Submission to the Senate Education, Employment and Workplace Relations Committee

Inquiry into the Fair Work Bill 2008

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Table of Contents

1. Executive Summary

1.1. The introduction of the Fair Work Bill to parliament reflects, in many respects, the government's pre-election commitments contained within Forward with Fairness and various other policy announcements made throughout the course of 2007 and 2008. The government relies on this pre-election commitment to support the passage of the Bill through parliament and reasons that 'it meets the needs of the modern age', 'will improve productivity' and will 'create rising national prosperity.[1]

1.2. The Fair Work Bill must then be judged on whether it does remain faithful to its pre-election commitments and proposed objectives, whether it does in fact meet the needs of business operating in a modern environment and whether it will lead to productivity benefits and encouragement of employment growth that will contribute to national prosperity.

1.3. Government policy and legislative reform does not, however, occur in a vacuum – it is shaped and impacted by the state of the Australian economic and social environment. Given this, the current global financial crisis that is impacting on job maintenance, job creation and business confidence must also be taken into consideration when implementing legislative reform as significant as the Fair Work Bill. The retention of flexibility and minimisation of third party intervention within Australia's labour market system is also crucial in terms of assisting business to respond quickly to an ever-changing economic environment and to maintain high levels of employment.

1.4. The merits of a flexible workplace relations system are supported by the Organisation for Economic Co-operation and Development, which reports that countries with a decentralised bargaining system and less restrictive

[1] The Hon. Julia Gillard MP, Minister for Employment and Workplace Relations, 'Fair Work Bill 2008', *Second Reading Speech*, 1, viewed 7 January 2009, http://www.workplace.gov.au/NR/rdonlyres/53C280C4-17AF-4EED-83BE-418C21E19999/0/fwbill20082rs.pdf

employment protection were better equipped to be industrially innovative and able to take advantage of new and evolving technologies. [2]

1.5. Based on the above criteria, AMMA's analysis of the Fair Work Bill has identified a number of concerns about its impact on resources sector employers, as it threatens to return the Australian workplace relations system to one that is highly centralised, more restrictive and at risk of being strongly adversarial and controlled by third parties.

1.6. The change in workplace relations presented by the Fair Work Bill fails to recognise that flexibility, cooperative direct relationships with employees and reduced third party intervention has enabled the resources sector to take full advantage of the international demand for Australian resources. It is therefore essential that the Fair Work Bill does not undermine important elements of previous workplace relations reform in order to ensure that the sector continues to make a significant contribution to the Australian economy in terms of high levels of productivity, job creation and contribution to GDP.

1.7. The resources sector currently contributes eight percent to the Australian gross domestic product;[3] its forecasted $159 billion in export earnings for 2008-09 are 37 percent higher than the previous year and 85 major minerals and energy projects are at an advanced stage of development.[4] Future investment decisions and completion of projects at this advanced stage are vulnerable to the changed global economic conditions and a rollback in labour market flexibility.[5] It is important therefore, that any new industrial relations regulation does not exacerbate the current tough conditions in which the sector is operating.

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[2] See Organisation for Economic Co-operation and Development, Survey of Australia 2008, Chapter 4, cited in Minerals Council of Australia, Submission to the Fair Work Bill Senate Inquiry, January 2009.
[3] Australian Bureau of Statistics, 'Sustaining mineral resources industry – overcoming the tyranny of depth',
Yearbook, 2008, Cat No 1301.0, ABS, viewed 30 September 2008,
http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/1301.0Feature%20Article18012008?opendocument&tabname=Summary&prodno=1301.0&issue=2008&num=&view=
[4] ABARE, *Minerals and Energy: Major development projects – October 2008 Listing*, Australian Government, 2008, 8.
[5] Ibid.

1.8. AMMA's primary concerns in relation to the Fair Work Bill are set out below and are immediately followed by a number of key recommendations detailing how these concerns could be resolved by the Senate. A more comprehensive discussion of AMMA's concerns and recommendations is provided in the body of this submission, followed by a concise summary of all concerns and proposed amendments at **Attachment A**.

Key Concerns / Recommendations

Expansion of Union Right of Entry and Access to Non-Member Records

1.8.1. Union right of entry to workplaces has been considerably expanded in the Fair Work Bill by a reliance on union coverage (rules) to determine access, which results in an expansion of access by unions to workplaces where the union may not be covered by the industrial instrument applying at the workplace. This is contrary to the government's policy of retaining Right of Entry rules without exception.

1.8.2. The Fair Work Bill also further expands the rights of unions when they are on an employer's premises. For example, a union exercising its right of entry will also be able to access the records of non-members, which it cannot do under existing laws without the permission of the Australian Industrial Relations Commission.

1.8.3. The removal of the existing definition of 'relevant record' also broadens the type of records that can be accessed. Existing privacy laws are inadequate, do not protect employees from the use of their information for recruitment purposes and therefore cannot justify this expansion of union powers and access to non-member records.

Default Bargaining Representatives

1.8.4. The option of making a non-union agreement under the Fair Work Bill is illusory. Under the Fair Work Bill, just one union member at the workplace could trigger union coverage of an agreement despite the majority of employees being non-union members (see ss 176, 183 and 201).

1.8.5. Further, a union can be covered by an agreement despite the bargaining agent having no active involvement in the bargaining process.

1.8.6. There is also no mechanism for an employee to revoke a representative's rights where the employee is dissatisfied with the performance of the bargaining representative. It is also unclear whether an employee can make an alternative appointment at any time, where the default representative rules apply. This undermines existing freedom of association rights by mandating third party involvement in the workplaces irrespective of employee choice.

1.8.7. Combined with the enhanced union rights of entry and access to non-member records, the default bargaining representative rules and notification obligations during agreement making give unions every opportunity to seek to disrupt currently harmonious workplaces and undermine the cooperative and collaborative approach to workplace relations established over the past decade in the resources sector.

Union Greenfields Agreements

1.8.8. A requirement that each union be compulsory notified and required to sign a greenfields agreement as a precondition of the agreement being made gives just one rogue union the ability to veto an agreement despite all other unions being satisfied with the outcome. On any given project there can be multiple default unions. Under the proposed laws, any one of them will have the opportunity to bring the commencement of a new project to a complete standstill by refusing

to sign off on an agreement, putting at risk billion dollar resource construction projects that require industrial certainty (see ss 175, 177 and 179).

Good Faith Bargaining

1.8.9. Under the guise of the 'good faith bargaining system', an employer may be surreptitiously exposed to an arbitrated outcome due to the mandated involvement of third parties. The interaction between s 228, s 231 and s 235 and lack of certainty in relation to the good faith bargaining process may result in an order that effectively coerces an employer into making a concession or agreeing that a term may be included in an agreement.

1.8.10. Further, the ability for an employer to engage replacement labour during industrial action may now be limited by the good faith bargaining obligations on parties to refrain from 'capricious or unfair conduct' that undermines collective bargaining.[6]

1.8.11. The ability to engage replacement labour is particularly important in light of the Fair Work Bill's removal of an employer's right to take pre-emptive action by locking out employees. Employers are now prevented from taking pre-emptive action against employees and unions, yet employees and unions will control the time at which action is taken to inflict maximum harm on the employer. A limitation on the ability to engage replacement labour was not articulated in government policy.

1.8.12. The resources sector has long been committed to a workplace relations environment based on choice and flexibility. Barriers such as those referenced above which impinge on the ability to flexibly

[6] See Senate, Standing Committee on Education, Employment and Workplace Relations, 'Fair Work Bill 2008', *Hansard*, 11 December 2008, Canberra, 44.

engage and deploy workers will weaken the capacity of resources sector employers to rapidly respond to future economic challenges.

Hours of Work and Rostering

1.8.13. The ability to average the hours of work over 52 weeks is reduced to just 26 weeks for both award covered and award free employees under the Fair Work Bill, impacting on those resources sector employers that operate rosters greater than 26 weeks (e.g. employers within the sector operating on a 28 week Norwegian roster). This is contrary to the government's assurances that current patterns of work in the industry will be able to continue under the new system.

1.8.14. The 'modern' Mining Industry Award now limits the ordinary hours for each day or shift worked to 10 ordinary hours which is a direct rollback of previous flexibilities within the sector. This will directly impact long-term current rostering arrangements in the resources sector, which have commonly averaged up to 12 ordinary hours in existing roster patterns. It will also create inconsistent levels of flexibility for award covered and award free employees and result in operational difficulties for employers with both types of employees currently working the same roster.

Cashing Out of Annual Leave

1.8.15. Employees covered by the Mining Industry Award are also prevented from cashing out their annual leave due to the absence of an enabling provision in the award. This sets a different standard compared to award free employees, who can agree to cash out annual leave under the Fair Work Bill. The Fair Work Bill also sets an unreasonable requirement for employees to retain a minimum accrued annual leave entitlement of four weeks, disadvantaging employees engaged on even-time rosters already allowing for

significant periods of rostered time off (i.e. six months), that wish to cash out all of their annual leave.

Taking of Annual Leave

1.8.16. Fly-in-fly-out remote sites operating in conjunction with a set roster cycle will also be adversely impacted where an employee has no choice but to take annual leave at a time that conflicts with the roster cycle (e.g. it will be difficult to find a replacement employee for short periods). A requirement by an employer that an employee take paid annual leave during their rostered period off may not be considered 'reasonable' under the Fair Work Bill. This is a particularly pertinent issue where the employee is unable to cash out annual leave.

Transfer of Business

1.8.17. In some cases the lack of flexibility or uncompetitive cost structures contained in an existing industrial instrument is often the cause of part of an operation to be outsourced or a commercial contract being terminated. The proposed categorisation under the new laws of an arrangement being considered a transfer of business together with an obligation to apply a sub-standard industrial instrument where employees come across to the new employer will directly result in decisions not to engage any employees from the old employer (see ss 311, 312, 313 and 314).

1.8.18. At a time when unemployment figures are increasing, it is essential that new employers are not burdened with the requirement to absorb inflexible or costly industrial arrangements in the event they choose to engage employees previously engaged by an old employer.

1.8.19. The proposed operation of the transfer of business provisions is a direct disincentive to employ persons who worked for a prior

employer in the transferred business. This risks jobs, and is directly related to the flexibility of the Australian labour market.

1.9. Finally, AMMA's current analysis of the impact of the Fair Work Bill is severely hampered by the requirement to consider the proposed laws in isolation from the impending transitional legislation and further legislation that deals with the registration and accountability of organisations, which is yet to be publicly released. Among other matters, the transitional legislation will detail how existing agreements will interact with the new system, including the operation of the National Employment Standards and the Modern Award system. The inability to consider all three aspects of the legislation concurrently, places the resources sector at an extreme disadvantage.

1.10. Nevertheless, it is clear that the Fair Work Bill exceeds a number of the government's key policy commitments and represents the greatest increase in union power since federation. For example, it expands union powers by:-

a) Enhancing particular union's access to workplaces for recruitment purposes or investigation purposes absent any award or agreement covering the union;
b) Allowing unions to access non-member records without their consent;
c) Automatically involving and affording rights to unions during enterprise bargaining without the employees' express consent;
d) Imposing compulsory union notification obligations on employers and Fair Work Australia, irrespective of levels of union membership or interest in the workplace;
e) Giving a rogue union veto power over the making of a greenfields agreement in circumstances where billion dollar projects are at stake.

1.11. In the past decade, the Australian resources sector has transformed its workplaces from a culture of industrial disputation and division, to one of direct employee engagement, increased levels of productivity and low levels of industrial disputation. Retaining this culture will be challenging for business under the proposed laws.

1.12. The Fair Work Bill will adversely impact on the sector's ability to achieve strong productivity growth by disturbing existing flexible arrangements, imposing union related matters in industrial arrangements, disturbing established union demarcations, increasing the prospects of industrial disputation as a direct result of increased regulation of the agreement making process (and putting at risk record low levels of industrial action in the mining industry[7]) and opening the door to arbitrated outcomes. Restrictive transfer of business rules will also prove to be a disincentive to take on transferring employees, leaving many employees without employment.

1.13. Despite the current market uncertainties the resources sector is geared to play an important role in contributing to Australia's economic performance in the future. A recent report of the Productivity Commission highlights that there has been a production lag affecting productivity growth in the industry due to the surge in capital investment from 2000-01 to 2006-07 that has not yet translated into increased outputs.[8] However, the Productivity Commission predicts that the sector's strong capital investment will be rewarded with a 'surge in…output between 2008-09 and 2011-12' and that this should have a 'strong positive effect' on multifactor productivity.[9] Consequently, this is not the time to implement industrial relations reform that rolls back existing flexibilities, stifles growth and risks increasing productivity and job creation.

