

In the
AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
Friday 30 May 2008 in Perth
AM 2008/1

Supplementary Submission
by the
Australian Mines and Metals Association on
Award Modernisation
30 May 2008

1. This supplementary submission is to read in conjunction with the AMMA Submission by the Australian Mines and Metals Association on Award Modernisation which was referred to in its submission to the Commission on Monday 26 May 2008 in Melbourne and as amended on 30 May 2008 (**First Submission**).
2. AMMA relies upon both submissions in support of its position on the preliminary matters for consultation set out in the Statement by the President dated 29 April 2008 and formally seeks to tender them.
3. The First Submission was directed to 3 key areas;
 - a. That the Mining industry (as defined by the awards contained in the Commissions panel list excluding enterprise awards) should be included as a priority industry;
 - b. In respect of the content of the award flexibility clause we express a preference for an award flexibility clause which generally gives effect to the ACCI/AIG model clause; and
 - c. An endorsement of the Commission's timetable.

4. This Supplementary Submission provides further detail on the following matters:
 - a. Further detail concerning AMMA's request that the Mining Industry be included on the priority list of awards based on statements made to the Commission to date, including a response to the matters raised by the Australian Worker's Union (AWU) in its submissions to the Commission on 28 May 2008;
 - b. The form of the draft model of flexibility clause, including recommended amendments, and how agreements made under this clause should operate in practice; and
 - c. AMMA's preparedness to meet the draft timetable proposed by the commission and to commit sufficient resources to ensure that this occurs for the Mining Industry and to encourage other industrial parties to do the same.

According Priority Award Status to the Mining Industry

5. We note that the President at paragraph PN161 of the transcript has confirmed our view that the Commission will be guided in the performance of its function by the relevant provisions of the Workplace Relations Act 1996 and the Award Modernisation Request.
6. Part 10A of the Workplace Relations Act 1996 regulate the Commission's activities with respect to Award modernisation.
7. AMMA contends that at this point in the Award Modernisation process the key provisions in Part 10A are as follows;
 - a. That the Commission perform its role in accord with the objects contained in s.576B

- b. That the Commission must conduct the process in accordance with the award modernisation request in order to meet its obligation under s.576C(1)(t).
 - c. That the Commission provide direction to the Full Bench as required in s.576E.
- 8. The various requirements of the Workplace Relations Act concerning the content of modern awards, who will be bound by them and the technical matters contained in the balance of Part 10A are not yet relevant.
- 9. The Award Modernisation Request at paragraph 20 requires the Commission to identify a list of priority industries or occupations for modernisation.
- 10. The Commission is required to have regard to industries and occupations with high numbers of AWAs and NAPSA's.
- 11. The Award Modernisation Request does not attach any importance to the;
 - a. The existence of over-award payments;
 - b. The levels of bargaining in an industry or occupation;
 - c. The number of enterprise awards; or
 - d. The level of interest of employers, employees or their representatives in participating in the award modernisation process.
- 12. AMMA has noted the President's request that parties focus on the requirements of the Act and the Award Modernisation Request and we do not propose to examine extraneous considerations in detail.
- 13. The factors that the legislation and the award modernisation request requires to be considered are set out in the First Submission. However,

the following matters weigh in favour of AMMA's nomination of the Mining Industry to the priority list.

The high incidence of AWAs

14. AMMA submits that the Commission could take judicial notice that AWAs (particularly in the State of Western Australia) were the primary means of engagement of employees in the mining industry prior to the recent amendments of the Workplace Relations Act 1996. This is a notorious fact.
15. This position is supported by research conducted by the Minerals Council of Australia which revealed that as at June 2007, 50.3% of the Australian metals and minerals industry were employed under an AWA.¹
16. It should be noted that definition of the metals and minerals industry used by the Minerals Council of Australia included the coal industry. AMMA submits that the presentation by the ACTU of Mining Industry data concerning AWAs and NAPSAs as being representative of the coal industry has the potential to mislead the Commission. Indeed, Ms Gray from the CFMEU submitted on Wednesday that the level of AWAs in coal is *'down to 2 or 3 per cent'* [PN1458].
17. The exclusion of the coal sector from the MCA research has the effect of increasing the percentage incidence of AWAs in the Mining Industry. This position is supported by data compiled using ABS and Workplace Authority data, revealing that in the metal ore industry (which is a substantial part of the Mining Industry as defined by the Mining Industry panel awards) 63% of employees have their remuneration set by AWAs.

