Submission

Senate Employment, Workplace Relations and Education
References Committee

Inquiry into Workplace Agreements
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AMMA and Resources Sector Profile

1. AMMA is the national employer association for the mining, hydrocarbons and associated processing and service industries. It is the sole national employer association representing the employee relations and human resource management interests of Australia's onshore and offshore resources sector and associated industries.

2. AMMA member companies operate in the following industry categories:
   - Exploration for minerals and hydrocarbons
   - Metalliferous mining, refining and smelting
   - Non-metallic mining and processing
   - Hydrocarbons production (liquid and gaseous)
   - Associated services such as:
   - Construction and maintenance
   - Diving
   - Transport
   - Support and Seismic Vessels
   - General Aviation (Helicopters)
   - Catering
   - Bulk Handling of Shipping Cargo

3. AMMA represents all major minerals and hydrocarbons producers as well as significant numbers of construction and maintenance companies in the resources sector. AMMA is in a unique position in that it is able to articulate a view on the workplace relations legislative reform needs of the resources sector.

4. The Australian resources sector has (and continues to make a significant contribution to Australia's wealth and prosperity, underpinning critical supply and demand relationships with the Australian manufacturing,

construction, banking and financial, process engineering, property and transport sectors.

5. The resources sector has contributed:
   - minerals and energy exports in the order of $67.1 billion in 2004-2005.[1] This represents approximately 67 per cent of Australia's total commodity export earnings in 2004-2005.[2] This equates to 32 per cent of Australia's overall export earnings during this period.[3] In 2005-6 export earning are expected to increase to $80.9 billion;
   - exports of mining technology, equipment and services of approximately $2 billion (2003-4)[4];
   - new capital expenditure in the mining industry was around $9.3 billion in 2003-2004[5] which is approximately 24 per cent of private new capital expenditure in Australia (2003-4)[6];
   - total government revenue payments of $4.6 billion (2003-4)[7]; and
   - infrastructure development since 1967 including the construction of 26 towns, 12 ports and additional port bulk handling infrastructure at many existing ports, 25 airfields and over 2,000 km of railway line.[8]

6. The continued growth of minerals and energy exports that has been experienced in Australia over the past decade has been achieved through large capital expenditure programs, both on the expansion/upgrading of existing projects and development of new projects.

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[1] ABARE, *Australian Commodities-Forecasts and issues,* Vol. 12 No. 1, March quarter 2005 at 19-21
[2] ABARE, *Australian Commodities*, Vol. 1 No. 1, March 2005 at 19
[3] RBA, *Statement On Monetary Policy*, February 2005 at 43
[4] Minerals Council of Australia, *Annual Report* 2004
[5] ABS, 'Private New Capital Expenditure and Expected Expenditure', Catalogue 5625.0, June 2004 at 12
[6] Ibid.
[7] Ibid.
[8] Ibid.

7. As at October 2004, ABARE reported 74 projects either committed or under construction with an expected capital expenditure totalling $22.6 billion. [9]

8. These statistics highlight the enormous significance of the resources sector, both in terms of export revenue and domestic capital investment.

Workplace Change

9. The mining industry (excluding hydrocarbons) directly employs 115,000 employees.[10] Many more employees are indirectly employed as a result of activity in the mining sector.

10. There has been a steady decline in union membership in Australian workplaces since the 1980s. Private sector union membership has plummeted from a high point of 57 per cent in 1985 to 17 per cent (22.7 per cent of the total workforce) in 2004.[11] More than four out of five Australians working in the private sector choose not to be a member of a union. Numerically union membership in the mining sector has halved.[12]

11. This has been accompanied by a marked change in regulation of employment arrangements in many sectors of the economy, none more so than the resources sector. In the metalliferous mining sector a high proportion of employees are now covered by direct employment arrangements with their employer as opposed to a collective agreement negotiated by a union.

[9] ABARE, *Australian Commodities*, Vol. 12 No. 2, June quarter 2005 at 398
[10] ABS, Labour Force, Australia, Detailed - Electronic Delivery, (cat. no. 6291.0.55.001).
[11] ABS: Employee Earnings, Benefits and Trade Union Membership, Cat No 6310.0, March 2005
[12] ABS: Employee Earnings, Benefits and Trade Union Membership, Cat No 6310.0, March 2005 It should be noted that this statistic has been disputed by the Union movement.

