Submission

Senate Employment, Workplace Relations and Education Legislation Committee

Inquiry into
Workplace Relations Stronger Safety Net Bill

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About AMMA

AMMA is the national employer association for the mining, oil and gas and associated processing and service industries. It is the sole national employer association representing the employee relations and human resources management interests of Australia's onshore and offshore resources sector and associated industries.

AMMA member companies operate in the following industry categories:

- Exploration for minerals and hydrocarbons
- Metalliferous mining, refining and smelting
- Non-metallic mining and processing
- Coal mining
- Oil and Gas
- Associated services such as:
    - Construction and maintenance
    - Diving
    - Transport
    - Support and seismic vessels
    - General aviation (helicopters)
    - Catering
    - Bulk handling of shipping cargo

AMMA represents all major minerals, coal and hydrocarbons producers as well as significant numbers of construction and maintenance employers in the resources sector. AMMA is uniquely able to articulate the workplace relations needs of the resources sector.

Resources Sector Profile

The resources sector was forecast to contribute minerals and energy exports in the order of $110 billion in the last 12 months.[1] This represents approximately two thirds of Australia's total commodity export earnings. In 2007-08 this contribution is forecast to increase to $116.5 billion.[2]

In 1996 the mining industry employed just 56,529 employees, today it directly employs 139,600 employees.[3] This represents a 146.9% increase in employment compared to the all industry increase of 25.1%. Approximately 558,000 employees are indirectly employed as a result of activity in the mining sector.[4]

The coal industry continues to be heavily unionised with 66 percent of employees being members of a union. In the hard rock mining sector the level of union membership is 11 percent. This is significantly lower than the average level of unionisation in the private sector of 15 percent.[5]

The average wage in the resource sector has increased by 65% since 1996 to $1820.40 per week, or $94,915 per annum. This is 62.6% higher than the all industry average.[6]

Industrial disputation in the resources sector is now a thing of the past. In 1996 the resources sector suffered 7,761.9 days of industrial action per 1000 employees (the CFMEU dominated coal industry was responsible for 86% of this result). In 2006 the total days lost decreased by 98.6% to 110.6 days per 1000 employees (the coal industry responsible for 87% of this result). The non-coal mining sector disputation level was 13.5 days lost per 1000

[1] ABARE Economics, *Australian Commodities*, Vol 14, 1, March Quarter 2007.
[2] Ibid.
[3] Australian Bureau of Statistics, *Australian Labour Market Statistics*, Cat. No. 6105.0, April 2007.
[4] Based on a 1:5 ratio.
[5] Australian Bureau of Statistics *Employee earnings, Benefits and Trade Union Membership*, January 2007 (6310.0) ABS, Canberra.
[6] Australian Bureau of Statistics, *Australian Labour Market Statistics*, Cat. No. 6105.0, April 2007.

employees. In the last quarter of 2006 the non-coal sector disputation figure was less than 1 day per 1000 employees – a record low.[7]

There is much conjecture over the productivity of the resources sector – some saying that the coal sector with its collective arrangements is more productive than the non-coal sector. Whilst there is no simple answer (the experts say you need to look at multi-factor productivity rather than simply dividing output by employees) part of the coal industry's productivity improvement is no doubt due to the fact that employees are now spending more time at work than on strike.

Over the next 12 months the resource sector is forecast to contribute $116.5 billion to the Australian economy.[8] Despite the high levels of exports the resources sector is not sitting on its laurels. ABARE Economics report that the number of advanced projects is currently at a historically high level.[9]

Some of the mining construction projects current under consideration or construction include:[10]

- Woodside's Pluto Gas field Burrup LNG Park, involving capital expenditure of $6-10 billion. Pluto is expected to boost the Western Australian economy by at least $28.6 billion over the life of the project;
- Xstrata/Nippon Steel's Bulga Underground Longwall black coal mine in New South Wales. This new project currently under construction has a capital expenditure of $350 million;
- Rio Tinto's Clermont open cut black coal mine in Queensland. This new project, committed to construction, has a capital expenditure of $950 million;