¹ Minerals Council of Australia, Economic Activity Brief for the period ending June 2007.

18. This position is further supported by Workplace Authority data which indicates that the mining industry (including coal) lodged 37,516 AWAs between 27 March 2006 and end September 2007.
19. By industry, the Mining Industry was the third highest lodger of AWAs in the WorkChoices period behind the retail and hospitality industry, both of whom appear on the draft priority award list.
20. AMMA contends that based on the incidence of AWAs alone, the requirements of the award modernisation request dictate that the Commission should include the Mining Industry in the priority list of industries/occupations.

The high incidence of NAPSA's

21. The second criteria is the incidence of NAPSA's
22. A review of the awards contained in the Commission's Mining Industry panel reveals 31 NAPSA's. A list is attached to our original submission.
23. 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), Rubber, Plastic and Cablemaking Industry (6 NAPSA's) and the Coal Industry (8 NAPSA's identified).
24. AMMA contends that the Commission should also look at the coverage of each NAPSA. In the mining industry the NAPSA's have extensive coverage, for example the NAPSA in the Western Australia Nickel Industry has application to approximately 12,000 employees.

Award flexibility arrangements

25. For the reasons set out in the First Submission, AMMA generally supports the draft model flexibility clause proposed by ACCI. It also generally supports the amendments to this clause proposed by BHP Billiton Limited in its submission dated 28 May 2008.

26. AMMA contends that the draft award flexibility clause proposed by the ACCI better fulfils the policy requirements than the ACTU proposal on the basis that:

- a. it: 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.

27. However, AMMA proposes three amendments to the model clause as follows:

- a. the no disadvantage test should be satisfied over the life of the award flexibility agreement, not just at the point in time that the agreement is made. It is proposed to delete the words "as it applied at the date the flexibility was agreed" in paragraph 1(b)(i) and replace them with the words "over the life of the flexibility agreement".
- b. it should also be clear that individual circumstances of the employer and employee must be taken into account for the purposes of the no disadvantage test. It is proposed to insert the words "having regard to the individual circumstances of the employer and the employee" in paragraph 1(b)(i).
- c. the test should also be applied globally against all conditions of employment not just those referred to in the flexibility agreement.

- d. it is appropriate for the Commission to give guidance to the parties about the making, form, operation and termination of award flexibility agreements. It is proposed that the Commission include a model award flexibility agreement as a schedule to modern awards to achieve this aim.

28. Attached as Appendix 1 and 2 to this submission is an amended award flexibility clause and an example of the matters that AMMA considers would be appropriate to include in a flexibility agreement, as guidance for the form of a model agreement.

29. AMMA submits that these amendments are consistent with requirements of s.576A of the Act and would assist to ensure that award flexibility agreements achieve flexibility in a manner that is consistent with the safety net function of modern awards. AMMA's detailed submissions in support of these amendments are set out below.

No disadvantage test should operate over the life of a flexibility agreement

30. AMMA proposes that the no disadvantage test proposed by ACCI should operate over the life of the agreed flexibility rather than only at the point in time when the flexibility is initially agreed.

31. This is consistent with the objective that modern awards should provide a fair safety net of minimum terms and conditions for employees.

32. If a modern award is varied during the life of a flexibility agreement, such that the agreement would not satisfy the award flexibility no disadvantage test, it is appropriate that the parties be required to reconsider the terms of that agreement, and make arrangements such that the no disadvantage test is met.

33. However, the requirement to satisfy the no disadvantage test as a result of changed circumstances must operate in a practical way such that the parties have a reasonable opportunity to identify award variations, assess their impact and to determine any changes (if necessary) to their award flexibility agreement.
34. Further, it is appropriate that the assessment of advantage/disadvantage take into account the global benefits provided over the life of the flexibility agreement. This would draw upon the familiar concepts related to absorption of over award payments.
35. Accordingly, the no disadvantage test would have a continuous operation and could be tested on an ongoing basis by the parties. This is consistent with the obligations to ensure that the award flexibility agreement does not present as a mechanism to reduce the overall safety net of terms and conditions, having regard to employees' individual circumstances and the benefits provided in total over the life of the agreement. It will also ensure public confidence that the award will be a true safety net yet provide the flexibility envisaged in the Forward with Fairness legislative amendments.

