EXECUTIVE SUMMARY

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EXECUTIVE SUMMARY

About AMMA

Established in 1918, the Australian Mines & Metals Association (AMMA) is the national employer association for the mining, hydrocarbons and associated processing and service industries, including construction and maintenance companies operating in Australia's resources sector.

AMMA advocates on behalf of its members for the establishment of a legislative framework for workplace relations that provides for innovation, employee engagement, best practice, productivity and a safe workplace.

The Review Paper - *Finding Fairness*

On 1 July 2009, the *Fair Work Act 2009* came into operation, putting into place the bulk of the Government's industrial relations policy contained in its *Forward with Fairness Policy Implementation Plan*[1]. Earlier, in March 2008, the Government amended the *Workplace Relations Act 1996*[2], removing the ability to make new Australian Workplace Agreements (AWAs), providing for Individual Transitional Employment Agreements (ITEAs), and further substituting the former Government's "fairness test" with the award based "no disadvantage test" for enterprise agreement approvals.

In this paper, AMMA assesses the first 12 months of operation of the *Fair Work Act* according to whether it remains faithful to the Government's pre-election commitments set out in its *Forward with Fairness Policy Implementation Plan* and whether it meets the needs of the resources sector by delivering a modern and progressive industrial relations framework.

Concerns identified with the operation of the legislation relate to:

- the expansion of union right of entry;

[1] Kevin Rudd & Julia Gillard, *Forward with Fairness Policy Implementation Plan*, August 2007
[2] *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008*

- the failure of individual flexibility agreements (IFAs) to deliver genuine flexibility;
- restrictions on agreement making options;
- the costs to employers of unfair dismissal claims;
- the breadth of the 'General Protections / Adverse Action' provisions;
- transfer of business limitations and burdens;
- a lack of certainty around modern award coverage;
- the increased likelihood of protected and unlawful industrial action; and
- the operation of the National Employment Standards (NES).

The *Fair Work Act*'s good faith bargaining and protected industrial action provisions and their impact during the first 12 months of operation will be subject to a more detailed analysis in a separate AMMA paper. Suffice to say, there are major areas of concern emerging in this area for employers. AMMA members are reporting difficulties with bargaining under the new regime that extend beyond the sheer unfamiliarity with the *Fair Work Act*'s provisions.

Members are reporting difficulties negotiating with union bargaining representatives and are pointing to a negative cultural shift in the way unions are approaching bargaining following the Act's introduction[3], highlighted by the lack of alternative bargaining options for employers.

Effective workplace laws are of critical importance, and their interpretation and application by courts and tribunals is central to their operation. Analysing the jurisprudence coming out of the new federal industrial tribunal Fair Work Australia and the Fair Work Divisions of the Federal Magistrates Court and the Federal Court builds a powerful picture of how the legislation is being applied.

I. ONE STEP FORWARD, TWO STEPS BACK

The resources sector requires an industrial relations framework that allows for the continual change necessary to maintain a competitive edge in a global economy.

[3] *AMMA Workplace Relations Research Project* report by RMIT, June 2010

AMMA's review of the first 12 months of operation of the *Fair Work Act 2009* confirms members' concerns held prior to its enactment on 1 July 2009. The legislation provides the union movement with an unparalleled influence in the workplace going well beyond that justified by union density, which according to the latest figures is 20 per cent Australia-wide[4].

The legislative changes have created an impost on employers by reducing their ability to negotiate directly with their workforces, increasing the authority of the new federal industrial tribunal Fair Work Australia, and adding unnecessary complexity to agreement making, rendering it harder for resources sector employers to maintain the efficiencies gained in recent years.

AMMA has made 26 recommendations for legislative change, which appear at the end of this report.

Steps forward in achieving a more modern industrial relations system under the *Fair Work Act* include the completion of the difficult award modernisation exercise, the continuation of a move to a single national industrial relations system and the compilation of a set of national minimum employment standards that apply to all employees irrespective of salary or position.

II. *THE FAIR WORK ACT 2009*

The bulk of the *Fair Work Act* came into operation on 1 July 2009, representing the culmination of the Government's *Forward with Fairness* industrial relations policy. It has now been 12 months since the bulk of the Act's provisions have been in force, including changes in the areas of union right of entry, unfair dismissal and agreement making.

The balance of the Act came into force on 1 January 2010, including the operation of the new safety net known as the *National Employment Standards* (NES) and the modern award system. The implications arising from these aspects of the Act have

[4] Australian Bureau of Statistics, *Employee Earnings, Benefits and Trade Union Membership, August 2009*, published on 12 May 2010. Category 6310.0

had less time to flow through to workplaces but issues of concern are starting to emerge.

On 1 January 2010, all states other than Western Australia (WA) allowed the *Fair Work Act* to cover their unincorporated businesses for the first time. This extended the *Fair Work Act's* coverage to provide a single national workplace relations framework for the private sector, with the exception of WA.

However, the Government's legislative reform in re-regulating industrial relations has occurred during a period of economic uncertainty. While the global financial crisis was impacting on job maintenance, job creation and business confidence, Australia's workplace laws were changing by handing more power back to trade unions and a third-party industrial tribunal.

III. FAIR WORK AUSTRALIA

Fair Work Australia became the new federal tribunal for workplace relations on 1 July 2009, replacing three former bodies – the Australian Industrial Relations Commission (AIRC), the Workplace Authority and the Australian Fair Pay Commission (AFPC). As such, Fair Work Australia's powers have expanded on those of the former federal tribunal the AIRC.

While the Government has placed control over its industrial relations system into the hands of Fair Work Australia, it has not agreed with all decisions coming out of the tribunal and has deemed it necessary, along with employer associations, to appeal a number of decisions.

An examination of employer appeals under the new Act reveals more than half have been successful in overturning decisions of individual Commissioners[5]. This is demonstrative of the lack of direction the Act provides to decision makers and is leading to uncertainty and confusion for employers.

Due to the increased discretionary powers given to Fair Work Australia, outcomes of matters before tribunal members can vary where the same factual matrix exists. This

[5] See table at *Attachment* at the end of this paper

was demonstrated in February and March 2010 where the approval of an enterprise agreement was allocated in error to two Commissioners[6], who independently reached markedly different conclusions[7] on the same set of facts. Both conclusions were within the members' discretionary powers. In another instance, similar enterprise agreements were subject to differing approaches by Fair Work Australia members, with some being approved and another rejected[8].

IV. UNION RIGHT OF ENTRY

Unions are now able to enter worksites that have non-union industrial agreements in place and which have no union members. Unions can enter without an invitation from the workforce or management, simply because their union rules cover an occupation that exists at that workplace. This extension of union involvement in workplaces is contrary the previous Labor government/ACTU push to reduce the number of unions an employer had to deal with, and amalgamating unions for efficiency reasons. There are no efficiencies to be gained where employers have to start dealing with unions they have never previously dealt with due to the expanded entry rights.

A Fair Work Australia decision concerning a right of entry dispute on the Pluto construction project in WA's North West demonstrates how much the *Fair Work Act* has changed things in terms of right of entry[9].

In the four months between 1 July 2009 when the Act's right of entry provisions took effect and 27 October 2009, the four main unions eligible to cover workers on the Pluto project made 217 requests for entry. As of May 2010, that number had increased to 450. Site management allowed the unions to enter when they complied with established site entry protocols but the CFMEU was not happy with the protocols and took its complaint to Fair Work Australia. The CFMEU had made

[6] *Riverina Division of General Practice* [2010] FWA 2170, 15 March 2010, McKenna C
[7] *Riverina Division of General Practice* [2010] FWAA 1185, 19 February 2010, Thatcher C
[8] *Waterdale Enterprises Pty Ltd as Trustee for the Boag Family Trust T/A Peel Finance Brokers* [2010] FWA 4509, 21 June 2010
[9] *CFMEU v Foster Wheeler Worley Parsons (Pluto) Joint Venture* [2010] FWA 2341, 29 March 2010, Williams C

around 80 visits up to late October 2009, up from zero visits prior to the *Fair Work Act* taking effect. Given there were no union agreements operating on the site when construction began in 2007, no unions had previously been entitled to enter to hold discussions with employees. The additional administrative burden and interruption to the workplace of 450 site entry applications is obvious.

In line with AMMA's submission to the Senate Inquiry into the *Fair Work Bill* in 2008[10], AMMA maintains that unions should not be entitled to enter a worksite solely based on their membership eligibility rules, which in many cases are complex and difficult to interpret. At a minimum, the following criteria should be met before unions are able to enter a worksite:

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

There should also be no ability under the legislation to agree to additional right of entry clauses in enterprise agreements other than what is contained in the *Fair Work Act* itself, which already gives unions greatly expanded access to workplaces.

V. INDIVIDUAL FLEXIBILITY ARRANGEMENTS

The Government's mandatory flexibility clauses in awards and enterprise agreements were promised to be the answer to the lack of a statutory individual agreement option for employers. To date, the flexibility options available under such clauses are far from a satisfactory substitute for individual agreements. Genuine flexibility has been openly opposed by unions[11] who are the default bargaining representatives in enterprise agreement negotiations as long as they have one

[10] AMMA submission to the Senate inquiry into the Fair Work Bill, January 2008
[11] *Flexibility push by employers is about undermining collective agreements,* AMWU website, 22 September 2009

member who will be covered by a proposed enterprise agreement. This opposition to individual flexibility agreements is encouraged by the unions' peak body, the Australian Council of Trade Unions (ACTU) [12].

Flexibility clauses, based on which Individual Flexibility Arrangements (IFAs) can be negotiated between an employer and an individual employee, are being written to meet the *Fair Work Act*'s requirements for mandatory inclusion in enterprise agreements. However, many flexibility clauses are unable to be applied in a way that meets the genuine needs of the employer and the individual employee.

While Fair Work Australia has been rigorously applying the no-disadvantage test (pre-1 January 2010) and the 'better off overall' test (post-1 January 2010) for the benefit of employees, it has to date failed to address whether the mandated flexibility clauses provide genuine flexibility for the employer and employee.

The objects of Part 2-4 of the *Fair Work Act* relating to enterprise agreements include the provision of a simple and flexible framework to deliver productivity benefits at the enterprise level. Despite this stated object, there is no requirement for enterprise agreements to contain productivity improvements or benefits for the employer as part of the approval process.

IFAs have the potential to meet their objectives if administered in the correct manner. However, AMMA believes that for flexibility clauses to reach their full potential, the following concerns must be addressed:

- The lack of obligation on Fair Work Australia to ensure that flexibility clauses in enterprise agreements meet the genuine flexibility needs of both the employer and employee;
- The existing ability of employees to take protected strike action while continuing to enjoy the benefits of an IFA such as increased wages;

[12] *New protections and minimum standards for all Australian workers from 1 January 2010*, ACTU Fact Sheet, January 2010

- The inability for employers to make IFAs a condition of employment, despite statutory protections in place to protect employees and prospective employees against being disadvantaged;
- The ability for employees to unilaterally terminate their IFAs with 28 days' notice. This detracts from employers' incentive to introduce flexible work practices because they have no guarantee the agreements will remain in place for any length of time;
- The AIRC's '*model*' flexibility clause, contained in all modern awards and most enterprise agreements[13], limits the scope of terms and conditions that can be individually negotiated. Despite those shortfalls, the model clause has now become the best possible outcome employers can achieve when negotiating enterprise agreements, despite there being no legislative limit on what can be subject to an IFA;
- The required review of the content of IFAs and how they are being used in agreements and awards by the General Manager of Fair Work Australia is not scheduled to begin until 1 July 2012. In view of the less than optimal outcomes occurring to date, this review needs to commence well before the scheduled date. AMMA has written[14] to former Deputy Prime Minister and current Prime Minister Julia Gillard requesting that the review be brought forward;
- Unions, in adopting the ACTU's template for negotiating flexibility clauses, are restricting the terms of the clauses and requiring a copy of any IFA negotiated between an employer and an individual employee to be provided to unions upon request. This includes the IFAs negotiated with employees who are not members of a union. AMMA maintains this is a deliberate attempt to avoid the prohibition on unions accessing non-member employee

[13] Media Release, *Individual Flexibility Arrangements*, the Hon Julia Gillard MP, 17 September 2009
[14] AMMA Letter to Deputy Prime Minister Julia Gillard, 7 June 2010

records under the *Fair Work Act*. AMMA has brought this matter to the attention of the Federal Privacy Commissioner[15].

VI. AGREEMENT MAKING

Agreement Making Options

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

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

With unions as default bargaining representatives (where they have one member to be covered by the enterprise agreement) the *Fair Work Act* has reduced the variety of agreement making options for employers to union collective agreements and union greenfield agreements.

The limited agreement options now available have stymied the continuation of innovative, flexible work practices in enterprise agreements and in some cases have led to the elimination of such practices. The *Fair Work Act* now only provides for collective agreements, with the ability to make new individual statutory agreements, including the Government's ITEAs, having been abolished.

As of 28 March 2008, the Government's *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* prevented the making of new AWAs and introduced the ability to make the new ITEAs, which were tested against an award-based 'no disadvantage' test.

[15] AMMA Letter to Federal Privacy Commissioner Karen Curtis, 7 June 2010

The Government's ITEAs were able to be a condition of employment and new ITEAs could be made from 28 March 2008 until 31 December 2009, i.e. for a period approaching two years. During this period, there was no suggestion ITEAs were being used to exploit workers. If those individual statutory agreements were subject to the 'better off overall test' (BOOT) that is currently in force, there could be no sound rational grounds to oppose the ongoing ability to make new ITEAs.

Greenfield Agreements

AMMA members' experience is that unions' involvement in greenfield agreements is about extracting windfalls from investors that are seeking to build new operations or expand and optimise existing ones. Members are reporting more difficulty negotiating greenfield agreements under the *Fair Work Act*[16], which has the potential to jeopardise major projects and add to the cost of doing business in Australia.

The *Fair Work Act*'s failure to include an alternative to a union greenfield agreement is a major concern in the resource and construction sectors where employers are trying to get multi-million dollar projects off the ground to a tight schedule. AMMA members have reported that unions are exercising their veto power over greenfield agreements by refusing to reach agreement with employers until they have extracted inflated benefits for their members with no productivity returns for employers.

This approach cannot be in the national interest[17]. New projects are a stimulus to the economy in terms of construction employment and the ongoing permanent employment associated with a completed project. The ability to register greenfield agreements with Fair Work Australia that meet the *better off overall test* (BOOT) where agreement cannot be reached with a union must be available to provide investment certainty.

[16] *AMMA Workplace Relations Research Project* report by RMIT, June 2010
[17] *A construction base rate of $150,000 per annum is just plain wrong*. Federal Resources Minister Martin Ferguson, *Australian Financial Review*, 6 July 2010, p10

Permitted Matters

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

According to AMMA members, this new ability for including union-specific matters in enterprise agreements has encouraged a return to union claims not seen in the resources sector since the 1970s[18]. The union agenda in enterprise agreement negotiations now commonly includes clauses for:

- Paid union meetings;
- Non-working shop stewards;
- Union meeting facilities;
- Union membership fee deductions;
- Paid trade union training leave; and
- Delegates' rights[19].

These provisions produce no measurable productivity improvements and are directed towards cementing the role of unions in the workplace at the expense of the employer's direct engagement with its workforce. Most of these agenda items are in conflict with the objects of the *Fair Work Act* and should not be allowed to be included in enterprise agreements.

While it can be argued that employers can resist such claims, the *Fair Work Act* allows for these claims to be made and for protected industrial action to be taken in pursuit of them. Their removal would enable the parties to focus on delivering outcomes which secured improved conditions for employees and enhanced productivity.

[18] *AMMA Workplace Relations Research Project* report by RMIT, June 2010
[19] ACTU Congress 2009, Future of Work, *Industrial Relations Legislation Policy*, June 2009

VII. INDUSTRIAL ACTION

Protected Industrial Action

There are numerous obligations on employers to ensure that employees' rights are protected under the *Fair Work Act*'s enterprise agreement making rules. This is in stark contrast to the absence of protections for employers when unions and employees embark on protected industrial action without exhausting the bargaining process and/or over extravagant claims.

The legislative test that Fair Work Australia is required to apply before employees, via their union, can embark on protected industrial action amounts to a '*tick the box*' exercise. The requirement to be 'genuinely trying to reach an agreement' prior to taking protected action pays no regard to the extravagance of the claims being made or whether negotiations have been exhausted, and includes no requirement that the industrial action be a last resort before a protected action ballot can be issued[20]. Unions have obtained orders for protected action ballots on the basis they have been found to be genuinely bargaining while at the same time pursuing claims for a $500 per day allowance and a 28 per cent wage rise in one year[21] [22].

As the agreement making choices for employers have been reduced under the *Fair Work Act*, so too have the options available to employers when faced with protected industrial action. This elevates the importance of unions and employees being required to meet a threshold of having exhausted the negotiating process and not being in pursuit of extravagant claims prior to taking protected action.

High Income Earners

The *Fair Work Act* grants any employee covered by an award or enterprise agreement the right to engage in protected industrial action. Such a right is not restricted to low income earners or vulnerable employees in need of protection.

[20] *CEPU & AFMEPKIU known as the Australian Manufacturing Workers' Union (AMWU) v Kraft Foods Limited* [2010] FWA 4404, 21 June 2010
[21] *LHMU v MSS Security Pty Ltd* [2010] FWA 4470, 21 June 2010
[22] *Maritime Union of Australia v Total Marine Services Pty Ltd* [2009] FWA 187, 1 September 2009

Employees on incomes more akin to management salaries are able to take protected industrial action because their classification is covered by an award or enterprise agreement.

Prime Minister Julia Gillard has previously stated that employees on six-figure salaries are able to look after themselves[23]. AMMA contends that high income earners on more than $108,300 per annum (the current unfair dismissal threshold) do not require the protections under the *Fair Work Act* of being able to take lawful industrial action to achieve wage and condition improvements.

