**The IR Landscape from an AMMA perspective**

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**AMMA:**

- Established in 1918
- Largest and most representative lobby group for the resources sector
- Membership includes coal, metalliferous, oil and gas, energy, construction and array of service providers to the industry
- Recognised as the peak employers' organisation for resources sector
- Is the only national employers group for the resources sector
- Regularly features in 'IR power and influences' review.

**Overview**

We are now about to enter the second stage of the Federal Government's *Forward with Fairness* policy, with the commencement of the National Employment Standards and new system of Modern Awards on 1 January. Clearly the *Fair Work Act* establishes a new framework for employer, employee and union engagement in Australian workplaces.

Areas of impact identified since the *Fair Work Act* commenced on 1 July 2009 include:

- A flood of union right-of-entry claims, where unions previously didn't have access, diverting valuable management time to external union agendas;
- Pre start-up agreements, critical to investment decisions, now requiring union approval, approval that is often denied;
- Good faith bargaining, and the testing of new rules and procedures;
- Increased involvement of industrial tribunals in business transactions;
- Increasing importance of management training and re-skilling in IR matters;
- Remaining concern about IR behaviour in the construction sector; and
- General imposition of third parties (unions and FWA) being used by some to erode company employee engagement strategies.

Nonetheless, the resources sector recognises that the current challenges brought by the new IR landscape are not new in Australia. I would suggest that most in attendance recognise that IR legislation in this country is subject to more changes than any other area of regulation.

The phrase the 'industrial relations pendulum' was used by AMMA in its report titled *Beyond Enterprise Bargaining* in 1999. In that report two Monash University academics, Carol Fox and Marilyn Pittard, researched IR legislative changes (covering the period 1956 to 1997).

Summary both then and now: there continues to be a 'lot of amendment and little agreement' on Australia's IR framework.

With this in mind, the resources sector was prepared for the latest IR changes.

Preparation is vital in order to minimize the effect on operations of ongoing changes to industrial relations legislation. For AMMA members the new legislation is all about protecting current interests and maximising opportunities.

In relation to the most recent IR legislative changes, AMMA members have generally insulated themselves from any immediate negative outcomes from the *Fair Work Act 2009* by negotiating industrial arrangements under the pre 1 July 2009 legislation.

For example employee collective agreements in almost identical terms to AWAs were approved and will continue in place, for well beyond the next two federal elections.

## THE IR LANDSCAPE FROM AN AMMA PERSPECTIVE

### Employee Relations Charter

Most AMMA members have subscribed to an *Employee Relations Charter* that AMMA developed in the late 1990s to assist them to deal with the shifting IR circumstances and to 'IR proof' their businesses.

The core principles of this Charter include:

- Employer's obligation to provide a safe system of work;

- employee obligations to work safely, act with integrity and honesty, perform their duties effectively, and act in accordance with lawful and reasonable direction of the employer;
- freedom of association;
- freedom from workplace harassment and unlawful discrimination;
- fair remuneration and conditions of employment;
- fair treatment of employees; and
- open communication.

Whether under the previous workplace relations system, or under the new Fair Work regime, our members have been looking beyond the industrial relations legislative issues of the day by adopting the principles of AMMA's charter as a means of ensuring their employees are engaged with the business. The aim of the Charter is to facilitate better and more productive workplaces – economically imperative at the best of times – crucial now as resources sector employers seek to survive the GFC.

**What is 'Employee Engagement'?**

In past AMMA publications on the benefits of 'employee engagement' AMMA has used a definition of engagement which emphasises the role of leadership and scope of work involved in effectively engaging employees, that is:

*'Engaged employees willingly work to the best of their capabilities in the interests of the organisation and are encouraged to do so through the leadership, structure, systems and culture of the organisation.'*[1]

The rationale behind a move towards increased employee engagement is obvious – employees who are more committed, work smarter, will be better for the employer than those who turn up, do merely what they are obliged to do, collect their pay, and leave. Generally, AMMA believes a workplace with engaged employees is an environment where employees:

- know what is expected of them at work;
- have the resources and authority they need to do their work right;
- have the opportunity to do what they do best;
- are encouraged and given opportunities to learn and develop;
- receive honest and constructive feedback about their work; and
- are rewarded for their individual contributions to the organisation and for their achievements.[2]

**Direct Employment**

Consequently, AMMA members face a challenge in the new Fair Work regime, in achieving direct employment and desired levels of employee engagement. These can now both be influenced by a broader group including union, rival union, Fair Work Australia, union members, the employee majority as well as the individual employer and employee.[3]

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[1] See: AMMA Paper, Workplace Improvement through employee engagement: A guideline for employers in the resources sector, October 2007, 4.
[2] Ibid, 7.
[3] See Henry Skene presentation "Shifting the balance: Union rights and protections under the Fair Work Act", presented at AMMA WA Conference 15 October 2009.

