National Employment Standards Exposure Draft Submission

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Executive Summary

In 2006/7 the resources sector contributed $106.47 billion to the Australian economy representing 77% of Australian commodity exports and 49.3% of Australia's total exports. Over 500,000 persons are engaged in producing this wealth, 138,000 of them directly at mining operations. The average wage for a mining industry employee is $99,994.00 per annum.

The move away from the one size fits all, lowest common denominator award system to an enterprise-focused, productivity-driven system of collective and individual bargaining has allowed greater flexibility, and higher rewards in the resources sector. This has been accompanied by lower industrial disputation, higher levels of employment, much increased output and continued high investor confidence.

The Rudd Government objective of increasing the protection offered to vulnerable employees without stifling the flexibility and productivity of key sectors such as the resources sector is a direction supported by AMMA. The content of the National Employment Standards and the level of flexibility afforded to customise the operation of the standards is a key component of this process.

In the period between 1904 to 1996, the minimum standards of federally regulated employees were prescribed by a system of awards accompanied by State legislation in the areas including sick leave, long service leave and in some cases public holidays. The State systems operated in a similar fashion with the exception that Awards operated on a common rule basis. Employees who were not covered by State or Federal Awards were not protected by the Award system but did have the benefit State legislated minima such as the leave entitlements described above.

In the 1990's Victoria and Western Australia provided minimum legislated conditions at a State level.

On 26 March 2006, the WorkChoices amendments extended the Federal system to cover all corporations and put in place legislated minima that applied to all employees regardless of award coverage, income level or seniority. In short, all employees of corporations (and persons employed in the Territories and Victoria) from the cleaner to the Chief Executive Officer were subject to the legislated minimum conditions.

The ALP Forward with Fairness implementation plan provides for the introduction of 10 National Employment Standards (excluding a system of minimum wages) that will apply to corporations. All AMMA members are constitutional corporations.

Like the WorkChoices minimum conditions, the National Employment Standards will impact on the employment arrangements of all persons engaged by corporations in the resources sector.

AMMA has long supported the introduction of a range of minimum standards which have protected employees yet provided flexibility to allow arrangements to be customized to meet the unique needs of the resources sector.

The majority of persons employed in the resources sector work in remote locations that operate on a continuous basis every day of the year. The most common shift is 12 hours long and it is estimated that 95% of resource sector employees work rostered overtime in addition to the 38 hour week. In the metalliferous mining sector even time rosters (e.g. one week on, one week off) and 2:1 rosters (two weeks on, one week off) are common; in the maritime sector four week on, four week off rosters are common; and in the offshore production sector the Norwegian roster (where employees work 3 weeks on, 3 weeks off, 3 weeks on and six weeks off) is the norm.

These working arrangements are a long way from the Monday to Friday 7.6 hour day which might be worked in an office in Canberra.

The legislated minimum standards should be set at a level designed to secure appropriate minimum entitlements (which is not an issue in the resources sector) and also provide sufficient flexibility to allow the resources sector to accommodate existing flexible working arrangements.

This is not to say that the WorkChoices minimum conditions were not without fault. There are lessons to be learnt from the WorkChoices experience. The initial definition of nominal hours for annual leave purposes was flawed and required subsequent modification so that overtime was not paid whilst annual leave was taken.

Other flaws in WorkChoices that was not addressed was the inability of an employee and an employer to formally agree on the working of regular overtime, and the inability to incorporate annual leave into rosters where the employee spends more time away than at work over the year.

The authors of the proposed National Employment Standards have succeeded in crafting the minimum standards in a compact and easily understood style. This should be retained.

However AMMA has concerns with the content of the Standards and access to flexibility, particularly for employees who do not have their terms and conditions of employment prescribed by Awards. This represents the majority of the resources sector and includes Award free persons, high income earners, managers and supervisors, and persons covered by Workplace Agreements which exclude Awards.

This submission details our concerns in the following areas;

- Clarification of the capacity for non-Award employees (including high income earners, manager and supervisors, and persons covered by workplace agreements) to access flexibilities in the application of the Standard;
- The definition of ‘high income earner’;
- The lack of flexibility within the Standards in the areas of:

    - Averaging of hours of work (e.g. over a roster cycle or on an annual basis);
    - Agreeing to work additional hours (e.g. a rostered average 56 hour week such as the 2:1 roster worked on remote sites);
    - Taking of annual leave (e.g. deeming leave to be taken under the Norwegian roster or requiring excess leave to be taken);
    - Rate of payment of annual leave (e.g. double the leave at half pay);
    - Cashing out of annual leave by agreement;
    - Variation of long service leave arrangements (e.g. cashing out by agreement);
    - The capacity for an employee and an employer to agree to reduce the period of notice.
- The content of the standards in respect of:
    - Recognition of existing levels of flexibility;
    - Notice period for extended parental leave;
    - Provisions regarding 'safe jobs' prior to the taking of parental leave and the inability to require the employee to use their leave entitlements if a safe job is not available;
    - Evidential requirements for personal leave/carers leave;
    - Level of notice to be given by an employee;
    - Makeup pay provisions for jury service and the resulting disproportionate contribution to the costs of the administration of justice by small to medium enterprises;
    - The interaction of the public holiday standard with State laws and the potential for substitute days to operate cumulatively with the actual public holiday;
    - The removal of the traditional redundancy pay exemption for employees who lose their job as a result of the 'customary and usual turnover of labour';
    - The ability to require work on public holidays where such work forms part of an agreed roster;
    - The recognition of public holidays compensation contained in a salary for the purposes of determining if the requirement to work on a public holiday was unreasonable;
    - The recognition of the ability to average wages over a period of up to a year, particularly where annualised salaries are in place.
- The capacity for Awards to 'build upon the standards', and thus facilitate a return to the old compulsory arbitration system;
- The requirement for the employer to provide information statements to employees.

