Policy Scorecard

An analysis of Workplace Policy under the major Political Parties

August 2010

www.amma.org.au

INDUSTRIAL RELATIONS SCORECARD AS OF AUGUST 2010

AMMA has rated the industrial relations policies of the Australian Labor Party, the Liberal/National Coalition and the Greens according to whether they meet the key workplace relations needs of the resources sector.

Please see the table below for the updated AMMA IR Scorecard for August 2010.

	Score (from 0 to 4)		
Key workplace relations needs of the resources sector	**ALP IR policy**	**Liberal/ National Coaition IR policy**	**Greens IR policy**
National regulatory framework	3.5	3.5	2
Minimum standards and awards	3.5	3.5	1.5
Agreement making	1.5	1.5	1
Agreement processing	3	3	0
Industrial action and compliance	2	3	1
Unfair dismissal	2.5	2.5	1.5
Union right of entry and access to records	1	1	1
Total Score	**17/28**	**18/28**	**8/28**

Preamble

In the lead-up to the November 2007 federal election, AMMA, in conjunction with its Board Reference Group made up of senior HR and IR professionals drawn from the AMMA membership, compiled a number of criteria for a modern workplace relations system.

The criteria were encapsulated in seven broad key policy areas and released in AMMA's *Workplace Relations Policy Scorecard Criteria* in April 2007. These seven policy areas were:

	Key policy areas
1	A national regulatory framework
2	Minimum standards and awards
3	Agreement making
4	Agreement processing
5	Industrial action and compliance
6	Unfair dismissal
7	Union right of entry and access to records

In developing its criteria, AMMA considered the resources sector's record exports, historically low levels of industrial disputation and above average earnings which highlighted '*what works'* in workplace relations regulation. This enabled AMMA to identify the requirements for a modern workplace relations system that would ensure the resources sector could continue its significant contribution to the Australian economy.

The workplace relations requirements of the resources sector identified in the seven broad policy areas formed the basis of AMMA's analysis of both the Coalition and Australian Labor Party's (ALP) workplace relations policies, prior to the election of the Rudd Labor government in November 2007. The policy positions of the Coalition and the current government were rated on a five-point scale from zero to four – zero being 'no policy position put forward' and four being 'policy meets resources sector requirements'. The complete scale is reproduced below.

Score	**Policy Position**
0	No policy position put forward
1	Policy does not meet resource sector's requirements
2	Policy addresses resource sector's requirements but contains undesirable content
3	Policy substantially addresses resource sector's requirements

4	Policy meets resource sector's requirements

The greater the score, the more the policy met the needs of the resources sector. The first AMMA analysis was released in July 2007 in *An analysis of Coalition and ALP Workplace Relations Policies,* which drew attention to a number of deficiencies in the ALP's workplace relations policy at that time, which received a score of 9 out of 28.

AMMA commented that:

> *…the ALP's* ***Forward with Fairness*** *policy is seen as a transition to the past, not the future, lacks detail, and appears unduly influenced by a union movement that represents only 15 per cent of the workforce*.[1]

The ALP workplace relations policy that was considered in AMMA's first analysis was limited to its policy document *Forward with Fairness: Labor's plan for fairer and more productive workplaces*, released when Labor was in Opposition.

Recognising that the ALP had indicated it would make further policy announcements, AMMA released its first analysis prefaced with a commitment to conduct a further analysis following the release of greater policy detail.

Thus, the scorecard was revisited in September 2007 following the release of the ALP's *Forward with Fairness Policy Implementation Plan* along with various other policy announcements. While the additional announcements resulted in a four-point improvement in the capacity of the ALP's workplace relations policy to meet the needs of the resources sector, it remained well below satisfactory with a score of 13 out of 28. AMMA noted that an *'urgent overhaul'* of the ALP's workplace relations policy was required[2].

The election of the ALP to government in November 2007 necessitated revisiting the scorecard again and conducting a new analysis. This time AMMA focused on re-assessing the government's policy in the absence of a revised Coalition policy. The primary sources of information used when conducting that analysis were:

- *Forward with Fairness: Labor's plan for fairer and more productive Australian workplaces*;
- The *Forward with Fairness Policy Implementation Plan*;
- The National Workplace Relations Ministerial Council;
- Public statements by the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008;*
- The final version of the National Employment Standards;
- The original award modernisation request plus exposure drafts of modern awards;
- The government's submission to the exposure drafts of modern awards dated 10 October 2008; and

[1] AMMA, *An analysis of Coalition and ALP workplace relations policies*, April 2007
[2] AMMA, *An analysis of Coalition and ALP workplace relations policies*, Revisited September 2008

- Then-Deputy Prime Minister Julia Gillard's speech to the National Press Club on 17 September 2008 plus accompanying policy fact sheets.

The October 2008 analysis was again conducted in consultation with AMMA's Board Reference Group. The ALP's workplace relations policy score at that time was based on an evaluation of the government's publicly detailed policy position, although its substantive industrial relations legislation, the *Fair Work Act 2009*, had yet to be tabled in parliament (the legislation was subsequently tabled in December 2008). At that stage, the ALP's rating improved by a further four points to a score of 18 out of 28.

