Senate Education and Employment Legislation Committee

Fair Work Amendment Bill 2014

Australian Mines & Metals Association (AMMA)

April 2014

ABOUT AMMA

AMMA is Australia's national resource industry employer group, a unified voice driving effective workforce outcomes.

Having actively served resource employers for more than 95 years, AMMA's membership covers employers in every allied sector of this diverse and rapidly evolving industry.

Our members include companies directly and indirectly employing more than half a million working Australians in mining, hydrocarbons, maritime, exploration, energy, transport, construction, smelting and refining, as well as suppliers to these industries.

AMMA works with its strong network of likeminded companies and resource industry experts to achieve significant workforce outcomes for the entire resource industry.

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INTRODUCTION

1. AMMA welcomes the opportunity to provide input to the Committee on the provisions of the *Fair Work Amendment Bill 2014* (the Bill).

2. There are many long overdue positives in the Bill. It acts on several key concerns that AMMA members have with the operation of the *Fair Work Act 2009.*

3. It also addresses unfinished business, progressing outstanding recommendations of the previous government's hand-picked Fair Work Act Review Panel.

4. Most welcome are the amendments that address key priority areas for resource industry employers, including starting to address problems with the Fair Work Act 2009 on:

    a. Greenfield agreement making.

    b. Union access to workplaces (right of entry).

    c. Transfer of business.

    d. Individual flexibility.

    e. Protected industrial action.

5. Starting to address these issues is important for ensuring the resource industry can continue to generate jobs and economic growth.

6. While this is welcome:

    a. The government has a mandate to go further in key areas.

    b. In some areas, the Bill risks detracting from its positive impact by imposing unnecessary conditions and processes, e.g. the proposed "prevailing industry standards" test for greenfields agreements.

    c. In other areas, while AMMA is very supportive of the substantive proposals, administrative provisions would increase the regulatory burden on employers with no apparent benefit for employees, e.g. the "genuine needs" statement for individual flexibility arrangements (IFAs).

7. In a number of areas it is open to the government to address these issues consistent with its pre-election *Policy to improve the Fair Work laws* and its stated intentions in introducing the amendments. AMMA identifies alternative options to amend the Bill where appropriate.

Productivity Commission (PC) review

8. Reviewing the proposed amendments and the current Fair Work Act has underlined to AMMA the convoluted and complex nature of Australia's workplace relations legislation following both the Work Choices and Fair Work amendments.

9. Preparing this submission has underscored the importance of a fundamental "root and branch" reconsideration of how we regulate employment in Australia.

10. This submission responds to the specific proposals in the Bill to amend the current Fair Work Act. However, engagement with specific parts of the existing Act in this submission does not mean there should not be further, more fundamental review and reconsideration on these matters in due course.

Snapshot of the AMMA position

Key provisions of the Bill	AMMA's position
Greenfields agreement making Schedule 1, Part 5	AMMA supports these provisions with the exception of the 'prevailing industry standards' test. AMMA proposes various options to improve the Bill in this area.
Union access to workplaces (right of entry) Schedule 1, Part 8	AMMA supports the repeal of transport, accommodation and lunch room changes that took effect on 1 January 2014. AMMA also supports the general thrust of changes regarding union entry for discussion purposes but believes the Bill could go further consistent with government policy.
Transfer of business Schedule 1, Part 6	AMMA supports these provisions but considers they should have broader application, particularly to outsourcing arrangements.
Individual flexibility arrangements (IFAs) Schedule 1, Part 4	AMMA supports these provisions but has concerns about the increased regulatory burden associated with "genuine needs" statements.
Protected action ballot orders Schedule 1, Part 7	AMMA supports these provisions to close the *JJ Richards* loophole and ensure protected industrial action cannot be applied for or taken until bargaining is deemed to have commenced.
Unpaid parental leave Schedule 1, Part 1	AMMA is neutral on these changes given the minimally increased regulatory burden from the requirement to give employees a "reasonable opportunity" to discuss requests for extra unpaid parental leave.
Annual leave loading on termination Schedule 1, Part 2	AMMA supports these provisions given they align with industry practice and problems arising from competing interpretations and legislative ambiguity.
Accrual of leave on workers' compensation Schedule 1, Part 3	AMMA supports these provisions to give effect to a recommendation from the Fair Work Act Review Panel and clarify that no paid or unpaid leave will accrue while employees are absent and in receipt of workers' compensation payments.
Unfair dismissal hearings and conferences Schedule 1, Part 9	AMMA supports these provisions to reduce red tape and costs by allowing the FWC to dismiss applications "on the papers" in certain circumstances.

GREENFIELD AGREEMENT MAKING

11. The ability to successfully secure employment arrangements for new projects before workforces are mobilised / employed is critical to the ongoing growth and investment in Australia's resource industry.

12. Successfully commissioning major projects relies on having stable, reliable workplace relations arrangements in place prior to project commencement, and being confident that projects can proceed free of industrial claims, disputation and uncertainty (i.e. with the same security that workplace arrangements under workplace relations legislation provide to existing "brownfields" operations).

13. The imperative to reform the area of greenfields (new project) agreement making has now become particularly acute.

14. In a recent address to the resource industry[1], the Hon Ian Macfarlane MP, Minister for Industry, acknowledged the huge growth potential of the industry, particularly in relation to LNG, noting Australia's LNG sector is the fastest-growing in the world:

> *"While these projects and others reflect Australia's continued success as an LNG exporter, we can't be complacent. Our competitors are fast catching up."*

15. The minister noted that like many LNG-producing countries, Australia faced rising LNG project costs against a background of stiff competition from emerging LNG exporters like the US, Canada and East Africa:

> *"My position is that competitive market forces, not governments, should decide which projects go ahead, what supply contracts are secured and at what price."*

16. To that end, it was in the best interests of workers and unions to engage constructively with companies, there being no room in the increasingly competitive resource sector for outrageous wages and conditions demands. Spiralling construction costs would continue to act as a drag on the sector if they continued unchecked, he said:

> *"If Australian projects price themselves out of the market then it's not only workers, but also the national economy that stands to lose out."*

17. Notwithstanding the success of our LNG sector, the resource and energy projects pipeline as a whole is not nearly as robust now as it was 12 to 18 months ago. According to the latest figures from the Bureau of Resources and Energy Economics (BREE)[2], in October 2013 all phases of the investment pipeline were seeing a lower number of projects at a lower value than six months earlier.

18. As of October 2013, there were 92 resource projects at the "publicly announced" stage of the investment pipeline with a combined value of $110 billion to $152 billion, a decrease of 21 projects and $12 billion to $19 billion compared with April 2013.

[1] Address to APPEA Conference & Exhibition, 8 April 2014, the Hon Ian Macfarlane MP, Minister for Industry
[2] *Resources and Energy Major Projects, October 2013*, Bureau of Resources and Energy Economics

19. In the six months between May and October 2013, five resource and energy projects worth a total of $1.7 billion received final approval to commence construction and moved to the committed stage. According to BREE:

> *"This is both the lowest number and lowest value of projects moving to the committed stage in over a decade. The number of projects at the committed stage decreased from 73 in April 2013 to 63 in October 2013. With this decline in project numbers, the value of committed investment has decreased from $268 billion in April 2013 to $240 billion in October 2013."*

20. Capital expenditure, particularly in the mining and energy sectors, has until now been an important driver of economic growth in Australia, especially since the global financial crisis. But as BREE points out[3]:

> *"In the coming period of lower prices, cutting costs and enhancing productivity will be paramount to the continued success of Australia's resource and energy producers."*

21. In the context of this changed investment outlook for Australia, AMMA has been the principal proponent for more practical and facilitative rules for greenfield agreement-making. This is a direct result of the significant problems currently being experienced for many projects as a function of unions' disproportionate bargaining power under the greenfield provisions of the Fair Work Act 2009.

22. The concerns AMMA voiced in the lead-up to the 2009 Act were rapidly borne out following its commencement. AMMA clearly communicated to the former government that the greenfield model it was considering would encourage unions to "game" the process (through protraction and manipulation) and that this would harm and hinder projects coming online.

23. AMMA's initial concerns have become more acute in the ensuing period of intensified global competition in resource markets, commodity price changes and increased pressure on investment in Australia.

24. Problems with the Fair Work Act's current greenfield rules have since been almost universally acknowledged, including by governments, the Fair Work Act Review Panel and some Labor and trade union leaders (*details below*).

25. These problems stem from unions having a monopoly over this type of agreement and holding all the cards when it comes to getting new projects off the ground with the industrial arrangements in place. It must be remembered that at that stage of a project the number of union members on a site is zero, and employees' endorsement of the union strategy and approach is also zero.

26. In a speech to the National Press Club on 5 February 2014, Australian Workers Union (AWU) national secretary Paul Howes conceded there was a pattern of unsustainable wages growth in some parts of the economy:

> *"The leap-frog wage outcomes in the offshore sector in particular are not going to be sustainable for the long term – we could be pricing ourselves out of the market."*

[3] *Resources and Energy Quarterly, March 2014*, Bureau of Resources and Energy Economics

27. Two years earlier in July 2012, the results of a three-year research project between AMMA and RMIT University revealed that one in five new resource projects was being delayed because unions were either refusing to make greenfield agreements or were putting pressure on companies to accept exorbitant wage and condition claims[4].

28. Commenting on the AMMA research findings at the time, WA Premier Colin Barnett agreed that unions' excessive claims during negotiations were threatening new projects in the West[5]:

> *"The unions again are making quite inappropriate wage claims on new projects. Those projects simply will be deferred or won't go ahead. They're just completely out of tune with what is happening internationally."*

29. In July 2012, then-federal Resources Minister Martin Ferguson warned that unions' unsustainable wage claims were jeopardising future investment in Australia's resource sector. He cautioned that future expansion opportunities would "disappear" unless everyone was "conscious of the cost of delivering projects in Australia"[6].

30. That same month, then-Federal Minister for Regional Development Simon Crean called for a return to a time when wage demands were moderated to enhance the nation's "productive capacity"[7]:

> *"When the accord years came along the fundamental change in that was recognising that wage increases could only be paid through strengthening the productive capacity of the nation ... We had to play our role in wealth creation."*

31. At the same time, Ferguson said greenfields agreements, which required working conditions on new projects being "thrashed out" with unions before workers were hired, was a key issue being looked at in the 2012 review of the Fair Work Act by the government-appointed review panel.

32. Despite its hand-selected review panel ultimately making significant (while not perfect) recommendations to improve the operation of the greenfields system, the former Labor government declined to adopt any of the panel's recommendations in that area, despite enacting three tranches of amendments to the Act following the review. The Bill currently being considered by the Committee redresses that, taking up several of the recommendations of that review panel.

33. In Ferguson's current role as chairman of the Australian Petroleum Production & Exploration Association (APPEA) Advisory Board, he has said the MUA is a "job-killing" and "rogue" union and is making a case for a review of Labor's workplace laws and tougher action on unions[8].

