Submission to the AFPC re 2007 Minimum Wage Review
on behalf on GCS Coal Industry Clients

Effect of Minimum Wage Review Decisions on Award Properly Fixed
Minimum Wage Rates

Introduction

My consultancy acts for a number of Coal Mining Industry Companies on IR matters that affect the Industry generally as well as for individual companies on specific issues as required from time to time. I also provide a subscription service to those Companies, which includes a loose leaf awards service for Coal Industry Awards, and hence my interest in the Pay Scales and other industry matters such as the recent increases to Award allowances flowing from the Australian Fair Pay Commission (AFPC) decision.

As the AFPC does not have a registry to issue award variations or orders re Pay Scales, this task has fallen to Department of Employment and Workplace Relations (DEWR) to administer. In order to confirm the Pay Scales for the Coal Industry Awards I contacted DEWR in November last year and periodically since then to ascertain the position. My enquiries, which were given the Reference Nos. 408072 and 455941, have only recently resulted in a response that included the suggestion I should raise the matter as a submission to the AFPC as part of the 2007 Minimum Wage Review.
History

Prior to the passing of the *Workplace Relations and Other Legislation Amendment Act 1996* (WROLA) and the Paid Rates Review Decision of the AIRC (Print Q7661), the Coal Industry Awards over a long period of time had accumulated in the wage rates various increases, that in general industry would have been considered as overaward payment, and allowances, covering such matters as travel, isolation and the like.

As a result of the WROLA Act and the Paid Rates Review Decision a number of major cases affecting the Coal Industry were argued before the Commission and two of the decisions in relation to those matters are attached for your information, the first dealing with the Coal Mining Industry (Production and Engineering) Consolidated Award 1997 (the P & E Award) (Print T2270) and the second with the two Coal Mining Industry Staff Awards, one covering New South Wales and Tasmania and the other Queensland (these two awards were combined to form the Coal Mining Industry (Staff) Award 2004 (the Staff Award))(Print PR939104). In the case of the P & E Award there was a side issue of getting rid of the so called Work Models and in the case of the Staff Award, the phasing out of the built in overtime that previously increased the Coal Industry 35 ordinary hour week up to 37.5 hours or 40 hours – both of these issues are irrelevant to the flow on of the AFPC decision.

The Issue

Both of these decisions provided for the establishment of relevant Minimum Rates (based on outside industry minimum standards), Residual Components (being the difference between the minimum rates and the then current wage rates) and Total Payments (which reflected the then current award rates). The decisions then provided for National Wage Increases or the like to be added to the minimum rates, with a corresponding reduction in the Residual Components until they disappeared when the minimum rates equalled or exceeded the total payments (at this point the residual component column and the total payment column could be deleted).
Some of these residual amounts have already been completely absorbed so the minimum and the total rates are already the same, but some still have a way to go. DEWR initially advised that they would apply the AFPC increase to the total rate. This, in the Industry’s view, would distort relativities and provide for award wage rates that are not properly set minimum rates, contrary to Government policy and the responsibility of the AFPC, which the Industry supports, and hence our request that DEWR review this proposal.

The DEWR Officers I talked to therefore referred the matter to their legal section and it was not until 12 March 2007 that I finally received their reply, which stated in part as follows:

“In both the Coal Mining Industry (Production and Engineering) Consolidated Award 1997 [AP774609] and the Coal Mining Industry (Staff) Award, 2004 [AP835164] the residual component is set out separately but is clearly included in the calculation of the total guaranteed minimum amount. Accordingly, the residual component, would be included in a pay scale, and the total guaranteed minimum (which includes the residual component) and would receive the Australian Fair Pay Commission decision increase determined with effect from 1 December 2006.”

It seems that DEWR have missed the point that the Total Payments are not properly fixed minimum rates and they are in fact in the process of being converted to properly fixed minima by the absorption of the previous National Wage increases in the residual components. We argue that this process should be continued, with the absorption of any increases granted by the AFPC as a result of its review of Minimum Wages so that the awards wage rates become properly fixed minimum.

It is true that the direct effect of such a policy would be minimal as most employers in the industry have Workplace Agreements of one sort or another which provide wage rates (and other conditions) that are well above the minima, but there are some where this is not the case. In addition, in some of the Workplace Agreements there are other matters, such as escalations, relativities, allowances etc that rely on the awards having properly fixed minimum wage rates.
Conclusion

It is our submission that the implementation of the AFPC Minimum Wage Review Decisions proposed by DEWR will result in unintended consequences which are contrary to the responsibility of the AFPC to set and adjust Federal Minimum Wages. We therefore request that this matter be clarified/remedied in the 2007 Minimum Wage Review decision of AFPC.

I would be happy on behalf of my Coal Industry clients to explain the situation in more detail and/or provide any additional information required.

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AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Workplace Relations Act 1996

Review of award pursuant to Item 51 of Part 2 of Schedule 5 of the Workplace Relations and Other Legislation Amendment Act 1996

COAL MINING INDUSTRY (SUPERVISION AND ADMINISTRATION) INTERIM CONSENT AWARD, 1999, NEW SOUTH WALES AND TASMANIA
(C No. 00808 of 1998)
(ODN C No. 00548 of 1989)
[AW772793]

COAL MINING INDUSTRY (SUPERVISION AND ADMINISTRATION) INTERIM CONSENT AWARD 1999, QUEENSLAND
(C No. 00809 of 1998)
(ODN C No. 00548 of 1989)
[AW772797]

Coal industry

COMMISSIONER BACON BRISBANE, 8 OCTOBER 2003

Award simplification.

DECISION

Background

[1] This decision relates to the requirement of the Commission to review awards in accordance with the Workplace Relations and Other Legislation Amendment Act 1996 (WROLA). For convenience and unless the context demands otherwise it is convenient in this decision to use the term “award simplification” to describe the Commission’s functions under the WROLA. The awards that are currently before the Commission are the:

- Coal Mining Industry (Supervision and Administration) Consent Award 1999 Queensland (the Queensland Staff Award); and
- Coal Mining Industry (Supervision and Administration) Consent Award 1999, New South Wales and Tasmania (the NSW Staff Award).

[2] The award simplification in relation to these two awards has a lengthy history. Proceedings commenced before Harrison, C in October 1998. On 9 December 1998 Harrison, C issued a Decision [Print Q9533] and on 29 March 1999 varied the two Staff Awards [Prints R3412 and R3414] by deleting all clauses schedules and appendices and inserting a number of replacement clauses.
For reasons that are not relevant, the matters were then allocated to Commissioner Wilks and after Wilks, C’s resignation the matters were allocated to the Commission as presently constituted. Conferences were held between the parties. Ultimately it became apparent that agreement could not be reached on all matters in dispute and the Commission determined that it would list the matters for arbitration. Directions were issued for written submissions and a hearing was held on 16 September 2003.

Mr G. Gillespie appeared for a number of employers (the Queensland employers) in relation to the Queensland Staff Award (C00809 of 1998). Ms C. Holmes appeared for the NSW Minerals Council for certain NSW employers (the NSW employers) in relation to the NSW Staff Award (C00808 of 1998). A reference herein to the employers is a reference to all of the employers. Ms C. Bolger appeared in both matters for The Association of Professional Engineers, Scientists and Managers, Australia (APESMA).

On 1 June 2001 the NSW Minerals Council made an application (C2001/3326) pursuant to s.113 of the Workplace Relations Act 1996 (the Act). The application sought to vary the NSW Staff Award by:

1. Variation consistent with the Paid Rates Review Decision [Print Q7661], and the Paid Rates Supplementary Decision [Print S0105].
2. Variation consistent with that required by Item 51 of the Workplace Relations and Other Legislation Amendment Act 1996 and sections 88A, 88B, 89, and 89A of the Workplace Relations Act 1996.
3. Variation, where appropriate, consistent with the decisions Print R4611, Print S6142, PR900232 and other relevant decisions relating to the simplification of the Coal Mining Industry (Production & Engineering) Consolidated Award 1997.

That application was heard on 2 October 2002. It is accepted that the three grounds on which the variations were sought in that application are the same as those required to be determined in C00808 of 1998. On that basis the application has been adjourned to be relisted on application. Although the application was not listed for hearing on 16 September it is apparent that the variations sought in it will be determined by this decision. Unless a written objection from the NSW Minerals Council is received by the Commission within seven days from the date of this decision, the Commission considers that the issues agitated in the NSW Minerals Council’s application have been determined by this decision and the file (C2001/3326) will be closed accordingly.

The Preliminary Issue

The employers contend that the Staff Awards require simplification in accordance with Items 51(6) and (7) of the WROLA. The employers submit that the simplification of the two Staff Awards was undertaken or has evolved in the following way. In May 1998 Justice Boulton varied the Coal Mining Industry (Production & Engineering) Consolidated Award 1997 (the P&E Award) by removing from it those clauses or provisions that had ceased to have legal effect as a result of the operation of Item 50 of the WROLA. Commissioner Harrison in December 1998 took steps to remove from the Staff Awards all provisions similar to those removed from the P&E Award by Boulton, J.
The simplification of the Staff Awards was then delayed whilst employer efforts were concentrated on the simplification of the P&E Award. This was a lengthy process, however the employers felt that whatever principles were established in the simplification of the P&E Award would or could flow to the Staff Awards, thus making their simplification easier. The P&E Award has been simplified and, according to the employers, the Staff Awards must now be completed.

APESMA has a different view. It is APESMA’s contention that Harrison, C in his decision of December 1998 and by the variations of March 1999 simplified the Staff Awards in relation to all matters except for properly fixed minimum rates. APESMA submits that these proceedings, as a matter of the Commission’s powers, must be limited to only a consideration of the properly fixed minimum rates issue.

The Commission has reviewed the transcript of the proceedings before both Harrison, C and Wilks, C. It is clear from that transcript that the employers always sought a simplification programme identical to the one they say was adopted by Harrison, C. APESMA was opposed to that programme. The transcript reveals that a two stage process was adopted by Harrison, C. The transcript is not conclusive as to the extent of the review that constituted the first stage. Was it a complete review as required by the WROLA (except for wages) as is submitted by the APESMA or was it, as is contended by the employers, simply the removal of non-allowable matters rendered ineffective by Item 50 of the WROLA?

Harrison, C’s decision of 9 December is not lengthy and is (relevantly) reproduced below:

“This decision concerns a consent application to vary the Coal Mining Industry (Supervision and Administration) Interim Consent Award 1990, New South Wales and Tasmania and the Coal Mining Industry (Supervision and Administration) Interim Consent Award 1990, Queensland, by the Queensland Mining Council and the New South Wales Minerals Council on behalf of employers respondent to the award following a review of the award under Item 51 of Part 2 of Schedule 5 of the Workplace Relations and Other Legislation Amendment Act 1996 (the WROLA Act). The review was initiated by the Commission pursuant to section 33 of the Act.

The parties submit that ambiguity and uncertainty has arisen in respect of the whole of the current award as a result of Item 51 of the transitional provisions of the WROLA Act.

The parties contend that as a result of Item 50 it is unclear which provisions of the current award continue to have legal force. The variation and orders which will issue will remove a number of non-allowable provisions identified by Justice Boulton in the Coal Mining Industry (Production & Engineering) Consolidated Award 1997 [Print Q1205] and are as follows:

- Clause 5(f) Unfair dismissals;
- Clause 5(g) Dispute Settlement Procedures - Unfair Dismissals;
- Clause 22 Housing;
- Clause 23 Right of Entry;
- Clause 24 Reduction of Hands;
- Clause 25 Representatives;
- Clause 25A Introduction of Major Change in the Workplace;
- Clause 30 Conditions not dealt with by the Award.
The variation will operate from 9 December 1998.”

[12] The first thing of note is the Commissioner’s observation that the variations are by consent. The second is that the decision is not conclusive of the issue currently in contest, although it does add weight to the employers’ contention as the only variations identified in the decision are those that are made consistent with Boulton, J’s decision in which His Honour identified and removed non-allowable provisions from the P&E Award.

[13] On the other hand Commissioner Harrison in his 9 December decision does say that the variations are “made following a review of the award under Item 51 of Part 2 of Schedule 5 of the Workplace Relations and Other Legislation Amendment Act 1996 . . .”. The Commissioner says nothing about a partial or first stage review or that the variations solely relate to the removal of non-allowable provisions and that further reviews are to be undertaken in accordance with sub items 51(6) and (7) and for the purposes of establishing properly fixed minimum rates.

[14] This adds some weight to the position contended for by APESMA. Although it is not contested that wages were to be reviewed at a later time in accordance with the Full Bench decision in Re: Australian Public Service, General Employment Conditions Award 1995 [Print Q7661] (the Paid Rates Review).

[15] As the Commission is unable on the foregoing material to resolve the contest between the parties it seems appropriate to investigate the variations agreed to by the parties and made by Harrison, C to determine whether or not they were limited to removing non-allowable provisions from the Staff Awards. In his 9 December decision Commissioner Harrison specifically identifies the provisions that will be removed because they are non-allowable (see paragraph 11 herein). A comparison between the NSW Staff Award pre and post 9 December discloses that a number of variations, other than removing non-allowable matters, were agreed and were made to the Award. Those variations include:

* the insertion of procedures for avoiding industrial disputes;
* the introduction of part time employment;
* a provision which allows the standing down of employees;
* a restructuring of the award clauses in line with the Commission’s approach in award simplification matters generally;
* the rewording of award clauses with no apparent change to the intent but presumably to clarify or simplify their intent.

[16] The above list is not exhaustive but it does demonstrate that whatever was agreed by the parties in December 1999 went beyond the removal of non-allowable provisions. This is evidence in support of a favourable finding for the APESMA contention. There remains in the award other provisions which support a finding favourable to the employers.

[17] Schedule B of the NSW Staff Award contains a number of “agreements” made between the award parties. Those agreements relate to the intended operation of certain clauses in the NSW Staff Award. A similar schedule appears in the Queensland Staff Award. One of the agreements therein deals with a variation made to the award in about 1989. The
background to the agreement is that the Staff Awards contained a provision whereby all employees became due to an annual leave entitlement on the same day. From the Commission’s knowledge of this industry, the day on which employees became so entitled was in early December each year.

[18] An agreement was reached in 1989 to vary the Staff Award (it was a single award at the time) in a way that each employee’s entitlement to annual leave would fall on the anniversary date of his or her employment. The introduction of such a change required a transitional provision between December 1989 and an employee’s next anniversary date. The agreed transition is contained in Schedule B and is as follows:

“AGREEMENT - ANNUAL LEAVE

It is agreed between the New South Wales Coal Association and the Cornwall Coal Company No Liability and the Australian Collieries Staff Association that all employees on the anniversary date of the employment shall receive an entitlement of pro rata annual leave for the period December 1989 to such anniversary date. An employee will then be credited with annual leave accruals in accordance with the award.

The pro rata annual leave credited to the employees accrual shall be available to be taken from such anniversary date (in accordance with appropriate award obligations).”

[19] The purpose of this trip down memory lane is to demonstrate that the above provision had no work to do after December 1990. By that time all employees had made the transition from the old to the new annual leave arrangements. From December 1990 the provision was obsolete. It remains in the Staff Awards. Its retention is contrary to sub item 51(7)(d) of the WROLA which requires the removal of (amongst other things) obsolete provisions. The Schedule contains other provisions which are equally obsolete. For example the same approach in 1989 was taken with sick leave, yet the sick leave transitional arrangements remain in the Staff Awards.

[20] Considering the submissions of the parties, as well as the foregoing, the Commission has concluded that whatever was agreed between the parties in 1998 did not result in a comprehensive and/or effective review of the Staff Awards as is required by Item 51 of the WROLA, particularly sub items 51(6) and (7). The examples described earlier are sufficient evidence on which to make such a finding. It is the Commission’s conclusion that the matters to be considered in these proceedings are not limited in the way contended for by APESMA.

Properly Fixed Minimum Rates - The Key Classification

[21] All parties agree that the wages in this award need to be subject to the process determined by the Full Bench in the Paid Rates Review decision. The parties do not disagree over the principles required by the Paid Rates decision to be used to convert the wage rates in the Staff Awards into properly fixed minimum rates (the MRA). The parties do disagree over which classification in the Staff Awards should be designated as the “key classification” rate. There is also disagreement over the date at which internal relativities were established, agreed or determined by the Coal Industry Tribunal (CIT) and the amount of safety net increases to be applied to the Staff Awards since that date.
Apart from long service leave there are four awards which establish wages and conditions for employees of coal mining companies when such employees (amongst other things) are employed in the coal mining industry. Those awards are:

- The NSW Staff Award
- The Queensland Staff Award
- The P&E Award
- The Coal Mining Industry Consent Award Deputies and Shotfirers 1990 (the Deputies Award)

The P&E Award operates in both Queensland and New South Wales (and Tasmania) and has been simplified and contains properly fixed minimum rates. The Deputies Award only operates in New South Wales and has been simplified and contains properly fixed minimum rates.

The employers propose that the key classification in the Staff Awards is that of “Clerk in fifth year of service in the coal mining industry and thereafter” (the four year plus Clerk). This is said to equate to “Mineworker Inducti on - Level 2” and/or “Mineworker - Training” (Mineworker Level 2) in the P&E Award. Both of these classifications were determined by the Full Bench (Giudice J, Boulton JJ, Lawson C, Print T2270) to equate to the Metal Industry Fitter (the C10 rate) in the Metal, Engineering and Associated Industries Award 1998 - Part 1. Thus the employers submit that the minimum rate for the “four year plus Clerk” should be fixed at the equivalent of the C10 rate.

APESMA submits that the employers’ approach is flawed and that the key classification is the “Engineering Graduate 1st year” and in accordance with a line of decisions the rate for that classification should be properly fixed at 130% of the C10 rate. In the alternate APESMA submits that the key classification is that of “Deputy” and that the properly fixed minimum rate for that classification should be established at 128.5% of the C10 rate consistent with the Full Bench decision.

The Paid Rates Review decision in its “Principles for the Conversion of Awards Which Do Not Contain Properly Fixed Minimum Rates (the conversion principles) makes it clear that the Commission in these matters should make “a comparison between the rate for the key classification within the award with rates for appropriate key classifications in awards which have been adjusted in accordance with the 1989 approach”’. The P&E Award is such an award. Before deciding what is the key classification in these awards it is first necessary to consider two issues.

Properly Fixed Minimum Rates - Incremental Payments

The Commission believes that it would be inappropriate to adopt the employers’ proposal that the “four year plus Clerk” classification be identified as the key classification. The reason for this conclusion is because the four year plus Clerk is a classification which contains an incremental payment. That is progress from a “Group A Clerk in the first and second year of adult service in the coal mining industry” to a Group B (third year of such service) to Group C (4th year) and ultimately to Group D (4 year plus Clerk) (in the Queensland Staff Award) is solely dependent upon the effluxion of time. The Full Bench in the Paid Rates Review decision had this to say about such incremental payments:
We now turn to consider whether incremental payments should have any role in the award system. The legislative scheme requires that the great majority of awards, being made under Part VI, will be of a minimum rates character. This fact, together with a consideration of the history of service increments in awards generally, leads us to the conclusion that increments which are not based on work value should not appear in minimum rates awards. In our view the abolition of advancement between pay points based primarily on service is also consistent with increased flexibility and the encouragement of agreement making. Performance management, for example, may be made more difficult where the award contains an incremental structure which is unrelated to change in the nature of the work. When the Commission is fixing appropriate minimum rates in awards which contain increments it will be necessary, subject to exceptions, to make arrangements for increments to be phased out.

Additional payments which are geared primarily to length of employment are not consistent with properly fixed minimum rates because they are not based on work value.

Where the relevant award does not make progression through the incremental scale dependent on changed work value, the incremental payments cannot be treated as part of the minimum rate. Where it can be demonstrated, however, that incremental payments were included in the award pursuant to the relevant work value principle or on grounds of structural efficiency and work value, the retention of such payments is permissible.