Protected Action Loophole

In *Boral Resources (NSW) Pty Ltd and the AWU*[24], a Full Bench of Fair Work Australia found the union could provide the employer with a notice of intended industrial action and, on the day the action was scheduled to take place, revoke the notice and have employees turn up for work and expect to be paid. This type of union industrial tactic runs counter to the requirement to provide the employer with 72 hours' notice of the intention to take protected industrial action so the employer can make arrangements for the cessation of work and notify their clients accordingly. This loophole, which has the same effect of employees taking industrial action without losing any income, needs to be closed.

Unlawful Industrial Action

The *Fair Work Act*, similar to the *Workplace Relations Act* before it, fails to adequately penalise unions and employees in a timely manner after they engage in unlawful industrial action.

The legislative mechanism under which the tribunals/courts can require work to resume is in need of urgent review as it is not responsive to employers' needs. Wildcat industrial stoppages often go unpunished, and unions resorting to industrial

[23] "*So we are saying, for people who earn those six figure sums, they can look after themselves. They will have the benefit of Labor's 10 National Employment Standards …, they can basically bargain for themselves."* (Opposition Leader Julia Gillard, *Channel 7 News*, 28 August 2007)

[24] *Boral Resources (NSW) Pty Ltd* [2010] FWAFB 1771, 31 March 2010, Full Bench

action under the guise of 'safety'[25] is common practice in the resources sector. Immediate sanctions against employees and unions taking unlawful industrial action need to be introduced, with unions being held responsible for the actions of their members.

VIII. UNFAIR DISMISSAL

AMMA members have reported various concerns with the operation and interpretation of unfair dismissal laws in the first 12 months of the *Fair Work Act*. The Act's unfair dismissal processes need further streamlining in order to limit speculative claims and ensure that legitimate dismissals are not overturned. In particular, the legislation should:

- Limit Fair Work Australia's consideration of whether a dismissal is unfair to whether a valid reason exists for the dismissal rather than subjective assessments about the consequences of termination of employment for employees. Fair Work Australia's reinstatement of an employee to Norske Skog Paper Mills (Australia) Pty Ltd[26] in February 2010 despite repeated safety breaches took into account the consequences of the termination on the employee's personal affairs, which exceeded what the tribunal should have considered in deciding whether the dismissal was fair;
- Exempt daily hire employees in the building and construction industry from bringing unfair dismissal claims unless they are dismissed for prohibited reasons, given the unique and fluctuating circumstances of the construction industry;
- Close the loophole that allows high-income earners who are not covered by a modern award or enterprise agreement to bring an unfair dismissal claim;[27] and

[25] The *Fair Work Act* now places the onus on employers to demonstrate that a workplace is safe
[26] *Quinlivan v Norske Skog Paper Mills (Australia) Ltd* [2010] FWA 883, 8 February 2010, VP Lawler
[27] *Atkinson v Midway Community Care Inc* [2010] FWA 2907, 13 April 2010

- Reduce the incentive which still exists for employers to pay 'go away' money to employees, even where unfair dismissal claims lack merit. Employees should be required to meet an evidentiary threshold before their claim can proceed.

IX. TRANSFER OF BUSINESS

The circumstances under which the *Fair Work Act* considers a 'transfer of business' has occurred are much broader than those under the previous *Workplace Relations Act*. The new rules focus on whether there has been a '*transfer of work'* between the old and new employer and the reason for that transfer of work.

The apparent unintended consequences of the changes are that employers are reporting that where they are involved in a potential transfer of business as the new employer they are reluctant to employ any of the previous employer's employees so as not to be bound by the previous employer's industrial agreements.

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

X. MODERN AWARDS

The AIRC's award modernisation process was long overdue and brought to finality previous efforts at simplifying awards. While it was a massive task that was completed on schedule, it is not without its problems. The benefits of a single national industrial relations system coupled with the introduction of modern awards cannot be underestimated. AMMA, on behalf of members, was involved with the modern award process in the resources sector and achieved what appear by comparison with other sectors to be the most flexible modern awards by far.

As with any new system, issues are arising for employers in the period since modern awards commenced on 1 January 2010. The education process explaining which modern award applies to various classifications, e.g. whether the Miscellaneous

Award applies, or whether a classification is award-free, needs to be continued and co-ordinated between employer associations, unions and the Fair Work Ombudsman in order to avoid inadvertent breaches of modern awards by employers.

XI. NATIONAL EMPLOYMENT STANDARDS

AMMA members support the concept of a minimum set of employment entitlements for all employees. The National Employment Standards (NES) expand on the minimum standards provided under the *Workplace Relations Act* known as the Australian Fair Pay and Conditions Standard.

However, the more these minimum standards are regulated, the clearer it becomes that a one-size-fits-all approach is unworkable, particularly in the resources sector where hours of work, rosters and salary arrangements are far removed from the standard working week of 38 hours worked Monday to Friday upon which the NES are founded.

The NES have provided essential minimum entitlements to all employees but these standards need to be adaptable enough to recognise that there is not always a model format for meeting them.

XII. ADVERSE ACTION / GENERAL PROTECTIONS

The *Fair Work Act* has introduced a new form of employee protection under the banner of '*General Protections*'. Under these provisions, it is unlawful for a person to take '*adverse action*' against another person on the grounds of their '*workplace rights*', '*industrial activities*' or for '*discriminatory*' reasons.

These protections are a vast extension to the employee protections that existed under the *Workplace Relations Act*[28], which were limited to prohibitions on unlawful termination for discriminatory reasons or in breach of freedom of association laws.

[28] Section 664 of the *Workplace Relations Act 1996*

While the courts to date have taken a sensible approach to adverse action claims, there are serious questions about the operation of the *Fair Work Act*'s General Protections. AMMA maintains:

- An entitlement to a *workplace right* should have to be the dominant reason for an *adverse action* claim. Currently, the entitlement to a workplace right only has to be part of the reason for the adverse action. Claims should not be able to proceed where other valid, more significant reasons exist for the *adverse action*, such as poor performance or gross misconduct;
- The application of the General Protections to independent contractors should be removed; and
- The *Fair Work Act's* reverse onus of proof should be removed, which forces employers to defend adverse action claims under the General Protections. This is an additional burden on employers and encourages non-meritorious claims by employees. The onus should be on the employee to prove any adverse action taken against them was for the alleged prohibited reasons.

XIII. THE UNION AGENDA

The ACTU has made no secret of the fact it sees the *Fair Work Act* as a work in progress and is proposing further industrial relations reform.

The matters the ACTU is proposing are more about what is in the best interests of the union movement rather than what is in the best interests of the Australian economy, and they deliver nothing in the way of genuine benefits to employees or employers.

Additional industrial relations changes in the direction proposed by the ACTU are neither desirable nor necessary. The *'unfinished'* business the union movement seeks to convince the Government to legislate on includes[29]:

[29] *The union agenda for working Australians*, Address to ACTU Congress by ACTU secretary Jeff Lawrence, 2 June 2009

- Terminating existing AWAs that at present continue beyond their nominal expiry dates unless either the employer or the employee terminates them;
- Enhancing workers' access to unions and increasing right of entry entitlements for union officials;
- Removing limitations on bargaining to make it possible for employees to bargain and take industrial action over any subject matter such as health, education, tax reform, climate change and indigenous rights;
- Introducing the same rights for independent contractors as exist for employees under the *Fair Work Act*;
- Ensuring there are no separate workplace laws for the building and construction industry, with building and construction workers to be covered by the *Fair Work Act* rather than the *Building & Construction Industry Improvement Act 2006*; and
- Greater rights for union delegates at the workplace.

The changes proposed by the ACTU are directed more towards further entrenching unions' role in the workplace and would deliver nothing in the way of benefits to employers or employees.

XIV. CONCLUSION

With the completion of the move to modern awards and a single national industrial relations system for the private sector (with the exclusion of Western Australia) and the codification of a set of minimum employment standards for all working Australians, the *Fair Work Act* advances both the interests of employers and employees and is a step in the right direction.

But the *Fair Work Act* falls foul of providing a genuinely fairer workplace relations framework with its over-emphasis on providing union access to and engagement with workplaces and its increased level of third-party tribunal intervention. There is nothing fair about reducing Australia's competitiveness.

The objects of the *Fair Work Act* provide for flexibility, productivity and economic growth, yet the application of these objects are notably absent in the important agreement making processes under the Act. The ease with which protected industrial action can be taken and the lack of effective sanctions for employees who take unlawful industrial action do not assist the objects of productivity and economic growth.

The resources sector has proven resilient to downturns in the economy and does so in part by relying on the flexibilities it has achieved in workplace arrangements over the past two decades. There is a considerable risk that outdated work practices long since removed from our industrial relations system will re-emerge under the new Act. AMMA members have seen that direct employment arrangements lead to better working relations and increased employee engagement.

The resources sector is about rewarding employees to the maximum extent possible and does so to a level well above other sectors[30]. There was never support for the reduction of employee benefits and entitlements under *Work Choices* and no support from AMMA or its members exists for a return to those provisions.

Unions are often caught up in external agendas, trying to achieve goals that are not necessarily aligned to those of the employer and its employees. This has the potential to create an adversarial environment, which can be seen emerging with the new enterprise bargaining regime[31].

The resources sector has a proud history of being at the forefront of workplace reform, regardless of the government of the day and other external party agendas. In the interests of employers and employees alike and in the interest of maximising the sector's capacity to assist in reducing Australia's national debt, innovative workplace reform will continue to be sought in the resources sector despite the obstacles the *Fair Work Act* raises.

[30] Australian Bureau of Statistics, *Employee Earnings, Benefits and Trade Union Membership, August 2009,* published on 12 May 2010. Category 6310.0
[31] *AMMA Workplace Relations Research Project* report by RMIT, June 2010

The *Fair Work Act* plays an important role in the performance of the Australian economy. Laws which allow investment to be frustrated or deferred cannot be considered in Australia's best interests. The *Fair Work Act* has a role in ensuring the balance is right between providing fairness to employees and promoting and encouraging investment from within and outside Australia, leading to a globally competitive resources sector.

Finding Fairness

A review of the first 12 months of the Fair Work Act 2009

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1. THE CURRENT ECONOMIC AND INDUSTRIAL CONTEXT

Resources sector contribution to the economy

1.1 The mining industry provided the greatest contribution to the Australian economy of any industry in 2008-09, surpassing even the manufacturing sector[32]. According to a May 2010 economic analysis by CommSec:

> *The data actually adds a fresh element to the debate on the proposed resource rent tax and suggests that the mining sector may have saved the Australian economy after all during the global financial crisis.*

1.2 CommSec noted, however, that only 51.2 per cent of mining companies had made a profit in 2008-09, while 46.9 per cent had made a loss:

> *The whole rationale for the resource rent tax is that the good times will continue and that all Australians should share in the gains. Clearly though, the aim is to ensure that mining remains successful otherwise any share in the benefits will be watered down.*

1.3 The resources sector has contributed A$500 billion to Australia's wealth over the past 20 years, with its commodity exports totalling $120 billion in 2008-09.

1.4 The sector is forecast to produce export earnings in 2009-10 totaling $124.4 billion, with 321 major resource projects identified. Unfortunately, some of the projects that are currently in the committed stage could be deferred, modified or even cancelled subject to prevailing economic circumstances. It is therefore important that the new workplace relations system does not exacerbate the current tough conditions in which the sector operates.

1.5 The mining industry, which makes up a significant part of the resources sector, directly employs 174,500 people according to the latest ABS statistics[33]. Of those:

- 31 per cent are employed in metal ore mining;
- 23 per cent are in coal mining;

[32] CommSec, Economic Insights, *Perhaps mining saved us after all*, 28 May 2010
[33] Australian Bureau of Statistics, *Australian Labour Market Statistics, February 2010,* published in April 2010, Category 6105.0

- 19 per cent are in exploration and other mining support services;
- 13 per cent are in other areas of the mining industry;
- nine per cent are in oil and gas extraction; and
- five per cent are in non-metallic mineral mining and quarrying.

1.6 The Queensland Department of Minerals & Energy has said that for every direct job in the mining industry, three more indirect jobs are created[34].

Current levels of industrial disputation

1.7 The latest Australian Bureau of Statistics (ABS) figures show that the number of industrial disputes across all Australian industries dropped by 39 per cent from 69 in the December 2009 quarter to 42 in the March 2010 quarter[35]. The number of employees involved in these industrial disputes also dropped from 25,100 to 7,200 in the period, and the number of working days lost dropped from 44.7 to 28.8 per thousand employees.

1.8 In the mining industry alone (with the exclusion of coal mining), there were 0.1 working days lost per thousand employees to industrial disputes in the March 2010 quarter, down from 0.2 in the December 2009 quarter but up from zero in the four quarters before that.

1.9 However, in the 12 months to March 2010 there were 235 industrial disputes, an increase of 44 on the number of disputes in the year to March 2009 (i.e. before the *Fair Work Act 2009* took effect).

1.10 It is also worth noting that the construction industry, in which AMMA members are actively involved, accounted for 43 per cent of working days lost to industrial disputes in the March 2010 quarter. Western Australia, where a high proportion of the country's resource and construction projects operate, accounted for 47 per cent of working days lost as well as the highest number of working days lost per thousand employees at 13.1.

1.11 These figures make it even more important for the Government to ensure there is a strong enforcement and compliance regime in the building and construction industry. AMMA maintains its concerns with the Government's

[34] *Queensland mining industries, The economic significance of mining and mineral processing to Queensland*, Summary Report, 2007
[35] Australian Bureau of Statistics, *Industrial Disputes, Australia, March 2010,* published on 3 June 2010, Category 6321.0.55.001

proposed changes to the Building & Construction Industry Improvement Act that will see the Australian Building & Construction Commission (ABCC) replaced with the Fair Work Building Industry Inspectorate, with a corresponding watering down of the new inspectorate's compliance and enforcement powers[36]. AMMA's member survey conducted with RMIT clearly highlighted our members' overwhelming preference for keeping the ABCC in its current form[37].

1.12 In the past decade, the Australian resources sector has worked hard to transform its workplaces from a culture of industrial disputation and division to one of direct employee engagement, increased levels of productivity and low levels of industrial disputation. Retaining this culture will be challenging for businesses within the new workplace relations laws given the *Fair Work Act*'s amendments to right of entry, bargaining and agreement-making rules.

Wages in the mining industry

1.13 Australian Bureau of Statistics (ABS) figures released in May 2010 show the mean weekly earnings for employees in the mining industry were $2,010 a week or $104,520 a year as of August 2009, nearly twice the all-industries figure of $995 a week or $51,740 a year[38].

1.14 The latest Labour Price Index shows the Wage Price Index (WPI) for the year to March 2010 was 2.9 per cent across all industries[39]. In the private sector, the WPI was 2.5 per cent while in the public sector it was 4.2 per cent. This was down from the all-industries WPI in the year to June 2009 (the 12 months immediately prior to the *Fair Work Act* being introduced), which was 3.9 per cent, including 3.6 per cent in the private sector and 4.5 per cent in the public sector.

1.15 For the mining industry, the percentage change in the WPI (total hourly rates of pay excluding bonuses) was 3.4 per cent in the year to March 2010, down from 5.8 per cent in the year to March 2009 and 5.9 per cent in the year to March 2008. The WPI for the mining industry was 4.2 per cent for the year to

[36] The *Building & Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009*
[37] *AMMA Workplace Relations Research Project* report by RMIT, June 2010
[38] Australian Bureau of Statistics, *Employee Earnings, Benefits and Trade Union Membership*, *August 2009,* published on 12 May 2010. Category 6310.0
[39] *Labour Price Index, Australia, March Quarter 2010,* 19 May 2010. Category 6345.0

June 2009, 6.6 per cent for the year to June 2008 and 5.7 per cent for the year to June 2007.

Fair Work Australia decisions and employer appeals

1.16 An analysis of Fair Work Australia Full Bench decisions up to 21 June 2010 reveals a total of 53 appeals have been decided under the *Fair Work Act*. Of those, 23 were brought by employers and 30 were brought by unions or individual employees. Of the 23 employer appeals, 13 appeals were upheld and the original decisions overturned while 10 were unsuccessful. Of the union/employee appeals, three appeals were upheld and 27 were unsuccessful.

1.17 The Government has supported recent appeals of Fair Work Australia decisions relating to right of entry clauses in enterprise agreements[40] and compulsory arbitration[41]. Both original decisions were overturned on appeal. But adding to employers' confusion over the application of the *Fair Work Act* is the fact that more than half of the decisions that employers and employer groups have appealed against have been overturned.

1.18 Then-Deputy Prime Minister & Workplace Relations Minister Julia Gillard said in April 2010 on the subject of appeals of Fair Work Australia decisions[42]:

> *After any kind of legislation is fundamentally changed, there is bound to be a period where parties want to test their interpretation of provisions. This is to be expected with any significant re-write of legislation in any subject area.*

1.19 Nevertheless, AMMA remains concerned at the level of divergence among Fair Work Australia Commissioners' decisions, with outcomes often depending on which member of the tribunal hears the matter.

1.20 A case in point is an administrative error that saw one enterprise agreement given separately to two Fair Work Australia Commissioners for approval. The *Riverina Division of General Practice and Primary Health Enterprise Agreement 2009* was accidentally separately allocated to Commissioner

[40] *Australian Industry Group* [2010] FWAFB 4337, 11 June 2010, Full Bench
[41] *Woolworths Ltd trading as Produce and Recycling Distribution Centre* [2010] FWAFB 1464, 26 February 2010, Full Bench
[42] Deputy Prime Minister Julia Gillard's speech to the Personnel & Industrial Relations Conference, 19 April 2010

McKenna and Commissioner Thatcher. In Commissioner McKenna's March 2010 decision[43], she cited shortcomings in the agreement in terms of it meeting the *Fair Work Act*'s requirements and said the employer should be required to give undertakings to remedy its shortcomings before the agreement was approved.

