Submission to the Fair Work Act Review Panel

On the post-implementation review of the Fair Work Act 2009

By the Australian Mines & Metals Association (AMMA)

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About AMMA

AMMA is the only national employer group representing the interests of the resource industry, having been serving the industry for over 90 years, particularly in relation to workplace relations issues.

AMMA members employ a significant proportion of the 239,100 direct employees in the mining industry as a whole[1], with the industry estimated to be responsible for at least three times as many indirect jobs.

AMMA member companies are engaged in a variety of activities in sectors including:

- Mining;
- Hydrocarbons;
- Maritime;
- Exploration;
- Energy;
- Construction;
- Transport;
- Smelting;
- Refining; and
- Suppliers to those industries.

AMMA's Board is comprised of business leaders from:

- Alcoa of Australia Ltd;
- Esso Australia Pty Ltd and Mobil Oil Australia Pty Ltd;
- Minara Resources Ltd;
- Oz Minerals Ltd;
- P&O Maritime Services Pty Ltd;
- Sodexo Australia and New Zealand
- Newcrest Mining Ltd;
- Orica Ltd; and
- Woodside Energy Ltd.

[1] *Labour Force, Australia, Detailed, Quarterly, November 2011*, ABS, Catalogue no: 6291.0.55.003

Executive summary

Resource industry employer group AMMA welcomes the opportunity to contribute to the review being undertaken by the Federal Government's Fair Work Act Review Panel.

Having represented employers in the resource industry for more than 90 years, AMMA is committed to a legislative framework that encourages and allows for direct, co-operative and mutually rewarding relationships between employers and employees.

Under this philosophy, AMMA has contributed to and fully supports the positive steps taken to achieve a more modern workplace relations system in recent years. Such activities include the move to a modern award system and the continued progress towards a national industrial relations system.

AMMA's submission to the Panel's review of the *Fair Work Act 2009* (Fair Work Act) follows AMMA's involvement in the Senate inquiry into the provisions of the *Fair Work Bill*[2] in June 2008.

During the 2008 Senate inquiry, AMMA outlined its major concerns with the draft legislation and included the following statement:

> *The Fair Work Bill will adversely impact on the sector's ability to achieve strong productivity growth by disturbing existing flexible arrangements, imposing union-related matters in industrial arrangements, disturbing established union demarcations, increasing the prospects of industrial disputation as a direct result of increased regulation of the agreement-making process (and putting at risk record low levels of industrial action in the mining industry) and opening the door to arbitrated outcomes. Restrictive transfer of business rules will also prove to be a disincentive to take on transferring employees, leaving many employees without employment.*

Disappointingly, and to the detriment of employers in every sector of the Australian economy, many of the concerns outlined in AMMA's 2008 submission have since come to fruition.

[2] AMMA submission to the Senate Education, Employment & Workplace Relations Committee inquiry into the Fair Work Bill 2008, 12 January 2008

This current submission examines how the *Fair Work Act* is failing to deliver its stated object to provide a balanced framework for co-operative and productive workplace relations that promotes national economic prosperity.

AMMA has worked in collaboration with RMIT University's Faculty of Economics to examine the *Fair Work Act's* impacts on employers in Australia's resource and construction industries over time. Commencing in April 2010, four comprehensive surveys of the workplace relations experiences of AMMA members have been undertaken at intervals of six months.

The results of the ongoing *AMMA Workplace Relations Research Project* form a detailed body of evidence on the impacts of the *Fair Work Act's* legislative framework on Australian resource industry employers.

This data underpins many of the observations and recommendations made by AMMA in this submission.

The economic impacts of the Fair Work Act

Workplace laws should provide for and facilitate employee engagement and productive, competitive workplaces.

Australia is not isolated from global competition and, as such, its legislative framework must reflect the industrial freedoms of an advanced economy while protecting the lower paid.

The resource industry makes a significant contribution to the Australian economy, not the least of which is to Australia's terms of trade, employment and gross domestic product.

Approximately $316 billion worth of approved minerals, energy and related infrastructure projects are either committed or under construction in every Australian state and territory, with a further $307.6 billion awaiting approval[3].

Whilst the construction of new resource projects and the expansion of existing operations will ensure Australia's resource industry continues to outperform global

[3] Pitcrew Consulting Management Services, *Major Project Labour Market in Australia*

trends, the domestic industrial relations challenges need to be overcome to assist this outcome.

Many current resource projects were given financial approval during the period in which the previous industrial regime was in place. Under that framework, the presence of individual statutory agreements and employer greenfield agreements provided investors with confidence that the large workforces required for significant projects could be appropriately managed.

The escalating labour costs associated with constructing and running these projects has led employers, investors and other industry stakeholders to seriously question the financial viability of future resource projects.

Coupled with the financial impacts of the Clean Energy Bill ("Carbon Tax") and proposed Minerals Resource Rent Tax ("Mining Tax"), this reinforces the importance of establishing statutory working conditions which facilitate maximum flexibility and minimise industrial action.

Key issues

The most concerning aspect of the *Fair Work Act* for the resource industry has been the reduction in the ability for employers to engage and negotiate directly with their workforces, even where this is the overwhelming desire of both the employer and employees.

The *Fair Work Act's* mandatory collective bargaining regime, to the exclusion of all other forms of bargaining, has not assisted in meeting the objects of the new framework.

Instead of advancing Australia's workplace culture, the *Fair Work Act* has facilitated a return to workplace restrictions, demarcations, lower productivity and additional transaction costs for employers and workplaces.

The negative impacts of the *Fair Work Act* on Australian workplaces and employers have become increasingly apparent since the legislation's introduction more than two years ago. Such impacts include:

- Extreme difficulties negotiating new enterprise agreements, given the fact that mandated union involvement is often disproportionate to union density;

- Significant problems with unions exercising their new-found power of veto in greenfield negotiations;

- Impediments to securing productivity/efficiency improvements in exchange for employee benefits and wage increases;

- Expanded union entry rights;

- The failure of individual flexibility arrangements (IFAs) to deliver genuine flexibility;

- The breadth and difficulties associated with the adverse action/general protections provisions;

- The expanded bargaining agenda broadening matters well beyond wages and conditions of employment;

- The increased likelihood of protected industrial action being taken during enterprise bargaining; and

- Having to deal with inter-union relationships on-site and the rising incidence of demarcation disputes.

Each of the above issues creates its own specific workplace relations challenges. However, when combined under a single legislative regime, the broader economic impacts are amplified.

Under the *Fair Work Act*, this hostile IR environment has left employers struggling to retain any effective workplace practices and efficiencies, with productivity advances in many cases unfeasible.

As such, AMMA's submission to the Fair Work Act Review Panel makes 54 recommendations which AMMA deems necessary to restore the industry's faith in Australia's workplace relations system and allow the nation's record investment in resource projects to continue.

Sources used in this submission

Given that AMMA has taken its own approach to compiling this submission, we invite the review panel to visit *Appendix 3: Questions answered in this submission,* to see which of the panel's suggested questions have been answered in which particular chapters of the submission.

In addition to AMMA's own research from member feedback and surveys, the submission uses a variety of information sources as evidence of the pressure points under the current IR legislation. These information sources include:

- Court and tribunal interpretations of the *Fair Work Act*;
- Previous AMMA submissions in relation to the *Fair Work Act* and Australia's IR laws;
- Officially published statistics and employment-related data since the *Fair Work Act* took effect; and
- Commentary on IR and economic issues by governments, industry and other stakeholders.

Included throughout this submission are comments collected over the course of the *AMMA Workplace Relations Research Project* so the panel can hear the words from employers themselves as to what their experiences with the new legislation have been.

Recommendations

This submission makes a series of 54 recommendations for change to Australia's IR system that AMMA believes are essential and must be acted upon to create a legislative framework that will serve Australia's best interests both domestically and internationally. Those recommendations are:

Productivity

1. When lodging enterprise agreements for approval with Fair Work Australia, parties must be required to produce evidence demonstrating that productivity improvements have been properly considered as part of the final agreement.

Internal regulation

2. Workplaces should have the option of voting for an 'internal regulation' model of IR as proposed in AMMA's submission. A two-thirds majority of the workforce would be required to vote in favour of self-regulation, with a safety net and grievance procedures put in place to protect all workers.

3. High-income earners (those with earnings exceeding the current $118,100 unfair dismissal limit) should have the ability to elect to enter into employment arrangements with their employers that allow them to opt out of the collective agreement-making stream under the *Fair Work Act*.

Statutory individual agreements

4. A form of statutory individual agreement in the form of an individual flexibility arrangement (IFA), underpinned by the Better Off Overall Test and the National Employment Standards, should be introduced to facilitate workplace flexibility.

Individual flexibility arrangements (IFAs)

5. Parties to an IFA should be able to agree that, in return for the benefits received under an IFA, no industrial action will be taken during its life.

6. Section 202 of the *Fair Work Act* should be amended so that parties can agree on an IFA prior to employment commencing, especially given the statutory protections that are in place for employees and prospective employees that they must be better off as a result of signing an IFA.

7. The test as to whether an employee is 'better off' under an IFA should remain ongoing, with either party able to invite the Fair Work Ombudsman to make that assessment at any time during the IFA's operation.

8. Section 203(6) of the *Fair Work Act* should be amended to remove the ability for a party to unilaterally terminate IFAs with 28 days' notice. Instead, IFAs should be able to operate for up to four years, with the arrangements able to run for shorter periods where mutually agreed and to be terminated at any time by mutual agreement.

9. Fair Work Australia's 'model' flexibility clause should be the minimum level of flexibility mandated under *Fair Work Act* agreements and awards, with parties able to agree on additional flexibility by consent.

10. Before an enterprise agreement is approved by Fair Work Australia, all parties to the agreement should be obligated to ensure the terms of mandated flexibility clauses are capable of delivering genuine flexibility and productivity benefits under IFAs.

11. Union scrutiny of IFAs after they have been entered into should be prohibited given that it is an invasion of individual privacy and contrary to the intention of the arrangements being 'individual' in nature.

Industrial action

12. Protected industrial action should not be permitted where claims being pursued do not satisfy a public interest test. The public interest test should take into consideration a number of factors including:

- the size of the wage claim being made compared to general industry standards;

- whether there has been any consideration given to productivity improvements or offsets within the workplace;

- the overall cost of the proposed claims to the employer, including allowances and increases in all terms and conditions;

- whether there have been efforts made to genuinely conciliate the claims and whether bargaining has been exhausted; and

- the employer's capacity to meet the wage and condition claims.

13. Section 413 of the *Fair Work Act* should be amended so that protected industrial action is only available as a last resort after a demonstrated attempt has been made to exhaust bargaining options, including mediation.

14. Where notices of protected industrial action are given to the employer and less than 24 hours' notice is given of the action's cancellation, the following provisions should come into effect:

- employers have the right to refuse to accept employees making themselves available for work; and

- no further protected industrial action is able to be taken by those employees for another 90 days.

15. Where there is clear evidence that union officials have recommended unlawful industrial action to their members, the union covering employees engaging in the industrial action should be held accountable for the actions along with its members and be exposed to immediate financial penalties, with offending officials losing the right to represent the union as an official.

16. The legislative mechanisms under which the courts can order work to resume following unprotected industrial action should be reviewed to ensure it is more responsive to the needs of employers who are subject to damaging and costly unlawful industrial action.

17. The definition of 'significant harm' to third parties under s.426(3) should be amended to specifically exclude any reference to the value of the applicant's business undertaking in deciding whether the harm caused by protected industrial action is 'significant'.

18. The requirement that protected industrial action be occurring at the time a 'cooling off' application is made under s.425 should be changed to allow an application to proceed where industrial action is threatened or likely to occur.

19. Employers must be provided with evidence that employees taking protected industrial action are entitled to do so.

Agreement content

20. The 'matters pertaining to the employment relationship' test under s.172 should be restricted to matters pertaining to the employment relationship between the employer and its employees and should not extend to the employer's relationship with its employees' unions.

21. Provisions in agreements that require employers to encourage union membership and/or activity and which fail to meet any objective test of benefit to the enterprise should be prohibited. For example, agreement content related to payroll deductions of union dues; trade union training leave; the provision of on-site facilities for union delegates; and other 'union rights' clauses should be outlawed as they do not pertain to the employment relationship between the employer and its employees.

22. Clauses placing restrictions on the use of contractors should be prohibited.

23. Bargaining representatives should not be able to obtain secret ballot orders for protected industrial action on the assertion they 'believe' they are bargaining for permitted content. The test of whether a bargaining representative is 'genuinely trying to reach an agreement' should rely on them actually bargaining for permitted content, not just believing they are.

Good faith bargaining

24. The provision under s.174(3) conferring default bargaining status on unions should be removed, with the appointment of bargaining representatives subject to specific written nominations by employees, and a copy of that nomination made available to employers.

25. Bargaining representatives should be required to advise all other bargaining representatives that they have status as a bargaining representative in negotiations, as well as the number, identity and geographical location of the employees they represent.

26. The *Fair Work Act* should expressly prohibit union officials from being appointed as individual employees' bargaining representatives unless they are entitled to represent those workers under the union's eligibility rules. Where an officer of a union seeks to act as a bargaining representative, they should at all times be assumed to be representing the union and not acting on an individual basis.

27. The exemption to pattern bargaining that exists under s.412(2) should be removed as it allows a bargaining representative to obtain orders for a secret ballot for protected industrial action as long as it is 'genuinely trying to reach an agreement', despite having served pattern claims on two or more employers. The definition of pattern bargaining should be confined to unions seeking common terms and conditions at two or more enterprises and, as long as that definition is met, pattern bargaining is deemed to be occurring and protected industrial action is not able to be taken.

28. Where the coverage of an enterprise agreement is in dispute, the employers' position with respect to scope should be preferred to the other bargaining representatives' position, unless the employer position is held to be unfair or capricious. The onus should rest with employee bargaining representatives to displace the employer's position as to scope.

Greenfield negotiations

29. Fair Work Australia should, on application by the employer, have the power to make a 'greenfield determination' for a new project where agreement on reasonable terms within a reasonable timeframe cannot be reached. This is a crucial reform for the resource industry. The greenfield determination would be in the form of an industrial agreement measured against the Better Off Overall Test, the National Employment Standards and the relevant modern award to ensure workers are 'better off' under the agreement.

30. Relevant good faith bargaining principles should apply to greenfield negotiations.

Majority support determinations

31. The majority support of all employees (not limited to union members) who will be subject to a proposed enterprise agreement must be obtained before any employees can embark on protected industrial action. A majority should be defined as 50 per cent plus one of the employees to be covered by the agreement.

32. Where majority support is in dispute, the Australian Electoral Commission or Fair Work Australia should, as part of all applications for majority support determinations, conduct a secret ballot to determine whether majority support exists. Union petitions should not qualify as proof of majority support.

33. Protected industrial action should not be available to employees before bargaining has commenced or a majority support determination has been made, contrary to the *JJ Richards* majority Full Bench finding[4].

Right of entry

34. Union rights to enter a workplace should not be solely based on unions' constitutional rules. All of the following conditions should be met before a union official can legally enter a worksite:

[4] *JJ Richards & Sons Pty Ltd v Transport Workers Union; AMMA v TWU* [2011] FWAFB 3377, 1 June 2011

- The union should be a party to an enterprise agreement on the site or be attempting to reach one;

- The union should be required to demonstrate that it has members on that site; and

- Those members should have requested the union's presence.

This would restrict entry under both s.481(1)(a) for the purposes of investigating breaches and s.484(b) for the purposes of holding discussions with members, to cases where unions have actual members on-site rather than just workers that are covered by the union's eligibility rules.

35. There should be no ability for industrial agreements to contain any additional entry rights outside those contained in the *Fair Work Act*.

36. There should be a limit on the number of entry visits that unions can make to worksites that are not for the purposes of investigating suspected breaches. The number of visits for discussion purposes should be capped.

Demarcation disputes

37. Once an employer and union have decided to make a greenfield agreement, there should be no right of entry allowed by other unions even if they have members onsite.

The adverse action provisions

38. The *Fair Work Act*'s adverse action provisions are unjustified and have led to a new era of speculative claims and should be removed in their entirety. The vast majority of these provisions merely duplicate existing state and federal anti-discrimination provisions.

39. In the absence of removing the adverse action provisions in their entirety, an entitlement to a workplace right should have to be the dominant reason for the adverse action alleged to have been taken, rather than one of several factors, for a claim to proceed. Claims should not be able to proceed where

other valid, more significant reasons exist for the adverse action such as poor performance or gross misconduct.

40. The six-year time limit for bringing adverse action claims under s.372 where dismissal is not involved should be reduced to 60 days, the same time limit applying to adverse action claims made under s.365 where dismissal is involved.

41. The application of the general protections to prospective employees and independent contractors is unwarranted and should be removed.

42. The reverse onus of proof on employers should be removed as it encourages non-meritorious claims to be brought by employees and allows claims to proceed further than they otherwise would if the burden of proof rested with the applicant.

43. There should be no 'union activity' exemption from employers' right to take disciplinary action against an employee.

Unfair dismissal

44. Fair Work Australia's determination of whether a dismissal is harsh, unjust or unreasonable should exclude consideration of the consequences of termination of employment for workers and their families.

45. Given the unique and fluctuating circumstances of the building and construction industry, daily hire employees in the industry should be prevented from bringing unfair dismissal claims unless they are dismissed for prohibited reasons. This would involve adding in a new exemption under s.382(b).

46. Employers should only be required to canvas redeployment options for workers they make genuinely redundant within their own enterprises or within their subsidiaries' enterprises. The broad definition of 'associated entity' applying to redeployment obligations on employers should be removed.

Transfer of business

47. Imposing a previous employer's industrial arrangements on a new employer or contractor is counter-productive and should be removed.

48. In the absence of the complete removal of the transfer of business provisions, transferring instruments should only apply for a period of six months rather than having open-ended operation until new arrangements are negotiated.

49. The *Fair Work Act*'s transfer of business provisions should not apply to the building and construction industry in recognition of the fact that work is primarily performed on a contract-by-contract basis.

The National Employment Standards (NES)

50. It should be made clear that the National Employment Standards provisions do not override modern awards in relation to leave loading to be paid upon termination if those awards are silent on the issue or state explicitly or implicitly that leave loading should not be paid on termination.

51. The Office of the Fair Work Ombudsman's advice to parties about workplace relations matters must be legally binding and act as protection against prosecution when parties rely on it.

52. In the alternative, parties who rely on FWO advice that is later found to be in error should be immune from prosecution.

Fair Work Australia

53. There should be more emphasis on having a background in the private sector or industry as a criterion in the selection process for Fair Work Australia appointments.

Ministerial interventions

54. The Workplace Relations Minister of the day should more frequently exercise their powers to intervene in matters concerning the interpretation of the *Fair*

Work Act and when there is a serious industrial dispute causing damage to the Australian economy, particularly where the parties have requested the minister's involvement.

1. AMMA members' experiences

1.1 With the aim of identifying any cultural shift or change in the industry's WR environment if and when it took place, AMMA began systematically surveying its members shortly after all aspects of the *Fair Work Act* took effect.

1.2 Launching the *AMMA Workplace Relations Research Project* in April 2010 in collaboration with RMIT University, AMMA has to date conducted four comprehensive surveys of its members spaced six months apart. The results of each survey have been reported in detail by Dr Steven Kates from the Faculty of Economics at RMIT University.

1.3 The research has revealed a cultural shift taking place since the *Fair Work Act* began, but which arguably started earlier when the new laws were first mooted. AMMA members reported from the very first survey that unions were feeling more empowered under the new legislation and approaching key interactions with employers such as enterprise bargaining and agreement making with a more combative stance.

1.4 The evidence of this cultural shift was clear in the first AMMA survey on the impacts of the *Fair Work Act* conducted in April 2010, with AMMA member companies making the following observations[5]:

> *The unions can be at times very confrontational. This is definitely the case with the blue-collar side of things. They clearly believe they are virtually untouchable and have the backing of the government in the great majority of their actions.*
>
> *We had interruptions at the beginning of the project due to the long period of time it took to negotiate the new agreement. It was frustrating that the new legislation did not prevent the industry from being held to ransom by militant unions.*
>
> *The unions are getting stronger or they think they are and are acting that way. Agreement making is way too hard, disputation and unfair*

[5] *AMMA Workplace Relations Research Project Survey 1 Report*, Dr Steven Kates, RMIT University, April 2010

dismissals are mounting. The balance in the workplace has clearly shifted.

1.5 Also in that survey[6]:

- 55 per cent of respondents said union influence had grown at their worksites since the *Fair Work Act* took effect;
- 35 per cent added that union involvement during that time had been 'unhelpful'; and
- 10 per cent said union involvement was 'extremely unhelpful'.

1.6 One AMMA member even went so far as to say that under the new IR system[7]:

There is more of an 'us and them' mentality. This is something that did not exist under Work Choices.

1.7 This evidence is important because the union campaign against Work Choices held the previous IR system responsible for creating an adversarial IR environment. This was never the case in the resource industry where direct engagement levels and workplace flexibility thrived during that period, as did employee remuneration and benefits.

The new WR environment

1.8 The extensive body of research that AMMA has collected over the past two years makes it clear that the overall WR environment has deteriorated for many resource industry employers following the introduction of the *Fair Work Act*.

1.9 The table below shows how employers' rating of their WR environment changed every six months from April 2010 to October 2011[8].

[6] *AMMA Workplace Relations Research Project Survey 1 Report*, Dr Steven Kates, RMIT University, April 2010
[7] *AMMA Workplace Relations Research Project Survey 2*, Dr Steven Kates, RMIT University, October 2010

How would you describe your current workplace relations environment?

Survey date	Extremely poor (%)	Poor (%)	Less than acceptable (%)	Acceptable (%)	Better than acceptable (%)	Good (%)	Excellent (%)	Index score out of 100
April 2010	0.0	0.0	2.9	4.4	38.2	42.6	11.8	75.9
Oct 2010	1.4	1.4	4.2	29.2	31.9	26.4	5.6	65.1
April 2011	0.0	4.2	9.9	29.6	28.2	23.9	4.2	61.7
Oct 2011	1.2	1.2	10.5	25.6	25.6	30.2	5.8	64.5

1.10 As can be seen from the table above, employers were most happy with their WR environment in early 2010 when the *Fair Work Act* had been operating for just a few months. Employers were prepared to give the new legislation a settling in period and rated their satisfaction with their IR environment with an average index score of 75.9 out of 100.

1.11 By the time the second survey was conducted six months later, there had been a noticeable deterioration in AMMA members' WR environments, with the index score falling more than 10 points from 75.9 to 65.1. There was also a reduction in the number of respondents rating their WR environments in the top three categories of 'better than acceptable', 'good', or 'excellent'.

1.12 This deterioration continued into the third survey when the index score fell again to 61.7. Although it recovered slightly in the latest survey in October 2011 to 64.5 it is still well below the level at which it began.

Employers' early interface with the current system

1.13 It is not only the increased power of unions that has led to problems for employers under the new IR system. The interpretation of the new laws by the federal industrial tribunal Fair Work Australia has at times been problematic and, in AMMA's view, counterproductive to the interests of the economy.

1.14 During the maritime dispute in August 2009, resource industry employer Total Marine Services (represented by AMMA in industry agreement negotiations) went to Fair Work Australia to oppose an MUA application for a secret ballot

[8] *AMMA Workplace Relations Research Project Survey 4 Report*, Dr Steven Kates, RMIT University, October 2011

order for protected industrial action. TMS argued the union's application should be rejected because it was seeking 'outlandish' wage and allowance claims and hence was not genuinely trying to reach an agreement with the employer as required by the *Fair Work Act*.

1.15 The MUA's claims at that stage included one for an increased construction allowance from the existing $87 a day to $500 a day across the industry. The union defended the claim, saying it was reasonable because seafarers deserved wage parity with construction riggers (despite not working as riggers)[9]. The tribunal granted the union's application for a ballot order.

1.16 In January 2010, another 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. In response to the employer's gravely held concerns about the economic impacts of the protracted and prematurely taken industrial action, Fair Work Australia Senior Deputy President Les Kaufman had this to say[10]:

> *... 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?*

1.17 It is experiences and comments like these that cause resource industry employers to have very little faith that the current IR system will support them in their economic endeavours.

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

2. The value of the resource industry to the economy

2.1 At present, there are $316 billion worth of approved resource projects across Australia in the pipeline that are either committed or under construction, plus a further $307.6 billion worth of projects awaiting approval[11]. These include mineral, energy and infrastructure projects in every state. The resource industry as a whole accounted for nine per cent of Australia's GDP at a value of $102.6 billion as of March 2011[12].

2.2 Resource companies that have had input into this submission range from those employing less than 20 workers locally to 100,000 globally. The value of resource projects those companies represent ranges from several million dollars to $43 billion.

2.3 The commencement in 2011 of construction on the Gorgon Project on Barrow Island in Western Australia involved an investment of $43 billion. This is the single largest investment of its kind in Australia and will be an enormous boost to the Western Australian and Australian economies. More than $10 billion in tenders for the project were awarded, with construction well under way.

2.4 During its life, the Gorgon project is expected to:

- Create 3,500 direct construction jobs on Barrow Island and 10,000 direct and indirect jobs during peak construction;
- Create 300 direct jobs on the island during the operational phase;
- Increase the state's gross product by four per cent;
- Boost Australia's GDP by more than $60 billion; and
- See the purchase of $33 billion worth of Australian goods and services.

[11] Pitcrew Consulting Management Services, *Major Project Labour Market in Australia*
[12] *Australian Commodities Statistical Tables*, Vol 18, No 1 March quarter 2011, ABARE

2.5 In addition to the massive Gorgon project, the following table identifies: selected key projects and their status; the expected date of commencement of operations following construction; the estimated capital expenditure; and anticipated employment figures (including for both the construction and operational phases where available)[13].

Project	Company	Status	Expected start-up	Capital expenditure	Additional employment
Ravensworth North	Xstrata	Expansion, under construction	2012	$1.44b	550 (const) 500 (op)
Ulan West	Xstrata	Expansion, under construction	2014	$1.34b	270 (const) 350 (op)
Daunia	BHP Billiton Mitsubishi Alliance (BMA)	New project, committed	2013	$1.65b	450 (const) 300 (op)
Kestrel	Rio Tinto	Expansion, under construction	2012-13	$1.13b	
Goonyella to Abbott Pt (rail) (X50)	QR National	Expansion, under construction	Early 2012	$1.1b	
Hay Point Coal Terminal Phase 3	BHP Billiton Mitsubishi Alliance (BMA)	Expansion, committed	2014	$2.6b	
Gladstone LNG project	Santos/Petronas/ Total/Kogas	New project, committed	2015	$16.5b	5000 (const) 1000 (op)
Gorgon LNG	Chevron/Shell/ ExxonMobil	New project, under construction	2015	$43b	3000 (const) 600 (op)
Kipper gas project (stage 1)	Esso/BHP Billiton/ Santos	New project, under construction	2012	$1.9b	
Macedon	BHP Billiton/ Apache Energy	New project, under construction	2013	$1.55b	300 (const)
NWS CWLH	Woodside Energy, BHP Billiton, BP, Chevron, Shell, Japan Australia LNG	Expansion, under construction	2011	$1.5b	
NWS North Rankin B	Woodside Energy, BHP Billiton, BP, Chevron, Shell, Japan Australia LNG	Expansion, under construction	2013	$5.3b	

[13] ABARES major minerals and energy projects listing for April 2011

Project	Company	Status	Expected start-up	Capital expenditure	Additional employment
Pluto (train 1)	Woodside Energy	New project, under construction	Late 2011	$14b	2000 (const) 150 (op)
Queensland Curtis LNG project	BG Group	New project, under construction	2014	$15.5b	5000 (const) 1000 (op)
Reindeer gas field/Devil Creek gas processing plant (phase 1)	Apache Energy/Santos	New project, under construction	Late 2011	$1.08b	
Turrum	ExxonMobil/BHP Billiton	New project, under construction	2013	$2.8b	
Cadia East	Newcrest	Expansion, under construction	2013	$1.9b	1300 (const) 800 (op)
Chichester Hub	Fortescue Metals Group	Expansion, committed	2013	$1.55b	
Hamersley Iron Brockman 4 project (Phase B)	Rio Tinto	Expansion, committed	2013	$1.13b	
Hope Downs 4	Rio Tinto, Hancock Prospecting	New project, under construction	2013	$1.65b	
Jimblebar mine and rail (WAIO)	BHP Billiton	New project, committed	2014	$3.5b	
Karara Project	Gindalbie Metals/Ansteel	New project, under construction	2011	$2.6b	500 (const) 130 (op)
Sino Iron Project	CITIC Pacific Mining	New project, under construction	2011	$5.4b	4500 (const) 800 (op)
Western Australian Iron Ore Rapid Growth Project 5	BHP Billiton	Expansion, under construction	2011	$5.8b	
Cape Lambert port and rail expansion	Rio Tinto/Robe River	Expansion, under construction	2013	$3.2b	
Port 55	Fortescue Metals Group	Expansion, under construction	2013	$2.5b	
WAIO optimisation (port blending and rail yards)	BHP Billiton	Expansion, committed	2014	$1.7b	

Project	Company	Status	Expected start-up	Capital expenditure	Additional employment
Argyle underground development (diamonds)	Rio Tinto	Expansion, under construction	2013	$1.65b	250 (const) 500 (op)
Worsley refinery efficiency and growth project	BHP Billiton, Japan Alumina, Sojitz Alumina	Expansion, under construction	2011	$2.3b	4000 (const) 100 (op)
Yarwun alumina refinery expansion	Rio Tinto Alcan	Expansion, under construction	2012	$1.96b	1200 (const) 300 (op)

2.6 The above projects are a proportion of resource projects across Australia, representing those with a capital expenditure of $1 billion or more that are either committed or already under construction.