Where the Commission determines that increments are in excess of a properly fixed minimum rate, they will, in accordance with the principles, be separately identified as a residual amount above the minimum rate and subject to absorption against increases to rates in the award.” (emphasis added)

[28] Although submissions were not made on this point during the proceedings, prima facie it is open to conclude that the proper application of the Paid Rates Review requires the incremental rates in the Staff Awards be phased out because they are inconsistent with properly fixed minimum rates. It follows that the “four year plus Clerk” classification cannot constitute the key classification for the Minimum Rates Adjustment (MRA) because it contains incremental payments. Accordingly the wage rate for the four year plus clerk could not be 100% of the C10 rate because it would continue an impermissible incremental payment.

[29] Given the foregoing it must follow that in these awards the only relevant clerical classification that exists on work value grounds and is not (for MRA purposes) tainted by incremental payments is the Group A clerical rate. If the Group A clerical rate was determined to be the key classification it would result (eventually) in the position contended for by the employers. If the Group A rate was determined to be the equivalent of the Level 2 Mineworker and the clerical classifications which contain incremental payments were phased out the result would be that the “four year plus Clerk” would have a properly fixed Minimum Rate equivalent to the Level 2 Mineworker. The following table demonstrates how that would eventuate in the NSW Staff Award (the Level 2 Mineworker has a minimum rate of $542.20).
<table>
<thead>
<tr>
<th>Classification</th>
<th>Minimum Rate</th>
<th>Residual Component</th>
<th>Total Payment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Group A Clerk 1st year</td>
<td>542.20</td>
<td>65.10</td>
<td>607.30</td>
</tr>
<tr>
<td>Group B 2nd, 3rd &amp; 4th year</td>
<td>542.20</td>
<td>79.30</td>
<td>621.50</td>
</tr>
<tr>
<td>Group C 5th year &amp; thereafter</td>
<td>542.20</td>
<td>94.50</td>
<td>636.70</td>
</tr>
</tbody>
</table>

[30] It is open for the parties by agreement or by application to introduce an entry level for Clerks, Tracers, Surveyors Assistants, Stores Clerks, Laboratory Assistants, Technical Assistants, Trainees and Coal and/or Dust Samplers with a relativity of about 95% - 97% of the Group A Minimum rate. Advancement from the entry level to the next pay point would need to take place on work value grounds. The Commission discusses in more detail a similar such arrangement later in this decision under the heading “Graduates”. The suggestion here is that there would be a new entry level for the relevant classifications with a prescribed minimum rate (rather than the “percentage” approach adopted for Engineering and Commercial Graduates).

Properly Fixed Minimum Rates - The Overtime Component

[31] A matter that further complicates the proper fixing of minimum rates for the Staff Awards is that the two awards contain different “hours of work”. The Queensland Staff Award requires employees to work a 37.5 hour week. The NSW Award contains hours of work for different classifications of 35, 37.5 and 40 per week. The P&E and Deputies Awards contain a 35 hour week.

[32] There is a significant history to all of this. It is not necessary to recount it all, however it is necessary to return to 1977 when issue of Staff hours, wages and relativities had been the cause of some considerable debate which also led to the extremely rare event of strike action by the Staff. Ultimately the issues were determined by the Coal Industry Tribunal (CIT). The centre of the controversy was an award provision which required Staff to work up to an average of 44 hours each 4 weeks for which the award prescribed a rate of pay. Not all Staff were required to work the 44 hour average which operated as a maximum number of hours for the award rate. As the CIT ultimately found, this created a number of anomalies, one of which was the fact that some members of Staff actually received less wages for equivalent hours when compared to the employees they supervised. In order to address this situation the CIT determined that “A Division” classifications in the Staff Award would nominally have a 35 hour week. “A Division” classifications were the more Senior classifications in what (at the time) was a single Staff Award with application in NSW, Queensland and Tasmania. “B Division” employees had a 35 hour week by award prescription.

[33] The CIT decided that the award would prescribe a 40 hour week for the “In Charge” classifications and a 37.5 hour week for the “A Division” classifications. Further the CIT decided that the rates of wage would include a payment of 5 hours overtime for the “In Charge” classifications and 2.5 hours overtime for the remaining “A Division” classifications. In CR2653 the CIT said:

“I am convinced that it is in the hours prescription - or lack of it - that the solution must be found. The weight of the evidence brought by the Association - if the institutionalised payments are ignored - is directed to the effects of the hours
arrangements. Indeed, no case has been made out for a wage increase as an appropriate means of dealing with the matter since no anomaly has been shown to exist in circumstances where a staff member and a non-staff employee both work 35 ordinary hours a week and are remunerated under the provisions of their respective awards. A further preliminary point has to be considered, namely what are the ordinary hours of work for ‘A’ division staff? The employers argue that the current ‘A’ division rates contain an overtime component, but as to what it is, they are reluctant to say. Indeed on the basis of current award provisions I take them to be contending that they are unable to say. To determine the overtime component in the award rates for ‘A’ division employees I find it impossible to take any other standard than 35 hours as there is no other reference point below 44 hours and it is agreed by all there is an overtime element in the award rates of pay.

The action I have decided to take is to prescribe a 40 hour week for the “In charge” classifications and a 37½ hour week for all other ‘A’ division classifications.

The new provision should remove any anomalies in the computation of award rates. This may be seen from the following examples:

<table>
<thead>
<tr>
<th>Hours</th>
<th>Under-manager in charge (all others)</th>
<th>Under-manager (all others)</th>
<th>Deputy</th>
</tr>
</thead>
<tbody>
<tr>
<td>40</td>
<td>$357.50</td>
<td>$341.50</td>
<td>$286.33</td>
</tr>
<tr>
<td>37½</td>
<td>-</td>
<td>$300.70</td>
<td>$255.08</td>
</tr>
<tr>
<td>35</td>
<td>$287.70 (nominal)</td>
<td>$271.60 (nominal)</td>
<td>$230.40</td>
</tr>
</tbody>
</table>

On the basis that the existing award rates of pay will contain an overtime component of 5 hours per week for “In charge” classifications and of 2½ hours per week for all other ‘A’ division classifications, such components, if expressed as a percentage of existing award rates and assessed at the rate of time and one-half for the first 3 hours and double time thereafter, will amount to approximately 19.5 per cent for “In charge” classifications and 9.7 per cent for the others.” (emphasis added)

[34] In about 1990 the Staff Award was split into the two awards that now exist. In the Queensland Staff Award it was agreed to add 2.5 hours of overtime into the ‘B’ Division classification rates and prescribe a 37.5 hour week for such employees. Similarly the overtime in the “In charge” classifications was reduced to 2.5 hours. Thus all classifications in the Queensland Staff Award contain 2.5 hours of overtime. The position in the NSW Staff award remains as it was in 1977. The “old” ‘B’ Division classification rates contain no overtime whilst the “old” ‘A’ Division classifications have 2.5 hours and the “In Charge” classification rates contain 5 hours of overtime.

[35] The inclusion of this overtime in the classification rate now raises some very difficult questions. For example, the parties are at issue in applying the MRA process as to whether safety net increases should be adjusted to take account of the overtime hours contained in the relevant classification rate. Traditionally such an approach has been adopted and was originally sanctioned by the CIT. On the abolition of the CIT in 1995 this Commission, with the consent of (or at least no opposition from) the employers, has continued to apply the adjustment. The formula that has been applied is to increase the Safety Net Adjustment (SNA) is SNA + 35 x 38.75 (or 43.5 for the In Charge classifications). Effectively the SNA is
divided by 35 (being 35 hours) and multiplied by 38.75 (being the 35 hours rate plus 2.5 hours at time and one half). The basis for the In Charge adjustment is 3 hours at time and one half and two hours at double time to produce the multiplier of 43.5. The employers now contend for a different approach. They submit that these classifications should be adjusted by the same Safety Net Adjustment as applies to all other safety net awards.

[36] There is also conflict between the parties as to what is the proper divisor for certain classifications to establish the hourly rate, ie 35, 37.5 or 40. The award currently prescribes 35, however the employers believe this to be inappropriate.

[37] Further, in applying the Paid Rates Review principles the classifications in the old ‘B’ Division of the Queensland Award could end up with an extremely anomalous and unfair result. The predecessor to APESMA agreed to increase the award prescribed hours of work by 2.5 hours (of overtime) on the basis that the classification rate of pay was increased by the monetary equivalent of 2.5 hours of overtime. The MRA principles do not allow wage rate adjustments depending upon the hours of work prescribed by the award. Thus once the properly fixed minimum rate was determined the monetary equivalent of the 2.5 hours of overtime would fall into the Residual Component and would be diminished over time until it is gone. Thus the employees are at risk of retaining the award obligation to work the extra 2.5 hours of overtime but losing any entitlement to payment for the additional hours.

[38] To further complicate the issue, if the payment described in paragraph 33 was retained then the properly fixed minimum rate for any of the “old ‘B’ Division” classifications that appear in both awards will be higher in Queensland than in New South Wales and Tasmania. This will exist because of the hours required to be worked in the States is different. There are no other examples, of which the Commission as constituted is aware, across the entire safety net award system where the fixing of minimum rates takes into account and makes adjustments for the hours of work prescribed by the relevant awards.

[39] It seems, in considering all of these issues, that the relevant question to be answered is whether or not it is appropriate for a safety net award with properly fixed minimum rates to continue to prescribe an overtime component (and payment) in the award hours of work and wage rates?

[40] It is the Commission’s view that the inclusion in a safety net award of periods of overtime is contrary to the award simplification process and the establishment of properly fixed minimum rates. The inclusion of the overtime component is a hangover from a time when the awards were expected to (and did) play a different role to that of a safety net. At the time that the overtime component was included in the wage rates and hours for certain classifications the awards operated in a way that endeavoured to more accurately comprehend and deal with the practical operational issues at minesites (enterprises). That role has been significantly modified by the WROLA whereby the awards are to now prescribe a safety net minimum with issues of detail more appropriately left for determination at the minesite (enterprise) level.

[41] A safety net award that compels the working of overtime (as these awards do) plays a role that is different to the one cast for such awards by the WROLA. Clearly the WROLA intends that the question of whether or not 2.5 (or 5) hours of overtime should be worked by certain employees (on average each week) is a matter of detail that is to be left to the parties at the individual mine to determine.
[42] The inclusion of the overtime component in the awards classification rates and hours renders the award complex and difficult to understand. Twenty-six years after the CIT decision the parties are still at odds as what should be the appropriate divisor to determine the hourly wage rate. The awards prescribe 35. The result of this is that the hourly rate for an employee required to work 37.5 hours is actually 38.75 or 43 ordinary hours pay (ie 35 hours plus 2.5 hours at time and one half = 38.75) divided by 35. Thus the hours for overtime beyond 37.5 are inflated or compounded by the overtime that is built into the 37.5 (or 40) hour rate. Similar anomalies occur when calculating the hourly rates for part time and casual employees. A part time employee may never work more than 35 hours per week yet the awards load his or her hourly rate with the overtime component as demonstrated in the foregoing formula.

[43] Further, it is clear that the classification rate contains this overtime yet the award states that for the relevant employees their ordinary hours are 37.5 (or 40). It is not clear when the terminology of ordinary hours was first introduced into the awards, however it is clearly inconsistent with the CIT decision in CR2653 wherein the CIT determined that the award would prescribe a 40 and 37.5 hour week (ie not 40 and 37.5 ordinary hours per week) and that the rate for such work would contain overtime paid at the relevant overtime rates and that hours worked in excess of 37.5 and 40 would be “excess” hours (see page 7 of CR2655).

[44] The removal of the overtime component included in these classification rates would also remove the ongoing anomalous situation that Safety Net Adjustments in these two awards are applied differently than such adjustments are applied across the entire safety net award system. These two awards in the coal mining industry are unable to sustain such an anomalous situation. Equally a failure to adjust the safety net increase immediately creates a disadvantage to the relevant employees because their 2.5 overtime hours would be paid at something less than the appropriate overtime penalty. Such an outcome is inconsistent with the CIT decision referred to earlier.

[45] The very concept of award simplification and the intention of the WROLA dictates that this overtime component be removed from the awards. All workers in the coal mining industry covered by safety net awards have a 35 hour week. The employees under consideration have such a provision but only nominally so because the award requires that they also work 2.5 or 5 hours of overtime. It is time to clarify, simplify and end this 26 plus years of confusion and debate. The WROLA requires it. The Paid Rates Review requirement to properly fix minimum rates requires it. The CIT in CR2653 is clear that the additional payment is to compensate for the additional hours of work. There is no evidence that there are any work value considerations in the overtime component. For the purposes of the Paid Rates Review decision the overtime component is to be considered in the same light as incremental payments. The Commission in properly fixing minimum rates has also determined that allowances must be disaggregated from wage rates (see decision of Wilks C, Print R1723 at p8). The removal of the overtime component is the only logical, fair (to employers and employees) and realistic way to overcome the foregoing competing issues.

[46] The Commission proposes to vary the awards to remove the overtime component and to reflect the reality of the 35 hour week and has determined that wage rates should be adjusted accordingly. As this approach was not the subject of submissions on 16 September, the parties will be provided with an opportunity to make submissions about the proposal and to advise the Commission of any problems or disadvantage that may flow to either side in the event that the proposal is implemented. A hearing date will be scheduled for that purpose.
In order to give effect to this decision the Commission proposes that the existing overtime and related award arrangements will be phased out over time. As a result of the requirement to properly fix minimum rates (including the removal of the overtime component) and the obligation not to reduce employees’ entitlements the current rates which include the overtime component will be retained in the award and will not be increased for any reason. It will operate in the same way as the “Total Payment” in the approach taken by the Full Bench in the Paid Rates Review decision. The overtime component will be removed from the current wage rates creating a 35 hour rate (the Total Payment). This will be achieved by reversing the traditional formula. This Total Payment rate will be used in order to properly fix the Minimum Rates. Wage rates will be expressed in the following way (for an imaginary 37.5 hour classification that is the equivalent of the Level 2 Mineworker after the May 2003 SNA):

<table>
<thead>
<tr>
<th>Classification</th>
<th>Minimum rate</th>
<th>Residual Component</th>
<th>Total Payment</th>
<th>37.5 or 40 hour Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Imaginary</td>
<td>542.20</td>
<td>50.00</td>
<td>592.20</td>
<td>655.65</td>
</tr>
</tbody>
</table>

Future safety net adjustments would be made in accordance with the requirements of the Paid rates decision. All existing relevant award arrangements (ie redundancy payments etc) would continue to be based on the 37.5 or 40 hour rate until the Total Payment was equal to or greater than the 37.5 or 40 hour rate. When this occurs the relevant classification will have a 35 ordinary hour week (ie one that does not contain overtime) at a properly fixed minimum wage rate to which future safety net adjustments will be made on the same basis as the adjustment to all other safety net awards and importantly during the transition employees would not have suffered an actual reduction of any award entitlements.

As stated above the classification rate (including the overtime component) will continue for all current award purposes until such time as the Total Payment rate is greater than the “37.5 or 40 hour” classification rate. In such an approach there will come a time when employees are disadvantaged. This will occur when the minimum rate exceeds the Total Payment (ie when the Residual component is totally absorbed). At such a point an employee who worked 2.5 hours overtime would earn more than the 37.5 hour rate contained in the award. If, in the example in paragraph 47, the minimum rate had moved to $602.20 the earnings for 37.5 hours would be $666.72. Thus a provision will need to be drafted the effect of which is that for the calculation of wages only the employee will receive the 37.5 or (40 hours) Classification rate or the Minimum Rate plus overtime of up to 2.5 (or 5) hours, whichever is the higher. This provision will become obsolete with the effluxion of time but is necessary to ensure that these adjustments meet the requirements of the Paid Rates Review decision that employees do not suffer any actual reductions in entitlements.

Properly Fixed Minimum Rates

The Commission now returns to consider the question of the key classification. The reality of properly fixed minimum rates is to end up with a result that is exactly that. Importantly the result must be realistic and should not be about process prevailing over reality. The Commission has already expressed its reservations about the employers’ proposed key classification. The APESMA proposal is to identify the First Year Graduate Engineer as the key classification, or in the alternative to select the Deputy as the key classification.
Neither of these proposals on their own are attractive to the Commission. They each produce results that are not sustainable. They each maintain process over reality. As observed earlier, the P&E Award has been simplified and the wage rates therein properly fixed. There are a number of key classifications in the coal mining industry which have traditionally been benchmarked against each other for relativity purposes irrespective of the award in which they appear. As can be seen from the CIT decision in 1977 when a comparison for relativity purposes was necessary the CIT compared the Undermanager and the Deputy. The traditional key benchmarks over many years in the coal mining industry have been the classifications of:

- Undermanager
- Deputy
- Coal Cutting Machineman; Mechanical Fitter; Electrical Fitter; Clerk 25 years of age and thereafter (now 5th year and thereafter of adult service in the coal mining industry)

Relativities were skewed between these classifications and the Open Cut classifications in the 1970’s as a result of earlier decisions to determine wage rates dependent upon a formula based on horsepower/bucket capacity/carrying capacity of machines coupled with the technological advances that increased the various machine capacities to levels not anticipated at the time that the formula was determined. Never the less the above classifications have been and remain the relevant benchmarks.

The approach of the Full Bench in the Paid Rates Review decision and the Supplementary decision is wide enough that it is capable of being applied across the awards within the coal mining industry. It is important to note that the purpose of the Full Bench’s approach was to maintain wage stability. For the reasons discussed later, it is unlikely that wage stability could be maintained with the outcomes that have been proposed for the fixing of Minimum Rates by the employers or APESMA.

The Full Bench said in the Paid Rates Review Supplementary Decision [Print S0105]:

“... In multi-employer awards, which have not been subjected to the 1989 minimum rates adjustment principle, consideration should be given to whether or not external or internal relativities should be preferred. The approach to be adopted in the establishment of properly fixed minimum rates in a particular case will be a matter for the Commission to assess having regard to the work comprehended by the classification and the history of the award structure.”

The Commission has considered the material and has decided that in properly fixing the minimum rates in these awards external relativities should be preferred. This assessment is made after having regard to the work comprehended by the classification(s) and the history of the award(s) structure. In reaching this conclusion the Commission has also placed weight on the conclusion that the adoption of an approach of maintaining internal relativities would not produce a result that is consistent with the objective of the Act that safety net minimum wages be fair and effective. (The detail of this will be discussed later herein). In applying external relativities to properly fix the minimum rates in these awards the Commission will apply the traditional key benchmarks identified in paragraph 51.
The Commission has concluded based on the traditional relativities that the employers are right in their broad approach that a Clerk in this industry should equate to the Level 2 Mineworker (and it follows to the C10 rate). Given what has already been said about the removal of incremental payments all Clerks (other than those in receipt of higher wages based on work value grounds) will ultimately be one classification. It should have the same Minimum Rate as the Level 2 Mineworker (the old Group B rate). There is nothing herein which would break that relativity which has been maintained over many years and was in place on the abolition of the CIT in 1995 [see CR Prints 4852, 4848 and 4849].

Equally APESMA is right when it submits that a Deputy has always been valued by the CIT at the same wage rate in each of the awards into which the classification has been inserted. That position had been maintained by the CIT until its abolition in 1995 (see CR Prints 4852, 4848, 4849 and 4846). There is no reason to alter that position now. The Deputy will equate to the Mineworker - Specialised classification. The employers set the wage rate for that classification based on the Level 6 rate in the Underground Work Model (see paragraph 49, Print T2270). The role of the Deputy was contained at Level 6 of the Underground Work Model. The conclusion that a Deputy equates to the Mineworker - Specialised is contrary to the position contended for by the employers.

