Submission to the Senate Education, Employment and Workplace Relations Committee

Inquiry into the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009

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Date:	9 April 2009

Table of Contents

1. Executive Summary

1.1. The Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 (the Transitional Bill) follows the recent passing of the Fair Work Bill 2008 by Parliament.

1.2. A number of matters were not resolved by the Fair Work Bill, which meant there were a number of important questions left unanswered. These included:

- Will existing agreements 'drop dead' on an arbitrarily specified date?
- Will an employee be able to unilaterally terminate an agreement before its nominal expiry date?
- Will existing agreements be able to be varied?
- Will ITEAs continue to be available until 31 December 2009?
- Will existing agreements have to comply with the National Employment Standards?
- How will union 'turf wars' be avoided?

1.3. The Transitional Bill, which sets out a number of arrangements for transitioning to the new workplace relations system, responds to these questions. However some answers are far from satisfactory and pose a significant risk to resource sector employers.

1.4. AMMA has reviewed the Transitional Bill based on its ability to meet the needs of the resources sector, whether it will improve productivity and whether it will adversely impact on employment. These are important criteria for legislative reform at any time and considerably more important in these current times where business is fighting to remain viable in the face of a global economic meltdown.

1.5. The resources sector, like so many others, has been hit hard by the global financial crisis. Relying largely on exports of its products, the resources sector has been impacted by reduced demand and reduced commodity prices.

Already, thousands of employees in the industry are losing jobs due to the financial crisis as employers scale back production and put projects on hold.

1.6. Radical industrial relations reform like the government's Forward with Fairness policy could make or break a business if it unduly interferes with existing employment arrangements and practises, exposes employers to increased bargaining transaction costs and external interference, industrial disputation.

1.7. The award modernisation process has drawn particular criticism from the business community. The process of rationalising and simplifying thousands of awards has seen employers burdened with reduced flexibility and increased employment costs arising from increased casual loadings, allowances and other entitlements. Ironically, the government is pressing the Australian Fair Pay Commission to give careful consideration to the amount of any wage increase in the interests of maintaining jobs, pointing to the 'nexus' between wages and employment to support its position.

1.8. AMMA recommends that the government adopt a similar approach with respect to the Transitional Bill and carefully consider the impact on employment.

1.9. AMMA's analysis has identified a number of shortcomings with the transitional arrangements proposed in the Bill, which are largely grounded in the failure to respect existing workplace arrangements that offer a high level of flexibility and which facilitate job creation and increased output.

1.10. AMMA's concerns in relation to the Transition Bill are set out below, followed by a summary of the key recommendations set forth in this submission as a means of addressing the shortcomings.

Key Concerns

Union representation orders

1.10.1. Representation orders to deal with union turf wars arising from the expansion of union rights under the Fair Work Bill do not appear to allow orders to be proactively sought by employers prior to a dispute arising. The Transitional Bill also does not allow for the automatic transfer of current demarcation orders to the new system, does not give consideration to the wishes of employers when making orders, and nor does it address the complexity of union rules.

Recommendations:

- Ensure applications for representation orders can be made prior to a dispute arising.
- Require that any right of entry or proceeding be stayed where an application has been made, until an order or interim order is made by Fair Work Australia.
- Allow existing representation orders made under the Workplace Relations Act or its predecessor to continue as though they are representation orders made under the Transitional Bill.
- Require Fair Work Australia to consider the views of the employer when making a representation order.
- Limit the operation of representation orders to restrict union entry to the workplace unless the union is covered by an enterprise agreement, modern award or transitional instrument.
- Require Fair Work Australia to modernise existing union rules and express such rules in plain English, or alternatively, publish plain English versions of the rules for common usage.

National employment standards

1.10.2. The application of the National Employment Standards to existing agreements on a no-detriment basis, requiring a line by line comparison between the agreement and the standard, interferes with existing flexibilities that were lawfully entered into and agreed by the parties. Annualised salary arrangements that do not disadvantage employees when considered on a global basis are not accommodated, and it will be difficult to 'unbundle' these arrangements.

1.10.3. While the Transitional Bill allows particular terms dealing with the National Employment Standards to continue, such as cashing out annual leave and personal leave, the constraints imposed (for example a minimum leave accrual of 4 weeks and a separate agreement for each occasion where leave is cashed out) will mean that existing arrangements will not be able to continue in practice.

Recommendations:

- Remove the retrospective application of the National Employment Standards to employees on agreements entered into prior to 1 January 2010.
- Alternatively, apply the National Employment Standards on a no-*net* detriment basis.
- Allow terms dealing with specific provisions of the National Employment Standards (e.g. annual leave cash-out for example) to continue to have effect without limitation.
- Allow Fair Work Australia to make an order that an existing agreement operates to the exclusion of the National Employment Standards, or order its variation, based on set criteria that include the operational requirements of the business and intention of the parties.

Early review of modern awards

1.10.4. AMMA supports the interim review of modern awards.

1.10.5. AMMA is concerned that the interim review will result in increased cost to business and common variation across all modern awards.

1.10.6. AMMA is also concerned that intended consequences of award modernisation ought to be resolved earlier. While the Fair Work Act provides for applications to be made to review a modern award outside the four yearly reviews, it is not clear whether it would enable Fair Work Australia to deal with unintended consequences arising from the award modernisation process.

Recommendations:

- That a mechanism be included in the Transitional Bill to provide an employer the right to seek a review of a modern award prior to the interim review, for the purpose of addressing unintended consequences.
- Require that an interim review consider each award separately.
- Require that the interim review does not result in increased costs to business.

Enterprise awards

1.10.7. A party to an enterprise instrument can apply to Fair Work Australia for it to make a modern enterprise award that will replace that instrument, but Fair Work Australia must consider a number of criteria and decide whether to make a modern enterprise award or not make a modern enterprise award. If a decision is made not to make a modern enterprise award, the instrument will terminate when that decision is made. This process for making modern enterprise awards is fraught with uncertainty for employers.

1.10.8. Further, a modern award can be expressed to cover one or more unions, but the Transitional Bill does not specify any limitation on which union would be entitled to be covered.

Recommendations:

- Limit cover of a modern enterprise award to a union that was a party to the enterprise instrument and which is eligible to represent the industrial interests of the employees.
- Require Fair Work Australia to make a modern award on receiving an application, unless it is satisfied it is not in the public interest to do so.
- If a decision is made not to make a modern enterprise award, allow the instrument to continue until 31 December 2013.

Take home pay orders

1.10.9. Enabling employees to seek take home pay orders where their take home pay is reduced due to transitioning to a modern award, without a comparable provision for employers to enable increased costs to be quarantined or offset, fails to recognise the increased costs being imposed on employers as a result of the award modernisation process. This is contrary to the government's award modernisation request which includes the dual objectives of not disadvantaging employees or increasing costs for employers.

1.10.10. Further, the availability of take-home pay orders may result in increased union entry to the workplace by encouraging unions to engage in 'ambulance chasing', in order to attract new members and compete with other unions.

1.10.11. Combined with the absence of a time limit on take-home pay order, the Transitional Bill tips the balance in favour of employees at the expense of the employer (and potentially employment levels).

Recommendations:

- Enable employers to make applications to Fair Work Australia to quarantine or offset any increased costs.
- Impose a time-limit for making an application for a take-home pay order.

Replacing agreement based transitional instruments

1.10.12. AMMA is concerned that an employer with an agreement based transitional instrument that has not passed its nominal expiry date can be subjected to majority support determinations, scope orders and obligations to provide employees with a notice of employee representational rights where the majority of employees want to replace the instrument with an enterprise agreement. This will have the effect of destabilising the operation of the existing transitional instrument, which could have a significant portion of its nominal term left, and negatively impact the employer's relationship with its employees.

1.10.13. Further, in the last 90 days of the transitional instrument's nominal term, a bargaining representative will be able to apply for bargaining orders, breaches of which can trigger bargaining related workplace determinations and their imposition on the parties prior to the expiry of the instrument's nominal expiry date.

Recommendations:

- Restrict a bargaining representative from applying for a majority support determination or scope order during the term of an agreement until 90 days prior to the nominal expiry date of the agreement based transitional instrument.
- Prevent a bargaining related workplace determination from being made before the nominal expiry date of a transitional instrument has passed.

Termination rules – individual agreements

1.10.14. The government's policy intention to allow a smooth transition from an individual agreement to an enterprise agreement by way of the parties agreeing to make a conditional termination instrument is not achieved in the Transition Bill.

1.10.15. Allowing an employee with a current AWA or ITEA, who has entered into a conditional termination instrument, to take protected industrial action is inconsistent with the protections offered by workplace agreements and will result in little or no use of conditional termination instruments by employers.

