the *Workplace Relations Act*, the Commission should approach the award modernisation process as an opportunity to use the award system to promote training and skills development to meet economic needs. Skill based classifications and other award conditions provide structures for employers that place a relative value on the skills in the workplace and remuneration incentives for employees to up skill.
90. In creating modern awards the Commission has an opportunity to maintain training related provisions to improve the quality of vocational education and training (VET) outcomes. Existing provisions in federal pre-reform awards and NAPSAs that facilitate VET for apprentices and trainees or more broadly encourage skill development among non-apprentice and trainee employees in NSW include:
- higher wage rates for adult apprentices

- allowances paid to apprentices
- reimbursement of course costs
- paid and unpaid leave to attend training and examinations
- reimbursement for excessive travel costs to attend off-the-job training
- restrictions on overtime for apprentices
- requirement for apprentices to be supervised by qualified tradespeople
- caps on the number of trainees and apprentices that can be supervised by qualified tradesperson
- a higher duties allowance for suitably qualified workplace trainers
- prohibitions on using apprentices to perform unskilled work.

91. Traineeships are covered by a wide range of federal and state awards with trainees in the NSW system covered by some cross-industry awards as well as industry specific training wage awards such as those dealing with clerical and retail employees. The principal cross-industry awards are the *Training Wage (State) Award 2002* or the *National Training Wage Award 2000*.

92. The NSW Government submits that the Commission should:

- support the inclusion in modern awards of wage and classification structures that create skill based career paths linked to the national training framework and the Australian Qualifications Framework
- support the inclusion in modern awards of a comprehensive range of NSW award provisions relating to the employment of apprentices and trainees (including school-based), dealing with wages, allowances, reimbursements, hours, and the quality of on-the-job training (as listed above) and consider apprenticeship classifications linked to competency based progression
- take the broadest possible approach to including provisions that support training and skill development as allowable matters in modern awards. This approach should be taken irrespective of the fact that according to the terms of s576J, 'training' is not specified to be an allowable matter
- not disperse training provisions throughout modern awards but rather take the approach of bringing relevant training clauses together in the one section of a modern award to make the importance of training provisions clear and their meaning easily interpreted.

Conclusion

93. As was pointed out in the NSW Government's first submission:

community standards ... have been (the) subject (of) extensive processes of evidence, submissions, testing and deliberation by the Industrial Relations Commission of NSW, the parties, and other interested bodies.²¹

²¹ NSW Govt Submission to the AIRC Award Modernisation , para 141

94. Whilst making legislation is subject to a different process, the legislated minima described above have been the subject of detailed parliamentary scrutiny and remain in place many decades after their original passage.
95. While these conditions are now contained in NAPSAs, they are nonetheless currently enjoyed by the employees subject to those instruments, and the subject employers are obliged to deliver those conditions.
96. In making modern awards, the Commission should therefore ensure that these important minimum conditions are not lost, and that these awards should provide outcomes for NSW employees at least as beneficial as current State provisions.

Part 2 – Comparison of provisions of NSW Awards with NES and allowable award matters

97. Attached to this section is a table that identifies known relevant NSW State awards (including NSW State Awards that the Commission has not previously identified as relevant). The table indicates whether clauses that can be dealt with under the National Employment Standards or as matters that can be contained in an award pursuant to s576J are to be found in those awards. This table is intended to assist the Commission, when making a modern award, to cross-check whether the relevant NSW State awards contain clauses in respect of each subject, on the submitted basis that in each case the Commission would then review such clauses carefully in order to prevent any reduction in existing conditions.

Textile, Clothing & Footwear Industry: NSW State Awards	NSW award code no.	Parties to NSW award	Effective date of wages clause of NSW award	Date of s.19 review of NSW award
Bootmakers and Heel Bar Operatives, &c. (State) Award	789	Employers: EF Employees: SDA	04/08/2007	4/02/2008 (new award)
Button Makers (State) Award	077	Employer: Jening Pty Ltd, Ming On Trading Pty Ltd Employee: TWU	08/07/2007	23/09/2005
Clothing Trades (State) Award	139	Employer: ABI, EF, ARA Employee: TWU	23/07/2007	18/01/2008 (new award)
Footwear Manufacturing Industry (State) Award	168	Employer: ABI Employee: TWU	07/09/2007	18/01/2008 (new award)
Textile Industry (State) Award	212	Employer: ABI, EF, ARA, CCER Employee: TWU	23/07/2007	18/01/2008 (new award)
Training Wage (State) Award	1614	Employer: ABI, EF, ARA, CCER, MTA, NSWFarmers, AIG Employee: AMWU, CFMEU, LHMU, MEAA, USU, NSWNF, PSA, AWU, UnionsNSW	04/10/2007	26/10/2005

Key:

