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National Employment Standards ('NES') Exposure Draft

**Submission by the
CFMEU Mining & Energy Division,
National Office**

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1 Introduction

- 1.1 The CFMEU Mining & Energy Division (**‘the Union’**) is the principal union covering workers in the coal mining industry. The Union also has a significant membership amongst employees involved in metalliferous mining, power generation and the processing of hydrocarbons.
- 1.2 This submission focuses upon the interface between the NES and the proposed system of modern awards. In particular, the Union is concerned to ensure that the combination of the NES and modern awards provide an effective safety net for employees in the industries we represent.

2 A Less Beneficial Safety Net than the Pre-Work Choices WRA?

- 2.1 Of particular concern to the CFMEU is that the proposed interface between the NES and the main coal industry award does not appear to provide a safety net for our members at least as beneficial as the pre-Work Choices *Workplace Relations Act 1996* (**‘WRA’**).
- 2.2 This would appear to be the result of the combination of the following factors:
- (i) The existence of certain award standards¹ in the coal mining industry which significantly exceed the counterpart standards in the NES; and
 - (ii) The income level of coal industry employees, which in most cases, exceeds the proposed \$100,000 threshold for exemption from the award system.
- 2.3 The combination of these factors means that coal industry employees in particular, may have a less comprehensive safety net under *Forward with Fairness* than in the earlier manifestation of the WRA.

¹ *The Coal Mining Industry (Production and Engineering) Consolidated Award 1997*

2.4 This is an incongruous and unfair outcome. In particular, it will mean that for most employees in the coal mining industry at least the following long-standing award conditions will be “up for grabs” each time employees bargain:

- The 35-hour week.
- 15 personal/carers leave days per annum.
- 5 weeks annual leave for ordinary employees and 6 weeks annual leave for shift workers.
- Uncapped redundancy/severance entitlements of 3 weeks for each year of service.
- The unique long service leave scheme which is based on industry, rather than employer service, and which provides for the full entitlement of 13 weeks paid leave after 8 years of service.

2.5 While the bargaining position of coal industry employees at present is arguably strong, the coal industry has historically been subject to regular cyclical swings and it is during the next downturn that a diminished bargaining safety net will be felt.

2.6 The Government should not proceed on the assumption that the current income levels and bargaining position of coal miners (and other workers in similar positions) will insulate those employees from a reduction in long established employment standards where legislation permits such an outcome. Obviously, members of the Union would naturally be alarmed at the prospect of existing award minima being forfeited under laws enacted by a Labor Government. However, an opportunity exists to address this concern in the substantive Act.

3 Award Standards & Bargaining in the Coal Industry

3.1 The experience of the coal mining industry in recent years is that the expansion and high productivity of the industry has been achieved in tandem with high levels of unionism and collective bargaining. In particular, the above mentioned award standards have - until the advent of Work Choices - formed the unalterable foundation for bargaining with employers.

- 3.2 Australian Bureau of Statistics data for the last 8 years demonstrates that productivity growth in the largely unionised coal mining industry has averaged over twice that of the largely non-union individual contract dominated iron ore industry in Western Australia.² Similarly, labour costs as a proportion of profits have decreased markedly over the entire mining industry during the current boom.³
- 3.3 As a minimum, these statistics are indicative of the fact that the higher wages and conditions applicable to the coal mining industry are not a brake on the continued expansion and profitability of the industry.
- 3.4 During the Work Choices period, coal industry employees have largely resisted attempts by employers to attack these important award entitlements. The determination of our members to protect long-standing award entitlements such as long service leave and annual leave was a key factor in the strong anti-Work Choices vote in coal industry seats such as Macquarie in New South Wales and Dawson and Flynn in Queensland.
- 3.5 The reasonable expectation of these members is that the mandate bestowed on the Government to address the unfairness associated with Work Choices will be given effect; not that the same unfairness is perpetuated under a different name.

4 Labor Policy can Accommodate our Concerns

- 4.1 The Union appreciates that the \$100,000 award-free threshold and the universality of the NES are central to *Forward with Fairness* and the “modern” industrial relations system that the Labor Government intends to introduce. However, we believe it is possible to accommodate the legitimate concerns of

² www.cfmeu.com.au/storage/documents/Productivity_mining2006c.pdf

³ Stanford, Jim Ph.D *Prices, Labor Costs, and Profits in the Australian Mining Industry: 2001 through 2006* Economist, Canadian Auto Workers, Toronto Visiting Scholar, Melbourne (2006-07)

the Union within the legal framework that is foreshadowed in the NES Exposure Draft and Labor policy.

- 4.2 The means by which these objectives may be reconciled lies in further extending the notion that modern awards are able to develop “industry specific detail” in relation to matters contained in the NES. This already envisaged relationship must be taken further to incorporate the concept that - for certain industry sectors or occupations - the NES will incorporate certain industry specific ‘supplementary’ entitlements contained in modern awards.
- 4.4 This proposal does not mean extending award coverage to employees earning over \$100, 000. It does mean however, that employees engaged in industries or occupations where the well established counterpart award standard exceeds the NES, will continue to enjoy the benefits of those standards when bargaining.
- 4.5 The real difference (consistent with the intent of Labor policy) is that all of the typical machinery matters and prescriptive detail contained in awards would not apply to persons earning over \$100,000. There would be no limitation on the flexibilities available in bargaining. The supplementation of the NES in the manner described would simply mean that an employer would not be able to reduce an already established minimum entitlement where that entitlement exceeds the relevant NES.
- 4.5 For example, under the Union proposal, the 5 additional personal/carers leave days currently enjoyed by coal industry employees would form part of the personal/carers leave NES for all employees in the coal mining industry, regardless of income level. However, the other provisions of the Award would not apply to employees earning over \$100,000.
- 4.6 The legislative means to achieve this end would involve the formulation of a provision in the substantive Act that:
- i. Permits modern awards to retain any established higher entitlements than the relevant NES standard; and

- ii. Designates those additional entitlements as a supplement to the relevant NES; and
- iii. Deems the supplement as forming part of the relevant NES for each employee in a nominated industry or occupation, regardless of income level.