The *Fair Work Act 2009*

It has now been more than 12 months since the bulk of the *Fair Work Act 2009,* including its good faith bargaining, unfair dismissal, agreement making and right of entry laws took effect on 1 July 2009. It has been a little more than six months since the National Employment Standards and modern awards took effect on 1 January 2010.

The Government also achieved on 1 January 2010 a national workplace relations system for the private sector in all states except Western Australia, with most states referring their private sector workforces to the Commonwealth for the first time. Victoria re-referred its industrial relations powers to the Commonwealth.

THE MAJOR POLITICAL PARTIES

The Australian Labor Party

As of August 2010, the ALP's score, based on AMMA's established criteria is 17 out of 28.

The areas of change between the current and previous scorecard ratings of the ALP's IR policy are illustrated in the comparative table below.

Improvements have been seen in the areas of 'national regulatory framework' and 'minimum standards and awards'. ALP scores have deteriorated in the areas of 'agreement making', 'industrial action and compliance' and 'unfair dismissal'. Scores in the areas of 'agreement processing' and 'union right of entry and access to records' remain unchanged.

Key workplace relations needs of the resources sector	Score as at September 2007	Score as at October 2008	Score as at August 2010
National regulatory framework	2	3	3.5
Minimum standards and awards	2	3	3.5
Agreement making	1	2	1.5
Agreement processing	3	3	3
Industrial action and compliance	3	3	2
Unfair dismissal	1	3	2.5

Union right of entry and access to records	1	1	1
Total Score	**13/28**	**18/28**	**17/28**

The Liberal/National Coalition

The Liberal/National Coalition's latest policy announcements are that, if elected, it will not change the *Fair Work Act* during its first term of government.

The prime difference between the ALP's industrial relations policy and that of the Coalition has therefore been reduced to their policy on industrial regulation of the building and construction industry. The ALP intends to repeal the *Building and Construction Industry Improvement Act 200*5 (BCIIA) and the Australian Building & Construction Commission (ABCC), while the Coalition will retain both the BCIIA and the ABCC.

AMMA has consistently argued for retaining the ABCC, as is, due to its superior enforcement and compliance powers and because of its independence from government. This area of regulation is now even more significant given individual statutory agreements have been abolished and there is no longer the ability to make non-union greenfield agreements.

There are 174 advanced Australian major resource projects involving a capital expenditure of $113 billion[3], either under construction or committed to that require certainty of industrial regulation and avoidance of unlawful industrial action. Retaining the ABCC with its current enforcement and compliance powers is of paramount importance in achieving this aim.

AMMA has given the Coalition a score of 3 in the area of '*Industrial Action and Compliance*' compared with the Government's score of 2 in light of the ALP's plans to water down the powers and influence of the building industry watchdog.

Key workplace relations needs of the resources sector	**Score as at August 2010**
National regulatory framework	3.5
Minimum standards and awards	3.5
Agreement making	1.5
Agreement processing	3
Industrial action and compliance	3
Unfair dismissal	2.5
Union right of entry and access to records	1
Total Score	**18/28**

[3] Australian Bureau of Agriculture and Resource Economics 2009 (ABARE)

The Australian Greens

The Australian Greens Party (the Greens) has significant influence in the Senate, which means it is also important to assess its industrial relations policy against AMMA's criteria.

In AMMA's view, the Greens' policy is anathema to any industrial relations system that purports to be modern or progressive.

Of most concern to AMMA in the Greens' policy is its advocacy of:

- Ensuring workplace and union-led bargaining is the primary tool for obtaining industrial outcomes;
- Repealing s.45D and s.45E of the *Trade Practices Act 1974* which currently prohibits union activity in the form of secondary boycotts;
- Abolishing the requirement for mandatory secret ballots before protected industrial action can be taken;
- Abolishing the Australian Building and Construction Commission and repealing the *Building and Construction Industry Improvement Act 2005*; and
- Reinstating conciliation and arbitration as the primary basis for an industrial relations system.

Industry-wide collective agreements are another name for pattern agreements which pay no regard to the enterprise-specific needs of employers. Repealing the secondary boycott provisions of the *Trade Practices Act 1974* would allow a return to national industrial stoppages or 'sympathy strikes' which have not been part of Australia's industrial relations system for well over a decade.

The Greens' IR policy score, according to AMMA's criteria appears below.

Key workplace relations needs of the resources sector	**Score**
National regulatory framework	2
Minimum standards and awards	1.5
Agreement making	1
Agreement processing	0
Industrial action and compliance	1
Unfair dismissal	1.5
Union right of entry and access to records	1
Total Score	**8/28**

Scorecard Analysis

1. National Regulatory Framework

***Criteria**:*

A single national workplace relations system, without the duplication and complexity resulting from the interaction of six states, two territories and a federal system, is a prime requirement of a modern industrial relations system. The national system should cover all employing entities including both constitutional corporations and unincorporated bodies.