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[4] "Union action stalls one in five mining projects", *The Australian*, 2 July 2012
[5] "Union action stalls one in five mining projects", *The Australian*, 2 July 2012
[6] "Govt warns of risk to resource boom – Some union demands unsustainable, minister says", Queensland Times, 3 July 2012
[7] "Put productivity first, not wages: Crean, Ferguson", The Australian, 3 July 2012
[8] "Martin Ferguson labelled a 'traitor' by MUA branch over Fair Work comments, ABC News, Latika Bourke, 1 March 2014

Decisive action is welcome, essential and urgent

34. It is welcome that the current government has moved swiftly to table legislation to address problems with the greenfields provisions of the Fair Work Act 2009.

35. The Explanatory Memorandum (EM) to the Bill indicates that the overarching policy objectives are:

    a. **To ensure** realistic timeframes for the negotiation of greenfields agreements.

    b. **To ensure** negotiations do not delay/jeopardise investment in major projects.

    c. **To protect** the interests of employees to be covered by such agreements.

36. AMMA supports these goals as the basis for a revised approach to greenfields agreement making and supports revising the current greenfields rules to deliver an improved, more practical, more facilitative process.

37. The EM acknowledges the current greenfields bargaining rules mean the commencement of projects can be delayed or even abandoned:

> *"Alternatively, employers may be forced to agree to claims that are economically unsustainable."*

38. The EM also cites the Fair Work Act Review Panel's examination of the costs arising from greenfield negotiations under the existing framework:

> *"The review panel found that wages outcomes under Fair Work Act greenfields agreements and enterprise agreements had widened, that greenfields agreements were less likely to contain flexible agreement clauses and that greenfields agreements were more likely to contain clauses that resulted in increased costs for employers."*

39. The Coalition's *Policy to improve the Fair Work laws*[9] quite correctly identifies that employers are faced with two choices under the current rules. One is to start work on a project without a greenfield agreement in place, with all the risks that entails, and:

> *"The only other choice for employers if they want to have an agreement in place is to agree to unions' often exorbitant demands for wages and conditions, as well as the extensive union rights agendas being pursued across the board simply to get a greenfield agreement."*

40. AMMA would therefore add a fourth policy objective to the three identified in the EM (paragraph 35, above):

> *To encourage unions to constructively contribute to getting new projects off the ground with appropriate workplace relations arrangements in place, including by approaching greenfields negotiations with realistic and practical wage and condition demands.*

[9] *Coalition's Policy to improve the Fair Work laws*, May 2013

41. We urge the Committee to recall that in the resource industry:

    a. We are not dealing with the lower-paid or employees earning even close to award rates of pay.

    b. Project work of the type critically in need of practical greenfields arrangements is very highly remunerated and sought after.

    c. Cutting wages is not the goal of employers in advocating improved processes for employment terms and conditions on new projects.

Positive aspects of Schedule 1, Part 5

42. AMMA strongly supports the thrust of the greenfield amendments in the Bill, including:

    a. **Applying** good faith bargaining principles to greenfield agreement making for the first time.

    b. **Retaining** the current requirement for employers to only notify and make a greenfield agreement with the union or unions representing the majority of employees to be covered.

    c. **Enabling** employers to notify a three-month deadline for negotiations to help ensure the timely resolution of bargaining.

    d. **Introducing** a much-needed capacity for employers to apply to the Fair Work Commission (FWC) to have their best offer endorsed as an agreement after three months of negotiations.

    e. **Commencing** the new provisions the day after the Act receives Royal Assent so they apply to all new greenfield agreements for which an employer agrees to bargain after that date.

43. These amendments can make a real difference in improving this vitally important mechanism for growing business, attracting investment and creating jobs in Australia.

44. However, the potential benefits will only be realised if other elements of Schedule 1, Part 5 of the Bill are modified/amended as set out below.

Key concerns with Schedule 1, Part 5

45. Consistent with each of the stated aims of the greenfields reforms in the Bill, it is vitally important that Schedule 1, Part 5 be amended to ensure existing artificially inflated greenfields agreements are not used as the benchmarks for future agreements, particularly given the almost universal acknowledgement that the current system's procedural flaws have led to unsustainable outcomes.

46. The importance of this is amplified by considering the global markets Australia is competing in and new hydrocarbons projects coming online in competitor countries seeking to expand in what have traditionally been our markets.

47. Australia cannot afford to have previous artificially inflated agreements form a hard floor for workplace relations arrangements on future projects. None of our competitors in global resource markets, particularly for LNG, are seeking to hamstring their resource industries in this way.

The 'prevailing industry standards' test

48. The Bill's proposal to apply an additional "prevailing industry standards" test to agreements that are not finalised within three months of negotiations and which are taken to the commission for endorsement unfortunately risks doing just that.

49. The three existing tests (the National Employment Standards (NES) safety net, the Better Off Overall Test (BOOT) and the public interest test) are more than adequate to protect employees' interests without the need for an additional or further test against "prevailing industry standards".

50. The proposed additional test risks detracting from the Bill's stated aims of delivering greenfields agreements on more realistic timeframes and not jeopardising project investment in Australia.

51. The Bill will only properly address inflated pay and conditions threatening the global competitiveness of the Australian resource industry if the prevailing industry standards test is removed or modified (*as set out below*).

52. It is precisely the "third party" rights in many prevailing industry agreements that hinder flexibility and productivity-enhancing workplace practices.

53. The proposed new test for greenfield agreements determined by the FWC rather than being agreed with a union is:

> ***At the end of section 187***
>
> *Add:*
>
> *(6) If an agreement is made under subsection 182(4) (which deals with a single-enterprise agreement that is a greenfields agreement), the FWC must be satisfied that the agreement, considered on an overall basis, provides for pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry for equivalent work.*
>
> *Note: In considering the prevailing pay and conditions within the relevant industry for equivalent work, the FWC may have regard to the prevailing pay and conditions in the relevant geographical area.*

54. The introduction of this additional test, while well-intentioned, risks creating significant problems for resource employers and risks detracting from the rest of the greenfields amendments.

55. It is also inconsistent with the nature of greenfield agreements as a species of agreement-making specific to an enterprise which has never been applied on an industry basis.

56. Imposing "prevailing" industry-level standards on these projects would entrench a policy approach which would:

    a. Be inconsistent with the reform of our system for more than two decades, which has been towards enterprise / workplace level determination of terms and conditions of employment and away from industry-wide outcomes.

    b. Threaten to impose precisely the homogenised industry level outcomes unions have wanted to pursue in the face of declining membership and an increasing focus at the workplace rather than national industry level.

    c. Threaten to entrench inflated, non-competitive terms and conditions on an industry-wide basis which would threaten or discourage project investment in Australia.

57. The Fair Work Act Review Panel did not recommend such an additional test.

58. Applying this test risks detracting from the very point of introducing the FWC determination power as a way of moderating unions' exorbitant pay and conditions claims.

59. The Australian Industrial Relations Commission (AIRC) in its August 1989 National Wage Case decision highlighted the dangers of letting what other industrial parties have agreed to influence outcomes at other businesses:

> *"Too many employers still persist with their own form of market adjustment of wages based on area rates surveys. Such surveys and the actions that invariably follow them are a recipe for wage breakouts. They have been instrumental in encouraging employers to participate in a type of area wages ranking system with an in-built and continuing escalation effect which has aptly been described as a spiral of nonsense."*

60. This is precisely the concern with the government's proposed new test which may give rise to a *de facto* form of "survey" as currently drafted, or a comparison to a single existing inflated project.

61. Under the Bill, employers must provide examples of other agreements that have been negotiated in their industry to ensure their agreement, on an "overall basis", meets the same standards.

62. While AMMA welcomes the test being performed on an "overall" not a "line-by-line" basis, this does not alleviate the concerns of industry.

63. A glaring omission from the model in the Bill and the prevailing industry standards test is any mention of productivity, or any imperative or opportunity to drive productivity through the workplace arrangements for a new greenfields project. Simply entrenching or "copying over" inflated wage outcomes from a

neighbouring or deemed comparable agreement / arrangement in the industry will leave little to no scope for encouraging and rewarding more productive work practices or continuous improvement.

64. Wages and conditions in some greenfield agreements currently operating in the offshore construction industry, as detailed in the case study that follows, were only able to be achieved because the current Fair Work Act rules give unions a distinct upper hand in bargaining.

65. Having to compare new project terms and conditions to such agreements under the proposed "prevailing industry standards" test would concern employers' seeking to undertake future operations productively and efficiently in Australia.

66. Put crudely, the "prevailing industry standards" test risks forcing employers to make the same "mistake" twice, and to rob them of any capacity to learn lessons, make changes, introduce innovations or take into account changing markets.

Case study – offshore construction agreement

A greenfields agreement covering an offshore construction project in the oil and gas industry, which has since been renewed in nearly identical form[1], would significantly discourage other similar projects going ahead even if just some of its provisions were adopted under the proposed "prevailing industry standards" test.

That agreement includes the following clauses for workers on a particular offshore vessel:

Job termination payment – On completion of work on the project, employees are entitled to a "job termination payment" simply for finishing the job, calculated at 15% of gross earnings for all hours worked, including allowances and training and money paid whilst on approved workers' compensation or income protection leave (but not paid on redundancy or termination pay).

Termination payment – This was in addition to the above "job termination payment" and equated to 84 hours' pay.

Termination bonus – This was in addition to the above termination payments and equated to 168 hours' pay.

Redundancy pay – Upon the completion of the contracted scope of work, employees are paid "redundancy" pay of 268 hours at their appropriate ordinary hourly rate (on top of the termination payments above). This is more than 20 days' pay (assuming a 12-hour working day) simply for completing the designated work for the duration of the contract.

Flexibility clause – The agreement allows flexibility around just one part of the agreement - the taking of annual leave – which in an offshore environment in particular is of very limited value to the employer.

Dispute resolution – The types of disputes able to be referred to the FWC under this clause are not limited to disputes over the application of the agreement. They also include "individual(s) grievances over management decisions not just limited to clauses of this agreement". The FWC is able to arbitrate on such grievances in the event conciliation fails, meaning the agreement is open-ended to additional costs and imposts. This appears, for example, as the opposite of the closed agreements and no extra claims clauses being contested in relation to workplace arrangements at Toyota.

Sick leave – The agreement gives workers 120 hours of sick leave which, if unused during their employment, is paid out upon termination as an "attendance incentive bonus".

[1] Noting that there would have been no practical scope in such a renewal to redress the inflated costs, terms and conditions of the original agreement.

Annual leave – The agreement provides for six weeks' annual leave.

Ordinary pay rates – Ordinary hourly rates for workers on the project, not including other allowances and benefits, range from $40.25 an hour for a janitor to $48.20 an hour for a barge welder.

Travel allowance – Each employee is paid a travel allowance of $455.25 each way for all travel to mobilise to and from the work location. Where travel time by another mode of transport is deemed unreasonable compared to flight time, the employee is paid an allowance of $911.60 each way.

