

*In the*  
**AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**  
*Melbourne*

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**Submission by the Australian Mines and Metals Association on  
Award Modernisation  
In response to the President's Statement dated 29 April 2008**

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**The Statement**

The President's Statement on Award Modernisation, dated 29 April 2008 ( 'the Statement'), advised that a Full Bench of the Australian Industrial Relations Commission will sit for consultation on:

- 1.1 The draft list of priority industries/occupations put forward in the Statement;
- 1.2 The draft model flexibility clauses;
- 1.3 The draft timetable.

**Index**

Part A of this submission in paragraphs 2 to 6 below includes an overview and deals with preliminary matters.

Part B of this submission in paragraphs 7 to 12 below deals with the draft priority list.

Part C of this submission in paragraphs 13 to 15 below deals with the draft model flexibility clause.

Part D of this submission in paragraph 16 below deals with the draft timetable.

## **PART A - OVERVIEW & INTRODUCTION**

- 2.1 In short, in relation to the matters for consultation set out in the Statement, AMMA submits on behalf of the majority of its members as follows:
- that the circumstances of the Mining Industry are such that it should be included on the list of priority industries;
  - that the form of draft flexibility clause proposed by the ACCI is appropriate as it will provide the flexibility that is required by the resources sector but the clause proposed by the ACTU will not do so and is therefore inappropriate; and
  - AMMA recognises that the draft timetable is ambitious, but considers that it is highly desirable that modern award content for the Mining Industry be finalised as quickly as possible.

### **Profile of the Australian Mines and Metals Association**

- 3.1 AMMA is the national employer association for the mining, oil and gas and associated processing and service industries. AMMA is the sole national employer association representing the employee relations and human resources management interests of Australia's onshore and offshore resources sector and associated industries.
- 3.2 AMMA member companies include all the major producers in the metalliferous, coal and hydrocarbons sectors. Our member companies operate in the following industry categories:
- Exploration for minerals and hydrocarbons
  - Metalliferous mining, refining and smelting
  - Non-metallic mining and processing
  - Coal mining
  - Oil and Gas
  - Associated services such as:

- Construction and maintenance
- Diving
- Transport
- Support and seismic vessels
- General aviation (helicopters)
- Catering
- Bulk handling of shipping cargo

### **Profile of the Australian Resources Sector**

- 4.1 The Australian resources sector plays a pivotal role in the economic wellbeing of all Australians. The Australian resources sector is forecast to contribute \$115 billion in minerals and energy exports in 2007/2008.
- 4.2 ABARE reports that resources sector investors and operators are presently planning or constructing approximately 275 mining and energy construction or expansion projects, with a total capital expenditure for these projects in the order of \$130 billion.
- 4.3 The resources sector employs 138,000 employees directly, with approximately another 553,000 employees indirectly employed as a result of activity in the mining sector. Direct employment in the sector has grown by 144% since 1996, in comparison to an all industries growth rate of approximately 25%.
- 4.4 The average total earnings per week in the resources sector have increased from \$1,153.70 in February 1996 to \$1,925.20 in February 2008, almost \$100,000 per annum. This is 65% more than the all industry average.

- 4.5 In the hard rock mining sector, the level of union membership is 11.8 percent.<sup>1</sup> This is significantly lower than the average level of unionisation in the private sector of 14 percent.<sup>2</sup>
- 4.6 Industrial dispute in the resources sector is now a thing of the past. In 1996 the resources sector suffered 7,761.9 days of industrial action per 1000 employees (coal industry was responsible for 86 per cent of this result). In the September quarter of 2007 there were no recorded days lost in the non-coal mining sector; the coal sector recorded a loss of 1.5 days per 1000 employees. Both results are excellent.<sup>3</sup>
- 4.7 Data from the Australian Bureau of Statistics show that the majority of mining employees are engaged under a registered or unregistered individual arrangement, such as a common law contract or AWA.<sup>4</sup> Only a small portion of mining employees are paid the rate specified in the award.<sup>5</sup>
- 4.8 While the incidence of AWAs is high,<sup>6</sup> many resources sector employers utilise common law contracts of employment in order to provide above award wages and conditions of employment. This includes paying an annualised salary that compensates employees for penalty rates and allowances that are contained in an award. If awards are suitably

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<sup>1</sup> Australian Bureau of Statistics *Employee earnings, Benefits and Trade Union Membership*, Cat. No. 6310.0 August 2007 ABS, Canberra.