4.7 Further, in relation to any concern that the Government may have that such an approach would lead to an expansion of arbitrated NES supplements, it would be simple matter to confine ‘NES supplements’ to what was in existence at the time a particular an award commenced the modernisation process. To facilitate this process, appropriate directions could be issued to the Australian Industrial Relations Commission prior to the passage of the substantive Act.

5 The Special Case of Coal Industry Long Service Leave

5.1 The coal industry long service leave scheme has the following particular characteristics:

- i. It is embodied in awards rather than statute.
- ii. It is based on the notion of industry service, rather than service with an individual employer.
- iii. It provides for an entitlement roughly double the existing statutory entitlement of some States (i.e. 13 weeks paid leave for each 8 years of service).
- iv. It provides for “bridging orders” to overcome breaks in service in certain circumstances.

- 5.2 The NES Exposure Draft proposes to develop (over an unspecified time frame) a new national NES for long service. In the meantime, long service leave entitlements in pre-modernised awards, NAPSAs or state and territory laws will be preserved. However, it is unclear what the future is of existing long service leave schemes that differ substantially from any future national NES dealing with long service leave.
- 5.4 It may be reasonably surmised that the existing coal industry long service leave will be of a radically different character to the new national NES on long service when such a standard is formulated. Further, due to Work Choices making long service leave a preserved award condition for most but not all employees in the industry, coal industry long service leave is not a matter that can be conveniently dealt with in terms of a framework of supplementary NES provisions suggested in this submission.
- 5.5 The Union believes that the proper means of ensuring that the coal industry long service scheme retains its current status as part of the safety net for bargaining in the coal mining industry is to enact separate Commonwealth legislation enshrining the existing entitlement.
- 5.6 The Union has already made separate representations to Minister Gillard on this matter.

6 Additional Comments on the NES Exposure Draft

- 6.1 *'Maximum Weekly Hours'*: This NES seems to have little work to do other than to offer employees a limited and conditional right to refuse excessive overtime. The relevant NES would be strengthened without imposing significant additional burden on employers if it were recast as *'maximum ordinary hours of work'* provision.
- 6.2 Such a recasting of the proposed NES would relate to modern awards in a more effective and logical way. The modern award would then detail how the NES would be applied (for example averaging of hours over a set period, the span of

ordinary hours etc). It could also deal with industry or occupation specific considerations going to what might constitute reasonable additional hours (for example, by reference to common roster arrangements in an industry).

- 6.3 In addition, an NES formulated as a '*maximum ordinary hours*' provision would facilitate the preservation of minimum ordinary hours as an NES supplement in industries where something less than the 38 hour week is the relevant standard.
- 6.4 '*Public Holidays*': The NES relating to public holidays appears to be restricted to holidays declared by State and Territory Governments. The proposed role for modern awards is to set "industry specific detail" in respect to public holidays, including for example, the appropriate penalty rate to apply for work performed on a public holiday.
- 6.5 The public holiday NES highlights the necessity of having supplementary NES standards for particular industries or occupations. That is, the main Award applying to coal industry workers provides for an additional public holiday to that enjoyed by employees subject to the standard public holidays proclaimed in State or Territory. In the case of coal miners, the additional day is Easter Tuesday (NSW) or Show Day (Qld), otherwise known as coal miner's picnic day. Unless the additional public holiday is recognised as forming part of the NES for coal industry employees, it is likely to be undermined as an ongoing entitlement.
- 6.6 '*Redundancy Pay*': The NES Exposure Draft recognises that "...some awards (e.g. in the building and construction industry) and laws may provide redundancy entitlements that are structured differently from the proposed NES and/or are more beneficial than the NES". The main coal industry award is of the same category. The relevant coal industry standard for redundancy/severance is three weeks pay for each year of service, uncapped. This means that a coal industry employee will currently exceed the maximum proposed redundancy level under the NES in just over 4 years service.

- 6.7 The redundancy provision highlights yet again the need for some supplementation of the NES in order to safeguard long established minima in particular occupations or industries. Existing redundancy pay standards – along with long service leave – represent the largest potential loss to coal industry employees in a bargaining context where those employees earn more than \$100,000.
- 6.8 The shortfall between the NES and the existing coal industry standard has the potential to lead to considerable unfairness in bargaining. Consider the following example:
- i. John is a coal miner employed under a union collective agreement whose term expires in the year 2012. In common with all his work mates, John earns over \$100,000 per year. At the time of the agreement reaching its nominal expiry date John has accrued 10 years service with his employer. The expiry date of the agreement also happens to coincide with a general industry downturn caused by a slow down in international demand for Australian coal.
 - ii. After a period of unsuccessful bargaining, the employer applies to Fair Work Australia to have the agreement terminated. The application is granted on the basis that the employer will guarantee existing pay levels and accrued entitlements pending the making of a replacement agreement.
 - iii. The employer subsequently presents an agreement for the employees to vote on which removes reference to the industry standard redundancy pay standard. Accordingly, the NES on redundancy only will apply. The result is that if John votes to support the agreement he will be effectively foregoing at least 18 weeks pay (the difference between the NES and the pre-existing award standard) if he is made redundant during the life of the agreement.

- 6.9 The above example is a realistic portrayal of one possible effect of adopting a rigid approach to the relationship between the NES and established award standards in high wage industries.

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