Shift allowance – A flat shift allowance applies to all hours worked, calculated at 17.5% of the ordinary rate of pay for the applicable classification.

Common-use ablutions allowance – Employees sharing common-use ablutions or accommodation aboard the facility are paid a flat allowance of $90 a day (this allowance was retained in the subsequent rollover of the agreement despite each bedroom by that stage having its own en suite on a new accommodation facility).

The culmination of such terms means that the above-mentioned janitor earns not less than several hundred thousand dollars per year, which is double or triple the average weekly earnings in the resource industry, and exponentially higher than comparable onshore rates for such work in, for example, a CBD office building.

For workers who had been on the project for one year and had not taken any sick leave, the termination payments alone totalled 640 hours' pay (including termination payments, termination bonuses, redundancy pay and untaken sick leave) in addition to the "job termination payment" of 15% on gross earnings. The more time worked, the more such payments would accumulate.

These termination payments were also received by some short-term casual workers who, because they worked on the project beyond one cycle, were deemed to be "permanent". This equated to around an extra $28,000 each for those workers for a two-week stint on the project, in addition to their ordinary pay and other allowances.

67. Agreements such as the example above are clearly unsustainable and should under no circumstances be used as a basis for sensible, competitive labour cost structures going forward in a more competitive global resource industry. If this were to become the "comparator" agreement for future offshore construction projects in Australia, it would be nothing short of disastrous for industry and the economy and would actively discourage project investment.

    a. It is important to recall that Australia is not the only place in the world with LNG, iron ore or other major resources. In LNG, for example, globally significant new project investments are being made in the United States and Russia with a view to exporting to the growing Asian market (i.e. the markets we service).

    b. Australia enjoys a comparative advantage not by virtue of the abundance and accessibility of our resources, but by the landed cost of our exports versus those in competing nations (combined with the costs of projects and track record of delivering them on time and on budget).

    c. Cost competitiveness is not guaranteed, and therefore neither are project investments into Australia. Calculation always occurs and this calculation takes into account greenfields arrangements and labour costs for both project construction and operation.

68. While some have argued employers should push back harder against exorbitant union claims, it must be remembered that in the above example in offshore construction, vessels can cost around $2 million a day to hire. They cannot be booked like a hire car and are in very high demand and tightly scheduled. Once work is completed on one project, the vessel is off to work on another project.

69. No matter how outrageous union claims may be, the timelines for these projects are such that employers are exposed to massive costs arising from any delays in finalising an agreement. Those costs are exponentially increased if work on a project begins without an industrial agreement in place and is therefore at risk of protected industrial action being taken from the outset.

70. Saying no in these situations is not a commercially viable option due the nature of the industry. Unions know that all too well in formulating and pressing their greenfields claims.

71. The "prevailing industry standards" test proposed in the Bill risks perpetuating and entrenching such inflated agreement outcomes, notwithstanding that the other proposed greenfields provisions in the Bill would have a positive moderating effect.

72. Having the type of agreement used in the above example on the books for the FWC to even consider as a comparator risks it becoming the benchmark for future offshore construction projects across Australia.

73. The same issues arise with an onshore construction project that may not want to use a "typical" construction roster. Some companies would like to do more innovative things and run their operations in a more family-friendly way but would be prevented from doing that if they had to comply with the "prevailing industry standard" for construction agreements in terms of rosters. This would not only restrict innovation but would cement in place the worst industrial outcomes that have been seen in 30 years.

74. The operational requirements of the enterprise need to be paramount in applying any prevailing industry standards test. In each case where an employer takes their agreement to the FWC for determination, they should have the chance to articulate why they think the deal is a good deal regardless of what other agreements may have been put in place under completely different circumstances for completely different reasons.

Proposed amendments to the Bill

The 'prevailing industry standards' test

Option 1 (AMMA's preferred and recommended approach)

75. Remove the prevailing industry standards test altogether and leave the existing three tests in place for all greenfield agreements (i.e. the National Employment Standards, the BOOT and the public interest test).

Option 2

76. The prevailing industry standards test should not be applied as a "stand-alone" or fourth test in addition to the BOOT and the NES but added to the BOOT through an amendment to s193(3), as highlighted.

> **Section 193**
>
> (3) A greenfields agreement passes the better off overall test under this section if the FWC is satisfied, as at the test time, that each prospective award-covered employee for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.
>
> **Only where the FWC has concerns that this test may not be met having regard to particular terms and conditions of work for employees may the FWC also have regard to prevailing industry standards in the application of those particular terms and conditions of work in deciding if employees will be better off overall.**

77. The prevailing industry standards test would not be mandatory but could be used as required to ensure employees are better off overall when all considerations are combined when appropriate and necessary. It would be an additional persuasive consideration in the exercise of discretion, rather than a hard and fast test.

78. The following is an example of how this amendment would work.

a. A comparator agreement applies a four-week roster but the new greenfield operation wants a five-week roster. Because the greenfield operation will pay significantly more than the award, or provide other more beneficial terms and conditions (such as additional leave), the agreement passes without being held to the terms of the comparator agreement.

b. This example may be how the test is already designed to work, however, this is not sufficiently clear in the drafting and supporting materials.

c. Such an approach needs to be made explicitly clear in the Bill or EM to properly guide members of the commission in making their determinations.

Option 3

79. Reframe the prevailing industry standards test as something the commission "may" rather than "must" consider, as amended below in bold:

> **At the end of section 187**
>
> Add:
>
> (6) If an agreement is made under subsection 182(4) (which deals with a single-enterprise agreement that is a greenfields agreement), the FWC **may additionally give consideration to whether** the agreement, considered on an overall basis, provides for pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry for equivalent work.

Note: In considering the prevailing pay and conditions within the relevant industry for equivalent work, the FWC may have regard to the prevailing pay and conditions in the relevant geographical area.

Option 4

80. Make the proposed note to section 187 something the commission "must" have regard to rather than "may" have regard to, while also adding further qualifiers such as the examples outlined below, but leaving the substantive text of the provision as is:

At the end of section 187

Add:

(6) If an agreement is made under subsection 182(4) (which deals with a single-enterprise agreement that is a greenfields agreement), the FWC must be satisfied that the agreement, considered on an overall basis, provides for pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry for equivalent work.

(7) In considering the prevailing pay and conditions within the relevant industry for equivalent work, the FWC **must** have regard to:

(a) Prevailing pay and conditions, to the extent they may exist, in the relevant geographical area.

(b) Any comparator agreements or workplace arrangements the employer identifies as providing for prevailing pay and conditions within the relevant industry for equivalent work.

(c) The extent to which the work to be undertaken would genuinely be equivalent to any proposed comparators.

(d) The nature of the proposed greenfields operation including its scope, operations, staffing levels and logistical requirements.

(e) Technologies to be utilised at the greenfields operation and those used in any proposed comparator operations.

(f) The employer's anticipated rostering and organisation of work.

(g) The employer's anticipated accommodation arrangements.

(h) The desirability of encouraging investment in job-creating enterprises in Australia.

(i) International and domestic competitiveness and the viability of the proposed greenfields operation.

(k) Scope to attract and retain employees while also paying particular regard to operating costs.

(l) Whether the proposed agreement provides levels of flexibility, productivity and efficiency to support the effective and competitive operation of the proposed project or new enterprise.

81. AMMA cannot overstate the harm that would be done if the prevailing industry standards test led to the commission seeking undertakings about, for example, the types of rosters to be used and those being drawn from a comparator agreement. Decisions about rostering are uniquely operational decisions that must be made by each operation without third-party interference.

82. Sensitive economic data about resource industry operations should under no circumstances be able to be sought by the FWC as part of the test.

Option 5

83. The Bill or EM could identify terms of existing arrangements that could not form part of "prevailing industry standards", along the lines of the example highlighted in bold below:

> **At the end of section 187**
>
> Add:
>
> (6) If an agreement is made under subsection 182(4) (which deals with a single-enterprise agreement that is a greenfields agreement), the FWC must be satisfied that the agreement, considered on an overall basis, provides for pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry for equivalent work.
>
> Note: In considering the prevailing pay and conditions within the relevant industry for equivalent work, the FWC may have regard to the prevailing pay and conditions in the relevant geographical area.
>
> **However, the FWC may not have regard to …**
>
> **Particular rosters in comparator agreements as these will be unique to each enterprise.**
>
> **Clauses relating to "union rights" and capacities such as those bestowing particular rights on union delegates; those requiring consultation with unions over staffing and contractor levels and other workplace arrangements; those requiring trade union training or training leave; or those requiring payment of monies into union funds.**

84. Clauses restricting the use of contractors, labour hire or skilled migrants, or those giving expansive union entry rights, even if written into other greenfields agreements, should not form part of the basis for comparison.

Option 6

85. This would be a simple amendment allowing the commission to be satisfied on other grounds that a proposed greenfields agreement should be approved even where the prevailing industry standards test is not met, or there is ambiguity.

At the end of section 187

Add:

(6) If an agreement is made under subsection 182(4) (which deals with a single-enterprise agreement that is a greenfields agreement), the FWC must be satisfied that the agreement, considered on an overall basis, provides for pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry for equivalent work **unless the commission is otherwise satisfied on other grounds that the pay and conditions in the agreement should be approved.**

Note 1: In considering the prevailing pay and conditions within the relevant industry for equivalent work, the FWC may have regard to the prevailing pay and conditions in the relevant geographical area.

86. If appropriate, the Act could also further guide the Commission on what these "other grounds" may and may not be, such as the agreement providing comparable ordinary time earnings to employees, the importance of creating jobs in particular areas etc.

87. This could allow an employer to make submissions that apparently or nominally prevailing pay and conditions were set in a different economic climate or would prevent a new project from proceeding.

88. To that end, AMMA welcomes the clarification in the EM that there may be times when the FWC finds there is no direct basis of comparison with other agreements and simply takes the employer's agreement on its merits underpinned by the existing tests. However, this provision should have broad, not narrow, application.

89. That there is no comparator agreement may be the commission's finding not only in relation to brand new industries but in relation to the unique scale of some projects, their location or the nature of work, any or all of which may preclude a realistic comparison being made.

90. It is important that the FWC, particularly as currently structured, not be left "at large" to use its discretion as to what the prevailing industry standards test should include and how it should be applied. There must be specific parameters and explicit guidance around what can and cannot be included by way of comparison as part of the test.

Option 7

91. Specify that the prevailing industry standards test does not apply in situations where the 'majority of workers to be covered by the agreement are set to earn more than the high income threshold' in the Fair Work Act. This threshold is currently $129,300[10] for unfair dismissal (or 1.7 times Average Weekly Ordinary Time Earnings across all industries of $75,017[11]).

[10] November 2013, trend, latest.
[11] Source: http://www.abs.gov.au/ausstats/abs@.nsf/mf/6302.0

92. Again, the principle should be that where the employees are not set to be in any way low paid, or where the safety net is not called into question, the additional prevailing industry standards test should not apply.