<sup>2</sup> Australian Bureau of Statistics *Employee earnings, Benefits and Trade Union Membership*, August 2007, ABS, Canberra.

<sup>3</sup> Australian Bureau of Statistics, *Industrial Disputes Australia*, Cat. No. 6321.0.55.001, September 2007, ABS, Canberra.

<sup>4</sup> Australian Bureau of Statistics, *Employee Earnings and Hours*, Cat no. 6306, Table 15, May 2006 (Reissue), ABS, Canberra.

<sup>5</sup> Australian Bureau of Statistics, *Employee Earnings and Hours*, Table 15, Cat. No. 6306.0, May 2006 (Reissue), ABS, Canberra. Although the ABS data shows that just 2.4% of mining employees have their pay set by an award, the ABS advises that this figure has a relative standard error of 25% to 50% and should be used with caution.

<sup>6</sup> The Minerals Council of Australia compiled data showing that approximately 50% of mining industry employees are covered by an AWA. Minerals Council of Australia, *Australian Workplace Agreements in the Australian Mining Industry as at June 2007*, Minerals Council of Australia, 2007.

modernised and contain an attractive individual flexibility clause, more employers may move to common law contracts.

**Preliminary matters relevant to award modernisation in the mining industry: approach to grouping of industries/occupations**

- 5.1 While this submission is confined to the consultation matters set out in the Statement, it is useful to place the submission in context by foreshadowing certain matters relevant to the substantive award modernization process in the Mining Industry.
- 5.2 AMMA supports the Commission’s approach to use the existing “panel system” within the Commission to group industries/occupations for purposes of starting the modernisation process. AMMA recognises that the exact parameters of work which should fall within the definition of ‘mining industry’ will need to be clearly defined. Appendix 1 and 2 contains lists of the pre-reform awards and NAPSAs currently listed by the AIRC under “Mining Industry” and “Coal Industry”, as extracted from the *Awards List by Industry* published by the Commission on 11 April 2008.
- 5.3 It is acknowledged that the use of the panel system is not intended to pre-determine the outcome of the modernisation process and does not constitute the list of modern awards to be established.
- 5.4 AMMA acknowledges the Commission’s obligation (when carrying out the modernisation process) to have regard, under subsection 576B(2)(d) of the Workplace Relations Act, to the desirability of reducing the number of awards operating in the workplace relations system. AMMA supports the notion of a reduced number of awards to the extent that the objectives contained in Part 10A of the Act, and in particular subsection 576A(2)(c): *“must be economically sustainable, and promote flexible modern work”*

*practices and the efficient and productive performance of work* are met. (emphasis added).”

- 5.5 AMMA is in favour of the pre-reform awards and NAPSAs listed as part of the Mining Industry (see Appendix 1) to be modernised as a priority. However, this should not be interpreted as support for all of the awards and NAPSAs to form a single Mining Industry award. The exact boundaries of a mining industry award or awards will be the subject of a further submission.
- 5.6 A reduction in the number of awards currently listed under Mining Industry is desirable, not for its own sake, but in order to improve efficiencies achieved in each of the sub-sectors currently identifiable under the Mining Industry grouping. It is anticipated that this outcome will most likely be achieved through specific sub-sector awards. AMMA will make further submissions on this issue.
- 5.7 Further, while the majority of AMMA members have expressed a desire to have the Mining Industry added to the draft priority list, for the reasons detailed in paragraph 7 and further below, AMMA would strongly support a continued distinction between the Coal Industry and Mining Industry, for the reasons contained in paragraph 12 below.

### **State Enterprise Awards**

- 6.1 As a further preliminary matter, we note that the Australian Industrial Relations Commission has included a number of State enterprise awards in its list of Mining Industry Awards.
- 6.2 Enterprise awards apply to a single employer and contain terms and conditions of employment that meet the unique needs of that particular

business and its employees. Often these enterprise awards are the culmination of years of bargaining and arbitration.<sup>7</sup> The status of enterprise awards as awards unique to a particular business is recognised by the Government in its *Forward with Fairness Policy Implementation Plan*.<sup>8</sup> In that policy, the following statement is made:

*Labor guarantees that enterprise awards will continue. Labor will instruct the Australian Industrial Relations Commission to only review enterprise awards where requested by the current parties to the award.*<sup>9</sup>

6.3 This position is reflected in the Request, which states that ‘*the creation of modern awards is not intended to...result in the modification of enterprise awards*’.<sup>10</sup>

6.4 However, section 576U of the *Workplace Relations Act 1996* defines an enterprise award as:

*an award that regulates a term or condition of employment of an employee or employees by an employer in a single business specified in the award (emphasis added).*

6.5 An ‘award’ is in turn defined as being a pre-reform federal award<sup>11</sup> and by virtue of this, State enterprise awards appear to have been inadvertently excluded as they now operate as NAPSAs. This anomaly needs to be resolved.