RED	common rule award not listed in AIRC Award modernisation decision
ABI	Australian Business Industrial
AIG	Australian Industry Group
AMWU	Australian Manufacturing Workers' Union
ARA	Australian Retailers Association, New South Wales Division
AWU	Australian Workers' Union, New South Wales
CCER	Catholic Commission for Employment Relations
CFMEU	Construction, Forestry, Mining and Energy Union (New South Wales) Branch
EF	Employers First
LHMU	Liquor, Hospitality and Miscellaneous Union, New South Wales Branch
MEAA	Media, Entertainment and Arts Alliance New South Wales
NSW Farmers	NSW Farmers' (Industrial) Association
NSWNF	NSW Nurses' Association
PSA	Public Service Association of NSW
USU	United Services Union
SDA	Shop, Distributive and Allied Employees' Association, New South Wales
TWU	Transport Workers' Union of NSW

TEXTILE, CLOTHING AND FOOTWEAR INDUSTRY:		NSW AWARD: incidence of NES/allowable matter	NSW AWARD: incidence of NES/allowable matter	NSW AWARD: incidence of NES/allowable matter
National Employment Standard (NES):		Bootmakers and Heel Bar Operatives, &c. (State) Award 789	Button Makers (State) Award 077	Clothing Trades (State) Award 139
MAXIMUM WEEKLY HOURS		Y	Y	Y
REQUESTS for FLEXIBLE WORKING ARRANGEMENTS		Y	Y	Y
PARENTAL LEAVE		Y	Y	Y
ANNUAL LEAVE		Y	Y	Y
PERSONAL/CARERS LEAVE and COMPASSIONATE LEAVE		Y	Y	Y
COMMUNITY SERVICE LEAVE	Jury Service	Y	Y	Y
	Emergency Leave	N	N	N
LONG SERVICE LEAVE		Y	Y	N
PUBLIC HOLIDAYS		Y	Y	Y
NOTICE of TERMINATION & REDUNDANCY PAY	Notice of Termination	Y	Y	Y
	Redundancy pay	Y	Y	Y
FAIR WORK INFORMATION STATEMENT		N	N	N
Allowable Award Matters:				
MINIMUM WAGES	Adult wage	Y	Y	Y
	Junior wage	Y	Y	N
	Apprenticeships/ Traineeships	Y	Y	Y
TYPE of WORK PERFORMED		Y	Y	Y

ARRANGEMENTS for when WORK PERFORMED		Y	Y	Y
OVERTIME RATES		Y	Y	Y
PENALTY RATES		Y	Y	Y
PROVISION for ANNUALISED WAGE/SALARY ARRANGEMENTS		N	N	N
ALLOWANCES		Y	Y	Y
LEAVE, LEAVE LOADINGS, Arrangements for taking leave	Annual Leave	Y	Y	Y
	Leave Loading	Y	Y	Y
SUPERANNUATION		Y	Y	Y
CONSULTATION, Representation & Dispute settling procedures		Y	Y	Y
Specific Condition Based NSW Awards in Textile, Clothing and Footwear Industry:		Retail Industry (State) Training Wage Award (4165)		Training Wage (State) Award (1614)

KEY: Y: where the NES/allowable award matter appears within the NSW award
N: where the NES/allowable award matter does not appear within the NSW award

TEXTILE, CLOTHING AND FOOTWEAR INDUSTRY:		NSW AWARD: incidence of NES/allowable matter	NSW AWARD: incidence of NES/allowable matter	NSW AWARD: incidence of NES/allowable matter
National Employment Standard (NES):		Footwear Manufacturing Industry (State) Award 168	Textile Industry (State) Award 212	
MAXIMUM WEEKLY HOURS		Y	Y	
REQUESTS for FLEXIBLE WORKING ARRANGEMENTS		Y	Y	
PARENTAL LEAVE		Y	Y	
ANNUAL LEAVE		Y	Y	
PERSONAL/CARERS LEAVE and COMPASSIONATE LEAVE		Y	Y	
COMMUNITY SERVICE LEAVE	Jury Service	Y	Y	
	Emergency Leave	N	N	
LONG SERVICE LEAVE		N	N	
PUBLIC HOLIDAYS		Y	Y	
NOTICE of TERMINATION & REDUNDANCY PAY	Notice of Termination	Y	Y	
	Redundancy pay	Y	Y	
FAIR WORK INFORMATION STATEMENT		N	N	
Allowable Award Matters:				
MINIMUM WAGES	Adult wage	Y	Y	
	Junior wage	Y	Y	
	Apprenticeships/ Traineeships	Y	Y	
TYPE of WORK PERFORMED		Y	Y	
ARRANGEMENTS for when WORK PERFORMED		Y	Y	
OVERTIME RATES		Y	Y	
PENALTY RATES		Y	Y	
PROVISION for ANNUALISED		N	N	