Operation of Draft Flexibility Arrangements

36. AMMA suggests that it is desirable that the Commission provide guidance to the parties about the form of award flexibility agreement that will be made under the award flexibility clause. In particular, it is submitted that guidance is desirable on the following matters:
- a. the form and operation of flexibility agreements
 - b. the consequences of the award flexibility clause being breached;
and
 - c. the content of flexibility agreements and their relationship with employment contracts and other industrial arrangements.

37. AMMA submits that the appropriate way for the Commission to give guidance upon these matters is for it to make a model award flexibility agreement and to include this as a schedule in modern awards.

38. This will provide certainty to both employers and employees about the form of the agreement, the circumstances in which it operates and may be terminated, the award terms affected, and the agreed terms that modify or vary their application. It is important that these matters are dealt with adequately by the parties.

(a) Form of flexibility agreement

39. The example flexibility agreement set out in Annexure B provides an example of the form of agreement that AMMA considers may be appropriate to give effect to award flexibility agreements and illustrates the types of content that might be included in a model agreement.

(b) Compliance and breach issues

40. AMMA supports the submission of BHP Billiton concerning the approach that should be taken to the enforcement of award flexibility agreements.

41. An award flexibility agreement is not properly characterised as a term of an award. Rather, it is a mechanism to modify or vary the application of particular award terms.

42. Accordingly, it is not appropriate for a breach of an award flexibility agreement to be treated as a breach of a term of a modern award. Rather, it should be a defence to an alleged breach of award for an employer to

demonstrate that an award flexibility agreement has been entered into, and that it has been complied with.

43. AMMA contends that in the event that the award flexibility agreement has not been properly made (e.g as a result of duress) or the agreement has been breached, or the agreement has failed the no disadvantage test and the parties have not been able to resolve the breach, then the aggrieved party should have access to the remedies which would be available as if the purportedly varied award terms applied (in case of an agreement which had not been properly made) or as if the modified terms were contained in the award (in the case of a valid agreement).

(c) Content and relationship with other employment instruments

44. An award flexibility agreement should only deal with the modification or variation of award terms.

45. It should not be permitted to deal with other aspects of the employment relationship, which are properly dealt with through enterprise bargaining or individual contracts of employment. It is desirable that both the draft flexibility clause, and the form of award flexibility agreements make it clear that the effect of the award flexibility agreement is confined to matters that can properly be dealt with in awards.

46. Accordingly, award flexibility agreements must be confined to allowable award matters and should not deal with any other such matters.

47. Further, only agreements which expressly provide that they are award flexibility agreements should fall within the scope of the clause. Other written agreements or contracts between an employer and an employee should not be capable of being treated as award flexibility agreements.

(d) Disputes

48. It is appropriate that any dispute dealing with award flexibility clause or agreement be dealt with under the disputes procedure in the award, as suggested by ACCI. The normal principles regulating the jurisdiction of the Commission should apply.

1.2 Conclusions

49. For the above reasons, AMMA submits that the process of making, evaluating and terminating award flexibility agreements would be streamlined and simplified by a form of model agreement provided in awards and the clause required that award flexibility agreement must be in the prescribed form.

50. The example award flexibility agreement is provided for consideration.

Draft Timetable and Resources Commitment

51. As foreshadowed in our earlier submission, AMMA recognises that the draft timetable for the completion of the modernisation of awards in the priority industries is ambitious.

52. However, this timetable should not be influenced by the willingness or otherwise of particular parties to commit resources. AMMA considers that the current economic circumstances of the Mining Industry, its contribution to the Australian economy and the projected level of future investment are

such that it is crucial for award modernisation to occur in this industry as a priority to give certainty and stability to current and future employees and employees who are subject to the modernised award . AMMA will commit sufficient resources to assist the Commission to ensure that the award modernisation timetable will be met.

53. AMMA encourage other industrial parties to dedicate such resources as necessary to achieve the onerous but extremely important task of award modernisation.