The need to protect the minimum entitlements of employees should be balanced against the need for flexibility, particularly where that flexibility has been available for a long period and has been utilised without disadvantaging employees. Such is the case in the resources sector where record contributions to Australian export revenue are matched by record wages being paid to those employees who contribute to the success of our sector.

The National Employment Standards must be flexible enough to allow the resource sector to build on our success.

About AMMA

AMMA is the national employer association for the mining, oil and gas and associated processing and service industries. It 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.

AMMA 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

AMMA represents all major minerals, coal and hydrocarbons producers as well as significant numbers of construction and maintenance employers in the resources sector. AMMA is uniquely able to articulate the workplace relations needs of the resources sector.

Resources Sector Profile

The resources sector was forecast to contribute minerals and energy exports in the order of $108 billion in the last 12 months.[1] This represents approximately two thirds of Australia's total commodity export earnings. In 2007/08 this contribution is forecast to increase to $115 billion.[2]

In 1996 the mining industry employed just 56,529 employees; today it directly employs 138,400 employees.[3] This represents a 144% increase in employment compared to the all industry increase in the order of 25 per cent. Approximately 553,000 employees are indirectly employed as a result of activity in the mining sector.[4]

In the hard rock mining sector, the level of union membership is 11 per cent. This is significantly lower than the average level of unionisation in the private sector of 15 per cent.[5]

Industrial disputation 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.[6]

The average total earnings per week in the resources sector has increased from $1153.70 in February 1996 to $1917.80 in November 2007, almost $100,000 per annum. This is 65% higher than the all industry average.[7]

Despite the high levels of exports the resources sector is not sitting on its laurels. 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.[8]

Some of the mining construction projects under consideration or construction include:[9]

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[1] ABARE, *Australian Commodities*, Vol 14, 4, December Quarter 2007.
[2] ABARE, *Australian Commodities*, Vol 15, 1, March Quarter 2007
[3] Australian Bureau of Statistics, *Australian Labour Market Statistics*, Cat. No. 6105.0, Jan 2008.
[4] Based on a 1:4 ratio.
[5] Australian Bureau of Statistics *Employee earnings, Benefits and Trade Union Membership*, January 2007 (6310.0) ABS, Canberra.
[6] Australian Bureau of Statistics, *Industrial Disputes Australia* September 2007, (6321.0.55.001)
[7] Australian Bureau of Statistics, *Average Weekly Earnings*, November 2007 (6302.0)
[8] Total calculated using the ABARE Mining and Energy table. ABARE Economics, *ABARE Major Minerals and Energy Projects*, April 2007.
[9] ABARE, *Mineral and Energy: Major Development Projects*, April 2007

- Woodside's Pluto Gas Field Burrup LNG Park, involving capital expenditure of $16.2 billion. Pluto is expected to boost the Western Australian economy by at least $28.6 billion over the life of the project;
- Xstrata/Nippon Steel's Bulga Underground Longwall black coal mine in New South Wales. This new project currently under construction has a capital expenditure of $350 million;
- Rio Tinto's Clermont open cut black coal mine in Queensland. This new project, committed to construction, has a capital expenditure of $950 million;
- Wesfarmer's Kwinana LNG plant in Western Australia with a capital expenditure of $138 million;
- SXR Uranium One's Honeymoon mine with a capital expenditure of $55 million;
- Oxiana's Prominent Hill copper mine currently under construction with a capital expenditure of $775 million;
- BHP Billiton's Olympic Dam mine expansion proposal, with a capital expenditure of $6 billion;
- Ballarat Goldfield's Ballarat East Project under construction with a capital expenditure of $120 million;
- Fortescue Metals Group's Pilbara Iron Ore Project currently under construction with a capital expenditure of $2.78 billion;
- Terramin Australia's Angas Zinc Project, currently under construction with a capital expenditure of $64 million; and
- Perilya's Flinders Zinc Project under construction with a capital expenditure of $35 million.

In addition to those specifically mentioned above, billions of dollars of additional projects have been announced since the release of the ABARE Report.

Investor confidence in the mining industry is readily apparent and there is no sign that the current high demand for Australian resources is diminishing. If anything, the high level of investment is a sign that the demand will continue for many years to come.