1.14. The broad-ranging economic and labour market reforms of the past 25 years have delivered vast increases to levels of personal income and productivity. Unemployment has fallen and business investment levels have risen. The Fair Work Bill provides 'an opportunity to build on recent workplace reforms'.[10] Yet, if this opportunity is not taken, the adverse macroeconomic impact of the

[7] In the non-coal mining sector in the September 2008 quarter, just 1.7 working days per thousand employees were lost. In the previous June quarter, zero days were lost. Likewise the coal sector is experiencing dramatically reduced lost days to industrial action. Australian Bureau of Statistics, *Industrial Disputes*, Cat No. 6321.0.55.001, ABS.
[8] Vernon Topp et al, *Productivity in the mining industry: measurement and interpretation*, Productivity Commission working paper, December 2008, 105-106.
[9] Ibid.
[10] Minerals Council of Australia, Submission to the Senate Review of Fair Work Bill, January 2009.

proposed legislative changes will be substantial. It is arguable that the imposition of new limits to labour market flexibility will be accompanied by the loss of Australian jobs, and 'an economic downturn will be deeper and last longer than might ordinarily be the case'.[11]

[11] Minerals Council of Australia, Submission to the Senate Review of Fair Work Bill, January 2009.

RECOMMENDATIONS and PROPOSED AMENDMENTS

Expansion of Union Right of Entry and Access to Non-Member Records

- Retain existing Right of Entry laws including current limitations on access to non-member records.
- Require all investigations of suspected breaches of industrial instruments to be undertaken by an independent government authority.
- Alternatively, ensure that union entry is based on historical union coverage that recognises existing demarcations. Allow an agreement regulating the employees' work to specify which union (if any) has access to the workplace.
- Require inspection of employee records to be carried out by the Fair Work Ombudsman or an equivalent independent government body.
- Alternatively, limit any right afforded to a union to inspect member and non-member records to where it has the written consent of the affected employee or an order of Fair Work Australia. In the alternate, impose these requirements in respect to non-member records only.
- Explicitly exclude records or documents that are subject to a claim of legal professional privilege or which contain confidential, personal or commercially sensitive information.
- Retain the current definition of 'relevant record' contained in s 748(12) of the existing *Workplace Relations Act 1996*.

Default Bargaining Representatives

- Remove the union default bargaining representative rule and make union representation of a member subject to specific written approval.
- Enable an employee to revoke the appointment of a bargaining representative or appoint an alternative bargaining representative at any time.
- Ensure that a bargaining representative can only exercise good faith bargaining rights or the right to be covered by an agreement where the bargaining representatives actively participated in the negotiation process **AND** a genuine majority of employees to whom the agreement will apply voted for the bargaining representative to be covered by the agreement.

Union Greenfields Agreements

- Restore the existing capacity for employers to enter into a union Greenfields agreement with one or more eligible unions.

Good Faith Bargaining

- Ensure that good faith bargaining orders cannot be imposed on employers who exercise their right to not make concessions or agree to a term to be contained in an agreement.
- Specifically exclude the engagement of alternative labour from the definition of capricious or unfair conduct.

Restoring Flexibility - Hours of Work and Rostering

- Restore the 52 week period for averaging hours of work or allow the hours of work to be averaged over the relevant roster cycle.
- Ensure the 52 week period for averaging hours of work, or ability to average the hours over the relevant roster cycle, applies to all employees, whether award covered or award free.
- Require the Australian Industrial Relations Commission to include a 12 ordinary hour day or shift in modern resources sector awards, without the need for union or majority approval.
- Amend the National Employment Standards to provide for a 12 hour day or shift in the resources sector. Amend current award modernisation request to require the Australian Industrial Relations Commission to include a standard 12 hour day or shift in modern awards for all industries operating in the resources sector.

Cashing Out of Annual Leave

- Amend the National Employment Standards to allow for cashing out of Annual Leave for all workers in the resources sector.
- Alternatively, amend the award modernisation request to require the Australian Industrial Relations Commission to include a term in a modern resource sector awards allowing employees to cash out their Annual Leave without limitation.
- Remove the requirement in the National Employment Standard to retain a minimum period of annual leave where employees are working in the resources sector.

Taking of Annual Leave

- Ensure that employers within the resources sector can reasonably require an employee to take a period of annual leave in their rostered period off where such rosters are designed to address remote rostering arrangements.

The Workplace Relations System

Stakeholders should be provided with the opportunity to consider all aspects of the government's industrial relations legislative reform measures, including the transitional legislation in their entirety before being passed by the Senate.

2. Introduction

Australian Mines and Metals Association Profile

2.1. AMMA is the national employer association for the mining, hydrocarbons and associated processing and service industries, including significant numbers of construction and maintenance companies in the resources sector.

2.2. AMMA is the sole national employer association representing the employee relations, human resource management, education, employment and training interests of Australia's onshore and offshore resources sector and associated industries.

Resources Sector Contribution to the Economy

2.3. Over the past 20 years the resources sector has contributed over $500 billion to Australia's wealth.[12] The sector accounts for 8 percent of Australia's gross domestic product[13] and is forecast to contribute $159 billion in minerals and energy exports in 2008-09, 37 percent higher than the previous year.[14]

2.4. There are 347 major minerals and energy development projects identified by the Australian Bureau of Agricultural and Resource Economics (ABARE).[15] Significantly, 262 of these minerals and energy projects are undergoing feasibility studies.[16] This includes 16 proposed LNG developments, such as the Chevron Gorgon joint venture project, BHP Billion and ExxonMobil Scarborough Gas project and the Woodside Energy, ConocoPhillips, Shell

[12] Australian Bureau of Statistics, 'Sustaining mineral resources industry – overcoming the tyranny of depth', *Yearbook*, 2008, Cat No 1301.0, ABS, viewed 30 September 2008, http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/1301.0Feature%20Article18012008?opendocument&tabname=Summary&prodno=1301.0&issue=2008&num=&view= .
[13] Ibid.
[14] ABARE, 'Global financial crisis weakens commodity export earnings', *Media Release*, ABARE, 15 December 2008, viewed 22 December 2008, http://www.abareconomics.com/corporate/media/2008_releases/15dec_08.html
[15] ABARE, 'Number of minerals and energy projects down but investment still strong', Media Release, Australian Government, viewed 7 January 2009, http://www.abareconomics.com/corporate/media/2008_releases/19nov_08_2.html
[16] Ibid.

and Osaka Sunrise Gas project.[17] These are projects with no definite decision on development and are therefore vulnerable to changing conditions that will impact on when and if they proceed.[18] Likewise projects that have reached the committed stage 'may be deferred, modified or even cancelled if economic or competitive circumstances change significantly.'[19] According to ABARE, 85 projects are at an advanced stage with projected capital expenditure of $67.3 billion.'[20]

2.5. A recently released report of the Productivity Commission identifies a 'production lag' in the resources sector from 2000-01 to 2006-07, which has contributed to a fall in multifactor productivity.[21] This lag has been attributed to a 'surge in capital investment' during this period and the 'lead times between investment and outputs in mining'.[22] The Productivity Commission concludes that the sector should experience 'a surge in…output between 2008-09 and 2011-12 in response to the surge in capital investment made from 2005-06 to 2007-08' and expects that it will have a significant positive influence on multifactor productivity in the sector.[23]

Submission Approach

2.6. The government's 2007 industrial relations election policy is contained in *Forward with Fairness*[24] and is supplemented by a number of public statements by the Hon. Julia Gillard MP. This includes a speech to the National Press Club on 30 May 2007 and a press conference on 1 April 2008,

[17] ABARE, *Minerals and Energy: Major development projects – October 2008 Listing*, Australian Government, 2008, 14.
[18] Ibid, 15.
[19] Ibid.
[20] Ibid.
[21] Vernon Topp et al, Productivity in the mining industry: measurement and interpretation, Productivity Commission working paper, December 2008, 105.
[22] Ibid, 106.
[23] Ibid.
[24] Kevin Rudd MP and Julia Gillard MP, *Forward with Fairness: policy implementation plan*, Australian Labor, August 2007 http://www.alp.org.au/download/now/070828_dp_forward_with_fairness___policy_implementation_plan.pdf and Kevin Rudd MP and Julia Gillard MP, *Forward with Fairness: Labor's plan for fairer and more productive Australian workplaces*, Australian Labor, April 2007, viewed 16 December 2008, http://www.alp.org.au/download/now/forwardwithfairness.pdf;

where Ms Gillard committed to retaining FIFO and remote roster arrangements:

> Fly-in-fly-out is vital for the mining industry. People work on historically accepted roster patterns; that's part of the mining industry. Workers work those patters, they are used to working those patters; many of them enjoy working those patters and those patterns of work will be available to the mining industry under our workplace relations reforms.[25]

2.7. AMMA accepts that the government has a made a pre-election commitment to introduce its industrial relations reform contained in its published policy.

2.8. AMMA contends, however, that the government should also be mindful of the changed economic circumstances since the last election and its pre-election commitment should not be read as a license to introduce policies that will have an adverse impact on productivity or employment.

2.9. AMMA's submission therefore focuses on areas where the Fair Work Bill has exceeded the government's pre-election policy commitment, or will have an adverse impact on productivity and employment in the resources sector. In addition, the government has privately foreshadowed amendments on a number of topics contained in this submission, but at the time of writing has not made formal announcements to do so. AMMA has included comment on these areas pending formal confirmation that our concerns have been appropriately addressed.

Limitations to the Submission

2.10. The government's industrial relations reform is being implemented in a number of staged legislative amendments.

[25] Joint Press Conference with the Hon. Julia Gillard MP, Acting Prime Minister; Minister for Education; Minister for Employment and Workplace Relations; Minister for Social Inclusion, Transcript, 1 April 2008, Canberra, viewed 22 December 2008, http://mediacentre.dewr.gov.au/mediacentre/Gillard/Releases/20000trainingplacesonlinediscussionpaperNationalEmploymentStandardsBudgetReserveBankTaxofficeOpesPri.htm

2.11. The first stage of amendments, which commenced in March 2008, is contained in the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008*.

2.12. The Fair Work Bill is the second stage of legislative amendment to the *Workplace Relations Act 1996*.

2.13. Further amendments will also be contained in a separate transition Bill to be introduced into Parliament in the first half of 2009.[26]

2.14. In addition, the government has advised that the Registration and Accountability of Organisations matters contained in Schedule 1 of the *Workplace Relations Act 1996,* and not dealt with in the Fair Work Bill, will become a stand alone Act with some modification.

2.15. Finally the award modernisation process is also proceeding and is expected to be finalised by 31 December 2009.

2.16. Due to the staged industrial relations reform process, it is not possible to make a complete assessment of the impact of the Fair Work Bill in isolation.

[26] The Hon. Julia Gillard, Minister for Employment and Workplace Relations, Fair Work Bill 2008, *Second Reading Speech*, 25 November 2008, viewed 17 December 2008, http://www.workplaceauthority.gov.au/docs/forwardwithfairness/FairWorkBillSecondreading.pdf

3. Enhanced Union Powers and the Impact on Employee Engagement and Organisational Effectiveness

3.1. It is AMMA's view that direct, co-operative and mutually rewarding relationships between employers and employees is the best means of achieving increased employee engagement and consequently, efficient and more productive work practices.[27]

3.2. Employees are engaged when they *'willingly work to the best of their capabilities in the interests of the organisation and are encouraged to do so through the leadership, structure, systems and culture of the organisation.'*[28]

3.3. AMMA believes a workplace with engaged employees is an environment where employees:

- know what is expected of them at work;
- have the resources and authority they need to do their work right;
- have the opportunity to do what they do best;
- are encouraged and given opportunities to learn and develop;
- receive honest and constructive feedback about their work; and
- are rewarded for their individual contributions to the organisation and for their achievements.[29]

3.4. In any economic environment, it is imperative that employers have the ability to manage internal factors over which they have control, particularly in the face of external factors such as decreasing commodity prices and increasing

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[27] For a discussion on employee engagement and organisational effectiveness see: AMMA, *Workplace improvement through employee engagement: A guideline for employers in the resources sector*, AMMA, 2007, viewed 8 December 2008, http://www.amma.org.au/home/publications/amma_aef_employeeengagementguide%20_october2007.pdf; AMMA, *Employee engagement: A lifetime of opportunity*, AMMA, 2007, viewed 8 December 2008, http://www.amma.org.au/home/publications/employeeengagement_a_lifetime_of_opportunity_sept2007.pdf; AMMA, *Australian resources sector: The case for ongoing flexibility in employment arrangement options*, AMMA, 2001, viewed 9 December 2008, http://www.amma.org.au/publications/Australian%20resources%20sector.pdf

[28] AMMA, W*orkplace improvement through employee engagement: A guideline for employers in the resources sector*, AMMA, 2007, http://www.amma.org.au/home/publications/amma_aef_employeeengagementguide%20_october2007.pdf;

[29] Ibid, 7.

international competition. Consequently the ability to access flexible labour practices without recourse to third parties, and having a link between wage and employee performance and productivity, are vital elements to achieving employee engagement and improvements in overall productivity at an enterprise.