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<sup>7</sup> Rio Tinto, *Rio Tinto submission to the award review taskforce regarding: award rationalization and rationalization of award wage and classification structures*, January 2006, 8.

<sup>8</sup> Australian Labor Government, *Forward with Fairness: Policy Implementation Plan*, August 2007.

<sup>9</sup> Rio Tinto, *Rio Tinto submission to the award review taskforce regarding: award rationalization and rationalization of award wage and classification structures*, January 2006, 16.

<sup>10</sup> The Hon Julia Gillard, Minister for Employment and Workplace Relations, *Request under section 576C(1) – award modernisation*, Australian Industrial Registry, Australian Government, 2 April 2008, 1.

<sup>11</sup> *Workplace Relations Act 1996*, s 4(1).

## **PART B - DRAFT PRIORITY LIST**

- 7.1 AMMA submits that the Mining Industry should be included in the list of priority industries. To include the Mining Industry is consistent with the obligations set out in the Minister's Request for Award Modernisation dated 28 March 2008 ('the Request'), the approach foreshadowed by the Commission in the Statement and the relevant legislative obligations under the Workplace Relations Act.
- 7.2 Specifically, AMMA relies on the following grounds in support of its submission:
- (a) There is a high incidence of AWAs and NAPSAs in the Mining Industry;
  - (b) Award level flexibility is essential for the Mining Industry to maintain existing flexibilities, particularly given the fragmented award regulation to date and prevalence of individual arrangements;
  - (c) Stability and certainty in the Mining Industry is critical to the economic wellbeing of all Australians;
  - (d) While historical differences between the Coal Industry (which is on the priority list already) and the Mining Industry mean that ultimately it is desirable that they be regulated by separate modern awards, substantial overlap and substantial common features mean that it is desirable to consider the Coal Industry and the Mining Industry concurrently.
- 7.3 These grounds are expanded upon below. AMMA does not wish to make any submissions on the listing any of the other industries/occupations on the draft list.

## High incidence of AWAs in the Mining Industry

- 8.1 The object of award modernisation is set out in section 576A of the Act. This section specifies the requirements for modern awards. Section 576A(1) provides that the award modernisation process must be carried out in accordance with the written Request.
- 8.2 The Commission is required in paragraph 20 of the Request to establish a list of priority industries or occupations for award modernisation. Paragraph 20 goes on to state that:
- “In developing its priority list, the Commission will have regard to those industries and occupations with high numbers of Australian Workplace Agreements and Notional Agreements Preserving State Awards (NAPSAs)”.*
- 8.3 It is acknowledged that the Request is to be read in conjunction with Part 10A of the Act, however, Part 10A is silent on the matter of establishing a priority list. It is further acknowledged that paragraph 14 of the Statement provides that the draft list of priority industries is the result of discussions between the ACTU, ACCI and AiG, and not proposed by the Commission itself.
- 8.4 AMMA submits that in finalising the list of priority industries/occupations, the Commission has the obligation under section 576C(1) of the Act to ensure that the requirement in paragraph 20 of the Request is met.
- 8.5 The Mining Industry has one of the highest incidences of Australian Workplace Agreements (AWAs) per industry. Data from the Australian Bureau of Statistics show that the majority of mining employees are engaged under a registered or unregistered individual arrangement, such

as a common law contract or AWA.<sup>12</sup> There is no ABS data that compares mining sub-sector methods of setting pay. Data compiled using ABS and Workplace Authority data, show that in the metal ore industry 63% of employees have their pay set by AWAs.

8.6 AWA prevalence in the Mining Industry is much higher than other industries listed in the draft priority list. The mining industry (as defined by the Workplace Authority, which includes the coal industry), lodged 37,516 AWAs between 27 March 2006 and end September 2007. Most of these AWAs were in the mining sector, not the coal sector.

