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Justice G M Giudice  
President  
Australian Industrial Relations Commission  
GPO Box 1994  
Melbourne VIC 3000

1 August 2008

Dear President

**MINING INDUSTRY (AM/2008/6): AWARD MODERNISATION  
SUBMISSION**

Please find attached a copy of the AMMA submission in respect of the review of awards in the mining industry.

As a result of the timeframe in which the submission was prepared AMMA has had limited consultations with other stakeholders.

We anticipate making a supplementary submission particularly with respect to the proposed classification structure and on matters where the award interacts with the substantive provisions of the new Act which are not yet available (e.g. definition of a high income earners, access to the NES for persons not covered by awards, powers of FWA to deal with disputes).

Please feel free to contact me if you have any questions about the submission.

Yours sincerely,



Christopher Platt  
Director Workplace Policy

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

*Workplace Relations Act 1996*

s.576E - Procedure for carrying out award modernisation process

**Request from the Minister for Employment and Workplace Relations**

**(as revised 16 June 2008)**

**Award modernisation**

(AM/2008/6)

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**Submission of the Australian Mines and Metals Association**

**Award Modernisation For The Mining Industry**

**1 August 2008**

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**INTRODUCTION**

1. This submission is provided pursuant to the revised timetable for pre-drafting consultation for the mining industry issued by the Full Bench on 22 July 2008.
2. The Australian Mines and Metals Association (**AMMA**) has prepared a draft modern award for the mining industry for consideration by the Commission. The draft award is referred to in this submission as the Mining Industry Safety Net Award 2010 (**MISNA**). It is attached as Appendix 1.
3. This submission deals with the following matters:
  - a. the principles relevant to the award modernisation process;
  - b. the appropriate scope of a modern award for the mining industry;

- c. the approach taken by AMMA to develop safety net content for the MISNA; and
  - d. the content of particular clauses in the MISNA.
4. This submission is to be read in conjunction with the submission and supplementary submission tendered by AMMA in Perth on 30 May 2008 (Exhibits P-AMMA 1 and P-AMMA 2) and the letters from AMMA to Senior Deputy President Harrison dated 11 June 2008 and 21 July 2008.

***Relevant principles***

5. In performing its award modernisation functions, the Commission must have regard to the requirements of:
- a. Part 10A of the *Workplace Relations Act 1996* (Cth) (**Act**);
  - b. the Request from the Minister for Employment and Workplace Relations as revised on 16 June 2008 (**Request**); and
  - c. the National Employment Standards (**NES**).
6. In addition, the following material provides guidance in relation to how these requirements should be met:
- a. the statement issued by the President dated 29 April 2008 (**Statement**);
  - b. the decision of the Full Bench dated 20 June 2008 (**Decision**); and
  - c. the interim drafting guidelines prepared by the Commission (**Drafting Guidelines**).
7. AMMA has had regard to this material in developing the MISNA. The MISNA is consistent with the relevant requirements.

## SCOPE OF THE MODERN AWARD

### *Coverage principles*

8. Based on the requirements of the Act, the Request and the Decision, AMMA submits that the scope of modern awards should be established having regard to the following principles:

#### Legislative objectives

- a. The Commission is obliged to have regard to the following legislative objectives:
- i. the relevant objects of Part 10A of the Act (including simplicity, reducing the regulatory burden and promoting flexible modern work practices and the efficient, productive performance of work and certainty);
  - ii. the matters the Commission must have regard to in s.576B of the Act;
  - iii. the object of the Request (including avoiding extending coverage to employees who perform work that has historically not been regulated by awards and high income earners, not disadvantaging employees or increasing costs for employers, or altering enterprise awards);
  - iv. the desirability of reducing the number of awards (see clause 4B of the Request and s.576B(2)(d)); and
  - v. the above objectives are equally important and must be balanced having regard to the circumstances of the industry under

consideration and its historical award regulation. It is not necessary that the Commission minimise the number of awards. The key focus of this process is to establish a comprehensive set of awards that provide an appropriate safety net of minimum terms and conditions for the circumstances of each industry.