12. This is in part evident through the growth in the take up of Australian Workplace Agreements ("AWAs") since their inclusion in the *Workplace Relations Act 1996* (WRA) in March 1997. Almost 709,000 AWAs have been approved by the Employment Advocate since their introduction.[13] 205,000 AWAs were approved in the last year.

13. As at 30 June 2005 approximately 33,000 employees (or 60%) in the mining were on AWAs.[14] A further 4,000 employees (7%) are covered by a federal collective non-union agreement.[15] Federal registered union agreements now cover only 23% of the mining industry. Sixty Seven percent of mining sector employees has chosen a form of regulation that requires no union involvement.

14. Notwithstanding this transformation Australia persists with a system of workplace laws which has changed little in a century, complicated by a duplicity of federal and state systems of industrial regulation.

15. The presence of international competition requires the resources sector to drive workplace reform in Australia. This exposure to international competition in commodities markets never permitted resources companies to indulge in the historical nexus that had operated between Australia's system of trade protection and wage fixation.[16]

16. Since the early eighties AMMA has advocated the use of direct, cooperative and mutually rewarding relationships between employers and employees as the best means of achieving efficient and productive work practices.

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[13] <http://www.oea.gov.au/graphics.asp?showdoc=/home/statistics.asp&Page=1&SubMenu=3> 3/2/05
[14] Office of the Employment Advocate Statistics <www.oea.gov.au>
[15] Ibid.
[16] 'Setting the Scene – Monitoring Micro Reform' ch5 *Bureau of Industry Economics Report* at 62 <http://www.pc.gov.au/bie/report/96-01/index.html> 26/4/04

17. It is in this context that AMMA has identified further labour market reform as essential to the long term competitiveness and viability of Australia's resources sector. This will require significant changes to the workplace relations legislative framework operating at state and national level.

18. **AMMA contends that the establishment of a national unitary workplace relations system which reduces the duplication and complexity resulting from six systems must be a prime objective of any reform.**

19. This should be accompanied by reforms concerning:

- Freedom to contract;
- Agreement making and industrial action;
- Minimum conditions of employment;
- Function and role of the Australian Industrial Relations Commission;
- Unfair dismissals; and
- Minimum wage setting.

20. This submission outlines the reform options proposed by AMMA in the areas concerned with contract making, agreement making and industrial action.

Freedom to Contract

21. In its paper 'What if AWAs Cease to Exist'[17] AMMA outlined in detail the complex legal issues and subsequent risk to employers when common law contracts are relied upon as the principal instrument for regulating employment terms and conditions. The prohibitions in federal and state

workplace relations legislation against contracting out of awards has meant that drafting contracts in a way that all award entitlements are provided for can be extremely difficult. It was also identified that many state common rule awards impose 'third party obligations' such as a requirement to gain the agreement of a union before the normal span of hours or a roster can be changed,[18] or union approval being required for salary packaging and so forth. These obligations cannot be overcome by a contractual term in an employment contract between a company and an individual.

22. **AMMA contends that a set of minimum conditions of employment be legislated** and where a corporation enters into an employment contract it is required to at least provide terms and conditions which are equal to the minimum conditions that would underpin a separate federal employment contract statute. This approach would require no formal registration process and would override any other federal or state industrial instrument or workplace relations legislation.

Internal Regulation.

23. In 2000 AMMA published a research paper which described a model for where workplaces could 'opt out' of the traditional statutory based regulations system in favour of a self-regulated arrangement termed 'internal regulation'.[19] This model would be appropriate for workplaces which have mature, highly developed human resource management systems and processes for internal resolution of workplace grievances. Typically these workplaces have individual employment arrangements

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[17] 'Post the Upcoming Federal Election, Workplace Relations In the Resources Sector, What Happens if AWAs Cease to Exist' http://www.amma.org.au/tl_index_publications.html , 14/12/04, at 17-19

[18] 'Post the Upcoming Federal Election, Workplace Relations In the Resources Sector, What Happens if AWAs Cease to Exist' http://www.amma.org.au/tl_index_publications.html , 14/12/04, at 18-19 & FN43.

[19] A Model of Internal Regulation of Employee Relations: Discussion Paper', February 2000, http://www.amma.org.au/tl_index_publications.html , 5/7/05.

through common law contracts and/or AWAs. AMMA contends that the *Model of Internal Regulation of Employee Relations*[20] continues to provide a legislative option that would provide facilitate employers who have well developed human resource systems and the confidence of their employees, with the freedom to contract in a way that reflected business needs without interference from third parties.