Further options

A 'project proponent' greenfields agreement

93. A further greenfield agreement making option is worth considering by the government and the committee. This would be in the form of a "project proponent" or "framework" greenfields agreement that could, by opting in, cover an entire resource project if all contractors decided to be covered by the agreement.

94. This could be addressed by creating scope for an overarching greenfield agreement, operating much like an Enterprise Migration Agreement (EMA) was intended to operate in the skilled migration space, although not necessarily applying only to "mega" resource projects.

95. Given that the client or project proponent takes most or all of the industrial risk, it makes sense to allow them to negotiate a framework agreement with the union or unions representing the majority of workers, which could then be adopted by subsequent contractors as they came on board the project (if they chose to be covered).

96. The project proponent and the union(s) would agree on the framework which would look very much like an industrial instrument but would not be registered as such as it would not have been made by an employer of workers.

97. Once that framework agreement was in place (with the three-month negotiation deadline and process applying to its negotiation), a contractor could come onsite and elect to be covered by it.

    a. They could also elect not to be covered by it and to then negotiate their own agreement with the unions involved, as a stand-alone greenfields agreement.

    b. They could also choose not to have a greenfields agreement in place when work starts on the project for that employer (although that would come with significant risk).

    c. Potential issues around compliance with the building industry code of the day would also need to be considered so that contractors signing up to the framework agreement would not be precluded from undertaking state or federal government building work. However, it should be noted that AMMA is not suggesting the imposition of a framework agreement on contractors, only that they have the option, free from coercion by any other party, to adopt a special form of greenfields agreement set by the proponent/ principal they are contracting to.

98. Because the same tests would apply to this framework agreement as to other greenfields agreements, the appropriate protections would be in place to ensure good faith bargaining occurred and workers were left better off overall.

99. There are also existing protections prohibiting a project proponent from taking adverse action against a contractor because they do or do not have a particular industrial agreement in place (s354 of the Act), and these would continue.

100. In short, a "project proponent" agreement would be an "umbrella" agreement that if no-one signed, would not cover any employees or have any effect.

101. However, as contracts are progressively awarded on a project, each union bargaining representative would be informed that a contractor wished to sign up to the framework agreement and the union could agree to sign or not.

102. Importantly, in this and other areas of the Bill, if unions do not sign up to agreements they should not be deemed to be covered by agreements. Consequently, they would have no entry rights for discussion purposes (see section on '*Union access to workplaces*' for full details of how AMMA would like the Bill's right of entry provisions to work). In this way, unions would be further incentivised to make greenfields and other agreements with employers.

103. The benefits to projects of having a "project proponent" agreement available would be considerable depending on its implementation. Projects would have certainty of investment, particularly around costs and scheduling, and large productivity gains would flow.

104. Such an additional agreement option would also lend itself to a "project length" agreement duration as proposed below.

A "project length" / "project construction" agreement

105. Major resource projects can be of such vast scale that they can take years to build and commission (i.e. to move from the construction to the production phase).

106. This means that project-construction can extend beyond four years and require re-negotiation of an initial greenfields agreement during an extended construction phase.

107. Renegotiation creates a massive exposure to protected industrial action and a vulnerability to additional costs and delay, which is well understood and actively exploited by trade unions.

108. In the case study mentioned earlier of an offshore construction project, the initial greenfields agreement had to be renegotiated during the construction phase. This meant that unions were able to insist on a roll-over of a $90 a day shared-ablutions allowance into the new agreement. This was paid under the initial agreement because workers had to walk down the hall to use the toilets and bathrooms and was said to compensate for the inconvenience.

109. However, when it came time to renegotiate the agreement, the union wanted that shared ablutions allowance to continue as an "interim transitional payment" even though on the new accommodation facility each room had its own en suite!

110. While the employer resisted including the allowance in the second agreement, the same financial imperatives and threats were at work as they were at the time the initial greenfields agreement was negotiated. For each day the vessel was idle, i.e. work was not being performed due to protected industrial action in support of the renegotiated agreement, it would cost the company in the realm of $2 million a day.

111. Again, unions know employers can not commercially hold out against their intransigence.

112. This case study illustrates the heart of the greenfields problem under the current rules. Companies on resource construction projects, particularly offshore, are forced to concede to union demands in both the initial greenfields agreement and any renegotiation of it due to commercial pressures and the costs of work not being performed outweighing the extra allowances and conditions that unions demand, no matter how exorbitant.

113. The Bill as drafted would not amend the duration of greenfields agreements or create a life of project/project construction agreement, and it could usefully do so. Four options are identified below for consideration.

Option 1

114. Extend the maximum four-year greenfield agreement length to a "project duration" length. Such agreements would have no defined duration but would apply as long as the project was in the construction phase.

Option 2

115. Extend the duration of greenfield agreements to a maximum of five years, or even six. This would see nearly all projects through to the operational phase.

116. This could be done via an amendment to s186 of the Act, changing the reference from four years to five or six, appropriately restricting such extended agreements to major resource industry projects.

Option 3

117. Introduce a streamlined extension process for projects still in construction so they could apply to have their existing greenfields agreement rolled over for the duration of construction (i.e. for a fifth or sixth year). This would mean that existing annual wage increases were rolled over for the extra years.

118. Under this proposal, options to extend could only be refused on certain limited grounds, with extensions used to maintain industrial stability. Given the high salaries resource employees receive, there should be no need for them to take protected

industrial action during the construction phase of a project in order to secure reasonable terms and conditions.

Option 4

119. Use the Act's existing "agreement variation" provisions (e.g. s207) so that existing greenfields agreements could be varied on application by the employer in the terms sought, subject to the applicable approval tests.

120. AMMA acknowledges that a "life of project" agreement may be longer than has previously been provided. However, the economic and operational case for such an option carefully targeted is compelling.

121. Existing safeguards would ensure no detriment to employees, particularly in the resource industry with high pay and conditions.

A shorter negotiation deadline after projects have mobilised

122. While a notified three-month time limit for greenfield negotiations is a hugely positive step, and very workable for agreements negotiated before projects have mobilised, this will be less workable in situations where projects have already commenced work.

123. Where a union or unions on a project have signed up to a greenfield agreement but other union(s) covering different groups of workers have not signed the same agreement or a separate stand-alone agreement, a shorter negotiation deadline is warranted.

124. It would be unworkable if each new contractor coming onto a site had to wait three months before going to the FWC with their proposed agreement and the project had to wait three months before moving to each successive phase, i.e. three months for the earth moving contractor to come onsite, three months for the formwork contractor, right through to three months for final commissioning, etc.

125. A solution would be to introduce a four-week negotiation deadline where an initial greenfields agreement had been signed on a project and subsequent contractors were coming onto a project that had already mobilised.

126. This could be achieved by amending the Bill's s178B (highlighted in bold below):

> **Section 178B 3-month negotiation period for a proposed single-enterprise agreement that is a greenfields agreement [*applying BEFORE a project has mobilised*]**
>
> (1) If a proposed single-enterprise agreement is a greenfields agreement, an employer that is a bargaining representative for the agreement may give written notice:
>
> (a) to each employee organisation that is a bargaining representative for the agreement; and

(b) stating that the period of 3 months beginning on a specified day is the *3-month negotiation period* for the agreement.

(2) The specified day must be later than:

(a) if only one employee organisation is a bargaining representative for the agreement—the day on which the employer gave the notice to the organisation; or

(b) if 2 or more employee organisations are bargaining representatives for the agreement—the last day on which the employer gave the notice to any of those organisations.

Multiple employers—agreement to giving of notice

(3) If 2 or more employers are bargaining representatives for the agreement, the notice has no effect unless the other employer or employers agree to the giving of the notice.

4-week negotiation period for a proposed single-enterprise agreement that is a greenfields agreement [*applying AFTER a project has mobilised*]

(1) If a proposed single-enterprise agreement is a greenfields agreement and would apply to work to be undertaken on a worksite already subject to a greenfields agreement made under this Part, an employer that is a bargaining representative for the agreement may give written notice:

(a) to each employee organisation that is a bargaining representative for the agreement; and

(b) stating that the period of four weeks beginning on a specified day is the *4-week negotiation period* for the agreement.

(2) The specified day must be later than:

(a) if only one employee organisation is a bargaining representative for the agreement—the day on which the employer gave the notice to the organisation; or

(b) if 2 or more employee organisations are bargaining representatives for the agreement—the last day on which the employer gave the notice to any of those organisations.

Multiple employers—agreement to giving of notice

(3) If 2 or more employers are bargaining representatives for the agreement, the notice has no effect unless the other employer or employers agree to the giving of the notice.

Undertakings provided to the commission

127. AMMA welcomes the ability for employers to provide undertakings in relation to greenfield agreements made via determination as an alternative to having to return to the negotiating table and / or triggering another three-month negotiating period (although under the Bill employers would also have those options, which is positive).

128. However, it is important that the proposed system of greenfield undertakings does not turn into "backdoor" arbitration by the FWC on non-work related issues.

129. The same restrictions AMMA suggests for the prevailing industry standards test (*above*) should apply to the commission's power to extract undertakings from employers.

130. For example, the FWC should not be able to ask employers to make operationally unsound concessions in terms of rosters, union rights clauses, or wages aside from ordinary time earnings via an undertaking. This is crucial because otherwise the proposed system of voluntary undertakings becomes a type of "at large" arbitration that AMMA and its members absolutely cannot support, particularly when it comes to matters not pertaining to the direct employment relationship. This would also be at odds with government policy and reforms to the workplace relations system over an extended period under both Labor and the Coalition.

131. Third parties should not be involved in the FWC's decisions about what sort of undertakings are required to get agreements across the line. Undertakings should be between the employer and the commission, with unions and other third parties not able to intervene. Unions should also not be able to further argue their case at that stage of the process, having failed to reach a reasonable agreement beforehand.

132. The labour market at the time and the demand for skills will ensure employers offer competitive wages without the constant snowballing of exorbitant outcomes or arguments from third parties about "parity".

133. Undertakings should be limited to terms and conditions of employment. There should be no scope for undertakings on (for example) union access or amenities. Otherwise, unions will be encouraged to pursue such claims, which risks diverting the determination process away from the interests of the project and its employees, towards a focus on the priorities of the union and its officials.

A separate greenfields section of the Act

134. Consideration should be given to re-organising the greenfield provisions into a separate, stand-alone sub-division of the Fair Work Act. This reflects a general problem with the redrafting of the workplace relations laws across the past decade. So-called modernisation of the legislation has rendered it very hard to comprehend, alienating employers and employees from the rules they must apply.

