

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 7 May 2009)

Award modernisation

Submission of the Australian Mines and Metals Association (AMMA)

29 May 2009 on

**AWARD MODERNISATION TRANSITIONAL ISSUES**

**INTRODUCTION**

1. This submission addresses the issue of the transition to modern awards, the need for modern awards to contain provisions to deal with transitional issues, and is made pursuant to the Commissions invitation contained in its decision of 3 April 2009.
2. AMMA first addressed the issue of the transition from the current award system to the modern award system in its submission in respect of the Mining Industry Award dated 1 August 2008 (see paragraphs 101-133 in attached Appendix A).<sup>1</sup>
3. Whilst some of the transitional issues identified by AMMA in the submission have subsequently been dealt with legislatively (e.g. treatment of enterprise NAPSA's, employee disadvantage) the submission reflects AMMA's current position. A review of the current Mining Industry Award 2010 reveals a number of changes to current

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<sup>1</sup> An extract of AMMA's 1 August 2008 which concerns transitional issue is attached for reference.

arrangements, workplace practices which presently occur across the industry in whole or part, including:

- An increase in the casual loading from 20% to 25%;
  - The loss of the concept of a roster cycle;
  - The loss of the capacity to average hours over a 52 week period;
  - The reduction of the maximum number of ordinary hours in a day from 12 to 10;
  - The removal of flexible annual leave arrangements for employees working compressed rosters in remote locations;
  - Increased (and in some cases new) allowances;
  - The removal of the capacity to make individual agreements with employees covering all award matters.
4. In addition the modern mining award contains a new classification structure which of it self requires a translation table to allow certainty for persons employed under existing awards.
  5. The award modernisation process will result in most (if not all) national system employers and employees<sup>2</sup> transiting from existing Federal Awards or preserved State instruments to the modern industry or occupational based award system.
  6. The modern award system will contain a lesser number of awards, many of which have a broader scope than the pre-existing awards that informed their development.<sup>3</sup>
  7. The modern awards upon commencement will have immediate application to national system employers who are not bound by an enterprise award or workplace agreement.
  8. The modern awards upon commencement will have an immediate impact on applications to approve workplace agreements as a result of the BOOT test.

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<sup>2</sup> As defined in s.12 of the Fair Work Act 2009

<sup>3</sup> This aim is contained in s.576B(1)d) of the Workplace Relations Act 1996

9. As a result most national system employers will need to transit from the pre-modern award arrangements to the modern award in the near future.
10. The compression of multiple awards and their varying terms and conditions into a single award will mean that the likelihood of a modern award exactly replicating all of the provisions of the pre-existing awards is remote.
11. As can be seen from a review of the current modern Mining Industry Award 2010 the transition will involve change to employee classifications, established working arrangements, wages and allowances, and will increase employer obligations compared with existing award arrangements, and potentially real wages.
12. The transition to the modern award system will present employers, employees and their representatives with challenges and AMMA contends that each modern award should contain a mechanism to deal with transitional issues on an industry (or occupational) and enterprise basis. Each case will turn on its facts.
13. AMMA has an interest in the Mining Industry Award 2010. However, since the making of that award, the award modernisation request has been varied and in accordance with the Commission's Statement of 22 May 2009, AMMA will soon lodge an application to vary the Mining Industry Award 2010 to give effect to the requirements of the revised award modernisation request. Accordingly AMMA contends that it is premature to review the transitional issues presented by the modern Mining Industry Award 2010.
14. AMMA proposes a number of general provisions for dealing with transitional issues, AMMA contends that this model if adopted will allow flexibility for most (if not all) of the transitional issues which arise.

## **The Commission's power to make transitional awards and orders**

15. In performing the necessary functions of award modernisation and the drafting of appropriate transitional provisions for modern awards, the Commission is required to have regard for the requirements of:

- a. Part 10A of the Act including Section 576M of the Act which provides a basis for awards and orders concerning transitional arrangements on the subject matters contained in s.576J and s.576K of the Workplace Relations Act 1996 (the Act), and Section 576T of the Act which allows a modern award to contain terms and conditions of employment which are determined by reference to State or Territory boundaries for an initial period of five years; and
- b. The Award Modernisation Request (the request) under s.576C(1) of the Act in which the Minister for Employment and Workplace Relations specifies the Commission may include transitional arrangements in modern awards to ensure the Commission complies with the objects and principles of award modernisation.