Regulation of similar systems of work

- b. Award modernisation will be effective and sustainable where the industries in question are similar in content and operation.
- c. The expansion of the existing boundaries of award regulation in the mining industry should not run the risk of introducing into that industry particular terms and conditions which have a different background, form, content or structure or regulate different systems or methods of work. This could adversely effect, for example, the flexibility and adaptability and competitive advantage enjoyed by the industry that have been tailored for the industry. This would be contrary to the requirements of the Act for award modernisation to be simple and promote flexibility.

Historical award regulation

- d. It is consistent with the objectives of the Request to create a comprehensive set of modern awards and to reduce the number of awards to recognise the historical boundaries of this industry and the peculiar circumstances of the enterprises in specific industries. If an industry has been regulated by awards that have their genesis in a separate industry award which has regard to the specific needs of the

enterprises operating in the industry, it should remain so. This is consistent with section 576A(2)(c) of the Act.

- e. Where an industry constitutes a distinct and separate industry within the Commission's panel structure and the industry has a distinct, clear and concise meaning/identity to the Commission, the unions, employers and those operating in the industry it should remain separate. The Full Bench adopted this submission of the union and employer parties in accepting separation of the coal mining industry from the mining industry (see paragraphs [15] – [18] of the Full Bench Decision).

*Views of the parties*

- f. The views of industry participants on whether particular industries should be or not be part of the mining industry should be given weight and where industry participants generally agree this should not be disturbed, unless exceptional circumstances exist. The Full Bench found it appropriate to give weight to the views of the parties (see paragraphs [10], [13] and [95] of the Full Bench Decision).
9. The scope provision of the MISNA has been developed consistent with these principles.

***MISNA coverage***

10. Under the proposed coverage clause, the MISNA will apply to employers that meet three requirements:
  - a. the employer must be engaged in the mining industry (as defined), recognising that an employer can be engaged in more than one industry;

- b. the employer has employees engaged in or in connection with the mining industry as defined; and
  - c. the employees are engaged in a classification in the award.
11. The MISNA will apply to employees of such employers provided that they are engaged in or in connection with the mining industry and in a classification in the award.

Definition of the mining industry

12. AMMA proposes a definition of the mining industry that specifically identifies the minerals, metals and ores covered in the activities specified in the Award.
13. The activities covered are:
- a. extraction which includes land-based clearing, preparatory works and rehabilitation during the life of a mine (including mine pre-strip work, which is typically an activity performed in mining);
  - b. handling, processing, smelting and refining;
  - c. transportation, handling and loading on or in the vicinity of a lease or tenement; and
  - d. rail, ship-loading and port works where the plant or infrastructure is owned by a mine operator or a related company. This would include things like line boats, navigation aides, mooring activities etc, where conducted by a mine operator or related company. Contrary to the characterisation of this activity in paragraph 3.3 of the CFMEU submission, AMMA's position is confined to infrastructure owned by the

mining operator or a related company and can be distinguished from the position in the coal mining industry on this basis.

14. In keeping with existing award coverage and practice, AMMA also includes:
  - a. the servicing and maintaining of mining plant and equipment (including mechanical, electrical, fabricating etc); and
  - b. temporary labour services used to perform mining activities (including labour hire providers)

where that work is done by employees principally engaged to work at any of the locations where the primary mining activities in paragraph 13 are being carried out.

15. This means mechanical and maintenance contractors and labour hire employees would be covered by the Award to the extent that the work is performed in the mining industry, even where the employer might engage other employees in or in connection with other industries. However, it would not cover contractors/employees who are not principally employed to perform work at a location where mining activities are taking place. (For example, contractors/employees who only provide work in the mining industry periodically, say, employees of an electrical contractor who on any given day might do electrical repairs or maintenance at a mine, at the school hall, at the shopping centre, etc). The result is major project construction, shut down/turn-around maintenance by metals, building or civil construction personnel would not be covered by MISNA.
16. This approach reflects the modern reality of the mining industry that mining activities are performed not just by mine operators but also contractors who have

specialist businesses or parts of their businesses that are dedicated to the mining industry and use employees who are principally employed in the mining industry. It is appropriate that employees of such contractors be regulated by the MISNA to the extent that they operate in the mining industry in this way.