The employers submit that if a relativity is to be established with the Deputy contained in the NSW Staff Award and a person fulfilling the Deputy’s role in the P&E Award the appropriate classification in the latter award is that of “Mineworker - Advanced”. The employers submitted:

“. . . that a deputy can fall within two classifications within the P&E Award, a Mineworker - Advanced and a Mineworker Specialised. As noted from the definitions in clause 18.4 and the advancement criteria in clauses 18.5.2 and 18.5.3, each classification may be required to supervise the work of other employees and each can occur by way of appointment to a statutory position. The major difference between the two classifications is that the Mineworker Specialised is assessed as competent to perform specialist functions and to “exercise independent discretion”.

The Employers submit that the base level Deputy in the NSW Staff Award is equivalent to a Mineworker - Advanced in the P&E Award and an Experienced Deputy (usually with greater supervision responsibilities and additional competencies) is equivalent to a Mineworker - Specialised. It is submitted that it is the Mineworker - Advanced rate, rather than the Mineworker - Specialised rate, that should be equated to the Deputy, if the Deputy was considered to be the key classification in the NSW Award.

The Employers reject the assertions of APESMA that there are good grounds to conclude that a Deputy is equivalent to a specialist mineworker (at para 65). While the duties of a deputy may well be prescribed by the relevant legislation in each State, such legislation does not describe duties that necessarily require them “to exercise independent discretion” and thus does not equate a deputy to the P&E Award Mineworker - Specialised classification. It is submitted that duties of deputies could equally fall within the definition of the advanced mineworker duties.”

There is no evidence before the Commission that establishes the employers’ contention that an Outbye Deputy (refer to transcript PN572 - 577) does not “exercise independent discretion”. The employers submit that an Outbye Deputy in exercising his or her powers under the relevant legislation does not “exercise independent discretion”.
The Coal Mines Regulation Act 1982 (NSW) provides that the term “Mining Official” means in relation to an underground mine a person holding at the mine any position specified in Part A of Schedule 1. The position of “Deputy” is contained in the relevant Part of the Schedule. The Coal Mines (Underground) Regulation 1999 prescribes the duties of Mining Officials at Regulation 10:

“10.  Duties of mining officials

(1) Mining officials must:

(a) take steps to make known to persons assigned to them any relevant information arising from their work at the mine and concerning their safety or health, and

(b) immediately act on any information received or discovered regarding the health or safety of persons in their charge, and

(c) investigate any complaints or reports made to them regarding the health or safety of persons in their charge; and

(d) take remedial action as soon as practicable to control known dangers to safety or health or, if such action is not possible, pass appropriate information regarding the danger on to a more senior mining official; and

(e) take steps to control the entry of persons to any part of the mine where danger is discovered and cannot be immediately rectified, and

(f) take steps to know at all times the whereabouts of persons in their charge, and

(g) attend, on a regular basis during the course of a shift, the places where persons in their charge are working and monitor conditions that may adversely affect their safety or health.

(2) The frequency of attendance by a mining official at places where persons in the official’s charge are working is to be based on an estimation by the official of the hazards involved in the work or the working environment. The greater the hazards, the more frequent the attendance.”

At Division 3 the Regulation places the following obligation on a Deputy irrespective of the district of the mine to which the Deputy has been appointed:

“24.  Compliance with Act and Regulations

Subject to the requirements of the Act, a deputy must, to the best of the deputy’s ability, ensure that:

(a) persons under the deputy’s charge understand their duties, and

(b) all requirements imposed by or under the Act, this Regulation or the Coal Mines (General) Regulation 1999 are observed.”
On the material before the Commission it is all but impossible to comprehend how a Deputy could fulfil his or her statutory obligations without exercising independent discretion. The Regulations certainly expect the exercise of independent discretion by Deputies irrespective of the district of the mine to which the Deputy has been appointed. There is no evidence to the contrary. The employers have not established their contention that Outbye Deputies do not exercise independent discretion.

It is also noted that Senior Deputy President Cartwright, in fixing the minimum rates in the NSW Deputies Award with the consent of the NSW employers, determined that the Deputy classification in that award was the key classification and that it “is equivalent to the Specialist Mineworker classification in [the P&E Award] which in turn has a relativity of 128.5% to the metal industry fitter . . .” The employers submit in these proceedings that their agreement was based on a refusal by the Senior Deputy President to allow the insertion of a new classification of “Experienced Deputy”. It is said that:

“Thus the fixing of the key classification was wrongly agreed by the parties and . . . this error should not be perpetuated in the NSW [Staff] Award.”

The Commission places weight on the agreement of the NSW employers that the Deputy in the NSW Deputies Award equates to the Mineworker - Specialised classification in the P&E Award.

There is no material before the Commission that the employers have approached the Senior Deputy President to correct what they allege to be an error. Nor is there any suggestion of any Appeal of SDP Cartwright’s Decision or Order. To accept the employers’ submission in these proceedings would be to accept that by their consent the employers have led the Senior Deputy President to erroneously fix the Minimum Rates in the Deputies Award, the consequence of which is that the rates in that award are not properly fixed minimum rates.

Absent any steps to correct what the employers submit to be an error on their part, the Senior Deputy President’s finding based on the agreement of the employers remains in place. As concluded earlier the Commission finds that the Deputy in the NSW Staff Award is the equivalent of the Mineworker - Specialised in the P&E Award.

Should the employers think it warranted to introduce into this award a concept of two levels of Deputy, they are free to make such an application. However there is no material before the Commission that would lead to a conclusion that the long established relativities of Deputies under the P&E award (originally only in Queensland) and the Deputies Award should be abandoned. This is particularly so, given the CIT in the early Nineties, without employer objection, confirmed this relativity when the Deputy classification was inserted into the P&E Award (to apply in New South Wales) and into the NSW Staff Award.

Lastly the relativity (benchmarking) between Deputy and the Undermanager has been discussed and it is the Commission’s view that such a relativity must be maintained. At the abolition of the CIT in 1995 that relativity was 8% (for equivalent 35 hours) above the Deputy. It follows that this relativity, for the reasons discussed earlier, now applies to the Mineworker - Specialised.
The internal relativities as between the classifications that fall between each of these three classifications shall be maintained. Put another way the percentage relativities held by Groups D, E and F over Group A will be maintained. The changed relationship of Groups B and C have already been discussed. The relationship in percentage terms between Groups G to K and the Deputy will be maintained. The remaining classifications will maintain their relativity with the Undermanager. Including the 2003 Safety Net Adjustment the minimum rates in the NSW staff award will be:

<table>
<thead>
<tr>
<th>Classification</th>
<th>Minimum Rate</th>
<th>Residual Component</th>
<th>Total Payment</th>
<th>37.5 or 40 hour rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Group A</td>
<td>542.20</td>
<td>65.10</td>
<td>607.30</td>
<td>N/A</td>
</tr>
<tr>
<td>Group B</td>
<td>542.20</td>
<td>79.30</td>
<td>621.50</td>
<td>N/A</td>
</tr>
<tr>
<td>Group C *</td>
<td>542.20</td>
<td>94.50</td>
<td>636.70</td>
<td>N/A</td>
</tr>
<tr>
<td>Group D</td>
<td>581.60</td>
<td>69.80</td>
<td>651.40</td>
<td>N/A</td>
</tr>
<tr>
<td>Group E</td>
<td>599.00</td>
<td>71.90</td>
<td>670.90</td>
<td>N/A</td>
</tr>
<tr>
<td>Group F</td>
<td>612.50</td>
<td>73.50</td>
<td>686.00</td>
<td>N/A</td>
</tr>
<tr>
<td>Group F (Deputy NSW)</td>
<td>684.60</td>
<td>40.00</td>
<td>724.60</td>
<td>N/A</td>
</tr>
<tr>
<td>Group G</td>
<td>655.20</td>
<td>38.30</td>
<td>693.50</td>
<td>767.80</td>
</tr>
<tr>
<td>Group H</td>
<td>674.20</td>
<td>39.40</td>
<td>713.60</td>
<td>790.00</td>
</tr>
<tr>
<td>Group I</td>
<td>684.20</td>
<td>40.00</td>
<td>724.20</td>
<td>801.80</td>
</tr>
<tr>
<td>Group J</td>
<td>697.80</td>
<td>40.80</td>
<td>738.60</td>
<td>817.70</td>
</tr>
<tr>
<td>Group K</td>
<td>712.40</td>
<td>41.60</td>
<td>754.00</td>
<td>834.80</td>
</tr>
<tr>
<td>Group L</td>
<td>739.40</td>
<td>33.20</td>
<td>772.60</td>
<td>855.40</td>
</tr>
<tr>
<td>Group M</td>
<td>759.40</td>
<td>34.10</td>
<td>793.50</td>
<td>878.50</td>
</tr>
<tr>
<td>Group N</td>
<td>No Rate</td>
<td>N/A</td>
<td>No Rate</td>
<td>No Rate</td>
</tr>
<tr>
<td>Group O</td>
<td>750.50</td>
<td>33.70</td>
<td>784.20</td>
<td>974.60</td>
</tr>
<tr>
<td>Group P</td>
<td>770.40</td>
<td>34.60</td>
<td>805.00</td>
<td>1000.50</td>
</tr>
</tbody>
</table>

* There are two classifications in this Group which do not contain incremental payments. They are “Screen and Surface Overseer” and “Traffic Officer”. These two classifications will have to appear in their own Group which, on the basis of maintaining the existing relativity with Group A, will appear as follows:

<table>
<thead>
<tr>
<th>Classification</th>
<th>Minimum Rate</th>
<th>Residual Component</th>
<th>Total Payment</th>
<th>37.5 or 40 hour rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Group ?</td>
<td>568.50</td>
<td>68.20</td>
<td>636.70</td>
<td>N/A</td>
</tr>
</tbody>
</table>

In summary the Commission has approached the task of properly fixing the minimum rates in these awards by maintaining long established relationships or relativities between a number of key classifications or roles within the industry. In doing so it has been necessary to effectively alter the relativities within the Staff Awards. For the reasons discussed, the changes in my view are necessary in part and as a result of the changes to the classifications in the P&E Award. The effect has been to widen the relativity between the top and the bottom rates. For the reasons discussed herein that was necessary if the Commission was to meet its obligation to properly fix minimum rates and not simply apply a formula which produced a nonsense.
[70] The internal relativities of the Staff Awards needed to be altered in order to re-establish the traditional relativities at the top (Undermanager) in the middle (Deputy) and at the bottom (Clerks, etc) with the new classifications in the P&E Award. Had this not been done and internal relativities maintained (as compressed as they are) depending on whether the key classification in the Staff Award was selected from the top or bottom rates of the Staff Award the result was to have (on the first of APESMA’s proposals) an entry level Clerk with a properly fixed minimum rate of approximately $60.00 per week more than a Level 2 Mineworker (the C10 Metal Industry Fitter) or (on the employers’ proposal) have an Undermanager in Queensland paid approximately $100.00 per week less than a Panel Deputy for equivalent hours. Such outcomes if adopted are unrealistic and unsustainable. Neither of those outcomes could on any reasonable analysis be said to meet the object of the Act that requires “an effective award safety net of fair and enforceable minimum wages . . .” Such outcomes, if adopted, are not effective or fair.

One Award

[71] Obviously a similar exercise will need to be undertaken with the Queensland Staff Award wages schedule. The properly fixed Minimum Rates for each of the various classifications should be the same in Queensland, NSW and Tasmania. There would seem to be some efficacy if the two awards were to be merged into one award. It is likely that it may need to carry two wages schedules whilst the transition to properly fixed minimum rates occurs but that should not pose any practical barrier to achieving one Staff safety net award across the industry (apart from any enterprise awards that may exist). Apart from the current differences arising from the wages schedules, which the Commission believes should be phased out, there are few differences of substance between the awards.

Length of Shift

[72] The Staff Awards currently limit to eight hours the length of a shift which is able to be determined by the employer. Shift lengths of greater than eight hours can only be implemented by agreement between the employer and the majority of affected employees. The employers wish to extend the length of the employer determined shift length to ten hours.

[73] Currently the limitation on employer determined shift lengths applies to shift lengths of “up to a maximum of eight ordinary hours”. The employers submit that there is some confusion about the term “eight ordinary hours” and seek to clarify the term by changing it to “eight ordinary time hours”.

[74] In addition to the foregoing the employers also seek to add the following sub clause:

“In the event that the employer wishes to introduce shift lengths greater than 10 ordinary time hours, and the employer has sought, but not obtained the agreement of the majority of employees as required by sub-clause 21.2.2 the matter may be referred to the Australian Industrial Relations Commission for determination.”

[75] The Full Bench in simplifying the P&E Award dealt with the issue of employer determined shift lengths [Print S6142]. The Full Bench concluded at paragraphs 53, 54 and 55 of that decision that:

“We have considered the evidence and material presented. We note that the working of extended shift lengths is not unusual in the coal industry even though the award restriction regarding 8 hour shifts remains. We also note that there are no such
restrictions on shift lengths in the Metal Industry Award or in the Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1995 (the Hospitality Award) which was under consideration in the Award Simplification Decision. In the coal industry, extended shifts have mainly been introduced by agreement between the employer and the majority of employees concerned, although there are some examples of 12 hour shifts being introduced as a result of arbitration (see the Curragh decision and Re Novacoal Australia Pty Limited and CFMEU [Print N1711, 17 May 1996] (the Vickery decision)). It is clear that extended shifts involving the working of eight and a half and nine hours are more common than those involving twelve hours work, at least in some parts of the coal industry.

The question is whether all of the employers to whom the award applies should have the right to require employees to work 12 hour shifts as part of their ordinary hours of work regardless of the consent of the employees and the CFMEU and regardless of the circumstances under which the work is performed. We do not assume that employers would use such a right unfairly. Nevertheless we are conscious that there has been some disputation in the industry concerning 12 hour shifts and of the troubled industrial history at a number of mines on this and other issues. As we have noted, the claim is not limited to a particular site or sites and if granted would have the potential to apply to all mines to which the award applies and to a variety of work environments. The Commission has not had the opportunity of hearing evidence and submissions about the circumstances in which the extended shifts would operate. Furthermore it is clear from the evidence in this case that a number of health and safety issues as well as social issues associated with the working of 12 hour shifts have not been conclusively resolved. In these circumstances a cautious approach is warranted.

We consider that the limitations in the award provisions on the working of extended shifts have the effect of restricting or hindering productivity and that the provisions need updating. We also recognise that there are a variety of significant issues relating to the working of 12 hour shifts in the coal industry and that it is appropriate that as far as possible where such extended shifts are necessary that they be introduced as a result of negotiations and by agreement with the employees concerned. In all the circumstances and in seeking to balance the needs of efficiency in the industry and fairness to employees, we have decided that employers in the industry should be able to determine shift lengths to be worked up to ten ordinary hours. Shift lengths greater than ten hours may be implemented at mines by agreement between the employer and the majority of affected employees. Where an employer wishes to introduce shift lengths greater than 10 ordinary hours and agreement cannot be reached, a procedure is to be provided under the award for the matter to be referred to the Commission for determination. The Award will be varied accordingly.”

[76] The P&E Award was subsequently varied to grant to employers the right to determine shift lengths of up to 10 ordinary hours.

[77] The Commission respectfully adopts the findings of the Full Bench and for the same reasons proposes to vary the Staff Awards. The issue that arises is that in considering the length of the shift to be determined by the employer the Full Bench throughout its reasoning used the terms “shift lengths”, “12 hour shifts”, “extended shifts” and “shift lengths greater than 10 ordinary hours” (emphasis added).
The result of all of this is, despite the Full Bench decision and its “cautionary approach” and for the reasons stated the intention of the Full Bench to require employee agreement for extended shifts, the P&E Award is claimed by the employers to operate in such a way that employers are able to determine shift lengths of 12 hours (or more). This is said to come about because the award clause as varied by the Full Bench only limits the employer’s right to determine shift lengths of more than 10 ordinary hours. Thus, argue the employers, a shift length of 10 ordinary hours plus rostered overtime of one or two hours (or more presumably) can be determined by the employer. That is the Full Bench decision has no practical effect if it was intended to require employee agreement before the working of any shift lengths greater than 10 hours.

The employers propose a similar outcome for the Staff Awards. There is no point entering the controversy (if that is the appropriate description) in relation to the P&E Award other than to say that, as far as it is relevant to a consideration of these awards, if the Full Bench intended that award to operate in the way contended for by the employers then the Commission as constituted intends to take a different approach in relation to these awards. More to the point on any fair reading of the Full Bench decision it is more likely that the Full Bench intended that employers required the agreement of the majority of affected employees before shifts of greater than 10 hours (irrespective of the hours being “ordinary” or “overtime” or a combination thereof) could be introduced.

A consideration of shift lengths (ie the number of hours the employee is required to attend for work from the commencement to the cessation of such work) requires a number of factors to be taken into account. Such factors include the work to be undertaken, whether the hours are to be worked during the day or the night, the environment for the employees during the hours between working extended shifts, the length of each individual shift and the number of shifts to be worked in a defined appropriate period. The list is not exhaustive.

Now is not the time to consider all of those factors. They, along with others, were before the Full Bench. The Full Bench decided that “a cautious approach is warranted”. The cautious approach that the Commission as constituted intends to take is that employer determined shift lengths (ie irrespective of whether such shifts are comprised of solely ordinary hours or are comprised of ordinary hours and overtime hours or are comprised of solely overtime hours) shall be limited to ten hours. In adopting such an approach the Commission does not assume that employees would unreasonably withhold agreement. The cautionary approach will include in the awards the procedure proposed by the employers to allow the Commission to resolve specific instances where agreement has been sought and cannot be reached.

The foregoing approach will ensure that whatever confusion is said to arise in relation to this provision in the P&E Award will not occur in this award. The employers’ proposal regarding “ordinary time” hours is dealt with later herein.

Agreements

The Staff Awards contain at clause 8 the following:

“8. AGREEMENTS

8.1 An employer and employee or prospective employee may enter into an agreement relating to rates of pay, hours of work and conditions of employment in excess of award provisions.
8.2 An agreement made pursuant to this clause will provide for:

- a specific term; and
- a disputes procedure facilitating the Association’s involvement for the resolution of any dispute arising out of the terms of the agreement.

8.3 If an agreement proposes to:

- substitute;
- trade off; and/or
- set off

any award entitlement or provision, then the agreement will not be implemented without the written acceptance of the branch secretary. The branch secretary’s acceptance will not be unreasonably withheld.

8.4 Should the branch secretary unreasonably withhold written acceptance the employer may apply to the Australian Industrial Relations Commission for approval.

The employers contend that the clause ought be varied:

- To allow an enterprise to operate more efficiently a broader agreements/general facilitative provision is required.

- Because of the history of the coal mining industry and the nature of the personnel covered by the Staff Awards.

- Because the Staff Awards are “members only” awards. Employers are at risk of breaching Part XA of the Act if they do not offer comparable employment terms to union members and non members. Employers do not know which employees are union members and are entitled to award coverage.

- Because the take up of Australian Workplace Agreements and the use of certified agreements for senior professional staff in the coal mining industry is low and is discouraged by unions generally.

- Because Clause 8 would allow offers of flexible salary packages to be made to both union members and non members.

- Because employers risk unknowingly breaching the Staff Awards upon an employee becoming an APESMA member thus acquiring award coverage and effectively undoing an employment arrangement which had previously been legally and genuinely agreed.

- Because that part of clause 8 that requires the approval of the branch secretary of APESMA is not allowable.

To remedy the foregoing the employers submit that the clause should be altered by changing the basis on which agreements may be made. The proposed changes are as follows:
“8.2 If any such agreement substitutes, trades off and/or sets off any award entitlement or provision, then the agreement will:

- be in writing; and
- provide for a specific term; and
- satisfy the no-disadvantage test in Part VIE of the Workplace Relations Act, ie. when taken as a whole, is no less favourable than the terms of this award when taken as a whole; and
- provide for a party, in the event of a dispute, to have the matter dealt with in accordance with clause 9 of this award.