3.5. The correlation between employee engagement and improved organisational effectiveness has been the subject of extensive research by global research based consultancy Gallop, International Survey Research and consultants Ulrich and Smallwood.[30] What has been found is that where there is a high level of employee engagement there is reduced employee turnover, increased employee retention, greater customer satisfaction, increased safety and increased profitability.[31]

3.6. Encouraged by these findings, AMMA undertook research to determine whether direct employment relationships would support improved levels of employee engagement and consequently increase organisational effectiveness. The findings of this research are documented in AMMA's 2007 report *Employee Engagement: a lifetime of opportunity*.[32]

3.7. AMMA conducted a number of case studies involving its members considering the impact of third party union involvement in the workplace on employee engagement and organisational effectiveness. AMMA found that where third parties have a greater involvement in controlling the organisation and execution of work, there is often an adverse effect on levels of employee engagement.[33] Union involvement in the decision making processes meant that many companies found it difficult to implement changes to work conditions and practices within a reasonable timeframe, or at all. Attempts to

[30] AMMA, *Employee engagement: a lifetime of opportunity*, 2007, AMMA, viewed 7 January 2009, http://www.amma.org.au/home/publications/publications_home.html#4_
[31] Ibid.
[32] Ibid.
[33] Ibid.

implement change were characterised by 'lengthy negotiations against a background of possible industrial action.'[34]

3.8. For example, an attempt by smelter Southern Copper in the early 1990s to improve its performance by investing and introducing new technologies and reducing employee numbers through voluntary redundancies was met with opposition by union officials.[35] As a result it achieved minimal increases in performance and failed to achieve improvements in its levels of employee engagement. After a 30 day strike the plant's closure was announced.[36]

3.9. Comalco Bell Bay, also a smelter under pressure to increase its performance, was far more successful. A move towards direct relationships with its employees was instrumental in improving its communication and leadership capability and resulted in rapid improvement in its performance. The smelter's lost time injury frequency fell by 60 percent; off specification metal fell from 28 percent to 7 percent; and overtime ceased to be necessary.[37] Between 1999 and 2000, absenteeism halved and tonnes per annum produced increased to 150,000 from 122,000.[38]

3.10. The story of Bell Bay and Southern Copper highlights the importance of building effective relationships between employers and employees to effect change where necessary. While AMMA acknowledged in its report that employee engagement could be achieved where there were established working relationships with unions, its research highlighted that such relationships were hard to maintain and invariably became adversarial.[39] This is because the interests of the union are not aligned with the interests of the organisation and in many cases, its employees.[40]

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[34] *AWU & Ors v BHP Iron-Ore Ltd* [2001] FCA 3 (10 January 2001), at 176.
[35] AMMA, *Employee engagement: a lifetime of opportunity*, 2007, AMMA, 18-20, viewed 7 January 2009, http://www.amma.org.au/home/publications/publications_home.html#4_
[36] Ibid, 20
[37] Ibid. 18-20.
[38] Ibid.
[39] Ibid, 5.
[40] Ibid.

3.11. The involvement of external third parties compromises the decision-making abilities of an enterprise. While agreement is essential to implement change (such as to effect changes to working arrangements on site), the more negotiations involve external parties the greater the risk that those parties may be focussing on what is in their own best interests, rather than joining the employer and employees' main focus, which is the ongoing viability and profitability of the enterprise.

3.12. The ideal situation is where the leadership of the organisation, through the integration of business and human resource management systems, creates an environment which supports employee engagement.[41] There is ample evidence from the case studies contained within AMMA's report that third party involvement can have an adverse impact on the viability and productivity of an enterprise.

3.13. AMMA is therefore significantly concerned that the Fair Work Bill represents the greatest expansion of union power since federation. It imposes third party involvement in the workplace through its more rigid safety net, increased regulation of enterprise bargaining processes, compulsory union notification requirement, automatic union involvement in the bargaining and approval process, the capacity for bargaining over union matters and increased right of entry. Examples are provided overleaf.

3.13.1. The expansion of union powers:-

a) Expanded rights of entry to enter sites for recruitment purposes where the union was not involved in the making of the relevant award or agreement and may have no members on site;
b) Expanded rights of entry for enforcement of awards and agreements where the union was not involved in the making of the relevant award or agreement;

[41] Ibid, 16.

c) The ability for unions, who assert that it is relevant or related to a suspected breach, to inspect any employee record without the consent of the employee concerned, or review by a tribunal;
d) The absence of any definition from the Fair Work Bill setting out what is a 'record';
e) Providing unions an automatic seat at the bargaining table based solely on union membership, absent any formal request for representation by a union member;
f) The introduction of compulsory union notification requirements for workplaces and Fair Work Australia;
g) The conferral of good faith bargaining rights and access to information based solely on union membership, absent any formal request for representation by a union member;
h) The ability for a union with automatic status as a bargaining representative, to seek to become a 'party' to a collective agreement, despite not having participated in the bargaining process; and
i) The capacity for any eligible union to veto the making of a multi-union greenfields agreement by refusing to reach agreement.

3.13.2. The imposition of obligations that will adversely impact on productivity:-

a) Insufficient flexibility in the National Employment Standards and modern awards to allow existing rostering arrangements to continue, particularly in respect of remote rostering arrangements;
b) Insufficient flexibility in the cashing out of annual leave provisions in the National Employment Standards and absence of cashing out provisions in priority modern awards;
c) The imposition of good faith bargaining obligations, which is expected to result in disputation over requests for provision of information; and the requirement to consider and respond to

claims when an employer is not required to make concessions or reach agreement;

d) The potential for union turf wars as a result of overlapping union coverage rules and expanded rights of entry;

e) The broadening of union right of entry laws and access to non-member records, combined with compulsory union notification requirements with respect to agreement making;

f) The lack of clarity with respect to what is a 'majority' for the purpose of majority representation orders;

g) The interaction between majority representation orders and subsequent scope orders;

h) The inability to make a greenfields agreement without the consent of all relevant unions who wish to be covered by the agreement; and

i) The delay in the commencement of agreements occurring as a result of the requirements of the BOOT test, which will compound existing delays in the approval of agreements.

3.13.3. The expansion of the types of matters that can be included in agreements to include matters not relating to the employee and employer relationship, which will impact on productivity and increase business transaction costs.

3.13.4. The increased ability to impose arbitrated agreements, contrary to government policy, where good faith bargaining obligations are breached or employees engage in self-harming industrial action in response to employer lockout. Arbitration, where a third party determines the bargaining outcomes, often follows a process where middle ground is struck between the claims being made, which is not necessarily in the interests of increased productivity and can result in a wages spiral.

3.13.5. The modification of the transfer of business provisions, which will dissuade new employers from engaging the employees of the old

employer, particularly where the industrial instrument is not favourable to the success of the new business. The new provisions

a) expand the circumstances under which a transfer of business can be said to occur;
b) remove the 12 month operating period for instruments that transfer to the new employer; and
c) require the employer to apply the transferring instrument to any new employee it engages (in addition to the employee(s) that had transferred to the new employer with the industrial instrument).

3.14. The government's proposed new workplace relations system will make it more challenging for business to respond to change quickly, increases business transaction costs and, increases the risk of industrial disputation without any empirical data to show that there will be a productivity benefit or encouragement of employment growth.

4. Expansion of Union Right of entry and Access to Non-Member Records

4.1. Union right of entry was first legislated in the 1973 amendments to the *Conciliation and Arbitration Act 1904*, which enabled a union to enter a workplace where work was being performed under an award that was binding on the union.[42] Prior to the 1973 amendments, right of entry was conferred solely by industrial awards.[43] Likewise, the *Industrial Relations Act 1988* also allowed entry to the workplace but only where an award or certified agreement was binding on the union.[44]

4.2. There has therefore been a longstanding requirement for a union to be bound by an award or certified agreement prior to entering the workplace. This requirement has been carried through in later reforms under the *Workplace Relations and Other Legislation Amendment Act 1996* and the *Workplace Relations Amendment (WorkChoices) Act 2005*. It strikes an appropriate balance between employer and union interests and the determination of entry rights according to the industrial instrument in place is clear and unambiguous. It also ensures that a union that enters a workplace for discussion purposes where there are no union members, is, at the very least, bound to an award applying at the workplace.

4.3. The government's policy position under *Forward with Fairness* was that it 'will maintain the existing right of entry rules'.[45] Julia Gillard MP, Minister for Employment and Workplace Relations has also stated that '[t]here are right of entry rules under industrial law and we've said we will keep the same right of entry rules.'[46]

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[42] *Conciliation and Arbitration Act 1904* s 42A.
[43] W J Ford, 'Being there: changing union rights of entry under federal industrial law' (2000) 13 *Australian Journal of Labour Law* 1, 2-3, visited 30 August 2007, http://www.lexisnexis.com/au/legal/search/homesubmitForm.do
[44] *Industrial Relations Act 1988* s 286(1).
[45] Kevin Rudd MP and Julia Gillard MP, *Forward with Fairness: Policy Implementation Plan*, Australian Labor, August 2007, 23.
[46] Julia Gillard, Transcript Interview with Laurie Oakes, *Sunday* (Nine), 16 March 2008, viewed 10 December 2008, http://mediacentre.dewr.gov.au/mediacentre/Gillard/Releases/TWUallegationsGovernmentsubmissiontotheAFPCSESfundingmodelforpublicschoolsBudget.htm

4.4. Despite these policy statements the Fair Work Bill significantly expands union rights to enter premises and inspect records, including the inspection of non-members' records and records of those employees who have chosen to become a member of a different union.

Right of Entry for Discussion/Recruitment Purposes

4.5. The existing *Workplace Relations Act 1996* allows a union official (who is a permit holder and has given the required notice) to enter premises for discussion purposes where the union is a party to an award or collective agreement which applies to the employees the union seeks to hold discussions with. No right of entry exists for persons who are engaged under an AWA or an ITEA (other than in circumstances where an employee expressly authorises it) or holders of a conscientious objection certificate.

4.6. Section 484 of the Fair Work Bill proposes that a union official (who is a permit holder and has given the required notice) can enter to hold discussions with persons who could become members of the union, regardless that the union was not a party to any award or agreement which applied to the employees.

4.7. This means that unions will have access to workplaces to recruit members where employees work under non-union agreements (including existing AWAs/ITEAs) or where the employees are excluded from award coverage due to historical reasons or because they are a high income earner.[47] Where union rules overlap, a union will have access to a workplace that has a union collective agreement with a competing union.

4.8. This represents a significant expansion of union rights of entry for discussion and recruitment purposes.

4.9. The reliance on union rule coverage as the determinant of union access will mean that an employer will not be in a position to ascertain a union's access

[47] As defined under s329 of the Fair Work Bill 2008.

rights without being an expert in federally registered and transitionally registered union rules – a topic that engages industrial barristers in debate for months if not years.

4.10. In addition, the overlap between union rules will increase the likelihood of a breakout of union turf wars, a battle ground that has already cost employers and unions millions of dollars in disruption and legal fees.

4.11. **The changes to right of entry represent the greatest change to union powers within the 21st century. AMMA contends that union access rights should be based on historical union coverage (which recognises existing demarcation decisions) and the application of a modern award or agreement that covers the employees at the workplace.**

Right of Entry to Investigate Breach

4.12. Under the Fair Work Bill a union's right to enter premises to investigate breaches has been considerably expanded, and now includes access to workplaces to investigate breaches of awards and industrial instruments that the union is not 'covered' by. This is a subtle but significant change.

4.13. Section 747(1)(d) of the existing *Workplace Relations Act 1996* provides a right to enter workplaces to investigate a suspected breach of an employee collective agreement only where an employee is a member of the union. Section 747(2) of that Act requires a union to have a written request from an employee that is a party to an ITEA/AWA prior to entering the workplace to investigate a suspected breach of that individual agreement.

4.14. Therefore under the current system a union is only entitled to enter to investigate a breach of an award or agreement if the union is a party to the award or agreement. The exception, as mentioned in paragraph 14.13, is in respect to employee collective agreements where entry is allowed if the employee is a member of the union.

4.15. The requirement that a union be a party to an award, or have written permission from an AWA/ITEA employee in order to have a right to enter the workplace to investigate a suspected breach has been removed by the Fair Work Bill.

4.16. This represents an expansion of union rights of entry for investigation purposes.

4.17. This means that unions will have access to workplaces to investigate breaches of existing AWAs/ITEAs, or at workplaces where the employees are excluded from award coverage due to historical reasons or their status as a high income earner. Where union rules overlap, a union will have access to a workplace to investigate suspected breaches of a union collective agreement entered into with a competing union.

4.18. The reliance on union rule coverage as the determinant of union access will mean that an employer will not be in a position to ascertain a union's access rights without being an expert in federally registered and transitionally registered union rules.

