The new IR laws – a challenge or opportunity for resource industry employers?

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Overview

The next three years will be incredibly challenging for employers in the resource industry as many industrial agreements expire between now and 2014, both individual and collective. Given the current economic, political and IR environment, 2011 is expected to see an upswing in industrial activity as union gains made under the Fair Work Act 2009 in the areas of enterprise bargaining, agreement making and right of entry become more entrenched and strategically utilised.

The Fair Work Act has now been in force for more than 18 months and, during that time, clear challenges have emerged for employers under the legislation. These include:

- union dominance over enterprise bargaining and agreement making;
- the enhanced ability for unions and employees to take protected industrial action with very few legislative hurdles;
- unions' expanded rights to enter unionised and non-unionised worksites; and
- a lack of flexibility for employers to strike individual agreements with their employees.

For the next three years, the resource industry will enter a period of increased exposure to protected industrial action in the context of enterprise bargaining,

increased management time and resources having to be devoted to bargaining (including increased lead time into negotiations), and an increased volume of entry requests and visits by unions, overwhelmingly used to shore up unions' own power base at the expense of the employer's.

Enterprise bargaining negotiations have historically been accompanied by the threat of, or actual taking of, protected industrial action, both of which are detrimental to an enterprise. The Fair Work Act has opened up employees' access to protected industrial action and there are now fewer conditions than ever before attached to the taking of such action. In a recent development, unless a Fair Work Australia decision handed down in February this year is overturned on appeal, unions will be able to take protected industrial action even before bargaining has commenced. This was not something that employers envisaged when the Fair Work Act was first introduced and will create major challenges for them in the enterprise bargaining space.

The resource industry prepared itself well for the uncertainties of the introduction of the current IR regime, which is a credit to its HR and IR managers and effective industry associations. Many employers chose to lock in their industrial arrangements before the Fair Work Act commenced in 2009 due to concerns over the Act's proposed bargaining and agreement making provisions. Some employers secured up to five-year agreements with their workforce, and some of those agreements in the resource industry will not expire until 2014.

Until recently, the industry also experienced very low levels of industrial disputation. However, the latest ABS statistics reveal those figures are on the rise[1]. In the September 2010 quarter, coal mining lost a huge 466.3 days per thousand employees to industrial disputes, the highest level since March 2001; while in the December 2010 quarter, the rest of the mining industry lost three days per thousand employees to industrial disputes, the highest level since September 2006.

Industrial activity is expected to heat up even more this year as agreements expire, however, the industry got a taste of things to come in the 2009/10 maritime industry

[1] *Industrial Disputes, Australia, December 2010*, Catalogue no: 6321.0.55.001, Australian Bureau of Statistics, published 10 March 2011

dispute between employers in the offshore oil and gas industry and the Maritime Union of Australia (MUA). The outcome of that dispute, which was achieved on the back of costly and protracted industrial action by employees, was a construction allowance for seafarers increased to $1,500 a week, an extra five days' pay and a wage increase of more than 30 per cent over the life of the agreement. A notable absence of this resolution was the complete absence of productivity improvements or changes to seafarers' duties.

During the heat of the maritime dispute, resource industry employer Total Marine Services Pty Ltd (represented by AMMA in industry negotiations) went to Fair Work Australia to oppose an MUA application for a secret ballot order. The employer unsuccessfully argued the union's application should not be granted because it was seeking 'outlandish' wages and allowances claims and therefore was not genuinely trying to reach an agreement with the employer. The MUA's claims at that stage included a construction allowance increased from $87 a day to $500 a day across the industry. The union simply said the claim was reasonable because seafarers wanted wage parity with construction riggers[2].

In January 2010, when resource industry employer Farstad Shipping (Indian Pacific) Pty Ltd sought Fair Work Australia's help to put a stop to the MUA's protected industrial action over similarly exorbitant claims[3], Senior Deputy President Les Kaufman said:

> *… how will suspending the industrial action assist with bargaining? You'll say we're not moving, they'll say we're not moving, where is the assistance in suspending it? Perhaps if they keep softening you up and I'm using the vernacular, that may assist a resolution if you bleed too much. I'm not suggesting there's any morality there but this is the scheme of this legislation and that's the question that's being put to you a little more subtly but I'm using this sledgehammer?*

[2] *MUA v Total Marine Services* (B2009/10385). Transcript of 5 August 2009 proceedings
[3] *Farstad Shipping (Indian Pacific) Pty Ltd v MUA* (B2010/2515). Transcript of 8 January 2010 proceedings

It is experiences such as these that give employers very little faith in the current system.

AMMA's own research into the Fair Work Act

AMMA wanted to make sure it understood exactly what the negative impacts were, if any, of the new legislation on its members so it could compile evidence-based academic research to put before the government. AMMA accepts that governments of all political persuasions need longitudinal evidence in order to mount a case for IR reform.

In partnership with RMIT University, AMMA began systematically tracking its members' experiences with the Fair Work Act via a comprehensive survey every six months after the legislation took effect. Two surveys to date have been subject to independent reporting and analysis by RMIT and have revealed enormous challenges for employers in doing business under the new IR framework.

The latest report[4] confirms there has been deterioration in the overall workplace relations environment for employers in the resource industry, even in the six months between the first survey being conducted in April 2010 and the latest one in October 2010.

Specifically, AMMA members' satisfaction with their overall IR environment deteriorated from an index score of 75.9 out of 100 in the first survey to 65.1 six months later. Commenting on the latest results, report author Dr Steven Kates from RMIT University said:

> *This indicates that greater familiarity with the new system has led to a much lower level of satisfaction with the workplace relations system than had existed during the previous survey period when the Fair Work Act was first introduced.*

[4] *The AMMA Workplace Relations Research Project, Report 2*, Dr Steven Kates, RMIT University, published January 2011

The index for employers' perception of labour productivity also fell between the two survey periods, from 66.7 to 61.3, a small but significant drop. The index for employers' direct engagement levels with their workforce also fell, from 69.5 to 66.7, between the two survey periods.

