Submission

Senate Employment, Workplace Relations and Education Legislation Committee

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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.

Executive Summary

Introduction

On 14 February 2008 the *Transition to Forward with Fairness Bill 2008* (the Bill) was referred to the Senate Committee for general consideration with particular reference to the:

- economic and social impacts from the abolition of individual statutory agreements;
- impact on employment;
- potential for a wages breakout and increased inflationary pressures;
- potential for increased industrial disputation;
- impact on sectors heavily reliant on individual statutory agreements; and
- impact on productivity.

In 2006/7 the resources sector contributed $106.47 billion to the Australian economy representing 77 per cent of Australian commodity exports and 49.3 per cent of Australia's total exports. Over 500,000 persons are engaged in producing this wealth, 138,000 of them directly at mining operations. The average wage for a mining industry employee is $99,994.00 per annum.

ABARE has found that resources sector investors and operators are presently planning or constructing approximately 275 mining and energy construction or expansion projects with a total capital expenditure for these projects in the order of $130 billion.

Access Economics has identified $178 billion in committed resources sector projects and a further $357 billion still in a planning stage.

In brief the significance of the resources sector to Australia's ongoing economic prosperity is well understood.

The importance of the reforms undertaken since the Hawke/Keating Government began to dismantle centralised wage fixing cannot be understated.

The move away from the one size fits all, lowest common denominator award system to an enterprise-focused, productivity-driven system of collective and individual bargaining has allowed greater flexibility, and higher rewards in the resources sector. This has been accompanied by lower industrial disputation, higher levels of employment, much increased output and continued high investor confidence.

AMMA recognizes that industrial relations was the subject of much debate in the lead up to the last federal election. The changes concerning access to unfair dismissal remedies and the capacity for agreements to undermine the award standards, reducing protections of the industrial system, were of concern to many Australians.

The mining industry has not used agreement making to drive wages down. Our average wage of $1918 per week is evidence of that fact. The majority of resources sector employers employ more than 100 persons and have sophisticated fair treatment processes. Employees in the resources sector have not been exploited as demonstrated by their willingness to deal directly with their employer.

The objective of the Rudd Government to increase the protection of vulnerable employees without stifling the flexibility and productivity of key sectors such as the resources sector is a direction supported by AMMA. How this is achieved will be a key performance measure for the Government.

In the absence of AWAs the new system must retain a workable system of agreement making that provides sufficient flexibility to meet our operational requirements in a globally competitive manner. To do otherwise would destroy Australia's reputation as a nation that can deliver raw materials to the world and would kill the golden goose.

Resources Sector Profile

The resources sector was forecast to contribute minerals and energy exports in the order of $108 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 $110.2 billion.[2]

In 1996 the mining industry employed just 56,529 employees; today it directly employs 138,400 employees.[3] This represents a 144 per cent increase in employment compared to the all industry increase in the order of 25 per cent. Approximately 553,000 employees are indirectly employed as a result of activity in the mining sector.[4]

In the hard rock mining sector, the level of union membership is 11 per cent. This is significantly lower than the average level of unionisation in the private sector of 15 per cent.[5]

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 (coal industry was responsible for 86 per cent of this result). In the September Quarter of 2007 there were no recorded days lost in the non-coal mining sector; the coal sector recorded a loss of 1.5 days per 1000 employees. Both results are excellent.[6]

The average weekly wage in the resources sector has increased from $1153.70 in February 1996 to $1917.80 per week, almost $100,000 per annum. This is 65 per cent higher than the all industry average.[7]

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[1] ABARE Economics, *Australian Commodities*, Vol 14, 4, December Quarter 2007.
[2] Ibid.
[3] Australian Bureau of Statistics, *Australian Labour Market Statistics*, Cat. No. 6105.0, Jan 2008.
[4] Based on a 1:4 ratio.
[5] Australian Bureau of Statistics *Employee earnings, Benefits and Trade Union Membership*, January 2007 (6310.0) ABS, Canberra.
[6] Australian Bureau of Statistics, *Industrial Disputes Australia* September 2007, (6321.0.55.001)
[7] Australian Bureau of Statistics, *Average Weekly Earnings*, November 2007 (6302.0)

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. The experts analyse multi-factor productivity rather than simply dividing output by employees. It is also acknowledged that the coal industry has improved in part due to the fact that employees are taking less industrial action than in the late 1990s.