4.19. In addition, the overlap between union rules will increase the likelihood of a breakout in union turf wars and enforcement by unions of the industrial instruments may become a tool for recruitment campaigns and union competition.

4.20. **AMMA contends that all investigations of suspected breaches should be conducted by the appropriate independent government authority.**

4.21. **Alternatively AMMA contends that a union ought to only be entitled to investigate and enforce the terms and conditions of awards and agreements that apply to their members and bind the union.**

Access to Employee Records

4.22. Where a union has access to the workplace to investigate a breach, the existing *Workplace Relations Act 1996* allows a union to inspect records of the union's members that are relevant to the breach.[48] The privacy of non-member records is protected by s 748(9) and (10), which requires the union to obtain the prior approval of the Australian Industrial Relations Commission to inspect non-member records. The Australian Industrial Relations Commission needs to be satisfied that the order is necessary to investigate the suspected breach. The Fair Work Bill removes this important protection.

4.23. The prohibition on unrestricted access to non-member records was introduced in 2005 and recognised that community attitudes are changing in respect to information privacy and unauthorised access to personal information, including income information.[49]

4.24. The Fair Work Bill proposes to expand the rights of unions whilst they are on an employer's premises. Section 482(1)(c) of the Fair Work Bill 'requires the occupier…to allow the permit holder to inspect and make copies of any record or document relevant to the suspected breach…'

4.25. Section 748(12) of the existing *Workplace Relations Act 1996* defines a 'record relevant to the suspected breach' as being a relevant record that is a time sheet, a pay sheet and any other record or document other than an ITEA. The Fair Work Bill fails to define the term 'record' and thus it will be accorded its natural and ordinary meaning (i.e. any record concerning the employee). Union access will not be limited only to time and wages records, and as a result this represents an expansion of union access to employee information.

[48] *Workplace Relations Act 1996* s 748(4)
[49] The Office of the Privacy Commissioner Australia, *Community attitudes towards privacy 2007*, Office of the Privacy Commissioner Australia, August 2007, viewed 10 December 2008, 4, http://www.privacy.gov.au/publications/rcommunity07.pdf. Research on changing attitudes was also conducted in 2001 and 2004.

4.26. In addition, the records which can be accessed are not restricted to members or potential members of the union that has gained access to the workplace. It includes records of any employee (including the CEO) which may be relevant to the breach. This is an expansion of union access to employee information.

4.27. Section 504 of the Fair Work Bill attempts to offer protection against the misuse of an employee record obtained under the right of entry provisions. In particular, it states that the use or disclosure must not contravene National Privacy Principle 2 in Schedule 3 to the *Privacy Act 1988*. Clause 2.1 of National Privacy Principle 2 prevents the use or disclosure of personal information other than for the primary purpose for which it was collected. However, there are exceptions to this principle including circumstances where the information is used 'for the secondary purpose of direct marketing'.[50] While there are requirements to be met in respect to this secondary use,[51] a union could potentially utilise the personal information obtained under the right of entry laws for recruitment purposes.

4.28. AMMA is concerned that there is insufficient protection for employee information and that by the time any fine is imposed for misuse, the horse will have well and truly bolted.

4.29. **AMMA contends that the term 'record relevant to the suspected breach' should be defined in the terms of s 748(12) of the existing *Workplace Relations Act* 1996 with an explicit exclusion of information which may be the subject of a claim of legal professional privilege, or that contain confidential or commercially sensitive information.**

[50] *Privacy Act 1988*, Schedule 3, National Privacy Principle 2, 2.1(c). The information must not be 'sensitive information' which is information or opinion about the person's race, membership of a political association or union, religion, sexual preferences etc and which also makes the identity of the individual apparent.

[51] For example, it must have been impracticable to seek their consent first, the individual must not be charged for the organisation giving effect to a request not to receive marketing material, a request must not have been made by the person to not receive marketing material and the material must notify the person that they can request not to receive such material.

4.30. **FWA should inspect records relating to a breach or alternatively AMMA contends that access to records of any employee should be subject to obtaining written consent from the affected employee or an order from Fair Work Australia in the terms of s 748(9) of the existing *Workplace Relations Act 1996*.**

4.31. **In the alternative, AMMA contents that access to any record of a person who is not a member of the union that is exercising a right of entry, must be subject to obtaining written consent or an order from Fair Work Australia in the terms of s 748(9) of the existing *Workplace Relations Act 1996*.**

5. Default Bargaining Representatives

5.1. The Hon. Julia Gillard MP has previously stated that

> Under Labor, it will be entirely possible for an employer which employees both union members and non-union members to make an enterprise agreement that the union plays no role in the making of and with which the union does not agree. Under Labor's system, unions have no automatic right to be involved in collective enterprise bargaining.[52]

5.2. The default bargaining representative provisions, combined with the compulsory union notification requirements contained in the Fair Work Bill are inconsistent with this position.

5.3. The Fair Work Bill removes any distinction between a union collective agreement and a non-union collective agreement. All agreements are entered into between an employer and employee (other than for greenfields agreements that are entered into between an employer and union(s)).

5.4. However, s 174 (3) of the Fair Work Bill provides unions with members at the workplace with an automatic right to be involved in collective enterprise bargaining as the default bargaining representative. It puts the onus on each individual employee to appoint an alternative representative in writing if they do not wish to be represented by the union.[53] This onus placed on an individual employee is contrary to the long held principle that an employee should be able to choose who they are represented by and when that representation should occur. No such default exists under the existing *Workplace Relations Act 1996.*

[52] Julia Gillard, *Speech – Queensland Media Club*, 30 August 2007.
[53] Fair Work Bill s 176(1)(b) and (c).

5.5. Section 175 of the Fair Work Bill also requires the employer to notify every relevant union of its intention to make a greenfields agreement, irrespective of whether the union has members within the workplace.

5.6. In addition, the Fair Work Bill allows a union that has no other involvement other than as a default bargaining representative to notify Fair Work Australia that it wants to be covered by the agreement.[54] If this notification occurs prior to approval of the agreement by Fair Work Australia, Fair Work Australia must note in its decision that the agreement covers the union.[55] There is no discretion afforded to Fair Work Australia as to whether the union will be covered by the agreement or not. This means that a union that was a bargaining representative by default but was not involved in bargaining or did not actively represent any member will have the opportunity to be covered by the agreement. Presumably Fair Work Australia will have a notification process similar to that required of greenfields agreement to ensure eligible unions are notified of applications for approval of agreements.

5.7. This approach to bargaining representatives makes the option of making a non- union agreement under the Fair Work Bill illusory and is inconsistent with the government's pre-election commitment that it will be possible to make an agreement without the involvement of unions in workplaces with both union and non-union members.[56]

5.8. The default representation rules and positive obligation on employees to nominate an alternative representative fail to recognise that employees choose to become a member of a union for a variety of reasons (i.e. to access benefits such as financial advice, banking, professional insurance and discount shopping[57]) and may not desire union representation during agreement negotiations.

[54] Fair Work Bill s 183(1) and (2).
[55] Fair Work Bill ss 183(2) and 201(2).
[56] Julia Gillard, *Speech – Queensland Media Club*, 30 August 2007.
[57] See Unions Australia, 'Extra Benefits', viewed 17 December 2008, http://www.unionsaustralia.com.au/extra.aspx.

5.9. It is not clear under the default bargaining representative rules whether an employee that is not satisfied with the performance of their representative can revoke that representative's rights without appointing an alternative representative. It is also not clear whether an employee that inadvertently fails to appoint an alternative to their default union representative, despite having the intention to do so, can make that alternative appointment at any time during bargaining.

5.10. **AMMA contends that the Fair Work Bill should provide workplaces with the option of accessing a genuine non-union enterprise bargaining option, as has existed since 1996.**

5.11. **AMMA contends that a bargaining representative should only be able to exercise good faith bargaining rights, and have a right to be covered by an agreement where the bargaining representative actively participated in the negotiation process AND a majority of employees to whom the agreement will apply voted for the bargaining representative to be covered by the agreement.**

5.12. **AMMA contends that the appointment of a union as a bargaining representative should be subject to the specific written approval by the union member concerned and the absence of any revocation or subsequent appointment.**

5.13. **AMMA contends that a bargaining representative's good faith bargaining rights and right to be covered by any resulting agreement, should be subject to the precondition that the majority of employees to be covered by the agreement have voted in support of their inclusion and the bargaining representative attend meetings, prepare, give genuine consideration and respond to proposals. Such right ought not to be automatically afforded to a bargaining representative that was a bystander and failed to participate in the bargaining process.**

6. Greenfields Agreements

6.1. The existing *Workplace Relations Act 1996* provides for employer greenfields agreements and union greenfields agreements. Currently, a union greenfields agreement can be made with one or more eligible unions.[58]

6.2. The Fair Work Bill removes the employer greenfields agreement option, leaving union greenfields agreements as the remaining greenfields agreement option. However, s 175(1) requires the employer to notify each relevant employee organisation of the intention to make such an agreement. This harks back to the requirements for Enterprise Flexibility Agreements under the 1993 Keating reforms to the *Industrial Relations Act 1988.* During the entire period that Enterprise Flexibility Agreements were available, only 239 of these agreements were entered into.[59]

6.3. In addition, s 182(3) of the Fair Work Bill requires 'each relevant employee organisation that will be covered by the agreement' to sign the agreement as a precondition of the agreement being made.

6.4. Section 12 defines a 'relevant employee organisation' in respect to a greenfields agreement as being one that is entitled to represent the industrial interests of the employees to be covered by the agreement.

6.5. On any given resources sector construction project, the employees to be covered by the agreement are most likely to include members or potential members of a number of unions including the CFMEU, AWU, AMWU and ETU.

6.6. The requirement for each relevant union to sign a greenfields agreement will provide each union with a veto power over the construction project. Despite an agreement having been reached with one or more unions, a single rogue union can refuse to sign the agreement and stall the making of the agreement.

[58] *Workplace Relations Act 1996* s 329.
[59] Department of Employment and Workplace Relations, 2007.

6.7. There are currently 262 minerals and energy projects identified by ABARE that remain uncommitted and are vulnerable to changing conditions.[60] These include 16 proposed LNG developments, such as the multi million dollar Chevron Gorgon joint venture project, BHP Billion and ExxonMobil Scarborough Gas project and the Woodside Energy, ConocoPhillips, Shell and Osaka Sunrise Gas project.[61] These projects are vulnerable to a number of changing conditions, including the accessibility of pre-determined industrial arrangements that are important to managing industrial relations risk. Resources sector projects are resource intensive and those who are committing significant capital require certainty concerning labour relations to be in place before the project proceeds.

6.8. Greenfields agreements provide this certainty by protecting the project from delays caused by industrial action. Such delays puts business at risk of liquidated damages for defaulting on its supply contracts and increased labour costs for the remainder of the project. It also provides certainty in respect to labour costs, preventing employees from making continued demands for increased entitlements as the project draws to an end, such as completion bonuses, which can escalate labour costs between 10 and 15 percent.

6.9. The mandatory notification and inclusion of all relevant unions in a greenfields agreement will adversely impact productivity and job creation and encourages unions to out bid each other on greenfields agreement claims. If agreement is not reached or is stalled, it can put at risk major, billion dollar resources sector construction projects.

6.10. **AMMA contends that s 182(3) of the Fair Work Bill be amended to confirm that an employer can make a greenfields agreement with one or more eligible unions.**

[60] ABARE, *Minerals and Energy: Major development projects – October 2008 Listing*, Australian Government, 2008, 14.
[61] Ibid.

7. Industrial Action Related Workplace Determinations

7.1. Under s 423(3) Fair Work Australia can suspend or terminate protected industrial action that is an employer lockout or employee action in response to an employer lockout, where the action is causing, or is threatening to cause, significant harm to any of the employees who'll be covered by the agreement. Where this occurs and the matters at issue remain unsettled after 21 days, Fair Work Australia can make an industrial action related workplace determination (arbitrated agreement).

7.2. There is no equivalent provision under the existing *Workplace Relations Act 1996*.

7.3. Whilst s 423(2) provides that where the action is employee claim action **both** the employer and an employee must be subject to significant economic harm, this test is relaxed where employee response action is taken (s 423(3)(a)). In such cases the protected industrial action may be terminated if a single employee is subject to significant economic harm.

7.4. AMMA contends that this provision is open to abuse and manipulation by employees, who can engage in self-harming action with the purpose of achieving an industrial action related workplace determination. Where the employee takes employee response action, any economic harm is self-imposed. Employers are at risk of a compulsory arbitrated agreement being imposed where self inflicted loss causes 'significant economic harm' to an employee, such as defaulting on mortgage payments or other debt.

7.5. **AMMA contends that the reference to employee response action be deleted from s 423(3) and included in s 423(2).**

8. Good Faith Bargaining

The requirement to provide relevant information.

