AMMA NATIONAL CONFERENCE

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LAUNCESTON COUNTRY CLUB RESORT

‘THE CHANGING FACE OF EMPLOYEE RELATIONS’

PAPER BY AMMA CHIEF EXECUTIVE

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1. The passage of the Commonwealth Government's Work Choices Legislation in December 2005 has been represented as the biggest overhaul of Australian Industrial arrangements since Federation.

2. What does it all mean for a resources sector that will have exports in excess of 93 billion dollars in 2005 – 2006 and directly employ over 134,000 people?

3. Some suggest Work Choices goes too far, others (like AMMA) highlight the need for further reforms.

AMMA's Lobbying Efforts

4. Let us be clear, the policy framework which underpins the Work Choices legislation did not occur by accident or as a result of a blinding flash of inspiration when the Commonwealth found that it had a majority in the Senate.

5. The policy framework has been formulated over a long time as was influenced by research and lobbying activities conducted by AMMA and other major employer organisations such as the Business Council of Australia and the Australian Chamber of Commerce and Industry.

6. AMMA began to draw a line in the sand as far back as 1988 with the publication of *'AMMA The Way Ahead'*. Key points included focus on the enterprise, encourage enterprise employee involvement, support performance included reward systems, promote freedom of association, reduce reliance on tribunals and to influence government legislation and action that facilitate improvements in efficiencies and working relationships within enterprises.

7. In July 1999 AMMA released a report titled *Beyond Enterprise Bargaining: The Case for Ongoing Reform of Workplace Relations in Australia which* examined the key legislative changes since 1956 and the position of the main political parties on these issues, areas of major agreement and disagreement on industrial regulation, and how

the position of the major political parties had changed during this period. Research commissioned by AMMA and undertaken by Monash University assisted greatly here. *Beyond Enterprise Bargaining* drew upon a study of overseas experience commissioned by the National Institute of Labour Studies. The report concluded with a discussion on strategic options for employers in the development of their own employee relations and the Employee Relations Charter that all employers would be expected to follow in order to internally regulate their industrial arrangements.

8. A comprehensive follow-up to this report will be released later this year. Between 1999 and 2005 AMMA published a range of position papers and submissions. They have all contributed to the debate and can be found on AMMA's website.

9. In March 2005 AMMA published a *Position Paper on Workplace Relations Legislative Reform Options*. This paper sought the following reforms:

   • a single national system of industrial regulation with the Workplace Relations Act to 'cover the field';

   • reductions in the number of allowable matters in awards;

   • the creation of an employment contract statute underpinned by statutory minimum conditions;

   • AWAs to have primacy over certified agreements;

   • AWAs to commence upon the date of signing;

   • protection against industrial action for 'projects of national economic importance';

   • the repeal of s.166A of the *Workplace Relations Act*;

   • the conduct of all compliance matters by a court of competent jurisdiction;

   • the AIRC powers of compulsory arbitration to be significantly reduced; and

• the outcome of unfair dismissal cases to be reflective of the merit of the application rather than procedural matters.

10. Whilst the subject matters contained in the March 2005 paper have been expanded upon in more recent Senate submission appearances and our submission to the Award Review Tribunal, the March 2005 paper sets the bench mark which AMMA will use to evaluate the Work Choices legislation.

11. The Commonwealth Government announced its intentions on industrial relations reform in May 2005. The correlation between the Government's policy direction and AMMA's proposal was significant. So significant that the ACTU's Greg Combet and Senator George Campbell accused AMMA of writing Work Choices. Regrettably this is not the case, if it were Work Choices would have some additional features, but more of this later.

Responses to Release of Work Choices Policy

12. The long gestation period of Work Choices allowed critics endless free kicks.

13. Some of the more notable predictions included:

14. *"…These repressive new industrial laws threaten the very fabric of the Australian ethos of a Fair Go; they threaten the fundamental character of Australia as a genuine egalitarian society."* John Maitland CFMEU

15. *"….These destructive new laws will remove the basic rights of working people, cut the take home pay of workers, reduce job security and hurt families."* ACTU President Sharan Burrow

16. *"….Australia will become like the United States – a less fair society, with more working poor and greater inequality. Basic community standards are at issue – four weeks leave, public holidays, the right to a meal break and a host of others."* ACTU secretary Greg Combet

17. *"….We will simply end up with an army of working poor and widespread inequality - a society like the United States."* ACTU secretary Greg Combet

18. *" [Work Choices] ….will cripple many Australian families…This… is like an infestation of termites. You'll start to see the knock-on effects of this coming into place next year [2007]."* Kim Beazley