8.3 If a party believes that an agreement or proposed agreement does not satisfy the no-disadvantage test, then, prior to implementation, the party may refer that question to the Australian Industrial Relations Commission for determination.”

[86] The significant changes are that the parties to any agreement must ensure that the agreement meets the no disadvantage test in the Act and that in the event that a party to a proposed agreement believes the agreement does not meet the relevant test then the matter will be referred to the Commission for determination.

[87] It was not referred to in the employer submissions, however the P&E Award used to contain an almost identical clause to the one under consideration. It was removed by Harrison, C during the award simplification process. During the proceedings before the Commissioner the employers submitted (amongst other things) that the clause was not a facilitative provision in the sense used in Item 51(7)(a) (see Print R4611). The employers now argue that an almost identical clause is a sub item 51(7)(a) facilitative provision.

[88] APESMA submits that the clause should be deleted from the Staff Awards because it is not allowable. APESMA relies on the decision of the Full Bench in the s.109 Review decision [Print R2700] commencing at paragraph 267 to support its contention. The employers submit that clause 8 is distinguishable from the clause reviewed by the Full Bench. The following is extracted from the decision of the Full Bench:

“[267] In this part of our decision we consider challenges made to a range of award provisions which do not fall easily into any of the groupings which we have dealt with so far.

Water Ecoscience Award 1998 (C No. 90271 of 1998)

[268] 6. INDIVIDUAL AGREEMENTS

6.1 Where Water Ecoscience and an employee agree, an individual employment agreement may be negotiated and shall take precedence over the terms of this award.

6.2 The overall benefits of any individual employment agreement shall be at least equivalent in total value to those contained in this award.
6.3 An employee may elect to have a Union Official or another representative to assist him/her in negotiations with Water Ecoscience.

6.4 All individual agreements shall be committed to writing and shall be signed by both parties and exchanged, and shall remain confidential.

6.5 Any dispute in relation to an individual employment agreement may be dealt with in accordance with the disputes settling procedures in clause 10 - Procedure to avoid Industrial Disputation, of this award.

......

[269] The Minister, supported by ACCI and the AMWU, submitted that clause 6 is not allowable. No submission was made that the clause is allowable or a s.89A(6) provision. The Minister submitted, in addition, that the clause is not a facilitative provision within the meaning of item 49(8)(a) or the definition of a facilitative provision adopted in the Hospitality Decision [at p.39]. It was submitted in particular that the clause provides for individual agreements which may override any term of the award and so change the level of entitlement provided by that term.

[270] We have concluded that clause 6 is not an allowable award matter, nor a s.89A(6) provision. Our primary reason for that conclusion is that the clause permits the complete abrogation of the rights and obligations in the award by individual agreement. Whilst item 49(8)(a) (and s.143(1C)(a)) contemplate provision for variation of award rights and obligations, they do so in a limited way. The variations they provide for relate to how the award provisions are to apply. The distinction between variations of that kind and variations which completely bypass the award is one of substance. We will delete the clause.”

[89] It is observed that the terms of sub item 49(8)(a) in relation to facilitative provisions is (relevant to these proceedings) identical to sub item 51(7)(a).

[90] An analysis of the clause before the Full Bench and the proposed (and for that matter the existing) clause reveals that:

- Both allow the making of agreements that will take precedence over the award.

- Both require that the benefits of such agreements when compared to the benefits of the award on a wholistic approach to be at least equal to the award.

- Both require the agreement to be in writing.

- Both require that the agreement provide that disputes between the parties to the agreement shall be resolved in accordance with the award disputes procedure.

[91] The clauses are not distinguishable in a way that would lead to a finding that the Full Bench decision should not be applied in the current circumstances. The Full Bench reasoning and conclusion are respectfully adopted. The clause is not allowable and will be deleted. Such a finding has immediate ramifications. As the clause is not allowable it has not had
effect since July 1998. It follows that there may be a raft of agreements operating in the industry which are not lawful. Rectifying that situation should be a priority of the parties.

[92] In the event that the Commission reached such a conclusion the employers submitted that at the very least employers would require additional facilitative provisions with respect to annual leave and sick leave to ensure parity between members and non members of APESMA. The ability to agree reductions in the quantum of annual and sick leave were referred to. The Commission was not provided with the details of any such proposals, nor was any evidence presented that would substantiate any award variations.

[93] The Commission notes the employers’ issues concerning members and non members of APESMA and award coverage, however there exists within the industrial relations framework a number of avenues which would overcome the employers’ concerns. That employers choose not to utilise them is not persuasive. Nor is the submission that the unions discourage the use of such avenues. There is no evidence in relation to the latter contention. In any event the employers are at liberty at any time to seek a variation to the awards to overcome whatever troubles them about the annual leave and sick leave clauses. Any such application will need to be supported by evidence.

**Coverage of the Staff Awards - SBCL**

[94] The Queensland Staff Award contains at sub clause 3.6 the following:

> “This Award binds:

> . . .

> 3.6 South Blackwater Coal Ltd except for:

> • Persons in positions not previously occupied by ACSA members at South Blackwater Coal Limited; and

> • Persons who are working under employment contracts which were directly or indirectly brought to the notice of the ACSA prior to 1 March 1996.”

[95] Although no evidence was placed before the Commission, it is generally known and not controversial that the South Blackwater Coal Ltd’s (SBCL) Mine at South Blackwater has been sold. Whatever employees of SBCL that were subject to subclause 3.6 and still remain at the site are now employed by a different coal mining company. The old SBCL mining operations have been absorbed into the existing operations of the company that purchased South Blackwater.

[96] The subclause will be deleted. Whatever dispute was agitated in 1996 which caused the subclause to be inserted in the award has been resolved. The subclause created certain rights for employees. Circumstances have changed. Events have moved on. There is a new employer. There seems little point in retaining an award provision that binds an entity that does not employ any relevant employees.

[97] The removal of the subclause does not dictate an outcome whereby an employee will lose rights. Whatever rights accrued to relevant employees at the time that the subclause existed will not be extinguished by the deletion of the subclause. Further, if any employee who is not a member of APESMA wishes to continue to enjoy award coverage then he or she
can join APESMA. If that approach is not attractive the employee then has a choice to make. Importantly that choice will be made under an employer with a different approach than the one exhibited by SBCL in 1996. The subclause is obsolete.

Coverage of the Staff Awards

[98] This is a debate between the parties with almost no substance. Neither side wants to change the coverage of the Staff Awards at existing sub clauses 3.3, 3.4 and 3.5. Each sub clause contains one sentence. The employers propose to collapse the three sentences into one sentence (for a saving of about 18 words). APESMA opposes the proposal on the grounds that the new wording may yield unintended consequences which may impact on the coverage of the award and that such a change was not made to the P&E Award.

[99] In order for the power to exist to vary the award the relevant provision must exhibit one or more of the criteria in 51(6) and/or (7). The employers submit that the existing provisions are not expressed in plain English and/or that the provisions need updating. The Commission is relaxed in relation to both sets of words. It seems that the employer proposal does not change the coverage, however the Commission is not of the view that any of the 51(6) and (7) criteria relied on by the employers are in existence. Accordingly the power to vary the awards in the way proposed by the employers does not exist.

Incidental and Peripheral

[100] The employers propose that the Employee Duties contained in subclause 10.1 be varied (in effect) by the removal of the words “including work which is incidental and peripheral to the employee’s main task.” The employers submit that the term sought to be deleted is obsolete and is not in plain English. It is said that the term is unnecessary because the requirement to perform incidental and peripheral work will always fall within the reasonable requirement of the employer.

[101] It is also said that the term may “qualify” or “limit” the work that may be reasonably required by an employer and such a “qualification” or “limitation” would be restrictive and contrary to s.51(6)(b).

[102] APESMA submits that the sub clause should remain in its current form.

[103] The Commission is satisfied that the term is obsolete or needs updating. It is accepted that the reasonable direction of the employer would include any incidental and/or peripheral tasks. There is no evidence before the Commission that would enable a finding that the provision operates in such a way in the Staff Awards that it restricts or hinders the efficient performance of work. The clause will be varied in the way contended for by the employers.

Casual employment

[104] It is agreed that the reference to APESMA in the clause will be deleted. APESMA wishes to retain that part of the clause that the employers submit limits an employer’s right to utilise casual employees. The alleged limitation is that casual employment will be limited to the circumstance of filling “any vacancy created by a permanent employee being on leave of absence, or in the event of a short term requirement”.


The employers claim these words restrict the use of casuals in a way that is contrary to Item 51(6)(b) because it restricts the efficient performance of work. The employers have not brought any evidence to establish their claim. It seems on the words themselves that an employer has an award right to employ casuals for a lengthy period if it is to replace a permanent employee on leave of absence (for example long service leave or Workers Compensation). The employment of casuals is also allowed to address a short term requirement.

From the Commission’s experience in this industry, it is not one that shares characteristics with, for example, the hospitality industry whereby the nature of the industry dictates that the long term engagement of casuals is necessary. Certainly in this matter a case has not been made out that the efficient performance of work is being restricted by the employers’ inability to engage casual employees on a long term basis (other than to fill vacancies created by permanent employees being on leave). It seems that employers have access to a number of forms of employment (or access to labour) which include full time, permanent part time, temporary (for both full time and part time employees), contractors, labour hire and casuals. Given the foregoing and in the absence of evidence, it is difficult to understand how the award, if it continues in its current form, restricts the efficient performance of work. The clause will remain in its current form.

Temporaries

The employers submit that the clause providing for temporary employment should be varied to allow temporary employees to be engaged on a full or part time basis and that the clause be made precise or widened by the inclusion of fixed “term” employment rather than the current provision of “fixed or defined task”.

APESMA opposes the variation. The variation slightly amended will be granted. The award in its current form does not preclude temporary part time employment. The inclusion of such a provision into the award may be new but such employment is currently permissible. The fact that the parties have different views about that is sufficient evidence to vary the award pursuant to sub item 51(7)(c) to ensure the award is clear and in plain English.

The current award prescription that temporaries be engaged for a “fixed or defined task” does not appear to provide for employment that will come to an end by the effluxion of time. Rather the paragraph appears to limit its application to the completion of a task. The removal of the word “term” is said to have been an error arising from the drafting of earlier variations to the award. On that basis the error will be corrected.

The Commission will alter the employers’ proposal so that the language in 11.3.1 is consistent with the language used in 11.2.1. The paragraph will read:

“A temporary employee is one engaged on a part time or full time basis for a fixed term or a defined task”.

The employers also propose the inclusion of the following:

“A temporary employee will receive entitlements under this award on a pro rata basis”.

26
The employers did not nominate any specific examples where this sub clause might have work to do. From the Commission’s experience it is known that sick leave is accredited in advance in the coal mining industry. On commencing employment an employee is accredited with one year’s sick leave entitlements. It is illogical to provide a full year’s sick leave accreditation to an employee commencing a fixed term engagement of six months. The Commission is satisfied that the employers have substantiated that the award should reflect the employers’ approach. The Commission has some reservations about the way in which the employers propose to vary the award. Does the proposed clause repeated in paragraph 111 mean that an employee engaged for a fixed term of six months and who has a need to access bereavement leave will only be provided with a maximum of one (rather than two) days leave without loss of pay? It seems that the award might be clearer and more easily understood if the approach was adopted whereby any specific arrangements that are necessary for temporary employees will be contained in the relevant clause.

**Part Time Employment**

The debate in relation to this matter concerns the correct divisor (35, 37.5 or 40) for the calculation of the hourly rate for Part Time employees. If the course determined earlier herein regarding the removal of the overtime component is implemented, it becomes unnecessary to determine this question.

**New Classifications**

The clause currently reads as follows:

“New Classifications

16.3.1 No new classifications will be created by employers unless wage rates and conditions are agreed between the employers and the Association.

16.3.2 If an agreement cannot be reached, either party may refer the matter to the Australian Industrial Relations Commission for determination.

16.3.3 Not all classifications need to be used at each mine.”

The employers submit that only the last sentence should be retained. APESMA proposes the retention of the clause without change. APESMA submits that the clause is vital to the integrity of the classification structure in the award as it allows for updating as new occupations or jobs are created. It also is said to prevent employers creating new classifications outside of the award but instead employers should either utilise the current classifications or commence negotiations on new classifications where needed.

In the Commission’s view the entire clause should be deleted. The creation of new classifications is a matter best left to the enterprise. Should employers wish to create new classifications such an outcome may be achieved through agreement at the enterprise level through the making of certified agreements or Australian Workplace Agreements. APESMA is free at any time to make application for the insertion into the award of any such classifications in the event that it believes such a course is necessary or appropriate.
It seems that in the context of the contemporary Australian industrial relations with the emphasis on agreement making at the enterprise level a provision in a safety net award which prohibits an employer from creating a new classification unless agreed with a union is more than a little out of step with the Act.

The safety net award system must remain effective and should APESMA believe that new classifications should be inserted in the Award that course is open. The current award clause is obsolete and contains matters of detail that are best left to the enterprise. The last sentence is unnecessary. In Thirty years experience in this industry the Commission as constituted has not heard of any contention that an employer is compelled to utilise each and every classification that appears in the award. As far as the Commission as constituted is aware, such a provision does not appear in any other safety net award.

Higher Wage

The clause reads:

"An employee in receipt of a higher wage than is provided for by this award must not, due to this award, have it reduced."

In other words agreed arrangements as to wages that are in excess of the award minimum should not be reduced due to the existence of the award. It is interesting to analyse this clause. It is an award provision requiring in certain circumstances the maintenance of wages at over the safety net award levels and therefore it follows maintains higher rates than the award properly fixed minimum rates. For that reason the Commission has concluded that this clause is inconsistent with the Paid Rates Review decision and must be deleted from the award. The safety net award should not compel the payment of wage rates that are in excess of those properly fixed Minimum Rates contained in the award.

It is noted that the intent of this clause is totally different to that clause retained in the Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1998 by the Full Bench [see Print P7500]. In that award the clause that was retained protected employees rights, obligations or liabilities which had accrued under the (now) superseded award. Such a provision is contained in these awards.

Payment of Wages

Only one sentence is in contest. The Commission will adopt APESMA’s proposal and insert into this award the same provision as appears in the P&E award. The sentence to be included in the award will be:

"18.2 Wages may be paid by cheque or electronic funds transfer."

Graduates

The Staff Awards both carry classifications and rates of pay for Commercial and Engineering Graduates. Although there are slight differences between the awards the clauses are fundamentally the same. The two award clauses may be summarised and compared in the following way:
The minimum rates to be paid to graduates shall be as follows:

<table>
<thead>
<tr>
<th>Classification</th>
<th>Qld</th>
<th>NSW</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commercial Graduate 1st Year</td>
<td>81%</td>
<td>80%</td>
<td>of the Commercial Graduate (thereafter) rate</td>
</tr>
<tr>
<td>Commercial Graduate 2nd Year</td>
<td>83%</td>
<td>85%</td>
<td></td>
</tr>
<tr>
<td>Commercial Graduate 3rd Year</td>
<td>89%</td>
<td>95%</td>
<td></td>
</tr>
<tr>
<td>Graduate Engineer 1st Year</td>
<td>81%</td>
<td>80%</td>
<td>of the Engineer rate*</td>
</tr>
<tr>
<td>Graduate Engineer 2nd Year</td>
<td>87%</td>
<td>85%</td>
<td></td>
</tr>
<tr>
<td>Graduate Engineer 3rd Year</td>
<td>93%</td>
<td>95%</td>
<td></td>
</tr>
</tbody>
</table>

* Note the comments in paragraph 125

[123] The employers contend that the percentages in both awards (States) should be the same and the Queensland employers propose that the NSW Staff Award percentages be adopted. APESMA is opposed to any reduction in the percentages. There is a more fundamental issue. These award classifications contain incremental payments and in accordance with the Paid Rates Review decision will need to be phased out of the award.

[124] The alternative is to change the basis for progression from one pay point to the next away from years of service to the acquisition of additional skills and/or increases in work value. The adoption of this approach in order to remove the time based increments would provide an opportunity to assess the work value criteria at each pay point and agree a common percentage applicable to all States. It seems that the employers’ proposal of common percentages could reasonably be adopted (provided that existing employees on existing pay points do not suffer an actual wage reduction.

[125] The “Engineer” rate in the Queensland Staff Award does not appear to contain an incremental payment. Arguably the NSW rate does. The classification in Group J - Commercial Graduate (fourth year and thereafter) in both awards prima facie does contain an incremental payment. The parties might give consideration to vary the award by deleting the classification and inserting in lieu thereof a classification of “Commercial Officer” with an agreed work value assessment to be the equivalent of the Group J rate (in the NSW Staff Award). A definition could be included for the classification that provides that a person appointed to such position must hold a tertiary qualification in the relevant discipline/s and have at least three years experience in a commercial context since graduating. A similar approach should be taken in relation to the Engineer classification. The parties would need to agree the precise words. It would be then a matter of establishing the entry level (80%) and agreeing the work value criteria for movement from one pay point to the next.

[126] In order to assist the parties agree what work value considerations should apply to progress to the second, third and fourth pay points the Commission notes that the Full Bench (Giudice J, Marsh SDP and Laing C; Print R9289) observed that:

“In addition Clauses 22.4.1 and 22.5 have been reformatted to make explicit the intent of the Full Bench Paid Rates Review Decision [Print Q7661] namely that increments are only permitted in awards where progression through the classification structure is based on work value considerations.

The reformatted subclauses follow:
22.4.1 Provided that a degree qualified Nurse entering the workforce without clinical experience shall start at increment 1 Level 1. At the completion of twelve months service that nurse shall accelerate one increment having regard to the acquisition and utilisation of skills and knowledge through experience in his or her practice setting(s) over such period.

22.5 Progression for all classifications for which there is more than one wage point, shall be by annual increments, having regard to the acquisition of skills and knowledge through experience in his or her practice setting(s) over such period.”

The 2002 Safety Net Adjustment - Queensland

[127] There is no need for the Commission to deal with this matter as Commissioner Roberts on 1 October 2003 varied the Queensland Staff Award [Print PR938811] to include the 2002 Safety Net Adjustment.

The 2003 Safety Net Adjustment

[128] The Minimum Rates determined in this decision include the 2003 Safety Net Adjustment. The parties are directed to include in the draft award other consequential award variations giving full effect to the Safety Net Review Decision of the Full Bench.

Sick Leave - Entitlement

[129] The employees seek to vary the entitlement to paid sick leave from days to hours. Given the fact of an employer’s right to determine shift lengths of up to 10 hours and the introduction by agreement of shift lengths greater than 10 hours there is merit in the employer’s proposal. Such a change has been made to the P&E Award and the Commission is not satisfied that any reason of substance exists which demands that a different approach should be taken in relation to this award.

[130] Employees who are still required to work 37.5 and 40 hours (ie have not made the transition described in paragraphs 31 - 49 herein) shall be entitled to 112.5 hours (37.5 hour employees) and 120 hours (40 hour employees) of paid sick leave per annum. This arrangement will cease on an employee’s transition to the 35 hour week. Employees on the 35 hour week shall be entitled to 105 hours of paid sick leave per annum.

Ordinary “time” hours

[131] The employers originally proposed a variation to a number of award clauses the effect of which would be to replace the term “ordinary hours” to “ordinary time hours”. After discussions during the proceedings the employers withdrew that proposal and replaced it with a proposal that a definition of “ordinary hours” be inserted. The proposed definition is:

“5.1.3 The term “ordinary hours”, where used in this award, refers to the hours required to be worked for the payment of the minimum rates of wage applicable for the employee’s classification as set out in clause 16.2.”
[132] APESMA is opposed to the insertion of the definition. Reference is made to the number of times the term is used in the award and what is contended to be different meanings for the same term. There also remains in the awards reference to terms that no longer have any apparent meaning. For example subclause 15.4.1 says:

“... The employees ordinary hours of work (even if they are not *standard hours*)”

(emphasis added).

