Submission

to

Senate Employment, Workplace Relations and Education Legislation Committee

Inquiry into the Workplace Relations Amendment (WorkChoices) Bill 2005

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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 makes 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 $87billion[4];
- exports of mining technology, equipment and services of approximately $2 billion (2003-4)[5];
- new capital expenditure in the mining industry was around $9.3 billion in 2003-2004[6] which is approximately 24 per cent of private new capital expenditure in Australia (2003-4)[7];
- total government revenue payments of $4.6 billion (2003-4)[8]; and
- infrastructure development including the construction of towns, ports and additional port bulk handling infrastructure at many existing ports, airfields and over 2,000 kms of railway line.[9]

6. The continued growth of minerals and energy exports 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] ABARE, *Australian Commodities*, Vol. 12 No. 3, September quarter 2005
[5] Minerals Council of Australia, *Annual Report* 2004
[6] ABS, 'Private New Capital Expenditure and Expected Expenditure', Catalogue 5625.0, June 2004 at 12
[7] Ibid.
[8] Ibid.
[9] Ibid.

7. As at October 2004, ABARE reported 74 projects either committed or under construction with an expected capital expenditure totalling $22.6 billion. [10] In addition to this there is well in excess of $40 billion in new projects under active consideration.

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

Workplace Arrangements

9. The mining industry directly employs in 115,000 employees.[11] 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.[12] 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.[13]

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

[10] ABARE, *Australian Commodities*, Vol. 12 No. 2, June quarter 2005 at 398
[11] ABS, Labour Force, Australia, Detailed - Electronic Delivery, (cat. no. 6291.0.55.001).
[12] ABS: Employee Earnings, Benefits and Trade Union Membership, Cat No 6310.0, March 2005
[13] ABS: Employee Earnings, Benefits and Trade Union Membership, Cat No 6310.0, March 2005

employment arrangements with their employer as opposed to a collective agreement negotiated by a union.

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.[14] In the last year alone, there were 205,000 AWAs approved.

13. As at 30 June 2005, 33,700 employees (or 60 per cent of employees covered by federal agreements) in the mining industry were on AWAs.[15] A further 3,600 employees (7 per cent) are covered by a federal collective non-union agreement.[16] Federal registered union agreements (18,500 employees) now cover only 16 per cent of the mining industry. Sixty-seven per cent of mining sector employees have chosen a workplace agreement 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 be at the forefront of workplace reform. The exposure to international competition in commodities markets has not allowed resource companies to indulge in the historical nexus that had

[14] http://www.oea.gov.au/graphics.asp?showdoc=/home/statistics.asp&Page=3&SubMenu=3 (7 November 2005)
[15] Ibid.
[16] Ibid.

operated between Australia's system of trade protection and wage fixation.[17]

16. Since the early 1980s 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.

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.

Previous AMMA Submission and Reports

18. In July 1999 AMMA released a report titled *Beyond Enterprise Bargaining: The Case for Ongoing Reform of Workplace Relations in Australia.*[18] This report examined the key legislative changes since 1956 and the position of the main political parties on these issues, areas of major agreement and disagreement on industrial regulation, and how the position of the major political parties had changed during this period. *Beyond Enterprise Bargaining* drew upon a study of overseas experience commissioned by the National Institute of Labour Studies. The report concluded with a discussion on strategic options for employers in the development of their own employee relations and the Employee Relations Charter that all employers would be expected to follow in order to internally regulate their industrial arrangements.

[17] '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
[18] < http://www.amma.org.au/publications/beb_report.pdf > (7 November 2005)

19. In September 1999 AMMA made a submission to the Senate Employment Workplace Relations, Small Business and Education Committee Inquiry into the Workplace Relations Legislation Amendment (More Jobs Better Pay) Bill 1999.[19] AMMA's submission dealt with areas including Awards, Termination of Employment, Certified Agreements, AWAs, Industrial Action, Right of Entry and Freedom of Association. AMMA supported the thrust of the Bill but noted there was much more work to be done.

20. On 31 October 2000 AMMA published a Ministerial Discussion Paper on Transmission of Business and Workplace Relations Issues.[20] AMMA contended that the existing approach adopted by the courts was confusing and did not facilitate predictable outcomes.

21. On 14 December 2004 in a paper titled *'What if AWAs Cease to Exist',*[21] AMMA outlined the complex legal issues and subsequent risk to employers that arise when common law contracts are relied upon as the principal instrument for regulating employment terms and conditions.

22. In February 2005 AMMA make a submission to the Senate Employment, Workplace Relations and Education Legislation Committee on the *Workplace Relations (Right of Entry) Bill 2004.* AMMA submitted that the proposals would have provided a clearer and more fair regime governing union right of entry and supported the Bill.