Given the continued high level of investment in the resources sector, it is not surprising that the resources sector wants to retain the current level of workplace flexibility.

Minimum Standards - A Historical Perspective

The regulation of a range of employment conditions has been a long held characteristic of the Australian industrial relations system, although the nature and extent of the regulation has shifted over time.

Awards

Prior to the introduction of formal agreement making in 1992, the industrial Award system put in place a range of minimum standards on an occupational or industry basis. The minimum standards could be varied by the Commission on application subject to meeting the requirements of any 'principles' determined by the Commission. Until recently, test cases seeking to increase, expand or include a new minimum standard were a predominant feature of the industrial landscape. Awards were regularly varied to insert test case provisions, including annual wage reviews.

As a result of this process general standards have developed including the provision of leave, hours of work, wages, penalty rates, overtime rates, allowances, notice of termination and severance pay. These standards also flow across industries and occupations, with some variation to the standards made to take into account differences that may exist between different industries.

The frequency of Award variations decreased as the capacity to make formal agreements was introduced. The Award system presented a rigid set of minimum conditions for employer and employees. Any deviation from the minimum standard not specifically permitted under an Award, aside from providing a more beneficial entitlement, represented a breach of the Award. For employers in the resources sector this presented a problem, for example, where they wished to average the hours of worked over a period greater than that provided by the Award which typically restricted the averaging capacity to a maximum of 4 weeks.

Some employers made enterprise Awards in order to secure the flexibility they required. Some of these enterprise Awards remain in use today.

Legislated Minimum Standards

In addition to the minimum standards set by industrial tribunals under Awards, a number of minimum standards are contained in State legislation and which, for the purpose of employers that are corporations, now form part of a range of Notional Agreement Preserving a State Awards (NAPSA).

The first jurisdiction to embrace legislated minimum standards was Western Australia. The Western Australian *Minimum Conditions of Employment Act 1993* set out minimum conditions including sick leave, carers leave, annual leave, bereavement leave, public holidays, parental leave and redundancy. These conditions apply to all workers in the State system.

In 1993, Victoria's *Employee Relations Act 1992* commenced, setting out minimum conditions of employment, including annual leave, sick leave, minimum wage rates, parental leave, and notice of termination of employment. These

minima underpinned agreements entered into under that Act. These minimum conditions were subsequently incorporated into schedule 1A of the Commonwealth *Workplace Relations Act 1996,* after Victoria referred its industrial relations powers to the Commonwealth. The conditions were limited to five: annual leave, sick leave, parental leave, notice of termination and minimum hourly rate of pay.

Historically, the States have been responsible for setting legislated minimum standards for employees employed within their State. However, the 2006 WorkChoices reforms extended the coverage of the Federal system to all constitutional corporations, displacing the State industrial relations systems.

Whilst the State standards have transitioned with employees into the Federal system under the umbrella of NAPSAs, the *Workplace Relations Act 1996* effectively regulates the minimum terms and conditions of employment of employees in Victoria, the Territories and constitutional corporations. State standards only survive if they are more beneficial than the Federal standard.

AMMA has long argued for a set of minimum legislated conditions of employment that would apply generally to all employees. In its 2005 *Position Paper on Workplace Relations Legislative Reform Options,* AMMA proposed that:

> *a set of minimum conditions of employment be legislated and where a corporation enters into an employment contract it is required to at least provide terms and conditions which are equal to the minimum conditions that would underpin a separate federal employment contract statute.*[10]

However these conditions must be limited to a core minimum. AMMA in its *Workplace Relations Policy Scorecard* highlighted that:

> *[s]etting minimum conditions beyond the core minima in order to protect employees against isolated conduct of rogue employers is overly prescriptive and reduces the capacity for the majority of employers to introduce and/or maintain flexibility in the workplace.*[11]

The WorkChoices reforms provided for minimum standards in the following areas:

- Minimum wage;
- Maximum hours of work;
- Annual leave;
- Personal, carer's and bereavement leave; and
- Parental Leave.

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[10] AMMA, 2005, *Position Paper on Workplace Relations Legislative Reform Options,* AMMA, 7 *http://www.amma.org.au/publications/AMMApaper_WRreform_March05.pdf,* at 17 March 2008.

[11] AMMA, 2007, *Workplace Relations Policy Scorecard*, http://www.amma.org.au/home/publications/ammaworkplacerelationsscorecard_24april2007.pdf at 18 March 2008.

The initial hours of work and annual leave standards contained in the 26 March 2006 WorkChoices amendments presented some difficulties for the resources sector in respect of:

1. The inability to agree on reasonable additional hours of work; and
2. The accrual of annual and personal leave based on all rostered hours worked, including rostered overtime, and
3. The requirement to pay an employee their actual rate of pay when taking annual and personal leave as opposed to the base rate of pay.