[7] Australian Bureau of Statistics, *Industrial Disputes Australia* December 2006, Cat No. 6321.0.55.001 (Released 15 March 2007)
[8] ABARE Economics, *Australian Commodities*, Vol 14, 1, March Quarter 2007
[9] ABARE Economics, *Mineral and Energy: Major Development Projects*, April 2007
[10] ABARE Economics, *Mineral and Energy: Major Development Projects*, April 2007

- Wesfarmer's Kwinana LNG plant in Western Australia with a capital expenditure of $138 million;
- SXR Uranium One's Honeymoon mine with a capital expenditure of $55 million;
- Oxiana's Prominent Hill copper mine currently under construction with a capital expenditure of $775 million;
- BHP Billiton's Olympic Dam mine expansion proposal, with a capital expenditure of $6 billion;
- Ballarat Goldfield's Ballarat East project under construction with a capital expenditure of $120 million;
- Fortescue Metals Group's Pilbara Iron Ore Project currently under construction with a capital expenditure of $2.78 billion;
- Tarramin Australia's Angas Zinc Project, currently under construction with a capital expenditure of $64 million; and
- Perilya's Flinders Zinc Project under construction with a capital expenditure of $35 million.

Investor confidence in the mining industry is readily apparent, there is no sign that the current high demand for Australian resources is diminishing, if anything the high levels of investment is a sign that the demand will continue for many years to come.

The resources sector has long lobbied for industrial relations reform. The reform has only just begun to come to fruition and given the continued high level of investment in the resources sector, it is not surprising that the sector wants to retain the key features of the current Australian workplace relations system.

Workplace Arrangements in the Resources Sector

The resources sector has always been subject to global competition. This competition has resulted in a continuous drive towards greater efficiency and productivity, as in the global resources market you have to 'run fast just to stand still'.

AMMA believes that a modern workplace relations system should provide a range of agreement making options. Such a system should ensure the varying needs of the employers and their employees can be met, and that the range of agreement options also reflects the low level of union membership at the workplace. The agreement making options should include collective agreements (both union and non-union), statutory individual agreements and Greenfield agreements.

The resources sector pioneered the determination of flexible working arrangements at the workplace level. An early example can be found in the 1978 *Iron Ore Production and Processing (Hamersley Iron Pty Ltd) Award*.

In the 1990s Australian industry generally recognised that it needed a flexible labour market in order to maximise economic growth, employment opportunities and to maintain and improve our standard of living in an increasingly globalised economy. The need to make workplace agreements a key element of the workplace relations system was endorsed by major political parties, all major employer associations, the Australian Council of Trade Unions (ACTU) and most individual unions.

In 1991 ACTU Secretary Bill Kelty claimed that employee capacity, willingness and confidence to put forward innovative ideas had been reduced by key elements of the centralized wage fixation system. In particular Kelty attributed fault to;

> '…wages being totally controlled by people workers don't know, by

> people who have never visited their workplace and through a process which workers do not understand or have direct input into…'[11]

In 1992 former Prime Minister Paul Keating said that the 1901 disputes based system of settling disputes by conciliation and arbitration and making awards was 'a system which served Australia quite well.' However, he went on to say:

> '…the news I have to deliver today to those of our visitors who still think Australian industrial relations is run this way, is that it is finished. Not only is the old system finished, but we are rapidly phasing out its replacement, and have now begun to do things in a new way.'[12]

This was followed by the introduction of union collective agreements and in 1993 non-union collective agreements (termed Enterprise Flexibility Agreements (EFAs)) which could be made directly between an employer and its employees were introduced.[13] In respect to the EFAs, former Prime Minister Paul Keating stated:

> 'Let me describe the model of industrial relations we are working towards…It is a model which places primary emphasis on bargaining at the workplace level within a framework of minimum standards provided by arbitral tribunals…it is a model under which compulsorily arbitrated awards and arbitrated wage increases would only be there as a safety net…the safety net would not be intended to prescribe the actual conditions of work of most employees, but only to catch those unable to make workplace agreements with employers.'[14]

In 1996 the Howard Government provided for a broader range of collective agreements: union certified agreements (including Greenfield agreements) and non-union certified agreements without the union focused procedural requirements of the EFAs.[15] A new type of individual agreement allowed an