AMMA's position on the greenfield agreement making provisions

AMMA supports:

- Urgent action to address fundamental problems with the existing greenfields provisions of the Fair Work Act which are affecting the capacity to do business, attract investment and create jobs in Australia, and which are particularly affecting major resource projects.
- Providing a reasonable opportunity for negotiations, but enabling employers to take their agreement to the FWC after a reasonable time period has elapsed.
- The passage of Schedule 1, Part 5 subject to addressing the concerns raised above, including:
    - Removing the proposed "prevailing industry standards test" (Option 1 above).
    - (Or alternatively) Modifying the test as set out at Options 2 to 7 above.

AMMA also supports:

- Consideration of an extended (more than four-year) life of project / project construction agreement to better meet the needs of major project construction.
- Consideration of a "project proponent" greenfields agreement.
- A less than three month deadline for agreement determination after projects have mobilised and "lead" greenfields arrangements have been put in place, for subsequent contractors.
- Limiting the content of undertakings the commission can seek from employers in determining greenfields agreements.
- Starting to address the complication of the agreement making provisions of the Act to make them more comprehensible to users.

UNION ACCESS TO WORKPLACES (RIGHT OF ENTRY)

135. Any rules empowering unions to enter employer premises must be subject to appropriate checks and balances in the same way as any other visits to a site, as AMMA pointed out in its June 2013 *Resource Industry Workplace Relations Election Paper: Trade Union Access to Workplaces*,

136. AMMA does not see union access to workplaces as a right. It is a fundamental tenet of our legal system that rights to access premises / land are severely limited to anyone other than the land owner or occupier, or those they permit to enter. Police, sheriffs and the like do not have a right to enter premises in Australia and require a warrant. Owners of a property do not have a right to enter rented property and do so under limitations.

137. Union access to work premises is a unique grant of privilege for a specified purpose, and it needs to be understood as such to properly inform sound policymaking in this area. As such, AMMA proposes that the provisions in the Bill and the Fair Work Act in this area be included under the banner of "union entry" rather than "right of entry".

138. AMMA believes Australia had the checks and balances right in this area prior to the introduction of the Fair Work Act on 1 July 2009, and it is to that pre-Fair Work Act system that AMMA would like the current system to return.

139. In 2007, then-Deputy Opposition Leader Julia Gillard famously promised to retain the Workplace Relations Act's existing right of entry rules in the move to the Fair Work Act[12]:

> *"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 [ie retaining the existing right of entry laws]."*

140. That promise was not honoured. But more important than the politics of broken promises was the Labor government's change of position away from sound and established policies to a model that has created significant practical problems.

141. The commencement of the Fair Work Act on 1 July 2009 saw massive changes to Australia's union right of entry system. Matters were made significantly worse for businesses in further amendments that took effect on 1 January 2014, which further opened up lunch rooms and remote sites to more union visits than ever before.

142. The Coalition while in Opposition opposed those amendments when they were before parliament in 2013 but this did not stop them passing into law.

143. AMMA therefore welcomed the commitment in the *Policy to improve the Fair Work laws* in May 2013 that a Coalition government would repeal Labor's latest damaging amendments and return to a system modelled on the pre-2009 right of entry laws:

[12] Deputy Opposition Leader, Julia Gillard, National Press Club Address, 8 November 2007

> *"A Coalition government will change the Fair Work laws to ensure union right of entry provisions are modelled on the promise that Julia Gillard made in 2007. We will also oppose Labor's latest attempts to go even further, and, if they become law, a Coalition government will repeal them."*

144. This was a welcome policy commitment given the problems that AMMA members are experiencing under the current rules, which include but are not limited to:

    a. **Union officials causing** repeated disruptions to businesses via excessive visits for discussion and recruitment purposes.

    b. **Difficulties ascertaining** which unions are entitled to enter premises to meet with workers due to complex and sometimes indecipherable union eligibility rules.

    c. **The ability to include** clauses in enterprise agreements conferring even greater union access to worksites than is delivered under the Act.

    d. **Increasing industrial instability** arising from multiple and often competing unions visiting worksites under the current basis of entry for discussion purposes.

Positive aspects of Schedule 1, Part 8

145. The Bill contains some extremely positive amendments to the Act on union access to workplaces. AMMA welcomes those amendments, chief among them the proposed repeal of the damaging aspects of Labor's changes that took effect on 1 January 2014.

146. AMMA's concerns about the 1 January 2014 right of entry provisions were documented in detail in our submission on the *Fair Work Amendment Bill 2013*. All of those concerns and more in relation to the provisions have been borne out in practice, with parties fighting it out in the tribunal at present about the scope and breadth of those changes in a raft of matters.

147. AMMA welcomes the Bill's proposal to remove entirely the schedules of the Act requiring employers to provide transport and / or accommodation to union officials to facilitate their access to remote sites.

148. AMMA also welcomes the Bill's proposed repeal of the provisions that removed employers' ability to designate a "reasonable" meeting location at which unions could hold discussions with members or eligible members.

149. AMMA further welcomes the Bill's removal of some of the constraints around employers' capacity to challenge the frequency of union entry by taking a dispute to the FWC. Issues around frequency of union visits are well-documented in AMMA's submissions and research papers since the Fair Work Act began.

150. The Bill's changes in this area are overwhelmingly positive for the resource industry. Once the Bill is enacted, it will bring things back to the pre-1 January 2014

approach, with the added benefit of a bolstered dispute resolution mechanism regarding frequency of union entry.

151. This is welcome, but the Bill can and should do more to return the basis for union entry for discussion purposes to what it was prior to the Fair Work Act being introduced. This approach is entirely open to the government consistent with its stated policy.

Key concerns with Schedule 1, Part 8

Basis for union entry to hold discussions

152. The Bill makes some modifications to the basis on which unions can enter worksites to hold discussions (currently regulated under s484 of the Fair Work Act) but falls short of the scope of reform necessary to fully address business concerns in this area.

153. The *Coalition's Policy to improve the Fair Work laws* states that unions can seek entry to a workplace for discussion purposes if:

- *The union is covered by an enterprise agreement that applies to the workplace;* ***or***
- *The union is a bargaining representative seeking in good faith to make an agreement to apply in that workplace;* ***and***
- *There is evidence that it has members in that workplace who have requested their presence.*

If a workplace is covered by a modern award, or, an enterprise agreement that does not cover a particular union, access will only be allowed if:

- *The union can demonstrate they have, or previously have had, a lawful representative role in that workplace;* ***and***
- *There is evidence that the workers or members have requested the presence of a union.*

154. The Bill deviates from the above in key ways but, more importantly, has moved away from the "principle" of returning to the pre-Fair Work Act right of entry rules to the extent that this is possible.

155. When looked at in detail, the Bill does two things in this area:

a. **Confirms** that if a union is covered by an enterprise agreement onsite, it will continue to have entry for discussion purposes under the current rules as outlined in the Fair Work Act as it currently stands.

b. **Places** one additional requirement on unions that are not covered by an enterprise agreement onsite (even for sites where other unions are covered by agreements) by requiring a member or potential member to extend an invitation to the union to enter.

156. The Bill does not require unions under scenario (a) above to prove a member has requested their presence onsite. Nor does it require unions under scenario (b) to prove they have or have had a lawful representative role in the workplace.

157. This deviates from the substance and principle of the Coalition's policy, and from the pre-Fair Work Act status quo to which employers support the system returning.

158. Under s760 of the then *Workplace Relations Act* as it stood immediately prior to the Fair Work Act, unions only had rights to enter worksites to hold discussions if the relevant employees carried out work that was covered by an award or collective agreement that was binding on the union **and** there were eligible members or members performing that work.

Invitation certificates

159. There are genuine concerns regarding the proposed system of "invitation certificates" under the right of entry provisions of the Bill as currently drafted.

160. Such certificates are aimed at proving there is an invitation by a member or potential member for a union to enter a site if the union is not covered by an enterprise agreement onsite.

161. AMMA members' threshold objection to this framework is that invitation certificates should not be available to gain entry onto sites where another union has an enterprise agreement in place with the employer. Again, this was the pre-Fair Work status quo which Labor previously promised to adhere to; it is the pre-Fair Work status quo that the government has signalled it intends to return to; and it is the approach to which the system should return.

162. Enabling invitation certificates to be obtained by unions not covered by agreements in order to gain entry to agreement-covered sites risks undermining the positives that would be achieved by the rest of the Bill's amendments on union entry. This is a fundamental concern.

163. As an example, on one major project site that is starting to mobilise, only one union has signed up to a project agreement but under the Bill as drafted, other construction unions would be able to be invited in by members (or potential members) and continue to agitate and cause disharmony on the site. That union was initially involved in negotiations but refused to sign on because they did not like the rostering arrangements.

Proposed amendments to the Bill

Basis for union entry to hold discussions

164. While the nature of awards has changed under the Fair Work Act and unions are no longer "bound" by modern awards or enterprise agreements, it is still open to Parliament to require a union to be covered by an enterprise agreement in order to gain entry for discussion purposes.

165. That is a fundamental change that AMMA would like to see in the Bill (indeed it would be a return to the pre-Fair Work Act status quo as intended).

166. Where an employer and employees have chosen to make an enterprise agreement without the involvement of a particular union, that union should not have access to that site at all, in AMMA's view, as that is how it was prior to the Fair Work Act coming into effect.

167. Only on those sites where there is no enterprise agreement in place with another union or unions should another union be able to enter for discussion purposes. On non-agreement covered sites, a union should only be able to gain entry if it is invited in by a member on that site, not a potential member.

Invitation certificates

168. AMMA members have concerns with the form and content of invitation certificates that could be addressed through amendments to the Bill itself and/or through the EM or Regulations:

a. AMMA members believe the system of invitation certificates should not allow "standing warrants" or open-ended invitations to apply at the discretion of FWC members who will be issuing the certificates.

i. Whatever the final form of these provisions, it is vitally important that these certificates are not open-ended or granted for such an extended period that they become a standing warrant or open license to enter premises.

ii. They must remain occasion-based and only provide for specified entries.

b. Certificates should allow one entry on one specified day during one meal break only (i.e. they should act in the same way as an entry notice once obtained from the commission).

c. There must be a cap on how many certificates can be issued, ideally a maximum of one entry per month per union and, as proposed above, only at non-enterprise agreement-covered worksites. Without appropriate caps on the number of certificates (i.e. visits), the Bill's other provisions which bolster employers' ability to challenge frequency of entry are in danger of being undermined.

d. Limiting invitation certificates to non-enterprise agreement-covered worksites will reduce the administrative burden on the FWC in having to deal with potentially thousands of applications per year. With a brand new anti-bullying jurisdiction to administer, including fast-tracked resolution of those matters, a too wide system of invitation certificates will divert FWC resources away from applications that are of real value to stakeholders to sort out.

e. There must also be strict criteria around what the certificates allow. If not, AMMA members fear they will see FWC members exercise their discretion in ways that are unfavourable to the business community.

f. Employers and occupiers should be informed that an invitation certificate has been applied for at their site and ideally have a chance to be heard in relation to it.

g. At least 24 hours' notice should apply in relation to entry under an invitation certificate.

h. Certificates must have a "stated purpose" as to why the union is entering and should not allow speculative fishing expeditions.