The operation of the WorkChoices minimum standards was amended in December 2006 to cap the accrual of annual and personal leave to the ordinary hours of work (38 hours per week) and to change the payment rule for annual and personal leave to reflect the base rate of pay. This returned the practical operation of those standards to the position which existed prior to the WorkChoices reforms. The inability to agree on reasonable additional hours was not addressed.

The WorkChoices minimum standards provide employers and employees with flexibilities on the implementation of the standard.

It is possible to average the hours of work over a specified period using a variety of industrial instruments. This period is open to variation to suit the individual circumstances of the employer and employee, with the limitation that it must not be longer than 12 months.

Employers had the capacity to direct an employee to take annual leave during a period where the business is shut down or where the employee has accumulated a large amount of annual leave. By making a Workplace Agreement, employees with the agreement of their employer, can cash out up to half of their annual leave and any amount of long service leave.

Agreement Making and Minimum Standards

The ability to determine terms and conditions that suited individual enterprise circumstances outside the scope of the Award system first became available with the introduction of statutory agreement making under the *Industrial Relations Act 1988*. This Act and its successors created a system whereby parties could agree to terms and conditions of employment that deviated from the minimum contained in an applicable award, if, on the whole, the employee was not disadvantaged as at the date of approval of the agreement.[12]

The test applying to agreements was the No Disadvantage Test. The No Disadvantage Test survived until the commencement of WorkChoices in March 2006. Under WorkChoices, agreements were required to comply with the five legislated minimum standards set out in the amended *Workplace Relations Act 1996*, and if they failed to do so the minimum standards overrode the terms of the agreement. In addition, agreements were required to honour the 'protected' terms of relevant Awards unless the parties specifically displaced them.

[12] Prior to 1992, agreements were only approved if the Australian Industrial Relations Commission agreed that it was in the public interest.

The introduction of the Fairness Test in May 2007 changed the approval process for agreements and required the agreement to provide fair compensation to employees where it removes or modified a 'protected' Award condition.

With the commencement of the Government's *Workplace Relations Amendment (Transitioning to Forward with Fairness)* Act *2008* Collective Agreements and the new Individual Transitional Employment Agreements will continue to be bound by the current legislated minimum conditions. However, they will be subject to a new No Disadvantage Test, which is a global test against the standard and any applicable Award (and in the case of ITEAs any applicable collective agreement)

Review of the draft National Employment Standards

It is now appropriate to review the draft National Employment Standards contained in the *Discussion Paper – National Employment Standards Exposure Draft 2008* (the 'discussion paper').

The test against which the National Employment Standards ('the Standards') are to be measured is that the Standard must be 'fair to working people, flexible for business and promote productivity and economic growth for the future prosperity of our nation.'[13]

AMMA is particularly concerned to ensure that the Standards are appropriate, flexible and promote productivity.

The National Employment Standards discussion paper proposes that the National Employment Standards (NES) will:

- Commence on 1 January 2010;
- Comprise key minimum conditions applicable to all employees covered by the federal system;[14]
- Provide a set of legislated minimum entitlements that cannot be excluded or modified to the detriment of the employee; [15]
- Be provided to the Australian Industrial Relations Commission by 30 June 2008 and be included in the major industrial relations reform bill which will be tabled in Parliament later in 2008;
- Have its extent of coverage determined by a set of rules (which as at March 2008 are yet to be finalised);
- Be simple and contain only those application and machinery provisions that are essential;
- May contain industry relevant detail about NES entitlements;
- Could build upon the NES to ensure fair minimum safety net conditions in particular industries.

[13] DEWR, *Discussion Paper – National Employment Standards Exposure Draft*, Australian Government, 2008, 2.
[14] Ibid.
[15] Ibid 3.

What should be the extent of coverage of the NES?

The exposure draft contemplates rules governing the coverage of the NES. These rules could be used to restrict the application of the NES in circumstances where fair working conditions exist and thus ensure that working arrangements provide for flexible and productive outcomes.

The resources sector would be a prime candidate for an exemption on this basis with the average weekly wage of $1917.80 per week ($99,994.00 p.a.) which exceeds the all industry average weekly wage by 65%.[16]

Alternatively, the rules could provide that the NES not apply to high income employees or managerial employees who, because of the nature or seniority of their role, have not been generally regulated by the industrial relations system (except by the WorkChoices legislation).

Interaction with Modern Awards

The discussion paper contemplates that modern Awards will contain machinery provisions concerning implementation of the NES in each industry. The example given concerns the capacity to average the ordinary hours of work over a period of more that a week (which the draft standard appears to be restricted to).

AMMA is not opposed to the provision of mechanisms that provide increased flexibility on the application of a base standard. However, AMMA contends that the base standard should recognise existing levels of flexibility. For example the majority of Awards already contain provisions which allow the ordinary hours of work to be averaged over a period up to 4 weeks, and some awards allow the hours to be averaged over 52 weeks.

In the metalliferous sector the most common rosters are a 12 hour shift even-time roster (with an average of 42 hours per week over the roster cycle) or a 12 hour 2:1 roster (with an average of 56 hours per week over the roster cycle). The length of the roster cycle varies depending on whether the work location is a residentially based one or fly-in-fly-out.
Common rosters in the maritime sector involve working 4 weeks on followed by 4 weeks off or 5 weeks on and 5 weeks off.

