INDIVIDUAL ENGAGEMENT AND WORKPLACE FLEXIBILITY

Introduction

The Australian Mines and Metals Association (AMMA) was incorporated in 1918. AMMA is the national employer association for the mining, hydrocarbons and associated processing and service industries. It is the sole national employer association representing the employee relations and human resource management interests of Australia's onshore and offshore resources sector and associated industries.

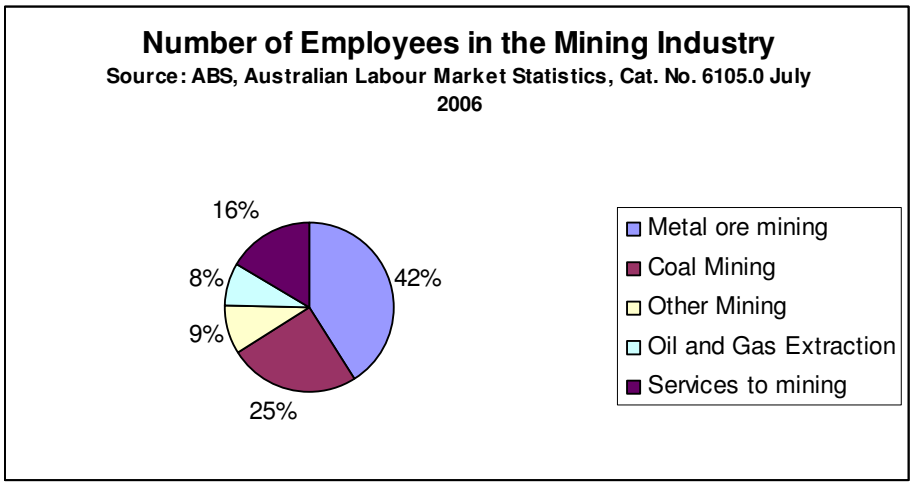
The Australian resources sector comprises companies involved in the exploration, production, and processing of minerals and hydrocarbons, and service providers to these companies. Resources sector commodities include metalliferous minerals, industrial minerals, energy minerals[1], precious metals, diamonds and other gemstones.

AMMA represents all major minerals and hydrocarbons producers as well as significant numbers of coal, construction and maintenance employers in the resources sector. AMMA is uniquely able to articulate the workplace relations needs of the resources sector.

The resources sector makes a significant contribution to Australia's wealth and prosperity, underpinning critical supply and demand relationships with the Australian manufacturing, construction, banking and financial, process engineering, property and transport sectors.

The mining industry directly employs 134,500 employees.[2] Approximately 540,000 employees are indirectly employed as a result of activity in the mining sector.[3]

Of the 134,500 employees directly employed in the industry, 49,100 are employed in metal ore mining, 29,900 in coal mining, 11,200 in other mining, 9,900 in oil and gas extraction and 19,600 in services to mining.[4]



The average annual rate of productivity growth since the mid 1980s as measured by the gross product per hour worked for the mining industry has been 3.3 per cent compared to an all industries average of 1.6 per cent – double the national average.

[1] The term energy minerals includes oil and gas and coal minerals.
[2] ABS, Australian Labour Market Statistics, Detailed - Electronic Delivery, (cat. no. 6105.0).
[3] This is based on a 1:5 ratio
[4] Australian Bureau of Statistics, Australian Labour Market Statistic, Cat. No. 6105.0 July 2006 (as of May 2006)

In the last two decades the resources sector has made dramatic improvements in efficiencies and productivity while continuing to improve its occupational health and safety record. In 2006-2007 the resources sector will contribute minerals and energy exports in the order of $110 billion. This represents approximately two-thirds of Australia's total commodity export earnings.

This (together with some skill shortages) is no doubt why the average wage in the resources sector is double the Australian average weekly earnings.

Clearly direct, cooperative and mutually rewarding relationships between employers and employees at the enterprise level have assisted the development of efficient and productive workplaces. This element of workplace relations is at the core of workplace flexibility. This is particularly important for mining sector employers who compete in a global market where 'you have to run fast to stand still'

Industrial Relations History

In order to contextualise the current industrial relations climate we need to review the centralised wage fixation system and its subsequent decline.

1904-1991

The pre-WorkChoices Australian arbitration system was founded on the 1904 practice of creating artificial paper disputes. A union served a log of claims for $10,000 per week, the employer 'rejected' the claims by throwing the claim in the waste paper basket, the Australian Industrial Relations Commission found that a 'dispute' existed and used its powers to impose a legally binding outcome on the parties.[5] This process is known as compulsory arbitration. This was the background in which negotiations were taking place, the parties knew that they did not have to reach agreement as the Commission would come along and impose one. Such a system encourages claims with plenty of ambit. The Commission almost invariably sought to find the middle ground.[6]