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[11] Kelty, Bill, *Together for Tomorrow: recognising change, repositioning the union movement, rethinking unions, recruiting new members*, ACTU Congress, September 9-13 1991, ACTU, Melbourne, 1991. In Peter Reith, MP, Breaking the Gridlock, Discussion Paper No 1, October 2000

[12] Address by the (then) Prime Minister, the Hon Paul Keating to the International Industrial Relations Association Ninth World Congress, Sydney, 31 August 1992, In Peter Reith, MP, Breaking the Gridlock, Discussion Paper No 1, October 2000
http://www.simplerwrsystem.gov.au/discussion/changecase.htm#4#4

[13] Industrial Relations Act 1988 (Cth)

[14] Prime Minister Paul Keating (1993) Speech to the Institute of Company Directors, Melbourne, 21 April 2003.

[15] Workplace Relations Act 1996 (Cth)

employer to negotiate a statutory industrial agreement directly with an individual employee (Australian Workplace Agreement).[16]

This range of statutory agreement options has now been available and utilised by employers in all industries for over a decade. Whilst informal individual agreement making in the form of common law contracts has been in use for considerably longer it is subservient to the award and agreement making system and is not a substitute for statutory individual agreements.

Until March 2006 statutory agreement making was underpinned by a no-disadvantage test administered by the Australian Industrial Relations Commission in the case of collective agreements (or the Employment Advocate in the case of AWAs. This test involved the global comparison of the agreement against the applicable state or federal award (or a designated award). Changes in award conditions could be traded off against improvements in remuneration or the provision of non-cash benefits. Where an AWA agreement failed the no-disadvantage test a review mechanism was available by the AIRC which could review the Employment Advocate's decision or exercise discretion to approve an agreement which failed the test on a public interest basis.

Direct employment relationships are a significant feature of the resources sector with 66.7% of resources sector employees employed under individual arrangements as at May 2006.[17] Of the statutory agreement making options available the resources sector has most embraced the Australian Workplace Agreements. A review of federal resources sector agreements as at 30 March 2006 found that 62% of these agreements were AWAs. [18]

In March 2006 the Workplace Relations Act was amended to give primacy of AWAs over collective agreements. The growth in individual arrangements has

[16] Workplace Relations Act 1996 (Cth).

[17] Australian Bureau of Statistics, Employee earnings and hours survey, May 2006, (6306.0)
[18] Office of the Employment Advocate. May 2007

continued since the March 2006 amendments. As at 30 March 2007 37.2% of the resources sector were covered by AWAs.[19]

A review of resources sector agreements lodged in the 12 months to 31 May 2007 reveals that 73.5% of resources sector employees were covered by an AWA, 21.8% are covered by a union collective agreement and 4.5% are covered by a non-union collective agreement.[20]

AWAs enjoy support for a range of reasons. These include their capacity to over ride inflexible union awards, prevent the taking of industrial action and restrict the role of uninvited unions. Some employers link AWAs with improved productivity. On 23 May 2007, BHP Billiton Chief Executive Chip Goodyear said that AWAs had had improved productivity by about 25 per cent by fostering a direct relationship with their employees.[21]

It is important that statutory individual agreement making remains an option, as without these types of agreements the only form of individual agreement available to employees and employers is a common law contract of employment.

Common law contracts of employment are not a suitable alternative to statutory individual employment arrangements such as AWAs. The shortcomings associated with a common law contract of employment, as opposed to an AWA, are that it:

1. cannot be used to override terms of a collective workplace agreement;
2. cannot be used to override terms and conditions of employment contained in a federal award;
3. cannot be used to override terms and conditions of employment contained in a NAPSA;

[19] Office of the Employment Advocate, May 2007
[20] Workplace Authority, June 2007
[21] The Australian, 24 May 2007