17. By contrast, as is the case now, ad hoc or periodic contractors are appropriately regulated by other arrangements, in the metals industry, electrical contracting industries or construction industries. This respects the work that has been traditionally regulated by awards applicable to these industries where they interact with the mining industry.
18. It also reflects the position that employees of temporary labour providers should take on the award regulation applicable to the industry in which they are working.

*Specific exclusions of industries and occupations*

19. Based on the coverage principles set out above, there are various industries and occupations that AMMA considers should be expressly excluded from the mining industry.
20. These industries that should be excluded are:
  - a. aluminium;
  - b. salt;
  - c. black coal mining;
  - d. steel making (including pig iron);
  - e. the quarrying, sand and general building materials industry; and
  - f. exploration and drilling industry.

21. Overlap between these separate industries and the MISNA will be minimal and to include the distinct industry needs of those industries would require unnecessary modification of the MISNA. The rationale for the exclusion of these industries is explained more fully in Appendix 2 - Coverage comparisons and rationale for exclusions.
22. The occupations that should be expressly excluded are:
  - a. catering, accommodation, cleaning of accommodation and offices and incidental services, including town services (unless employed by mine operator);
  - b. clerical, administrative, information technology, managerial, professional engineers and securities and geologists;
  - c. security services (unless employed by mine operator); and
  - d. mechanical, electrical fabricating and engineering employees who would be in the mining industry sporadically.
23. AMMA considers it is not appropriate for these occupations to be regulated by the MISNA. They would be better regulated by modern awards that are aligned to the particular work performed (or alternatively, to the extent that this kind of work has been historically award covered by the proposed "catch-all" award for employees not covered elsewhere).
24. The rationale for the exclusions of these occupations is explained more fully in Appendix 2 - Coverage comparisons and rationale for exclusions.

Other specific exclusions

25. Paragraph 2 of the Request makes it clear that high-income employees will be excluded from the scope of modern awards. AMMA submits that this exclusion should be clear on the face of each modern award. It should refer to a legislative exclusion to be included in the substantive reform legislation. Accordingly, the drafting proposed for the exclusion is subject to review when the legislation is published.
26. Similarly, it should be clear that the award does not apply to employees who perform work that has been historically award free, consistent with current policy. This is also desirable given need for interaction with the modern award created under paragraph 4A of the Request for employees not otherwise regulated by a modern award.
27. Section 576V(3) states that a modern award must be expressed not to bind employers bound by enterprise awards in respect of employees to whom the award applies. The draft MISNA does this.
28. Finally, AMMA has also proposed the exclusion of the County of Yancowinna (Broken Hill). Mining operations in this region have historically been regulated discretely and are expressly excluded from the scope of the common rule award that would otherwise apply. Based on the information presently available to AMMA, all current mining operations in the County of Yancowinna are regulated by Preserved State Agreements. AMMA submits that it is not appropriate to extend the coverage of relevant existing awards to include a region that is presently not covered by these award.

***Other proposals***

29. AMMA has been provided with draft coverage clauses by the AWU and the CFMEU.
30. A comparative table of the respective positions of the parties on coverage is included in Appendix 2. For the reasons set out in Appendix 2, the coverage clauses proposed by the AWU and CFMEU are not appropriate for a modern award for the mining industry. The AMMA approach should be preferred.
31. Finally, scope is a crucial issue in determining the appropriate content of the MISNA and the safety net of minimum terms and conditions for the industry to be covered. Should the scope provision alter, it may be necessary to revisit the content of the MISNA.