In the offshore oil and gas operations area the Norwegian roster is commonly worked, which involves 3 weeks on, 3 weeks off, 3 weeks on and 6 weeks off. This roster is inclusive of annual leave and public holidays.

It can be seen that the resources sector, particularly remote and off shore areas, do not conform to Monday to Friday, 38 hours per week, 7.6 hour day arrangements. In these cases it is not practical for an employee to opt out of work after completing 38 hours in a week. These circumstances reinforce the need to

[16] Australian Bureau of Statistics, *Average Weekly Earnings*, November 2007 (6302.0)

allow averaging of hours of work over a 12 month period and flexibility in the rostering of annual leave and working public holidays.

AMMA contends that the proposed hours of work standard is inflexible and would preclude existing arrangements in the resources sector. This would have an adverse impact on existing levels of productivity. The problem is compounded in the case of non-award covered employees who will not have access to mechanisms for flexible working arrangements at all.

Building upon the NES

The discussion paper contemplates modern Awards building on entitlements contained in the NES.[17] The Australian Industrial Relations Commission will have the capacity to build upon the NES *'if it considers it is necessary to do so in order to ensure the maintenance of a fair minimum safety net for employees covered by a modern award.'* This appears to be a return to the 1990's approach where minimum standards could be varied upon application of an Award party with the Commission empowered to arbitrate on the claim and vary the Award as it saw fit in the circumstances. The example provided in the discussion paper concerns an increase to a personal leave entitlement based on the nature of work in an industry. The capacity to build on entitlements based on the nature of work in an industry would be limitless and would undoubtedly see a return to the range of Commission Test Cases last seen in the 1990's.

This approach would likely represent a return to the centralised wage fixation system which, in 1991, Bill Kelty attributed to reducing employees capacity, willingness and confidence to put forward innovative ideas.[18]

AMMA does not believe granting the industrial parties an unfettered right to make claims to increase the NES and giving the Australian Industrial Relations Commission the power to arbitrate and grant these claims is consistent with promoting productivity and economic growth for the future prosperity of our nation.

Non-Award Employees

The discussion paper contemplates three categories of non-award employees:

- Managerial and senior employees;
- High-income employees;
- Employees in emerging industries or occupations who perform work similar to work historically covered by awards.

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[17] DEWR, *Discussion Paper – National Employment Standards Exposure Draft*, 2008, 3

[18] Kelty, Bill, *Together for Tomorrow: recognising change, repositioning the union movement, rethinking unions, recruiting new members*, ACTU Congress, September 9-13 1991, ACTU, Melbourne, 1991, In Peter Reith, MP, *Breaking the Gridlock, Discussion Paper No 1*, October 2000.

The categories detailed do not appear to embrace existing occupations or industries which have not had a history of Award coverage, and emerging occupations or industries which do not perform work similar to work historically covered by Awards.

Paragraph 38 of the discussion paper contemplates a position where employees in emerging industries or occupations who do not fall within the scope of modern Awards but perform work similar to work historically regulated by Awards could be covered by a 'catch-all' Award. Such an approach represents and expansion of the award system and appears to be inconsistent with the notion that the award system would be simplified.

Indeed under the *Workplace Relations Amendment (Transition To Forward With Fairness) Act 2008*, the capacity of the AIRC to make a modern 'catch-all' Award would appear to be constrained by Section 576G of the *Workplace Relations Act 1996* which would require an Award modernisation request.

Putting aside the proposed expansion of Award coverage, the key issue for non-award employees is access to a mechanism which allow for the NES to operate in these areas effectively. This mechanism is of particular importance to the resources sector where AMMA estimates that between 30% and 50% of persons employed in the resources sector are not bound by an Award and depending on the composition of the $100,000 salary threshold up to 35% of the resources sector could fall within the definition of high income earners.

AMMA submits two options to address non-award covered employees:

1. Provide greater flexibility in the NES; and
2. Include a schedule of flexibility provisions to the NES which will apply to all non-award employees.

The first option would have the added benefit of addressing issues which will be common to most Award covered personnel such as mechanisms to:

- Cashing out all or part of an employee's annual leave entitlement by agreement, or where they have extensive rostered hours off;
- Allowing an employer to require an employee to take leave during a shut down or where work is prevented for reasons beyond the control of the employer;
- Allowing the employer to require the employee to take annual leave where they have a large accumulation of leave;
- Allowing an employer and employee to agree on variations to the payment of leave (e.g. leave at half pay or where excess leave has accumulated, leave at double pay with an adjustment to the accrual);
- Allowing the employer to require the taking of annual leave where the personal leave entitlement has been exhausted;
- Cashing out all or some long service leave.

The second option could be used to provide additional flexibility for non-award employees who would otherwise be provided in an Award. The contents of the schedule would need to accommodate the need for flexibility in all of the industries and occupations that are Award free.