This system of conciliation and arbitration has resulted in 'a complex network of federal and state awards.'[7] This fact was confirmed by the September 2006 report of the Award Review Taskforce, which identified 105,235 employee classifications in over 4000 awards across Australia.[8] Whilst maintaining and extending the award system the Commissions would hold national and state wage cases. The unions would ask for $40, the employer organisations would offer $0, the Commission would award $20.00. Little recognition was given to industry or workplace productivity, the location of the workplace or the impact of the wage determination. The tribunals also determined other conditions of employment such as hours of work, leave, allowances and obligations on termination.[9]

The centralised approach to wage fixation and minimum standards operated across all industries and occupations coved by awards and bound all employers. Where the tribunal set a new standard or increased an existing one, this would also often flow on to other sectors, regardless of the business's individual circumstances.[10]

The centralised wage fixation and compulsory conciliation and arbitration system was seen as a major impediment to the achievement of more efficient and productive enterprises.'[11] Restrained by fixed wages and conditions of employment contained in awards, enterprise-specific bargaining was severely limited despite the ability to negotiate over award payments in light of the system's inability to provide protection by way of enforceability and flexibility to such negotiations.[12]

The lack of competitiveness in part caused the 'recession we had to have' in the 1990s. The focus moved from wage outcomes to retaining employment; advice on redundancy was in high demand.

[5] Breen Creighton and Andrew Stewart, *Australian Labour Law* (4th ed, 2005) 21.
[6] Ibid 20
[7] Ibid 22.
[8] Award Review Taskforce, *Final Report: Rationalisation of Wage and Classification Structures,* Australian Government, July 2006.
[9] Creighton and Stewart, above n3, 22.
[10] Ibid 24.
[11] CCH online, Australian Labour Law Reporter, ¶55-050.
[12] Ibid.

Finally the industrial parties determined that an alternative to the centralised system must be found in order to achieve increased productivity and efficiency.[13]

The value of direct bargaining with employees was not overlooked and was afforded greater prominence in 1992 when employers were given the capacity to make agreement with unions to provide for workplace-level flexibility via amendments to the *Industrial Relations Act 1988* (Cth). The ability to negotiate directly with employees collectively without a union was also introduced after Paul Keating's famous speech with the Company Directors Association . [14]

With the election of the Howard government in 1996, further deregulation occurred. The ability to enter into individual agreements in the form of Australian Workplace Agreements (AWAs) became available to employers in 1996. The 2006 WorkChoices legislation has further facilitated the making of AWAs and in October 2006, the one millionth AWA was signed in Adelaide.

As at March 2006, AWAs regulated the terms and conditions of employment of over 40 per cent of employees in the mining sector.[15]. In Western Australia the concentration of AWAs is reported to be as high as 80 per cent. WorkChoices has further encouraged the adoption of AWAs with its ease of lodgement and predominance over other forms of agreement.

More importantly individual agreements allow for outcomes that recognise the individual circumstances of employees and businesses and provide certainty for employers who are required to observe a 'one size fits all' award system that is different in each state and territory.

With the simplification of awards to 20 allowable matters and the increasing trend to override all award provisions with the use of a workplace agreement, awards now primarily act as a safety net of minimum wages and conditions of employment.[16]

Union Involvement in the Workplace

There has been a steady decline in union membership in Australian workplaces since the 1980s. Since a high point of 57 per cent in 1985, union saturation has plummeted to 22 per cent of the total workforce in 2006. This means that about four out of five Australians choose not to be a member of a union.

In the mining sector, coal mining represents the largest percentage of union membership with 58 per cent of all employees being union members. The metalliferous sector has 13 per cent union membership; mining services runs at 8 per cent and oil and gas extraction is only 1 per cent.[17]

[13] Ibid.
[14] Ibid.
[15] As at 27 March 2006 there were 55,700 AWAs registered in the Mining industry. < http://www.oea.gov.au/docs/news/Preworkchoices_factsheet.pdf> 17 October 2006
[16] CCH online, *Australian Labour Law Reporter*, ¶27-025.
[17] Australian Bureau of Statistics, Employee Earnings, Benefits and Trade Union Membership, Australia, Cat No. 6310, 28 March 2006 (Table 18).

Until recently, despite unions having only 22 per cent coverage, the industrial relations system remained focused on unions and their rights. Whilst Workchoices has made some positive steps in reducing the mandatory involvement of unions, for the industrial relations system to be relevant to the whole labour market it is necessary that there be a wide range of agreement making options including an individual agreement stream.

Even in workplaces where collective bargaining with unions occurs, the option of offering AWAs to employees assists by giving a 'reality check' to the parties and ensures that unions are being responsive to the needs of individual employees and the business.

Removing access to statutory individual agreement making, as proposed by the ALP and the ACTU, would be a step backwards towards restoring the 1990s union monopoly over workplace bargaining.

The Need for Workplace Flexibility

The global nature of resources sector markets and the pressures this places on companies requires the pursuit of workplace practices, policies and a legislative framework that best foster productivity, growth and prosperity. Employer and employee innovation and technological developments have contributed significantly to these improvements. Access to a full range of employment arrangements that provide flexibility at the workplace level is essential if companies are to remain viable in the face of intense international competition.

