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WORKPLACE FLEXIBILITY AND INDIVIDUAL AGREEMENTS: A MULTI BILLION DOLLAR QUESTION

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The importance of flexible employment arrangements and employers and employees being engaged and aligned to business outcomes is often discussed. The industrial relations legislative framework where this occurs has been subject to robust debate in recent years. AWAs, WorkChoices, unfair dismissals, High Court Decisions, Award Review Taskforce and so forth are keeping many active in a variety of different ways.

The mining industry directly employs 139,500 employees,[1] plus 558,000 employees are indirectly employed.[2]

The average annual rate of productivity growth since the mid 1980s is 3.3 per cent compared to an all industries average of 1.6 per cent.[3] I am pleased to say that this productivity growth was accompanied by significant improvements to our occupational health and safety record. For example there were 78 LTIFR in 1988, 21 in 1996, 3 in 2005/2006. In summary since the introduction of the Workplace Relations Act in 1996 in the industry there has been a decline in LTFR's of 84 percent.[4]

In 2006-2007 the resources sector will contribute $110 billion to Australia's total commodity export earnings. In the forthcoming year export revenue is expected to exceed $144 billion.[5] This (together with some skill shortages) is no doubt why the average wage in the resources sector is double the Australian average.

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

[1] ABS, Australian Labour Market Statistics, Detailed - Electronic Delivery, (cat. no. 6105.0). November 2006
[2] This is based on a 1:5 ratio
[3] *Australian Bureau of Statistics, Australian National Accounts 2004-05, Cat No 5204.0, 7 November 2005, Table 25*
[4] Minerals Council of Australia, *Australian Minerals Industry Safety Survey Report* , 2nd quarter 2005-06.(December 2005)
[5] Abare, Australian Commodities, December Quarter 2006. www.abareeconomics.com/interactive/ac/_dec06/overview.html

The Australian arbitration system was founded on the 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 bin the Commission found that a 'dispute' existed, using its powers to impose a legally binding award.

This process is known as compulsory arbitration and was the background in which negotiations took place. In this system, the parties knew that they did not have to reach agreement as the Commission would come along and impose one and these only encouraged claims with plenty of ambit. The Commission almost invariably sought to find the middle ground.[6]

This system 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]

Wage increases via national and state wage cases also played the ambit game. The unions would seek a $30 increase; employer organisations would offer $0 and the Commission award $15.

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.'[9]

Inefficient and unproductive enterprises resulted in Australian businesses lacking competitiveness in a globalised world and in part, resulted in the 'recession we had to have'.

[6] Ibid 20
[7] Ibid 22.
[8] Award Review Taskforce, *Final Report: Rationalisation of Wage and Classification Structures,* Australian Government, July 2006.
[8] CCH online, Australian Labour Law Reporter, ¶55-050.

In order to achieve increased productivity and efficiency, in 1991 all the industrial parties and Government determined that an alternative to the centralised system was necessary.

In 1991 the Hawke/Keating Government provided the capacity to make collective agreements with unions to provide for workplace-level flexibility.

In 1993 the capacity to make non-union agreements known as EFAs was introduced. Rio Tinto and Woodside have operations covered by such agreements today.

In 1996 the Howard government introduced individual agreements in the form of Australian Workplace Agreements

The resources sector has been quick to embrace the ability to customise employment relationships.

Pre-WorkChoices

62% of persons engaged under a Federal Agreement were engaged on an individual contract (AWA)
23% were on a union collective agreement and the balance under a non-union collective agreement.

The OEA has reported that, as of March 2006, AWAs regulate the terms and conditions of employment of over 40 per cent of employees in the mining sector[10]. In Western Australia, the concentration of AWAs is reported to be as high as 80 per cent.

Recent statistics[11] suggest that *WorkChoices* has further encouraged the adoption of AWAs. A review of the employees covered by mining sector agreements lodged in the December 2006 quarter reveals that 79% of

[10] 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

employees were covered by AWAs, 83% were covered by a non-union agreement.[12]

Importantly, these agreements allow for outcomes that recognise the individual circumstances of employees and businesses and provide certainty for employers who are otherwise required to observe a 'one size fits all' award system

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 membership has plummeted to 22 per cent of the total workforce in 2006.[13]

In the mining sector, union membership is below the national average. 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; and oil and gas extraction is only 1 per cent.[14]

Until the introduction of *WorkChoices*, the industrial relations system remained focused on unions and their rights despite unions having only 22 per cent coverage of the entire workforce.

In order for the industrial relations system to be relevant to the whole of labour market it is necessary for there to 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 provides a 'reality check' to the parties and ensures that unions are being responsive to the needs of employees and the business.

[11] http://www.oea.gov.au/graphics.asp?showdoc=/news/researchStatistics.asp
[12] ABS, WorkChoices agreements - Employees coverage by Industry – December Quarter 2006
[13] http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/D0C52615006E2F2FCA25713E001838D7/$File/63100_aug%202005.pdf
[14] Australian Bureau of Statistics, Employee Earnings, Benefits and Trade Union Membership, Australia, Cat No. 6310, 28 March 2006 (Table 18).

Given the economic conditions outside of the control of resources sector companies, it is important 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, the management of labour costs is a significant component.

Flexible labour practices and wages linked to employee performance and productivity are vital elements of the sector's employee relations framework

Therefore, the capacity for employers and employees to enter into employment arrangements which are mutually beneficial is fundamental to the success of any industrial relations system.

Employee Engagement

Flexible employment arrangements result in an increase in employee engagement which creates improved business outcomes.[15]

Employee engagement supports productivity and continuous improvement, leading to better staff retention and a commitment to the organisation's success.[16] 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.[17]

With the resource sector facing long-term skill shortages, increased staff retention is a significant factor.[18]

Gallup

[15] Geoff McGill, *Workplaces Beyond Enterprise Bargaining: A Review of Member Companies' Experiences with Workplace Change*, AMMA 2006, 2.
[16] Ibid 9.
[17] Ibid 10.
[15] Ibid 11.

In a survey conducted by the Gallup Organisation it was found that where an organization 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.[19]

Gollan

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.[20] This included employers in the mining industry - where it was found that the positive contribution of AWAs was highly regarded.

Gollan found that the mining industry had recorded the greatest percentage increase in

- improvements in management and employee relations
- the ability to implement change
- workplace profitability
- employee commitment
- and labour productivity of approximately 70 per cent.[21]

Moore and Gardner

[19] Gallup 2005 referred to in Geoff McGill, *Workplaces Beyond Enterprise Bargaining: A Review of Member Companies' Experiences with Workplace Change*, AMMA 2006, 11.
[20] http://www.oea.gov.au/docs/news/senate_submission_050926.pdf
[20] Ibid.

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.[22]

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' …resulting in an alignment between management and employee'.[23]

What can be seen from this research 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**.[24] 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 BHP and Hamersley Iron Ore

The beneficial effects of employee engagement has been made strikingly evident in the case of Hamersley Iron Ore. BHP Iron ore operates the Mount Newman Mine which produces a third of the worlds iron order. Also in the Pilbara region of Western Australia, Rio Tinto operates the Hamersley Iron Ore Mine that contributes another third of the worlds iron ore. The mining

[22] 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.
[23] Ibid.

[24] Ibid 44.

methodology and ore bodies are identical. The difference is in the method of engagement and the influence of the Union.