Despite the high levels of exports the resources sector is not sitting on its laurels. ABARE Economics reports that resources sector investors and operators are presently planning or constructing approximately 275 mining and energy construction or expansion projects, with a total capital expenditure for these projects in the order of $130 billion.[8]

Some of the mining construction projects under consideration or construction include:[9]

- Woodside's Pluto Gas field Burrup LNG Park, involving capital expenditure of $16.2 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;
- 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;

[8] Total calculated using the ABARE Mining and Energy table. ABARE Economics, *ABARE Major Minerals and Energy Projects*, April 2007.
[9] ABARE Economics, *Mineral and Energy: Major Development Projects*, April 2007

- 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.

Further to the above billions of dollars of additional projects have been announced since this ABARE report.

Investor confidence in the mining industry is readily apparent and there is no sign that the current high demand for Australian resources is diminishing. If anything the high level 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 reforms since 1993 have without question assisted the mining industry's much increased contribution to the Australian economy. Given the continued high level of investment in the resources sector, it is not surprising that the sector wants to retain the key workplace flexibility provisions in any future 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. 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), 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 recognized that it needed a more 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 rocess which workers do not understand or have direct input into…'[10]

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.'*[11]

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.

On the topic of 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*

[10] 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

[11] 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

conditions of work of most employees, but only to catch those unable to make workplace agreements with employers.'[12]

In 1996 the Howard Government expanded the range of agreement making options with the addition of union Greenfield agreements, employee/employer agreements without the union focused procedural requirements of the EFAs and a statutory individual agreement termed an AWA. The operation of these collective agreements was subject to approval by the Australian Industrial Relations Commission which administered a global no-disadvantage test against the applicable state or federal award (or a designated award). AWAs were reviewed by a Government department. Where an AWA or agreement failed the no-disadvantage test, a review mechanism was available by which the AIRC could approve an agreement that had failed the no disadvantage test on a 'public interest' basis. Agreements could be made for a period not exceeding three years.

In March 2006 the Howard Government introduced the WorkChoices Amendments. With respect to agreement making a new employer Greenfield agreement was added. The operation of AWAs was varied to give them predominance over collective agreements, including collective agreements that had not yet expired. Agreements operated from lodgment and were processed by a Government body. Agreements were tested against a subset of award conditions (protected conditions) and a set of statutory minima.

As a result of the changes to the approval test, agreements could be made that provided terms and conditions less than the award. Regrettably public confidence in the system was undermined by the making of agreements which fell below the previous award safety net.

In May 2007 the Workplace Relations Act was further amended to introduce a 'Fairness Test' which raised the standard that agreements were tested against but remained below the pre-WorkChoices level. In practice the test

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

was complicated and the Workplace Authority has struggled to process agreements within an acceptable time frame. At the time of writing this submission the Workplace Authority reportedly had a backlog of 100,000 agreements.

Note: As the Rudd Government is aware, in May 2007 prior to the introduction of the 'Fairness Test' AMMA was already on the public record stating the pre-WorkChoices AWAs with a 'no disadvantage test' would work well for the resources sector, reflecting the fact that the sector did not seek to use AWAs to cut wages and conditions.

The inability of the Workplace Authority to process agreements in a consistent and timely fashion has resulted in frustration to employers who seek the certainty of knowing that their agreements have been successfully reviewed. In addition the complexity of the test has resulted in identical agreements being rejected by some Workplace Authority branches and accepted by others. In other cases large batches of agreements have been rejected without any discussion with the lodging parties. AMMA contends that the Workplace Authority needs to be adequately resourced to review or approve all agreements within a period of four weeks from lodgment.