**APPROACH TO DEVELOPING SAFETY NET CONTENT**

32. The development of safety net content for modern awards involves two phases:
  - a. the establishment of a new safety net of minimum terms and conditions of employment appropriate for the mining industry; and
  - b. transitional arrangements where the new safety net established by modern awards is different from the terms and conditions in existing awards and NAPSAs.
33. Both these tasks must be undertaken having regard to the requirements of the Act and the Request.

***Principles for the new safety net***

34. The mining industry does not have a principal federal award to provide a starting point for drafting new award content.<sup>1</sup> Existing award regulation of the industry is fragmented.<sup>2</sup> It is predominantly constituted by common rule NAPSA's and enterprise awards (both federal and NAPSA's). Enterprise award content has not been set having regard to the circumstances of the industry as a whole. As a result, this content does not generally provide an appropriate guide for safety net content for an industry award.
35. Accordingly, the following principles should guide the development of award content for the MISNA:
- a. Current work arrangements and practices must not be adversely affected or altered as a result of the making of the new award. The new safety net should reflect and accommodate the current flexible work practices operating in the industry and its needs for the future. The safety net of minimum terms and conditions that prevail under existing awards and NAPSA's should not be assumed to constitute an appropriate safety net for a modern award moving forward.
  - b. The list of relevant awards published by the Commission is a starting point only;
  - c. From this list, the following instruments should be excluded from consideration:

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<sup>1</sup> Paragraph 11 of the Statement issued by the President on 29 April 2008 indicates that the principal federal award will be the starting point for drafting the modern award. It acknowledges that wage rates derived from State award should be taken into account and terms from State awards may be relevant.

<sup>2</sup> See AMMA submission dated 30 May 2008 (pp.11-12); decision of Full Bench [2008] AIRCFB 550 (20 June 2008), paras 43 - 51.

- i. awards that fall outside the scope of the proposed MISNA; and
    - ii. enterprise awards (both federal and NAPSA's), except to the extent mentioned in paragraph (e) below.
  - d. The remaining awards are common rule NAPSA's that apply to the scope of work proposed to be covered by MISNA in the various states (**base awards**). The list of relevant base awards was provided to the Commission in the letter from AMMA to Harrison SDP dated 21 July 2008.
  - e. Base awards provide an initial guide for developing award content for the new safety net (as they applied at the time of the making of the MISNA and to the extent that they deal with allowable award matters);
  - f. Base award content must be reviewed having regard to existing flexibilities and work practices in the industry (including practises in those parts of the industry which have not been regulated by awards but as a result of the award modernisation process will be embraced by the modern mining award) to ensure that it reflects the current and future needs of the industry. Enterprise award content may be relevant to this review process. The MISNA should not adversely impact the ability of workplace arrangements at current operations to continue post 1 January 2010.
  - g. Minimum terms and conditions should then be identified to establish a true safety net for matters to be included in the modern award.
36. The award content for each clause of the MISNA is based on these principles as explained in paragraphs 38 to 147 below.

***Transitional arrangements***

37. Transitional arrangements are dealt with in paragraphs 100 to 133 below.

**REVIEW OF PROPOSED MISNA CONTENT**

38. The rationale for the content of the proposed MISNA is set out below.

***Clause 1 - Award Title***

39. The proposed award title recognises the safety net function of the MISNA in the award system and distinguishes it from enterprise arrangements. It is consistent with the terminology used by the Commission.

***Clause 2 – Table of contents***

40. AMMA has adopted the form proposed by the drafting guide.

***Clause 3 - Coverage***

41. The submissions concerning the scope of the mining industry and coverage is set out in paragraphs 8 to 31 above.
42. Consistent with the drafting guide, classification descriptors, transitional arrangements and the parties bound by the award are identified separately in schedules to the MISNA.

***Clause 4 - Date the Award Starts***

43. This clause reflects the form proposed by the drafting guide. It will need to be settled according to the Commission's general approach.

***Clause 5 Definitions***

44. This Clause provides the definitions of terms used in the award. Consistent definitions have been used, unless industry specific detail is required.