Given the economic conditions outside of the control of resources sector companies, such as volatile commodity prices and increased international competition, it is important that these companies closely manage the internal issues over which they do have some control. Two such issues are production costs and productivity. When managing production costs, companies need to place particular emphasis on the management of labour costs, a significant component of which are wages and salaries. Productivity in the Australian resources sector has been at levels well above the national average for the past decade. In fact the mining industry index has averaged an annual growth rate of 3.3 per cent over the years 1986 to 2005 compared to an all industries average of 1.6 per cent – in other words, approximately double the national average.[18] While the continued rapid growth of productivity is essential to the maintenance of competitiveness in any industry, it is especially so in the resources sector given the sector's high exposure to international competition. Flexible labour practices and wages linked to employee performance and productivity are vital elements of the sector's employee relations.

[18] Australian Bureau of Statistics, Australian National Accounts 2004-05, Cat No 5204.0 7 November 2005, Table 25.

The capacity for employers and employees to enter into direct and mutually beneficial employment arrangements is fundamental to the success of the current industrial relations system. This flexibility not only encompasses the choice of instrument, but also flexibility to determine employment arrangements.

In regard to flexibility within chosen employment arrangements, five main sources of labour market flexibility have been identified. These are 'internal', 'external', 'wages', 'functional' and 'procedural' flexibility.[19] 'These encompass the ability of companies to adjust labour input to accommodate changes in demand by facilitating the growth of temporary, short-term and part-time contractual arrangements, varying the number and pattern of working hours, linking wages to productivity improvements, deploying workers between tasks to meet demand for different types of labour and increasing the ability for a company to introduce changes in conditions and organisation of work.'[20] In summary, the key element of workplace flexibility is the ability to internally regulate within the parameters of reasonable external regulation.

In this context AMMA's Employee Relations Charter is an excellent employee relations framework for employers and employees.

AMMA's employee relations charter was developed by member companies including blue chip majors, medium and small companies and sets out an underpinning philosophy of honesty, fairness and accountability in the way organisations and employees work with each other.

It does not exclude trade union membership or collective bargaining. What it does do is set out a requirement for responsible and effective leadership that ensures employees:

- Are productivity engaged;
- Feel their work is valued; and
- Are treaded fairly

For the employment relationship to flourish the Charter outlines the required entitlements and accountabilities as follows:

All employees are entitled to:

- Work in an environment were effective standards of health and safety are in place;
- Be free from workplace harassment and unlawful discrimination;
- Have access to appropriate means for internal review of individual concerns or complaints without fear of recrimination; and
- Not join a union or join a union with the legal capacity to represent their industrial interests.

It is the employer's accountability to:

- Provide remuneration and conditions of employment that are fair and reflect community and industry standards;
- Ensure that individual employees have a clear understanding of work requirements and have accurate and timely information about how they are performing in their role with scope for recognition of that performance; and
- Work with all employees honestly and fairly and promote a shared understanding of business direction and performance through managerial leadership and open communications.

It is the employee's accountability to:

- Work safely;
- Act with integrity and honesty; and
- Perform their duties lawfully and effectively.

[19] Nick Wailes and Russell D Lansbury, *Flexibility vs Collective Bargaining? Australia During the 1980s and 1990's*. Working Paper No49 ACIRRT 1997.
[20] Ibid.

Employee Engagement

Employee engagement supports productivity and continuous improvement, leading to better staff retention and a commitment to the organisation's success.[21] This is because engaged employees are willing to work to the best of their ability in the interests of the organisation and are helped to do so through the leadership structure and systems of the organisation.[22] With the resources sector facing long-term skill shortages, increased staff retention is a significant factor.[23]

Flexible employment arrangements are resulting in an increase in employee engagement that is in turn creating improved business outcomes.[24] In a survey conducted by the Gallup Organisation where an organisation was categorised as being in the top quartile of engagement, better outcomes were found in staff retention (50 per cent), customer satisfaction (56 per cent), safety (63 per cent), productivity (38 per cent), and profitability (27 per cent) compared to other organisations in the data base.[25] The Commonwealth Bank of Australia has found a positive relationship between employee engagement and business outcomes.[26]

Employee engagement is realised through the decreased reliance on third parties and greater levels of internal regulation.[27] In preparing a forthcoming AMMA research paper on employee enagement, AMMA identified a case study that highlights the type of negative impact that third party intervention can have, particularly for companies struggling to remain afloat.

In this case study, the smelter was under the threat of closure but operating with strong union control where the workplace culture was not amenable to change. In order to survive the company introduced significant technological change to upgrade the operations. A new agreement was sought between the union and the employer. The employees consequently took industrial action that ended when the company was forced to close down.

