

Submission

to

Senate Employment, Workplace Relations and Education
Legislation Committee

Provisions of the Workplace Relations Amendment (Right of Entry) Bill 2004

Submission no: 24

Received: 9/2/2005

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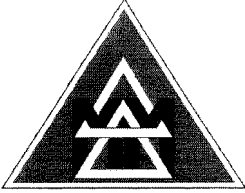
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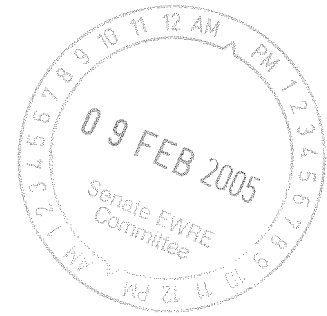
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**AUSTRALIAN MINES &
METALS ASSOCIATION (INC)**



**THE WORKPLACE RELATIONS
AMENDMENT (RIGHT OF ENTRY)**

BILL 2004

**SUBMISSION BY THE
AUSTRALIAN MINES & METALS
ASSOCIATION (INC) TO THE
SENATE EMPLOYMENT,
WORKPLACE RELATIONS AND
EDUCATION COMMITTEE**

FEBRUARY 2005

AMMA and Resources Sector Profile

1. Australian Mines and Metals Association (Inc) (“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 resource sector and associated industries.

2. In operation since 1918, AMMA includes companies engaged 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. In representing all major minerals and hydrocarbons producers as well as significant numbers of construction and maintenance companies in the resource sector, AMMA is in a unique position in that it is able to articulate a view on the issue of right of entry for union officials to resources projects and workplaces.

4. The resources sector has traditionally made an important contribution to the Australian economy, particularly in terms of investment and exports. The resources sector is a major contributor to Australia’s balance of trade

with five of the six top commodity exports in the year ending June 2002 coming from the resources sector. The total value of Australia's minerals and energy exports is estimated to have been \$52.7 billion in 2003-2004. This represents approximately 36% of Australia's total export earnings.

5. 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.
6. Based on the ABS survey data, new capital expenditure in the mining industry is estimated to be around \$8.9 billion in 2002-2003, significantly higher (by 23 percent) than in 2001-2002. In real terms, new capital expenditure is estimated to be the highest since 1998-1999 and around 28 per cent above the average annual expenditure for the past 22 years.
7. At the end of April 2003, there were 40 projects at 'advanced' stages of development included in ABARE's project list – that is, projects that are either committed or under construction. The announced capital expenditure of these 40 advanced projects adds up to \$16.9 billion.
8. The above figures highlight the enormous significance of the resources sector, both in terms of export revenue and domestic capital investment.

Introduction

9. The resources sector is a major contributor to the Australian economy; as a producer, as an employer; and as an exporter. Development of the sector is also a major driver of the domestic engineering design and construction sector.
10. The finite nature of projects undertaken within the sector, leading to the regular turnover of new projects to replace those in decline or at the point

of conclusion, combined with the scale of such projects is a powerful driver of capital investment.

11. New projects or expansion of existing operations in the mining and hydrocarbons sectors invariably requires investment of substantial sums of money.
12. While the viability of projects will be primarily driven by the quality of the resource to be developed, the growing scale of such projects means that the development costs including the engineering and construction phase costs are critical to the financial planning and decision making with respect to such projects.
13. One of the major factors in the successful planning, financial approval and execution of major projects in the resource sector is that of the labour relations arrangements during the construction phase. The certainty and security of the capital investment is closely linked to developing and maintaining stable labour relations arrangements.

Changes in Workplaces

14. There has been a steady decline in union membership in Australian workplaces since the 1980s. Since a high point of 57 per cent in 1985,¹ union saturation has plummeted to 17.6 per cent of private sector employees (23 per cent of the total workforce) in 2003.² This means that about four out of five Australians choose not to be a member of a union.
15. This has been accompanied 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, for example a high proportion of employees are now covered by direct

¹ Dabscheck B 'Australian Labour Law Reform: Consequences and Prospects' at 238 in Nolan D (ed) *The Australasian Labour Law Reforms* The Federation Press, Sydney, 1998

² ABS: Employee Earnings, Benefits and Trade Union Membership, Cat no 6105.0, August 2003

employment arrangements with their employer as opposed to a collective agreement negotiated by a union or unions at the workplace.

