

**New South Wales Government**

**Submission to the Australian Industrial Relations  
Commission**

**Award Modernisation**

**May 2008**

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## **Executive summary**

1. Part 1 of this submission addresses the matters on which the Australian Industrial Relations Commission has sought comment as set out at paragraph [19] of the Statement issued on 29 April 2008.
2. The NSW Government's views regarding these matters are as follows:

### **Draft timetable**

3. The NSW Government submits that:
  - (a) Prior to finalising any modern award the Commission would take submissions as to certain fundamental threshold questions which affect the approach which is going to be taken;
  - (b) There be one or two industries where a decision is handed down in advance of the others being finalised which would set out the approach of the Commission.
4. The process for making submissions on these threshold questions should be one in which all interested parties have an opportunity to file material and an opportunity to respond to each other's material, consistent with considerations of natural justice, and having regard to the public interest. Further, having regard to the Commission's obligation to act judicially, the Commission would take certain steps before making a modern award in addition to the consultation requirements found in paragraphs 13-16 of the Ministerial Request. That may include the need for oral hearings.

### **Draft flexibility clause**

5. It is the view of the New South Wales Government that the provisions of modern awards themselves should be crafted to provide sufficient flexibility for adaptation in the workplace without the need for excessive recourse to arrangements outside the scope of the award.
6. However, given that a flexibility clause is to be developed, the New South Wales Government firmly believes that any award flexibility clause should contain adequate protections for all parties to ensure that arrangements made under the clause do not become, nor are perceived to be, a mechanism to undercut award conditions.

## **Draft list of priority industries and occupations**

7. In the NSW Government's submission, the overall number of priority industries should be lower than that proposed, and as proposed above, one or two industries should be dealt with before all the others. While making no submission as to the full range of industries to be given priority, the NSW Government submits that the metals, accommodation and food services, clerical and retail industries should be included in the list of priority industries.

## **Additional matters**

8. Part 2 of this submission addresses a range of important issues that will arise when undertaking the process of making modern awards, given that the necessary starting point is the current system of awards (and NAPSAs). Some of these issues will arise for direct consideration in the settlement of modern award provisions. Other issues are contextual - that is, they are matters which it may not be in the Commission's direct power to address, but nevertheless issues of which the Commission should be mindful when making modern awards, in order to ensure that the modern award system is best positioned to address the needs of employers and employees in the short, medium and long term.

## Introduction

9. 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.
10. NSW common rule awards, either directly or operating as NAPSAs – rather than certified agreements of any kind - actively regulate the industrial relations of a large number of employees in NSW. Over time, it has become clear that these employees are amongst the most disadvantaged and vulnerable in the workforce, and they work in enterprises in which bargaining is neither chosen nor viable. In this sense, NSW common rule awards (and the NAPSAs created from them) are more than a mere floor from which parties can bargain. Rather they contain a full set of fair and reasonable conditions of employment.
11. Knowledge of the history and operation of current NSW common rule awards resides with the Industrial Relations Commission of New South Wales and the employer and union parties to those awards. The success of any modernisation of relevant industry awards will depend critically on the input of the State tribunal and the parties, and this submission makes a number of proposals aimed at facilitating and supporting such input (see paragraphs 143-147 below).
12. In addition, the NSW Government's views on a number of issues relevant to the award modernisation process are set out in the second part of this submission. As will be seen, these views flow from our experience of the operation of the current NSW system, and are particularly aimed at ensuring that the benefits of that system are not lost.
13. In the first instance, however, this submission addresses the specific matters on which the Commission has sought the views of the parties: the timetable for award modernisation, the proposed flexibility clauses, and the proposed priority industries.

## **Part 1 – Matters on which the AIRC has sought specific comment**

### ***Proposed timetable***

14. The Request from the Minister states that the Commission should ‘endeavour’ by 30 June 2008 to develop a timetable for completing the award modernisation process. To that end the Statement by the President states that the Full Bench should decide on a timetable by 20 June 2008 (Paragraph 25).
15. The award modernisation process is to be completed by 31 December 2009 (Paragraph 22).
16. 740 federal awards, together with 1670 State awards that have been converted into NAPSAs, fall within the scope of the award modernisation process.
17. The award modernisation process involves the consolidation of both conditions and rates of pay across disparate awards with, in many cases, quite different histories, thus giving rise to real complexity.
18. In performing this task, the Commission is required to take into account that employees and employers are respectively not to be disadvantaged by the award modernisation process, and that employers are not to be subject to increased costs thereby (Request paras 2(c) and 2(d)).
19. The NSW Government submits that one or two industries or occupations be dealt with before the others, which would in effect create a test case or cases. There is nothing in the WR Act or the Request to prevent such an approach, and the NSW Government accordingly submits that the Metal Engineering and Associated Industries and the Hospitality Industry should be dealt with in the first instance, the first because of its benchmark nature, and the second because of the substantial numbers of NAPSAs and AWAs in the industry. Noting that the Commission will issue reasons when it makes a modern award (s576Z(1)(b)) such an approach would allow parties in respect of all other industries the benefit of such reasons before formulating their submissions.
20. In determining an appropriate timetable for the making of modern awards the Commission will, of course, need to take into account requirements of natural justice.

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

22. An aspect of the duty to act judicially is an obligation to hear a party or give such a person a reasonable opportunity to present his or her case and a duty to consider that case: *Re Australian Bank Employees Union: Ex parte Citicorp Australia Ltd* (1989) 167 CLR 513 at 519.

23. In *R v Ludeke: Ex parte The Customs Officers' Association of Australia, Fourth Division* (1985) 155 CLR 513 Gibbs CJ at 519.9-520, having noted that the Commission is bound to observe the rules of natural justice, stated at 520:

'That means that a person whose rights will be directly affected by an order made by the Commission must be given a full and fair opportunity to be heard before the order is made.'

24. In *R v AIU: Ex parte Public Transport Commission* (1993) 67 ALJR 904 at 909 the Full Court held as follows:

'But the wide scope given to the Commission in determining the relief which it will give does not absolve it from an obligation to observe the rules of procedural fairness in exercising its arbitral function. In *Re Australian Bank Employees Union; Ex parte Citicorp Australia Ltd* (1989) 167 CLR 513 at 519 this Court pointed out that it was well settled that the Conciliation and Arbitration Commission was bound to act judicially and that the Commission as its successor, is bound to do likewise. The Court went on to point out that one aspect of the duty to act judicially is the duty to hear a party and to allow him or her to reasonable opportunity to present his or her case, and coupled with that duty, is the duty to consider the case put. And in *Re Media, Entertainment and Arts Alliance; Ex parte Hoyts Corporation Pty Ltd* (1993) 67 ALJR 389 at 390 the Court said that the Commission has a duty in considering an application to afford a party a reasonable opportunity to allow his or her case to be put.'

Further at 900 the Court held:

'Before making the final award the Commission ought to have alerted the parties to the possibility that it might do so, in order to afford them a reasonable opportunity to put whatever case they might have wished to put in the circumstances.'

25. Traditionally the Commission has met its obligations to provide natural justice by determining matters by way of public hearings at which interested parties appear to present evidence and put submissions.
26. Section 576E sets out matters concerning the procedure for carrying out the award modernisation process. It provides a power to the President to give directions to the Full Bench to carry out the award modernisation process. It further states in s 576E(3) that otherwise 'the procedure of a Full Bench is within the absolute discretion of the Full Bench'. Subsection 4 provides that a Full Bench may inform itself 'in any way it thinks appropriate' including by undertaking or commissioning research or consulting with persons in any manner it considers appropriate. Further, paragraphs 13-16 of the Request require the Commission to conduct certain consultation procedures. Those provisions, however, do not suggest that a Full Bench has a discretion to not comply with long-established natural justice requirements. Section 576E(5) notes that subsection 4 does not limit the powers of a Full Bench and the legislative Note immediately beneath that subsection makes reference to Division 4 of Part 3, which confers various powers on the Commission, including the powers found in s 110 and s 111, such as the power to take evidence on oath, summon witnesses, compel the production of documents and otherwise conduct hearings. There is nothing in Part 10A that prevents the Commission from conducting hearings, where they are appropriate.
27. In determining the timetable the Commission will need to consider whether it is going to meet natural justice requirements by taking that traditional approach, or whether some other approach can be adopted consistent with its obligation to act judicially.
28. If an approach other than conducting public hearings in the traditional manner is to be adopted, then the Commission will need to ensure that other approach nevertheless provides procedural fairness.
29. The Commission is required by the s 576C award modernisation request to complete the award modernisation process by 31 December 2009 (at [19]) and to 'endeavour to have created by the end of December 2008 modern awards for each of the priority industries or occupations' (at [22]). The Commission has been given an extraordinarily large and complex task that it is required to complete in a relatively

short period of time. It can be accepted that in circumstances of urgency the content of the duty to hear will reduce: see *Judicial Review of Administrative Action*, 3<sup>d</sup> edition Aronson, Dyer and Groves at page 483. Given the time constraints the Commission may consider that full hearings in respect of each modern award conducted in the traditional sense can not occur. However mindful of the obligation to act judicially the Commission would not exclude the prospect of conducting hearings, where appropriate or necessary.

30. Natural justice requires that persons whose interests would be affected by the making of a modern award have an opportunity to be heard. In some circumstances the requirement to allow parties be heard may be satisfied by receiving from them written materials. However, the Commission would not close off in advance the question as to whether, in some or all cases, there needs to be a hearing at which parties can make oral submissions and/or test statements of fact.
31. For example, the Commission may be considering the making of a modern award in an industry where there are, in addition to pre-existing federal instruments, State awards containing different terms which have been established over many years. Those State awards might have as parties different organisations than the organisations that represent employees in other States and/or at a federal level. The Commission would not create a modern award, which is expected to override those State based conditions, and determine which industrial parties are to be bound by that award, without allowing the various organisations to put material before the Commission, *including* material *in reply* to material filed by others. When considering whether a particular clause is appropriate in circumstances where existing clauses in State awards might have an uncertain effect or an uncertain history, or whether a particular organisation is appropriate to be bound, there may well be a need for the Commission to take evidence as to those matters and it is conceivable that such evidence might be contested. In such circumstances the Commission may not be able to determine the contested matters without a hearing.
32. The obligation to allow parties an opportunity to be heard is of particular relevance in respect of s 576V, pursuant to which the Commission will need to determine what organisations and persons are to be bound by any modern award. Clearly it will be important for the Commission to notify such persons before making a decision to bind them and give them an opportunity to make whatever submissions they wish as

to whether they should or should not be bound, as well as the content of the modern award to which they may be bound.

33. In summary, it is submitted that the obligation to act judicially and provide procedural fairness would require the Commission to do at least the following before making a modern award, in addition to the consultation requirements contained at paragraphs 13-16 of the Request;

- (a) Identify as far as possible persons who would be affected by the making of a modern award in a particular industry or occupation. This step would include identifying as far as possible parties to NAPSAs made in those industries, which would include State based organisations, and notifying them of the Commission's intention to make a modern award in respect of the area covered by the NAPSA derived from a State award to which they are a party;
- (b) Provide in respect of each modern award a timetable which allows parties initially an opportunity to put submissions and any evidentiary material before the Commission that would be relevant to the Commission making a modern award;
- (c) Allow for all the parties to see the material filed by other parties with an opportunity to be able to respond to that material;
- (d) Allow an opportunity for the parties to submit that the Commission should conduct a hearing to allow either for evidence to be tested and/or for oral submissions to be made before any decision is made as to the content of a modern award; and
- (e) Determine whether a hearing is required, and if so determine the nature of that hearing (including whether the Full Bench should refer questions of fact to be determined by a single member pursuant to s 112(6)).

34. A related consideration, dealt with below, is that there are questions of general application going to the issue of how the Commission should approach the exercise of setting modern awards.

35. In order to provide procedural fairness in respect of such general issues the Commission could take one of three approaches:

- (a) Identify the general questions that need to be determined (whether in the form of modern award principles or otherwise) and indicate to any interested party that they will have an opportunity to put submissions as to those matters and to respond to other parties submissions, such that the Commission would determine those questions in advance of any modern award being made;
- (b) The Commission, when considering the first modern award, could invite all interested parties, not only in respect of that particular industry, to put submissions as to the more general questions which the Commission would determine at the same time as making the first modern award and set out its conclusions in its reasons for making that modern award (noting the requirement to give reasons at s576Z(1)(b)); or
- (c) The Commission could each time it makes a modern award allow parties relevant to that particular industry to put submissions as to the general questions, and each Full Bench would determine for itself the proper approach in respect of those general issues.

36. For obvious reasons, including ensuring consistency, the third option is unattractive.

37. It is submitted that the first option is the most attractive. However given the very tight time frame the Commission is working to, the second approach might be considered more practical. Either way, it is submitted that in order to provide procedural fairness, it will be appropriate for the Commission to identify by way of a Statement or other means certain general questions to which it would be assisted by submissions from any interested party as to the approach to be taken to making modern awards. The content of some of those questions is suggested immediately below. Further, in Part 2 below headed 'Principles for the Creation of Modern Awards', submissions are made as to the proper approach to be taken in respect of some of those questions.

