

**New South Wales Government**

**Submission to the Australian Industrial  
Relations Commission**

**Exposure Draft Modern Awards  
Stage 2**

**February 2009**

## Part 1

1. A primary concern of the NSW Government is that NSW workers are not disadvantaged as a result of the award modernisation process. Rates of pay and community standards for such workers, to date contained in NSW common rule awards, should not be diminished.
2. The NSW Government is accordingly concerned that the Australian Industrial Relations Commission's (the Commission) 23 January 2009 decision proposes by way of exposure drafts for modern awards to exclude certain conditions contained in NSW Notional Agreements Preserving State Awards (NAPSAs) and/or reduce employee conditions in comparison to those NAPSAs.
3. From March 2006 the rates of pay in NSW awards became part of the Australian Pay and Classification Scales (APCS). The Commission is required by s. 576B(2)(h) of the *Workplace Relations Act 1996* (Cth) to have regard to those rates in setting rates of pay in modern awards. The Commission cannot disregard NSW rates merely because they are different to or were set in a manner different to federal award rates.
4. Similarly, in respect of conditions, the Award Modernisation Ministerial Request<sup>1</sup> (the Ministerial Request) makes clear that the creation of a modern award is not intended to disadvantage employees: 2(c). Accordingly, a modern award that replaces a NSW NAPSA would take as its starting point an objective of not setting conditions below those found in that NAPSA.
5. NAPSAs, by their nature, are creations of the Industrial Relations Commission of NSW (IRC). In many circumstances they are the result of an arbitral outcome. In some circumstances, following conciliation or other processes, the parties present an award that is partially or wholly by consent. In each case the award is the creation of the IRC which will make the award only if it is satisfied that it sets fair and reasonable

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<sup>1</sup> Julia Gillard, Deputy Prime Minister and Minister for Employment and Workplace Relations, Award Modernisation Request to the President of the Australian Industrial Relations Commission, 18 December 2008.

conditions of employment and complies with wage fixing principles:  
see s. 10 *Industrial Relations Act 1996* (NSW).

6. The NSW Government is concerned that the Commission in considering NAPSAs, may be too quick to conclude that any condition that is above conditions found elsewhere must be a reflection of a *bargained outcome* and therefore is somehow said to be not a *safety net* condition.
7. Once contained in a State award, that condition or rate of pay becomes the minimum standard required to be paid in NSW for such workers. It is the safety net. Second, as noted, these conditions and rates are set by the IRC and are not to be treated as if they are an enterprise agreement outcome. Third, and most importantly, the NSW Government is concerned that the Commission should not conclude that a NSW award rate of pay or condition is the result of a *bargained outcome* without examining with great care the industrial history of that condition to ensure that such a conclusion can be properly drawn. In particular, the NSW Government is concerned that the exposure drafts in some respects reach such a conclusion without any evidence nor any expressed analysis as to how such conclusion was reached.
8. Failure by the Commission to have proper regard to NSW rates and conditions found in NSW NAPSAs may well amount to jurisdictional error.

### **Capacity to maintain State-based differences**

9. Pursuant to s. 576T(2) of the *Workplace Relations Act 1996* (Cth), a modern award can contain state-based differences for a period of five years.
10. The NSW Government urges the Commission not to make modern awards that have the effect of reducing the take home pay of NSW employees or that removes or reduces NSW community standard conditions.

11. Given the capacity to maintain current conditions for NSW workers for five years there seems no good reason why an approach would be taken that would reduce them at least during that period.
12. Should the Commission determine to include in a modern award a rate of pay or condition less than the applicable NSW NAPSA or NSW award derived APCS, the Commission should ensure (consistent with the Ministerial Request) that the NSW condition would be maintained for NSW employees at least during the five year period, with these NSW based rates and allowances to be adjusted in accord with the annual wage review processes envisaged by the *Fair Work Bill*.

**Balance of this submission**

13. In Part 2 of this submission the NSW Government turns to specific NSW NAPSA conditions which are not being reflected in modern awards but should be if employees are not to be disadvantaged.
14. In Part 3 of the submission the NSW Government turns to the exposure drafts and makes specific comments as to the apparent failure by the Commission to date to have proper regard to NSW NAPSA conditions and APCS rates of pay derived from NSW awards.

