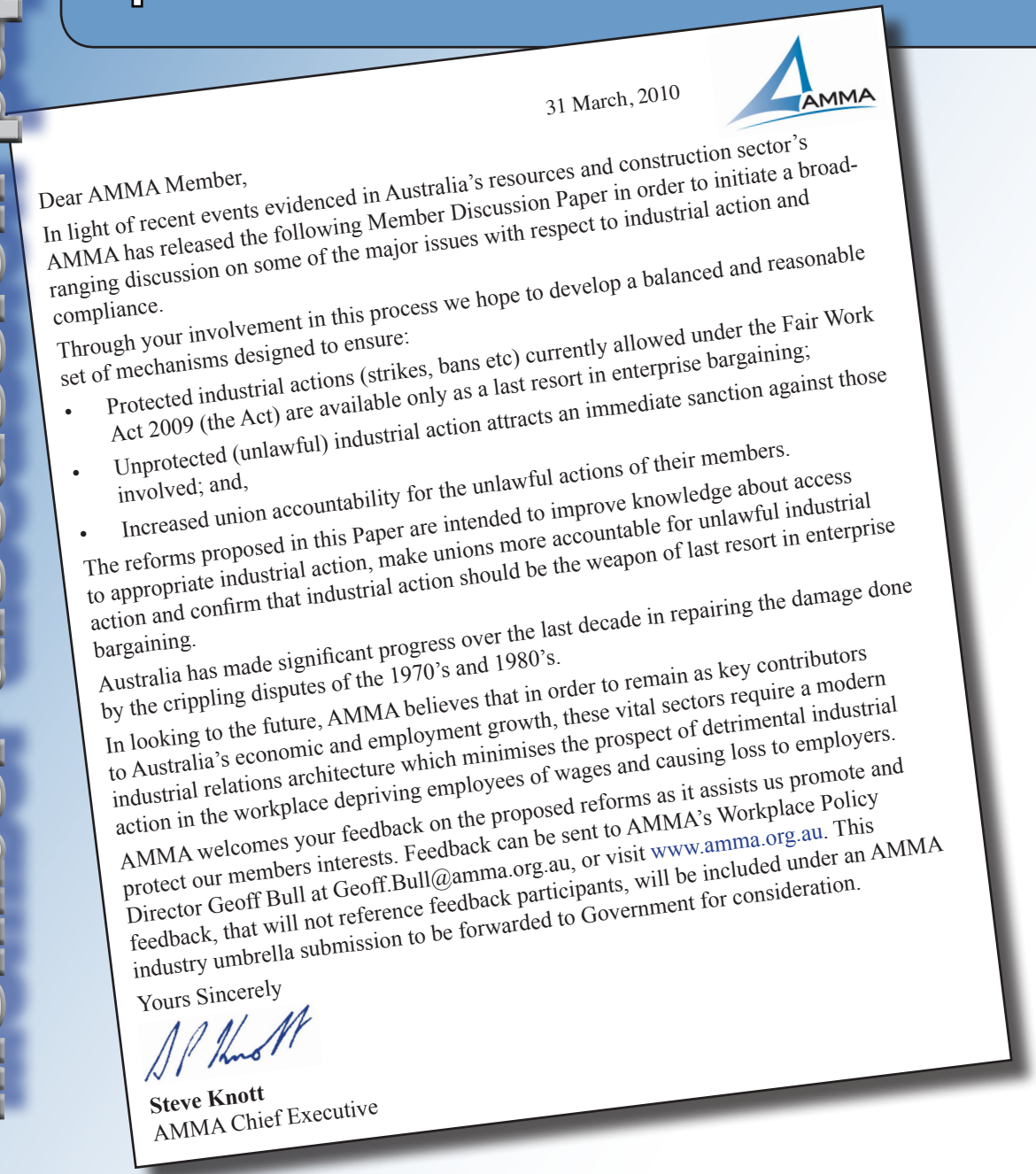
Member discussion paper

Strategies to reduce unlawful industrial action and abuse of protected strike action under the Fair Work Act 2009



31 March, 2010

Dear AMMA Member,

In light of recent events evidenced in Australia's resources and construction sector's ranging discussion on some of the major issues with respect to industrial action and compliance.