4. cannot be used to override terms and conditions of employment contained in a pre-reform federal agreement;
5. cannot be used to override terms and conditions of employment contained in a pre-reform state agreement;
6. cannot displace conditions of employment contained in a Commonwealth law that is prescribed by the regulations;
7. cannot be used to override applicable state workplace related legislation (e.g. long service leave);
8. cannot be used to specify a Superannuation Fund (in cases where this is available);
9. cannot be used to facilitate workplace flexibility where union consultation or agreement is required by an award, transitional arrangement or workplace agreement (e.g. implementation of 12 hour shifts);
10. cannot be used to cash out annual leave;
11. does not provide any protection against the initiation of a bargaining period and the taking of industrial action;
12. does not provide a means to agree to an alternative to dispute resolution process contained in Division 1 of Part 13 of the *Workplace Relations Act 1996* (Cth);
13. does not protect against uninvited union involvement in the investigation of an alleged breach of an individual agreement;
14. does not protect against a union exercising right of entry to hold discussions with employees;[22] and
15. does not provide the capacity to vary the meal break entitlements under section 607 of the *Workplace Relations Act 1996* (Cth).

The use of common law contracts is a legal mine field. The inability of common law contracts to over ride awards can result in the employer being liable for under payment of wages and prosecutions for breaches of an award even where an honest mistake has been made. Penalties for breaches of an award can be as high as $33,000 per offence. The use of common law

[22] If an employer has entered into an AWA with all its employees, a union does not have a right to enter the workplace to hold discussions with employees: see *Workplace Relations Act 1996* (Cth) s760.

contracts cannot provide employers and employees with the certainty that their agreed conditions of employment have legal effect. The use of an AWA provides this certainty.

A more detailed discussion of the impact of Australian Workplace Agreements in the resources sector and their benefits to both employers and employees is discussed further in an AMMA's discussion paper titled *AWAs - A Major Matter for Miners*.[23]

It is also important that Greenfield agreements remain an agreement option. Greenfield agreements underpin the vast majority of new resources sector construction projects' labour relations arrangements and are utilised to:

- assist in the approval of major projects by allowing developers to more accurately forecast construction labour costs by negotiating and agreeing employment arrangements in advance of a project's approval and/or commencement.; and

- reduce the potential for industrial action over terms and conditions of employment by registration of the agreement prior to the commencement of work. This prevents the taking of lawful industrial action, significantly reducing the risk of industrial disputation in an industry previously characterised by high levels of industrial militancy.

The labour relations arrangements in a workplace are one of the major factors in the successful planning, financial approval and execution of major projects in the resources sector. The certainty and security of the capital investment is closely linked to developing and maintaining stable labour relations arrangements. New projects or expansion of existing operations in the mining and hydrocarbons sectors invariably require investment of substantial sums of money. While the viability of projects will be primarily driven by the quality of

[23] AMMA (2007) *AWAs: A Major Matter for Miners*, AMMA. http://www.amma.org.au/home/publications/publications_home.html#1

the resource to be developed, the growing scale of such projects means that the development costs, including the engineering and construction phase costs, are critical to the financial planning and decision making for these projects.

AMMA contends that agreement making should be free from the mandated involvement of third parties. This involvement extends beyond the negotiation of an agreement and includes the potential for compulsory arbitration in agreement making. Arbitration, with its attendant imposition of an agreement on the parties by an external body (e.g. the Australian Industrial Relations Commission), should only be permitted in exceptional circumstances. Those circumstances include where the failure of the parties to reach agreement is significantly impacting on the life, safety, or health of the population or where it may cause significant damage to the Australian economy.

AMMA further contends that the content of an agreement should be restricted to matters that pertain to the relationship between the employee and the employer. Matters outside of the employment relationship, such as the payment of union bargaining fees by non-union members, should not be permitted to be contained in an agreement.

With an understanding of the agreement making in the resources sector and having identified the key features of an the agreement making system that is part of a modern industrial system that would meet the needs of the resources sector it is appropriate to review the *Workplace Relations Amendment (A Stronger Safety Net) Bill 2007* as amended.

The Workplace Relations Amendment (A Stronger Safety Net) *Bill* 2007

This submission is not intended to analyse the Bill on a line by line basis. This submission is intended to address and comment on the key concepts of the Bill of relevance to the resources sector.

The Fairness Test

AMMA supports the introduction of the fairness test contained in the *Workplace Relations Amendment (A Stronger Safety Net) Bill 2007*. Whilst the resources sector has traditionally paid well above award rates (even in the absence of a 'boom'), AMMA accepts that the proposed test will give added confidence to employees who enter into agreements, on the basis that they cannot be disadvantaged as compared to the applicable award.

