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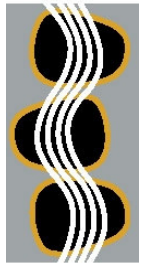
NES Exposure Draft Submissions by NSW Minerals Council

Please find attached submissions made on behalf of the NSW Minerals Council on the NES Exposure Draft.

Yours sincerely



Martin Aicken
DIRECTOR HUMAN RESOURCES



NATIONAL EMPLOYMENT STANDARDS EXPOSURE DRAFT AND DISCUSSION PAPER SUBMISSION BY NEW SOUTH WALES MINERALS COUNCIL

About the NSW Minerals Council

The NSW Minerals Council (NSWMC) represents the State's \$12.5 billion mining industry. It provides a single, united voice for mineral producers, operators and extractive material producers operating in NSW, as well as associated service providers.

NSWMC works closely with Government, other industry groups and stakeholders to foster a dynamic, efficient and sustainable mining industry in NSW.

The primary focus of NSWMC is on State issues. However, there are also a significant number of important national policy issues relevant to the NSW mining industry.

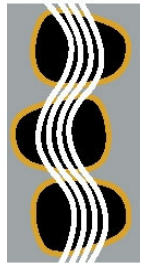
The economic contribution of the NSW minerals industry

NSW minerals production has grown to a phenomenal \$12.5 billion in 2007, of which about \$8.5 billion comes from high grade coal reserves.

Total exports from NSW were valued at \$6.8 billion, while taxes and royalties from this production is valued at over \$1.5 billion.

The total number of people directly employed in mining in NSW is 21,000, with a further 26,000 employed in minerals processing.

Due to the high salaries paid in the mining industry, a multiplier of 4.5 is applied to determine the number of jobs indirectly supported through mining – a total of about 200,000. With over 247,000 people directly or indirectly supported by the mining industry – this represents nearly 15% of the State's total workforce.



NSW Minerals Council's Role in Human Resources and Workplace Relations Issues

The NSWMC has a long tradition of representing the interests of mining companies in industrial relations and human resources matters.

Where the members of NSWMC believe that a matter is of industry significance and that coordination of common interests in such matters would be advantageous to members, those members will authorize the NSWMC to coordinate the response of the industry to a matter. This is particularly the case among the coal mining company members of the NSWMC.

The NSWMC is not a registered organization under the terms of *Workplace Relations Act 1996*.

Subject matter of this submission

This submission relates to the National Employment Standards Exposure Draft and Discussion Paper and is in response to the call for submissions that is contained in that paper.

This submission addresses broad areas of concern identified by the NSW Minerals Council with the operation of NES how the NES shall operate in concert with other industrial instruments. Those areas of concern can be identified as:

- The Interaction between Modern Awards and the NES
- The Interaction between Workplace Agreements and the NES
- Specific suggestions for improvements to the provisions of the proposed NES

The submission is made largely from the perspective of the application of the NES to the Coal Mining Industry, and the Awards of the Coal Mining Industry. That part of the submission concerning specific suggestions for improvements to the proposed NES have general application to all members of the NSWMC.

This submission is in addition to a specific submission made by the NSW Minerals Council concerning the issue of Long Service Leave and the particular Coal Mining Industry Long Service Leave arrangements that may be affected by the application of the National Employment Standards (NES) if applied as currently proposed.

Current workplace relations arrangements in the coal mining industry

The coal mining industry in NSW has three “pre-reform” federal awards that provide the safety net of employment conditions for the majority of employees. The award that applies to an employee is dependent upon the work that they perform. Those awards are:

- Coal Mining Industry (Production and Engineering) Consolidated Award 1997
- Coal Mining Industry (Supervision and Administration) Consent Award 1999, New South Wales and Tasmania
- Coal Mining Industry Consent Award (Deputies and Shotfirers) 1990

The awards are in similar terms, and provide for a common set of core conditions for all employees covered by the awards.

The awards, whilst similar in terms to each other, contain a number of unique conditions which are well in advance of community standards. For example:

- The Awards are based upon a 35 hour working week.
- Sick leave is accrued at a rate of 15 days per annum, without limitation.
- Annual Leave is 5 weeks per annum for employees, with an additional weeks leave for shiftworkers.
- Long Service Leave entitlements are based on coal mining industry service and so are portable, as employees move between employers with employees entitled to 13 weeks long service leave after 8 years of continuous coal mining industry service.

At most workplaces within the coal mining industry, a collective agreement, most often negotiated with the involvement of employee representatives, shall also apply to employees.

