Submission to the Fair Work Act Review Panel

(Executive Summary Only)

Review of the Fair Work Act 2009

By AMMA - The Resource Industry Employer Group

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Executive summary

Resource industry employer group AMMA welcomes the opportunity to contribute to the review being undertaken by the Federal Government's Fair Work Act Review Panel.

Having represented a pervasive range of employers in the resource industry for more than 90 years, AMMA is committed to a legislative framework that encourages and allows for direct, co-operative and mutually rewarding relationships between employers and employees.

Under this philosophy, AMMA has contributed to and fully supports the positive steps taken to achieve a more modern workplace relations system in recent years. Such activities include the move to a modern award system and the progress towards a national industrial relations system.

AMMA's submission to the Panel's review of the *Fair Work Act 2009* (Fair Work Act) follows AMMA's involvement in the Senate inquiry into the provisions of the *Fair Work Bill*[1] in June 2008.

During the 2008 Senate inquiry, AMMA outlined its major concerns with the draft legislation and included the following statement:

The Fair Work Bill will adversely impact on the sector's ability to achieve strong productivity growth by disturbing existing flexible arrangements, imposing union-related matters in industrial arrangements, disturbing established union demarcations, increasing the prospects of industrial disputation as a direct result of increased regulation of the agreement-making process (and putting at risk record low levels of industrial action in the mining industry) and opening the door to arbitrated outcomes. Restrictive transfer of business rules will also prove to be a disincentive to take on transferring employees, leaving many employees without employment.

Disappointingly, and to the detriment of employers in every sector of the Australian economy, many of the concerns outlined in AMMA's 2008 submission have since come to fruition.

AMMA's current submission examines how the *Fair Work Act* is failing to deliver its stated object to provide a balanced framework for co-operative and productive workplace relations that promotes national economic prosperity.

[1] AMMA submission to the Senate Education, Employment & Workplace Relations Committee inquiry into the Fair Work Bill 2008, 12 January 2008

AMMA has worked in collaboration with RMIT University's Faculty of Economics to examine the *Fair Work Act's* impacts on employers in Australia's resource and construction industries over time. Commencing in April 2010, four comprehensive surveys of the workplace relations experiences of AMMA members have been undertaken at intervals of six months.

The results of the ongoing *AMMA Workplace Relations Research Project* form a detailed body of evidence on the impacts of the *Fair Work Act's* legislative framework on Australian resource industry employers.

This data underpins many of the observations and recommendations made by AMMA in its submission to the Fair Work Act Review Panel.

The economic impacts of the Fair Work Act

Workplace laws should provide for and facilitate employee engagement and productive, competitive workplaces.

Australia is not isolated from global competition and, as such, its legislative framework must reflect the industrial freedoms of an advanced economy while protecting the lower paid.

The resource industry makes a significant contribution to the Australian economy, not the least of which is to Australia's terms of trade, employment and gross domestic product.

Approximately $316 billion worth of approved minerals, energy and related infrastructure projects are either committed or under construction in every Australian state and territory, with a further $307.6 billion awaiting approval[2].

Whilst the construction of new resource projects and the expansion of existing operations will ensure Australia's resource industry continues to outperform global trends, the domestic industrial relations challenges need to be overcome to assist this outcome.

Many current resource projects were given financial approval during the period in which the previous industrial regime was in place. Under that framework, the presence of individual statutory agreements and employer greenfield agreements provided investors with confidence that the large workforces required for significant projects could be appropriately managed.

The escalating labour costs associated with constructing and running these projects has led employers, investors and other industry stakeholders to seriously question the financial viability of future resource projects.

[2] Pitcrew Consulting Management Services, *Major Project Labour Market in Australia*

Coupled with the financial impacts of the Clean Energy Bill ("Carbon Tax") and proposed Minerals Resource Rent Tax ("Mining Tax"), this outcome reinforces the importance of establishing statutory working conditions which facilitate maximum flexibility and minimise industrial action.

The most concerning aspect of the *Fair Work Act* for the resource industry has been the reduction in the ability for employers to engage and negotiate directly with their workforces, even where this is the overwhelming desire of both the employer and employees.