38. Issues of general relevance to the making of modern awards that could be identified by the Commission as issues upon which it would be assisted by submissions from parties include:

- (a) What is meant by the expression 'fair minimum safety net of enforceable terms and conditions of employment', particularly in the context of comparing existing State award conditions and federal award conditions. This appears to give rise to a question as to what extent that expression in the context of Part 10A as a whole requires a different approach to the previous requirement to create awards that met the objects of Part 10; and to what extent that expression suggests different conditions and rates of pay to those that are found in State common rule awards;
- (b) Whether modern awards are going to only contain competency based classifications, and the method by which the Commission is to translate varying existing classifications and rates of pay found in NAPSAs and federal awards into any new modern award (see further the issues raised by the Award Review Taskforce Final Report on Rationalisation of Wage and Classification structures, July 2006);
- (c) What principles will apply to determine whether in a particular industry more than one modern award will apply;
- (d) The question of the way in which modern awards are to deal with subjects which are NES standards;
- (e) The question of what matters are allowable – this may involve identifying, at least by way of example, various provisions in existing NAPSAs which may or may not fall within the subjects which are permitted to be dealt with by a modern award;
- (f) How the differing pay and conditions contained in NAPSAs and federal awards are to be dealt with. This in turn raises questions as to:
  - i. The extent to which modern awards will preserve existing (different) conditions which are State based, noting that State based differences are permitted for a five year transitional period. This would involve a consideration of the tension between the need to create reduced complexity and the 'aim' not to disadvantage employees or employers through the process of creating a modern award;

- ii. What approach is to be taken to setting rates of pay in respect of a modern award which is to apply to employees who currently have different APCS rates of pay, noting the intention that neither employees nor employers are to be disadvantaged; and
  - iii. The extent to which the Commission (mindful of the aim not to disadvantage) will consider providing counter-balancing benefits where there are award entitlements currently contained within NAPSAs which are not permitted to be contained in a modern award;
- (g) How, and whether, the Commission in creating modern awards should take into account preserved collective State agreements;
- (h) Whether modern awards will be common rule awards, and how their coverage is to be described;
- (i) Whether there should be one or more new awards made to deal with employees who currently have no award coverage (this is a reference to two quite distinct categories of employees – on the one hand, lower-level managerial or supervisory or professional employees whose job classifications have never been included within the coverage of awards (and who would not fall into the intended exclusion in Paragraph 2(a) of the Request); on the other hand, employees who have never been the subject of collective representation either because of an incapacity to organise collectively or because their work (either their industry or occupation) is relatively new and has not been the subject of consideration by industrial organisations);
- (j) Whether State organisations that are not transitionally registered can be bound by a modern award;
- (k) The extent to which dispute resolution procedures will contemplate specific organisations having a role and the extent to which specific organisations will be recognised by being made parties bound;
- (l) In respect of enterprise awards (Request paragraph 2(e)): Whether while excluded they are nevertheless to be taken into account in setting conditions or rates of pay, particularly where they cover a significant number of

employees in an industry; and how NAPSAs made from State enterprise awards are to be dealt with;

(m) How the subject of pay equity is to be dealt with;

(n) How training requirements are to be dealt with;

(o) The extent to which and the method by which the Commission intends to investigate how and to what extent employees and employers may be worse off as a result of any change to a modern award;

(p) The content of a dispute resolution clause, noting that it is not clear whether the statutory approach to dispute resolution will change before the modern awards come into effect;

(q) What is meant by the expression "high-income employees" in paragraph 2(b) of the Request, and whether the intention there stated will result in employees who have traditionally been award covered from being excluded from a modern award because of their income.

39. The New South Wales Government's position regarding many of these matters is offered at Part 2 below. However, the preferred approach to dealing with these issues is that the Commission should establish a process whereby it can obtain the benefit of hearing from all parties about these matters.

40. Of course, consistent with paragraph 16 of the Request, all hearings, decisions, and the reasons for those decisions would be recorded and made available to the public.

### ***Award flexibility clauses***

41. In the NSW Government's submission, the Commission's primary aim in determining a model award flexibility clause should be to ensure that employees, whose ability to bargain is significantly less than their employers, are not disadvantaged, and to ensure that there are appropriate protections in place.

42. This section is divided into two parts. The first part provides some relevant reflections on the concept of flexibility, informed by the experience of the operation of

AWAs. The second part examines and comments on the draft model flexibility clauses which accompany the Commission's Statement.

## Flexibility

43. The Request provides for flexibility at Objects 1(c) and 10, which provide that modern awards:

must be economically sustainable and promote flexible work practices and the efficient and productive performance of work;<sup>1</sup>

and

The Commission will prepare a model flexibility clause to enable an employer and an individual employee to agree on arrangements to meet the genuine individual needs of the employer and the employee. The Commission must ensure that the flexibility clause cannot be used to disadvantage the individual employee.<sup>2</sup>

44. A traditional argument advanced in support of individual bargaining is the flexibility it provides to employees who require family friendly provisions. This was advocated by the former federal government in introducing the *Workplace Relations Act 1996*.

45. However, a range of research released since the commencement of the former federal government's workplace relations regime has shown that many employees lack sufficient bargaining power to insist upon agreements which enshrine family friendly policies.

46. In his submission to the Senate, Employment, Workplace Relations and Education References Committee Inquiry into Workplace Agreements, Professor Andrew Stewart was quite explicit in his comments surrounding the notion that individual employees had the same bargaining power as their employers.

It is a basic fact of life, which only the most blinkered ideologue would deny, that there is an inequality of bargaining power between most individual workers and their employers<sup>3</sup>

47. Further, the Full Bench of the AIRC in handing down its decision in the Family Provisions Test Case 2005 observed that:

Many employees lack sufficient bargaining power to insist upon agreements which enshrine family friendly policies.<sup>4</sup>

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<sup>1</sup> Formal Request Object 1(c)

<sup>2</sup> Formal Request Object 10

<sup>3</sup> Professor Andrew Stewart, Submission to Senate, Employment, Workplace Relations and Education References Committee, Inquiry into Workplace Agreements, 2005

<sup>4</sup> Family Provisions Test Case Decision, PR082005 8 August 2005, Pg 38

48. The research of van Barneveld and Nassif found that examples of AWAs being employee-driven were 'virtually non-existent'.<sup>5</sup> The notion of individual bargaining in AWAs was a fallacy, the use of template or pattern AWAs was common practice with little bargaining taking place between the parties.<sup>6</sup>
49. Similarly, *Australia @Work: The Benchmark Report*, released in 2007, indicated that bargaining outcomes continue to be governed by the level of bargaining power the individual holds.<sup>7</sup>
50. It should particularly be noted that the industries with the highest incidence of AWAs as illustrated at Table 1 contain vulnerable employees such as women, young and low skilled employees.
51. Consistent in the debate surrounding AWAs was whether or not they provided the flexibility claimed by the former federal government and others, particularly in relation to family-friendly arrangements. Roan et al made the observation that the OEA considered flexible hours as family friendly provisions while the ACIRRT ADAM report suggested arrangements such as flexible starting and finishing times to employees were usually detrimental to employees.<sup>8</sup>
52. In the NSW Government's submission, available research does not support the proposition that individual bargaining provides more beneficial work-family balance. Peetz, for example, concluded that individual contracts such as AWAs translated into a poorer work-family-balance for non-managerial, non-professional employees.<sup>9</sup> In 1999, only 7.4 per cent of AWAs contained references to work and family measures compared to 15.2 per cent of collective agreements.<sup>10</sup>
53. Indeed, it was the Full Bench of the AIRC in handing down its decision in the Family Provisions Test Case 2005 which commented:

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<sup>5</sup> Van Barneveld and Nassif R, 'Motivations for the Introduction of Australian Workplace Agreements', *Labour and Industry*, 2003, 14 (2): 21-37.

<sup>6</sup> van Barneveld and Waring P, 'AWAs: A Review of the Literature and Debates', *Australian Bulletin of Labour*, 2002, 28 (2): 104-119

<sup>7</sup> van Wanrooy B, Oxenbridge S, Buchanan J and Jakubauskas M, *Australia @Work: The Benchmark Report*, University of Sydney, 2007

<sup>8</sup> Roan A, Bramble T, Lafferty G, *Australian Workplace Agreements In Practice: The 'Hard' and 'Soft' Dimensions*, *Journal of Industrial Relations* 2001, 43: 392

<sup>9</sup> Peetz D, *How Well Off Are Employees Under AWAs? Reanalysing the OEA's Employee Survey*, Paper presented at AIRAANZ Queensland, 2004

<sup>10</sup> Whitehouse, G 'Industrial Agreements and Work/Family Provisions: Trends and Prospects Under Enterprise Bargaining', *Labour and Industry*, Special Issue: 10 years of Enterprise Bargaining, Vol 12, No 1, August 2001

Many employees lack sufficient bargaining power to insist upon agreements which enshrine family friendly policies.<sup>11</sup>

54. It is important to note that the above findings and comments were made in the context of the pre-Work Choices provisions of the federal law. In other words, these negative results were apparent even at a time when a full 'no disadvantage' test was in place.
55. More recent data (dating from the period in which there was no 'no disadvantage' test) demonstrates that where an individual agreement provides for family friendly provisions, these have come at the cost of other entitlements, including wages. For example, the Employment Advocate advised the Senate Standing Committee on Employment and Workplace Relations in May 2006 that of a sample of 250 AWAs lodged in the first month of Work Choices, every one expressly removed at least one protected award condition and 16% expressly excluded all protected award conditions. Most often removed, in the name of flexibility, were leave loading (removed in 64% of sampled AWAs), penalty rates (removed by 63%) and shiftwork loading (removed by 52%)<sup>12</sup>.
56. In aggregate, individual bargaining has been shown to create poorer pay for employees in weaker bargaining positions, even with the No Disadvantage Test in place. In 2004, women on AWAs received only 80 per cent of the hourly pay of men on AWAs and women on AWAs received 11 per cent less per hour than collective agreements for women.<sup>13</sup>
57. In summary, recent data demonstrates the inherent dangers of individual bargaining for particular sections of the workforce. Although the outcomes were patently far worse in respect of AWAs concluded in the absence of a no disadvantage test, the NSW Government submits that the data clearly shows the level of disadvantage experienced by employees in a system of individual bargaining even where there is a requirement of that sort. Indeed, Waring & Lewer have commented on the difficulty of ensuring no disadvantage *per se*, quoting Commission Whelan's apposite remarks in the Bunnings Case, where she said:

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<sup>11</sup> Family Provisions Test Case Decision, PR082005 8 August 2005, Pg 38

<sup>12</sup> Senate Employment, Workplace Relations and Education Legislation Committee, Senate Estimates Hearing, 29 May 2006, pp.138-141

<sup>13</sup> Peetz D *The Impact on Workers of Australian Workplace Agreements and the Abolition of the 'No Disadvantage' Test*, The Federal Government's Industrial Relations Policy: Report Card on the Proposed Changes, University of Sydney, 2005, Pg 11-14.

'...The no-disadvantage test has sometimes been described as a 'no net reduction' test implying that the determination of disadvantage can be conducted purely as a mathematical exercise. Entitlements can be 'bought out' provided the value of those entitlements is compensated for by the wage the employee takes home at the end of the week, fortnight, month or year.

The benefits of some award conditions cannot be so easily calculated and compensated for in that way.....Should the Commission consider the purpose of award provisions are not simply their financial value to the employee?..'14 .

58. Considerations such as these have no doubt informed the present Commonwealth Government's policy decision to abolish individual bargaining of this sort, and it is noted that the legislation relevant to the award modernisation process explicitly reflects this policy position: WR Act s576A(2)(d).
59. Against this background, it would appear not in keeping with the apparent intentions of the federal government if award flexibility clauses delivered the sort of outcomes described in the foregoing paragraphs.
60. Having regard to the foregoing, it is the NSW Government's strong submission that any flexibility clause should be approached with considerable circumspection, and modern awards, and the system in which they operate, must provide adequate protections for the individuals concerned, as well as the awards to which they are subject if they are to 'provide a fair minimum safety net of enforceable terms and conditions of employment': s576A(1)(b).
61. The Commission has released for public exposure and comment draft model flexibility clauses prepared by the Australian Council of Trade Unions (ACTU) and jointly by the Australian Chamber of Commerce and Industry (ACCI) and the Australian Industry Group (AIG).

### **The ACTU clause**

62. The flexibility clause proposed by the ACTU provides for protections against the potential abuse of individual flexibility arrangements. It contains a statement of intention to the effect that such clauses should not be used to disadvantage or discriminate against an employee or group of employees (cl .1). Award flexibility arrangements can only be made for existing employees and cannot be a condition of engagement.

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<sup>14</sup> *Shop, Distributive and Allied Employees Association and Bunnings Building Supplies Pty Ltd* AIRC Print No P6024, quoted in Waring P and Lewer J, *The No Disadvantage Test: Failing Workers*, Labour and Industry, Vol 12 No. 1, August 2001, at 73.