High Income Employees – The Definition

The exclusion of high income earners from the coverage of Awards and the concerns with respect to the lack of flexibility available to them under the NES also raises issues about the definition of a 'high income employee'.

The Government has previously announced in its *Forward with Fairness: Policy Implementation Plan* that employees earning above $100,000 could negotiate their terms and conditions of employment without reference to the Award.[19] The *Forward with Fairness Policy Implementation Plan* states that the threshold will be the employee's guaranteed ordinary earnings and that this will include:

> *The pay received for ordinary hours of work, guaranteed overtime and any other monetary allowances that are a guaranteed part of an employee's normal remuneration arrangements.*[20]

The calculation of the $100,000 threshold will determine how much of the resources sector will have access to Common Law Agreements that operate outside the scope of the modern Award system. These Common Law Agreements were intended to provide an alternative to the now unaccessible Australian Workplace Agreements. In order for Common Law Agreements to be a genuine alternative to AWAs, they must be readily accessible and flexible.

As of May 2006, the Australian Bureau of Statistics' *Employee Earnings and Hours* survey shows that only 35% (approximately) of resources sector employees had total cash earnings above $100,000.[21] The ordinary time total cash earnings comprise regular and recurring payments including ordinary time and overtime payments, commissions, bonuses, profit sharing schemes, taxable allowances, payment by result and all salary sacrificed.[22] However, this is wider in scope than that identified in the Government's policy document, meaning that the percentage of employees earning over $100,000 for the purpose of entering into Common Law Agreements is likely to be much lower.

What the calculation of ordinary time cash earnings and the Government's threshold does not include, but which are part of an employer's legitimate employment costs, are wages and salaries 'in kind' and what the Australian Bureau of Statistics identifies as 'employers' social contributions'.[23] These include benefits such as free accommodation and meals, private use of company motor

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[19] Australian Labor Party, *Forward with Fairness: Policy Implementation Plan*, August 2007.
[20] Ibid.
[21] Australian Bureau of Statistics, *Employee Earnings and Hours*, May 2006, Table 4, Weekly total cash earnings – Distribution of full time non-managerial adult employees, Cat No. 6306.0, Canberra. http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/6480191AC5BFCE59CA25728F0016A73E/$File/6306004.xls
[22] Australian Bureau of Statistics, *Employee Earnings and Hours*, May 2006, Cat No. 6306.0, Appendix 1 ABS conceptual framework for measures of employee remuneration, http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/6306.0Appendix1May%202006?opendocument&tabname=Notes&prodno=6306.0&issue=May%202006&num=&view=
[23] See Australian Bureau of Statistics, *Employee Earnings and Hours*, May 2006, Cat No. 6306.0, Appendix 1 ABS conceptual framework for measures of employee remuneration, http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/6306.0Appendix1May%202006?opendocument&tabname=Notes&prodno=6306.0&issue=May%202006&num=&view=

vehicles, subsidies for utilities and housing, private use of a company mobile phone, contributions to further education and employer superannuation contributions.[24]

AMMA contends that these non-cash components (including employer superannuation contributions) should form part of the calculation for the Government's $100,000 threshold. If a claim was made for an underpayment of wages, all compensation paid to an employee would be available to offset any Award entitlement – this is what the employee's true earnings are.

AMMA has previously sought a lower threshold figure of $75,000 to increase the number of employees that can access Common Law Agreements.[25] This position was rejected by the ALP. It should be noted that if the threshold were reduced to $75,000 (and the wider definition of earnings used), approximately 66.5% of resources sector employees would have access to Common Law Agreements.[26] This level of access would fall within AMMAs objective of Common Law Agreements bring accessible.

Employees on 'stand alone' Workplace Agreements

Whilst the proposed NES allows employers and employees who operate under Awards (and potentially non-award persons, high income earners and senior managers and supervisors by use of a schedule to the NES) flexibility in the operation of the Standards, no such flexibility appears to have been considered for employees covered by Workplace Agreements which exclude the operation of an Award.

The scheme of the WorkChoices legislation resulted in a workplace agreements wholly displacing relevant Award(s). The recent Transitional Amendments do not alter this position.

AMMA submits that where employment is regulated by a workplace agreement, the parties should have the same access to the flexibilities as if they were bound by an Award or had access to a schedule which provided for additional flexibility in the application of the NES.

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[24] Ibid.

[25] Kim MacDonald, No strike clauses key to any AWA substitute, miners tell Labor, West Australian, 24 August 2007.

[26] Australian Bureau of Statistics, *Employee Earnings and Hours*, May 2006, Table 4, Weekly total cash earnings – Distribution of full time non-managerial adult employees, Cat No. 6306.0, Canberra. http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/6480191AC5BFCE59CA25728F0016A73E/$File/6306004.xls

Maximum Weekly Hours

The proposed standard, like the existing legislation, fails to provide a mechanism for employers and employees to agree to work a roster which regularly exceeds 38 hours per week. Such rosters are common in the resources sector where 95% of employees work more than average of 38 hours per week and rosters over cycles of up to a year are common. AMMA submits that the standard should be varied to allow the hours (and wages) to be averaged over a period up to 12 months.