169. AMMA and its members do not seek to prevent unions doing their critical work, but the key is to make sure the Bill's right of entry provisions are sensible and reward parties for agreement making.

Photo Identification permits

170. The Coalition's 2013 *Policy to improve the Fair Work laws* included a requirement for union officials to produce photo ID upon request by the employer / occupier.

171. That requirement is not contained in the Bill. However, AMMA supports urgent action on this important issue.

172. Again, the Committee should consider wider practice in our community in considering the standards and responsibilities union officials should be subject to when exercising unique powers bestowed upon them by the state.

173. Inspectors, local government officials, community workers, and even charity collectors all carry official photographic ID to ensure:

a. They are who they say they are.

b. Those they interact with can have confidence in their identity and accountability in the discharge of their functions.

c. There is clarity about who entered premises on what basis if and when allegations of impropriety or illegality arise.

174. Importantly, photographic ID protects the ID carrier and all persons they deal with.

175. Even couriers and the people who fill up the soft drink machine increasingly carry photographic identification. Whilst police do not carry photographic ID, they do clearly display their name.

176. It would be extraordinary if union officials were held to lesser standards of proof and confidence than our public officials, a proposition made all the more extraordinary when one considers:

a. The questions being posed about the character and conduct of some union officials both in public debate and the current Heydon Royal Commission.

b. The apparent growing interest of organised crime, and other unregistered interests and figures, in becoming involved in industrial relations at various levels.

c. The very real fears that criminal gangs and other unsavoury elements are purporting to pursue industrial relations matters in this country.

177. It is vital that there is scope to quickly identify genuine union officials and confirm their identity to distinguish them from unregistered, unaccountable and potentially criminal elements.

178. One would have thought an official identity confirmation that would rapidly separate properly registered and regulated union officials from others purporting to represent employees would have been welcomed by the union movement.

179. The importance of photographic ID for union officials seeking to enter worksites is underscored by two very recent developments:

180. Alleged misrepresentation 1: The following report from the *Australian Financial Review* online of 23 April 2014[13] illustrates the type of conduct regarding union officials' identity which photo ID would properly regulate:

> *In March a project at Sydney's Mascot was slowed by the arrival of two union officials, one of whom is alleged to have claimed to be Steve Irwin.*

181. Assuming the official's name wasn't Steve Irwin, it is important that he be accountable to the system under his proper name, and accountable in particular for his conduct on site exercising what are statutory powers.

a. Were any complaints made, it would be vital that all parties, including the union official, have the proper protection of identity confirmation.

b. Were a government official to have sought to exercise his or her powers using a false or concocted name, they would potentially be guilty of very serious misconduct, if not corruption / breaches of public sector standards.

c. Giving a false name to police is an offence.

182. Alleged misrepresentation 2: We also draw the Committee's attention to a recent media statement[14] from SafeWork South Australia (*below*), responding to a "*spate of reports of people attending workplaces and falsely claiming to be an authorised SafeWork SA inspector*".

[13] Stevens, M. 23/04/14, The battle to tame the building union, Australian Financial Review, viewed at http://www.afr.com/p/business/companies/the_battle_to_tame_the_building_2jMFyNs0w7vG3kMeWaFPVN
[14] Safe WorkSA (14 February 2014) Media Statement "*SafeWork SA investigating bogus inspectors*" viewed at: http://www.safework.sa.gov.au/uploaded_files/20140214BogusInspectors.pdf

MEDIA STATEMENT

Government of South Australia
SafeWork SA

Friday, 14 February 2014

SafeWork SA investigating bogus inspectors

SafeWork SA, the state's work health and safety regulator, is asking people to request photo identification when an inspector requests workplace access.

This follows a spate of reports of people attending workplaces and falsely claiming to be an authorised SafeWork SA inspector.

SafeWork SA is concerned that South Australian workers and businesses are receiving incorrect or misleading WHS information which may compromise work health and safety.

It is an offence to impersonate an inspector and any person doing so may be subject to a maximum penalty of $10,000. SafeWork SA is investigating these incidents with a view to initiating prosecution action.

SafeWork SA inspectors always carry authorised inspector photo identification, provide their full name and wear a uniform.

SafeWork SA encourages employers or officials at workplaces to require proof of identity and check the credentials of any unknown person seeking site access.

SafeWork SA will only direct authorised inspectors to conduct site inspections, and will never direct any person who is not an authorised inspector to conduct any work on our behalf.

SafeWork SA encourages anyone with information about bogus inspectors to telephone 1300 365 255.

END

183. Two matters particularly stand out from this which are directly relevant to the importance of union officials carrying photographic ID when exercising statutory grants of power to enter any worksite:

a. "*SafeWork SA inspectors always carry authorised inspector photo identification, provide their full name and wear a uniform*".

b. "*SafeWork SA encourages employers or officials at workplaces to require proof of identity and to check the credentials of any unknown person seeking site access.*"

184. Finally, the committee and government should consider the contemporary imperatives for employers to even more tightly control and monitor who is on their sites, along with the identity of visitors.

185. Greater workplace security is driven by diverse imperatives such as: national security, food security, risks of industrial espionage, and workplace health and safety, right through to protecting employees from violence. Such considerations have made employers increasingly vigilant in confirming and controlling who is coming onto site and what they do when they get there. This is part of a global trend to greater security and site control following 9-11.

186. It would be entirely consistent with this global trend towards greater control and identification of all persons in the workplace to require unions exercising powers of entry to show photographic ID.

Commencement dates

187. All the Bill's right of entry provisions, including the repeal of the worst aspects of the 1 January 2014 changes, have a scheduled commencement of not more than six months after the legislation receives Royal Assent. This is in contrast to other parts of the Bill that commence on or the day after Royal Assent.

188. The provisions repealing the 1 January 2014 changes can and should commence upon Royal Assent and apply to all entry notices served after that date. The longer the existing damaging Labor provisions remain in place, the more costly they will be to industry and the economy. We can see no reason for delayed commencement of those provisions.

AMMA's position on the union entry provisions

AMMA supports:

- Passage of those elements in Schedule 1, Part 8 that reverse damaging aspects of the *Fair Work Amendment Act 2013* that commenced operating on 1 January 2014.
- Amending Schedule 1, Part 8 to:
  - Require a union to be covered by an enterprise agreement onsite to gain right of entry for discussion purposes.
  - Preclude a union exercising right of entry for discussion purposes to a workplace that is covered by an agreement with another union or unions.
  - Enable invitation certificates to only be used to gain entry on non-agreement covered sites.
  - Provide appropriate safeguards on the role and operation of invitation certificates for union entry, as set out above.

AMMA also supports:

- All changes to union entry commencing as soon as possible.
- Additional requirements for union officials to carry photo ID.
- Amending the *Fair Work Act* to talk about "union entry" not "right of entry".

TRANSFER OF BUSINESS

189. Taking on the employees of an enterprise that has been bought or merged is a very delicate human resource strategy consideration for employers and has to balance the value of retaining knowledge and experience with other considerations such as:

    a. The legal liability and risk of keeping existing staff along with their transferring industrial instruments.

    b. The relative terms and conditions of those employees under transferring instruments compared with others within the incoming business.

    c. The relative costs of employing those workers against the financial and performance goals of the enterprise.

190. In the resource industry, having to take on another employer's enterprise agreement in the event of a sale or outsourcing arrangement is deterring new owners / providers from employing the former owner's employees. This is true even if those employees have directly relevant skills and experience that would benefit the incoming operator.

191. As AMMA pointed out in its February 2012 submission to the Fair Work Act Review Panel, the current transfer of business rules, which mean an employee's industrial instrument transfers across with them in the event they are taken on by the new owner of a business, represent a serious inefficiency for new business owners and a massive disincentive to employment.

192. AMMA therefore welcomes the Bill's provisions that will remove those restrictions for transfers between "related entities".

193. However, transfers between "related entities" represent only a minority of circumstances now captured by the Act's transfer of business provisions. The Bill will not provide as much relief as it could if those provisions applied more broadly.

Positive aspects of Schedule 1, Part 6

194. The Bill gives effect to Fair Work Review Panel Recommendation 38, which was to amend s311 of the Act to "*make it clear that when employees, on their own initiative, seek to transfer to a related entity of their current employer they will be subject to the terms and conditions of employment provided by the new employer*".

195. The Bill seeks to amend both Part 2-8 of the Act dealing with transfers between national system employers and Part 6-3A dealing with transfers between state public sector employers and national system employers.

196. The Bill provides there will not be a transfer of business when the new employer is an "associated entity" of the old employer if the employee has sought to become employed by the new employer of their own initiative.

197. The term "associated entity" is defined in s12 of the Fair Work Act 2009 as having the meaning given by s50AAA of the *Corporations Act 2001*.

198. Unfortunately, the Bill's provisions will not apply further than scenarios in which the old and new employer are "associated". The Bill's welcome reprieve will therefore only apply to a very limited number of employers. Other employers will continue to have to apply for an exemption from the transferring instrument from the FWC or to have the transferring agreement set aside and, in doing so, go to great time and expense to manage the transfer for current and future employees.

199. In AMMA's view, broader application of the Bill's provisions is warranted given the current rules are a deterrent to employment and creating significant administrative imposts for business.

Key concerns with the current transfer rules

200. Under the current rules, transfers of employees from one business to another are unjustifiably time-consuming and expensive as employers navigate complex risks and liabilities.

201. In a case study of one AMMA member company, two recent transfer of business scenarios cost the company a total of $120,000 in legal expenses alone.

Transfer of business – Scenario 1

In the oil processing sector, the company applied for a s222 application for the FWC's approval of the termination of a transferring enterprise agreement.

The number of internal person hours devoted to this exercise was around 140, with a significant cost to business in the form of HR and other staff salaries.

The preparation of employee information documents alone cost the business around 40 hours.

In order for the transferring employees to vote on whether to have their transferring instrument set aside, the employer had to provide and host a voting website which cost $5,000, the customary price for such services.

Following an overwhelming majority vote supporting the setting aside of the agreement, the FWC took three weeks to make orders to that effect, following several months leading up to the employee vote.

In the five months between the transferring employees being taken on by the new business and the FWC handing down its orders, the impacts on the new business owner included:

- Having to pay for an outsourced payroll provider for five months to administer the transferring employees' fortnightly pay cycles (existing employees were paid on a different pay cycle).

- Having leave balances (and hence liabilities) across the business inaccurate for those five months.

- Having to maintain a different roster for transferring employees for five months.
- Having to provide different pay rates for supervisors and those covered by the transferring enterprise agreement for five months.
- Having to manage disgruntled transferring employees who wanted to be on the same roster as their colleagues while having to wait for FWC orders to set their agreement aside.
- Incurring $76,000 in legal costs associated with the transfer of business scenario.

Transfer of business – Scenario 2

In the surface mining sector, the company applied for a s318 application from the FWC seeking orders that the transferring industrial agreement not apply at the new enterprise.

