AMMA
RESOURCE INDUSTRY EMPLOYER GROUP

Submission to the Senate Committee on Education, Employment & Workplace Relations

Inquiry into the Fair Work Amendment Bill 2012

By the Australian Mines & Metals Association (AMMA)

November 2012

AMMA is Australia's national resource industry employer group, a unified voice driving effective workforce outcomes. Having actively served resource employers for 94 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 network of likeminded companies and resource industry experts to achieve significant workforce outcomes for the entire resource industry.

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Committee Secretary
Senate Education, Employment and Workplace Relations Committee
PO Box 6100
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Australia

Dear Committee Secretary

Submission on the Fair Work Amendment Bill 2012

On 30 October 2012, Minister for Employment & Workplace Relations, Bill Shorten, introduced to Parliament the Fair Work Amendment Bill 2012. The bill represents the first 'tranche' of legislative amendments that are proposed to be made to the Fair Work Act 2009.

As the national resource industry employer group, the Australian Mines and Metals Association (AMMA) welcomes the opportunity to make a submission regarding this bill.

Reforms to the Fair Work Act 2009, the legislative framework that governs Australia's national workplace relations system, are of great interest to AMMA and its members in the resource industry.

AMMA supports meaningful changes being made to the current legislation in order to restore balance and enhance Australia's national competitiveness and productivity.

AMMA members have concerns with quite a few of its provisions, particularly those not recommended by the Fair Work Act review panel.

While most of the proposed amendments arose out of the Fair Work Act review panel's recommendations, there are a number that did not, which relate to appointments to the federal industrial tribunal and the way in which the tribunal conducts its activities.

AMMA's concerns with the bill are detailed in this submission. We would be happy to provide further details should the committee wish.

Yours sincerely

Minna Knight
Executive Director, Industry

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1 Executive Summary

AMMA welcomes the opportunity to make a submission to the Senate inquiry into the Fair Work Amendment Bill 2012.

This submission focuses on AMMA's recommended amendments in relation to the bill.

A key concern with the process surrounding the bill that AMMA would like to address at the outset is that it appears the reforms to the Fair Work Act 2009 are going to be released in separate and numerous 'tranches'. This is not ideal as it deprives stakeholders of the opportunity to consider the suite of reforms in their entirety and also denies stakeholders the ability to consider the interaction of proposed provisions with other provisions that may not have been announced at the same time.

1.1 Provisions of the bill

Key provisions of the bill that will impact negatively on resource industry employers include the following:

Default super funds

- **Changing** the way that default super funds are nominated and chosen for inclusion in modern awards will inhibit choice in relation to superannuation and result in a preference towards industry super funds.

Opt-out clauses

- **Prohibiting** opt-out clauses in enterprise agreements, while moot to some extent given recent court decisions outlawing them, means the only vehicle by which parties can put in place individual working arrangements is Individual Flexibility Arrangements (IFAs), which AMMA's research has revealed are largely useless.

Bargaining notices and representation

- **Proposed changes** in relation to the notice of employee representational rights (the issuing of which must precede enterprise bargaining) mean employers will be unable to modify what many regard as a highly legalistic notice, and one which must highlight unions as the default bargaining representative.
- **However, AMMA** welcomes the Federal Government's inclusion of a provision to close off the *Technip* loophole in its first tranche of reforms. AMMA is pleased to see the government has adopted recommendation 21 of the Fair Work Act review panel which will prevent an individual union official from acting as a bargaining representative for employees for whom the official's union does not have coverage.

General protections

- **Reducing** the time limit for general protections (adverse action) claims where dismissal is involved from 60 days down to 21 (in line with the proposal to increase the time limit for lodging unfair dismissal claims from 14 days to 21) on the face of it seems positive. However, AMMA is disappointed that the government has neglected to address the far more worrisome six-year time limit on lodging general protections claims where dismissal is not involved.

Unfair dismissal

- **Extending** the time limit within which employees can lodge unfair dismissal claims from 14 days to 21 will be particularly unfavourable for small businesses.