63. The proposed clause sets out procedural requirements that allow for good faith negotiation and the cancellation of flexibility agreements (cl.4), and highlights the important role majority employee authorisation at the enterprise level should play in the modification of standard award entitlements.
64. The clause allows for the regular review of the operation of flexibility arrangements. It does not, however, specify the mechanism or principles which may be adopted to identify employee disadvantage. Many of the procedural protections it prescribes are in line with the relevant terms of facilitative provisions contained in current pre-reform federal awards.
65. The strengths of the ACTU model clause proposal include:
- (a) Its emphasis on strong and detailed procedural protections for employees entering into flexibility arrangements including good faith negotiation and rescission of flexibility arrangements
  - (b) The highlighting of the importance of majority employee approval for certain flexibility arrangements as a way of safeguarding against employees being disadvantaged and making provision for collective arrangements
  - (c) The clause clearly specifies that arrangements made outside the limits set out in the standard award clause are void
  - (d) The provision for the parties to provide regular reviews of the operation of the award flexibility arrangements.
66. The weaknesses of the proposed ACTU clause include:
- (a) It does not set out specific mechanisms that may be used to address the issue of employee disadvantage such as the test for disadvantage, including a remuneration test: cf the Australian Industry Group (AIG) proposal
  - (b) The clause does not give examples of the type of matters which may be appropriately dealt with by an individual flexibility arrangement between an employer and employee and those matters that should not be dealt with outside the scope of the standard award clauses

## Joint ACCI/AIG proposal

67. The joint ACCI /AIG proposal sets out model provisions dealing with the issue of employee disadvantage. The ACCI proposal is vague and indeterminate in its application. It does not permit a review of the individual arrangement or flexibility provision on the grounds of disadvantage over the life of the agreement but only at the time it is made. This approach does not take account of changing circumstances, including award variations, which could render the arrangement unfair over time.

68. The proposed AIG clause uses a test for determining disadvantage which compares the total remuneration paid to the employee with the aggregate amount that would be payable under the award as a whole (see Clause XX.1(b) Option 2). This process does not, however, take account of the detrimental effects on the employee of contracting out of important award entitlements which:

- cannot readily be quantified; and/ or
- which may be of particular significance for an employee in the context of the employee's overall pattern of working hours/obligations or the specific industry setting of the relevant employment?

69. The strengths of the joint employer's model clause include:

- (a) The proposed clause is relatively short and simple and does not contain complex procedural requirements
- (b) The AIG part of the proposal (Option 2) tries to formulate a practical (although ultimately flawed) test for determining whether an employee is disadvantaged or not by an individual flexibility arrangement
- (c) Examples of matters which may be dealt with by flexibility arrangements are set out to give employers and employees some direction and guidance
- (d) The clause clearly sets out the effect of entering into a flexibility arrangement- that is that the agreed terms will apply in place of the relevant award terms.

70. The weaknesses of the proposed joint employer's clause include:

- (a) The clause contains inadequate procedural protections for employees and fails to recognise the need for good faith negotiations and other requirements that protect employees where there is an imbalance of bargaining power.
- (b) Flexibility arrangements can only be tested for disadvantage at the time they are entered into and no account is taken of changing circumstances which may produce disadvantage, such as a variation to relevant award provisions
- (c) The proposed clause does not make any provision for collective flexibility arrangements approved by the majority of employees in an enterprise or provide an acknowledgement that these arrangements may be more appropriate when modifying standard clauses and protections contained in an award.

## **Other Issues**

71. It should also be noted that neither of the proposed model award flexibility clauses adequately address the issue of the need, if any, to impose limits on the appropriate extent and incidence of individualised flexibility arrangements in an enterprise or industry covered by a modern award. Should there, for example, be a limit to their use or coverage in a particular business or enterprise based on the size of the relevant workforce or other appropriate criteria?

72. Another issue that may have to be addressed is the need, if any, to delineate the permissible scope for flexible individualised arrangements established following industry specific adaptation of a template flexibility clause. This may be necessary to:

- ensure the consistency of widely endorsed community standards operating across industries to ensure there is not a wide divergence in these standards that cannot be justified by compelling industry specific economic or industrial circumstances , and
- preserve the integrity of the modern award safety net and maintain an appropriate alignment with the legislated national employment standards.

## **Conclusion**

73. It is the view of the New South Wales Government that the award provisions themselves should be crafted to provide sufficient flexibility for adaptation in the

workplace without the need for excessive recourse to arrangements outside the scope of the award.

74. However, given that a flexibility clause is to be developed, the New South Wales Government firmly believes that any award flexibility clause should contain adequate protections for all parties to ensure that arrangements made under the clause do not become, nor are perceived to be, a mechanism to undercut award conditions or subvert NES provisions.

75. Specifically, the model award flexibility clause, and award flexibility clauses generally, should:

- Allow only limited trading of award conditions
- Provide for collective as well as individual flexibility arrangements
- Require the genuine consent of each party
- Not be permitted to be a condition of engagement
- Be required to include in the arrangement a time-frame for review of no longer than 12 months
- Provide access to the award's dispute resolution procedure in the event of a disagreement
- Allow for the employee to be represented in negotiations if they so request
- Allow for unilateral termination (with appropriate notice) should either the employee or the employer decide that the arrangement no longer benefits them
- Be recorded as part of an employees time and wage records so as to allow investigation by authorised persons if required

76. The experience of Australian Workplace Agreements should be considered by the Commission in the design of any flexibility clause. In particular, the disproportionate impact on workers with less bargaining power should serve as a reminder that where individual workers are required to bargain with their employer, a no disadvantage test and vetting by a government agency did not provide adequate protection.

77. However, there should be adequate recourse to make a complaint to Fair Work Australia (either directly or via a representative organisation) in the event of a breach of terms of the arrangement or any of the protections contained within, and adequate penalties to apply in such circumstances.

78. Finally, there could be a concern that award flexibility clauses could be used as a device to subvert the NES, to the extent that the NES are included in awards. The model clause should make it clear that doing so is not permissible.

## ***Priority industries***

### **Overview**

79. Paragraph 20 of the Request requires the Commission to identify a list of priority industries and occupations for award modernisation by 30 June 2008. In developing its priority list, the Commission 'will have regard to those industries and occupations with high numbers of Australian Workplace Agreements (AWAs) and Notional Agreements Preserving State Awards (NAPSAs)'.

80. The Statement includes a draft list of priority industries, formulated in consultation with the ACTU, AiG and ACCI. The list proposes nineteen priority 'industries' although it should be noted that three of these are more properly classified as occupations. A list of State awards which appear to be comprehended by the nineteen priority industries is at Appendix A.

81. In the NSW Government's submission, the overall number of priority industries should be lower than that proposed, and as outlined above in the section dealing with 'Timetable', one or two industries should be dealt with before all the others, in the form of a 'test case'. While making no submission as to the full range of industries to be given priority, the NSW Government submits that the metals, hospitality, clerical and retail industries should be included in the list of priority industries.

82. While the NSW Government does not submit that any particular industries appearing on the list should be omitted, the reasons for including some industries are not clear, having regard to the criteria set out in the Request. For example there is no statistical data of which the NSW Government is aware to demonstrate that either the Poultry Processing or Gardening and Sportsground Maintenance Industries have a particularly high incidence of employees working under AWAs or NAPSAs compared

with other industries. Similarly the Rail Industry has historically had its workplace arrangements determined predominantly within the federal jurisdiction in the form of collective workplace agreements, thus it is not clear why it should be a priority for the making of a modern award.

83. In the NSW Government's view, the priority industries and occupations should be those which either contain high numbers of employers and/or employees, or have a high incidence of NAPSAs or AWAs.
84. The following data is presented to assist the Commission in determining its priority list for award modernisation by highlighting industries and occupations that have a high incidence of AWAs or NAPSAs. The statistical analysis following shows that in accordance with the formal Request the most appropriate industries to be prioritised are most likely to be accommodation, cafes and restaurants, clerical and retail trade.

### **Numbers of AWAs in NSW**

85. In NSW, registered and unregistered individual arrangements comprise 34.8 per cent of all methods of setting pay.<sup>15</sup> These individual arrangements may include AWAs, common law contracts and above award payments. Furthermore, ABS data shows that certain occupations have a greater reliance on this method of pay setting than others. For example, nationally, 42.8 per cent of clerical and administrative workers and 28.4 per cent of sales workers are paid according to unregistered and registered individual agreements.<sup>16</sup>
86. Since the commencement of the Workplace Relations Act 1996, approximately 297,000 employees in NSW have entered into AWAs. This accounts for 21 per cent (or 1 in 5) of the 1.3 million AWAs made nationally.
87. Approximately one third (105,077) of current AWAs have been entered into since the commencement of the former federal government's Work Choices legislation. Between March 2006 and September 2007, the uptake of AWAs in NSW has outstripped both employee and union collective agreements.<sup>17</sup>

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<sup>15</sup> Australian Bureau of Statistics, *Employee Earnings and Hours*, May 2006, table 17.

<sup>16</sup> Ibid, Table 16

<sup>17</sup> Workplace Authority, Workplace agreement data – New South Wales, 27 March 2006 to 30 September 2007.

88. Given the recent exponential increase in the use of AWAs in NSW it is important to consider the industries with the highest incidence of employees paid under this method of pay setting. The following table illustrates the incidence of AWAs in the top five industries in New South Wales for the eighteen months to September 2007.<sup>18</sup>

<b>Table 1: AWAs by Industry (NSW)</b>	
<b>Industry</b>	<b>Number of AWAs</b>
Retail Trade	18,375
Accommodation and Food Services	12,117
Other Services	10,195
Manufacturing	8,845
Information Media and Telecommunications	7,334
<b>All industries in New South Wales</b>	<b>105,077</b>

*Source: Workplace Authority, Workplace agreement data – New South Wales, 27 March 2006 to 30 September 2007*

89. The above data reveals the retail trade and accommodation and food services industries have the highest incidence of AWAs in New South Wales. Coincidentally these industries and occupations also have a proportionately high incidence of award-reliant employees. Accordingly, it is proposed the Commission gives consideration to prioritising these industries during the award modernisation process to ensure the most vulnerable workers in NSW are provided with a comprehensive safety net of wages and conditions as soon as is practicable.

### **Numbers of NAPSAs in NSW**

90. Upon the commencement of the former federal government's Work Choices legislation, employees employed by incorporated entities under state awards were transferred into the federal system under a transitional instrument known as a 'notional agreement preserving a state award' or NAPSA.

91. Table 2 below illustrates the numbers of award-reliant employees employed by incorporated entities in certain industries and consequently reveals those industries that are likely to have a high incidence of NAPSA coverage.

<b>Table 2: Award-reliant employees by industry and type of legal organisation</b>					
<b>Industry</b>	<b>Incorporated</b>	<b>Number</b>	<b>Unincorporated</b>	<b>Number</b>	<b>Award-reliant</b>

<sup>18</sup> Workplace Authority, Workplace agreement data – New South Wales, 27 March 2006 to 30 September 2007.

	%		%		employees in industry %
Mining	57.1*	300*	42.9**	200**	3.6**
Manufacturing	85.5	29,000	14.5*	4,900*	12.4
Electricity gas and water	0.0	0	0.0	0	1.4**
Construction	73.0*	14,400*	27.0*	5,300*	14.4
Wholesale Trade	82.1*	17,200*	17.9*	3,800*	14.4
Retail	56.4	70,400	43.5	54,300	34.3
Accommodation, cafes and restaurants	69.4	81,200	30.6*	35,800*	70.5
Transport & storage	77.4*	8,700*	22.6**	2,500**	10.0*
Communication services	20.0**	100**	80.0**	300**	1.0**
Finance & insurance	38.9*	2,800*	61.1*	4,500*	5.2*
Property & business services	69.8	60,100	29.8**	25,700**	23.5*
Government administration and defence	0.0	0	0.0	0	0.5**
Education	16.3*	5,500*	83.0	28,200	15.9
Health & community services	36.8*	31,600*	62.3	53,400	29.7
Cultural and recreation services	86.2*	8,200*	13.0**	1,200**	18.8*
Personal & other services	46.0*	10,100*	51.6*	11,300*	24.2
All Industries	59.2	339,700	40.3	231,600	22.5

Source: ABS, *Employee Earnings and Hours (EEH)*, May 2004, (Cat No 6306.0) unpublished data.

\*Estimate has relative standard error of 25 per cent to 50 per cent and should be used with caution.

\*\* Estimate has a relative standard error greater than 50 per cent and is considered too unreliable for general use.

92. For example, within the accommodation, cafes and restaurants sector close to three-quarters of employees are award-reliant and approximately 70 per cent of these employees are employed by incorporated entities. Table 4 below further reveals that around two-thirds of award reliant employees in this industry were employed by state awards prior to the commencement of the Work Choices legislation. Accordingly it is reasonable to assume that a high proportion of employees in this industry are now likely to be covered by NAPSAs within the federal jurisdiction.
93. Other industries with high numbers of employees who are likely to have their employment conditions determined by NAPSAs are noted in Table 3. The table also includes particular state award/NAPSAs that apply to those industries:
94. In terms of complaints received by the NSW Office of Industrial Relations it is evident that a significant proportion of employees in NSW are employed under the

Clerical and Administrative Employees (State) Award and its NAPSA. This is supported by evidence provided in Table 5.

**Table 3: Examples of State Awards and NAPSA within Industries**

Industry	Award/NAPSA
Accommodation, cafes and restaurants	Restaurants, &c. Employees (State) Club Employees (State) Motels, Accommodation and Resorts (State)
Manufacturing	Metal Engineering and Associated Industries (State)
Construction	Building and Construction Industry (State) Plumbers & Gasfitters (State)
Wholesale trade	Commercial Travellers (State)
Retail	Shop Employees (State) Pharmacy Assistants (State)
Transport & storage	Transport Industry (State)
Property & business services	Real Estate Industry (State) Cleaning Contractors (State)
Health & community services	Social and Community Services Employees (State) Miscellaneous Workers'- Kindergartens and Child Care Centres, &c. (State)
Cultural and recreation services	Theatrical Employees Recreation & Leisure (State)
Personal & other services	Hairdressers' &c. (State)

Source: OIR internal analysis

Note: While the tables above highlight certain industries and occupations where NAPSA will be prevalent they do not assist in determining the incidence of employees working in the clerical and administrative sector as such employees may be employed across a range of industries.

