Presentation to IR Summit
June 3, 2008
Sydney Harbour Marriott
by Christopher Platt
General Manager Workplace Policy

Transitioning from AWAs to ITEAs

Introduction

The Australian Resources sector plays a pivotal role in the economic well being of all Australians with strong investment levels, high international demand for our exports, high employment growth and financial rewards.

Record numbers are being broken by the resources sector - there are currently 341 major minerals and energy projects, with the total value of projects in planning reaching $357 billion. 97 projects are at advanced stage with a total value of $70.5 billion. Also, according to ABARE, 'the total value of Australia's minerals and energy exports is forecast to rise by 33 per cent to a record $153 billion in 2008-09, following a forecast rise of 7 percent to $115 billion in 2007-08.'

The resources sector employs 138,000 employees directly, with approximately another 553,000 employees indirectly employed as a result of activity in the mining sector. Direct employment in the sector has grown by 144 percent since 1996, in comparison to an all industries growth rate of approximately 25 percent.

Growth in employment will not slow in the immediate future. A report commissioned by the Minerals Council has shown that employment in the industry is set to grow by a further 70 percent by 2020, with an additional 90,000 employees required.

These employees can look forward to higher than average total earnings per week of $1,925.20, almost $100,000 per annum.

Union membership though, is falling, with 2007 data showing that 21.5 percent of the mining industry is a member of a union, down 1 percent from 2006. In the hard rock mining sector, the level of union membership is 11.8 percent; coal has fallen 10 percent since 2007 to 56.5 percent.

Industry wide industrial stoppages that threatened the resources sector's ability to meet global demand are now a thing of the past. Industrial disputation in the mining industry has fallen from 7,761.9 days per thousand employees in 1996 to just 139.9 days per thousand employees in 2007. While industrial action in the coal industry has made up the largest proportion of days lost, there were no recorded days lost in the last quarter of 2007 for both coal and non-coal mining – an excellent result.

The stunning success of the ABCC is evident in the decline of industrial disputation in the construction industry from a high of 534.5 working days per thousand employees in the June 1996 quarter to just 1.7 working days per thousand employees in the same quarter last year.

Now having said all that, the means by which coal and the non-coal mining industry engage their employees are quite different. Employees in the coal sector are largely engaged on union collective agreements, not surprising given the higher level of union membership in that sector. Employees in the non-coal mining industry on the other hand, have been engaged on direct employment arrangements - data from the Australian Bureau of Statistics show that the majority of mining employees are engaged under a registered or unregistered

individual arrangement, such as a common law contract or AWA. AWAs were available from 1996 and became the agreement of choice for the metal ore industry, with 63 percent of metal ore employees engaged on an AWA.

Industrial Reform

But as they say, all good things must come to an end.

We are in the midst of another major round of industrial relations reforms within the space of a few years. The first stage of the Government's *Forward with Fairness* has been implemented by amending legislation on 28 March 2008 and steps are being taken in respect to the second stage.

Employer organisations with an IR consulting business such as AMMA, employment lawyers and consultants are having a busy year developing IR strategies for clients impacted by such significant changes.

What have been the key changes in the first stage of industrial relations reform?

- Australian Workplace Agreements are no longer an agreement making option for employers, although existing AWAs will remain in force;
- Individual Transitional Employment Agreements have been created;
- The No Disadvantage Test has been reinstated;
- Agreements for existing employees now commence seven days from notification of approval from the Workplace Authority Director.
- Pre-WorkChoices certified agreements can be extended; and
- The award modernisation process has begun.

This has been an interesting period for the resources sector.

During the lead up to the election there was a lot of heat in the IR debate. AMMA was an active participant.

Through various consultative mechanisms, including direct dialogue with the then Opposition and now Government, a lot of issues have been worked through and some sound outcomes have been achieved.

Current Agreement Making Options (short term)

AMMA and its members have been planning for an non-AWA environment for some time. At the moment though, there is no need for a mass exodus from AWAs. Existing AWAs will continue to operate until they are terminated or replaced, although employee turnover within the industry means that employers will be facing new employment arrangements sooner rather than later.