8.7 By contrast, the following table contains information on the number of AWAs lodged with Workplace Authority by industries identified on the draft priority list for the period 27 March 2006 to end September 2007:

<b>Draft priority listed industry/ occupation</b>	<b>Industry (as grouped by Workplace Authority)</b>	<b>AWAs lodged between 27 March 2006 and end September 2007</b>
Retail Industry	Retail Trade	84,150
Hospitality Industry	Accommodation and Food Services	69,597
<b>Coal Industry (Mining Industry – not listed)</b>	<b>Mining Industry</b>	<b>37,516</b>
Information and Communication Technology	Information Media and Telecommunications	28,280
Technical Services – Engineers and Scientists Occupations	Professional Scientific and Technical Services	27,709
Rail Industry	Transport Postal and Warehousing	20,716
Nursing Occupation Aged Care Industry	Health Care and Social Assistance	20,162

<sup>12</sup> Australian Bureau of Statistics, *Employee Earnings and Hours*, Cat no. 6306, Table 15, May 2006 (Reissue), ABS, Canberra.

	Financial and Insurance Services	11,720
Higher Education Industry	Education and Training	8,911
Poultry Processing Industry	Agriculture, Forestry and Fishing	8,446
Graphic Arts Industry	Arts and recreational services	7,551
Racing Industry	Arts and Recreation services?	7,551
Clerical Occupation	Administrative Support Services	2,584
Rubber Plastic and Cablemaking Industry	No corresponding industry	

It is contended that the Mining Industry should be included, in accordance with the Request, in the priority list of industries/occupations.

### **High incidence of NAPSA's in the Mining Industry**

- 9.1 The incidence of NAPSA's in the Mining Industry is also high, with 31 NAPSA's identified (see attached Appendix 1).
- 9.2 The number of NAPSA's in the Mining Industry is higher than the number of NAPSA's in other industries already on the draft list of priority industries, such as the Graphic Arts Industry (no NAPSA's identified), Insurance Industry (1 NAPSA), Coal Industry (8 NAPSA's identified), and Rubber, Plastic and Cablemaking Industry (6 NAPSA's).

### **Need to deliver a safety net for the Mining Industry that is certain and will deliver flexibility**

- 10.1 Paragraph 11 of the Statement foreshadows that within each industry/occupation, the principal federal award will usually be the starting point for drafting. There is no principal federal award for the Mining Industry. At present the regulation of the industry through awards is very

fragmented, and bearing in mind that the industry had a high reliance on AWAs and a large number of NAPSAs, this heightens the need for the industry to be treated as a priority industry in the modernisation process.

- 10.2 The Mining Industry will rely substantially on modern awards to deliver flexibility and certainty. The circumstances of the Mining Industry are such that it is desirable that this be done as quickly as possible to enable industry participants to plan transition to the modern award system. The Mining Industry will be able to maintain the flexibilities achieved through statutory individual arrangements over the last two decades by using common law agreements, underpinned by awards, only if the awards provide enough flexibility to satisfy the needs of employers and employees alike.

### **Mining Industry's contribution to the economy**

- 11.1 Apart from meeting its obligations under paragraph 20 of the Request, the Commission should consider listing the Mining Industry as a priority industry for reasons related to the impact on the Australian economy as a whole.
- 11.2 In accordance with section 576B(a) of the Act, the Commission must have regard to *“the creation of jobs and the promotion of high levels of productivity, low inflation, high levels of employment and labour force participation, national and international competitiveness, the development of skills and a fair labour market”* when engaging in award modernisation.
- 11.3 We therefore submit that the Commission ought to take into consideration the pivotal role that the Mining Industry plays within the Australian economy, as the continued growth of exports earnings through the resources sector is central to the ongoing prosperity of all Australians.

- 11.4 The Mining Industry's contribution to the economy is significant: For metals and other minerals, export earnings are forecast to rise by 21% to \$86.7 billion in 2008-09. Growth in the iron ore sector accounts for more than 1/3 of projected growth in total energy and minerals export earnings in 2008/2009. The expected value of exports for 2008-09 is as follows:
- Iron ore, pellets \$32.5 billion
  - Gold \$13.9 billion
  - Copper \$6.7 billion
  - Nickel \$5.5 billion<sup>13</sup>
- 11.5 In 2008 – 2009 mine production is forecast to increase by 11% as new mines begin operation and as recently commissioned projects approach full capacity. The largest expansion is in iron ore, nickel and copper.<sup>14</sup>
- 11.6 Direct employment in the resources sector has grown by 144% since 1996, in comparison to an all industries growth rate of approximately 25%.
- 11.7 Stability and certainty on workplace relations, and specifically wages and conditions of employment in the Mining Industry, is central to the employment growth, mine expansion and international competitiveness of the Mining Industry.