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 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 Justice Kenny in *AWU v BHP Iron Ore Pty Ltd*[25]

In his decision, Kenny J discussed in detail, the reasoning and process by which BHP Iron Ore introduced AWAs into its workplace.[26]

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.[27]

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.[28] 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.[29]

[25] (2001) FCA 3.
[26] 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.
[27] AWU v BHP Iron Ore Pty Ltd [2001] FCA 3, para 10.
[25] Ibid para 86.

[29] Ibid para 88.

Of particular concern to BHP Iron Ore were the excessive costs associated with their current collective agreement, partly 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.'[30]

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 25-30 per cent more efficiently than BHP Iron Ore due to its industrial relations arrangements, namely the use of individual agreements. [31] 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.[32]

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. Justice Kenny 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.'[33] This represented a $51 million gap between the operations at BHP Iron Ore and Hamersley Iron.[34]

Any prospect 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.[35] Also at issue for BHP Iron Ore was the current

[30] Ibid para 90.
[31] Ibid para 95.
[32] Ibid.
[33] Ibid para 100.
[34] Ibid para 102.
[35] Ibid para 120-121.

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

- 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 has been slow to make change. Change results in unions extracting a price for it.
- The workforce needs to be aligned with the business, not the union.
- Employees want more control over their earnings/increased earnings.
- Employees want to be more accountable for their work performance.
- More money for performance will, over time, focus people on doing the job they do best, better.
- Union agendas are often determined by their own career aspirations in the union and state politics.
- Convenors have recently been more interested with own privileges, i.e. time off work, meetings and trips away rather than the real issues of their members. This has meant that convenors are held in low regard by members.[36]

It was considered that the introduction and operation of individual agreements in BHP Iron Ore would result in a significant increase in productivity and at least a 26-38 cent per tonne cost saving.[37]

[36] Ibid para 143.

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

The resources sector has by necessity been at the front of workplace reform in Australia. Since the 1980s, 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 response by the resources sector to individual agreements is illustrated below.

As I mentioned earlier there is a preference for individual contracts in the resources sector

Individual contracts have facilitated;

- Flexible Arrangements - e.g rosters.

- Improved Wages - In 2006 the average wage for a full time resources sector employee rose from $1380 per week $1684 per week – and increase of 22 percent. This is in comparison to the all industries wage of $1042 per week and last year's increase being 3.5 per cent.[38] The resources sector pays an average 61 per cent premium compared to all industries.

- 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. In the mining industry (excluding coal),

[38] *Australian Bureau of Statistics, Average Weekly Earnings, Australia, Cat No. 6302.0, May quarter 2006, Tables 10, 5,2.*

there were 1190 days lost per 1000 employees in the June and September quarters of 1995 compared to 11.9 days lost in the same period of 2006[39] Compare these results to 123.3 days lost in the coal mining industry, which has a greater percentage of union membership and which primarily utilises collective agreements.[40]

Relationships between management and employees

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.'*[41]

The Multi Billion Dollar Question

So what would happen if we lost access to AWAs?

This is addressed in a paper being released today titled 'AWA's – A Major Matter for Miners' – refer Appendix A

Using a conservative productivity improvement level of 20-30 per cent, an AWA penetration rate of 30 per cent Australia wide and assuming we will export $110 billion of product the loss of productivity which accrues as a result of employee engagement via AWAs could result in a loss of resource sector export revenue in excess of $6 billion per annum

Despite its acknowledgement that individual agreements in the form of AWAs have had a positive impact in the resource sector, the ALP has announced that it will kill off AWAs as we know them and will not replace them with any other form of individual statutory agreement. Yet one million individual AWAs have been made since 1996. Tearing AWAs up without providing a workable alternative would be the result of ideology overriding pragmatism and reflect of Government acting under the undue influence of unions.

[39] Australian Bureau of Statistics, *Industrial Disputes*, September 2006 (6321.0.55.001).table 2b: Industrial disputes which occurred in the period, Working days lost per thousand employees, Industry (other mining)..

[40] Australian Bureau of Statistics, Industrial Disputes, Australia, Cat No 6321.0.55.001, June quarter 2006

Although the ALP is yet to release a detailed industrial relations policy, the ALP has countered criticism of this policy by saying that employers and employees will be able to reach individual common law agreements. [42] This raises some interesting issues. Common Law contracts (as we know them) cannot:

- Override awards or agreements
- Prevent the parties from taking protected industrial action
- Restrict union access
- Prevent a union seeking to impose a collective agreement at the workplace

Fifteen examples of common law contract shortcomings are detailed in Appendix A. A key issue with the ALP's common law ALP proposal is facilitating a union right to be at the terms and conditions negotiating table for both members and non members.

Industrial awards 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 non-union. An employer that did not consult with the union would be in breach of the award and liable to prosecution.

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.

[41] OEAs Employee Attitude Survey 2001. This information was provided by Geoffrey Casson, Deputy Employment Advocate, OEA.
[42] Stephen Smith MP, Shadow Minister for Industry, Infrastructure and Industrial Relations, 'Collective Bargaining for Higher Productivity' (Press Release, 11 September 2006).

Of greater concern are the ACTU proposals[43]. In its report *A Fair Go at Work: Collective Bargaining for Australian Workers* released in September 2006, the ACTU plans to replace basic rights of employers and employees for self determination with powerful new union rights to force union demands on to an employer.

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, it won't even need a majority to force an employer to bargain[44]. An employer who can't afford to bargain will end up bargaining for his businesses survival.

The ALP has also promised to return the Australian Industrial Relations Commission 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.

This would result in increased disputation and employers will be forced into collective agreement making with unions. The ACTU approach is akin to the Model T Ford colour selection brochure i.e. you can have any colour as long as it's black or any agreement as long as it is a union collective.

Past experience suggests that compulsory union bargaining and compulsory arbitration inhibits flexibility. The collective bargaining plans of the ALP and the ACTU will roll back 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 was in the Accord years where real

[43] ACTU, A Fair Go at Work: Collective Bargaining for Australian Workers, September 2006.
[44] Ibid.

wages fell and almost one million Australians lost their jobs because the labour market was not flexible enough to cope with an economic downturn.

It's a choice we can't afford to make.

Australian Workplace Agreements - A Major Matter for Miners

Workplace Policy Division
Australian Mines and Metals Association
22 March 2007
(Updated 11 May 2007)

CONTENTS

EXECUTIVE SUMMARY

The presence of unrelenting international competition requires the Australian resources sector to continually optimise its productivity and efficiency. These improvements have contributed to the achievement of $110 billion in export earnings, increased employee remuneration and improved workplace safety.

Direct individual employment arrangements were introduced into the Australian industrial relations legislative framework over a decade ago. AWAs have been the subject of a misinformation campaign by a variety of interest groups. Despite this AWAs have proven to be popular and highly successful for both employers and employees in the resources sector. For example in Western Australia, AWA penetration in resources sector employers is as high as 80 percent.

The popularity of AWAs is due to their capacity to:

- provide legally enforceable terms and conditions of employment suited to the needs of the employer and employee for a period of up to five years;
- override inflexible, inconsistent or irrelevant terms of awards, collective agreements or state laws;
- ensure the supply of labour and protect against unlawful industrial action
- prevent the involvement of uninvited third parties; and
- be processed rapidly without complex lodgement requirements and formal hearings.