Collective agreement making has remained untouched – existing collective agreements entered into during the WorkChoices period can continue to operate and certified agreements entered into prior to WorkChoices can be varied or extended on application to the Commission. The main impact is a delayed operative date.

Those employers who need to enter into a new agreement, either with their existing or new employees, have, until the commencement of the Government's substantive legislation, the option of pursuing either:

1. an employee collective agreement;

2. a union collective agreement;
3. an ITEA; and/or
4. a common law contract of employment (recognising the impact of any applicable award)
5. or rolling over a pre-WorkChoices collective agreement.

Given the preference of many resources sector employers for direct employment arrangements, existing AWAs under pinned by employee collective agreements, ITEAs and common law contracts are the most attractive options.

Those less inclined to wait to see the outcome of award modernisation and eager to finalise their employment arrangements have already moved, or are preparing to move, to employee collective agreements underpinning existing AWAs. While not offering the individual flexibility of an ITEA, the strategy allows employers to offer workers a way to keep existing terms and conditions of employment largely unchanged and preserves the individual relationship.

The transition from AWA to employee collective agreement is relatively smooth in technical terms – the transitional legislation has given an employee on an expired AWA the ability to vote on a collective agreement and enabled a collective agreement to operate in respect to the employee once the AWA has been terminated. But arguably it can come at a cost – employees may expect some additional incentive – usually monetary - from the employer before they sign a new agreement.

Those more inclined to wait and see what award modernisation and the new legislation brings and are not yet ready to leave behind statutory individual agreements can pursue ITEAs as an interim arrangement. The transition from

AWA to ITEA is also relatively smooth – provided you meet the eligibility requirements:

- the ITEA can override award provisions;
- they can be made with new employees as a condition of employment;
- they can be made with existing employees currently employed under an AWA;
- they can mirror the terms contained in the AWA;
- they offer protection from industrial action during their nominal term; and
- they can continue to operate beyond their expiry date.

The eligibility requirements can be somewhat limiting. Employers must have had an AWA in place somewhere in the business as at 1 December 2007 – some of our member companies that are only just starting to take on employees for projects but want the benefit of a statutory individual agreement, cannot use ITEAs.

While the ITEA can mirror the terms contained in the AWA, it must pass the No Disadvantage Test – which is against the entire award, not just the protected award conditions. But the impact of the NDT on the mining industry is minimal, given the high wages it pays.

However, the image of individual agreements has taken a battering as a result of the anti-WorkChoices ACTU campaign. There are instances of employees being skeptical of entering into them on the mislaid assumption that their conditions will be undercut or that they are in some way being treated unfairly. Whilst there is evidence of employers in some industries exploiting WorkChoices AWA, in the

resources sector, with an average total yearly wage of nearly $100,000 this clearly was not the case.

While ITEAs are not a long term agreement making option with a nominal expiry date not later than 31 December 2009, employers entering into ITEAs are not in denial. Employers accept that AWAs are gone, but ITEAs do provide them some reprieve from immediate change and the opportunity to develop a well-considered industrial relations strategy that is appropriate to the business and its employees. The final result though is that ultimately, ITEAs and AWAs will be replaced by other forms of direct employment arrangements.

In addition a few employers (4 to date) have taken the option to extend their pre-WorkChoices collective agreements.

Agreement Making Options in 2010

The Government's substantive legislation will change the face of industrial relations as we currently know it.

Agreement making will be underpinned by a two-part safety net comprised by modern awards and the national employment standards. From 2010, employers have the option of pursuing a range of employment options on top of the National Employment Standards

NES plus

- Award free
- Modern award
- Modern Award and award flexibility agreement;
- Modern award + award flexibility agreement and common law contract of employment;
- Common law agreement (>$100K that are not covered by a collective agreement); or

- Collective agreement
- Collective agreement + agreement flexibility agreement
- Collective agreement + agreement flexibility agreement + common law contract

The challenge during this period of industrial reform will be to ensure the advantages experienced by the individual statutory contract regime are not lost by the resources sector. AMMA has already highlighted the difficulties associated with having much of the flexibility for the national employment standards contained within the award system. The Government has assured us that historically accepted roster patters that many mining sector employees enjoy and are used to working will be available under their workplace relations reforms.