1.21 Commissioner Thatcher's decision[44], however, found all the requirements of the *Fair Work Act* had been met and approved the agreement on the papers.

1.22 In an April 2010 decision, Commissioner Donna McKenna rejected an application by fast food giant McDonald's to approve an enterprise agreement that was proposed to cover 80,000 employees in restaurant outlets across Australia[45]. She cited serious deficits in the agreement's content and in meeting the *Fair Work Act*'s pre-approval requirements. The decision was also overturned on appeal with the Full Bench, after hearing the case; taking the unusual step of immediately quashing Commissioner McKenna's ruling and approving the agreement[46].

1.23 Such contrasting decisions on the same facts illustrate that in many cases it depends on which member of the tribunal is hearing a matter as to what the outcome will be. This adds to employers' confusion in dealing with an already unfamiliar set of rules. Consistency is lacking in Fair Work Australia's application of the *Fair Work Act*, and employers and the tribunal need more clarity in the legislation as to how the various tests will be applied.

2. UNION RIGHT OF ENTRY

> *'The laws that we have in Australia concerning union right of entry, if we're elected to form the next government, will be identical to those which currently exist under this government…'* (Opposition Leader Kevin Rudd, Doorstop Interview, Perth, 26 October 2007)

[43] *Riverina Division of General Practice* [2010] FWA 2170, 15 March 2010, McKenna C
[44] *Riverina Division of General Practice* [2010] FWAA 1185, 19 February 2010, Thatcher C
[45] *McDonald's Australia Pty Ltd on behalf of Operators of McDonald's outlets* [2010] FWA 1347, 23 April 2010, McKenna C
[46] *McDonald's Australia Pty Ltd, SDA* [2010] FWAA 4754, 29 June 2010, Full Bench

> *'I'm happy to do whatever you would like. If you'd like me to pledge to resign, sign a contract in blood, take a polygraph, bet my house on it, give you my mother as a hostage, whatever you'd like … we will be delivering our policy as we have outlined it.'* (Deputy Opposition Leader Julia Gillard, National Press Club Debate, 8 November 2007, in response to a journalist's question as to whether she would be willing to resign if Labor failed to deliver its promise to retain existing right of entry laws)

2.1 Union right of entry to workplaces has been considerably expanded under the *Fair Work Act*, despite the many promises like the ones above in the lead-up to the Government winning the 2007 federal election. On any analysis of the *Fair Work Act*'s provisions compared with those of the *Workplace Relations Act*, the regulation of union right of entry has changed and union rights to enter premises have expanded.

2.2 Of primary significance is the *Fair Work Act*'s removal of the requirement that unions be bound by an award or agreement at a workplace to gain entry to hold discussions with members. Under the *Workplace Relations Act*, unions had to be covered by an award or agreement at the site to gain entry for discussion purposes. As a result of the introduction of the *Fair Work Act*, unions can now enter worksites for recruitment and discussion purposes as long as there is at least one person on the site who is eligible to be their member. The *Fair Work Act* links entry for discussion purposes to union eligibility rules.

2.3 AMMA members have reported that unions' prime reason for entering resource and construction industry worksites under the *Fair Work Act* is for recruitment and consultation, followed by bargaining, followed by alleged award or agreement breaches and, lastly, for alleged safety breaches[47]. This means the main reason for union site visits under the *Fair Work Act* has nothing to do with improving productivity or site safety but is about recruiting members and in the process disrupting workplace productivity.

[47] *AMMA Workplace Relations Research Project* report by RMIT, June 2010

2.4 AMMA members are reporting that more unions are visiting their worksites under the *Fair Work Act* but that a greater number of different unions are also entering [48]. Some AMMA members have reported unions entering their worksites for the first time under the *Fair Work Act*.

2.5 Between 1 July 2009 and 10 February 2010, the Fair Work Australia registry received 927 applications from union officials for entry permits under the *Fair Work Act*, with only a handful being refused[49].

2.6 Unions have been quick to make use of their expanded entry rights, particularly on resource construction projects. A March 2010 Fair Work Australia decision, *CFMEU v Foster Wheeler Worley Parsons (Pluto) Joint Venture*[50] involving a right of entry dispute at the Pluto gas construction site in the north west of Australia is illuminating.

2.7 In that matter, there were 50 contractors on the Pluto project employing a total of 3,300 people. Between 1 July and 27 October 2009, there were 217 requests for entry by the four main unions eligible to cover workers. Of the 217 requests, 130 were from the CFMEU. The CFMEU had been allowed to enter the project around 80 times during that four-month period, as long as it complied with established site entry protocols. However, the union was not happy with the restrictions and lodged a dispute with Fair Work Australia. As of May 2010, the number of entry requests on the project had reached 450. Before the *Fair Work Act* took effect, unions had no right to enter the project on which work commenced in 2007, and there were no visits by unions during that time.

2.8 In Fair Work Australia's decision on the right of entry dispute, Commissioner Williams accepted it was reasonable for site management, Foster Wheeler Worley Parsons, to ask the CFMEU to name the contractor whose employees it wanted to meet with, among other conditions it imposed. This was important given there were, as the Commissioner acknowledged, occasions where the CFMEU had held discussions with people other than its own members or those eligible to be its members.

[48] *AMMA Workplace Relations Research Project* report by RMIT, June 2010
[49] *Official Committee Hansard.* Senate Education, Employment & Workplace Relations Legislation Committee. Additional Estimates Hearings. 10 February 2010
[50] *CFMEU v Foster Wheeler Worley Parsons (Pluto) Joint Venture* [2010] FWA 2341, 29 March 2010, Williams C

2.9 AMMA is particularly concerned to ensure the safety of employees on large projects is not compromised by union visits. AMMA holds concerns about union members travelling *en masse* across large resources and construction projects to attend mass union meetings, which Fair Work Australia noted could compromise safety in some instances[51]. Any union access not strictly regulated and supervised has the potential to compromise safety on large resource construction sites.

2.10 AMMA welcomes the Pluto decision's acknowledgement that site management is best placed to determine right of entry protocols. AMMA also welcomes confirmation in the decision that an employer representative is entitled to observe (while not listening to) all meetings between a union and employees. However, the CFMEU has since appealed the decision and a Full Bench ruling is pending.

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

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

Right of entry clauses in enterprise agreements

2.12 The *Fair Work Act* has expanded the previous right of entry rules by introducing the ability for parties to include right of entry clauses in enterprise agreements. As stated in the *Fair Work Act*'s Explanatory Memorandum, lawful right of entry clauses 'might' provide an entitlement to enter an employer's premises for a range of reasons connected to the terms of the agreement such as to:

[51] *CFMEU v Foster Wheeler Worley Parsons (Pluto) Joint Venture* [2010] FWA 2341, 29 March 2010, Williams C

- assist in representing an employee under a term dealing with the resolution of disputes or consultation over workplace change;
- attend induction meetings of new employees; or
- meet with the employer when bargaining for a replacement to the current agreement.

2.13 Under the *Workplace Relations Act*, it was not possible to include in enterprise agreements any right of entry terms in addition to those in the legislation.

2.14 Under s.194 of the *Fair Work Act*, a term of an enterprise agreement is unlawful to the extent that it confers an entitlement for unions to enter premises to investigate suspected breaches or for discussion purposes 'other than in accordance' with Part 3-4 of the Act.

2.15 AMMA welcomes the June 2010 Fair Work Australia Full Bench decision, *Australian Industry Group*[52], which overturned an earlier decision that had deemed lawful a very broad right of entry clause in a *Dunlop Foams* enterprise agreement[53].

2.16 AMMA supported the appeal of the decision, as did the Government.

2.17 In the decision at first instance, Commissioner Ryan had approved an enterprise agreement to which the National Union of Workers (NUW) was a party, approving a clause giving additional entry rights to the union. The clause stated:

> *An authorised NUW representative is entitled to enter at all reasonable times upon the premises and to interview any employee, but not so as to interfere unreasonably with the employer's business.*

2.18 In approving the agreement at first instance, Commissioner Ryan found the clause did not contain entry rights that were the same as those in the *Fair Work Act* and therefore did not transgress the Act's provisions.

2.19 He found the clause was intended to act as a 'conditional invitation' which the employer was entitled to extend under the common law. He found the *Fair*

[52] *Australian Industry Group* [2010] FWAFB 4337, 11 June 2010
[53] *Pacific Brands Limited t/as Dunlop Foams* [2010] FWAA 1401, 22 February 2010

Work Act's right of entry provisions did not limit the common law rights of an employer as an occupier to invite persons onto their premises and did not operate at all while a union official was entering or remaining on-site pursuant to an implied or direct invitation from the employer as occupier.

2.20 The Government, AMMA and other employer groups held a different view and welcome Full Bench clarification that the right of entry clause was unlawful. The Full Bench found the clause bestowed entry rights that were so broad they did encompass entry to investigate a suspected breach, which was regulated by s.481 of the Act, as well as entry to hold discussions with members, which was regulated under s.484. But because the clause did not place any restrictions on such entry, such as notice periods, contrary to the restrictions placed on such entry under the Act, the clause breached the terms of the Act and was therefore unlawful, the Full Bench said.

2.21 AMMA welcomes the finding as it had argued during the appeal hearing that the clause breached the terms of the Act. AMMA also expressed concerns over the ability of a single contractor on-site to make special arrangements for unions to enter without the consent of other contractors on-site.

2.22 While right of entry clauses have not been a major issue in bargaining in the resources and construction sectors to date, AMMA members have reported unions increasingly seeking to include right of entry clauses in enterprise agreements[54]. AMMA is pleased the Full Bench ruling places the appropriate restrictions on entry under the clauses. However, concerns remain about how unions will attempt to get around the new restrictions.

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

Union access to records

2.24 Under both the *Workplace Relations Act* and the *Fair Work Act*, the federal industrial tribunal has to approve unions' inspection of non-member records over an alleged breach of an industrial law. The proposed ability for unions to access non-member records was something AMMA argued against in its

[54] *AMMA Workplace Relations Research Project* report by RMIT, June 2010

submission[55] to the original *Fair Work Bill* as that would have given union's *carte blanche* access to the employment records of members and non-members alike.

2.25 Commenting on the changes the *Fair Work Act* had made, in an October 2009 Fair Work Australia decision, *NTEU v Central Queensland University*[56], Senior Deputy President Richards compared union access to records under s.482 of the *Fair Work Act* with access under s.748 of the *Workplace Relations Act*. He found the changed wording of the *Fair Work Act* restricting access to records or documents 'directly relevant' to the suspected breach tightened up the provisions of the *Workplace Relations Act*, which only constrained access to 'records relevant to the suspected breach':

> *In my view, it appears the scope of documents that may be accessed by a permit holder under the Fair Work Act has been constrained to those that are 'directly relevant' to the suspected breach. This qualifying requirement (that the documents sought be 'directly' relevant) may have the effect of narrowing the scope of documents that may be accessed compared with the provisions under the former Act.*

2.26 AMMA supports union access to documents being restricted to those directly relevant to a suspected breach. It also supports the continuing requirement for Fair Work Australia's approval before unions can access non-member records under industrial relations laws. However, concerns remain about the effectiveness of this area of regulation in future.

2.27 The final version of the Work Health & Safety Bill[57], the legislation that will give effect to nationally harmonised model occupational health and safety laws from 1 January 2012, gives union officials the ability to inspect non-member records for alleged safety breaches without recourse to a higher authority such as Fair Work Australia.

2.28 It is not difficult to imagine a future in which unions rely increasingly on the provisions of the Work Health & Safety legislation to access non-member

[55] AMMA submission to the Senate inquiry into the Fair Work Bill, January 2008
[56] *NTEU v Central Queensland University* [2009] FWA 780, 28 October 2009, SDP Richards
[57] *Model Work Health & Safety Bill*, revised draft 21 May 2010

records, undermining the relevance of hard-fought restrictions under the *Fair Work Act*.

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

2.30 AMMA also notes that ACTU Secretary Jeff Lawrence has promised the union movement's continuing campaign for 'improvements' to the *Fair Work Act* will focus on persuading the Government to 'improve' right of entry to better protect workers from 'unscrupulous' employers[58].

2.31 **Recommendation:** There should be no expansion of existing right of entry laws despite the union movement's ongoing campaign.

3. INDIVIDUAL FLEXIBILITY ARRANGEMENTS

> *'…a simple, modern award system with opportunities for individual flexibilities will remove the need for any individual statutory agreements and the associated complexity and bureaucracy attached to those agreements.'* (Deputy Prime Minister Julia Gillard, Second Reading Speech for the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill*, February 2008)
>
> *'We see no need whatsoever for individual statutory agreements. What we're looking for is very clearly flexibility in the workplace and there are a range of mechanisms through which they can be provided. We've already spoken in the past at length about individual flexibility arrangements which are alive within enterprise agreements. There are also the flexibility arrangements which are available in common law agreements.'*

[58] *The union agenda for working Australians*, Address to ACTU Congress by ACTU secretary Jeff Lawrence, 2 June 2009

(Opposition Leader Kevin Rudd, Sky News, 10 May 2007)

3.1 The *Fair Work Act*'s mandated inclusion of 'flexibility terms' in all enterprise agreements from 1 July 2009 and all modern awards from 1 January 2010 is a well-intended policy initiative by the Government aimed at fostering individual negotiations between employers and employees for flexible workplace arrangements that suit them both.

3.2 In practice, however, employers are facing considerable legislative and other impediments to achieving genuine flexibility, including having to negotiate flexibility terms collectively with unions before Individual Flexibility Arrangements (IFAs) can be negotiated with individual employees. Any resulting flexibilities are hard-won and, in many cases, illusory.

3.3 In a comprehensive survey[59] of AMMA members on their experience of the first eight months under the *Fair Work Act*, 31.7 per cent of respondents said in their experience IFAs offered 'far less' flexibility than AWAs or ITEAs, while 16.7 per cent said IFAs offered 'less' flexibility.

3.4 Prior to the implementation of the *Fair Work* reforms, the resources sector had used individual statutory agreements to negotiate workplace flexibility from the time such agreements became available in WA in 1993 and federally as AWAs from 1996. However, the Government removed the option for employers and employees to have an employment relationship based on an individual statutory agreement in March 2008 in the commencement of its move towards *Forward with Fairness*[60].

3.5 Until that time, it was estimated that 67 per cent of resource sector employers that operated in the federal industrial relations sphere were operating under AWAs, with that figure closer to 80 per cent in metalliferous mining[61].

3.6 When the Government removed the ability to make new AWAs, it promised employers would be able to negotiate the same individual flexibilities under IFAs. However, there would be no ability under IFAs to cut wages and conditions as had happened in some industries under the *Workplace*

[59] *AMMA Workplace Relations Research Project* report by RMIT, June 2010
[60] *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008*
[61] *The case for ongoing flexibility in employment arrangement options in the Australian resources sector*, AMMA Paper, March 2004

Relations Act's 'Work Choices' AWAs, although this had never been the case in the resources sector.

3.7 The *Fair Work Act's* promise was that once a flexibility clause was included in an enterprise agreement or a modern award, it was up to the individual employee and employer to negotiate sufficiently flexible workplace arrangements to suit them both. While that was the theory, the reality is quite different.

The union campaign against IFAs

3.8 AMMA members that have been involved in enterprise bargaining under the *Fair Work Act* have reported that unions are showing a reluctance to negotiate genuinely flexible clauses with employers[62].

3.9 The ACTU's 'model' flexibility clause, which many unions have adopted in their bargaining agendas, restricts the terms of clauses that can be individually negotiated and requires a copy of any IFA negotiated between an employer and an individual employee to be given to the relevant union upon request.

3.10 The ACTU website cites IFAs as '*an ongoing concern for unions, as it may allow unscrupulous employers to undermine the collective agreement*'[63], despite the protections in place for employees and prospective employees requiring them to be left better off overall after entering into an IFA[64].

3.11 Similarly, the AMWU, the key union involved in the first major bargaining round under the *Fair Work Act* in 2009, posted a warning to its members on its website accusing employers of seeking flexibility clauses '*in an attempt to undermine pay and conditions in collective agreements*'[65].

3.12 The AMWU website says that while the union supports flexible working arrangements that suit workers and employers, flexibility must be agreed by a majority of workers and '*not forced on individuals*'. This push for majority flexibility provisions by unions, while including token individual flexibility

[62] *AMMA Workplace Relations Research Project* report by RMIT, June 2010
[63] *New protections and minimum standards for all Australian workers from 1 January 2010*, ACTU Fact Sheet, January 2010
[64] Section 144 and s.203 of the *Fair Work Act 2009*
[65] *Flexibility push by employers is about undermining collective agreements,* AMWU website, 22 September 2009

clauses to meet the *Fair Work Act's* requirements is at odds with the promise[66] the Government made to employers to provide a real alternative to AWAs.

The AIRC's model flexibility clause

3.13 The AIRC released its model flexibility term in June 2008[67] at the time it was the federal industrial relations tribunal.

3.14 The AIRC's model term has been included to a significant extent in all 122 modern awards and in around 75 per cent of enterprise agreements[68]. Where the model clause is adopted, it limits an IFA to varying award or agreement terms relating to:

- Arrangements about when work is performed;
- Overtime rates;
- Penalty rates;
- Allowances; and
- Leave loading.

3.15 While the AIRC's model flexibility clause is far more flexible than the ACTU's, it is still extremely narrow compared to what can lawfully be negotiated under an IFA. Fair Work Australia confirmed early on there was no restriction on what matters could be subject to an IFA provided they related to permitted matters and were not unlawful terms[69]. Section 203 of the *Fair Work Act* does not prescribe what terms of an enterprise agreement can be subject to an IFA, with the AIRC's model flexibility term only provided as guidance to bargaining representatives.