95. It should further be noted that certain industries include NSW state awards that prior to the commencement of the Work Choices legislation had no equivalent coverage within the federal jurisdiction. One such example is the Hairdressers', &c. (State) Award located within the personal and other services industry. Whereas only 46 per cent of award-reliant employees in this industry are employed by incorporated entities the absence of any pre-reform federal award applying to the hairdressing industry suggests the majority of these employees are likely to be covered by the Hairdressers', &c. (State) Award (NAPSA).

**Table 4: Federal/State Award coverage by Industry**

Industry	Federal Award	State Award
	%	%
Agriculture, forestry & fishing	49	51
Mining & construction	35	65
Manufacturing	53	47
Infrastructure services	38	62
Wholesale & retail trade	24	76
Accommodation, cafes & restaurants	35	65
Finance & insurance	60	40
Property & business services	16	84
Government	3	97

Education, health & community service	11	89
Cultural & recreational services, personal & other services	20	80
<b>Total</b>	<b>24</b>	<b>76</b>

Source: *Industrial coverage and earnings in NSW, Findings from Working NSW Employer Survey (WNES), January 2001, Pg 7*

96. Table 4 illustrates the disaggregation of state and federal award coverage by industry for award-reliant employees prior to the commencement of the federal Work Choices legislation. This table only refers to employees whose employment arrangements are determined by either a state or federal award; other arrangements such as registered collective, individual and common law agreements may also determine conditions at the workplace.

### Number of industrial complaints received in NSW jurisdiction

97. Table 5 indicates a high proportion of employees who lodge industrial complaints with the NSW Office of Industrial Relations (OIR) have their wages and conditions determined by relatively small numbers of industrial awards.

**Table 5: OIR Industrial Complaints by Award 2005-06**

Title of Award	% of total complaints received
Shop Employees (State)	13
Clerical and Administrative Employees (State)	10
Restaurants, &c., Employees (State)	9
Hairdressers', &c. (State)	8
Building and Construction Industry (State)	6
Transport Industry (State)	5
Metal, Engineering and Associated Industries (State)	3

Source: *Internal data from NSW Office of Industrial Relations: Industrial Complaints by Award 2005/06 Note: 61 per cent of complaints received were from employees of incorporated entities and 35 per cent from employees of unincorporated entities. The remainder were received from employees of either incorporated or unincorporated trusts.*

98. Over half of all industrial complaints lodged refer to alleged underpayments of only six awards. While almost one third of the total numbers of employees who lodged industrial complaints for the year ending 2005-06 had their wages and conditions determined by just three awards.

99. Awards within industries (retail trade and accommodation, cafes and restaurants) where there is a high level of award reliance and large numbers of female and casual employment also rate highly in terms of complaints received by the OIR. These types of employees are most likely to be concentrated in jobs affected by minimum wage regulation when measured by occupation, industry and nature of employment.

100. By industry more than one third of all award reliant employees in NSW are employed in the retail and accommodation, cafes and restaurants sector. Further, nationally in August 2007, over 40 per cent of all employees within the retail trade and over 60 per cent within the accommodation, cafes and restaurants sector were employed on a casual basis.<sup>19</sup> In addition to a high incidence of casual employment, these industries also possess a high proportion of female employees. For example, in NSW, women comprise over 50 per cent of employees in the retail trade and almost 55 per cent of employees in the accommodation, cafes and restaurants sector.

101. By occupation more than half (53.2 per cent) of award reliant employees in NSW are employed in clerical, sales and service occupations<sup>20</sup> and nationally these types of employees comprise almost a third of all casual employment<sup>21</sup> while in NSW over 70 per cent are women.<sup>22</sup>

102. It is therefore the NSW Government's submission that the industries and occupations identified in the preceding paragraphs – accommodation and food services, clerical and retail – be among the priority industries and occupations.

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<sup>19</sup> ABS, Employee Earnings, Benefits and Trade Union Membership, Table 14

<sup>20</sup> Australian Bureau of Statistics, *Employee Earnings and Hours*, May 2006, table 16.

<sup>21</sup> ABS, Employee Earnings, Benefits and Trade Union Membership, Table 14 - Casual employment as defined by ABS data refers to employees without paid leave entitlements, therefore making them more reliant on industry standards often set by awards.

<sup>22</sup> Australian Bureau of Statistics, Labour Force (data cube) , Feb 2008, Cat No 6291.055.003

## **Part 2 – Principles for the creation of modern awards**

103. This Part of the submission addresses a range of important issues that will arise when undertaking the process of making modern awards, given that the necessary starting point is the current system of awards (and NAPSAs). Some of these issues will arise for direct consideration in the settlement of modern award provisions. Other issues are contextual - that is, they are matters which it may not be in the Commission's direct power to address, but nevertheless issues of which the Commission should be mindful when making modern awards, in order to ensure that the modern award system is best positioned to address the needs of employers and employees in the short, medium and long term.

104. The discussion commences with a description of the role that awards have played in the NSW industrial relations system, which sets the scene for much of the commentary which follows. In the NSW Government's submission, any loss of the benefits provided to both employers and employees by the current common rule award system in NSW is an outcome that should be avoided. Therefore many of the recommendations and suggestions in the following sections of this Part of the commentary are intended to provide the Commission with strategies and solutions that will ensure that beneficial characteristics of that system are able to be preserved, albeit in the different form of modern awards.

### ***The importance of awards in NSW***

105. Awards are the centrepiece of the NSW industrial relations system. In contrast with industrial legislation in some other jurisdictions, the Industrial Relations Act 1996 (NSW) (IR Act) provides very little by way of minimum entitlements of general application. Instead, the Act generally leaves it to the award system to provide for employment conditions that are appropriate and relevant to the industry or occupation covered by the award.

106. This approach has led to the development of comprehensive common rule awards in this State. These awards are well-tailored to meet the particular needs of the specific industries and/or occupations to which they apply. It is for the parties to awards, with the assistance of the Industrial Relations Commission of New South Wales, to determine what conditions should be contained in those awards in accordance with the provision in section 10 of the IR Act that the Commission may

make an award 'setting fair and reasonable conditions of employment for employees'.

107. In this sense, the industrial relations system in NSW provides for effective self-regulation by the industrial parties. It does not require the action of Parliament to determine, maintain or improve fair and just conditions of employment; rather the onus is on the parties themselves to ensure that their awards remain relevant and practicable.

108. The common rule award system has proved to be particularly suited to addressing the industrial relations needs of employers and employees of small to medium businesses. The relevant common rule award provides a set of straightforward provisions about rates of pay and conditions of employment that have been appropriately tailored to the work that is undertaken at the business. Both the employer and the employee have ready access to advice and assistance regarding the interpretation and application of award provisions. Above all, common rule award provisions mean that a small to medium business operator is assured of certainty that all his or her competitors are providing the same set of employment conditions, and that there is no need or incentive to compete against each other by undercutting employment conditions.

109. Two important conclusions should be drawn from these observations: firstly, NSW common rule awards, either directly or operating as NAPSAs – rather than certified agreements of any kind - actively regulate the industrial relations of many employees in NSW. Over time, it has become clear that these employees are amongst the most disadvantaged and vulnerable in the workforce, and they work in enterprises in which bargaining is neither chosen nor viable. Secondly, knowledge of the history and operation of current NSW common rule awards firmly resides with the Industrial Relations Commission of New South Wales and the employer and union parties to those awards. It follows that modernisation of relevant industry awards will depend critically on the input of the State tribunal and the parties for its success.

110. The statutory background relevant to the making and operation of NSW awards is set out at Appendix B.

## ***Concerns about modernising NAPSAs based on NSW awards***

111. This section sets out a number of issues about which the NSW Government has particular concerns, broadly consistent with the issues listed at paragraph 10a-o above. By way of introduction, these issues and the relevant preferred position of the NSW Government, are summarised in the next paragraph. Succeeding paragraphs then go on to examine each issue in detail.

### *Potential for erosion of current NSW community standards*

112. In relation to state based community standards, the award modernisation process should provide award outcomes at least as beneficial as current NSW settings, noting the aim to not disadvantage employers or employees..

113. The removal of state –based differences in modern awards should be a task for the medium term, utilising the transition period made available by s576T of the WR Act to the appropriate extent.

### *Using the experience of State Industrial Tribunals*

114. The Commission should make use of the expertise of the NSW Industrial Relations Commission in relation to State awards subject to award modernisation by actively involving members of the State Commission in the process.

115. The involvement of members of the NSW Commission would be facilitated if there were dual appointment of all NSW Commission members to the AIRC.

### *Pay equity and equal remuneration*

116. The award modernisation process should not result in the removal of award provisions designed to address pay equity issues, and that the establishment of mechanisms such as a Pay Equity Principle similar to that crafted by the NSWIRC should be considered, possibly within the context of the AIRC's obligation to report to the Minister pursuant to Paragraph 23 of the Request.

### *Nature and functions of modern awards*

117. Modern awards should be common rule industry or occupation awards.

### *Role and responsibilities of parties to modern awards*

118. Modern awards should contain provisions recognising the parties who will have an ongoing role and responsibility for the making and maintenance of each modern award.

### *Addressing the needs of award reliant enterprises*

119. Modern awards should fully address the needs of employees and employers who do not bargain, and be capable of actively regulating the working relationships of such employees and employers

### *Maintaining the relevance of awards*

120. In undertaking the award modernisation process, the AIRC should be cognisant of the need to keep awards relevant and contemporary.

### *Dispute resolution*

121. All modern awards should contain dispute resolution procedures that provide for access to an independent statutory tribunal (for the present the AIRC), which has a wide range of powers it can deploy to resolve such disputes. If this issue cannot be properly settled in the short or medium term, then it may need to be revisited when the powers of the Tribunal (AIRC or Fair Work Australia) are more clearly known.

### *High-income employees*

122. The NSW Government contends there is no basis to remove award coverage for supervisory and professional positions that have traditionally been award covered, and the NSW Government would be concerned if there is to be any reduction in traditional award coverage at the expense of such positions.

### *Support for training provisions*

123. 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. Specifically, the Commission should not disperse training provisions throughout modern awards and should instead aim to consolidate training clauses in the award in order to make their importance clear and their meaning readily understood.

### *Interaction of awards with the NES*

124. The Commission, when creating a modern award, should consider whether additional machinery rules in relation to NES entitlements are necessary for an applicable industry or occupation.
125. Any prohibition on awards operating inconsistently with the NES be read beneficially to ensure existing award employees are not unintentionally disadvantaged and that the application of the NES is not unnecessarily restrictive;
126. The Commission should seek to maintain consistency across industries in relation to the application of NES standards;
127. In modernising awards in areas that are dealt with in the NES the Commission should have regard to relevant State laws;
128. The Commission should take a favourable approach to including NES provisions in award wherever possible on the basis that it will often be essential to the operation of the award to do so;
129. The Commission should give consideration to how it will provide, via the modern award system, for the needs of award-free employees.

### *Allowable award matters and current state award provisions*

130. The Commission should clarify the approach to be taken in the award modernisation process with regard to existing State award provisions which neither fall within the range of allowable matters, nor are comprehended by the NES.

### *Limitations of using federal awards*

131. The starting point for drafting new awards should be the relevant State award where there is no principal federal award, or where the industry or occupation in question has been traditionally covered the State system. Evaluation of which award is the appropriate starting point should take place on a case-by-case basis, subject to relevant submissions from the award parties, State Governments and State industrial tribunals.

## *Wage rates*

132. Employees and employers subject to NAPSAs should not be disadvantaged by changes to their wage rates.

## **Potential for erosion of current NSW community standards**

133. As befits an independent and fully functioning industrial relations system, the NSW industrial relations jurisdiction has developed its own community standards, usually by means of hearing major industrial cases: see, for example *Secure Employment Test Case* [2006] NSWIRComm 38 (30 March 2006), *Transport Industry - Mutual Responsibility for Road Safety (State) Award and Contract Determination (No. 2), Re* [2006] NSWIRComm 328 (2 November 2006), *Family Provisions Case 2005* [2005] NSWIRComm 478, *State Wage Case 2007* [2007] NSWIRComm 118, *Re Application for Redundancy Awards* (1994) 53 IR 419<sup>23</sup>.

134. As a result of these cases and the operation of the IR Act, all NSW awards relevantly reflect these test case standards, and as such, these provisions must be considered as part of the award modernisation process.

135. Prima facie, this may create some difficulties: some NSW standards may differ significantly from the relevant federal standard – eg redundancy standards (as per *Re Application for Redundancy Awards* (1994) 53 IR 419); some standards may have no federal counterpart at all eg casual conversion and other provisions (as per *Secure Employment Test Case* [2006] NSWIRComm 38 (30 March 2006))

136. Further, some NSW standards perform significant workplace health and safety functions. For example, the decision in *Transport Industry - Mutual Responsibility for Road Safety (State) Award and Contract Determination (No. 2), Re* [2006] NSWIRComm 328 (2 November 2006) put in place a number of measures designed to address significant (and sometimes fatal) workplace hazards in the long-haul trucking industry. The *Transport Industry - Cash in Transit (State) Interim Award (NSW)*<sup>24</sup> has terms which, *inter alia*, perform a similar function in the cash in transit industry.