The flexibility that we are used to – the flexibility that the new Government has promised to deliver – must continue. It is essential to the continued success of the resources sector that employers are able to adjust labour input and work rosters to accommodate changes in demand, to link wages to productivity improvements, to have a workforce capable of moving between tasks to meet demand for different types of labour and to introduce change.

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 override awards can result in an employer being liable for underpayment of wages and prosecutions for breach of an award.

The $100,000 common law agreement goes some way to alleviate concerns AMMA raised in its *AWAs – A major matter for miners* paper – indeed, it offers all the perks of an AWA without the administrative liability - although it could have

gone further with a lower earnings threshold that would not have the result of excluding 65 percent of non-managerial staff in the mining industry.

For the 65 percent of employees that earn less than $100,000 pa resources sector employers will be monitoring the creation of the model award flexibility clause closely – this clause has the potential to offer employers high levels of flexibility with minimal administrative cost. An award flexibility clause that offers flexible and genuine individual arrangements will make common law contracts much simpler - and a return to an individual statutory agreement regime may not be necessary.

The first five options do not protect an employer from protected industrial action taken in pursuit of a collective agreement. A number of resource sector employers have relied on being an ‘employer of choice’ to protect against industrial action. This requires sophisticated employee communication, recognition and reward systems and keeping a watchful eye for problems. One large employer has not had the protection of an in term agreement for over 12 years, yet has not lost a day in industrial action and does not have the expectation of regular agreement re-negotiation rounds.

It’s risky business

Our greatest challenge will be to continue to work directly with our employees to achieve and maintain high levels of employee engagement, in a completely different industrial environment.

The potential for almost mandatory union involvement in agreement making under the new system, the ability of unions to enter workplaces that have

traditionally been union free, loosening of restrictions on agreement content and the transition of the ABCC to Fair Work Australia may be testing on employers.

- Union Right of Entry

Union's are restricted in their ability to enter the workplace under Right of Entry laws where an employee is engaged on an AWA or ITEA. They cannot enter the workplace in order to hold discussions with employees and cannot enter to investigate a suspected breach of an AWA or ITEA unless the employee requests it. Rights of entry for suspected breaches of occupational health and safety laws remain regulated by the States, and many have taken the opportunity to amend their legislation in this respect in order to circumvent the restrictions imposed by WorkChoices.

While the Government has stated that it will retain existing right of entry laws, current restrictions may be lost as employers transition from AWAs and ITEAs to awards, common law agreements and common law contracts.

The creation of industry based modern awards may also impact on union respondency, potentially given more unions more coverage across industry and ability to enter the workplace.

- Prohibited content

Restriction on agreement content is important to the resources sector. The High Court *Electrolux* decision restricted bargaining to "matters pertaining to the employment relationship" and was largely codified by WorkChoices in its "prohibited content" provisions. While *Forward with Fairness* maintains some of

those restrictions in respect to union preference clauses and bargaining fees, the rest appears to be largely unrestricted. Our concern is if the Government completely opens up agreement making it would put at risk our historical low of "zero" industrial disputes in the mining sector and "nearly zero" in construction. The ACTU has called for bargaining to be opened up so parties have the ability to restrict the use of contractors and overseas labour; the nomination of union supplied insurance, super and training products and may even require construction projects to be "carbon neutral."

It is all very well for the ACTU to decide global warming was a "real issue", but expecting employers to foot the bill is overstepping the mark. As an example, in negotiations employers could find themselves facing a claim to have a carbon neutral construction site of processing plant with a need to plant 50,000 hectare forests to offset carbon emissions.