Other findings from the latest survey were:

- There is a high level of dissatisfaction with the remedies available to employers to stop or prevent protected and unprotected industrial action;
- Union involvement in the workplace is perceived as largely unhelpful in fostering a productive IR environment;
- Achieving increased workplace flexibility, while technically possible, is challenging;
- Labour productivity, while still relatively good, has eroded in the eyes of employers; and
- Direct engagement with employees has become more challenging to achieve.

AMMA members are also reporting unions building up their power base under the new legislation, in particular using their expanded entry rights to consult with and recruit new members ahead of upcoming bargaining rounds. As one member said in October 2010:

> *I think it's a lull before the storm and I do think there's been a little testing time going on with the legislation and the shift in right of entry and there has been a 'shoring up' of union opportunity.*

On that front, AMMA members are reporting:

- greater flexing of muscles by unions in all areas of workplace relations;
- increased agitation from unions wanting to get onto worksites;
- unions competing for territory in areas where they had not traditionally had coverage; and
- unions creating major issues from minor matters.

Members are also reporting more of an 'us versus them' mentality, which resource industry employers had successfully addressed when the previous legislation allowed for more direct engagement with an employer's workforce.

In recent weeks, the Australian Workers Union has made no secret of the fact it will be looking to make inroads and build its membership base across the Australian resource industry[5]. Make no mistake, dramatic changes are afoot.

Challenges to Australia's international reputation

Research published by independent brokerage and investment group, CLSA in January 2011 is already warning investors in Australia's resource industry to expect higher capital expenditure, completion delays, and lower project returns on some projects due to Australia's changed legislative environment[6]. Changes include those made to Australia's IR legislation in 2009 and its skilled migration program in 2010.

CLSA also predicted unions would be 'reinvigorated' by the Fair Work Act's removal of Australian Workplace Agreements (AWAs) and tolerance for the strategic use of protected strike action, saying:

> *Seasonally high wage agreement expiration and record numbers of protected ballot orders set the scene for a possible fiery industrial relations environment in 2011.*

Not all IR reform is a return to Work Choices

It is frustrating to say the least that every time AMMA makes the case for IR reform in the current political environment it is labelled as seeking a 'return to Work Choices' by the government and unions.

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[5] *We're coming after you: AWU's Howes warns Rio Tinto*, Workplace Express, published 15 February 2011

[6] *Australia Market Strategy*, CLSA Asia-Pacific, 31 January 2011

Such comments by ACTU president Ged Kearney and even former-Deputy Prime Minister Julia Gillard when she was Workplace Relations Minister seek to divert attention away from any independent comment, including fact-based research that AMMA and RMIT have compiled based on the direct experience of employers in the resource industry.

AMMA members are telling us precisely what the impediments are to them doing business productively and effectively under the new IR system, and the government and opposition should not ignore it simply because IR has proven to be a political hot potato.

The resource industry has never asked for nor required Work Choices-style AWAs. The pre-Work Choices Workplace Relations Act reforms from 1996 onwards were sufficient for the industry, and to suggest that AMMA's subsequent calls for change are seeking a return to Work Choices is simply at odds with the facts.

AMMA was the only employer group prior to the Labor Government winning office in 2007 to publicly advocate abolishing Work Choices AWAs and restoring the no-disadvantage test[7].

A quick examination of Australian Electoral Commission (AEC) returns highlights that unions have donated millions of dollars to the ALP and not surprisingly received an array of privileges under the Fair Work Act. These include but are not limited to: enhanced rights to enter worksites; mandated involvement in bargaining for greenfield agreements; and increased scope to take protected industrial action. As is the case for most employer groups in Australia, AMMA does not feature in the same AEC political donation returns.

Before the Fair Work Act was introduced, the resource industry was characterised by direct employment arrangements, with 80 per cent of all mining employees covered by individual statutory employment instruments, and negligible time lost to industrial action.

[7] *Mining industry puts forward compromise offer on AWAs*, Workplace Express, 4 May 2007

The impact of the removal of the ability to make new individual statutory agreements in March 2008 has yet to be fully felt in the resource industry given that some of those instruments, plus employee collective agreements made prior to 1 July 2009, are still in force.

That being said, average weekly earnings for mining industry employees are consistently among the highest of any sector and are currently $2,077.10 (or $108,000 a year) compared to an all-industries average of $1,272.50 a week (or $66,170 a year)[8].

This is an industry that for the past two decades has been characterised by a high level of individual agreement making and in which AWAs continue to operate with the express legislative consent of the current Labor Government.

However, it often goes unnoticed that AMMA actively represents members throughout Australia that are involved in collective agreement making with unions on a daily basis. AMMA simply does not share the ACTU's aspiration that union collective agreement making be compulsory on all Australian worksites.

Other voices joining AMMA's calls for change

The Labor Government under both Kevin Rudd and Julia Gillard has steadfastly refused to make any changes to the current IR laws[9]. The Federal Opposition's current official stance is that it will not make any IR changes for the first three years of any future term in government. Despite that, it is heartening to see in recent months that other voices have joined AMMA in seeking to re-ignite the IR debate. These include Shadow Ministers Andrew Robb and Joe Hockey[10], the Australian Chamber of Commerce & Industry, and former Howard Government Workplace Relations Minister Peter Reith.

[8] *Average Weekly Earnings Australia, November 2010*, ABS Catalogue no: 6302.0
[9] *Battle lines drawn on construction laws as Gillard booed at ACTU Congress*, Workplace Express, 3 June 2009
[10] *Government seizes on Opposition 'disarray' over IR,* Workplace Express, 3 December 2010

Reith said recently[11]:

> *I understand the political tactic of not making IR an issue in the last election. It was an exceptional situation because no opposition has ever won the first election after a new government has been returned to office from opposition. The situation now is different. The costs of Labor's system will build up in the next two years. And Tony Abbott has said "it is up to the business community to convince the Coalition to change policy".*

Reith also said:

> *If we are to secure Australia's productivity potential into the future, the regulation of labour markets cannot remain a no-go area for evidence-based policy making.*

AMMA has never resiled from putting the case for IR reform on behalf of its members in the resource industry and will continue to progressively build an undeniable case for change.