## Part 2

15. The NSW Government is concerned that the NSW community standard condition in respect of casual conversion and secure employment is being properly reflected in neither the modern awards made to date nor the exposure drafts. Second, the NSW Government is concerned that the method of calculating wage payments for periods of annual leave applicable to NSW employees is being significantly reduced by modern awards, including the exposure drafts. Third, the NSW Government is concerned that modern awards are dealing with jury service in a manner which significantly reduces entitlements of NSW employees.
16. A majority of the modern awards made do not include these basic entitlements, with the result that these provisions are inconsistently applied on an industry by industry basis. A similar consideration applies in the case of the stage 2 exposure draft awards.

### Annual leave

17. The annual leave NES provides that an employee only receives their base rate of pay for the purposes of annual leave. By contrast the *Annual Holidays Act 1944* (NSW) provides that penalty rates and shift allowances the employee would have earned over the relevant leave period had the employee not been on leave are included in the leave payment calculation.
18. Under the terms of the NES, a modern award may include provisions dealing with the taking of paid annual leave and the Ministerial Request allows a modern award to supplement the NES 'where the Commission considers it necessary to do so to ensure the maintenance of a fair minimum safety net'.<sup>2</sup>
19. An analysis of the stage 1 priority awards reveals that only seven of the seventeen modern awards made by the Commission prescribe a more

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<sup>2</sup> Para 32 of the consolidated Ministerial Request

generous payment to employees when commencing annual leave. It should further be noted that similar inconsistencies are also evident in the stage 2 exposure drafts published in the 23 January Statement issued by the Commission.

20. It is the view of the NSW Government that all employees covered by modern awards should be entitled to the more beneficial annual leave payment standard. The NSW Government urges the Commission to apply the more generous annual leave provisions in a uniform manner and thereby provide a fair and relevant minimum safety net of terms and conditions for all employees in accordance with the modern award objective as proposed by s134 of the *Fair Work Bill*.

### **Secure employment provisions**

21. The majority of major state awards/NAPSAs in NSW contain provisions which provide a right for casuals with a regular and systematic pattern of engagement for a prescribed period with an employer to seek conversion to permanent full time or part time employment.
22. Of the 17 awards that were made on 19 December 2008, only five contain clauses that facilitate an employee's right to convert from casual employment to other types of employment arrangements.
23. The NSW Government is concerned that the Commission has effectively adopted an approach to the secure employment provisions which requires them to be retained where they constitute an industry standard and only extended in exceptional circumstances.<sup>3</sup> The right of casual employees to elect to convert to permanent employment is an important test case standard in the NSW jurisdiction and should be applied uniformly across modern awards to provide a fair and relevant safety net of employment conditions.

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<sup>3</sup> [2008] AIRCFB 1000 para 51

24. The NSW Government also notes with concern that while the exposure draft of the Clerks – Private Sector Award 2010 contained secure employment provisions, these were subsequently removed when the award was made on 19 December 2008. In the absence of any explicit reason for this excision, the NSW Government submits, consistent with the position it has taken, that the clause should be restored to the modern clerical award.

### **Jury service leave**

25. The NES provides that jury service leave should be limited to 10 days whereas a substantial number of NSW NAPSAs provide an unlimited number of paid days from work to attend jury service.
26. At para 103 of its 23 January Statement the Commission has noted that if it were to ‘maintain an unlimited entitlement it would be necessary to supplement the NES in every modern award’ and to do so ‘would be inconsistent with the NES and tend to undermine it’.
27. The NSW Government notes in this regard that the Ministerial Request, in dealing with the interaction between modern awards and the NES, states that ‘the NES will operate in conjunction with a relevant modern award to provide a fair safety net of minimum entitlements for award covered employees’. The Request also permits a modern award to ‘supplement the NES where the Commission considers it necessary to do so to ensure the maintenance of a minimum safety net for employees covered by the modern award, having regard to...the existing award provisions (including under NAPSAs) for those employees’.<sup>4</sup>
28. The NSW Government believes that entitlements integral to a fair safety net should apply across all modern awards so that all employees have equitable access to them. It also reiterates the view that the

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<sup>4</sup> Paras 28 and 32 of consolidated Ministerial Request

entitlements currently enjoyed by employees in NSW should not be detrimentally affected by the award modernisation process.

29. Accordingly, while it would be the strongly preferred option of the NSW Government if all employees were given an extended entitlement to unlimited paid leave for jury service, the Commission should at least not remove that current entitlement from NSW employees for so long as it can maintain state-based differences.

### Part 3

30. Earlier in this submission the NSW Government has identified its concern that the Commission has published exposure drafts which will have the effect of reducing conditions of employment for employees in NSW and, in some circumstances, their rates of pay. In this part the NSW Government identifies with particularity its concerns.