1. The Interaction between Modern Awards and the NES

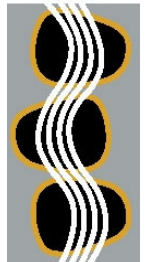
Proposed Structure and Interaction Between the National Employment Standards and Modern Awards

NSWMC supports a nationwide unitary workplace relations system, and an effective safety net of employment conditions that apply to all employees.

NSWMC is concerned about the proposed structure of the NES and Modern Awards system. We consider that the proposed structure of the NES, rather than providing for a simple user friendly safety net of employment minimum standards, actually provides a level of detail about the operation of standards that will significantly reduce the flexibility of employees and employees to be able to manage those entitlements effectively. NSWMC also considers that the proposal creates confusion about the source of employee entitlements – parts of those entitlements being in both an NES and Modern Award, the role of the AIRC becomes unclear and the proposal will make the process of agreement making more difficult.

To this end, NSWMC suggests the following approach:

- That the NES should express the entitlements of employees, but provide for only minimum guidance on the application and management of those entitlements.
- Where guidance on the application and management of those entitlements is a part of an NES, flexibility should be provided to allow variation and modification of that part of the NES, subject to the application of the “no disadvantage test” to those arrangements.



NES provisions in modern awards

The Discussion Paper deals with the interaction of the NES with modern awards at paragraphs 23 to 34. The detail of those paragraphs provides a number of examples of the operation of the NES and the Modern Award.

NSWMC note paragraph 33, which states that modern awards cannot contain provisions covered by the NES. Where an existing award provision is substantially different from the proposed NES provision, the NSWMC consider that difficulties may arise in creating a modern award provision that does not require complex drafting and cross – referencing between the NES and the modern award.

Suggested Approach

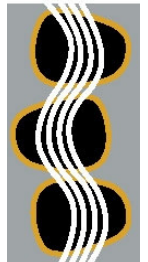
The NSWMC request that an option be available under the award modernisation process for a modern award to contain a provision already provided for in the NES where the incorporation of the provision would simplify the provisions of the modern award.

Modern awards modifying or excluding a NES entitlement

NSWMC note paragraph 31, which states that, in limited circumstances, a modern award may deal with a matter seen as “modifying or excluding” a NES entitlement. NSWMC is concerned that the application of this provision to Coal Mining Industry Awards may not prevent a “leveling up” of conditions of employment, if existing provisions of employment are considered on a line by line basis

For example; under Coal Mining Industry Awards, the employees existing entitlement to Long Service Leave is based upon service to the industry and accrues at the rate of 13 weeks leave for every 8 years of continuous industry service. However, the employee does not have an entitlement to pro-rata payment on resignation until 8 years service has been achieved.

NSWMC are concerned that the application of the NES and the award modernization process shall result in the retention of the headline provision on long service leave accrual, and that the pro – rata entitlement is adjusted if it does not align with the provisions of the NES, which may result in significant additional costs to employers.



Suggested approach

NSWMC suggest that when considering the inclusion of provisions which may be seen to modify or exclude a NES entitlement, that regard be had to the entirety of the existing entitlement, and that consideration be given to the incorporation of the all parts of that entitlement into a modern award, rather than parts of that entitlement.

Enterprise Awards

NSWMC submit that specific regard should be had to the effect of proposal for the NES and Modern Awards on those workplaces that have adopted an Enterprise Award as a form of workplace regulation.

NSWMC suggests that the application of the NES and Modern Awards to such workplaces should ensure that such workplaces do not bear additional costs or disruption to their employment arrangements.

2. The Interaction between Workplace Agreements and the NES

NSWMC note the provisions of paragraph 34 of the Discussion Paper; that NES cannot be “modified or excluded in a workplace agreement”. Workplace agreements, by their very nature, deal with flexibilities and the needs of the workplace. Many agreements deal with comprehensive arrangements for the management of leave. Such agreed arrangements shall, under the proposed NES deal directly with the provisions of the NES.

NSWMC is concerned that restricting workplace agreements from dealing with matters that may be seen to be modifying or excluding the NES shall reduce the flexibility of workplaces to reach agreements to best suit the needs of the workplace.

The Discussion Paper makes reference to agreements meeting a “Better Off Overall Test.” NSWMC has raised a separate concern with this issue. That concern is set out in section 3 of this submission.

Suggested approach

NSWMC suggest that workplace agreements be allowed to modify or exclude the NES. NSWMC further suggest that such modifications or exclusions be tested against the “better off overall test” or “no disadvantage test” to be provided for in the legislation as it will apply to all workplace agreements.