But even if the major political parties refuse to make changes to the IR legislation, there are things that can be done via the Fair Work Regulations to introduce much needed rigour to the operation of the Fair Work Act.

Positive aspects of the Fair Work Act

AMMA has in the past commended the Labor Government for introducing the safety net for employees under the National Employment Standards (NES), which includes a raft of guaranteed minimum entitlements such as the right for employees to request flexible working arrangements.

[11] Peter Reith commentary in *The Australian* newspaper, February 24, 2011

Similarly, the introduction of modern awards and the simplification of more than 1,500 state and federal awards (excluding another 2,000 or so enterprise awards) is something AMMA has applauded the government for undertaking.

Former Deputy Prime Minister Julia Gillard listened to AMMA's concerns about the need to ensure a modern award system for the resource industry that was sufficiently flexible to allow current shift and rostering arrangements to continue.

As a result, the modern awards AMMA has been involved with are by far the most flexible, to the point where the *Mining Industry Award* and the *Hydrocarbons Industry (Upstream) Award* became a model for all other industries seeking similar levels of flexibility.

In terms of other positives under the Fair Work Act, individual flexibility arrangements (IFAs) had the potential to offer employers added flexibility following the removal of AWAs. As it turns out, however, IFAs are at best a missed opportunity for the Australian economy, employers and employees alike.

AMMA has also welcomed and supported the achievement of a truly national IR system, with the exception of unincorporated businesses in Western Australia, because its members often have operations throughout Australia and across state boundaries.

However, despite these positives, major challenges remain for employers in the resource industry under the current IR system and AMMA will continue to lobby the government to make amendments via legislative and non-legislative means.

Unions' dominance over enterprise bargaining and agreement making

Just over half (52.2 per cent) of AMMA members had engaged in enterprise bargaining under the Fair Work Act as of October 2010[12]. Of those:

[12] *The AMMA Workplace Relations Research Project, Report 2*, Dr Steven Kates, RMIT University, published January 2011

- nearly half (47.7 per cent) said bargaining was ‘more difficult’ or ‘significantly more difficult’ under the Fair Work Act than under the Workplace Relations Act;
- 27.3 per cent said there was ‘no significant difference’;
- 25 per cent said it was ‘too soon to tell’; but
- no respondent to either of the two AMMA surveys to date has said bargaining is easier under the Fair Work Act.

Major challenges for employers with the Fair Work Act’s good faith bargaining and agreement making rules include that union involvement is mandated in greenfield negotiations and that unions tend to dominate enterprise negotiations even when they represent only a minority of employees.

The failure of the Fair Work Act to include a non-union greenfield agreement option has actually delayed the start-up of projects for 13.4 per cent of respondents to the latest AMMA survey, while another 22.4 per cent said it was ‘too soon to tell’ if projects would be delayed.

When you consider the hundreds of billions of dollars in the investment pipeline, any delays caused by the operation of the IR system are cause for concern.

In greenfield negotiations, the situation is particularly grim for employers because unions are well aware they have the balance of power and will happily hold out until all their demands are met. In some cases, where an employer finds itself on the wrong side of a union, the union will refuse to make an agreement at all, forcing the project to start up with no industrial agreement in place and thus the potential for protected industrial action from day one. This is not an attractive prospect for investors.

The cost of an offshore resource construction project is rarely less than one billion dollars and can be as high as $43 billion (i.e. the Gorgon Project). Understandably, project owners are acutely conscious of their costs mounting as a result of industrial

action. They therefore insist for cost and scheduling certainty on industrial agreements being in place prior to construction commencing.

A recent independent analysis of Australia's economic situation confirms what AMMA has been saying – that in the past six to 12 months, labour costs in Australia's resource industry have accelerated[13]. Casual daily rates for offshore and onshore construction are now up by around 37 per cent since July 2009 following the introduction of the Fair Work Act, with construction rates expected to head in the same direction in the near future.

AMMA members have also reported needing to allow longer timeframes for negotiating greenfield agreements under the Fair Work Act because it takes longer to finalise agreements in the current IR environment[14].

AMMA maintains that some form of leverage must be applied to moderate the pressure of unions when negotiating greenfield agreements. That leverage used to be in the ability for employers to engage staff on alternative agreements such as AWAs as a condition of employment. Under the previous legislation, employers could also enter into employer greenfield agreements, although these were of limited use given they had a nominal expiry date of 12 months after lodgement.

The challenge for employers under the current bargaining and agreement-making regime is that the cost of delays in starting up projects is a multiple of the cost of unions' wage and condition claims, even where those claims are exorbitant. The unfortunate reality is that without union agreement, no greenfield agreement can be made for a resource industry construction project under the Fair Work Act.

It is therefore critical that employers have the ability to make greenfield agreements that reflect reasonable outcomes. Greenfield negotiations finalised in the offshore oil and gas sector in the past 12 months have seen wages increase phenomenally. A

[13] *Australia Market Strategy*, CLSA Asia-Pacific, 31 January 2011
[14] *The AMMA Workplace Relations Research Project, Report 2*, Dr Steven Kates, RMIT University, published January 2011

tradesperson working a four-week-on, two-week off roster on an offshore oil and gas project is now on a package of $460,000 a year.

Casual daily rates of pay in offshore construction have nearly tripled in the past nine years, from $685.04 a day in 2002 to $1,854 a day at present.

The current approach by unions to negotiating greenfield agreements, which is condoned by the Fair Work Act and the federal industrial tribunal Fair Work Australia, has resulted in:

- exorbitant cost escalations for offshore construction projects;
- negative economic and social implications associated with excessive wage escalations; and
- flow-on implications to other maritime operations and the onshore resource construction and operations sectors.

Such outcomes are clearly not in the public interest and AMMA is not alone in thinking so.