The number of internal person hours devoted to this exercise was around 110, at a significant cost to the business.

Around 40 hours were involving in putting together presentations for employees and communicating those presentations to employees.

Following the application for an exemption with the FWC, it took two weeks for the agreement to be exempted by the commission.

In the interim period, the company had to:

- Set up a weekly payroll run for transferring employees with an outsourced provider in case the agreement was not set aside in time.
- Communicate complicated messages to employees about the differences between the transferrable instrument and the company's established agreement, leading to some confusion among employees.
- Incur legal costs associated with the transfer of business scenario of $45,000.

202. These are significant costs to businesses purely because of an inability under the current system to take on the employees of another company under their own agreement, even where that agreement clearly offers equal or superior terms and conditions.

203. In the above cases, the purchasing company's existing agreements included a range of benefits not offered in the transferrable instruments including a bonus structure and the capacity to salary sacrifice flights.

204. In short, this process required a huge effort for something that in the end did not add any value to either the transferring employees or the employer. Neither employers nor employees are well-served by the current transfer of business rules.

Why bother? The impact on job security and employment

205. The obvious question is why any new employer would bother given the transfer of business scenarios outlined above. The costs, complexities and delays of the current approach discourage employers from attempting to take on qualified and experienced staff of companies they purchase or take over the functions of via an outsourcing arrangement.

206. This is a significant question for job retention, particularly if the existing employees are older, lower-skilled or have more operation-specific skills and experience (i.e. that are less valued on an open jobs market).

207. Our system should better support employers interested in retaining existing staff to do so, and under no circumstances should it provide legal and compliance barriers to discourage employers from taking on staff they would otherwise want to retain.

The potential for industrial unease

208. The potential for, at the very least, miscommunication among employees in the event the employer is providing two or three different sets of terms and conditions on one site for the same work is huge. This does not bode well for industrial harmony or simplicity in managing employees and their conditions – and these concerns come on top of a change of management and employers seeking to engender trust and confidence with their new employees transferring from their former employer.

209. In some cases, AMMA member companies have had to say to a business they are taking over through an outsourcing arrangement that they absolutely will not employ any of the existing employees.

210. We ask the Committee to particularly reflect on that – it is a sobering if not distressing development for our labour market driven by the previous policy choices of those setting our workplace laws.

211. It is almost always the case in deciding whether to take on state public sector employees that national system employers will not take any of them on because their agreements often contain massive inflexibilities and high levels of union involvement at every step of the way.

212. The implementation of the *Fair Work Amendment (Transfer of Business) Act 2012* in December 2012 roped state public sector entities into the Fair Work Act's already unworkable transfer of business provisions applying to private sector organisations, to the detriment of both employers and employees.

213. Note it is no lack of confidence in hiring such employees from the incoming employer that causes the problem; it is uneconomic and impractical obligations that would transfer with them.

214. If not for the current transfer of business rules, AMMA member companies would employ a significant proportion of any client's employees in an outsourcing arrangement.

215. More often than not, the outsourced work can be performed better if they take on some employees of the old employer. Typically, a business would choose to take on about 50% to 70% of the outsourced company's employees if there were no inbuilt structural disincentives to doing so.

216. The danger for workers who are not picked up, of course, is they will end up on the unemployment queue. The disadvantage for new business owners is they will lose valuable long-term skills from the enterprise and experience in the operation and working with customers.

217. While the Bill's transfer of business amendments are very positive to the extent that they apply, AMMA believes they should have much broader application to all transfer of business scenarios under the Act where employees transfer of their own initiative. This would encourage employment, efficiency and productivity.

Proposed amendments to the Bill

Return to the pre-Fair Work Act rules

Option 1

218. Extend the Bill's transfer of business exemption to all transfer of business scenarios where employees are transferring of their own initiative, particularly to outsourcing arrangements.

Option 2

219. Revert to the pre-Fair Work Act "transmission of business" rules.

220. The pre-Fair Work Act "transmission of business" rules were relatively clear, with the Federal Court in September 2008 confirming they did not apply to outsourcing arrangements[15].

221. Under the pre-Fair Work Act rules, if a business was outsourced it would never have involved the transfer of existing employees' industrial agreements to the new employer.

AMMA's position on the transfer of business provisions

AMMA supports:

- Extending the Bill's transfer of business exemption to all transfer of business scenarios where employees are transferring of their own initiative, particularly in outsourcing arrangements (Option 1 above).

Alternatively:

- Reverting to the pre-Fair Work Act "transmission of business" rules (Option 2 above).

[15] *Urquhart v Automated Meter Reading Services (Australia) Pty Ltd* [2008] FCA 1447, 23 September 2008

INDIVIDUAL FLEXIBILITY ARRANGEMENTS (IFAs)

222. The Bill's provisions regarding IFAs are on the whole extremely positive and a step in the right direction for individual agreement making and workplace flexibility, albeit within IFA architecture that needs more fundamental re-examination in due course.

223. In AMMA's April 2012 submission to the General Manager of Fair Work Australia on the operation of the first three years of IFAs, AMMA pointed out that:

a. The estimated take-up rate of IFAs in the resource industry was less than 5%.

b. Resource employers perceive IFAs in their current form as being of little or no value.

224. As pointed out in AMMA's May 2010 paper, *IFAs: The Great Illusion*:

a. The mandatory inclusion of flexibility terms in enterprise agreements has not delivered genuine workplace flexibility because in many cases negotiating such terms with unions reduces them to mere tokens.

b. To make IFAs more attractive to employers, the breadth of flexibility available under award and agreement flexibility clauses is crucial, as is reducing scope for unions to trivialise or render nominal flexibility through bargaining.

c. The "model" flexibility clause, while common in modern awards, is often not used in enterprise agreements (AMMA therefore welcomes the Bill's proposal that the model flexibility clause become a minimum to be built on in negotiations).

d. The ability for an employee to unilaterally terminate an IFA with just 28 days' notice severely detracts from the benefits of such arrangements for employers (AMMA therefore welcomes the Bill's extension of termination periods by either party from 28 days to 90 days, consistent for IFAs made under modern awards and enterprise agreements).

225. As AMMA's February 2012 submission to the Fair Work Act Review Panel highlighted, employers have found the flexibility clauses they are able to negotiate with unions under the Fair Work Act often only benefit employees and offer little or no flexibility to the enterprise.

226. This was not what the former government sold users of the system in proposing IFAs as an alternative to AWAs.

227. Scope to agree flexibility has gone backwards and it is important the system now be made more usable and live up to its stated intentions.

Positive aspects of Schedule 1, Part 4

228. AMMA welcomes the Bill's broadening of the mandated level of flexibility under awards and agreements to all areas covered by the "model" flexibility clause.

229. This means if an agreement or award includes terms relating to the following, an IFA can be made with an individual employee varying such terms:

    a. Arrangements about when work is performed.

    b. Overtime rates, penalty rates, allowances, and leave loading.

230. This progresses Fair Work Act Review Panel Recommendation 9.

231. AMMA also welcomes the Bill's explicit confirmation that the Better Off Overall Test (BOOT) will allow an IFA to confer a non-monetary benefit in exchange for a monetary benefit. This is about recognising that employees, in particular those with family responsibilities, can value and prioritise non-remunerative parts of their work arrangements.

232. AMMA also welcomes the Bill's introduction of a defence for employers to an alleged breach of a flexibility term where the employer believes all requirements have been met in entering into the IFA.

    a. This gives effect to Review Panel Recommendation 11 and starts to restore some confidence and trust in users of the system where they act in good faith.

    b. AMMA would like to see this principle applied more widely across our workplace relations system.

233. AMMA is also pleased there is no retrospective requirement for a "genuine needs" statement for existing IFAs made under modern awards and enterprise agreements with statements only required for IFAs made after the provisions commence.

234. For IFAs made under enterprise agreements, AMMA is pleased that the genuine needs statement will only apply to IFAs made under new agreements certified after the commencement date of those provisions.

Key concerns with Schedule 1, Part 4

The genuine needs statement

235. AMMA members' primary concern with the Bill's IFA provisions is the requirement for employers to ensure employees provide a "genuine needs statement" when entering into an IFA.

236. Each employee would be required to provide a statement that the IFA leaves them better off than they would otherwise have been and detailing why the arrangement meets their genuine needs.

237. The Bill purports to merely formalise current requirements via a written record.

238. However, AMMA members are extremely concerned about how this requirement will operate in practice.

239. This threatens to create such a level of complexity and administrative burden on businesses that it will dissuade them from using IFAs. It risks discouraging use of one of the few mechanisms under awards and agreements to access flexibility, e.g. for work-family balance.

240. Given that employees are not currently required to provide such a written statement, it seems onerous to apply such a requirement to future arrangements, particularly given the protections that require employers to ensure IFAs leave employees better off overall.

241. This proposal reflects an excess of caution and a deficiency of trust in the maturity and judgement of users of the system.

242. It also reflects a slightly paternalistic assumption regarding employees.

243. Employees should be able to agree flexibility and have the freedom to make such decisions protected. It is not necessary or practical to try to have employees attest that they are better off. They either agree or they do not, and the arrangement either meets the prescribed standards or it does not.

244. AMMA presumes this has been included in the Bill to protect employees who may be trading off monetary benefits for non-monetary benefits, which is explicitly allowed in the Bill. However, there are better ways to do this (*see below*).

245. Other problems with the requirement for a genuine needs statement:

    a. Many employees will find the requirement to write a statement from scratch on those issues daunting and stressful.

        i. Employment scares many people (something not assisted by the consistent fear-mongering of recent years in relation to individual flexibility and collective agreements).

        ii. Some employees may fear committing themselves to writing in relation to their terms and conditions of employment and assume they are altering their contractual terms or making a change they cannot reverse.

    b. There may be particular concerns and reticence by employees for whom English is not their first language or for those with low literacy.

    c. This may, for example, have the effect of discouraging someone who is illiterate from requesting flexibility which would be of assistance and benefit to them. Consider, for example, the burden of asking a recent migrant, whose first language is not English, to commit themselves to writing on why a particular arrangement meets their needs and will leave them better off.

d. In addition, the reason for the flexibility, and the perceived benefit to the employee, may be private. It is no business of the employer or the HR department whether someone is volunteering with a charity or building model railways. A requirement to detail why the arrangement meets the employee's genuine needs risks stepping into the personal to an extent employers, let alone employees, will be uncomfortable with.

e. This requirement also thereby risks opening up a Pandora's Box of value judgements, personal considerations and allegations of discrimination.

f. Employers will also not want to be seen to be assisting workers with what to write, even if assistance is requested, as that could be perceived as a type of coercion.

g. Limiting the form to a tick the box pro forma that an employee then signs will make this task much less onerous than currently proposed in the Bill.

Proposed amendments to the Bill

Option 1

246. AMMA's preference would be for the requirement for a genuine needs statement to be removed from the Bill entirely, whilst of course retaining protections ensuring employees are left better off overall after entering into an IFA.