8.1. Section 228(1)(a)-(e) details the good faith bargaining obligations under the Fair Work Bill.

8.2. AMMA is concerned about the potential abuse and disputation over requests for access to information under s 228(1)(b).

8.3. AMMA contends that this provision could be used as a vehicle to obtain information about current or future activities unrelated to claims made in respect to the agreement. Imposing a requirement on employers to identify, search and disclose relevant information will increase business costs through the unnecessary use of time and resources when undertaking in this process.

8.4. **AMMA contends that 'relevant information' should be defined as information relevant to the claims being considered and discussed by the bargaining representatives.**

8.5. AMMA is also concerned about the potential disputes that will arise over the meaning of 'confidential or commercially sensitive information' that is excluded from the disclosure requirement under section 228(1)(b).

8.6. **AMMA contends that in such cases, confidential or commercially sensitive information should be prima facia excluded from a request, unless Fair Work Australia is satisfied that the information is relevant to a claim being considered and discussed by the bargaining representatives and that the information is not properly characterised as confidential or commercially sensitive.**

8.7. Section 228(1)(c) and (d) require bargaining representatives to give genuine consideration and to respond to proposals put by other bargaining representatives.

8.8. Section 228(2)(a) and (b) provide that a bargaining representative is not required to make concessions or reach agreement on the terms to be included in the agreement.

8.9. AMMA is concerned about the interaction between s 228(1)(c) and (d) and s 228(2)(a) and (b). It is not difficult to envisage a situation where a union seeks a response to a proposal and the employer is not prepared to make any concession with respect to that proposal, or is not willing to agree that that term should be included in an agreement.

8.10. AMMA is concerned that in such circumstances Fair Work Australia may issue a bargaining order requiring the employer to further consider the proposal and respond. This may result in an employer being 'coerced' into making a concession or agreeing that a term may be included in the agreement despite the existence of s 228(2)(a) and (b).

8.11. The issuance of a bargaining order may lead to an agreement being compulsorily arbitrated under s 269 of the Fair Work Bill, if certain circumstances follow this order. These circumstances are described below.

8.12. Under s 229(4) a bargaining representative can seek a bargaining order if it 'has concerns' that a bargaining representative is not meeting the good faith bargaining requirements.[62] A 'serious breach declaration' may follow where there is a serious and sustained breach of the good faith bargaining order.[63] The consequence of a serious breach declaration is that Fair Work Australia may make a bargaining related determination (arbitrated agreement) under s 269 if all the matters at issue have not been settled within 21 days.

8.13. **AMMA contends that Fair Work Australia should not have the power to make a good faith bargaining order which requires an employer to**

[62] Section 229(4) also requires the bargaining representative to give written notice of their concerns to the relevant bargaining representative and time to respond to those concerns. However, under s 229(5), if these extra requirements have not been met complied with, the representative can still apply for the order if FWA considers it is appropriate for the application to be made in the circumstances.
[63] Fair Work Bill ss 234 and 235.

further consider or provide an additional response where an employer has exercised their right not to make concessions during bargaining.

8.14. **AMMA contends that Fair Work Australia should not have the power to make a good faith bargaining order where an employer has exercised their right not to reach agreement on the terms to be included in the agreement.**

Access to Replacement Labour during Employee Action

8.15. Section 228(1)(e) of the Fair Work Bill requires a bargaining representative to refrain from 'capricious or unfair conduct that undermines freedom of association or collective bargaining'.

8.16. During the public hearing of the Senate Standing Committee on Employment, Education and Workplace Relations on 11 December 2008, the transcript of DEEWR comments on the operation of s 228(1)(e) reveal that an employer's engagement of replacement labour during industrial action may amount to 'capricious or unfair conduct'.[64]

8.17. This discussion was the result of Senator Cameron's concerns that employers can lock-out employees and engage replacement labour.

8.18. Under the Fair Work Bill, an employer can only lock out employees in response to industrial action organised or engaged in by those employees.[65] Employers will therefore lose the capacity to take pre-emptive action against employees under the Fair Work Bill, yet unions can control the time at which industrial action is taken by employees in order to inflict maximum harm on an employer.

[64] Senate, Standing Committee on Education, Employment and Workplace Relations, 'Fair Work Bill 2008', *Hansard*, 11 December 2008, Canberra, 44.
[65] Fair Work Bill s 411.

8.19. The encroachment on an employer's ability to engage a replacement labour force is not appropriate and was not articulated in the government's *Forward with Fairness* policy.

8.20. **AMMA contends that a specific provision or a note be included in the Fair Work Bill confirming that the engagement of replacement labour during industrial action does not fall within the definition of capricious or unfair conduct.**

9. The Safety Net

9.1. In its submission on the National Employment Standards Exposure Draft on 31 March 2008, AMMA raised concerns that the minimum standards would not provide sufficient flexibility to allow the resources sector to continue its current flexible arrangements.[66] In response to these concerns the Hon. Julia Gillard MP commented on 1 April 2008 that

> Fly-in-fly out is vital for the mining industry. People work on historically accepted roster patterns; that's part of the mining industry. Workers work those patterns, they are used to working those patters; many of them enjoy working those patters and those patterns of work will be available to the mining industry under our workplace relations reforms.[67]

9.2. This built on previous assurances by the Hon. Julia Gillard MP that there will be sufficient flexibility to meet the requirements of the resources sector. In an interview with Laurie Oakes, the Hon. Julia Gillard MP stated that

> What we're considering and what is inherent in the policy that's there so far…is individual common law contracts that give a great deal of flexibility because they come off the base of simple flexible awards. That does give the kind of flexibility about rostering and work arrangements that we think the mining industry and others are seeking….We do believe there are other ways of making sure the system has a great deal of flexibility; we're still in dialogue with the mining community and with business generally about the way of achieving that flexibility that meets their needs.[68]

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[66] AMMA, *National Employment Standards Exposure Draft Submission*, 31 March 2008, viewed 5 January 2008, http://www.amma.org.au/home/publications/AMMA_NES_Submission_Final_31March2008.pdf

[67] Joint Press Conference with the Hon. Julia Gillard MP, Acting Prime Minister; Minister for Education; Minister for Employment and Workplace Relations; Minister for Social Inclusion, Transcript, 1 April 2008, Canberra, viewed 22 December 2008, http://mediacentre.dewr.gov.au/mediacentre/Gillard/Releases/20000trainingplacesonlinediscussionpaperNationalEmploymentStandardsBudgetReserveBankTaxofficeOpesPri.htm

[68] Julia Gillard, Transcript Interview with Laurie Oakes, *Sunday* (Nine), 16 March 2008, viewed 10 December 2008, http://mediacentre.dewr.gov.au/mediacentre/Gillard/Releases/TWUallegationsGovernmentsubmissiontotheAFPCSESfundingmodelforpublicschoolsBudget.htm

9.3. The government has quite plainly expressed that it will deliver the flexibility that the resources sector requires to continue its operations. However, there are a number of shortcomings in the Fair Work Bill.

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Averaging of Hours of Work

9.4. Currently, under s 226(1)(a)(ii) of the existing *Workplace Relations Act 1996*, an employer and employee can agree to average the hours of work over a period of 52 weeks. This averaging period is available to all employees.

9.5. In some sections of the resources sector the Norwegian roster is commonly used, which is a 28 week roster. This roster is accommodated under the current averaging period in the existing *Workplace Relations Act 1996*.

9.6. The resources sector was assured by the Deputy Prime Minister Julia Gillard that the patterns of work in the industry would be available under the government's industrial relations reforms.[69]

9.7. Under the Fair Work Bill the safety net is comprised of the National Employment Standards and the modern award system. For award/agreement free employees s 64 specifies the period over which the hours of work can be averaged. The period over which the hours of work can be averaged for award covered employees is at the discretion of the Australian Industrial Relations Commission pursuant to s 63. Section 63 provides that a modern award can include a term providing for the averaging of hours over a specified uncapped period. This means that a modern award could include a term providing for the averaging of hours over a period of 52 weeks.

9.8. However, ss 64 and 63 raise the following issues for the resources sector:

9.8.1. Section 64 of the Fair Work Bill reduces the period over which the hours of work can be averaged from 52 weeks to 26 weeks for award/agreement free employees. It does not provide the flexibility

[69] Ibid.

required by the resources sector to continue to operate its existing rosters, particularly the commonly used Norwegian roster.

9.8.2. While s 63 does not restrict the period over which hours of work can be averaged, the Mining Industry Award released on 19 December 2008, also only allows the hours of work to be averaged over 26 weeks. As with s 64, this also does not provide the flexibility required by the resources sector to continue to operate its existing rosters.

9.8.3. The discretion of the Australian Industrial Relations Commission in respect to setting the specified period over which the hours of work can be averaged has the potential to create differing levels of flexibility for award covered and award free employees as the award modernisation process continues. This will create operational difficulties for employers with both types of employees working the same roster.

9.9. The Mining Industry Award also does not provide an automatic right to average up to 12 ordinary hours per shift, a flexibility that used to be afforded under many mining awards and agreements. Under the new modernised award this flexibility will now only be available where a majority of employees agree. Twelve hour shifts are common within the mining industry. This new limitation will lead to restrictions on the ability to average the hours of work in the resources sector resulting in a roll back in flexibility, decreases in productivity and increased costs. Furthermore, differing levels of flexibility for award covered and award free employees will be created.

9.10. **AMMA submits the Fair Work Bill should reflect the government's commitment to enable resource sector employers to continue their existing rosters, including 12 hour ordinary shifts and proposes that the Fair Work Bill be amended to increased the specified period for averaging the hours of work in s 64 to 52 weeks, which is the current level of flexibility contained with the s 226(1)(a)(ii) of the existing**

***Workplace Relations Act 1996*, or provide that the hours of work can be averaged over the applicable roster cycle without limitation. In addition, the existing industry requirement for 12 hour ordinary shifts given remote rostering requirements should be retained.**

9.11. **AMMA further contends the specified period for averaging the hours of work under s 64 of the Fair Work Bill should apply consistently to award, agreement and award/agreement free employees, as is the case in under s 226(1)(a)(ii) of the existing *Workplace Relations Act 1996*.**

9.12. **In the alternative AMMA contends that the Minister should vary the Award Modernisation Request so as to require the Australian Industrial Relations Commission to provide a 52 week averaging period and minimum 12 hour ordinary shift for awards that have application to the resources sector, or to provide that the hours of work can be averaged over the applicable roster cycle without limitation.**

Cashing Out of Annual Leave/Taking Leave as Specified in Roster

9.13. Under s 233(1) of the existing *Workplace Relations Act 1996* an employer and employee can agree to cash out a period of their annual leave. This entitlement is available to all employees, without distinguishing between those that are award covered and award free, provided a formal agreement is entered into that facilitates cashing out of annual leave.

9.14. The Fair Work Bill provides a similar entitlement to cash out annual leave in s 93 (where such a term is included in an award or agreement) and s 94 (award/agreement free employees). Cashing out of annual leave for both award covered and award free employees is subject to retaining a minimum leave accrual of four weeks.

9.15. However, despite s 93 allowing a modern award to include a term relating to cashing out paid annual leave, the Australian Industrial Relations Commission to date has not included a term permitting cashing out in any of the priority

awards, including the Mining Industry Award. This means that award employees are excluded from accessing the same benefit and flexibility with respect to cashing out a period of annual leave that is provided to award free employees under s 94.

9.16. The minimum four week accrual is also problematic in some areas of the resources sector where employees work on even-time rosters that provide them with 26 weeks of the year off. Many resources sector employees on these rosters have enjoyed the flexibility and immediate benefit of cashing out their annual leave or including the leave in a pre-determined even time roster.

9.17. In the absence of provisions allowing for cashing out of annual leave, annual leave taken at odds with an established roster cycle will adversely impact on resources sector employers. In fly-in-fly-out sites where flights to site operate in conjunction with the roster cycle, non-standard absences can cause employers difficulty in finding replacement employees for short periods.

9.18. **AMMA submits the Fair Work Bill should reflect the government's commitment to enable resource sector employers to continue their existing rosters and leave arrangements. In particular s 94 of the Fair Work Bill should be amended to allow the ability to cash out annual leave without having to retain a minimum accrued entitlement of four weeks.**

9.19. **In addition AMMA submits that the Fair Work Bill be amended so as to confirm that an employer can reasonably require an employee who has agreed to work a roster which incorporates the taking of annual leave, to take annual leave as scheduled in the roster.**

9.20. **In the alternative AMMA contends that the Minister should vary the Award Modernisation Request so as to require the Australian Industrial Relations Commission to provide for cashing out of annual leave provisions in awards that have application to the resources sector.**

10. Majority Support Determinations

10.1. Majority support determinations are not a feature of the existing *Workplace Relations Act 1996*.

10.2. Section 236(1) of the Fair Work Bill provides that a bargaining representative can seek a majority support determination from Fair Work Australia that a majority of employees that will be covered by a collective agreement want to bargain.