WAGE/SALARY ARRANGEMENTS				
ALLOWANCES		Y	Y	
LEAVE, LEAVE LOADINGS, Arrangements for taking leave	Annual Leave	Y	Y	
	Leave Loading	Y	Y	
SUPERANNUATION		Y	Y	
CONSULTATION, Representation & Dispute settling procedures		Y	Y	
Specific Condition Based NSW Awards in Textile, Clothing and Footwear Industry:		Training Wage (State) Award	Training Wage (State) Award	

KEY: Y: where the NES/allowable award matter appears within the NSW award
N: where the NES/allowable award matter does not appear within the NSW award

Part 3 - Special Measures in NSW legislation that regulate particular industries

98. In this section, legislation specific to the textile, clothing and footwear industry is identified. In the NSW Government's submission, this legislation forms part of the community standard relevant to this industry, and it is therefore relevant to the making of modern awards for the textile, clothing and footwear industry.
99. The textile, clothing and footwear industry is a particularly vulnerable sector of the labour force. It has a high proportion of female workers, many of whom are from non-English speaking backgrounds; a majority of its workers are heavily award reliant, with little or no capacity to bargain. The industry also contains outworkers who manufacture clothing products outside the employer's workshop or factory under a contract of service and are mostly engaged on a casual basis with little or no official documentation.
100. Considering the vulnerable nature of this industry's labour force it is essential the range of specific NSW industrial legislation is maintained to ensure protections from exploitative practices.

Provisions for outworkers in NSW Industrial Relations Act 1996 (IR Act)

101. To avoid any doubt regarding the status of outworkers, s5(3) Schedule 1 of the IR Act explicitly deems an outworker to be an employee for the purposes of the Act, thereby ensuring such individuals in the NSW jurisdiction are afforded the protection of the Clothing Trades (State) Award.
102. The IR Act also contains provisions specifically to protect outworkers from exploitative employment practices. In 2001, new provisions were included in the IR Act to establish a system for outworkers to recover unpaid wages from their employer, through the supply chain.
103. In 2006, in anticipation of the commencement of the federal government's Work Choices legislation, the IR Act was amended to include additional provisions protecting outworkers who work in the federal industrial relations system. As a consequence of the amendment, conditions of employment set out in the Clothing Trades (State) Award in relation to outworkers became applicable by force of legislation to outworkers employed by constitutional corporations and employers.

Industrial Relations (Ethical Clothing Trades) Act 2002

104. To support compliance within the industry the NSW Government enacted the *Industrial Relations (Ethical Clothing Trades) Act 2002* which established the *Ethical Clothing Trades Extended Responsibility Scheme*. The Scheme, which came into effect on 1 July 2005 is an initiative of the NSW Government designed to address the exploitation of clothing outworkers and was a key recommendation of the Ethical Clothing Trades Council.

105. The Council was established by the NSW Government as part of the Behind the Label Strategy to improve compliance with industrial law in the NSW clothing industry and advise the Government on ways to address issues facing clothing workers.
106. The Scheme places certain obligations on clothing retailers, suppliers, contractors and sub-contractors, about clothing goods made in Australia and sold within NSW. These obligations generally relate to keeping and exchanging information about the manufacture of clothing, and making those records open to inspection.
107. Under the Scheme, at least twice each year, retailers must provide to the NSW Office of Industrial Relations details of all the suppliers that manufacture clothing in Australia for the retailer and whether any of these suppliers engage outworkers.
108. The Scheme also compels suppliers to provide retailers with details on agreements to supply clothing products. It must contain all details concerning where the work is being performed, if contractors are engaged and their particulars, and whether outworkers are used in the supply of clothing products.
109. The Scheme's requirements provide for more transparency of industry supply chains, greater capacity to protect the rights of outworkers and promote ethical practice within the industry.
110. A voluntary code of practice²² jointly developed by unions and business is an alternative to compliance with the Scheme. The code sets out business practices that lead to ethical dealings with outworkers in the clothing industry.

²² Voluntary Retailers Ethical Clothing Code of Practice
http://www.retail.org.au/ara2/fileadmin/user_upload/ss-pir/ARA%20%20Ethical%20Clothing%20Code.pdf

Part 4 – NSW Award Conditions

111. NSW State awards relevant to this industry have a significant history, indicating their durability and ongoing relevance.
112. Tables have been prepared in respect of the *Clothing Trades (State) Award* in the NSW State system of particular significance in this industry, dealing with some key clauses in those awards.
113. The tables attached in this section record the provenance and currency of those award provisions. The tables demonstrate that these clauses have been seldom the subject of applications for variation, have remained in the respective instruments over a very long time and may be thereby presumed to have a relevance to the parties in the industry not only because of those facts, but because the provisions themselves, more often than not, deal with matters which are of some practical real significance to the employment of persons in the respective industries.
114. In the NSW Government's submission, the provisions set out in the attached tables should be closely considered in the award modernisation process with a view to replicating them as far as possible to ensure that no disadvantage to employers or employees would result in the making of a modern award.
115. See tables attached.