In July 2010, Minister for Resources, Energy and Tourism, Martin Ferguson, publicly stated that excessively high wages in the resource industry harmed other struggling industries[15]. Unfortunately, he appeared to blame employers for the outcomes rather than the enormous challenges posed for employers in gaining any sort of leverage under his government's IR legislation. The minister was quoted as saying:

> *I do not accept that some of the agreements that have been put in place are in the national interest.*

AMMA agrees. Unfortunately, as stated, due to the Fair Work Act's agreement-making rules, such inflated outcomes are becoming the cost of reaching agreement with unions.

[15] Minister for Resources, Energy and Tourism quoted in the *Australian Financial Review*, July 6, 2010, p10

Sharing the wealth of the resource industry

In October 2010, ACTU secretary Jeff Lawrence claimed businesses were doing well from the resurgence of the Australian economy and there were no grounds for business lobby groups to agitate for changes to the IR legislation[16]. In particular, Lawrence claimed that total profits in the mining and construction industries were growing at a higher rate than wages and that employers had no cause for complaint.

AMMA's response to that is if you are an investor putting billions of dollars into a resource project you expect to get a reasonable rate of return. The investment risk lies entirely with the investor, not with employees, and certainly not with unions. The fact is that investors would not explore or start up operations creating wealth and jobs for Australians if there was no chance of a reasonable rate of return on their investment.

While the ACTU has argued wages should go up in line with profits in the mining industry, we do not hear the peak union body advocating pay cuts during financial downturns when commodity prices for Australian minerals are at all-time lows. During those times, employers and investors bear the full brunt of losses. During the global financial crisis and its concomitant decreases in oil and gas prices, no oil and gas worker had their wages reduced, but the profits of businesses reduced dramatically.

Ensuring employees get a share of Australia's economic prosperity is one thing, and the resource industry, as discussed, has always rewarded its workforce extremely well in order to attract the best talent. However, the exorbitant pay outcomes we are seeing, particularly in the offshore oil and gas sector, are completely out of step with community expectations and totally out of the question for many industries faced with a flow-on effect.

The Federal Government, the Opposition and the Australian Greens (with the latter to have control of the Senate from 1 July 2011), should not continue to ignore

[16] *Unions working for a fairer society*, speech by ACTU secretary Jeff Lawrence to the AiGroup PIR conference, Canberra, October 19, 2010

employers' very real concerns with the operation of the Fair Work Act's agreement-making and bargaining rules.

Legislative and non-legislative solutions

The current legislative approval process for greenfield agreements requires Fair Work Australia to be satisfied that the agreement being approved is 'in the public interest'. As we have seen, some agreements approved in the offshore oil and gas industry would be difficult to regard as being in the public interest, with one of the government's own ministers saying as much[17].

Putting to one side the very strong argument for legislative reform, a regulatory amendment could easily be made requiring all greenfield agreements to be brought to the attention of the workplace relations minister of the day before being approved by Fair Work Australia. Fair Work Australia could also be required to ensure the public interest test was actively and rigorously applied to all greenfield agreements.

Regulations could also be made to bring greenfield agreement negotiations into the good faith bargaining realm, something which AMMA notes already has the support of the ACTU[18].

The Fair Work Regulations could also specify that a hearing be conducted for the approval of all greenfield agreements to ensure greater public scrutiny of the outcomes.

As for legislative changes that could be made, 73.8 per cent of respondents to the latest AMMA survey[19] endorsed the option of being able to enter into a greenfield agreement without the involvement of unions, as long as it was subject to the application of the Better Off Overall Test and approved by Fair Work Australia.

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[17] Minister for Resources, Energy and Tourism quoted in the *Australian Financial Review*, July 6, 2010, p10

[18] ACTU president Ged Kearney, address to the *9th Annual Workforce Conference*, hosted by Thomson Reuters, 22 November 2010

[19] *The AMMA Workplace Relations Research Project, Report 2*, Dr Steven Kates, RMIT University, published January 2011

The enhanced ability for unions and employees to take protected industrial action

The outlandish wage claims being made in some sectors of the resource industry, in particular in offshore oil and gas, are able to be achieved because the Fair Work Act encourages the use of strategic protected industrial action to further employees' and unions' wage and condition demands.

Union bargaining representatives often apply for protected action ballots without having made any real effort to resolve the dispute at hand.

Successful secret ballot orders have grown tenfold since 2006 levels, with the number of secret ballot order applications being approved by Fair Work Australia expected to be even higher in 2011[20].

Unions are increasingly resorting to the threat of strike action in their negotiations and in many cases actually taking it. As mentioned, the number of working days lost to industrial disputes in the mining industry has already started to increase, according to the latest figures from the ABS[21]. This means that one of the emerging challenges for employers under the Fair Work Act will be dealing with the ease with which employees can now embark on protected industrial action.

A decision handed down earlier this year by Fair Work Australia involving JJ Richards & Sons and the Transport Workers Union, which I will talk more about later, makes it easier still for unions and employees to take protected industrial action and harder for employers and business to withstand the threat of such action[22].

Other challenges for employers under the Fair Work Act's rules for protected industrial action include the ability for employees to notify they are taking industrial action on a particular day, causing the employer to make alternative arrangements

[20] *Australia Market Strategy*, CLSA Asia-Pacific, 31 January 2011
[21] *Industrial Disputes, Australia, December 2010*, Category no 6321.0.55.001, Australian Bureau of Statistics, published 10 March 2011
[22] *Transport Workers Union of Australia v JJ Richards & Sons Pty Ltd* [2011] FWA 973, 16 February 2011

such as closing down or cancelling deliveries, etc. But it is now common for employees to then turn up for work as usual, without notice, and expect to be paid. This is an increasingly utilised industrial tactic that puts the employer to the same cost and inconvenience as if strike action had actually been taken, but which does not even see workers lose a day's pay.