Direct employment relationships are a significant feature of the resources sector with 66.7 per cent of resources sector employees employed under individual arrangements as at May 2006.

Of the statutory agreement-making options available, the resources sector has most embraced AWAs. A review of federal resources sector agreements as at 30 March 2006 found that 62 per cent of these agreements were AWAs.[13]

A review of resources sector agreements lodged in the 12 months to 31 May 2007 revealed that 73.5 per cent of resources sector employees were

[13] Office of the Employment Advocate. May 2007

employed under an AWA, 21.8 per cent were covered by a union collective agreement and 4.5% were covered by a non-union collective agreement.

AWAs enjoyed support in the resources sector for a range of reasons. These include their capacity to over ride inflexible awards, prevent the taking of industrial action and restrict the role of uninvited unions.[14]

Resources sector employers link AWAs with improved productivity. On 23 May 2007, BHP Billiton Chief Executive Chip Goodyear said that AWAs had improved productivity by about 25 per cent by fostering a direct relationship with their employees.[15] It is important that an accessible and workable system of individual agreement making remains an option.

A more detailed review 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*.[16]

Traditionally common law contracts of employment have not been a suitable alternative to statutory individual employment arrangements such as AWAs. The historic 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. The Rudd Government's *Forward with Fairness* policy when implemented will modify the effect of common law contracts for persons earning over $100,000 per annum by facilitating a mechanism for awards not to operate above that level. This will go some way to alleviating AMMA's concerns expressed in *AWAs - A Major Matter for Miners*.[17]

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[14] 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.
[15] The Australian, 24 May 2007
[16] AMMA (2007) *AWAs: A Major Matter for Miners*, AMMA. http://www.amma.org.au/home/publications/publications_home.html
[17] AMMA (2007) *AWAs: A Major Matter for Miners*, AMMA. http://www.amma.org.au/home/publications/publications_home.html

AMMA awaits the detail on the implementation of common law agreements and particularly how the $100,000 will be calculated. In order to reduce complexity we suggest that the remuneration ought to be calculated in the same manner used to determine employer superannuation guarantee contributions.

Another area of concern is uninvited union access – AMMA notes the Rudd Government's commitment to retaining the current right of entry regime.

The final area is the capacity for industrial action to impede labour supply. Again we note that the Forward with Fairness policy retains the existing compliance regime and commits to retaining the Australian Building and Construction Commission (ABCC) until 2010. AMMA looks forward to the recognition of the positive role that the ABCC has played and retention of the key features of that role.

It is now appropriate to review the *Transition to Forward with Fairness Bill 2008*. This submission is not intended to analyse the Bill on a line-by-line basis but addresses the key concepts of the Bill of relevance to the resources sector.

Australian Workplace Agreements

AMMA contends that employers in the resources sector have used AWAs responsibly and have not sought to undermine remuneration levels contained in awards. This is evident in the fact that despite a majority of resources sector employees being engaged on AWAs, the average resources sector wage is almost $100,000 per annum, or $758 higher than the average weekly wage.[18]

AWAs have assisted improved levels of employee engagement in the resources sector. Productivity levels in the resources sector consistently exceed the all industry average.

Despite the success of AWAs in the resources sector AMMA recognises that the ALP policy of removing access to AWAs contained in the Forward with Fairness Policy was a prominent feature of the recent election campaign. The provisions contained in the Transitional Bill concerning the removal of AWA reflect the ALP policy.