This case study is illustrative of what happens when the relationship with the third party is adversarial and conflict ridden. The parties can spend hours negotiating sometimes trivial matters, often involving the industrial tribunals. These processes can become dominant and destroy value in the businesses, creating mistrust and conflict.[28]

What can be seen from the research undertaken by AMMA is that whether employees are engaged and productive does not depend on the legal form of the agreement that governs the employment relationship, but rather it depends on the substance of the relationship itself.[29] Where a union is a party to the determination of workplace arrangements, increases in productivity and business outcomes afforded by increased employee engagement will depend on whether the union's demands are aligned to the needs of the business.

The Case of Hamersley Iron Ore

BHP (now BHPB) Iron ore operates the Mount Newman Mine, which produces a third of the world's iron ore. Also in the Pilbara region of Western Australia, Rio Tinto operates the Hamersley Iron Ore Mine that contributes another third of the world's iron ore. The mining methodology and ore bodies are almost identical.

In 1999, BHP Iron Ore entered into negotiations with Rio Tinto for a proposed merger of their operations in Western Australia. While the merger did not come to fruition, the negotiations regarding

[21] Ibid 9.
[22] Ibid 10.
[23] Ibid 11.
[24] Geoff McGill, *Workplaces Beyond Enterprise Bargaining: A Review of Member Companies' Experiences with Workplace Change*, AMMA 2006, 2.
[25] Gallup 2005 referred to in Geoff McGill, *Workplaces Beyond Enterprise Bargaining: A Review of Member Companies' Experiences with Workplace Change*, AMMA 2006, 11.
[26] MacDonal et al 2006, referred to in Geoff McGill, *Workplaces Beyond Enterprise Bargaining: A Review of Member Companies' Experiences with Workplace Change*, AMMA 2006, 11.
[27] Geoff McGill, *Workplaces Beyond Enterprise Bargaining: A Review of Member Companies' Experiences with Workplace Change*, AMMA 2006, 11.
[28] Ibid 15.
[29] Ibid 44.

the merger allowed BHP Iron Ore to seriously analyse the operations of its competitor. The result of this analysis was given detailed attention in the decision of Kenny J in *AWU v BHP Iron Ore Pty Ltd*[30] in which the AWU unsuccessfully claimed that BHP Iron Ore breached the *Workplace Relations Act 1996* (Cth) by introducing AWAs due to union membership or to stop employees being union members. Kenny J discussed in detail, the reasoning and process by which BHP Iron Ore introduced AWAs into its workplace.[31]

BHP Iron Ore was covered by a union collective agreement. It also had in place a plan called Vision 2005, which focused on cultural change and was directed to lowering costs of production while increasing iron ore output.[32] The requirement to become competitive and improve productivity became a pressing consideration due to the merger negotiations with Hamersley Iron and a 10 per cent reduction in the global iron ore price, resulting in an intense focus on how cost efficiencies could be best achieved.[33]

Of particular concern to BHP Iron Ore were the excessive costs associated with its current collective agreement, largely due to the requirement for paid union meetings. This resulted in BHP Iron Ore looking to 'get union representatives back on the job instead of spending large amounts of time on union business.'[34]

As part of BHP Iron Ore and Hamersley Iron Ore's due diligence examinations of each other's operations, it became apparent to BHP Iron Ore that Hamersley Iron Ore was operating 20-30 per cent more efficiently than BHP Iron Ore due to its industrial relations arrangements, namely the use of individual agreements. [35] Of particular importance was Hamersley Iron's ability to implement change quickly, once business and OHS tests were satisfied, something that would take BHP Iron Ore months to do.[36]

Rio Tinto used individual Workplace Agreements (WPAs) under the Western Australian *Workplace Agreements Act 1993* to determine the terms and conditions of employment. WPAs were a form of individual contract between employer and employee that displaced any applicable award or collective instrument. WPAs operated very similarly to AWAs in that they were individual agreements providing for all or some of the rights and obligations and when in force, no award or registered industrial agreement applied.[37]

By utilising individual agreements it was apparent to BHP Iron Ore that employees at Hamersley Iron had a higher commitment to business outcomes and an increased capacity to rapidly respond to changing circumstances, leading to greater productivity. Kenny J stated that while BHP Iron Ore recognised that 'structural issues such as railing distances and ore to waste ratios contributed to the productivity gap between the two companies, it became apparent that the key difference was their relative flexibility in the workplace.'[38] This represented a $51 million gap between the operations at BHP Iron Ore and Hamersley Iron.[39]

Any prospects of reaching a new collective agreement were dropped in favour of individual agreements when it became apparent that BHP Iron Ore and the union were not going to reach a comprise sufficient enough that BHP Iron Ore could meet its increased productivity target. In particular, BHP Iron Ore considered that the collective agreement could not support the introduction of performance based pay.[40] Also at issue for BHP Iron Ore was the current unstable climate employees were working in due to conflicting instructions from the employer and the union and the continued interruptions due to disputes between different unions vying for membership of BHP Iron Ore