3.16 There is a need for the model flexibility clause to be broadened.

[66] Deputy Prime Minister Julia Gillard, Second Reading Speech for the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill*, February 2008
[67] Award modernisation decision [2008] AIRCFB 550, 20 June 2008, Full Bench
[68] Media Release, *Individual Flexibility Arrangements*, the Hon Julia Gillard MP, 17 September 2009
[69] AMWU v HJ Heinz Company Australia Ltd (Echuca Site) [2009] FWA 322, 22 September 2009, Whelan C

3.17 Around 40 per cent of respondents to a comprehensive AMMA survey conducted in April and May 2010 agreed the AIRC's model flexibility clause should be broadened[70].

3.18 As it turns out, the AIRC's model clause is often the best outcome an employer can expect to achieve in enterprise negotiations with union bargaining representatives under the *Fair Work Act*.

Examples of less than optimal flexibility clauses

3.19 A key obstacle to achieving truly flexible IFAs is the lack of an explicit requirement under the legislation that flexibility clauses offer 'genuine' flexibility.

3.20 Section 202(1) (a) of the *Fair Work Act* requires enterprise agreements to include a flexibility term that enables an IFA to vary the effect of the agreement in relation to the employee and the employer '*in order to meet the genuine needs of the employee and the employer*'. However, it provides no other guidance or requirement about how that will be monitored or defined.

3.21 While flexibility clauses are required to provide the possibility of achieving workplace flexibility, their potential can be as narrow as allowing a single clause of an agreement to be varied in order to meet the *Fair Work Act's* requirements.

3.22 An agreement struck between the Victorian branch of the construction division of the CFMEU and Bam & Associates[71] gives little away in terms of flexibility. The agreement includes a mandatory flexibility term which outlines the requirements for any flexibility arrangements entered into. The agreement then specifies only one clause that can be subject to an individual flexibility arrangement – the *Protective Clothing and Boots* clause. The flexibility term clearly provides the employer with no enterprise-specific flexibility despite it being couched in a way that meets the *Fair Work Act*'s mandatory approval requirements.

[70] *AMMA Workplace Relations Research Project* report by RMIT, June 2009
[71] *Bam & Associates Pty Ltd as trustee for Bam Trading Trust and CFMEU Agreement 2009-2012*, FWAA 2530, March 2010

3.23 The *Coates Hire Operations Pty Limited National Agreement 2009*[72], an agreement negotiated with the AMWU and CEPU, contains two separate flexibility clauses applying in different circumstances. Fair Work Australia approved the agreement in November 2009. The agreement's first flexibility term applies generally to all employees covered by the agreement and allows flexibility around just one clause of the agreement – when a paid 15-minute tea break can be taken!

3.24 The *Emerald Reo Greenfields Enterprise Agreement 2009-12*[73] was approved by Fair Work Australia in August 2009 and contains a flexibility clause that simply states:

> *The IFA may only vary terms of the agreement relating to flexible working arrangements to assist with an employee's family responsibilities.*

3.25 **Recommendation:** An obligation should be introduced for Fair Work Australia and the parties to enterprise agreements to ensure flexibility terms are delivering genuine flexibility and productivity benefits and are not depriving employers and employees of the benefits of those arrangements.

3.26 Another enterprise agreement[74] between Campbell's Soup and the AMWU was approved by Fair Work Australia in December 2009 following a very public stoush between the parties over the flexibility clauses. Two flexibility clauses eventually made their way into the agreement. The first was an 'individual' flexibility clause, the second a 'majority' flexibility clause.

3.27 The individual clause, which ensured the *Fair Work Act*'s minimum requirements were met, stated the only terms the IFA could vary were those in the *Food Preservers Award* incorporated into the agreement. Those were confined to the maximum number of single days or part of a single day's annual leave an employee could take in any calendar year.

3.28 The majority flexibility clause was much broader, although majority support was needed to arrive at any sort of agreement. A majority of employees in

[72] *Coates Hire Operations Pty Ltd t/as Coates Hire* [2009] FWAA 1336, 26 November 2009
[73] *Emerald Reo Greenfields Enterprise Agreement 2009-2012* [2009] FWA 135, 24 August 2009
[74] *Campbell Australasia Pty Ltd t/as Campbell Soups Australia* [2009] FWAA 1598, December 2009

each department had to agree to any changes that the employer proposed and the AMWU had to be fully consulted in developing and considering any modifications, with the right to consult with members over any proposals. This did not breach the Act given that a token individual flexibility clause was included in the agreement. But it meant the employer had to negotiate collectively for any genuine flexibility.

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

3.30 The *Parmalat Rowville AMWU/ETU Enterprise Agreement 2009-12*[75] was approved in October 2009. It stated the only term in the agreement that an IFA was allowed to vary was one concerning the taking of annual leave in individual days. The clause also required the employer to provide copies of all flexibility arrangements entered into to the union upon request.

3.31 AMMA contends the requirement for a union to have access to copies of all IFAs negotiated between employers and individual employees, even those of non-members, is a breach of non-members' privacy. AMMA maintains this is a breach of the National Privacy Principles and contrary to the *Fair Work Act's* prohibition on unions accessing the employment records of non-members without the employee's express consent or that of Fair Work Australia[76]. AMMA has written to Federal Privacy Commissioner Karen Curtis about its concerns in this area[77].

3.32 **Recommendation:** Section 482 of the *Fair Work Act* should make it explicit that unions cannot access employee records in the form of IFAs that have been agreed between an employer and an individual employee without that employee's written authority.

[75] *Parmalat Australia Limited* [2009] FWAA 664, 26 October 2009
[76] Section 482 of the *Fair Work Act 2009*
[77] AMMA Letter to Federal Privacy Commissioner Karen Curtis, 7 June 2010

Other issues with IFAs

3.33 In a comprehensive survey of AMMA members by RMIT University[78], 53.3 per cent of respondents said IFAs should be able to be a condition of employment.

3.34 There is no ability under the *Fair Work Act* to make IFAs a condition of employment, despite the ample statutory protections in place under s.144 and s.203 to protect employees and prospective employees from being disadvantaged by entering into IFAs.

3.35 This inability to offer pre-employment IFAs prevents employers that have reached agreement with existing employees from ensuring new employees are working under the same flexible terms and conditions. It may also prevent employers from using enhanced benefits under an IFA to attract the best applicants.

3.36 Employers are, under the *Fair Work Act*, obliged to offer a prospective employee the choice of engagement under the award or an IFA. An IFA can be offered prior to employment, just not as a condition of employment. For instance, the employer could outline at the interview what the difference in pay would be between the award or agreement and the IFA. While in practice this would not offend the requirement not to offer an IFA as a condition of employment, it represents extra effort and uncertainty for the parties.

3.37 The statutory protections under s.144 and s.203 ensure that IFAs must leave employees and prospective employees 'better off overall' when compared to the award or enterprise agreement. This is more than sufficient to satisfy any concerns the Government might have about the exploitation of current or prospective employees.

3.38 **Recommendation:** IFAs should be able to be a condition of employment given the statutory protections in place which guard against employees and prospective employees being disadvantaged.

3.39 Another shortfall of IFAs compared to statutory individual agreements is the ability of an employee to unilaterally terminate an IFA at any time during the life of an enterprise agreement with just 28 days' notice.

[78] *AMMA Workplace Relations Research Project* report by RMIT, June 2010

3.40 Employers need certainty about flexible work practices to plan their operational strategies and forecast budget expenditures. Employees need certainty about their conditions of employment, pay and rosters.

3.41 Problems resulting from unilateral employee termination of IFAs include the potential for a multitude of industrial arrangements to operate at any one time across a single enterprise. Some employees will be working under an IFA while others will be reverting at different stages to the modern award or enterprise agreement after terminating their IFA.

3.42 There is also no enforceable end date for IFAs under the *Fair Work Act*. They continue operating until a new enterprise agreement is finalised or either party decides to terminate the arrangement. This means resource sector employers could be faced with having to administer a plethora of workplace arrangements that need to be updated on a rolling basis. Given that employee wage rates will often have been negotiated and calculated on the basis of an IFA being in place, employees terminating IFAs at short notice will require an adjustment of pay.

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

3.44 Another shortfall of IFAs compared to individual statutory agreements is that there is nothing to stop an employee from taking protected industrial action after an enterprise agreement that an IFA is attached to has expired, despite the employee continuing to enjoy the benefits of an IFA such as higher wages.

3.45 The spectre of protected industrial action is always of major concern to resource sector employers, but the prospect of protected industrial action while an IFA is in force is particularly unpalatable where employers have negotiated improved terms and conditions on the basis the employee will continue to honour the IFA.

3.46 Of AMMA members who responded to a comprehensive survey on the *Fair Work Act* in April and May 2010[79], 90 per cent said no industrial action should

[79] *AMMA Workplace Relations Research Project* report by RMIT, June 2010

be able to be taken by an employee while they are enjoying the benefits of an IFA.

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

Decisions of interest on flexibility clauses

3.48 In a May 2010 Full Bench decision by Fair Work Australia[80], the Bench commented on a flexibility clause contained in the *TriMas Operations Waterview Close Collective Bargaining Agreement 2009,* which was negotiated between the employer and the AMWU.

3.49 The agreement's flexibility clause said an IFA could be made concerning the agreement's prohibition of the '*one in, all in*' principle for overtime. The agreement specifically ruled out the '*one in, all in'* principle in the following terms:

> *The assignment of overtime by an employer to an employee is to be based on specific work requirements, and the practice of 'one in, all in' overtime must not apply.*

3.50 However, the flexibility clause enabled that term to be subject to an IFA, meaning it could be varied by agreement between the employer and an individual employee. Commenting on that purported ability, the Full Bench said:

> *While it is not difficult to envisage the effect of that prohibition being altered by individual agreement, it is very difficult to envisage the circumstances in which such an alteration would meet the genuine needs of the employer and the employees as required by s.202(1)(a). Be that as it may, we cannot form the conclusion that the effect of [the clause] is incapable of being varied, at least in relation to the first element of the clause.*

[80] *Minister for Employment and Workplace Relations* [2010] FWAFB 3552, 19 May 2010, Full Bench

3.51 Clearly, the Full Bench had reservations that the flexibility term, which was already operating in the agreement, did not provide the means to meet the genuine needs of the employer and employee, but was unable to make a conclusive finding.

3.52 **Recommendation:** The legislation should clarify the test Fair Work Australia is required to apply when deciding whether a flexibility clause meets the genuine needs of the employer and employee.

The scheduled review of IFAs

3.53 AMMA's May 2010 paper, *Individual Flexibility Arrangements: The Great Illusion*[81], provides greater detail about the shortfalls of IFAs compared to individual statutory agreements in offering genuine flexibility to employers and employees.

3.54 On the first anniversary of the *Fair Work Act*'s agreement making provisions, it is clear that flexibility terms in modern awards and enterprise agreements are not delivering the genuine flexibility employers were promised.

3.55 AMMA notes that s.653 of the *Fair Work Act* requires the General Manager of Fair Work Australia to conduct research into the extent to which IFAs under modern awards and enterprise agreements are being agreed to, and the content of those arrangements.

3.56 The review is to be conducted three years from the commencement of the Act's provisions, with the General Manager required to provide a written report to the Workplace Relations Minister within six months of the three-year period.

3.57 AMMA is concerned that if the IFA review is left until July 2012, as currently scheduled, most resource sector employers will have negotiated enterprise agreements under the *Fair Work Act* while less than optimal IFA outcomes have been occurring for up to three years. This is precisely the time at which the Australian economy is starting to recover and the resources sector is entering a period of high activity. Any constraints on flexibility and productivity during that time should be rectified sooner rather than later.

[81] *IFAs: The Great Illusion*, Paper by AMMA, May 2010

3.58 In AMMA's view, Fair Work Australia's scheduled review of IFAs and how they are operating in awards and enterprise agreements should be brought forward to commence no later than 1 July 2011. AMMA has written to the former Deputy Prime Minister (now Prime Minister) Julia Gillard asking her to bring forward the review date[82].

3.59 **Recommendation:** The General Manager of Fair Work Australia's review of IFAs currently scheduled to commence on 1 July 2012 should be brought forward 12 months to commence no later than 1 July 2011.

4. AGREEMENT MAKING

> *'The current system allows for multiple streams of agreement making, including Individual Transitional Employment Agreements (ITEAs), introduced in the Transition Act to replace the use of Australian Workplace Agreements (AWAs) during the transition to the proposed framework, union collective agreements, employee collective agreements, union greenfields agreements, employee collective agreements and multi-employer agreements. The existence of multiple streams of agreement making has the capacity to create disputes over which industrial instrument to use.'* (Explanatory Memorandum to the Fair Work Act 2009)

Agreement Making Options

4.1 In the past quarter of a century, the resources sector has accessed the full range of agreement making options in order to improve flexibility and productivity, to reward performance and attract and retain employees. AMMA members continue to seek access to genuinely flexible collective agreements with the ability to make individual arrangements underpinned by a no-disadvantage test.

4.2 The resources sector is one of the highest paying employment sectors in the economy[83] and has not used agreement making, either collective or individual,

[82] AMMA Letter to Deputy Prime Minister Julia Gillard, 7 June 2010
[83] Australian Bureau of Statistics, *Employee Earnings, Benefits and Trade Union Membership*, *August 2009,* published on 12 May 2010. Category 6310.0

to drive down wages or conditions. It has used agreement making as an opportunity to increase employee benefits in return for improved workplace flexibility and productivity.

4.3 Prior to the *Fair Work Act* coming into force, statutory agreement making options that employers could make use of included:

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

4.4 Under the *Fair Work Act*, the options have been reduced to just two – union collective agreements and union greenfield agreements.

4.5 AMMA members are reporting increased difficulty in negotiating with bargaining representatives under the *Fair Work Act*, in particular when trying to negotiate greenfields agreements under the new regime[84].

Greenfield Agreements

4.6 The *Fair Work Act* removed the ability for employers to make greenfield agreements for start-up resources and construction projects without union involvement. As union involvement is now mandatory, AMMA members are reporting inflated union demands compared with those of the previous workplace relations system.

4.7 The majority of new projects will not commence until enterprise agreements are in place that provide certainty on the cost of wages and conditions. It is therefore of the utmost importance there be a capacity for employers to make greenfield agreements for major projects free from the unreasonable demands of unions.

4.8 While AMMA successfully lobbied against the unworkable proposal in the original *Fair Work Bill* that would have required employers to negotiate a

[84] *AMMA Workplace Relations Research Project* survey results

greenfield agreement with all unions that had coverage of potential employees, the absence of a non-union greenfield option remains an issue.

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

Permitted Matters

> *'The current workplace relations system extensively regulates what can be included in enterprise agreements. The extent of current regulation adds significant obstacles to genuine agreement making.' (Explanatory Memorandum to the Fair Work Act 2009 in reference to the Workplace Relations Act)*

4.10 There is a history of jurisprudence about the concept of 'matters pertaining to the employment relationship' regulating the content that can be included in registered industrial agreements. The *Fair Work Act* adopted the '*matters pertaining*' rule established by the courts which had also been incorporated into the *Workplace Relations Act* before it[85]:

> *This content rule retains the 'matters pertaining' formulation established in case law and ensures that matters that clearly fall within 'managerial prerogative' that are outside the employer's control or are unrelated to employment arrangements are not subject to bargaining and industrial action. The continuation of the familiar 'matters pertaining' formulation provides certainty to employers as to what matters can be included in enterprise agreements. The capacity to include more issues in agreements where the parties agree will make side agreements between employers and unions unnecessary … There will be no concept of 'prohibited content' in the Bill.*

[85] Explanatory Memorandum to the *Fair Work Act 2009*

4.11 The 2004 High Court decision in *Electrolux*[86] ruled that industrial agreements could not be certified if they contained matters that did not 'pertain to the employment relationship'. This meant unions and employees could not take protected industrial action in support of such agreements.

4.12 The *Electrolux* decision also confirmed that compulsory union bargaining fees did not pertain to the employment relationship and as a result, the supposedly 'protected' industrial action the AWU took in support of the Electrolux agreement was rendered 'unprotected'. Earlier High Court decisions made similar findings about the non-pertaining nature of compulsory union bargaining fees, including in the *Re Alcan* decision[87] handed down in 1994 – two years before the *Workplace Relations Act* was introduced.

4.13 The *Workplace Relations Act* incorporated the concept of 'matters pertaining' from the time it was first introduced in 1996. However, in the wake of the 2004 *Electrolux* decision, the Howard Government introduced into the Act the concept of 'prohibited content' via Regulations accompanying the *Work Choices* reforms in March 2006[88].

4.14 The Regulations were based on the *Electrolux* findings and spelled out that 'prohibited content' included:

- Deductions from employees' pay for union membership fees;
- Payroll deduction facilities for union membership fees;
- Leave to attend training provided by a trade union;
- Paid leave to attend union meetings;
- The right of an employer association or union to participate in or represent an employer or employee in a dispute settling procedure unless the organisation is the representative of choice of the employer or employee;
- The rights of a union or employer organisation to enter the premises of an employer;
- Restrictions on engaging independent contractors and requirements relating to their conditions of engagement;

[86] *Electrolux Home Products Pty Ltd v AWU* [2004] HCA 40, 2 September 2004
[87] *Re Alcan Australia Limited* [1994] HCA 34, 25 August 1994
[88] *Workplace Relations Regulations 2006*

- Restrictions on engaging labour hire workers and requirements relating to their engagement;
- The cashing out of an employee's annual leave; and
- Providing information about employees bound by the agreement to a union or union representative unless required by law.

4.15 Terms encouraging or discouraging union membership were also prohibited under the *Workplace Relations Regulations*, as were terms: allowing for industrial action; dealing with the disclosure of details of a workplace agreement; providing unfair dismissal remedies; restricting the offering or negotiating of AWAs; and 'objectionable' terms.