16. In addition, the following material provides guidance in relation to how these requirements should be met:

- a. The Decision of the Full Bench of the Commission, dated 3 April 2009, in which the Commission discussed a number of matters in the award modernisation process, including transitional provisions.<sup>4</sup>

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<sup>4</sup> [2009] AIRCFB 345

17. AMMA contends that transitional provisions are an essential part of moving from the current award system to the modern award system.
18. Some transitional issues have already been determined, for example, enterprise award and enterprise NAPSA's have been excluded from consideration at this stage, the Commission has developed model clauses to deal with the transition of more beneficial NES terms from NAPSA's. (e.g. redundancy pay in Clause 12.5 of the Mining Industry Award 2010). Another example is the treatment of interstate district allowances.
19. In its 1 August 2008 submission AMMA proposed that;
- “No salaries, rates or conditions of employment paid or applied by an employer to an employee employed (as at the commencement date of this award) will be reduced or adversely impacted as a result of the making of this award when compared to the benefits provided under the modern award as a whole.”*
20. The need for the modern award transitional arrangements to deal with this topic has been removed as a result of the legislative provision of access to take 'home pay orders' in Schedule 2 Part 3 of the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 (the T&C Bill). On the assumption that the take home pays provisions of the T&C Bill survive the scrutiny of the Senate. AMMA submits that the key focus of award modernisation transitional provisions should be development of provisions to deal with increased costs to employers and the creation of a mechanism to process such matters.
21. The Award modernisation request<sup>5</sup> details a number of objectives of the Award Modernisation process. Objective 2(c) seeks to avoid employees being disadvantaged. Objective 2(d) seeks to avoid employers being subject to increased costs. As a result of the legislative protections offered to employees AMMA contends that the phasing in of increased employer costs should be the focus of the transitional arrangements.

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<sup>5</sup> [http://www.airc.gov.au/awardmod/download/request\\_cons\\_080509.pdf](http://www.airc.gov.au/awardmod/download/request_cons_080509.pdf)

22. AMMA also contends that the transitional arrangements must also deal with non-financial disadvantage which may arise from the failure to preserve exiting workplace arrangements, practices, flexibilities or facilitative arrangements. A clause which achieves this objective was included in Clause S3.1.2 of AMMA's 1 August 2008 draft of the model Mining Industry Award.

23. AMMA's model clause provides;

*"No workplace arrangement, practice, flexibility, or facilitative arrangement applied or available to an employer (as at the commencement date of operation of this award) will be reduced, removed or adversely impacted as a result of the making of this award."*

24. AMMA recognises that the most recent amendments to the Award Modernisation Request address this issue and the existing modern Mining Industry Award 2010 will be the subject of further review.

#### **AMMA's proposed approach**

25. With respect to the treatment of matters which may result in increased costs to employers, the first matter to be determined is meant by the term 'increased costs'. AMMA contends that term be restricted to award provisions which have the effect of increasing an employers actual employment costs. These would include increased casual loading, allowances, changes to hours of work provisions that resulted in an increased cost in applying a given arrangement of working hours.

26. AMMA contends that the assessment whether a modern award has the effect of increasing costs should be determined using a global rather than a line by line basis. Increases in costs which arise in one award provision should be able to be offset by reductions in costs from another (for example a new industry allowance may replace a number of separate allowances for particular working conditions).

27. Where there is an increase in costs employers should be permitted to offset any increased entitlement from existing employee remuneration,

including non-cash benefits that are capable of having a value placed on them.

28. In its 1 August 2008 submission AMMA proposed;

*Where an employee entitlement is preserved as a result of the operation of Clause S3.1.1 [see paragraph 19 above] the employer shall be entitled to set off against the preserved entitlement any increase in entitlements provided by this award.*

*An employer shall be entitled to absorb any additional entitlement provided by this award against any over award payment.*

29. AMMA contends that where the employer would be subject to an increased cost after following the above process, the employer would be entitled to apply for a transitional award variation or order.

30. In industries where the working arrangements, allowances, classifications and wages have been transferred to the modern award or where over award payments are commonplace, it may be that only a small number of employers may be disadvantaged. In industries where the modern award represents a significant departure from existing award regulation and the pre-existing awards closely match actual wage rates there is potential for a significant portion of employers in the industry to be subject to increased costs.