10.3. The Fair Work Bill does not define 'majority' for the purposes of a majority support determination, leaving the matter to Fair Work Australia to determine how the majority might be ascertained. This provides no certainty to employers and employees in enterprise bargaining and will result in confusion at the workplace. This represents a significant discretionary power for Fair Work Australia that lacks transparency and accountability.

10.4. This approach raises the prospect of disputation. Fair Work Australia may decide that the majority should be determined by a show of hands at a union convened meeting. A single 'yes' vote in the absence of a 'no' vote could represent a majority in such circumstances despite the presence of 99 other employees. The approach does not ensure a democratic outcome.

10.5. **AMMA contends that existence of 'majority' should be consistent with the approach taken for a protected action ballot in s 459 of the Fair Work Bill. That is, there must be a quorum of 50 percent of employees that would be covered by the agreement voting, and a simple majority of that quorum must vote in favour of bargaining with the employer in order for Fair Work Australia to make a majority support determination.**

11. Scope Orders

11.1. Section 238 of the Fair Work Bill enables a bargaining representative to seek a scope order if he or she has concerns that bargaining is not proceeding efficiently or fairly because of the group of employees that the agreement will or will not cover. A scope order can be obtained at any time during bargaining and will determine the group of employees that will be covered by the agreement.

11.2. The making of a scope order, which will change the group of employees who will be covered by the agreement, will impact any existing majority support determination.

11.3. **Whilst s 238(7) provides a discretion for Fair Work Australia to amend any existing majority support determination, AMMA contends that the provisions be varied so as to require the termination of a majority support determination if a subsequent scope order varies the group of employees who will be covered by the agreement.**

12. Agreement Content

12.1. Under the existing *Workplace Relations Act 1996*, an agreement cannot contain matters that are considered 'prohibited content'.[70]

12.2. Prohibited content includes, but is not limited to, rights of unions in dispute resolution, deduction of union dues, right of entry, renegotiation of an agreement, leave to attend union training, paid leave to attend union meetings and matters that do not pertain to the employment relationship.[71]

12.3. The Fair Work Bill significantly expands the matters which may be bargained for and included in an agreement.

12.4. Importantly, s 172(1)(b) of the Fair Work Bill provides that an agreement can not only contain matters that relate to the employer/employee relationship, but also matters relating to the relationship between the employer and the union(s) to be covered by the agreement.[72]

12.5. This means that under the Fair Work Bill claims can be made (and industrial action taken in support of) matters such as additional rights to enter the workplace and access facilities, paid union training leave, paid leave to attend union meetings, payment of union delegates, requirements that all contractors consult with a union, and a requirement to engage a full time, non-working shop steward.

12.6. An agreement can also provide for deductions from wages for any purpose where the deduction is authorised by the employee. This is specifically provided for in section 172(1)(c). Such purpose may include the deduction of union dues, which may require employers to reconfigure their payroll systems at their own cost.

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[70] *Workplace Relations Act 1996* s 356. Prohibited content is also detailed in the *Workplace Relations Regulations 2006* Division 7.
[71] Ibid.
[72] The exception is in respect to 'unlawful content' which includes discriminatory terms and terms that contravene the general protections in the Fair Work Bill.

12.7. None of these matters will improve employee engagement or productivity.

12.8. Under the existing *Workplace Relations Act 1996*, an agreement must not be lodged if it contains prohibited content. While a term in an agreement that is prohibited is void,[73] s 363 enables the Workplace Authority to vary the agreement to remove prohibited content on its own initiative or on application by a person.

12.9. Section 186(4) of the Fair Work Bill requires Fair Work Australia to be satisfied that an agreement does not contain any unlawful terms. Unlawful terms are defined in s 194 and include discriminatory terms and terms that contravene the general protections in the Fair Work Bill. There is no such requirement on Fair Work Australia to be satisfied that the agreement does not include terms that are not permitted matters. However, s 253 operates so that if an agreement includes any unlawful terms or terms that are not about permitted matters, those terms have no effect.

12.10. This may result in employers and employees being unaware that particular provisions of their agreement have no effect. AMMA contends that where an agreement contains a term that is unlawful or not about a permitted matter, it is in the public interest that unlawful terms or terms that are not about a permitted matter must identified and removed from the agreement prior to its approval, to ensure there can be no misunderstanding or misrepresentation that a particular term applies at the workplace.

12.11. **AMMA contends that permitting claims concerning union matters will increase the risk of industrial action and will not have any productivity trade-off nor encourage employment growth. This will discourage employers from bargaining for enterprise agreements, especially at a time of significant slowdown in economic growth and declining levels of productivity.**

[73] *Workplace Relations Act 1996*, s 358.

12.12. **AMMA submits that agreement content should be restricted to matters that pertain to the employer/employee relationship and that s 172(b) which permits union/employer related matters, and s 172(c) which permits payroll for deduction for union dues, be deleted from the Fair Work Bill.**

12.13. **AMMA contends that s 186(4), which requires Fair Work Australia to be satisfied that an agreement does not contain any unlawful terms prior to approval, be amended to require Fair Work Australia to remove any unlawful terms and terms that are not about permitted matters from the agreement prior to approval**

13. Agreement Processing

The better off overall test

13.1. Fair Work Australia will have the responsibility for the approval of enterprise agreements. Section 186(2)(d) requires Fair Work Australia to be satisfied that the agreement passes the better off overall test.

13.2. An agreement cannot pass the better off overall test until Fair Work Australia is satisfied that 'each' employee and prospective employee would be better off than under the award.[74] Prior tests, including the current no disadvantage test, the fairness test and the pre-1996 no disadvantage test did not require the approving authority to consider the position of each and every employee.

13.3. This requirement that Fair Work Australia be satisfied that each employee is better off overall against the award is an added complexity and will be susceptible to significant delays. The Workplace Authority, which currently has the responsibility for approving agreements against the no disadvantage test under the existing *Workplace Relations Act 1996,* has a significant backlog of agreements to approve. In the experience of AMMA members, approval of collective agreements is taking between three and seven months to get approved. Of three agreements recently approved, two took seven months and one took five months.

13.4. The Fair Work Bill changes the commencement date for all enterprise agreements to seven days after the agreement is approved by Fair Work Australia.[75] Therefore, the commencement date of an agreement is vulnerable to significant delays in the approval process.

13.5. **AMMA contends that the Fair Work Bill should provide that where an agreement has not been approved within seven days after lodgement, the agreement will commence on an interim basis.**

[74] Fair Work Bill 2008 s 193(1).
[75] Fair Work Bill 2008 s 54.

14. Transmission of business

14.1. The transmission (or transfer) of agreements from one employer to another has always been a vexed question. Two main considerations arise: the first is what circumstances will constitute a transfer of business; and the second issue concerns the terms and conditions of employment that the new employer will inherit.

14.2. The first issue is of particular relevance in the resources sector to employers who provide services (e.g. catering and accommodation services) to miner operators. These contracts regularly change over 3-5 year periods. At the end of a contract the employees may transfer to other sites where the contractor continues to provide services or the employees may wish to continue to work in the same location and may seek employment with the new contractor.

14.3. It is common for the new service provider to use existing infrastructure (which may be owned by the miner operator or the previous contractor (e.g. a kitchen fit-out).

14.4. Under the existing provisions of the existing *Workplace Relations Act 1996* the key issue is if the 'business has transferred' and whether the employee has been offered employment within two months from date of the transfer.[76] In most cases the industrial instruments which applied to the employee in their old employment transfer and continue to apply for a period of one year unless it is replaced by a new agreement in the meantime.

14.5. The Fair Work bill expands the basis under which a transfer is deemed to occur.[77] The Fair Work Bill continues to require an employee to perform work substantially similar to the work performed with the old employer albeit that the period of time which may elapse is now three months. The key issue is the definition of 'connection between the employers'. Under the Fair Work Bill the connection could be as tenuous as an intangible asset (such as transfer of an

[76] *Workplace Relations Act 1996* ss 580-581.
[77] See Fair Work Bill ss 311(1)-(5).

electricity account), or if the work had been outsourced or later in-sourced. AMMA is concerned that not all of these circumstances would ordinarily fall within the existing definition of a transfer of business and thus unintended consequences will apply.

14.6. The second issue is the treatment of the transferring instruments. Whilst the existing legislation provides a sunset date for existing agreements, section 313 of the Fair Work Bill preserves existing agreements in perpetuity (subject to an order from Fair Work Australia) and goes even further to apply the transferring agreement to new employees who it could not be said had a connection with the old employer.[78]

14.7. In some cases the lack of flexibility or uncompetitive costs structures contained in an industrial instrument is a cause of the operation being outsourced or in-sourced or a commercial contract being terminated. In such cases the categorisation of the arrangement as a transfer of business together with the obligation to apply a pre-existing agreement in perpetuity (unless an alternative agreement can be made) will result in a decision not to engage any employees of the old employer. This will result in increased unemployment.

14.8. **AMMA contends that the Fair Work Bill's approach to the transfer of business is too restrictive and goes beyond the existing notions of a transmission of business. The operation of the transfer of business provisions is a disincentive to employ persons who worked with the old employer.**

[78] Fair Work Bill s 314.

15. Representation

15.1. AMMA supports the restrictions on legal representation before Fair Work Australia and the Small Claims Court in ss 548 and 596 of the Fair Work Bill.

15.2. However AMMA is concerned that the exemption for lawyers and paid agents employed by industrial associations has been removed and replaced with a much narrower notion of registered organisations.

15.3. A significant number of not-for-profit unregistered organisations are involved in proceedings before industrial tribunals and courts. These include AMMA, most state based chambers of commerce and organisations that are not registered under schedule 1 of the existing *Workplace Relations Act 1996.* These organisations perform a valuable role in representing members at costs lower than law firms that operate for profit.

15.4. **AMMA contends that the exception in s 596(4) and other similar provisions ought to refer to 'industrial associations' in lieu of 'registered organisations'. The government has advised that this amendment will be forthcoming.**

16. Concluding Comments

AMMA has characterised the Fair Work Bill as giving the union movement the greatest expansion of powers since federation. The Fair Work Bill does this by:

- Expanding the ability of the union to enter the workplace;
- Allowing unions to enter and inspect all employer records, including non-member records;
- Imposing compulsory union notification requirements on workplaces wanting to make agreements, even where no union membership exists;
- Automatically involving unions in bargaining for agreements, regardless whether the overwhelming majority of the workplace are non-union members;
- Enabling unions to seek coverage of an agreement despite not actively participating in the bargaining process;
- Giving unions access to company information during good faith bargaining; and
- Allowing agreements to contain matters that pertain to the relationship between the employer and the union.

The Fair Work Bill also increases the opportunity for arbitrated agreements to be imposed with 'soft option' workplace determinations in the face of employees taking self-harming industrial action, or where a bargaining representative breaches good faith bargaining orders.

This uninvited third party involvement is unlikely to produce any productivity trade off or incentive for job creation. This is supported by AMMA's research on the impact of uninvited third party involvement on levels of employee engagement in the workplace. High levels of employee engagement in the workplace are important, having been found to increase organisational effectiveness – business is more profitable, customers are more satisfied, employee turnover is low and the workplace is safer. AMMA's research identified that in workplaces with uninvited union involvement,

(where self interested outcomes are commonly sought) it is more difficult to effectively engage employees and to implement essential workplace change that is often essential to the survival of the business.

The government's Fair Work Bill in its current form is at risk of not achieving its stated objective, among other things, to promote national economic prosperity by achieving productivity - a critical objective at any time, but particularly important in the face of a significant global financial crisis.

The government made significant promises to the resources sector that its current remote roster arrangements could continue under the new system. Yet, the sector will be prevented from continuing its current remote roster arrangements due to the reduction of the specified period over which hours of work can be averaged from 52 weeks to just 26 weeks. Further, the new Mining Award compounds the rollback in flexibility by restricting the working of 12 ordinary hour days or shifts that previously been available in various areas of the resources sector. This will have a particular impact on operations that operate on the 28 week Norwegian roster.

Differing minimum standards will also operate for award covered and award free employees in respect to cashing out of annual leave, creating inequality between employees and undermining the sector's efforts to break down the barriers caused by the distinction between blue collar workers and staff employees. The inability for employees to cash out annual leave where they work an even-time roster on a remote fly-in-fly-out site will also adversely impact the rostering arrangements in the sector.