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<sup>23</sup> Some features of this decision were adopted in the *Employment Protection Act 1982*(NSW), and the *Employment Protection Regulation 2001* (NSW).

<sup>24</sup> *Transport Industry - Cash in Transit (State) Interim Award* [2001] NSWIRComm 220 (21 September 2001)

137. Loss or dilution of the standards and/or conditions in instruments such as these would amount to the removal of significant health and safety protections constructed after careful consideration by all the parties, and in some cases as a result of extensive arbitration proceedings. In some cases the provisions were introduced in response to significant injuries or fatalities. Indeed, many such provisions are essential to the operation of such awards and their removal would render the award nugatory.
138. New s576A requires that '(m)odern awards...must provide a fair minimum safety net of enforceable terms and conditions of employment for employees...'. It is unclear what such a fair minimum safety might specifically be, and whether it is capable of comprehending current NSW community standards.
139. On the other hand, new s576T of the Workplace Relations Act requires that modern awards not contain State-based differences. However, Paragraphs 2(c) and 2(d) of the Request respectively provide that the creation of modern awards will not disadvantage employees or increase costs for employers.
140. It is difficult to see how all of the latter requirements might be concurrently applied to the kinds of community standards described above. For example, adoption of the NSW standard regarding casual conversion would add to employer costs in other States, but the loss of the provision would mean that casual employees subject to relevant NAPSA's would lose the opportunity to convert to permanent employment.
141. Given that provisions of this kind are community standards, they currently apply in some or all industries, so their fate in the award modernisation process will have significant effects within the NSW workforce. Further, as community standards they have been subject to extensive processes of evidence, submissions, testing and deliberation by the Industrial Relations Commission of NSW, the parties, and other interested bodies. As a minimum, the NSW Government would expect that the award modernisation process should provide award outcomes at least as beneficial as current NSW settings.
142. This said, the NSW Government acknowledges that meeting the full range of legislative requirements will be a difficult task which will require a substantial investment of time and goodwill from the parties. It would therefore seem appropriate 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) of the WR Act.

143. Accordingly, in relation to state based community standards, the award modernisation process:

- (a) The award modernisation process should provide award outcomes at least as beneficial as current NSW settings; and
- (b) Removal of resulting state –based differences in modern awards should be a task for the medium term, utilising the transition period made available by s576T of the WR Act to the appropriate extent.

### **Using the experience of State Industrial Tribunals**

144. As noted at paragraph 11 above, the number of State awards (in their guise as NAPSAs) subject to the award modernisation process 1670, more than double the number of relevant federal awards (740). As also noted earlier, knowledge of the history and operation of these awards resides with State industrial tribunals, which in NSW is of course Industrial Relations Commission of NSW ('the NSW Commission').

145. It would thus appear appropriate to have the members State tribunals play a substantial role in the award modernisation process, particularly as it relates to State awards. Like the AIRC, the NSW Commission is organised in a panel structure, so the location of knowledge of particular industries, relevant employees and employers, and the awards that regulate them, is easily accessible.

146. To assist in such a process, the NSW Government is strongly supporting the dual appointment of all members of the NSW Industrial Relations Commission to the AIRC. If that were to occur, then dually appointed members could then be actively involved in the process of shaping modern awards, conducting hearings, taking evidence and bringing their accumulated expertise to bear on the process. Even in the absence of further dual appointments, the AIRC would at least take steps to actively involve those members of the NSW IRC who are dual appointed, and otherwise consult with other members of the NSW IRC, consistent with paragraph 13 of the Request.

## Pay equity and equal remuneration

147. Community standards in regard to equity and equal remuneration are well established in the NSW industrial relations system.
148. The 2000 Pay Equity case (*Re Equal Remuneration Principle* [2000] NSWIRComm 113) case resulted in the establishment of a Wage Fixing Principle (Principle 15) 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’.
149. This Principle has been subsequently applied in cases such as *Miscellaneous Workers Kindergartens and Child Care Centres &c (State) Award - Statement of the Full Bench, Re* [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 squarely address issues of pay equity in relation to specific awards, and put in place particular measures to address those issues.
150. No similar provisions appear to be currently available in the federal jurisdiction. Part 12 Division 3 of the current WR Act provides for applications in relation to equal remuneration, but s622 (inserted by the 2005 WorkChoices amendments) prohibits application by employees entitled to a rate of pay set by an APCS, which would exclude all employees subject to awards<sup>25</sup>.
151. New s576S prohibits the inclusion of ‘...terms that discriminate against an employee because of, or for reasons including...sex..’. While the presence of such a provision is welcome, it should be noted that the discriminatory effects of particular award terms may be difficult to clearly identify, and may require substantial investigation of available evidence, as the cases cited above at para ?? demonstrate. It would not appear that the award modernisation process is directed to investigations of that kind, and that the effects of s576S will therefore be limited.
152. Clause 3(e) of the Request provides that, in relevantly performing its functions, the Commission will (inter alia) have regard to ‘the need to help prevent and eliminate discrimination on the grounds of ....sex....’. While this provision could be said to be

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<sup>25</sup> It is worth noting that these provisions carry forward those that appeared in former Part VIA Division 2, which saw only three applications proceed to hearing during its life, all of them in the period 1996 to 2002.

directed at issues of pay equity and equal remuneration amongst others, it could not be said to be a fully developed Principle equivalent to that established by the NSWIRC. Further, while Clause 3(e) also requires the AIRC to have regard to ‘the need ...to promote the principle of equal remuneration’, the absence of a relevant test case standard in the federal jurisdiction suggests that this is no more than a broad statement of principle.

153. As such, it would appear that the mechanisms available to parties to NSW awards to address pay equity issues are unavailable in the federal jurisdiction, and that provisions inserted into specific awards to address these issues may be removed.

154. While the NSW Government acknowledges that the award modernisation process is not specifically intended to establish Principles such as the Pay Equity Principle, equal remuneration must be a matter for active consideration as per para 3(e) of the Request. Further, the Request provides that employees are not to be disadvantaged by the award modernisation process (para 2(c)).

155. Having regard to these considerations, the way forward for specific pay equity remedies is not clear. From the NSW Government’s point of view, it is critical that what has been achieved so far in pursuit of pay equity in the NSW jurisdiction not be lost. The fact that many of the employees who could be expected to benefit from such provisions are to be found in priority industries and occupations for the award modernisation process makes this point more acute.

156. The NSW Government submits in conclusion that the award modernisation process does not result in the removal of award provisions designed to address pay equity issues, and that the establishment of mechanisms such as a Pay Equity Principle similar to that crafted by the NSWIRC be considered, possibly within the context of the AIRC’s obligation to report to the Minister pursuant to Paragraph 23 of the Request.

### **Nature of modern awards**

157. As indicated above, common rule awards are at the centre of the NSW industrial relations system. NSW common rule awards may either be industry awards (eg the Metal Engineering and Associated Industries (State) Award or the Club Employees

(State) Award ), or may relate to a specific occupation or calling (eg the Clerical and Administrative Employees (State) Award or the Hairdressers (State) Award).

158. The common rule nature of such awards means that they apply to all employers and employees who fall within the area, incidence and duration clause of the relevant award. The area, incidence and duration clause ('AID clause') clause describes the industries and/or occupations covered by the award in detail. For example, the AID clause to the Clerical and Administrative Employees (State) Award provides as follows:

'34.1 This award shall apply in respect of all persons employed in any clerical capacity whatsoever and without limiting the generality of the foregoing shall include telephonists, receptionists, cashiers, messengers, copy boys, telephone canvassers (other than for the sale of goods), persons employed on machines designed to perform or to assist in performing any clerical work whatsoever and all classes of employees engaged in any clerical capacity in or in connection with payroll preparation, cash handling and processing in the state of New South Wales excluding the County of Yancowinna, within the jurisdiction of the Clerical and Administrative Employees (State) Industrial Committee, excepting employees covered by industry or employer specific awards

159. The application of a State common rule award to any particular employer or employee does not therefore depend on whether that employer or employee, either directly or indirectly through a representative body, has been party to an industrial dispute. This contrasts with the technical requirements for being a party to a federal award that was made pursuant to the conciliation and arbitration powers of the Australian Industrial Relations Commission, constrained by the constitutional requirements in section 51(xxxv) of the Constitution.

160. The State common rule approach to the binding nature of awards means that all employers and employees in an industry or occupation can rest assured that they all start with the same set of award conditions, which cannot be undercut.

161. One positive thing, at least, that is achieved by the shift from reliance on the conciliation and arbitration power, is the new found freedom to give federal awards common rule effect.

162. The NSW Government submits that modern awards be common rule industry or occupation awards containing provisions that describe with precision the nature of the industry or occupation covered by the award.

## **Role and responsibilities of parties to modern awards**

163. While State common rule awards do not list by name the full range of specific employers (or employees) subject to a particular award, common rule awards do still recognise the role and responsibilities of parties to each common rule award.
164. As set out in the award making provisions of the Act, those entities that are permitted to apply for the making of an award may become a party to any proceedings for making an award. These entities are limited to employers, industrial organisations of employers or of employees, and State peak councils. These parties then have the role and responsibility of representing their own and their members interests in the making and variation of relevant awards. Notably, these parties are also themselves bound by the award.
165. In this way, the State award system combines the concept of common rule application with the concept of parties with a special role and responsibility for maintaining and looking after awards in the interests of all persons bound by them.
166. Modern awards should contain provisions recognising the parties who have an ongoing role and responsibility for the making and maintenance of each modern award.

## **Addressing the needs of low paid and award reliant enterprises**

167. 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 .
168. Such employees do not and cannot bargain, and are to be found principally in small to medium businesses in industries such as hospitality and accommodation. In the NSW Government's submission, it cannot be expected that workplaces in this situation will bargain in the short or medium term, if at all, and the case for inducing or compelling them to do so does not seem persuasive.
169. As common rule awards, modern awards should likewise provide a comprehensive and adaptable set of working conditions for employees and employers who do not

bargain, and be capable of actively regulating the working relationships of such employees and employers.

### **Maintaining the relevance of modern awards**

170. As can be seen from Appendix B, the NSW jurisdiction provides a number of mechanisms to vary and review awards, either on application from a party or parties (s17 IR Act), as a result of a national or state decision (Ch2 Pt 3), or as part of a statutory award review process (ss19-20).

171. For the most part, award variations are designed to ensure that awards adequately address changed workplace circumstances as identified by the parties: for example, the Secure Employment Test Case<sup>26</sup> was intended to establish award mechanisms to deal with the increased casualisation of the workforce.

172. The result of the award modernisation process is to be awards which are ‘...economically sustainable, and promote flexible modern work practices and the efficient and productive performance of work’ (WRA s576A(2)(c)). While that may be the case in the short term, the current provisions in Part 10A do not provide any mechanisms which allow them to adapt to changing workplace circumstances beyond the power to vary in s576H (it is not clear how and by whom an application to vary may be made). For workplaces where awards are the primary means of industrial regulation (as noted above), this is obviously a matter of considerable importance.

173. Given the uncertainty as to whether the Commission will be able to update modern awards, the Commission in undertaking the award modernisation process, should be cognisant of the need to make awards as relevant and contemporary as possible.

### **Dispute resolution**

174. Access to the NSW Commission for dispute resolution purposes at any time is a key feature of the NSW industrial relations jurisdiction. The NSW Commission has a broad range of powers to enable it to settle disputes by conciliation and arbitration (IR Act Ch3, Ch 4 Part 5).

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<sup>26</sup> *Secure Employment Test Case* [2006] NSWIRComm 38 (30 March 2006)

175. The NSW Government strongly supports the existence of a strong and independent industrial tribunal possessing all powers necessary to resolve disputes.
176. It seems reasonable to assume that the likelihood of disputes about, or arising from, the terms of awards, will be undiminished following the process of award modernisation. If anything, it would seem that the operation of new features of the system such as award flexibility clauses may well add to the likelihood of disputes.
177. On the other side of the ledger, it will no longer be necessary to create a paper dispute to make a new award if the supporting legislation relies on the constitutional corporations power. This has been the situation in the NSW industrial relations jurisdiction since its inception, however, as experience in that jurisdiction demonstrates, the absence of a requirement for a paper dispute does not mean that, for example, an application for a new award will not be disputed, or that the proposed terms of an award will be readily agreed.
178. In the NSW Government's submission, as the independent tribunal will have responsibility for making and maintaining modern awards, it should have a strong and independent role in resolving disputes that arise from the operation of these awards.
179. While the award modernisation process admits the inclusion of dispute resolution procedures in awards (WR Act s576J(1)(j)), it is not clear what the character of those procedures will be, and specifically, whether or not access to the AIRC and a full range of powers will be readily available.
180. It would appear that the question of available dispute resolution powers cannot be fully answered until such time as fully developed legislation to implement the Forward With Fairness policy is available for consideration.
181. In this circumstance, it may be appropriate for the full text of dispute resolution clauses of modern awards to be fully developed after it is known what dispute resolution powers the AIRC or Fair Work Australia will have, and accordingly, whether it will be appropriate for such procedures to contain within them a recognition that disputes can ultimately come before the Tribunal for determination.

182. This said, it is nonetheless the NSW Government's view that any loss of current NSW dispute settling procedures has the potential to disadvantage NSW employees and employers subject to awards or relevant NAPSAs.