4.16 When the *Fair Work Act* was introduced on 1 July 2009 it expanded the breadth of matters that could be included in enterprise agreements, while continuing to deem some terms unlawful and discriminatory. Acceptable terms for inclusion in agreements from then on included:

- Matters pertaining to the relationship between the employer and employees to be covered by the agreement (which had also been the case under the *Workplace Relations Act)*;
- Matters pertaining to the relationship between the employer and the employee organisation (the union) that would be covered by the agreement (a new concept);
- Wage deductions for any purpose authorised by an employee who would be covered by the agreement, including union membership fees (a reversal of the prohibition in the *Workplace Relations Act)*; and
- Terms about how the agreement would operate.

4.17 The following are also permitted matters under the *Fair Work Act*:

- Terms relating to manning requirements/staffing levels, particularly those aimed at ensuring the health, safety and wellbeing of employees;
- Terms relating to conditions or requirements about employing casuals or engaging labour hire or contractors as long as they sufficiently relate to employees' job security. An example would be a term that provided that contractors must not be engaged on terms and conditions that would undercut the enterprise agreement;

- Terms that provided for casual employees to convert to permanency after a set time; and
- Terms that would prevent an employer from seeking a contribution or indemnity from an employee in respect of personal injuries or losses suffered by that person where such injuries or losses were caused by the employee in the course of their employment.

4.18 Non-permitted matters under the *Fair Work Act* include clauses that contain a general prohibition on engaging labour hire employees and contractors or on employing casuals.

Unions now commonly pursuing previously prohibited matters

4.19 Unions have wasted no time in pursuing the inclusion of union-specific terms in enterprise agreements under the *Fair Work Act*.

4.20 AMMA member respondents to a comprehensive survey in April and May 2010 that had been involved in enterprise bargaining under the *Fair Work Act* reported union-specific clauses were now commonly on the bargaining agenda[89].

4.21 Some 77.3 per cent of those respondents that had been engaged in bargaining under the *Fair Work Act* said unions were now pursuing clauses that would have been deemed prohibited content under the *Workplace Relations Act.*

4.22 Of those member companies:

- 76.5 per cent said unions had pursued trade union training leave clauses in enterprise agreement negotiations;
- 64.7 per cent said they had pursued right of entry clauses;
- 58.8 per cent said they had pursued shop stewards' rights clauses;
- 52.9 per cent said they had pursued clauses facilitating payroll deductions of union fees;
- 29.4 per cent said they had pursued clauses relating to the use of contractors; and
- 11.8 per cent said unions had pursued clauses requiring workplaces to have a union office on-site.

[89] *AMMA Workplace Relations Research Project* report by RMIT, June 2010

4.23 New enterprise agreements in the sector made under the *Fair Work Act* reflect a return to excessive union demands and union-specific agendas. AMMA maintains that the legislation should not enable enterprise agreements to be used as vehicles to further entrench unions' role in the workplace without any requirement to improve work practices or productivity.

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

Dispute settlement clauses

4.25 Under s.146 of the *Fair Work Act*, all modern awards must include terms for settling disputes about the award or the National Employment Standards (NES).

4.26 Under s.186 of the Act, before approving an enterprise agreement, Fair Work Australia has to be satisfied it contains a term providing a procedure that requires or allows Fair Work Australia or another independent person to settle disputes about any matters arising under the agreement or in relation to the NES; and which allows employees to be represented for the purposes of the dispute settlement procedure.

4.27 A significant decision on the requirements of dispute settlement clauses was handed down by a Full Bench of Fair Work Australia in February 2010[90]. The decision, *Woolworths Ltd trading as Produce and Recycling Distribution Centre*, overturned an earlier decision that refused to approve a Woolworths Limited enterprise agreement because the Commissioner at first instance found the dispute resolution clause did not meet the requirements of s.186 of the *Fair Work Act*.

4.28 The Federal Government intervened to support Woolworths in the appeal, arguing that contrary to the original Commissioner's findings, the *Fair Work Act* did not require agreements to include a mandatory procedure for

[90] *Woolworths Ltd trading as Produce and Recycling Distribution Centre* [2010] FWAFB 1464, 26 February 2010, Full Bench

resolving disputes via arbitration, ie, agreements did not have to include a compulsory arbitration clause.

4.29 Commissioner Smith in his original decision[91] said the agreement between Woolworths and its employees, with the involvement of the shop employees union, met the requirements for approval in all ways but one.

4.30 Significantly, the agreement's dispute resolution clause 'permitted' any party – Woolworths, an employee or the SDA – to refer a matter to Fair Work Australia for conciliation and, if not resolved, to 'agree' to Fair Work Australia to arbitrate. The Commissioner at first instance said access to arbitration was a requirement of dispute resolution clauses in all enterprise agreements under the *Fair Work Act* and the legislation did not leave that up to the discretion of the parties.

4.31 The Full Bench disagreed, saying while compulsory arbitration was an 'essential ingredient' in the AIRC's 'model' dispute resolution procedure, not all agreements had to adopt the model procedure. It quashed the original finding.

4.32 There was no evidence the legislature intended arbitration to be an essential ingredient in all dispute resolution terms, the Full Bench said:

> *In our view, the model term does no more than illustrate the types of procedures and powers that may be dealt with in a dispute resolution term. There is no basis for an implication that all of them must be included in every term.*

4.33 Unless a particular agreement conferred dispute settling functions on the tribunal, it had no power to perform those functions and the parties had a choice in that regard, the Full Bench said.

4.34 AMMA welcomes the ruling's confirmation that access to compulsory arbitration in the event a dispute is not resolved via conciliation is not a mandatory feature of agreements under the *Fair Work Act*. Acceptable dispute resolution procedures can allow parties to choose to empower Fair Work Australia to arbitrate disputes. Parties are able to adopt as much or as

[91] *Woolworths Ltd trading as Produce and Recycling Distribution Centre* [2010] FWA 30, 21 January 2010, Smith C

little of the model dispute resolution procedure in their agreements as they choose.

5. INDUSTRIAL ACTION

Protected Industrial Action

> *'It is intended that industrial action that is organised or taken in the context of legitimate collective bargaining and meets certain pre-requisites is permissible and therefore protected.' (*Explanatory Memorandum to the Fair Work Act 2009*)*

5.1 Industrial action under the *Fair Work Act*[92] is defined as the performance of work in a manner different from how it is customarily performed or the adoption of a work-related practice that results in a restriction, limitation or delay in the performance of work.

5.2 While protected industrial action will be dealt with in the separate AMMA report on good faith bargaining to be released shortly, AMMA members have expressed concerns in this area.

5.3 There are numerous obligations on employers to ensure the protection of employees as part of the enterprise agreement making process under the *Fair Work Act*. This is in contrast to the absence of protection for employers when unions and employees embark on protected industrial action over extravagant claims. There is also no requirement for there to be an impasse in enterprise agreement negotiations before protected industrial action can be taken.

5.4 The legislative test which Fair Work Australia is required to apply before employees, via their union, can embark on protected action amounts to a '*tick the box*' exercise. The requirement to be genuinely trying to reach an agreement prior to taking protected action pays no regard to the extravagance of the claims being made.

5.5 Unions have obtained orders for protected action ballots on the basis they have been found to be genuinely bargaining while at the same time

[92] Section 19 of the *Fair Work Act 2009*

maintaining claims for a $500-a-day allowance and a 28 per cent wage rise in a single year[93] [94].

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

5.7 While the agreement making choices for employers have been reduced under the *Fair Work Act*, so too have the options available to employers when faced with protected industrial action. This elevates the importance of requiring unions and employees to have exhausted the negotiation process and not be pursuing extravagant claims when taking protected action.

5.8 In *Boral Resources (NSW) Pty Ltd and the AWU*[95], a Full Bench of Fair Work Australia found the union could provide the employer with a notice of intended industrial action and, on the day the action was scheduled to take place, revoke the notice and have employees turn up for work and expect to be paid. This type of industrial tactic by unions is contrary to the requirement to provide the employer with 72 hours' notice of the intention to take protected action to enable the employer to make arrangements for the cessation of work and notify their clients. This loophole, where employees achieve the same effect as if they actually took the industrial action, but do not lose any pay, needs to be closed.

5.9 Employers should have the right in these circumstances to refuse to accept employees making themselves available for work contrary to their notice to take industrial action. Alternatively, employees should be prevented from taking that form of industrial action again during the enterprise negotiations.

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

[93] *LHMU v MSS Security Pty Ltd* [2010] FWA 4470, 21 June 2010
[94] *Maritime Union of Australia v Total Marine Services Pty Ltd* [2009] FWA 187, 1 September 2009
[95] *Boral Resources (NSW) Pty Ltd* [2010] FWAFB 1771, 31 March 2010, Full Bench

provided of the cancellation, that type of action should not be able to be taken for the remainder of the enterprise negotiations.

High Income Earners

5.11 The *Fair Work Act* grants any employee covered by an award or enterprise agreement the right to engage in protected industrial action. Such a right is not restricted to low income earners or vulnerable employees in need of protection. Employees on incomes more akin to management salaries are able to take protected industrial action because their classification is covered by an award or enterprise agreement.

5.12 Many resource sector employers are subject to continuity of supply obligations and their clients make no concessions for the right of employees to take protected industrial action. AMMA contends that high income earners on more than $108,300 a year do not require the protections under the *Fair Work Act* of being able to take protected industrial action. While it may be argued that international conventions provide that all employees have the right to strike, the ILO Conventions are always subject to the national laws of the ratifying country.

5.13 Recommendation: The right to take protected industrial action should extinguish at an income threshold of $108,300 a year or pro rata.

Unlawful Industrial Action

> *'Unprotected action typically has a greater impact on the economy as it is often targeted to cause significant damage to a business, with no opportunity afforded to the employer to prepare for or manage the impact.' (Explanatory Memorandum to the Fair Work Act 2009)*

5.14 Under the *Fair Work Act*, unprotected industrial action, also known as 'unlawful' industrial action, is any form of industrial action that is not protected, meaning it has not been approved by Fair Work Australia via a secret ballot for protected industrial action in support of enterprise bargaining; or is not

based on a reasonable concern of an imminent risk to an employee's health or safety[96].

5.15 Unprotected industrial action includes, but is not limited to, withdrawal of labour such as strike action, overtime bans and partial work bans and restrictions. It is unlawful for an employer to pay, or for an employee to demand or accept pay, for any period of protected or unprotected industrial action.

5.16 Under s.418(1) of the *Fair Work Act*, if industrial action that is not, or would not, be 'protected' is happening, threatened, impending, probable or being organised, Fair Work Australia must make an order to stop the action for a specified period of time.

Refusal to work regular overtime found to be unlawful action

5.17 The decisions from Fair Work Australia to date on unprotected industrial action under the *Fair Work Act* confirm it will be considered unprotected action if employees' regular and customary work practices are not adhered to, such as in *AE&E Australia Pty Ltd v CFMEU and AMWU – WA Branch*[97].

5.18 In that case, the employer AE&E applied to the tribunal under s.418 against the CFMEU and AMWU to stop unprotected industrial action it claimed was inconsistent with the customary practice of working overtime.

5.19 The employer said around 50 per cent of employees regularly worked Saturdays when overtime was available, and around 15 per cent regularly worked Sundays when overtime was available.

5.20 In the decision, Fair Work Australia found that between 9 January and 7 February 2010, employees *'engaged in action which can only be described as a ban or restriction on the working of overtime... inconsistent with the customary practice of working overtime prior to 9 January 2010'.* It also found it was unlikely the co-ordinated action was occurring without being organised. The Commissioner confirmed unprotected industrial action was occurring and ordered it to stop immediately.

[96] Section 19 of the *Fair Work Act 2009*
[97] *AE&E Australia Pty Ltd v CFMEU and AMWU – WA Branch* [2010] FWA 1212, 22 February 2010, Cloghan C

Employee co-ordinated 'sickies' deemed unlawful

5.21 In another decision, *Pacific National Pty Ltd v Australian Rail, Tram and Bus Industry Union*[98], the employer successfully applied to Fair Work Australia to stop or prevent industrial action being taken by train drivers during bargaining for a proposed enterprise agreement.

5.22 The company's regional manager overheard a conversation between employees saying there might be a bit of 'Chinese flu' going around in the coming week. This was confirmed when employees suddenly began to call in sick and were unavailable to cover shift vacancies.

5.23 The RTBU denied any involvement in the industrial action, claiming it did not and would not endorse or support any action other than protected industrial action. The Commissioner cleared the union of any involvement.

Unscheduled refusal to attend work found to be unlawful

5.24 In *United Group Resources Pty Ltd & Ors v AMWU, CFMEU and CEPU*[99], employees from 13 different companies contracting to site manager Foster Wheeler Worley Parsons on the Woodside Pluto LNG Project were found to be engaging in unlawful strike action over accommodation arrangements known as 'motelling'.

5.25 On 22 and 23 January 2010, the companies sought orders from Fair Work Australia to stop the unlawful action after 1,800 employees refused to attend for work. The unions conceded that industrial action had occurred and agreed it was not protected, although they denied being involved in or organising the action.

5.26 Fair Work Australia noted the history of unprotected industrial action at the Pluto site involving members of the AMWU, CFMEU and CEPU. On 1 December 2009, employees had engaged in unprotected action by failing to attend work for a period of 48 hours, the Commissioner noted:

> *Whether or not the Respondent unions are trying to distance themselves from the unprotected industrial action of the*

[98] *Pacific National Pty Ltd v Australian Rail, Tram and Bus Industry Union* [2010] FWA 2884, 14 April 2010
[99] *United Group Resources Pty Ltd & Ors v AMWU, CFMEU and CEPU* [2010] FWA 847, 8 February 2010

employees at the site, it is clear that they have had significant involvement in the past and continued to be involved, albeit in a different form, on this occasion.

5.27 The Commissioner ordered the employees to stop the unlawful strike action, saying it was *'indisputable'* that unprotected action had occurred.

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

The need for reform

5.29 Unprotected industrial action generally has a greater impact on employers than protected industrial action, although both are detrimental. AMMA maintains that with the limited agreement making options for employers, even protected industrial action should only be taken as a last resort. However, unprotected action is particularly harmful to the enterprise and the economy because there is no warning and no time to prepare for contingencies.

5.30 AMMA contends that the *Fair Work Act*, similar to the *Workplace Relations Act*, fails to adequately penalise unions and employees in a timely manner after they engage in unlawful industrial action.

5.31 The legislative mechanism under which the tribunals and courts can require work to resume is in need of review as it is not responsive to employers' needs. Wildcat industrial stoppages often go unpunished and unions resorting to industrial action under the guise of 'safety' is a practice commonly reported by AMMA members. Immediate sanctions against employees and unions taking unlawful industrial action need to be introduced, with unions held responsible for the actions of their members.

5.32 Despite Fair Work Australia's powers to suspend or terminate unprotected industrial action, AMMA members' view is that access to remedies for unprotected action are not able to be accessed swiftly enough to act as a deterrent to those employees prepared to take unlawful action[100].

[100] *AMMA Workplace Relations Research Project* report by RMIT, June 2010

5.33 It has been known to take more than a year for a court to charge offending employees over unprotected action. Often by that time, the enterprise is free of disputes and employers do not want to 'muddy the waters' by prosecuting employees who might still work for them.

5.34 As an example, the Australian Building & Construction Commission's prosecution of 107 workers who took unprotected strike action on the Perth to Mandurah Rail Project in February and March 2006 took five months to investigate, was filed in the Federal Court in August 2006, and final orders were issued in December 2007.

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

6. UNFAIR DISMISSAL

> *'The new legislation will expand access to unfair dismissal provisions. Approximately 100,000 additional previously exempt businesses, with around three million employees, will become part of the unfair dismissal system … While there is likely to be more unfair dismissal claims, they should be easier and cheaper to resolve. The unfair dismissal system will provide definite benefits for employees in terms of job security and mitigate adverse impacts on employers.' (Explanatory Memorandum to the Fair Work Act 2009)*

6.1 The *Fair Work Act* has significantly expanded the unfair dismissal jurisdiction compared to the system under the *Workplace Relations Act*.

6.2 The *Fair Work Act*'s unfair dismissal provisions took effect on 1 July 2009 and extended statutory protections to all award-covered employees with more than six months' continuous service with an employer, including regular and systematic casuals, but excluding those employed by small business until they achieved a qualifying period of 12 months.

6.3 Under the *Workplace Relations Act's* Work Choices reforms, small businesses were defined as those employing 100 employees or fewer. People employed by those businesses were not able to bring an unfair dismissal claim at any stage.

6.4 The change under the *Fair Work Act* that opened up the jurisdiction the most was lowering the threshold of what was considered a 'small business' to those employing fewer than 15 full-time equivalents. The qualifying period for those employees is 12 months' continuous service, including for regular and systematic casuals. It is worth noting that the *Fair Work Act*'s small business definition will be revised to mean businesses with fewer than 15 employees by headcount rather than full-time equivalency from 1 January 2011.

6.5 As stated above, dismissals by a small business before the 12-month qualifying period are exempt from unfair dismissal claims. Dismissals after that time are also exempt as long as the employer can show they have complied with the *Fair Work Act's 'Small Business Fair Dismissal Code'*.

6.6 Another significant change under the *Fair Work Act* was its removal of the Work Choices '*operational reasons*' exemption relating to redundancies. That exemption had meant that as long as operational reasons played a part in a dismissal, regardless of the size of the business, no unfair dismissal claim could be brought. The *Workplace Relations Act* defined operational reasons as:

> *…reasons of an economic, technological, structural or similar nature relating to the employer's undertaking, establishment, service or business or to a part of the employer's undertaking, establishment, service or business.*

6.7 The Government removed the operational reasons exemption from 1 July 2009 and replaced it with a narrower '*genuine redundancy*' exemption. Section 389 of the *Fair Work Act* states a dismissal will be a case of genuine redundancy if the employer:

> *…no longer required the job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and the employer has complied with*

> *any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.*

6.8 It would not be a case of genuine redundancy if it was reasonable for the worker to be redeployed within the employer's enterprise or within the enterprise of an associated entity.