A key contributing factor in achieving engagement in recent years has traditionally been the reduction in levels of external regulation and reliance on third parties, in order to ensure the leadership within the organisation is not delegated externally. This requires a delicate balancing of commercial, technical and social aspects of the business.[4]

During the 1990s many companies were forced to partake in a process of reaching agreement characterised by 'lengthy negotiations against a background of possible industrial action'.[5] The Federal Court case of *AWU v BHP Iron Ore*[6] in 2001 gave specific examples of how an externally regulated, unionised workforce could reduce the ability to reach employee engagement and productivity aims.

In an attempt to achieve the levels of productivity and efficiency seen at Rio Tinto's Hamersley Iron Operations, BHP Iron-Ore Pty Ltd (BHPIO) studied the nexus between Hamersley Iron's better production levels and its industrial arrangements in an exercise of due diligence.[7] Hamersley Iron claimed it had a 25 per cent to 30 per cent productivity advantage[8] over BHPIO as a result of its non-union employment arrangements, which converted to a net $51 million gap between the two operations.[9]

With the exception of about a dozen employees, all other Hamersley Iron employees were covered by individual workplace agreements (and as a result it

[4] Ibid, 6.
[5] For example, in the case of BHP Iron Ore in *AWU & Ors v BHP Iron-Ore Ltd [2001] FCA 3* (10 January 2001), at 176. In this case the AWU sought an injunction against the company from making workplace agreements with its employees.
[6] Ibid.
[7] Ibid, see discussion at 90- 102.
[8] Ibid, at 97.
[9] Ibid, at 102.

did not have a great deal of direct involvement with unions). The link between direct, individual arrangements and the increased wages seen in the resources sector over the past decade was on display for all to see. Consequently, our members are concerned about the new workplace relations regime and what it will mean for direct employment and engagement. This brings us back to the key areas of impact of the Fair Work legislation.

**WorkChoices**

Whilst AMMA generally supported the previous Government's WorkChoices regime, it was also on the record as supporting the No-Disadvantage Test applied to agreement making prior to the then Government introducing its so called 'Fairness Test'. The other main Workchoices issue was the small business exemption from unfair dismissal claims. The erosion of unfair dismissal rights for employees in workforces with less than 100 employees was not a major issue for AMMA members but unsurprisingly we did argue the need to reduce the payment of 'go away money'.

Similarly, AMMA supported, and continues to support, the ability to access legal representation where a party to an unfair dismissal dispute is a member of an industrial organisation. AMMA recognises the government did incorporate an AMMA recommendation that legally qualified representatives that are employees of such industrial organizations should be able to provide such representation. AMMA does support the general principle designed to make the unfair dismissal process less formal, yet recognises the value of this provision to our members.

Also unsurprisingly, AMMA and its members have serious concerns with some aspects of the new legislation.

## FAIR WORK ACT

Some issues include:

- **Statutory Individual Agreements and the IR amoebas**

AMMA has had a bit to say about the role of individual statutory agreements, so it is appropriate to provide an update. The current situation was aptly summed up by one AMMA member who recently made the following statement about the practical impact of not being able to enter into statutory individual agreements under the new system:

> *'The end of the option for any type of statutory individual agreements has forced our company to unwind and overturn years of dealing with our employees and having to find ways of maintaining our direct dealings in a collective manner. This is not always conducive to open discussion on what matters to individual people and often encourages a more outspoken minority to dominate. Some employees, aligned to a minority union group are using the new laws to seek unsustainable increases in labour costs and/or reductions in current flexibilities…'*[10]

The current IR debate in Australia and discussion about individual statutory agreements was summed up in a Wall Street Journal editorial after the release of the Fair Work Bill. The Journal acknowledged AMMA as one of the few voices in Australia's business community prepared to publicly criticize the Fair Work legislation on behalf of its members: 'AMMA is one of the few voicing loud, public opposition', it stated.[11]

[10] Comments provided by blue chip AMMA member.
[11] Editorial, 'Australia's Labor love-in', *The Wall Street Journal*, 5- 7 December 2008, 12.