[30] (2001) FCA 3.
[31] Kenny J did not purport to express a view on the desirability of individual agreements, but rather relied on the intentions and expectations that BHP Iron Ore had regarding the implementation of individual agreements as to whether they breached the WRA.
[32] Ibid para 86.
[33] Ibid para 88.
[34] Ibid para 90.
[35] Ibid para 95.
[36] Ibid.
[37] AWU v BHP Iron Ore Pty Ltd [2001] FCA 3, para 10.
[38] Ibid para 100.
[39] Ibid para 102.
[40] Ibid para 120-121.

employees. Consequently, BHP Iron Ore introduced individual contracts. In evidence, senior management gave the following reasons for introducing them:

- An increasingly changing world environment needs companies to be able to make change more quickly than in the past. Customer markets can change quickly.
- BHP Iron Ore had been slow to make change. Change was resulting in unions extracting a price for it.
- The workforce needed to be aligned with the business, not the union.
- Employees wanted more control over their earnings/increased earnings.
- Employees wanted to be more accountable for their work performance.
- More money for performance would, over time, focus people on doing the job they do best, better.
- Union agendas were often determined by external career aspirations in the union and state politics.
- Convenors had recently been more interested with their own privileges, that is time off work, meetings and trips away rather than the real issues of their members. This meant that convenors were held in low regard by members.[41]

The individual contracts offered by BHP Iron Ore to its employees provided a significant financial benefit to those employees compared to the collective agreement that applied to the workplace. Benefits included a pay increase, increased superannuation contributions, pay out of accrued sick leave worth an average of $10,000 for each employee, a salary continuance for up to 12 months in the case of illness and a fly-in fly-out clause that was attractive to those workers wanting more time to spend with their families.[42] It was considered that the introduction and operation of individual agreements in BHP Iron Ore would result in a 10-15 per cent increase in productivity and at least a 26-38 cent per tonne cost saving.[43]

The Hammersley BHP Iron Ore comparison is almost a perfect test laboratory to compare the practical benefits of individual employee engagement (Hamersley) compared to having a workforce aligned with an external party whose objectives are at odds with the business. In this case the productivity differential was 20-30 per cent.

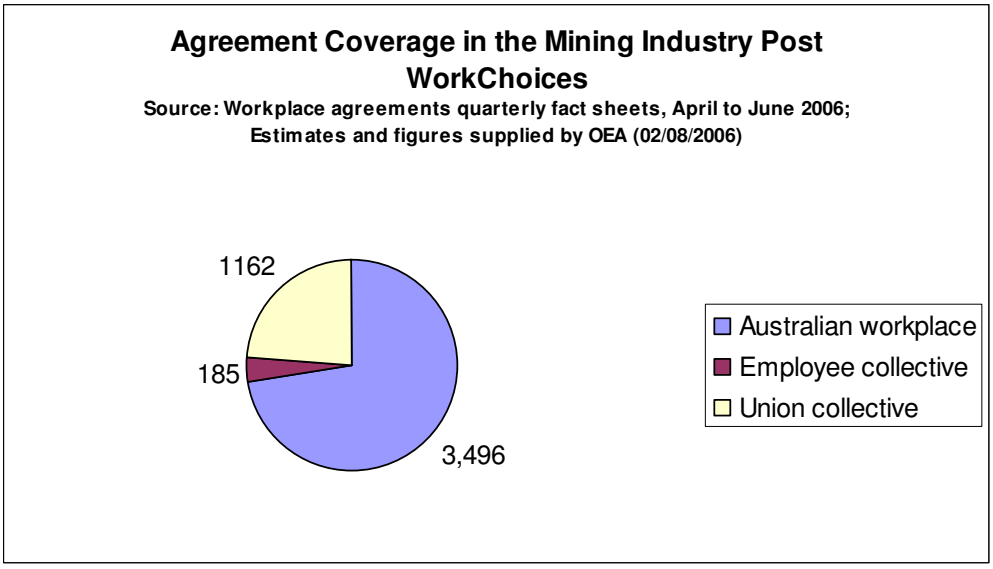
The Importance of Individual Agreements for a Flexible Workplace

Since the passage of the *Workplace Relations Act 1996,* individual contractual arrangements have been made available in the form of Australian Workplace Agreements. Prior to this, collective agreements were the only form of agreement making available to companies that wanted some type of individualised industrial regulation that awards were ill equipped to provide.

Prevalence of Individual Agreements

As at 26 March 2006 (Pre-WorkChoices), 57,627 mining industry employees were covered by formal individual agreements (AWAs)[44] A further 7314 mining industry AWAs have been lodged under the new WorkChoices legislation between 27 March and 31 August 2006.[45] Post WorkChoices, the preference is largely leaning towards Australian Workplace Agreements in the mining industry.