The introduction of the fairness test may encourage employees to enter into agreements with their employer and ensure that their employment arrangements meet the needs of the employee and the workplace rather than being forced to accept a 'one size fits all' award based arrangement which provides a sub-optimal wage outcome.

A recent study by the Melbourne Institute found that average wage increases to workers on individual contracts (6.8%) exceeded those under collective agreements (3.9%) and awards (3.3%).[24]

The fairness test has application (subject to the AWA salary cap) where an agreement modifies a protected condition in an award that would apply to the relevant occupation or industry.

<u>General impact of the fairness test</u>

The resources sector has always rewarded its employees well in excess of

[24] Melbourne Institute of Applied Economic and Social Research, Melbourne Institute Wages Report, May 2007

amounts required under awards. With the average resource sector wage now $1820.40 (or $94,879.25 p.a.) and with experienced, highly skilled employees earning $120,000 or more, it is expected that resource sector agreements will easily pass the requirement to provide fair compensation in lieu of the protected award conditions as required by Section 346M.

Despite the high average salary levels, however, there will be a number of agreements which will be subject to review under the new fairness test provisions.

AMMA believes that in so far as is possible the agreement making process should be a simple process with the level of 'red tape' being kept to a minimum. This will reduce transaction costs and time spent in processing agreements.

The previous approach of conducting formal Commission hearings, where parties and the Australian Industrial Relations Commission could 'seek evidence, ask questions, produce witnesses and provide testimony'[25] in the process of certifying the agreement was expensive, onerous and time consuming. It also produced inconsistent results as was evident in *Re Knight Watch Security Pty Ltd* (*Knight Watch*).[26]

In *Knight Watch*, the Commission at first instance sought advice of an academic consultant and it was not until 15 weeks later that the consultant advised that the agreement would not meet the requirements of the *Workplace Relations Act 1996* (Cth) without undertakings being given by the employer.[27] Consequently the Commission refused to certify the agreement. Although the decision at first instance was set aside on appeal, the entire

[25] Ibid, 401.
[26] *Re Knight Watch Security Pty Ltd* (*Knight Watch*), In Mitchell, Richard; Campbell, Rebecca; Barnes, Andrew' Bicknell, Emma; Creighton, Kate; Fetter, Joel and Korman, Samantha, 'What's going on with the NDT? An analysis of outcomes and process under the Workplace Relations Act 1996 (Cth) *Journal of Industrial Relations*, V47, No4, December 2005, 393-423, 401.
[27] Op. Cit.

process was unnecessarily lengthy and involved significant cost despite the parties having reached an agreement.[28]

The proposed Bill avoids the Knight Watch scenario by allowing the agreement to come into operation whilst the fairness test is applied. It appears from the Bill that the approach to the old 'no disadvantage test' has been applied with specific recognition being given to cash and non-cash benefits. The resource sector was able to work with the old 'no disadvantage test' and does not believe that the proposed fairness test will be any different.

In order to provide certainty that the agreement has met the formal requirements AMMA encourages the Government to provide a sufficient level of funding to the Workplace Authority to enable agreements to be vetted in a timely and proficient manner. Where an agreement is found to fail the fairness test, early notice of the issues will allow the parties to resolve the situation promptly.

Application of the fairness test in exceptional circumstances

The proposed amendments allow for a level of flexibility of the application of the fairness tests in exceptional circumstances where the public interest is not offended. [s.346M(4)]

This approach is similar to the capacity of the Australian Industrial Relations Commission had to review AWAs which were considered by the (then) Office of Employment Advocate to have failed the 'no disadvantage test' under old sections 170VPB(3) and 170VPG of the Workplace Relations Act.

AMMA supports the provision of this flexibility.

[28] *Re Knight Watch Security Pty Ltd* (*Knight Watch*), In Mitchell, Richard; Campbell, Rebecca; Barnes, Andrew' Bicknell, Emma; Creighton, Kate; Fetter, Joel and Korman, Samantha, 'What's going on with the NDT? An analysis of outcomes and process under the Workplace Relations Act 1996 (Cth) *Journal of Industrial Relations*, V47, No4, December 2005, 393-423, 401

Review of Fairness Test determinations

The Workplace Authority determination that an agreement fails the fairness test does not appear to be subject to review other than by administrative appeal. AMMA contends that a mechanism (which could be a review by a more senior Workplace Authority officer) for the review of a finding that an agreement failed the fairness test should be provided. The review should allow for the parties to make submissions on an adverse finding and allow for a timely review.