1.10.16. AMMA is concerned that the mechanism to allow employees who are prohibited from taking industrial action to have access to protected industrial action whilst their entitlements are preserved is extremely attractive option for employees and their union and may result in an employer being unduly pressured or intimidated into entering into a conditional termination instrument. The Transitional Bill fails to adequately protect an employer from conduct directed at coercing or intimidating it to make a conditional termination instrument.

Recommendations:

- Remove the ability for an employee to take protected industrial action under a conditional termination instrument, where they have an AWA/ITEA that has not passed its nominal expiry date.
- Alternatively, provide adequate protection from coercive behaviour designed to force an employer and/or employee to agree to enter into a conditional termination instrument.

Processing existing agreements

1.10.17. AMMA members continue to experience significant delays in respect to the processing of agreements lodged with the Workplace Authority, with some reporting that they are waiting for the approval of agreements lodged some six months or more ago. This is an ongoing concern made that much more pressing due to the recent amendments which provide that the agreement does not come into operation until 7 days after approval. The slow approval process denies employers access to more flexible arrangements and as a result delays the flow on of wage increases to employees.

Recommendations:

- Increase resources available to the Workplace Authority to process existing agreements lodged under the *Workplace Relations Act*.
- Allow employers to lodge an agreement made prior to 1 July 2009, with Fair Work Australia for processing under the *Workplace Relations Act,* rather than the Workplace Authority, where it would result in quicker approval.
- Approve transitional agreements waiting to be processed or still being processed on an interim basis by 21 July 2009 and allow compensation provisions in the *Workplace Relations Act* to operate if the agreement does not pass the No Disadvantage Test.

Consideration of pre-1 July 2009 bargaining conduct

1.10.18. Although good faith bargaining obligations and rights for bargaining representatives do not commence until 1 July 2009, the Transitional Bill has the effect of retrospectively regulating conduct by taking pre-*Fair Work Act* conduct into account for future bargaining where a collective agreement under the *Workplace Relations Act 1996* is not concluded prior to the commencement of the *Fair Work Act*.

Recommendations:

- Require all bargaining and industrial action to commence afresh from 1 July 2009 and remove the ability for Fair Work Australia to consider the conduct of representatives bargaining for a collective agreement under the *Workplace Relations Act* when making decisions under the *Fair Work Act*.

Notice of employee representational rights

1.10.19. A requirement for employers to provide a notice of employee representational rights to employees with an AWA/ITEA that has not yet passed its nominal expiry date imposes additional red tape on employers and undermines the arrangements entered into between the parties by pressuring the employer to enter into a conditional termination instrument.

Recommendations:

- Remove the requirement for an employer to provide a notice of employee representational rights to an employee that is covered by an AWA/ITEA that has not passed its nominal expiry date.

1.11. Since AMMA's submission on the Fair Work Bill to the Senate in January 2009, forecasted export earnings have dramatically dropped from $159 billion in 2008-09 to a forecasted $126 billion for 2009-10. Business confidence is also low and a survey of the AMMA membership by AMMA in late March 2009 shows a bleak picture, as it indicates that further job losses in the resources sector is highly likely, with more than 50 percent of respondents planning further job cuts, and a further 21 percent indicating that additional cuts are a clear possibility.[1] It is time to take greater heed of these circumstances and ensure that the transitional arrangements do not undermine existing flexibilities, result in increased employment costs nor negatively affect productivity.

[1] AMMA, *AMMA redundancy survey*, February 2009, AMMA.

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.[2] The sector accounts for 8 percent of Australia's gross domestic product.[3] Despite an earlier forecast of $159 billion revise forecast export the sector to contribute $126 billion in minerals and energy exports in 2009-10. This represents a 20 percent reduction due to lower contract prices for bulk commodities, weaker prices for base metals and aluminium and lower forecast prices for oil and coal.[4] Some resources sector employers have responded to falling commodity prices by increasing volumes, which highlights the importance of optimising productivity in the present low point of the commodity cycle. Improvements in export earnings are projected to 'gradually increase' from 2010-11.[5]

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[2] 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=

[3] Ibid.

[4] ABARE, 'Farm exports forecast to give rise despite global downturn', Media Release, 3 March 2009, ABARE, viewed 3 April 2009, http://www.abare.gov.au/corporate/media/2009_releases/3mar_09.html

[5] Ibid.

2.4. There are 347 major minerals and energy development projects identified by the Australian Bureau of Agricultural and Resource Economics (ABARE).[6] Significantly, 262 of these minerals and energy projects are undergoing feasibility studies.[7] 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 and Osaka Sunrise Gas project.[8] 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.[9] Likewise projects that have reached the committed stage 'may be deferred, modified or even cancelled if economic or competitive circumstances change significantly.'[10] According to ABARE, 85 projects are at an advanced stage with projected capital expenditure of $67.3 billion.'[11]

2.5. A recently released report of the Productivity Commission identified a 'production lag' in the resources sector from 2000-01 to 2006-07, which has contributed to a fall in multifactor productivity.[12] This lag has been attributed to a 'surge in capital investment' during this period and the 'lead times between investment and outputs in mining'.[13] 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.[14]

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[6] 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
[7] Ibid.
[8] ABARE, *Minerals and Energy: Major development projects – October 2008 Listing*, Australian Government, 2008, 14.
[9] Ibid, 15.
[10] Ibid.
[11] Ibid.
[12] Vernon Topp et al, Productivity in the mining industry: measurement and interpretation, Productivity Commission working paper, December 2008, 105.
[13] Ibid, 106.
[14] Ibid.

3. Forward with Fairness Background

3.1. The Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 (the Transitional Bill) is the first of two Bills dealing with transitional arrangements for the *Fair Work Act 2009*.

3.2. The Transitional Bill repeals the *Workplace Relations Act 1996* other than Schedule 1 and Schedule 10 (which deal with registered organisations and transitional registered organisations respectively). The Bill outlines a number of transitional arrangements, the following of which will be addressed in this submission:

3.2.1. Representation orders to deal with union demarcation disputes
3.2.2. Application of the National Employment Standards to transitional instruments;
3.2.3. Early review of modern awards;
3.2.4. Modernising enterprise awards;
3.2.5. Take home pay orders;
3.2.6. Termination rules for transitional instruments;
3.2.7. Continued application of the agreement processing rules for agreements made under the *Workplace Relations Act 1996;*
3.2.8. Fair Work Australia consideration of pre-1 July 2009 bargaining conduct; and
3.2.9. Notice of employee representation rights.

3.3. The Transitional Bill is the third legislative instalment of the government's Forward with Fairness industrial relations reform policy and follows the recent passage of the Fair Work Bill through Parliament. AMMA outlined a number of concerns and made recommendations in respect to the Fair Work Bill in written and verbal submissions to the Senate Committee Inquiry.

3.4. In its submission to the Senate Committee on the Fair Work Bill, AMMA made particular comment in respect to

3.4.1. commitments made by the Hon. Julia Gillard, Deputy Prime Minister and Minster for Eduction, Employment and Workplace Relations, that remote roster arrangements would be able to continue;

3.4.2. the changed economic circumstances since the release of the government's Forward with Fairness policy; and

3.4.3. the importance of not implementing industrial relations reform that will adversely impact on productivity and employment in the resources sector.

3.5. These comments apply to the current inquiry into the government's Transitional Bill. The global financial crisis continues to have a significant adverse impact on resources sector employers, which are dealing with falls in commodity prices and demand and cutting tens of thousands of jobs in order to remain financially viable**.**[15]

3.6. Significantly, the Hon. Julia Gillard has recognised the impact of increased employment costs on employment. In a recent interview with ABC Insiders she said[16]

> There is obviously a relationship between minimum wages and employment. [I]n a slowing economy there is more reason to be concerned about the nexus between wages and employment.

3.7. These comments were made in respect to the current minimum wage review being conducted by the Australian Fair Pay Commission. AMMA contends that these comments should be given consideration in respect the operation and impact of the government's proposed transitional arrangements.

[15] See Geoff Easdown and John McCarthy, 'Mining job losses surge past 11,000, *The Advertiser*, 27 March 2009; Luke Forrestal and Andrew Burrell, 'Miners cut more jobs', *The Australian Financial Review*, 27 March 2009.
[16] The Hon. Julia Gillard MP, *ABC Insiders Interview*, ABC Sunday, 29 March 2009.

3.8. The concerns discussed in this submission and recommendations for changes to the Transitional Bill would be made whether the reforms were being implemented during a financial crisis or not. Workplace relations reform must not put at risk the creation of jobs, maintenance of jobs and must facilitate improved productivity, not impede it, regardless of the environment in which business operates. The current financial crisis highlights the importance of these objectives.