[133] The term “standard hours” is a hangover from the ‘A’ Division hours arrangements discussed throughout this decision. “Standard hours” applied only to ‘A’ Division employees and were those hours prescribed by the award to be worked each four weekly cycle and included the overtime component. ‘A’ Division (not In Charge) standard hours after 1977 [CR2653] were 150 per 4 week cycle. If an employee worked beyond the “Standard hours” the additional time was described as “Excess hours”. All of this is outdated and these concepts have been partly removed from the award and will be fully removed from the award once the overtime component is removed.

[134] Once that occurs there will only be two types of “hours” that can be worked. They are “ordinary” hours and “overtime” hours. Whilst the award may provide various penalties payable for work on different days, etc. (eg Saturdays and Sundays) none of that is relevant to the determination of whether hours are “ordinary” or “overtime”.

[135] The award hours clause will ultimately require that the ordinary hours of work shall average 35 per week. That is for each week in a roster cycle there must be included in the roster 35 ordinary hours. There is no requirement for each individual week in the roster to contain 35 ordinary hours unless of course the roster cycle is one week. A roster with a two, three, four or seven week cycle must contain somewhere in the roster 70, 105, 140 or 245 “ordinary” hours respectively. Such ordinary hours can fall anywhere in the roster (ie there need not be 35 ordinary hours in each individual week of the roster). It is the Commission’s view that the ordinary hours in any roster need to be identified by the employer (or where such rosters are by agreement the ordinary hours need to be identified by agreement).

[136] Any hours contained in the above rosters that are in excess of 70, 105, 140 or 245 hours respectively are “overtime” hours. These hours are often described as rostered overtime. A useful definition of such overtime appears at subclause 5.3.6 of the P&E Award. Rostered overtime hours are simply overtime hours that form an integral part of the roster. Such hours are not (and never can be) “ordinary” hours. For the purposes of this discussion there is no distinction between “rostered” overtime and “unrostered” or “unscheduled” overtime.

[137] There is merit in the award defining the term “ordinary hours”. It is confusing if the award as APESMA submits uses the same term in various clauses with several different intended meanings. Simplification requires that the term have a single meaning and if a particular provision in the award intends a different meaning then a different term should be utilised. The definition is not intended to reduce any current entitlements. During the drafting of the award as a consequence of this decision APESMA will be able to advance different terms to ensure there is no reduction in employee entitlements. Provided that the Commission has determined earlier herein that the safety net award is unable to mandate the inclusion of overaward payments in the calculation of award benefits. The Commission has decided to adopt the employers’ proposed definition.
Termination of Employment

[138] The employers wish to include an exclusion from this provision for employees engaged on a casual basis. Given that a casual employee’s employment is terminated at the cessation of each engagement, (ie each day) the termination of employment clause can have no practical effect for such employees. The clause will be varied in the way proposed by the employers.

[139] Temporary employees as defined in this award are engaged on a fixed term or for a defined task. There is a line of decisions of the Commission (see for example the decision of SDP Williams in Joanne Evans v. Australian Defence Apparel Pty Ltd at paragraph 18, at Print PR921552) wherein the conflict between employment for a fixed term (or defined task) is found to be at odds with a right to terminate the employment at any time. It seems that temporary employees should also be excluded from this clause other than the subclause that provides a right to the employer to terminate a temporary employee for misconduct.

Termination of Employment - Period of Notice

[140] The period of notice required to be given is different in the two States. The NSW Staff Award basically reflects the provisions in the Act. The Queensland Staff Award provides a minimum of four weeks to be provided by an employer to an employee. The Queensland employers seek to have the same provisions as apply in NSW. APESMA is opposed to the variation submitting that it would constitute a reduction in entitlements and is contrary to the award simplification principles.

[141] The Commission is desirous of achieving one award with no differences as between the States. Never the less there is little alternative in the face of APESMA’s opposition but to find the variation would constitute a reduction of an entitlement and as none of the criteria of sub items 51(6) and (7) are found to exist, the Commission is unable to make the variation. It may be that during the drafting sessions that will follow this decision that some common arrangements to apply in all states can be agreed. If not the Queensland provisions will not be altered.

Hours of Work - Majority of Affected Employees

[142] The employers propose a variation to subclause 21.1.3 the effect of which would change the requirement of the employer to agree the ordinary working hours of any shift from the current “with the employees” to the “majority of affected” employees. There is no evidence that the subclause as currently worded has caused any difficulties or has affected productivity, etc.

[143] On the other hand the proposal makes more explicit what is already implied in the subclause. How else could the employer agree a shift starting time with the employees other than with the majority? Subject to what follows and on the basis that the proposal simply makes the clause more explicit, it will be included. The Commission notes the change to “affected” employees. It is the Commission’s view that this is a reasonable approach and will be adopted. The subclause could also be redrafted to make it clear that it is only concerned with shift starting times. As the length of the shift is dealt with elsewhere in the award the shift finishing time simply becomes a function of the starting time and the length of the shift.
Serious or Wilful

[144] There is no evidence or other basis on which to alter subclause 26.8.1 from “wilful” misconduct to “serious or wilful” misconduct. There is however a case for deleting the adjective “wilful” and replacing it with “serious”. The right of an employer to terminate without notice for serious misconduct is contained in subclause 15.2.2. For consistency and to avoid confusion and to ensure the award is in plain English, the type of misconduct which entitles an employer to terminate without notice (subclause 15.2.2) and to withhold payment of accrued annual leave (subclause 26.8.1) should be the same. To that end the award will be varied by replacing “wilful” with “serious” in subclause 26.8.1.

Pressing Domestic Leave

[145] There is no reason to alter subclause 28.2 other than to make it clear that casual employees are excluded from the operation of the subclause.

Shift Work

[146] The employers propose to change the heading of clause 24 from “Shift Work - up to Eight Ordinary Hour Shifts” to just “Shift Work”. APESMA opposes the change. The employers’ proposal will be adopted. The clause deals with a number of aspects relating to shift work including the length of shifts. The heading is inaccurate. In any event nothing turns on the change.

Sick Leave - Deduction and Payout

[147] Subclause 27.6 will be varied to read:

“Any paid sick leave taken will be deducted from the employee’s credit.”

[148] There is no need to make any reference to ordinary hours as proposed by the employers because subclause 27.5 makes it clear that paid sick leave is only available for the ordinary hours that the employee misses due to his or her illness.

[149] Similarly subclause 27.1 need only read (relevant to the debate between the parties):

“. . . has 75 or more hours of unused sick leave, be paid at ordinary time for sick leave accrued and not already taken.”

[150] APESMA argues that the change could constitute a reduction in entitlements because the current term of “ordinary pay” may include payment of overaward payments. It is not the role of a safety net award to purport to include in award entitlements overaward payments. The safety net award need only be precise about the basis on which safety net entitlements are to be made.

[151] If salary contracts or other arrangements are entered into between employers and employees the inclusion of those overaward arrangements in any payout of sick leave is a matter to be left between the parties to the overaward arrangements. It is not the role of a safety net award to endeavour to determine for those parties whether their overaward arrangements will be included (in this example) in the payout of sick leave in certain circumstances. If the award currently operates in the way contended for by APESMA then the variation is necessary to ensure compliance with sub item 51(6)(a) of the WROLA.
Long Service Leave - Payment

[152] The Queensland Staff Award contains a provision for long service leave whilst the NSW Staff Award does not. Long service leave benefits for NSW and Tasmanian employees are contained in a specific award which is not currently before the Commission for simplification. For the same reasons as the payout of sick leave, the payment for long service leave needs to be varied to make it clear that the subclause does not operate in such a way as to purport to include overaward arrangements. The proposal by the Queensland employers achieves that requirement and will be adopted.

Long Service Leave - Credit for Prior Service

[153] Sub clause 32.7 in brief summary operates to the effect that if an employee who has accrued an entitlement to long service leave is terminated and is later re-employed the employee shall be given credit for long service leave which has not been taken or paid out.

[154] One of the criteria for gaining the benefit of the subclause is that the employee has an entitlement to long service leave. That is the employee has achieved the threshold of eight years continuous service in the coal mining industry. It is only on achievement of that threshold that an employee has an entitlement to long service leave (apart from some specific circumstances not relevant to this discussion). Such an employee at the time of the retrenchment may have partially taken his or her long service leave entitlement but for the purposes of the subclause at least some long service leave has not been taken. The intention of the subclause is that on re-employment such an employee will be accredited with his or her untaken (or paid out) long service.

[155] The subclause is extremely poorly drafted. It does not contain in the body of the subclause that the termination must be due to retrenchment to enliven the subclause. Such a reference only appears in the heading of the subclause. The subclause implies that an employee who is retrenched has a discretion not to be paid out his or her long service entitlement on termination. The subclause is in direct conflict with subclause 32.6.2 which mandates that an employer pay to an employee whose employment is terminated and who has an entitlement to long service leave any long service leave accumulated and not taken.

[156] The clause needs to be redrafted. The employers’ proposal has the potential to be confusing. The reference to 13 weeks may exclude an employee who has had such an entitlement (ie 13 weeks) and who has taken 6 weeks of leave and thus has only 7 weeks accrued. The subclause should be clarified on the general approach contended for by the employers.

[157] APESMA’s submissions on this subclause are based on a misunderstanding of the subclause. The maintenance of “continuous service” which is the point of APESMA’s submission is effected independently of subclause 32.7. Subclause 32.7 has no work to do in maintaining “continuous service”. To the extent that APESMA submits that subclause 32.7 is not dependent upon an employee having an entitlement to long service leave (ie by achieving the threshold of eight years continuous industry service) the Commission has concluded that such a contention is incorrect.
Schedule A - Respondents

[158] This matter will be deferred to the drafting sessions that will flow from this decision.

Juniors

[159] Junior rates based upon the employee’s age are allowable (Award Simplification Decision Print P7500).

[160] The Queensland employers propose to reduce by one point the percentage of the adult rate to be paid to two junior classifications. There is also a proposal to increase one Junior classification by one percentage point. This is to align the percentages with that appearing in the NSW Staff Award.

[161] The award will be so varied provided that no employee currently being paid in accordance with the two classifications that are to be reduced shall have his or her wage reduced. There can be no justification after properly fixing minimum rates for a difference in wage rate of the type currently under consideration. This is particularly so given the Commission’s intention to achieve a single award.

Overtime

[162] The awards contain unusual or special overtime arrangements for those classifications that contain an overtime component. Again for context it is necessary to return to the 1970’s. As discussed earlier, the ‘A’ Division (not In Charge) classifications were required to work 150 “standard” hours per four weekly cycle. The 150 hours contained 10 hours of overtime which was paid at time and one half. The CIT determined that the payment for the hours beyond the 150 (excess hours) was on the basis of time and one half for the first three hours and double time thereafter. However, this approach was not applied on a daily basis (as was the case in the P&E Award and for the ‘B’ Division employees in this award). Rather the CIT adopted a four weekly approach toward the payment of excess hours.

[163] The result of such an approach was that “overtime” (excess) hours each four weeks was paid at time and one half for the first thirty minutes and double time thereafter. The thirty minutes at time and one half was deleted by agreement in the early 1990’s. The four weekly approach to overtime was also deleted at about that time. However the awards, for the classifications with an overtime component continue to provide that all overtime (other than the overtime component in the classification rate) is paid at double time.

[164] The special overtime arrangements exist because of the fact that the classification rates contain an overtime component. Subject to the further submissions of the parties, the Commission has determined that the overtime component is to be removed from the classification rates. It therefore seems appropriate that at the very least the Commission, as part of award simplification, should review the overtime arrangements for such classifications. That review will be undertaken by the Commission at the hearing scheduled for 24 October 2003.

The Future

[165] The employers are directed to draft a single award to give effect to this decision. Such draft shall be provided to APESMA and filed in the Commission by 5.00pm, 29 October 2003.
The parties are then to confer in an attempt to reach an agreed draft award. Those matters that cannot be agreed will be dealt with by way of a conference on 7 November 2003 in Brisbane commencing at 9.30am.

Matters C No. 00808 and 00809 of 1998 will be listed for further hearing in Brisbane commencing at 9.30am on 24 October 2003. The purpose of this hearing will be to provide the parties the opportunity to make any submissions they wish to make concerning the Commission’s intention to phase out incremental payments and to remove the overtime component from certain wage rates. Whilst other matters arising from this decision regarding the practical impact of implementing the decisions contained herein may be raised the parties should not see this as an opportunity to re-argue the matters determined herein. It is an opportunity for the parties to make the Commission aware of unintended consequences of the decisions herein. The only matters that the Commission has not finally determined are the incremental payments and the removal of the overtime component.

Should the parties not have any further submissions to make the Commission and the other parties should be so advised in writing by no later than 5.00pm Monday, 20 October 2003.

BY THE COMMISSION:

COMMISSIONER

Appearances:

Mr G. Gillespie and Ms C. Holmes on behalf of the employers.

Ms C. Bolger on behalf of The Association of Professional Engineers, Scientists and Managers, Australia.

Hearing details:

2002.
Brisbane:
October 2.

2003.
Brisbane:
July 23;
September 16.

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AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Workplace Relations Act 1996
s.45 appeals against decision [Print R4611] and order [Print S0657]
issued by Commissioner Harrison on 16 July 1999 and 4 November 1999

BHP Coal and others
(C No. 22644 of 1999)

Bloomfield Collieries and others
(C No. 24465 of 1999)

Construction, Forestry, Mining and Energy Union
(C No. 24466 of 1999)

s.33 action on the Commission's own motion
s.113 Application to vary award

Australian Industrial Relations Commission
(C Nos. 37716, 37717 and 37718 of 1997, 00807 of 1998)

Queensland Mining Council Ltd and another
(C No. 40113 of 1998)

THE COAL MINING INDUSTRY (PRODUCTION AND ENGINEERING)
CONSOLIDATED AWARD 1997
(ODN C No. C00623 of 1989)

Various employees
Coal industry

JUSTICE GIUDICE, PRESIDENT
JUSTICE BOULTON
COMMISSIONER LAWSON
MELBOURNE, 20 OCTOBER, 2000

Award simplification - finalisation of new classification structure and determination of appropriate rates of pay in the new structure - not possible for parties to agree on new classification structure - employer parties proposed structure not agreed to by unions - unions proposed modification to existing structure - unions’ proposal falls short of remedying fundamental problems with structure - unions unable to identify any fundamental deficiencies in employers’ proposal - appropriate to adopt employers’ proposal- determination that rates in the Award do not conform with requirement of properly fixed minimum rates - rates of pay fixed within new structure in accordance with Paid Rates Review Decision - opportunity given for rates and relativities to be reviewed after a reasonable period.

DECISION

[1] In the decision of 18 May 2000 [Print S6142], the Full Bench established a process for the examination of the classification structure in the Coal Mining Industry (Production and Engineering) Consolidated Award 1997 (the Award) and for the development of a new
structure. It was indicated that the Award would be varied to include a new classification structure and that the new structure should be developed as far as possible by agreement between the parties having regard to the matters determined in the Commission’s decision. Commissioner Lawson was assigned to assist the parties in the development of the new structure and to prepare a report for consideration by the Full Bench on the structure to be introduced.

[2] The Commissioner provided a report to the Full Bench on 4 August 2000. The Report is an attachment to this decision (Attachment 1). Following consideration of the Commissioner’s report, the Full Bench on 10 August 2000 issued directions to the parties on the filing of further evidence and outlines of submissions regarding the finalisation of the new classification structure. The dates for arbitration proceedings before the Full Bench were fixed so as to “permit the parties ample opportunity to explore further the possibility of reaching agreement”. The Bench indicated that it would

“sit on 4 & 5 October, 2000 in Sydney to complete any evidentiary matters and to hear each party’s final submissions on the new classification structure”.

[3] In this decision, we deal with the parties’ proposals and submissions regarding the new classification structure to be included in the Award.

Background

[4] The classification structure and work models in the Award were considered in the award simplification exercise, with the employers contending inter alia that the work models restrict or hinder the efficient performance of work in coal mines and have the effect of restricting or hindering productivity (see item 51(6) of Schedule 5 of the Workplace Relations and Other Legislation Amendment Act 1996 (the WROLA Act)). The employers sought the deletion of the work models from the Award and their replacement with a three tiered classification structure and a supervision allowance.

[5] In the initial proceedings, Commissioner Harrison decided not to vary the classification structure and work models in the Award. However the Commissioner did vary the Award to make them subject to the general facilitative provisions so as to give further impetus to those who wish to modify the work models to suit their particular circumstances. On appeal, it was found that the Commissioner had erred in the application of the award simplification criteria. Accordingly the appeal bench considered the evidence and submissions presented and concluded that the classification structure and work models in the Award should be replaced. In the decision of 18 May 2000, the Full Bench said:

“We believe that a persuasive case has been made out that the work models in the award have led to work practices and inflexibilities which restrict or hinder productivity and the efficient performance of work in the industry. The work models have resulted in the imposition of restrictions in the allocation of work and the achievement by employees of skill levels; they incorporate significant demarcations between the performance of work by tradespersons and production employees; they result in inappropriate "quarantining" in the use of acquired skills; they have not been shown to be necessary for reasons of safety; and they require the adoption of outmoded approaches to work organisation. There is evidence that the work models have been departed from at various mines as a result of agreement or practice and that departures from them have resulted in productivity improvements.
The types of restrictions embodied in the work models were recently considered by Full Benches of the Commission in the Moranbah North and Curragh cases. In both cases the Commission was presented with substantial evidence from the employer and the union/s concerned about the value and purpose of the work models prescribed in the award and the proposed departures sought at the two mines. Although the cases were conducted pursuant to different legislative provisions, they focused on considerations of efficiency and productivity in the operation of the mines, and the need to have regard to fairness to employees and not imposing unreasonable requirements or unsafe working conditions.

In the Curragh decision, the Full Bench said:

"The parties’ submissions on this matter have already been set out. We can find no objective, supporting rationale for the continuation of the work model concept. The quarantining of skills and limitations on the performance of production tasks by tradespersons are just two examples of an outmoded approach to work organisation. CQML’s proposal is that employees shall perform any work within their skills, training, experience and knowledge. Implicit in that approach is that all legal requirements are met and that safety is not compromised in any way. Limitations on the work to be performed by employees which are not genuinely based on lack of skills, experience or legal qualifications or on a well-founded safety consideration, constitute barriers to efficiency and an impact on production which the coal industry cannot afford. Whilst parties are free to negotiate on such matters, when the issues are before the Commission for consideration we will not impose such costs on unwilling employers. That having been said, however, the fact that our decision may lead to changes in the scope of the duties traditionally performed by employees is a matter which we have taken into account in framing our decision in relation to remuneration." (Print Q4464, at pp.46-47)

Having regard to the evidence and material presented in the proceedings before the Commissioner and the decided cases, we have decided that the classification structure and work models in the award do not meet the requirements of item 51(6) and (7) and should be replaced. In various respects we agree with the conclusion of the Commissioner that the work models are more appropriately dealt with at the mine site level (see item 51(6)(a)) although we consider that the award provisions relating to the work models and classification structure need to be varied in a substantive way in response both to the case presented and the statutory requirements.

The variations should include a modern classification structure which is developed having regard to the needs of employers and employees in the industry and the statutory requirements and which allows for a single stream workforce as provided in recently decided cases.” (Print S6142, paras 36-40)

[6] In the circumstances of the matter, we decided to establish a process for the development of a new classification structure by agreement between the parties or, if this was not possible, through arbitration by the Commission. The process is referred to in the decision of 18 May 2000 as follows:

“...It is not appropriate to adopt the classification structure proposed by the employers given the limited evidence and material presented in support of that structure. In the
circumstances we have decided, pursuant to item 51(8), to establish a process for the development and, if necessary, determination of a new classification structure to be included in the award to replace the existing structure and work models. The structure should be developed so far as possible by agreement between the employers and unions party to the award and having regard to the matters determined in this decision. The program for the discussions between the parties, conciliation and, if necessary, arbitration by the Commission should be such as to ensure that the new structure is in place no later than 1 September 2000. The rates of pay in the structure should be fixed having regard to the principles in the Paid Rates Review decision.