#### Road Transport and Distribution Award 2010

31. The Commission requested the parties to make further submissions about the appropriateness of including rates of pay from the Transport Industry (State) Award/NAPSA in a modern minimum safety net award (para 102).

32. At para 102, in relation to the Road Transport and Distribution Award 2010 exposure draft, the Commission states:

The classification structure and minimum rates of pay are based on the [federal] Transport Workers Award. The majority of pre-reform awards also reflect similar if not identical rates of pay, as do several of the NAPSA's, as the general industry transport award. The rates in the *Transport Industry (State) Award*, a New South Wales NAPSA, are considerably higher and we have not reproduced them in this exposure draft. The parties may wish to confer about the New South Wales rates and make further submissions about how they may be accommodated in a modern minimum safety net award.

33. When analysing comparable wage classifications within the APCS derived from the Transport Industry (State) Award/NAPSA, it is evident they contain more favourable rates of pay than the exposure draft. The following table illustrates the significant difference in wages for a full-time employee.

<b>Classification</b>	<b>NAPSA/Pay Scale</b>	<b>Modern Award</b>	<b>Difference</b>
Transport Worker Grade 1	\$621.68	\$577.60	\$44.08
Transport Worker Grade 2	\$638.78	\$592.90	\$45.88
Transport Worker Grade 3	\$650.56	\$600.60	\$49.96
Transport Worker Grade 4	\$661.20	\$612.10	\$49.10
Transport Worker Grade 5	\$687.80	\$619.70	\$68.10
Transport Worker Grade 6	\$694.64	\$627.40	\$67.24
Transport Worker Grade 7	\$714.78	\$637.10	\$77.68
Transport Worker Grade 8	\$751.26	\$656.10	\$95.16

34. The NSW Government submits that the fact that the rates of pay set down in this, or any other NSW NAPSA, are higher than other federal awards and NAPSAs within particular industries is insufficient justification to consider them not appropriate for inclusion within the exposure drafts of the modern awards.
35. The rates contained in this State award were amended in 1996 in proceedings which were arbitrated. In that decision the IRC awarded wage increases only on the basis of certain award changes consented to by a majority of the parties. These included the extension to Saturday of ordinary time for an industry which was then traditionally regarded as a five-day week, widening the span of ordinary hours and reducing the minimum engagement for casual employees.<sup>5</sup>
36. NSW submits that, it would be wrong to conclude that the rates of pay are not *safety net* rates or should be disregarded merely because they are higher than rates elsewhere. Accordingly, the Commission should ensure that the modern award permits NSW rates to continue to be paid to workers in NSW doing that work.

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<sup>5</sup> See 95 IR 126 Re: Transport Industry (State) Award

## Waste Management Industry Award 2010

37. In relation to the Waste Management Industry Award 2010 exposure draft at para 111 the Commission states:

The rates in the New South Wales NAPSAs are considerably higher than the rates in the federal award and reflect a bargained approach to wage outcomes. The rates in the federal award reflect the results of award simplification and it appears, at least at this stage, that they are properly fixed minimum rates appropriate for a safety net award.

38. The Statement does not refer to any evidence, decisions or other material which would form a proper basis for a conclusion that the rates in this NSW award are rates which are above a safety net or otherwise above that which is appropriate. To date, the Commission has had the benefit of submissions from relevant parties in respect of this award. Those submissions put conflicting factual statements as to the history of this award and the nature of how the rates were to be determined. The Commission is not able to form conclusions merely from competing submissions without the parties being given the opportunity to test evidence and/or submissions.
39. Further, even if the rates in this award were not arbitrated, they nevertheless are rates set by the NSW IRC pursuant to its statutory obligations and wage fixing principles. The Commission would not be complying with its statutory obligation (see s 576B(2)(h)) to disregard such rates because of a perception that they are in some way *bargained*. They were, from the time they were made, the minimum rate required to be paid in NSW and are in that sense a safety net. Given that para 2(c) of the award modernisation request requires that employees not be disadvantaged, the Commission would not disregard these rates but rather ensure that the modern award had provisions which permit NSW employees to not suffer any reduction in rates of pay.

## **Building and Construction Industry General On-Site Award 2010**

40. The Commission invited the relevant parties in the construction sector to address the suitability of 'the continuing role of the daily hire mode of employment, and associated loaded rates, in the context of a contemporary safety net modern award' (para 39).
41. The exposure draft of this award provides for lower minimum weekly wages when compared to those provided within the APCS derived from the Building and Construction Industry (State) Award/NAPSA. The following table includes three such examples.