6.9 The *Fair Work Act* also purported to exclude from the unfair dismissal jurisdiction high-income earners with a guaranteed annual income of more than $108,300 who were not covered by a modern award. As will be discussed, a recent Fair Work Australia decision shows that is not necessarily the case.

The current context

6.10 Fair Work Australia is yet to release its first annual report covering the year from 1 July 2009 to 30 June 2010. However, publicly released figures to date indicate the number of unfair dismissal applications has increased by 50 per cent since the *Fair Work Act* came into force. There were 7,437 applications in the first eight months of the *Fair Work Act* compared to 4,924 in the corresponding eight months under the *Workplace Relations Act* in 2008-09[101].

6.11 What can also be seen from the AIRC's annual report for the year 2008-09 is that termination of employment claims were already on the rise before the *Fair Work Act*'s unfair dismissal changes took effect[102]. As the latest annual report notes:

> *The number of applications for a remedy in relation to termination of employment increased by more than 30 per cent and the total number of applications was the highest since 2000-01. Although there is no clear indication of the reason for the increase, it is reasonable to assume that the significant downturn in global financial markets has had an effect and employers are responding to market conditions by reducing labour costs where it is practical to do so. It is also likely that the rising unemployment rate is providing an additional*

[101] FWA Deputy President Brendan McCarthy quoted in article in *The Australian*, 10 March 2010

[102] *Annual Report*, Australian Industrial Relations Commission and Australian Industrial Registry, 2008-09

incentive to challenge a termination of employment which is perceived to be unfair.

6.12 In 2008-09 – the year before the *Fair Work Act* was introduced – there were 7,994 applications under the *Workplace Relations Act*'s termination of employment provisions. This was considerably more than the 6,067 in 2007-08, 5,173 in 2006-07, 5,758 in 2005-06 and 6,707 in 2004-05. The majority of termination of employment matters were filed in Victoria, while New South Wales and Western Australia both experienced a sharp increase in lodgements (2,428 in New South Wales in 2008-09 compared to 1,712 in 2007-08, and 762 in Western Australia compared to 422).

Case law on unfair dismissal

6.13 AMMA's primary concern with decisions coming out of Fair Work Australia in the unfair dismissal area is where the tribunal has ordered the reinstatement of workers dismissed over serious safety issues. Also unsettling is the benchmark the tribunal has set in considering the impact of a dismissal on an employee in deciding whether it was harsh, unjust or unreasonable.

6.14 In AMMA's view, Fair Work Australia's reinstatement of a worker to Norske Skog Paper Mills (Australia) Pty Ltd[103], despite repeated safety breaches, exceeded what the tribunal should have taken into account in deciding whether the dismissal was fair.

6.15 In that case, a man was dismissed for repeatedly failing to wear his safety glasses while cleaning a pre-screen feed tank full of warm water from which he was collecting staples. He admitted to removing his glasses several times, despite knowing it was against company policy and despite prominent signs at every entrance to the warehouse reminding workers to wear them. He also admitted to swearing at his supervisor after being told to put his glasses back on.

6.16 Despite having received at least six warnings over safety breaches between 1995 and 2008, Fair Work Australia ordered the man's reinstatement, saying:

[103] *Quinlivan v Norske Skog Paper Mills (Australia) Ltd* [2010] FWA 883, 8 February 2010, VP Lawler

> *For a man of the applicant's age and poor educational profile, it is unsurprising that he has not been able to find another job despite great efforts to do so. Realistically, the applicant faces the prospect of long-term unemployment or underemployment. His family faces severe financial hardship. There is a real risk that he will lose his house. His marriage will suffer increased stresses. His wife's depression could well be exacerbated. All these circumstances are likely to impact adversely on his young daughters.*

6.17 There is an element of hardship for any employee resulting from being dismissed. However, where safety issues are concerned, the tribunal should be very cautious about overturning the legitimate decisions of the employer. AMMA believes the tribunal should confine its deliberations to whether there is merit in a particular dismissal rather than extending its assessment to the impacts of the dismissal on the employee or their family.

6.18 It is important to note that the reinstatement in the above case was granted at the same time as the tribunal sent a message to employers in the decision saying:

> *Employers are entitled to treat conduct that may expose them to prosecution or civil liability seriously. Employers are entitled to have employees take safety rules seriously.*

6.19 Decisions such as these send the wrong message to employees about the importance of safety. AMMA members are reporting[104] that in the first months of the *Fair Work Act* there has been a growing tendency for workers to believe they will be reinstated no matter what they do. The legislation should not be encouraging this type of attitude.

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

[104] *AMMA Workplace Relations Research Project* report by RMIT, June 2010

6.21 However, AMMA welcomes other decisions such as that involving BHP Billiton Iron Ore's dismissal of a train service worker, where Fair Work Australia upheld the dismissal in part due to the worker's negative attitude to workplace safety following numerous safety breaches[105].

6.22 AMMA also welcomes the Fair Work Australia decision upholding BHP Billiton Petroleum Pty Ltd's dismissal of a worker for turning up to work under the influence of alcohol. This was despite the worker consequently missing out on a significant redundancy payout just three days later[106].

High-income earners and unfair dismissal

6.23 In a decision that will have implications for employers in Western Australia and other affected states who have been acting on the assumption that their high-income employees were excluded from the unfair dismissal jurisdiction, Fair Work Australia has found a former CEO of a community care centre was entitled to bring an unfair dismissal claim[107]. This was despite the man's earnings exceeding the $108,300 a year high-income threshold as well as the fact that no award or enterprise agreement applied to him at the time of his dismissal in August 2009.

6.24 The chief executive successfully argued that because he was covered by a General Order of the Western Australian Industrial Relations Commission (WAIRC) immediately before his dismissal, he was not precluded from making an unfair dismissal application.

6.25 Of particular relevance to Commissioner Williams' April 2010 decision was that on 1 June 2005 the WAIRC had made a *General Order on Termination Change and Redundancy*, which under Work Choices became a Notional Agreement Preserving State Awards (NAPSA). This became a transitional instrument under the *Fair Work Act* which, for the purposes of s.394 and unfair dismissal, qualified as a modern award. Employees *covered* by a modern award are entitled to unfair dismissal protections under the section, even if no modern award *applies* to their employment and they have guaranteed annual earnings in excess of the high-income threshold.

[105] *Butson v BHP Billiton Iron Ore Pty Ltd* [2010] FWA 640, 1 February 2010. DP McCarthy
[106] *Smith v BHP Billiton Petroleum Pty Ltd* [2010] FWA 3349, 28 April 2010, DP McCarthy
[107] *Atkinson v Midway Community Care Inc* [2010] FWA 2907, 13 April 2010, Williams C

6.26 AMMA has concerns about the ramifications of this decision, which would apply equally across Australia wherever NAPSAs are still in operation. This decision thwarts the Government's promises to exclude high-income earners from the unfair dismissal jurisdiction. The decision is of particular relevance to the resources sector given it is one of the highest paying sectors in the economy.

6.27 Australian Bureau of Statistics (ABS) figures released in May 2010 show the mean weekly earnings for employees in the mining industry are $2,010 a week ($104,520 a year) as of August 2009, nearly twice the all-industries figure of $995 ($51,740 a year)[108].

6.28 With many employees in the resources sector earning more than the $108,300 high-income threshold and not being covered by a modern award, if the legislation is not amended it will have implications for all those employers who have been operating under the assumption that their award-free high-income employees are precluded from bringing an unfair dismissal claim.

6.29 Commissioner Williams in the decision said the implications would only impact on dismissals up to 31 December 2009 as that was when NAPSAs were stated to cease to apply under the *Workplace Relations Act*. However, the *Fair Work (Transitional Provisions & Consequential Amendments) Act 2009*, the more recent and hence superseding legislation, says that NAPSAs (other than enterprise instruments) terminate on 1 January 2014. Therefore, the decision will have ramifications for dismissals up to 31 December 2013 if the issue is not addressed before then.

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

Genuine redundancies

6.31 AMMA welcomes the Full Bench ruling that confirms the concept of genuine redundancies extends to situations where the employer outsources work to a

[108] Australian Bureau of Statistics, *Employee Earnings, Benefits and Trade Union Membership*, August 2009, published on 12 May 2010. Category 6310.0

third party[109]. The test is that the employer no longer requires the work to be performed by anyone in its employ, not anyone in general, the Bench confirmed in the *Ulan Coal* case.

6.32 In the case, 11 mineworkers were hired at the same time as the 10 employees were made redundant. This, according to the Commissioner at first instance, showed the employer still needed the work to be performed and the redundancies were therefore not genuine.

6.33 Ulan successfully argued on appeal that the Commissioner's decision involved significant errors of fact and interpretation. The Full Bench in its appeal decision said:

> *We agree that the appeal does raise issues of possible wider application going to the construction of the redundancy and consultation provisions in the Act and the Ulan Coal Mines Underground Mine Enterprise Agreement 2006 and that it is in the public interest that any significant errors in the decision under appeal should be corrected.*

6.34 The Bench found the Commissioner had failed to take full account of the nature and circumstances of the changes in the company's operational requirements including the way in which those changes and the application of seniority in the selection process had led to the retrenchment of the 10 applicants. The Commissioner had misconstrued the statutory provisions, the Bench said:

> *The changes in the operational requirements at the mine included changes in the composition of the workforce, in the tasks and functions that would be performed by contractors and employees and in the number and skills mix of mineworkers required to be employed. As a consequence of the changes it was determined that there were a number of non-trades mineworker positions that were surplus to requirements as they were no longer needed for the company's operations …The need to reduce the overall*

[109] *Ulan Coal Mines Limited v Howarth & Others* [2010] FWAFB 3488, 10 May 2010, Full Bench

> *number of non-trades mineworkers, together with the application of the seniority principle for selection, meant that mineworkers from different parts of the operations would be retrenched and that other mineworkers might need to be reallocated into available mineworker jobs … This does not mean that if any aspect of the employee's duties is still to be performed by somebody, he or she cannot be redundant. The examples given in the [Fair Work Act] Explanatory Memorandum illustrate circumstances where tasks and duties of a particular employee continue to be performed by other employees but nevertheless the 'job' of that employee no longer exists.*

6.35 Fewer non-trade mineworker jobs were required overall as a result of the operational changes introduced and therefore the jobs of the retrenched mineworkers could be said to no longer exist, the Bench said. This meant they were genuine redundancies.

Genuine redundancies not so clear in construction industry

6.36 In another case concerning whether a construction worker's termination of employment was a genuine redundancy, Fair Work Australia upheld the employer's argument that it was for genuine operational reasons[110]. However, Commissioner Hampton noted in passing that the issues would not be so cut and dried in an industry like the construction industry where employment levels went up and down depending on the contracts the employer had in place at the time.

6.37 The construction worker claimed he was unfairly dismissed for refusing to work on a rostered day off. He said there was plenty of other work available and some of his work was now being performed by other employees. Two university students had also been put on since he was let go, he said.

6.38 Commenting on the nature of the formwork business, the Commissioner said:

> *The nature of the business is such that the levels of employment are dependent upon a range of factors but*

[110] *TG v SF Pty Ltd* [2010] FWA 2650, 13 May 2010, Hampton C

> *principally, the number and size of contracts that it undertakes from time to time. Employment levels are also contingent upon construction schedules, particularly on more significant jobs and the employment levels within the business have fluctuated significantly from time to time.*

6.39 The Commissioner said while some elements of the construction worker's job were being performed by other employees, the test for genuine redundancy was not whether the 'duties' survived in some form, but whether the previous 'job' survived the restructure or downsizing. Importantly in this case, the number of employees doing the range of functions previously performed by the worker had reduced. While finding it was a case of genuine redundancy, the Commissioner cautioned:

> *In my view, care needs to be taken in the application of these concepts in relation to the construction industry. Given the nature of the industry and the utilisation of daily hire broadly across this sector, not every change in employment levels associated with changes in business activity will be such as to meet the requirements of s.389(1) of the Act [to qualify as a genuine redundancy]. That is, in cases where the changes in work and/or employment levels are short-term and transitional in nature, it may be more difficult for an employer to demonstrate that the job is in fact no longer required. In that regard I also note that the particular circumstances within the construction industry are recognised within the Act in relation to termination of employment related obligations.*

6.40 Under s.534 of the *Fair Work Act*, daily hire employees in the construction industry are exempt from the requirements for employers to consult with affected employees prior to dismissal as well from the notification requirements for termination of employment under s.789 and from notice of termination provisions under s.123.

6.41 **Recommendation:** Daily hire employees in the building and construction industry should be exempt from bringing unfair dismissal claims unless they

are dismissed for prohibited reasons given the unique and fluctuating circumstances of the construction industry.

Incapacity to perform the inherent requirements of the job

6.42 In a May 2010 decision, a Full Bench of Fair Work Australia clarified the test against which employers should measure employee's capacity to perform the inherent requirements of a job[111].

6.43 Where employers are relying on an employee's incapacity to perform the inherent requirements of the job to enact a dismissal, the incapacity has to be tested against the actual or substantive role, not against their restricted duties or temporary alternative job, the Full Bench clarified.

6.44 The particular case involved a brewery technician formerly employed by J Boag and Son Brewing Pty Ltd who was dismissed following medical evidence he could no longer perform the inherent requirements of the job.

6.45 Following a medical check-up for the man's congenital bladder condition in 2008, he was told he had developed a hernia and should not continue to perform heavy lifting at work. He was put on lighter duties which he performed on the understanding his restriction was not permanent. However, a follow-up medical in July 2009 revealed the restriction on the man lifting anything weighing more than five kilos was ongoing.

6.46 The company decided to terminate his employment because of his incapacity to perform the inherent requirements of the job. In the case at first instance, the dismissal was found to be unfair because he was still able to perform the modified duties he had been performing since 2008 with the support of his co-workers.

6.47 In the appeal decision, the Full Bench found both the man's 'position' (the one he was originally hired for) and his 'job' (the one he had been performing for some time with the help of his colleagues) had important features he could not perform because of his medical restriction on lifting. That meant there was a valid reason for his dismissal but it did not mean his dismissal was not harsh, it said.

[111] *J Boag & Son Brewing Pty Ltd v Button* [2010] FWAFB 4022, 26 May 2010

6.48 It was against his original position that his incapacity should be measured, not his modified duties in deciding whether his termination was harsh, the Full Bench said. It quashed the original decision but remitted it back to another member of Fair Work Australia to decide whether his dismissal was harsh.

The Small Business Fair Dismissal Code

6.49 AMMA notes the criticisms levelled at the Small Business Fair Dismissal Code's checklist in April 2010 by Fair Work Australia Senior Deputy President Matthew O'Callaghan[112]. Finding a dismissal from a bakery was done in accordance with the code, the Senior Deputy President noted the code's checklist was 'deficient' in its failure to include all the requirements of the code itself. The code included the right of the employee to have another person present in discussions where dismissal is possible. This was not contained in the 'checklist'. Small businesses were led to believe that if they complied with the checklist they would have complied with the code:

> *This deficiency, together with the extent to which the checklist does not assist where there are disputed facts or an element of doubt about the reasonableness of the employer position means that I consider the checklist to be of dubious value as a determinant of whether the code has been complied with.*

The costs to employers of unfair dismissal claims

6.50 AMMA members continue to support a workplace relations system that provides unfair dismissal remedies based on a streamlined process but which recognises the unique circumstances of small business. Around 10 per cent of AMMA members are small businesses.

6.51 However, AMMA members have concerns with the operation and interpretation of unfair dismissal laws in the first 12 months of the *Fair Work Act*. The Act's unfair dismissal processes need further streamlining in order to limit speculative claims and to ensure that legitimate decisions are not capable of being overturned.

[112] *Mr N v The Bakery* [2010] FWA 3096, 20 April 2010, SDP O'Callaghan

6.52 AMMA members that have received unfair dismissal claims during the first 12 months of the *Fair Work Act* have reported that the number of claims is either the same or higher than the number received under the *Workplace Relations Act*[113]. This will have implications for the productivity of businesses in the sector going forward as employers have to devote time and resources to respond to claims, even unmeritorious ones.

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

7. TRANSFER OF BUSINESS

> *'The fact that an employee may have stacked shelves for the old employer but now works on the checkout for the new employer would not stop the employee from being a transferring employee.' (Explanatory Memorandum to the Fair Work Act 2009)*

7.1 The transfer of industrial agreements from one employer to another following a sale of business or change of contract has always been a vexed question. The issue of most relevance to the resources sector, particularly those employers who provide catering and accommodation services to mine operators, is under what circumstances a transfer of business is said to occur.

7.2 Service contracts regularly change over three-to-five-year periods and at the end of a contract the employees may transfer to other sites where the contractor continues to provide services. Alternatively, employees may wish to continue to work in the same location and seek employment with the new contractor. It is common for the new service provider to use existing infrastructure that may be owned by the mine operator or previous contractor, such as a kitchen fit-out. Unless there is an arrangement between the contractors for the new contractor to have the beneficial use of the outgoing

[113] *AMMA Workplace Relations Research Project* report by RMIT, June 2010

contractor's assets, there would not be a transfer of business within the meaning of the new provisions.

7.3 A key concern for resources sector employers is the definition of 'connection' between the old and new employer under the *Fair Work Act*'s 'transfer of business' regime as opposed to the *Workplace Relations Act*'s 'transmission of business' rules. Under the *Fair Work Act*, a 'connection' includes the in-sourcing and outsourcing of work.