31. AMMA contends that these two scenarios be addressed by the Commission providing two avenues to determine transitional arrangements.

32. The first option would be available at an industry (or occupational) level and would be available where the Commission was convinced that a majority of employers in an industry (or occupation) would be subject to net increased costs as a result of the application of the modern award. Where the Commission was so satisfied, it would be entitled to vary the award to give effect to such transitional arrangements as it determined to be appropriate within the parameters of the Act and request (i.e. a

maximum transition period of 5 years from 1 January 2010). The award so varied would apply to all persons covered by the award.

33. The second option would be upon application by a single employer. The employer would need to convince the Commission that it would be subject to a net increase in costs as a result of the application of the modern award. The powers of the Commission would be the same as in the industry approach except that the order would only apply to the enterprise. The order would be made available to the employer and employees, and be publically accessible.
34. AMMA contends that such applications should be accessible until 31 December 2010, and would transmit as if they were an award.
35. AMMA contends the decision to make or not to make a transitional order should be reviewable before a Full Bench of the Commission.
36. Where there is a dispute in relation to the transition to a modern award AMMA that does not require an application to the Commission for an award variation or order, AMMA contends that the modern award dispute resolution procedure should apply.
37. With respect to the phasing in arrangements that the Commission may determine in response to an application for transitional orders AMMA proposes that unless the circumstances of the application require otherwise:
  - a. Where the Commission determines that an existing rate is higher than the properly fixed minimum rate (and absorption into an over award payment is not possible) the difference be identified as a residual amount and absorbed from future movements in wages and/or allowances. This is consistent with the Conversion Principles in Print [Q7661];
  - b. Where workplace flexibilities or facilitative arrangements apply they should not be disturbed during the transition period;

- c. Where the transition to a new classification structure results in an increase to an existing (as at 1 January 2010) employees' rate of pay (and absorption into an over award payment is not possible) the increase will be phased in over equal instalments over the transition period. Increases that arise from minimum wage reviews will flow in their entirety.
- d. Where a modern award allowance results in an increase to an existing (as at 1 January 2010) employees' remuneration (and absorption into an over award payment is not possible) the increase will be phased in equal instalments over the transition period. Increases that arise from minimum wage reviews will flow in their entirety.

38. AMMA contends that this type of phasing in approach is consistent with the Commission's Statement of Principles that regulated the Commission's functions in establishing and maintaining the safety net prior to 27 March 2006 and the approach taken in the Award Simplification in the decision of Vice President Ross in Print [S5616]

# Appendix A

97. Clause 22 provides additional factors which must be taken into account in determining whether community service leave (other than jury service leave) is reasonable. The factors are similar to those applied in relation to flexible working arrangements and annual leave. Again, it is appropriate for the realities of remote work and work roster cycles to be expressly considered in assessing what is reasonable in the circumstances.
98. Clause 23 provides a mechanism to substitute public holidays and provides that an employer may reasonably require an employee to work on a public holiday where the employee is rostered to work on that day and is compensated appropriately.

## ***Schedule 1 - Classification structure***

99. Classification descriptors for the six level structure are intended to be implemented under the MISNA. These descriptors are based on existing descriptors for work of equivalent value in existing awards with properly fixed minimum rates. The descriptors are intended to be provided prior to the pre-drafting consultation conference for consideration of interested parties.

## ***Schedule 2 - Supported wage arrangements***

100. Consistent with the drafting guide, schedule 2 contains the model clause for supported wage arrangements for employees with disabilities.

## ***Schedule 3 - Transitional arrangements***

101. Transitional arrangements for the MISNA are set out in Schedule 3.
102. Ultimately the need for transitional arrangements will depend on the final content of the modern award(s) for the mining industry and the preferences of industry participants. As a result, the MISNA foreshadows an approach to transitional

arrangements at an in principle level only. AMMA recognises that transitional arrangements will be a matter where the Commission may seek consistency of approach across industries.