Another decision made by a Full Bench of Fair Work Australia in August 2010 warrants mention here. In *CFMEU v Woodside Burrup Pty Ltd and Kentz E & C Pty Ltd*[23], the Bench made a comment in response to Pluto project operator Woodside's application as a third party that it had sustained economic damage as a result of industrial action taken by the employees of one of its sub-contractors. Woodside argued that it cost $3.5 million per day to keep the Pluto project running, including site-based services but excluding payments to contractors working on the project. This, Woodside said, represented the potential economic loss arising from each day's industrial action by its sub-contractor's employees given the flow-on effects and delays caused to other work on the project.

The Full Bench disputed that the $3.5 million figure cited was the potential daily loss caused to Woodside by the protected industrial action, but said even if that were true, the amount was 'a function of the enormous size of the project':

> *In our view, those amounts are not significant in the relevant sense when considered in the context of the project as a whole unless the further delays on account of the protected industrial action become very protracted.*

So here we have the federal industrial tribunal saying that potential losses to project operators of $3.5 million a day are insignificant to the economy if they occur in the context of a project worth billions of dollars. If the IR legislation is leading the tribunal to arrive at such findings, it is in urgent need of review.

Legislative and non-legislative solutions

[23] *CFMEU v Woodside Burrup Pty Ltd and Kentz E&C Pty Ltd* [2010] FWAFB 6021, 6 August 2010

A change could be made to the Fair Work Regulations specifying that before taking protected industrial action, the parties involved have to supply information on productivity improvements that have been considered as part of any enterprise agreement. At present, there is no requirement for Fair Work Australia to take into account productivity issues when approving enterprise agreements despite the Fair Work Act including an object of agreements delivering productivity benefits.

Regulatory amendments could also be made to require any outstanding issues between the parties to be identified to Fair Work Australia before protected action ballots are approved. This could include that productivity improvements have been considered before taking industrial action over an exorbitant log of claims.

In terms of legislative changes that could be made, 77.6 per cent of respondents to the latest AMMA survey on the Fair Work Act[24] said they would appreciate being able to refuse to allow employees to work if they turned up after issuing notices of protected industrial action for that day.

Unions' enhanced rights to enter workplaces

The right of entry experience since 1 July 2009 has perhaps been the most challenging for employers in the resource industry, with a dramatic upsurge in notices received during the past 18 months. One AMMA member received over 217 right of entry requests in the first few months of the Fair Work Act coming into effect[25], which later peaked and tapered off at around 450[26].

AMMA members are reporting that right of entry under the Fair Work Act is particularly challenging in view of:

[24] *The AMMA Workplace Relations Research Project, Report 2*, Dr Steven Kates, RMIT University, published January 2011
[25] *CFMEU v Foster Wheeler Worley Parsons (Pluto) Joint Venture* [2010] FWA 2341, 29 March 2010
[26] Woodside IR manager Ian Masson's address to AMMA National Conference in Perth on 20 May, 2010

- Extra company resources being required to manage the increased volume of right of entry requests and deal with union delegates when they arrive onsite;
- Concerns about access to personnel records and requests to access areas of the site that may impact on the freedom of choice of non-union members, such as meal rooms;
- The potential for aggressive unions to disturb existing arrangements with employees;
- Dual right of entry permits allowing an organiser from one union to hold a permit to represent another;
- Unions being entitled to enter worksites for consultation purposes whether they have members onsite or not;
- Multiple unions having potential coverage, leading to an increase in visits and extra resources having to be devoted to the exercise;
- Unions seeking to one-up each other with the workforce, causing confusion among employees;
- Multiple unions having the same coverage opportunities; and
- Difficulties for site staff in fully ascertaining the eligibility rules of each and every union.

In the latest AMMA survey on the Fair Work Act[27], 50.7 per cent of respondents said their level of concern with right of entry laws had increased compared to six months earlier, showing that as the Fair Work Act becomes more entrenched, employer concerns with right of entry laws increase.

The latest survey also confirmed the results of the first survey, which is that the main reason for union visits to workplaces under the Fair Work Act is for bargaining purposes, followed by visits for the purpose of recruitment, consultation and discussion with members or eligible members.

In the first AMMA survey on the Fair Work Act in April 2010[28]:

[27] *The AMMA Workplace Relations Research Project, Report 2*, Dr Steven Kates, RMIT University, published January 2011
[28] *The AMMA Workplace Relations Research Project, First Report*, Dr Steven Kates, RMIT University, published June 2010

- 55.6 per cent of respondents said unions were able to enter their worksites for the first time under the Fair Work Act;
- 40 per cent said a greater number of different unions had the ability to enter their sites when the new IR legislation took effect;
- 37.2 per cent said a greater number of different unions had actually entered their sites since the Fair Work Act began;
- 30.2 per cent said there were significantly more union visits in the first eight months of the Fair Work Act's operation compared to the previous eight months; and
- 25.4 per cent said they were not confident they knew which unions were entitled to enter their worksites.

In terms of legislative changes that should be made to the current right of entry regime, AMMA maintains that unions seeking to enter a worksite should have members on-site, be a party to an enterprise agreement covering the site or, failing that, be attempting to reach such an agreement.

The ability under the current legislation to agree to additional union entry rights under enterprise agreements, other than what is contained in the legislation, is also unwarranted and should be removed.

The lack of flexibility for employers to make individual arrangements with their employees

Individual flexibility arrangements (IFAs) were originally touted as providing an opportunity for employers to negotiate the flexibility of an AWA without the potential to cut employees' wages and conditions (which had never been an issue in the resource industry). However, 18 months down the track, IFAs represent at best a missed opportunity for employers and employees and have failed to deliver genuine flexibility.

All modern awards and enterprise agreements now have to contain a 'flexibility clause' under which an individual employee can make a flexible arrangement (IFA) with their employer should they so choose. The challenge for employers under the legislation as it is currently drafted is there is no minimum requirement for what a flexibility clause must include. It is also more often the case that employers have to negotiate flexibility clauses with unions before they can turn that into an IFA with an individual employee.