2.7 This shows the enormous significance of the resource industry in terms of export revenue and domestic capital investment, both of which have the potential to either positively or negatively affected by the IR system of the day.

Low levels of disputes coupled with high wages

2.8 An extremely high performing industry economically, the resource industry has experienced historically low levels of industrial disputes and the highest average weekly earnings of all industries. This has been achieved with the support of a modern IR framework over the past 20 years.

2.9 By way of comparison, the number of working days lost per thousand employees to industrial disputes across all industries in the September 2011 quarter was 101.3, whereas the mining industry (excluding coal mining) lost zero days to industrial disputes in the quarter[14]. In coal mining, the figure was 8.5 days lost per thousand employees.

2.10 The mining industry also boasts the highest average weekly full-time adult ordinary time earnings of any industry. Average weekly earnings in all

[14] *Industrial Disputes, Australia, September 2011*, ABS, Catalogue number 6321.0.55.001, published on 1 December 2011

industries (both public and private sector) were $1,322.60 a week (or $68,775.20 a year) in August 2011. In the private sector alone, average earnings were $1,296.70 a week (or $67,428.40 a year). In the mining industry, average weekly earnings were $2,161.40 a week[15] (or $112,392.80 a year), almost double the average earnings in the rest of the private sector.

Union density levels

2.11 The *Fair Work Act* provided the union movement with unparalleled influence in the workplace which, in AMMA's view, goes well beyond that justified by current union density. Union membership in Australia is sitting at just 18 per cent of the total workforce (and 14 per cent of the private sector workforce)[16]. This means that 82 per cent of Australian workers and 86 per cent of private sector workers have chosen not to belong to a union, although the pressure from various quarters to do so is mounting every day.

2.12 In the mining industry, the proportion of employees that have chosen not to belong to a union is:

- 87 per cent in non-metallic mineral mining and quarrying;
- 86 per cent in metal ore mining;
- 85 per cent in exploration and other support services;
- 81 per cent in oil and gas extraction; and
- 50 per cent in coal mining.

2.13 Yet the *Fair Work Act* has legislatively promoted union involvement in our IR system which is disproportionate to an 18 per cent membership level.

2.14 AMMA agrees that where a majority of workers on a site have chosen to belong to a union and be represented by that union, that union should be

[15] *Average Weekly Earnings, Australia, August 2011*, ABS, Catalogue no 6302.0, published on 17 November 2011
[16] Australian Bureau of Statistics, *Employee Earnings, Benefits and Trade Union Membership, August 2010*, published in May 2011. Catalogue number 6310.0

recognised as a legitimate representative of that workforce. However, the *Fair Work Act* goes much, much further than that.

3. Wages growth

"I believe the expectation for larger increases is growing and this results in higher turnover if not realised." [17]

3.1 Wages and labour costs in Australia's resource industry have escalated at a higher rate than the official data would suggest.

3.2 The problem is that when it comes to labour costs, Australian employers are facing a 'double whammy'. The resource and construction industries in particular are in the midst of very serious skills shortages which are artificially driving wages up. At the same time, the *Fair Work Act* has given unions increased bargaining power which they use to obtain the highest wages and conditions possible for their members, in disregard to long-term consequences.

3.3 There are, of course, other factors contributing to wage escalations than the workplace relations laws of the day, the skills shortage and market factors including demand for products from overseas. However, AMMA believes it is important to paint a realistic picture of what is happening to wages and labour costs under the current IR laws, particularly if the Federal Government is using those figures, as it has, to claim its IR system is working to control wages growth.

3.4 The latest official data on average annualised wage increases in federal enterprise agreements states that private sector increases are currently running at 3.8 per cent a year[18].

3.5 Greenfield agreements across all industries have experienced an official wage inflation rate of 4.8 per cent a year (for agreements lodged in the June 2011 quarter), and non-greenfield agreements of 4 per cent for agreements lodged in the quarter.

[17] AMMA member company responding to AMMA Workplace Relations Research Project Survey 4, October 2011, reported by Dr Steven Kates, RMIT University
[18] DEEWR Trends in Federal Enterprise Bargaining report, June Quarter 2011

3.6 For the mining industry, the official figures put wage inflation at 4.6 per cent a year for all agreements lodged in the June 2011 quarter, and at 4.2 per cent for all agreements currently in operation.

3.7 In the construction industry, the official data puts wage inflation at 5.2 per cent a year for agreements lodged in the June 2011 quarter and at 4.8 per cent a year for all current agreements.

3.8 The trouble with the official data is that it only takes into account the quantum annual pay rises negotiated - the 'headline' wages figure. It ignores allowances and other benefits that equate to significant take-home pay increases for workers and significantly increased labour costs for business. In the resource and construction industries, those other labour costs can far outstrip those reported in the official data.

3.9 For example:

- **In 2009/10 wage negotiations,** offshore oil and gas workers secured a $200 a day construction allowance (up from $87 a day), which would not have shown up in the official figures, on top of the 37 per cent quantum pay rises granted over less than two years. A further week's annual leave was also conceded but is not included as part of wage cost calculations.

- **An AMMA member in the Tasmanian mining industry** negotiated a three per cent a year pay rise with its blue-collar unionised workforce, but this came with a higher duties rate, an extra three per cent of annual salary for the existing workforce at the outset of the agreement, a production bonus of one per cent of annual salary, plus an undertaking to pay any additional hours worked if, under the *Mining Industry Award 2010*, the employees would have been better off in terms of penalty rates. Only the quantum pay rise would have been recorded in the official data.

- **Another AMMA member in the Western Australian oil and gas industry** negotiated annual pay rises of 4.5 per cent a year in two agreements covering blue-collar non-unionised workers, along with a massive 100 per cent retention bonus for workers who stayed in their jobs for three

years. And that was in return for no productivity offsets. Again, not recorded in the official statistics.

- **Another AMMA member in the Queensland mining industry** awarded a five per cent annual salary increase to both its white-collar and blue-collar unionised workforces on top of an extra one per cent of annual salary in income protection insurance.

- **Another AMMA member in the Queensland coal mining industry** negotiated pay rises ranging from 3.5 per cent to 4.5 per cent in three agreements covering its unionised blue-collar workforce. But those agreements came with commitments to pay personal leave at total salary rather than base salary in certain circumstances.

- **Another AMMA member in the Queensland mining services industry** paid wage increases of 3.5 per cent to its blue-collar unionised workforce in an agreement that also included redundancy entitlements of 50 per cent of annual salary.

- **Another AMMA member in the NSW mining services industry** agreed to quantum annual pay rises of 4.5 per cent in an agreement covering its blue-collar unionised workforce, in addition to time in lieu provisions equating to two per cent of salary and potential bonuses equating to another 2.5 per cent.

- **Another AMMA member operating nationally in the transport industry** paid 4 per cent increases to its blue-collar unionised workforce as well as 10 per cent in superannuation contributions in the first year, 11 per cent in the second year and 12 per cent in the third year. In another blue-collar agreement, the company paid 5 per cent annual wage rises along with increased housing assistance, meal allowances, the introduction of two days' travel for compassionate leave, plus the superannuation increases included in the other agreement.

- **Another AMMA member operating nationally in mineral processing** agreed to pay its non-unionised blue-collar workforce 3 per cent a year but also committed to a salary review that would involve pay rises of up to 10 per cent following a 'salary levelling' exercise.

- **Another AMMA member in the Tasmanian mining services industry** paid its white-collar workforce 5 per cent in annual wage increases as well as an extra week's annual leave equating to 2 per cent of salary.

- **Another AMMA member in the Western Australian gold mining industry** gave more than 10 per cent a year in pay rises to its blue-collar non-unionised workforce along with a move from a 56-hour week to a 42-hour week with possible overtime. While the workforce was not overly unionised, the AWU was the bargaining agent.

- **Another AMMA member in the Queensland metalliferous mining industry** paid its blue-collar unionised workforce five per cent a year as well as an extra travel allowance equating to one per cent of salary plus extra salary increases based on a new classification structure equating to one per cent of salary in the first year of the agreement.

- **An AMMA member in the Victorian oil and gas industry** paid its unionised blue-collar workforce five per cent a year under a three-year deal that also included a move to a 15-week roster with paid training and study leave, redundancy entitlements and 14 per cent employer superannuation contributions.

- **Another AMMA member in Queensland metalliferous mining** paid its blue-collar non-unionised workforce around three per cent wage increases a year for three years together with a change of standard roster from 14/7 to 8/6 with no pay reduction (equating to a 6.33 per cent wage rise) as well as increased redundancy entitlements.

- **Another AMMA member in the Victorian construction industry** gave pay rises of five per cent a year under three blue-collar unionised agreements, one of which also included all overtime being paid at double time, while the others included sick and accident insurance equating to 2.4 per cent of salary.

- **Another AMMA member in the Queensland coal mining industry** paid between four and six per cent pay rises to its blue-collar unionised workforces, with those agreements also including retention schemes equating to four per cent and five per cent of annual salary.

3.10 Almost without exception, the above generous wages and conditions outcomes for workers were received without any productivity offsets.

3.11 As previously mentioned, the mining industry currently boasts the highest average weekly full-time adult ordinary time earnings of any industry, at $2,161.40 a week[19] (or $112,392.80 a year).

Current and future wage claims

3.12 Recently, the MUA rejected claims from former Prime Minister Paul Keating that previous wage explosions nearly destroyed Australia's economy and that continued exorbitant claims by maritime unions threatened to do likewise[20]. The union confirmed its upcoming pay claim would be for six per cent a year but said it would not rule out claims for 30 per cent given that was the level of increase Prime Minister Julia Gillard had just received. The union justified its claims for such exorbitant increases by saying its members were operating in a 'boom' industry. The 30 per cent was also the wage figure achieved in the vessel operator industry in 2010.

3.13 All this at a time when the Consumer Price Index (CPI) is running at 3.1 per cent[21].

The current skills shortage

3.14 There is no doubt the Australian resource industry is in the midst of a very serious skills/labour shortage. As the industry continues to strive for greater efficiencies and to take advantage of the benefits that improved technology can offer, demand for highly skilled employees is only set to grow.

3.15 A survey of 200 AMMA members in May 2011 revealed that 86 per cent were at that time experiencing a skills shortage.

[19] *Average Weekly Earnings, Australia, August 2011,* ABS, Catalogue no 6302.0, published on 17 November 2011
[20] *Union defiant on pay push threat, The West Australian* newspaper, January 3, 2012
[21] *Consumer Price Index, Australia, December 2011,* Catalogue number 6401.0, ABS, published 25 January 2012

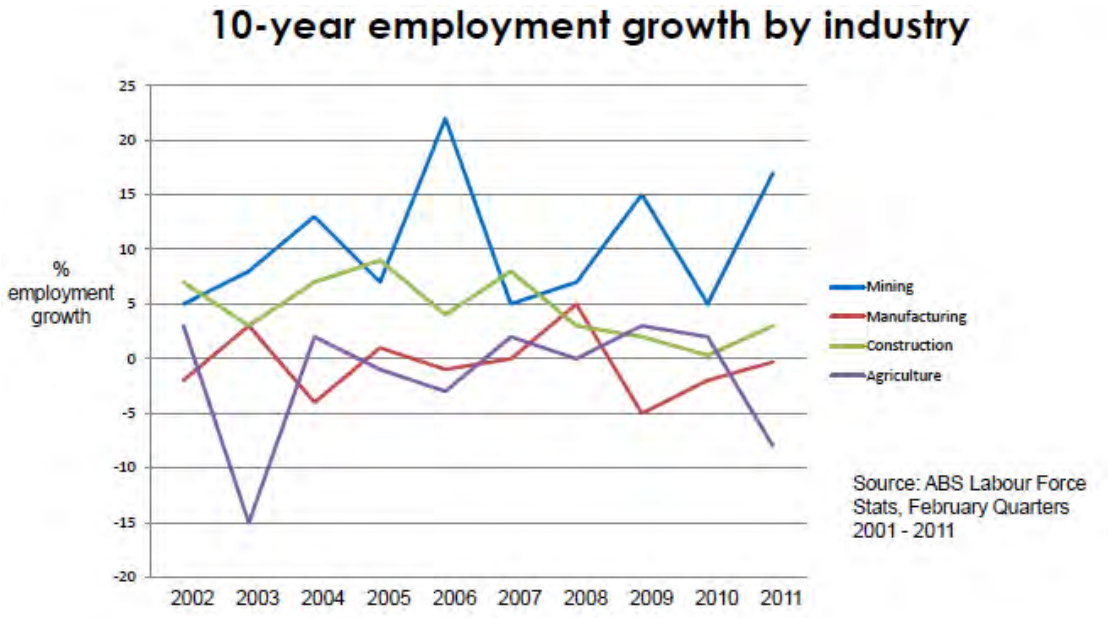
3.16 AMMA members are, in particular, experiencing a shortage of engineers, closely followed by tradespeople, particularly for the construction phases of projects.

3.17 This has also contributed to wages pressure on employers to attract and keep the skilled staff they need for their projects.

Employment growth in mining

3.18 Just six years ago, the mining industry employed less than half as many people as it does now, with a direct workforce of just 107,500 in February 2005. The mining industry boasts a direct workforce of 239,100 as of November 2011[22].

3.19 The graph below shows how employment growth in the mining industry has tracked against other key industries like construction and manufacturing over the past 10 years.



3.20 Growth in mining industry employment has far outstripped that in the other industries shown, again adding pressure on resource industry employers to attract enough labour by offering superior terms and conditions.

[22] *Labour Force, Australia, Detailed, Quarterly, November 2011,* ABS, Catalogue no: 6291.0.55.003

3.21 It is also often overlooked that different parts of the resource industry sometimes have to compete with themselves for skilled labour.

3.22 It is particularly difficult for AMMA members operating onshore trying to compete with wages in the offshore construction sector where casual daily rates of pay have risen by 37 per cent since July 2009.

3.23 In an October 2011 survey of AMMA members[23]:

- 27.5 per cent of respondents said they had experienced a flow-on to their enterprise of recent wage and allowance outcomes in the offshore oil and gas industry;
- 36.2 per cent said they had not yet seen a flow-on; and
- 36.2 per cent said it was 'too soon to tell'.

3.24 Respondents also had this to say:

> *The expectation is that those higher wages will flow on to production sites.*

3.25 Despite employers' best efforts to attract and retain, the resource industry is just as susceptible as any other to having to compete for labour, including competing for skilled construction labour with major infrastructure projects. Between 2010 and 2012, more than $70 billion worth of major non-resource infrastructure projects will get the go-ahead including rail, road, port, hospitals and sporting arenas. All of these projects will be competing for scarce labour with new and established resource projects.

Employee expectations

3.26 Another reason for increasingly high wages and conditions outcomes is the increased expectation of employees for high wages because of the current resources 'boom'. This expectation is fed by unions seeking to gain or keep those workers as members.

[23] AMMA Workplace Relations Research Project Survey 4 Report, October 2011, by Dr Steven Kates, RMIT University

3.27 As one AMMA member observed[24]:

> *Employees have a perception that they are entitled to high wage increases – much higher than the CPI or what other collective federal agreements are paying – without trading off productivity increases.*

3.28 In an April 2011 survey of AMMA members[25], respondents were asked how the rate of wage increase under *Fair Work Act* agreements compared to that payable under previous workplace agreements:

- 17.8 per cent said the rate of wage increase under *Fair Work Act* agreements was 'significantly higher';
- 26.7 per cent said it was 'slightly higher';
- 51.1 per cent said it was 'about the same'; and
- 4.4 per cent said it was 'significantly lower'.

3.29 Asked what the reason was for the higher rate of wage increase in agreements under the *Fair Work Act*, one AMMA member cited:

> *A shortage of skilled labour; prolonged EBA negotiations; more aggressive union leadership which promulgated and promoted unreasonable expectations amongst their members. Couple this with large projects pending in the offshore industry and nervous companies, and the Fair Work Act terms which seemed at the time to be biased towards the unions, I believe all these factors contributed to the excessive wages realised in the last agreements.*

3.30 Labour costs under the *Fair Work Act*, albeit in an environment where strong competition exists for labour, are escalating out of control. As AMEC business

[24] AMMA Workplace Relations Research Project Survey 4 Report, October 2011, by Dr Steven Kates, RMIT University
[25] AMMA Workplace Relations Research Project Survey 3 Report, April 2011, by Dr Steven Kates, RMIT University

leader for global mining and energy services, Tony Cruddas, recently pointed out, labour costs in Australia's resource sector are the highest in the world[26].

[26] *Labour costs hit gas sector,* Australian Financial Review, 31 January 2012

4. Productivity

"We have lost productivity improvements previously negotiated under the Workplace Relations Act."[27]

4.1 The objects of the *Fair Work Act* of delivering greater productivity in enterprise bargaining are not being met under the current framework.

4.2 In the experience of resource industry employers, productivity improvements can often not even be discussed let alone achieved during enterprise negotiations. Productivity improvements are particularly elusive in greenfield agreements, with many AMMA members reporting agreeing to things just to get a greenfield agreement off the ground.

4.3 Back in March 2007, the Labor Opposition promised that its IR policies would be 'focused on the big drivers of productivity'[28] and that 'enterprise collective bargaining is an important driver of productivity and a key feature of our policy'[29].

4.4 The fundamental disconnect here is that despite the *Fair Work Act's* objectives, there is no requirement to link enterprise agreement outcomes to productivity improvements. Nor is there any requirement for Fair Work Australia to ask the parties to an enterprise agreement whether productivity improvements have been considered before approving an agreement. Perhaps the Federal Government expected this to happen automatically?

4.5 In the 2009-10 vessel operators' dispute in the offshore oil and gas industry, maritime unions were able to secure, on the back of ongoing strike action, 37 per cent pay rises plus a $200 a day construction allowance in return for zero productivity improvements.

4.6 Maritime Union of Australia (MUA) national secretary Paddy Crumlin went so far as to boast that the massive pay rises won by his offshore oil and gas members were secured without any productivity trade-offs whatsoever.

[27] AMMA member company responding to AMMA Workplace Relations Research Project Survey 3, April 2011, reported by Dr Steven Kates, RMIT University
[28] Deputy Opposition Leader Julia Gillard, Australian Workplace Relations Summit, 14 March 2007
[29] Deputy Opposition Leader Julia Gillard, Speech – Melbourne Press Club – 25 June 2007

Crumlin was quoted in *The Australian* as saying that employer groups like AMMA who dared suggest productivity should have been part of the deal were 'dinosaurs'. Crumlin has since said he actually meant productivity improvements were built into everything the maritime workers did and so should not be relegated to something parties traded off during bargaining once every few years.

4.7 But whichever way you look at it, these sorts of exorbitant wage and condition outcomes are contrary to the Labor Government's promises that its new IR system would be a strong driver of productivity.

4.8 Presumably, enterprise level bargaining under the *Fair Work Act* was meant to make the employees of an enterprise feel like they had a direct interest in its success; or motivate them by making wage increases conditional on better work (this has not happened under the *Fair Work Act*); or by giving the bargaining parties a better understanding of each other's needs (this has also not happened under the *Fair Work Act* due to third-party interference).

4.9 However, the other side of the enterprise bargaining coin, particularly under the *Fair Work Act*, is the increased likelihood of productivity-damaging industrial action, and the potential for increased hostility and mistrust between the parties, again due to third party interference in wage negotiations.

4.10 The reality is that the overwhelming majority of resource industry employers have not been able to achieve productivity increases in exchange for wage increases during enterprise bargaining under the *Fair Work Act*, even where those wage increases are exorbitant by community standards.

4.11 According to AMMA's research, 82.6 per cent of AMMA members that have tried to negotiate productivity improvements in exchange for wage increases under the *Fair Work Act* have not been able to do so[30].

4.12 And while there is no directly measurable link between productivity and the IR framework, the perception of resource industry employers is that labour productivity has fallen over the past two years corresponding with the introduction of the *Fair Work Act*.

[30] AMMA WR Research Project Survey 3 report, April 2011, by Dr Steven Kates, RMIT University

AMMA's own research

4.13 In the first survey conducted of AMMA members under the *AMMA Workplace Relations Research Project* in April 2010, employers' perceptions of labour productivity were at an index score of 66.7 out of 100 as the table below shows. While that was not an overly high score to begin with, it declined to 61.3 in the next survey in October 2010 and again to 56.7 in the following survey in April 2011. The index score rose slightly in October 2011 to 59.5 but remains well below the level recorded in the initial survey 18 months earlier and well below what would be considered good levels of labour productivity.

What is your perception of the current level of labour productivity at your worksite(s)?

Survey date	Extremely low (%)	Quite low (%)	Low (%)	Acceptable (%)	High (%)	Quite high (%)	Extremely high (%)	Index score out of 100
April 2010	0.0	4.6	7.7	16.9	30.8	33.8	6.2	66.7
Oct 2010	0.0	0.0	8.8	38.2	30.9	20.6	1.5	61.3
April 2011	0.0	2.9	20.0	28.6	32.9	14.3	1.4	56.7
Oct 2011	1.2	3.5	11.6	31.4	31.4	15.1	5.8	59.5

4.14 As one AMMA member said[31]:

> *Even though union representation is only a very small percentage of our workforce, agreements can decrease productivity through restrictions while very large wage increases are negotiated.*

4.15 Not only is there a lack of any productivity aspect to most wage claims, AMMA members are reporting productivity levels starting to slip due to poor morale fuelled by union influence and because workers are encouraged to believe they can get away with doing less under the new system.

4.16 One AMMA member went so far as to say[32]:

> *Because certain unions feel they have the backing of the government in all they do and say and that they will be supported by the present legislation, their members believe they are able to be less productive*

[31] AMMA WR Research Project Survey 3 report, April 2011, by Dr Steven Kates, RMIT University
[32] AMMA WR Research Project Survey 1 report, April 2010, by Dr Steven Kates, RMIT University

> *than previously without fear of consequence. This cannot be said for all as some are still professional in their approach to their labour but they can be made outcasts for their efforts.*

4.17 What all this means is that not only is productivity not being enhanced by enterprise bargaining under the *Fair Work Act,* contrary to Labor Government promises, but in some cases it is actually going backwards.

What the experts say

4.18 The Productivity Commission recently said that companies' productivity performance had the most potential to be influenced by policy settings that allowed flexibility, i.e. which provided 'the scope for organisations to make changes in order to respond to market pressures'[33]. AMMA maintains this type of workplace flexibility is becoming increasingly challenging to achieve under the *Fair Work Act*.

4.19 According to Productivity Commission chairman Gary Banks, the policy areas that are likely to be the most successful at promoting flexibility and productivity include the IR policies of the day:

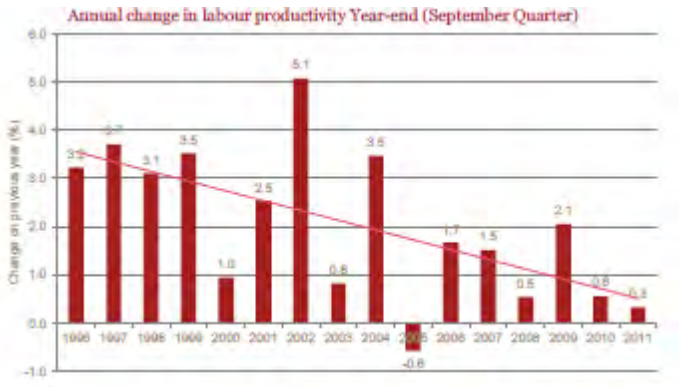
> *Given the importance of organisational change to innovation and productivity throughout the economy, labour market policies and industrial relations regulation in particular are clearly one important candidate.*

4.20 The economic commentators agree that, quite aside from the introduction of the *Fair Work Act* in July 2009, labour productivity has now slumped to one of its lowest points since the mid-1990s[34].

4.21 Labour productivity grew by just 0.3 per cent in the 12 months to September 2011, the worst outcome in many years and better only than that achieved in

[33] Industry assistance in a 'patchwork economy' by Gary Banks, Chairman, Productivity Commission, November 2011
[34] *Productivity dive not our fault: Swan*, Australian Financial Review, 12 December 2011

2004-05, which was one of the weakest years for productivity gains since 1996[35]. This is demonstrated in the graph below.



4.22 The PricewaterhouseCoopers (PwC) "Productivity Scorecard"[36] also noted that productivity in mining and utilities had plunged in the past five years, with labour productivity in those industries declining by almost 28 per cent since 2006.

4.23 As the graph below demonstrates, the mining industry experienced negative productivity growth of 2.5 per cent in the September 2011 quarter alone.

4.24 Whichever way you look at it, mining industry labour productivity is now well below the all-industries level and is actually dragging state productivity levels down in resource-rich states like Queensland[37].

4.25 Something needs to be done, including changing the IR laws to ensure more flexibility is given to employers to respond to changing market conditions, but

[35] PricewaterhouseCoopers 'Productivity Scorecard', December 2011
[36] Ibid.
[37] Ibid.

also to apply some form of pressure on unions and employees to temper their wages and conditions demands and to outlaw agreement content that does nothing to enhance the productivity of an enterprise but serves only to further entrench union power and influence.

Recommendations

4.26 When lodging enterprise agreements for approval with Fair Work Australia, parties must be required to produce evidence demonstrating that productivity improvements have been properly considered as part of the final agreement.

5. The case for internal regulation

> *"We have observed a greater tendency for unions to involve themselves in matters on-site and limit direct discussion with employees, e.g. advising members to refuse to provide information on incidents to management."*[38]

5.1 The *Fair Work Act* has impeded direct relationships between employers and employees by imposing a mandated role for unions in agreement making.

5.2 It has also enhanced the role of Fair Work Australia and the industrial courts to review and constrain legitimate management decision-making.

5.3 AMMA maintains that where organisations and their employees have attained a high level of trust through their WR systems and methods of management, they should be free to choose to work directly with each other under an 'internal regulation' model of IR and not be subject to any mandated interference by third parties such as unions and industrial tribunals.

5.4 Following the implementation of the *Workplace Relations Act* 1996 and the Work Choices reforms of March 2006, resource industry employers had a significant capacity to deal directly with their employees either as a collective or individually without any mandated role for unions or industrial tribunals in setting wages and conditions.

5.5 The reduced complexity in agreement-making and processing introduced by the 2006 amendments also greatly enhanced the capacity of enterprises to establish industrial agreements that incorporated current pay and conditions and the statutory minimum standards, but which otherwise enabled organisations to develop high levels of trust to facilitate a shift towards internal regulation.

5.6 The subsequent introduction of the *Fair Work Act* in July 2009 and January 2010 had the effect of dragging many organisations into a more bureaucratic and less direct management style and taking them further away from the ideal of self-regulation.

[38] AMMA member company responding to AMMA WR Research Project Survey 1, April 2010, reported by Dr Steven Kates, RMIT University

5.7 Under the *Fair Work* reforms, historically effective methods of fostering direct employee engagement were removed:

- New AWAs have been abolished;
- ITEAs were only able to be made for a transitional period;
- Access to employee (non-union) collective agreements has been severely curtailed; and
- The existence of a single union member on-site now guarantees a union dynamic in the workplace.

5.8 AMMA believes that legislation that removes easy access to statutory individual agreements encourages a non-representative union presence in the workplace and leads to problems with direct engagement levels between employers and employees.

5.9 AMMA's proposed model of internal regulation of IR arrangements and the associated benefits this can offer is contrasted with the evidence of many AMMA members that increased union involvement in the workplace under the *Fair Work Act* has served to make direct engagement more difficult. Unions' presence is viewed in some circumstances as creating conflict between management and workers in order to justify their own existence and create a business case for employees' continued membership.

5.10 One AMMA member identified the following problems when asked to list the shortfalls in the IR environment under the *Fair Work Act*[39]:

> *Interference by unions resulting in productivity loss, decreased employee engagement, decreased preferred culture, increase in negativity, increased workload for HR.*

5.11 AMMA has tracked members' perceptions of direct engagement levels with their employees under the *Fair Work Act* since April 2010. The table below shows the results[40].