- ABCC review

Current record low levels of illegal industrial action in the construction industry during the ABCC's existence have not occurred by accident – it is the result of effective investigation and compliance mechanisms that must also be integrated into the proposed specialist division of Fair Work Australia. The ABCC has changed the behaviors but as yet not the underlying unlawful culture – just look to the west to see some indicators of what might happen if we lose the 'strong cop on the beat'

The impact on dispute resolution in the workplace

All agreements must contain a dispute resolution clause to deal with disputes arising between the employer and employees as early as possible to resolve them. Disputes can be referred to an alternative dispute resolution provider and this does not necessarily have to be the Commission. Nor is it mandatory for a union to be involved in the dispute resolution process – in fact, it is prohibited to include such a requirement in an agreement.

But is this going to change under the Government's industrial relations system? Fair Work Australia is going to have some wide ranging powers and *Forward with Fairness* sees a role for Fair Work Australia in undertaking formal and informal dispute resolution. Will it be compulsory for parties to refer their disputes to Fair Work Australia or will they have a choice as to which dispute resolution provider they use? Will unions have to be included in the dispute resolution process?

AMMA has always been a staunch believer in dispute resolution at the workplace level. Of course, some disputes are intractable, but this is where resolution by the Australian Industrial Relations Commission or Fair Work Australia and also respective State Commissions can have a role. Large, intractable disputes impacting on the Australian economy should also remain within the power of the Minister to stop.

What about when the parties are not bargaining in good faith? Could Fair Work Australia have the power to conduct compulsory arbitration and impose an outcome on the parties or will it be restricted to conciliation unless the parties agree otherwise?

Reducing the risk by being an employer of choice

But for those who have a truly and highly engaged workplace, who focus on their employees as individuals and have sound people management systems may find their employees are less easily swayed by the advances of unions, disputes are more easily resolved and employees are less inclined to take industrial action.

There is less need or desire to strike when employees are committed to the organisation, are satisfied with their job, are paid excellent wages and conditions and have access to further education and training: (e.g.)

- Full time adult mining employees' total average weekly earnings are $1925.20 – around $100,000 per year;
- They enjoy flexible working hours;
- They are the focus of imaginative recruitment strategies, such as giving graduates a free ipod with their letter of employment;
- Some are given assistance with further education and training;
- Some can participate in overseas exchange programs;
- Some are even provided with cars for their spouses.

When employees are engaged, research shows that business benefits from greater customer satisfaction, increased workplace safety, increased profitability and reduced staff turnover.[1] A survey of human resource managers from approximately 80 mining companies identified that individual workplace agreements were used by these companies because they offered:

[1] This research has been undertaken by the Gallup Organisation – a global consultancy firm and Ulrich and Smallwood, two prominent consultants specialising in employee engagement.

- greater efficiency and simplification of payroll;

- an opportunity to break down divisions with the organisation;

- an easier to understand and consistent approach to remuneration and job requirements; and

- a greater emphasis on a unified approach to company operation and performance.

With employee engagement the end goal, the resources sector has never relied on Government of either persuasion for their IR salvation. You will find a fairly practical bunch in our industry and they are simply getting on with the job of IR strategy planning for the long term and striving to become employer of choice.

Conclusion

The challenges facing the resources sector in 2008 are widespread, born in no small part by the adaptation of business to the current and forthcoming changes to the industrial relations legislation. However, the resources sector will learn to live with the new regime.

Industrial relations legislation is not the sole priority of business – the pendulum keeps on going back and forth and business understands that the legislation itself will not dictate the relationship they have with their employees. The continued focus for business will be on managing its people and rewarding innovation.

The greatest challenge rests with the Rudd Government, a Government who says they have a policy that strikes an appropriate balance between employer and employee rights and will be good for the economy. The challenge simply will be to facilitate mechanisms that keep record low industrial disputation levels, reduce unemployment, keeps inflation and interest rates under control, to provide certainty to business, to restrain militant union behaviour and give access to skilled migration.

With AWAs gone the focus for business remains the same – to 'industrial relations proof' our business by ensuring we are fully engaged with our greatest resource – our employees.