The *Fair Work Act's* mandatory collective bargaining regime, to the exclusion of all other forms of bargaining, has not assisted in meeting the objects of the new framework.

Instead of advancing Australia's workplace culture, the *Fair Work Act* has facilitated a return to workplace restrictions, demarcations, lower productivity and additional transaction costs for employers and workplaces.

The negative impacts of the *Fair Work Act* on Australian workplaces and employers have become increasingly apparent since the legislation's introduction more than two years ago. Such impacts include:

- Extreme difficulties negotiating new enterprise agreements, given the fact that mandated union involvement is often disproportionate to union density;
- Significant problems with unions exercising their new-found power of veto in greenfield negotiations;
- Impediments to securing productivity/efficiency improvements in exchange for employee benefits and wage increases;
- Expanded union entry rights;
- The failure of individual flexibility arrangements (IFAs) to deliver genuine flexibility;
- The breadth and difficulties associated with the adverse action/general protections provisions;
- The expanded bargaining agenda broadening matters well beyond wages and conditions of employment;
- The increased likelihood of protected industrial action being taken during enterprise bargaining; and

- Having to deal with inter-union relationships on-site and the rising incidence of demarcation disputes.

Each of the above issues creates its own specific workplace relations challenges. However, when combined under a single legislative regime, the broader economic impacts are amplified.

Under the *Fair Work Act*, this hostile IR environment has left employers struggling to retain any effective workplace practices and efficiencies, with productivity advances in many cases unfeasible.

As such, AMMA's submission to the Fair Work Act Review Panel makes a number of recommendations (including the key recommendations below) which AMMA deems necessary to restore the industry's faith in Australia's workplace relations system and allow the nation's record investment in resource projects to continue.

Key recommendations

In addition to raising numerous concerns with the *Fair Work Act*, AMMA's submission makes various recommendations for actions that AMMA deems essential to creating a legislative framework that will serve Australia's best interests, both domestically and internationally.

While AMMA's full submission contains extensive detail and evidence behind 54 recommendations, the below highlights AMMA's key recommendations for effective legislative reform.

Improving our productivity performance

1. When lodging enterprise agreements for approval with Fair Work Australia, parties must be required to produce evidence demonstrating that productivity improvements have been properly considered as part of the final agreement.

2. Before an enterprise agreement is approved by Fair Work Australia, all parties to the agreement should be obligated to ensure the terms of mandated flexibility clauses are capable of delivering genuine flexibility and productivity benefits under individual flexibility arrangements (IFAs).

Internal regulation

3. High income earners (those with earnings exceeding the current $118,100 unfair dismissal limit) should have the ability to elect to enter into

employment arrangements with their employer that allow them to opt out of the collective agreement making stream under the *Fair Work Act*.

4. Workplaces should have the option of voting for an 'internal regulation' model of industrial relations. A two-thirds majority of the workforce would be required to vote in favour of self-regulation, with a safety net and grievance procedures put in place to protect all workers.

Individual Flexibility Arrangements (IFAs)

5. A statutory individual agreement in the form of an IFA, underpinned by the Better Off Overall Test and National Employment Standards, should be introduced to facilitate workplace flexibility. Parties should be able to agree on the terms and length of an IFA prior to employment commencing.

6. Parties to an IFA should be able to agree that, in return for the benefits received under the IFA, no industrial action will be taken during its life.

7. The test as to whether an employee is 'better off' under an IFA should remain ongoing, with either party able to invite the Fair Work Ombudsman to make that assessment at any time during the IFA's operation.

8. IFAs should be able to operate for up to four years, with the arrangements able to run for shorter periods where mutually agreed and to be terminated at any time by mutual agreement.

Protected industrial action

9. Protected industrial action should not be permitted where the claims sought are not considered to be in the public interest. The public interest test should take into consideration a number of factors including:

- the size of the wage claim being made compared to general industry standards;
- whether there has been any consideration given to productivity improvements or offsets within the workplace;
- the overall cost of the proposed claims to the employer, including allowances and increases in all terms and conditions;
- whether there have been efforts made to genuinely conciliate the claims and whether bargaining has been exhausted; and

- the employer's capacity to meet the wage and condition claims.