Despite their popularity, AWAs remain the subject of unfair criticism on the basis that they allow for award conditions to be excluded, reduce wages and remove union rights.

Whilst it is true that AWAs are being used to exclude restrictive award practices, this is not a new practice, being a key part of collective agreement negotiations for over a decade. There is no evidence that the remuneration arrangements in the resources sector have resulted in employees being disadvantaged.

In the resources sector AWAs have provided for significant wage improvements with a premium of 30 per cent compared to awards. Statistics published in February 2007 confirm that that the average resource sector wage is now $1713.60 per week, ($89,352 p.a.) this is 62% higher than the all industry average. In the resources sector AWAs have not proved to be a mechanism for a race to the bottom of the wage ladder.

In addition AWAs and the individual relationship that they foster have improved productivity. In 2001 a review comparison of operations of BHP Iron Ore Pty Ltd and Rio Tinto Hamersley Iron Pty Ltd conducted in the late 1990's found that statutory individual agreements at Hamersley facilitated an increased capacity to implement change, improved the focus on business outcomes and improved efficiency by 25 to 30 percent. The majority of BHPIO employees now work under AWAs.

The ALP Industrial Relations Policy approved at the April 2007 National ALP Conference unequivocally abolishes AWAs without provision of any statutory substitute. It also advocates a reinvigorated network of awards and promotes union-based collective agreement making. The ALP suggests that AWAs in the resources sector can be replaced by common law contracts. Nothing could be further from the truth.

The failings of common law contracts include the following:

- they cannot be used override an award or a collective agreement, resulting in employers being subject to prosecution if they customise their work arrangements in a manner inconsistent with an industry award or a collective agreement;
- they do not prevent the unwanted intervention of unions in the employer's business - giving unions to right to enter into a workplace even if there are no union members; and
- they do not prevent unions from coercing employees into taking of industrial action – threatening the viability of major infrastructure projects or provision of essential services.

A common law contract (and the ALP's proposal to allow all current AWAs to be terminated at the employee's option) puts at risk Australia's record low levels of industrial disputation. This presents a sovereign risk to employers and will adversely impact decisions to invest in Australia. Put simply common law contracts don't cut it in the resources sector.

The current Australian resources sector boom has improved living standards for all Australians. The removal of AWAs without a suitable alternative puts at risk years of hard won productivity gains rising from the introduction of flexible work practises and removal of inflexible union award provisions, the reductions in industrial disputation and the removal of union agendas from the workplace. The removal of AWAs is not a minor matter; it's a roll back we can't afford to make.

INTRODUCTION

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.

AMMA member companies operate in the following industry categories:

- Exploration for minerals and hydrocarbons:
- Metaliferous mining, refining and smelting:
- Non-metallic mining and processing:
- Coal mining:
- Hydrocarbons production (liquid and gaseous): and
- Associated services such as:
    - Construction and maintenance
    - Diving
    - Transport
    - Support and seismic vessels
    - General aviation (helicopters)
    - Catering
    - Bulk handling of shipping cargo

The resources sector is a significant contributor to the national economy by way of mining exports and underpinning critical supply and demand relationships with the Australian manufacturing, construction, banking and financial, process engineering, property and transport sectors.

The resources sector will contribute minerals and energy exports in the order of $110 billion in 2006-07.[45] This represents approximately 38 percent of Australia's total commodity export earnings.[46]

The mining industry directly employs over 139,600 employees.[47] It is estimated that in excess of 558,000 persons are indirectly employed as a result of mining sector operations.[48] The coal industry continues to be heavily unionised with 66 percent of employees being members of a union. In the hard rock sector the level of union membership is 11 percent.[49] This is significantly lower than the average level of unionisation in the private sector of 15 percent.[50]

[45] ABARE, Australian Commodities, December Quarter 2006. www.abareeconomics.com/interactive/ac/_dec06/overview.html
[46] Ibid.
[47] ABS, Australian Labour Market Statistics, Detailed - Electronic Delivery, (Cat. no. 6105.0). November 2006
[48] Based on a 1:5 ratio.
[49] Australian Bureau of Statistics, *Employee Earnings, Benefits and Trade Union Membership*, March 2006, (6310.0)
[50] Australian Bureau of Statistics 2006 *Employee earnings, Benefits and Trade Union Membership*, January 2007 (6310.0) ABS, Canberra.

Statutory individual contracts in the form of Australian Workplace Agreements (AWAs) were introduced by the *Workplace Relations Act 1996* (Cth). AWAs give an employer and employee the capacity to enter into binding individual employment arrangements that take precedence over awards and collective agreements without the uninvited involvement of third parties. The resources sector has long advocated access to individual arrangements and has been an early adopter of AWAs.

At a state level, in Western Australia, the resources sector extensively used individual workplace agreements (WPAs) available under the *Workplace Agreements Act 1993* (WA). By the time they were abolished in 2002 approximately 85 percent of employees in the Western Australian resources sector were covered by WPAs.[51]

When the incoming state Labor government abolished WPAs, the resources sector employees and employers converted their state WPAs into federal AWAs. Thus, should federal AWAs be abolished, there are no other suitable statutory individual contract streams in Australia available to employers and employees.

When all types of individual arrangements[52] are considered, 58 percent of all resources sector employees have their wages set by an individual agreement.[53] Of these individual employment arrangements, 37.2 percent of the entire resources sector (including coal) is employed under an AWA.[54] AWAs are also the most popular choice of federal agreement with 62 percent of all resources sector employees who are covered by a federal agreement employed under an AWA (this figure is in the order of 80 percent in metaliferous mining in Western Australia).[55]

Whilst it is too early to state conclusively, early indications are that the number of AWAs lodged per quarter has increased significantly.[56] What can be concluded from this is that individual employment arrangements are the preferred method of employment regulation in the mining industry and AWAs are the most prevalent statutory industrial arrangement.

This paper will outline the historical events and industrial practices that led to the introduction of AWAs into the *Workplace Relations Act 1996* (Cth) and will demonstrate why retention of a statutory individual agreement mechanism such as the current AWA is important to the continued success of the resources sector.

STATUTORY AGREEMENT MAKING – A BRIEF HISTORY

[51] AMMA and the Chamber of Minerals and Energy of WA, *WA Minerals Industry Employee Relations Profile*, April 2004.
[52] Including common law arrangements
[53] Australian Bureau of Statistics, *Employee earnings and hours survey,* May 2004, (6306.0).
[54] Office of the Employment Advocate, *Workplace agreements quarterly fact sheets*, October to December 2006; Additional Estimates and figures supplied by OEA (08/05/2007)
[55] Ibid.
[56] Office of the Employment advocate, *Workplace agreements quarterly fact sheets* http://www.oea.gov.au/graphics.asp?showdoc=/news/researchStatistics.asp. A comparison of the September 2005 quarter with the September 2006 quarter reveals an 47% increase in the number of lodgments, in the December quarter of 2006 there was a 85% increase in lodgments compared to the 2005 December quarter.