We have decided to assign Commissioner Lawson to assist the parties in the development of the new classification structure. The Commissioner will prepare a report for consideration by the Full Bench on the structure to be introduced. The report should be submitted by early August 2000. It should cover the agreed position of the parties regarding the new classification structure and/or the evidence and submissions sought to be advanced by the parties regarding the new structure. Upon receipt of the report, the Full Bench will decide whether to convene any further hearing/s on this matter and what variations should be made to the Consolidated Award in order to implement a new classification structure.” (Print S6142, paras 41-42)

[7] Pursuant to the decision, Commissioner Lawson convened a number of hearings and conciliation conferences during June and July 2000 in order to assist the parties in the development of a new classification structure. The parties also met privately on various occasions. As is stated in the Commissioner’s report, discussion and debate between the parties centred on a range of disputed issues including: the appropriate number of levels for the new classification structure; generic definitions for each level in the structure; indicative competencies for the levels; appropriate wage rates (and the structure of same); training provisions; and transitional provisions.

[8] Commissioner Lawson issued directions on 31 July 2000 for the exchange and filing by the parties of final positions, submissions and evidence regarding the classification structure and on 4 August 2000 the Commissioner convened a hearing to consider the material filed. Following this hearing, the Commissioner provided his report to the Full Bench.

[9] In the report, the Commissioner refers to the submissions made by the parties and notes that there are no union-initiated classification proposals. The Commissioner concluded his report as follows:

“[8] From my observation of developments during the many phases of conciliation it was a logical extension that the parties would have submitted extensive but differing proposals with (at best) some commonality of content. The absence of Union proposals is as baffling as it is disappointing, however it is consistent with the application/plea for an extension of time to allow further conciliation. When questioned concerning the Unions’ preferred period for further conciliation, responses were at first equivocal and then clarified as 3 months. Not unexpectedly the Employers expressed a contrary view that conciliation was exhausted, and that further conciliation would likely finalise only minor matters. The Employers rejected the proposition that, having regard to the period to date for all parties to prepare for and participate in conciliation and to prepare formal submissions for inclusion in this report, the Unions be given an opportunity to respond to the documents filed on 3 August. The Employers submitted
that the Full Bench adhere to its original timetable to have a new classification structure in place by 1 September 2000.

[9] These conflicting views need to be examined against the process determined by the Full Bench at paragraph 42 of the appeal decision.”

[10] On 10 August 2000, the Full Bench issued a statement and directions in relation to the further steps to be taken to finalise the new classification structure. The statement reads, in part, as follows:

“We note that the parties have not been able to reach agreement so far. The CFMEU, supported by the AMWU and the CEPU, seeks a further period of time in which to reach agreement with the employers on a new structure. The employers submit that conciliation is exhausted and the Commission should arbitrate. They have put forward a proposal for the Full Bench’s consideration. The unions, consistent with their position that conciliation is not yet exhausted, have not made a formal proposal at this stage. In the circumstances it is appropriate to programme a further hearing before the Full Bench for the purpose of arbitration to finalise the new classification structure. We shall fix a date for the arbitration which will still permit the parties ample opportunity to explore further the possibility of reaching agreement. Commissioner Lawson is available to assist the parties if required. If agreement can be achieved we would expect consent orders to be produced for the consideration of the Bench.”

[11] Directions were issued in relation to the cross-examination of witnesses, the filing of additional evidence, the filing of outlines of submissions in relation to the arbitration of the new classification structure and the conduct of further discussions/conferences between the parties.

[12] In the proceedings on 4 and 5 October 2000 the Full Bench heard additional evidence from an employer witness, Mr J.F. Lawson, and also heard the submissions of the parties on the finalisation of the new classification structure.

Matters for Consideration

[13] Arising from the decision of 18 May 2000 and the parties’ proposals and submissions, the main matters for consideration at this time relate to:

- the finalisation of the new classification structure; and
- the determination of appropriate rates of pay for the classifications in the structure having regard to the principles in the Paid Rates Review Decision [Print Q7661, 20 October 1998].

[14] We now turn to these matters.

1. The New Classification Structure

[15] The employers put forward a proposal for a new classification structure (Exhibit QMC 41) to replace the existing structure and work models in the Award. This proposal is set out as an attachment to this decision (Attachment 2).
It was submitted by the employers that substantial evidence was produced in the proceedings before Commissioner Harrison as to the unproductive and inefficient nature of the existing classification structure and work models when applied to work performed at various enterprises in the industry. It was said that there is much in that evidence which assists in ascertaining the characteristics and features of a classification structure which complies with the requirements of item 51 of Schedule 5 of the WROLA Act. Further it was said that there is substantial evidence as to the classification structures in certified agreements applying at a range of mines across the industry and that this provides a guide as to “the needs of employers and employees in the industry”.

In addition, the employers relied upon a supplementary statement provided by Mr. J.F. Lawson (Exhibit QMC 35) which describes the diverse nature of the coal mining industry and the variety of ways in which work is organised. The statement deals with various mining methods, including: underground mining, which can generally be categorised as bord and pillar mines, place change mines and longwall mines; open cut mining using various established methods of extraction; more advanced mining methods which have been recently introduced into some open cut mines to achieve the extraction of additional coal by using Auger and/or highwall mining methods; and longwall mining off a highwall in open cut mines.

It was put that the employers’ classification structure proposal is the result of many changes agreed by them during the course of conciliation to address concerns raised by the unions. It was submitted that the proposal provides a logical, skill-based career path which is premised on the fact that the industry is characterised by a diverse range of operations, activities and work requirements. It was said that the structure: acknowledges the need for employers to determine competency and training; provides transparency through classification definitions, indicative competencies and explanatory material; removes all notions of demarcations, quarantining and inefficiencies; and is based on the utilisation of skills by workers and not just the acquisition of skills.

It was also submitted that the proposed structure is consistent with those determined by the Commission in Re Moranbah North Coal (Management) Pty Ltd [Print P7254, 8 December 1997] and Re Curragh Queensland Mining Limited [Print Q4464, 11 August 1998]. In particular, it was said that the classification structures which apply at the Moranbah North and Curragh mines include the following features: employees are classified according to the work actually performed; the structures have a limited number of classifications; progression is determined at the discretion of management; and the structures are free from demarcations. It was noted that there are only two classification levels in the Moranbah North and Curragh structures whereas the employers’ proposal in the present proceedings is for a five level structure. This is because the employers considered that there should be more levels in the industry award, having regard to its operation as a safety net award and the evidence presently before the Commission.

The Construction, Forestry, Mining and Energy Union (the CFMEU), supported by the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (the AMWU) and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (the CEPU), opposed the adoption of the classification structure put forward by the employers. It was submitted that the Commission should not in the present case go beyond the task of applying item 51(6) and (7) and varying the Award to remove matters which are contrary to those provisions. It was said that the replacement of the
current work models with a new classification structure is not warranted by the evidence before the Commission or the findings made and is not justified under item 51(8).

[21] The unions submitted that there are three specific matters complained of in relation to the existing classification structure and work models and that the action of the Commission should be limited to dealing with these matters. The first matter relates to restrictions in the allocation of work and the achievement of skill levels by employees. It was submitted that this could be addressed by including a provision similar to clause 4.1.1 of the Metal, Engineering and Associated Industries Award, 1998 Part I [M1913] (the Metals Award) into clause 12 of the Award. Clause 4.1.1 of the Metals Award provides:

“4.1.1 An employer may direct an employee to carry out such duties as are within the limits of the employee’s skills, competence and training consistent with the classification structure of this award provided that such duties are not designed to promote de-skilling.”

[22] The second matter relates to the significant demarcations in coal mines between the performance of work by tradespersons and production employees. It was submitted that the Commission should adopt a similar approach to that taken to the career structure in the Hospitality Industry Award, which was dealt with in the Award Simplification decision [Print P7500, 23 December 1997] and which contains five streams. This would entail inserting an additional subclause in clause 12 of the Award, to the effect that despite the recognition of a number of career path streams in the classification structure “such streams do not prevent employees undertaking duties across different streams”.

[23] The third matter relates to inappropriate “quarantining” in the use of skills. It was said that the complaint about the restrictions at the highest level of the classification structure on the number of skills that may be accessed by an employer could be alleviated by doing away with the maximum number of skills at the top level of the work models. Further the complaint might be addressed by a variation to the Award such that, for example, the skills identified in the open cut matrix do not preclude the use of skills in excess of those specified.

[24] In support of their submissions and in response to the additional evidence of Mr. Lawson, the CFMEU provided a supplementary statement by Mr. A.W. Vickers (Exhibit CFMEU 22). In the statement, Mr. Vickers deals with and contradicts a number of matters dealt with in Mr. Lawson’s evidence.

[25] The unions proposed that redrafted work models (Exhibit CFMEU 24) should be included in the Award. These are essentially the same as currently contained in Schedules E and F of the Award, but with the removal of unnecessary verbiage such as statements of intent and historical provisions. It was submitted that the unions’ proposal would, for example, allow the allocation of work across streams whilst maintaining those streams for career path purposes. This, it was said, would meet the requirement for a single stream workforce.

[26] The unions submitted that the evidence before the Commission does not support the employers’ proposed structure. The evidence merely raises complaints about aspects of the current work models or training arrangements or the organization of work in coal mines. It was also submitted that the current work models, properly understood, are not as restrictive as the employers have suggested. Further, it was said that there has been no detailed analysis by the employers of the variety of structures contained in certified agreements applying at coal mines as would support the five level structure now proposed. The unions submitted that there
are many problems with the employers’ proposals. These include: a reduction in the number of levels in the classification structure from 6 or 7 in the current work models to five; the effect of compression on the rates of pay for Advanced Mineworkers; the deletion of award provisions relating to training, the protection of higher wages, leading hands allowances and trainee dragline operators; the replacement of the work models in Schedules E and F of the Award with a new skills menu and definitions; the introduction of more onerous requirements for advancement by mineworkers through the structure; and the removal of training committees.

[27] The CEPU, in addition to its support for the CFMEU’s submissions, submitted that the implementation of the Commission’s decision of 18 May 2000 [Print S6142] will result in significant changes in work requirements and that these will have work value implications. In consequence, it was submitted that the finalised classification structure should contain additional levels or that there should be additional allowances paid to mineworkers to take account of the significant net increase in work requirements. It was proposed that, after the finalisation of the new structure and before it comes into operation, a work value investigation be undertaken to determine the value of the new work.

[28] The AMWU supported the submissions put by the CFMEU and the CEPU. In addition, the AMWU put submissions in the alternative in relation to the classification structure for trade certified employees. The AMWU suggested that the employers’ proposal should be augmented by the addition of the following to the definition of the Mineworker - Advanced:

“For a trade certificated employee this may be achieved by exercising skills which require 6 post-trade modules of training or an equivalent level of skills in non-trade or cross-trade work.” (Exhibit T1, para 5.1)

[29] A similar addition was proposed by the AMWU for the definition of the Mineworker - Specialised, with the reference to the exercise of “skills which require 12 post-trade modules of training”. It was submitted that these changes would give recognition to advancement through the vertical acquisition of skills or a broadening of skills and that this approach is current in the industry and would allow for operational flexibility in mine manning. It was said that advancement would still be contingent upon the employer calling on the employee to utilise the skills required at each level. The CFMEU supported the alternative submission put by the AMWU on this issue.

[30] Mr Martin S.C. for the employers responded to various criticisms made by the unions about the employers’ proposed structure. In particular, he said that: the proposal includes many features of the current Award provisions; the definitions are based on current provisions; that there are transitional arrangements which protect existing rates of pay for employees on higher rates; the unions’ submissions suggesting that more skills or competencies will be required for advancement is based on a misreading of the employers’ proposal; the proposal does not remove Award entitlements regarding training; and the existing capacity to establish training committees at mine sites is not removed by or contrary to the employers’ proposal.

[31] We have considered the proposals put forward by the employers and the unions.

[32] In the decision of 18 May 2000, we decided that the existing classification structure and work models in the Award do not meet the requirements of item 51(6) and (7) of
Schedule 5 of the Act and should be replaced. Pursuant to item 51(8), a process was established for the examination of the structure and the development of a new structure to be included in the Award. The process included discussions and negotiations between the parties and conciliation by a member of the Bench. In our view, this was the preferable course to follow in the development of a new and modern classification structure for the industry safety net award. However it was indicated that if the new structure could not be developed in this way, the Full Bench would need to determine the matter by arbitration.

[33] Despite the efforts of the parties and the Commission, it has not been possible over the past four months for the parties to agree on a new classification structure. In these circumstances it is necessary for the Commission to determine the new structure having regard to the decision of 18 May 2000 and the proposals, evidence and submissions before us.

[34] The employers have put forward a proposal for a new classification structure which:

- provides a skill based career path for coalmining workers;
- allows for a single stream workforce;
- replaces the existing work models;
- provides for classifications of employees based on clear definitions and work performed;
- sets out the competencies to be taken into consideration for advancement through the classification structure; and
- removes notions of demarcations, quarantining and inefficiencies.

[35] The proposed structure addresses the issues and needs referred to in the decision of 18 May 2000. The structure has been the subject of considerable discussion with the unions and has been modified to address concerns raised by the unions. However, as noted earlier, the structure has not been agreed to by the unions.

[36] By contrast, the proposal put forward by the unions is merely a modification of the existing award structure and work models. As such, it does not address the issues and needs referred to in the earlier decision. Although the unions’ proposal deals with some problems in the current provisions, it falls far short of remedying the fundamental issues and problems with the structure and work models which were the subject of evidence in the award simplification proceedings and which led us to conclude that a new classification structure should be developed. In many respects, the unions’ proposal is for the retention of the existing classification structure and work models with some changes or submissions directed towards the allocation of work, the ability to work across streams and the removal of certain restrictions on the use of skills. We do not consider that the unions’ proposed changes adequately address the overall problems which have been identified in relation to the current structure and work models. Further, the changes do not provide for variations to the Award which would ensure that the award simplification criteria are met.

[37] In effect, the Commission has only one developed proposal for a new classification structure before it. In these circumstances, we have carefully examined the employers’ proposal having regard to the requirements of the award simplification exercise and relevant statutory provisions. In so doing, we have had particular regard to the needs of employers and employees in the coal mining industry, the problems and issues which have been raised in relation to the current classification structure and work models, the need for award provisions which do not prescribe work practices or procedures that restrict or hinder productivity or the efficient performance of work, the need for fairness to employees, and the conclusions
reached and process established in the decision of 18 May 2000. We have considered the submissions of the unions in opposition to the employers’ proposed structure. However the unions have not been able to identify any fundamental deficiencies in the proposal or to suggest any major changes which should be made to it.

[38] In all the circumstances we have decided that the appropriate course is to adopt the employers’ proposed structure, subject to a number of modifications referred to later. We have also decided to provide an opportunity for a review of that structure after a reasonable period of operation. This review will allow any problems arising under the new structure to be examined and, if necessary, for adjustments to be made. It will also allow the issues raised by the CEPU in regard to the rates of pay for the new classifications to be addressed, subject to what is said later in this decision.

[39] During the course of the proceedings, the unions and members of the Bench raised a number of specific issues relating to the employers’ proposed structure. The CFMEU submitted that a provision similar to clause 4.1.1 of the Metals Award should be included. We adopt this submission and consider that clause 12.1 of the employers’ proposal dealing with Employee Duties should be amended along the following lines:

“An employer may direct an employee to carry out such duties as are within the limits of the employee's skills, competence and training consistent with the classification structure of this award provided that such duties are not designed to promote de-skilling and provided that the duties are within safe working practices and statutory requirements.”

[40] We also consider that proposed clause 12.3 should be amended to refer to work within the scope of clause 12.1.

[41] The AMWU put forward various amendments regarding the advancement of trade certified employees through the classification structure. We consider that provisions along the lines proposed by the AMWU, and supported by the CFMEU, may be included in the Award. However the provisions should make it clear that advancement is not to be governed by the acquisition of skills alone and should include appropriate definitions or identification of relevant “non-trade or cross-trade work”.

[42] The CFMEU raised questions regarding the number of competencies required for advancement to the Mineworker - Advanced classification in the employers’ proposal and submitted that more skills and competencies were required for advancement than under the current structure. These criticisms were rejected by Mr. Martin SC for the employers as being based upon a misreading of the proposal. We consider that the relevant provisions should be clarified so as to avoid such misreading. The CFMEU also raised an issue regarding minesite training committees. We consider that the employers’ proposal should be amended so as to make it clear that the capacity for such committees to be formed and to operate at mines remains.

[43] The employers’ proposed structure provides separate rates of pay for apprentices in New South Wales (NSW) and Queensland. The employers proposed a mechanism whereby the minimum wage rates for “Apprentices - other than Mature Age Apprentices” in the two States would be equalised over a period of time. It was submitted that it is desirable to bring about consistency in the rates of pay for apprentices in the two States. It was said that the difference between the rates has arisen because the NSW rates are expressed as dollar
amounts and have been given full national wage and other adjustments whereas the Queensland rates are set as a percentage of the current Group B rate and have received only the relevant percentage of such adjustments. The CFMEU opposed these changes. It was submitted that there is no warrant for such changes under item 51, that the standardisation of apprentice rates is not appropriate given the different apprenticeship systems in the two States and that the employers’ proposal is merely an attempt to reduce apprentice rates in NSW to the lower rates applicable in Queensland.

[44] We do not consider that an adequate case has been made out by the employers for the inclusion of the proposed equalisation mechanism for apprentice rates as part of the award simplification exercise. This was not argued before Commissioner Harrison and was not sufficiently raised and argued before the Full Bench. We recognise that a disparity has arisen in the rates for apprentices but are unable on the limited submissions and material presented to make a final judgement as to whether and in what way the disparity should be removed. In these circumstances, we consider that the matter should be the subject of further discussion and negotiation between the parties and, if necessary, a separate application for consideration by the Commission.

2. **Rates of Pay**

[45] In the decision of 18 May 2000, it was stated that the rates of pay in the new classification structure should be fixed having regard to the principles established in the *Paid Rates Review Decision*.

[46] Item 51(4) of Schedule 5 of the WROLA Act provides:

> “If, immediately before the end of the interim period, the award provided for rates of pay that, in the opinion of the Commission:

(a) were not operating as minimum rates of pay; or

(b) were made on the basis that they were not intended to operate as minimum rates;

the Commission may vary the award so that it provides for minimum rates of pay consistent with sections 88A and 88B of the Principal Act and the limitation on the Commission’s power in subsection 89A(3) of that Act.”

[47] The employers submitted that the existing rates of pay in the Award are not “properly fixed minimum rates” in the manner in which that term is used in item 51(4). It was said that the rates in the Award do not equate to rates in other awards which have been adjusted in accordance with the *August 1989 National Wage Case* approach. Neither have the rates in the Award been the subject of the minimum rates adjustment process, nor do they equate with the rates in other awards which have been subject to that process. Further it was said that a Full Bench of the Commission in *Re Pacific Coal Pty Ltd* [Print R1384, 12 February 1999] (*Pacific Coal*) decided that the rates in the Award were not properly fixed minimum rates.

[48] It was submitted by the employers that their proposed classification structure contains rates of pay which are properly fixed minimum rates in accordance with item 51(4) and the principles in the *Paid Rates Review decision*. 
[49] The basis for the calculation of the rates for the various classifications in the proposed structure was explained as follows.