19. *"These measures …. are a massive attack on the living standards, the entitlements and the conditions of working Australian families." ."* Stephen Smith

20. *"Australian employees and their families have got nothing to look forward to under the Howard Government's extreme changes, except having their wages reduced, entitlements and conditions stripped, and their safety nets removed."* Stephen Smith 7 December 2005

21. *"My first act as prime minister of the nation will be to stand on the steps of Parliament and rip these laws up — these extreme laws are headed straight for the bin which is where they belong."* Kim Beazley 15 November 2005

22. *"The WA experience ….suggests [Work Choices will result in] further entrenchment of a secondary labour market of low paid, low skill, part-time, casual jobs with high turnover and low levels of investment in education and training."* Professor David Plowman

23. *"It is the most extraordinary bill I have read and no other comparable country has even suggested putting in place this type of regime,"* Professor Ron McCallum

24. Similar "race to the bottom of the wages and conditions ladder" were made in 1996. They did not materalise.

Work Choices v AMMA Paper Model

National System

AMMA sought a single national system of industrial regulation with the Workplace Relations Act to 'cover the field'.

The regulatory burden imposed upon employers by the existence of six separate statutory labor relations systems operating in Australia, each with its own awards, agreements and common law contracts is huge.

Subject to the High Court Challenge scheduled this May, Work choices will deliver a single (but complex) industrial relations systems for corporations. This achievement of a single national system of industrial relations will provide considerable benefits for AMMA members who operate across state boundaries. A bronze medal for the national system, a gold to be awarded when the complexity is removed.

Allowable Award Matters

AMMA sought a reduction in the number of allowable award matters

At the federal award level allowable matters has been reduced from 20 to 16. However the four items that were removed (Long Service Leave, Jury Service, Notice of Termination and Superannuation) are provided in other legislation. In addition the Commonwealth has ensured that the removal of these items from awards will not disadvantage those with greater benefits such as those covered by the Coal Industry Long Service Leave Scheme.

Work Choices will remove some federal award content through the removal of non-allowable award matters. These matters include:

- Union participation in dispute settling processes without invitation;
- Right of entry;
- Conversion from casual to full or part time employment;
- Numbers, proportions or prohibitions of particular types of employees;
- Maximum hours for part-time employees;
- Restrictions on training;
- Restrictions on the engagement of independent contractors and labour hire workers;

- Union picnic days;
- Discrimination and Preference;
- Trade union training and dispute resolution training; and
- Enterprise Flexibility provisions

The removal of these matters will not reduce the remuneration of employees, and on this basis it is difficult to justify argument that employees will be worse off under Work Choices, unless you argue that continuance of the all embracing award system will act as a barrier to wage increases via agreement making. The greatest potential for award reform will come via the award review process which I will deal with last.

Interaction of Awards and Agreements

Work Choices falls short of the mark in the continued role of awards, particularly for those employers who embrace Work Choice agreements. In its first iteration the Work Choices legislation provided a one way gate from award stream to the agreements stream. Regrettably the Senate re-introduced a continued role for awards where Work Choice agreements were terminated. Whilst employers can displace the award system by entering into a Work Choices agreement, if the agreement is subsequently terminated the employer will re-enter the award system so far as 'protected award conditions' contained in an award. This was a retrograde step which will allow the award system to limp on like a wounded dog until a future Government takes it to the vet and has it put down or revives it. AMMA's view is the award system should be euthanased now.

Freedom to Contract Underpinned by Statutory Minimum Conditions

AMMA's policy objective was to scrap the current Award system and replace it with key legislated minima. This policy has been achieved in part by the establishment of the legislated minimum standards. The standards are prescriptive and unable to be over ridden by Work Choices agreements. This will restrict the capacity to customise leave arrangements (for example in the offshore oil and gas sector). On the positive side the AFPC Standard is a much simpler test for the processing of workplace agreements. This together

with the self-assessment workplace agreement lodgement model will reduce the transactional cost of agreement making.

Recognition of common law contacts

Many employers in the resources sector have a close relationship with their employees. This is demonstrated by the growth in direct employment relationships since the late 1980s. In workplaces where management has developed the trust and confidence of employees, individual common law contracts of employment are the favoured form of expressing employment terms and conditions. These contracts provide as a whole terms well in excess of the AFPC Standard and 'protected award conditions'. These contracts should not have any less status than workplace agreements, this is an important area for future reform.

AWAs to have Primacy over Certified Agreements

AMMA contended that the wishes of the individual should over ride the collective. Work Choices delivers this position by allowing an AWA to over ride all other agreements. In addition Work Choices will void any existing agreement provision which prevents the use of AWAs.