16. This is in part evident through the growth in the take up of Australian Workplace Agreements since their inclusion in the *Workplace Relations Act 1996* in March 1997. Almost 620,000 AWAs have been approved by the Employment Advocate since their introduction.³ Currently 388,000 employees are covered by AWAs which equates to about 20% of all employees covered by federal agreements. A further 9% of employees covered by federal agreements are covered by a collective non-union certified agreement.⁴ That is, almost one in three employees covered by federal agreements are in workplaces that have chosen a form of regulation that requires no union involvement.

17. In the mining industry around 67 per cent of employees who are covered by federal agreements are on AWAs,⁵ with the figure closer to 80 per cent in the metalliferous mining sector.⁶ A further 7% of mining industry employees covered by a federal agreement are covered by a collective non-union agreement. AWAs and non-union collective agreements also apply for nearly 70 per cent of federal agreement covered employees in the property and business services sector and 80% of such employees in the hospitality industry.⁷ Since 2002 in the resource rich state of Western Australia, there has been a major shift to the federal industrial system following changes in workplace laws in that state. That has meant that, while WA accounts for 10 per cent of the Australian workforce, it has accounted for 32 per cent of AWA approvals during the last two years.⁸

18. AMMA submits that this marked decline in union saturation rate and the rapid move away from collective union agreements is a principal reason why legislation providing rights of entry to workplaces to union officials

³ <<http://www.oea.gov.au/graphics.asp?showdoc=/home/statistics.asp&Page=1&SubMenu=3>> 3/2/05

⁴ <<http://www.oea.gov.au/graphics.asp?showdoc=/home/statistics.asp&Page=1&SubMenu=3>> 3/2/05

⁵ <<http://www.oea.gov.au/graphics.asp?showdoc=/home/statistics.asp&Page=3&SubMenu=3>> 3/2/05

⁶ 'The Case for Ongoing Flexibility in Employment Arrangement Options in the Australian Resources Sector' *Australian Mines and Metals Association Paper* March 2004 at 3

⁷ <<http://www.oea.gov.au/graphics.asp?showdoc=/home/statistics.asp&Page=1&SubMenu=3>> 3/2/05

requires amendment. A strong case can be made against uninvited access for union officials to workplaces where employees choose both not to be a member of a union and to enter into an employment agreement directly with their employer. Such a circumstance has become a feature of resources sector workplaces and thereby affects workplace relations in a key sector of the economy.

Conduct of Union Officials - Resources Sector

19. Problems experienced with application of the current provisions of Part IX of the *Workplace Relations Act 1996* in the resources sector appear to mainly stem from:

- Officials of unions with no legal right to represent the employees at a workplace seeking right of entry;
- Unions officials seeking uninvited right of entry to workplaces covered by AWAs and collective non-union agreements that they are not party to;
- Union officials, when granted right of entry, failing to observe restrictions placed on them while in the workplace when many such restrictions are for security or safety reasons;
- Disruptive behaviour while in the workplace.

20. There is no better example of union officials without a lawful right to represent employees at a workplace persistently seeking to gain right of entry, than that which arises from the long history of demarcation disputes between the Australian Workers' Union ("AWU") and the Construction, Forestry, Mining and Energy Union (Construction & General Division) ("CFMEU") (incorporates the former BLF). This demarcation dispute has predominantly been over union coverage of non-trades classifications

⁸ <<http://www.oea.gov.au/graphics.asp?showdoc=/home/statistics.asp&Page=2&SubMenu=3>> 3/2/05

working on civil, mechanical and electrical engineering construction projects within the resources sector.