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[19] < http://www.amma.org.au/publications/mb_submissions_wraamend.html > (7 November 2005)

[20] < http://www.amma.org.au/publications/AMMAsubmission_transmission%20of%20bussiness.pdf > (7 November 2005)

[21] '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

23. On 10 March 2005 AMMA published a Position Paper on Workplace Relations Legislative Reform Options.[22] This paper suggested the following industrial reform;

- a single national unitary system of industrial regulation with the Workplace Relations Act to 'cover the field';
- reductions in the number of allowable matters in awards;
- the creation of an employment contract statute underpinned by statutory minimum conditions;
- AWAs to have primacy over certified agreements;
- AWAs to commence upon the date of signing;
- Protection against industrial action for 'projects of national economic importance';
- The repeal of s.166A of the *Workplace Relations Act*;
- The conduct of all compliance matters by a court of competent jurisdiction;
- The AIRC powers of compulsory arbitration to be significantly reduced.
- The outcome of unfair dismissal cases to be reflective of the merit of the application rather than procedural matters.

- On 18 May 2005 AMMA released a paper titled *AMMA position paper on the requirement for a single national workplace relations system.*[23] This paper argued that it was time for a national, simplified and harmonious workplace relations system. The paper provided a range of examples of the burden imposed upon employers by the existence of six separate statutory labour relations systems operating in Australia, each with its own awards, agreements and common law contracts. This complex mix of jurisdictions has produced a very confusing industrial environment and costly duplication.

[22] < http://www.amma.org.au/publications/AMMApaper_WRreform_March05.pdf > (7 November 2005)
[23] < http://www.amma.org.au/publications/AMMApaper_nationalWRsystem.pdf > (7 November 2005)

24. On 4 August 2005 AMMA made a submission to the Senate Employment, Workplace Relations and Education Legislation Committee Inquiry on Workplace Agreements.[24] AMMA submitted the Workplace Relations Act would be improved by;

- Provision of a national system of workplace regulation including agreement making and compliance;
- Legislating a number of 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 occupational health and safety, 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.
- Compensation should be a natural consequence of unlawful industrial action.

[24] < http://www.amma.org.au/publications/AMMASubmission_AgreementMaking_5Aug05.pdf > (7 November 2005)

- Special arrangements should exist for essential services and projects of national significance.

Subject Matter of the Current Inquiry

25. The subject matter of the current inquiry was determined by a motion passed by the Senate on 12 October 2005.

26. The Senate Employment, Workplace Relations and Education Legislation Committee ('the Committee') has advised that it will not consider matters previously referred to, examined and reported on by the committee, namely;

- secret ballots
- suspension/termination of a bargaining period
- pattern bargaining
- cooling off periods
- remedies for unprotected industrial action
- removal of section 166A of the *Workplace Relations Act 1996;*
- strike pay
- reform of unfair dismissal arrangements
- right of entry
- award simplification
- freedom of association
- amendments to section 299 of the Workplace Relations Act (Offences in relation to Commission)
- civil penalties for officers of organisations.

27. Many of these matters have been the subject of the previous AMMA submissions detailed in paragraphs 18 -25. These documents are available at http://www.amma.org.au/tl_index_publications.html

28. This submission is concerned with the reform options proposed by the Work Choices Bill in the following areas;

- Australian Fair Pay Commission
- Australian Pair Pay and Conditions Standard
- Workplace agreements
- Awards
- Transmission of business

- Dispute resolution
- Transitional arrangements for parties bound by federal awards
- Transitional Arrangements for existing pre-reform agreements
- Transitional treatment of state employment agreements and state awards

Australian Fair Pay Commission

29. AMMA has long contended that a set of minimum conditions of employment be legislated and provide the minimum conditions which must apply regardless of the industrial instalment applying. The AFPC Standard provides this mechanism.

Australian Fair Pay and Conditions Standard

30. AMMA contends that a set of statute-based minimum conditions be created. A separate statute (such as proposed in AMMA 10 March 20005 position paper[25]) would enable the employer and employee to enter into an employment contract that must be in excess of the legislated minimum terms and conditions. This approach would require no formal registration process and would override any other federal or state industrial instrument or workplace relations legislation. The AFPC Standard provides this mechanism for Work Choices Workplace Agreements. AMMA submits that the AFPC standard should apply to common law contracts of employment to facilitate the breaking of the nexus between statutory award and agreement regimes. As evidenced in previous AMMA submissions, resources sector employers have sophisticated employment arrangements that have moved far beyond the adversarial nature of award and agreement making.