Whilst AMMA accepts that based on the current criteria it is likely that the requirement to work additional hours would be reasonable, it is by no means guaranteed that on any one occasion an employee (or a group of employees) won't seek to argue that the requirement to work additional hours was unreasonable. In one dispute in the Construction Sector, a number of employees used the capacity to refuse to work additional hours (allegedly in support of a claim for increased wages) and refused to work rostered overtime over a number of days. Retaining this provision simply continues the problems created by WorkChoices hour of work standard.

AMMA contends that an employer and an employee ought to be able to agree to the hours of work (including reasonable additional hours) under a particular roster pattern and that this agreement should attract a rebuttable presumption that the additional hours are reasonable. The presumption could be rebutted by evidence to the contrary, which would allow for short term changes in personal circumstances to be met.

Capacity to request Flexible Work Arrangements

AMMA is supportive of this standard as it provides an appropriate balance between the needs of business and the needs of employees. The type of flexibility envisioned in the discussion paper is already occurring within the resources sector. The decision not to include a review mechanism will encourage the parties to come to their own resolution.

Parental Leave and Related Entitlements

<u>Notice for seeking extended leave or cancelling leave</u>

The proposed standard creates a new legislative entitlement allowing employees taking 12 months of unpaid parental leave to request an extension for up to an additional 12 months. The proposed standard requires that the request should be submitted at least four weeks before the end of the initial period of parental leave.

AMMA contends that this notice period is not sufficient enough to allow an employer to make arrangements for a replacement employee in the changed circumstances. This is particularly the case where the current replacement

employee has been engaged for 12 months and is unable to continue beyond the initial contracted period. The notice period should be increased to a minimum of 10 weeks to provide employers sufficient time to carry out the recruitment process, particularly in the present tight labour market.

The discussion paper recognises that there are situations where an employee ceases to have responsibility for the care of a child while taking unpaid parental leave.

Taking of leave where a 'safe job' in unavailable

The proposed standard gives an employee an entitlement to be paid at the base rate of pay for ordinary hours of work when a 'safe job' is not available for an employee who is not fit to work in her current position. AMMA contends that employers that do not have a safe job available should be able to require the employee to first utilise any leave entitlements accrued to cover this period. The requirement to pay an employee on 'no safe job leave', in addition to costs associated with finding a replacement employee, results in additional costs to the employer.

Annual Leave

Under the proposed standard, an employee's request to take annual leave cannot be unreasonably refused. In addition an employee is able to take leave in blocks or single days.

Although it is acknowledged that the phrase 'unreasonably refuse' is to be given its ordinary meaning, the standard should be clarified so that the nature of a particular roster cycle is a specific consideration. For example, an employer should be able to require an employee working on a 2 weeks on 1 week off roster to take annual leave in a three week blocks to ensure that the employee returns to work at the start of the roster cycle. Annual leave that interrupts a particular roster cycle will cause issues particularly in respect to fly-in-fly-out sites where flights to site operate in conjunction with the roster cycle and non standard absences can cause employers difficulty in finding replacement employees for short periods.

AMMA submits that in cases where annual leave has been incorporated into a roster (e.g. the Norwegian roster in the oil and gas sector) an employee who has agreed to work under that roster shall be deemed to have agreed to take their annual leave in accordance with the roster.

The proposed standard also makes provision for modern Awards to provide rules for the cashing out and taking of paid annual leave. While this provides flexibility for Award covered employees, it does not provide non-award employees with the opportunity to cash out their annual leave. Under the *Workplace Relations Act 1996*, section 233 provides an entitlement to employees to cash out an amount of annual leave by formal agreement. This potentially provides all employees the opportunity to cash out annual leave, provided they are willing to enter into an agreement that facilitates it. The Standard should continue this current level of

flexibility. This is particularly relevant for resources sector employees that work a roster that already provides them with twenty-six weeks of the year off (or in some cases more).

Similarly the Standard should continue to provide the employer with the capacity to require an employee to take leave during a period of shut down or where there is an excessive accumulation of leave. This level of flexibility should apply to all employees. It is important that employers have the ability to direct leave to be taken to ensure employees are well rested and in order to reduce annual leave accruals that can be a significant financial obligation where wage levels are increasing rapidly.

There should be a capacity to implement flexible options for taking leave by agreement, such as twice the leave at half pay. The current proposal to insert this flexibility only into Awards unnecessarily excludes non-award covered employees.

Personal/Carers leave and Compassionate Leave

The discussion paper proposes that where an employee is absent beyond a short period or has repeated absences, it may be reasonable for an employer to request a medical certificate.

AMMA acknowledges that it would be burdensome on the employees and the health care system to require medical certificates for every single absence. Item 41(3) of the draft standard allows an employer to request evidence that would satisfy a 'reasonable person'.