3. Specific suggestions for improvements to the provisions of the proposed NES

Title of Maximum Weekly Hours Standard

The title of the first standard is Maximum Weekly Hours (Page 6). Under the Standard, the Discussion Paper describes the requirements for the working of additional hours. It also discusses modern awards dealing with the averaging of hours over periods longer than a week. It would appear that the Standard does not deal with “maximum hours” per se.

NSWMC suggest that the standard be re-titled “Standard”, “Regular” or “Ordinary” Hours of Work.

Weekly Hours and High Income Employees

Question 3, page 9 of the Discussion Paper asks how the NES should deal with the hours of work of high income employees. NSWMC would be concerned if extensive provisions concerning the working hours of high income employees were to be included in the NES, and would recommend against such an approach being adopted.

NSWMC suggests that the remuneration received by an employee should be a factor considered in assessing the fairness of an employment arrangement overall.

Defining Shift Work in an NES.

Question 15, page 28 of the Discussion Paper asks what is the appropriate forum for defining what a “shiftworker” is. NSWMC would be concerned that an attempt to provide a definition in the Annual Leave NES may result in additional costs for employers, where the resultant definition of shiftworker is broader than the current industry standard.

NSWMC considers it appropriate for Modern Awards to define what a “shift worker” is, either by reference to a current pre reform award definition, if there is one, or by reference to existing industry arrangements.

“Reasonable Business Grounds”

Question 13, page 21 of the Discussion Paper asks what types of examples of Reasonable Business Grounds could be used to address issues arising from the application of the NES.

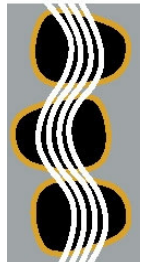
NSWMC suggest that an example reasonable business grounds could include the difficulty of readily obtaining a replacement employee. Reasons for this difficulty may include the specialist skills of the employees being required to be replaced, or the time required to appropriately train and induct an employee to undertake replacement duties.

NSWMC also suggest that the examples of “reasonable business grounds” developed and utilized by Fair Work Australia, shall have application beyond the parental leave NES in which this question appears. Regard to this general application is required when developing the examples.

Access to Paid Carers Leave

Question 27 on Page 36 of the Discussion Paper asks if there are issues arising from not placing restrictions in the NES upon the amount of paid carers leave that can be taken.

NSWMC has already suggested that workplace agreements should be allowed to include provisions that may modify or exclude the provisions of an NES subject to an applicable test. NSWMC suggests



that the example of access to paid carers leave illustrates the need to allow such an arrangement for workplace agreements.

Use of Terms in the Discussion Paper

NSWMC has identified a number of terms that have been used in the Discussion Paper. In relation to the interaction between the NES and modern awards and workplace agreements, the following terms are used:

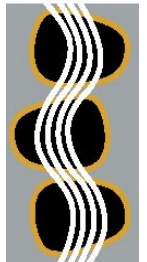
- “Bargained Away” - at Page 44, Par 241.
- “Modified or excluded” - at Page 4, Par 34.
- “Varied or excluded” - at Page 4, Par 34.

In relation to workplace agreements the Discussion Paper identifies the future operation of a test termed the, “better off overall test” - at Page 4, paragraph 34. NSWMC notes the recent reintroduction of the, “no disadvantage test” as reflected in the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008*.

NSWMC suggests that certainty about the meaning of these terms is provided as the process of developing the NES is progressed.

Further discussion

The NSWMC would welcome the opportunity for further consultation with the Government in relation to the matters referred to in this submission.



**NATIONAL EMPLOYMENT STANDARDS EXPOSURE DRAFT AND DISCUSSION PAPER
SUBMISSION BY NEW SOUTH WALES MINERALS COUNCIL
LONG SERVICE LEAVE**

This submission is being made to alert the Workplace Relations Policy Group of an unintended consequence arising from the potential application of the National Employment Standards to employees in the coal mining industry. The NSW Minerals Council is concerned that this unintended consequence will put the long service leave entitlements of employees in the Coal Mining Industry at risk, if industry stakeholders are not able to discuss options for the reform of the current industry long service leave arrangements.

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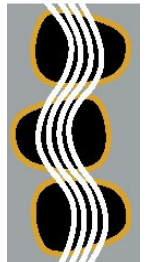
Due to the high salaries paid in the mining industry, a multiplier of 4.5 is applied to determine the number of jobs indirectly supported through mining – a total of about 200,000. With over 247,000 people directly or indirectly supported by the mining industry – this represents nearly 15% of the State's total workforce.