[39] AMMA member company responding to AMMA WR Research Project Survey 3, April 2011, reported by Dr Steven Kates, RMIT University

How would you describe the current level of direct engagement with your workforce?

Survey date	Extremely low (%)	Quite low (%)	Low (%)	Acceptable (%)	High (%)	Quite high (%)	Extremely high (%)	Index score out of 100
April 2010	0.0	1.6	3.1	29.7	20.3	32.8	12.5	**69.5**
Oct 2010	0.0	1.5	4.5	34.3	19.4	32.8	7.5	**66.7**
April 2011	0.0	2.8	7.0	35.2	29.6	19.7	5.6	**62.2**
Oct 2011	1.2	1.2	8.5	32.9	29.3	26.8	0.0	**61.4**

5.12 As you can see, employers' index scores for the levels of direct engagement with employees have declined every six months for resource industry employers since the *Fair Work Act* began.

5.13 In April 2010, levels of direct engagement were rated at an index score of 69.5, which six months later dropped to 66.7, then to 62.2 then to 61.4 in October 2011.

5.14 Comments from AMMA members as to what has contributed to that decline are as follows[41]:

> *Union involvement in all levels of decision making impedes genuine employee/employer relationships.*
>
> *There is sometimes artificial conflict.*
>
> *Our employees usually believe union reps over management reps.*
>
> *We have had to deal with the discontent created by lies.*
>
> *It has been time consuming to respond to the many challenges by the union; also time consuming to meet with employees to explain fact from fiction.*

5.15 And[42]:

[40] AMMA WR Research Project Survey Report 4, October 2011, Dr Steven Kates, RMIT University
[41] AMMA member company responding to AMMA WR Research Project Survey 4, October 2011, reported by Dr Steven Kates, RMIT University
[42] AMMA member company responding to AMMA WR Research Project Survey 2, October 2010, reported by Dr Steven Kates, RMIT University

Direct engagement has deteriorated due to a drop in morale.

There has been growing union interference in the workplace.

5.16 Particular problems arising from third-party involvement at the workplace that have been experienced by AMMA members under the *Fair Work Act* include[43]:

Unions creating more major issues from minor matters.

Greater contact on trivial issues. Actions without all the facts.

Unnecessary disputes and issues.

5.17 One real outcome under the *Fair Work Act* has been the reduced capacity of employers to deal directly with their own employees.

5.18 The labour movement's position, which has been adopted to a large extent by the Federal Government in its workplace laws, assumes an inherent inequality of power between employer and employee which is said to require the involvement of third parties (unions and tribunals) to balance the relationship.

5.19 Despite the *Fair Work Act*'s focus on collective arrangements and third party involvement, AMMA maintains there is considerable merit in introducing an option of internal IR regulation for those organisations that have shown they and their employees have the integrity and leadership capacity to manage their own IR regulation. The economic imperatives to create better and more productive workplaces will of course remain for those organisations.

5.20 The adoption by all political parties of a legislative policy that espouses both individual and collective agreements with safeguards would also do much to mitigate the swings in the IR pendulum across the political cycle and the attendant transaction costs, uncertainty and waste that continual legislative change generates.

[43] AMMA member company responding to AMMA WR Research Project Survey 2, October 2010, reported by Dr Steven Kates, RMIT University.

Case studies

5.21 AMMA's *Beyond Enterprise Bargaining* report published in July 1999[44] first proposed a model of internal regulation to actively promote effective leadership management systems and HR practices. The aim was to ensure Australian enterprises were well-placed to meet the challenges of a competitive global environment.

5.22 That report also contained the AMMA Employee Relations Charter (*see Appendix 1 to this submission*), which set out the principles and values that high performance workplaces would be encouraged to strive towards in order to successfully internally regulate their employee relations arrangements. The components of AMMA's internal regulation model were later fully detailed in a 2000 discussion paper[45] and again in a September 2007 research paper[46], citing strong support for an internal regulation model within the AMMA membership.

5.23 As part of those exercises, AMMA conducted a number of case studies of its members to look at the impact of third party union involvement on employee engagement and organisational effectiveness[47]. AMMA found that where third parties had greater involvement in controlling the organisation and the execution of work, there was often an adverse effect on levels of employee engagement. In short, union involvement in decision-making processes meant many companies found it difficult to implement changes in working conditions and practices within a reasonable timeframe, if they were able to do so at all.

5.24 For example:

- **An attempt by smelter Southern Copper** in the early 1990s to improve its performance by investing in and introducing new technologies and reducing employee numbers through voluntary redundancies was met

[44] *Beyond enterprise bargaining: the case for ongoing reform of workplace relations in Australia,* AMMA paper, July 1999
[45] *A model of internal regulation of workplace employee relations,* AMMA discussion paper, 2000
[46] *Employee Engagement – A lifetime of opportunity: An analysis of the employee engagement experiences of AMMA members using the Four Quadrant Model of Employee Relations and Organisational Effectiveness,* AMMA Paper, September 2007
[47] AMMA submission to the Senate Education, Employment and Workplace Relations Committee inquiry into the Fair Work Bill 2008, 12 January 2008

with union opposition[48]. As a result, it achieved minimal increases in performance and failed to achieve improvements in employee engagement levels. Following a 30-day strike, the plant announced its closure.

- **Comalco Bell Bay,** also a smelter under pressure to increase performance, was far more successful. A move towards direct relationships with its employees was instrumental in improving its communication and leadership capability and resulted in rapid improvement in its performance. The smelter's lost time injury frequency rate fell by 60 per cent; off specification metal fell from 28 per cent to seven per cent; and overtime ceased to be necessary. Between 1999 and 2000, absenteeism halved and tonnes per annum produced grew from 122,000 to 150,000.

5.25 The stories of Bell Bay and Southern Copper highlight the importance of building effective relationships between employers and employees to effect smooth workplace change where it is necessary for the success of the enterprise. While AMMA acknowledges employee engagement can be achieved where there are established working relationships with unions, our research highlights that those relationships are hard to maintain and invariably become adversarial. This is because the interests of the union are not necessarily aligned with the interests of the organisation or the interests of employees.

5.26 AMMA maintains that the involvement of external third parties in IR processes has the effect of compromising the decision-making abilities of an enterprise. While consultation and agreement is essential to implement change (such as to effect changes to working arrangements onsite), the more such negotiations involve external third parties the greater the risk that those parties will focus on what is in their own best interests rather than what is in the best interests of the ongoing viability and profitability of the enterprise.

5.27 AMMA's proposed model for internal regulation of IR is outlined below.

[48] AMMA, *Employee engagement: a lifetime of opportunity*, 2007

AMMA's proposed model of internal regulation

5.28 Under AMMA's proposed model, aside from the safeguards detailed below, enterprises would be immune from third-party involvement by trade unions and industrial tribunals in their IR practices. In order to ensure a high level of employee buy-in for the model, key features and protections would be:

- Sixty-six per cent of employees must vote in favour of internal regulation in an employee ballot. A two-thirds majority would act as an added safeguard for employees in recognition of the fact that such a model represents a fundamental change to the regulation of Australian workplaces. The most significant and rapid improvements in operational performance and productivity have occurred when the acceptance rate of individual employment arrangements has been in excess of 90 per cent. The 66 per cent majority proposed is therefore a minimum which companies would aim to exceed;

- Procedures must be in place to ensure any ballot for self-regulation is free and informed;

- Any agreement on a self-regulation framework would not have a fixed term of operation but would continue indefinitely or until a 50 per cent plus one majority of workers voted in favour of a return to the previous regulatory arrangements under the IR legislation of the day;

- Minimum employment standards set by the appropriate authority would have to be met or exceeded; and

- Employees would have guaranteed access to a fair treatment procedure for complaints and grievances in order to resolve industrial problems.

5.29 Accompanying the self-regulation model would be the employee relations charter (*see Appendix 1 to this submission*), a statement of standards for managerial leadership, behaviour and systems that AMMA believes is necessary to support and maintain a system of internal regulation. The charter would serve as a vision towards which organisations that wished to move to an internal regulation model would strive.

Recommendations

5.30 **Workplaces should have the option of voting for an 'internal regulation' model of IR as proposed in AMMA's submission. A two-thirds majority of the workforce would be required to vote in favour of self-regulation, with a safety net and grievance procedures put in place to protect all workers.**

5.31 **High-income earners (those with earnings exceeding the current $118,100 unfair dismissal limit) should have the ability to elect to enter into employment arrangements with their employers that allow them to opt out of the collective agreement-making stream under the *Fair Work Act*.**

6. Statutory individual agreements

> *"At a previous mining industry company, we used AWAs for all operator/trades roles with great success. The workforce was not keen to change from that to the Fair Work Act."*[49]

6.1 The *Fair Work Act*'s failure to provide an option for a statutory individual agreement between industrial parties is the sign of an immature IR system and is impeding the proliferation of innovative and progressive workplace arrangements.

6.2 AMMA has long advocated the use of direct, co-operative and mutually rewarding relationships between employers and employees as the best means of achieving flexible, efficient and productive workplaces with highly engaged workforces.

6.3 The resource industry's historical reliance on statutory individual agreements is well known. The industry utilised statutory individual agreements from the time they first became available in Western Australia from 1993 and federally as AWAs from 1996.

6.4 Up until the point the Rudd Government removed the option for employers and employees to strike new employment relationships based on AWAs in March 2008, it was estimated that 67 per cent of resource industry employers in the federal IR system were operating under AWAs, with that figure closer to 80 per cent in metalliferous mining[50].

6.5 The prospective termination of thousands of resource industry AWAs between now and 2014 means the industry will again be reliant on awards and collective enterprise agreements for workplace flexibility. It is then that the full extent of the impact created by the removal of previously flexible workplace arrangements will be realised, although the problems employers will face in replacing those agreements are already clear.

[49] AMMA member company responding to AMMA WR Research Project Survey 4, October 2011, reported by Dr Steven Kates, RMIT University
[50] *The case for ongoing flexibility in employment arrangement options in the Australian resources sector*, AMMA paper, March 2004

6.6 An April 2011 survey of AMMA member companies[51], including construction companies, found the following types of industrial agreements were in place at their enterprises:

- *Fair Work Act* single enterprise non-greenfield agreements;
- *Fair Work Act* single enterprise greenfield agreements;
- *Workplace Relations Act* employee collective agreements;
- *Workplace Relations Act* union greenfield agreements;
- *Workplace Relations Act* employer greenfield agreements;
- Australian Workplace Agreements (AWAs);
- Individual Transitional Employment Agreements (ITEAs);
- Common law contracts;
- Modern awards;
- Enterprise award-based terms and conditions; and
- Old Industrial Relations Act agreements.

6.7 Many of the above pre-*Fair Work Act* agreements are yet to expire and are therefore still delivering flexibility benefits to those enterprises.

6.8 One of the problems with the Fair Work system is that much of the flexibility in modern awards and enterprise agreements was expected to come from mandatory flexibility clauses which, for reasons discussed in detail in the next chapter, have not proved nearly as flexible as employers were led to believe. As a result, a large degree of flexibility has been lost under the current system.

6.9 As the inflexibilities of the current system become increasingly apparent, strong support has emerged in AMMA's membership for a return to the flexibilities afforded by a form of individual statutory agreement.

6.10 As one AMMA member company said when asked whether it supported a return to AWAs[52]:

> *Categorically yes. We need the direct engagement to improve productivity and AWAs have been a proven approach to achieve this objective.*

[51] *AMMA Workplace Relations Research Project Report 3*, April 2011, RMIT University, Dr Steven Kates
[52] AMMA member responding to AMMA Workplace Relations Research Project Survey 4, Dr Steven Kates, RMIT University, October 2011

6.11 Another WA-based member company said[53]:

> *Businesses in WA need their flexibility. As you know, whole industries have been built on AWAs in WA since 1993.*

6.12 Going forward, employers and employees must have the option of being able to agree to individual contractual arrangements that have statutory effect. Those individual arrangements would, of course, require a guarantee of minimum entitlements under modern awards and the National Employment Standards (NES).

6.13 The strong support from AMMA's membership for a return to AWAs underpinned by some form of safety net is clear, with 65.1 per cent of respondents to a recent AMMA survey saying they supported a return to AWAs underpinned by a no-disadvantage test[54].

6.14 AMMA maintains that despite the union campaign against statutory individual contracts, they can offer real flexibility and productivity gains for employers as well as real financial and lifestyle benefits for employees where minimum entitlements are guaranteed.

Recommendations

6.15 A form of statutory individual agreement in the form of an individual flexibility arrangement (IFA), underpinned by the Better Off Overall Test and the National Employment Standards, should be introduced to facilitate workplace flexibility.

[53] AMMA member responding to AMMA Workplace Relations Research Project Survey 4, Dr Steven Kates, RMIT University, October 2011
[54] *AMMA Workplace Relations Research Project Survey 4 Report*, Dr Steven Kates, RMIT University, October 2011

7. Individual flexibility arrangements (IFAs)

> *"Individual flexibility arrangements (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."*[55]

7.1 As an alternative to AWAs, individual flexibility arrangements (IFAs) are of so little value to employers that many AMMA members have abandoned any attempt to negotiate genuine flexibility clauses in their agreements. Employers are finding the flexibility clauses they are able to negotiate with unions generally benefit only the employee and offer little or no flexibility to the employer.

7.2 A flexibility term enables an employer and employee to make an IFA down the track should they so choose. All modern awards operating from 1 January 2010 include a flexibility term based on the 'model' term contained in the *Fair Work Regulations*. All enterprise agreements approved on or after 1 July 2009 contain flexibility clauses, either the 'model' clause or one negotiated between an employer and its employees or their unions.

7.3 In the lead-up to Labor's federal election win in 2007, it promised employers that IFAs would be a suitable alternative to statutory individual agreements but without the ability to reduce pay and conditions, which had happened in some industries but not in the resource industry.

7.4 Consistent with its *Forward with Fairness* policy, the Rudd Government terminated the ability to make new AWAs in March 2008 and began promoting the benefits of IFAs. Given that a flexibility term had to be included in all modern awards and enterprise agreements, it looked as if the

[55] AMMA member company responding to AMMA WR Research Project Survey 4, October 2011, reported by Dr Steven Kates, RMIT University

government was committed to fostering flexibility in all types of workplace arrangements.

7.5 Back in 2008, then-Deputy Prime Minister Julia Gillard promised employers that[56]:

> *... a simple, modern award system with opportunities for individual flexibilities will remove the need for any individual statutory agreements and the associated complexity and bureaucracy attached to those agreements.*

7.6 In practice, IFAs in their current form under many enterprise agreements fall far short of the government's promises due to the fact that flexibility around hours of work, rostering and overtime, which is critical to the productivity of resource industry enterprises is often not available. In order to keep pace with fluctuating demand for their products, resource industry workplaces need to operate around extremely flexible schedules that maximise production while rewarding employees for their efforts. This is possible under the model flexibility clause contained in all awards and some enterprise agreements but often impossible under union-negotiated clauses.

7.7 Despite the superior terms and conditions provided to employees in the resource industry, the experience of employers has been that flexibility clauses in enterprise agreements are extremely difficult to negotiate and rarely result in genuine flexibility.

7.8 In an October 2011 survey of AMMA members[57]:

- 44.2 per cent said IFAs were 'of no value' to them as employers;
- 20.9 per cent said IFAs were of 'little value'; and
- 34.9 per cent said IFAs were of 'some value'.

7.9 In the words of one AMMA member[58]:

[56] Second Reading Speech, Workplace Relations Amendment (Transition to Forward with Fairness) Bill, the Hon Julia Gillard MP, February 2008
[57] *AMMA WR Research Project Report 4*, October 2011, Dr Steven Kates, RMIT University

With regard to flexibility clauses, union resistance is too high, plus the company is not convinced it is worth the fight (i.e. any flexibilities achieved would be too hard to exercise anyway).

7.10 While another AMMA member had this to say[59]:

While they are required under the Fair Work Act, the issues which can be covered are almost always reduced to meaningless issues such as the employees' desire to alternate leave arrangements, etc. There is no capacity to vary the agreement re an individual's role and responsibilities in any real sense.

7.11 The specific deficiencies of IFAs in their current form include:

- While Fair Work Australia applies the 'better off overall' test to agreement flexibility terms on behalf of employees, there is no requirement to ensure that any genuine flexibility is able to be delivered to the employer;

- The legislation fails to allow the parties to agree that protected industrial action will not be taken while employees continue to enjoy the benefits of an IFA such as increased wages (90 per cent of respondents to an April 2010 AMMA survey supported industrial action not being taken during the life of an IFA)[60];

- There is no ability for the parties to agree to an IFA prior to employment commencing, despite the statutory protections in place to protect employees and prospective employees from being disadvantaged by signing an IFA; and

- The ability for either party to unilaterally terminate an IFA at any time with just 28 days' notice severely detracts from the benefits to employers.

[58] *AMMA WR Research Project Report 4*, October 2011, Dr Steven Kates, RMIT University
[59] Ibid.
[60] *AMMA WR Research Project Report 1*, April 2011, Dr Steven Kates, RMIT University

The case for fixed-term IFAs

7.12 There is a strong case for fixed-term IFAs or for mutual agreement to be reached before such an agreement is able to be terminated.

7.13 Problems resulting from the ability for either party to terminate an IFA with 28 days' notice include the potential for a multitude of industrial arrangements to be operating across a single enterprise at any given time. For instance, some employees could be working under a current IFA while others have reverted to the modern award or enterprise agreement after having terminated their IFA.

7.14 There is no fixed end date for IFAs under the *Fair Work Act* and they continue to operate until a new enterprise agreement is finalised or until one of the parties decides to terminate the arrangement. Resource industry employers therefore face the prospect of needing to update a plethora of workplace arrangements on a rolling basis as employees opt out of previously agreed arrangements. Given that employee wage rates may have been negotiated and calculated on the basis of an IFA being in operation, the ability for employees to terminate IFAs on short notice can require an adjustment of the employee's pay, requiring numerous payroll systems to be in place.

7.15 To be of any value, IFAs must operate for a set period, which AMMA recommends be up to four years, with the ability for parties to re-negotiate the arrangements at the end of that time if desired. This would give both parties certainty that the arrangements would continue for a minimum period and would see IFAs operate with more certainty. As one AMMA member put it[61]:

> *[IFAs] need to be in place for a fixed term rather than subject to termination on a whim!*

7.16 A four-year maximum end date for IFAs would go some way towards making them more attractive to employers, with agreements able to be terminated by mutual agreement at any time with 28 days' notice.

[61] *AMMA WR Research Project Report 2,* October 2010, Dr Steven Kates, RMIT University

The case for pre-start IFAs

7.17 The inability for employers to offer pre-employment IFAs prevents companies that have reached agreements with existing employees on flexibilities from hiring any new employees on the same arrangements. This also impedes employers' ability to advertise enhanced benefits under an IFA to attract the best applicants.

7.18 Under the *Fair Work Act* as it currently stands, employers can 'offer' an employee an IFA prior to employment but it cannot be a 'condition' of employment. For instance, an employer can outline at the interview stage what the difference in pay would be between the award or agreement and the IFA. While this would not offend the requirement not to offer an IFA as a condition of employment, it represents uncertainty for the parties from the outset of the employment relationship.

7.19 The current system requires a 'double handling' of the employment relationship which is time consuming and costly, i.e. a worker might start out on a certain set of arrangements and a short time after commencing work move to an IFA.

7.20 The statutory protections for employees under ss.144 and 203 of the *Fair Work Act* ensure that IFAs must leave workers 'better off overall' in comparison with an award or enterprise agreement. This removes any concerns about the potential exploitation of new employees as a reason not to allow IFAs as a condition of employment.

7.21 There is strong support among AMMA members for being able to make IFAs a condition of employment. In an October 2011 survey of AMMA members[62], 73.2 per cent said they supported that ability.

Union access to IFAs

7.22 Under the *Fair Work Act,* unions are not able to insist on being shown proposed IFAs before they are consented to by individual workers. However,

[62] *AMMA WR Research Project Report 4,* October 2011, Dr Steven Kates, RMIT University

some enterprise agreements now include a requirement to show the IFA to the union after one has been made.

7.23 As one AMMA member observed[63]:

> *This places undue pressure on the employee and discourages departure from standard terms in the collective agreement for fear of attention being drawn to them.*

7.24 Union scrutiny of IFAs, even after the event, should be prohibited as it constitutes a breach of individual privacy and undermines the intention of the arrangements.

The union campaign against IFAs

7.25 Since the *Fair Work Act* began, unions have shown an antipathy for negotiating genuine flexibility terms no matter how generous such terms might be for employees who choose to use them to make IFAs. One reason for this is that IFAs have the capacity to undermine the notion that collective bargaining yields better outcomes for workers than they could achieve individually.

7.26 Since 2009, the Australian Council of Trade Unions (ACTU) and the Australian Manufacturing Workers Union (AMWU) have led the charge against IFAs, urging their members to treat them with suspicion, even going so far as to warn them that employers will seek to use IFAs to exploit individuals. This ignores the statutory protections that are in place requiring workers to be 'better off overall' after entering an IFA.

7.27 The ACTU website cites IFAs as 'an ongoing concern for unions, as it may allow unscrupulous employers to undermine the collective agreement'[64].

7.28 The AMWU even posted a warning on its website accusing employers of seeking flexibility clauses 'in an attempt to undermine pay and conditions in

[63] *AMMA WR Research Project Report 2*, October 2010, Dr Steven Kates, RMIT University
[64] New protections and minimum standards for all Australian workers from 1 January 2010, ACTU Fact Sheet, January 2010

collective agreements'[65]. The union said while it supported flexible working arrangements that suited employers and employees, the extent of that flexibility first had to be agreed by a majority of workers and 'not forced on individuals'.

Examples of sub-standard flexibility clauses

7.29 Some flexibility clauses that make their way into enterprise agreements pay only lip service to the concept of flexibility but continue to be approved by Fair Work Australia without challenge because they meet the requirements of the *Fair Work Act*.

7.30 There are numerous examples of sub-standard flexibility clauses:

- **An agreement struck between** the construction division of the CFMEU in Victoria and Bam & Associates[66] was approved by Fair Work Australia in March 2010 and includes a mandatory flexibility term specifying that only one clause in the agreement can be subject to an IFA. That is the 'protective clothing and boots clause' which states:

  > *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.*

  This type of 'flexibility' clause provides no enterprise-specific flexibility but meets the *Fair Work Act*'s approval requirements. To suggest it is a viable alternative to a statutory individual agreement is a fiction.

- **The *Coates Hire Operations Pty Ltd National Agreement 2009***[67], an agreement negotiated with the AMWU and CEPU, contains two separate flexibility clauses applying in different circumstances.

[65] Flexibility push by employers is about undermining collective agreements, 22 September 2009, AMWU website
[66] Bam & Associates Pty Ltd as trustee for Bam Trading Trust and CFMEU Agreement 2009-2012. FWAA 2530.
[67] Coates Hire Operations Pty Ltd t/as Coates Hire [2009], FWAA 1366

The first 'flexibility' term applies to all employees covered by the agreement but allows flexibility around just one clause:

> *The terms that may be subject to an individual flexibility arrangement are a 15-minute 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.*

The second flexibility term applies only to specific projects but more closely resembles the 'model' flexibility clause.

- **In another agreement** approved by Fair Work Australia in August 2009[68], a flexibility clause stated:

> *The IFA may only vary terms of the agreement relating to flexible working arrangements to assist with an employee's family responsibilities.*

- **Another approved in October 2009**[69] stated the only term an IFA could vary was one that said:

> *The employer will on an annual basis allow each employee to take up to 10 days' annual leave in single day absences.*

The clause also required the employer to provide copies of all IFAs to the union upon request.

- **An agreement between Campbell's Soup and the AMWU**[70] was approved in December 2009 following a very public dispute between the parties over the flexibility clauses in particular. Two flexibility clauses made their way into the agreement. The first was an 'individual' flexibility clause, the second a 'majority' clause.

  Under the individual clause, the only terms an IFA could vary were those in the *Food Preservers Award* that had been incorporated into the agreement. That was confined to the maximum number of single

[68] Emerald Reo Greenfields Enterprise Agreement 2009-2012 [2009] FWA 135.
[69] Parmalat Australia Limited [2009] FWAA 664
[70] Campbell Australasia Pty Ltd t/as Campbell Soups Australia [2009] FWAA 1598.

days or parts of a single day's annual leave an employee could take in any calendar year.

The 'majority' flexibility clause offered more flexibility but unfortunately required majority support from the workforce in order to arrive at any sort of arrangement. Similar to the model clause, it allowed terms to be varied including arrangements about when work was performed; overtime rates; penalty rates and allowances. But a majority of employees in each department had to agree to any changes the employer proposed. It also required the AMWU to be fully consulted in developing and considering any modifications, giving the union the right to consult with members over any proposals.

7.31 Fair Work Australia is on the record as saying the intention of the model flexibility clause and, by extension all other flexibility clauses, is to allow negotiations on an individual basis, not to require majority consent for genuine workplace flexibility[71]:

It is not intended that the clause should deal with collective agreements such as those with a majority of employees. The use of terms such as 'individual employee' and 'individual needs' and 'the individual employee' leave no room for doubt on the issue. For this reason, the model clause should not provide for agreements between an employer and a majority of employees. Nor should the ability of an employer and an individual employee to make an agreement under the clause be in any way conditional on an agreement with a majority of employees in the area concerned.

7.32 As we approach the third anniversary of the *Fair Work Act*, it is increasingly clear that flexibility terms in enterprise agreements are not delivering genuine flexibility to any but a minority of businesses, contrary to Labor Party promises.

7.33 If the government is serious about its stated aims of increasing enterprise flexibility and productivity, it should act immediately to address this glaring deficiency in its IR system.

[71] AIRC Full Bench decision on award modernisation [2008], AIRCFB 550. 20 June 2008

Recommendations

7.34 **Parties to an IFA should be able to agree that, in return for the benefits received under an IFA, no industrial action will be taken during its life.**

7.35 **Section 202 of the *Fair Work Act* should be amended so that parties can agree on an IFA prior to employment commencing, especially given the statutory protections that are in place for employees and prospective employees that they must be better off as a result of signing an IFA.**

7.36 **The test as to whether an employee is 'better off' under an IFA should remain ongoing, with either party able to invite the Fair Work Ombudsman to make that assessment at any time during the IFA's operation.**

7.37 **Section 203(6) of the *Fair Work Act* should be amended to remove the ability for a party to unilaterally terminate IFAs with 28 days' notice. Instead, IFAs should be able to operate for up to four years, with the arrangements able to run for shorter periods where mutually agreed and to be terminated at any time by mutual agreement.**

7.38 **Fair Work Australia's 'model' flexibility clause should be the minimum level of flexibility mandated under *Fair Work Act* agreements and awards, with parties able to agree on additional flexibility by consent.**

7.39 **Before an enterprise agreement is approved by Fair Work Australia, all parties to the agreement should be obligated to ensure the terms of mandated flexibility clauses are capable of delivering genuine flexibility and productivity benefits under IFAs.**

7.40 **Union scrutiny of IFAs after they have been entered into should be prohibited given that it is an invasion of individual privacy and contrary to the intention of the arrangements being 'individual' in nature.**

8. Industrial action

"This year the unions for the first time in 15-plus years got an order from Fair Work Australia to take industrial action."[72]

8.1 The many obligations on employers to ensure employees' rights are protected under the *Fair Work Act*'s enterprise bargaining and agreement making rules are in direct contrast with the total lack of protections afforded to employers against premature and damaging industrial action, often embarked on at the very earliest stages of bargaining and with the full blessing of the industrial tribunal.

8.2 Because it is so costly and an anathema to 'bargaining in good faith', AMMA maintains that protected industrial action should only be available as a last resort after a demonstrated attempt has been made to exhaust all bargaining options, including mediation. To resort to coercion via protected industrial action as a first means of attack should be deemed at odds with an obligation to bargain in good faith.

8.3 Under the current interpretation of the *Fair Work Act*, employees can take protected industrial action with just a minority of employees supporting it, provided that the minority represents the majority of union members to be covered by the agreement.

8.4 AMMA maintains this is unjust on the rest of the employees and the employer, all of whom may have no desire to progress a union-negotiated collective agreement or be exposed to economically damaging industrial action in support of such an agreement.