The standard should provide more clarity as to the evidentiary requirements in order to protect integrity to personal leave. This should include medical certificates and statutory declarations. Where medical certificates are requested, the standard should specify the qualifications required of a person who is issuing medical certificates. AMMA concedes that it would be impracticable and costly to restrict this to legally qualified medical practitioners, the person issuing the certificate should have a recognised professional qualification, such as a registered health practitioner., and the certificate must be issued in respect to the area of competence in which that person is qualified

Community Service Leave

<u>Emergency Services</u>

AMMA members regularly allow employees time off to undertake emergency service activities. Many work sites within the resources sector are based in remote locations where the local communities rely on employees to volunteer their services in an emergency. Many companies within the resources sector also provide emergency services equipment in addition to releasing their employees for training and emergency activities.

Jury Service

The proposed standard requires that in respect to an employee absent on jury service, the employer will be required to 'make-up' the difference between the payment received for jury service and the employee's base rate of pay. This is a new obligation.

Jury service is a compulsory State, Territory or Commonwealth obligation to assist in the administration of justice. Whilst larger corporations are able to bear this cost, the cost is a disproportionate burden for small to medium enterprises that are less able to shoulder the cost.

AMMA contends that make-up payments for Jury service should be fully borne by the relevant State, Territory or the Commonwealth justice system.

Long Service Leave

AMMA supports the harmonisation of long service entitlements provided it does not increase employment costs.

Public Holidays

Substitution Days

The proposed standard sets out the days that will be considered to be public holidays, which appears to include substitute public holidays under a State or Territory law. This is consistent with the current legislation.

The inclusion of substitute public holidays has created a situation where, for example, where Christmas Day falls on a Saturday, the Monday is declared a substitute day. In some cases this has resulted in employees being entitlement to penalty rates in respect of both days and could potentially allow an employee to reasonably refuse to work on both of the days. AMMA contends that the definition of public holiday be clarified to ensure that an employee only obtains the benefit of the day declared as a substitution or the actual holiday, but not both.

Entitlement to be absent from employment on public holiday

Item 48 of the Standard lists factors to be considered with respect to the reasonableness of a request or refusal of a request to work a public holiday. This subsection should be amended to reflect a requirement to work a public holidays where a salary is paid that includes payment for public holidays, although it may not be expressly specified in the contract of employment. This is particularly the case with respect to employees working at continuous 24/7 operations.

Notice of Termination and Redundancy Pay

Redundancy Pay

Traditionally, a redundancy did not arise if it was the result of 'ordinary and customary turnover of employment'. AMMA contends that this exception should be retained in the standard. It is of particular relevance to the service providers in the resources sector (e.g. caterers) where contractors are unable to retain their contracts and the sole cause of the loss of employment is due to the loss of the contract. In this situation, a redundancy entitlement should not arise. This was discussed in *Stan Spiljar v Chubb Security Australia Pty Ltd*[27] where Chief Industrial Magistrate stated that:

> *It seems to me that the dismissal of the employee in question was on account of the company's loss of its contract, and cannot be said to be on other grounds. If the respondent had made a conscious commercial decision to close its participation in the security industry at Lithgow then there would be an entitlement but the evidence presented indicated that the closure of the respondent's security operation at Delta Power resulted solely from the loss of the security contract and therefore their dismissal would appear to be within "the ordinary and customary turnover of labour" as construed by the authorities.*

'Ordinary and customary turnover of labour' was a negotiated component of the model clause from the 2004 Test Case,[28] and should form part of the redundancy NES.

Another matter of concern is the potential for an employee to 'transmit' to another company, accept an offer of employment and still be entitled to a redundancy payment. Item 55 of the draft provisions, which specifies the circumstances of a transmission of business where redundancy pay does not apply, should be clarified to ensure that a 'new employer' includes another company provided it is part of a 'dual listed companies' structure. This will prevent situations where an employee may become entitled to redundancy pay despite taking up employment elsewhere within the corporate group.

Notice of Termination

In respect to the notice of termination, the standard should include the capacity to agree to a shorter period of notice. This would allow the employer and employee to agree to a lesser amount of notice if, for example, an employee wished to move on to new employment, without requiring the employer to make payment in lieu.

Notice by the employee

The standard should also require that except in respect to employees over 45 years of age and with 2 years continuous service, an employee resigning from his or her employment is to provide the same period of notice as specified in item

[27] [1999] NSWCIMC 17.
[28] *Redundancy Case*, Decision, March 2004, [Print PR032004]

50(3) of the draft provisions. Employers require sufficient notice to obtain a skilled replacement employee and 7 days notice is not sufficient for this purpose, particularly where the skills of a long serving experienced employee are about the be lost.

Fair Work Information Statement

The proposed Fair Work Information Statement should be removed from the NES. The statement could be considered to be Government propaganda, a view AMMA held in respect to the WorkChoices Fact Sheet.

If information is required to be distributed, the obligation to distribute should not be put on employers as it merely serves to add to the red tape. As an alternative the ATO could distribute the statement to employees who lodge a concessional rebate form after joining a new employer.

AMMA
Workplace Policy Division
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