24. An alternative opt-out mechanism would be to allow an employer and employee to contract directly outside of the award system when remuneration is above a threshold level. The threshold amount would be prescribed by regulation and subject to indexation in much the same way as the current threshold applicable to unfair dismissals under s170CC(3)-(4) of the Workplace Relations Act.

Agreement Making

25. While prescribing some aspects of content of agreements, the requirements for collective agreement making under Part VIB of the Workplace Relations Act primarily govern procedure to be followed by parties. The certification process currently involves a hearing before a member of the Australian Industrial Relations Commission. In most cases these hearings are little more than an administrative exercise that could as easily be performed by the Office of the Employment Advocate (OEA) or the Australian Industrial Relations Commission registry. Agreement certification also makes up a substantial part of the Australian Industrial Relations Commission's day-to-day work.

26. **Agreement certification should become an administrative function performed by the OEA or Australian Industrial Relations Commission Registry.**

[20] 'A Model of Internal Regulation of Employee Relations: Discussion Paper', February 2000, http://www.amma.org.au/tl_index_publications.html , 5/7/05.

Australian Workplace Agreements

27. The high level to which AWAs have been utilised in the metalliferous mining sector is well documented. As at 30 June 2005, 60 per cent of employees in the mining sector who are covered by a federal instrument have entered into an AWA.[21] While substantial benefits have been gained through the flexibility provided by AWAs to this sector, there are some areas in which amendments to Part VID of the Workplace Relations Act would improve the AWA system and facilitate their use.

28. The provision concerning the relationship between AWAs and certified agreements (WRA s170VQ(6)) currently gives primacy to CAs in circumstances where the CA was entered into before the AWA and is still within its nominal term.

29. **The Workplace Relations Act should provide that AWAs have primacy over certified agreement in all circumstances and can be entered into at any time.**

30. A number of certified agreement contain provisions which prohibit access to Australian Workplace Agreements. This reduces the range of agreement making options available to employers. This is contrary to the public interest.

31. **The existing certified agreement provisions which operate to remove the right of an employer and an employee to enter into an AWA should be unenforceable. Future agreements containing such provisions should not be eligible for certification.**

[21] AMMA Submission – *Workplace Relations (Right of Entry) Bill 2004* http://www.amma.org.au/tl_index_publications.html , at para 17 & FN7

32. The current provisions (WRA s170VPA) require that a waiting period elapse between the provision and signing of an AWA (5 days for new employees 14 days for existing employees), additionally the AWA does not come into operation until at least the day after the issuing of the filing receipt, in the case of a new employee (WRA s170VJ(1)) or in the case of an existing employee, not before the day after the issuing of the approval notice (WRA s170VJ(2)). This often leads to difficulty in situations of change of ownership of an operation or change of contractor and the subsequent engagement of an entirely or partially new workforce.

33. The Workplace Relations Act should be varied to provide that an AWA will commence operation from the date of signing (provided they are subsequently approved).

34. There remains doubt as to whether state workplace relations laws can have any operation with respect to an AWA employee or to a workplace entirely covered by AWAs. The recent decisions of French J of the Federal Court in the *BGC v CFMEU*[22] and of the Full Bench of the Industrial Relations Commission of New South Wales in *Newcrest v CFMEU*[23] have given an indication that there is scope for state workplace relations laws to continue to operate in these circumstances. This causes confusion, uncertainty, increases business transaction costs and undermines productivity and everything that flows from unnecessary industrial relations legislative complexity.

35. The Workplace Relations Act should specifically provide that an AWA 'covers the field' with respect to all employment terms and conditions and that state workplace relations laws (leaving the current exceptions for state OHS, workers' compensation and

[22] *BGC Contracting v CFMEU* [2004] FCA 981 at [7]-[33]
[23] *Newcrest v CFMEU* [2005] NSWIRComm 23

training legislation in place) are thereby entirely overridden. Removal of current legislative obstacles to moving from state to federal award coverage (WRA s111AAA) should also be repealed to assist in reducing the potential for overlap between the AWA and state industrial systems.

Unlawful Industrial Action and Compliance

36. One of the reasons why employers enter into agreements with employees is to ensure the guaranteed supply of goods or services through the protections against industrial action contained in the Section 170MN of the Workplace Relations Act.