4. Representation Orders

4.1. Following the release of the Fair Work Bill AMMA raised a number of concerns about the significant expansion of union powers, particularly in respect to the new bargaining framework and union right of entry. In its submission on the Fair Work Bill AMMA argued that, as a result of a major shift in the basis on which a union could gain entry to the workplace,

> the overlap of 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.[17]

4.2. In evidence to the Senate during public hearings AMMA commented that resources sector employers have experienced an increase in union activity since the introduction of the Fair Work Bill.[18] Once the restrictions on union entry to the workplace are removed, this activity is likely to increase as unions compete to gain a foothold in union-free workplaces or workplaces that have arrangements with other unions.

4.3. Competition between unions is disruptive, a distraction to the workforce and is of no benefit to productivity or employment. There is a long history of demarcation disputes in the resources sector, with particular tensions having long existed between the CFMEU and AWU due to the overlap in their coverage rules. Demarcation orders, which often follow lengthy hearings and significant costs, currently operate in respect to some sites. A table of existing demarcation orders and decisions is attached at Appendix A.

4.4. The government foreshadowed its intended approach to union demarcation disputes in a letter to AMMA and others on 8 January 2009. In that letter the

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[17] AMMA, *Submission to the Senate Eduction, Employment and Workplace Relations Committee*, Inquiry into the Fair Work Bill 2008, 12 January 2009, AMMA, 29.
[18] Standing Committee on Education, Employment and Workplace Relations, 'Fair Work Bill 2008' *Proof Committee Hansard*, Senate, 27 January 2009, Australian Government, viewed 7 April 2009, http://www.aph.gov.au/hansard/senate/commttee/S11617.pdf

Hon. Julia Gillard MP stated that the move away from award coverage as a basis for right of entry,

> ….is not intended to displace existing union coverage boundaries. The Government does not intend that there be any re-opening of settled demarcations. The mechanism through which this will be addressed is through representation orders that will reflect existing union coverage…It is proposed that such orders would be able to be obtained based on previously settled award coverage patterns, without any requirement to demonstrate current disruption to the employer's business.

4.5. AMMA had the opportunity to provide input into the development of the representation orders and did so through a joint AMMA/MBA submission to the Department of Eduction, Employment and Workplace Relations (DEEWR) in January 2009. The submission can be viewed at http://www.amma.org.au/home/publications/AMMA_MBA_Position_UnionRepresentationRightsUnderFairWorkBill.pdf. In that submission, AMMA and Master Builders Australia identified two issues with union representation rights under the Fair Work Bill:

- Union rules are complex and employers must be able to ascertain with certainty which organisations are eligible to represent the industrial interests of the employees and
- Damaging demarcation disputes must be avoided.

4.6. AMMA and Master Builders Australia consequently made the following proposals to DEEWR:

4.6.1. That plain English versions of union rules and all existing union rules information (e.g. demarcation decisions and private agreements) be easily accessible;

4.6.2. That Fair Work Australia have the power to amend union rules to address ambiguities and resolve demarcation disputes;

4.6.3. That unions seeking to exercise their representation rights be required to provide details of their eligibility rules to employers;

4.6.4. That advance representation orders be made available in the form of a certificate issued by Fair Work Australia to a union seeking to confirm its right to represent particular employees at a chosen workplace; and

4.6.5. That a union can seek to exercise its representation rights without having an advance representation order provided such right can be suspended by the employer raising an objection with the union and Fair Work Australia. The suspension will apply until Fair Work Australia makes a representation order.

4.7. **AMMA supports the inclusion of representation orders in the Transitional Bill as a means of avoiding damaging union demarcation disputes.**

Existence of a dispute

4.8. Provision for representation orders is made at Part 3 of Schedule 22 of the Transitional Bill. Clause 137A allows an organisation, employer or the Minister to apply for an order 'in relation to a dispute.'

4.9. This provision appears to predicate the application for a representation order on the existence of a dispute. Such a precondition for representation orders currently exists under Schedule 1, Clause 133 of the *Workplace Relations Act 1996*. AMMA contends that it does not meet the policy intention of the government announced in the Hon. Julia Gillard MP's letter on 8 January 2009, which appears to be more correctly enunciated in the Explanatory Memorandum. The Explanatory Memorandum appears to enable an employer to apply for an order where there is 'disagreement' regarding the union's entitlement to represent the employees. That this does not require an actual dispute is supported by the illustrative example, where the employer seeks a

representation order to ensure there is no conflict between two unions with overlapping coverage, where one union has a long standing role of representing the employees in the workplace.[19]

4.10. There are a number of established demarcations in the resources sector arising either from an existing demarcation order, private agreement or current arrangements at particular workplaces. Employers must have an opportunity to be proactive and apply for representation orders that will settle existing union coverage. AMMA contends that Clause 137A is not sufficiently clear to enable an employer to seek a representation order prior to a dispute arising.

4.11. **AMMA submits that Clause 173A should be clarified to ensure that an application for a representation order as to a union's ability to represent the interests of employees at a specific workplace can be made without the need for a 'dispute' as a precondition.**

4.12. **AMMA further submits that where an application has been made for a representation order in respect of the access or intended access to a representation right under the *Fair Work Act*, any disputed right be stayed until an order has been made by Fair Work Australia. Fair Work Australia should be empowered to make an interim order where appropriate.**

Eligibility for membership

4.13. A representation order that a union is to have the right to represent employees in a particular workplace group is limited to those employees that are eligible for membership of the union.

[19] The Parliament of the Commonwealth of Australia, Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009, Explanatory Memorandum, House of Representatives, 2008-2009, 129.

4.14. **AMMA supports limiting a union's representation rights to those employees that are eligible for membership.**

Criteria for making representation order

4.15. Clause 137B of the Transitional Bill sets out a number of factors that must be taken into account by Fair Work Australia when considering whether to make a representation order. This includes the history of award coverage and agreement making, the wishes of the employees, the extent to which the union represents the employees, any agreement or understanding that deals with the union's representation rights and the consequences of not making the order.

4.16. AMMA supports the inclusion of the criteria currently listed but notes that it does not specifically take into account the existence of demarcation orders made under the *Workplace Relations Act 1996*. These orders are often the result of significant time and cost by all parties and should automatically be recognised in the new system.

4.17. Nor do the criteria require Fair Work Australia to give consideration to the views of the employer, giving consideration only to the views of the employees. While it is quite possible that an employer may have an opportunity to make submission to Fair Work Australia when an application has been made, there should be an express requirement to consider the views of the employer.

4.18. **AMMA submits that the Transitional Bill be amended to deem that a representation order made under Clause 133 of Schedule 1 of the *Workplace Relations Act 1996*, or its predecessor, will continue to operate as though it were a representation order made under the Transitional Bill.**

4.19. **AMMA further submits that in order to ensure a balanced approach to making representation orders, the views of the employer must form part of the criteria for consideration by Fair Work Australia.**

Representation orders - union right of entry

4.20. In its submission on the Fair Work Bill, AMMA raised particular concerns about the expansion of union right of entry to the workplace.[20] This was on the basis that union entry rights were no longer based on coverage of an award or being a party to an agreement.[21]

4.21. The *Fair Work Act* will allow a union to enter a workplace that is covered by an agreement entered into with another union in order to investigate a suspected breach of that agreement or hold discussions with those employees. The union can also enter a workplace previously not accessible due to the operation of an employee collective agreement or individual statutory agreements, in order to hold discussions with members or employees eligible to be members.

4.22. While reliance on union coverage rules creates a significant risk of union turf wars it also allows unions to access workplaces where the employees have democratically voted to exclude the union. They may have done so by entering into a non-union agreement or by entering into an agreement with a different union. This decision of the workplace should be respected.

4.23. **AMMA therefore submits that a representation order affording a union the right to represent a group of employees must not operate so as to allow a union to enter the workplace under part 3-4 of the *Fair Work Act* unless**

[20] AMMA, *Submission to the Senate Eduction, Employment and Workplace Relations Committee*, Inquiry into the Fair Work Bill 2008, 12 January 2009, AMMA, 26.
[21] In its submission AMMA acknowledged that under the *Workplace Relations Act 1996*, a union could enter to investigate a suspected breach of an employee collective agreement where they had a member affected by the breach.

4.23.1. **the union is covered by an enterprise agreement or agreement based transitional instrument operating at the workplace; or**

4.23.2. **the union is covered by a modern award, or award based transitional instrument operating at the workplace.**

Powers of Fair Work Australia - union rules

4.24. The proposed representation order provisions do not embrace the issues raised in the joint AMMA/Master Builders Australia submission regarding the current complexities with union rules. Union eligibility rules are not clearly drafted, are complex and may also not reflect decisions of the Australian Industrial Relations Commission in respect to their operation. This will impede the ability of employers to effectively and efficiently determine whether a union has a right to represent the industrial interests of their employees.