The Fair Work Bill has a high risk of compounding the difficulties employers are already facing in the financial crisis and will weaken their capacity to adjust to the economic challenges this crisis poses. The resources sector is already feeling the impact, with mine closures, delays on projects and withdrawal of investment in new projects. The new good faith bargaining obligations will result in disputes over what is relevant information and what information is confidential or commercially sensitive and, unless clarified, will limit the ability of employers to engage replacement labour during employee strike action. The removal of the link between industrial instruments

and right of entry also exposes workplaces to inter-union disputes, re-opening well settled demarcations as unions seek to re-define their turf.

The full impact of the government's industrial relations reforms cannot be completely understood until the entire gamut of reform is clear – the completion of the award modernisation process, the transitional Bill and provisions dealing with the registration and accountability of industrial organisations.

AMMA has acknowledged that the government has a pre-election commitment to introduce its industrial relations reforms. This commitment should not be exceeded and industrial relations reform must not make it more difficult for business to ride the waves of the economy and engage with their employees directly.

ATTACHMENT A: Table summarising key concerns with Fair Work Bill plus proposed amendment or solution

GOVERNMENT POSITION	FAIR WORK BILL	IMPACT/PROBLEM	AMENDMENT/SOLUTION
Expansion of union right of entry and access to non-union employee records			
"As announced today, Federal Labor will maintain the existing right of entry rules without exception." (Julia Gillard, *Media Release – Right of entry*, 28 / 08 / 2007)	Sections 481: a union can enter the workplace to investigate a suspected breach of any type of industrial instrument where the breach relates to or affects a member performing work on the premises.	A union's right to enter premises to investigate breaches has been considerably expanded, and now includes access to workplaces where the union may not be covered by an agreement or an industrial instrument that applies in that workplace. The reliance on union coverage (rules) as the determinant of union access, rather than agreement coverage significantly expands union access. Overlap between union rules will increase the likelihood of a breakout in union turf wars and increase uncertainty in relation to union access.	Retain existing right of entry laws, without exception. Require all investigations of suspected breaches of industrial instruments to be undertaken by an independent government authority. Alternatively, ensure that union entry is based on historical union coverage that recognises existing demarcations. Require the award or agreement regulating the employees' work to apply to the union.
"We believe that it is important that we have a clear cut set of rules around that which doesn't **provide unnecessary burdens for employers**. We've got to make sure that when it comes to what's referred to as	Section 484: a union can enter any workplace where it has employees that are members, or eligible to become members for the purpose of holding discussions with those employees.	Many workplaces have no actual union members or have employees who choose to belong to one particular union instead of another. The expansion of access to unions that may not have members at a worksite, or who may not be covered by an agreement at that worksite disturbs existing demarcation orders dealing with overlapping union coverage of employees	Ensure that union entry is based on historical union coverage that recognises existing demarcations. Require the award or agreement regulating the employees' work to determine which unions have right of entry. Remove compulsory union notification requirements for workplaces where

the union right of entry that that is **prescribed to defined areas and properly authorised**, and on the detail of all that, we're confident that we are going to get that balance right as well." (Kevin Rudd, *ABC Ballarat – Martin*, 27 / 06 / 2007)		at a workplace, creating opportunity for inter-union competition and reopening of union turf wars. This is contrary to the government's policy.	employees do not choose to have a union, or a particular union as the bargaining representative. Ensure that a bargaining representative can only be covered by an agreement (and therefore have access to a workplace) where the bargaining representative actively participated in the negotiation process AND a majority of employees to whom the agreement will apply voted for the bargaining representative to be covered by the agreement.
There are right of entry rules under industrial law and we've said we will keep the same right of entry rules.' *Julia Gillard, Minister for Employment and Workplace Relations, Speech to AMMA National Conference, 2 April 2008.*	**Section 482(1)(c):** a union exercising its right of entry can inspect and make copies of any record or document relevant to the suspected breach. Existing definition of relevant record removed. (Unions can access records of non-union members – currently more than 85% of the private sector.)	The Fair Work Bill expands the rights of unions when they are on an employer's premises. A union exercising its right of entry will also be able to access the records of non-members, which it cannot do under existing laws without the permission of the Australian Industrial Relations Commission. This encroaches on the privacy of non-members. Leaving 'relevant record or document' undefined gives broad scope for unions to access records that extend beyond time and wages records. The use of non-member records for recruitment and campaign purposes is also very plausible.	Require inspection of all records to be carried out by the Fair Work Ombudsmen or an equivalent independent government body. Alternatively, **limit any right afforded to a union to inspect member and non-member records to where it has the written consent of the affected employee or an order of Fair Work Australia.** In the alternate, impose these requirements in respect to non-member records only. Include the current definition of 'record relevant to the suspected breach' contained in s 748(12) of the existing

		The *Privacy Act 1988* does not offer non-members or union members adequate protection from misuse or disclosure. It provides a remedy for breaches of privacy after the fact and expressly allows information to be used for marketing purposes (if the requirements are met for this purpose).	*Workplace Relations Act 1996*. Explicitly exclude records or documents that are subject to a claim of legal professional privilege or which contain confidential, personal or commercially sensitive information.
GOVERNMENT POSITION	**FAIR WORK BILL**	**IMPACT/PROBLEM**	**AMENDMENT/SOLUTION**
Default bargaining representatives			
"All Australian workers will be free to join a union and make their own choice about whether or not to participate in activities like collective bargaining and industrial action" – *Julia Gillard Address to the National Press Club 17 September 2008* '[U]nder our proposed system, a union does not have an automatic right to be involved in collective enterprise bargaining'. ALP, *Forward with*	Section 173(4): a union is a default bargaining representative for each employee that is a member of the union. Section 183(1) and (2): a union that was a bargaining representative will be covered by the agreement if it notifies Fair Work Australia prior to its approval	The option of making a non-union agreement under the Fair Work Bill is illusory. Under the Fair Work Bill one union member at the workplace could trigger union coverage of an agreement despite the majority of employees being non-union members. A union bargaining representative can be covered by an agreement despite having no active involvement or failing to participate in the bargaining process. There is no mechanism for an employee to revoke a representative's rights where the employee is dissatisfied. It is also not clear whether an employee can make an alternative appointment at any time, where the default representative rules apply.	Provide genuine access to non-union agreements for employees who do not want a union to be involved with agreement making in their workplace. Remove the union default bargaining representative rule and make union representation of a member subject to specific written approval. Enable an employee to revoke the appointment of a bargaining representative or appoint an alternative bargaining representative at any time. Ensure that a bargaining representative can only exercise good faith bargaining rights or the right to be covered by an agreement where the bargaining representative actively participated in

Fairness: Policy Implementation Plan, August 2007			the negotiation process **AND** the majority of employees voted for the bargaining representative to be covered by the agreement.
GOVERNMENT POSITION	**FAIR WORK BILL**	**IMPACT/PROBLEM**	**AMENDMENT/SOLUTION**
Union Greenfields agreements			
	Section 182: Employers are required to obtain the signatures of all relevant unions in order to make a Greenfields agreement	Under this system, on any given project there can be multiple unions. A requirement that each union sign the agreement as a precondition of the agreement being made gives just one recalcitrant union the ability to veto an agreement despite all other unions and employees being satisfied with the outcome. Unions will have the opportunity to bring the commencement of a new project to a standstill, putting at risk billion dollar resource construction projects that require industrial certainty.	Restore the existing capacity for employers to enter into a union greenfields agreement with one or more eligible unions.
GOVERNMENT POSITION	**FAIR WORK BILL**	**IMPACT/PROBLEM**	**AMENDMENT/SOLUTION**
Industrial action – workplace determinations			
"….in the ordinary course people who are collectively bargaining at their enterprise level, all of that	Section 423(3): Industrial action can be suspended or terminated where it is causing or threatening to cause significant harm to an	This process will open the door to arbitrated outcomes. Where employees/unions initiate industrial action in response to an employer lockout and	Delete reference to employee response action at Section 423(3).

bargaining will happen at the enterprise level, they will either strike an agreement or not strike an agreement." (Julia Gillard, *Doorstop – Melbourne*, 03 / 09 / 2007)	individual employee to be covered by the agreement. Section 266(1): an arbitrated agreement will be made 21 days after the action was terminated if the matters at issue remain unsettled.	suffer harm (i.e. default on mortgage payments) this is a self-inflicted loss. This provision is open to abuse and manipulation from parties that see an arbitration as a desirable outcome.	
GOVERNMENT POSITION	**FAIR WORK BILL**	**IMPACT/PROBLEM**	**AMENDMENT/SOLUTION**
Good faith bargaining			
	Section 228(1) (b): relevant information, excluding confidential or commercially sensitive information, must be disclosed under good faith bargaining obligations.	This is a new bargaining obligation that will have the effect of increasing business transaction costs. Disputes will inevitably arise over what is 'relevant information' and whether information has been correctly identified as confidential and commercially sensitive, leading to protracted negotiations and increased risk of industrial stoppages.	Define 'relevant information' to ensure it is limited to information that is relevant to the discussions by the bargaining representatives as well as the claims being made during discussions, and that does not result in an excessive amount of time and resources being utilised by the employer to obtain information.
"Good faith bargaining will not require parties to make concessions, or to sign up to an agreement when they don't agree. Parties will still be able to take a tough stance in negotiations.	Section 228(1), (2): good faith bargaining obligations include an obligation to give genuine consideration to proposals and provide a reason for their response. It does not require concessions or require agreement to be reached on the terms to be included.	Employers are at risk of arbitrated agreements where currently there is no such risk. Further, the interaction between s 228, s 231 and s 235 may result in an order that has the effect of coercing an employer into making a concession or agreeing that a term may be included in an agreement.	Ensure that good faith bargaining orders cannot be imposed on employers who exercise their right to not make concessions or agree to a term to be contained in an agreement.

Compulsory arbitration will not be a feature of good faith bargaining." *(Julia Gillard Address to the National Press Club 17 September 2008)*	Section 231(3): a bargaining order can be made if the good faith bargaining obligations are not being met. Section 235(2): Fair Work Australia can make a serious breach declaration if a bargaining order is being seriously breached and this undermines bargaining. Section 269(1): If agreement is still not reached 21 days later, Fair Work Australia has the power to impose an arbitrated agreement on the parties.		
	Section 228(1)(d): a bargaining representative must refrain from capricious or unfair conduct that undermines collective bargaining.	The ability for an employer to engage replacement labour during industrial action may be limited by the good faith bargaining obligation to refrain from 'capricious or unfair conduct' that undermines collective bargaining *(see DEEWR, at Senate Standing Committee on Employment, Education and Workplace Relations – 11 December, 2008)* The ability to engage replacement labour is particularly important in light of the Fair Work Bill's removal of an employer's right to take pre-	Exclude the engagement of alternative labour from the meaning of capricious or unfair conduct.

		emptive action by locking out employees. Employers cannot take pre-emptive action against employees yet employees can control the time at which action is taken to inflict maximum harm on the employer. A limitation on the ability to engage replacement labour was not foreshadowed in government policy.	
GOVERNMENT POSITION	**FAIR WORK BILL**	**IMPACT/PROBLEM**	**AMENDMENT/SOLUTION**
Hours of work and rostering			
Fly-in-fly out is vital for the mining industry. People working on historically accepted roster patterns; that's part of the mining industry. Workers work those patterns, they are used to working those patters; many of them enjoy working those patterns and those patterns of work will be available to the mining industry under our workplace relations reforms. *Julia Gillard, Minister for Employment and Workplace Relations,*	Section 64: The period for averaging hours of work has been reduced from the current 52 weeks to 26 weeks for non-award employees Section 63: The Australian Industrial Relations Commission adopted the 26 week period for averaging hours of work in the Mining Industry Award.	This will reduce flexibility and decrease productivity for employers currently operating on rosters where hours of work are averaged over more than 26 weeks (i.e. 28 week Norwegian roster).	Restore the 52 week period for averaging hours of work or allow the hours of work to be averaged over the relevant roster cycle without limitation. Restore 12 hour ordinary hour shifts. Allow shifts to operate throughout the resources sector. Ensure the 52 week period for averaging hours of work, or ability to average the hours over the relevant roster cycle without limitation, applies to all employees, whether award covered or award free.