<b>Classification</b>	<b>NAPSA/Pay Scale</b>	<b>Modern Award</b>	<b>Difference</b>
CW Level 2	\$666.90	\$619.00	\$47.90
CW Level 3 (Carpenter and/or Joiner)	\$710.22	\$637.60	\$72.62
CW Level 5	\$729.22	\$679.40	\$49.82

42. With regard to redundancy provisions in the building and construction industry the Commission noted at para 41 in its 23 January 2009 Statement:

...Most, but not all, awards contain the provision peculiar to the building and construction industry, which defines redundancy more broadly than the definition arising from Commission test cases and reflected in the NES...

43. It is submitted that the redundancy provisions in the Building and Construction Industry General On-site Award 2010 and Plumbing and Fire Sprinklers Contracting Industry and Occupational Award 2010 exposure drafts are less beneficial to certain employees when compared to the relevant NSW NAPSAs in those industries. The

specifics of each award are dealt with under the relevant headings below.

### **Building and Construction Industry General On-Site Award 2010 - Redundancy**

44. The Commission has included a redundancy pay scale similar to the provision contained within the Building and Construction Industry (State) Award/NAPSA. It is not clear, however, why the provisions of clause 18.4 of the exposure draft only apply to employees of a *small employer*. The redundancy provisions in the NSW NAPSA apply to all employees regardless of the number of employees employed in the business.
45. An employee other than a casual is also entitled to redundancy pay in the following circumstances under the Building and Construction Industry (State) Award/NAPSA:
  - where an employee terminates his/her employment (cl.16.1); or
  - where an employee is terminated by the employer for reasons other than misconduct or refusal of duty and the employee has been employed for less than twelve months continuous service (cl.16.2).
46. It is acknowledged, however, that the transitional provisions contained within clause 18.7 of the exposure draft protect an employee's entitlement to redundancy pay under the NAPSA until 31 December 2014.
47. The NSW Government has concerns that if the redundancy clause in the exposure draft retains its current content, a two-tier entitlement to redundancy will apply from 1 January 2015 as follows:
  - redundancy pay for employees of a *small employer* will be provided by the modern award; while

- employees of *larger employers* will have their redundancy pay provided by the NES which provides a less beneficial redundancy pay scale for the first four years of service.
48. The NSW Government notes that the Commission in this respect is considering maintaining a state-based difference for five years. While this is to be preferred over the option of removing the current NSW entitlement altogether, it is submitted that the strongly preferred option approach would be to increase the conditions that apply generally to avoid the two-tiered approach identified above occurring in the future.

### **Plumbing and Fire Sprinklers Contracting Industry and Occupational Award 2010 – Redundancy**

49. Although the Plumbers and Gasfitters (State) Award/NAPSA contains similar redundancy pay provisions to the Building and Construction Industry (State) Award/NAPSA it is not clear why those provisions have not been included in this exposure draft.
50. The redundancy pay scale contained within cl. 30 of the Plumbers and Gasfitters (State) Award/NAPSA provides a more favourable entitlement than the exposure draft:
- where an employee is employed for less than four years;
  - where an employee terminates his/her employment; and
  - where an employee is terminated by the employer for reasons other than misconduct or refusal of duty and the employee has been employed for less than twelve months continuous service.

### **Electrical, Electronic and Communications Contracting Industry Award 2010**

51. The Commission noted the exclusion of an attendance allowance contained in a pre-reform federal award from the relevant exposure draft because an additional payment for attendance at work has no role within a minimum safety net award (para 48).

52. The Commission also noted the appropriateness of the level of minimum classification rates derived from the NSW Electrical, Electronic and Communications Contracting Industry (State) Award/NAPSA for inclusion in a safety net award (para 49).
53. The following table reveals the significant difference in minimum wage rates for a weekly employee when comparing the pay scale derived from the Electrical, Electronic and Communications Contracting Industry Award/NAPSA to the exposure draft.

<b>Classification</b>	<b>NAPSA/Pay Scale</b>	<b>Modern Award</b>	<b>Difference</b>
Grade 1	\$589.00	\$552.20	\$36.80
Grade 2	\$612.18	\$572.70	\$39.48
Grade 3	\$635.74	\$593.90	\$41.84
Grade 4	\$658.92	\$614.70	\$44.22
Grade 5	\$684.38	\$637.60	\$46.78

54. The NSW Government submits that, consistent with the Ministerial Request, the Commission should not make the modern award in these terms since it will have the effect of reducing the take home pay of NSW employees.
55. There would appear to be no good reason not to apply NSW rates, which were set by the IRC and are the current minimum rates in NSW. Should the Commission determine to include in this modern award a rate of pay or condition less than the applicable NSW NAPSA or NSW award derived APCS, the Commission should ensure (consistent with the Ministerial Request) that the NSW condition would be maintained for NSW employees at least during the five year period, with rates and allowances to be adjusted in accord with the annual wage review processes envisaged by the *Fair Work Bill*.