AWAs to Commence Upon the Date of Signing

The AWAs will commence from the time that the agreement is made. This together with the capacity to waive the seven day waiting period will facilitate the rapid engagement of new employees where required.

Protection Against Industrial Action for 'Projects of National Economic Importance'

AMMA lobbied hard for 5 year construction project agreements and was disappointed when the Government announced that union greenfield agreements would only last for a year. Undeterred, AMMA with the

assistance of the BRG, industry CEO's and evidence of over $40 Billion worth of imminent long-term infrastructure projects that required certainty during their 3-5 year life span, was able to convince the Government that 5 years was an appropriate outcome.

Another area of concern was the capacity for industrial action to impact significantly on employers in essential industries. AMMA proposed a model where the Minister could intervene and impose restrictions on the taking of industrial action. Work Choices contains such a provision. The Minister's capacity to intervene is based on the same provisions that apply to the Commission. The Minister has advised he will not be hesitant in intervening in appropriate cases. AMMA will review the operation of this provision after its introduction.

The Repeal of s.166A of the *Workplace Relations Act*

Section 166A was a provision in the Act which required the Commission to issue a certificate before civil action could be taken. This provision allowed a culture to develop where short periods of unlawful industrial action could be taken with impunity. The Government accepted our position and will repeal s.166A.

The Conduct of all Compliance Matters by a Court of Competent Jurisdiction

AMMA sought to exclude the Commission from involvement in compliance matters (such as the taking of unlawful industrial action) due to its history of inaction on such issues. Work Choices provides a range of compliance mechanisms in the Court and Commission. Employers have access to Commission-based dispute resolution and a more timely s.127 process (now s.598). The Commission retains a limited discretion not to determine s.127 orders matters within 48 hours and this is an area where AMMA will monitor the Commission's performance. Court-based mechanisms providing access to fines and injunctions for unlawful industrial action from the first moment of industrial action have been introduced in s.494 and s.495.

Employers should be mindful that it is an offence to pay employees whilst taking industrial action with a minimum of four hours pay to be deducted on any occasion of unlawful industrial action. It is also an offence for an employee to accept payment.

A Silver medal for Compliance, cut the 48 hours and AIRC's limited discretion and a gold is the offering.

The AIRC Powers of Compulsory Arbitration to be Significantly Reduced

AMMA contended that the Commission's role should be curtailed. The Commission's award making powers have largely been removed. The Commission will not have a right to arbitrate in most industrial disputes unless the parties agree to confer such a right.

In the area of protected industrial action the Commission's role has been expanded to provide for 'cooling off' periods, restrictions of the initiation of new bargaining periods and a detailed ballot process which must be approved by the Commission before employees take industrial action.

One to watch but a gold medal could be awarded here.

The Outcome of Unfair Dismissal Cases to be Reflective of the Merit of the Application Rather Than Procedural Matters

Work Choices has created a single industrial unfair dismissal regime. Subject to the capacity of laws to massage excluded claims into unlawful dismissal claims, discrimination tribunals and the common law courts, Work Choices presents a single national system for corporations that covers the field.

Work Choices has now added three more barriers to unfair dismissal claims. These barriers prevent access to employees serving their 6 month 'qualifying period' of employment, termination for 'Genuine operational reasons' and employer who engage 100 or less employees at the time of the dismissal. In addition the onus of proof for a constructive dismissal is now reversed back on the employee.

Whilst there were no significant changes to substantive and procedural fairness tests, an employees compensation can now be reduced by the Commission AIRC where it is satisfied the employee's 'misconduct' contributed to the employer's decision to terminate the employee.

The Commission may also determine that a hearing is not required (by taking into account the cost to the employer in attending) where the employer has claimed the Commission has no jurisdictions and for extension to the 21 day time limit.

A final eight performance, but a need to revisit what was in place prior to 1993 i.e. no threshold on employee numbers as large employers are often hit with extensive costs over alleged unfair dismissal claims that are often without merit.

Award Simplification

One matter we did not raise was Award Simplification. With the Award Review Taskforce report due to be provided at the end of this month it is timely to review the area of Award simplification

The Minister will be responsible for specifying the award rationalisation time principles and process. The Minister has commissioned a report by the Award Rationalisation Taskforce. AMMA is lobbying to ensure the Award Rationalisation process takes cognizance of historical factors which have led to the existing award arrangements and not result in:

- any additional cost on employers;
- any negative impact on workplace productivity or efficiency;
- loss of flexibility;
- increased potential for disputation;
- increased the scope and/or coverage of awards;
- awards extending to covers previously 'award free' areas;
- increased coverage by registered employee organisations;

- changes to existing wage relativities or remuneration arrangements; and
- the removal of single enterprise awards.