Industrial disputes are on the rise

8.5 Industrial disputes under the *Fair Work Act* are increasing. According to the latest official data[73]:

[72] AMMA member company responding to AMMA Workplace Relations Research Project Survey 3, April 2011, reported by Dr Steven Kates, RMIT University

[73] *Industrial Disputes, Australia, September 2011*, Catalogue no: 6321.0.55.001, published on 1 December 2011, ABS

- there were 53 industrial disputes starting in the September 2011 quarter, up from 43 in June 2011;

- the total number of employees involved in disputes grew from 14,700 in June 2011 to 66,400 in September 2011;

- the number of working days lost per thousand employees grew from 66.2 in June to 101.3 in September; and

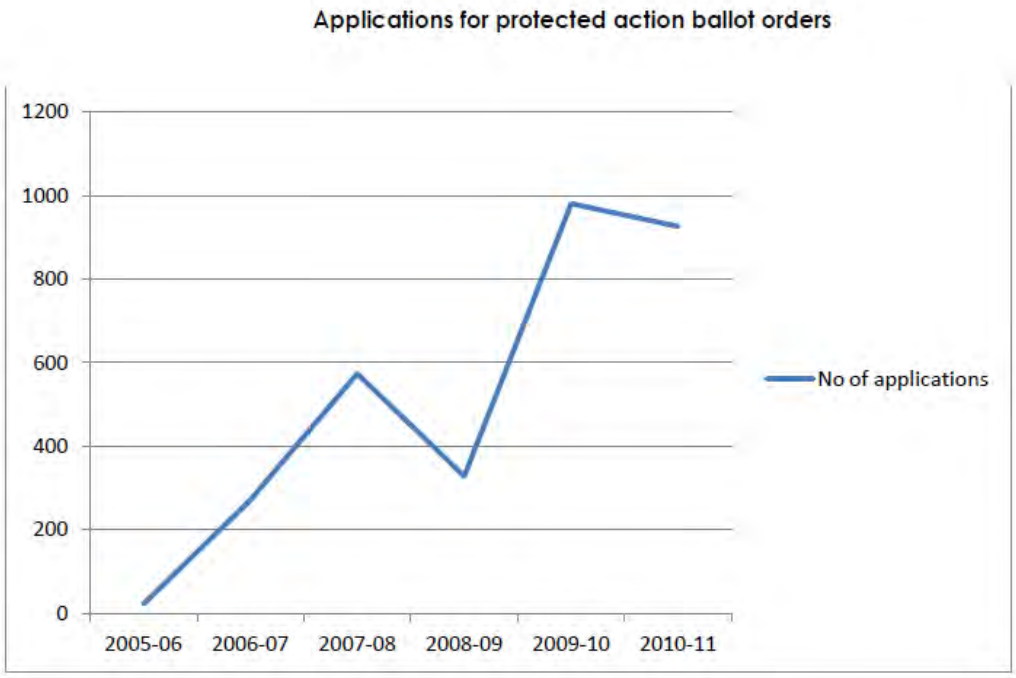
- the number of working days lost per thousand employees in the 12 months to September 2011 was 214.4, up from 144.1 the year before.

8.6 While the mining industry has seen relatively stable and low levels of industrial disputation for many years now (with the exception of coal mining), there has unquestionably been an increased threat of industrial action under the *Fair Work Act* that puts pressure on employers. Even where industrial action is not explicitly threatened, employers are all too aware it is an easily available option under the current scheme. As one AMMA member put it, the spectre of industrial action acts like the 'the sword of Damocles' hanging over employers' heads the entire time they are bargaining[74].

8.7 The current lower level of industrial disputes in mining is also a product of the high proportion of five-year AWAs made before the *Fair Work Act* was introduced which are still in effect, thereby preventing those employees from taking lawful industrial action. A significant proportion of agreements in the resource industry are due to expire in 2013 and 2014. It will be then that the real extent of industrial disputation under the new legislation will emerge, although what has happened in the other industries that have undergone major bargaining rounds paints a pretty clear picture.

8.8 As the graph below demonstrates, the number of applications for secret ballot orders has increased sharply in the past five years, from a low of 271 in the first full year under Work Choices in 2006-07 to 926 in 2010-11 under the *Fair Work Act*.

[74] *AMMA Workplace Relations Research Project Survey 3 Report*, Dr Steven Kates, RMIT University, April 2011



8.9 According to the AIRC's annual report for 2008-09[75], the dip in the number of secret ballot applications that year was likely influenced by bargaining patterns, the length of agreements in various industries and the low number of agreements that expired that year.

8.10 The AMWU leads in terms of the number of secret ballot applications filed, having lodged 190 applications in 2010-11, followed by:

- The Community and Public Sector Union (CPSU) with 94 applications;
- The National Union of Workers (NUW) with 80 applications;
- The Construction, Forestry, Mining and Energy Union (CFMEU) with 60 applications;
- The Australian Workers Union (AWU) with 57 applications;
- The Transport Workers Union (TWU) with 48 applications;
- The Australian Municipal, Administrative, Clerical and Services Union (ASU) with 27 applications;

[75] AIRC Annual Report, 2008-09

- The Maritime Union of Australia (MUA) with 24 applications;
- The Liquor, Hospitality and Miscellaneous Union (LHMU) with 19 applications; and
- A number of other unions who each made a small handful of applications during the 2010-11 financial year.

8.11 AMMA also maintains it is unfair for employees to notify protected industrial action and then not take it but give no notice of its cancellation.

8.12 In an October 2010 survey of AMMA members[76]:

- 77.6 per cent said they would like the right to refuse to allow employees to turn up for work in cases where employees notify strike action but then do not take it and turn up for work at short notice expecting to be paid.

8.13 This often-used tactic puts the employer to the inconvenience of notifying their customers, etc, that business will not continue as usual and puts employers to the same expense as if the action went ahead. The benefit for workers is they do not lose any pay if they turn up for work as usual with no notice.

8.14 A recent example of this was in the Qantas dispute in late 2011. Three unions, the TWU, the ALAEA and the AIPA, had been negotiating with the airline for three separate enterprise agreements. Members of all three unions had taken protected industrial action in support of their agreements.

8.15 In addition to actually taking protected action, twice in one week in October 2011, two separate unions called off their notified industrial action at short notice[77]. The first was the ALAEA calling off a four-hour stoppage in Brisbane, Sydney and Melbourne; the second was the TWU calling off a two-hour strike of its members.

[76] AMMA WR Research Project Survey 2 Report, October 2010, Dr Steven Kates, RMIT University
[77] *Union cancels Qantas strike action on short notice*, 10 October 2011, Courier Mail

8.16 Qantas had already made major flight changes in order to avoid disruption to its customers, cancelling 13 flights in and out of Brisbane, with another six flights having to be delayed or rescheduled by several hours. Such tactics by unions and workers cause maximum disruption to employers and their customers but do not cause any detriment to employees in terms of lost wages.

How much damage is enough?

8.17 While unions are lodging increasing numbers of secret ballot applications on the back of an increased number of collective bargaining agreements being made, employers are at the same time finding the bar has been set extremely high under the *Fair Work Act* to obtain orders to get that action to stop, no matter how much it is costing the business or the economy.

8.18 An August 2010 decision by a Full Bench of Fair Work Australia warrants mention. In *CFMEU v Woodside Burrup Pty Ltd and Kentz E & C Pty Ltd*[78], the Bench made a comment in response to Pluto project operator Woodside's application under s.426 of the *Fair Work Act* to stop protected action being taken by the employees of one of its sub-contractors. Woodside applied as a third party experiencing 'significant harm' as a result of the strike.

8.19 Woodside revealed it cost $3.5 million a day to keep the Pluto project running, which meant the potential economic loss of each day's industrial action was $3.5 million given the flow-on effects and delays caused to other work on the project.

8.20 The Full Bench disputed Woodside's claim that $3.5 million was the daily loss that would be sustained, but said even if it was, the amount was 'a function of the 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.*

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

8.21 The case clearly shows that the federal industrial tribunal views economic losses of $3.5 million a day as insignificant simply because they occur in the context of a large project. This is particularly concerning for resource industry employers.

8.22 As mentioned, in 2009-10 two resource industry employers opposed secret ballot applications lodged by the MUA because of the exorbitant wage and conditions demands the union had on the table at the time, including an increased construction allowance from $87 to $500 a day. However, the tribunal declined to take the employers' views seriously and instead granted the union's applications for secret ballots. In one of the cases, the tribunal went so far as to say the *Fair Work Act* was designed to let employers 'bleed' a little in order to progress bargaining[79].

A lack of remedies to stop industrial action

8.23 In contrast with the 90 per cent of secret ballot applications lodged by unions that are granted by the tribunal under the *Fair Work Act*, only a handful of employer applications to terminate or suspend protected industrial action have been granted under the new scheme.

8.24 In 2009-10, a total of 27 applications were made by employers under:

- s.423 (to suspend or terminate protected industrial action due to significant economic harm, etc);
- s.424 (to suspend or terminate protected industrial action that is endangering life, etc);
- s.425 (to suspend protected industrial action for a cooling off period); and
- s.426 (to suspend protected industrial action due to significant harm to third parties).

[79] *Farstad Shipping (Indian Pacific) Pty Ltd v MUA* (B2010/2515). Transcript of 8 January 2010 proceedings

8.25 Just 14 of those 27 applications were subject to a published outcome by Fair Work Australia, with just seven employer applications being successful.

8.26 The numbers were similar in 2010-11, with 39 applications filed by employers under those sections of the *Fair Work Act*, and just 18 subject to a published outcome. Of those 18, just six applications succeeded in obtaining orders for the action to stop.

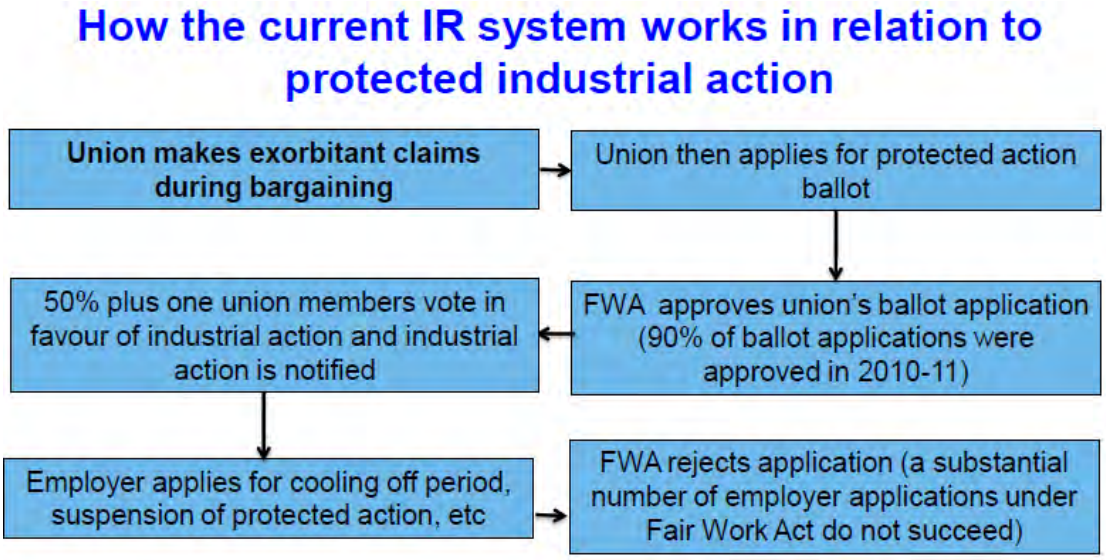
8.27 In an April 2010 survey of AMMA members[80]:

- 17.5 per cent said they were 'totally dissatisfied' with the remedies available under the *Fair Work Act* to stop or prevent protected industrial action;
- 28.1 per cent said they were 'very dissatisfied' with the available remedies;
- 22.8 per cent said they were 'somewhat dissatisfied';
- 22.8 per cent said they were 'neither satisfied nor dissatisfied';
- 5.3 per cent said they were 'satisfied';
- 1.8 per cent said they were 'very satisfied'; and
- 1.8 per cent said they were 'totally satisfied'.

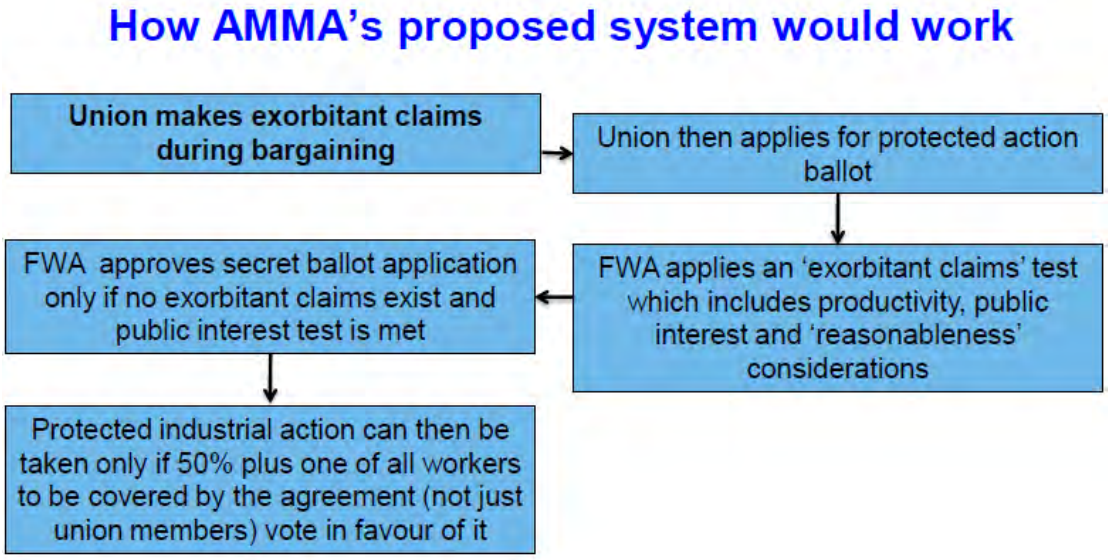
What can be done to make things fair?

8.28 In AMMA's view, protected industrial action should not be able to be taken when a union has exorbitant wage and conditions demands on the table that would fail to satisfy a public interest or 'reasonableness' test. Below is a depiction of how the current IR system works in relation to applications for protected industrial action.

[80] AMMA WR Research Project Survey 1 Report, April 2010, Dr Steven Kates, RMIT University



8.29 Below is a depiction of how AMMA believes the system should work in order to bring some balance back.



Unprotected industrial action

8.30 Employers not only have to contend with the increased potential for legally sanctioned industrial action in the course of bargaining, they also have to deal with unlawful 'wildcat' stoppages. In the past, AMMA has highlighted the problems stemming from workers taking industrial action over minor issues. An AMMA member recently described an entire production line of employees walking off the job after squeeze bottles of tomato sauce were replaced with

pump bottles without consultation. Such unlawful strike action over trivial issues that can be addressed through other channels costs businesses money in terms of lost production time and there should be tougher rules in relation to it.

8.31 Unfortunately, there are numerous examples in the past two or more years of illegal industrial action being taken.

The Pluto project

8.32 In a case that attracted a lot of attention, Woodside Burrup Pty Ltd and the ABCC launched legal proceedings against the WA branch of the CFMEU and its official Joe McDonald over unprotected strike action on the Pluto LNG processing plant near Karratha in the Pilbara in December 2009.

8.33 Several of the project's contractors also launched proceedings against the more than 1,300 individual employees who took part in a subsequent strike on the project in January 2010. Those workers were later ordered to pay thousands of dollars each in fines[81].

8.34 According to the ABCC's statement of claim, McDonald encouraged workers to go on strike unless Woodside reversed its plans to introduce 'motelling'. Motelling involves workers' accommodation being changed at the end of each roster rather than being allocated on a permanent basis for the duration of the project.

8.35 The Federal Court found McDonald actively encouraged workers to go on strike over the issue, reportedly saying to them[82]:

> *Nothing ever happens without a fight.*

8.36 Unfortunately, this remains the culture in some parts of the union movement, particularly in WA and Victoria. Rather than resolving disputes through the proper channels, some unions will break the law and incite their members to take damaging and costly unprotected industrial action to get their point across.

[81] *United Group Resources Pty Ltd v Calabro* (No 5) [2011] FCA 1408, 8 December 2011
[82] *Woodside Burrup Pty Ltd v CFMEU* [2011] FCA 949, 22 August 2011

8.37 One of the employers on the Pluto project told the courts that threats had even been made against the workers who refused to take part in the strikes. This meant security onsite and around the accommodation village had to be increased. Workers who wanted to return to work after the first of the two strikes were also allegedly threatened by those who chose to stay out. As the Federal Court heard, workers who refused to participate were exposed to the risk of serious physical and psychological harm.

8.38 In the Pluto case, it was nearly two years after the strikes that the parties were compensated for the damage caused.

8.39 In one Federal Court decision associated with the case, one contractor estimated the costs of the strike to their company to be $500,000 a day. For a 10-day strike, that would equate to $5 million.

8.40 Potential financial losses due to the illegal strike action on the Pluto project include:

- Delays to the construction program affecting the ultimate completion date;
- The costs associated with having machinery and equipment laying idle;
- The need to replace workers who resigned as a result of the industrial action;
- Until recently, significant accommodation costs while no productive work was being performed (an October 2011 court ruling clarified that employers must not provide accommodation to employees during periods of industrial action[83]);
- The costs associated with providing extra security;
- Extension of time claims by contractors; and

[83] *CFMEU v Mammoet Australia Pty Ltd* [2011] FMCA 802, 20 October 2011

- The client's inability to meet contracts for future commodity sales due to delays in the project.

The City Square project

8.41 In a decision handed down in September 2011[84], the Federal Court imposed a $40,000 fine on the CFMEU and $8,000 on official Joe McDonald for his involvement in unlawful strike action on the City Square Project construction site in Perth. The strike action was taken just days after the *Fair Work Act* came into force in July 2009.

8.42 The court noted that losses arising from the strike for one contractor were potentially $45,000 a day in preliminary costs, $113,000 a day in interest charges plus the possible loss of an early completion bonus.

8.43 According to the court:

> *It is not possible simply to say that every project has built into it some wriggle room to ensure that a project will be finished on time according to the contract, even taking into account some industrial action.*

8.44 As to the costs of other types of industrial action taken on resource industry worksites in the past two or more years, one AMMA member cited 'serious' losses from 12 days of protected industrial action at a cost of $1 million per day[85].

8.45 Another member reported losing around 10 days to unprotected industrial action at a cost of between $40 million and $80 million in total[86].

8.46 Unprotected industrial action on the $24 billion Victorian Desalination plant at Wonthaggi contributed to a 12-month delay in production of the first water from the plant[87], leading to significant financial losses.

[84] *ABCC v CFMEU (No 2)* [2010] FCA 977, 3 September 2010
[85] *AMMA survey on proposed changes to building industry industrial laws*, December 2011
[86] Ibid.
[87] *Wages, water and Wonthaggi*, The Age, 13 December 2011

Recommendations

8.47 **Protected industrial action should not be permitted where claims being pursued do not satisfy a public interest test. The public interest test should take into consideration a number of factors including:**

- **the size of the wage claim being made compared to general industry standards;**
- **whether there has been any consideration given to productivity improvements or offsets within the workplace;**
- **the overall cost of the proposed claims to the employer, including allowances and increases in all terms and conditions;**
- **whether there have been efforts made to genuinely conciliate the claims and whether bargaining has been exhausted; and**
- **the employer's capacity to meet the wage and condition claims.**

8.48 **Section 413 of the *Fair Work Act* should be amended so that protected industrial action is only available as a last resort after a demonstrated attempt has been made to exhaust bargaining options, including mediation.**

8.49 **Where notices of protected industrial action are given to the employer and less than 24 hours' notice is given of the action's cancellation, the following provisions should come into effect:**

- **employers have the right to refuse to accept employees making themselves available for work; and**
- **no further protected industrial action is able to be taken by those employees for another 90 days.**

8.50 **Where there is clear evidence that union officials have recommended unlawful industrial action to their members, the union covering employees engaging in the industrial action should be held accountable for the actions**

along with its members and be exposed to immediate financial penalties, with offending officials losing the right to represent the union as an official.

8.51 **The legislative mechanisms under which the courts can order work to resume following unprotected industrial action should be reviewed to ensure it is more responsive to the needs of employers who are subject to damaging and costly unlawful industrial action.**

8.52 **The definition of 'significant harm' to third parties under s.426(3) should be amended to specifically exclude any reference to the value of the applicant's business undertaking in deciding whether the harm caused by protected industrial action is 'significant'.**

8.53 **The requirement that protected industrial action be occurring at the time a 'cooling off' application is made under s.425 should be changed to allow an application to proceed where industrial action is threatened or likely to occur.**

8.54 **Employers must be provided with evidence that employees taking protected industrial action are entitled to do so.**

9. Agreement content

> *"Our ability to have union-free agreements and be free from value-adding and ideological union influence will be removed."* [88]

9.1 The restricted number of agreement-making options for employers under the *Fair Work Act* has frustrated the continuation of innovative, flexible work practices in resource industry enterprises. As mentioned earlier, in some cases this has led to the loss of flexibilities gained decades earlier.

9.2 The opening up of allowable matters in *Fair Work Act* agreements has compounded those negative effects by allowing a return to the union rights agendas of the 1970s and '80s.

9.3 In the past two years there has been a raft of union rights clauses approved for inclusion in enterprise agreements under the *Fair Work Act*. Those clauses are immediately recognisable as part of a union rights agenda although some purport to be about job security.

9.4 With the *Fair Work Act*'s expansion of allowable matters in enterprise agreements, permitted matters now include those not only pertaining to the relationship between the employer and its employees, but to the relationship between the employer and its employees' union.

9.5 Union rights clauses are returning under the *Fair Work Act* given they are now deemed matters pertaining to the employment relationship. This is contrary to the restrictions that existed under the *Workplace Relations Act*.

9.6 Agreements like the *Dunlop Foams* agreement that Fair Work Australia approved in November 2009[89] and the *ADJ Contracting* agreement that was upheld in October 2011[90] demonstrate how much things have changed.

[88] AMMA member company responding to AMMA Workplace Relations Research Project Survey 3, April 2011, reported by Dr Steven Kates, RMIT University
[89] *Pacific Brands Limited t/as Dunlop Foams* [2009] FWAA 1118, 16 November 2009
[90] *Australian Industry Group v ADJ Contracting Pty Ltd* [2011] FWAFB 6684, 13 October 2011

9.7 The approval of the Dunlop Foams agreement was challenged by employer groups and industry regulators but the agreement was nevertheless endorsed by Fair Work Australia subject to undertakings by the parties with regard to its right of entry provisions.

9.8 The agreement, which was negotiated with the National Union of Workers (NUW), contained other clauses unrelated to the employer-employee relationship. Under the banner of 'delegates rights', the agreement allowed for:

- Union delegates to be given paid time to meet with new employees for the purposes of induction, explaining the agreement and/or union matters;
- Delegates to be paid for reasonable time spent conducting legitimate on-site union business with workers;
- Delegates to be given 'reasonable access' to resources to perform their role, including a private meeting room, phone and fax machine; and
- Delegates to have reasonable time offsite on union business without loss of ordinary pay by prior agreement with the employer, with the employer not to unreasonably withhold agreement for those activities.

9.9 The agreement also included a comprehensive trade union training leave clause.

The new bargaining agenda

9.10 Since the *Fair Work Act* first opened up the allowable matters in enterprise agreements, AMMA began tracking the experience of its members while bargaining under the new rules to find out what sorts of clauses unions were now pushing for in enterprise negotiations.

9.11 In an October 2011 survey of AMMA members[91], the following responses were received in answer to the question:

Have union bargaining representatives pursued any of the following types of clauses in agreements?

	Oct 2011 % of respondents
Trade union training leave	79.2
Payroll deductions of union fees	58.3
Shop stewards' rights clauses	58.3
Paid union meetings	50.0
Trade union training levies	29.2
The requirement to have a union office onsite	20.8
Union picnic days	20.8
Other	16.7

9.12 As can be seen from the table above, union rights clauses are now a common feature of bargaining for enterprise agreements in the resource industry.

9.13 'Other' types of clauses that unions have been pursuing in enterprise negotiations included:

- Clauses restricting the use of contractors;
- Clauses widening right of entry;
- Clauses ensuring union involvement in company-wide health and safety committees; and
- One clause stipulating a 'union development fund' levy of $1,000 per employee.

[91] AMMA Workplace Relations Research Project Survey 4 Report, October 2011, Dr Steven Kates, RMIT University

9.14 An earlier AMMA survey found that union bargaining representatives were also actively pursuing[92]:

- Clauses demanding participation in union-sponsored term payment schemes;
- Introduction of change clauses;
- Clauses requiring collective industrial relations to continue as a fundamental principle of the employer;
- Clauses requiring union membership to be promoted by the employer to all prospective and current employees;
- Clauses requiring employers to encourage employees to participate in union meetings and exercise their 'democratic' rights;
- Clauses placing limitations on drug and alcohol policy disciplinary action;
- Clauses requiring union representatives to be paid for performing union duties; and
- Clauses requiring the employer to pay the employees' expenses when attending mediations, hearings, etc, in situations where an employee has raised a dispute with the company.

9.15 The inclusion of such provisions produces no measurable productivity benefits for the enterprise and in most cases no benefits for employees. The clauses are blatantly directed towards entrenching the role of unions in the workplace at the expense of the direct relationship between employers and employees and are dragging Australia's IR practices back decades.

[92] AMMA member company responding to AMMA Workplace Relations Research Project Survey 3, April 2011, reported by Dr Steven Kates, RMIT University

Clauses from the 1970s and '80s

9.16 In the late 1970s and early 1980s, the resource industry saw a proliferation of clauses in enterprise agreements that sought to entrench the union rights agenda at the expense of the enterprise.

9.17 *The Cliffs Robe River Iron Associates Iron Ore Production and Processing Agreement No 10* (made in 1979) included clauses requiring that:

- It be a condition of employment that each worker remains a union member while work continues;
- The employer interview all new employees and ascertain whether they are current union members;
- Prospective employees produce proof of current union membership;
- If the employee is not a current union member and cannot afford to join the union, the employer make those payments on the employees' behalf and the amount be deducted from workers' first full day's pay;
- The employer give an undertaking to facilitate and arrange accommodation on their premises for visiting full-time union officers as long as prior notice is given; and
- The company allow for 33.3 days per site for employees to attend trade union training.

9.18 Under the *Iron Ore Production and Processing (BHP Minerals Ltd) Award No 22* of 1981, there were clauses requiring:

- Shop stewards to be allowed the necessary time to interview the employer's representative during working hours in the event of a dispute affecting workers within their area; and
- The employer to allow union officials to enter the premises at any time.

9.19 What we are seeing today in *Fair Work Act* agreements is a return to arrangements in agreements that the resource industry thought had been confined to history.

Clauses restricting the use of contractors

9.20 Fair Work Australia's approval in industrial agreements of clauses restricting the use of contractors is a huge issue for resource and construction industry employers.

9.21 Unions have characterised the clauses as 'employment security' clauses but in reality such an argument is disingenuous.

9.22 Clauses that place restrictions on the use of contractors and/or which require employers to consult with unions before hiring contractors lead to preferential treatment of prospective contractors that has little or nothing to do with job security.

9.23 In the construction industry in particular, jobs can only last as long as projects do, and jobs are often performed by construction companies who are themselves contractors. As a result, clauses restricting the use of contractors mean an inability by clients to engage large construction contractors. This type of legitimate contracting situation is part of having a modern industrial system free of restrictive and unproductive practices.

9.24 The Federal Government and Fair Work Australia seem to have lost sight of the fact that the construction industry is itself a contracting industry. Contractors do the work on construction sites, with client companies engaging them. Employment is predominantly on a daily hire basis and workers are paid higher wage rates to compensate for this. Total average earnings for employees in the construction industry were $1,276 a week in August 2011 compared to an all-industries average of $1,024.20[93].

9.25 Clauses in the *ADJ Contracting* agreement covering the Victorian electrical contracting industry require that when an employer decides to use

[93] *Average Weekly Earnings, Australia, August 2011,* ABS, published 17 November 2011, Cat 6302.0

contractors it must first meet with a union official to 'consult'[94]. Assuming the employer can get a meeting with the union official in a reasonable timeframe, the official will invariably say 'we don't want you to use those contractors, we want you to use these contractors' and give the employer a list of contractors that is acceptable to the union. The process is wide open to corruption and nepotism and does nothing whatsoever to promote job security, contrary to union claims.

Freedom of association issues

9.26 Clauses requiring employers to actively promote union membership and involvement to their employees massively oversteps the bounds of any semblance of freedom of association includes the right to join a union and also the right not to.

9.27 The endorsement of such clauses flies in the face of promises the Labor Party made in Opposition back in 2007:

> *I believe in freedom of association, I believe it's your right to choose to join a trade union if you wish to. I believe it's your right to choose not to join that union if you wish to*[95].

9.28 Despite Labor's pre-election promises that its IR system would respect the right of employees not to join a union, the Federal Government did not object to the approval of the ADJ Contracting agreement, despite the Australian Building & Construction Commission (ABCC) opposing the agreement's approval before Fair Work Australia in the first instance.

9.29 While the clauses technically do not require employers to 'coerce' existing or prospective employees to join a union, there is a fine line between coercion and encouragement. A prospective employee might be forgiven for thinking an employer's 'encouragement' to join a union is a veiled instruction to join or else not get the job. Time spent by management actively encouraging union membership and activities obviously means diverting management resources and turns the employer into a de facto recruitment officer for the trade union movement.