The pre-WorkChoices Australian arbitration system was founded on the 1904 practice of creating artificial paper disputes. The union served a log of claims for $10,000 wages per week to all mining employers listed in the Australian Stock Exchange and the employer 'rejected' the claims by throwing the claim in the waste paper basket. The union then lodged proceedings and some time later (by which time the employer has forgotten about the demand letter they had thrown away) the Australian Industrial Relations Commission (the Commission) found that a 'dispute' existed and used its powers to impose a legally binding award on the parties.[57]

This process of compulsory arbitration was the background in which negotiations were taking place. In this system, the parties knew that they did not have to reach agreement as the Commission would eventually impose one. The process encouraged ambit claims and the Commission almost invariably sought to find the middle ground.[58]

This process has resulted in a complex network of federal and state awards.[59] The September 2006 Award Review Taskforce report found over 4000 awards in existence containing 105,235 employee classifications across Australia.[60] Most awards were subject to annual variation arising from a protracted National Wage Case and flow-on applications in the states, together with a range of test cases on hours of work, leave, allowances and obligations on termination.[61] As a result, the award system was largely industry or craft based with minimal recognition of enterprise circumstances or needs.[62]

This centralised wage fixation and compulsory conciliation and arbitration system was seen as a 'major impediment to the achievement of more efficient and productive enterprises'.[63] Restrained by fixed wages and conditions of employment contained in awards, enterprise specific bargaining was severely limited (despite being able to negotiate over award payments) due to the inability to provide protection by way of enforceability and flexibility of enterprise negotiated outcomes.[64]

Finally, the industrial parties demanded an alternative to the centralised system in order to achieve increased productivity and efficiency.[65] In 1988 section 155 of the *Industrial Relations Act 1988* (Cth) gave the Commission the capacity to certify an agreement between a union and an employer. The agreement could have an outcome that was inconsistent with the national wage fixing principles, provided the Commission agreed that it was in the public interest. [66] The exercise of the Commission's discretion in determining what was in the public interest resulted in minimal use of this provision.

In 1992, the agreement making provisions in the *Industrial Relations Act 1988* (Cth) were amended to require the Commission to certify an agreement between a

[57] Breen Creighton and Andrew Stewart, *Australian Labour Law* (4th ed, 2005) 21.
[58] Ibid 20
[59] Ibid 22.
[60] Award Review Taskforce, *Final Report: Rationalisation of Wage and Classification Structures*, Australian Government, July 2006.
[61] Creighton and Stewart, above n6, 22.
[62] Ibid 24.
[63] CCH online, Australian Labour Law Reporter, ¶55-050.
[64] Ibid.
[65] Ibid.
[66] *Industrial Relations Act 1988* (Cth) s 115

union and the employer provided that it met the requirements contained in section 134E, which included a 'no disadvantage test.' This test involved a global comparison against the applicable award.[67]

In April 1993 the then Prime Minister Paul Keating outlined a new model of agreement making. He said,

[L]et me describe the model of industrial relations we are working toward. It is a model which places primary emphasis on bargaining at the workplace level within a framework of minimum standards provided by arbitral tribunals. It is a model under which compulsorily arbitrated awards and arbitrated wage increases would only be there as a safety net. [68]

Subsequently, the *Industrial Relations Act 1988* (Cth) was amended by the *Industrial Relations Reform Act 1993* (Cth) to allow employees to bargain directly with employers and enter into enterprise flexibility agreements (EFAs) without the involvement of unions. EFAs were not numerically popular. This may have been a result of the requirement on the employer to advise the relevant union secretary that it intended to negotiate a non-union agreement.

Further deregulation occurred with the election of the Howard government in 1996 and the introduction of *Workplace Relations Act 1996* (Cth). The Howard government's reforms provided a range of collective agreements: union certified agreements (including Greenfield agreements) and non-union certified agreements (but without some of the procedural requirements of the EFAs). The *Workplace Relations Act 1996* (Cth) also introduced Australia's first federal statutory individual agreement – the AWA. These arrangements were designed to 'allow employers and employees to reach their own agreements at the enterprise level.'[69]

WORKCHOICES REFORMS

The next significant industrial reforms occurred in March 2006 with the implementation of the WorkChoices amendments to the *Workplace Relations Act 1996* (Cth).

The WorkChoices legislation made the following changes to agreement making:

- The waiting period before an agreement can be made was reduced to 7 days and in some circumstances the period can be waived;

- The previous award based 'no disadvantage test' was replaced by a test against the statutory Australian Fair Pay and Conditions Standard (the standard). The standard comprises five legislated minimum conditions: basic periodic rate of pay and casual loadings, maximum hours of work, annual leave, personal leave and parental leave.[70] These entitlements cannot be reduced or varied by the parties even if they are in agreement[71] and any attempt to exclude the standard is

[67] *Industrial relations Act 1988* (Cth) s134E
[68] Paul Keating, Speech to the Institute of Company Directors, April 1993.
[69] Parliamentary Library of Australia, Workplace Relations and other Legislation Amendment Bill 1996, Bills Digest No14, 1997-1998, Commonwealth of Australia.
[70] *Workplace Relations Act 1996* (Cth) Part 7.
[71] *Workplace Relations Act 1996* (Cth) s 173

deemed to be of no effect.[72] This new test has reduced the transactional cost of agreement making particularly for employers who work across multiple jurisdictions;

- Employees who have the benefit of protected award conditions[73] retain that benefit unless they expressly exclude or modify those conditions in a workplace agreement;[74]

- Workplace agreements are no longer processed by the Commission (a process which was a *fait a compli* if the requirements were met) but by the Office of the Employment Advocate, an independent Commonwealth agency; [75]

- The employer is responsible for lodging the agreement with the Office of the Employment Advocate and ensuring that the agreement meets the minimum standards.[76] The employer is also responsible for ensuring that the agreement does not contain matters which are prohibited;[77]

- The agreement commences from the time of lodgement and in some cases can operate for up to 5 years.

On 4 May 2007 the Government announced that it would introduce a 'fairness test' for agreements which covered employees who were subject to an industrial award and earned less than $75,000 per annum.

This fairness test operates in conjunction with the WorkChoices legislated minimum standards and is intended to ensure that the award provisions concerning penalty rates, shift and overtime loadings, monetary allowances, annual leave loadings, public holidays, rest breaks and incentive based payments and bonuses cannot be traded away to the detriment of the employee.

The fairness test recognises cash and non-cash benefits provided by the employer in determining whether the remuneration arrangements in the new agreement (as a whole) meets or exceeds the benefits provided by the protected conditions in the award. The new fairness test is similar to the pre-WorkChoices 'no disadvantage test'

Whilst the new test creates an additional transaction cost for agreements covering award covered employees paid less that $75,000 per annum, it will have minimal impact in the mining industry where the average wage is $89,352 per annum. Resources sector employees are paid on average 30 percent more than the award rate[78] and 62% greater than the all industry average wage.

[72] Ibid.
[73] *Workplace Relations Act 1996* (Cth) s 354 (4). These protected award conditions include: rest breaks, incentive based payments and bonuses, annual leave loadings, monetary allowances, penalty rates, overtime loadings and outworker conditions.
[74] Ibid.
[75] *Workplace Relations Act 1996* (Cth) s 342
[76] *Workplace Relations Act 1996* (Cth) Part 8 Division 5.
[77] *Workplace Relations Act 1996* (Cth) s 357.
[78] Australian Bureau of Statistics, *Employee Earnings and Hours Survey*, May 2004 (6306.0).