There is, of course, a 'model' flexibility clause containing some flexibility around issues like penalty rates, leave loading and the like, although again, the case law to date has eroded the potential benefits of the model clause, particularly with regard to employees foregoing penalty rates in exchange for working their preferred hours[29].

However, many unions, led by the ACTU, have taken an ideological position against IFAs so that while flexibility clauses are mandatory in all enterprise agreements, the level of flexibility they are able to achieve is often illusory.

The impediments to employers getting extra flexibility out of an IFA include that, unlike an individual statutory agreement, IFAs:

- can not stop employees from taking protected industrial action while IFAs are in force and while workers are enjoying increased benefits of an IFA such as higher wages;
- cannot be made a condition of employment;
- can be terminated with 28 days' notice by either party; and
- can only be made after a flexibility clause has been negotiated, often with a union that is ideologically opposed to negotiating genuine flexibility.

The ACTU and the AMWU[30] have urged their members to treat IFAs with suspicion and have warned them that employers are seeking to use them to exploit workers. An

[29] *Bupa Care Services Pty Ltd, P&A Securities Pty Ltd* [2010] FWAFB 2762, 15 April 2010
[30] *Flexibility push by employers is about undermining collective agreements*, AMWU website, September 22, 2009

ACTU fact sheet[31] cites IFAs as an 'ongoing concern for unions as it may allow unscrupulous employers to undermine the collective agreement'.

These kinds of statements are misleading and ignore the statutory protections in place requiring workers to be left 'better off overall' under IFAs.

An example of a mandatory clause that allows for questionable flexibility can be found in an enterprise agreement negotiated by the Victorian branch of the CFMEU, which allows flexibility around a single clause relating to protective clothing and boots[32]. The clause says:

> *Consistent with current practice, protective clothing and boots will be issued to each employee on a fair wear and tear basis. Employees are required to wear and maintain the company-provided clothing and to present in a tidy manner so as to display a professional company image.*

Another agreement negotiated by the CEPU and AMWU[33] contains a flexibility clause of equally questionable value, which states:

> *The terms that may be subject to an individual flexibility arrangement are a 15-minute paid tea break, paid at the rate prevailing at the time, which will be granted two hours after the start of an employee's ordinary hours.*

AMMA maintains that if the government is serious about ensuring genuine flexibility under enterprise agreements, it would mandate the inclusion of minimum flexibility terms and not allow such clauses to be bargained down to nothing.

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[31] *New protections and minimum standards for all Australian workers from 1 January 2010*, ACTU Fact Sheet, 1 January 2010
[32] *Bam & Associates Pty Ltd and CFMEU Agreement 2009-2012*. FWAA 2530
[33] *Coates Hire Operations Pty Ltd National Agreement 2009*, FWAA 1366

Of course, employers have to take some responsibility for failing to negotiate sufficient flexibility under the clauses, but in the face of a concerted mass union campaign against IFAs, this can be a real challenge.

In AMMA's latest survey on the Fair Work Act[34], respondents who had attempted to negotiate flexibility clauses and/or IFAs were asked if they had achieved the aim of any extra workplace flexibility for the enterprise:

- 33.3 per cent said they had failed to achieve any added flexibility;
- 55.6 per cent said it was 'too soon to tell'; and
- 11.1 per cent said they had been able to negotiate added flexibility.

Asked what respondents thought about the value of flexibility clauses and IFAs in achieving workplace flexibility:

- three per cent said IFAs were of 'significant value';
- 25.8 per cent said they were of 'some value'; and
- 28.8 per cent said they were of 'no value'.
- The rest had no experience with IFAs on which to base a comment.

As one respondent to the latest AMMA survey said:

> *IFAs are not relied upon by an employer. As when making greenfield agreements, unions are ensuring that IFAs are restricted to very basic items, e.g. single day leave absences etc. It is difficult for an employer to even consider an IFA as an alternative as there is no reliability nor continuity as an employee can opt out of the arrangement by giving notice.*

Legislative and non-legislative solutions

[34] *The AMMA Workplace Relations Research Project, Report 2*, Dr Steven Kates, RMIT University, published January 2011

The Fair Work Act currently allows the president of Fair Work Australia to give directions of a general nature to members of the tribunal. The president could be encouraged by the workplace relations minister of the day to give directions to tribunal members to ensure that mandated flexibility clauses were capable of meeting the needs of the employer and employee if an IFA was to be made on the back of them.

On a legislative front, just over half of the respondents to the latest AMMA survey (50.7 per cent) said they would support a legislative change to introduce a maximum four-year end date for IFAs rather than the current ability for either party to terminate them with 28 days' notice.

Unforeseen developments in recent case law

In recent months, employers have seen some disturbing and unforeseen decisions being handed down by the federal industrial tribunal Fair Work Australia and the Federal Court in interpreting the new legislation.

In particular I refer to two decisions – the first, a decision in which Fair Work Australia removed virtually all pre-requisites before a union could apply on behalf of its members to take protected industrial action; and the second relating to new constraints imposed on employers in their disciplining of employees for misconduct in the event the employees are actively involved with their union.

A challenging and unforeseen development for employers under good faith bargaining case law is contained in the latest in a series of decisions in a matter involving JJ Richards & Sons Pty Ltd and the Transport Workers Union (TWU)[35]. The decisions have enormous implications for bargaining under the Fair Work Act, particularly for resource industry employers with a raft of agreements due to expire. The decision severely undermines employers' ability to refuse to bargain in the absence of proof that a majority of their workforce wants to.

[35] *Transport Workers Union of Australia v JJ Richards and Sons Pty Ltd* [2011] FWA 973, 16 February 2011

The latest decision, and an earlier majority Full Bench ruling in the same matter[36], set the disturbing precedent that bargaining does not have to have commenced before a union representing a minority of workers can apply to take protected industrial action.