The Australian Labor Party

On 1 January 2010, a national workplace relations system for the private sector took effect in all states except Western Australia (WA).

In 2008 and again in 2009, then-WA Commerce & Industrial Relations Minister Troy Buswell said he would not refer his state's industrial relations powers to the Commonwealth, nor enact legislation mirroring the *Fair Work Act 2009*. Instead, his government commissioned a review into the WA industrial relations system to assess what needed to be updated in the state legislation. That review was undertaken by Blake Dawson partner Steven Amendola and has been provided to the WA Government but not yet made public.

The Howard Coalition government made the first moves towards a national industrial relations system for the private sector with the introduction of *Work Choices* in March 2006. However, due to state government opposition to the legislation, it only ever covered constitutional corporations because it relied on the corporations power under the Australian Constitution. While estimates vary about what proportion of private sector companies the corporations power left out of the federal system, it was somewhere in the vicinity of 25 per cent. This left many unincorporated private sector organisations under the coverage of the state IR jurisdictions, or unsure of where they fell, in particular unincorporated small businesses and community sector organisations.

When the Rudd Labor government won office in November 2007, it immediately began negotiating with the states, all of whom were at that time Labor governments. That changed in September 2008 when Liberal leader Colin Barnett won office in WA.

Following the Commonwealth's negotiations with the state governments, all states except WA agreed to adopt the *Fair Work Act 2009* as the basis for their industrial relations systems from 1 January 2010. Participating states retained opt-out rights and coverage of their public sector and local government sectors if they chose. While the Commonwealth allowed the states to retain coverage of some state-owned corporations, the national system covered all state-owned corporations in the areas of electricity, gas, water, rail and ports.

Victoria, which had already referred its industrial relations powers to the Commonwealth in 1996, again referred powers in 2009 to ensure the referral was recognised under the new IR system.

South Australia was the first state to announce its intention to refer powers for the first time while ensuring it retained some say in how the national industrial relations system developed. This was used as a model on which the other states based their referrals.

The Queensland government's referral included transitional arrangements whereby private sector employees transferring to the national system would have their state award and agreement entitlements protected for 12 months from 1 January 2010. Its public sector and local government workforces (around 30,000 employees) remained in the state system.

The Tasmanian government referred its local government and community services sectors to the Commonwealth, with local government already being in the national system and community service organisations being split between the Commonwealth and the state depending on whether the employer was a constitutional corporation.

NSW was the last of the referring states to enact and pass legislation giving effect to its qualified referral of industrial relations powers to the Commonwealth. NSW opted to keep its public sector and local government workforces in the state system.

While the achievement of a national industrial relations system for the private sector was a complex exercise logistically, AMMA recognises that significant progress has been made in achieving a national regulatory framework, which represents a substantial improvement on the position that existed when this area was last assessed under previous scorecards.

AMMA notes that WA refraining from referring its industrial relations powers to the Commonwealth means a truly national system for the private sector has yet to be achieved.

ALP score: 3.5

The Liberal/National Coalition

Given that the latest policy announcements from the Liberal/National Party have confirmed the Coalition will not make any changes to the *Fair Work Act* for the first three years of a federal Coalition government, AMMA has given the Coalition the same score as the ALP in the area of a 'national regulatory framework'.

Coalition score: 3.5

The Greens

AMMA notes the Greens' IR policy[4] lists among its 'goals':

[4] The Australian Greens IR policy

'the restoration and maintenance of strong state and national industrial relations systems'.

AMMA would be concerned by any attempt to return Australia's industrial relations system to the situation that existed before the Howard government made use of the corporations power to regulate industrial relations on a national basis.

Greens score: 2

2. Minimum Standards and Awards

There must be a set of legislated statutory core minimum standards of general application. There must also be an ability to agree to hours of work that meet operational needs having regard to OHS and fitness for work principles.

Awards should be restricted to providing a safety net of core conditions of employment in industry (and where relevant sub-industry) sectors. Enterprise awards should be treated as if they were enterprise agreements.

The Australian Labor Party

The government's two-part safety net, which took effect on 1 January 2010, provides for nationally legislated minimum standards and has created minimum conditions in the form of the National Employment Standards (NES) and modern awards.

AMMA supports the concept of a minimum set of employment entitlements for all employees. The NES expand on the minimum standards provided under the *Workplace Relations Act 1996* then known as the *Australian Fair Pay and Conditions Standard*.

The NES have provided essential minimum entitlements to all employees. However, these standards need to be sufficiently adaptable in recognition of the fact that there is not always a single format that will meet the requirements of all industries, particularly when industry practices vary considerably in terms of hours of work, rosters, shift patterns, leave etc.

Around 95 per cent of the resources sector works in excess of a standard 38-hour week. Forty-two and 56-hour rosters and fly-in fly-out arrangements (which by necessity mean longer working hours over a concentrated period) are common on remote and isolated worksites.