21. One of the many episodes of litigation in which this historical demarcation dispute has been played out was in the litigation between 1997 and 2003 concerning the ultimately unsuccessful attempt by the CFMEU to amend its eligibility for membership rule to give it coverage of non-trades classifications on civil, mechanical and electrical engineering projects, including in the mining and oil and gas industries. The AWU was the principal union objector to this and AMMA the principal employer objector. [See: *CFMEU v AWU & Ors* Print S2640, per Williams SDP; *AWU & Ors v CFMEU* PR901486, Full Bench AIRC; *Re: AWU; Ex parte CFMEU* [2002] FCAFC 150; *AWU & Ors v CFMEU* PR920670, Full bench AIRC; *CFMEU v AIRC* [2003] FCAFC 196]. Well in excess a million dollars was expended by AMMA and its resource company members in opposing the CFMEU's attempt gain legal coverage in the sector.
22. Notwithstanding the ultimate refusal of the courts to allow the CFMEU to expand its coverage, this union continues to seek to disrupt resource projects through attempts by its officials to gain entry to these workplaces. The facts concerning attempts over several months by CFMEU officials to gain access to the North-West Shelf Stage IV Project on the Burrup Peninsula near Karratha in the north west of Western Australia are set out in the decision of Carr J of the Federal Court in *Woodside v McDonald*.⁹ On this project, despite refusal of the operators of the site Woodside Energy Ltd to grant the union access, and the company's warnings about likely breaches of its strict security and safety procedures by the union officials, they persisted in entering the site for the purpose 'organising' the workforce. The misconduct of the officials included one official gaining unauthorised entry and staging a 'sit in' in a bus on the work site.¹⁰ In another unauthorised entry to the work site, strike action was incited resulting in disruption to the project for six days.¹¹ Certified agreements

⁹ *Woodside v McDonald* [2003] FCA 69 at [38]-[78]

¹⁰ *Woodside v McDonald* [2003] FCA 69 at [60]-[63]

¹¹ *Woodside v McDonald* [2003] FCA 69 at [69]-[73]

for the project operated between the construction contractors and several other unions with legal coverage of the work including the AWU.

23. At the site of the construction of an ammonia plant for Burrup Fertilisers Pty Ltd also on the Burrup Peninsula, construction contractors had established a workforce entirely regulated by AWAs. This had meant that no agreements with unions operated at the project. A factual account of attempts by the CFMEU to gain access to the site through rights created under state workplace relations laws is set out in the decision of French J in *BGC Contracting Pty Ltd and Ors v CFMEU*.¹² French J found that there was no inconsistency between the state and federal right of entry provisions, provided operation of the state laws would “not impinge on performance of obligations under the AWAs.”¹³
24. Up to the time of this decision in July 2004, the understanding of industry parties was that if all employees in a workplace were covered by AWAs there was no right of uninvited access for union officials. In 2001 Linnane VP of the Queensland Industrial Court had refused to grant injunctions against WMC Resources Ltd, the operators of Phosphate Hill Mine in Northern Queensland, that would have had the effect of providing unions with right of entry under state law. All employees at the workplace were covered by AWAs and Linnane VP decided that the Commonwealth provisions covered the field with respect to any rights of entry.¹⁴ All doubt about the operation state law in this circumstance needs to be removed.

Effect of *Workplace Relations (Right of Entry) Bill 2004*

25. The effect of the *Workplace Relations (Right of Entry) Bill 2004* (“the Bill”) will be to make clear that where all employees at a workplace are covered by AWAs, the only rights of access will arise under Commonwealth law. This will overcome a significant problem affecting resources companies.

¹² *BGC Contracting v CFMEU* [2004] FCA 981 at [7]-[33]

¹³ *BGC Contracting v CFMEU* [2004] FCA 981 at [94]-[96]

¹⁴ *AWU v WMC Resources* [2001] QIRComm 199

26. Also appropriately, under the Bill, a right of entry to investigate an AWA breach would not arise unless requested by the employee.
27. The Bill would also clarify that the operators of worksites can place appropriate restrictions on access. Security and safety considerations often require that entry to resources projects be strictly controlled.
28. Proposed expansion of the powers of the Australian Industrial Relations Commission to deal with abuse of right of entry by union officials will also assist operators of resource projects responding to unlawful disruption to work by union officials who, as referred to above, are often motivated by a demarcation dispute with a competing union.

AMMA Position

29. A right of entry regime that provides access to workplaces for union officials in circumstances where the union has legal coverage of the work being performed, an award or a certified agreement to which the union is a party is in operation, requires that the union provide reasonable notice in writing to the employer, requires the union to provide some details of breaches of workplace laws it seeks to investigate (when applicable), and the employer can place reasonable limits on the access (usually based on safety and security grounds on resources projects), is supported by AMMA.
30. On the basis that it meets this criteria and will provide a clearer and more fairer regime governing union right of entry, AMMA supports the Bill.

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