[41] Ibid para 143.
[42] Joel Fetter, *The Strategic Use of Individual Employment Agreements: Three Case Studies*, Working Paper No. 26 Centre for Employment and Labour Relations Law, December 2002.
[43] AWU v BHP Iron Ore [2001] FCA 3 para 155.
[44] Office of the Employment Advocate, Pre-Workchoices Fact Sheets www.oea.gov.au
[45] Office of the Employment Advocate, Workplace Agreement Statistics 1 April 2006 – 30 June 2006 www.oea.gov.au



The resources sector has by necessity been at the front of workplace reform in Australia. Since the 1980s, the AMMA has advocated the use of direct, cooperative and mutually rewarding relationships between employers and employees as the best means of achieving efficient and productive work practices. The non-coal resources sector companies have enthusiastically embraced this approach. By way of example, 62 per cent of all resources sector employees currently covered by a federal agreement are covered by Australian Workplace Agreements. As this figure includes coal mining employees and excludes those providing services to the resources sector, it is estimated that the figure would be closer to 80 per cent Australian Workplace Agreement coverage for other than coal mining employees.

Flexible Arrangements

The use of direct arrangements has enabled companies to implement flexible employment practices, such as multi-skilling, flexible shift arrangements suited to their production activities and performance-linked remuneration arrangements. Flexible shift arrangements are particularly important in relation to fly-in, fly-out sites (FIFO), which use rosters such as 2 weeks on and 2 weeks off, 2 and 1 and 3 and 1 shift rosters. This reflects the unique nature of the industry. Importantly, companies in this industry need to provide rosters that attract and retain high quality employees by ensuring suitable monetary rewards and blocks of time off. These roster arrangements, which are impracticable and unworkable under the rigid award system, have coincided with significant productivity and wage improvements.

Improved Wages

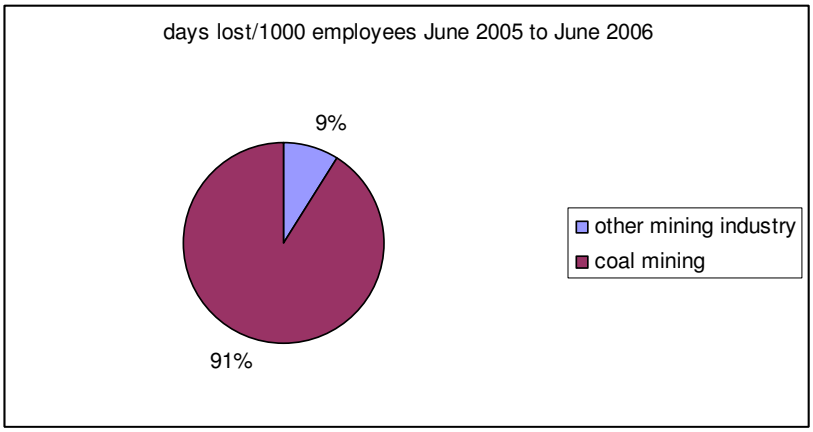
Individual agreements allow the mining industry to directly reward employees. Pay and conditions are well above the other industries. The average weekly adult ordinary time earnings way in the resources sector in the May 2006 quarter was $1682.50, representing a 6.4 per cent increase from the previous year. This is in comparison to the all industries wage of $1041.60 per week and an annual increase of being 3.5 per cent The resources sector pays an average 61 per cent premium compared to all industries. And these are average figures, there are plenty of examples where more is paid.

Decline in lost time due to industrial disputation

Another benefit associated with the use of direct employment arrangements has been the significant improvement in labour relations evidenced by the decline in industrial disputation. The sustained reduction in lost time due to industrial disputation has been supported by the passage of the *Workplace Relations Act 1996* which enabled access to formal direct employment arrangements. This has been further consolidated and improved as a result of the 2006 WorkChoices amendments.

In the non-coal mining industry 11.9 working days per 1000 employees were lost from June 2005 to June 2006, compared to 123.3 in the coal mining industry, which has a greater percentage of union

membership and which primarily uses collective agreements.[46] Disputes in the coal mining industry represent 91 per cent of all days lost in the mining sector.



Relationships between management and employees

In 2000 the Office of the Employment Advocate commissioned Paul Gollan from the London School of Economics to conduct research into the use of AWAs by nearly 700 employers. This included employers in the mining industry, where it was found that the positive contribution of AWAs was highly regarded.

In fact, the mining industry recorded the greatest percentage increase of improvements in management and employee relations, the ability to implement change, workplace profitability, employee commitment and labour productivity of approximately 70 per cent.