103. The potential mechanisms for transitional arrangements for the MISNA are described below, although these are intended to be subject to guidance from the Commission on its preferred approach.
104. AMMA has included the following potential transitional mechanisms in the MISNA:
  - a. savings provisions to ensure that:
    - i. salaries, rates of pay and allowances paid or applied at the time of commencement of the MISNA are not reduced or adversely impacted by the making of the MISNA; and
    - ii. workplace operational flexibilities and facilitative arrangements applied or available at the time of the commencement of the MISNA are not reduced or adversely impacted by the making of the MISNA.
  - b. preservation of certain enterprise NAPSA arrangements;
  - c. principles for the translation of existing classifications; and
  - d. phasing-in arrangements, to provide a progressive transition for particular benefits if necessary.
105. A final consideration is the potential preservation of certain enterprise NAPSA arrangements. It is appropriate that consideration be given to transitional arrangements for persons subject to enterprise NAPSA. A transitional

mechanism to do this is included in the MISNA for guidance from the Commission.

106. Ultimately the need for transitional arrangements will depend on the final content of the modern award(s) for the mining industry and the preferences of industry participants.
107. As a result, the MISNA foreshadows an approach to transitional arrangements and a principle level only. These are described below.

*Principles for transitional arrangements*

108. The new safety net established by the MISNA contains different terms and conditions in various respects from those in existing awards and NAPSAs.
109. The Request provides that the creation of modern awards is not intended to
  - a. disadvantage employees; or
  - b. increase costs for employers.
110. There is the potential for conflict between these objectives where the level of the safety net benefit established by the MISNA differs from the current safety net in existing awards and NAPSAs. Transitional arrangements must balance these objectives for both monetary and non monetary terms and conditions.
111. The proposed transitional arrangements do this in a reasonable manner, that will permit a measured transition to the MISNA.

*Savings provisions*

112. The effect of the savings provisions is to preserve rates, conditions and flexibilities that apply at the time the MISNA commences and are inconsistent with its terms.

113. Where the level of a monetary benefit set by a modern award is less than the benefit set by existing awards, arrangements must be put in place so that employees are not disadvantaged. In general terms, where an existing award provides for a higher level of benefit for employees, the most straightforward approach to a transition arrangement is to preserve that higher level of benefit until the safety net established by the modern award increases beyond it. This is the approach adopted in the MISNA.
114. Similarly, where flexibilities or facilitative arrangements apply, such arrangements should not be disturbed by the making of the MISNA.
115. These savings arrangements are reasonable and consistent with the Request and established principles.
116. The Commission has considerable past experience with such measures to introduce changes to the level of the safety net of minimum terms and conditions. Preservation arose under the minimum rates adjustment principle used by the Commission for the purpose of establishing properly fixed minimum rates for many years. For example, the principles for the conversion of awards which do not contain properly fixed minimum rates (**Conversion Principles**) established by the Full Bench in Print [Q7661]. Under the Conversion Principles, where it is found that an existing rate was higher than a properly fixed minimum rate, it was appropriate to identify the difference as a residual amount to be absorbed over time.

*Translation of classifications*

117. Under AMMA's proposal, the MISNA will be based on a simplified 6 level classification structure.

118. Other than the Common Rule Order for the Mining Industry Victoria, which has a modern award classification structure, all common rule NAPSAs have more than 6 classification levels. If the AMMA position on the proposed classification structure for the MISNA is adopted there will be a need to translate classifications under the common rule NAPSAs into the new structure
119. AMMA has developed a series of conversion tables which demonstrate how classifications will translate into the new structure. The following principles will apply to the use of the conversion tables:
- a. they will only be relevant to employees of a particular employer who are employed at the time the MISNA commences and whose employment is subject to one of the awards included in the table in Schedule 4.3 of the MISNA (ie. awards displaced by workplace agreements or collective agreements will not apply);
  - b. an **employee** satisfying these criteria and who is employed on an award will receive whichever is the higher base rate for their classification for the transition period (5 years) after which time they will be entitled to the base rate in the MISNA. The rate of pay will be phased-in over the transition period such that at the end of the 5 year transition the award base rates have equalised; and
  - c. the base rates in the conversion tables will be adjusted for movements in the Federal Minimum Wage.
120. The differences in wage rates largely arise from having multiple classifications in multiple awards as a result of state-based differences. This approach protects existing base rates where they are higher than the MISNA. However, the impact

of differential rates during the transitional period is limited to the class of employees who are actually immediately affected because their statutory entitlements are set out in a NAPSA. Statutory entitlements for employees who are employed pursuant to a workplace agreement are protected in that instrument which must, by definition, pass a no disadvantage test against the NAPSA.