The key issue for the resources sector in this area is the need to allow flexibility in how the NES are applied.

<u>Award modernisation</u>

The Australian Industrial Relations Commission (AIRC) completed the task of creating new modern awards, reducing the number of federal and referred state

awards (not including enterprise awards which were excluded from the initial process) from around 2,000 down to 121.

Modern awards came into operation on 1 January 2010, although many of the monetary changes associated with the move were deferred until 1 July 2010 and will be transitioned in over five years.

The Rudd Government said the overall aim of award modernisation was to make a complete set of modern industry-based federal awards that:

- *were simple and easy to understand;*
- *provided a minimum safety net of enforceable terms and conditions of employment;*
- *were economically sustainable; and*
- *promoted collective bargaining, with no provision for new individual statutory agreements.*

As part of the award modernisation process, AMMA submitted a comprehensive and flexible draft *Mining Industry Award*, much of which was reflected in the AIRC's final award for the industry.

AMMA is comfortable with the outcome of the modern awards relevant to the resources sector, in particular mining, hydrocarbons and salt. These modern awards are sufficiently flexible so that employers and employees can operate without the absolute need to enter into enterprise negotiations.

The government's consolidated award modernisation request to the AIRC allowing rosters and leave arrangements that were currently operating to continue was a welcome and essential variation to the *Mining Industry Award*.

On balance, the situation with regard to minimum standards and awards has, over all, improved since it was last assessed.

ALP score: 3.5

The Liberal/National Coalition

Given that the latest policy announcements from the Liberal/National Party reveal that the Coalition will not make any changes to the *Fair Work Act* for the first three years of a federal Coalition government, AMMA has given the Coalition the same score as the ALP in the area of 'minimum standards and awards'.

Coalition score: 3.5

The Greens

AMMA notes with concern the Greens' policy, which advocates:

> *'providing comprehensive industry-wide awards that give rights and entitlements in excess of the legislative minimums and which are determined by conciliation and arbitration before an effective and independent industrial tribunal'.*

The Greens policy also advocates the introduction of five weeks' paid annual leave for all employees rather than the current minimum entitlement of four. AMMA maintains that awards should operate, as they currently do, as minimum standards and their function should be to operate as a safety net only, with parties able to agree on enhanced terms and conditions should they choose.

AMMA would be opposed to the introduction of five weeks' annual leave as a minimum entitlement, particularly in the mining industry where rosters already provide adequate leave between roster cycles.

Greens score: 1.5

3. Agreement Making

Criteria:

There must be access to a broad range of agreement-making options including collective agreements, greenfield agreements and statutory individual agreements, with a duration of up to five years.

Agreements should be able to customise the conditions of employment to the needs of the parties and be capable of overriding awards or (in the case of individual agreements) collective agreements. Agreements should not be imposed except in limited circumstances.

The Australian Labor Party

Agreement Making Options

In the past two decades, the resources sector has accessed a wide range of agreement-making options in order to improve flexibility and productivity, reward performance and attract and retain the best employees. During that time, statutory agreement making options have included:

- Union collective agreements;
- Employee collective agreements;
- Australian Workplace Agreements (AWAs);
- Individual Transitional Employment Agreements (ITEAs);
- Union greenfield agreements; and
- Non-union greenfield agreements.

The *Fair Work Act* has reduced that variety of agreement making options for the resources sector to just two - union collective agreements (with unions as the default bargaining representative) and union pre-start greenfield agreements.

The limited number of agreement options now available has the potential to frustrate the continuation of innovative, flexible work practices in resources sector enterprise agreements and, in some cases, has led to the elimination of such practices.

Greenfield Agreements

AMMA members' experience is that unions are using their newfound power to veto greenfield agreements to extract extravagant windfalls from investors and employers who are seeking to build new operations or expand and optimise existing ones. Members are currently reporting more difficulty negotiating greenfield agreements under the *Fair Work Act*[5].

The *Fair Work Act*'s failure to include an alternative to a union greenfield agreement is a major issue in resource construction where investors and employers are trying to get multi-million dollar projects off the ground to a tight schedule. All the political parties need to address this issue.

Agreement Content

The *Fair Work Act* has expanded the breadth of matters that can be included in enterprise agreements. Permissible matters for inclusion in enterprise agreements now include matters pertaining to the relationship between the employer and the union that will be covered by the agreement.

According to AMMA members, this new ability to include union-specific content in enterprise agreements has encouraged a return to union claims not seen in the resources sector since the 1970s[6]. The union agenda in enterprise agreement negotiations now commonly includes clauses for:

- Paid union meetings;
- Non-working shop stewards;
- Union meeting facilities;
- Union membership fee deductions;
- Paid trade union training leave; and
- Delegates' rights.

These provisions produce no measurable productivity improvements and are solely directed towards entrenching the role of unions in the workplace at the expense of direct engagement between the employer and its employees.