### **Coal Industry and Mining Industry should be modernised concurrently**

- 12.1 In accordance with paragraphs 8 and 9 of the Request, the Commission will have to identify the coverage and application of awards, with a view to avoiding overlapping of awards and providing clear rules that identify which award applies.

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<sup>13</sup> ABARE Australian Commodities March 2008 vol 15, no 1

<sup>14</sup> ABARE, p 114.

- 12.2 The workplace relations arrangements in the Coal Industry and Mining Industry are not homogenous. Each has its own unique history and peculiarities in respect to, among other things, the union that has coverage, the types of engagement, level of prescription in the award, classification structures, level of consultation, hours of work and remuneration arrangements.
- 12.3 Despite these differences, there are also significant common features across the two industries. Due to the structure of mine ownership and contract mining activity, a large number of employers and employees operate in both industries and will be affected by changes in both industry awards. The same employers will have to be involved in the consultation activities which will form part of the modernisation process in both industries. It will be efficient and practical for the Commission to deal with both at the same time.
- 12.4 In developing modern award content for mining it would be desirable for the Commission to have regard to the needs of both the Mining and the Coal industries. It is certainly not desirable to consider the Coal Industry award in isolation from the Mining Industry award/s as this may result in duplication of process and reduce the prospect of (some degree of) uniform content, where it could otherwise be achieved. By reviewing awards and NAPSAs in both industries, greater clarity and certainty will be provided to employers and employees alike and will provide employers with the opportunity to assess the impact of modernised awards on their business.
- 12.5 Furthermore, it is essential that the amalgamation of awards to create an industry or occupation based award does not upset existing demarcation orders or create demarcation disputes. In respect to the latter, the Minister

for Employment and Workplace Relations has said *'the Government has made it clear that old demarcation disputes are not to be re-opened.'*<sup>15</sup>

12.6 There has been a long history of costly demarcation disputes between the Australian Workers' Union (AWU) and the Construction Forestry Mining Energy Union (CFMEU) predominantly over union coverage of non-trades classifications working on civil, mechanical and electrical engineering construction projects within the resources sector.<sup>16 17</sup>

12.7 AMMA outlined the following at trial, which was highlighted by the Full Bench:

*"A settled pattern of union and award and agreement coverage is of significant benefit to employers and employees in any industry since it inevitably avoids:*

- *disputation on site over union membership;*
- *the complications of having multiple union coverage of employees undertaking particular work;*
- *cost and inefficiencies of having to deal with multiple unions in day to day management, the negotiations of industrial instruments and the settlement of industrial issues and disputes."*<sup>18</sup>

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<sup>15</sup> The Hon Julia Gillard MP, (DPM and Minister for Employment and Workplace Relations and Social Inclusion) *Fair Work Australia Summit*, media release, DEEWR, Canberra, 29 April 2008 viewed 5 May 2008,

<http://mediacentre.dewr.gov.au/mediacentre/Gillard/Releases/FairWorkAustraliaSummit.htm>

<sup>16</sup> Well in excess of one million dollars in representation costs were expended in opposing a CFMEU application for a change in its eligibility rules in order to expand its membership base.

<sup>17</sup> *AWU & Others v CFMEU* PR901486, 28 February 2001 Full Bench AIRC [142]-[151]

<sup>18</sup> *AWU & Others v CFMEU* PR901486, 28 February 2001 Full Bench AIRC [142]-[151]

## **PART C - DRAFT FLEXIBILITY CLAUSE**

- 13.1 The object of award modernisation is set out in section 576A of the Act. This section specifies the requirements for modern awards.

*576A Object of Part*

...

*(2) modern awards:*

*(a) must be simple to understand and easy to apply, and must reduce the regulatory burden on business;*

...

*(c) must be economically sustainable, and promote flexible modern work practices and efficient and productive performance of work;*

As noted above, section 576A(1) provides that the award modernisation process must be carried out in accordance with the written Request.

- 13.2 Paragraph 10 of the Request states:

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

- 13.3 The Request, at paragraph 11 also states that:

*Each modern award will include the model flexibility clause with such adaptation as is required by the modern award in which it is included.*

13.4 The Commission released two draft award flexibility clauses in the Statement of Justice Giudice on 29 April 2008.<sup>19</sup> The first was one proposed by the Australian Council of Trade Unions (ACTU) and the second a joint proposal of the Australian Chamber of Commerce and Industry (ACCI) and Australian Industry Group (AiG).