[25] < http://www.amma.org.au/publications/AMMApaper_WRreform_March05.pdf > (7 November 2005)

Workplace Agreements

31. The Work Choices Bill provides for an increased range of workplace agreements. This is a positive step.

Greenfield Agreements

32. Work Choices at s.96C proposes that union Greenfield agreements have a nominal term limited to twelve months. AMMA submits that this is grossly inadequate and should be increased to five years. The Work Choices proposal is less that the current three year Greenfield agreement (see s.170LL) and will result in the increased risk of significant industrial action on a number of planned major infrastructure projects. Known investments in resources developments totalling over $40 billion are potentially at risk, and in addition there are many more projects in the planning stages which may be adversely impacted.

33. As resources developments are highly capital intensive, resource companies and their financiers require certainty throughout the duration of the construction phase with respect to labour arrangements. This provides the best opportunity to manage industrial relations risks and control potential for cost escalation due to delay as a result of industrial action and increase in labour cost.

34. An example of a resource development that will have a construction phase spanning in excess of 3 years is the proposed Gorgan Project. This project involves the development of offshore gas fields and associated onshore LNG processing plant on and offshore in Australia's North-West. Chevron Australia Pty Ltd is expected to decide whether to proceed with this project and a capital commitment of approximately $11 billion by mid-2006. As with all major projects of this nature, certainty with respect to labour cost and management

of industrial relations risks will be significant factors considered before an investment decision is made.

35. Other offshore gas developments with associated LNG processing plant are being considered by Woodside Energy and BHP Billiton Petroleum. These projects are also in Australia's North-West region and involve capital commitments totalling approximately $20 billion. In these projects it is envisaged that the construction phase will take in excess of three years.

36. In addition to the oil and gas projects identified above, it has been well documented that major mining construction projects are under active consideration in Western Australia, Queensland and South Australia. AMMA submits that it is in the national interest that union Greenfield agreements with terms of up to five years be available as an option.

37. Provision for union Greenfields agreements with a nominal term of up to five years (as is the case in s.96, s.96A and s.96B agreements) would allow these major developments to be planned with far greater confidence. By way of example, if it were possible to enter into a Greenfields agreement prior to the commencement of a four year construction program, management of industrial relations risks could be approached with greater certainty for the project duration. Under the current maximum three year term for a Greenfield agreement, a multi-billion dollar resources project would be exposed to the risk of bargaining related 'protected industrial action' after three years. This would expose the project in its crucial final twelve months to delays due to industrial action and escalation in labour costs.

38. Experience has shown that the opportunity cost to the project of such disruption is at its greatest in the latter stages because any ability to recover from delays to the construction schedule diminishes, and the risk of delayed commencement to production increases. With

respect to projects of the scale of these proposed LNG projects, this opportunity cost will be well in excess of $3 million per day. If production of LNG and therefore shipments to customers were delayed, the financial impact can be devastating. On current prices a shipment of LNG is worth approximately $22 million.

AWAs

39. Section 96 Workplace Agreements will have the capacity to override a collective agreement. This will be most relevant where a collective agreement has provisions that do not suit an individual employee. This provision will allow the contract of employment to be customised to meet the needs of an employee and the employer. This will enhance the ability of employers and employees to enter into flexible and productive workplace arrangements. AMMA has been a strong advocate of this proposal and supports its implementation.

40. AMMA supports the streamlined agreement pre-approval, approval and termination provisions contained in the Work Choices Bill.

Internal Regulation

41. An area where the Bill could be improved would be the incorporation of the model of 'internal regulation'. In 2000 AMMA published a research paper which described such a model, where workplaces could 'opt out' of the traditional statutory based regulations system in favour of a self-regulated arrangement termed 'internal regulation'.[26] 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 through common law contracts and/or AWAs. AMMA contends that the

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

Model of Internal Regulation of Employee Relations[27] continues to provide a legislative option that would facilitate employers who have well developed human resource systems and have the support of their employees, with the freedom to contract in a way that reflected business needs without interference from third parties.

Formalising Common Law Contracts

42. The Bill would be further enhanced by the recognising that in many workplaces where management has developed the trust and confidence of employees, individual contracts of employment are the favoured form of expressing employment terms and conditions. These contracts are recognised in the common law of contract and are not registered instruments under the *Workplace Relations Act*. [28] To allow such arrangements to effectively operate in conjunction with the Work Choices workplace agreement system, the Bill could be amended to provide for common law employment contracts between a corporation and its employees to be underpinned by the AFPC Standard only.

Awards

43. The historical dominance of awards as the prime source of industrial regulations began its decline with the Hawke Government's 1991 amendments to the Industrial Relations Act and were further diminished by the Keating Government introduction of the concept of non-union agreements (Enterprise Flexibility Agreements). This process was taken further by the introduction of individual workplace agreements in the Howard Governments 1996 reforms.