- **Mineworker - Induction Level 2 and Mineworker Training.** The key classification in the current Award is the Group B classification which includes a number of trades occupations. The base trades equivalent to the Group B classification in the proposed structure is **Mineworker - Induction Level 2.** It is therefore appropriate that the properly fixed minimum rate of $492.20 (100%) for the C10 classification in the Metals Award be applied to this classification together with a residual component of $85.80. The total rate for the new classification is therefore $578, being the current Group B rate.

- **Mineworker - Induction Level 1.** This is the entry level classification for a non-tradesperson in the proposed structure. An employee classified at this level would, under the current structure, be classified as Group A in the general rates or as Level O in the open cut work model or Level 1 in the underground work model. It is proposed that the rates to be affixed to this classification be a base rate of $481.55 (97.8%) with a residual component of $83.95. The total rate equates with the current rate for Group A/Level 0/Level 1 of $565.50.

- **Mineworker -** It is contended that employees classified at this level would have been classified as Level 3 employees in both the underground and open cut work models. The rates for the Level 3 employees are currently $628.30 (underground) and $641.20 (open cut). It is proposed that the rate applicable to the classification in the previous underground structure should be adopted for the new **Mineworker** classification. Applying the relativity between the new total rate for the **Mineworker - Induction Level 2** and the current rate for the Level 3 in the underground work model, this would mean a base rate for the new classification of $535.05 (108.7%) and a residual component of $93.25. The total rate is $628.30.

- **Mineworker - Advanced.** It is contended that the rate for this classification should be that fixed for the Level 4 classification in the underground and open cut work models, namely $667.10. Applying the relativity between the rate for the **Mineworker - Induction Level 2** and that rate, the base rate for the new classification is $568.10 (115.4%) with a residual component of $99. The total rate is $667.10.

- **Mineworker - Specialised.** It is contended that the rate for this classification should be fixed at the pre-existing Level 6 rate under the underground work model ($742.90). Adopting the same approach to relativity as above, the base rate is $632.60 (128.5%) with a residual component of $110.30. The total rate is $742.90.

[50] The unions opposed the conversion of the rates in the Award pursuant to item 51(4). It was submitted that the current rates are properly fixed minimum rates and that the principles in the **August 1989 National Wage Case** decision [Print H9100] were applied in the determination of those rates by the Coal Industry Tribunal. Therefore the Award does not fall within the class of awards described in item 51(4) and the rates do not need to be adjusted as proposed by the employers.
In support of these submissions, reference was made to a number of decisions of the Coal Industry Tribunal which provide a history of the application of the *August 1989 National Wage Case* decision to the coal industry awards. These included decisions of the Tribunal in which the wage fixing principles in the August 1989 decision were adopted [see *United Mineworkers Federation of Australia & Others v. New South Wales Coal Association and Others* Print CR 4305, 9 February 1990] and in which a new consent award covering production and engineering work was made pursuant to the structural efficiency principle and the issue of the broadbanding of classifications and rates of pay was determined [see *United Mineworkers Federation of Australia & Others v. Queensland Coal Association and Others* Print CR 4349, 27 April 1990].

It was said that the broadbanded classifications still exist in the Award and that the Group B rate is the tradesperson rate and equivalent to the C10 rate in the Metals Award. Reference was then made to the following passage in the *August 1989 National Wage Case* decision:

“Subject to what we say later in this decision, we have decided that the minimum classification rate to be established over time for a metal industry tradesperson and a building industry tradesperson should be $356.30 per week with a $50.70 per week supplementary payment. The minimum classification rate of $356.30 per week would reflect the final effect of the structural efficiency adjustment determined by this decision.

Minimum classification rates and supplementary payments for other classifications throughout awards should be set in individual cases in relation to these rates on the basis of relative skill, responsibility and the conditions under which the particular work is normally performed. The Commission will only approve relativities in a particular award when satisfied that they are consistent with the rates and relativities fixed for comparable classifications in other awards. Before that requirement can be satisfied clear definitions will have to be established.” (Print H9100 at p12)

It was explained by the unions that the tradesperson rate in the coal industry award was higher than the C10 rate and that this was because of work value differences. Some of the work value considerations are referred to in a 1971 decision of the Coal Industry Tribunal (see *The Amalgamated Engineering Union and Others v New South Wales Combined Colliery Proprietors Association and Others* Print CR 2095, 23 June 1971). It was submitted that the factors identified in 1971 as relevant to the work performed by tradespersons in the coal mining industry applied equally in 1990 when the minimum rates were set for the new coal industry awards. It was said that the rates of pay for the new work models had to be arbitrated by the Tribunal, as the parties had been unable to reach agreement on them. We were taken to the relevant decisions of the Tribunal (including *United Mineworkers Federation of Australia and Others v New South Wales Coal Association and Others* Print CR 4505, 13 January 1992 and *Construction, Forestry, Mining and Energy Union (UMW division) and Others v New South Wales Coal Association and Others* Print CR 4569, 12 October 1992) and to the passages in those decisions relating to the application of the principles in the *August 1989 National Wage Case* decision. We were also taken to cases relating to the review and absorption of various allowances into the classification rates (see *The Australian Coal and Shale Employees Federation and Others v New South Wales Coal Association and Others* Print CR 3635, 17 June 1986).

From the examination, it was submitted by the unions that the rates in the Award were properly fixed minimum rates at the end of the interim period in that they were intended to
and did operate as such. They have since that time not been varied other than to provide for national wage or safety net increases. The rates were determined by the Tribunal also taking into account work value considerations and the absorption of some allowances. In consequence it was submitted that the requirement under the Paid Rates Review Decision to make a comparison with the metals tradesperson’s rate does not apply to the Award.

[55] In relation to the decision in Pacific Coal, it was said that no submissions were made in that case by the parties regarding the Paid Rates Review principles and that the new minimum rates were determined by the Full Bench only on an interim basis and have not yet been finalised. It was submitted that the approach adopted in the recent decision in Re Camberwell Coal Mine Agreement Award 1995 [Print T1157, 25 September 2000] by Commissioner Wilks involved an acceptance of the unions’ submissions that the benchmark to be applied in the fixing of minimum rates in the award under consideration was the appropriate rate in the Award and that “the rates of pay contained in the Industry Award have been set by the CIT in 1990 having regard to the Structural Efficiency Principle set out in the 1989 National Wage Case decision”. However it was conceded by the unions that the issue was not fully debated in that case as the employer party did not oppose the adoption of the unions’ approach.

[56] We have carefully considered the submissions of the parties in relation to the appropriate rates of pay to apply in the new classification structure and the application of the Paid Rates Review principles to the Award.

[57] In the Paid Rates Review Decision, a Full Bench of the Commission sets out the principles to be applied in relation to the conversion of awards which do not contain properly fixed minimum rates. The principles, so far as presently relevant, are as follows:

1. Awards requiring review under item 51(4) will be:

   (a) awards containing rates which have not been adjusted in accordance with the minimum rates adjustment principle in the August 1989 National Wage Case decision; and

   (b) awards containing rates which have been adjusted in accordance with the minimum rates adjustment principle in the August 1989 National Wage Case decision but which have been varied since the adjustment other than for safety net increases or pursuant to the work value change principle.

2. The rates in the award under review should be examined to ascertain whether they equate to rates in other awards which have been adjusted in accordance with the August 1989 approach with particular reference to the current rates for the relevant classifications in the Metal, Engineering and Associated Industries Award, 1998 - Part 1 [Print Q2527]; where the rates do not equate they will require conversion in accordance with these principles.

3. Fixation of appropriate minimum rates should be achieved by making a comparison between the rate for the key classification within the award with rates for appropriate key classifications in awards which have been adjusted in accordance with the 1989 approach.
4. In the fixation of rates the relationship between the key classification in the award and the metal industry fitter should be the starting point; internal award relativities established, agreed or determined should be maintained: see, for example, the approach adopted in Kenworth Trucks Vehicle Industry Award 1981 [Print K0003] and Commonwealth Serum Laboratories Commission Sales Representative Award 1987 [Print K4939].

5. Any residual component above the identified minimum rate, including where relevant incremental payments, should be separately identified and not subject to future increases....

7. Any future increases in rates in the award will only be applied to the minimum rates component and will be absorbed against any residual component; that is, the residual component will be reduced by the amount of the increase in the minimum rates component...

9. Where parties cannot agree on rates, or they agree on rates which the Commission is not satisfied are properly fixed minima, the Commission will determine the matter, subject to the right of any party to seek a reference pursuant to s.107..." (Print Q7661, at pp. 17-18)

[58] In the course of the present proceedings, we were taken to various decisions of the Coal Industry Tribunal in relation to the application in the coal industry awards of the principles determined in the August 1989 National Wage Case decision. However we are not able to conclude from an examination of these decisions that the minimum rates adjustment principle was applied in relation to those awards. In particular, we are not satisfied that the rates in the coal industry award were examined or adjusted by comparison with the rates for key classifications in the predecessor to the Metals Award. There is no clear statement in any of the decisions of the Tribunal to indicate that the classification rates were determined by reference to or consistent with the rates and relativities fixed for comparable classifications in other awards. Nor is it evident from an examination of the rates in the Award that they are properly fixed minimum rates in the sense used in the Paid Rates Review Decision. We have therefore come to the same conclusion as that reached by the Full Bench in the Pacific Coal decision, namely that the rates in the Award do not conform with the requirement for awards to contain properly fixed minimum rates.

[59] The principles formulated in the Paid Rates Review Decision provide that the awards which require review under item 51(4) include awards containing rates which have not been adjusted in accordance with the minimum rates adjustment principle in the August 1989 National Wage Case decision. The principles set out the approach to be adopted in the fixation of appropriate minimum rates in awards. This approach includes:

- a comparison between the rate for the key classification in the award with rates for appropriate key classifications in awards which have been adjusted in accordance with the 1989 approach;
- the starting point is the relationship between the key classification in the award and the metal industry fitter (C10);
- in fixing other rates in the award, internal award relativities established, agreed or determined should be maintained; and
• any residual component above the identified minimum rate should be separately identified.

[60] Applying this approach to the Award, we accept the submissions of both the employers and the CFMEU/CEPU that the key classification in the Award is the Group B classification and that this is equivalent to the base trades classification (C10) in the Metals Award. The current rate for the Group B classification is $578 per week. The conversion of this to a properly fixed minimum rate results in a rate of $492.20 (the current C10 rate in the Metals Award) and a residual component of $85.80. Appropriate minimum rates for other classifications in the Award may be determined following this approach and maintaining the established relativities within the Award.

[61] However the task for the Commission in the present matter goes beyond the conversion of the existing rates in the Award to properly fixed minimum rates. The Commission is called upon to determine appropriate rates of pay for a new classification structure to be included in the Award as part of the award simplification exercise.

[62] As earlier stated, we have decided to adopt the classification structure put forward by the employers. This involves the introduction of a new five level one-stream classification structure to replace the current broadbanded classification structure in the Award and the six and seven level two-stream structures in the underground and open cut work models.

[63] The employers in their submissions have sought to align classifications in the new structure with current classifications in the Award and to adopt existing award relativities for the purpose of fixing appropriate minimum rates. The CFMEU opposed the adoption of the new classification structure and the adjustment of the rates pursuant to the Paid Rates Review Decision. The CFMEU did not make specific submissions in relation to the employers’ proposed relativities within the new structure, although problems of compression were referred to. The CEPU submitted that the finalised classification structure must have levels in addition to those currently existing or additional allowances to take account of significant net additional work requirements under the new structure. This would involve an examination after the new structure is finalised and before it is introduced in order to determine the value of the new work requirements. The AMWU proposed relativities for the Mineworker, the Mineworker - Advanced and the Mineworker - Specialised classifications in the employers’ proposal which correspond to the C10 (100%), C8 (110%) and C6 (125%) levels respectively in the Metals Award. This would seem to propose lower relativities for the new classifications than those put forward by the employers. However the AMWU’s submission states that nothing herein should be construed as being determinative of wage rates in the Paid Rates Review context, as there are other factors relevant to determining how the appropriate rates should be arrived at. In relation to this issue, the CFMEU referred to its reliance on the internal relativities that already exist in the industry award [see transcript para. 1010].

[64] On the basis of the submissions before us and having regard to the classification definition for the Mineworker - Induction Level 2, we have decided that this is the key classification in the new structure and should be aligned with the base trades classification (C10) in the Metals Award for the purpose of fixing appropriate minimum rates in accordance with the Paid Rates Review Decision and item 51(4). We have also decided on the basis of the employers’ submissions that the appropriate total rate for this classification should be $578, being the current rate for Group B mineworkers under the Award.
In relation to the other classifications in the new structure, we note that there were no detailed submissions from the unions as to appropriate relativities for these classifications, either by way of criticism of the employers’ proposed relativities or putting forward a case for different relativities. In the circumstances we have decided to adopt the relativities proposed by the employers for the new classifications and to apply these for the purpose of fixing appropriate minimum rates within the new structure. However, having regard to the need for such rates and relativities to be fixed on the basis of relative skill, responsibility and the conditions under which work is performed, we have decided to provide an opportunity for the rates and relativities now determined to be reviewed by the parties to the Award after a reasonable period. This will provide a further opportunity for the unions to examine and, if necessary, to make submissions on these matters. The review will also ensure that the final structure and rates to apply in the Award have been determined having regard to the work requirements under the new structure.

**Conclusions**

Pursuant to the decision of 18 May 2000, we have decided that a new classification structure shall be included in the Award as part of the award simplification exercise.

In the proceedings, the employers and unions were given an opportunity to put proposals and make submissions as to the new structure. The employers put forward a classification structure proposal developed in accordance with the earlier decision of the Commission. The unions did not put forward a new structure, but suggested various amendments to the current structure. We do not consider that these amendments sufficiently address the issues and problems identified in our earlier decision. The employers’ proposed structure has been the subject of detailed discussions with the unions over a considerable period of time and has been modified to take account of matters raised in those discussions. However the unions have not agreed to the structure.

In all the circumstances, we have decided that the new classification structure to be included in the Award will be as proposed by the employers, subject to a number of changes which we have made having regard to the submissions of the unions in the proceedings.

The structure proposed by the employers includes rates of pay for the various classifications which have been calculated having regard to the Paid Rates Review Decision and the current rates and relativities in the Award. The unions did not put detailed submissions as to the appropriate rates and relativities to apply under the employers’ proposed structure. The unions opposed the application of the Paid Rates Review principles as it was submitted that the Award currently provides properly fixed minimum rates. We do not consider that this submission can be sustained. The CEPU proposed a work value exercise to determine appropriate rates within the new structure prior to the implementation of the structure.

Given that the parties have already been given a lengthy period to develop a new classification structure and an opportunity to address issues regarding rates and relativities, we do not consider that there should be any further delay in the determination of the rates of pay to apply to the new structure. We have decided to adopt the rates proposed by the employers on an interim basis and subject to review as provided hereunder. On the material before the Commission, these represent properly fixed minimum rates of pay for the levels in the new structure determined in accordance with the requirements of the Paid Rates Review Decision.
and item 51(4). No detailed submission has been made in the current proceedings to the effect that the rates proposed are inappropriate.

[71] Accordingly we have decided that the Award will be varied to include the new classification structure and rates of pay as determined. Having regard to the submissions of the parties regarding an appropriate transition period for the preparation of information and advice and for the implementation of the new structure, we have decided that the new structure will apply on and from 1 March 2001.

[72] To assist in the implementation of the new structure, we propose that the parties give consideration to establishing a body comprising employer and union representatives to deal with any problems or issues which may arise, including in relation to the translation of employees into the structure. This body might take the form of a board of reference under s.131 of the Act. In that event an award provision would be required specifying the powers of the Board for the purposes of s.131(1)(b). Alternatively the parties might favour the establishment of a consultative committee.

[73] We have decided that there should be an opportunity for the parties to review the new structure and rates of pay after a reasonable period of operation. The review will allow the parties to address any work value or other issues arising out of the introduction of the structure, if considered necessary. The review should be conducted not before October 2001 and may be undertaken by a working party comprised of representatives of employers and unions. If the assistance of the Commission is to be sought in relation to the working party or otherwise in the conduct of the review or the implementation of outcomes, an appropriate request or application should be made to the head of the coal industry panel.

Order

[74] The parties are to confer in relation to the preparation of variations to the Award to give effect to this decision.

[75] Draft orders should be forwarded to the Commission within 14 days from the date of this decision. The order will be settled by Commissioner Lawson with recourse if necessary to the Full Bench.

BY THE COMMISSION:

PRESIDENT
Appearances:
G Martin S.C. of counsel with A Longland and G Gillespie for the appellant companies.
T Slevin for the Construction, Forestry, Mining and Energy Union.
D O'Sullivan for the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia.
B Terzic for the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union.

Hearing details:

2000.
Sydney:
October 4,5.
REPORT TO FULL BENCH

BACKGROUND

[76] On 18 May 2000, the Full Bench issued a decision (Print S6142) in relation to three appeals against a decision and order of Commissioner Harrison concerning the award simplification process of the Coal Mining Industry (Production and Engineering) Interim Consent Award, September 1990 (C0889) (the 1990 Award) and the Coal Mining Industry (Production and Engineering) Consolidated Award 1997 [C2758] (the Consolidated Award). The decision and order appealed against were the outcome of the second stage of the award simplification process by Commissioner Harrison which dealt with productivity and efficiency issues, pursuant to Item 51 of schedule 5 of the Workplace Relations and Other Legislation Act 1996 (the WROLA Act).
In its decision the Full Bench, amongst other things, set aside the 1990 award and varied other provisions of the Consolidated Award. Specifically in relation to the Consolidated Award provisions concerning “classifications” and “work models”, the Full Bench said:

“[34] We have examined the evidence and material before the Commissioner regarding the classification structure and work models. Having regard to the obligations imposed upon the Commission in the award simplification exercise and the material presented, we consider that it was incumbent upon the Commissioner to analyse the respective cases put to him and to provide a reasoned decision for the conclusions reached. In failing to do this, the Commissioner did not respond adequately to the cases put to him for determination. Further there are grounds for concluding that the Commissioner, in reaching his decision, misconstrued the case put by the employers. That case was to the effect that the work models should be removed from the award and the parties left to decide if an over award structure should be introduced at particular mines - not that the work models might be retained and the application of them and departures therefrom be dealt with at site level.

[35] In the circumstances, we consider that the Commissioner fell into error in the application of the award simplification criteria and the examination of the respective cases put by the parties in the proceedings before him. We have therefore considered the evidence and submissions presented and have reached the following conclusions about the existing classification structure and work models.” [S6142, p 14]

and later

“[39] Having regard to the evidence and material presented in the proceedings before the Commissioner and the decided cases, we have decided that the classification structure and work models in the award do not meet the requirements of item 51(6) and (7) and should be replaced. In various respects we agree with the conclusion of the Commissioner that the work models are more appropriately dealt with at the mine site level (see item 51(6)(a)) although we consider that the award provisions relating to the work models and classification structure need to be varied in a substantive way in response both to the case presented and the statutory requirements.

[40] The variations should include a modern classification structure which is developed having regard to the needs of employers and employees in the industry and the statutory requirements and which allows for a single stream workforce as provided in recently decided cases.