37. The resources sector is concerned that, particularly during the construction phase of projects, the provisions of the Workplace Relations Act and the approach adopted by the Australian Industrial Relations Commission has been ineffectual when dealing with unlawful industrial action.

38. The current mechanisms to deal with unlawful industrial action are too slow, allow too much discretion, and fail to dissuade organisations and employees from engaging in unlawful action.

39. An example of the failure of the present approach can be found by an examination of the Australian Industrial Relations Commission's decisions to grant orders preventing workers from taking unlawful industrial action (by attending industrial relations protest rallies on 1 July 2005) for Australia Post, GlaxoSmithKline, Spicer Axle Structural Components Australia and Toll Express and contrasting them to the Australian Industrial Relations Commission's decision not to grant similar orders for GM Holden, Iveco Trucks Australia, Yallourn Energy, Silcar and TNT Australia.

40. AMMA has the view that the existing mechanism is not effective in addressing unlawful industrial action in a prompt, merit-based and enforceable manner. Too often there are delays, with orders ignored and the Australian Industrial Relations Commission process becoming a tool for unions to continue to inflict substantial and direct financial damage to projects. Unions are able to inflict damage on business and the broader community with impunity.

41. AMMA is concerned that the concept of 'unprotected action' is being accompanied by a view that such action is acceptable. The culture that has emerged, often condoned by ineffective Australian Industrial Relations Commission action, is that those responsible, both organisations and individuals, will not be subject to sanctions/penalties.

42. Australian industrial parties must adopt a culture where *'a deal is a deal'* and all employers and employees understand that they are legally precluded from taking industrial action during the period of operation of an agreement.

43. The federal workplace relations system provides a right to take lawful industrial action, concurrent with this right must be that parties who choose to take unlawful industrial action should be held responsible for their actions without additional warning (strict liability).

44. The primary role of the Australian Industrial Relations Commission is to conciliate and arbitrate industrial disputes. This role role does not sit well with enforcement. **AMMA contends that the enforcement of the obligations of parties (including those steps presently undertaken by the Commission) not to take unlawful industrial action should be undertaken by a Court of competent jurisdiction, not an industrial tribunal.**

45. **Relief (by way of injunction or damages) should follow the event and not require any additional action by the subject of the unlawful action and be available on an exparte basis.**

46. Where a registered organisation or a holder of a s.285 permit to enter a workplace organises, encourages or engages in unlawful industrial actions, **available sanctions should to include the suspension or revocation of access permits, suspension of revocation of the organisations registered status (including respondency to an award or agreement), or a lien on an organisation's assets. Organisations should be vicariously liable for the action of officials.**

47. **Action for damages, injunctions or suspension/revocation of a permit or registration should be available to parties or any person or entity affected by the unlawful industrial action and the Minister.**

48. **There must also be a capacity for any industrial dispute involving industrial action to be dealt and resolved at short notice at any time of the day or week.**

49. Current requirements to gain a certificate under s166A of the Workplace Relations Act before pursuing tort action against a union taking unlawful industrial action is another impediment to an effective compliance regime and also confuses the dispute settlement role of the Australian Industrial Relations Commission with issues of legal compliance. **AMMA submits that s166A of the Workplace Relations Act be repealed.**

50. The use of bogus safety disputes (and the ability to be paid for lost time in such circumstances) as a Trojan horse in pursuit of industrial claims also needs to be addressed.

Industrial Action in Essential Services

51. AMMA believes there is a case for separate arrangements in ‘essential services’ and ‘major projects of national significance’. This position is on the basis that the ‘public interest’ is best served where there is certainty regarding the continuity of supply of ‘essential services’.

52. The Workplace Relations Act currently allows that in strictly limited circumstances, the Australian Industrial Relations Commission can terminate a bargaining period (WRA s170MW). This includes in circumstances where protected action being taken in pursuit of the certified agreement is endangering life or personal safety, health or welfare of the population or will cause significant damage to the Australian economy or an important part of it (WRA s170MW(3)). When a bargaining period is terminated in these circumstances the Australian Industrial Relations Commission can arbitrate the bargaining claims that are in dispute (WRA s170MX). In doing so the Australian Industrial Relations Commission is required to take various factors into account including ‘how productivity might be improved in the business’ (WRA s170MX(5)). This provision has been employed sparingly by the Australian Industrial Relations Commission and has enabled some intractable bargaining disputes in ‘essential services’ industries to be resolved without a continuation of industrial action.