Other safeguards are also in place when entering into an AWA:

- Genuine informed consent is required; an employee must have ready access to the AWA and be provided with an employee information statement at least seven days before the AWA is approved, unless this requirement is waived in writing;[79]

- All AWAs must be lodged with an independent body, the Office of the Employment Advocate, before they have legal effect;

- Any coercion is unlawful. No one can be required or forced to make AWAs or be discriminated against because they have or have not agreed to an AWA;[80]

- All AWAs must have a dispute resolution procedure;[81]

- AWAs have a maximum duration of 5 years;[82]

- It is an offence to hinder the negotiation of an AWA and to apply duress or make false statements in relation to the making or operation of an AWA;[83] and

- A party to an AWA can seek damages for breach and can seek injunctions to prevent further contravention. [84]

Some commentators have complained that a large number of AWAs have removed award conditions.[85] The capacity for agreements (both AWAs and collective agreements) to exclude awards is not a new feature having been introduced by the Keating Government when workplace bargaining was first introduced in 1992. In 1991 ACTU Secretary Bill Kelty contended that the imposition of award conditions reduced employees' capacity, confidence and willingness to contribute towards improving the workplace.[86] The AWA provides a mechanism to move away from the one size fits all award system and engage employees with the workplace. No genuine commentator could seriously be concerned by this practice.

What has changed since 1996 is the style of agreement making; initially, most agreements were read in conjunction with an award and focussed on increases in remuneration. However, in recent years a trend has emerged towards 'composite agreements' that contain all of the conditions of employment in a single document.

[79] *Workplace Relations Act 1996* (Cth) s 338
[80] *Workplace Relations Act 1996* (Cth) s 400
[81] *Workplace Relations Act 1996* (Cth) s 353
[82] *Workplace Relations Act 1996* (Cth) s 352
[83] *Workplace Relations Act 1996* (Cth) s 401
[84] *Workplace Relations Act 1996* (Cth) Part 14 (compliance)
[85] David Peetz, 'Brave New Work Choices: What is the Story so Far?' paper presented to Diverging Employment Relations in Australia and New Zealand?, 24th conference of the Association of Industrial Relations Academics of Australia and New Zealand, Auckland, NZ, 9 February 2007, p5.
[86] Bill Kelty, ACTU Secretary, 'Together for tomorrow', in Together for Tomorrow: recognising change, repositioning the union movement, rethinking unions, recruiting new members, ACTU Congress, September 9-13 1991, ACTU, Melbourne, 1991, p.1.

Rather than replicate a large number of (sometimes irrelevant) award conditions, many employers have chosen to start with a 'clean sheet of paper' by expressly excluding the terms of any pre-existing industrial instrument.

That is not to say that the workplace agreement will provide for terms and conditions that are globally less than the previous industrial instrument. The WorkChoices reforms have not had the effect of reducing wages as is demonstrated by the average wage levels in the resources sector; however where award provisions are inconsistent with the hours of work roster (such as fly-in fly-out operations) the award provisions must be overridden in order to meet the operational needs of the business.

Commentators also complain that AWAs do not provide for wage improvements during their term. This belief could be based in the misunderstanding that the wage rates contained in an AWA are always the actual rates paid. Many resources sector employers pay rates in excess of those detailed in the AWA. In some cases remuneration levels in agreements are pitched at the new employee on their first day of employment and do not reflect additional remuneration. Performance-based reviews are not uncommon and regular market-based reviews have become a feature as a result of the high demand for skills.

Many AWAs specifically provide for annual or other periodic reviews without specifying a fixed quantum. The growth of remuneration in the mining industry demonstrates that employees in this sector have been significantly advantaged by this process.

IMPACT OF THE WORKCHOICES AMENDMENTS ON AWAS

The reduced complexity in processing AWAs has resulted in lower agreement transaction costs for employers. As a result it is not surprising that since the WorkChoices amendments AWAs have increased in popularity. This is illustrated by the steady increase in the number of AWA lodgements since WorkChoices was introduced. In the September 2006 quarter 76,161 AWAs were lodged: this was a 47 per cent increase in lodgements compared to the same quarter in 2005. In the last quarter of 2006, 94,403 AWAs were lodged, being an increase of 85 percent compared to the corresponding 2005 quarter.[87]

This increasing popularity could also be attributed to the benefits associated with the interaction of AWAs with other industrial instruments. Prior to WorkChoices, complex rules existed which governed the relationship between AWAs and collective agreements. This was simplified by WorkChoices, and AWAs now override any collective agreement, giving employees and employers further opportunity to increase workplace flexibility.[88] This feature also allows an employer to accommodate the needs of an individual employee that cannot be met under a collective agreement applying to the balance of the workforce.

When an AWA is in operation, an award has no effect in relation to the employee.[89] The capacity to override other industrial instruments, and thus provide a mechanism to

[87] Office of the Employment Advocate, Workplace Agreement Statistics, December Quarter 2006, Canberra. http://www.oea.gov.au/graphics.asp?showdoc=/news/researchStatistics.asp
[88] *Workplace Relations Act 1996* (Cth) s 348 and s 349.
[89] *Workplace Relations Act 1996* (Cth) s 349.

customise the working arrangements to suit the needs of the employer and the employee, is an important feature of an AWA. AWAs also remove the capacity for uninvited third parties to involve themselves in the workplace, as many award provisions provided rights to unions who were a stranger to the employment contract. The removal of these provisions means that a union can no longer force themselves upon the workforce as they could under the compulsory conciliation and arbitration system pre-1996. In addition a union does not have an automatic right to enter the workplace where all employees are covered by an AWA.[90] This removes the potential for distraction by a union that may have previously sought to exercise a right of entry for recruitment or political purposes.

Prior to WorkChoices a union which had a single member covered by a collective non-union agreement could, at any time before the agreement was registered, seek to intervene and become party to the agreement.[91] This provision was removed in the WorkChoices amendments and where an employee is covered by an AWA only the direct parties and their appointed bargaining agents have representative rights.[92]

AWAs also have an indirect impact on collective agreement making. An employer's capacity to access an alternative arrangement which does not involve a union (AWAs) has the effect of moderating extreme union positions. In this sense the success of AWAs should not be solely measured by their number in the same way as the success of sections 45D & E of the *Trade Practices Act* (Cth) should not be measured in successful court actions.

THE BENEFITS OF STATUTORY INDIVIDUAL AGREEMENTS – A CASE STUDY

Some of the benefits of direct relationships and reduced third party involvement were identified in a due diligence review undertaken by BHP Iron Ore Pty Ltd (BHPIO) and Hamersley Iron Pty Ltd (Hamersley). The findings of the due diligence exercise were discussed by the Federal Court in the matter of *AWU v BHP Iron Ore Pty Ltd*.[93]

BHPIO operates the Mount Newman Mine which produces a third of the world's iron ore. Their neighbour is Rio Tinto, which operates the Hamersley mine that contributes another third of the world's iron ore. The mining methodology and ore bodies are the same.