The potential for a single mining industry award is of great concern to AMMA. We could end up with the Coal Industry 35 hour week and restrictive hours provisions, combined with the wages of the off shore oil and gas industry. Combine that with coverage by the CMFEU, the AWU, the NUW and we have a recipe for disputation and disaster. Companies who have embraced workplace bargaining via enterprise awards should not be thrust back into industry awards. The end result should be an informed one and meet the criteria above.

Minister Andrew's consideration of the Award Review Taskforce Report will be a significant indicator of the Government's resolve with respect to awards. If the Government determines to reduce awards to minimalist documents which fulfill a safety net role, we will be closer to the AMMA minimalist approach to standard setting. If the Government chooses to combine awards in a manner where award entitlements are homogenized, it would be a backward step. AMMA awaits the Minister's decision with interest.

Conclusion

In AMMA's view Work Choices is not the end of the industrial relations reform road. Yes, we applaud the progress it makes but there really is a need for more.

The national industrial relations system for corporations that will come in under Work Choices will be of great benefit to AMMA members who operate across state boundaries, but it will still be too complex as a system. For the full benefits of a national system to be felt, it will need to be made simpler.

Work Choices also allows the continuation of the award system. A Work Choices agreement will displace the award system but if such an agreement is terminated, the employer will find itself back in the award system again.

Thus the award system will continue to limp along. AMMA believes this to be a retrograde step and that further reform is needed to make the move from the award stream to the Work Choices agreement stream a one-way move.

Another matter that calls for further reform is the status given to common law contracts of employment as compared to that of workplace agreements. AMMA members have increasingly used direct common law contracts with their employees that in whole terms, provide well in excess of the Australian Fair Pay Commission Standard and the protected award conditions set down under Work Choices. These contracts should not have less status than workplace agreements.

AMMA welcomes the introduction under Work Choices of court-based compliance mechanisms giving access to fines and injunctions for unlawful industrial action from the first moment of industrial action. However the Australian Industrial Relations Commission still has limited discretion to not to determine a s.127 order matter within 48 hours. AMMA believes this 48 hour period should be reduced and discretion should be removed.

These are just a few matters that stand out as calling for further reform. AMMA will have more to say on workplace relations reform after the dust settles on the changes brought under Work Choices.

Clearly Senator Minchin's recent off the record (now on the record) comments that the Government needs to seek a mandate fore further substantial workplace relations reform highlights at least one Coalition member recognises, as AMMA does, much more needs to be done. I suspect he is not alone in that regard.

Our plea to the federal ALP remains unchanged. When considering their IR policy formation ensure there is a workable system of statutory individual and

collective, union and non union workplace agreements, remove the reliance on the award system and ensure a deal is a deal and compliance issues are appropriately attended to.

The ALP's IR policy position taken to the last federal election, and still current ALP policy, that AWAs should be abolished let the business community clearly know where they stood on this issue.

Given 80% of the hard rock mining industry in Australia had direct employment arrangements with their workforce, and AWAs being the primary vehicle for such regulation, it wasn't surprising AMMA was the first business organisation to publicly criticise this position.

Disastrous u-turn in IR policy making, 'not happy Jan' and so forth featured prominently in the press and in hansard. Other business groups joined AMMA in expressing concern over this issue.

It is fact that some State Labor Governments have AWA's in their State systems. They are unworkable and the take rate is minimal. Latham's position in abolishing AWAs is far more principled than having an AWA regulatory regime that doesn't work.

Having a workable system of AWAs and collective non-union agreements certainly will go a long way to ensuring AMMA is mute on IR policy matters when the next federal election is called.

Generally the resources sector enjoys bi-partisan support in its endeavour to best meet the challenge of fierce international competition and as a consequence enhance the living standards of all Australians.

Effective leadership and sound people management systems is where the industry wants to maximize company resources, not IR regulation / de-regulation debates and associated business transaction costs.

Our hope for the future is that the IR pendulum stops swinging and there is bi-partisan support for a single, simple National IR system that supports business efficiencies and working relationships within enterprises. The criteria for such a system can be found in AMMA's employee relation charter, that many members have adopted, that requires:

- productive engagement of employees
- work being valued
- people being treated fairly

This, not IR political product differentiation, should be the focus going forward.

In conclusion, as a famous Professor once said, 'I thank you'.