[94] *Australian Industry Group v ADJ Contracting Pty Ltd* [2011] FWAFB 6684, 13 October 2011
[95] Deputy Opposition Leader Julia Gillard, 3AW interview with Neil Mitchell, 18 April 2007

9.30 In AMMA's view, such clauses have no role in a modern IR system.

9.31 Not only are the clauses themselves aimed at entrenching union rights in the workplace at the expense of employers, their endorsement as a genuine bargaining item means employees can take protected industrial action over these claims if employers refuse to agree to their inclusion in an agreement.

9.32 Employers that do attempt to push back against the union rights agenda in bargaining are experiencing unions' refusal to negotiate any other matters of importance to the employer until the union rights agenda is settled.

The importance of the *ADJ Contracting* case

9.33 AMMA considered the *ADJ Contracting* case to be of such public importance and of such significance to its membership that it intervened to support the appeal of the decision. The appeal was unfortunately unsuccessful and the case is now being challenged in the Federal Court.

9.34 The ADJ Contracting agreement was negotiated with the Victorian Branch of the ETU (CEPU).

9.35 In 2007, ETU Victorian Branch secretary Dean Mighell revealed his expectations of the *Fair Work Act* in terms of agreement making:

> *I welcome particularly the policy that lets us put anything back in agreements that we can coerce our friendly employers to put back in. That's going to be fun.*

9.36 Mighell has not been disappointed. Clauses in the ADJ Contracting agreement to which the tribunal has given its blessing include:

- One requiring the employer to actively promote union membership to employees and prospective employees;
- One requiring the employer to encourage employees who are already members of the union to participate in union meetings and exercise their 'democratic' rights;

- A clause requiring employers to consult with their workforce before deciding to engage contractors and labour hire workers under the agreement, including consulting about the name of the proposed labour hire company, the number of people to be hired, their qualifications, and the likely duration of the labour hire contract; and

- A clause allowing union officials entry to workplaces without holding a valid entry permit, without giving notice, outside of meal breaks, and without having to abide by any of the right of entry provisions of the *Fair Work Act*.

Recommendations

9.37 **The 'matters pertaining to the employment relationship' test under s.172 should be restricted to matters pertaining to the employment relationship between the employer and its employees and should not extend to the employer's relationship with its employees' unions.**

9.38 **Provisions in agreements that require employers to encourage union membership and/or activity and which fail to meet any objective test of benefit to the enterprise should be prohibited. For example, agreement content related to payroll deductions of union dues; trade union training leave; the provision of on-site facilities for union delegates; and other 'union rights' clauses should be outlawed as they do not pertain to the employment relationship between the employer and its employees.**

9.39 **Clauses placing restrictions on the use of contractors should be prohibited.**

9.40 **Bargaining representatives should not be able to obtain secret ballot orders for protected industrial action on the assertion they 'believe' they are bargaining for permitted content. The test of whether a bargaining representative is 'genuinely trying to reach an agreement' should rely on them actually bargaining for permitted content, not just believing they are.**

10. Good faith bargaining

> *"The objects of the Act specify that individual agreements can never be fair. I think that says it all as far as the mindset of the authors is concerned. The unimpeded right of parties to take punitive industrial action in support of unsustainable claims is a recipe for economic peril for my company and the entire economy, and while proponents will point to options available to employers, these are not realistic in a competitive commercial environment. The Act facilitates actions that amount to commercial terrorism ... This is a ticking time bomb for the economy. Significant change is needed to address this power imbalance in bargaining. It is currently as bad an imbalance as having individuals required to bargain with multinationals without some protection, which was the theme of the anti-Work Choices campaign."*[96]

10.1 Bargaining under the new IR regime has rated as the top concern in survey after survey on the impacts of the *Fair Work Act*, closely followed by concerns over the increased presence of union officials onsite.

10.2 Unions now have a guaranteed seat at the bargaining table as long as they have one member at an enterprise. As would be expected, once they are at the table, unions tend to dominate negotiations regardless of the fact they might represent a very small minority of employees. This leads to the union's bargaining agenda being met rather than the employees' or the employer's.

10.3 AMMA estimates that around half of its members have so far had to bargain for an agreement under the *Fair Work Act*. This is due to the fact that many resource industry employers negotiated five-year industrial agreements prior to the *Fair Work Act* taking effect on 1 July 2009. A high proportion of agreements in the resource industry are therefore due to expire in 2014.

[96] AMMA member company responding to AMMA Workplace Relations Research Project Survey 3, April 2011, reported by Dr Steven Kates, RMIT University

10.4 Those employers that have bargained under the new legislation are generally not reporting positive experiences.

10.5 In an April 2010 survey of AMMA members[97], those that had engaged in bargaining under the *Fair Work Act* had found the new provisions more difficult to navigate than the old ones:

- 27.3 per cent of respondents said bargaining was 'more difficult' under the *Fair Work Act* than under the *Workplace Relations Act*;
- 27.3 per cent said bargaining was 'significantly more difficult';
- 22.7 per cent said it was 'too soon to tell'; and
- 22.7 per cent said there was 'no significant difference'.

10.6 Twelve months later in an April 2011 survey[98], of AMMA members that had experienced bargaining under the *Fair Work Act* at that stage:

- 90 per cent said there had been an increase in working hours devoted to the bargaining process under the *Fair Work Act* compared with the *Workplace Relations Act*;
- 80 per cent said more time had to be devoted to meetings and negotiations;
- 68.4 per cent said more time had to be devoted to tribunal processes and applications; and
- 55 per cent cited a greater number of bargaining representatives being involved.

10.7 As one AMMA member observed[99]:

[97] AMMA Workplace Relations Research Project Survey 1, April 2010, Dr Steven Kates, RMIT University
[98] AMMA Workplace Relations Research Project Survey 2, April 2011, Dr Steven Kates, RMIT University
[99] AMMA Workplace Relations Research Project Survey 3, April 2011, Dr Steven Kates, RMIT University

We negotiated a small agreement covering only 12 people but involving five employee representatives including a representative from the CFMEU.

10.8 Issues that resource industry employers have with the *Fair Work Act's* bargaining regime are numerous. They include[100]:

- The time and resources involved in bargaining for a new agreement;
- The formality of the process for appointing bargaining representatives;
- Dealing with competing unions pushing their own EBA agendas;
- Unions pushing for the inclusion of union-centric clauses in agreements;
- Unions' lack of availability to attend meetings;
- Industrial action being an accepted part of negotiations;
- Unrealistic wage expectations due to 'boom' times;
- Increased union involvement in the bargaining process;
- Having to explain the bargaining representative requirements to staff and ensuring they make an election;
- Trying to negotiate productivity and flexibility arrangements;
- Being caught in the middle of union demarcation disputes with the potential to delay negotiations;
- Burdensome administrative and compliance aspects of the agreement making process;
- The involvement of multiple bargaining representatives; and
- The imbalance of power in negotiating greenfield agreements.

[100] AMMA Workplace Relations Research Project Survey 4, October 2011, Dr Steven Kates, RMIT University

10.9 One AMMA member summed it up this way[101]:

> *Every one of the employers I've talked to has said there are more problems than they thought [with enterprise bargaining under the Fair Work Act] and that it's not an easy process to work through.*

'Employers should push back'

10.10 The Federal Government has said employers should push back harder against the union agenda and that employers are as much to blame as unions for the outcomes being achieved in bargaining under the *Fair Work Act* because they have conceded to union demands.

10.11 Former Workplace Relations Minister Chris Evans in April 2011 urged both unions and employers to stop blaming the legislation for their problems. He was quoted as saying[102]:

> *... on an almost daily basis, I am confronted by media reports which typically feature a business organisation, an employer or a union blaming the Fair Work Act for their failure to achieve a desired outcome. These constant calls assume that there is a quick fix for every problem encountered. But every time there is a call for change it is greeted by an equally strong opposing view.*

10.12 According to Evans, the *Fair Work Act's* bargaining framework required parties to act 'maturely, constructively and responsibly':

> *The constant preoccupation with legislative quick fixes distracts from the real opportunities provided under the Fair Work system. The government has no intention of making major changes to this legislation. The act has only been in operation since July 2009 and many of the provisions have not been utilised or fully explored.*

[101] AMMA Workplace Relations Research Project Survey 2, October 2010, Dr Steven Kates, RMIT University
[102] *Evans rebuts both sides on Fair Work*, The Australian, 14 April 2011

10.13 Unfortunately, the former WR Minister's comments do not take into account the commercial realities of the situation employers face when bargaining under the current legislation.

10.14 As one AMMA member noted[103]:

> *There is limited negotiation leverage as there is a common pattern of union positioning.*

10.15 And another said[104]:

> *The underlying focus is on pleasing and strengthening the unions whether or not the workforce is actually supportive of union involvement.*

No such thing as pattern bargaining

10.16 The *Fair Work Act* purports to prohibit the taking of protected industrial action if pattern bargaining is occurring, i.e. if union bargaining agendas are seeking common terms and conditions at two or more enterprises.

10.17 However, under s.412(2) of the *Fair Work Act,* there is an exemption to that rule. The rule that says protected industrial action cannot be taken if a union is engaged in pattern bargaining does not apply if the union is otherwise 'genuinely trying to reach an agreement' with the employer. The test for pattern bargaining and the test for genuinely trying to reach an agreement are two separate things and do not cancel each other out.

10.18 Employers in the resource industry are all too aware that despite any promises to the contrary, pattern bargaining continues to be the *modus operandi* of many unions.

10.19 Fair Work Australia is yet to prohibit the taking of protected industrial action on the basis that pattern bargaining is occurring. The legislation itself makes such an eventuality impossible.

[103] AMMA Workplace Relations Research Project Survey 3, April 2011, Dr Steven Kates, RMIT University
[104] AMMA Workplace Relations Research Project Survey 2, October 2010, Dr Steven Kates, RMIT University

10.20 In a case involving the NTEU and the University of Queensland[105], the union applied for orders to conduct a secret ballot for protected industrial action under s.437 of the *Fair Work Act*. The university argued the ballot application should be fixed because the union was pattern bargaining, i.e. seeking common terms and conditions with Queensland University and other universities.

10.21 But according to the tribunal, under the *Fair Work Act* it is only considered pattern bargaining if the eventual wage rates are identical in each agreement, not just that a union is seeking identical quantum pay rises and other identical conditions. Obviously, this is unlikely ever to occur given e various classification structures and wage rates typical in enterprise agreements. And so it is impossible that a pattern bargaining allegation by an employer could ever succeed in stopping the taking of protected industrial action.

10.22 In a case involving John Holland Pty Ltd and the AMWU[106], the union made a secret ballot application which the employer opposed. John Holland argued the union was engaged in pattern bargaining, or something 'inimical' to it, by seeking to incorporate all the terms of the *Metal Engineering and Associated Industries Award 1998* as terms of the proposed enterprise agreement. That was pattern bargaining because the union sought a large number of provisions that were irrelevant to the particular enterprise for inclusion in an agreement, John Holland argued.

10.23 Again, the tribunal found that such a course of action on the part of the union was not pattern bargaining and the secret ballot should go ahead. While John Holland might consider that a 'sub-optimal' outcome to agreement making, it was not pattern bargaining, according to Senior Deputy President Peter Richards. The SDP confirmed that even if a union was pattern bargaining, it did not mean it was not genuinely trying to reach an agreement and was not entitled to take protected industrial action. These were two separate things and the existence of pattern bargaining, despite the test itself being incredibly rigid, did not mean that protected industrial action could not be taken in support of a pattern agreement.

[105] *NTEU v University of Queensland* [2009] FWA 90, 18 August 2009
[106] *AMWU v John Holland Pty Ltd* [2009] FWA 494, 2 October 2009

10.24 In another case involving the CFMEU and Mitolo Constructions Pty Ltd[107], the union applied for a secret ballot order for protected industrial action, rejecting the employer's contention it was engaged in pattern bargaining. The union argued it was 'always prepared to recognise different requirements for employers in the industry'. Counsel for the employer pointed out the union was pursuing common wage outcomes and agreement terms in the Mitolo agreement as well as other agreements in the formwork sector of the construction industry. However, because the union had met with the employer and modified its claims in some areas, it was genuinely trying to reach an agreement, the tribunal found.

10.25 The *Fair Work Act's* anti-pattern bargaining provisions are ineffective in providing any protection to employers against blanket union agendas and must be amended if they are to have any utility at all.

Applications for bargaining orders

10.26 Applications for bargaining orders to attempt to force other bargaining representatives to 'bargain in good faith' are unfortunately not worth the effort employers have to go to in order to get them under the *Fair Work Act*. While orders might compel bargaining parties to sit at a table across from each other, they cannot ensure the parties will behave reasonably.

10.27 The relative lack of utility of bargaining orders under the *Fair Work Act* can be seen in the limited number of applications for orders under s.229. In 2009-10, the number of applications to Fair Work Australia for bargaining orders was 121, dropping to 96 in 2010-11.

10.28 In April 2010, then-Deputy Prime Minister Julia Gillard said the 69 applications that had been made for bargaining orders to date showed the *Fair Work Act*'s bargaining provisions were 'operating as they should':

> *The vast majority of agreements are being negotiated in good faith from start to finish, without recourse to Fair Work Australia.*

[107] *CFMEU v Mitolo Constructions Pty Ltd* [2010] FWA 4232, 8 June 2010

10.29 The former Deputy Prime Minister's comments do not, of course, take into account the many instances where unions refuse to bargain at all, such as in greenfield agreement making where they have the power of veto over an agreement, or where they are engaged in pattern bargaining but there is nothing the employer can do to stop them taking protected industrial action anyway, or where unions simply refuse to make an agreement until their full bargaining agenda is met. In such cases, there is very little that Fair Work Australia can or will do under the legislation to assist employers.

The role of bargaining representatives

10.30 Bargaining representatives have a more significant formal role to play under the *Fair Work Act* than they did under the *Workplace Relations Act*. They can not only bargain for enterprise agreements but, depending on the type of agreement involved, apply for:

- protected action ballot orders;
- bargaining orders;
- majority support determinations;
- scope orders; and
- serious breach declarations under s.234 (although no applications have been brought under that section to date).

10.31 For resource industry employers, the most significant aspect of the *Fair Work Act*'s changes to the rules about representation in bargaining are in s.176(1)(b). Under that section, a union is deemed a 'default' bargaining representative as long as it has at least one union member that will be covered by a proposed agreement. That member would have to appoint someone else to that role and notify the union in writing for the union not to have default bargaining status.

10.32 There are other issues for employers with the *Fair Work Act's* rules about representation in bargaining. For instance, the failure to require bargaining

representatives to disclose how many employees they represent, if any, in bargaining.

10.33 In an October 2011 survey of AMMA members[108], 73.3 per cent of respondents that had engaged in bargaining under the *Fair Work Act* said they were not aware which employees were entitled to take protected industrial action if it occurred. That is, they did not know which employees the union was representing in bargaining.

10.34 If employers are not aware which employees are represented by a union, how can they decide how much weight to give to the union bargaining agenda over that of other bargaining representatives? Equally importantly, that lack of knowledge means employers do not know which employees are taking unlawful industrial action and which are not.

10.35 As one AMMA member said[109]:

> *Typically, non-union personnel will also engage in the action even though they may not have voted for it. This can be a consequence of peer pressure whether real or imagined.*

10.36 The weight and regard that should be paid to the respective bargaining representatives' claims can only be assessed if the employer knows how many of its employees support those claims. If an employer attempts to take any prejudicial action against an employee for being represented by a union, employees are more than adequately protected by the *Fair Work Act*'s adverse action (general protections) provisions.

10.37 There are also issues around union officials attempting to act is individual bargaining representatives for employees that their union is not even entitled to represent.

10.38 In *Heath v Gravity Cranes Services Pty Ltd*[110], Fair Work Australia said there was nothing in the *Fair Work Act* to prevent an employee or group of employees appointing a person as a bargaining representative who happened to be an

[108] AMMA WR Research Project Survey 4 Report, October 2011, Dr Steven Kates, RMIT University
[109] Ibid.
[110] *Heath v Gravity Crane Services Pty Ltd* [2010] FWA 7751, 5 October 2010

employee of a union, even a union not otherwise entitled to represent the workers:

> *... there is no prohibition on an employee of an employee organisation being a bargaining representative and there may be many circumstances where it is appropriate for that to be the case.*

10.39 In the *Technip* case[111], the tribunal did not rule out the possibility of a union official representing workers which the union was not entitled to represent under its eligibility rules, although it said this would depend on how the official conducted themselves, i.e. if they were seen to be acting in an individual capacity or in an official union capacity. In AMMA's view, this allows for demarcation disputes to arise where a union cannot otherwise represent the employees concerned.

Recommendations

10.40 The provision under s.174(3) conferring default bargaining status on unions should be removed, with the appointment of bargaining representatives subject to specific written nominations by employees, and a copy of that nomination made available to employers.

10.41 Bargaining representatives should be required to advise all other bargaining representatives that they have status as a bargaining representative in negotiations, as well as the number, identity and geographical location of the employees they represent.

10.42 The *Fair Work Act* should expressly prohibit union officials from being appointed as individual employees' bargaining representatives unless they are entitled to represent those workers under the union's eligibility rules. Where an officer of a union seeks to act as a bargaining representative, they should at all times be assumed to be representing the union and not acting on an individual basis.

10.43 The exemption to pattern bargaining that exists under s.412(2) should be removed as it allows a bargaining representative to obtain orders for a secret

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

ballot for protected industrial action as long as it is 'genuinely trying to reach an agreement', despite having served pattern claims on two or more employers. The definition of pattern bargaining should be confined to unions seeking common terms and conditions at two or more enterprises and, as long as that definition is met, pattern bargaining is deemed to be occurring and protected industrial action is not able to be taken.

10.44 Where the coverage of an enterprise agreement is in dispute, the employers' position with respect to scope should be preferred to the other bargaining representatives' position, unless the employer position is held to be unfair or capricious. The onus should rest with employee bargaining representatives to displace the employer's position as to scope.

11. Greenfield negotiations

"We felt like the union was holding the project to ransom. There is a huge power imbalance." [112]

11.1 There is a substantial power disparity between unions and employers during negotiations for greenfield agreements under the *Fair Work Act.* The odds are stacked heavily in favour of trade unions whose involvement in such agreements is now mandatory. This one-sidedness can be seen in the exorbitant pay and conditions outcomes that are achieved in many greenfield agreements under the current system which do not reflect any improvements in productivity or any changes in workers' duties.

11.2 In AMMA's view, it makes no economic sense to hand unions a power of veto over a project's terms and conditions for employees that have yet to begin work.

11.3 Under the *Workplace Relations Act*, employers were able to make greenfield agreements for start-up projects either with or without union involvement. One option (which no longer exists) was to make an 'employer greenfield' agreement that lasted for up to 12 months. Under the *Fair Work Act*, employers' only option is to make a greenfield agreement with one or more unions, which in many cases is easier said than done.

11.4 Not only does mandated union involvement in greenfield negotiations give unions the power of veto over any terms and conditions an agreement will include, it also gives them the power to refuse to make an agreement at all. This can happen with unions holding grudges against employers for many years over what the unions see as employers' past transgressions.

11.5 As one AMMA member said of their experience in greenfield negotiations under the current system[113]:

The union realises they 'hold the keys to the car' can really ask for more than they'd get if it was regular non-greenfield bargaining.

[112] AMMA member company responding to AMMA Workplace Relations Research Project Survey 4, October 2011, reported by Dr Steven Kates, RMIT University
[113] AMMA WR Research Project Survey 4, October 2011, Dr Steven Kates, RMIT University

11.6 The choices for employers under the current system are unenviable.

11.7 One choice is to start up a project without a greenfield agreement in place, leaving the project vulnerable to protected industrial action as soon as employees start work. This has the effect of increasing the project's financial exposure and placing it in an extremely uncertain position, potentially being subject to delays from the outset. The failure to have an agreement in place will also raise alarm bells with investors who demand industrial certainty before signing on the dotted line.

11.8 The only other choice for employers if they want to have an agreement in place is to agree to unions' often exorbitant wage and conditions demands, as well as the extensive union rights agendas being pursued across the board simply to get a greenfield agreement.

11.9 As one AMMA member said[114]:

> *Yes, we agreed to union preference clauses as we needed to get an agreement in place and the client did not want a protracted dispute.*

11.10 Employers should be able to make a greenfield agreement for a new project without union involvement in situations where unions are using their power of veto over an agreement being made and what it can include.

11.11 Where unions are demanding fanciful or exorbitant outcomes and are refusing to negotiate reasonably, employers should have a safety net.

11.12 That safety net should consist of giving employers the option of registering a greenfield agreement that is tested against the relevant modern award, the National Employment Standards and the better off overall test without the need to obtain consent from unions.

11.13 As part of the process, Fair Work Australia would have the power to determine that a union's demands were not in the public interest and issue a 'greenfield determination' if agreement could not be reached between the parties.

[114] AMMA WR Research Project Survey 3, April 2011, Dr Steven Kates, RMIT University

Demarcation issues on greenfield sites

11.14 Given the way the *Fair Work Act's* greenfield agreement provisions are structured, a host of demarcation issues has arisen under the new greenfield bargaining framework. In the resource and construction industries, demarcation disputes are typically between the AWU and CFMEU.

11.15 Under the current framework, employers are forced to 'pick a side' and make an agreement with either the AWU or the CFMEU. Unlike under the previous IR system, once employers do a deal, union preference is still not resolved. Demarcation disputes can still arise, launched by unions not party to the greenfield agreement.

11.16 The notion of trying to do a greenfield agreement, or indeed any type of agreement, with more than one union at a time is at best extremely frustrating for employers and at worst so impractical as to be impossible. As one AMMA member said of their experience in trying to bargain with more than one union[115]:

> *I just can't get the three unions in the same room together. They've got a head of agreement document signed saying 'yes' they'll co-operate in redrafting the EBAs, but I can't get them in the same room together to discuss it.*

11.17 Under the previous IR system, once a greenfield agreement was made, no other union had right of entry because they were not a party to an agreement that covered that site. This took the heat out of any potential demarcation disputes. But with the *Fair Work Act*'s reliance on union eligibility rules for right of entry rather than agreement coverage, rival unions continue to be able to access a site, disrupt work and cause hindrances. The West Gate Bridge dispute is a classic example of the havoc that demarcation issues can wreak on worksites (*see the 'Demarcation disputes' chapter of this submission*).

[115] AMMA Workplace Relations Research Project Survey 2, October 2010, Dr Steven Kates, RMIT University

11.18 As one AMMA member said about greenfield agreement making under the *Fair Work Act*[116]:

> *There is an inability to create binding workplace instruments for greenfield projects without the union's agreement. We will work with unions, however, it cannot be in a situation where the mobilisation of a project is dependent on the outcome of a union demarcation dispute (where we have no control over the timing or resolution) or where reaching agreement requires us accepting union-centric clauses that offer no productivity or flexibility gains.*

Good faith bargaining and greenfield negotiations

11.19 AMMA supports a version of the *Fair Work Act*'s good faith bargaining rules applying to greenfield negotiations so that unions cannot act unreasonably, especially if union involvement in greenfield negotiations continues to be mandatory.

11.20 In the event that bargaining breaks down or the parties fail to bargain in good faith, there must be some type of industrial arrangement able to be put in place that allows for a greenfield agreement to be approved.

11.21 A Fair Work Australia greenfield determination should be able to be put in place for 12 months until another set of industrial arrangements is negotiated. A mechanism is needed to resolve the stalemates and disputes which add hundreds of thousands of dollars to the cost of resource and construction projects.

The costs associated with delays

11.22 According to an April 2011 survey of AMMA members, the lack of a non-union greenfield agreement option has delayed the start-up of projects in 11.5 per cent of relevant respondent companies since the *Fair Work Act* began, with a

[116] AMMA member company responding to AMMA Workplace Relations Research Project Survey 4, October 2011, reported by Dr Steven Kates, RMIT University

further 34.6 per cent saying it was 'too soon to tell' if projects would be delayed[117].

11.23 Additionally, 40 per cent of those respondents that had engaged in bargaining under the *Fair Work Act* said they had conceded to union claims during greenfield negotiations that they would not have agreed to in negotiations for any other type of agreement[118].

11.24 As one AMMA member said[119]:

> *I believe the final wages settlement was agreed to solely to get the agreement signed.*

11.25 Other AMMA members have reported agreeing to things they otherwise would not have in greenfield negotiations simply because unions had the upper hand. These included[120]:

- 'Hard lying' allowances (allowances for sharing quarters with other workers);
- Special project allowances; and
- Redundancy payments.

11.26 The extra costs associated with the *Fair Work Act*'s greenfield agreement making rules will be unique to each project and the circumstances involved. However, costs associated with delays in getting an agreement up or a failure to get one in place at all (not to mention the exorbitant wage and conditions outcomes 'negotiated' under such agreements) are:

- Delays to the construction program affecting the ultimate completion date;
- Costs associated with having machinery and equipment laying idle;

[117] AMMA WR Research Project Survey 3, April 2011, Dr Steven Kates, RMIT University
[118] Ibid
[119] Ibid
[120] Ibid

- Extension of time claims by contractors;
- Clients' inability to meet contracts for future commodity sales due to project delays; and
- Investors deciding not to enter the Australian market.

11.27 By virtue of the veto power that unions have in greenfield negotiations under the new rules, agreements are taking longer to negotiate. Unions know employers have no other option and that simply biding their time will have the effect of 'softening' employers up.

11.28 One AMMA member described the problem this way[121]:

> *[There were] extortionate claims in greenfield construction project negotiations and the use of 'blackmail' to drive other agenda issues affecting maintenance contractors and the in-house workforce.*

11.29 In an October 2010 survey of AMMA members[122], respondents were asked if they would like the option of entering into a non-union greenfield agreement subject to approval from Fair Work Australia and the application of the Better Off Overall Test. Nearly 74 per cent of respondents said 'yes'.

Recommendations

11.30 Fair Work Australia should, on application by the employer, have the power to make a 'greenfield determination' for a new project where agreement on reasonable terms within a reasonable timeframe cannot be reached. This is a crucial reform for the resource industry. The greenfield determination would be in the form of an industrial agreement measured against the Better Off Overall Test, the National Employment Standards and the relevant modern award to ensure workers are 'better off' under the agreement.

11.31 Relevant good faith bargaining principles should apply to greenfield negotiations.

[121] AMMA WR Research Project Survey 2, October 2010, Dr Steven Kates, RMIT University
[122] Ibid.

12. Majority support determinations

> *"It is inappropriate for a majority of just union members to be able to dictate to the whole workforce if industrial action should be taken."*[123]

12.1 Under the current provisions of the *Fair Work Act*, protected industrial action can be taken with the support of just a minority of employees to be covered by a proposed enterprise agreement, provided that minority comprises a majority of union members to be covered. AMMA maintains that this is unfair not only to employers but also to other employees who may have no desire to be party to a collective agreement.

12.2 While the *Fair Work Act* requires proof of majority support by a workforce in order to force an employer to bargain collectively with the workforce, it does not require majority support of the workforce for protected industrial action to be taken by just union members. These are two separate tests.

12.3 The *Fair Work Act* allows unions to apply to take protected industrial action in the absence of majority employee support for that action, as long as they have the support of the majority of union members covered by the proposed agreement. The end result is that before an employer has even agreed to bargain, it can be subject to protected industrial action by a minority of employees. While this does not technically force employers to the bargaining table, in most cases it will have that effect and be much more influential in doing so than the other mechanisms under the *Fair Work Act* designed for that purpose.

12.4 Employers' prevailing assumption in the lead-up to the introduction of the *Fair Work Act* was they would only be compelled to bargain if a majority of their employees wanted them to. In the absence of evidence of majority support of the workforce, employers were told they would have the right to refuse to bargain collectively unless other mechanisms forced their hand. Those other mechanisms to encourage bargaining were having to apply to Fair Work

[123] AMMA member company responding to AMMA Workplace Relations Research Project Survey 4, October 2011, reported by Dr Steven Kates, RMIT University

Australia for a majority support determination under s.236 or for a scope order under s.238.

12.5 Based on the current jurisprudence, employers can face protected industrial action over bargaining, even in the absence of proof of majority support from their employees.

12.6 This is contrary to Labor Party promises that led employers to believe that majority support for bargaining meant 50 per cent of the workforce plus one would not only have to support collective bargaining with their employer but would also have to support any protected industrial action that could be taken in support of such an agreement.

12.7 Not surprisingly, there is strong support among AMMA's membership for majority support of the employees to be covered by an agreement to be required before protected industrial action can be taken. In an October 2011 survey of AMMA members[124]:

- 87 per cent said majority support of the workforce should be a pre-requisite for protected industrial action.