The decisions maintain there are no pre-requisites to taking protected industrial action other than the applicant union having to satisfy the somewhat nebulous test of being 'genuinely trying to reach an agreement' with the employer. Unions are not required to obtain a majority support determination from Fair Work Australia where the employer does not wish to bargain to prove there is majority support for bargaining, or apply for a scope order or a bargaining order to force an employer to the bargaining table. They can simply move straight to threatening and/or taking costly and premature industrial action.

AMMA maintains this decision is of huge significance to employers and as such, has filed an appeal in Fair Work Australia, together with the employer concerned on the grounds it is contrary to the stated intentions of the Fair Work Act.

Unless the findings are overturned, employers can expect to see a lot more premature industrial action being threatened and taken, and the value of majority support determinations as a first port of call for unions when employers refuse to bargain severely undermined.

New challenges for employers in disciplining active unionists

Another challenging development for employers is a decision handed down by a Full Court of the Federal Court in February this year in the matter of *Barclay v The Board of Bendigo TAFE*[37]. The decision relates to a growing area of concern for AMMA members – that of the Fair Work Act's 'adverse action' or 'general protections' principles.

[36] *JJ Richards & Sons Pty Ltd v TWU* [2010] FWAFB 963, 23 December 2010
[37] *Barclay v The Board of Bendigo Regional Institute of TAFE* [2011] FCAFC 14, 9 February 2011

Some 10.4 per cent of respondents to the latest AMMA survey on the Fair Work Act[38] said they had received an adverse action claim from a current, former or prospective employee between 1 July 2009 and October 2010. This is a significant number of claims in such a new area of the legislation.

In a majority decision, a Full Court of the Federal Court quashed a Federal Magistrate's Court decision that upheld the employer's right to discipline an employee for serious misconduct while purporting to carry out his role as a union delegate.

The employer had suspended the teacher with pay and begun disciplinary proceedings against him following an email he sent to fellow union members under the guise of his role as a union delegate. The email referred to alleged requests that some managers had made to Australian Education Union (AEU) members asking them to provide fraudulent information to a quality audit.

The employer was given the email by one of its employees and decided to stand the teacher down with pay and suspend his access to the work computer system. It did so on the basis that it would further damage the employer's reputation amongst its employees if the teacher was allowed to continue perpetuating rumours via email. In the original case, the employer successfully argued the teacher had breached its code of conduct, under which he was required to report all such allegations to management, and that was the reason for the man's suspension, not his union activities.

The AEU appealed that finding, with a majority of the Full Court finding that because the emails were sent in the employee's capacity as a union delegate, the adverse action stemming from the conduct had to be because of his workplace right to actively represent his union. Such a finding would apply to all such cases where union activities prompted the adverse action, regardless of the employer's actual motivation in taking the action, the court found.

[38] *The AMMA Workplace Relations Research Project, Report 2*, Dr Steven Kates, RMIT University, published January 2011

This is a challenging development for employers on several levels, not least of which is that it severely undermines employers' ability to discipline their employees for misconduct in the event that the misconduct has a possible nexus with their union activities.

The Victorian Government has signalled its intention to support the employer's appeal in the High Court. However, unless the decision is overturned, employers will be severely constrained in their ability to discipline employees over any conduct that involves their union activities. In other words, the interpretation of the Fair Work Act's general protections principles embodied in this decision gives blanket protection for all behaviour associated with union activities.

Now that we are starting to see 'success stories' from employees bringing applications, some of them via their union, adverse action claims are expected to become a more prominent feature of the IR environment, posing a myriad of challenges to employers trying to navigate their way around the extremely broad jurisdiction and the expansive scope for employees to mount claims.

The fact that workers have six years to bring adverse action claims where dismissal is not a factor in the claim (and 60 days where dismissal is a factor) will make it even more difficult for employers to defend claims, bearing in mind the jurisdiction comes with a reverse onus of proof on employers.

Fair Work Australia appointments

With the greatly enhanced role of Fair Work Australia compared to its predecessor the Australian Industrial Relations Commission, appointments to the new independent body arguably have a much more profound impact on Australian businesses than was the case under the previous IR laws.

In 2007, then-Opposition Leader Kevin Rudd promised[39]:

[39] Opposition Leader Kevin Rudd, *The 7.30 Report*, ABC, 30 April 2007

I will not stand by and have this body either become the agency of ex-trade union officials or ex-officials from former employer organisations, for that matter. People will be appointed on their merit but I'm not going to turn this into an employment agency for retired union officials from the ACTU. End of story.

Then-Deputy Opposition Leader Julia Gillard also said of the new tribunal[40]:

Appointments will not favour one side over the other.

Despite those earlier assurances, nine out of the 11 most recent appointments to Fair Work Australia have been people with union backgrounds. With Fair Work Australia members handing down some decisions causing unease in the business community, these seemingly partisan appointments are in danger of further undermining business confidence in the new IR laws.

Challenges in the skilled migration area

This year, resource industry employers will face increasing challenges in their ability to attract the right skilled labour for their business, including skilled labour from overseas.

The temporary skilled migration visa is used by the resource industry to satisfy a shortage of skilled labour that cannot be sourced from within the Australian workforce at any given time. The industry does not view this visa as a way of sourcing inexpensive labour or providing an alternative to existing skilled Australian labour.

However, there is no doubt the resource industry is experiencing a skills shortage. While shortages have traditionally existed for professional roles, and demand for those roles continues to be the highest of all the occupational groups, demand for tradespeople and semi-skilled workers is now also approaching the supply limit.

[40] Deputy Opposition Leader Julia Gillard, *National Press Club Speech*, 30 May 2007

As mentioned, a recent report by the National Resources Sector Employment Taskforce (NRSET) predicts the resource industry will experience a shortfall of more than 36,000 tradespeople by 2015 at current recruitment levels.

Posing further challenges for employers is the fact that the number of skilled visa entrants has declined at a time when the economy, and in particular the resource industry, is recovering from the financial downturn and needs workers to fill short-term gaps.