- **Enabling** costs orders to be made against parties to unfair dismissal claims where costs have been incurred as a result of an unreasonable act or omission in connection with the conduct or continuation of a matter, while a step in the right direction, will do little to discourage unmeritorious unfair dismissal claims.
- **The same is true** of enabling costs orders to be made against lawyers and paid agents where costs have been incurred as a result of an unreasonable act or omission.

Secret ballots for protected industrial action

- **Allowing** employees to be included on a roll of voters for a protected action ballot after the ballot order has been made but before the roll of voters closes will allow new employees who were not employees at the date of the protected action ballot order to vote in the ballot, thus extending the right to participate in protected industrial action to a wider range of workers.

Powers of the tribunal president

The amendment bill proposes the following changes in relation to the powers of the tribunal president which were not recommended by the Fair Work Act review panel. These proposals warrant greater scrutiny and include:

- **Enabling** the president to direct a Full Bench to perform a function or exercise a power over an application made by a person or the minister.
- **Providing** the president with more power to deal with matters before Fair Work Australia where he so decides, extending to taking over a matter from a tribunal member or Full Bench.
- **Enabling** the president to deal with complaints about tribunal members, giving the president broad powers including taking 'any measures that the president believes are reasonably necessary to maintain public confidence' in the tribunal.

These proposed amendments would significantly enhance the powers of the president, particularly in relation to other tribunal members.

Two new vice presidents

- **Enabling** the appointment of two new vice presidents to Fair Work Australia did also not arise out of the Fair Work Act review panel's recommendations and to date there has been no suggestion of the need for the two appointments.

Name of the tribunal

- Enacting a name change from Fair Work Australia to the Fair Work Commission will do little to rectify the branding challenges the tribunal has experienced in the wake of the Health Services Union investigation or to clear up the confusion between the judicial and administrative arms of the Fair Work infrastructure. A more objective name for the tribunal such as the Australian Workplace Relations Commission (AWRC) if far more appropriate.

1.2 Recommended additions to the bill

Detailed below are issues that are causing major disadvantages for employers in the resource industry but which were not included in the first tranche of amendments in this bill.

Some further amendments to the Fair Work Act have been made necessary by the outcomes of recent high-profile court and tribunal cases, including those following:

The JJ Richards case

Despite the Fair Work Act review panel having recommended that the *JJ Richards* loophole be closed, provisions enacting that recommendation are absent from the first tranche of reforms.

The Barclay v Bendigo TAFE case

The review panel's recommendation to rectify the perverse outcomes arising from the *Barclay v Bendigo Board of Regional TAFE* case was not included in the first tranche of reforms.

The ADJ Contracting case

Not only has the review panel not recommended any changes that would address widespread concerns about the ramifications of the *ADJ Contracting* case, but this bill also ignores the very real problems arising from the series of decisions in that matter.

Resource industry's top five recommended amendments

This bill has failed to address the five major impediments to doing business under the current industrial relations system. Rectifying these would help to bolster resource industry productivity along with Australia's international competitiveness. The Federal Government in this bill should have acted to:

- **Ensure** the capacity to make greenfield agreements without exorbitant wage and condition outcomes or unnecessary project delays;
- **Ensure** that allowable matters in enterprise agreements pertain to the employment relationship;
- **Ensure** that protected industrial action can only be taken as a last resort;
- **Ensure** that the location and frequency of union workplace visits is reasonable; and
- **Broaden** the current agreement-making options through the re-introduction of some form of individual agreement making.

AMMA will continue to lobby the Federal Government and Opposition to ensure these issues are addressed and that any reforms made in these areas do not adversely affect the interests of the resource industry.

2 Default super funds

The Fair Work Amendment Bill's proposed changes in relation to default super funds in modern awards will inhibit choice in relation to super and result in a preference towards industry super funds over other types of funds.

This is despite the proposed amendments purporting to provide greater scrutiny over funds to the extent they will need to satisfy reviews performed by the federal industrial tribunal.

AMMA questions whether Fair Work Australia or its successor is the most appropriate body to review such funds, in particular in relation to their performance and governance.

Under the proposed reforms, the tribunal and the president in particular, will have a fundamental role in determining which funds qualify for nomination as default funds within modern awards. It is clear from the proposed amendments that industry super funds will be given precedence over company or retail funds.