4.25. **AMMA submits that Fair Work Australia should be required to prepare and publish a non-authorities copy of all organisation rules in plain English, including detailing the effect of all demarcation decisions and agreements.**

5. Application of the National Employment Standards

5.1. Statutory minimum conditions of employment are currently set by the Australian Fair Pay and Conditions Standard under Part 7 of the *Workplace Relations Act 1996*. The minimum entitlements set out in Part 7 apply to all employees and prevail over a workplace agreement or contract to the extent that the minimum standard provides a more favourable outcome.[22]

5.2. However, different rules apply where the employee is covered by an agreement entered into prior to the commencement of the federal statutory minimum conditions. Clause 30 of Schedule 7 of the *Workplace Relations Act 1996* has the effect that the minimum standard does not apply where it is already dealt with in the agreement. This means that arrangements already made in respect to a particular entitlement and approved under the requirements of the law operating at the time, are not disturbed.

5.3. This limitation on the application of the statutory minimum standards to agreements that already exist recognises the binding contractual arrangement previously entered into between an employer and its employees.

No detriment rule

5.4. The minimum standards are similarly set under the *Fair Work Act* in the National Employment Standards.

5.5. Under Clause 23 of Schedule 3 of the Transitional Bill, the National Employment Standards will apply to employees covered by an existing agreement where the term in the instrument is detrimental as against the standard. This has been termed the 'no detriment rule' and requires a line-by-line comparison between the minimum standard and the term in the

[22] *Workplace Relations Act 1996* s 172.

agreement.[23] Importantly, where the entitlement is not detrimental to the employee as against the National Employment Standards, the term in the agreement will continue to have effect.

5.6. Where it is the policy of the government to set statutory minimum terms and conditions of employment, or increase the existing minimum as is the case under the *Fair Work Act*, it is preferable that where the entitlement is dealt with in an existing agreement, that entitlement should be allowed to continue to have effect. These agreements often set highly flexible terms and conditions of employment, which were lawfully entered into at the time they were made.

5.7. For example, a pre-reform agreement entered into prior to the commencement of the *Workplace Relations Amendment (WorkChoices) Act 2005* may provide an employee with an amount of pay in lieu of paid annual leave. Such an arrangement would be common in areas of the sector that operate on an even-time roster. This even-time roster gives the employee an equal amount of working time and non-working time over the year and it is the preference of employees to have the benefit of being paid annual leave in lieu. This is also operationally beneficial for employers as it means that these workers are more productive – for the employee to take a period of leave where they work an even-time roster, it would impact on the rostering arrangements and significantly, result in an employee working for less than half the year.

5.8. Applying the no-detriment rule specified in the Transitional Bill, a term providing for annual leave to be paid in lieu would be considered not to be as beneficial as the annual leave entitlement in the National Employment Standards. The employee would therefore be entitled to the four weeks annual leave entitlement specified in the National Employment Standards, despite the employee's hourly rate of pay or annualised salary containing a component that is compensation for this 'loss' of paid annual leave.

[23] The application of the 'no detriment rule' was explained in the government's explanatory memorandum to the Transitional Bill: The Parliament of the Commonwealth of Australia, Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009, Explanatory Memorandum, House of Representatives, 2008-2009.

5.9. The application of the National Employment Standards under the 'no detriment rule', requiring a line-by-line comparison with the terms of the transitional instrument interferes with existing arrangements and flexibilities. AMMA contends that the 'no detriment rule' is not the appropriate method for applying the National Minimum Standards to existing agreements, which were lawfully entered into and approved under the law prevailing at the time.

5.10. **AMMA submits that the National Employment Standards (except as to the minimum ordinary hourly rate) should not apply to agreements made prior to 1 January 2010 unless the agreement specifically provides for the application of the National Employment Standards (or part thereof).**

5.11. **In the alternative AMMA contents that the National Employment Standards (except as to the minimum ordinary hourly rate) should not apply to agreements made prior to 1 January 2010 until the nominal expiry date has passed, unless the agreement specifically provides for the application of the National Employment Standards (or part thereof).**

5.12. **Alternatively, Clause 23 of the Transitional Bill should be amended so that the National Employment Standard applies to existing agreements on a global no-net detriment basis, enabling the agreement as a whole to be considered when determining whether the employee has suffered any detriment.**

Continuation of certain ancillary terms

5.13. While the National Employment Standards set out minimum employment entitlements, certain flexibilities and ancillary terms regarding their operation can be dealt with in awards or enterprise agreements for those employees covered by those instruments.

5.14. Clause 24 of Schedule 3 of the Transitional Bill operates to allow transitional agreements to include these terms in the same manner as enterprise agreements. The relevant provisions are listed in paragraphs (a) to (h) in Clause 24 of Schedule 3 of the Transitional Bill and include terms relating to averaging hours of work, cashing out and taking paid annual leave and cashing out paid personal/carer's leave.[24]

5.15. However, the continuation of these terms is limited by the 'protections' or rules set out in the *Fair Work Act*. For example, in order to cash out annual leave under the National Employment Standards, the requirements in subclause 93(2) of the *Fair Work Act* must be followed, including:

- A separate written agreement between the employer and employee for each cashing out of a particular amount of paid annual leave; and
- The paid annual leave must not be cashed out if it would result in the employee's remaining accrued entitlement being less than four weeks.

5.16. These rules are different to those that apply under the current *Workplace Relations Act 1996*. Section 233 of that Act allows a workplace agreement to contain a provision entitling an employee to cash out an amount of annual leave. While a written election to forgo an amount of annual leave must be made by the employee, it does not require this written election to be made for each separate period. There is also a limitation on the amount on annual leave that can be cashed out, set at not more than half the annual leave credited to the employee in a 12 month period. This means that an employee in the first year of employment, could cash out 2 weeks annual leave.

5.17. What this means in practice is that employees covered by a workplace agreement with a cashing out of annual leave provision, can make a written election to cash out a portion of their annual leave at each pay period in order to increase their take-home pay, provided not more than 2 weeks is cashed

[24] See *Fair Work Act 2009* ss 63, 93, 101, 107(5), 115(3), 118, 121(2)(3), 126.

out over a period of 12 months. Such arrangements are currently being utilised by some resources sector employers and employees, which involves re-calculating the employee's hourly rate based on the amount of leave the employee elects to cash out. Once this rate is determined, it is processed by payroll. This is done on an annual basis, with one written election being provided by the employee.

5.18. It is possible that existing practices of cashing out a portion of paid annual leave at each pay period by a single written election of the employee made on an annual basis could be a breach of the requirements set in section 93(2)(b) of the *Fair Work Act*. In order to comply with the requirements set out in the *Fair Work Act* it appears that a separate agreement would be required for each portion of leave cashed out at each pay period. AMMA contends that this is an unreasonable and impracticable requirement.

5.19. **AMMA submits that where a transitional agreement includes terms that supplement those specific National Employment Standards listed in section 24 of the Transitional Bill, those terms should continue to have effect without limitation.**

Applications to Fair Work Australia to resolve difficulties

5.20. The government acknowledges that the application of the transitional provisions to transitional instruments may result in difficulties. Provision has therefore been made under Clause 26 of Schedule 3 to allow a person covered by the instrument to apply to Fair Work Australia to resolve uncertainty or difficulty or to make the instrument operate effectively with the National Employment Standards.

5.21. Particular difficulties will arise where Fair Work Australia attempts to vary a transitional instrument that pays an employee an annualised salary, part of which includes an unspecified amount in lieu of the paid annual leave or other

entitlement. It would be difficult to 'unbundle' the employee's entitlement in this situation in order that the instrument would operate effectively with the National Employment Standards. For example, it would require arbitrarily affording a monetary amount to the entitlement, inclusion of the entitlement in the transitional instrument and reducing the employee's annualised salary by the relevant monetary amount.

5.22. **AMMA contends that section 26 of the Transitional Bill should be amended to allow an application to be made to Fair Work Australia in respect to the interaction of the instrument with the National Employment Standards, in which Fair Work Australia should be empowered to make the following orders:**

- **An order stating that the transitional agreement operates to the exclusion of the National Employment Standards; or**
- **An order varying the transitional instrument.**

When determining which order to make Fair Work Australia should be required to consider:

- **Any monetary benefit or other compensation provided to the employee in lieu of an entitlement that is a matter in the National Employment Standards;**
- **Whether the employee is suffering any detriment, based on a global, non-net detriment rule;**
- **The operational requirements of the business;**
- **The intention of the parties at the time the agreement was made; and**
- **Any productivity offsets which may be made to offset the cost impact of any proposed order.**

6. Early review of modern awards

6.1. Clause 6 of Schedule 5 of the Transitional Bill will require Fair Work Australia to review all modern awards two years from the commencement of the safety net on 1 January 2010. The modern awards are to be reviewed against the modern awards objective and to ensure the awards are operating without anomalies or technical problems.

6.2. The modern awards objective is listed in section 134 of the *Fair Work Act*. Key objectives for resources sector employers include:

- The need to promote flexible modern work practices and the efficient and productive performance of work;
- The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
- The likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability.