### **ACTU clause is inconsistent with policy and principle**

14.1 A review of the competing proposed drafts reveals a distinct divergence between the ACTU and ACCI/AiG about the intended operation of the award flexibility clause.

14.2 AMMA submits that the ACTU proposal is at odds with the policy position on award flexibility put forward by the Government in its *Forward with Fairness Policy Implementation Plan*.<sup>20</sup> This position is demonstrated by the majority flexibility provisions contemplated in paragraph 2 of the draft clause.

14.3 AMMA also submits that the ACTU clause does not meet the policy objectives contained in Section 576A particularly the requirement for the clause to be simple to understand, easy to apply, and reduce the regulatory burden on business.

14.4 AMMA submits that the policy intention of the Government's award flexibility clause was to enable an individual employee and their employer to enter into a flexible arrangement by genuine agreement. This is supported by statements made by Julia Gillard, Minister for Employment and Workplace Relations who said:

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<sup>19</sup> Australian Industrial Relations Commission, Justice Giudice, *Request from the Minister for Employment and Workplace Relations – 28 March 2008 Award Modernisation*, Statement, 29 April 2008.

<sup>20</sup> Australian Labor Party, *Forward with Fairness: Policy Implementation Plan*, August 2007, 11.

*[t]he purpose of such a clause is to enable an employer and an individual employee to agree on individual arrangements to meet the genuine individual needs of the employer and employee (emphasis added).*<sup>21</sup>

14.5 The clause proposed by the ACTU does not meet objects of the Act or the Request in that it:

- Provides for a *majority* award flexibility arrangement (majority-only clauses);
- Prevents an individual employee from making flexible arrangements with his or her employer in respect to award provisions classified as *majority*-only clauses;
- Prevents an individual employee from making flexible arrangements with his or her employer in respect to a particular clause if that clause has been classified as a *majority*-authorisation clause, unless previously authorised by the *majority* of employees;
- Prevents an individual employee from making flexible arrangements with his or her employer in respect to a particular clause if the employer previously sought a *majority* award flexibility arrangement but the *majority* of employees did not agree;
- Prevents an employee from making a flexible arrangement with his or her employer in respect to a particular matter if half of the employees have already made an individual award flexibility arrangement on that same matter;
- Binds an employee to any majority award flexibility arrangement.

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<sup>21</sup> The Hon Julia Gillard MP, (DPM and Minister for Employment and Workplace Relations and Social Inclusion) *Fair Work Australia Summit*, media release, DEEWR, Canberra, 29 April 2008 viewed 5 May 2008, <http://mediacentre.dewr.gov.au/mediacentre/Gillard/Releases/FairWorkAustraliaSummit.htm>

14.6 The Minister's Request has also stated that the clause should be simple and practical, neither of which criteria are met by the ACTU clause in that it:

- Lists four separate circumstances for when an individual arrangement cannot be entered into;
- Specifies rules over which arrangement (individual or majority) prevails;
- Is overly technical, referring to 'majority-only' clauses', 'majority-authorisation clauses', 'majority award flexibility arrangements', and 'individual flexibility arrangements';
- Specifies a different process for making a flexible arrangement depending on which party (employer or employee) makes the proposal;
- Requires an employer to provide a written statement of its reasons for proposing the flexible arrangement and an explanation of its effect, a copy of the proposed arrangement, a copy of the relevant award provision and a copy of a letter prescribed by the Commission; and
- Makes it an absolute requirement for the employer to notify the relevant union of its proposal and give it an opportunity to participate in negotiations and participate in regular reviews.

14.7 AMMA contends that the ACTU requirement that an employer to notify the relevant union of its intention to enter into an agreement under an award flexibility clause is unduly restrictive, and does not accord with the principle of having an 'individual agreement'. Such a provision is a relic of the unpopular enterprise flexibility agreements of the early 1990's, and is not appropriate for a body which represents a minority of Australian employees. Recent data from the ABS shows that Unions represent just

14% of the private sector.<sup>22</sup> A requirement to consult a union appears to be more directed at improving membership levels than affording a mechanism to improve individual workplace flexibility.