The changes proposed under Schedules 1 and 2 of the Fair Work Act will make default super funds mandatory in modern awards. At present there are some modern awards that do not list a default fund.

The proposals will enable the tribunal to conduct four-yearly reviews of default fund terms in modern awards in order to, on the face of it, provide greater scrutiny over such funds. The review will be conducted by an expert panel comprised of the president and at least three expert panel members who will be part-time appointees.

Unfortunately, the bill does nothing to address the current 'closed shop', anti-competitive arrangements for the selection of default super funds in modern awards. The current process lacks transparency and the proposed reforms will do little, if anything, to make the process more transparent.

The reforms risk depriving workers of the benefits of direct competition between funds in this area. For those funds that do not make it onto the default fund list in modern awards, it will be difficult for them to survive. As was pointed out in the debate over the bill in parliament recently[1], being nominated as a default fund in a modern award is extremely lucrative and guarantees a steady stream of contributions.

The vast majority of default funds listed under modern awards is industry super funds.

2.1 The bill's proposal

The amendment proposal is for the expert panel to create a shortlist of default funds and for the president to decide which of the funds on that list make it as default funds in modern awards. This puts a great deal of power into the hands of the president of the federal industrial tribunal in terms of assessing the merits of diverse super funds.

The government also seeks to limit the number of MySuper products in modern awards to 10, where there has been no justification for any limit in this regard.

It is also problematic that the process of reviewing and including default funds in modern awards will happen every four years from 2014 as opposed to being an ongoing and dynamic process subject to constant review.

[1] House of Representatives Hansard, 31 October 2012, p36

AMMA believes that rather than restoring transparency and competition in this area, the proposed amendments will mean a continuation of the closed shop system that currently exists for choosing default super funds.

Further consultation with all relevant stakeholders is needed to ensure the system for choosing default super funds in modern awards is a fair and competitive process.

3 Opt-out clauses

Schedule 4 Part 3 of the Fair Work Amendment Bill proposes to prohibit clauses in enterprise agreements enabling an employee or employer to 'opt out' of coverage of that agreement in favour of coverage by a common law contract.

This follows conflicting Full Bench decisions leading to the matter finally being settled by a five-member Full Bench in September 2012[2]. The Full Bench found that opt-out clauses were not permissible matters to include in enterprise agreements under the Fair Work Act as currently drafted.

While the legislative amendment included in this first tranche of reforms is largely moot, it does clarify that the only avenue for individual agreement making under the Fair Work Act is individual flexibility arrangements (IFAs).

AMMA's comprehensive research of its membership since the Fair Work Act began has shown time and time again that IFAs are simply not being used because they fail to deliver any genuine flexibility.

In AMMA's April 2012 submission to the General Manager of Fair Work Australia on the operation of the first three years of IFAs[3], AMMA highlighted the deficiencies of IFAs in their current form.

AMMA's best estimate based on feedback and surveys of its membership is that less than five per cent of employment arrangements in the resource industry under the Fair Work Act are subject to IFAs. This is compared to 67 per cent of industry employment arrangements that were operating under Australian Workplace Agreements (AWAs) at the peak of their use, with this density closer to 80 per cent in metalliferous mining.

With the government now proposing to specifically legislate to prohibit opt-out clauses, together with the extremely low take-up of IFAs, employers and employees in the resource industry are without a viable form of individual agreement.

The failure to include some form of workable individual agreement under the Fair Work Act shows the government is taking a paternalistic approach to industrial relations and does not credit the parties with being able to make informed decisions about their own working arrangements.

AMMA notes that Fair Work Australia is due to report to the minister on its review into the operation of IFAs on 24 November 2012. AMMA trusts that some sensible changes will be recommended and adopted.

[2] *CFMEU v Queensland Bulk Handling Pty Ltd* [2012] FWAFB 7551, 3 September 2012

[3] AMMA submission to the General Manager of Fair Work Australia on the operation of the first three years of IFAs, April 2012

4 Bargaining notices and representation

4.1 Notices of representational rights

The proposed inability for employers to modify the mandatory notice of employee representational rights, the issuing of which must precede enterprise bargaining, follows attempts by employers to modify the content and form of the notice in communicating with employees.