The impact on existing AWAs will be minimal as a result of the continued recognition of existing AWAs until they are terminated or replaced. However employee 'churn' in the resources sector is presently ranging between 20-30 per cent per annum. The removal of AWAs will result in employers having to choose between ITEA as a short term solution or moving to collective agreements and potentially common law contracts if awards are suitably modernised and do not restrict employer / employee flexibilities

One issue concerning the operation of AWAs that arises from the Transitional Bill is the capacity of employees subject to expired pre-WorkChoices AWAs to vote on a collective agreement and be bound by it upon termination of the AWA. The position in respect of expired WorkChoices AWAs is clear (such employees are entitled to vote on a collective agreement and be bound if the

[18] Australian Bureau of Statistics, *Average Weekly Earnings*, November 2007 (6302.0)

AWA is terminated) but the same cannot be said of the pre-WorkChoices AWAs. AMMA contends that pre-WorkChoices AWA should be treated the same manner.

ITEAs

The operation of ITEAs is almost identical to AWAs and thus they present an alternative statutory individual contract for the transitional period. The key differences are the No Disadvantage Test (not an issue for the resources sector) and the date of commencement of operation for existing employees. These topics will be dealt with later in this submission.

The capacity for employers to access ITEAs was contained on the Forward with Fairness Policy Implementation document. The Transition Bill has followed the policy document in respect of ITEAs. However this leads to the following anomaly which may cause difficulties:

The effect of s.326(2)(b)(i) is that an employee who has at any time previously been employed by the employer is precluded from making an ITEA. In the building industry employees are routinely employed on a daily hire basis or hired for the duration of a project. At the conclusion of a project the employee is terminated and may not return to work until the next project. In the normal course new workplace agreements are processed for each project with the terms and conditions of employment varying depending on the geographical location, rosters, and so on. In recent years AWAs have become more prevalent in the construction area.

As a result of the restriction on offering ITEAs to prior employees the continued engagement of employees on statutory individual agreements will not be possible despite the fact that the employer engaged employees on AWAs prior to 1 December 2007.

AMMA contends that daily hire employees should be permitted access to ITEAs as is the case with casual employees in section 326(4).

In addition AMMA contends that previous employees who have worked with the employer not more than six months prior to the offering of the ITEA should be able to be engaged on an ITEA.

Collective Agreements

AMMA supports the capacity for pre-reform certified agreements to be extended and varied for a period of up to 3 years.

AMMA supports the retention of employer Greenfield agreements.

AMMA contends that employees on all forms of an expired AWA should be entitled to vote on a collective agreement and be bound by it upon termination of the AWA.

No Disadvantage Test

The Transitional Bill replaces the cumbersome Fairness Test with a global No Disadvantage Test (NDT) administered as at the date of lodgement by the Workplace Authority.

The NDT for ITEA essentially requires the agreement to be at least as beneficial as any existing relevant agreement, award and (by implication) meet the minimum legislative standards. In practice this will not present an issue for the resources sector. One area which would benefit from further clarification is that an employer who has engaged employees on a construction project under a collective agreement will not have that agreement

used as the NDT for future construction work. This is implied in the by the use of the term 'relevant agreement' but should be amplified.

The NDT for collective agreements has a lower threshold having only to meet the requirements of an award and (by implication) the legislated standards. Again in practice this will not be an issue for the resources sector and closely resembles the pre-WorkChoices NDT that AMMA advocated a return to in May 2007 prior to the introduction of the Fairness Test.

The NDT will be administered by the Workplace Authority until 31 December 2009. The timely processing of the NDT will be important for workplace agreements that are made with existing employees as a result of the changes made to the commencement dates of workplace agreements contained in s.347(1)(b).

Fast Tracking of NDT reviews

AMMA submits that the Minister should direct the Workplace Authority to provide an electronic NDT calculator to assist employers ensure that agreements meet the NDT and to streamline processing times. In addition the Workplace Authority should allow accredited employer associations and companies, that can demonstrate that they are proficient in ensuring that agreements lodged pass the NDT, and agreements which mirror a previously approved agreement, to have access to a 'fast track' option to agreement processing.