In the 2001 *AWU v BHP Iron Ore Pty Ltd* decision, Justice Kenny discussed in detail the reasoning why BHPIO introduced AWAs into its workplace.[94]

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[90] See *Workplace Relations Act 1996* (Cth) s 747 re right to enter to investigate suspected breach only if the employee covered by an AWA makes a written request; s 760 re right to enter only for discussion purposes if covered by an award or collective agreement.
[91] *Workplace Relations Act 1996* s 170M(3)
[92] *Workplace Relations Act 1996*, s 334; s 760
[93] [2001] FCA 3.
[94] *AWU v BHP Iron Ore Pty Ltd* [2001] FCA 3. 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 *Workplace Relations Act 1996* (Cth).

Rio Tinto used individual Workplace Agreements (WPAs) under the Western Australian *Workplace Agreements Act 1993* (WA) to determine the terms and conditions of employment. WPAs were a form of individual contract between the 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 instrument applied.[95]

BHPIO was covered by a collective agreement. It also had in place a plan called 'Vision 2005', which focussed on cultural change and was directed at lowering costs of production while increasing iron ore output.[96] The requirement to become competitive and improve productivity became a pressing consideration due to the merger negotiations with Hamersley and a 10 percent reduction in the global iron ore price.[97]

Of particular concern to BHPIO were the excessive costs associated with its current collective agreement and this included the requirement for paid union meetings and excessive transaction costs associated with changing shift rosters. This resulted in BHPIO looking to 'get union representatives back on the job instead of spending large amounts of time on union business.'[98]

During the due diligence exercise, it became apparent that Hamersley operations were 25-30 percent more efficient than BHPIO due to its industrial relations arrangements, namely the use of individual agreements.[99] Of particular importance was Hamersley's ability to implement change quickly, once business and occupational health and safety tests were satisfied. This was something that BHPIO took months to do.

Justice Kenny found that while BHPIO 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.'[100] This represented a $51 million gap between the two operations.[101]

As a result of these findings, BHPIO considered that by bargaining with the union, a sufficient compromise could not be reached that would ensure it met its increased productivity target. Also at issue 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 demarcation disputes between unions vying for membership.

BHPIO introduced statutory individual contracts. In evidence, senior management gave the following reasons for introducing them: [102]

[95] *AWU v BHP Iron Ore Pty Ltd* [2001] FCA 3, para 10.
[96] Ibid para 86.
[97] Ibid para 88.
[98] Ibid para 90.
[99] Ibid para 95.
[100] Ibid para 100.
[101] Ibid para 102.
[102] Ibid para 143.

- The increasing speed at which customer markets could change meant that companies needed to be able to make change more quickly than in the past. Customer markets could change quickly;
- BHPIO had been slow to make change. Change resulted 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 and potential 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 a union official's career aspirations in the union and state politics; and
- Union convenors had been more interested with their own privileges, such as time off work, meetings and trips away rather than the real issues of their members. This has meant that convenors were held in low regard by employee members.

It was considered that the introduction and operation of individual agreements in BHPIO would result in a 10-15 percent increase in productivity and at least a 26-38 percent per tonne cost saving.[103] This allowed BHPIO to offer increased remuneration benefits to employees in return for their commitment and hard work. Removing intrusive third party involvement in the workplace has a role in ensuring employees remain engaged and aligned with the needs of the business.

Therefore, the potential benefits offered by an AWA to both an employer and its employees should not be lightly discounted. The ability to choose the type of employment regulation required for the business should not be undervalued as a means to maintain a harmonious working environment. However, it is acknowledged that employee engagement does not arise solely due to the operation of AWAs in the workplace. 'If a business is not engaging its people, workplace reform will not improve performance,'[104] meaning that it is up to the business to lead its people to ensure they remain engaged. Individual employment arrangements facilitate the broader engagement between an employer and employee that leads to improvements in methods of doing work, increased productivity and improved employee satisfaction.

Employee engagement is more achievable where the workplace relations regulatory structure facilitates good working relationships between the leadership and the employees. By limiting uninvited third party involvement in the workplace, AWAs have increased the ability for employers and employees to have direct interaction. This has been a positive experience for Rio Tinto, which has attributed its success to 'direct interaction…with committed, engaged employees,'[105] after rejecting the involvement of unions, who 'had a standard industry plan for how the plant should be manned and run'.[106]

[103] *AWU v BHP Iron Ore* [2001] FCA 3 para 155.
[104] Oscar Groeneveld, 'Leadership in the mining industry: The value of employee engagement; paper presented to the AMMA National Conference, *The Bygone and the Brand New: The changing face of employee relations*, 16-17 March 2006 – Launceston Tasmania.
[105] Ibid.
[106] Ibid.

The drive for productivity improvement through AWAs has not resulted in unsafe workplaces. Access to AWAs has been accompanied by improvements in safety. Since 1996 there has been a decline in lost time injury frequency rates of 84 percent.[107]

The introduction of AWAs and consequential reduced union involvement has also been accompanied by reduced industrial disputation. The data shows that since the introduction of direct employee arrangements the number of working days lost per year in Australian workplaces, while fluctuating, has decreased significantly over the last decade,[108] to just 8.9 working days lost per 1000 working Australians in 2006 (to the September quarter only).[109] In the mining industry (excluding coal), there were 1190 days lost per 1000 employees in the June and September quarters of 1995 compared to 11.9 days lost in the same period of 2006.[110]

[107] Minerals Council of Australia, *Australian Minerals Industry Safety Survey Report* , 2nd quarter 2005-06.(December 2005)
[108] Australian Bureau of Statistics, *Year Book Australia 2007*, ABS, 185.
[109] Australian Bureau of Statistics, *Industrial Disputes*, September 2006 (6321.0.55.001). table 2b: Industrial disputes which occurred in the period, Working days lost per thousand employees, Industry (all industries figure). In 1996 131.5 working days per 1000 employees were lost.
[110] Australian Bureau of Statistics, *Industrial Disputes*, September 2006 (6321.0.55.001).table 2b: Industrial disputes which occurred in the period, Working days lost per thousand employees, Industry (other mining)..

THE KEY FEATURES OF AN INDIVIDUAL AGREEMENT

The key features of a resources sector individual agreement are as follows:

1. The ability to provide for enforceable terms and conditions specific to the employees' and employers' needs and to override inconsistent terms and conditions contained in any other applicable award, agreement or state industrial law;
2. The content of the agreement must be assessed against clearly defined minimum standards with the ability to agree on their operation;
3. Protection from industrial action during the life of the agreement to ensure continuity of supply of labour;
4. A duration of up to 5 years to allow major construction projects to be entered into with certainty of industrial arrangements;
5. No uninvited intervention by a third party; and
6. A simple low cost administrative method of lodging the agreement.

These key features have underpinned the use of AWAs in the resources sector for both employers and their employees. Remuneration for resources sector employees is well above the national average and significantly above award rates; the resources sector workplace is experiencing its lowest disputation levels in history and export earnings from the mining industry are continuing to rise. AWAs are a success by any measure.

Therefore, it is important that the current industrial arrangements continue and the individual agreements which meet these key features remain readily accessible to the employers and employees in the resources sector.