Option 2

247. Alternatively, the requirement to provide a genuine needs statement should only apply in relation to IFAs where a monetary benefit has been traded off for a non-monetary benefit.

248. In cases where the take-home pay stays the same or increases, there should be no need to provide a statement as there is little risk employees would not be better off.

Option 3

249. Make the statement a pro-forma rather than requiring each employee to elucidate in writing why they believe they are better off.

250. Ideally, a single employee signature on a document stating that the IFA is agreed to and meets their genuine needs should be the only requirement.

AMMA's position on the individual flexibility arrangement (IFA) provisions

AMMA supports passage of Schedule 1, Part 4, subject to:

- The removal of requirements for a genuine needs statement (Option 1 above)

If the genuine needs statements are retained, Part 4 should be amended to:

- Require a genuine needs statement only where a monetary benefit has been traded off

for a non-monetary benefit (Option 2), and

- Make the genuine needs statements a simple pro forma (Option 3).

PROTECTED ACTION BALLOT ORDERS

251. Under the current rules for protected industrial action, employees can apply to the FWC to take action before an employer has agreed to bargain or a majority support determination has been obtained. This was borne out in the series of court and tribunal decisions in the *JJ Richards* case[16], in which AMMA was centrally involved.

252. AMMA joined with the company to appeal the original decision that found the Transport Workers Union (TWU) could apply to take protected industrial action before bargaining had commenced. In the FWC's view, the fact that bargaining had not yet commenced did not mean the union was not "genuinely trying to reach an agreement", as required under the industrial action provisions.

253. AMMA considered the decision was of such significance that it should be appealed to the highest level. Unfortunately, the original and subsequent appeals of those decisions, which went all the way to the Federal Court, were unsuccessful.

254. AMMA's prosecution of the case did, however, lead to a very important recommendation by the Fair Work Act Review Panel in 2012 to close the "strike first, talk later" loophole.

255. Review Panel Recommendation 31 was that Division 8 of Part 3-3 of the *Fair Work Act 2009* be amended to provide that an application for a protected action ballot order may only be made when bargaining for a proposed agreement has commenced, either voluntarily or because a majority support determination has been obtained. The panel further recommended that the Fair Work Act expressly provide that bargaining had commenced for that purpose despite any disagreement over the scope of the agreement.

256. The Bill's provisions will ensure that the FWC cannot approve an application for a protected action ballot until bargaining has commenced (i.e. until an employer has agreed to bargain or the union has obtained a majority support determination to prove there is majority support in the workforce for bargaining). Either of those two circumstances will constitute "notification time" as required under the Bill.

257. AMMA very much welcomes this change that will finally uphold the promise that Labor made to employers in the lead-up to the Fair Work Act being introduced, i.e. that employers will have the right to refuse to bargain unless and until they are ready or until their workforce has signalled a desire for bargaining via a majority support determination.

258. AMMA is pleased that once the Bill passes through parliament, these provisions will commence the day after Royal Assent.

AMMA's position on the protected action ballot provisions

AMMA supports the passage of Schedule 1, Part 7.

[16] Add a proper reference to the decision as reported

EXTENSION OF UNPAID PARENTAL LEAVE

259. Schedule 1, Part 1 (p.4 of the Bill) proposes to amend the National Employment Standards (NES) provision in relation to unpaid parental leave and create an additional statutory requirement upon employers where an employee requests an additional 12 months' unpaid parental leave.

260. Item 1 would amend existing s.76A by including an additional requirement that an *"employer must not refuse the request unless the employer has given the employee a reasonable opportunity to discuss the request"*.

261. The EM indicates that the *"amendment in this Part implements Fair Work Review Panel Recommendation 3"* (paragraph 4, p.2).

262. Whilst AMMA notes that this does represent an additional regulatory requirement / impost on employers, and the Panel's report does not appear to indicate that there was evidence presented before its Post Implementation Review to justify a change to the extant legislation, the EM (paragraph 8, p.2) makes clear that the additional obligation appears to be able to be met by way of a telephone or "skype" meeting, without requiring face to face meetings in all cases.

263. This is critical for the resource industry. AMMA would be concerned if face to face meetings were always required given that the employer's operation may be remote from where the employee is based, and face to face meetings will often be impractical (and indeed few employees with a small baby are going to want to travel to a non-urban location of their previous workplace).

AMMA's position on the extra unpaid parental leave provisions

If Schedule 1, Part 1 is to progress, clarification that it will not be practical to hold a face to face meeting in all circumstances will be critical[17].

[17] Explanatory Memorandum, paragraph 8, p.1

ANNUAL LEAVE LOADING ON TERMINATION

264. Part 2 of Schedule 1 to the Bill amends s.90 of the Act to provide that on termination of employment, untaken annual leave accrued under the NES is to be paid out at the employee's base rate of pay.

265. The EM indicates (paragraph 10, p.2) that the *"amendments in this Part implement Fair Work Review Panel recommendation 6".*

266. Item 4 will amend subsection 90(2) (and legislative notes accompanying s.55) to ensure that where an employee, who has a period of untaken annual leave at the time when the employment of the employee ends, the employer:

a. Must pay the employee an hourly rate for each hour of paid annual leave that the employee has accrued and not taken; and

b. That the hourly rate must not be less than the employee's base rate of pay that is payable immediately before the termination time.

267. The EM indicates (paragraph 12, p.3) that:

> *"The amendment restores the historical position that, on termination of employment, if an employee has a period of untaken annual leave, the employer must pay the employee in respect of that leave at the employee's base rate of pay. The effect of this is that annual leave loading will not be payable on termination of employment unless an applicable modern award or enterprise agreement expressly provides for a more beneficial entitlement than the employee's base rate of pay."*

268. Amendments to the legislative notes to s.55 ensure that modern awards and enterprise agreements are permitted to provide more beneficial terms than the minimum statutory standards provided by the NES.

269. AMMA strongly supports the clarification of what unfortunately became a source of concern to the resource industry (and to employers generally) when the Office of the Fair Work Ombudsman reversed its interpretation of the issue and indicated that it would pursue employers for failing to pay upon termination annual leave loading accrued on annual leave under the NES where that was payable during the employment relationship.

270. This was in direct contrast to the submissions of AMMA and other employer and business groups to the FWO and to the-then Labor Government about longstanding industry practice.

271. AMMA argued in its written submissions to the Fair Work Review Panel that the FWO's interpretation was contrary to the custom and practice adopted by resource sector employers (that leave loading was only payable if an award or agreement included an express entitlement) and would lead to an unintended 'windfall gain' to employees that Parliament did not intend, in addition to exposure of significant civil penalties for employers.

272. AMMA also took a lead role on the issue when it intervened in a matter which went before the NSW Chief Industrial Magistrates' Court in February 2011 (*CFMEU v Whitehaven Coal Mining Ltd*).

273. As noted by the Fair Work Act Review Panel in its August 2012 report[18] *"…the interpretation of the provision by the FWO, in contradistinction to the interpretation of many employer representatives, has meant that longstanding arrangements under awards and enterprise agreements have been disturbed"*.

274. The Panel ultimately recommended as follows:

> *"[b]acked with the weight of past practice and to provide certainty on the issue, the Panel therefore recommends that s.90(2) of legislation be amended to provide that leave loading is only payable on separation where expressly provided under the relevant modern award or enterprise agreement for both new and existing employees"*.

275. The Bill's amendments in this area will only have prospective effect, in so far as they will apply to terminations of employment occurring after the provisions commence upon Royal Assent.

276. It is important that the provisions have retrospective effect given that the FWO and unions may still attempt to prosecute employers for breaches of the NES where an employer does not normally pay leave loading upon termination but does during the employment relationship.

277. This could foreseeably occur for allegations which are said to have materialised prior to the commencement of this amendment, but still within the statute of limitation period for prosecuting civil breaches under the Act (ie. six years).

AMMA's position on the annual leave loading on termination provisions

AMMA supports the passage of Schedule 1, Part 2, with consideration of limited retrospective application to preclude unforeseen and unmerited gains to ex-employees and to avoid perpetuating the confusion caused by previous flawed statutory construction.

[18] Fair Work Act Review Panel Report, August 2012, p100

ACCRUAL OF LEAVE ON WORKERS' COMPENSATION

278. Schedule 1, Part 3, Item 5 of the Bill will repeal subsection130(2) of the Act with the effect that *an employee who is absent from work and in receipt of workers' compensation will not be able to take or accrue leave under the Fair Work Act during the compensation period.*

279. AMMA supports this amendment which was recommended by the Fair Work Review Panel at p.89 of its report. The Panel noted in its report (at p.88) that *"s.130 of the FW Act is, regrettably in the majority of the Panel's view, not clearly worded"*.

280. The Panel noted that in various jurisdictions it was unclear as to whether relevant state/territory workers' compensation laws permitted or did not permit various types of leave to be accrued and/or taken while an employee was on workers' compensation. The Panel noted (at p.88) that the situation was *"confusing for affected parties and may involve costs – for example, in obtaining legal advice"*.

281. The amendment will provide clarity for employers upon commencement. However, and similar to the concern raised by AMMA in relation to the annual leave loading on termination issue (*see previous section*), Item 5 should also have retrospective application to ensure that employers are not subject to possible legal liability from the date of the commencement of s.130 of the Act (1 January 2010).

AMMA's position on the accrual of leave on workers' compensation provisions

AMMA supports the passage of Schedule 1, Part 3 with appropriate safeguards outlined above.

UNFAIR DISMISSAL HEARINGS AND CONFERENCES

282. Part 9 of Schedule 1 of the Bill amends Part 3-2 of the Act to provide that, subject to certain conditions, the FWC is not required to hold a hearing or conduct a conference, when determining whether to dismiss an unfair dismissal application under s.399A or s.587.

283. The EM (paragraph 194, p.36) indicates that *"the amendments in this Part implement Fair Work Review Panel recommendation 43"*.

284. As a general principle, AMMA supports common sense amendments to the unfair dismissal system generally to improve outcomes for employer respondents whom expend considerable time and cost to defend matters, despite the weak merits or strength of some unfair dismissal claims.

285. AMMA supports these amendments which will hopefully reduce the capacity for an applicant to create unnecessary additional cost imposts on employers and the FWC's resources where an applicant has unreasonably failed to attend a conference/hearing, comply with a direction/order, or discontinue an application after a settlement agreement has been concluded.

286. Where a person feels aggrieved and exercises their right to make an allegation that triggers the costly machinery of the state, funded by the community (in this case the FWC), it is beholden on that person to attend and prosecute their case. Where that does not occur, the person should quite rightly lose access to the mechanisms they have triggered, noting that there are well-accepted mechanisms between parties for adjournment, delay and appropriate communication in regard to the smooth running of the jurisdiction.

AMMA's position on the unfair dismissal provisions

AMMA supports the passage of Schedule 1, Part 9.