The amendment proposed under Schedule 4 Part 5 of the Fair Work Amendment Bill means employers will be unable to modify what many regard as a highly legalistic notice and they will have no choice but to promote unions as the default bargaining representative in negotiations.

AMMA maintains that substantial compliance with the prescribed notice of employee representational rights is all that should be required.

4.2 The *Technip* decision

AMMA welcomes the Federal Government's inclusion of a provision to close the *Technip*[4] loophole in its first tranche of reforms to the Fair Work Act.

AMMA was involved in challenging the original *Technip* decision and was successful on appeal on behalf of its member company in having the original decision overturned.

In the original decision[5], the tribunal found there was no legislative impediment to Maritime Union of Australia (MUA) WA branch assistant secretary Will Tracey acting as an 'individual' bargaining representative for remotely operated vehicle workers, despite the MUA having no right to represent those workers in bargaining.

AMMA's February 2012 submission to the Fair Work Act review panel[6] highlighted that the original decision was flawed and would merely open up the prospect of increased union demarcation disputes.

AMMA is pleased to see that the government has adopted recommendation 21 of the Fair Work Act review panel to amend s176 of the Act to specifically prohibit an individual union official being a bargaining representative for employees over whom the official's union does not have coverage.

We welcome this proposed reform, which is a reflection of the commitment of AMMA and its members to test court and tribunal decisions which are adverse to the interests of resource industry employers.

[4] *Technip Oceania Pty Ltd v W Tracey* [2011] FWAFB 6551, 7 November 2011

[5] *W Tracey v Technip Oceania Pty Ltd* [2011] 13 June 2001

[6] AMMA submission to the Fair Work Act review panel on the post-implementation review of the Fair Work Act 2009, February 2012

5 General protections

The proposal to reduce the time limit for general protections (adverse action) claims where dismissal is involved from 60 days down to 21 on the face of it seems positive. The rationale is to make the timeframes for general protections matters involving dismissal consistent with the proposed new timeframe for lodging unfair dismissal claims (both 21 days).

However, the bill neglects to address in any way the far more worrisome six-year time limit on lodging general protections claims where dismissal is not involved.

AMMA is surprised that the six-year time limit for other types of general protections claims has not been acknowledged as an issue in this bill.

Of the two classes of general protections claims, the six-year time limit for non-dismissal related claims was and remains the one of most detriment to employers in the resource industry.

As AMMA's submission[7] to the Fair Work Act review panel pointed out, the existence of the six-year time limit creates untold liabilities for employers for up to six years into the future.

The introduction of such broad-ranging provisions has never been fully justified, with the current adverse action provisions creating a new field of litigation such that every employer action must be assessed against the possibility of a claim being brought over it at any time in the next six years.

This six-year time limit is unwarranted and unjust and should be reduced to 21 days to align it with the newly proposed time limit for adverse action claims involving dismissal.

5.1 The *Barclay* decision

The Fair Work Act review panel at recommendation 47 suggested that Division 7 of Part 3-1 of the Fair Work Act be amended so that the central consideration about the reason for adverse action being taken would be the subjective intention of the person taking the alleged adverse action.

This recommendation, if adopted, would close the loophole left open by the Full Court of the Federal Court's February 2011 decision in *Barclay*[8], which essentially rendered unionists a protected species in terms of employers' ability to discipline them.

The original decision found that even if the decision-maker was not consciously motivated by the person's union activities, it was a given that this was the motivator and therefore any adverse action taken against that person would automatically be unlawful.

While the High Court in its September 2012 decision[9] upheld the employer's appeal against the original decision, AMMA is disappointed that a legislative amendment to clarify the situation does not appear in the first tranche of reforms in this bill.

[7] AMMA submission to the Fair Work Act review panel on the post-implementation review of the Fair Work Act 2009

[8] *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* [2011] FCAFC 14 (9 February 2011)

[9] *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32 (7 September 2012)

6 Unfair dismissal

The Federal Government has proposed under Schedule 6 Part 1 of the Fair Work Amendment Bill 2012 to extend the time limit for lodging unfair dismissal claims from 14 days to 21.

This will be particularly unfavourable for small businesses, which comprise around 10 per cent of AMMA's membership.