Then Shadow IR Minister, Julie Bishop stated at the AMMA 2008 National Conference (post election) that the Coalition, if re-elected, would provide a statutory individual agreement regime: 'a form of individual statutory agreement – with a suitable safety net – will be part of our platform at the next election'.[12] The Australian Chamber of Commerce and Industry has a ten year blueprint that refers to internal regulation and individual statutory agreements in particular[13], we have not heard much from either the federal Opposition or ACCI on the topic. Only time will tell where Malcolm Turnbull stands amidst this debate - one commentator has suggested he has been 'spooked' by the ACTU TV advertisement campaign during the last election.[14]

Hence the reference to IR amoebas. While the Coalition, ACCI and others are absent from the statutory individual agreement debate, the government in true major 'emperor forever style' are trying to slip through the Senate a provision that provides for :

*'"collective bargaining at the enterprise level with no provision for individual statutory agreements'.*[15]

A year out from the last federal election, most in the IR arena knew Julia Gillard was the Shadow IR Minister with a clear agenda. Less than a year from the next election, how many know who the Shadow IR Minister is, let alone what the alternate government's agenda is for IR? AMMA can answer part of this

[12] Julie Bishop, Address to AMMA 2008 Conference, Melbourne, 3 April 2008.
[13] ACCI blueprint, *Modern Workplace – Modern Future: A Blueprint for the Australian Workplace Relations System 2002 – 2012*, http://www.acci.asn.au/text_files/blueprint/Chapter3.pdf, 48.
[14] Peter Hendy, Presentation to HR Nicholls Society, 28 March 2009*, Industrial Relations: Where to Now?* at http://www.hrnicholls.com.au/archives/vol29/Hendy2009.pdf, 8.
[15] Inter-Governmental Agreement for a National Workplace Relations System for the Private Sector, section 2.1 (c).

question. The current Shadow IR Minister is Michael Keenan. We can also suggest an IR policy position for the Coaltion, i.e. revert to the pre March 2006 IR legislation that had statutory individual agreements with a no-disadvantage test floor – a regime that serviced Australia well for over a decade – and acceptance of the ALP's new unfair dismissal regime for small business.

The government will refer a return to such a regime as a return to WorkChoices, and the Coalition will have two choices. One, be an IR jellyfish, or two, develop some backbone and highlight that such a position is pre WorkChoices and associate it with near full employment, wages growth, individual freedom, record low industrial action levels, the no disadvantage test, and budget surpluses.

- **Inflexible Individual Flexibility Agreements (IFAs)**

Are IFAs an alternative to AWAs? Despite the DPM's undertaking that IFAs would provide the agreement flexibility employers require; our member experience doesn't support this as unions are restricting flexibility as much as possible. For example:

**AMWU IFA**

*The facilitative provisions and the flexibility term in the Award must not be used without the consent of the Union.*

Union control measures are very much back in vogue.

- **Fair Work Australia Orders**

The FWA is also becoming involved in our members' business with Orders like:

  - *'The employer cease to conduct its agreement ballot and take no further action to put the agreement to a ballot at least until the matters set out below have been complied with;*

- *employer and union schedule four meetings to be conducted over two weeks at an agreed time and place. The duration of the meetings to be determined by the bargaining representatives'.*[16]

Clearly process and procedures having much more relevance than pre FWA days.

- **No communicating directly with employees**.

Another order of FWA restricted the employer's ability to communicate directly with its employees, stating:

> *'During that 10 day period, (the employer must) not attempt to bypass the bargaining agent representatives in relation to its proposal by contacting for this purpose the members of the bargaining agent representatives directly, in meetings or by text or other telephonic messages.'*[17]

- **Comment on employee communications**

My view on employee communications, provided all relevant freedom of association, duress, and other relevant laws are complied with, is pretty straightforward. Fair Work Australia should not have the power to order employers not to communicate with their employees about agreement issues, regardless of whether or not a bargaining agent has been appointed.

It is a simple philosophy - shareholders appoint Boards, Boards appoint management, management is paid to lead and manage employees.

[16] NUW v Defries [2009] FWA August 2009.
[17] AMWU v Transfield [2009] FWA 93, 14 August 2009.

If Fair Work Australia or the trade union movement own 51 per cent of the company, **then and only then** should they have a right to regulate the way and on what issues management communicates with employees about.

- **Right of Entry (ROE)**

The ROE experience since 1 July has been perhaps the most challenging, with a dramatic upsurge in notices received by employers in recent months. One AMMA member received over 190 Right of Entry notices in the first few weeks of the new legislation. This is not surprising in light of the position of some union representatives since July.