Phasing-in arrangements

121. There are two circumstances where phasing in may be appropriate:
  - a. where a monetary benefit is established by a modern award that is greater than a present level of benefit under an existing award, transitional arrangement must be put in place to avoid increased costs to employers; and
  - b. where a modern award sets non monetary terms and conditions that are different from prevailing arrangement under existing awards, a transitional arrangement may be appropriate to balance the competing aims of avoiding disadvantage to employees and increased costs to employers....
122. Similarly, where the modern award safety net is higher than the previous safety net, a method of phasing in change should be implemented. While the difficulty with this course is that certain employees would not receive the full benefit of modern award safety net for the duration of the phasing in period, this must be balanced against the objective to avoid increased cost for employers. Such an approach is likely to be appropriate in the present case as it would ensure that employees are not disadvantaged in the short term and would enable any increase in costs to employers to be born over time as the safety net increases.

123. The phasing in of monetary benefits is an approach recognised by the Commission. Under the Statement of Principles that regulated the Commission's functions in establishing and maintaining the safety net prior to 27 March 2006, the Commission required that adjustments to the safety net increased actual costs should not all occur immediately. For example, Principle 8 required that where multiple safety net adjustments should generally have a twelve month gap between respective adjustments. Again, in 2005, safety-net adjustments were delayed for Victorian employers following the introduction of common rule awards in that State. Such phasing-in measures were also adopted in relation to previous exercises of award simplification, see for example the decision of Vice President Ross in Print [S5616].
124. Where particular work arrangements or conditions under an existing award are different from those set under the modern award, there is a risk that the existing arrangement will breach the terms of the modern arrangement. The most simple method of providing for transition is simply to delay the implementation of the modern award framework for a period of time or to permit the parties to continue their existing arrangements during this period and to make appropriate arrangements for transition.
125. Non-monetary benefits that may be affected in this way could include:
- a. hours of work;
  - b. breaks;
  - c. shift work and rostering;
  - d. process for the application of leave; or
  - e. other work practices.

126. Where appropriate, transitional arrangements should be implemented to ensure that changes required to rectify this situation can be managed in a practical way. The MISNA provides for such matters to be included in Schedule 3 if required.

*Preservation of enterprise NAPSAs*

127. Under current principles, federal enterprise awards are to be excluded from the award modernisation process but enterprise NAPSAs will not be. This is an arbitrary distinction. The Mining industry has historically relied heavily on state based enterprise awards. There are a large number of enterprise NAPSAs that will be disturbed by the making of the MISNA, with the potential to disrupt enterprise arrangements. This jurisdiction in which an enterprise award is made is not an appropriate basis to determine whether the arrangements should continue or not.
128. Consideration should be given to providing persons subject to enterprise NAPSAs with a period of time to consider the transition to the MISNA and for their enterprise arrangements to continue in the meantime.
129. Accordingly, AMMA has proposed a mechanism in Schedule 3 to provide the parties to enterprise NAPSAs with the opportunity for their existing arrangements to continue to apply for a transitional period of up to 5 years. It would involve the incorporation of the terms of the enterprise NAPSA by reference as a transitional measure. The terms of the MISNA would not apply to the parties to Incorporated NAPSAs during the transitional period. These arrangements would only be necessary for employers and employees whose employment was actually subject to the NAPSA at the time of the making of the MISNA. It would not be necessary for persons covered by workplace agreements.

130. The approach should also include appropriate mechanisms for persons subject to an incorporated NAPSA to move to the substantive MISNA at any time during the transitional period should they wish to do so. This transition should be encouraged and consideration should be given to various options to achieve this, including the following:
- a. by agreement of the parties;
  - b. by agreement between an employer and individual employee;
  - c. by agreement between an employer and a majority of affected employees in a work area.
131. A mechanism of this nature would permit persons subject to enterprise arrangements to develop appropriate transitional arrangements as required, without immediately disturbing established enterprise arrangements. AMMA seeks guidance from the Commission in relation to appropriate transitional arrangements for enterprise NAPSAs, including the mechanism outlined above.
132. Even if the proposed mechanism is not pursued, careful consideration will need to be given to the impact of the MISNA on existing enterprise arrangements having regard to the principles in the Request.

Disputes.

133. Affected parties should deal with disputes in relation to transitional arrangements through the disputes procedure under the MISNA.

**Schedule 4 - Parties bound**

134. The employers and employees described in the coverage provisions of the Award should be bound by it. Based on the principles as they stand, it is