### **Cleaning Services Industry Award 2010**

56. The Commission observed that in the cleaning industry there are a large number of allowances in various awards and NAPSAs that are State or location specific and noted that 'it is not always clear that they are appropriate for inclusion in a safety net award' (para 62).
57. The NSW Government's view is that there should be well considered reasons based on sound evidence before excluding such allowances from the modern award.

### **Transport Industry (Cash in Transit) Award 2010**

58. The Commission noted whether an allowance specific to a particular contract in the cash-in-transit sector of the transport industry is appropriate for a modern minimum safety net award (para 107).
59. The NSW Government's view is that current allowances in the NAPSA should be included in the modern award, irrespective of whether their source is from a NAPSA or pre-reform federal award.

### **Quarrying Industry Award 2010 Exposure Draft - Minimum Wage Rates**

60. The Commission at para 108 noted that the minimum wages in the exposure draft are significantly lower than the NSW NAPSA rates of pay. Although the classifications in the Quarries (State) Award/NAPSA are not exactly equivalent to the classifications in the exposure draft they are similar and the following table provides an example of the difference in particular classification rates of pay. It should be noted that as an APCS has not been published for this NAPSA the rates are derived from the current NSW state award.

Classification	NAPSA*	Classification	Modern Award**	Difference
Operator Level One	\$598.40	Grade I (Trainee)	\$580.73	\$17.67
Operator Level Two	\$625.30	Grade II	\$620.13	\$5.17
Operator Level Three	\$650.30	Grade III	\$638.93	\$11.37
Operator Level Four	\$673.20	Grade IV	\$658.43	\$14.77
Operator Level Five	\$685.70	Grade V	\$678.83	\$6.87

\* includes industry disability & inclement weather allowance

\*\* includes industry allowance

61. The NSW Government submits that, consistent with the Ministerial Request, the Commission should not make the modern award in these terms since it will have the effect of reducing the take home pay of NSW employees.
62. The NSW Government can see no good reason why the Commission would not apply NSW rates, which were set by the IRC and are the current minimum rates in NSW.
63. If, however, the Commission chose not to use the NSW rates, then it would at the very least maintain current conditions for NSW workers for five years with rates and allowances to be adjusted in accord with annual wage review processes envisaged by the *Fair Work Bill*. This would avoid NSW employees being disadvantaged by the modern award.

### **Pastoral Industry Award 2010**

64. The Commission noted that the draft award for the pastoral industry attempts to bring together a number of pre-reform federal awards and 'NAPSAs containing an extremely diverse range of conditions' and

when the modern award is made, attention will need to be given to appropriate transitional provisions (para 30).

65. The view of the NSW Government is that, consistent with the Ministerial Request, rates of pay and other conditions in the NSW Pastoral Industry (State) Award/NAPSA should not be undermined by the award modernisation process. The NSW Government has particular concerns about the extension of the span of ordinary hours proposed in the exposure draft award.
66. Specifically, the draft modern award provides that ordinary hours are to be worked on any five days Monday to Sunday for up to 10 hours per day within a span of 5.00am to 7.00pm. any hours work outside ordinary hours are overtime. These hours apply to farm and livestock hands. The award is to have broad coverage and includes livestock management, dairying and hatchery work.
67. The NSW Pastoral Employees (State) Award, the basis of the NAPSA, provides for station hands to work ordinary hours five days Monday to Friday (160 hours over 4 weeks) and five and one-half days including Saturday where work is essential for good husbandry or tending stock. All work in excess is to be paid at overtime with Sunday work at double time and a Sunday penalty rate of time and one-half in the case of feeding or watering stock (see cl.51).
68. The NSW Government submits that, consistent with the Ministerial Request, the Commission should not make the modern award in these terms since it will have the effect of reducing the take home pay of NSW employees by reducing their overtime payments.
69. There would appear to be no good reason not to apply NSW conditions set by the IRC and which have been the minimum conditions in NSW over many years.

70. If, however, the Commission chose not to use the NSW conditions, then the Commission would at the very least maintain them for NSW workers for five years with rates and allowances to be adjusted in accord with the annual wage review processes envisaged by the *Fair Work Bill*.