Australian Mines & Metals Association

30 May 2008

Appendix 1 – Amended ACCI Award Flexibility Model Clause

“X.X AWARD FLEXIBILITY

X.X.1 Award Flexibility Arrangements

X.X.1(a) *This clause enables an employer and an employee to agree on arrangements to meet the genuine individual needs of the employer and the employee.*

X.X.1(b) *An employee and employer may agree, in writing, to vary or modify the application of one or more of the terms of this award subject to:*

- (i) The employee not being disadvantaged in his or her employment under the award when considered as a whole, over the life of the flexibility arrangement and having regard to the individual circumstances of the employer and employee.*
- (ii) Genuine agreement being reached between the employer and employee without coercion or duress; and*
- (iii) The arrangement being consistent with the employer’s responsibility to provide a safe and healthy work environment, including the provision of adequate breaks.*

X.X.1(c) *An employer and employee may agree to vary or modify the application of award terms. The agreement in writing under this clause must be in the form set out in Schedule [x] of this Award.*

X.X.1(d) *Where an arrangement is entered into under this clause, the agreed terms apply in place of the award terms.*

X.X.1(e) *An agreement is only taken to disadvantage an employee if:*

- (i) application of the arrangement would result in the reduction of any entitlements and protections under a modern award; and*
- (ii) in the context of any modern award considered as a whole, and having regard to any guidelines published by Fair Work Australia, the reduction is contrary to the public interest.*

An arrangement is taken not to disadvantage an employee if it is within the terms of a private ruling given by Fair Work Australia declaring that it does not disadvantage the employee.

X.X.2 Record Keeping

A copy of the agreed award flexibility arrangement must be given to the employee and retained by the employer.

X.X.3 Disputes

A dispute arising from the operation of an agreed flexibility arrangement entered into under this clause may be dealt with under the dispute settlement procedure set out in cl.X of this award.

X.X.4 Examples

Examples of matters which may be dealt with in an award flexibility arrangement, include, but are not limited to:

- *Rostering and hours of work;*
- *All up rates of pay;*
- *Provisions that certain award conditions may not apply where an employee is paid above a fixed percentage; and*
- *An arrangement to allow an employee to start and finish work early to allow children to be collected from school without the employer paying additional penalty rates for the early start.”*

Appendix 2 – Example Award Flexibility Agreement

Example Award Flexibility Agreement

1. This is an award flexibility agreement (**Agreement**) made between [*insert name of employer*] (**Employer**) and [*insert name of employee*] (**Employee**) under Clause [XX] of the Mining Industry Award 2008 (**Award**).

Period of Operation

2. This Agreement shall commence on [*insert date*] and operates until:
 - a. [*insert date if specific date is agreed or delete*];
 - b. it is terminated in accordance with clause 3; or
 - c. it is replaced by a new agreement.

Termination of the Agreement

3. The Employer or Employee may terminate this agreement by providing [*insert notice period*] written notice, unless both parties agree in writing to a lesser period.

Application of Award terms

4. This Agreement varies or modifies the application of the terms of the Award in column 1 (**Award Terms**) in the manner set out in column 2 (**Agreed Terms**) of the table below:

Award Term(s)	Agreed Term(s)
[<i>insert term of Award</i>]	[<i>insert variation or modification of the application of the Award term.</i>] <i>Possible examples are listed below</i>
Clause [XX] - Annual Leave	Upon request by the employee and with the consent of the employer, annual leave may be taken at half pay and the period of the leave doubled. The other provisions of clause [XX] remain unchanged.

5. During the period of operation of this Agreement, the Agreed Terms apply in place of the Award Terms.

Application of No Disadvantage Test

6. The parties agree that, based on their individual circumstances, the following features of this Agreement should be taken into account for the purposes of the Award Flexibility No Disadvantage Test in clause [XX] of the Award:
 - a. *[Insert relevant qualitative considerations, both monetary and non-monetary. Possible Examples are listed below:*
 - i. The actual wages and conditions provided to the Employee in the course of the employment, which exceed the minimum rates and conditions provided under the Award;
 - ii. Employee may take a more extended period of leave]
7. If the Award is varied at any time during the operation of this Agreement, the operation of this Agreement may be reviewed on the request of either party.

Dispute Resolution

8. Any dispute concerning the operation of this Agreement shall be dealt with in accordance with the dispute resolution procedure contained in the Award.

Signature	Date	Signature	Date
Name of employee		Name of authorised officer of the employer	