6.3. Stage three of the award modernisation process has commenced. AMMA is significantly involved in the award modernisation process and has made lengthy submissions to the Australian Industrial Relations Commission (the Commission) on the Mining Industry Award, Hydrocarbons Award and Maritime Industry Award. In respect to the Mining Industry Award, of which a final modern award has been released by the Commission, while it contains a number of flexibilities, the industry continues to have concerns about the refusal of the Commission to include 12 ordinary hour shifts as of right and a term for cashing out of annual leave, both of which are common practices in the resources sector.

6.4. AMMA supports an interim review of all modern awards, which will complement the scheduled four year review set under section 156 of the *Fair Work Act*. However, it is essential that the interim review does not result in an

increase in the award safety net and consequent increased costs for business nor result in common variation that does not take into account the peculiarities of each industry or occupation.

6.5. Furthermore, the first twelve months after the commencement of modern awards will enable employers to assess the full impact of the modern award on their operations and identify where there are any unintended consequences, particularly those that increase employer costs and/or reduce flexibilities. While sections 157 and 159 of the *Fair Work Act* allow for applications to be made by employers for Fair Work Australia to vary an award to achieve the modern awards objective or to remove ambiguity, uncertainty or to correct error, it is not clear that those provisions would specifically enable a variation to deal with unintended consequences. A mechanism to address unintended consequences should be specifically provided in the Transitional Bill.

6.6. **AMMA submits that a mechanism for earlier review ought to be available to deal with unintended consequences of award modernisation, particularly where the consequences increase employer costs and/or reduce flexibility.**

6.7. **AMMA submits that Clause 6 of Schedule 5 should be amended to include a provision stating that the two year interim review is not to result in increased cost to business.**

6.8. **AMMA submits that each modern award should be reviewed in its own right, as required for the four yearly reviews under Division 4 of Part 2-3 of the *Fair Work Act*.**

6.9. **AMMA further submits that Clause 6 of Schedule 5 should not prevent an application being made and heard by Fair Work Australia, for a review**

of a modern award outside the four yearly reviews under Division 5 of Part 3 of the *Fair Work Act*.

7. Enterprise Awards

7.1. Under Clause 4 of Schedule 6 of the Transitional Bill, a party to an enterprise instrument may apply to Fair Work Australia for a modern enterprise award to be made, which will replace the enterprise instrument. An enterprise instrument includes federal enterprise awards and state enterprise awards that are derived from NAPSAs.

7.2. There is a limited period during which an application can be made, which begins from 1 January 2010 and concludes on 31 December 2013. If an application has not been made to modernise an enterprise award by this date, the award will automatically terminate.

7.3. On receiving an application by a party to an enterprise instrument Fair Work Australia may make a modern enterprise award, or may decide not to make a modern enterprise award. If Fair Work Australia decides not to make a modern enterprise award to replace the enterprise instrument, the instrument terminates when that decision comes into operation, in accordance with Clause 9 of Schedule 6.

7.4. When making a modern enterprise award, the award can be expressed to cover one or more unions in relation to all or specified employees, in accordance with Clause 8(4). This may potentially allow an award to cover a union that was not a party to the original enterprise instrument, a union that does not have eligibility to cover the employees or a union with no involvement in the workplace or history of representation of the specified employees.

7.5. **AMMA considers that the period during which an application can be made to vary or terminate an enterprise award is reasonable.**

7.6. **AMMA supports the exclusion of state enterprise awards derived from NAPSAs from the award modernisation process.**

7.7. **AMMA submits that on receiving an application to modernise an enterprise award, Fair Work Australia must be required to modernise the award unless it is satisfied that it is against the public interest to do so.**

7.8. **AMMA further submits that if Fair Work Australia decides not to modernise the enterprise instrument, the instrument should continue to operate until 31 December 2013.**

7.9. **AMMA further submits that Clause 8(4) of Schedule 6 should limit coverage of a modern enterprise award only to those unions that were a party to the enterprise instrument and are eligible to represent the industrial interests of the employees.**

8. Take-home pay orders

8.1. The award modernisation request stated that the award modernisation process was not intended to increase costs for business nor disadvantage employees.[25]

8.2. However by virtue of the nature of the award modernisation process, which involves rationalising and simplifying hundreds of awards into a reduced number of modern awards, there will result some decrease in entitlements for some employees and increase in costs for employers.

8.3. Clause 8(1) of schedule 5 of the Transitional Bill provides that award modernisation is not to result in a reduction in the take-home pay of employees. Take home pay includes wages, incentive based payments, additional amounts such as allowances and overtime.

8.4. There are some limitations: the employee's take-home pay for working particular hours under the modern award must be less than the pay for working the same hours before the award commenced operating. The employee must also be working in the same or comparable position and a take home pay order must not be made where the reduction in take home pay is 'minor' or insignificant' or the employee is compensated in some other way (Schedule 5, Clause 10(1)).

8.5. As stated above at paragraph 8.1 the award modernisation request requires that the award modernisation process not disadvantage employees or result in increased costs for business. However, it has become apparent that many businesses are going to incur significant increased operational costs as a result of the award modernisation process due to increased casual loadings, increased allowances, increased wages and other entitlements as part of the

[25] Australian Government, Request under section 576C – Award Modernisation, Consolidated Version, Issued by the Hon. Julia Gillard MP, Australian Government, viewed 7 April 2009, http://www.workplace.gov.au/NR/rdonlyres/2C83348A-C1C4-45BB-A8B9-2149187DE3D9/0/ConsolidatedAwardModernisationRequest.pdf

rationalisation process. In the resources sector in particular, an inability to require employees to work 12 ordinary hour shifts under the current modern mining award as of right, will result in a substantial increase in overtime rates paid to employees. Other indirect costs, such as a reduction in productivity, will result due to there not being a term allowing cash out of annual leave.

8.6. The government's protection of employee take-home pay under Schedule 5 fails to recognise and accommodate the interests of the employer and does not align with the award modernisation request. Its inclusion in the Transitional Bill may,

- unduly influence the Australian Industrial Relations Commission in the finalisation of the last stages of the award modernisation process, leading to Commission members giving greater consideration to the impact on employees at the expense of employers; and
- encourage increased union activity and utilisation of the relaxed right of entry provisions in order to engage in a form of 'ambulance chasing' to investigate any potential reduction in take-home pay and recruit new members.

8.7. Resources sector employers are being heavily impacted by the global financial crisis. As discussed at paragraph 3.5 above, employers are reducing employee numbers in order to remain viable in the face of falling commodity prices and decreased demand. While the government has acknowledged the nexus that exists between increased employment costs and jobs, this hasn't been reflected in the take-home pay order provisions of the Transitional Bill, which is balanced in favour of the employee and fails to provide employers a similar means to address increased employment costs.

8.8. Furthermore, the Transitional Bill does not set any time limit under which an application is made for a take-home order, explaining in the Explanatory Memorandum that 'it is expected that the ability to draw a connection between

a reduction in take-home pay and the award modernisation process will diminish over time'.[26] While this may be the case, it would be more appropriate to specify a maximum period of time for an application to be made, in order to prevent an employee from bringing a claim after a substantially long period of time. Any application after the set time limit would enable an employer to use that in its defence in order that the application can be dealt with expeditiously. The time limit might reasonably align with the record keeping obligations of employers.

8.9. **AMMA submits that a new provision should be inserted into the Transitional Bill that will enable an employer faced with an increase in costs to apply to Fair Work Australia for an order remedying that increase.**

8.10. **AMMA supports limiting a take home-pay order to situations where the employee suffers a reduction under the modern award based on working the same hours worked prior to commencement of the award.**

8.11. **AMMA further submits that 12 month time limit for making an application for a take home pay order must be inserted into the Transitional Bill.**

8.12. **AMMA makes these same recommendations in respect to the take home pay order provisions relating to modern enterprise awards (Schedule 6, Division 3 of the Transitional Bill).**

[26] The Parliament of the Commonwealth of Australia, Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009, Explanatory Memorandum, House of Representatives, 2008-2009, 35.

9. Replacing agreement based transitional instruments

9.1. A number of resources sector employers are currently negotiating a union or employee collective agreement under the *Workplace Relations Act 1996* in order to have arrangements in place prior to the commencement of the *Fair Work Act*. A number of collective agreements have also recently been entered into. These agreements are approved by a majority of employees and have a nominal term of up to five years.

9.2. Clause 30 of Schedule 3 of the Transitional Bill enables an enterprise agreement to replace an agreement based transitional instrument as soon as the enterprise agreement begins operating. Note 1 of Clause 30 makes it clear that an enterprise agreement can replace an agreement based transitional instrument, even when that instrument has not passed its nominal expiry date. Note 2 states that industrial action cannot be taken in support of the enterprise agreement while the transitional instrument is still within its nominal term, which is consistent with the industrial action provisions of the *Fair Work Act*.