The proposal under Schedule 6 Part 3 of the bill to enable costs orders to be made against parties to unfair dismissal claims where costs have been incurred as a result of an unreasonable act or omission in connection with the conduct or continuation of a matter, while a step in the right direction, will have minimal if any impact on discouraging unmeritorious claims.

Similarly, the proposal under Schedule 6 Part 4 of the bill to enable costs orders to be made against lawyers and paid agents where costs have been incurred as a result of an unreasonable act or omission are likely to have a negligible impact on curbing frivolous claims and unreasonable conduct.

More stringent measures are needed in this regard.

7 Secret ballots for protected industrial action

Under Schedule 7 Part 2 of the Fair Work Amendment Bill, the Federal Government has proposed to allow the inclusion of employees on a roll of voters for a protected action ballot after the ballot order has been made but before the roll of voters has closed.

This comes with the caveat that the employees would otherwise have been eligible to vote in the ballot.

The result of this proposal will be that new employees who were not employees on the date the protected action ballot order was made can still vote in the ballot and subsequently take part in any authorised industrial action.

It would also allow existing employees who were not represented by the union at the time the ballot order was made to vote in that ballot and subsequently take part in any ensuing action.

If this provision is adopted, it will encourage unions to 'stack' the roll of eligible voters between the date that the tribunal makes a ballot order and the date on which the roll of voters closes by encouraging more employees to become union members.

It also increases the likelihood of duress being applied to workers to join a union.

This is a concern for AMMA members and employers across the board as it opens up the ability for a wider range of employees to take part in protected industrial action where under the current system they could not.

AMMA also notes that the bill has not addressed the fact that employers often do not know which employees are union members and therefore can lawfully take part in industrial action during bargaining.

8 Powers of the tribunal president

None of the below provisions giving greater powers to the tribunal president were recommended by the Fair Work Act review panel and AMMA is yet to hear any justification for them.

Schedule 8 Part 3 of the Fair Work Amendment Bill in a proposed new s615A would empower the president to direct a Full Bench to perform a function, and outlines under what circumstances this can happen.

Schedule 8 Part 3 of the bill in a proposed new s615C would give the president the power to deal with matters that are already before the tribunal being dealt with by another member or a Full Bench.

Schedule 8 Part 7 of the bill proposes new provisions that would enable the president to deal with complaints about tribunal members. The proposed s581A would allow the president to take 'any measures that the president believes are reasonably necessary to maintain public confidence' in the tribunal, including (but not limited to) temporarily restricting the duties of a member.

Together, these proposed amendments would significantly enhance the powers of the president, particularly in relation to other tribunal members.

9 Two new vice presidents

There are currently two vice presidents, nine senior deputy presidents and five deputy presidents at Fair Work Australia, in addition to the president and numerous commissioners.

The proposal under Schedule 8 Part 6 of the Fair Work Amendment Bill to create two new statutory vice president appointments is of concern to AMMA and its members.

In a 15 October 2012 communique from Employment and Workplace Relations Minister Bill Shorten, the government announced its intention to create the two additional positions within the federal industrial tribunal.

The resource industry notes there was no submission to or recommendation by the Fair Work Act review panel calling for those new positions despite an exhaustive process for comment and review.

The proposed appointments could set the scene for the perception of a union-centric or Labor-leaning tribunal which risks damaging its good standing and its capacity to engage with employers.

The president will also have broad powers to allocate matters to single members, which will include the two new vice presidents.

9.1 How much the two new positions will cost

It has recently been highlighted[10] that a vice president appointed to Fair Work Australia is paid at least $350,000 a year, not including on-costs such as super and the use of a car. It was also pointed out that such roles attract two assistants who are paid around $90,000 a year each, again not including super and other conditions.

It has been estimated that the two new roles will cost $1 million each per year.

AMMA maintains that the Federal Government should stick to its pre-2007 election promise that appointments to the tribunal will be based on merit and not favour one side over the other. In particular, these higher-level appointments should be subject to a significant level of scrutiny.

[10] House of Representatives Hansard, 31 October 2012, p40-41

10 Name of the tribunal

AMMA does not endorse the current name of the federal industrial tribunal and does not believe that changing the name to the 'Fair Work Commission' will do anything to rectify the branding issues the tribunal experienced in the wake of the Health Services Union investigation.