7.4 The circumstances under which the *Fair Work Act* considers a 'transfer of business' has occurred are much broader than those under the previous *Workplace Relations Act*. The new rules focus on whether there has been a 'transfer of work' between the old and new employer and the reason for that transfer of work. There also has to be a sufficient 'connection' between the old and new employer. As the opening extract from the *Explanatory Memorandum to the Fair Work Act* shows, the work does not have to be exactly the same but 'substantially the same'.

7.5 Under the *Workplace Relations Act*, a transferable instrument only applied where the 'business' had transferred and the employees had been offered work with the new employer within two months of the sale. Under the *Fair Work Act*, the test is whether the 'work' has transferred, in which case existing employees who are offered work with the new employer within three months of a sale (as opposed to two months under the previous regime) or in limited cases a change of contract will bring their industrial agreements with them as transferable instruments.

7.6 Under the *Workplace Relations Act*, transferable instruments only applied for 12 months after a transfer whereas under the *Fair Work Act* there is no specified end date.

7.7 Instruments that accompany the employees in any transfer are:

- enterprise agreements that Fair Work Australia has approved;
- workplace determinations;
- named employer awards (excluding modern awards); and
- any individual flexibility arrangements (IFAs) that were in place covering any transferring employees immediately before the transfer, but only in relation to those specific employees.

Case Law on Transfer of Business

7.8 Fair Work Australia is empowered under the *Fair Work Act* to make orders granting exemptions from the transfer of business rules. Under s.318, it can order that a transferable instrument that would otherwise cover a new employer and transferring employee would not cover them. It can also make an order that an existing enterprise agreement or named employer award covers or will cover the transferring employees.

7.9 In deciding whether to make the order, Fair Work Australia has to take into account:

- The views of the new employer and the transferring employees;
- Whether any employees would be disadvantaged by the order in relation to their terms and conditions of employment;
- The nominal expiry date of any relevant enterprise agreements;
- Whether the transferable instrument would have a negative impact on the new employer's productivity;
- Whether the new employer would incur significant economic disadvantage as a result of the transferable instrument covering it;
- The degree of 'business synergy' between the transferable instrument and any workplace instrument already covering the new employer; and
- The public interest.

7.10 The case law out of Fair Work Australia in the first 12 months of the new transfer of business rules have confirmed that an employer's application for an exemption from a transferable instrument will have the greatest chances of success if:

- The transferring employees and their union support the application;
- There is no disadvantage to the transferring employees from being covered by the new agreement; and
- The employer gives undertakings such as recognising length of service of transferring employees.

7.11 Where transferring employees oppose the application and want to stay covered by their existing agreement, an employer's application is likely to fail.

7.12 Employers also need to show some lack of business synergy between the old and new agreements so as to convince Fair Work Australia that not having the exemption would impede the business in some way.

7.13 It will be difficult to prove that 'significant economic disadvantage' will be caused to the new employer by having the old industrial agreement of a small number of transferring employees applying to its business.

7.14 In *Queensland Nickel Pty Ltd*[114], one of the first Fair Work Australia decisions on the issue, the company was granted an exemption from having a contractor's industrial instrument apply to it after it decided to in-source some work that it had previously outsourced.

7.15 The tribunal found the transferring employees would be much better off under the new agreement, also noting the three unions covering the workers did not object to the order sought. Fair Work Australia also took into account the fact the old agreement would interfere with Queensland Nickel's desire to maintain a unified set of salary-based terms and conditions, saying there was 'very little synergy' between the two agreements.

7.16 In *Whitehaven Coal Mining Ltd*[115], Fair Work Australia exempted the company from having the agreement of a labour hire firm's agreement transfer with employees once they were hired in Whitehaven's black coal operations. Whitehaven wanted to directly employ 22 casuals from labour hire firm TESA but the offers of employment were contingent on Fair Work Australia granting the exemption.

7.17 The fact that the two companies had a pre-existing outsourcing arrangement was a sufficient connection to mean a transfer of business was likely to have occurred, the tribunal said.

7.18 It took into account the fact that the transferring employees supported the new employee's application; that no transferring employee would be disadvantaged by the application; and that the union representing the transferring employees, the CFMEU, supported the application. It also accepted there would be negative impacts in requiring Whitehaven to take on

[114] *Queensland Nickel Pty Ltd* [2009] FWA 335, 22 September 2009, SDP Richards
[115] *Whitehaven Coal Mining Ltd* [2010] FWA 1142, 17 February 2010, DP Sams

the old agreement, including having to administer separate industrial instruments as this would create uncertainty for the business.

7.19 Undertakings from new employers commonly accompany applications to Fair Work Australia for exemptions, such as in the case *Futuris Automotive Interiors (Australia) Pty Ltd*.

7.20 Futuris was relocating plant and equipment from a Plexicor facility to its own premises and proposed to engage 26 Plexicor employees to operate it. Futuris gave an undertaking that it would recognise the transferring employees' length of service and accrued entitlements following the transfer. This, coupled with the fact that transferring employees would be significantly better off under the new employer's agreement, including having salaries between 4.63 per cent and 22.22 per cent higher, meant the exemption should be granted, Fair Work Australia said.

7.21 In another case, *CEPU and CSIRO*, Fair Work Australia rejected an application from the CSIRO to exempt it from being covered by a transferable instrument[116].

7.22 The CSIRO was taking over the Canberra Deep Space Communication Complex, after which the employees working there would become CSIRO employees. CSIRO told Fair Work Australia it did not want the Complex to become a 'separate enclave' of the business and sought to integrate it into the newly formed astronomy and science business unit. It stressed the importance of its 'one CSIRO' policy that sought to apply one classification structure to most staff.

7.23 APESMA, the AMWU and the CEPU opposed the application on the grounds that most of their members wanted to stay covered by the old agreement. The CEPU brought an application opposing the employer's application.

7.24 Fair Work Australia refused to grant the orders the CSIRO sought, saying it was not convinced its efficiency and productivity would be enhanced by having the transferring employees covered by the CSIRO agreement. Most of the transferring employees would have different salaries and conditions to other CSIRO staff even if the old agreement did not transfer, it said.

[116] *CEPU and CSIRO* [2010] FWA 1171, 15 February, 2010, Deegan C

7.25 The effect on the business would not be so negative as to outweigh all other considerations such as the majority of transferring employees not wanting to be covered by the CSIRO agreement and the fact that their unions were opposed to the orders.

The need for reform

7.26 While AMMA supports the ability for employers to apply to Fair Work Australia for exemptions from transferable instruments, the provisions are virtually unworkable for a contractor. Not knowing in advance whether Fair Work Australia will grant an application for an exemption is not a practicable basis on which to conduct a commercial enterprise. Contractors are unable to tender for work on the assumption that an exemption will be granted. The costs and timeframe for applications to be heard and determined is also a barrier.

7.27 When the employee's employment with the old employer terminates, so too should coverage of that employer's industrial agreement. The new employer should not be burdened with the decisions and employment arrangements of the previous employer.

7.28 AMMA members have advised that, particularly with outsourcing, a transferring instrument creates two classes of employees. This is because any new employees will be offered work on the basis of the relevant modern award or new employer's enterprise agreement and not on the old employer's enterprise agreement. The contractor's success in winning the contract has usually been driven in part by the client's expectation of efficiencies that may not be available under the old employer's enterprise agreement. This results in a strong disincentive to employee transferring employees who would otherwise be an asset for an incoming contractor, with the benefits of hiring them outweighed by the disadvantages.

7.29 It is noted that exemption applications to date have only been granted where the employees and the relevant union also support the employer's position. AMMA contends that the onus should be on the relevant union to make an application to Fair Work Australia for an enterprise agreement to be transferred if it can be demonstrated that it will not be detrimental to the employer and will be in the public interest.

7.30 In summary, the consequence of the expansion of the provisions under the *Fair Work Act* is that employers are reporting that where they are involved in a potential transfer of business they are reluctant to employ any of the previous employer's employees to ensure they are not bound by the restrictions of the previous employer's industrial agreements.

7.31 While the Government's intention was to protect employees' terms and conditions in enterprise agreements in transfer of business situations, the changes are acting as a disincentive to employ people who worked for the previous employer.

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

8. MODERN AWARDS

> *'The making of modern awards is a significant change for employees, employers and their representatives. This will require them to adjust and become familiar with the form, arrangement, content and new processes associated with modern awards.' (Explanatory Memorandum to the Fair Work Act 2009)*

8.1 Modern awards under the *Fair Work Act* took effect on 1 January 2010, which for many employers, including those in the resources sector, changed the nature and number of awards covering their operations.

8.2 Modern awards operate together with the National Employment Standards (NES) to provide minimum conditions of employment for employees in the national industrial relations system.

8.3 Issues around award coverage can be complex, particularly in the resources sector, and employers are still bedding down the requirements of the new system.

8.4 AMMA members made a significant financial contribution to the award modernisation exercise and expended considerable internal and external resources to achieve the final favourable outcomes.

8.5 The *Mining Industry Award* was released as an exposure draft in December 2008. It was flexible and provided for 12-hour shifts as a right. Three months later, the final award was released which was less flexible than the exposure draft and did not allow for shifts in excess of 10 hours to be worked without employees' express permission. Had this inflexibility remained, existing rostering arrangements in the resources sector, which can average up to 12 ordinary hours a day, would have been impossible to continue without specific employee agreement.

8.6 Following meetings with AMMA, then-Deputy Prime Minister Julia Gillard revised her award modernisation request, writing to the AIRC confirming[117]:

> *…if the Commission is satisfied employees are currently working 12-hour shifts, that should be reflected in the award … Where employees in remote areas work even time rostering arrangements, which include annual leave, the Commission should facilitate the retention of these arrangements.*

8.7 AMMA commends the former Deputy Prime Minister for listening to AMMA's concerns, acting to alleviate them and honouring her pre-election commitment that the award modernisation process would not disturb well-established working arrangements in the sector.

8.8 Clearly, and by necessity, the modern awards AMMA has been involved in are by far the most flexible of the key modern awards. While issues remain about the effectiveness of mandatory flexibility clauses in modern awards (*discussed in the section of this paper on 'Individual Flexibility Arrangements'*), the *Mining Industry Award 2010* has become a model for other industries seeking similar levels of flexibility.

8.9 Other awards where AMMA has achieved flexibility for its members and where employees were not left worse off include the *Hydrocarbons Industry*

[117] *Letter from Deputy Prime Minister Julia Gillard to AIRC President Justice Geoffrey Giudice,* 7 May 2009

(Upstream) Award 2010, the *Maritime Offshore Oil and Gas Award 2010* and the *Salt Industry Award 2010*.

8.10 Around 1,560 state and federal awards have now been reduced to 122 modern awards that took effect on 1 January 2010, although most of the changes in monetary payments occur from 1 July 2010.

8.11 There are still, however, more than 2,000 enterprise awards, some in the resources sector, which are yet to be modernised. Fair Work Australia will take applications to modernise enterprise awards until 31 December 2013, at which point if enterprise awards have not been modernised or subject to an application to be modernised they will terminate and the parties revert to the industry award.

8.12 The Australian Industrial Relations Commission's award modernisation process was long overdue. While it was a massive task that was completed on schedule, it is not without its problems. The benefits of a single national industrial relations system coupled with the introduction of modern awards cannot be underestimated.

8.13 As with any new system, issues are arising for employers in the period since modern awards commenced on 1 January 2010. The biggest concerns for AMMA members at present are:

- Uncertainty about the impact of awards on minor business areas;
- Identifying which awards now apply to positions previously not covered by awards;
- Knowing which awards actually apply; and
- Transitional provisions on pay and penalty rates (*discussed below*).

8.14 AMMA notes Fair Work Australia had received 74 applications to vary modern awards as of 21 June 2010, with 40 having so far been decided.

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

9. NATIONAL EMPLOYMENT STANDARDS

9.1 AMMA members support the concept of a minimum set of employment entitlements for all employees regardless of award or agreement coverage.

9.2 The National Employment Standards (NES) came into effect on 1 January 2010 under the *Fair Work Act*. The NES replace and expand on the Australian Fair Pay and Conditions Standard (the AFPCS) under the *Workplace Relations Act*.

9.3 The NES, coupled with 122 modern awards that also came into effect on 1 January 2010, were introduced to act as a safety net for all national workplace relations system employees. It is important to note that the NES and modern award provisions cannot be displaced, regardless of the industrial instrument or contract of employment in place.

9.4 Under the NES, there are now ten legislated minimum employment entitlements:

- Maximum weekly hours;
- Requests for flexible working arrangements;
- Parental leave and related entitlements;
- Annual leave;
- Personal/carer's leave and compassionate leave;
- Community service leave;
- Long service leave;
- Public holidays;
- Notice of termination and redundancy pay; and
- The Fair Work Information Statement.

9.5 The NES provide essential minimum entitlements to all employees but such standards need to be adaptable enough to recognise there is not always a standard format for achieving the same result.

9.6 As minimum standards become more prescriptive it becomes clearer that a one-size-fits-all approach is unworkable, particularly in the resources sector where the hours of work, rosters and salary arrangements are far removed from the standard working week of 38 hours worked Monday to Friday.

Maximum weekly hours

9.7 Maximum ordinary hours of work under the AFPCS were 38 per week plus reasonable additional hours. Hours of work could also be averaged over 12 months.

9.8 The requirement for 38 ordinary hours per week plus reasonable additional hours remains under the NES, with employees able to refuse to work additional hours if the request is unreasonable.

9.9 The criteria for determining whether additional hours are reasonable are outlined in the NES and are largely based on the provisions of the *Workplace Relations Act*. However, six months into the new system employers are still unclear as to what additional working hours above 38 actually constitute 'reasonable additional hours' under the *Fair Work Act*.

Requests for flexible working arrangements

> *'The increased access to flexible working arrangements is designed to assist employees to balance their work and personal lives. However, businesses are able to refuse access to these provisions on reasonable business grounds, which will minimise the disruption of these provisions to business.' (Explanatory Memorandum to the Fair Work Act 2009)*

9.10 The right to request flexible working arrangements now forms part of the NES. The right applies to an employee who is a parent, or has responsibility for the care of a child if the child is under school age or is under 18 and has a disability. Examples of changes in working arrangements include changes in hours of work, patterns of work and location of work.

9.11 Since the right to request flexible working arrangements commenced on 1 January 2010, some AMMA members have reported[118] being asked by their employees to accommodate flexible arrangements including the ability to return to work part time and to work from home. Some requests have been granted and some have been refused on reasonable business grounds, depending on the legitimate needs of the enterprise.

[118] *AMMA Workplace Relations Research Project* report by RMIT, June 2010

9.12 The resources sector, in which employees often work and reside on remote sites, does not naturally lend itself to flexibilities such as working from home or starting and finishing work outside the normal shift times. However, where the employee returns home every evening such flexibilities are more beneficial and achievable.

Annual leave

9.13 An initial issue of concern for AMMA members is that for the purpose of calculating payments for absences from work on annual leave and personal/carer's leave, the NES quantifies the time in days rather than hours. This raises issues for many employers in the resources sector, particularly in relation to the high number of employees working on a roster cycle of 12-hour days. If an employee takes a day off work, the question remains whether they should be paid for the 12 hours they regularly work or for the 7.6-hour ordinary day in a standard working week.

9.14 Shift rosters in the resource sector often incorporate the employees' entitlement to annual leave and public holidays in the time off component of the roster. This is particularly the case where even time rosters are worked such as three weeks on and three weeks off. A one-size-fits-all prescription for annual leave makes it difficult to reconcile the unusual working arrangements of the resources sector.

Public holidays

9.15 Under the NES, employees are entitled to a day off on a public holiday. Employers can request an employee work on a public holiday and an employee can refuse if they have reasonable grounds for doing so.

9.16 The NES provides for eight public holidays plus an unlimited number of extra public holidays provided they are declared by state and territory governments. Where an employee is absent from work on a day that is a public holiday, the employer must pay the employee at their base rate of pay for the employee's ordinary hours of work. In practice, the wording of this entitlement combined with modern awards can result in employees being paid penalty rates for the same public holiday twice where the state and/or territory government provide for substituted days.

9.17 There is also confusion as to whether employees who are continuous shift workers regularly working weekends and public holidays can be docked a day of annual leave or personal/carer's leave if that leave is taken on a public holiday.

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

10. AREAS TO WATCH

Adverse Action / General Protections

> *'It has never been the case that an employer was prevented by federal industrial legislation from taking prejudicial action against an employee who happened to be a union member or a union official. An employer could not, however, act to the detriment of an employee "by reason of" or "because" of the employee's union membership or associated activities.' (Federal Court Justice Richard Tracey in Barclay v The Board of Bendigo Regional Institute of TAFE [2010] FCA 284. 25 March 2010)*

10.1 The *Fair Work Act* on 1 July 2009 introduced significant reforms under the banner of '*General Protections*' in Part 3-1 of the *Fair Work Act*. Under the provisions, it is now unlawful for a person to take '*adverse action*' against another person on the grounds of their '*workplace rights*', '*industrial activities*' or for other '*discriminatory*' reasons.

10.2 While there were predecessor provisions under the *Workplace Relations Act* protecting employees from being unlawfully terminated for prohibited reasons including discriminatory reasons or in breach of freedom of association laws, they were much more limited than the new *Fair Work Act* terms.

10.3 Section 341 of the *Fair Work Act* defines a '*workplace right*' as:

- *an entitlement to the benefit of a workplace law, industrial instrument or order made by an industrial body;*
- *the ability to initiate or participate in a process or proceedings under a workplace law or instrument; or*
- *the ability to make a complaint or inquiry to seek compliance with a workplace law or instrument.*

The *Fair Work Act* specifies that certain persons are prohibited from taking adverse action against certain other persons for the reason or reasons including that they have a workplace right.