9.3. However, there are particular bargaining provisions in the *Fair Work Act* that appear to have application to the parties but which are at odds with the limitations described above. For instance, section 236 of the *Fair Work Act* enables a bargaining representative who will be covered by a proposed enterprise agreement to apply for a majority support determination. Section 237 requires Fair Work Australia to make the majority support determination if the employer has not agreed to bargain but the majority of employees want to bargain. Section 238 of the *Fair Work Act* also allows a bargaining representative to apply for a scope order.

9.4. What this means is that an employer that has made a collective agreement under the *Workplace Relations Act* (and this agreement could have been made just days before the *Fair Work Act* commenced operating) could be subject to a majority support determination and scope order. Once a majority

support determination is made, the employer is required to bargain with its employees. A right to apply for the order and an obligation to bargain if the order is made is absurd given that such an obligation cannot be enforced by way of bargaining orders, particular where the agreement still has a significant period of its nominal term remaining.

9.5. Furthermore, once a majority support determination comes into operation, section 173 requires an employer to be covered by a proposed enterprise agreement to notify each employee of their representation rights. Combined with the availability of the majority support provisions, the operation of these bargaining rules will destabilise the arrangements employers have put in place and the relationship they have with their employees. The Transitional Bill will have the undesired consequence of subjecting employers to demands to enter into a further round of bargaining for an enterprise agreement under the *Fair Work Act.* It will unreasonably raise the expectations of employees of making a new agreement, when their current agreement has not reached its nominal expiry date.

9.6. It is appropriate that Clause 3 of Schedule 13 prevents a bargaining representative from making an application for bargaining orders; however it falls short by allowing such orders to be applied for during the final 90 days of a the transitional instrument's nominal term. The risk for employers is that as soon as the agreement hits its last 90 days of its nominal term, an application for a bargaining order can be made and granted and breaches of such orders can lead to a bargaining related workplace determination being imposed on the parties even before the nominal expiry date of the transitional instrument has been reached.

9.7. **AMMA submits that the Transitional Bill must restrict a bargaining representative from applying for a majority support determination or scope order during the term of an agreement until 90 days prior to the nominal expiry date of the agreement based transitional instrument.**

9.8. **AMMA further submits that the Transitional Bill must prevent a bargaining related workplace determination from being made before the nominal expiry date of a transitional instrument has passed.**

10. Termination rules – Individual agreements

10.1. Media speculation in late 2008 raised concerns for resources sector employers that individual statutory agreements would automatically expire on a date to be decided by government, or to allow unilateral termination of the agreement, even where the agreement has not reached its nominal expiry date.

10.2. AMMA responded by saying that '[t]he unilateral termination of all existing agreements would force employers to bargain all over again to retain existing flexibilities', would lead to 'increased disputation' and 'decreased productivity'.[27]

10.3. The 'drop dead date' or unilateral termination of an individual statutory agreement does not form part of the transitional arrangements in the Transitional Bill. This position is strongly supported by AMMA. Provision has been made under Clause 18 of Schedule 3, for conditional termination instrument to be entered into, which automatically terminates the individual agreement once an enterprise agreement has been made and commences operating.

10.4. There are two means by which a conditional termination instrument can be made. The first allows either party to make the conditional termination instrument without the agreement of the other, if the individual agreement has passed its nominal expiry date. The second allows both parties to agree to enter into a conditional termination instrument where the individual agreement is still within its nominal term.

10.5. The implications of entering into a conditional termination instrument while the individual agreement is still within its nominal term are significant and create a

[27] AMMA, 'Drop dead date = A dirty bomb for the resources sector', *Media Release*, 30 October 2008, AMMA, viewed 2 April 2009, http://www.amma.org.au/home/Media%20Releases/MR_IRDirtyBomb_30October2008.pdf

high risk for employers. Under Clause 4 of Schedule 13, the prohibition on taking industrial action before the nominal expiry date of an agreement does not apply to an employee that has entered into a conditional termination instrument.

10.6. The Explanatory Memorandum explains that the conditional termination instrument is intended to facilitate the orderly transition of employees covered by an individual statutory agreement to an enterprise agreement.[28] It would overcome some procedural difficulties currently existing due to the different termination rules applying to an agreement depending on when they were made, and rules as to who is entitled to be covered by the agreement when it commences. Measures to facilitate an improved transition from individual to enterprise agreement is supported by AMMA, however the conditional termination instrument provisions for employees on an individual agreement still within its nominal term will not achieve the policy intent of the government.

10.7. Allowing an employee with an individual agreement that is still within its nominal term to take protected industrial action makes a conditional termination instrument an extremely unattractive option for employers. Such arrangements are entered into by employers in order to settle an employee's terms and conditions of employment for a specified period of time and to remove the potential for lost time from industrial disputation. Re-opening this risk is not desirable, meaning that the individual arrangements will be likely to continue until terminated by another available means, leading to delays in the employee gaining the benefit of the new enterprise agreement.

10.8. Furthermore, the availability of conditional termination instruments during the nominal term of an individual agreement, coupled with an ability of the employee to take protected industrial action, could raise a real risk of behaviour directed towards coercing an employer or an employee to enter into

[28] The Parliament of the Commonwealth of Australia, Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009, Explanatory Memorandum, House of Representatives, 2008-2009, 15.

the instrument. Adequate protection from coercive behaviour must be provided in the Transitional Bill.

10.9. **AMMA submits that any industrial action taken before the nominal expiry date of an agreement must continue to be unprotected industrial action. AMMA submits that an ability of an employee to take protected action where they have entered into a conditional termination instrument during the nominal term of their existing agreement must be removed from Schedule 13 of the Transitional Bill.**

10.10. **Alternatively, AMMA submits that the Transitional Bill must provide adequate protection from coercion to make a conditional termination instrument. For example, it should be unlawful for a union to organise or take industrial action designed to coerce an employer into entering a conditional termination instrument with an employee on an individual instrument that has not expired.**

11. Processing existing agreements

11.1. It is important that agreements entered into under the *Workplace Relations Act 1996* are able to be lodged post 1 July 2009 and processed under that Act to ensure certainty for the parties. This includes having an opportunity to vary the agreement after being advised it has not passed the No Disadvantage Test to ensure that it does pass.

11.2. Of continuing concern for employers and employees is the lengthy approval processing time by the Workplace Authority. AMMA members continue to experience significant delays in the approval of their agreements, which is even more pertinent since the *Workplace Relations (Transition to Forward with Fairness) Act 2008* modified the operative date of agreements entered into with existing employees. The government must ensure that the Workplace Authority is adequately resourced to process agreements promptly. This includes providing those charged with processing agreements with appropriate training in respect to the application of the *Workplace Relations Act 1996* to ensure employers do not disadvantaged by unnecessary delay.

11.3. **AMMA supports the continuation of current *Workplace Relations Act 1996* agreement processing rules in respect to agreements made prior to repeal of that Act, including the continued opportunity to vary an agreement in order to pass the No Disadvantage Test.**

11.4. **AMMA submits that adequate resources must be afforded to the Workplace Authority for the purpose of processing agreements lodged under the *Workplace Relations Act 1996*. Furthermore, employers should be given the opportunity to lodge an agreement direct with Fair Work Australia for processing under the *Workplace Relations Act 1996* where that would result in quicker approval of the agreement.**

11.5. **AMMA further submits that provision should be made to allow transitional agreements still being or waiting to be processed to be approved on an interim basis by 21 July 2009. Section 346ZG of the *Workplace Relations Act 1996* should be capable of continued application to compensate an employee where the agreement is considered not to have passed the No Disadvantage Test.**

12. Fair Work Australia consideration of pre 1 July bargaining conduct

12.1. Under Clause 18 of Schedule 13, where bargaining under the current *Workplace Relations Act 1996* for a collective agreement has not concluded by 1 July 2009, Fair Work Australia can consider the conduct of the bargaining representatives during bargaining for that agreement when making certain decisions under the *Fair Work Act*. The circumstances in which pre-1July 2009 conduct can be taken into consideration include determining whether to make bargaining orders for failure to meet good faith bargaining obligations, and whether to make scope orders.

12.2. Good faith bargaining obligations under section 228 of the *Fair Work Act* require bargaining representatives to meet at reasonable times, disclose relevant information, respond to proposals in a timely manner, give genuine consideration to proposals, give reasons for responses and refrain from capricious or unfair conduct undermining freedom of association or collective bargaining. These obligations do not commence until the commencement of the *Fair Work Act* on 1 July 2009.

12.3. While many parties do currently engage in bargaining and conduct that would be considered to be good faith, the obligations under section 288 of the *Fair Work Act* do not apply. This means that an employer can quite lawfully and without consequence, refuse to disclose relevant information, refuse to give reasons for their response to proposals and refuse to meet with a union that is seeking a union collective agreement, where the employer's preferred position is to bargain directly with its employees.