Nor will the new name do anything to clarify the confusion around the separation of the judicial and administrative arms of the Fair Work infrastructure.

AMMA maintains that the name of the tribunal should be apolitical and objective, for example, the Australian Workplace Relations Commission (AWRC).

Such an objective name would not only have the benefit of depoliticising the tribunal but would also help the tribunal to break down the divide between employers and unions, both worthy aims.

The tribunal should have at its core the issue of Australian employment and should steer clear of slogans and epithets.

11 Recommended additions to the bill

Some further amendments to the Fair Work Act have become necessary due to recent high-profile court and tribunal cases.

11.1 The *JJ Richards* case

Despite the Fair Work Act review panel's recommendation, the Federal Government has not included legislation to close off the loophole left open by the *JJ Richards* case in the current bill.

At recommendation 31, the panel suggested Division 8 of Part 3-3 of the Fair Work Act be amended to provide that an application for a protected action ballot order only be made after bargaining had commenced or a majority support determination had been obtained.

This would mean, as AMMA has long argued, that a majority support determination would be a pre-requisite to taking protected industrial action in cases where an employer had not yet agreed to bargain.

AMMA and its members spent a great deal of money appealing the original decisions in this case all the way to the Federal Court[11]. While AMMA's appeal was ultimately unsuccessful, the Federal Court did concede that it seemed logical that protected industrial action should only be taken during the course of bargaining. However, the court noted that the current wording of the Fair Work Act did not restrict protected industrial action to situations where bargaining had commenced.

AMMA is disappointed that this recommendation was not part of this first reform bill and maintains it should be implemented by the government as a matter of urgency.

11.2 The *ADJ Contracting* case

AMMA is also disappointed that not only has the review panel not recommended any changes that would address widespread concerns about the *ADJ Contracting* decisions, but that the government has chosen to ignore these very real problems in this bill.

The original *ADJ Contracting* decision[12], which AMMA unsuccessfully appealed to a Full Bench of Fair Work Australia, found that clauses which, among other things, required employers to encourage union membership and activism, were acceptable to include in enterprise agreements.

Also deemed acceptable were clauses extending right of entry to those without valid entry permits and at any time of day, plus clauses requiring contractors to pay their employees site rates.

All of these clauses were deemed permitted by the Full Bench on appeal[13] and later by a Full Court of the Federal Court[14].

AMMA continues to be of the view that the contractor clauses are anti-competitive and are more about unions controlling the contractors used on a site than protecting employees' wages and conditions.

[11] *JJ Richards & Sons Pty Ltd v Fair Work Australia* [2012] FCAFC 53, 20 April 2012 decision

[12] ADJ Contracting [2011] FWA 2380, 28 April 2011

[13] AiG v ADJ Contracting Pty Ltd [2011] FWAFB 6684, 13 October 2011

[14] AiG v Fair Work Australia [2012] FCAFC 108, 14 August 2012

AMMA maintains that the union 'encouragement' clauses breach freedom of association laws and that the extended right of entry provisions are in stark contrast with Labor government promises that right of entry would not change under the Fair Work Act.

AMMA maintains that the above matters should be expressly prohibited under any balanced industrial relations framework and that all matters previously deemed 'prohibited content' under the Workplace Relations Act should be deemed prohibited under the Fair Work Act.

11.3 Resource industry's top five recommended amendments

The current bill does not satisfactorily address the five major industrial relations concerns of resource industry employers, which are to:

- Ensure the capacity to make greenfield agreements without exorbitant wage and condition outcomes or unnecessary project delays;
- Ensure that allowable matters in enterprise agreements pertain to the employment relationship (as touched on earlier);
- Ensure that protected industrial action can only be taken as a last resort;
- Ensure that the location and frequency of union right of entry visits is reasonable; and
- Broaden the current agreement-making options through the re-introduction of some form of individual agreement.

Greenfield agreements

The resource industry needs a workable set of rules in this area that:

- Do not give unions unfettered power over the content of new project agreements;
- Provide employers with some ability to temper extortionate union demands;
- Do not exacerbate existing union demarcation disputes; and
- Do not lead to project delays and/or bludget blowouts.