183. In the NSW Government's submission, all dispute resolution procedures in modern awards should (ultimately) provide for access to an independent statutory tribunal (for the present the AIRC), which has a wide range of powers it can deploy to resolve such disputes.

184. In conclusion, the NSW Government submits that all modern awards contain dispute resolution procedures that provide for access to an independent statutory tribunal (for the present the AIRC), which has a wide range of powers it can deploy to resolve such disputes. If this issue cannot be properly settled in the short or medium term, then it may need to be revisited when the powers of the Tribunal (AIRC or Fair Work Australia) are more clearly known.

### **High Income Employees**

185. The Request states in paragraph 2(b) that the creation of modern awards is not intended to result in 'high-income employees' being covered by modern awards.

186. The NSW Government would be concerned if that led to any change in traditional award coverage. In particular the NSW Government contends there is no basis to remove award coverage for supervisory and professional positions that have traditionally been award covered.

187. Historically there have been awards that cover supervisory, professional and other positions, which have set a rate of pay that would not be considered 'high': for example professional engineers have had federal award coverage since 1961. Such categories of employees have long been considered appropriate to be covered by an award, even though some individual employees covered by such awards may (arguably) be considered 'high-income' earners because of above-award payments.

188. The protection offered by the award safety net has meant that many professional and managerial employees have entered into individual contracts of employment with the knowledge that their basic workplace rights are safeguarded. For instance, it has meant, for example, that professionals and managers have been able to insist that they are compensated for the working of additional hours and negotiate around

work/life balance etc. It should be noted however, that while the awards regulating professionals and managers have established basic entitlements, these have operated in a flexible manner. This fact is evidenced by the longevity of these awards over time and the virtual lack of disputation surrounding their application.

189. The Request at 2(a) states that modern awards are not intended to extend to managerial employees who have traditionally been award free. That confirms the view that professional and managerial employees who have traditionally been covered by an award are expected to continue to be covered by awards.

190. It is understood that the Federal Government has indicated that further amendments are to be made to the WRA, and such amendments may include provisions that affect the applicability of awards and or NES entitlements to employees earning above a certain amount. Any such possible future development, of course, does not affect the task of making a modern award under the current legislation. In particular, there is no basis to conclude that it is appropriate to have such awards not apply to employees earning above a particular sum. If individual employees and employers wish to enter into above-award agreements, that can be done by way of the use of an award flexibility clause.

191. It can be accepted that modern awards, which are required to set a fair minimum safety net of enforceable terms and conditions, would not contain rates of pay that would make an employee covered by that award a 'high-income employee'. It is submitted that paragraph 2(b) is directed to that scenario only, such that modern awards can apply to classes of employee traditionally covered by an award so long as the award rate set is not a rate that would classify as a 'high-income' rate. Any concern about award conditions being unnecessary in respect of an employee who is paid a high-income by way of above award payments can be readily met by application of the award flexibility clause.

192. The expression 'high-income' is not defined. In today's environment, the expression would be understood to mean some multiple of the average income.

### **Support for training provisions**

193. Sections 576B (2) (a) and (b) of the WR Act, provide that, in modernising awards the Commission must have regard to a range of factors including '.....the

development of skills...' and 'protecting the position in the labour market of ...employees to whom training arrangements apply'

194. According to the terms of s576J, 'training' is not specified to be an allowable matter, although some elements of training clauses (training leave, allowances, competency based progression etc) are all allowable. However it is unclear as to whether other provisions such as training leave and qualified supervision will be considered allowable or not. Accordingly, it is submitted that the Commission should take the broadest possible approach to including provisions that support training and skill development in awards and not take a narrow approach of dispersing training provisions throughout the award which the NSW Government believes would lessen their priority/importance. The NSW Government therefore strongly submits that the Commission 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.

195. The process of award restructuring in the late 1980s drove improvements in workforce flexibility and productivity. In the NSW Government's submission, the award modernisation process being undertaken by the Commission is a similar opportunity to use the award system to promote training and skills development to meet economic needs.

196. Currently federal pre-reform awards and NAPSAs contain a range of existing provisions that facilitate vocational education and training for apprentices and trainees or more broadly encourage skill development among non-apprentice and trainee employees.

197. A number of NSW awards contain general training provisions which are not confined in their application to apprentices and trainees bound by vocational training contracts. Generally these arrangements encourage and facilitate skills development and training opportunities on and off-the-job through the requirement for employers to develop consultative training programs, pay for training in work time and reimburse course, textbook and other costs for training undertaken at their request (see for example Metal Engineering & Associated Industries (State) Award, Clerical & Administrative Employees (State) Award).

198. For apprentices, while the nominal duration of training is provided for under the training contract, awards provide for progression through the wage scales, usually expressed on a yearly time served basis. Some awards provide for wage classifications based on competency based progression (such as federal Metal, Engineering & Associated Industries Award). In addition, some awards provide for part-time school based apprenticeships (such as Electricians &c. (State) Award, Restaurants &c. Employees (State) Award, Building and Construction Industry (State) Award).
199. Apprentices' award provisions may also include such entitlements as paid time off to attend training (Electrical, Electronic and Communications Contracting Industry (State) Award), paid time for exams and block release, reimbursement of course fees and textbooks (Joiners (State) Award), paid travelling time (Coachmakers & c. Road Perambulator Manufacturers (State) Award ), tool allowances, and the guarantee that there will be sufficient qualified tradespeople on the job to supervise an apprentice when working (Building and Construction Industry (State) Award).
200. 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.
201. The principal cross-industry awards are the Training Wage (State) Award 2002 or the National Training Wage Award 2000 which require employers to ensure the trainee is permitted to attend the relevant training, receive the appropriate on-the-job training and supervision, and agree to monitoring by the 'relevant NSW Training Authority' (defined as the NSW Department of Education and Training).
202. There are explicit provisions in relation to wage protection for trainee employees engaged in off-the-job structured training including no loss of continuity of employment and/or wages to attend off-the-job training.
203. With regard to how training arrangements will be dealt with in modern awards there are a number of matters which the Commission will need to consider including:

- (a) Existing vocational training arrangements for apprenticeships and traineeships and the extent to and approach by which they will be dealt with under the allowable matters.
- (b) The extent to which APCSs derived from federal pre-reform awards and NAPSAs provide for classifications linked to competency based progression, and part time school based arrangements.
- (c) The question of whether modern awards will only contain competency based classifications, and the method by which the Commission is to consider translating existing classifications and rates of pay into any new structure.
- (d) The extent to which existing training and career development provisions in federal pre-reform awards and NAPSAs fit within the definition of allowable matters (including those that apply to apprentices and trainees) and the impact of 'dispersing' or 'fragmenting' elements of existing clauses.

204. Despite 'training' not specifically being an allowable matter, the elements of training clauses (such as training leave, allowances, competency based progression etc outlined above) would appear to mostly be allowable matters under provisions outlined in s576 (J) 1 of the WR Act which inter alia provide for:

- (a) Minimum wages – which will include skill based classifications and career structures, incentive based payments and bonuses, wage rates and other arrangements for apprentices and trainees.
- (b) Type of employment and arrangements for when work is performed
- (c) Allowances, including for reimbursement of expenses incurred in the course of employment and for responsibilities or skills that are not taken into account in rates of pay

205. However it is unclear as to whether other provisions such as training leave and qualified supervision will be considered allowable or not. Accordingly, it is submitted that the Commission should take the broadest possible approach to including provisions that support training and skill development in awards.

206. Further, the Commission should not be restricted to dispersing training provisions throughout the award which NSW believes would lessen their priority/importance. NSW strongly urges the Commission to bring relevant training clauses together in the one section of a modern award to make the importance of training provisions clear and easily interpreted.

207. Finally, the Commission's attention is drawn to a range of research about the link between industrial arrangements and skill reform, which may assist in the making of modern awards that support the development of skills. This research is detailed at Appendix C.

208. 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. Specifically, the Commission should take the broadest possible approach to including provisions that support training and skill development in awards. Further, the Commission should not disperse training provisions throughout modern awards and should instead aim to consolidate training clauses in the award in order to make their importance clear and their meaning readily understood.

### **Interaction of awards with the NES**

209. Ten proposed National Employment Standards (NES) were released by the federal government as an Exposure Draft for public comment with submissions due by the 4<sup>th</sup> of April 2008. The Discussion Paper which accompanied the Exposure Draft provided some information on how the federal government intends modern awards to operate in the new industrial relations system and how the NES will interact with modern awards.

210. Specifically, NES Discussion Paper noted that a modern award:

- may cross reference a provision of the proposed NES (paragraph 32);
- may replicate a provision of the proposed NES only where the Australian Industrial Relations Commission (AIRC) considers this essential for the effective operation of the particular modern award provision (paragraph 32);

- where it replicates a provision of the proposed NES, NES entitlements will be enforceable only as NES entitlements and not as provisions of the modern award (paragraph 33);
- cannot exclude a term of the proposed NES or operate inconsistently with a term of the proposed NES (paragraph 21); and
- may contain machinery provisions about how the NES entitlements can operate in a particular industry or occupation (paragraph 27).

211. The Discussion Paper also refers to a number of machinery provisions that are matters for inclusion in future modern awards as summarised in paragraphs 25 to 31. They include references to:

- averaging of hours (paragraph 50)
- calculation of payment for no safe job leave (paragraph 111)
- pieceworkers rate of pay (paragraphs 114, 138, 181, 230)
- specifying 'ordinary hours of work' (paragraphs 133, 163, 178, 227, 254, 258, 264)
- cashing out and taking of paid annual leave (paragraph 155)
- flexible options for taking leave (paragraphs 152, 156)
- allowing greater beneficial entitlements for personal/carer's leave (paragraph 198)
- compensation for working on a public holiday (paragraph 262).

212. It is understood that the creation of the relevant machinery provisions will, in the first instance, be a task performed by the Commission through the award modernisation process. The NSW Government has some concerns about how this process will work which are detailed in succeeding paragraphs.

213. In the first instance, the NSW Government supports the Commission exercising its discretion to determine whether additional machinery rules in relation to NES entitlements are necessary for an applicable industry or occupation. For example, a provision to permit an employee to take double the period of annual leave at half pay

by agreement with their employer may be appropriate in some industries where such flexibilities have already been established through robust award variation processes but not in others where circumstances may be different.

214. Further, the NSW Government believes that the Commission should apply a beneficial reading to the proposed prohibition on awards operating inconsistently with the NES to ensure existing award employees are not unintentionally disadvantaged and that the application of the NES is not unnecessarily restrictive. For example, casual employees who have an entitlement to personal/carer's leave under an award should not lose such a benefit because it may be inconsistent with the NES which does not provide for personal/carer's leave for casual employees. Such an approach would be consistent with paragraph 2(c) of the Request, which provides that the creation of modern awards is not intended to disadvantage employees.

215. The Discussion Paper suggests that proposed modern awards may contain terms requiring annual leave to be given and taken at a particular time or in specified circumstances. These arrangements would then, however, be settled on a largely industry specific basis. Of concern would be any situation that may arise where employees in one industry can be directed to take annual leave but not in another industry where the same or similar circumstances apply. The employee's ability to access the basic NES entitlement may thus depend upon the terms of machinery provisions that differ from one industry award to another.

216. As a general approach to dealing with conditions of employment, the NSW Government strongly supports industry and/or occupation specific awards, which are able to deal with the needs, history and prevailing norms in particular industries or occupations. However, it must be acknowledged that some of the conditions of employment with which awards will now deal are conditions that have traditionally been dealt with by way of state legislation or that are standard conditions achieved by way of test cases. The risk of leaving the sorts of matters that these clauses deal with to award by award regulation is that workers (and employers) who have typically enjoyed standardised conditions common throughout the community, may risk losing such conditions.

217. For example, under the NES, accrual of leave and other entitlements is based on recognised service with the employer performed in accordance with the employee's

ordinary hours of work. There is however, no proposed statutory definition of ordinary hours for the purpose of the NES. Ordinary hours will be set out in a modern award for an employee covered by the award for the purposes of calculating an entitlement to annual leave. A situation may thus arise where the NES may have varying application depending on the ordinary hours definition adopted in a particular modern award.

218. This is important as the identified ordinary hours not only determine the quantum of leave or other entitlement and the rate at which it accrues in an individual case. It also determines the level of payment as an employee is paid an amount based on their ordinary hours for the period of leave or other entitlement. In the absence of a uniform definition of ordinary hours, a full-time worker in one industry may accrue an entitlement at a different rate, and be paid a different quantum, when compared to a worker in another industry.

219. The view of the NSW Government is not that award conditions should be identical across all industries, but rather that key conditions should be sufficiently similar and consistent to ensure that workers are not disadvantaged between different industries, and that the Commission's award-making power be used to secure this goal.

220. The NSW Government is also concerned about areas where the NES may undermine state legislative employment standards. The Annual Holidays Act 1944, Industrial Relations Act 1996 and Employment Protection Act 1982 provide a number of entitlements that are superior to what is proposed under the NES. In modernising the awards in areas that are dealt with in the NES the Commission should, in the NSW Government's submission, have regard to relevant State laws, particularly given that the terms of such State laws are terms contained in NAPSA's, pursuant to Schedule 8, clause 34.

221. With regard to ease of access, it would be much easier for the employee and the employer to have access to one document containing information about their rights, obligations and entitlements. The NES should therefore be able to be replicated in an award and can be distinguished with clear annotation.