Back in early August [militant] building unionist Kevin Reynolds indicated clearly that the CFMEU will 'defend its patch' and would go straight to the courts if denied entry to a work site. He also warned of a union turf war in Western Australia's mining region as a result of the new laws and referred to the Australian Workers Union as 'Australia's weakest union'[18]. AMMA has previously expressed concerns about union turf war behaviour, something that is facilitated by the new legislation. AMMA members highlight the enormous level of right-of-entry notices require significant management by site personnel, both in terms of assessing the notices for statutory compliance, as well as management of actual visits, and such visits often detract from other important operational activities.

[18] Debbie Guest and Ewin Hannan, 'Unions to wage bitter turf war in Pilbara', *The Australian*, 7 August 2009.

- **Unionisation v union influence**

The levels of unionisation remain low in the resources sector with union membership among hard rock mining sector at 7.2 per cent, and the oil and gas extraction sector at just 3.59 per cent.

While there is increased activity, and AMMA members are experiencing some change in union influences, there is generally no new era of union deal making being reported.

However, the expansion of the regulatory regime will bring with it increased scope of unions to wage campaigns is likely to weaken the resolve of even the most committed and successful corporate exponents of direct employee engagement. The *Fair Work Act* has introduced three new or expanded areas of regulation that will be used to embolden union campaigning.

Firstly, the grand scale expansion of right of entry for union officials by basing it on eligibility for membership[19] rather than on actual membership working under an industrial instrument that the union was party to, allows unions to intervene in workplaces even where Employee Collective Agreements and AWAs apply that are within their nominal term. This places at risk the agreement strategies to protect direct employee engagement strategies by resources companies that were established prior to 1 July and the commencement of the Fair Work Act.

Secondly, the General Protections in the Fair Work Act that provide access to remedies for employees and unions (including injunctions) against any adverse action taken by an employee against an employee or prospective employee because of their entitlement to a workplace right or on the grounds of one of the unlawful discrimination categories. [20]

[19] *Fair Work Act 2009* section 484
[20] *Fair Work Act 2009* Part 3-1

Thirdly, the more widely debated bargaining provisions through access to majority support determinations,[21] bargaining orders due to failure to bargain in good faith,[22] scope orders,[23] serious breach declarations[24] and the good faith bargaining principles themselves.[25]

Each of these areas of regulatory expansion provide significant scope for unions to campaign through adverse publicity alleging contravention of workplace laws, costly litigation and use of regulators thereby tying up enormous management resources and distracting businesses from their main task of remaining competitive and profitable.

Whenever there is a campaign by unions you can be sure it will be based around regulatory pressure allowing the union to tie management up in costly and time consuming litigation, allegations (often unfounded) of contravention of workplace laws that are damaging to a corporate brand and even using regulators such as the Fair Work Ombudsman to apply its considerable resources investigating these same often unfounded allegations.

This is fertile ground for well resourced unions such as the LHMU and the CFMEU to build greater influence if not membership.

We were recently reminded by visiting American labor lawyer Joe Turzi (who spoke at the IRSV's conference in August) about the extent to which Australian unions have been influenced in their campaigning strategies by the hugely well resourced US unions.

Whilst one can only view the ACTU's *Your Rights at Work* campaign as successful in turning public opinion against Work Choices and ultimately contributing to the defeat of the Howard Government to the ALP in 2007, it was sobering to be shown by Joe (in some private discussions I was able to have with

[21] *Fair Work Act 2009* sections 236-237
[22] *Fair Work Act 2009* sections 229 - 231

[23] *Fair Work Act 2009* sections 238
[24] *Fair Work Act 2009* sections 234-235

[25] *Fair Work Act 2009* sections 228

him through his Australian partners in DLA Phillips Fox) the stark similarity between this campaign and the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)'s *American Rights at Work* campaign. The ACTU had barely changed the AFL-CIO's colour scheme.[26]

Even more recently we have seen the LHMU run the US *Hotel Workers Rising* campaign[27] as *Better Jobs, Better Hotels*[28] and the US *Justice for Janitors* campaign[29] as *Clean Start*[30] These campaign had a substantial regulatory component within Australia, the LHMU making use of the new regulation available to them via the *Fair Work Act*.

A very cursory perusal of the ACTU's website will show the extent to which Australian and American unions have been cooperating since at least the mid-1990s, hence this is no revelation. However, its takes on a new meaning for Australian employers, particularly those that have been at the forefront of direct employee engagement such as many of AMMA's members.

Australia's union leadership know this and its business people that must now play catch up if they are to deal this new regulatory environment.