12.8 As one AMMA member put it[125]:

> *A vocal and influential minority should not be able to easily stand over and influence the outcome for the majority of employees, who may in fact be happy with the deal/package presented to them.*

12.9 In addition to the important issues around majority support for bargaining, employers have also recently discovered that a minority of their employees can take protected industrial action before bargaining has even started[126].

[124] AMMA WR Research Project Survey 4, October 2011, Dr Steven Kates, RMIT University
[125] Ibid.
[126] *JJ Richards & Sons Pty Ltd v Transport Workers Union; AMMA v TWU* [2011] FWAFB 3377, 1 June 2011

The *JJ Richards* case

12.10 In a series of Fair Work Australia decisions in the *JJ Richards* matter, in which AMMA was instrumental and which culminated in a minority Full Bench decision in June 2011[127], the tribunal found a majority support determination was not a pre-requisite for unions applying to take protected industrial action.

12.11 This meant there were virtually no pre-requisites to be met before employees could threaten or take protected industrial action under the new IR system, regardless of whether there was majority support for such action. In fact, according to the tribunal, bargaining did not even have to have begun before employees could take protected action.

12.12 Ironically and most unfairly in AMMA's view, even though employees were given the go-ahead to take protected industrial action after their union had served a log of claims on their employer, employers' hands were tied because they were only allowed to take protected industrial action ('employer response action') once bargaining had commenced. This again has the effect of forcing employers to the bargaining table where they have greater rights than if they exercised their legitimate right to refuse to bargain in the absence of majority support.

12.13 What all of this means is that rather than pursuing the more democratic mechanisms under the *Fair Work Act* that are available to force an employer to bargain, unions can and will immediately employ the far less democratic approach of obtaining majority support from union members.

12.14 As evidence of the increasing lack of use of majority support determinations, the number of applications for such determinations under s.236 of the *Fair Work Act* dropped from 111 in 2009-10[128] to 93 in 2010-11[129], a decline of nearly 20 per cent.

[127] *JJ Richards & Sons Pty Ltd v Transport Workers Union; AMMA v TWU* [2011] FWAFB 3377, 1 June 2011
[128] Fair Work Australia Annual Report, 2009-10
[129] Fair Work Australia Annual Report, 2010-11

12.15 Applications for scope orders under s.238 of the *Fair Work Act* dropped from 48 in 2009-10[130] to 31 in 2010-11[131], a decline of more than 35 per cent.

Recommendations

12.16 The majority support of all employees (not limited to union members) who will be subject to a proposed enterprise agreement must be obtained before any employees can embark on protected industrial action. A majority should be defined as 50 per cent plus one of the employees to be covered by the agreement.

12.17 Where majority support is in dispute, the Australian Electoral Commission or Fair Work Australia should, as part of all applications for majority support determinations, conduct a secret ballot to determine whether majority support exists. Union petitions should not qualify as proof of majority support.

12.18 Protected industrial action should not be available to employees before bargaining has commenced or a majority support determination has been made, contrary to the *JJ Richards* majority Full Bench finding[132].

[130] Fair Work Australia Annual Report, 2009-10
[131] Fair Work Australia Annual Report, 2010-11
[132] *JJ Richards & Sons Pty Ltd v Transport Workers Union; AMMA v TWU* [2011] FWAFB 3377, 1 June 2011

13. Right of entry

> *"We have seen more than 400 visits to one site since July 2009 and visits have been almost weekly in the past six months."*[133]

13.1 Whichever way you look at it, the *Fair Work Act*'s right of entry provisions have allowed a greater number of unions to visit a greater number of worksites where they have caused a greater level of disruption to businesses simply by being there.

13.2 This is contrary to the Australian Labor Party's assurances that it would retain under the *Fair Work Act* the same right of entry provisions that existed under the *Workplace Relations Act.*

13.3 Asked in 2007 what she would do if Federal Labor failed to deliver on its pledge to retain identical right of entry provisions under the *Fair Work Act* to those under the *Workplace Relations Act*, then-Deputy Opposition Leader Julia Gillard said[134]:

> *I'm happy to do whatever you would like. If you'd like me to pledge to resign, sign a contract in blood, take a polygraph, bet my house on it, give you my mother as a hostage, whatever you'd like ... we will be delivering our policy as we have outlined it.*

13.4 The fact is that on 1 July 2009 the *Fair Work Act* made drastic changes to right of entry laws that were immediately apparent to employers and unions alike. The new legislation did this by:

- Linking right of entry to unions' eligibility rules rather than union coverage by an agreement or award applying on a site;
- Abolishing the ability to make new AWAs with the introduction of the *Workplace Relations Amendment (Transition to Forward with Fairness) Act* in March 2008; and

[133] AMMA member company responding to AMMA Workplace Relations Research Project Survey 4, October 2011, reported by Dr Steven Kates, RMIT University
[134] Deputy Opposition Leader, National Press Club Address, 8 November 2007

- Opening up the ability for parties to include clauses in enterprise agreements conferring extra union entry rights on top of the already expanded rights under the *Fair Work Act*.

Practical implications of the changes

13.5 As of 1 July 2009, unions have been able to enter worksites where there is no award or agreement in place to which they are a party and where they have no actual members. As long as there are 'potential' members as identified by the union's eligibility rules, unions can enter to hold 'discussions' with workers under s.484 or investigate suspected breaches under s.481.

13.6 As one AMMA member said[135]:

> *The concern is that a union can now gain lawful access to a site based upon the scope of their rules as distinct from any real connection to the workforce or workplace.*

13.7 In addition to the extra work this causes for employers, the changes have also had the effect of increasing tensions between unions and adding to the incidence of union demarcation disputes, thereby causing further disruption to work.

13.8 Demarcation disputes were minimised under the *Workplace Relations Act* because, if one union had an industrial agreement in place with an employer that covered an entire site, no other union had entry rights.

13.9 As one AMMA member observed of the new situation in October 2011[136]:

> *There has been a definite increase from levels under the Workplace Relations Act. In the construction area, right of entry is being used to further demarcation disputes.*

13.10 As of March 2008, new employees had to be employed on collective agreements and could no longer be hired on AWAs (although Individual Transitional Employment Agreements did exist for an interim period). This had

[135] AMMA WR Research Project Survey 2 Report, October 2010, Dr Steven Kates, RMIT University
[136] AMMA WR Research Project Survey 4 Report, October 2011, Dr Steven Kates, RMIT University

the effect of opening up previously non-unionised worksites to union visits for the first time.

13.11 On the Pluto LNG project, for example, the entire site was covered by AWAs for the first two years of construction starting in 2007, during which time there were no union visits at all. In the four months between 1 July 2009 and 27 October 2009 (after the *Fair Work Act*'s right of entry rules took effect), the four unions eligible to represent workers on the project made 217 entry requests[137]. By May 2010, that number had grown to 450.

Right of entry clauses in agreements

13.12 Fair Work Australia has in the past two years approved clauses in enterprise agreements that allow union officials to enter worksites without valid entry permits, without notice, outside of meal breaks, and without having to abide by any of the right of entry restrictions under the *Fair Work Act*[138].

13.13 The tribunal has also handed down decisions that have sought to curtail employers' ability to restrict union visits to designated areas[139], a power they were assured they would retain under the new legislation.

13.14 Unless overturned on appeal to the Federal Court, one particular Fair Work Australia decision in the *ADJ Contracting* case will mean unions can sidestep altogether the right of entry restrictions applying under the *Fair Work Act*[140]. Under such carefully crafted clauses, unions only have to say they are entering to 'assist with representing an employee under the dispute resolution clause' to avoid any limitations. If unions were entering to investigate a suspected breach of the legislation (under s.481) or to hold discussions with members or eligible members (under s.484), they would have to comply with the right of entry requirements of the *Fair Work Act*. The incentive exists for union representatives to mask their true intentions upon entering a worksite.

13.15 Fair Work Australia's approval of right of entry clauses in enterprise agreements means unions can now apply on behalf of their members to take

[137] *CFMEU v Foster Wheeler Worley Parsons (Pluto) Joint Venture* [2010] FWA 2341, 29 March 2010, Williams C
[138] *ADJ Contracting Pty Ltd* [2011] FWA 2380, 28 April 2011
[139] *AMIEU v Dardanup Butchering Company Pty Ltd* [2011] FWAFB 3847, 17 June 2011
[140] *Australian Industry Group v ADJ Contracting Pty Ltd* [2011] FWAFB 6684, 13 October 2011

protected industrial action where employers refuse to concede to the inclusion of those clauses in negotiations. This puts further pressure on employers to open up their worksites to unions.

The experience of AMMA members

13.16 From the moment the *Fair Work Act* was introduced, union visits to resource industry worksites have been increasing. In an April 2010 survey of AMMA members[141], 55.6 per cent of respondents said unions were entitled to enter their worksites for the first time under the *Fair Work Act.*

13.17 AMMA members have reported in survey after survey that a greater number of different unions is entering their premises under the *Fair Work Act* compared with the *Workplace Relations Act*, and that those unions are seeking to enter their sites more often.

13.18 In an April 2010 survey of AMMA members[142]:

- 58.7 per cent said a greater number of unions were entitled to enter their worksites under the *Fair Work Act* compared with the *Workplace Relations Act*; and

- 37.2 per cent said a greater number of different unions were not only entitled to enter but actually entering their worksites under the *Fair Work Act*.

13.19 One AMMA member observed in October 2010[143]:

> *We have recently had our first right of entry matter at a remote site.*

13.20 This increase in the volume of union visits has meant management resources need to be diverted to processing entry requests and significant disruption to business by virtue of the fact that workers have to stop work and move to designated locations to meet with unions. There can also be safety issues

[141] AMMA WR Research Project Survey 1 Report, April 2010, Dr Steven Kates, RMIT University
[142] Ibid.
[143] AMMA WR Research Project Survey 2 Report, October 2010, Dr Steven Kates, RMIT University

involved in having groups of workers and union officials moving around worksites at any given time, which employers are also required to manage.

13.21 Since the *Fair Work Act* began, the increased presence of union officials on worksites has ranked as one of the top two concerns of AMMA members, along with having to negotiate new enterprise agreements under the *Fair Work Act*'s rules.

Difficulties ascertaining union eligibility rules

13.22 Unions themselves are often involved in demarcation disputes about which workers their eligibility rules entitle them to represent. On this basis, it is even more difficult for employers to ascertain exactly who is entitled to enter their worksites and which groups of workers they may hold discussions with.

13.23 As one AMMA member put it[144]:

> *It is difficult to fully ascertain the eligibility rules of each and every union; they are difficult to obtain, read and make sense of.*

13.24 Another AMMA member said[145]:

> *Any union can have right of entry whether they have members or not [based] on the simple fact they have some right to cover the type of work being done, but so do other unions. It is all very confusing as to who has what right.*

13.25 Another AMMA member cited as a concern[146]:

> *The opportunity for aggressive unions to disturb existing arrangements with employees and other unions.*

13.26 Union visits under the current system are increasingly for the purposes of competing with other unions. This means that union visits to worksites under the new system have less to do with genuine workplace and safety issues and

[144] AMMA WR Research Project Survey 2 Report, October 2010, Dr Steven Kates, RMIT University
[145] Ibid.
[146] Ibid.

more to do with ideological issues and competing with other unions for dominance.

13.27 As one AMMA member said[147]:

> *Increased access can lead to increased agitation by unions and them wanting more access. This has resulted in additional resources being required to manage right of entry requests and to deal with union delegates when they arrive; they are often quite aggressive.*

13.28 Another AMMA member observed[148]:

> *The unions spend a lot of time bagging out the other unions which causes confusion in the workforce. This in turn increases the entries on-site so that each union can maintain face, strength and counter-attack.*

13.29 In AMMA's view, unions should only have a legislated right to visit workplaces where they have members onsite. Otherwise, employers should not be put to the time and expense of having to ascertain complex and numerous sets of union eligibility rules just so they can facilitate unions' recruitment drives.

13.30 Given the already extremely broad right of entry ambit for unions under the *Fair Work Act*, there is no justification for industrial agreements to be able to contain more generous entry rights than those conferred by the legislation.

13.31 The ability for only those unions that are party to an enterprise agreement to enter worksites would limit the number of union demarcation disputes.

Recommendations

13.32 Union rights to enter a workplace should not be solely based on unions' constitutional rules. All of the following conditions should be met before a union official can legally enter a worksite:

[147] AMMA WR Research Project Survey 2 Report, October 2010, Dr Steven Kates, RMIT University
[148] Ibid.

- **The union should be a party to an enterprise agreement on the site or be attempting to reach one;**

- **The union should be required to demonstrate that it has members on that site; and**

- **Those members should have requested the union's presence.**

This would restrict entry under both s.481(1)(a) for the purposes of investigating breaches and s.484(b) for the purposes of holding discussions with members, to cases where unions have actual members on-site rather than just workers that are covered by the union's eligibility rules.

13.33 **There should be no ability for industrial agreements to contain any additional entry rights outside those contained in the *Fair Work Act*.**

13.34 **There should be a limit on the number of entry visits that unions can make to worksites that are not for the purposes of investigating suspected breaches. The number of visits for discussion purposes should be capped.**

14. Demarcation disputes

"Unions are competing for territory in areas that they have not traditionally had coverage."[149]

14.1 The *Fair Work Act* has encouraged increased competition between unions by failing to put any boundaries around union demarcations, with employers more often than not caught in the middle.

14.2 The rising incidence of demarcation disputes is particularly pronounced in the resource and construction industries where historically entrenched demarcations have again become a live feature of the IR landscape.

14.3 The move from a right of entry system based on agreement coverage to one based on unions' own eligibility rules (see previous chapter on 'Right of entry') has led to complex and semantic arguments being mounted over which unions are entitled to represent which groups of workers.

14.4 The issues for employers in terms of demarcations under the *Fair Work Act* generally boil down to:

- Issues around which unions employers can make agreements with; and
- Issues around which unions have right of entry regardless of which unions employers choose to make agreements with.

14.5 In *AWU v Leighton Contractors et al*[150], the AWU challenged the ability for the CFMEU construction and general division's Queensland Branch to validly sign off on four greenfield agreements with Leighton Contractors Pty Ltd and Bechtel Australia Pty Ltd. The AWU appealed against the August 2011 approval of the four agreements. The trigger for the AWU's appeal was a demarcation issue.

14.6 In the appeal decision, the Full Bench noted that the AWU:

[149] AMMA member company responding to AMMA Workplace Relations Research Project Survey 2, October 2010, reported by Dr Steven Kates, RMIT University
[150] *AWU v Leighton Contractors et al* [2012] FWAFB 207, 10 January 2012

> *... submits that it has been deprived of the opportunity of representing the interests of persons who are, or who are eligible to be, its members and whose employment is likely to be covered by the agreement if approval is allowed to continue in effect.*

14.7 The crux of the AWU's argument was that it was impossible to know if at some stage in the future (once workers were employed on the project) whether the greenfield agreement would cover other workers who were eligible to be members of the Mining & Energy division of the CFMEU rather than the construction division and therefore also be eligible to be members of the AWU.

14.8 While the Full Bench rejected the AWU's appeal, the case demonstrates the kinds of demarcation problems that are arising under the *Fair Work Act* which were not a prominent feature of the IR environment under the *Workplace Relations Act*.

14.9 If the AWU had succeeded in its appeal, the employers Leighton and Bechtel would have had to start their projects without enterprise agreements in place, thus opening them up to the prospect of immediate protected industrial action being taken while a new agreement was being negotiated.

14.10 The *Fair Work Act* allows unions to rely on their eligibility rules more and more frequently. This is a dangerous development, especially in the midst of a serious skills and labour shortage, because it marks a return to the days when unions would not allow workers to be 'multi-skilled' due to the volatile demarcations involved.

AMMA members' experiences

14.11 In an April 2011 survey of AMMA members[151]:

- 13 per cent said the incidence of union demarcation issues had increased 'significantly' under the *Fair Work Act*; and
- Another 14.8 per cent said it had increased 'slightly'.

[151] AMMA WR Research Project Survey 3, April 2011, Dr Steven Kates, RMIT University

14.12 As one AMMA member noted[152]:

> *Increased rights of entry enable unions without award/agreement coverage to enter the workplace and discuss matters with employees who aren't their traditional membership.*

14.13 This attempt by some unions to make inroads into what has not traditionally been their membership has been confirmed in the caselaw[153] and by AMMA member companies. As one AMMA member observed[154]:

> *There has been an increase in coverage claims from the MUA in construction areas.*

14.14 Under the new system, rival unions are constantly bumping up against each other.

The West Gate Bridge and other disputes

14.15 Unprotected industrial action was taken on the West Gate Bridge Strengthening Project run by John Holland in 2009 and 2010. Following a successful prosecution by the ABCC, the CFMEU and two of its officials were ordered to pay a record $1 million in penalties, with the AMWU and one of its officials ordered to pay $325,000[155].

14.16 The trigger for the unprotected action, and the many thousands of dollars it cost the project due to lost time and the deterioration of the IR environment, boiled down to a demarcation dispute. The ABCC alleged, and it was later held to be true, that the CFMEU and to a lesser extent the AMWU put pressure on site contractor Civil Pacific (Victoria) Pty Ltd to forfeit its enterprise agreement with the AWU and instead make one with the other two unions[156].

14.17 On another construction project in May 2010, a picket line and blockade were set up at the Melbourne Wholesale Fruit, Vegetable and Flower Market

[152] AMMA WR Research Project Survey 3, April 2011, Dr Steven Kates, RMIT University
[153] *Technip Oceania Pty Ltd v W Tracey* [2011] FWAFB 6551, 7 November 2011
[154] AMMA WR Research Project Survey 3, April 2011, Dr Steven Kates, RMIT University
[155] ABCC secures record $1.3m penalty over West Gate Bridge dispute, ABCC media statement, 28 July 2010
[156] Williams v AMWU, CFMEU, Powell, Mavromatis, Stephenson and Pizarro [2010] FCA 754, 28 July 2010

construction site in Epping. Around 75 workers and 30 vehicles that were scheduled to work on the day in question were prevented from entering the site because CFMEU officials were said to be blocking the entrance with their cars.

14.18 The ABCC successfully alleged the unlawful industrial action was designed to force earthworks contractor Fulton Hogan to enter into a union collective agreement with the CFMEU instead of the greenfields deal it had struck with the AWU (another demarcation dispute).

14.19 The Federal Court issued an injunction ordering the CFMEU to stop hindering access to the project, but the union failed to comply. The ABCC alleged contempt against the CFMEU and the court fined the union a total of $560,000 in penalties, costs and compensation[157].

14.20 The last thing Australia needs is a return to the entrenched demarcation disputes of the late 1970s and early 1980s, such as the one between the Builders' Labourers Federation (BLF) and the Federated Ironworkers Association (FIA)[158] that took more than four years to resolve. In that dispute, the BLF refused to have its members build the 'Omega' tower in Victoria because the union believed there should be no United States bases on Australian soil. The BLF boycotted the project for two years until, in 1980, the AIRC ruled that the members of rival union, the FIA, could build the Omega tower.

14.21 The BLF's stance then shifted to competing with the FIA over whose members should build the tower, despite its anti-war stance. The demarcation dispute was over which of the two unions the project's workers would more 'convenient belong' to. Over the course of the next two years, the case went to the AIRC, the Federal Court and the High Court. Eventually, in 1982 the High Court handed down its decision in the matter , ruling in favour of the BLF.

14.22 The kinds of demarcation disputes we are already seeing under the *Fair Work Act* are only likely to get worse as more resource industry agreements expire and more resource and construction projects commence.

[157] *Alfred v CFMEU* [2011] FCA 556 and FCA 557, 2 June 2011
[158] Demarcation dispute had the BLF fighting for right to help US military, 3 January 2011, *The Australian*

Recommendations

14.23 Once an employer and union have decided to make a greenfield agreement, there should be no right of entry allowed by other unions even if they have members onsite.

15. The adverse action provisions

> *"They are too broad and leave the employer too vulnerable and unable to exercise basic rights to manage staff even if in a fair and equitable manner. They are extremely worrisome."*[159]

15.1 The *Fair Work Act*'s adverse action or 'general protections' provisions are ridiculously broad and create untold liabilities for employers for up to six years into the future. In AMMA's view, the provisions are an unnecessary duplication of what is already contained in Australia's anti-discrimination laws but are much more attractive to applicants because the compensation that can be awarded is uncapped and the orders the courts can make are limitless.

15.2 Employers' concerns with the provisions are only likely to grow as employees, prospective employees and even independent contractors become more aware of their ability to bring claims.

15.3 The introduction of such broad-ranging provisions has never been fully justified, especially as employees already have generous protections from workplace discrimination under state and federal anti-discrimination and equal opportunity laws. The *Fair Work Act* also contains protections for employees against unlawful conduct and unfair dismissal.

15.4 With all those existing protections in place, the adverse action provisions create a new field of litigation such that every employer activity must be assessed against the possibility of an adverse action claim being brought as a result any time in the next six years.

15.5 The provisions are a vast extension to the employee protections that existed under s.664 of the *Workplace Relations Act* which were limited to prohibitions on unlawful termination for discriminatory reasons or in breach of freedom of association laws. AMMA maintains the previous protections operated effectively.

[159] AMMA member company responding to AMMA Workplace Relations Research Project Survey 3, April 2011, reported by Dr Steven Kates, RMIT University

Key concerns with the provisions

15.6 AMMA members have concerns with the adverse action provisions, including that:

- Their scope is too broad;
- The time limits for claims are too long (60 days or six years depending on whether a dismissal was involved);
- They are open to abuse by vexatious and litigious employees given the reverse onus of proof on employers to defend claims;
- There is an unlimited cap on compensation; and
- There is the ability for both prospective and current employees to access the provisions.

15.7 With regard to prospective employees' ability to bring claims, one AMMA member said[160]:

> *... this should not be a tool for a prospective employee to exercise this as a workplace right when they are not yet even employed by you. People should refer such matters to the Australian Human Rights Commission for discrimination, etc.*

15.8 Specific concerns cited by AMMA members based on their experiences include[161]:

- The fabrication of 'anti-union' complaints when a union delegate is disciplined or terminated;
- The potential for challenges to management exercising its normal responsibilities;

[160] AMMA WR Research Project Survey Report 3, April 2011, Dr Steven Kates, RMIT University
[161] Ibid.

- The potential for the jurisdiction to be used as an excuse to leverage power over the business; and

- The potential for the provisions to establish two classes of employees by applying inconsistent standards of behaviour. As one AMMA member put it[162]:

> *...it makes delegates a protected species and discourages supervisors from managing their work teams fairly.*

A growing jurisdiction

15.9 Applications to Fair Work Australia under s.372 of the *Fair Work Act* (dealing with alleged adverse action not involving dismissal) effectively doubled in the 12 months between 30 June 2010 and 30 June 2011[163], from 254 to 504.

15.10 During that same 12 months, general protections claims under s.365 (where the alleged adverse action did involve dismissal) grew by almost 60 per cent from 1,188 in 2009-10 to 1,871 in 2010-11.

15.11 This is in line with AMMA members' experiences with the jurisdiction. In an April 2011 survey of AMMA members[164]:

- 16.2 per cent said they had received adverse action claims from former employees since the *Fair Work Act* began; and

- 10.8 per cent said they had received claims from current employees.

15.12 Of respondents that had received claims, 11.1 per cent had paid 'go away' money to avoid going to court. This is no reflection on the merit of such claims as there is an inbuilt incentive for employers to settle even unmeritorious ones given that potential compensation for applicants is uncapped.

15.13 As one AMMA member said[165]:

[162] AMMA WR Research Project Survey Report 3, April 2011, Dr Steven Kates, RMIT University
[163] Fair Work Australia, Annual Report, 2010-11
[164] AMMA Workplace Relations Research Project Survey 3 Report, April 2011, Dr Steven Kates, RMIT University

We have felt the need to pay this money to circumvent the time and money involved in defending the claim in court.

15.14 Another said[166]:

We have had claims but defended our decisions. Although we did not pay any 'go away' money, we still had legal fees associated with this activity. Therefore, there was still an unnecessary cost for the employer.

15.15 AMMA members are also reporting it is often the case that adverse action claims are agitated by unions rather than individuals.

15.16 In an April 2011 survey of AMMA members[167], of those respondents that had received adverse action claims since the *Fair Work Act* began, 31.6 per cent said all such claims were agitated by unions.

15.17 In one AMMA member's experience[168]:

The employee advised he hadn't wanted to make a case of it – the union pushed him into it.

Adverse action v unfair dismissal

15.18 The *Fair Work Act's* adverse action jurisdiction has also provided a new and emerging alternative for unfair dismissal claims but with:

- More generous timeframes within which to lodge claims (60 days as opposed to 14 days for unfair dismissal claims);
- No six-month qualifying period, unlike the requirement for accessing the unfair dismissal jurisdiction; and

[165] AMMA Workplace Relations Research Project Survey 3 Report, April 2011, Dr Steven Kates, RMIT University
[166] Ibid.
[167] Ibid.
[168] Ibid.

- No high-income salary cap, unlike the high-income cut-off currently set at $118,100 for unfair dismissal claims for non-award/agreement employees.

15.19 Virtually anyone who is ruled out of bringing an unfair dismissal claim under the *Fair Work Act* is almost certainly able to bring an adverse action claim over their termination of employment, with the onus being on the employer to disprove the claim rather than on the applicant to prove it.

15.20 Another key difference between the two jurisdictions is that compensation in the unfair dismissal jurisdiction is capped at six months' salary and/or reinstatement while general protections orders can include:

- Reinstatement;
- Injunctions;
- Declaratory orders;
- Unlimited compensation;
- Penalties; and
- Any other orders the courts see fit to make.

Other types of claims

15.21 Adverse action claims are not limited to situations where dismissal is involved and can be made over almost any type of employment-related behaviour. AMMA members have reported outlandish claims being made under this banner, including[169]:

- An employee claiming it was adverse action to ask him to work a night shift going into his rostered day off;
- Another employee filing an adverse action claim because his performance was being managed after repeatedly failing to phone in

[169] *AMMA WR Research Project Survey Report 3*, RMIT University, Dr Steve Kates, April 2011

when he was going to be absent for work (he claimed this was adverse action based on his right to take sick leave); and

- Numerous adverse action claims being threatened by employees on the basis of their union membership or activities.

15.22 Other potential adverse action scenarios include:

- The case that Ms Kristy Fraser-Kirk brought against David Jones CEO Mark McInnes alleging sexual harassment;
- An employer's refusal to sign a training reimbursement form; or
- A disputes over a classification structure.

15.23 Almost anything can now be characterised as 'adverse action' for a prohibited reason given that virtually everyone has a workplace right that can be violated[170].

15.24 In adverse action cases since the *Fair Work Act* began, the courts have found:

- CEOs have workplace rights that can be breached, especially if they have been involved in enterprise bargaining[171];
- Union activists cannot be disciplined for conduct they engage in under the umbrella of 'union activities'[172];
- Revoking benefits for all staff can be seen as adverse action against one particular staff member[173]; and
- Corporations probably do not have workplace rights, including arguably no protection against unions' misleading notices of industrial action[174].

[170] *Jones v Queensland Tertiary Admissions Centre Ltd (No 2)* [2010, FCA 399, 29 April 2010
[171] Ibid
[172] *Barclay v The Board of Bendigo Regional Institute of TAFE* [2011] FCAFC 14. 9/2/11
[173] *ALAEA v Qantas Airways Ltd & Anor* [2011] FMCA 58. 11/2/11

The *Barclay v Bendigo TAFE* decision

15.25 The current interpretation of the adverse action provisions by the courts has had the effect of rendering active unionists untouchable in the workplace.

15.26 The findings in the *Barclay v Bendigo TAFE* decision[175] have made employers extremely wary of taking any disciplinary action against them, even if it is unrelated to their union activities.

15.27 In one of the first adverse action cases decided under the *Fair Work Act*, the Fair Work Division of the Federal Court rejected a union member's claim for monetary compensation but found his employer, Bendigo TAFE, did take adverse action against him for a prohibited reason, i.e. because of his union activities.

15.28 The applicant was a senior teacher who was suspended without pay following an email he sent to fellow Australian Education Union (AEU) members alleging serious misconduct by unnamed individuals at the TAFE. The email found its way into the hands of senior management and the CEO suspended him and revoked his internet access. TAFE argued the man should have reported the alleged misconduct to management in line with its policy rather than disseminating unproven allegations.

15.29 The applicant successfully claimed the adverse action was taken against him because:

- He was an officer of the union;
- He had engaged in industrial activity by representing the views and interests of his union;
- He had encouraged members to participate in lawful activity organised by the union; and
- He had exercised a workplace right under an industrial instrument.

[174] *Boral Resources (NSW) Pty Ltd* [2010] FWAFB 1771, 31 March 2010, Full Bench
[175] *Barclay v The Board of Bendigo Regional Institute of TAFE* [2010], FCA 284, 25 March 2010

15.30 The judge agreed the adverse action had been taken against him for prohibited reasons but found the man had not suffered any compensable hardship as a result.