A further study of the metalliferous mining industry conducted in 1998 and 1999 (released in 2004) by two Western Australian academics (Moore & Gardner) also came to the conclusion that individual agreements produced significantly improved organisational performance.[47] Surveying human resource managers from approximately 80 mining companies, Moore and Gardner identified that individual workplace agreements were used by these companies for the following reasons:

- greater efficiency and simplification of payroll;
- an opportunity to break down divisions with the organization;
- gave employees an easier to understand and consistent approach to remuneration and job requirements; and
- placed a greater emphasis on a unified approach to company operation and performance.[48]

Importantly, 'most interviewees reported that their organisations were achieving high levels of productivity and had organisational cultures amendable to change.'[49] Moore and Gardner explained the correlation between individual workplace agreements as being:

> 'employees enter into workplace agreements with management free from interference by and conflicting allegiances to third parties (namely, unions); the agreements therefore represent a true '"meeting of the minds", with rights and obligations between the parties in fair balance; with both parties willing participants to the bargain, employees will more readily "march to the beat of the same drum" with management in the enjoyment of their rights and in the commission of their obligations'.[50]

[46] Australian Bureau of Statistics, Industrial Disputes, Australia, Cat No 6321.0.55.001, June quarter 2006
[47] Brad Moore and Scott Gardner, 'HRM in the Australian Metals Mining Sector' (2004) 42(3) *Asia-Pacific Journal of Human Resources* 274, 274-300. WA workplace Agreements were the predominant form of individual agreements in Western Australia at that time.
[48] Ibid 283.
[49] Ibid 296.
[50] Ibid.

A matter of concern for all interviewees however, and which will have only escalated in light of recent announcements of ALP and ACTU policy, is a 'feeling of discomfort' associated with a possible change in government and 'possible return to the pluralism of the 1970s and 1980s.[51]

In 2001 the OEA reviewed individual agreements from the employees perspective. The OEA found that 'AWA employees were more satisfied with levels of communication and information in the workplace, the level of training received and their hours and control over hours than collective employees.'[52] It was also found that 'AWA employees were also more likely to report having an influence over workplace decisions and more positive perceptions of management than employees covered by collective agreements.'[53]

Australian Workplace Agreements – What are they?

Individual agreements are available under the *Workplace Relations Act 1996* (Cth) and are provided in the form of Australian Workplace Agreements. AWAs are individual written agreements which determine the terms and conditions of employment in part of in whole.

The fundamental features of an AWA is that it is:

- a legally binding agreement;
- enforceable in the industrial and federal court;
- allows the parties to determine by consent their employment arrangements in single document that suits their needs subject only to the minimum standards provided in WorkChoices and can replace the regulation provided by awards or collective agreements;
- allows the parties to determine rights of access and/or representation by third parties;
- allows the parties to determine how disputes are resolved and by whom; and
- prevents the taking of industrial action by the parties during the term of the agreement.

Are AWAs Fair to Employees?

An AWA is but one of the agreement making options currently available to employers, employees and unions under the federal system. In many resources sector workplaces collective agreements with unions and with employees are used instead, as they have been considered to be more appropriate to the circumstances of the particular business.

Where an individual company makes the choice to enter into an individual agreement that is reflective of their operational requirements and offers flexibility to both the employer and the employee, there are many checks and balances designed to ensure that the AWA is fair:

- An AWA must meet the Australian Fair Pay and Conditions Standard.
- Genuine informed consent is required.
- Coercion is strictly prohibited. No one can be required or forced to make AWAs or be discriminated against because they have or have not agreed to an AWA.
- A bargaining agent can be appointed and must be recognised.
- It cannot contain prohibited content.
- All AWAs must have a dispute resolution procedure.
- AWAs can only operate for a maximum term of 5 years.
- It is an offence to hinder the negotiation of an AWA and an offence to apply duress or make false statements in relation to the making or operation of an AWA.
- A party to an AWA can seek damages for breach of an AWA.

The Multi Billion Dollar Question

So what would happen if we lost access to AWAs? Using a conservative productivity improvement level of 20-30 per cent, a conservative AWA penetration rate of 30 per cent in the Australian resources sector and recognising that the resources sector will reap about $110 billion in exports, the loss of

[51] Ibid.
[52] OEAs Employee Attitude Survey 2001. This information was provided by Geoffrey Casson, Deputy Employment Advocate, OEA.
[53] Ibid.

productivity that accrues as a result of employee engagement via AWAs could result in a loss of export revenue of between 6.6 billion to 9.9 billion per annum for the resources sector alone.

The ALP has recognised that individual agreements in the form of AWA have had a positive impact in the resources sector. Despite this the ALP has announced that it will kill off AWAs as we know them. Opposition Leader Kim Beazley has said that employers and employees can reach individual common law agreements. [54]

This raises some interesting issues.

Common law contracts (as we know them) cannot:

- over ride union awards or agreements;
- prevent the parties from taking protected industrial action;
- be enforced in the industrial courts;
- restrict union access; or
- prevent a union seeking to impose a collective agreement at the workplace.

Industrial awards, by their very nature as a 'one size fits all' instrument, do not promote flexibility and are often incapable of meeting the requirements of individual businesses. In many awards, before varying the hours of work provisions such as roster patterns, working weekends, starting times and so forth, the union must be consulted even if the workplace is 100 per cent non-union. An employer that does not consult with the union would be in breach of the award and liable to prosecution.

The employer also may be prevented by award provisions that do not allow for annualised salaries or cashing out excess annual leave, or for restricting union entry, even if the employees wanted them to. In addition, common-law agreements do not prohibit the taking of industrial action even in essential service industries or where the commercial nature of the business requires certainty of supply.