Press Conference, 1 April 2008			
'Another objective is that modern awards be economically sustainable and promote flexible modern work practices'. *Julia Gillard, Minister for Employment and Workplace Relations, Speech to the Fair Work Australia Summit, 29 April 2008.*	Section 55(4): The Australian Industrial Relations Commission has included terms incidental to the operation of the hours of work standard in the Mining Industry Award, by limiting the ordinary hours for each day or shift worked to 10 hours.	This will impact current rostering arrangements in the resources sector, which commonly uses a 12 hour shift roster, as well as increasing costs to employers. It will create differing levels of flexibility for award covered and award free employee and result in operational difficulties for employers.	Amend the National Employment Standards to provide for greater flexibility in averaging ordinary hours without limitation. Amend current award modernisation request to require the Australian Industrial Relations Commission to include flexibility in averaging ordinary hours without limitation. Amend current award modernisation request to require the Australian Industrial Relations commission to allow for a 12 hour ordinary hour roster throughout the resources sector.
GOVERNMENT POSITION	**FAIR WORK BILL**	**IMPACT/PROBLEM**	**AMENDMENT/SOLUTION**
Cashing out of annual leave			
	Section 94: award free employees can cash out annual leave but must retain a minimum of four weeks leave. Section 93: The Mining Industry Award does not	The absence of cashing out provisions in modern awards creates differing levels of flexibility and inconsistency for award covered and award free employees. The minimum leave that must be retained unnecessarily restricts employees working compressed or even-time rosters who wish to	Amend the National Employment Standards to allow for cashing out of Annual Leave for all workers in the resources sector. Alternatively, amend the award modernisation request to require the Australian Industrial Relations

	include a term relating to cashing out annual leave.	cash out their leave. Those who are award covered are also disadvantaged.	Commission to include a term in a modern resource sector awards allowing employees to cash out their Annual Leave. Remove the requirement to retain a minimum period of annual leave where employees are working in the resources sector.
GOVERNMENT POSITION	**FAIR WORK BILL**	**IMPACT/PROBLEM**	**AMENDMENT/SOLUTION**
Taking annual leave			
	Section 94(5): an employer can reasonably require an employee to take annual leave Section 93(3)(4): a modern award can include terms about taking annual leave	Fly-in-fly-out remote sites operating in conjunction with a set roster cycle will be adversely impacted where an employee takes annual leave at a time that conflicts with the roster cycle (e.g. it will be difficult to find a replacement employee for short periods). A requirement by an employer that an employee take paid annual leave during their rostered period off may not be considered 'reasonable' under the Fair Work Bill. This is particularly pertinent issue where the employee cannot or is limited in cashing out annual leave.	Ensure that employers can reasonably require an employee to take a period of annual leave in their rostered period off.

GOVERNMENT POSITION	FAIR WORK BILL	IMPACT/PROBLEM	AMENDMENT/SOLUTION
Majority support determinations			
	Section 236(1): Fair Work Australia can determine if a majority of employees to be covered by an agreement support bargaining. How the majority is determined is at the discretion of Fair Work Australia.	A lack of specificity in respect to what constitutes a majority and how it can be ascertained provides the parties with no certainty over the rules for enterprise bargaining. The substantial discretionary power afforded to Fair Work Australia is open to manipulation and will potentially lack transparency and accountability.	Require a 'majority' to be determined by a vote by at least 50 percent of employees to be covered by the agreement. More than 50 percent of those voting must support collective bargaining. This is consistent with the approach that applies to a protected action ballot (s 459 of the Fair Work Bill)
GOVERNMENT POSITION	**FAIR WORK BILL**	**IMPACT/PROBLEM**	**AMENDMENT/SOLUTION**
Scope Orders			
	Section 238: Fair Work Australia can change the scope of a proposed agreement during bargaining, modifying the group of employees that will be covered by the agreement, if it considers bargaining is proceeding inefficiently or unfairly (s 238).	Where bargaining commences due to there being majority support by the employees to be covered by the proposed agreement but Fair Work Australia subsequently modifies the group of employees to be covered, it will not be clear whether the requisite majority support exists among this new group of employees. For example, the proposed agreement may initially cover an operationally distinct group of employees who voted to support collectively bargaining. However, Fair Work Australia may change the scope of the agreement so it covers a larger, geographically distinct group of	An existing majority support determination should be terminated where the scope of the agreement is varied.

		employees. The earlier determination of Fair Work Australia that there is majority support for bargaining can no longer be said to apply to this group of employees.	
GOVERNMENT POSITION	**FAIR WORK BILL**	**IMPACT/PROBLEM**	**AMENDMENT/SOLUTION**
Agreement content			
	Section 172(1): The type of content permitted to be included in an agreement has expanded to include non-employee related matters (i.e. union related matters). Section 253(1): A term that is unlawful or is not about a permitted matter is unenforceable.	The Fair Work Bill has expanded the agreement content beyond matters relating to the employer/employee relationship, to also allow for the inclusion of union-related matters. Expanded content rules will expose employers to non-employee related claims that will not assist employee engagement and have no productivity trade-off. Such content includes paid trade union training leave, payments into trade union training funds, additional rights for unions to enter the workplace, paid leave to attend union meetings and conduct union work, payment for union delegates and a paid non-working union shop steward. Such matters will only increase business transaction costs. Allowing unlawful terms or terms that are not about permitted matters to remain in an agreement but be characterised as unenforceable only serves to create confusion and risk of misrepresentation about their enforceability.	Restrict agreement content to matters that relate only to the relationship between an employer and its employees. Require Fair Work Australia to identify and remove all unlawful terms and terms that do not relate to the employee/employer relationship from an agreement prior to approval.

GOVERNMENT POSITION	FAIR WORK BILL	IMPACT/PROBLEM	AMENDMENT/SOLUTION
Agreement Processing			
	Section 193(1): an agreement does not pass the better off overall test unless Fair Work Australia is satisfied that each employee and prospective employee would be better off than under the award. Section 54: agreements operate 7 days after the agreement is approved.	This line by line test will add complexity to the approval process and will add to existing delays. The current approval process, which does not require assessment of each individual employee, is already taking between three and seven months. The change in the commencement date of agreements from lodgement to 7 days after approval means that the commencement of agreements is vulnerable to further delay.	Provide that an agreement lodged with Fair Work Australia will commence on an interim basis if not approved within 7 days after lodgement.
GOVERNMENT POSITION	**FAIR WORK BILL**	**IMPACT/PROBLEM**	**AMENDMENT/SOLUTION**
Transfer of business			
	Section 311(1) - (5): a transfer of business occurs if there is a connection between the old and the new employer and the new employer has the beneficial use of the tangible or intangible assets of the old employer, outsourcing or ceasing to outsource. Section 313: an industrial instrument transfers applying	In some cases the lack of flexibility or uncompetitive cost structures contained in an existing industrial instrument is the cause of part of an operation to be outsourced or in sourced, or a commercial contract being terminated. The categorisation under the proposed laws of an arrangement being considered a transfer of business together with an obligation to apply a sub-standard industrial instrument where employees come across to the new employer will result in a decision not to engage any employees from the old employer.	Relax transmission of business laws to promote the employment of existing employees.

	to the employee that transfers to the new employer, follows the employee and covers the new employer. There is no time limit on how long this instrument will apply to the new employer. Section 414: an instrument that transferred to the new employer will also apply to any new employee that performs the same work, unless another agreement or award applies.	The operation of the transfer of business provisions in their current form is a disincentive to employ persons who worked for the previous employer.	
GOVERNMENT POSITION	**FAIR WORK BILL**	**IMPACT/PROBLEM**	**AMENDMENT/SOLUTION**
Representation			
	Section 596(4) (and other related sections): restricts legal or paid agent representation in matters before Fair Work Australia and the small claims court unless the lawyer or paid agent is an employee or officer of an organisation.	The exemption for employees or officers of an organisation that are lawyers or paid agents is unnecessarily limited to registered organisations. It has the effect of excluding not for profit associations or organisations that are unregistered but which represent their members on industrial matters.	Replace 'industrial organisation' with 'industrial association' for the purposes of the conduct of industrial matters.

GOVERNMENT POSITION	FAIR WORK BILL	IMPACT/PROBLEM	AMENDMENT/SOLUTION
Replacement Labour during Strikes			
	Section 228(1)(e): as part of the good faith bargaining obligations a bargaining representative must refrain from capricious or unfair conduct that undermines freedom of association or collective bargaining.	This provision may operate to prevent an employer from engaging replacement labour during employee strike action as it could be considered to be 'capricious or unfair conduct' that undermines collective bargaining. This was not articulated in the government's policy and further disadvantages employers now prevented from taking pre-emptive lockout action against employees.	AMMA contends that a specific provision or a note be included in the Fair Work Bill confirming that the engagement of replacement labour during industrial action does not fall within the definition of capricious or unfair conduct.

BIBLIOGRAPHY

Legislation

Conciliation and Arbitration Act 1904

Industrial Relations Act 1988

Privacy Act 1988

Workplace Relations Act 1996

Fair Work Bill

Cases

AWU & Ors v BHP Iron-Ore Ltd [2001] FCA 3 (10 January 2001).

Journals

W J Ford, 'Being there: changing union rights of entry under federal industrial law' (2000) 13 *Australian Journal of Labour Law* 1, 2-3, visited 30 August 2007, http://www.lexisnexis.com/au/legal/search/homesubmitForm.do

Government Media

Joint Press Conference with the Hon. Julia Gillard MP, Acting Prime Minister; Minister for Education; Minister for Employment and Workplace Relations; Minister for Social Inclusion, Transcript, 1 April 2008, Canberra, viewed 22 December 2008, http://mediacentre.dewr.gov.au/mediacentre/Gillard/Releases/20000trainingplacesonlinediscussionpaperNationalEmploymentStandardsBudgetReserveBankTaxofficeOpesPri.htm

Julia Gillard, Transcript Interview with Laurie Oakes, *Sunday* (Nine), 16 March 2008, viewed 10 December 2008, http://mediacentre.dewr.gov.au/mediacentre/Gillard/Releases/TWUallegationsGovernmentsubmissiontotheAFPCSESfundingmodelforpublicschoolsBudget.htm

Julia Gillard, *Speech – Queensland Media Club*, 30 August 2007.

Government Policy

Kevin Rudd MP and Julia Gillard MP, *Forward with Fairness: policy implementation plan*, Australian Labor, August 2007 http://www.alp.org.au/download/now/070828_dp_forward_with_fairness___policy_implementation_plan.pdf

Kevin Rudd MP and Julia Gillard MP, *Forward with Fairness: Labor's plan for fairer and more productive Australian workplaces*, Australian Labor, April 2007, viewed 16 December 2008, http://www.alp.org.au/download/now/forwardwithfairness.pdf;

Government Material

ABARE, *Minerals and Energy: Major development projects – October 2008 Listing*, Australian Government, 2008.

ABARE, 'Number of minerals and energy projects down but investment still strong', Media Release, Australian Government, viewed 7 January 2009, http://www.abareconomics.com/corporate/media/2008_releases/19nov_08_2.html

ABARE, 'Global financial crisis weakens commodity export earnings', *Media Release*, Australian Government, 15 December 2008, viewed 22 December 2008, http://www.abareconomics.com/corporate/media/2008_releases/15dec_08.html

Australian Bureau of Statistics, *Industrial Disputes*, Cat No. 6321.0.55.001, ABS.

Australian Bureau of Statistics, 'Sustaining mineral resources industry – overcoming the tyranny of depth',
Yearbook, 2008, Cat No 1301.0, ABS, viewed 30 September 2008, http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/1301.0Feature%20Article18012008?opendocument&tabname=Summary&prodno=1301.0&issue=2008&num=&view=

The Hon. Julia Gillard MP, Minister for Employment and Workplace Relations, 'Fair Work Bill 2008', *Second Reading Speech*, 1, viewed 7 January 2009, http://www.workplace.gov.au/NR/rdonlyres/53C280C4-17AF-4EED-83BE-418C21E19999/0/fwbill20082rs.pdf

The Office of the Privacy Commissioner Australia, Community attitudes towards privacy 2007, Office of the Privacy Commissioner Australia, August 2007, viewed 10 December 2008, 4, http://www.privacy.gov.au/publications/rcommunity07.pdf.

Vernon Topp et al, *Productivity in the mining industry: measurement and interpretation*, Productivity Commission working paper, December 2008.

Senate Inquiry

Minerals Council of Australia, Submission to the Fair Work Bill Senate Inquiry, January 2009.

Senate, Standing Committee on Education, Employment and Workplace Relations, 'Fair Work Bill 2008', *Hansard*, 11 December 2008, Canberra.

Papers/Submissions

AMMA, *Workplace improvement through employee engagement: A guideline for employers in the resources sector*, AMMA, 2007, viewed 8 December 2008, http://www.amma.org.au/home/publications/amma_aef_employeeengagementguide%20_october2007.pdf;

AMMA, *Employee engagement: A lifetime of opportunity*, AMMA, 2007, viewed 8 December 2008, http://www.amma.org.au/home/publications/employeeengagement_a_lifetime_of_opportunity_sept2007.pdf;

AMMA, *Australian resources sector: The case for ongoing flexibility in employment arrangement options*, AMMA, 2001, viewed 9 December 2008, http://www.amma.org.au/publications/Australian%20resources%20sector.pdf

AMMA, *National Employment Standards Exposure Draft Submission*, 31 March 2008, viewed 5 January 2008, http://www.amma.org.au/home/publications/AMMA_NES_Submission_Final_31March2008.pdf

Web pages

Unions Australia, 'Extra Benefits', viewed 17 December 2008, http://www.unionsaustralia.com.au/extra.aspx.