Detailed in AMMA's submission is evidence of a $90,000 wages claim made in 2009 by the Maritime Union of Australia (MUA) against the vessel operators that support the offshore oil and gas industry. Following damaging but protected industrial action, AMMA members sought suspension of the protected industrial action and orders for 'cooling off' from Fair Work Australia, which were unsuccessful.

AMMA's requests for the Workplace Relations Minister to intervene were also declined. In that dispute, all legislative options that were open to employers were exhausted but to no avail, demonstrating that protected industrial action is too easy to take and virtually impossible to stop, leaving employers with little option but to agree to extravagant claims when they are made.

10. Where notices of protected industrial action are given to the employer and less than 24 hours' notice is given of the action's cancellation, the following provisions should come into effect:

    - employers have the right to refuse to accept employees making themselves available for work; and

    - no further protected industrial action is able to be taken by those employees for another 90 days.

11. The majority support of all employees (not limited to union members) who will be subject to a proposed enterprise agreement must be obtained before any employees can embark on protected industrial action.

12. Protected industrial action should not be available to employees before bargaining has commenced or a majority support determination has been made.

Unlawful industrial action

13. The legislative mechanism under which the courts can order work to resume following unprotected industrial action should be reviewed to ensure it is more responsive to the needs of employers who are subject to damaging and costly unlawful industrial action.

    There are numerous examples of illegal industrial action occurring, with both Fair Work Australia and Federal Court orders having been ignored. While

some of those issues are ultimately pursued via the courts by employer groups and industry regulators such as the Australian Building & Construction Commission (ABCC), settling those matters often takes more than two years and does little to deter further unlawful action occurring in future.

Often, by the time a matter is brought on before the courts two years after the event, the employees have moved on and, where work on a construction project is involved, that work has often been completed.

14. Where there is clear evidence that union officials have recommended unlawful industrial action to their members, the union covering employees engaging in the industrial action should be held accountable for the actions along with its members and be exposed to immediate financial penalties, with offending officials losing the right to represent the union as an official.

Agreement making

15. Agreement content should be restricted to matters pertaining only to the employment relationship between the employer and its employees.

16. The exemption to pattern bargaining should be removed.

17. Fair Work Australia should, on application by the employer, have the power to make a greenfield determination agreement for a new project where agreement on reasonable terms within a reasonable timeframe cannot be reached. This is a crucial reform for the resource industry. The greenfield determination would be in the form of an industrial agreement measured against the Better Off Overall Test, the National Employment Standards and the relevant modern award to ensure workers are 'better off' under the agreement.

Right of entry

18. Union rights to enter a workplace should not be solely based on unions' constitutional rules. All of the following conditions should be met before a union official can legally enter a worksite:

- the union should be a party to an enterprise agreement on the site or be attempting to reach one;
- the union should be required to demonstrate it has members on that site; and
- those members should have requested the union's presence.

19. There should be no ability for industrial agreements to contain any additional entry rights outside those contained in the *Fair Work Act*.

Adverse action

20. The *Fair Work Act's* adverse action provisions are unjustified and have led to a new era of speculative claims and should be removed in their entirety. The vast majority of these provisions merely duplicate existing state and federal anti-discrimination provisions.

21. In the absence of removing the adverse action provisions in their entirety, an entitlement to a workplace right should have to be the dominant reason for the adverse action alleged to have been taken, rather than one of several factors. Claims should not be able to proceed where other valid, more significant reasons exist for the adverse action such as poor performance or gross misconduct.

22. The reverse onus of proof on employers should be removed as it encourages non-meritorious claims to be brought by employees and allows claims to proceed further than they otherwise would if the burden of proof rested with the applicant.

23. There should be no "union activity" exemption from an employer's right to take disciplinary action against an employee.

24. The six-year time limit for bringing adverse action claims where dismissal is not involved should be reduced to 60 days, the same time limit applying to adverse action claims where dismissal is involved.

Transfer of business

25. Imposing a previous employer's industrial arrangements on a new employer or contractor is counter-productive and should be removed. At the very least, transferring instruments should only apply for a period of six months rather than having open-ended operation until new arrangements are negotiated.