- **Pre start agreements**

Some immediate effect has been felt by AMMA members by the loss of alternate agreement making options, the issue of pre-start agreements only being available in the form of 'union collective' arrangements is already starting to cause concern. As one professional and experienced construction IR Manager highlighted recently:

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[26] < http://www.americanrightsatwork.org/>

[27] < http://www.hotelworkersrising.org/>
[28] < http://www.lhmu.org.au/campaigns/better-jobs-better-hotels>
[29] < http://www.seiu.org/division/property-services/justice-for-janitors/>
[30] < http://www.lhmu.org.au/campaigns/clean-start>

*'the choice for construction sector employers in the resources sector is stark - either cut a deal to settle excessive demands or commence a project or operation without agreements and run the risk that enormous financial damage can be wrought by a determined union'.*

This is occurring now in new offshore construction agreement negotiations. The previous legislation provided for non-union pre-start agreements that while seldom used, often served to moderate excessive union demands.

- **Agreement making generally**

Changes to agreement-making appears to be a slow burn issue for our sector with levels of industrial disputation remaining low. As mentioned previously, this has been facilitated by the fact many AMMA members are covered by a range of agreements due to expire progressively over the next three to four years.

Whilst it is difficult to draw conclusions just yet as to how good faith bargaining rules will play out, it is fair to say the new principles, together with the increased involvement of Fair Work Australia, impose additional business transaction costs that were not previously present.

Whether or not US bargaining laws and rules find place in Australia, as outlined by leading Melbourne IR Barrister, Stuart Wood in his paper *Good Faith*

*Bargaining: The Impact on the Mining Industry* at AMMA's WA Conference on 15 October 2009, only time will tell.[31]

The new principles do require employers to justify their position/s, producing relevant information to prove their case. Unions may use the principles to delay negotiations and force concessions. Against this background the employer's strike weapons have been altered. The 'no by-passing of union representatives and communicating directly with your employees' undermines the employer's authority with its employees. I respectfully suggest such attempts to thwart employee communications should be challenged where possible. Similarly, the ability to use replacement labour has been severely curtailed - with the possibility that this will be considered capricious and unfair conduct – watch this space.

- **Construction IR issues**

AMMA members are similarly concerned that on 1 February 2010 the *Building and Construction Industry Improvement Act* becomes impotent. With the ABCC having record levels of investigations, the IR culture of the construction industry clearly is not changing, now is not the time to replace the tough regulator with a toothless tiger.

- **Award Modernisation**

The Award Modernisation outcome for many AMMA members has been a positive one relative to other industries. The *Hydrocarbons Industry (Upstream) Award 2010* and the *Mining Industry Award 2010* are highly flexible and will

[31] Presentation by Stuart Wood to the AMMA WA Conference, 'Good Faith Bargaining: Impact on the Mining Industry', 15 October 2009.

comfortably accommodate contemporary industry practice. The awards are envisaged to allow resources sector employers to operate where registered agreements are not in place.

- **Re-skilling management**

In terms of industrial relations expertise, large sections of management have become 'deskilled' due to 10 years of relative industrial peace, particularly in relation to bargaining, negotiating with trade unions and managing industrial disputation. Thus AMMA sees the challenge of re-skilling these HR and management professionals as one of the most important in order to manage the current landscape effectively, control engagement, and take advantage of the upcoming opportunities provided to the Australian resources sector and allied industries.

Unsurprisingly AMMA's business in this area has had a major 'stimulus' with blue chip companies and other utilising AMMA's *IR for supervisors* training packages.

- **AMMA stimulus package**

On a positive note, in the midst of the GFC, Julia Gillard's new Fair Work legislation provided AMMA's business with the best 'IR stimulus package' in AMMA's 90 year history. Our membership has increased 15 per cent and our IR employment consulting services are up over 25 per cent. Employment law firms are no doubt sharing similar experiences.

**OPPORTUNITIES**

Whilst there are obvious concerns surrounding the impact of the Forward with Fairness legislation, the Australian resources sector is well placed to continue as a major contributor to GDP.

Against the background of the GFC and IR concerns, opportunities are significant. At least 321 major minerals and energy projects have been identified by Australian Bureau of Agricultural and Resource Economics (ABARE) as at an advanced stage, and capital expenditure, particular in Western Australia, remains strong.

Export earnings for 2009-2010 were forecasted at $124.4 billion. Projects like the $50 billion Gorgon project, said to employ up to 10,000 employees in construction and generate 3,500 permanent jobs, have been given final investment approval and other major projects are in the pipeline.

It is the challenge of the resources sector to optimize these opportunities and continue to IR proof their operations.