15.31 The decision has since served as a cautionary tale to employers to be extremely careful about taking disciplinary action against workers who are active in their union, particularly in relation to the activities those workers purport to conduct on their union's behalf. This is despite Federal Court Justice Richard Tracey emphasising in his decision:

> *It has never been the case that an employer was prevented by federal industrial legislation from taking prejudicial action against an employee who happened to be a union member or a union official. An employer could not, however, act to the detriment of an employee 'by reason of' or 'because' of the employee's union membership or associated activities.*

15.32 In an earlier Federal Court decision handed down in 1981[176], Justice Trevor Morling reinforced that under the WR laws of the time (*the Conciliation & Arbitration Act 1904*), which still holds true under the *Fair Work Act*, unionists are not immune from being disciplined or terminated over misconduct.

15.33 Citing a passage from a 1961 judgment[177], Justice Morling said:

> *Any case that comes before an industrial tribunal involving the dismissal of a union delegate requires anxious consideration by the tribunal with a view to ensuring that no man be unjustly penalised for his participation in legitimate activity as a representative of his union. It is basic to our system that employees should be organised in industrial unions and it is through such unions that approach must be made to the tribunals set up. Men who are willing to play a part in the affairs of an industrial union are entitled to expect that they will not be prejudiced in their employment because of any legitimate actions they take in any union office they assume ... But, while this commission will be vigilant to protect the position of any delegate unjustly dealt*

[176] *Re David John Lewis v Qantas Airways Ltd* [1981] FCA 137, 22 September 1981
[177] The Court Session of the Industrial Commission of NSW sitting in Court Session in re Dispute at Broken Hill Pty Co Limited Steel Works Newcastle (No 2) (1961)

with by an employer for legitimate activity on behalf of his union, it certainly will not regard delegateship as a magic cloak conferring on the wearer immunity from liability for wrongful actions.

15.34 The difference between the earlier case and *Barclay v Bendigo TAFE* is that in the former case, the applicant was dismissed by Qantas for allegedly getting another worker to clock him off after he had already left the premises. Both the man and his colleague who clocked him off were dismissed in line with Qantas's policy. The other man was not a union delegate and so, based on that and the rest of the evidence, Justice Morling found the man's involvement in an earlier protracted industrial dispute within the flight catering division had no bearing on the decision to dismiss him. In that case, there was evidence of misconduct unrelated to his union activities whereas in *Barclay v Bendigo TAFE*, the applicant's conduct was found to be wholly connected with his union activities.

15.35 Under the *Fair Work Act*, the reverse onus of proof on employers means they are often caught between a rock and a hard place in deciding whether to discipline active unionists or union members, even for misconduct seemingly unrelated to their union activities and over which they would not hesitate to discipline another employee.

Recommendations

15.36 The *Fair Work Act*'s adverse action provisions are unjustified and have led to a new era of speculative claims and should be removed in their entirety. The vast majority of these provisions merely duplicate existing state and federal anti-discrimination provisions.

15.37 In the absence of removing the adverse action provisions in their entirety, an entitlement to a workplace right should have to be the dominant reason for the adverse action alleged to have been taken, rather than one of several factors, for a claim to proceed. Claims should not be able to proceed where other valid, more significant reasons exist for the adverse action such as poor performance or gross misconduct.

15.38 The six-year time limit for bringing adverse action claims under s.372 where dismissal is not involved should be reduced to 60 days, the same time limit

applying to adverse action claims made under s.365 where dismissal is involved.

15.39 **The application of the general protections to prospective employees and independent contractors is unwarranted and should be removed.**

15.40 **The reverse onus of proof on employers should be removed as it encourages non-meritorious claims to be brought by employees and allows claims to proceed further than they otherwise would if the burden of proof rested with the applicant.**

15.41 **There should be no 'union activity' exemption from employers' right to take disciplinary action against an employee.**

16. Unfair dismissal

> *"In most unfair dismissal applications, there has been an expectation that the employer will pay 'go away' money in order to resolve the matter. The legal fees involved in going to arbitration are extremely high so we tend to agree to settle at conciliation in order to avoid arbitration."* [178]

16.1 The *Fair Work Act*'s unfair dismissal rules have had the effect of encouraging speculative claims and have in some instances seen Fair Work Australia encroaching on what should be left to legitimate managerial prerogative.

16.2 The unfair dismissal jurisdiction is undoubtedly a growing one, even before the *Fair Work Act* took effect on 1 July 2009[179]. As the AIRC noted in its final annual report in 2008-09:

> *The number of applications for a remedy in relation to termination of employment increased by more than 30 per cent and the total number of applications was the highest since 2000-01. Although there is no clear indication of the reason for the increase, it is reasonable to assume that the significant downturn in global financial markets has had an effect and employers are responding to market conditions by reducing labour costs where it is practical to do so. It is also likely that the rising unemployment rate is providing an additional incentive to challenge a termination of employment which is perceived to be unfair.*

16.3 In 2008-09, there were 7,994 applications under the *Workplace Relations Act*'s termination of employment provisions, up from:

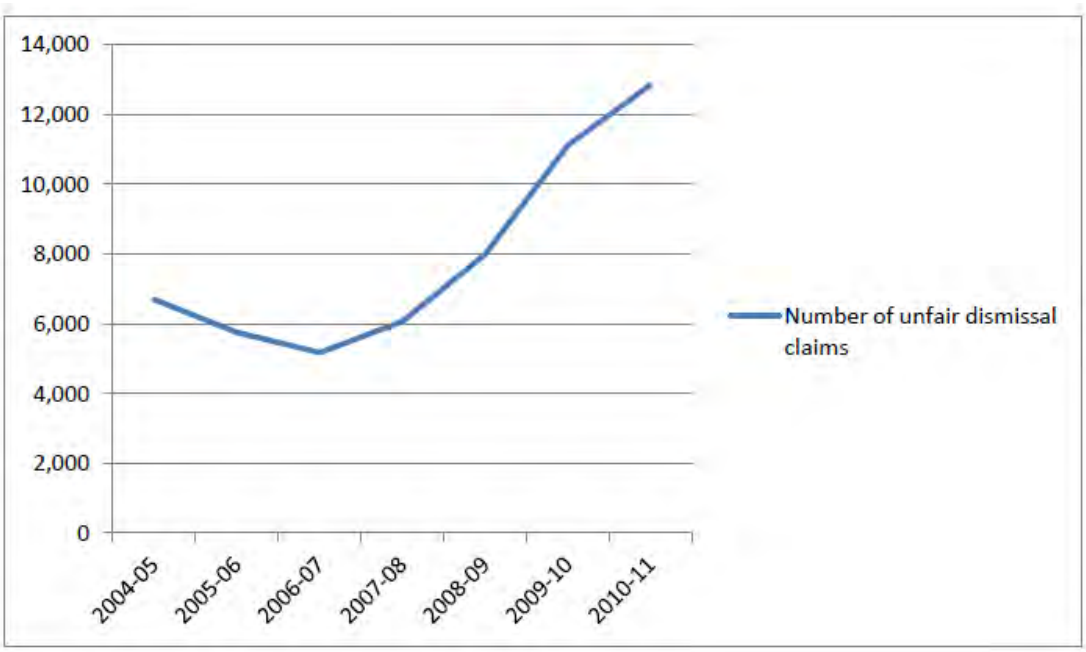
- 6,067 in 2007-08;
- 5,173 in 2006-07;

[178] AMMA member company responding to AMMA Workplace Relations Research Project Survey 2, October 2010, reported by Dr Steven Kates, RMIT University
[179] Annual Report, Australian Industrial Relations Commission and Australian Industrial Registry, 2008-09

- 5,758 in 2005-06; and
- 6,707 in 2004-05.

16.4 Under the *Fair Work Act*, the number of termination of employment applications under s.394 grew to 11,116 in 2009-10 (an increase of 39 per cent on pre-*Fair Work Act* levels) and rose again to 12,840 in 2010-11 (a further increase of 16 per cent on the previous year).

16.5 The graph below demonstrates this rise.



16.6 Among AMMA's concerns in relation to the growing number of unmeritorious claims is that AMMA members report being pressured to settle claims during the conciliation process before Fair Work Australia, even in the face of there being little evidence to support an applicant's allegations.

16.7 AMMA members still report paying 'go away' money to settle unfair dismissal claims, even those with no merit, because it is often cheaper to settle the case than go to the time and expense of slugging it out in court.

16.8 In an April 2010 survey of AMMA members[180], 30 per cent of employers that had received unfair dismissal claims in the preceding six months paid 'go away' money to settle the claims out of court.

16.9 As one AMMA member said[181]:

> *This is what most people want – they think they can get a lump sum payout to avoid Fair Work Australia. One guy claimed $2 million and he had only worked with us for three weeks!!!*

16.10 Another member said[182]:

> *Many cases I've been involved in have just been a pure and utter waste of time. There is nothing [for the applicant] to lose.*

16.11 There is strong support among AMMA's membership for daily hire workers in the building and construction industry to be prevented from bringing unfair dismissal claims given employment in the industry is fluctuating in any case. In an October 2010 survey of AMMA members[183], 67.2 per cent of respondents supported such a prohibition.

The case law

16.12 A primary concern with some of the decisions that have come out of Fair Work Australia in the past two or more years, aside from the sheer volume of applications, is where the tribunal has ordered the reinstatement of a worker following a serious safety breach.

16.13 Also of concern is the precedent the tribunal has set in considering the impact of the dismissal on the applicant and their family in deciding whether it was harsh, unjust or unreasonable. AMMA maintains those issues should have nothing to do with the tribunal's decision and each application should be judged on the facts alone.

[180] AMMA WR Research Project Survey Report 1, April 2010, Dr Steven Kates, RMIT University
[181] AMMA WR Research Project Survey Report 4, October 2011, Dr Steven Kates, RMIT University
[182] AMMA WR Research Project Survey Report 2, October 2010, Dr Steven Kates, RMIT University
[183] Ibid.

16.14 Fair Work Australia's February 2010 reinstatement of an employee to Norske Skog Paper Mills (Australia) Pty Ltd[184], despite the man's repeated safety breaches, was in part ordered because of the consequences of the applicant's termination on his personal life.

16.15 Despite having received at least six warnings over safety breaches between 1995 and 2008, the tribunal ordered the man to be reinstated, saying:

> *For a man of the applicant's age and poor educational profile, it is unsurprising that he has not been able to find another job despite great efforts to do so. Realistically, the applicant faces the prospect of long-term unemployment or underemployment. His family faces severe financial hardship. There is a real risk that he will lose his house. His marriage will suffer increased stresses. His wife's depression could well be exacerbated. All these circumstances are likely to impact adversely on his young daughters.*

16.16 As unfortunate as those eventualities are, there is always going to be an element of hardship associated with a termination of employment. But in this case, the applicant can hardly say he was not warned. Particularly where safety issues are concerned, given employers' strict liability obligations under work health and safety laws, the courts and tribunals should be extremely cautious about overturning the legitimate decisions of the employer, especially based on something as subjective as the tribunal member's sympathetic tendencies. Tribunals should confine their deliberations to whether an unfair dismissal claim has merit rather than the adverse impacts of it on the applicant after the event.

16.17 While reinstatement was ordered in the above case, the tribunal sent a mixed message by saying:

> *Employers are entitled to treat conduct that may expose them to prosecution or civil liability seriously. Employers are entitled to have employees take safety rules seriously.*

[184] *Quinlivan v Norske Skog Paper Mills (Australia) Ltd* [2010] FWA 883, 8 February 2010, VP Lawler

16.18 The ability to discriminate over whether a dismissal is valid or not based on an employee's personal circumstances needs to be removed.

Genuine redundancies

16.19 Under s.389 of the *Fair Work Act*, if an employer dismisses a person for reasons of 'genuine redundancy', that dismissal can be found to be unfair if it would have been 'reasonable' for the employer to redeploy that person elsewhere in the employer's enterprise or within an 'associated entity'.

16.20 While the extent of what is 'reasonable' in terms of employers' redeployment obligations has not been fully tested under the *Fair Work Act*, the requirement arguably means that an employer could be expected to canvass redeployment options with 'associated' companies over which it has no control, with which it has no direct interaction and with which it may even be in direct competition.

16.21 The definition of 'associated entity' used by the *Fair Work Act* is adopted from s.50AAA of the Corporations Act and so broad that it potentially ropes in other entities that would owe no obligation to that other enterprise to redeploy one of its former employees.

16.22 This situation is particularly applicable to the building and construction industry where large conglomerates of companies operate and companies within that would meet the definition of 'associated entities' while having nothing really to do with each other.

Recommendations

16.23 Fair Work Australia's determination of whether a dismissal is harsh, unjust or unreasonable should exclude consideration of the consequences of termination of employment for workers and their families.

16.24 Given the unique and fluctuating circumstances of the building and construction industry, daily hire employees in the industry should be prevented from bringing unfair dismissal claims unless they are dismissed for

prohibited reasons. This would involve adding in a new exemption under s.382(b).

16.25 Employers should only be required to canvas redeployment options for workers they make genuinely redundant within their own enterprises or within their subsidiaries' enterprises. The broad definition of 'associated entity' applying to redeployment obligations on employers should be removed.

17. Transfer of business

"Taking on other EBAs is encouraging us not to employ other contractors' employees."[185]

17.1 The *Fair Work Act*'s transfer of business provisions are acting as a disincentive for new employers to take on the existing employees of a business or contractor, which is contrary to what the Federal Government must have intended when drafting the provisions.

17.2 The *Fair Work Act*'s requirement for new employers to take on a previous employer's industrial instruments along with any transferring employees (unless Fair Work Australia grants an exemption) represents a serious inefficiency for new business owners, particularly ones that have their own very different enterprise-specific industrial arrangements in place.

17.3 The transfer of industrial arrangements from one employer to another following the sale of a business or a change of contract has always been vexed but under the *Fair Work Act* is even more so given the breadth of scenarios captured by the new rules.

17.4 Under the *Workplace Relations Act*, in deciding whether there had been a transmission of business, courts and tribunals looked at the 'character' of the business in the hands of the old and new owners. Where the 'character' of the entire business was the same, there was likely to have been a transfer of business if the other pre-conditions were met, such as some assets changing hands between the old and new employers.

17.5 Under the *Fair Work Act*, the test is whether the 'work' performed by the transferring employees is the same, along with a transfer of assets and a sufficient 'connection' between the old and new employers. As might be expected, this captures a lot of scenarios given that workers generally keep performing the work they are qualified to do, regardless of the employer they perform it for.

[185] AMMA member company responding to AMMA Workplace Relations Research Project Survey 2, October 2010, reported by Dr Steven Kates, RMIT University

17.6 In the resource industry in particular, service contracts regularly change hands over three-to-five-year periods. At the end of each contract, employees might transfer to other sites where the contractor continues to provide services, or they might choose to keep working at the same location and apply for a job with the new contractor.

17.7 It is not uncommon in such situations for the new service provider or contractor to use some of the infrastructure that is either owned by the mine operator or was owned by the previous contractor, such as kitchen fit-outs or machinery. Under the *Fair Work Act*, using that equipment, along with the other pre-conditions being met, may mean a transfer of business had taken place under the legislation's definitions and that industrial instruments of any existing employees the new employer hired would carry over with them into the new business.

17.8 The circumstances under which the *Fair Work Act* considers a 'transfer of business' to have occurred are much broader than under the 'transmission of business' test under the *Workplace Relations Act*.

17.9 Under the *Workplace Relations Act*, an industrial instrument transferred where existing employees were offered work with the new owner/contractor within two months of a sale or change of hands and certain other things happened.

17.10 Under the *Fair Work Act*, employees have to be offered work with the new owner within three months.

17.11 Under the *Workplace Relations Act*, transferring industrial instruments only applied for 12 months after the sale of a business or contract. Under the *Fair Work Act*, there is no specified end date for transferring instruments which apply in perpetuity until new arrangements are made.

17.12 The types of industrial instruments that transfer across with employees under the *Fair Work Act* include:

- Enterprise agreements approved by Fair Work Australia;
- Workplace determinations;

- Named employer awards; and

- IFAs that were in place covering any transferring employee immediately before the sale (but only in relation to that particular employee).

17.13 Given that the *Fair Work Act* defines a transfer of business as occurring where the 'work' is the same and where the employing entities are sufficiently connected, working for one construction contractor on one project it is arguable this would be sufficiently connected to another construction contractor on another project in that same group of companies. This serves no useful purpose in protecting employees' jobs or their length of service.

17.14 In the construction industry, if a group of companies owns three different construction companies, a construction contractor working for one of those companies later goes to work for another one on a completely different project, they could arguably be required to take their industrial agreement with them under a deemed 'transfer of business'. This is particularly unwarranted in the construction industry where contracts change hands all the time and job security is not anticipated from one project to the next.

17.15 In an October 2010 survey of AMMA members[186], nearly 20 per cent of those who responded to the question of whether the *Fair Work Act*'s transfer of business rules were deterring them from employing existing employees said 'yes', the provisions were having such a deterrent effect.

17.16 As one AMMA member said[187]:

> *The 'associated entity' basis for connection means a transfer of business can occur where an employee voluntarily resigns from one employer and commences employment with another, simply because of corporate ownership.*

[186] AMMA Workplace Relations Research Project Survey 2, October 2010, Dr Steven Kates, RMIT University
[187] Ibid.

How the provisions operate in practice

17.17 The case law coming out of Fair Work Australia since the *Fair Work Act's* transfer of business provisions took effect shows that employers will generally only succeed in applications for exemptions from transferring instruments where:

- The transferring employees and their union support the employees not continuing to be covered by the transferring instrument;
- Employees are better off under the new employer's existing arrangements than they would be under their own old arrangements; and
- The employer is prepared to give undertakings to recognise employees' previous length of service with the old employer.

17.18 AMMA maintains that when employment ends with one employer, so too should coverage of that employee by the old employer's industrial instrument. The new employer should not be burdened with the decisions and employment arrangements of the previous employer. The unworkability of the old employer's industrial arrangements could well have been a factor in it going out of business or losing a contract in the first place.

17.19 Aside from scenarios involving the sale of a business, outsourcing arrangements are relevant to AMMA members involved in service provision on mine sites. In such instances, a transferring industrial instrument can have the effect of creating two classes of employees.

17.20 Moreover, a contractor's success in winning a given contract is based in part on the client's expectation of efficiencies that might not be achievable under the old employer's industrial arrangements. This provides a strong disincentive for a new employer to take on employees who would otherwise be an asset to the incoming contractor. Unfortunately, the benefits of hiring them will be outweighed by the disadvantages. This is surely not what the Labor Government intended.

17.21 While the intention in enacting the *Fair Work Act's* transfer of business provisions was presumably to protect employees' terms and conditions in the event of a sale of a business, the changes are having the opposite effect and making continued employment more unlikely.

Recommendations

17.22 Imposing a previous employer's industrial arrangements on a new employer or contractor is counter-productive and should be removed.

17.23 In the absence of the complete removal of the transfer of business provisions, transferring instruments should only apply for a period of six months rather than having open-ended operation until new arrangements are negotiated.

17.24 The *Fair Work Act*'s transfer of business provisions should not apply to the building and construction industry in recognition of the fact that work is primarily performed on a contract-by-contract basis.

18. The National Employment Standards (NES)

> *"We do not have the legislative ability to provide binding advice."*[188]

18.1 The National Employment Standards (NES) were introduced as a minimum safety net for all employees under the national workplace relations system from 1 January 2010. Together with pay rates in modern awards and minimum wage orders, the NES establishes a safety net that cannot be undermined and provides minimum entitlements to leave, public holidays, notice of termination and redundancy pay.

18.2 While AMMA commends the Federal Government for establishing the minimum safety net, some unforeseen and, at this stage, unresolved issues have arisen due to the unique working arrangements that exist in Australia's resource industry.

Leave loading on termination pay

18.3 Confusion has arisen among resource industry employers in relation to whether they are required to pay 'leave loading' on termination if they would otherwise have paid it when an employee actually took annual leave.

18.4 While this seems like a fairly simple issue to resolve, employers are still waiting for binding advice from the Federal Government more than two years after the NES took effect.

18.5 Under the *Fair Work Act*, the Office of the Fair Work Ombudsman (FWO) plays an educative role as well as a compliance role in relation to WR laws.

18.6 While the FWO can give advice to parties about IR matters, its advice is not legally binding and does not provide a defence against prosecution. Needless to say, this is a huge problem under a new IR framework that

[188] Fair Work Ombudsman, Nick Wilson, Education, Employment & Workplace Relations Legislation Committee Senate Estimates Hearings, May 30, 2011

stakeholders are attempting to come to grips with in terms of their statutory obligations.

18.7 The situation is particularly undesirable in cases where the FWO's advice conflicts with that of employer associations and/or is contrary to established industry practice.

18.8 In relation to the leave loading question, the FWO issued advice in early 2011 saying the NES required leave loading to be paid on unused annual leave at the time of termination and also overrode anything to the contrary in awards or agreements that came into force on or after 1 January 2010[189].

18.9 Fair Work Ombudsman Nicholas Wilson told a Senate Estimates hearing in May 2011 that his office viewed the matter as 'settled', despite the Federal Government and then-Workplace Relations Minister Chris Evans saying they were looking into a range of policy options to clarify the issue.

18.10 Employer groups, including AMMA, have been advising their members for some time and will continue to do so, that where an award or enterprise agreement states that the employer does not have to pay leave loading on termination, or is silent on the issue, then leave loading does not need to be paid on termination.

18.11 The FWO's advice had the effect of turning on its head what had been common and accepted practice by resource industry employers for many years.

18.12 Minister Evans told the Senate Estimates committee it was not a problem if employer groups disagreed with the FWO's advice and continued to advise their members otherwise, as long as their advice came from an informed perspective.

18.13 But as to whether an employer taking the FWO's advice about the leave loading issue could be open to prosecution if that advice turned out to be contrary to the minister's subsequent clarification, the FWO could not make any guarantees, only saying the regulators were 'not looking for' litigation over such matters.

[189] FWO Fact Sheet, *Final Pay*, viewed on FWO website (www.fwo.gov.au) on 4 February 2012

18.14 Minister Evans conceded the FWO's interpretation of the NES conflicted with what was in some modern awards, which he admitted was not 'desirable':

> *I think everyone agrees with that. No-one agrees on the solution to that, and I am currently dealing with the matter. I wanted to mention that because I would be disappointed if employer organisations who are in the know on this issue did not provide advice to employers who tried to provide some protection for their employees because that is what they should be doing.*

18.15 More than two years after the NES first took effect, employers are still waiting for the Minister's 'legally binding' advice.

18.16 In a matter that went before the NSW Chief Industrial Magistrate's Court in February 2011 involving the *CFMEU and Whitehaven Coal Mining Ltd*, AMMA intervened on behalf of the employer.

18.17 AMMA's written submission pointed out that resource industry awards contained a variety of provisions relating to the payment of accrued leave on termination, none of which included a requirement to pay leave loading on termination. The relevant awards were:

- *The Hydrocarbons Industry (Upstream) Award 2010;*
- *The Mining Industry Award 2010;*
- *The Maritime Offshore Oil and Gas Award 2010;*
- *The Hydrocarbons Field Geologists Award 2010;* and
- *The Black Coal Mining Industry Award 2010.*

18.18 The *Hydrocarbons Industry (Upstream) Award 2010* provides for annual leave loading of 17.5 per cent when leave is actually taken but is silent on the payment of leave loading on termination.

18.19 Similarly, the *Mining Industry Award 2010* provides for 17.5 per cent leave loading when leave is taken but is silent on whether it is paid on termination.

18.20 Of Fair Work Australia's 122 modern awards, 112 provide for annual leave loading on leave taken but 29 of those either explicitly or implicitly state that leave loading is not to be paid on unused annual leave at termination. The remainder of the awards are silent on the issue.

18.21 If the CFMEU's argument in the Whitehaven Coal matter is adopted, those 29 modern awards made by the Australian Industrial Relations Commission (AIRC) will be in breach of the NES. The remainder of the awards that are silent on the issue will also have to pay leave loading on termination.

18.22 It is worth noting that the origins of leave loading were that employees who normally received overtime and allowances would continue to receive the same rate of pay while on holidays and not suffer any disadvantage. The original awards bestowing that entitlement only provided leave loading if the leave was actually taken.

18.23 AMMA maintains that any interpretation of the *Fair Work Act* that says the NES requires leave loading to be paid on termination where an award states something to the contrary or is silent on the issue is based on a narrow and isolated construction of s.90(2). That construction would not only be inconsistent with modern statutory interpretation but would provide a 'windfall gain' to employees that parliament did not intend, while exposing many resource industry employers to significant additional labour costs.

Personal leave entitlements on compressed rosters

18.24 Another unresolved issue relating to the operation of the NES for resource industry employers involves the calculation of annual leave entitlements on 'compressed' rosters.

18.25 AMMA wrote to the FWO in February 2011 seeking clarification about how to calculate personal leave entitlements for employees working 'compressed' rosters under the *Mining Industry Award 2010*.

18.26 For example, given that some of those employees worked 12-hour shifts as the norm, did that mean their entitlement to 10 days' personal/carer's leave should be deducted according to the hours the employee normally worked

(i.e. 12 hours) or at the rate of a standard working day (i.e. 7.6 hours) every time they took a leave day?

18.27 The FWO said it was 'inclined to the view' that under s.99 of the *Fair Work Act*, if an employee covered by the *Mining Industry Award 2010* worked 12 hours a day normally then they were entitled to 10 days of personal/carer's leave deducted at their ordinary daily rate of 12 hours per day rather than 7.6. Those workers would therefore be using 1.58 days of their 10 days' personal/carer's leave every time they took a leave day, the FWO said.

18.28 For all intents and purposes, those employees' entitlement to personal/carer's leave would be 6.33 days rather than 10 days. The FWO advised AMMA that employers should treat the entitlement to 10 days of personal/carer's leave as an entitlement to 76 hours instead and calculate the deductions according to the employees' normal hours worked.

18.29 Again, this advice is not legally binding but some employers are relying on it.

Recommendations

18.30 It should be made clear that the National Employment Standards provisions do not override modern awards in relation to leave loading to be paid upon termination if those awards are silent on the issue or state explicitly or implicitly that leave loading should not be paid on termination.

18.31 The Office of the Fair Work Ombudsman's advice to parties about workplace relations matters must be legally binding and act as protection against prosecution when parties rely on it.

18.32 In the alternative, parties who rely on FWO advice that is later found to be in error should be immune from prosecution.

19. Fair Work Australia

> *"I will not be Prime Minister of this country and appoint some endless tribe of trade union officials or ex-trade union officials to staff the key positions in this body. I will not stand by and have this body become the agency of ex-trade union officials. People will be appointed on their merit..."*[190]

19.1 Effective workplace laws are critically important to resource industry employers and their interpretation and application by the industrial courts and tribunals is equally important. Therefore, the decisions coming out of the federal industrial tribunal Fair Work Australia and the Fair Work Divisions of the Federal Magistrates Court and the Federal Court are a focal point in terms of showing the most unworkable aspects of the legislation for employers and the economy.

19.2 An examination of employer appeals under the *Fair Work Act* at Appendix 2 of this submission shows that of 217 published appeal decisions between 1 July 2009 and 23 January 2012, 61 (or nearly 30 per cent) were successful in having the original decision overturned. This is perhaps not wholly unexpected in a new IR system that is being bedded down and test cases are being run to define the boundaries. However, such a large number of decisions being quashed has led to uncertainty and confusion for many resource industry employers as to whether to rely on decisions at first instance.

19.3 Fair Work Australia became the new federal tribunal for workplace relations on 1 July 2009, replacing three former bodies:

- the Australian Industrial Relations Commission (AIRC);
- the Workplace Authority; and
- the Australian Fair Pay Commission (AFPC).

19.4 Fair Work Australia's power and influence has thus been expanded beyond that of the former federal tribunal, the AIRC.

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

19.5 Due to the increased powers that Fair Work Australia possesses, it is a concern that the outcomes of matters before different tribunal members can vary widely, even where the same factual matrix exists. This was demonstrated in February and March 2010 when the approval of the same enterprise agreement was allocated to two separate commissioners[191]. Both commissioners independently reached different conclusions on the same facts[192]. Both conclusions were within the remit of the tribunal's discretionary powers. The approval of other enterprise agreements have also been subject to different approaches by Fair Work Australia members in terms of assessing whether they meet the Fair Work Act's approval requirements, with some being approved but others rejected[193], despite being of a very similar nature.

The appointment of tribunal members

19.6 With the greatly enhanced role of Fair Work Australia compared with its predecessor the AIRC, appointments to the new independent body have a much more profound impact on Australian businesses than was previously the case.