Recovery of Shortfalls

If the event that an agreement fails the fairness test the Subdivision D details the process to address the issue. Subdivision E deals with an employee's entitlement to compensation in respect of a shortfall. Section 346ZD provides for the payment of compensation in the event that an agreement failed the fairness test. Section 346ZD(3) provides the timelines for the payment of any shortfall during the 'fairness test period'.

If the fairness test period was lengthy an employer who had mistakenly entered into multiple agreements which failed the fairness test could face paying a considerable shortfall in a short timeframe.

AMMA submits that the Workplace Authority should aim to ensure that the majority of agreement reviews are completed within a short period after lodgement, in the longer term the majority of agreements should be reviewed within a two week period. This approach could also be complemented by providing a rapid 'pre-assessment' process.

Offering of AWAs to employees involved in a transmission of business

AMMA supports the amendments to Section 400 of the Workplace Relations Act which have the effect of confirming that the protections offered to persons employed in a business which is being transmitted cannot be undermined by

making an offer of employment with the new employer conditional upon an AWA.

Prohibited Content

AMMA supports the proposed amendment to s.356 to specify particular examples of prohibited content in the Act rather than by regulation.

AMMA submits that that this provision should be amended to expand the range of prohibited content. Agreement content which contains matters which do not pertain to the relationship between the employer and employee should be prohibited. This was the case prior to the March 2006 amendments.

Examples of clauses which should be prohibited content include provisions which;

- restrict the engagement of types of employees (e.g. casual or part time employees or the imposition of employee ratios);
- require the employee to change an employee's status after a period of time. E.g. casual conversion clauses – such clauses can act as a disincentive to employment or result in employee churn;
- prevent the use of labour hire suppliers or use of contractors;
- direct that superannuation payments be made into a particular fund (e.g. a union administered fund which has contracts for the provision of services (e.g. insurance) with related entities);
- require the engagement of new employees from a list or a particular source;
- restrictions on where goods and services (e.g. safety equipment) is purchased;

  restricting agreement making options (either during or after the term of the agreement); and
- require the employer to providing trade union training leave.

Conclusion

Australia's present workplace relations system is a vast improvement on that which existed in the 1980s. The devolution of Australian workplace relations commenced with the introduction of agreement making at the enterprise level by the Keating Government in 1991, followed by access to non-union agreement making in 1993. In 1996 the Howard Government introduced the capacity to make individual agreements.

The Government March 2006 reforms brought about a single national system for corporations, introduced statutory minimum conditions, streamlined access to agreement making and placed a greater onus on the industrial parties to be responsible for their own actions. These reforms have assisted the resources sector to improve their already substantial contribution to the Australian economy.

AMMAs policy position on agreement making and processing is that;

> *"There must be access to a broad range of agreement making options including collective agreements, Greenfield agreements and statutory individual agreements, with a duration of up to five years.*
>
> *Agreements should be able to customise the conditions of employment to the needs of the parties and be capable of overriding awards or (in the case of individual agreements) collective agreements. Agreements should not be imposed except in limited circumstances.*
>
> *There should be a simple administrative agreement registration process, without a requirement to attend a formal hearing. Agreements should commence on signing and be required to meet a simple set of legislated minimum conditions."*[29]

The amendments contained in Workplace Relations Amendment (A Stronger Safety Net) Bill 2007 provide the security that agreement making cannot reduce the conditions of employment when compared to an applicable award.

[29] http://www.amma.org.au/home/publications/ammaworkplacerelationsscorecard_24april2007.pdf

The means by which the test will be administered will not adversely impact on the agreement lodgement process.

In the resources sector the prevailing remuneration levels will ensure that agreements pass the proposed fairness test. Whilst the imposition of the test will increase the agreement processing overhead, the fairness test should restore confidence that employees cannot be disadvantaged by agreement making.

The added safety net provided by these amendments should negate any argument that statutory agreement making should be restricted to collective instruments.