222. In this regard, the NSW Government submits that, to the extent possible, the Commission ensure that NES are included in an award on the basis that their inclusion is essential for effective operation of the award.

223. The NSW Government also has concerns in relation to award-free employees. In the NSW Government's submission, such workers fall into two groups. The first such group consists of low or average income employees whose occupation or industry has not been subject to award coverage for various reasons: for example the occupation or industry is too 'new' (eg call centres, the IT industry), or the occupation or industry has never been subject to award coverage (eg trolley collectors). The second such group consists of high income, professional employees, who traditionally have never been subject to an award, but who will now be subject to the NES.

224. In relation to the first of these groups, there should be a modern award that applies to them, namely a miscellaneous workers award. Such an award is appropriate so as to provide flexibility clauses and machinery provisions to be read with the NES, dealing with matters such as defining meal breaks, what constitutes shift work, and when and how an employee's hours are to be worked. However, this should be a modern award in the full sense, to ensure that these workers who have far less bargaining power also have access to basic versions of entitlements such as penalty rates and meal breaks. It is acknowledged that achieving a 'catch all' award may well be a complex exercise as it will require the tribunal charged with making the award to determine the needs and requirements of what could be a significantly diverse group of employees.

225. With regard to the second group of award-free employees, these employees will have access to and benefit from certain entitlements that were previously not available to them, for example, a standard for maximum weekly hours, as a result of being subject to the NES. The weekly hours NES may be an issue of some concern in industries or occupations where highly paid workers have traditionally worked long hours. This problem stems from the 'one-size-fits-all' approach that is inherent in any system that legislates universally for minimum employment conditions, rather than leaving the regulation of employment conditions to the parties to sort out, with the assistance of an independent industrial tribunal. The latter system results in awards that are tailored to the particular needs of defined industries or occupations, and does not impose inappropriate conditions on other industries and occupations. In the NSW Government's submission, once the NES are known the Commission should

consider making an award or awards that provide for relevant machinery provisions that are appropriate to such workers.

226. In conclusion, the NSW Government submits that:

- (a) The Commission, when creating a modern award, consider whether additional machinery rules in relation to NES entitlements are necessary for an applicable industry or occupation;
- (b) Any prohibition on awards operating inconsistently with the NES be read beneficially to ensure existing award employees are not unintentionally disadvantaged and that the application of the NES is not unnecessarily restrictive;
- (c) In modernising awards in areas that are dealt with in the NES the Commission have regard to relevant State laws, particularly those terms of NAPSAs derived from State laws.;
- (d) The commission takes a favourable approach to including NES provisions in award wherever possible on the basis that it will often be essential to the operation of the award to do so;
- (e) The Commission should give consideration to how it will provide, via the modern award system, for the needs of the two identified groups of award – free employees.

### **Allowable award matters and current state award provisions**

227. Modern awards are to contain minimum terms and conditions of employment for particular industries and occupations in relation to ten allowable matters including minimum wages, penalty rates, overtime and allowances: WR Act 576J(1).

228. In February 2008, in anticipation of the award modernisation process, the NSW Government undertook an analysis of the impact of the 10 allowable award matters on NSW state awards.

229. An analysis of 10 major industry awards was undertaken to identify which award matters currently contained in NSW state awards could be covered by the Forward with Fairness 10 allowable award matters and which matters may fall outside these.

230. The following state awards were selected for analysis as they provide a cross section of common industries and also provide a comprehensive list of award conditions:

- Shop Employees (State) Award (601)
- Clerical and Administrative Employees (State) Award (135)
- Building and Construction industry (State) Award (001)
- Restaurants, &c., Employees (State) Award (577)
- Hairdressers' &c. (State) Award (372)
- Transport Industry (State) Award (677)
- Metal, Engineering and Associated Industries (State) Award (039)
- Miscellaneous Workers' – Kindergarten and Child Care Centres, &c. (State) Award (482)
- Commercial Travellers, &c., (State) Award (159)
- Cleaning and Building Services Contractors (State) Award (116).

231. A comparative table setting out the details of this analysis is at Appendix D. The table compares how NSW award matters might be grouped against the 10 allowable award matters. It also lists the range of current NSW award conditions that are not obviously aligned with the NES and the 10 allowable award matters. The table was derived from an analysis of the impact of the 10 allowable award matters on 10 major industry awards in NSW.

232. This analysis raises several questions about the award modernisation process, particularly including issues about the scope, extent of application, process for determining the highest or lowest common denominator to be applied when consolidating several awards, and the extent of industry relevant detail to be included in modern awards.

233. The Commission has since released research undertaken as part of the modernisation process on comparative schedules for the metals industry. It is noted

that the Commission has attempted, wherever possible to match particular provisions in the state award with allowable award matters that may be included in modern awards, provisions relevant to the draft NES and scope and incidence.

234. A corresponding line by line analysis of the Metal, Engineering and Associated Industries (State) Award (NSW) has not been undertaken. However, the following significant provisions appear to be excluded from the comparative schedules:

- CI 7.7.1(b) Public Holidays; that provides for an additional public holiday for full-time employees.
- CI 4.2A Secure Employment; dealing with casual conversion in particular. Similar clauses in the other State and federal awards compared have been included.

235. A further concern is the effect of 'taking apart' current state award clauses and provisions and fitting their various subclauses or elements under different allowable matters. For example, training is a matter that may be diffused throughout modern awards. Will the original intent or purpose of that clause be lost if its elements are dispersed and it can no longer be read as a whole?

236. The NSW Government notes that the Commission has formulated the comparative schedules for research purposes, however it is apparent this information will be considered in the making of modern awards in the industry. The NSW Government is concerned about the disaggregation of NAPSAs and the possible consequential effect that results in award provisions being lost in the process.

237. In addition, there appear to be a significant number of award conditions in NSW state awards that have been identified by the NSW Government as are not obviously aligned with the proposed 10 allowable matters, and which are not covered by the 10 legislated national employment standards. The likely fate of such provisions is unclear.

238. Existing NSW award conditions that are not obviously aligned with the allowable matters include:

- Training and career development (excluding those that apply to apprentices and trainees)

- Employer provided facilities, protective clothing and equipment, tools, accommodation etc
- Use of employee skills and flexibility of job tasks.
- Anti-discrimination provisions
- Secure employment (in particular casual conversion) including relevant OH&S consultation provisions.
- Deduction of union membership fees
- Area, incidence and duration
- Transfer of employees
- Past services entitlements
- Accident pay
- Stand-down provisions
- Provisions for sub-contracting
- Relationship to other awards
- Non-reduction of existing wages and conditions
- Enterprise arrangements
- Level of detail contained in job classification structure clauses, particularly in relation to job definitions within classifications
- Employer and employee duties and obligations.

239. The transitional arrangements appear to broaden the scope of the 10 allowable award matters. Section 576J(2) of the Workplace Relations Act 1996 provides scope for matters that fall outside the 10 allowable award matters and the national employment standards to be included in modern awards by including them in the award modernisation request. However, the Request does not appear to include any

direction to examine or consider existing conditions that are not obviously aligned with the 10 allowable award matters and the national employment standards.

240. Although it is encouraging that the Commission appears to have considered a broad scope for the allowable matters, as demonstrated by the comparative schedules for the metals industry, until the final draft is seen concerns remain about what provisions may fall outside the range of the 10 allowable matters.

241. Consequently, uncertainty remains about what may happen to conditions contained in NSW state awards, many of which are now defined as NAPSAs. Clarification is still required regarding the preservation of these existing NSW award conditions, in order to ensure that existing employees will not be disadvantaged by the award modernisation process.

242. In conclusion, it will be appropriate for the Commission to clarify the approach to be taken in the award modernisation process with regard to existing State award provisions which are not obviously aligned with the range of allowable matters, nor are comprehended by the NES.

### **Limitations of using federal awards as the starting point**

243. According to the Commission's Statement, '(w)ithin each industry/occupation the principal federal award will usually be the starting point for drafting.': [11].

244. However, there may be industries with no such federal award eg hairdressing, restaurants, or industries which have been traditionally covered by State systems rather than the federal system eg hospitality, child care, social and community services etc.

245. In such cases, it would appear appropriate that the relevant State award be the starting point.

246. As such, the NSW Government takes the view that the starting point for drafting new awards should be the relevant State award where there is no principal federal award, or where the industry or occupation in question has been traditionally covered the State system. Evaluation of which award is the appropriate starting point should take place on a case-by-case basis, subject to relevant submissions from the award parties, State Governments and State industrial tribunals.

## **Wage rates**

247. While the decision to reunite pay rates (currently in APCSSs) with relevant awards is welcome, it is not clear how final pay rates in modern awards are to be set, having particular regard to pay rates operating in NAPSAs.

248. The Request provides that the award modernisation process is to have the aim of neither disadvantaging employees nor increasing employer's costs: 2(c) and (d). The WR Act provides that state-based differences must be excised after 5 years at most.

249. It would thus appear that the endpoint of the award modernisation process is a single (set of) pay point(s) at each classification. However the manner in which this goal is to be arrived at is not clear, given the attendant requirements of the Request and the WR Act.

250. The NSW Government is concerned that existing wage rates in NAPSAs and State awards are maintained, and neither employees or employers are disadvantaged by the award modernisation process.

251. As identified by the Award Review Taskforce's July 2006 Report, there are very significant issues surrounding how disparate pay and classification structures, developed over decades, can be readily translated into a single new structure, particularly without disadvantaging employers or employees. This will be somewhat easier if State-based differences are maintained, at least in the short-term, and this approach is to be preferred. The NSW Government submits that the AIRC call for submissions as to how it should undertake this complex process in making modern awards, and determine this as a threshold question.

## Conclusion

252. In conclusion, the NSW Government notes the difficult and complex task which the award modernisation process confers on the Commission which is to be completed in a relatively short period of time. The NSW Government believes that the role of current award parties, State Governments and State industrial tribunals in meeting these requirements is critical if the process is to be a success.

253. On this basis, we have, in this submission, sought to assist the Commission by proposing a structured process in which the Commission can hear from award parties in regard to a number of issues which we believe to be critical to the award modernisation process at large

254. The NSW Government believes that, in addressing these issues, the processes adopted by the Commission should have regard to established natural justice principles relevant to a situation where the rights of the parties will be affected by a decision of the Commission.

255. Of particular importance in ensuring the success of award modernisation, is the role of State industrial tribunals, who are able to draw their accumulated expertise in relation to many of the industries and occupations for which modern awards will be made.

256. The result of this process should be a set of principles which will then guide Commission and the parties in the making of each modern award.

257. In the NSW Government's submission, this is the approach with the greatest likelihood of producing modern awards which are relevant and have the support and confidence of the parties.

## Appendix A

### ***Draft list of priority industries: NSW awards potentially affected***

258. On 29 April 2008 a list of priority industries was issued by Justice Giudice, President of the AIRC as part of a statement in response to Minister Gillard's request.

259. Examples of NSW State awards contained within the priority industries listed at Attachment A of the Statement are as follows:

#### *Aged Care Industry (excluding nursing)*

- Aged Care General Services (State) Award
- Aged Care Industry (Broken Hill) Award
- Miscellaneous Workers Home Care Industry (State) Award
- Private Hospitals, Aged Care and Disability Services Industry (Training) (State) Award
- The Private Hospitals and Aged and Disability Care Services Industry Redundancy (State) Award

#### *Clerical Occupations (with appropriate exclusions)*

- Clerical and Administrative Employees Legal Industry (State) Award
- Clerical and Administrative Employees (State) Award
- Clerical and Administrative Employees (Catholic Personal Carer's Leave) Award
- Clerical and Administrative Employees in Temporary Employment Services (State) Award
- Clerical and Administrative Employees, Hire Cars and Taxis (State) Award
- Clerks Redundancy (State) Award
- Clerical and Administrative Employees in Permanent Building Societies (State) Award

- Clerical Employees In Metropolitan Newspapers (State) Award
- Real Estate Industry (Clerical and Administrative) (State) Award

*Coal Industry*

- Coal Mining Industry (Accident Pay) Interim Award 2004
- Refractory Industry (State) Award
- Coal Superintending Samplers (State) Award

*Electrical Occupation (other than electricians covered by relevant industry awards)*

- Electrical, Electronic and Communications Contracting Industry (State) Award
- Electricians, &c. (State) Award

*Gardening and Sportsground Maintenance Industry*

- Bowling and Golf Clubs Employees (State) Award
- Landscape Gardeners, &c. (State) Award
- Miscellaneous Gardeners, &c. (State) Award
- Race Clubs Employees (State) Award

*Graphic Arts Industry*

- Advertising Sales Representatives (Sydney Daily Newspapers) Award
- Clerical Employees In Metropolitan Newspapers (State) Award
- Printing Industries (State) Award

*Hospitality Industry*

- Club Employees (State) Award
- Club Industry (Variety Artists) (State) Award 2001
- Club Managers' (State) Award 2006
- Hotel Employees (State) Award

- Motels, Accommodation and Resorts (State) Award
- Restaurants, &c., Employees State Award
- Caterers Employees State Award
- Restaurant, &c., Employees' Retail Shops (State) Award

#### *Insurance Industry*

- Clerical and Administrative Employees (State) Award

#### *Metal Engineering and Associated Industries*

- Engine Packing Manufacture (State) Award
- Metal Trades (Training Wage) (State) Award
- Metal, Engineering and Associated Industries (State) Award