Designated Awards

The Transitional Bill continues to provide a mechanism to determine a 'designated award' in s.346G and s.346H. In the past AMMA members have been concerned that the Workplace Authority (and its predecessor) have designated an inappropriate award or designated an 'award of best fit' where no award should have been designated at all. Whilst s.s.346J(1)(b) provides a mechanism for the Workplace Authority to inform itself (including contacting

the parties or their representative), AMMA contends that the award designation process could be improved by imposing a legal requirement to consult with agreement parties (or their representatives) prior to an award being designated.

In addition a legislated appeal mechanism should be available to agreement parties to review the decision by the Workplace Authority. Such a process could be heard before a Federal Magistrate. The need for a review mechanism is particularly appropriate in light of the continued operation of a designated award in circumstances where the workplace agreement is cancelled.

Agreement Processing

With the exception of the variation and/or extension of pre-WorkChoices collective agreements, all agreements will be processed by the Workplace Authority.

In recent times the Workplace Authority has struggled to process agreements within a reasonable time frame. Complaints have been received from AMMA members that agreements are taking up to three months and in some cases 12 months to be processed.

In addition the implementation of the fairness test has caused difficulties in reaching consistent results, with complaints being made that identical agreements have been passed by one Workplace Authority representative and rejected by another simultaneously. Others have been placed in an 'inaction' basket

AMMA has put similar concerns to the Senate Committee which reviewed the Bill that introduced the Fairness Test. Regrettably these concerns have been

realised with (reportedly) over 150,000 agreements waiting processing as at 10 December 2007.[19]

On 21 February 2008, a Workplace Authority representative gave evidence to a Senate estimate hearing that approximately 148,000 agreements were yet to be processed. This information appears to support a *Workplace Express* report which suggested that on current trends, the backlog would not be cleared until the third quarter of 2008.

The proposed amendments to section 347(b) delay the commencement of agreements for existing employees to seven days after the date of formal approval. This heightens the need for an efficient, consistent means of reviewing and approving agreements.

Proposed Solutions

In the previous section AMMA proposed the provision of an agreed electronic NDT calculator to ensure that agreements meet the NDT and to streamline processing, together with a 'fast track' lodgement option for approved organisations and employers. In the event a 'fast tracked' agreement was subsequently found to have failed the NDT, a mechanism could be provided to ensure any underpayment of wages could be recovered, as is the case for ITEAs for new employees and Greenfield agreements under s.346ZG.

AMMA also contends that agreements which require approval before coming into operation should be processed within a period of 14 days and in the absence of an assessment be presumed to have commenced operation 14 days after lodgement. This may mean the provision of greater resources to the Workplace Authority is needed.

[19] Workplace Express, 10 December 2007

Termination of Agreements

The Transitional Bill continues the practice of existing workplace agreements remaining in force until they are terminated or replaced, and extends this to ITEAs. AMMA believes this is important and will provide a level of stability and thus confidence to employers.

As we understand the Bill, pre-WorkChoices agreements will be able to be terminated in accordance with the rules that were applicable at the time or their creation. Under s.393 expired ITEAs (like expired WorkChoices AWAs) will be able to be unilaterally terminated upon 90 days notice by either party.

Section 397A deals with the termination of expired collective agreements and gives the Australian Industrial Relations Commission the power to terminate a collective agreement upon application subject to the public interest.

The impact of the public interest on the termination of a certified agreement will always be a difficult question. In the 2003 Geelong Wool Combing dispute, the applicable certified agreement contained composite salary arrangements which incorporated applicable overtime, penalties and most allowances, based on a 24/7 shift working arrangement. When the employer could no longer operate on a 24/7 basis due to falling wool volumes, it could not afford to maintain the salaries contained in the agreement for a weekend operation. An application was made to the Australian Industrial Relations Commission to terminate the agreement. The application was rejected and a short time later the business ceased trading with the loss of approximately 120 jobs.

The provisions of s.397A differ from the pre-WorkChoices provisions for terminating collective agreement contained in the (then) section 170MH. Section 170MH required the Commission to terminate an agreement if it was satisfied that it would not be contrary to the public interest whereas the

proposed s.397A provides the Commission with discretion. Subsection 397A(3)(d) is a new requirement.