14.8 The Minister for Employment and Workplace Relations recently commented that award modernisation '*won't be about preserving existing rules and structures for the sake of preserving them*'<sup>23</sup> is relevant in the context of award flexibility clauses: Between 1994 and 1996, the Commission was required to insert award flexibility clauses into awards under section 113A of the *Industrial Relations Reform Act 1993*. Yet these clauses failed to facilitate any change at the enterprise level because they required majority agreement, the union had to be involved and employers experienced delay in implementing flexibility. Just 54 agreements under the award flexibility clause were entered into during their period of availability.<sup>24</sup>

14.9 The ACTU's proposed clause appears to incorporate much of the 'old' system of industrial regulation as opposed to a more modern, sophisticated approach that would facilitate use of the clause. AMMA considers that the ability to achieve the intended flexibilities proposed by the Government using the ACTU flexibility clause would verge on the impossible.

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<sup>22</sup> Australian Bureau of Statistics, *Employee Earnings, Benefits and Trade Union Membership*, Cat. No 6310.0 August 2006.

<sup>23</sup> The Hon Julia Gillard MP, (DPM and Minister for Employment and Workplace Relations and Social Inclusion) *Fair Work Australia Summit*, media release, DEEWR, Canberra, 29 April 2008 viewed 5 May 2008,

<http://mediacentre.dewr.gov.au/mediacentre/Gillard/Releases/FairWorkAustraliaSummit.htm>

<sup>24</sup> Data sourced from DEEWR, 29 April 2008.

## **Award flexibility outcomes**

- 15.1 In order to meet the policy intent of the legislation and the needs of the resources sector AMMA contends that the award flexibility clause must allow for the following;
- (a) Variation of hours of work provisions to embrace flexibility not contained in the model award hour of work provisions such as changes to shift duration, rosters, timing of meal breaks, and the taking of time off in lieu of overtime.
  - (b) The payment of composite rates to take into account roster patterns (including penalties) and allowances.
  - (c) Changes to operation of non-monetary entitlements such as the operation of notice provisions.
- 15.2 AMMA contends that the award flexibility clauses should not detract from an employers capacity to use a common law contract which provides for payment of a salary paid in substitution for any entitlement under an awards (provided the salary is at sufficient level to meet or exceed the award obligations).
- 15.3 AMMA contends that the draft award flexibility clause proposed by the ACCI better fulfills the policy requirements that the ACTU proposal on the basis that it:
- (a) meets the objects of the Act as contained in section 576A;
  - (b) meets the requirements for the flexibility clause as stated in the Request; and
  - (c) will deliver the flexibilities required by the resources sector to continue its substantial contribution to the Australian economy.

15.4 The ACCI clause is simple to understand, easy to apply and does not impose unnecessary restrictions on employers, making it an attractive clause for the resources sector to provide an improved level of flexibility particularly in light of the absence of AWAs.

## **PART D - DRAFT TIMETABLE**

- 16.1 AMMA submits that the Request's completion date of end of December 2008 is ambitious and will require an extraordinary effort by all stakeholders to be achievable. AMMA also recognizes that the Commission must comply with the completion date and commends the Commission for its proposed draft timetable.
- 16.2 One consequence of the priority approach is that award not on the priority list are unlikely to be considered until after 31 December 2008. For the reasons outlined above, this would be disadvantageous for the Mining Industry.