#### *Nursing Occupation*

- Aged Care General Services (State) Award
- Aged Care Industry (Broken Hill) Award
- Charitable Sector, Aged and Disability Care Services (State) Award 2003
- Charitable, Aged and Disability Care Services (State) Award
- Nurses (Private Sector) Redundancy (State) Consolidated Award [Parents 759, 510, 508 & 517]
- Nurses' (Private Sector) Training Wage (State) Award
- Nurses Private Sector Superannuation (State) Award
- Nurses, Non-Government Schools (State) Award
- Nurses, Other Than In Hospitals, &c., (State) Award
- Nursing Homes Professional Employees (State) Award
- Nursing Homes, &c., Nurses' (State) Award

- Occupational Health Nurses (State) Award
- Private Hospital Industry Nurses' (State) Award

#### *Poultry Processing Industry*

- Poultry Farm Employees (State) Award
- Poultry Industry Livestock (State) Award
- Poultry Industry Preparation (State) Award

#### *Racing Industry*

- Race Clubs Employees (State) Award
- Greyhound Racing Authority (NSW) Award
- Racecourse Totalisators (State) Award
- Strappers and Stable Hands (State) Award

#### *Rail Industry*

- Sydney Light Rail (State) Award 1997
- Coachmakers, &c., Rail (State) Award

#### *Retail Industry*

- Butchers, Retail (State) Award
- Clerical Employees in Retail (State) Award
- Fish and Fish Marketing (State) Consolidated Award
- Fruit Packing Houses Employees (State) Consolidated Award
- Motor Vehicle Salesperson (State) Award
- Pharmacy Assistants (State) Award
- Retail Industry (State) Superannuation Award

- Retail Industry (State) Training Wage Award
- Retail Services Employees (State) Award
- Shop Employees (Catholic Personal/Carers Leave) (State) Award
- Shop Employees (State) Award
- Transport Industry Retail (State) Award 1999
- Van Sales Employees' (State) Award

*Rubber, Plastic and Cablemaking Industry*

- Plastic Moulding, &c. (State) Award
- Rubber Workers (State) Award

*Technical Services – Engineers and Scientists Occupations (with appropriate exclusions)*

- Professional Engineers and Professional Scientists (Private Industry) (State) Award

*Textile, Clothing and Footwear Industry*

- Textile Industry (State) Award
- Bootmakers and Heel Bar Operatives, &c. (State) Award
- Button Makers (State) Award
- Clothing Trades (State) Award
- Footwear Manufacturing Industry (State) Award

## **Appendix B**

### ***Awards in the NSW Jurisdiction***

#### **Statutory Background**

260. In the NSW jurisdiction, the making and operation of awards is provided for by Chapter 2 Part 1 of the Industrial Relations Act 1996 (the IR Act).

261. The IR Act provides the NSW Industrial Relations Commission (the NSWIRC) with the power to make awards (IR Act s10). Particular attention is drawn to the statutory direction in s10 to make awards ‘...setting fair and reasonable conditions of employment for employees’.

262. This award making power is able to be exercised on application or on the Commission’s own initiative (ss11(a), 11(b)). Application may be made only by either an employer, an industrial organisation of employers or employee, or a State peak council (as defined) (s11(2)).

263. Anyone who may apply for an award to be made may become a party to any proceedings for making an award (s11(3)). Any applicant for the making of an award, or to become party to the making of an award must satisfy the Commission that it or any one or more of its members has a sufficient interest in the proposed award (s11(4)).

264. Section 12 of the IR Act sets out the persons bound by awards, and is here reproduced in full:

#### 12 Persons bound by award

(1) An award is binding on all employees and employers to which it relates, whether or not they were a party to the making of the award.

(2) An award that applies to a particular industry is, subject to its terms, taken to bind all employees and employers engaged in the industry.

(3) An award is, subject to its terms, binding on all industrial organisations that were a party to the making of the award.

265. Section 19 of the IR Act provides for the review of all awards every three years (s19(1)), for the purpose of modernising awards, or consolidating awards relating to the same industry, or rescinding obsolete awards (s19(2)). The Commission may make such changes to awards as it considers necessary as a result of a review.

266. The Commission may consolidate existing awards, with or without amendment (s20(1)), rescind an obsolete award, or an obsolete part of an award s20(2).

267. Division 2 of Chapter 2 Part 1 provides for particular conditions of employment in awards. Section 21 provides that, on application, the Commission must make an award setting any of the following conditions of employment:

- (a) ordinary hours of employment,
- (b) equal remuneration and other conditions for men and women doing work of equal or comparable value,
- (c) employment protection provisions,
- (d) provisions relevant to technological change,
- (e) sick leave,
- (f) part-time work,
- (g) casual work.

268. These conditions are to be set in accordance with the provisions of the IR Act and any established principles of the Commission: s21(2).

269. Division 2 then goes on to set conditions in relation to maximum ordinary hours of employment (s22), minimum sick leave entitlements (s26), and prohibits the cashing-in of accumulated sick leave (s27). Division 2 also provides for general requirements in relation to equal remuneration and other conditions (s23), employment protection provisions (s24), and provisions relevant to technological change (s25).

270. The Commission make decisions applying to all awards by adopting national decisions (defined at s48) such as Safety Net Reviews of the AIRC (s50), or by making a State decision (ss49 and 51), on application from a State peak council or on its own motion.

271. The Commission must, in performing its functions, take into account the public interest, having regard to the objects of the IR Act and the state of the NSW economy (s146(2)).

## **The Wage Fixing Principles**

272. In addition, current Wage Fixing Principles set by the Commission (See State Wage Case 2007 [2007] NSWIRComm 118) provide for matters such as the variation of awards (Principle 2), special cases (Principle 10), Enterprise arrangements (including enterprise awards) (Principle 11), and the making of first awards or extensions to existing awards (Principle 13).

## Appendix C

### Link between industrial arrangements and skill reform

273. The Commission's attention is drawn to a range of research about the link between industrial arrangements and skill reform, which may assist in the making of modern awards that support the development of skills. This research is as follows:

- (a) The importance of AQF qualifications being embedded in skills-based classification structures in awards. Employees are reluctant to undertake training if they know that it will not result in a pay rise from their employers.<sup>27</sup>
- (b) There is every indication that harmonising wage rates to the highest current level would improve retention of current apprentices and trainees, encourage more people to commence apprenticeships and trainees, and would not significantly deter employers from engaging apprentices and trainees.<sup>28</sup>
- (c) The best quality training outcomes occur where there is a combination of on the job and off the job training.<sup>29</sup>
- (d) The importance of initiatives that encourage employees to encourage employees to pursue vocational education and training, including reimbursement of relevant course costs, time off for study purposes, and a career path that recognises the attainment of nationally recognised qualifications relevant to the employee's job.<sup>30</sup>
- (e) The importance of allowances to apprentices and trainees. Where they exist, penalty rates, overtime and allowances are an important supplement to

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<sup>27</sup> Workplace Research Centre (2008) *Identifying paths to skill growth or skill recession*. Sydney: University of Sydney

<sup>28</sup> Workplace Research Centre (Unpublished interim report forthcoming 2008) *The link between industrial arrangements and skill reform*. Sydney: University of Sydney

<sup>29</sup> Schofield, K (2001) Quality in context: Reflections on factors impacting on the quality of apprenticeship and traineeship training. In: N. Smart (ed.) *Australian apprenticeships: Research readings*, pp. 239-60. Adelaide: National Centre for Vocational Education Research & Snell, D and A Hart (2007) *"I think about leaving every day. Doesn't everyone?": Reasons for non-completion and dissatisfaction amongst apprentices and trainees*. December. Churchill: Monash University Research Unit for Work and Communications Futures.

<sup>30</sup> Workplace Research Centre (Unpublished interim report forthcoming 2008) *The link between industrial arrangements and skill reform*. Sydney: University of Sydney

apprentices' and trainees' low wages.<sup>31</sup> There is a strong case to maintain and expand the payment of allowances to apprentices and trainees in order to maximise their income.

- (f) The importance and impact of 'non-training' provisions. Apprentices and trainees face a range of problems with their working hours, including long hours, irregular hours, inadequate notice of shift changes, performing long periods of shift work, and not being paid overtime for additional hours.<sup>32</sup> For example, existing provisions in the Hairdressing (State) award preclude an apprentice or junior extending ordinary hours (cl 4.(ii)). General allowances paid to all employees are also an important component of apprentices' and trainees' total income under some awards.
- (g) Harris et al (2001a: 234) recommend that industry-wide standards be introduced for apprentices and trainees, addressing the particular industrial relations issues of breaks, hours and wage rates.<sup>33</sup>

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<sup>31</sup> Bittman, M, R Reavell, G Smith and T Battin (2007) *Living standards of apprentices*. October. Armidale: University of New England, Centre of Applied Research in Social Sciences.

<sup>32</sup> Harris R, M Simons, H Symons and B Clayton (2001) Factors that contribute to retention and completion in apprenticeships and traineeships. In: N. Smart (ed.) *Australian apprenticeships: Research readings*, pp. 221-37. Adelaide: National Centre for Vocational Education Research.

<sup>33</sup> *ibid*

## Appendix D

### Federal allowable award matters compared to state awards

Ten Allowable Award Matters	Grouping of Current NSW Award Matters
<p><b>Minimum wages</b> includes:</p> <ul style="list-style-type: none"> <li>wage rates for junior employees, employees with a disability and employees to whom training arrangements apply)</li> <li>skill-based classifications and career structures</li> <li>incentive-based payments, piece rates and bonuses</li> </ul>	<p><b>Rates of pay for all employees</b> includes:</p> <ul style="list-style-type: none"> <li>full-time/part-time/casual rates, juniors, apprentices, trainees, supported wages, piece-workers, grade/classification pay structures, payment for holidays, leave, RDOs, state wage case adjustments, etc.</li> </ul>
<p><b>Type of employment</b> such as full-time employment, casual employment, regular part-time employment and shift work, and the facilitation of flexible working arrangements, particularly for employees with family responsibilities.</p>	<p><b>Status of employment and terms of engagement</b> such as full-time/part-time, permanent/casual, and flexibility of work, job sharing arrangements</p>
<p><b>Arrangement for when work is performed</b>, including hours of work, rostering, notice periods, rest breaks and variations to working hours.</p>	<p><b>Hours of work/employment</b> including span of hours, rosters, shift work, RDOs, make-up time, job-sharing</p>
<p><b>Overtime rates</b></p>	<p><b>Overtime rates</b> for long hours and outside of ordinary hours work, including weekend work, shift work, payment for such work</p>
<p><b>Penalty rates</b>, including for any of the following:</p> <ul style="list-style-type: none"> <li>employees working unsocial, irregular or unpredictable hours;</li> <li>employees working on weekends or public holidays;</li> <li>shift workers</li> </ul>	<p><b>Penalty rates</b> for outside of ordinary hours work, including weekend work rates, public holidays, shift work, hours for such work</p>
<p><b>Annualised wage or salary arrangements</b> that:</p> <ul style="list-style-type: none"> <li>have regard to the patterns of work in an occupation, industry or enterprise; and</li> <li>provide an alternative to the separate payment of wages, or salaries, and other monetary entitlements; and</li> <li>include appropriate safeguards to ensure that individual employees are not disadvantaged</li> </ul>	<p><b>All wage/salary arrangements</b> including salary packaging, special provisions for certain classes of employees, loaded wages/salary</p>
<p><b>Allowances</b>, including for any of the following:</p> <ul style="list-style-type: none"> <li>expenses incurred in the course of employment;</li> <li>responsibilities or skills that are not taken into account in rates of pay;</li> <li>disabilities associated with the performance of particular tasks or work in particular conditions or locations</li> </ul>	<p><b>Additional payments</b> including payments for particular duties/tasks, conditions, expenses, equipment, services, qualifications/skills, higher duties, meals, travel, etc.</p>
<p><b>Leave, leave loadings and arrangements for taking leave</b></p>	<p><b>All employee leave</b> including arrangements for leave, annual leave, sick leave, personal leave, carers' leave,</p>

	bereavement leave, parental leave, jury leave, leave loading, study leave, community leave, etc.
<b>Superannuation</b>	<b>Superannuation</b>
<b>Procedures for consultation, representation and dispute settlement</b>	<b>Consultation, representation and dispute resolution processes</b> including dispute settlement and grievance procedures, employee consultation procedures, employee representation & union delegate.
	<p><b>NSW state award matters that are not obviously aligned with the 10 allowable award matters</b></p> <ul style="list-style-type: none"> <li>• Training and career development (excluding those that apply to apprentices and trainees)</li> <li>• Employer provided facilities, protective clothing and equipment, tools, accommodation etc</li> <li>• Use of employee skills and flexibility of job tasks</li> <li>• Anti-discrimination provisions</li> <li>• Secure employment (in particular casual conversion)</li> <li>• Deduction of union membership fees</li> <li>• Area, incidence and duration</li> <li>• Transfer of employees</li> <li>• Pay slips and employer records</li> <li>• Past services entitlements</li> <li>• Accident pay</li> <li>• Stand-down provisions</li> <li>• Provisions for sub-contracting</li> <li>• Relationship to other awards</li> <li>• Non-reduction of existing wages and conditions</li> <li>• Enterprise arrangements</li> <li>• Level of detail contained in job classification structure clauses, particularly in relation to job definitions within classifications</li> <li>• Employer and employee duties and obligations</li> </ul>