AMMA research reported on the front page of *The Australian* on 3 July 2012 revealed that one in five new resource project agreements were stalling because unions were refusing to make workplace agreements, putting pressure on companies to accept exorbitant wage claims or risk damaging investor confidence.

While the ideal solution to this poblem would be an 'employer' greenfield option, this is unlikely to gain much support from the current government.

Instead, AMMA has advocated a greenfield 'determination' power that would act as a circuit breaker in situations where unions were refusing to bargain. AMMA is committed to working with the government to ensure that such a determination power, if adopted, meets the needs of the resource industry.

Permitted matters

As touched on above, the concept of 'prohibited content' should be reintroduced under the Fair Work Act. All matters previously deemed prohibited under the Workplace Relations Act and Regulations should be prohibited under the Fair Work Act and Regulations.

The previous IR system's narrower definition of 'matters pertaining' to the employment relationship should also be adopted.

Employers deserve an agreement making system that does not encourage unions and employees to take protected industrial action in support of matters that have nothing to do with the efficient operation of the enterprise, but which serve only to interfere with managerial prerogative and to shore up union power.

Protected industrial action

As mentioned above, AMMA maintains that protected industrial action should only be available during the course of bargaining and only after an employer has agreed to bargain or a majority support determination has been obtained.

AMMA also believes that protected industrial action should not be permitted where the claims being pursued do not satisfy a public interest test. Such a public interest test would take into account:

- The size of the wage claim being made compared to general industry standards;
- The impact of the increase on the wider economy;
- Whether the parties have considered productivity improvements as part of bargaining;
- The overall cost of the claims to the employer, taking into account improvements in all terms and conditions of employment;
- Whether efforts have been made to genuinely exhaust bargaining; and
- Whether there is support for protected industrial action by a majority of employees to be covered by an agreement, not just a majority of union members.

Right of entry

AMMA continues to call on the Federal Government to honour its promise to retain the identical right of entry laws that existed immediately prior to the Fair Work Act being introduced.

Under normal circumstances, the federal industrial tribunal should not have the power to determine the number, location and frequency of union visits as proposed by the review panel. Such decisions should rest with the employer.

However, where a dispute arises over the reasonableness of right of entry requests, the federal industrial tribunal might, as a last resort, make a determination on conditions of union right of entry for the enterprise concerned.

Individual agreement making options

As mentioned earlier, with the removal of 'opt-out' clauses in enterprise agreements, IFAs remain the only form of individual agreement available under the current industrial relations framework.

IFAs in their current form are virtually useless and a major overhaul is needed if their take-up is to increase:

- At a minimum, parties should be able to agree on an IFA prior to employment commencing, especially given the protections that are in place ensuring employees are left better off;

- IFAs should be able to operate for fixed terms of up to four years, with arrangements able to run for shorter periods where mutually agreed and to be terminated by mutual agreement at any time;
- Parties to IFAs should be able to agree that, in return for the benefits of an IFA, no industrial action will be taken during its life; and
- Public scrutiny of IFAs that have been entered into should be prohibited given it is an invasion of privacy and may lead to unions pressuring workers not to sign individual agreements.

In order for the resource industry to increase its productivity and for the Australian economy to boost its international competitiveness, the above areas of reform must be addressed as a matter of urgency.

12 Conclusion

While the Federal Government purports to have gained widespread support for this first tranche of reforms to the Fair Work Act, the resource industry has concerns about quite a few of the proposals, particularly those not recommended by the Fair Work Act review panel and about which no consultation has been entered into.

Having said that, this tranche of reforms are likely to be less controversial than the next round, where major issues like bargaining, right of entry, industrial action and greenfield agreement making are likely to be addressed.

AMMA urges the Federal Government not to subject stakeholders to a piecemeal implementation of reforms to the Fair Work Act but to give them a fair opportunity to appraise the impact of the reforms as a total package.

AMMA remains committed to working with the Federal Government and other stakeholders in relation to these and future proposed reforms to ensure they benefit not only the resource industry but the Australian economy and at the same time do not erode the legitimate minimum standards of workers.