NSW Minerals Council's Role in Human Resources and Workplace Relations Issues

The NSWMC has a long tradition of representing the interests of mining companies in industrial relations and human resources matters.

Where the members of NSWMC believe that a matter is of industry significance and that coordination of common interests in such matters would be advantageous to members, those members will authorize the NSWMC to coordinate the response of the industry to a matter. This is particularly the case among the coal mining company members of NSWMC.

The NSWMC is not a registered organization under the terms of *Workplace Relations Act 1996*.



Subject matter of this submission

This submission relates to the National Employment Standards Exposure Draft and Discussion Paper concerning long service leave.

Current long service leave arrangements in the coal mining industry

The coal mining industry in New South Wales, Queensland, Tasmania and Western Australia presently has unique arrangements for long service leave. These unique long service leave arrangements pre-date and depart in substantial respects from more general long service leave standards and arrangements for employees in Australia. In particular:

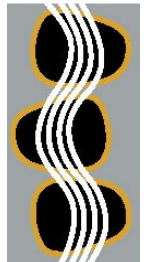
- Coal mining industry standard long service leave entitlements are prescribed in the main federal awards for the coal mining industry – although, they are replicated in many enterprise agreements. The current award standards originated in awards of the former Coal Industry Tribunal;
- Long service leave entitlements are based on coal mining industry service and so are portable, as employees move between employers;
- Employees are entitled to 13 weeks long service leave after 8 years of continuous coal mining industry service - a more generous condition than applicable in other industries under State or Territory laws;
- The coal mining industry awards contain provisions referring to the making of orders, in some circumstances, that "bridge", breaks between periods of industry service or "deem" service outside the coal mining industry to be treated as if it is service in the industry for long service leave purposes – these provisions are problematic, and if not resolved could put the entitlements of employees to long service leave at risk;
- In addition, the long service leave entitlements for defined coal mining industry employees (whether or not covered by awards) are funded under a Commonwealth statutory scheme under which employers contribute by way of a levy and are then reimbursed for long service leave payments when made (see the *Coal Mining Industry (Long Service Leave Funding) Act 1992* and cognate legislation);
- There are significant deficiencies in the operation of the current arrangements, including in the present Commonwealth statutory scheme.
- The NSWMC understand that in accordance with s.55 *Coal Mining Industry (Long Service Leave Funding) Act 1992*, a review of that Act is now required.

Under the auspices of the NSWMC and Queensland Resources Council (QRC), employers in the coal mining industry have been discussing issues concerning the current long service leave arrangements and statutory scheme over the course of 2007 and have resolved to commence a process of consultation with other industry stakeholders to bring about improvement in the present arrangements that have proper regard to the interests of all stakeholders.

The National Employment Standard Exposure Draft and Discussion Paper – long service leave aspects

The Discussion Paper deals with the proposed national employment standard for long service leave at paragraphs 233 to 242 and in the draft provision, Division 8 – *Long service leave*. The NSWMC and QRC are concerned that the national employment standard proposed in the exposure draft, especially when coupled with the draft award modernisation request, would prevent coal mining industry stakeholders and the Commonwealth Government giving proper attention to, and bringing about improvements in, the current long service leave arrangements both in respect of award provisions and the statutory scheme, until new long service leave standards have been developed, and potentially even after that time.

The present view of the NSWMC and QRC is that improvements are both necessary and desirable in the interests of industry stakeholders and currently appropriate having regard to the purpose and



objectives of national employment standards and modernised awards – as reflected in the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008*.

Suggested approach

The NSWMC and QRC request that the national employment standards and award modernisation request provide a suitable exception in respect of long service leave arrangements in the coal mining industry.

Such an exception would allow:

- The review by coal mining industry stakeholders of present arrangements concerning long service leave in the coal mining industry and, if appropriate, the variation of present award long service leave provisions;
- The review of the terms and operation of the present statutory coal mining industry long service leave funding scheme provided for in the *Coal Mining Industry (Long Service Leave Funding) Act* and related acts;
- Regard to be given to the purpose and objectives of the national employment standards and award modernisation.

Support for other Submissions on this Issue

The NSW Minerals Council endorses and supports the submission made on this matter by the Queensland Resources Council.

Further discussion

The NSWMC would welcome the opportunity for further consultation with the Government in relation to the matters referred to in this submission.

