

New South Wales Government

**Submission to the Australian Industrial
Relations Commission**

**Award Modernisation in the
Mining Industry**

July 2008

Table of Contents

Overview	3
Background.....	4
Part 1 NSW Community Standards.....	4
1.1 NSW Community Standards in Awards	5
Secure Employment Test Case	6
Family Provisions Test Case	6
Equal Remuneration Principle	7
Redundancy.....	8
Hours of Work – Reasonable Hours Test Case	8
1.2 NSW Community Standards in Legislation	9
Annual Holidays Act 1944.....	9
Long Service Leave Act 1955	11
Employment Protection Act 1982.....	11
Industrial Relations Act 1996	12
1.3 Why specific NSW Award provisions should be preserved.....	13
1.4 Maintaining the Relevance of Modern Awards	15
1.5 Support for training provisions as existing NSW standards	17
Conclusion.....	18
Part 2 – Comparison of provisions of NSW Awards with NES and allowable award matters	19
NSW Project/Enterprise Awards within the Mining Industry	23
Part 3 - Special Measures in NSW legislation that regulate the mining industry	24
NSW Long Service Leave (Metalliferous Mining Industry) Act 1963.....	24

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 mining industry, principally from the position of advocating that it reflect community standards and award entitlements contained in NSW awards and legislation.
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 to 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
 - 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

¹ AIRC Print No PR062008 20 June 2008, para 195

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;

- Also in **Part 2**, identifies those NSW State Awards that, as a result of NSW legislation, were converted to State enterprise agreements before 27 March 2006 and so are not NAPSAs, but rather Preserved State Agreements

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.

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.

² NSW Govt Submission to the AIRC Award Modernisation para 9

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.
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.

³ Secure Employment Test Case [2006] NSWIRComm 38

⁴ [PR802005]

⁵ Family Provisions Case 2005 [2005] NSWIRComm 478

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 (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).

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.

⁶ Re application for redundancy awards [1994 AILR 301]

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

⁸ State Working Hours Case 2003 [2003] NSWIRComm 86

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 to the Workplace Relations Act 1996, the conditions set by the AH Act are currently conditions contained in NAPSAs applicable to almost all NSW employees employed by a constitutional 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

⁹ See ss48 and 50 of Industrial Relations Act 1996

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.

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

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

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

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...' ¹³, and the Request provides

that the creation of modern awards is not intended to disadvantage employers or employees.¹⁴

76. Further, the Request provides that ‘a modern award may include industry-specific detail about matters in the NES’¹⁵, 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.’¹⁶
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 differences¹⁷, 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)...’¹⁸.

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’¹⁹. 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

¹³ WR Act s576(2)(b)

¹⁴ Consolidated Ministerial Request paras 2(c) & (d)

¹⁵ Consolidated Ministerial Request para 31

¹⁶ Consolidated Ministerial Request para 32

¹⁷ Workplace Relations Act, s576T.

¹⁸ NSW Govt Submission to the AIRC Award Modernisation para 142.

¹⁹ NSW Govt Submission to the AIRC Award Modernisation para 173.

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.
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.²⁰

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.

²⁰ NSW Govt Submission to the AIRC Award Modernisation , para 141

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.

Mining 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
Metalliferous Mining Industry (State) Award	474	Employer: AMMA (listed in conciliation committee only) Employee: AMWU, ETU, AWU	27/01/2004	03/10/2007
Mineral Sands Mining and Treatment Industry (State) Consolidated Award	477	Employer: ABI Employee: AIMPE, AMWU, ETU, AWU	27/10/2007	23/11/2003

Key: ABI Australian Business Industrial
 AIMPE Australian Institute of Marine and Power Engineers New South Wales District
 AMWU Australian Manufacturing Workers' Union
 AMMA Australian Mines and Metals Association
 AWU Australian Workers' Union, New South Wales
 ETU Electrical Trades Union of Australia, New South Wales Branch

MINING INDUSTRY:		NSW AWARD: incidence of NES/allowable matter	NSW AWARD: incidence of NES/allowable matter
National Employment Standard (NES):		Metalliferous Mining Industry (State) 474	Mineral Sands Mining and Treatment Industry (State) 477
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		Y	Y
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 WAGE/SALARY ARRANGEMENTS		N	N
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 the Mining Industry:			

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

NSW Project/Enterprise Awards within the Mining Industry

98. The NSW State Awards listed below were included in the Commission's first Award Modernisation Decision handed down on 20 June 2008 as NSW State Awards relevant to this industry. They are, however, Project/Enterprise Awards which did not become NAPSAs.
99. It should be noted that the Industrial Relations Amendment Act 2006 (NSW) deemed existing consent or enterprise awards to be enterprise agreements within the meaning of the Industrial Relations Act 1996 (NSW), with effect immediately prior to the commencement of Workplace Relations Amendment (Workchoices) Act 200521.
100. On commencement of that Act, therefore they were converted into Preserved State Agreements.

Elura Mine Enterprise (Consent) Award 2001	AN120194
Flyash Australia (State) Award 2002	AN120211
Galong Mine Lease 1496 (State) Award	AN120224
UNIMIN Australia Limited - Attunga (NSW) Enterprise Award 2004	AN120623

²¹ See NSW Government, Supplementary Submission to the AIRC- Award Modernisation June 2008, paras 2-10.

Part 3 - Special Measures in NSW legislation that regulate the mining industry

101. In this section, legislation specific to the mining industry is identified. In the NSW Government's submission, this legislation forms part of the community standard relevant to the mining industry, and it is therefore relevant to the making of modern awards for the mining industry.

NSW Long Service Leave (Metalliferous Mining Industry) Act 1963

102. Long Service leave entitlements in New South Wales are predominantly provided for by the Long Service Leave Act 1955. Within the metalliferous mining industry however, there is a counterpart statute, providing long service leave entitlements for employees in the industry (the Long Service Leave (Metalliferous Mining Industry) Act 1963).
103. Workers engaged in the metalliferous mining industry in New South Wales are subject to this special legislation in relation to their long service leave rights. Enacted in 1963, the Long Service Leave (Metalliferous Mining Industry) Act provides long service leave benefits to employees in the industry which are superior to the those accorded employees covered by the Long Service Leave Act 1955.
104. The enhanced long service leave benefits for metalliferous miners in the NSW recognise the arduous and hazardous nature of the work undertaken and the isolated locations that miners are often required to work. The entitlements also provide parity with coal mining workers, who since 1949 have been entitled to paid long service leave of three months after ten years' continuous service.