WORKPLACE RELATIONS POLICIES OF POLITICAL PARTIES

The ALP has long held the position that it will abolish AWAs when elected, with Kim Beazley making this promise in 2001.[111] Mark Latham similarly pledged removing AWAs in 2004[112] and this position was endorsed again by Kim Beazley in 2005.[113] In 2006, the Rudd/Gillard leadership team has again reiterated the promise to 'rip up' WorkChoices and abolish AWAs. [114] Ms Gillard states:

> [a]ll of the industrial relations commitments that have been given by the Federal Labor to date stand.…[i]ncluding the commitment to get rid of Australian Workplace Agreements.[115]

[111] Workplace Info, '*Beazley, I won't be lagging on IR*,' 5 July 2001.
[112] Mark Latham, 'Opportunity for All', Speech to the ALP National Conference 29 January 2004, Sydney.
[113] Kim Beazley, press conference held by the Leader of the Opposition, Kim Beazley, and the Shadow Minister for Industry, Infrastructre and Industrial Relations, Stephen Smith, 10 October 2005.
[114] Julia Gillard, 'Statement on Shadow Ministry,' (Portfolio News: Australian Labor Party, 10 December 2006) http://www.juliagillard.alp.org.au/news/1206/mediaportfolionews/0-01.php at 5 February 2007.
[115] Julia Gillard, 'Doorstop Interview Transcript: Casuarina,' (Portfolio News: Australian Labor Party, 12 December 2006) http://www.juliagillard.alp.org.au/news/1206/mediaportfolionews/2-03.php at 5 February 2007.

The ALP industrial relations platform Forward with Fairness[116] was approved by the ALP National Conference in April 2007. The ALP industrial relations platform outlines the following principles with respect to agreement making:[117]

- The abolition of AWAs and confirmation that the new ALP system will not provide for statutory individual employment arrangements;
- An expanded safety net of 10 legislated minimum conditions with 'decent' minimum together with the protection of 10 core conditions contained awards;
- Provision of a right to bargain collectively for wages and conditions, including protecting and enhancing the role of unions and their right to bargain collectively. This will be promoted through a stream of workplace and enterprise agreements negotiated with unions or employees;
- The abolition of the Australian Industrial Relations Commission and the creation of a new umpire Fair Work Australia to settle disputes and ensure and enforce wages and conditions.; and
- All agreements to be subject to a new global no disadvantage test.

As the policy details currently stand, they are reflective of proposals put forward by the ACTU in its Industrial Relations Policy at the 2006 ACTU Congress, although it is acknowledged that further detail of a number of ALP policy areas including compliance and right of entry, and transitional provisions is yet to be provided.

The Australian Democrats do not go so far as to undertake to abolish AWAs. In a press release on 5 October 2006, Senator Andrew Bartlett stated that the ALP's pledge to 'rip up' AWAs 'provides no guarantee that some workers won't be worse off' and 'plays to a vision of all workers being forced onto collective agreements regardless of the situation.'[118] Importantly, the Democrats recognise the need to have a 'mix of industrial instruments' and the existence of individual agreements as a method for providing workplace flexibility. [119]

The industrial relations policies of the Australian Greens were not available at the time of writing this paper.

THE IMPACT OF ABOLISHING AWAS

The ALP is yet to release details of the transitional arrangements for the 51,800 resources sector workers covered by AWAs.[120] It originally appeared that this policy may

[116] < http://www.alp.org.au/download/fwf_finala.pdf > (11 May 2007)
[117] Australian Labor Party, Draft ALP Platform – Industrial Relations. Samantha Malden, Labor to protect 38 hour week, *The Australian*, 4 January 2007; Julia Gillard, Panel Discussion on Channel Nine Today Show, 2 February 2007; Leader of the Opposition The Hon Kim C Beazley MP, Labor's plan for industrial relations reform: an agenda for productivity and participation, Speech delivered to the IQPC Industrial Relations Summit 2006 Sydney, 20 November 2006
[118] Senator Andrew Bartlett, 'Howard and Beazley Both Denying Real Workplace Choice,' Australian Democrats Press Releases, 5 October 2006. http://www.democrats.org.au/news/index.htm?press_id=5417&display=1
[119] Ibid.
[120] Australian Broadcasting Corporation, *Insider*: 'Gillard reaffirms Oppositions' plan to dump WorkChoices Act', (11/02/07) ABC. http://www.abc.net.au/insiders/content/2007/s1844979.htm

give all employees who have entered into a legally binding AWA an unfettered right to terminate the AWA.

Apart from the administrative burden that this would create, it is contrary to the concept of once having made a legally binding contract it should only be varied by consent during its term. The effect of re-opening the negotiation of these agreements will increase the likelihood of involvement of uninvited unions and thus industrial disputation, with the ALP transitional arrangements providing parties with an opportunity to recant on their previous agreement under the guise of deciding if they wish to continue with the AWA.

Depending on the circumstances, employers and employees could be disadvantaged by the process (that is, key conditions may be lost)[121] and the resultant change of focus will not assist the industry contribution towards exports earnings. Employers who have made investment decisions based on AWAs that provide certainty and known labour arrangements and wages will be exposed to change.

AMMA contends that this would be an untenable situation and would pose a sovereign risk issue if the ground rules for engagement were to change while the agreements were still operating.

In May 2007, media reports indicated that the ALP was considering allowing AWAs with remuneration levels above a certain amount to continue until their termination. This position should however be considered in the light that new employees (and thus new projects) would not have access to AWAs under this model. Anecdotally the rate of employee turnover in the resources sector in WA is reported to be as high as 20% per annum, no doubt in part due to the buoyancy of the employment market in the resources sector.

[121] For example, a pre-WorkChoices AWA that completely cashed out annual leave and paid a higher salary in lieu because the employee worked on a two week on and two week off roster could be lost.

IN THE ABSENCE OF AWAs - WHAT ALTERNATIVES EXIST?

Currently there only appears to be one option put forward by the ALP: that employers and employees are to rely on common law contracts of employment in place of an AWA.

In respect to common law contracts of employment, Julia Gillard, Shadow Minister for Employment and Industrial Relations has stated that:

> Obviously you can ensure through common law contracts there is space for people to agree on conditions that are above and beyond and different to what is in an award or collective agreement. We will not have an AWA or anything like AWAs. But within the ambit of people's common law contract of employment, particularly for people in upper income brackets, you can have flexibility.[122]

An employer and employee cannot contract out of an award or collective agreement no matter how much they may wish to do so. This is due to a number of serious shortcomings associated with the use of common law contracts of employment in a system underpinned by awards. For example, common law contracts of employment

1. cannot be used to override terms of a collective workplace agreement;
2. cannot be used to override terms and conditions of employment contained in a Federal award;
3. cannot be used to override terms and conditions of employment contained in a NAPSA;
4. cannot be used to override terms and conditions of employment contained in a pre-reform Federal agreement;
5. cannot be used to override terms and conditions of employment contained in a pre-reform State Agreement;
6. cannot displace conditions of employment contained in a Commonwealth law that is prescribed by the regulations;
7. cannot be used to override applicable State workplace related legislation (e.g. long service leave);
8. cannot be used to specify a Superannuation Fund (in cases where this is available);
9. cannot be used to facilitate workplace flexibility where union consultation or agreement is required by an award, transitional arrangement or workplace agreement (e.g. implementation of 12 hour shifts);
10. cannot be used to cash out annual leave;
11. do not provide any protection against the initiation of a bargaining period and the taking of industrial action;
12. do not provide a means to agree an alternative to dispute resolution process contained in Division 1 of Part 13 of the WRA;
13. do not protect against uninvited union involvement in the investigation of an alleged breach of individual agreement;
14. do not protect against a union exercising right of entry to hold discussions with employees; and
15. do not provide the capacity to vary the meal break entitlements under s 607 of the Workplace Relations Act 1996 (Cth).