Individual Flexibility Arrangements (IFAs)

The mandatory inclusion of a flexibility clause in all enterprise agreements negotiated from 1 July 2009 was said to allow an employer and an individual employee to agree to vary the application of certain award terms to meet their individual enterprise needs. This would be done via individual flexibility arrangements (IFAs) that would be facilitated by the flexibility clauses.

Although not providing the full benefits of AWAs, it was hoped IFAs would provide some flexibility for individual employees and employers.

[5] *AMMA Workplace Relations Research Project* report by RMIT, June 2010
[6] Ibid

However, issues have arisen since 1 July 2009 that have caused AMMA to question the usefulness for employers, with unions having developed their own flexibility clauses for inclusion in enterprise agreements that seek to limit any flexibility while still meeting the mandated legislative obligation for inclusion.

In its paper, *IFAs: the Great Illusion*[7] released in May 2010, AMMA highlighted its view that IFAs fall short of the flexibility available under AWAs and discusses steps that can be taken to make IFAs more effective. In short, due to the vehement opposition to any form of individual employment agreement, the ACTU and its union affiliates have reduced the mandatory flexibility clause in many enterprise agreements to a token clause that provides little genuine flexibility.

ALP score: 1.5

The Liberal/National Coalition

In the first half of 2010, the Coalition said it would not rule out making changes to Labor's industrial relations system if it won government. This included 'tweaking' the unfair dismissal provisions to further protect small business from unfair dismissal claims, as well as making individual flexibility arrangements (IFAs) more genuinely flexible.

However, the Coalition has since said it will not change the legislation for at least three years if it won government.

Given AMMA's well-documented criticisms of the flexibility that is currently able to be achieved via flexibility clauses in enterprise agreements, AMMA has scored the Coalition the same as the ALP in the area of 'agreement making' given it has said it will retain the existing legislation.

Coalition score: 1.5

The Greens

The Greens' policy states among its goals:
'

> *'facilitating industry wide collective agreements that are union negotiated and exceed the Award standards' and 'allowing workers to terminate substandard individual or collective agreements and be covered by a relevant award or collective agreement.'*

AMMA's scorecard criteria include access to a broad range of agreement-making options, including collective agreements, greenfield agreements and statutory individual agreements. The Greens policy falls short in this area by allocating primacy to collective agreements and allowing for the termination of both individual and collective agreements prior to their nominal expiry dates. It has therefore been rated lower than both the ALP and the Coalition's score.

Greens score: 1

[7] *IFAs: The Great Illusion*, AMMA paper, May 2010

4. Agreement Processing

***Criteria**:*

There should be a simple administrative agreement registration process, without a requirement to attend a formal hearing. Agreements should commence on signing and be required to meet a simple set of legislated minimum conditions.

The Australian Labor Party

The *Fair Work Act 2009* allows agreements to be approved against the two-part safety net comprising the legislated minimum conditions and the relevant modern award. This is the basis of the *Better Off Overall Test* (BOOT) under which an agreement must leave an employee better off compared to the two-part safety net.

AMMA supports the BOOT as a manifestation of the previous no-disadvantage test which applied to agreements prior to the *Fair Work Act* taking effect, a test which AMMA supported in previous policy papers.

However, under the *Fair Work Act*, an agreement cannot become operational until Fair Work Australia has formally approved it. This process is still vulnerable to delays depending on the number of agreements lodged, the review mechanism and the number of resources allocated to Fair Work Australia.

Fair Work Australia President Justice Geoffrey Giudice told a Senate Estimates hearing on 1 June 2010[8] there were agreements lodged with Fair Work Australia in December 2009 that were still awaiting assessment in June 2010.

Shadow Employment & Workplace Relations Minister Senator Eric Abetz during the hearing pointed to one agreement covering *Haigh's Chocolates* that had experienced a considerable delay in processing, having been lodged in October 2009 but not being approved until 17 weeks later.

Justice Giudice said reasons for delays could include situations where employers had been asked to give undertakings to compensate for employee disadvantage in the agreement. In other cases, where issues relevant to the agreement's approval were awaiting a Full Bench decision, it was reasonable for Commissioners to await the outcome of the decision before deciding whether to pass the agreement, he said.

Where processing delays are experienced by employers in agreement approval, it creates uncertainty for the business and employees as to their rights and obligations.

While general turnaround times for approval have greatly improved under the new system, there is anecdotal evidence that union-negotiated agreements are approved more quickly than those with which a union has had no involvement.

[8] *Official Hansard*, Senate Education, Employment and Workplace Relations Legislation Committee, 1 June 2010

AMMA members are also reporting frustration with the *Fair Work Act's* onerous administrative requirements, particularly the forms required to be completed when lodging enterprise agreements.

With the exception of the potential delays in agreement processing, the government's position in this area substantially meets AMMA's requirements and is unchanged from previous assessments under the scorecard.