53. Major projects often involve commitment of hundreds of millions and in some cases billions of dollars. In such cases it is vital that certainty with respect to workplace relations arrangements be established before the project commencement. In recent years this has proven difficult to achieve, leaving the projects vulnerable to protected industrial action and significant blow-outs in labour cost. To protect projects of significant national economic importance, a different approach should apply to essential services and major projects of national significance.

54. The benefits of such an approach to the Australian community, our trading partners and Australia's position in the international community should take precedence over the capacity for employees to disrupt the essential services/major projects under the current regime of protected industrial action.

55. Definition of 'Essential Service'

56. AMMA contends that the proposed definition of essential service should be clarified to include the import and export of goods and services that are required to supply essential services and major projects of national significance.

Unlawful Industrial Action in Essential Services

57. The reluctance and speed of which of the Australian Industrial Relations Commission is able to deal with unlawful industrial action is even more concerning when it impacts upon the provision of essential services or major projects of national significance.

Bargaining in Essential Services

58. In order to address the needs of the essential services sector and major projects of national significance AMMA recommends the following approach.

59. No industrial action should be permitted until after the nominal expiry date of an agreement has passed.

60. Taking this into account AMMA recommends the following approach to protected industrial action in essential services/major projects of national significance:

- If the agreement is past its nominal expiry date in an essential service/major project there should be a minimum notice of 28 days to commence a bargaining period. The notice could not be issued until after the expiry of the agreement.

- After the commencement of a bargaining period parties must attempt to reach agreement (meet and exchange positions and responses and so forth) for a period not less than 28 days. This process does not compel the parties to reach agreement.

- If agreement cannot be reached the parties must participate in mediation or other agreed alternate dispute resolution process conducted by the Australian Industrial Relations Commission or other agreed accredited mediator.

- The mediation process will conclude upon reaching agreement, or all parties agreeing that further mediation is unlike to resolve the matter, or the mediator certifying that further mediation is unlikely to resolve the matter. The parties may agree that the matter be arbitrated. In the absence of such agreement, the mediator must provide a report to the parties and the Minister detailing the matters in dispute, the positions of the parties and the likelihood and the potential impact of any industrial action.

- Within 28 days at any time after receipt of such report the Minister may require, by written notice that the dispute arbitrated by the Australian Industrial Relations Commission or other arbiter agreed between the parties.

- If the Minister so determines, he may issue a notice requiring that no industrial action be taken or that any industrial action taken by the parties must not interfere with minimum service obligations of essential service providers/major projects.

- In the absence of a notice from the Minister within 28 days the parties to the dispute may engage in protected action as permitted by the Workplace Relations Act.

- If the matter is arbitrated, by agreement or direction from the Minister, the arbiter shall expeditiously hear and determine the matters in dispute. Protected action is to cease while the arbitration process is being heard and determined. The arbitration determination shall be final and binding on the parties. In determining the matters in dispute the arbiter shall have regard to the criteria provided in s.170MX (5) of the Workplace Relations Act.

Conclusion

61. The Workplace Relations Act does not represent the 'state of the art' in workplace regulation, particularly in the area of agreement making and compliance.

62. AMMA submits that the existing legislation would be improved by;

- Provision of a national system of workplace regulation including agreement making and compliance.
- Legislated minimum entitlements.
- The legal recognition of the common law agreements with the capacity to override awards subject to meeting legislated minima.
- Employment contracts in excess of a pre-determined amount should be legally recognised as over-riding awards.
- Implementation of a 'opt out' mechanism for high trust workplaces with sophisticated human resource systems
- Agreements should be processed without the need for a formal hearing.
- AWAs should override certified agreements.
- Certified Agreements should not be allowed to prevent the making and approval of a subsequent AWA.
- AWAs should cover the field and exclude all State workplace relations legislation (except OH&S, Workers Compensation and Training legislation)
- Enforcement of unlawful industrial action should be performed by the Courts without the need for preliminary proceedings in the Australian Industrial Relations Commission. Section 166A of the Workplace Relations Act should be repealed.

- Sanctions for unlawful industrial action should include suspension of access rights, deregistration (and removal of the associated privileges), injunctive relief and damages.
- Relief should follow the event.
- Special arrangements should exist for essential services and projections of national significance.