The provisions in s.170MH have been the subject of much judicial consideration and therefore guidance. The provisions of s.170MH, whilst imperfect, were settled and parties knew where they stood. Unfortunately the same cannot be said of the proposed s.397A. AMMA submits that unless there is a demonstrable reason to deviate from the past approach, the wording of s.170MH should be reinstated.

Other matters

Impact of s.347A on agreement content

The Transitional Bill inserts a new provisions s.347A into the Act. The explanatory memorandum states that the provision is intended to overcome the shortcoming found in *Inspector Wade Connolly v AC and MS Services* [2007] FMCA 139 where a employee collective agreement that was intended to cover certain cleaning staff was approved not by the cleaning staff (who were yet to be employed) but by employees whose employment was not subject to the agreement. The agreement was held to be invalid as such an agreement could only be made with employees whose employment will be subject to the agreement.

AMMA believes the operation of s.347A needs to be clarified. Our concern is that many agreements (particularly collective agreements) contain classifications of persons not yet employed. This practice ensures that the agreement will have the capacity to cover all employees within an enterprise and cover future needs. In some cases the future need is foreseeable (i.e. the employment of a commissioning crew at the end of the construction phase) or unforeseeable (normally addressed by a catch all classification ‘not elsewhere classified’).

It appears that the operation of s.347A as described in the explanatory memorandum would prevent the certification of an agreement that provided for classifications for future employees.

Distribution of the employee fact sheet

AMMA members welcome the removal of the requirement to distribute the Government's employee fact sheet and would invite the Government to take responsibility for the distribution of similar information in the future. In short resource sector employers, and employers in general, oppose being vehicles for what is essentially viewed as government propaganda under the guise of 'information sheets'.

Removal of s.355 – Calling up of other documents

AMMA understands that the policy intent of the removal of s.355 was to allow workplace agreements to draft parts of an agreement by reference to terms contained in other instruments. In this context the term 'instrument' should be a reference to an 'industrial instrument' – that is awards and/or workplace agreements. The removal of s.355 has the potential to allow the incorporation of any document into a workplace agreement. Thus documents such as memoranda of understanding, industry agreements and codes of conduct and the like could be incorporated into a workplace agreement subject only to the prohibited content restrictions as they stood at the time. This would facilitate industry level or pattern bargaining with its increased potential for non-productivity-based improvements in wages and conditions and reduce the focus of workplace-focused arrangements. AMMA contends that the capacity to call up documents be restricted to awards (and as at 1 January 2010 'modern awards') and approved workplace agreements.

Concluding Remarks

Regrettably the Workplace Relations Act remains a convoluted complex piece of legislation that prevents ease of understanding. The Transitional Bill adds another 100 pages to an already large piece of legislation.

Gone are the days when an industrial relations practitioner could be absolutely certain of almost anything in the Workplace Relations Act without extensive checking, referencing and costs to businesses. This means that those employees and employers in the 'real world' have no chance of understanding their rights and obligations without professional help.

In 1996 the then Industrial Relations Minister Peter Reith embarked on a project to re-write the legislation in plain English. This failed. The Rudd Government should re-commit to such a process and with business and union support ensure its ultimate success.

AMMA has not made any remarks about the Award Modernisation process in this submission. This is an extremely important process that AMMA has and will continue to be active in via the National Workplace Relations Consultative Committee, the Committee on Industrial Legislation and other direct representation processes.

Finally the Rudd Government has used the consultative mechanisms of the National Workplace Relations Consultative Council and Committee on Industrial Legislation well. The fact that the draft Bill was exposed to scrutiny and discussion with access to Department of Employment and Workplace Relations and the Deputy Prime Minister has resulted in an improved Bill being placed before Parliament.

AMMA congratulates the Government on its consultation levels and looks forward to this approach being continued in respect to further legislative and regulatory changes.