Other restrictions to flexibility associated with common law contracts are that they do not allow access for parties to agree to the implementation of facilitative provisions under WorkChoices (for example, meal breaks), do not allow the parties to agree on the different operation of legislated minimum conditions and do not proscribe the conduct of negotiations for collective agreements.

Also of great concern are the ACTU proposals. Clearly the ACTU proposals will turn the clock back to the 1970s and 1980s[55] announced at their Congress in October this year. The ACTU wants to replace basic rights of employers and employees for self determination with powerful new union rights to force union demands on employers.

ACTU Secretary Greg Combet was reported by the *The Australian* on 22nd September 2006 as saying 'under WorkChoices most collective bargaining in Australian workplaces occurs by mutual consent between employers, employees and unions'. Unfortunately the ACTU believes that 'mutual consent' is not good enough for the trade unions that are pushing for compulsory union bargaining.

The ACTU and the ALP have been strongly advocating that WorkChoices does not allow collective bargaining and forces everyone onto individual contracts. Yet the latest statistics highlight that employees and employers are exercising their freedom of choice to enter into the full range of agreements available under WorkChoices, with more than 2000 employee and union collective agreements having been entered into.

Under the ACTU plan if a union knocks on your door and demands a union agreement and the union thinks half your employees back it, you will be forced to negotiate the union demands under threat of arbitration. According to the ACTU plan released in September 2006, it will not even need a majority to force an employer to bargain.[56] An employer who cannot afford to bargain may end up bargaining for their businesses survival.

[54] Stephen Smith MP, Shadow Minister for Industry, Infrastructure and Industrial Relations, 'Collective Bargaining for Higher Productivity' (Press Release, 11 September 2006).
[55] ACTU, A Fair Go at Work: Collective Bargaining for Australian Workers, September 2006.
[56] Ibid.

Australians, including Australian employers, have accepted voluntary unionism, but the ACTU does not seem to accept voluntary bargaining. Forced union bargaining interferes with basic freedoms of choice and ignores modern realities. Only one in ten workplaces have union members. Less than one in five private sector employees are union members. Over one million non-union agreements have been made between employers and employees over the past ten years. More than half a million of those still exist. Yet the ACTU seeks to put its member unions in a dominant position in the workplace. Perhaps this is more about union survival and associated ALP finding than outcomes for employees.

The ALP has also promised to return the Australian Industrial Relations to its former glory. Making it 'much more powerful,' so powerful that it can force employers to agree to things that they do not want by arbitrating and imposing an agreement.

Collective agreement making is supported by employers where three conditions exist: the agreement is freely entered into, it reflects the real interests of the parties, and it is not the exclusive form of employer/employee engagement over wages and working conditions.

Both the ALP's and the ACTU's plans breach these principles. Collective bargaining will be compelled, outcomes will be determined by third parties with little knowledge of or commitment to the business goals, and collective bargaining will override every other form of bargaining including AWAs.

This concept fundamentally distorts the basic freedom to say 'no' to union demands and 'yes' to direct discussion between employers and employees. In contrast, a voluntary system of agreement making is not anti-union; it is pro choice.

The intrusion into basic rights is compounded by the ALP announcement that an employer is also prohibited from reaching an agreement with an employee on terms that differ from the collective agreement.

This is not a flexible option to set aside restrictive work practices or unacceptable conditions in awards or collective agreements. Common law agreements are simply employment contracts requiring award or over award payments and conditions. They are only able to operate if they do not differ from the terms of an award or a collective agreement. Inefficient work practices or unjustified labour costs arising from collective agreements cannot be set aside or varied by common law contracts. This has implications for productivity.

Tearing AWAs up without proving a workable alternative would be the result of ideological overriding pragmatism and reminiscent of a government acting under the undue influence of unions.

There is also another good reason why statutory individual bargaining should be kept as one of the agreement making options even in a unionised business. The fact that an employer or employee can invoke individual bargaining options has an impact on collective agreement negotiations. It makes it more likely that those agreements address the needs of the parties. Abolishing that option would give unions the whip hand in negotiations as few other alternatives would be available.

Past experience suggests that compulsory union bargaining and compulsory arbitration inhibits flexibility, makes it difficult to remove restrictive work practices and raises labour costs. The collective bargaining plans of the ALP and the ACTU will result in the roll back of thirteen years of industrial relations reform started by Paul Keating, not just the past six months of WorkChoices.

The economic and social consequences of workplace reform roll back would be devastating. The last time unions and powerful industrial tribunals were the centrepiece of industrial relations, real wages fell and almost one million Australians lost their jobs because the labour market was not flexible enough to cope with an economic downturn.

After a generation of effort, Australia has an unemployment rate with a '4' in front of it and unheralded prosperity – unthinkable a few years ago – historical low industrial disputation and strong wages growth. Having achieved this, we should do everything to keep it that way. The last thing we should do is tear up the workplace laws that help make it possible, or deny our basic workplace freedoms that now exist.