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

[28] Problems caused by the interaction between common law employment contracts and awards and certified agreements were discussed in '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

44. Work Choices retains the federal award system for those employees who do not wish to move to the Work Choices system. Those employees who agree to enter into Work Choices Workplace Agreements will rely on the AFPC Standard as the foundation upon which their agreement is built. This will allow greater flexibility to structure agreement provisions to meet operational requirements, and is unlikely to result in any diminution of conditions due to the typically high level of earnings in the resources sector. Skill shortages make this an even more unlikely outcome flowing from introduction of the AFPC Standard as the instrument underpinning workplace agreements.

45. Employers will also benefit from the reduced complexity in measuring agreements against the AFPC standard which may encourage other employers to reach agreements with their employees on the terms and conditions of employment that suit the needs of the workplace and the employee rather than an industry at large.

Transmission of Business

46. AMMA has long considered that the existing legislative arrangements and their interpretation by the courts have created high level of uncertainty on when a transmission of business occurs.

47. The Work Choices proposal does not facilitate a transmission where no employees are engaged by the transmittee employer. AMMA supports this reform.

48. In cases where there is a transmission of business, such a transmission is limited to 'transferring employees' and will operate for a period of twelve months. This will allow a period of transmission and facilitate the assimilation of the transferred employees into the new business. AMMA supports this reform.

Dispute Resolution

49. Work Choices provides a range of options for dispute resolution including access to the AIRC. AMMA believes that the AIRC should only exercise compulsory dispute resolution powers where the parties confer jurisdiction. Work Choices delivers this approach in all but the most intractable disputes [refer Part VC Divisions 6,7,8] .

50. AMMA supports the proposal for the Minister to be vested with the power to act in particular circumstances. The disputes in which the Minister may intervene appear to be confined to those types of disputes where presently the AIRC can terminate the bargaining period and require compulsory arbitration. Australian as a nation has matured in its workplace relations activities in recent decades. There is now an expectation that intractable disputes or disputes in essential service areas be resolved without recourse to disputation that results in economic damage to business and/or harm to Australian community. AMMA submits that the Minister should have the capacity to intervene in a broad range of circumstances, for example the failure to supply coal that adversely impacts on the capacity for electricity generation.

Transitional Arrangements for Parties Bound by Federal Awards

51. AMMA supports the reduction in the number of federal awards. The effectiveness of these provisions will depend on the outcome of the Award Review Tribunal and the timely implementation of these recommendations by the AIRC

Transitional Arrangements for Existing Pre-reform Agreements

52. Work Choices treats ‘old IR agreements’ such as non union enterprise flexibility agreements differently to pre-reform agreements.

AMMA is aware that some employers have an enterprise flexibility agreement which continue to underpin employment arrangements. AMMA submits that there is no public policy reason why old IR agreements should not be treated in the same manner as pre-reform agreements. Excluding the old IR agreement issue, AMMA believes that the Work Choices transition provisions concerning pre-reform agreements are appropriate

Transitional treatment of State Employment Agreements and State Awards

53. AMMA believes that the Work Choices transition provisions concerning state employment agreements and state awards are appropriate.

Conclusion

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

55. AMMA advocates the benefits of a simpler national system of industrial regulation. Work Choices delivers a simpler national system for corporate Australia and will break the gridlock imposed by having six competing industrial relations system in Australia. AMMA will continue to lobby state governments to adopt the Victorian approach and cede their industrial relations powers and cooperatively embrace a national approach.

56. Many employers in the resources sector have a close relationship with their employees, which has been demonstrated by the growth in direct employment relationships since 1980s. Where a workplace

has achieved excellence in human resource management processes, AMMA submits that the employer and its employees should have the option of regulating their industrial arrangements internally.

57. Work Choices, with its simple system of minimum standards and more efficient agreement processing arrangements, will further facilitate and reduce the transaction costs of agreement making. These minimum standards should underpin a formalised system of common law contracts which would not require formal registration.

58. AMMA welcomes the improved focus on agreement making as the awards system becomes less of an impediment to workplace flexibility and productivity.

59. For several years AMMA has lobbied for five year terms for workplace agreements. The Work Choices proposal to limit union Greenfield agreements to twelve months contained in s.96C AMMA submits is without foundation and should be extended to five years. The instability caused by this provision puts at risk more than $40 billion in Australian resources projects.

60. Work Choices should treat all pre-reform agreements equally. The definition of pre-reform agreements should include non union enterprise flexibility agreements made under provisions existing prior to the 1996 legislative reforms.

61. AMMA supports the reduction in arbitration powers of the Commission. In our view this move will encourage workplaces to take more responsibility for dispute prevention and resolution.

62. AMMA supports the simplified transmission of business arrangements.

63. AMMA submits the adoption of issues raised by AMMA in this submission in addition to the Work Choices package (as released on 9 October 2005) will further enhance the productivity, profitability of industry and facilitate increased employment and real wages growth in the Australian economy.