[41] It is not appropriate to adopt the classification structure proposed by the employers given the limited evidence and material presented in support of that structure. In the circumstances we have decided, pursuant to item 51(8), to establish a process for the development and, if necessary, determination of a new classification structure to be included in the award to replace the existing structure and work models. The structure should be developed so far as possible by agreement between the employers and unions party to the award and having regard to the matters determined in this decision. The program for the discussions between the parties, conciliation and, if necessary, arbitration by the Commission should be such as to ensure that the new structure is in place no later than 1 September 2000. The rates of pay in the structure should be fixed having regard to the principles in the Paid Rates Review decision.
[42]  We have decided to assign Commissioner Lawson to assist the parties in the development of the new classification structure. The Commissioner will prepare a report for consideration by the Full Bench on the structure to be introduced. The report should be submitted by early August 2000. It should cover the agreed position of the parties regarding the new classification structure and/or the evidence and submissions sought to be advanced by the parties regarding the new structure. Upon receipt of the report, the Full Bench will decide whether to convene any further hearing/s on this matter and what variations should be made to the Consolidated Award in order to implement a new classification structure.” [S6142, pp 15-16] (emphasis added)

THE REVIEW PROCESS

[78]  The review process commenced with a mention & programming hearing on 21 June 2000 when all 16 parties to the appeal proceedings were given an opportunity to be heard, and to prepare for substantive conciliation. Since then, the principal award parties (Queensland and New South Wales employer representatives and officials of the Construction, Forestry, Mining and Energy Union (CFMEU), the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (AMWU) and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU)) have participated in formal Commission-chaired conciliation conferences on seven occasions (7, 11, 13, 14, 18, 19 and 27 July 2000). The parties have also met privately on three occasions (on 20, 26 and 28 July), and participated in a teleconference on one occasion (21 July). Several ‘without prejudice’ documents were exchanged during conciliation proceedings. Discussion, explanation of positions and debate centred on a number of disputed issues including: the appropriate number of levels for a new classification structure; generic definitions for each level; indicative competencies for each level; relevant wage rates (and the structure of same); training provisions and transitional provisions.

[79]  Directions were issued on 31 July 2000 for the exchanging of, and filing of final positions about which there was consensus; submissions in relation to those parts of the new classification structure about which there was no consensus; witness statements; other documents to be relied upon; and authorities.

THE SUBMISSIONS

[80]  Formal submissions were received on 3 August and were dealt with further at a hearing on 4 August. The parties’ submissions included the following positions:

(1)  CFMEU:

- The Union acknowledged that a classification structure was not able to be achieved (to date) through the conciliation process. (para 8)
- The Union sought an (unspecified) extension of time for further conciliation. (para 9)
- The Union believed that there was an unreasonable expectation that the parties would reach agreement in the 10 week period between 18 May and the beginning of August. (para 10)
- The Union did not seek to bring further evidence before the Full Bench: the Commission had sufficient evidence before it to make variations to the Award. (paras 14 & 16)
- The Union reserved its right to bring evidence in reply to any further evidence advanced. (para 15)
• The Commission should act on its findings in relation to “specific matters in the work models” (para 17), including the adoption of the Curragh approach in these proceedings (para 19); the insertion of a “work organisation” clause as per the Award simplification test case (paras 21 & 22); the deletion of the maximum number of skills at the top level of each of the work models (to remove quarantining of skills) (para 24); and by redrafting Schedules E and F of the Award (para 25).
• The Commission should reinvestigate whether item 51(4) applied to the Award properly fixed minimum rates after a new classification structure was finalised.

(2) AMWU:
• The Union concurred with the CFMEU;
• The Union submitted that “…in the relatively short time in which meetings took place there was a growing acceptance of each others’ points of view and a palpable commitment making the negotiations productive”. (page 1)
• The Union supported the CFMEU’s request for an (unspecified) extension of time to permit further conciliation prior to arbitration. (page 2)

(3) CEPU:
• The Union supported further conciliation and the CFMEU’s request for an (unspecified) extension of time “allocated to the conciliation process before programming of arbitration”.

(4) The Employers submitted:
• that the Commission should be guided in the framing of a replacement classification structure by the decisions in the Moranbah North and Curragh decisions [Prints P7254 & Q4464], (paras 2, 8, 9, 10)
• that the Commission could rely upon the evidence before it concerning work practices and procedures which restrict or hinder the efficient performance of work. (paras 2 & 5)
• that competing proposals for a new classification structure must be measured against extensive material already submitted in exhibits, and contained in a supplementary statement of Mr JF Lawson. (paras 6 & 7)
• that the Employers’ proposed classification structure, training and consultation provisions – see the Employers’ Document #6 – resulted from many changes agreed to during the course of conciliation. (para 11)
• that the principles of the Paid Rates Review decision [Print Q7661] when applied to the existing rates and classification structure – as adopted and applied in Re Pacific Coal Pty Ltd [Print R1834] – produced wage rate/classification relativities as follows:

<table>
<thead>
<tr>
<th>Classification</th>
<th>Relativity</th>
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</thead>
<tbody>
<tr>
<td>Mineworker – Induction Level 1</td>
<td>97.8%</td>
</tr>
<tr>
<td>Mineworker – Induction Level 2</td>
<td>100%</td>
</tr>
<tr>
<td>(Mineworker – Training)</td>
<td></td>
</tr>
<tr>
<td>Mineworker</td>
<td>108.7%</td>
</tr>
<tr>
<td>Mineworker – Advanced</td>
<td>115.4%</td>
</tr>
<tr>
<td>Mineworker – Specialised</td>
<td>128.5%</td>
</tr>
</tbody>
</table>
The full submissions of the parties are attached. The Full Bench should note that in those attachments there are no Union-initiated classification proposals.

At the hearing on 4 August, there was a point of considerable contention at the bar table as to whether the Unions had undertaken on 27 July to file a consolidated proposal with the documents required by 3 August. Mr Watson (for the Employers) contended that the Employers’ documents had been prepared on the basis of an ‘agreement’ that each side would file their respective proposals for a new classification structure. Mr Crawshaw (for the CFMEU) rejected that notion without the benefit of instructions from Mr Slevin (not present at the hearing). Mr Crawshaw rejected taking ‘instructions’ or advice from Messrs Terzic (AMWU) and O’Sullivan (CEPU) who were said to have been party to the agreement; Mr Terzic was equivocal in his responses.

RELEVANT POINTS CONTAINED IN THE TRANSCRIPT

- The CFMEU application for an opportunity to respond to the Employers’ written submissions and witness statement. (T16.2, 31.5, 38.4)
- The CFMEU’s request that the employers excise from their classification proposal all references in reply to the Unions’ proposals (given the position that the Unions had not provided any formal written proposals). (T17.5, 40.1)
- The Commission’s notation of the absence of Union proposals. (T18.2)
- The Unions’ application for additional time to allow the process of conciliation to continue (T19.5, 19.8, 20.2, 21.4, 22.9, 32.1, 32.9, 33.1) and for continued Commission involvement in that process. (T20.7, 29.6)
- The Commission’s distinction between an arbitration (of the parties’ differences) and its statutory function under the WROLA Act. (T19.1, 21.2)
- The Employers’ view that the Full Bench should proceed to conclude the award simplification review having regard to its earlier decision, to its statutory responsibilities, and to the submissions of the parties following conciliation. (T23.3, 23.7, 24.3)
- The Employers’ submission that the Unions had rejected the Full Bench’s earlier decision and now sought to follow another process of review. (T25.3, 26.9)
- The Employers’ preparation of their formal submissions and documents for the Full Bench’s consideration on the understanding that the Unions had undertaken to submit similarly-comprehensive proposals (albeit different in many respects). (T25.8, 40.1)
- The Employers’ view that further conciliation would not achieve a consensus outcome (T27.6, 27.9)
- The Full Bench to consider the material submitted, this report and the transcript, and to then decide whether to convene further hearings. (T36.8)

CONCLUSION

From my observation of developments during the many phases of conciliation it was a logical extension that the parties would have submitted extensive but differing proposals with (at best) some commonality of content. The absence of Union proposals is as baffling as it is disappointing, however it is consistent with the application/plea for an extension of time to allow further conciliation. When questioned concerning the Unions’ preferred period for further conciliation, responses were at first equivocal and then clarified as 3 months. Not unexpectedly the Employers expressed a contrary view that conciliation was exhausted, and that further conciliation would likely finalise only minor matters. The Employers rejected the proposition that, having regard to the period to date for all parties to prepare for and
participate in conciliation and to prepare formal submissions for inclusion in this report, the
Unions be given an opportunity to respond to the documents filed on 3 August. The
Employers submitted that the Full Bench adhere to its original timetable to have a new
classification structure in place by 1 September 2000.

These conflicting views need to be examined against the process determined by the
Full Bench at paragraph 42 of the appeal decision. Pursuant to section 45(7)(c) the report is
submitted for the Full Bench’s consideration.

COMMISSIONER LAWSON

Appearances:

M. Jaeger and A. Slevin for Construction, Forestry, Mining and Energy Union

B. Terzic for Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union

R. Krajewski for Communications, Electrical, Electronic, Energy, Information, Postal,
Plumbing and Allied Services Union of Australia

D. Houlihan for Glencorp

D. Longland Solicitor, for employers (other than Glencorp), with K. Turner and G. Gillespie

Hearing details:

2000.
Sydney:
June 21.

Appearances:

S. Crawshaw of Counsel for Construction, Forestry, Mining and Energy Union

B. Terzic for Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union

D. O’Sullivan for Communications, Electrical, Electronic, Energy, Information, Postal,
Plumbing and Allied Services Union of Australia

G. Watson Solicitor, for employers, with K. Turner and G. Gillespie

Hearing details:

2000.
Sydney:
August 4.
12. EMPLOYEE DUTIES

12.1 Employees must perform any work that the employer reasonably requires in accordance with the employee’s classification under the award that is within

12.1.1 the limits of the employee’s competence

12.1.2 safe working practices; and

12.1.3 statutory requirements

12.2 Employees must undertake training that the employer reasonably requires. This may include training to maintain their classification or acquire new competencies.

12.3 Where an employee does not perform the required work, the employee is not entitled to payment for that period.

12.4 An employee with a competency may be required to demonstrate to and familiarise another employee with work to be performed in accordance with that competency.
PART 5 - WAGES AND RELATED MATTERS

CLASSIFICATION STRUCTURE

18.1 Preamble and Principles

The classification structure in this award replaces the work models and the minimum rates classification structure. It determines the minimum weekly wages payable to employees whose employment is subject to this award.

The new structure is a ‘single stream’ structure, which does not contain any demarcations relating to the performance of work. It allows for a list of minesite competencies to be developed. Each mine’s indicative competencies will use as a guide the competency standards contained in the Coal Industry Training Package.

The definitions for each of the classification levels are necessarily general and intended to cover the types of work actually performed under this award. To eliminate doubt, the work performed by the employee, the assessment of the employee against minesite standards and, in relevant cases, the appointment of an employee to a particular classification by the employer, are the only relevant matters that determine an employee’s entitlement to wages pursuant to this clause.

18.2 Information for Employees

Where this structure is to be utilised, then within three months after its introduction, the employer will make available to employees at a minesite the following:

• The classifications that will be occupied by employees whose employment is subject to this award; and

• The requirements each employee must meet to occupy those classifications.

Whenever an employer alters the requirements that an employee must have to occupy a classification, the altered requirements will be published at the minesite.

18.3 Safety Net Review - Wages May 2000

The rates of pay in this award include the arbitrated safety net adjustment payable under the Safety Net Review - Wages May 2000 decision [Print S5000]. This arbitrated safety net adjustment may be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to certified agreements, currently operating enterprise flexibility agreements, Australian workplace agreements, award variations to give effect to enterprise agreements and overaward arrangements. Absorption which is contrary to the terms of an agreement is not required.
18.4 Definitions

18.4.1 Mineworker - Induction Level 1

Mineworker - Induction Level 1 is the entry level for a non-trade person who is undertaking the statutory/generic and/or minesite induction and who remains at this level until assessed by the employer to have successfully completed the induction requirements when they then advance to a Mineworker - Training.

18.4.2 Mineworker - Induction Level 2

Mineworker - Training

Mineworker - Induction Level 2 is the entry level for a qualified tradesperson who is undertaking the statutory/generic and/or minesite induction. The tradesperson after successful completion of the induction phase then becomes a Mineworker - Training at this level.

A Mineworker - Training is an employee who trains in and performs the required tasks under direct supervision. This classification applies to employees until assessed by the employer as meeting the requirements to be classified as a mineworker.

18.4.3 Mineworker

A Mineworker is an employee who is assessed by the employer as competent to perform the required tasks in a variety of operating circumstances and under limited supervision. An employee continues in this classification until assessed for advancement to Mineworker - Advanced.

18.4.4 Mineworker - Advanced

A Mineworker - Advanced is an employee who is assessed by the employer against the employer’s available criteria as competent to perform the required tasks in all relevant operating circumstances at a level above that of a Mineworker.

A Mineworker - Advanced may be required to supervise the work of other employees.

18.4.5 Mineworker - Specialised

A Mineworker - Specialised is an employee assessed by the employer as competent to perform specialised functions beyond the level of a Mineworker - Advanced. They will be appointed to a specialised role, which requires them to exercise independent discretion in undertaking functions within the bounds set by the employer.

The performance of this role may require the employee to supervise the work of other employees.
18.5 Advancement

18.5.1 An employee’s advancement through the classification structure will be determined in accordance with the definitions above and as outlined in the following table:

<table>
<thead>
<tr>
<th>Classification</th>
<th>Minimum Rates</th>
<th>Residual Component</th>
<th>Total Payment</th>
</tr>
</thead>
<tbody>
<tr>
<td>MINEWORKER - INDUCTION LEVEL 1</td>
<td>481.55</td>
<td>83.95</td>
<td>565.50</td>
</tr>
<tr>
<td>MINEWORKER - INDUCTION LEVEL 2</td>
<td>492.20</td>
<td>85.80</td>
<td>578.00</td>
</tr>
<tr>
<td>MINEWORKER - TRAINING</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>MINEWORKER</td>
<td>535.05</td>
<td>93.25</td>
<td>628.30</td>
</tr>
<tr>
<td>MINEWORKER - Advanced</td>
<td>568.10</td>
<td>99.00</td>
<td>667.10</td>
</tr>
<tr>
<td>MINEWORKER - Specialised</td>
<td>632.60</td>
<td>110.30</td>
<td>742.90</td>
</tr>
</tbody>
</table>

18.5.2 Progression to the classification of Mineworker - Advanced may occur where an employee is assessed by the employer as meeting the available criteria referred to in sub-clauses 18.2 and 18.4 above or is appointed to a statutory position.

18.5.3 Progression to the classification of Mineworker - Specialised is by appointment of the employer where an employee is assessed as a specialist against the available criteria or is appointed to a statutory position.

18.6 Minimum Rates
### Apprentices - Other than Mature Age Apprentices - New South Wales

<table>
<thead>
<tr>
<th>Classification</th>
<th>Minimum Rates $</th>
<th>Residual Component $</th>
<th>Total Payment $</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st year of experience</td>
<td>260.10</td>
<td>92.70</td>
<td>352.80</td>
</tr>
<tr>
<td>2nd year of experience</td>
<td>346.80</td>
<td>53.10</td>
<td>400.60</td>
</tr>
<tr>
<td>3rd year of experience</td>
<td>433.50</td>
<td>39.30</td>
<td>472.80</td>
</tr>
<tr>
<td>4th year of experience</td>
<td>520.20</td>
<td>0</td>
<td>520.20</td>
</tr>
</tbody>
</table>

Note - When the amount appearing in the column headed “residual component” in the rates set out above for Apprentices - Other than Mature Age Apprentices - New South Wales reduces to zero, the rates set out above will revert to the percentages of the Mineworker Induction level 2 rate which are set out below for Apprentices - Other than Mature Age Apprentices - Queensland. The objective of this clause is to facilitate the equalisation of minimum wage rates for Apprentices - Other than Mature Age Apprentices.

### Apprentices - Other than Mature Age Apprentices - Queensland

- 1st year of experience 45%
- 2nd year of experience 60%
- 3rd year of experience 75%
- 4th year of experience 90%

of the Mineworker Induction level 2 rate

### Mature Age Apprentices

- 1st year of experience 85%
- 2nd year of experience 90%
- 3rd year of experience 95%

of the Mineworker Induction level 2 rate.

#### 18.7 Transition

Where the new classifications structure is to be utilised, employers will have a period of up to three months to prepare the information required by sub-clause 18.2 and for its implementation. During that period the award rates in operation immediately prior to this variation will continue to apply.
Provided that on introduction of the new structure, an employee on a higher rate will not have that rate reduced while engaged at his original mine, purely as a result of the introduction of the new classification structure. That rate will be fixed until such time as the new classification rate exceeds that rate.

18.8 Indicative Competencies

18.8.1 Open Cut Mines

The following lists are not exhaustive, but rather are indicative of the types of competencies utilised in open cut mines.

INDUCTION

Induction (Generic, Minesite), Interpersonal, First Aid, Fire Fighting, Occupational Health and Safety

ADVANCEMENT COMPETENCIES

The competency standards used by the employer for the following:-


OTHER COMPETENCIES

While an employer may require an employee to become competent in one or more of the following, these competencies will not be taken into consideration for advancement through the classification structure:

Cross-Trade work, Medium Vehicle Operations, Low Loader Operations, Scaffolding, Minor-Maintenance, Bobcat Operations, Coal Haulage, • Mine Services, • T.Q.C. Principles, • Trade Certificate or Adult Apprenticeship, • Basic Coal Preparation Surface Operations

18.8.2 Underground Mines

The following lists are not exhaustive, but rather are indicative of the types of competencies utilised in underground mines.
INDUCTION

Induction (Generic, Minesite), Interpersonal, First Aid, Fire Fighting, Occupational Health and Safety

ADVANCEMENT COMPETENCIES

The Competency standards used by the employer for the following:


OTHER COMPETENCIES

While an employer may require an employee to become competent in one or more of the following, these competencies will not be taken into consideration for advancement through the classification structure:

• Coal Haulage • Mine Services • T.Q.C. Principles • Roadways • Roof & Rib Support • Gas Drainage • Trade Certificate or Adult Apprenticeship • Basic Coal Preparation • Riggers Certificate • Surface Operations • Coal Stockpile & Reclaim Operations • Washery Services • Cross-Trade Work

18.9 TRAINING

18.9.1 An Employer will develop a minesite training plan consistent with:

- the current and future competencies needs of the minesite
- the size, structure and nature of the operations of the minesite
- the need to develop competencies relevant to the minesite.

18.9.2 The minesite training plan is to be the subject of consultation with the workforce.

18.9.3 Training opportunities will be provided to employees in specific competencies to meet the operational requirements of the minesite.
18.9.4 Where the employer requires or, as a result of consultation with the employee concerned, it is agreed that training in accordance with the plan developed pursuant to sub clause 18.9.1 should be undertaken by an employee, that training may be undertaken either on or off the job. Provided that if the training is approved in writing by the employer:-

- the employee concerned will not suffer any loss of pay for normal rostered hours;

- the employer will be responsible for all costs associated with tuition fees and prescribed textbooks (excluding those textbooks which are available in the employer’s technical library).

18.9.5 Each mine will maintain a list of each employee’s competencies which will be available to the employee on request.

18.9.6 The employer will provide refresher training necessary to enable an employee to retain those competencies required for the position held by the employee in accordance with sub-clause 12.2. An employee’s rate of pay will not be reduced solely because an employer does not provide that refresher training.

(Note: Variation to clause 13.4.2 of the award will be required to provide that the % is of the Mineworker - Induction Level 2 rate other resulting variations may also be required).

**Decision Summary**

Award - award simplification - appeal - full bench - finalisation of new structure and rates of pay - not possible for parties to agree on new classification structure - employer parties proposed structure not agreed to by unions - unions proposed modification to existing structure - union’s proposal falls short of remedying fundamental problems with structure - unions unable to identify fundamental deficiencies in employers’ proposal - appropriate to adopt employers’ proposal - determination that rates in Award do not conform with requirement of properly fixed minimum rates - rates of pay fixed within new structure in accordance with Paid Rates Review Decision - opportunity given for rates and relativities to be reviewed after a reasonable period - parties to forward draft orders to Commission

Appeal by Bloomfield Collieries & others against decision of Harrison C at Sydney 16 July & 4 November 1999 Print No R4611

C No 22644 of 1999
Giudice President
Boulton J
Lawson C

** end of text **