According to statistics released by the Australian Government in late 2010[41], while more 457 skilled migration visa applications were lodged in June 2010 than in any of the 12 months leading up to that, the total number of applications for that 12 months was still 29 per cent lower than the previous year to June 2009 (38,900 applications, down from 54,830). This drop follows the September 2009 commencement of legislative changes under the Migration Legislation Amendment (Worker Protection) Act.

A recent independent economic analysis[42] of Australia's legislative environment in the skilled migration area said:

> *The decline in skilled migrants is undoubtedly a product of the changes to existing skilled migration legislation by the current Federal Government in 2009. The changes have made it increasingly more difficult for employers to recruit skilled tradespeople to supplement Australian workforces.*

Despite the past few years of Federal Government reforms in the skilled migration area, some of which have been beneficial to employers such as improved processing times for 457 visas, challenges remain for employers due to[43]:

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[41] *Subclass 457 Business (Long Stay) State/Territory Summary Report, 2009-10, Financial Year to 30 June 2010*, released by the Department of Immigration & Citizenship
[42] *Australia Market Strategy*, CLSA Asia-Pacific, 31 January 2011
[43] *AMMA submission to the Department of Immigration & Citizenship on the Migration Program for 2011-12 and Beyond*, 7 January 2011

- Onerously high English language requirements which AMMA estimates have locked out of the system 30 per cent of potential overseas applicants that would previously have passed the English language test;
- A lack of flexibility for short-term projects;
- A lack of consistent advice from the Department of Immigration & Citizenship (DIAC) about visa application requirements;
- A lack of transparency about the progress of visa applications;
- A lack of flexibility to cope with a change of employer sponsor;
- Professional applications being treated the same as those from semi-skilled applicants;
- A lack of a streamlined process for 457 visa renewals; and
- The undermining of the ability for employers to reward long-serving staff more generously than 457 visa employees via the introduction of a market rates requirement. Employers are required to pay market rates to 457 visa holders earning less than $180,000 a year. If this threshold was lowered, for example, to around $100,000, it would facilitate greater flexibility for employers to increase payments to experienced and longer-tenured staff.

Enterprise migration agreements (EMAs)

In July 2010, the NRSET recommended the introduction of enterprise migration agreements (EMAs) for 'mega' resource projects in Australia in order to help manage the skills shortage in the resource industry[44].

EMAs are intended to act as an overarching agreement that will allow a project owner to establish the number of skilled overseas workers and occupations required on a project, in a not dissimilar way to how labour agreements currently operate. However, EMAs would be mega resource project-specific.

Among other things, EMAs are intended to streamline labour agreement processing by reducing the negotiating timeframes for a labour agreement.

[44] *Resourcing the Future: NRSET Report*, July 2010, Australian Government

AMMA maintains that the usefulness of EMAs will be maximised only if:

- the definition of a ‘mega’ project is not set so high as to exclude all but a very few projects in Australia;
- they offer the continued ability to recruit semi-skilled workers from overseas, unlike the 457 visa which only allows skilled labour to be recruited;
- any data requirements on workforce planning are sufficiently flexible to recognise the complexity of predicting labour demands on some projects;
- The existing labour agreements stream remains for the resource industry;
- Each client on a project is able to enter into an EMA, not just the project owner;
- EMAs are sufficiently fast-tracked to exceed current processing times for labour agreements; and
- There are no additional impediments imposed on resource industry employers such as training quotas and levies.

On that last point, AMMA accepts that the industry should and does demonstrate a commitment to training but is opposed to a quota system or levies which would introduce further unnecessary red tape.

Superannuation challenges

AMMA supports the Federal Government’s proposed increase of compulsory superannuation contributions to 12 per cent by 2019-20 as a necessary move to increase the retirement savings of Australian workers. However, the debate is yet to be had on how exactly the increases should be funded.

However, an equally important issue is that of concessional contribution caps applying to employees’ voluntary super contributions, which at present are set at $25,000 a year for workers aged under 50.

At present, if workers aged under 50 contribute more than $25,000 a year to their personal super funds, they are slugged with massive tax disincentives. This is a

particular problem for young workers in the resource industry where wages are high and employees may wish to contribute greater amounts to super for shorter periods while they have comparatively few demands on their resources.

AMMA maintains that concessional contribution caps should be permanently returned to the pre-existing rate of $50,000 a year for workers aged under 50. This would make investing more money into retirement savings an attractive proposition for the industry, workers and unions, and would mean less people relying on the aged pension in future.

Conclusion

The resource industry has a proud history of being at the forefront of IR reform and has proven resilient to downturns in the economy. This is in large measure due to the flexibilities the industry has been able to achieve in workplace arrangements over the past two decades. Unfortunately, some of those flexibilities no longer exist under the Fair Work Act.

There is mounting evidence that outdated bargaining and workplace practices have re-emerged under the new IR regime and are threatening industrial stability. International investors are already being warned to expect deteriorated conditions on resource industry projects as a result of Australia's current IR environment, including higher capital expenditure, project delays and lower returns on investment. This should be cause for immediate concern by the government, the Opposition and the Greens.

The next few years will be extremely challenging for employers in the resource industry, due to a combination of factors including the operation of IR laws, changes to Australia's skilled migration program and a looming skills shortage. However, the resource industry can continue to be the most productive sector of the Australian economy if:

- businesses are left to get on with the job without unwarranted interference from third parties;

- unions are forced to behave reasonably during enterprise bargaining negotiations and exhibit some moderation in their wages demands; and
- key changes are made to the IR regulatory environment to ensure that the IR system discourages the current ‘us versus them’ approach to workplace relations.

Both legislative and non-legislative changes should be made to the Fair Work Act and the Fair Work Regulations to remove the current impediments to doing business. These include changes that would moderate union dominance in enterprise bargaining, in particular for greenfield agreements, and provide the ability for employers to strike individual agreements with their employees where both parties consent.

AMMA believes that meaningful IR reform should be the subject of ongoing debate by stakeholders, and the government of the day should be receptive to evidence-based research on the negative economic impacts arising from the operation of IR laws and should act accordingly in the country’s best interests.

Thank you.