ALP score: 3

The Liberal/National Coalition

Given that the latest policy announcements from the Liberal/National Party have said the Coalition will not make any changes to the *Fair Work Act* for the first three years of a federal Coalition government, AMMA has given the Coalition the same score as the ALP in the area of 'agreement processing'.

Coalition score: 3

The Greens

The Greens policy is silent on the issue of agreement processing. According to the AMMA criteria, no score is allocated where no policy position is put forward.

Greens score: 0

5. Industrial Action and Compliance

***Criteria**:*

The law should prohibit the taking of industrial action during the life of an agreement and provide readily accessible remedies to prevent or stop the taking of unlawful industrial action and the capacity to seek compensation.

The Australian Labor Party

In AMMA's paper *Constructing Lawful Workplaces: The need to retain Australia's economic success by maintaining a strong industrial action compliance regime*, AMMA outlined key areas of compliance that were necessary to prevent unlawful industrial action, including:

- the continued operation of s.45D and s.45E in the *Trade Practices Act 1974* to deal with secondary boycotts;
- an ability to stop or prevent unlawful industrial action without delay;
- readily available civil remedies for unlawful industrial action; and

- an authoritative ABCC or Fair Work Building Industry Inspectorate to police the building and construction industry.

AMMA supports the government's decision to retain existing secondary boycott provisions in the *Trade Practices Act 1974* and to retain current arrangements for obtaining orders to stop or prevent industrial action.

However, the removal of the concept of prohibited content in the *Fair Work Act 2009* and the expansion of the traditional '*matters pertaining to the employment relationship'* to the relationship between employer and union, thereby allowing bargaining on a broader range of matters, have given unions greater scope to reintroduce inefficient work practices that were the scourge of the resources sector in the 70s and 80s.

Under the *Fair Work Act*, the government has sanctioned industrial action in support of claims that do not pertain to the employment relationship, such as payment for trade union-provided training and the requirement to provide amenities for union delegates while they are on-site.

AMMA is also concerned at the emerging trend for unions to apply for and obtain secret ballot orders for protected industrial action before bargaining has been exhausted. This was borne out in the recent dispute between vessel operators and the Maritime Union of Australia (MUA), where industrial action was able to be taken as a first resort rather than a last resort. Fair Work Australia did not criticise the action which had the effect of holding employers in the industry to ransom until they agreed to a 30 per cent wage claim plus exorbitant daily allowances for no change in workers' duties.

AMMA members also remain concerned about proposals to water down the powers of the ABCC with draft laws that were previously blocked in the Senate in the form of the *Building & Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009*.

Accordingly, the Labor government's policy falls short of meeting the needs of AMMA members.

ALP score: 2

The Liberal/National Coalition

The key difference between the ALP and the Coalition's industrial relations policies is that the Coalition is strong on industrial action and compliance. The Coalition has promised to retain the ABCC with its current powers along with the Building & Construction Industry Improvement Act. Both the ABCC and the accompanying legislation are key deterrents against unlawful industrial action in the building and construction industry and must be retained. For this reason, AMMA has given the Coalition a higher score than the ALP in the area of 'industrial action and compliance'.

Coalition score: 3

The Greens

The Greens policy includes legislatively protecting the right to strike as a 'fundamental right of workers to promote and defend their economic and social interests'. Its policy also advocates abolishing the ABCC and repealing the Building & Construction Industry Improvement Act. For this reason, AMMA has scored the Greens lower than the Coalition in the area of 'industrial action and compliance'.

The Greens policy also advocates repealing s.45D and s.45E of the *Trade Practices Act 1974*, which prohibits union activity in the form of secondary boycott provisions.

Secondary boycotts are regulated under the *Trade Practices Act* which prohibits engaging in conduct with a second person to hinder or prevent a third person (who is not an employer of the first or second person) supplying or receiving goods and services from a fourth person (who is also not an employer of the first or second person).

The prohibition of secondary boycotts has been a feature, in one form or another, of Australia's industrial relations system for over 30 years. To return to an industrial relations environment where this type of action was allowed to occur lawfully would not be in the resource sector's best economic interests.

Greens score: 1

6. Unfair Dismissal

Criteria:

There should be a single unfair/unlawful dismissal system, with exemptions for probationary employees and high income earners. The primary determinant of whether a termination is unfair should be confined to the merits of the case. Employers should be protected from vexatious and frivolous claims by being provided with an ability to recover costs in the case of unmeritorious claims.

The Australian Labor Party

Under the *Fair Work Act's* unfair dismissal rules that took effect on 1 July 2009, unfair dismissal rights were restored to almost every employee in the country following a six-month qualifying period (12 months for those working for businesses employing fewer than 15 full-time equivalents). There appears to be little disincentive for employees making frivolous claims as the jurisdiction remains a *no costs* one.

Small businesses are exposed to unfair dismissal claims after a permanent or casual employee hits 12 months service with them (the current definition of small business will continue until 1 January 2011, after which it will change to businesses employing fewer than 15 people by head count alone rather than by full-time equivalency).