AMMA has released the following Member Discussion Paper in order to initiate a broad-

Through your involvement in this process we hope to develop a balanced and reasonable set of mechanisms designed to ensure:

- Protected industrial actions (strikes, bans etc) currently allowed under the Fair Work Act 2009 (the Act) are available only as a last resort in enterprise bargaining;
- Unprotected (unlawful) industrial action attracts an immediate sanction against those involved; and,
- Increased union accountability for the unlawful actions of their members.

The reforms proposed in this Paper are intended to improve knowledge about access to appropriate industrial action, make unions more accountable for unlawful industrial action and confirm that industrial action should be the weapon of last resort in enterprise bargaining.

Australia has made significant progress over the last decade in repairing the damage done by the crippling disputes of the 1970's and 1980's.

In looking to the future, AMMA believes that in order to remain as key contributors to Australia's economic and employment growth, these vital sectors require a modern industrial relations architecture which minimises the prospect of detrimental industrial action in the workplace depriving employees of wages and causing loss to employers.

AMMA welcomes your feedback on the proposed reforms as it assists us promote and protect our members interests. Feedback can be sent to AMMA's Workplace Policy Director Geoff Bull at Geoff.Bull@amma.org.au, or visit www.amma.org.au. This feedback, that will not reference feedback participants, will be included under an AMMA industry umbrella submission to be forwarded to Government for consideration.

Yours Sincerely

Steve Knott
AMMA Chief Executive

Introduction

In the early 1990's the Australian workplace relations laws were amended to give employees/unions access to protected industrial action in support of their claims for enterprise agreements. Unprotected industrial action was unlawful.

In order for employees/unions to access protected industrial action a range of procedural requirements must be observed. For employees this included nominating the action proposed to be taken and demonstrating majority employee support though a secret ballot. The taking of protected industrial action then required approval by the relevant industrial tribunal.

Organising or participating in unprotected industrial action remains unlawful. Mechanisms exist allowing for Fair Work Australia (FWA) to issue return to work orders and Civil Courts are able to give injunctive and final relief including the imposition of damages and penalties.

However, the process of collecting, testing and presenting evidence in a court means that a civil action seeking penalties and damages can take an inordinate amount of time to reach finality. Industrial action generally only lasts for a short period and employers are then anxious to restore their relationship with their employees and relevant unions.

Continuing legal action by employers seeking penalties against their employees or to recover losses from unions is often seen as doing more harm than good when the dispute has been resolved and the employees have resumed work.

Furthermore, unions may attempt to avoid legal liability for unlawful strikes by engaging in conduct that gives the appearance that they are encouraging their members to return to return to work or not take industrial action. Often the reverse is true but is difficult to demonstrate in a court of law.

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The weakness & The opportunity for improvement

> Recently Nippon Steel's Australian representative expressed concern over strike action in Western Australia, and former ALP Finance Minister Peter Walsh expressed concerns over excessive Maritime Union pay demands.

The Weakness

Where employers are exposed to high costs for any work stoppages (e.g. capital intensive industries such as construction and maritime industries) unlawful "wild cat" industrial action is an effective weapon for unions to pursue claims often under the guise of being a 'safety issue'.

The Australian Building Construction Commission's (ABCC) action against employees and unions who engaged in unlawful industrial action in Western Australia on the Perth to Mandurah Rail Project, took five months to investigate. Action was then taken by the ABCC in the Federal Court and it was another 18 months before final orders issued against the employees.

More recently the Woodside Pluto construction project in Karratha, Western Australia was subject to unprotected strike action for a period of eight days despite an order from Fair Work Australia for the employees to return to work. The industrial action continued with a return to work only occurring after orders from the Federal Court were obtained. The Federal Court action is still continuing.