10.4 In addition to existing employees, prospective and former employees are also taken to have the same workplace rights, subject to a few exceptions.

10.5 Adverse action by an employer against an employee includes:

- dismissing the employee;
- injuring the employee in his or her employment;
- altering the position of the employee to the employee's prejudice; or
- discriminating between the employee and other employees.

10.6 Adverse action by a prospective employer against a prospective employee includes refusing to employ someone; or discriminating against them in the terms and conditions on which they are offered employment.

10.7 Adverse action can also be taken by a 'principal' entering into a contract for services with an independent contractor. Adverse action by a principal against an independent contractor includes:

- terminating the contract;
- injuring the independent contractor in relation to the terms and conditions of the contract;
- altering the position of the independent contractor to the independent contractor's prejudice;
- refusing to make use of, or agree to make use of, services offered by the independent contractor; or

- refusing to supply, or agree to supply, goods or services to the independent contractor. Around 10 per cent of the Australian workforce is now independent contractors[119].

10.8 All employees and employers in the federal workplace relations system are covered by the general protections. This includes unincorporated entities in all states except Western Australia which has not referred those organisations to the federal system.

10.9 Applicants have 60 days to bring a claim if the adverse action resulted in dismissal. This compares to the 14-day time limit for bringing an unfair dismissal claim. However, if the adverse action did not result in dismissal, applicants have six years to bring a claim. Potential compensation for successful adverse action claims is unlimited compared to a maximum of six months' pay in the unfair dismissal jurisdiction.

10.10 Parties found to have breached the general protections face up to $6,600 fines per breach if they are individuals or up to $33,000 per breach if they are corporations. Fines can also be imposed on company directors.

10.11 Employers alleged to have taken adverse action against their employees for prohibited reasons can be subject to investigation and prosecution by the Fair Work Ombudsman (FWO) as well as prosecution by the parties themselves or their union.

10.12 Under s.545 and s.546 of the *Fair Work Act*, the Federal Court and the Federal Magistrates Court can impose injunctions against the adverse action taking place; make an order awarding compensation for loss that a person has suffered because of the breach; or order reinstatement.

10.13 As can be seen from the above there is now enormous scope for prospective, former and existing employees to bring a claim that was not previously available. As it is only early days, the courts have not been overwhelmed with claims and, of the cases to date, most have been dismissed.

[119] Australian Bureau of Statistics, *Forms of Employment*, *Australia, November 2009,* published on 29 April 2010, Category 6359.0

Case law on adverse action

10.14 One of the first adverse action cases, *Barclay v The Board of Bendigo Regional Institute of TAFE,* was decided by the Fair Work Division of the Federal Court in March 2010[120].

10.15 The court rejected a union member's claim for monetary compensation over adverse action his employer took against him, which he claimed was because of his union activities. The senior teacher and his union, the Australian Education Union (AEU), brought the adverse action claim against Bendigo TAFE.

10.16 The teacher was suspended with pay following an email he sent to AEU members saying he was aware of reports of serious misconduct by unnamed individuals at the TAFE. The email found its way into the hands of senior management, and the CEO suspended him and revoked his internet access. TAFE argued the man should have reported the alleged misconduct to management in line with its policy rather than disseminating the allegations to other AEU members.

10.17 The employee claimed that adverse action was taken against him because:

- he was an officer of the union;
- he had engaged in industrial activity by representing the views and interests of his union;
- he had encouraged members to participate in lawful activity organised by the AEU; and
- he had exercised a workplace right under the industrial agreement.

10.18 Despite the claims, the court accepted the evidence of the TAFE decision-maker that the man was suspended purely so that no other 'loose' allegations could be made until a campus audit was conducted. The judge was satisfied TAFE did not act for any prohibited reason, dismissing the claim. Such a claim was not available under the *Workplace Relations Act*.

[120] *Barclay v The Board of Bendigo Regional Institute of TAFE* [2010] FCA 284, 25 March 2010

CEOs have workplace rights too

10.19 In an April 2010 decision in *Jones v Queensland Tertiary Admissions Centre Ltd (No 2)*[121] the Federal Court confirmed a chief executive officer at the Queensland Tertiary Admissions Centre Ltd (QTAC) did have workplace rights, although it rejected her claim that those rights motivated the adverse action her employer took against her.

10.20 The court confirmed the woman's role as QTAC's bargaining representative during negotiations for an enterprise agreement meant she was subject to a 'workplace right' and was entitled to bring a claim under the *Fair Work Act*'s General Protections.

10.21 She successfully argued her involvement in negotiations for an enterprise agreement constituted an ability to '*initiate or participate in a process or proceedings under workplace law or a workplace instrument*' under s.341 (1) (b).

10.22 The judge confirmed that even if the woman was not a bargaining representative she would still have a workplace right via her role as a spokesperson for the employer during negotiations. Attending meetings, having discussions and generally taking part in negotiations constituted '*participation*' in proceedings, the judge found.

Employers' workplace rights given short shrift

10.23 In another case, Boral Resources (NSW) Pty Ltd took what it admitted was a 'novel' argument to a Full Bench of Fair Work Australia under the *Fair Work Act*'s industrial action provisions, in part arguing the AWU's misleading notices of industrial action breached the employer's workplace rights[122].

10.24 Boral in its original application sought orders from Fair Work Australia that the proposed industrial action by AWU members cease. The application was refused and Boral appealed the decision.

10.25 On appeal, Boral argued that its employees, by giving notice of a protected stoppage via the union then turning up for work as usual, caused the

[121] *Jones v Queensland Tertiary Admissions Centre Ltd (No 2)* [2010] FCA 399, 29 April 2010, Collier J
[122] *Boral Resources (NSW) Pty Ltd* [2010] FWAFB 1771, 31 March 2010, Full Bench

employer to incur damage and inconvenience by having to prepare for a full day of industrial action. This included having to warn its customers that supply would be affected.

10.26 The company argued the union's obligation under s.414 of the *Fair Work Act* to give notice of industrial action gave rise to a workplace right for the employer under s.341.

10.27 The Full Bench left the issue open:

> *Even if there was such a workplace right (which we do not need to decide), it has not been shown that that right was denied by the conduct of the AWU or the employees in the present case (the relevant notice having been given) or that an appropriate remedy for any denial of such right would be by application under s.418 rather than through the compliance provisions of the Act with respect to workplace rights (see e.g. Division 8 of Part 3-1).*

10.28 Boral is not the only employer to try to mount a workplace rights argument against a union, with Qantas having launched Federal Court proceedings against the engineers' union, APESMA[123]. The airline claimed the union made false and misleading statements in the media about the effects that its members' industrial action would have on its operations.

10.29 Qantas argued that the '*false and misleading*' claims by the union were in breach of s.345 of the *Fair Work Act*, which prohibits a person from knowingly or recklessly making a false or misleading representation about the workplace rights of another person or the effect of the exercise of those workplace rights. The case is yet to be decided.

Conclusions an adverse action

10.30 The *Fair Work Act*'s General Protections are a vast extension to the employee protections that existed under the *Workplace Relations Act*[124].

[123] *Qantas seeks penalties over 'false' APESMA disruption claims*, published in Workplace Express, 26 May 2010
[124] Section 664 of the *Workplace Relations Act 1996*

10.31 While the Federal Courts to date have taken a sensible approach to adverse action claims, employers must be conscious of making sure any conduct they perform is not in breach of the new General Protections.

10.32 Employers need to be aware that an entitlement to a 'workplace right' does not have to be the dominant reason for the adverse action for claims made under the General Protections to proceed. The entitlement to a workplace right only has to be part of the reason for the adverse action even where there are other valid, more significant reasons existing for the adverse action, such as poor performance or gross misconduct.

10.33 Further, once a claim is made under these provisions, the onus is on the employer to prove any adverse action taken against the employee was not taken for the alleged prohibited reasons.

The Union Movement's Unfinished Business

10.34 While AMMA is keen to see the improvements outlined in this paper adopted by the Federal Government, it has not gone unnoticed that the Australian Council of Trade Unions (ACTU) also has plans for further ongoing industrial relations changes.

10.35 AMMA members are particularly concerned with the widening of permitted matters in enterprise agreements which allows the ACTU to pursue its aim of including delegates' rights clauses as part of its standard bargaining agenda[125]. An ACTU industrial relations policy document endorsed at its June 2009 Congress said:

> *Our laws need to protect delegates from unfair treatment and confer rights upon delegates that recognise their role in representing employees. The Fair Work Act should be amended to ensure that accredited delegates are entitled to reasonable:*
>
> - *Paid time off from duties to prepare for and engage in bargaining, consult members during bargaining, to participate in the operation of the union, to attend union meetings and to undertake union training and education;*

[125] ACTU Congress 2009, Future of Work, *Industrial Relations Legislation Policy,* June 2009

- *Access to facilities to carry out their work as a delegate, consult with workplace colleagues and the union, and distribute information at the workplace; and*
- *Leave without pay to be employment by the union.*

Affiliates will also seek to enshrine delegates' rights in agreements and awards.

10.36 In a speech to the ACTU Congress in June 2009, ACTU secretary Jeff Lawrence flagged the 'unfinished' business the union movement had with the government and the *Fair Work Act*[126]:

> *I believe that further improvements to IR legislation and workers' rights are necessary, and that it is our job to make sure they are on the Federal Government's agenda for the remainder of this term and into their next. Improvements to workers' rights should ALWAYS be on a Labor Government's agenda.*

10.37 Lawrence flagged a continuing union campaign that would focus on persuading the Government to:

- Abolish existing AWAs that at present continue beyond their nominal expiry dates unless either party terminates them;
- Improve workers' access to unions and improve right of entry to better protect workers from 'unscrupulous' employers;
- Remove the limitations on bargaining, with Lawrence saying it should be possible for employers and employees to freely choose what they bargain for;
- Introduce the same rights for independent contractors as employees have in the workplace; and
- Ensure there are no separate workplace laws for the construction industry, with construction workers ideally being covered by the *Fair Work Act* along with all other employees.

10.38 AMMA notes with concern the union agenda for these changes and will continue to oppose the union campaign in areas that will be of detriment to

[126] *The union agenda for working Australians*, Address to ACTU Congress by ACTU secretary Jeff Lawrence, 2 June 2009

AMMA members. AMMA will continue to advance the industrial relations debate going forward on behalf of its members.

SUMMARY OF RECOMMENDATIONS

UNION RIGHT OF ENTRY

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

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

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

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

4. There should be no expansion of existing right of entry laws despite the union movement's ongoing campaign.

INDIVIDUAL FLEXIBILITY ARRANGEMENTS

5. An obligation should be introduced for Fair Work Australia and the parties to enterprise agreements to ensure flexibility terms are delivering genuine flexibility and productivity benefits and are not depriving employers and employees of the benefits of those arrangements.

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

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

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

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

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

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

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

12. The General Manager of Fair Work Australia's review of IFAs currently scheduled to commence on 1 July 2012 be brought forward 12 months to commence no later than 1 July 2011.

AGREEMENT MAKING

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

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

INDUSTRIAL ACTION

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

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

17. The right to take protected industrial action should extinguish at an income threshold of $108,300 a year or pro rata.

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

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

UNFAIR DISMISSAL

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

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

22. Daily hire employees in the building and construction industry should be exempt from bringing unfair dismissal claims unless they are dismissed for

prohibited reasons given the unique and fluctuating circumstances of the construction industry.

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

TRANSFER OF BUSINESS

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

MODERN AWARDS

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

THE NATIONAL EMPLOYMENT STANDARDS

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

ATTACHMENT

Summary of decisions overturned by FWA Full Bench

To date there have been 30 appeals made under the *Fair Work Act 2009* under s.604 or s.605. Of these appeals, 13 have been granted (see below) and 17 have been dismissed. Nineteen of the appeals were brought by employers.

Of the 13 decisions overturned, 11 were brought by an employer and 2 were brought by other applicants i.e. employees, unions or a Minister. Of the 17 decisions that were not overturned, 8 were brought by an employer and 9 were brought by other applicants.

	Original decision	**Appeal**	**s.604 – Appeal of decision**	**Full Bench decision**	**Outcome**
1	[2009] FWA 187 Commissioner Thatcher	Total Marine Services Pty Ltd v MUA	RE: protected action ballot order	[2009] FWAFB 368 09/10/2009 VP Watson SDP Hamburger Commissioner Roberts	*"For the reasons above we are of the view that the jurisdictional pre-requisite for making the order in s. 443(1) (b) of the Act was not satisfied and the application should have been dismissed. We grant permission to appeal, allow the appeal and quash the order of Commissioner Thatcher dated 1 September 2009."*
2	[2009] FWA 136 SDP Drake	Australian Postal Corporation v CEPU	RE: protected action ballot order	[2009] FWAFB 599 12/10/2009 SDP Acton DP Hamilton Commissioner Blair	*"As a result a jurisdictional pre-requisite for making the protected action ballot order sought by the CEPU in its s.437 application concerning Australia Post employees, excluding Post Logistics' employees, was not satisfied. Her Honour erred in concluding otherwise."*
3	[2009] FWA 1599 VP Lawler	Telstra Corporation Limited v CEPU	RE: notice of industrial action	[2009] FWAFB 1698 15/12/2009 President Justice Giudice SDP Acton Commissioner Whelan	*"We respectfully disagree with the Vice President's conclusion that the notice specifies action involving all CEPU members at all worksites and that such a notice specifies the nature of the industrial action and complies with s.414(6)."*
4	[2010] FWA 30 Commissioner Smith	Woolworths Ltd T/as Produce and	RE: approval of an enterprise agreement	[2010] FWAFB 1464 26/02/2010 President Justice	*"For these reasons the Commissioner's decision was affected by appealable error. We grant permission to appeal.*

		Recycling Distribution Centre		Giudice SDP Acton Commissioner Hampton	*Clause 30 of the agreement includes a term that provides a procedure that requires or allows Fair Work Australia to settle disputes about any matters arising under the agreement."*
5	[2010} FWAA 1257 Commissioner Williams	Modern Industries Australia Pty Ltd and another	RE: approval of an enterprise agreement	[2010] FWAFB 2541 30/03/2010 SDP Watson ADP Kaufman Commissioner Cargill	*"On the facts before us, we are not satisfied that the agreement has been genuinely agreed to by the employees covered by the agreement or that the agreement was "made" in accordance with s.182(1) of the Act."*
6	[2010] FWA 16 Commissioner Smith [2010] FWA 339 Commissioner McKenna	Bupa Care Services Pty Ltd P & A Securities Pty Ltd as trustee for the D'Agostino Family Trust T/as Michel's Patisserie Murwillumbah and others	RE: approval of an enterprise agreement	[2010] FWAFB 2762 15/04/2010 SDP Acton DP Sams Commissioner Williams	*"In the circumstances, the appropriate course is for us to grant permission to appeal, uphold the appeal, and quash the decision of Commissioner Smith of 5 January 2010."* *"In the circumstances, we grant permission to appeal, uphold the appeal, and quash the decision of Commissioner McKenna of 20 January 2010."*
7	[2010] FWA 167 Commissioner Raffaelli	Ulan Coal Mines Limited v Henry Jon Howarth and others	RE: unfair dismissal and genuine redundancy	[2010] FWAFB 3488 10/05/2010 SDP Justice Boulton SDP Drake Commissioner McKenna	*"The Commissioner decided that, in view of his conclusions regarding the matters in s.389(1), it was not necessary for him to deal with the third limb of the requirement for there to be genuine redundancy.*
8	[2010] FWAA 1485 Commissioner Ryan	Minister for Employment and Workplace Relations	RE: approval of an enterprise agreement (s.605 – Minister may apply for review of a decision)	[2010] FWAFB 3552 19/05/2010 President Justice Giudice SDP Harrison Commissioner Blair	*"For these reasons the Commissioner fell into error. Clause 12.1 is a valid flexibility term and the model term does not apply. In the circumstances the Commissioner's decision on this point cannot stand."*
9	[2010] FWA 148 SDP Kaufman	J Boag and Son Brewing Pty Ltd	RE: unfair dismissal	[2010] FWAFB 4022 26/05/2010 VP Lawler	*"Permission to appeal is granted. The appeal is allowed and the decision of the Senior Deputy President is quashed."*

		v Allan John Button		SDP O'Callaghan Commissioner Williams	
10	[2010] FWA 985 SDP O'Callaghan	Dr F Tiver v University of South Australia	RE: disciplinary action for misconduct	[2010] FWAFB 3544 31/05/2010 SDP Watson SDP Kaufman Commissioner Cargill	*"We find that Senior Deputy President O'Callaghan erred in finding that the 15 December 2009 materials satisfied the requirements of clause 46.5(b) (i) of the agreement."*
11	[2010] FWAA 1401 Commissioner Ryan	Australian Industry Group	RE: approval of an enterprise agreement	[2010] FWAFB 4337 11/06/2010 President Justice Giudice SDP Watson Commissioner Blair	*"With respect to the Commissioner, in our view the conclusion that cl.44 is not an unlawful term is wrong. The decision approving the agreement must be quashed."*
12	[2010] FWA 2850 SDP Hamburger	Airport Fuel Services Pty Limited v Transport Workers' Union of Australia	RE: protected action ballot order	[2010] FWAFB 4457 17/06/2010 SDP Acton DP Ives Commissioner Thatcher	*"As a result we do not think it was open to his Honour to be satisfied, as required by s.443 (1) (b) of the FW Act, that the TWU had been genuinely trying to reach an agreement with AFS as the employer of the employees to be balloted."*
13	[2010] FWA 1347 Commissioner McKenna	McDonald's Australia Pty Ltd	RE: approval of an enterprise agreement	*McDonald's Australia Pty Ltd, SDA* [2010] FWAA 4754, 29 June 2010, Full Bench	*"After hearing the case, the full bench took the unusual step of immediately quashing Commissioner McKenna's ruling and approving the deal." – Workplace Express article*