It is of concern that whilst employees have to serve a six-month qualifying period before being eligible to lodge an unfair dismissal claim (12 months for a small business employee), other eligibility rules have been relaxed under the *Fair Work Act*. Significantly, casuals have the same qualifying periods as other employees and

fixed-term employees are now only excluded from making a claim if they are terminated at the end of a contract rather than during its term.

The time limit for lodging unfair dismissal claims has been sensibly reduced to 14 days from 21 days, with decisions coming out of Fair Work Australia showing it is taking a firm stance against granting extensions of time.

Bearing all this in mind, the current unfair dismissal system falls short of what the resources sector needs in order to dissuade employees from making frivolous claims and employers from paying '*go away*' money.

ALP score: 2.5

The Liberal/National Coalition

In a speech to a Liberal National Party conference on 17 July 2010[9], Opposition Leader Tony Abbott gave a commitment that:

> *'An incoming Coalition government will seek to make Labor's individual flexibility arrangements more flexible and seek to reduce the burdens on small business but we will do so within the existing legislation. The existing legislation is far from perfect but it deserves a fair go.'*

The resources sector would welcome any attempt to improve the regulation of unfair dismissal. AMMA has scored the Coalition slightly higher than the ALP in this area due to its commitment to reduce the unfair dismissal burden for small business. Around 10 per cent of AMMA members employ less than 20 people and would be considered small businesses.

Coalition score: 2.5

The Greens

The Greens policy includes a commitment to ensure all employees, including casual, fixed-term and probationary workers and employees of small businesses have the right to bring an unfair dismissal claim.

Given that employers are required to devote substantial time and resources to defending unfair dismissal claims, even unmeritorious ones, and AMMA members are still paying 'go away' money in response to unfair dismissal claims, AMMA has scored the Greens significantly lower than the Coalition in this area.

Greens score: 1.5

7. Union Right of Entry and Access to Records

***Criteria**:*

There should be a single national right of entry law for unions, with access restricted to meeting with union members who have requested the meeting and where a genuine breach of an industrial instrument or a provision of the Fair Work Act has occurred.

The Australian Labor Party

When the ALP was in Opposition it promised to retain existing right of entry laws and that union officials would only be allowed to enter workplaces if they had a permit and in the limited circumstances below:

- to investigate breaches of industrial law, awards or agreements;
- to hold discussions with members or eligible members; and
- to investigate OHS breaches.

Of particular concern to AMMA's members is the *Fair Work Act's* linking of right of entry for discussion purposes to union eligibility rules rather than award or agreement coverage.

Previous limitations on unions accessing time and wages records of non-union members, which required AIRC approval, have been retained under the *Fair Work Act* which requires employee consent or Fair Work Australia approval before third-party access is given. AMMA maintains the privacy of the employment records of non-union members (who make up 86% of the private sector workforce) must continue to be protected as it currently is under the *Fair Work Act's* access provisions.

It is, however, of concern that the final version of the national model Work Health & Safety Bill allows access to non-member records by union permit-holders. This will have the effect of allowing unions to sidestep access restrictions under the *Fair Work Act* under the guise of workplace health and safety.

Also, unions are seeking and Fair Work Australia is approving enterprise agreements that provide for copies of individual flexibility arrangements (IFAs) that have been negotiated between employers and individual employees to be provided to union officials on demand. This is clearly an attempt by unions to escape the existing prohibition on union access to employee records without the employee's written approval.

Accordingly, the government's right of entry laws, when taken cumulatively, fall well short of the standard required to meet the needs of AMMA members.

ALP score: 1

The Liberal/National Coalition

Given that the latest policy announcements from the Liberal/National Party have said the Coalition will not make any changes to the *Fair Work Act* for at least three years of a federal Coalition government, AMMA has given the Coalition the same score as the ALP in the area of 'union right of entry and access to records'.

Coalition score: 1

The Greens

The Greens IR policy states that one of its aims is to:

> *'strengthen unions' right of entry to recruit members, inspect for and remedy breaches of OHS provisions, breaches of the Fair Work Act and relevant awards or agreements, and other activities relating to strengthening workers' organisations'.*

AMMA believes the *Fair Work Act* has already gone too far in giving unions unfettered access to workplaces. Consequently, AMMA has scored the Greens' IR policy, along with that of Labor and the Coalition, poorly in this area. AMMA maintains that unions' access to workplaces should be restricted to cases where the union is meeting with its members who have requested a meeting and where there has been a genuine breach of an industrial instrument or a provision of the *Fair Work Act*.

Greens score: 1

Conclusion

In summary, the industrial relations policies of all three major political parties – the ALP, the Liberal/National Coalition and the Greens - currently fall short of the requirements of the resources sector. The attachment on the following pages outlines AMMA's recommendations for changes to the *Fair Work Act* to better align it with industry needs and expectations.

ATTACHMENT A

AMMA'S RECOMMENDATIONS FOR CHANGE

MINIMUM STANDARDS AND AWARDS

1. The provisions of the National Employment Standards (NES) should be applied in a sensible and practical manner to suit the various working arrangements that exist across industries including the resource sector. Where this is not possible, the legislation should allow flexibility for employers to meet the NES in a manner that suits the industry in which they operate.