[122] Samantha Malden, Labor to protect 38 hour week, *The Australian*, 4 January 2007.

The ALP policy has the effect of restricting the use of common law contracts to only recording additional benefits over and above those provided by statutory instruments and awards. This means that the inflexibility of the award system will be imposed on all employers and employees who choose not to enter into collective arrangements.

Of particular concern are those provisions that require consultation with unions (e.g. in order to work shift work), which WorkChoices has restricted. In the absence of the restrictions on union power, the capacity for common law contracts to override state and federal awards would be more problematic.

The relationship between AWAs and common law contracts of employment was reviewed by Access Economics Pty Ltd in its review of the ALP's 2004 Workplace Relations Policy Platform.[123] The report concluded that common law contracts are:

- difficult to enforce;
- do not provide 'equivalent protections to an industrial instrument because the employer is still left exposed to protected industrial action'[124]; and
- puts the employer at risk of prosecution for breaching 'specific line items in an award or collective agreement.'[125]

In some cases where an employer has faced prosecution for breaching specific award items such as wages, the courts have been prepared to allow set-off between an over-award payment and the amount claimed in respect to the breach. This is at least where the employment contract expressly, or through 'natural implication' from the parties' actions, indicates agreement to the over-award payments being designated as satisfaction of the particular award entitlements.[126]

However, a recent judicial consideration of these cases concluded that this may mean no more than if the employer pays amounts in excess of the award to satisfy a particular entitlement, it cannot later claim that the payment was in satisfaction of another award entitlement as defence to a subsequent claim of underpayment.[127] That is, if amounts are paid under the contract in excess of the award and their purpose are not specified by express term or they are not capable of implication from conduct, it may not be permissible to later set-off these amounts against other award provisions.[128] This will expose employers to significant penalties for breach of an award and employers, despite paying an over award salary, may be liable to compensate an employee for underpayment of wages.

Therefore the interaction of common law contracts with awards is a legal mine field and is fraught with uncertainty. This highlights the difficulties that employers will face if a

[123] Access Economics Pty Ltd, 'Assessment of the Australia Labor Party Workplace Relations Policy Platform' *Access Economics Pty Limited report commissioned by the Business Council of Australia*, July 2004 at 28-29
[124] Ibid.
[125] Ibid.
[126] *Poletti v Ecob* (No. 2) (1989) 31 IR 321 at 332-333; ANZ Banking Group Ltd v Finance Sector Union [2001] FCA 1785; Ray v Radano [1967] AR (NSW) 471
[127] *James Turner Roofing Pty Ltd v Peters* [2003] WASCA 28 at [44
[128] Ibid.

newly elected Government sweeps away their lawful employment arrangements during the five year operating period, with one swing of the industrial relations pendulum.

The issues associated with removing pre-existing arrangements has been recognised by the Australian Democrats which has stated that 'if Labor gets elected in 2007, the Democrats will seek to negotiate into law individual contracts that are genuine agreements and cover workers entitlements fully'.[129]

The same shortcomings will also apply in respect to individual agreements entered into within the scope of an operating collective agreement. The existing ALP policy will mean that the employer and employee would not be able to reach an agreement on terms that differ from the collective agreement.[130] Ms Gillard has stated that this is 'flexibility up' rather than 'flexibility down'[131] but bargaining within a narrow set of terms and conditions contained in a collective agreement will not offer the real flexibility currently available under an AWA.

The proposal to abolish AWAs will have negative consequences on the current harmonious environment experienced in Australian workplaces, reflected in Australia's historically low disputation levels. This concern heightened when the CFMEU publicly announced that '[t]he Howard Government is taking every opportunity to prevent us from doing our job and protecting the interests and safety of workers', indicating that if it could take industrial action, it would, as this will 'restore balance'.[132]

Australia can ill afford to return the poor industrial relations record that it held in the 1980's where strikes occurred over matters as trivial as the range of ice cream flavours offered in the canteen. Increased disputation would adversely impact our capacity to supply existing contracts and our reputation. This could place $110 billion of export earnings at risk [133]

In the 1980's BHPIO & Rio Tinto Hamersley Iron due diligence comparison the difference in operating efficiencies was estimated to be worth $51M per annum at one mine alone. Whilst it is difficult to extrapolate this result across the entire Australian resource sector there is little doubt that the cost impost would be significant. The importance of retaining flexible and productive workplace arrangements is heightened by the fact that mining export earnings represent 47 percent of Australia's total goods and services exports. [134]

In addition, where there is uncertainty in respect to expected labour costs for a project, the ability to budget for costs becomes difficult and the ability to attract financial

[129] Senator Andrew Bartlett, 'AWAs Must Go, But…' Australian Democrats Press Releases, 13 June 2006. http://www.democrats.org.au/news/index.htm?press_id=5213&display=1
[130] Leader of the Opposition The Hon Kim C Beazley MP, Labor's plan for industrial relations reform: an agenda for productivity and participation, Speech delivered to the IQPC Industrial Relations Summit 2006 Sydney, 20 November 2006
[131] Julia Gillard, Panel Discussion on Channel Nine Today Show, 2 February 2007.
[132] Australian Government, Business Group Confirms: Workers would take industrial action if penalties did not apply, Media Release, 30 January 2007.
[133] ABARE, Australian Commodities December Quarter 2006 (2005-06 data). www.abareeconomics.com/interative/ac/_dec06/overview.html
[134] Abare, Australian Commodities, December Quarter 2006. www.abareeconomics.com/interactive/ac/_dec06/overview.html

investment for multi-billion dollar projects is hampered. This in turn will affect the industry's ability to maximise its full export earnings potential.

CONCLUSION

The resources sector's performance is a success story for both Australia and its employer and employee participants. In 2006-07 mining industry exports will reach $110 billion and in the forthcoming year export revenue is expected to exceed $116.5 billion.[135] This performance has been achieved with the assistance of a workforce which is fully engaged, aligned with the business outcomes, earns record high wages, has minimal industrial disputation or union involvement and continued improvements in safety.

Abolishing AWAs without having a suitable alternative in place will increase union involvement in the workplace, increase industrial disputation, decrease employee engagement and put at risk our record as world class exporters.[136]

With less than 11 percent of the hard rock sector belonging to a union, the *Workplace Relations Act 1996* must provide a range of agreement making mechanisms that meet the needs of the non-unionised sector. These arrangements must include collective and individual agreement making options.

Removing the right to enter into an statutory individual employment arrangement that can override an award or collective agreement ignores the fact that employees in the resources sector have voted with their feet to accept individual arrangements.

To abandon individual agreement making (and worse, to terminate existing legally binding agreements that have a life of up to 5 years) is irresponsible and puts at risk Australia's commercial reputation. Common law contracts don't cut it and facilitative provisions do not offer the flexibility needed to meet the needs of the resources sector.

Statutory individual agreements are part of the resources sector landscape and an individual agreement making stream (such as that presently available using AWAs) should not be abandoned as part of a mechanism to prop up an ailing union movement.

It is time to recognise that the concept of freedom to associate includes the freedom not to associate and consequently, there must be a complete range of statutory employment arrangements available, including statutory individual agreements.

Access to AWAs is a major matter for the resources sector.

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