The *Fair Work Act 2009* has reduced the threshold for obtaining a protected action ballot to a level where limited negotiation need only occur before the employer is subject to lawful strikes, bans and restrictions.

In the recent MUA offshore oil and gas enterprise agreement negotiations employers complained to Fair Work Australia that they didn't even know the extent of the claims made against them, yet Fair Work Australia continually issued orders for protected industrial action to occur.

The opportunity for improvement

AMMA believes the law concerning both protected and unprotected industrial action should be changed.

The right to take protected industrial action should only be available as a last resort and not used to extract exorbitant concessions from employers. This is especially relevant in the modern economy where "just in time" delivery is a feature of the resources industry as much as for manufacturing. Thus the power to "damage" companies through industrial action is far greater than at any time in our previous history. The law should also ensure that employees and their union/s are immediately accountable where they engage in unlawful industrial action.

The requirement to be genuinely attempting to reach an agreement prior to taking protected industrial action should involve a level of engagement that means industrial action is not the first resort in placing pressure on an employer to concede to claims made.

Where unlawful industrial action occurs, there needs to be an immediate penalty. Employer experience demonstrates that the breaching of Fair Work Australia orders has no real impact on employees or unions until the employer institutes action in the civil courts which is a costly and time-consuming exercise. Failure to comply with industrial instruments and Fair Work Australia orders needs to result in a more immediate sanction.

> In the Australian Financial Review on 25 February 2010, Don Volte, Woodside CEO reported that energy purchasers around the Pacific Rim are already concerned about Australia's capacity to be a safe and secure supplier.

AMMA proposes the following amendments to the *Fair Work Act 2009* and associated legislation:

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1. **Before a protected action ballot can be conducted, Fair Work Australia should be required to satisfy itself that:**
   - **the industrial claims being made, if agreed to would not result in an adverse impact on the employer or industry concerned; and**
   - **all reasonable attempts have been undertaken by the applicant to reach agreement so industrial action is a last resort in the negotiation process.**

   These proposals would minimise protected industrial action being taken in support of excessive demands and where the negotiation process has not been exhausted.

2. **Unions should be subject to immediate sanction for unlawful industrial action or failure to comply with orders of the FWA or a Court.**

   The Act already contains a mechanism to allow infringements notices to be issued against employers, the same should occur for unions in respect of actions of their officials and members.

   Infringement notices have an immediate impact whilst still allowing a challenge to the offence in relevant court. Regulations could be made to allow notices to be issued for civil remedy offences by the ABCC and the Fair Work Ombudsman

   Penalties should exist to ensure that fines are paid only by those who incur them and not by third parties.

3. **A breach of the *Fair Work Act 2009*, an award, agreement or an Fair Work Australia or court order by a member of a union should constitute a breach by the union.**

   Unions should be liable for the actions of their members in the same manner that corporations are responsible for the actions of their employees, unless the Court is satisfied by the union that the union took all reasonable steps to prevent their members from committing the unlawful act.

   This will ensure unions take responsibility for the action of their membership and genuinely intervene to stop unlawful industrial action rather than give the appearance of opposition to the unlawful industrial action while passively encouraging the action.

   In addition unions should be required to accept service of legal documents on behalf of the employees whom they represent in bargaining the same as a Company Secretary is for employers.

4. **Office holders of unions that have been found to have committed serious or repeated breaches the Act should be disqualified from holding office or enjoying the rights afforded under the Act in a manner similar to the potential disqualification of Directors under the *Corporations Act*.**

5. **Union disclosure of industrial action.**

   To assist in the evaluation of the behaviour of unions, those organisations whose members participate in industrial action should be required to disclose these details in their annual returns to FWA.

   This includes both protected and unlawful strikes.

6. **The Fair Work Information Statement required to be provided by employers to their employees should provide greater details of circumstances in which industrial action can not be taken.**

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