## Appendix 1- Mining Industry Pre-Reform Awards and NAPSAs

Aboriginal Community Controlled Health Services (Northern Territory) Award 2002	<a href="#">AP817919</a>
Drilling and Exploration Industry (AWU) Award 1998, The	<a href="#">AP778713</a>
Drilling and Exploration Industry (Superannuation) Award 1991, The	<a href="#">AP778712</a>
Mining Industry Sector – Minimum Wage Order – Victoria 1997	<a href="#">AP789237</a>
Argyle Diamonds Production Award 1996	<a href="#">AN160013</a>
AWU Gold (Mining and Processing) Award 1993	<a href="#">AN160003</a>
BHP-Utah Minerals International Cadjebut Production Award 1989	<a href="#">AN160018</a>
BRADKEN Bassendean (WA) Way Forward Enterprise Award 2003	<a href="#">AN160026</a>
Building and Engineering Trades (Nickel Mining and Processing) Award, 1968	<a href="#">AN160038</a>
Building Trades (Gold Mining Industry) Award	<a href="#">AN160035</a>
Elura Mine Enterprise (Consent) Award 2001	<a href="#">AN120194</a>
Engine Drivers' (Gold Mining) Consolidated Award, 1979	<a href="#">AN160116</a>
Engine Drivers' (Nickel Mining) Award 1968	<a href="#">AN160117</a>
Flyash Australia (State) Award 2002	<a href="#">AN120211</a>
Galong Mine Lease 1496 (State) Award	<a href="#">AN120224</a>
Gold Mining Consolidated Award, 1980	<a href="#">AN160141</a>
Gold Mining Engineering and Maintenance Award	<a href="#">AN160142</a>
Iron Ore Production & Processing (BHP Billiton Iron Ore Pty Ltd) Award 2002	<a href="#">AN160182</a>
Iron Ore Production & Processing (Locomotive Drivers Rio Tinto Railway) Award 2006	<a href="#">AN160353</a>
Iron Ore Production & Processing (Locomotive Drivers) Award 2006	<a href="#">AN160352</a>
Iron Ore Production and Processing (Hamersley Iron Pty Ltd) Award 1987	<a href="#">AN160183</a>
Kalgoorlie Consolidated Gold Mines Award 2002	<a href="#">AN160188</a>
Metalliferous Mining and Processing Award	<a href="#">AN170065</a>
Metalliferous Mining Industry (State) Award 1995	<a href="#">AN120681</a>
Mineral Earths Employees' Award	<a href="#">AN160211</a>
Mineral Sands Industry Award – State 2002	<a href="#">AN140178</a>

Mineral Sands Industry Award 1991	<a href="#">AN160212</a>
Mineral Sands Mining and Processing (Engineering and Building Trades) Award, 1977	<a href="#">AN160213</a>
Mineral Sands Mining and Processing Industry Award, 1981	<a href="#">AN160214</a>
Mineral Sands Mining and Treatment Industry (State) Consolidated Award	<a href="#">AN120338</a>
Mining (Non-Coal) Award – State 2003	<a href="#">AN140179</a>
Mining Miscellaneous Award	<a href="#">AN150086</a>
Mount Isa Mines Limited Award 2004	<a href="#">AN140185</a>
Mount Isa Mines Limited Contractors' and Sub-Contractors' Employees Award 2002	<a href="#">AN140186</a>
Nickel Mining and Processing Award, 1975	<a href="#">AN160225</a>
Nickel Refining Award, 1971	<a href="#">AN160226</a>
Nickel Smelting (WMC Resources Ltd) Award 2003	<a href="#">AN160227</a>
Telfer Gold Mine Fly In/Fly Out Award	<a href="#">AN160310</a>
Tin and Associated Minerals Mining and Processing Industry Award No. 14 of 1971	<a href="#">AN160316</a>
UNIMIN Australia Limited – Attunga (NSW) Enterprise Award 2004	<a href="#">AN120623</a>
UNIMIN Australia Limited Award	<a href="#">AN150165</a>
Xstrata Queensland Limited – Port Operations Award – State 2005	<a href="#">AN140320</a>
Zinifex Rosebery (Mining) Award	<a href="#">AN170117</a>

## Appendix 2 – Coal Industry awards

Coal Mining Industry (Mines Resuce Staff) Award, 2005, Queensland, The	<a href="#">AP839582</a>
Coal Mining Industry (Production and Engineering) Consolidated Award 1997, The	<a href="#">AP774609</a>
Coal Mining Industry (Staff) Award, 2004	<a href="#">AP835164</a>
Coal Mining Industry Accident Pay (Managers) Award, 1986, New South Wales	<a href="#">AP772803</a>
Coal Mining Industry Award (Deputies and Shotfirers), 2002, The	<a href="#">AP813783</a>
Deputies & Shotfirers Long Service Leave Award [1991]	<a href="#">AP778857</a>
Managers Long Service Leave Award 1991	<a href="#">AP788574</a>
Staff Long Service Leave Award 1991	<a href="#">AP796492</a>
Bowen Coke Works Award 2005	<a href="#">AN140034</a>
Coal Mining Industry (Accident Pay) Interim Award 2004	AN120659
Port Waratah Coal Services Consent Enterprise (State) Award 1995	AN120685
Port Waratah Coal Services Limited (Traineeship) (State) Award	<a href="#">AN120422</a>
Refractory Industry (State) Award	<a href="#">AN120464</a>
Coal Services Pty Limited Award 1999	<a href="#">AN120141</a>
Coal Superintending Samplers (State) Award	<a href="#">AN120142</a>
Ulan Coal Delivery Facility Consent Award 2004	<a href="#">AN120622</a>