12.4. Such conduct that occurs prior to 1 July 2009 should not be considered by Fair Work Australia, particularly for the purpose of determining whether to make good faith bargaining orders, as at the time such conduct was lawful. The ability for Fair Work Australia to consider pre-1July 2009 conduct has the effect of imposing good faith bargaining obligations on the parties

retrospectively and creating a risk of arbitrated outcomes in the agreement making system.

12.5. Interestingly, consideration of bargaining conduct under the *Workplace Relations Act 1996* is the exception. In all other respects, as described in the Explanatory Memorandum, 'those involved in bargaining for a collective agreement will generally need to start the bargaining and industrial action processes afresh under the Fair Work Bill in relation to a proposed enterprise agreement'.[29] This is an appropriate approach where there are significant changes to the rights and obligations of parties in bargaining. There must be no exceptions and retrospective application of the *Fair Work Act*.

12.6. **AMMA does not support the ability for Fair Work Australia to give consideration to pre-1 July 2009 conduct of bargaining representatives. AMMA submits that Clause 18 of Schedule 13 should be removed from the Transition Bill. All new bargaining obligations and rights must commence from 1 July 2009 at the commencement of the *Fair Work Act*.**

[29] Ibid, 82.

13. Notice of Employee Representational Rights

13.1. Under section 173 of the Fair Work Bill, when bargaining begins for an enterprise agreement, the employer is obliged to give all employees that will be covered by the proposed agreement a notice of employee representational rights. That notice explains to the employee that he or she is entitled to be represented during bargaining for the proposed agreement and that if he or she is a member of a union, the union will be the bargaining agent by default unless an alternative is appointed by the employee.

13.2. Under Schedule 13, Clause 2(3), an employer that will be covered by a proposed enterprise agreement will be required to also give those employees with an in-term ITEA/AWA a notice of employee representational rights, even though they have no legal entitlement to be represented or to vote on the agreement. The notice is to explain that they will be entitled to be represented in bargaining for the proposed collective agreement only once the AWA/ITEA has passed its nominal expiry date or a conditional termination instrument has been made.

13.3. The Explanatory Memorandum explains that the requirement to provide the employee with a representation notice is intended to ensure that the employee is aware that bargaining is taking place for an enterprise agreement.[30] AMMA considers that this obligation is unnecessary and inappropriate in respect to employees whose agreement is within its nominal term. It is not appropriate for an employee with a valid in-term agreement and no right to enter into a formal vote to be given a notice advising the employee when they will have representation rights. It will merely operate to apply undue pressure on the employer to enter into a conditional termination agreement, where that employer may have no intention of terminating the agreement that is in place.

[30] Ibid, 83.

13.4. When representation rights do arise, (because the AWA/ITEA passes its nominal expiry date or a conditional termination instrument is entered into by agreement of the parties) section 173 of the *Fair Work Act* will oblige the employer to provide a notice of employee representational rights to the employee. This is the only appropriate time for the obligation on employers to provide an employee representational notice to arise.

13.5. **AMMA submits that the requirement to provide an employee on an AWA/ITEA that has not passed its nominal expiry date with a notice of employee representational rights should be removed from Schedule 13 of the Transition Bill. An employer should only be required to provide a notice of employee representational rights to employees on an expired AWA/ITEA or on entering into a conditional termination instrument.**

14. Concluding Comments

The *Fair Work Act* establishes a new workplace relations system. The majority of the new system, with the exception of the two-part safety net, will commence on 1 July 2009. The national employment standards and modern awards will generally commence from 1 January 2010. The changes to the existing workplace relations system are substantial: individual statutory agreements will no longer be available, automatic union representation in bargaining and coverage of an agreement will make non-union collective agreements almost non-existent, good faith bargaining obligations apply and give rise to arbitrated agreements for serious breaches, unions can enter workplaces to investigate breaches of instruments they are not a party to and enter workplaces where they have no members.

Arrangements for transitioning to this new workplace relations system are provided by the Transitional Bill. It is important that they are not given a cursory glance but are tested against the same criteria and given the same intense scrutiny afforded to the Fair Work Bill. It is the transitional arrangements, of moving from one system to the other, that could make or break a company in tough economic times such as these.

Like so many other industries, the resources sector is being greatly impacted by the global economic meltdown and consequent drop in commodity prices and international demand. Thousands of jobs have been shed as projects are put on hold and contracts lost as businesses try to remain financially viable. AMMA's own survey of its membership has identified a stark lack of business confidence and likelihood of further job losses occurring.

It is therefore extremely important the arrangements for the transition to the new system do not have the effect of further compounding the difficulties already being experienced by employers across the country. For resources sector employers, who have a high take up of AWAs and ITEAs, the treatment of these instruments under the new system is particularly important, and AMMA is pleased to see that there is no

arbitrarily imposed ‘drop dead date’ or rights to unilaterally vary agreements that have not reached their nominal expiry date.

That aside, there are a number of shortcomings in the Transitional Bill, which if implemented in its current form, will negatively impact productivity, increase employment costs and put jobs at risk. These concerns arise by:

- Undermining terms and conditions of employment and flexible working arrangements in existing agreements by rigidly applying the national employment standards and failing to consider whether the agreement, on balance, disadvantages the employee;
- Retrospectively imposing good faith bargaining obligations on parties and risk of arbitrated outcomes where that bargaining for a collective agreement is not concluded by 1 July 2009;
- Undermining the protection offered by AWAs/ITEAs that have not reached their expiry date, by enabling protected action to be taken in support of a collective agreement, where a the parties have agreed to enter a conditional termination instrument;
- Undermining the terms and conditions agreed to for a particular period, by requiring a notice of employee representational rights to be given to employees covered by an AWA or ITEA that has not passed its nominal expiry date;
- Not allowing existing representation orders to be automatically recognised and operative under the new system; and
- Failing to appropriately balance the impact of the award modernisation process by neglecting to make provision for employers to offset or prevent increased costs in the same measure that employees can seek take-home pay orders.

In its submission to the Senate Committee in respect to the Fair Work Bill, AMMA stated that the full impact of the government’s industrial relations reforms could not be completely understood until the completion of the award modernisation process, the

release of the transitional arrangements and provisions dealing with union representation orders. The introduction of the Transitional Bill to parliament has provided another piece of the Forward with Fairness puzzle but it is far from satisfactory.

The government has failed to take its own advice given to the Australian Fair Pay Commission that consideration be given to the nexus between wages and employment when making any minimum wage increase. This same advice should be heeded in respect to the transitional arrangements for the *Fair Work Act*.

Appendix A Representation Orders

FEDERAL Representation Orders & Demarcation Disputes	Background	Effect
North West Shelf Gas Project (Mobil Equipment) Demarcation Award 1985 (revocation 2000)	In 2000 the employer parties to the award and **AWU** indicated they wished the award to remain in place, but SDP Polites indicated it dealt with non-allowable award matters. Employers lodged application for an 'Exceptional Matters Order', arguing the award had played a significant part in avoiding demarcation disputes in connection with North-West Shelf Gas Project	Award set aside with effect from 23 November 2000.
Comalco Weipa site Organisational Coverage Order 1991 (revocation 2001)	**AWU** was given representation rights to site in early 1990s in context of compulsory union membership in place. In 2001 **CFMEU** applied to have order revoked on grounds that circumstances and relevant considerations have changed since order was made. **CFMEU application opposed by Comalco, AWU and AMMA** intervening. (AMMA argued there was a need for an order given other metalliferous mining sites where demarcation issues had arisen or might arise)	Order was revoked and set aside with effect from 22 January 2001

Energy Developments Limited Group of Companies Representation Order 1996	Application brought by Energy Developments Limited Group of Companies (EDL) under Industrial Relations Act 1988. Had been **previous disputes between it and CEPU, and LHMU**. <u>Position of EDL as follows:</u> An order should be made in favour of the AWU because: · an enterprise flexibility agreement covering its operations to which the AWU is party; · the AWU rules are wide enough to cover all non managerial employees; · the ALHMWU has the potential to cause demarcation problems especially in respect of its claim to cover construction projects; · the AMWU would also seek coverage and would seek to fragment the existing coverage seeking separate awards for each project; · the CEPU would have partial coverage for employees and would seek to fragment the existing coverage; · the CFMEU has partial coverage but does not operate in the Northern Territory, moreover, it would seek to have retrenched mine workers employed in EDL positions; · in relation to the McArthur River Power Station	**AWU has the right to representation at EDL** (and subsidiary companies)**, to the exclusion of:** the **LHMU, AMWU, CEPU, CFMEU at EDL** AWU rules amended to have this effect; part N sub rule 29 in section 6 of rule 6 excludes these unions. Similar amendments made to AMWU, CEPU, CFMEU and ALHMWU rules to exclude EDL employees.