2. The modern award education process needs to be continued and co-ordinated between employer associations, unions and the Fair Work Ombudsman in order to avoid employers inadvertently breaching modern award provisions.

AGREEMENT MAKING

3. Employers negotiating greenfield agreements should have the alternative of having a greenfield agreement approved by Fair Work Australia free of any union involvement. These agreements would be tested against the relevant modern award, minimum standards and the 'better off overall test' (BOOT) so as not to disadvantage prospective employees.

4. Restrictions should be imposed against union-specific content in enterprise agreements that do nothing to boost the productivity of the enterprise. The 'matters pertaining to the employment relationship' test should be restricted to matters pertaining to the employment relationship between employers and employees and not extend to the relationship with the union.

5. New employers should not be burdened by the industrial agreements of previous employers. A six-month end date for transferable industrial instruments rather than their open-ended application following a transfer of business would make it more attractive for employers to engage employees from the previous employer.

Individual Flexibility Arrangements (IFAs)

6. A further obligation should be introduced for FWA and the parties to enterprise agreements to ensure flexibility terms are capable of delivering genuine flexibility and productivity benefits and are not depriving employers and employees of the benefits of those arrangements.

7. The legislation should be amended so that majority flexibility clauses in enterprise agreements cannot be used by unions to veto the genuine flexibility that the *Fair Work Act* intended to be negotiated between employers and employees on an individual basis.

8. Section 482 of the *Fair Work Act* should make it explicit that unions cannot access employee records in the form of IFAs that have been agreed between

an employer and an individual employee without the employee's written authority.

9. IFAs should be able to be a condition of employment given the statutory protections in place that guard against employees and prospective employees being disadvantaged.

10. The ability for employees to terminate an IFA with 28 days' notice should be removed and a four-year maximum end date introduced for IFAs.

11. The legislation should be changed to remove the ability for employees to take protected industrial action during the life of an IFA where an IFA is made under a modern award or an enterprise agreement that has passed its nominal expiry date.

12. The legislation should clarify the test FWA is required to apply when deciding whether a flexibility clause meets the genuine needs of the employer and employee.

13. The General Manager of FWA's review of IFAs currently scheduled to commence on 1 July 2012 should be brought forward by 12 months to commence no later than 1 July 2011.

INDUSTRIAL ACTION AND COMPLIANCE

14. Where extravagant claims are pursued and/or negotiations have not yet reached an impasse, protected industrial action by unions and employees should not be available.

15. The legislation should be amended to require that where notices of protected industrial action are given to employers, the employers should have the right to refuse to accept employees making themselves available for work, except in cases where the employer requests that work be performed as usual. Where notice is given of plans to take a form of industrial action and that action is then not taken and no notice is provided of the cancellation, that type of action should not be able to be taken for the remainder of enterprise negotiations.

16. The right to take protected industrial action should extinguish at an indexed income threshold of $113,800 a year.

17. The union covering employees engaging in unlawful industrial action should be held accountable for the actions of its members and be exposed to immediate financial penalties, with offending officials losing the right to represent the union as an official.

18. The legislative mechanism under which the courts can order work to resume following unprotected industrial action should be reviewed to ensure it is more responsive to the needs of employers who are subject to damaging and costly unlawful action.

19. The ABCC should be retained along with its current enforcement and compliance powers and its current levels of resourcing.

UNFAIR DISMISSAL

20. The determination of unfair dismissal claims should be limited to a consideration of whether a valid reason exists for the dismissal rather than subjective assessments about the consequences of termination for employees.

21. The loophole should be closed that currently allows high-income earners who are not covered by a modern award or enterprise agreement to bring an unfair dismissal claim.

22. Daily hire employees in the building and construction industry should be exempt from bringing unfair dismissal claims unless they are dismissed for prohibited reasons. This is because of the unique and fluctuating circumstances of the construction industry.

23. Incentives should be removed for employers to pay *go away* money to employees, even where their unfair dismissal claims lack merit. Employees should be required to meet an evidentiary threshold before their claim can proceed.

UNION RIGHT OF ENTRY

24. Before unions are able to enter a worksite under the *Fair Work Act* they should have to meet the following criteria:

- have employees at the worksite who are members and eligible to be members under their rules;
- union members have requested the union to attend the site on their behalf; and
- the union is a party to an enterprise agreement covering the employee members it seeks to visit or, failing that, it is attempting to reach such an agreement.

25. There should be no ability under the legislation to agree to additional union entry rights in enterprise agreements other than what is contained in the *Fair Work Act* itself.

26. The Government should close the loophole that allows unions to access non-member records under the *Model Work Health & Safety Act* to make it consistent with the *Fair Work Act*.

27. There should be no expansion of existing right of entry laws despite the union movement's ongoing campaign to broaden the application of those laws.