	the Fleur Daniel construction agreement for the construction of the mine was not operative in relation to the power station and should have no effect upon it; · to grant the application would be consistent with the objects of the Act by reducing the number of organisations that would have the potential to be in the enterprise; · the EDL award and enterprise flexibility agreement provide a career structure which is beneficial to the employees; · there is no industrial need for other union to have access to EDL employees since they are protected by a federally registered union with an award and an enterprise flexibility agreement; · AWU has been active in representing its members; · EDL has successfully operated with the award and AWU with a nationally mobile workforce; · it will be easier to negotiate enterprise bargains with one union.	
Mount Isa Mines Limited Lease Representation Order 2007	In 1995 the QLD IRC made the MIM Lease Representation Order which demarked exclusive representation rights in parts of MIM's operations to the Australian Workers Union, Queensland **AWU(Qld)** and the Automotive, Metals,	MIM Limited Lease Representation Order 2007: **AWUQ** has representation of employees engaged in**:** - copper zinc, lead streams; - KSOC; and

	Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland **AMWU(Qld)**, excluding all other unions which had previously held representation rights. Since the state order was made the (federal) AWU and AMWU have been only two unions to exercise representation rights for MIM employees. In general the dispute concerned status of federally registered organisations and the earlier state representation order. In 2007 MIM applied to AIRC for order that transitionally registered associations have exclusive coverage over parts of its operation. Order to same effect as previous state order was made (see next column).	- Control Systems Maintenance Dept. of Energy Div. **AWUQ** has representation of employees engaged in the following departments: - Administration; - Research and Development; - Personnel; - Supply Department; - Safety & Security **AMWUQ** has representation of: - Engineering Div.; - Surface Workshop Department of Copper Stream; and - Fans and Refrigeration Dept of the Copper Stream
AWU and BHP and Ors Dec 1228/92 (1992)	Decision concerns several applications for orders under s118A of IRA 1988, by both the Australian Workers Union (AWU) and CFMEU (then FEDFA). AMMA supported the AWU's application, which was opposed by FEDFA. Nov 1992 decision also concerned alteration of eligibility rules of relevant unions and whether or not changes were necessary. VP Moore said yes. [NB. CFMEU has more recently been rejected in proceedings in the Tasmanian Commission attempting to get coverage at the Barrick Henty	As a result of the decision the **CFMEU's rules** were amended to expressly **exclude any person employed by the following employers in metalliferous mining in Tasmania and SA:** - **Mt Lyell Mining & Railway Co. Ltd;** - **Pasminco Mining,** - **Renison Ltd; and** - **Tasmania Mines** There have been new relevant mine sites since the order, but CFMEU has generally not been involved in the mining sector there.

	mine, but has generally not been involved in the mining sector in Tasmania.]	
STATE Representation Orders & Demarcation Disputes	**Background**	**Effect**
AWUE, Qld v AFMEU & Ors [2008] AIRC 32 *Dalrymple Bay Coal Terminal Pty Ltd Production Employees Representation Order 2007*	In 1996 Qld IR Comm gave **AWUE(Qld)** exclusive representation of all employees at Dalrymple (except clerical and admin, tradespersons on maintenance of plant and equipment) and expressed to exclude FEDFAQ. A federal representation order (applicable to the federal unions) with same effect as state order was made in 1997, and was consequentially binding on the federal components of the **CFMEU** and **AWU**. Expired after 1 year, having no further effect (from 6 Feb 1998). September 2007 **AWUE(Qld)** applied for representative rights (as transitionally registered organisation) over all employees at Dalrymple Bay Coal Terminal except for: - tradespersons employed on maintenance of the plant and equipment at the terminal; - electrical trades assistants similarly	Order made with same effect as 1996 state order- giving federal **AWU representative rights** over employees at Dalrymple (except for clerical and admin, tradespersons on maintenance plant and equipment employees).

	employed; and - clerical and administration employees.	
Queensland Tourism and Hospitality Representation Order 2008	Relates to an application by the **Australian Workers' Union of Employees, Queensland** ("AWUEQ") for an order concerning the representational rights of the AWUEQ in respect of employees employed in various cooking and catering occupations in various enterprises as described in an order ("the State order") made pursuant to the *Industrial Relations Act 1990* (Qld)	All **orders exclude industrial catering services for employees at mine sites and civil construction sites**: **LHMU, Qld has the right to the exclusion of the AWUEQ and AWU to represent industrial interests of:** - persons employed in or in connection with hotels, motels, restaurants, contract catering, boarding houses, clubs, resorts, casinos and tourist accommodation within South East Queensland - bakers where appropriate; - employees at "Cook Freeze" at Grindle Road, Wacol 4076; - employees employed at agricultural colleges Order operates from 18 July 2008.
CFMEU v Dyno Nobel Asia Pacific Ltd c2003/3762	This matter raised important questions about the proper application of a class of union eligibility rules known as 'industry' rules. Central issue was whether, pursuant to Rule 2D (*the Union shall also consist of an unlimited number of employees engaged in or in connection with the coal and shale industries*), employees of Dyno Nobel were eligible to become members of the CFMEU. The **employees of Dyno Nobel were not**	The employees of Dyno Nobel were not considered to be engaged in or in connection with the coal industry within the meaning of Rule 2D and were therefore not eligible for membership of the CFMEU pursuant to that rule.

	engaged in or in connection with the coal industry within the meaning of Rule 2D and were therefore not eligible for membership of the CFMEU pursuant to that rule.	
Diamond Offshore General Company Demarcation Dispute Finding No. 36113 of 1997	The Ocean General which is owned by Diamond Offshore Gen. Co., commenced work in Australia as a self-propelled rig in 1988 and continued to work in Australian waters as a self-propelled rig until January 1996. In accordance with the usual practice for such rigs there were four principal unions eligible to cover workers on the Ocean General during that period. They were the Maritime Union of Australia (**MUA), AWU,** Australian Institute of Marine and Power Engineers (**AIMPE)** and the **AMOU**. Diamond Offshore General Co. made an application under WRA to give AWU the right to representation of employs engaged in classifications contained in the *Diamond Offshore (Offshore Mobile Drilling Rigs) Agreement 1997*.	Diamond Offshore General Company Demarcation Dispute Finding No. 36113 of 1997 Found: Demarcation dispute between The MUA, The AWU and Diamond Offshore Company, regarding representation of employees employed on "Ocean General". No actual representation order made (??)
AWU & Another v CFMEU and Ors (including AMMA) - series of proceedings from application in 2000 to final decision in July 2002.	**CFMEU applied to AIRC to alter its eligibility rules**. Proposed rule did not refer to any particular industry, though CFMEU alleged it referred only to construction industry.	**Refused consent for rule change of CFMEU's eligibility rules.** AIRC decided that employment in the relevant industries is covered by an established pattern of awards and agreements, the union parties to which are substantially unions other than the CFMEU, although there is, in some cases, CFMEU involvement.

The Australian Workers' Union, (WA), Industrial Union of Workers - and - The Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia – (WA) [1999] WAIRComm 211 (22 September 1999)	**AWU(WA) and** Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers union of Australia, Western Australia (**CMETSWU (WA)) made conflicting applications for orders**. CMETSWU's representational role has been a comparatively minor one in BHP operations over the years, whereas the AWU's representational role has, on the evidence, always been a major one.	AWU application granted: The **Australian Workers' Union, Western Australian Branch,** Industrial Union of Workers ("the AWU") **has the exclusive right to represent the industrial interests of all employees employed by BHP Iron Ore Pty Ltd ("BHP") at sites in Western Australia** in the following classifications set out in the ***Iron Ore Production and Processing Award*** **and the BHP Iron Ore Pty Ltd Enterprise Bargaining Agreement 111:** AWU Level 1 AWU Level 2 AWU Level 3 AWU Level 4
AWU, (NSW) v AMWU (NSW) (2002) NSW IRComm 245	Some Multi-Fill employees which were **AWU(NSW)** members resigned membership in August 2000. Some joined **AMWU(NSW)** which negotiated with employer and served notice of bargaining period on Multi-Fill. Industrial action proceeded, and an application was then made by AWU(NSW), and a cross application by AMWU(NSW).	**AWU (NSW Branch) given the right, to the exclusion of the AMWU (NSW Branch)**, **to represent** the industrial interests of all **employees of Multi-Fill except** those employed as: - **receiving store-persons;** - **Production store persons; or** - **Dispatch store-persons who are eligible for membership of NUW, NSW branch.** **AMWU (NSW branch), is not to have the right to represent Multi-Fill employees** (their application was

		dismissed)
AWU(NSW) v CFMEU(NSW), Unimin Aust. Ltd, and **AMMA** No. IRC 6033 of 2004	**CFMEU** 'poached' 8 **AWU** members in 2004 during negotiations for a replacement enterprise agreement at a Unimin site. CFMEU had publicly campaigned to recruit members from metalliferous mining industry in NSW.	Was set for hearing June 2006 but abandoned with implementation of WorkChoices.

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