19.7 Despite the assurances of the Labor Party when in Opposition, 10 of the 13 most recent full-time appointees to the tribunal under Labor have had union backgrounds:

- **Suzanne Jones** (appointed in September 2011) was a barrister at the Victorian Bar but also formerly a National Wage Case advocate for the ACTU;

- **Tim Lee** (also appointed in September 2011) was formerly the general manager of Fair Work Australia but prior to that held senior roles with the ASU;

- **Chris Simpson** (appointed in May 2010) was a former senior industrial advocate with the AWU Queensland who had worked for the union since 1995;

[191] *Riverina Division of General Practice* [2010] FWA 2170, 15 March 2010, McKenna C
[192] *Riverina Division of General Practice* [2010] FWA 1185, 19 February 2010, Thatcher C
[193] *Waterdale Enterprises Pty Ltd as Trustee for the Boag Family Trust t/a Peel Finance Brokers* [2010] FWA 4509, 21 June 2010

- **John Ryan** (appointed in December 2009) was a former national industrial officer with the shop employees union;

- **Julius Roe** (appointed in December 2009) was formerly the serving president of the AMWU;

- **Anne Gooley** (appointed in December 2009) was a former senior official with the Media Entertainment and Arts Alliance (MEAA);

- **Danny Cloghan** (appointed in December 2009) was the former secretary of the WA Prison Officers Union;

- **Michelle Bissett** (appointed in December 2009) was a former senior industrial officer with the ACTU;

- **Commissioner Ian Cambridge** (appointed from the NSW IRC) was formerly the joint national secretary of the AWU from 1994 to 1996; and

- **Commissioner Donna McKenna** (appointed from the NSW IRC) was a former legal officer for the Labor Council of NSW (now Unions NSW).

19.8 Of the 12 appointees from state commissions, at least six had union backgrounds:

- **Deputy President Peter Sams** from the NSW IRC was the secretary of the NSW Labor Council (now Unions NSW) from 1994 to 1998;

- **Commissioner Ian Cambridge** from the NSW IRC was formerly the joint national secretary of the AWU from 1994 to 1996;

- **Commissioner Alastair Macdonald** from the NSW IRC was formerly an official with the Federated Clerks Union and the Australian Services Union (ASU) NSW Clerical and Administrative Branch for 28 years before being appointed to the state commission in February 2002;

- **Commissioner Deidre Swan** of the Queensland IRC was a former AWU Queensland heavyweight and member of the ALP who was appointed to the state commission in 1990;

- **Deputy President Karen Bartel** from the SA IRC was a former official of the LHMU in SA, having been appointed to the state commission as a 'lay' commissioner in 2003; and

- **Commissioner Donna McKenna** from the NSW IRC was a former legal officer for the Labor Council of NSW (now Unions NSW).

19.9 Aside from the above appointees having union backgrounds, none of Labor's 13 full-time appointees to the tribunal have had experience in running a business or working in industry.

19.10 With more than two million actively trading businesses in Australia, it beggars belief that the Rudd/Gillard Government could find no-one from the private sector businesses to appoint to Fair Work Australia.

19.11 While appointed members of Fair Work Australia strive to maintain a high degree of independence and objectivity in the course of their duties, when new appointments so clearly weigh in favour of those with a union background, it undermines employers' confidence in the system.

19.12 With Fair Work Australia continuing to hand down decisions that are causing unease in the business community, these seemingly partisan appointments are in danger of further undermining business confidence in the new IR laws.

19.13 AMMA notes that at the time of writing this submission, a successor for the first president of Fair Work Australia, Justice Geoffrey Giudice, was yet to be announced.

Recommendations

19.14 There should be more emphasis on having a background in the private sector or industry as a criterion in the selection process for Fair Work Australia appointments.

20. Ministerial interventions

20.1 Given that the *Fair Work Act* was introduced more than two years ago, one would have expected the workplace relations minister of the day to have been involved in more matters and disputes than they have been, if only to assist the industrial courts and tribunals in interpreting and applying the new legislation.

20.2 To date, only two applications for ministerial reviews of Fair Work Australia decisions have been made, and the WR ministers of the day have been missing in action when it comes to getting involved in even the most heated and economically damaging industrial disputes.

20.3 Among the ministerial powers, the WR Minister has the power under s.605 of the *Fair Work Act* to apply for a review of Fair Work Australia decisions.

20.4 A minister has only exercised the powers under s.605 of the *Fair Work Act* to seek a ministerial review of a Fair Work Australia decision once in the two or more years since the *Fair Work Act* took effect. And has only once become involved in an industrial dispute.

20.5 The s.605 application was filed in 2010 in relation to a matter involving Trimas Corporation Pty Ltd[194], with the minister taking issue with a commissioner's non-approval of the company's enterprise agreement. The original commissioner found the mandatory flexibility term in the Trimas agreement was invalid, for largely semantic reasons involving the wording of the clause.

20.6 Following the minister's application under s.605, a Full Bench of Fair Work Australia deemed the flexibility clause to be valid and ruled the agreement should be approved, in line with the minister's application.

20.7 The minister also lodged a s.424 application in relation to the Qantas dispute in late 2011 to suspend or terminate protected industrial action on the grounds it was endangering life, etc.

[194] *Minister for Employment and Workplace Relations* [2010] FWAFB 3552, 19 May 2010

The Qantas dispute

20.8 In October 2011, a Full Bench of Fair Work Australia handed down a decision in response to an application from then-Workplace Relations Minister Chris Evans, with the Full Bench ordering industrial action to cease[195].

20.9 The minister brought the application under s.424 of the *Fair Work Act* with the aim of suspending or terminating industrial action that was threatening to cause significant damage to the Australian economy or an important part of it.

20.10 The background to the application was that three unions, the TWU, the ALAEA and the AIPA, had been negotiating with the airline for three separate enterprise agreements covering pilots on long haul routes; ramp, baggage handling and catering employees; and licensed aircraft engineers.

20.11 Members of the three unions had all taken extended industrial action in the context of EBA negotiations during 2011, however, it was not the employees' industrial action that the minister was seeking to terminate, it was the employer's 'response action'.

20.12 Qantas gave evidence to the Full Bench that the employees' industrial action had affected 70,000 passengers, caused 600 flights to be cancelled, seven planes to be grounded, and a total of $70 million in damage.

20.13 Qantas had decided to take its own legally sanctioned employer response action by implementing a lockout of all three unions' members from 31 October 2011. At the same time, Qantas announced it would ground its entire fleet worldwide and the lockout would continue until unions abandoned specific claims that, according to Qantas, would seriously impair if not destroy the airline's viability.

20.14 In response to the Minister's application, the Full Bench said while it was unlikely the employee strikes would have caused significant damage to the tourism and air transport industries, Qantas's grounding of its fleet would be

[195] *Minister for Tertiary Education, Skills, Jobs and Workplace Relations* [2011] FWAFB 7444, 31 October 2011

likely to. The evidence from Qantas was that the grounding of its fleet was costing $20 million per day.

20.15 The Full Bench granted the minister's application to stop the employer's industrial action, saying:

> *We should do what we can to avoid significant damage to the tourism industry.*

The offshore oil and gas dispute

20.16 In December 2009, AMMA wrote to then-Prime Minister Julia Gillard asking her to intervene to resolve the ongoing dispute between maritime unions and vessel operators in Australia's offshore oil and gas industry.

20.17 The letter, dated 18 December 2009, pointed out that AMMA members who operated offshore vessels had been bargaining in good faith with the MUA to renew their enterprise agreements for nearly 12 months. AMMA's letter stated:

> *Since mid-November 2009, the MUA has engaged in a damaging and escalating campaign of industrial action in support of obscene wage and allowance claims that cannot and will not be acceded to by the oil and gas sector.*

20.18 AMMA's letter pointed out that at that stage the MUA's claims included:

- A 30 per cent wage rise over three years, with the MUA having rejected the industry's offer of 25 per cent;
- A $400 a day or $2,800 a week construction allowance, which the MUA was 'relentlessly' pursuing as a 'threshold' issue; and
- A claim for a $45 a day per employee levy to be paid by employers into an MUA-established training fund, to be included in a 'side deal' accompanying the enterprise agreement.

20.19 The MUA's claims would take the average seafarer's remuneration package from $130,000 a year to more than $200,000.

20.20 AMMA also pointed out that the Fair Work legislation specifically allowed for government intervention in unique circumstances such as this one, noting this type of industrial activity had not been experienced by the sector in many years:

> *AMMA is certain it was not your government's intention for the new IR framework to allow rogue union behaviour to damage our sector and the economy generally. There is an opportunity here for the government to prevent further damage to the sector.*

20.21 AMMA has never received a response from the government to its letter.

20.22 And lastly, the most high-profile case with respect to the *Fair Work Act's* new enterprise bargaining provisions has been the *JJ Richards* matter, which is currently on appeal to a Full Court of the Federal Court[196]. The *JJ Richards* dispute has been subject to two Fair Work Australia Full Bench decisions, neither of which has been unanimous in its findings. On no occasion has the Minister sought to place the government's perspective before the tribunal in this matter, even though the dispute relates to the meaning and intent of the *Fair Work Act's* bargaining provisions.

Recommendations

20.23 The Workplace Relations Minister of the day should more frequently exercise their powers to intervene in matters concerning the interpretation of the *Fair Work Act* and when there is a serious industrial dispute causing damage to the Australian economy, particularly where the parties have requested the minister's involvement.

[196] *JJ Richards & Sons Pty Ltd v Transport Workers Union; AMMA v TWU* [2011] FWAFB 3377, 1 June 2011

Appendix 1: AMMA Employee Relations Charter

Subject to maintaining appropriate minimum conditions of work and protections for individuals, AMMA believes that employers and employees should be able to choose to operate in an environment of internal regulation as opposed to external regulation. This choice is a decision for them and should be subject only to the employer being able to demonstrate, with the free and informed support of its employees, the necessary commitment to a set of core principles.

These core principles are summarised as follows:

1. The right of all employees to:
    a. Work in an environment where effective standards of health and safety are in place;
    b. Join or not join a union with appropriate representational rights;
    c. Be free from workplace harassment and unlawful discrimination; and
    d. Have access to appropriate means for internal review of individual concerns or complaints without fear of recrimination.
2. Remuneration and conditions of employment that are fair and have regard for community and industry standards and allow scope for recognition and reward of individual, team or organisational performance.
3. Establishing a clear understanding of the requirements of an employee's role and providing accurate and timely information to the employees about how they are performing in that role.
4. Encouraging a shared understanding of business direction and performance through open communication between the employer and employees.
5. The obligation of all employees to:
    a. Work safely;
    b. Act with integrity and honesty;
    c. Perform their duties effectively; and
    d. Act in accordance with the lawful and reasonable directions of the employer.

Legislation must enable genuine choice to employers and employees as to what form of employment regulation is used at the workplace.

The legislative framework should provide for a full range of options for employers and employees including awards and statutorily recognised collective and individual agreements and must not favour one form of arrangement over another. The process of negotiation of an agreement and an agreement once entered into by the employer and employees should not be subject to outside influence which is unwanted by the direct parties.

Appendix 2: Successful appeals

Between 1 July 2009 and 23 January 2012, there were 217 appeal decisions handed down under s.604 involving appeals of *Fair Work Act* decisions. Of those appeals, 61 have been successful. The details of the successful appeals are contained in the table below.

	Original decision being appealed	Appeal	Nature of S604 appeal	Full Bench decision	Appeal outcome
61	[2011] FWA 2062. Cmr Spencer	William Stewart Bentley v Vee Gillian Kelly	Re: appeal against granting extension of time for lodging s394 unfair dismissal claim	[2011] FWAFB 8992. 21/12/11. SDP Harrison, SDP Richards, Cmr Smith	"We have decided it is in the public interest to grant permission to appeal. We have also decided to uphold the appeal to the extent the Commissioner was in error in making the finding that she did about the status of the relationship between Ms Kelly and Mr Bentley." http://www.fwa.gov.au/decisionssigned/html/2011fwafb8992.htm
60	[2011] PR507116. Cmr Raffaelli	Svitzer Australia Pty Ltd v MUA, Northern NSW Branch	Re: entitlements to redundancy payments	[2011] FWAFB 7947. 16/11/11. SDP O'Callaghan, DP Hamilton, Cmr Roe	"We have concluded that the agreement must be read in the context of Part 2-8 of the FW Act and that a redundancy circumstance was not made out before the commissioner. In our respectful view the learned commissioner was in error in the interpretation he made of the agreement. We quash the determination made in this matter." http://www.fwa.gov.au/decisionssigned/html/2011fwafb7947.htm
59	[2010] FWA 4986. Cmr Roe	Newlands Coal Pty Ltd v CFMEU	Appeal against the refusal to approve an enterprise agreement	[2011] FWAFB 7325. 15/12/11. SDP Hamberger, DP McCarthy, Cmr Blair	A majority decision of two out of three members of the Full Bench approved an agreement with undertakings. http://www.fwa.gov.au/decisionssigned/html/2011fwafb7325.htm

	Original decision being appealed	Appeal	Nature of S604 appeal	Full Bench decision	Appeal outcome
58	[2011] FWAA 7899. Cmr Booth	Cannon Hill Services Pty Ltd t/as Australian Country Choice v AMIEU	Uncertainty and operation in the effect of an enterprise agreement clause as it related to a picnic day public holiday	[2011] FWAFB 8522. 8/11/11. SDP Watson, DP Hamilton, Cmr Roberts	"The variation as it applies to 2013 and 2014 will be in the form proposed by the appellant, specifically, picnic day is to be taken during the annual shutdown between 1 September and 30 November or, in the absence of a shutdown between those dates in a particular year, on a working day to be fixed by the employer between 1 September and 30 November." http://www.fwa.gov.au/decisionssigned/html/2011fwafb8522.htm
57	[2011] FWA 285. SDP Hamberger	TWU v Queensland Properties Investment Pty Ltd	Appeal against construction of eligibility rules	[2011] FWAFB 8207. 6/12/11. SDP Harrison, SDP Richards, Cmr Roberts	"We have decided that permission to appeal should be granted. We are persuaded his Honour was in error in finding the occupational provisions of the rules did not cover any QPI employees at the SRDC. We uphold the appeal and quash His Honour's decision. We have considered the evidence ourselves and identified certain employees who are covered by the relevant occupational provisions of the TWU rules." http://www.fwa.gov.au/decisionssigned/html/2011fwafb8207.htm
56	[2011] FWA 5618. SDP O'Callaghan	Mr Irving Warren; Hull-Moody Finishes Pty Ltd; Mr Romano Sidotti	Re: approval of an enterprise agreement	[2011] FWAFB 6709. 29/11/11. VP Watson, SDP Hamberger, Cmr Cambridge	VP Watson and SDP Hamberger in majority decision: "For the above reasons we find that the Senior Deputy President erred in concluding that the agreement excludes a provision of the NES. We grant permission to appeal and allow the appeal. We refer the application for approval of the agreement to SDP Hamberger for consideration of the remaining statutory tests." http://www.fwa.gov.au/decisionssigned/html/2011fwafb6709.htm
55	[2011] FWA 8271. Cmr Jones	Victorian Hospitals' Industrial Association v ANF	Appeal against an order granted to stop industrial	[2011] FWAFB 8101. 25/11/11. Pres Justice Giudice, SDP	"We uphold the appeal and quash the order made by the commissioner on 18 November 2011 and will publish an order giving effect to this decision." http://www.fwa.gov.au/decisionssigned/html/2011fwafb8101.htm

	Original decision being appealed	Appeal	Nature of S604 appeal	Full Bench decision	Appeal outcome
			action under s418	Acton, Cmr Lewin	
54	[2011] FWA 3519. Cmr Cloghan	ASU v City of Fremantle	Appeal against the approval of an enterprise agreement	[2011] FWAFB 7161. 22/11/11. Pres Justice Giudice, SDP Drake, Cmr Blair	"We have decided to refer the question of coverage to a member of this bench to consider. We grant permission to appeal to that extent. We do not consider that it would be appropriate to grant permission to appeal in relation to any other aspect of the appeal." http://www.fwa.gov.au/decisionssigned/html/2011fwafb7161.htm
53	[2011] FWA 3509. Cmr Cloghan	Technip Oceania Pty Ltd v W Tracey	Appeal against the granting of a bargaining order	[2011] FWAFB 6551. 7/11/11. Pres Justice Giudice, SDP Drake, Cmr Blair	Majority decision of Justice Giudice and Cmr Blair: "Given our conclusion that at the relevant times Mr Tracey was acting in the capacity of an MUA official, there was a basis for a conclusion that it would not be reasonable to grant the application [for bargaining orders by Mr Tracey] ... We have decided to grant permission to appeal, to uphold the appeal and to quash the decision and orders of 13 June 2011." http://www.fwa.gov.au/decisionssigned/html/2011fwafb6551.htm
52	[2011] FWA 3934. DP Sams	CEPU v CJ Manfield Pty Ltd	Appeal against a decision not to allow an extension of time	[2011] FWAFB 6845. 31/10/11. VP Watson, SDP Hamberger, Cmr Cambridge	"We grant permission to appeal, allow the appeal and quash his decision to refuse the application to extend time." http://www.fwa.gov.au/decisionssigned/html/2011fwafb6845.htm
51	[2011] FWAA 6104. Cmr Blair	RotoMetrics Australia Pty Ltd t/as RotoMetrics v AMWU and others	Re: approval of an enterprise agreement	[2011] FWAFB 7214. 27/10/11. SDP Watson, SDP Richards,	"In the circumstances of the agreement approval decision by Cmr Blair, the inclusion of the s201 note appears to have reflected a presumption of regularity by the commissioner as to the meeting of the Service Requirements in Form F22." http://www.fwa.gov.au/decisionssigned/html/2011fwafb7214.htm

	Original decision being appealed	Appeal	Nature of S604 appeal	Full Bench decision	Appeal outcome
				Cmr Smith	
50	[2011] 17 August 2011, Cmr Blair, B2011/172	CFMEU v Porta Mouldings Pty Ltd t/as Porta	Appeal against approval of a secret ballot application	[2011] FWAFB 7243. 21/10/11. Justice Boulton, SDP Acton, Cmr Jones	"There is a lack of clarity in the order for the ballot made by the Commissioner in relation to a number of issues ... In these circumstances, we have decided to grant permission to appeal and to allow the appeal to the extent of quashing the order made by the Commissioner. The application shall be returned to the commissioner to be dealt with in accordance with the relevant provisions of the Fair Work Act." http://www.fwa.gov.au/decisionssigned/html/2011fwafb7243.htm
49	[2011] FWA 3490 and FWA 2670, SDP O'Callaghan	CFMEU v Moyle Bendale Timber Pty Ltd	Appeal against the refusal to approve an enterprise agreement in relation to right of entry clause	[2011] FWAFB 6761. 13/10/11. SDP Harrison, SDP Richards, Cmr Roe	"We grant permission to the CFMEU to appeal and uphold the appeal. We quash the decision of the Senior Deputy President and, in its place, indicate that the agreement should be approved. We refer to Senior Deputy President Harrison the task of issuing an approval decision in accordance with the FW Act." http://www.fwa.gov.au/decisionssigned/html/2011fwafb6761.htm
48	[2011] FWA 3508. Cmr Cloghan	MJ Holly v SMS Operations Pty Ltd t/as Swick Mining Services Ltd	Appeal against a rejection of an unfair dismissal claim	[2011] FWAFB 6640. 31/10/11. Pres Justice Giudice, SDP Drake, Cmr Blair	"The commissioner's decision was affected by a failure to observe the requirement of natural justice. Given the nature of the error, it is in the public interest that we grant permission to appeal. We do so. In the circumstances it is appropriate that the Commissioner's decision be quashed. That means that Mr Holly's application remains to be determined." http://www.fwa.gov.au/decisionssigned/html/2011fwafb6640.htm
47	[2011] FWA 5221. Cmr Blair	Wagstaff Piling Pty Ltd; Thiess Pty Ltd v CFMEU	Re: dispute settlement procedures	[2011] FWAFB 6892. 7/10/11. SDP O'Callaghan, DP Ives, Cmr	"For the reasons we have already detailed, we do not consider that any provisions of the Wagstaff agreement ... prevent or prohibit Wagstaff from requiring an employee to submit to drug and alcohol testing. We note that there might well be concerns over the implementation or means of implementation of such compulsory drug

	Original decision being appealed	Appeal	Nature of S604 appeal	Full Bench decision	Appeal outcome
				Gay	and alcohol testing and we would expect that any dispute about such matters will be addressed through the Wagstaff agreement dispute settlement process. http://www.fwa.gov.au/decisionssigned/html/2011fwafb6892.htm
46	[2011] FWA 3894. Cmr Bissett	Ballarat Truck Centre Pty Ltd v Melissa Ker	Appeal against extension of time granted to lodge an adverse action claim	[2011] FWAFB 5645. 29/9/11. SDP Acton, SDP Kaufman, Cmr Williams	"We are not satisfied there are exceptional circumstances warranting us allowing Ms Kerr a further period for the making of her application under s365 of the Act… We therefore uphold the appeal. The Commissioner's order at first instance is quashed with the consequence that Ms Kerr's application under s365 is struck out and the certificate issued under s369 of the Act is set aside." http://www.fwa.gov.au/decisionssigned/html/2011fwafb5645.htm
45	[2011] FWA 1475. Cmr Bissett	IGA Distribution (Vic) Pty Ltd v Cong Nguyen	Appeal against order to reinstate applicant to former role	[2011] FWAFB 4070. 9/9/11. Justice Boulton, SDP O'Callaghan, Cmr Ryan	"On the material and evidence before us and having regard to the submissions in the appeal proceedings, we are satisfied that the applicant could be employed in the other warehouse at Laverton and under the relevant industrial agreement on terms and conditions which are 'no less favourable' than the previous position." http://www.fwa.gov.au/decisionssigned/html/2011fwafb4070.htm
44	[2011] Matter No U2011/6234. Cmr McKenna	Adam Dundas-Taylor v The Cuisine Group Pty Ltd	Appeal against refusal to grant extension of time to file unfair dismissal application	[2011] FWAFB 6008. 5/9/11. SDP Acton, DP McCarthy, Cmr Spencer	"We are satisfied there are exceptional circumstances warranting us allowing a further period to Mr Dundas-Taylor for the making of his second unfair dismissal remedy application to the date it was made…As a result, we uphold the appeal in this matter and we will quash the commissioner's decision and order dismissing Mr Dundas-Taylor's second unfair dismissal remedy application." http://www.fwa.gov.au/decisionssigned/html/2011fwafb6008.htm
43	[2011] FWA 1504. Cmr Ryan	Fr Andrea Bellia v Assisi Centre Inc t/as Assisi Centre Aged Care	Appeal against amount of compensation ordered for	[2011] FWAFB 5249. 11/8/11. SDP Drake, DP Ives, Cmr	On appeal the Full Bench changed the compensation amount from $2,500 to $47,500. "We grant leave to appeal and uphold the appeal in relation to remedy. We quash the Commissioner's decision in this regard."

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			unfair dismissal remedy	Simpson	http://www.fwa.gov.au/decisionssigned/html/2011fwafb5249.htm
42	[2011] PR509444. SDP Richards	AMWU v UGL Resources Pty Ltd; Conneq Infrastructure Services (Australia) Pty Ltd	Appeal against orders that industrial action cease	[2011] FWAFB 4777. 21/7/11. VP Lawler, SDP Drake, Cmr Roe	"The appeal is allowed. We have issued an order under s607 of the FW Act that quashes the decision of the Senior Deputy President in so far as it subjects the AMWU to an order under s418 and varies the order issued by the Senior Deputy President to remove order 4(c)." http://www.fwa.gov.au/decisionssigned/html/2011fwafb4777.htm
41	[2010] PR504969. SDP Cartwright	CFMEU v Hooker Cockram Projects NSW Pty Ltd	Appeal against orders that industrial action cease	[2011] FWAFB 3658. 21/6/11. SDP Harrison, SDP Richards, Cmr Williams	The Bench upheld one of four grounds of appeal. "In relation to the fourth ground of appeal, and to the extent only we have identified ... the appellant and the company should confer. If they are able to reach agreement as to the order this Full Bench should make we should be advised within the next 14 days." http://www.fwa.gov.au/decisionssigned/html/2011fwafb3658.htm
40	[2011] PR507123. DP Ives	Mr Zhan Gao v Department of Human Services	Appeal against dismissal of unfair dismissal application	[2011] FWAFB 3050. 25/5/11. SDP Acton, DP Hamilton, Cmr McKenna	"... for the reasons we have given, we do not think a conclusion that the department was not Mr Gao's employer was open on the evidence before his Honour. Accordingly, we considered it was in the public interest to grant permission to appeal and decided to uphold the appeal, quash his honour's decisions and order dismissing Mr Gao's s394 application and remit the s394 application to DP Hamilton for further consideration." http://www.fwa.gov.au/decisionssigned/html/2011fwafb3050.htm
39	[2011] FWA 696. Cmr Simpson	MN Robinson v Interstate Transport Pty Ltd	Appeal against refusal to grant extension of time for an adverse action claim	[2011] FWAFB 2728. 17/5/11. SDP Watson, SDP Drake, Cmr Harrison	"Having considered all of the matters within s366(2) of the Act, we are satisfied that there are exceptional circumstances to allow a further period of time for the making of the application by Mr Robinson ... In our view, the error by Mr Robinson's original representative, in circumstances in which Mr Robinson is blameless for the delay, constitutes an exceptional circumstance in which the application should be accepted late."

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					http://www.fwa.gov.au/decisionssigned/html/2011fwafb2728.htm
38	[2011] FWAA 8707. SDP Cartwright	AWU v Roadworx Surfacing Pty Ltd	Appeal against approval of an enterprise agreement	[2011] FWAFB 1759. 10/5/11. SDP Harrison, SDP Richards, Cmr Williams	"The undertakings which his Honour accepted, and annexed to his decision, were not signed by any person for or on behalf of Roadworx as required by the Act and regulations. His Honour was in error in accepting the undertaking in the form he did… The errors are such as to satisfy us the appeal should be upheld. The decision to approve the agreement is quashed." http://www.fwa.gov.au/decisionssigned/html/2011fwafb1759.htm
37	[2011] FWA 1639. SDP O'Callaghan	Appeal by Philmac Pty Ltd	Appeal against refusal to approve an enterprise agreement	[2011] FWAFB 2668. 5/5/11. Justice Boulton, SDP Kaufman, Cmr Bissett	"Following discussions, the parties put an agreed position to us which included the withdrawal of the application for approval of the agreement and resubmitting the agreement to a further ballot of employees. Accordingly, we decided to grant permission to appeal, allow the appeal and quash the decision of the Senior Deputy President." http://www.fwa.gov.au/decisionssigned/html/2011fwafb2668.htm
36	[2011] FWA 167. Cmr Bissett	Coles Group Supply Chain Pty Ltd v NUW	Appeal against decision regarding the application of redundancy payments	[2011] FWAFB 2425. 29/4/11. SDP Watson, SDP Hamberger, Cmr Spencer	"Having granted permission to appeal, we have decided to admit the new evidence which the NUW sought to introduce – a 1998 communique, under the name of Kmart, in which the transfer from Kmart to CML is said to 'not affect your entitlements or conditions of employment in any way'. Accordingly, even with the admission of the new evidence, we uphold the appeal and quash the commissioner's decision." http://www.fwa.gov.au/decisionssigned/html/2011fwafb2425.htm
35	[2010] FWA 9101. Cmr Bissett	Tabro Meat Pty Ltd v Kevin Heffernan	Appeal against amount of compensation ordered as unfair dismissal	[2011] FWAFB 1080. SDP Acton, DP Hamilton, Cmr Crib	The Full Bench reduced the amount of compensation to be paid to the applicant from $17,437 less tax to $13,844.37 gross. http://www.fwa.gov.au/decisionssigned/html/2011fwafb1080.htm

	Original decision being appealed	Appeal	Nature of S604 appeal	Full Bench decision	Appeal outcome
			remedy		
34	[2010] FWA 7358. Cmr Bissett	Dianna Smith t/as Escape Hair Design v Sally-Anne Fitzgerald	Appeal against remedy awarded for unfair dismissal	[2011] FWAFB 1422. 15/3/11. SDP Acton, SDP Cartwright, Cmr Blair	The original commissioner ordered compensation of $2,340.48 less tax. "Being satisfied that, in failing to give adequate reasons for the decision on remedy, the Commissioner was in error, we consider that it is in the public interest to grant permission to appeal. We do so, allow the appeal and quash the decision on remedy." The matter was remitted back to the commissioner to deal with the issue of remedy. http://www.fwa.gov.au/decisionssigned/html/2011fwafb1422.htm
33	[2010] FWAA 8559. Cmr Raffaelli	AIMPE v Inco Ships Pty Ltd	Appeal against approval of an enterprise agreement	[2011] FWAFB 1537. 10/3/11. SDP Watson, DP McCarthy, Cmr Deegan	"We find that Commissioner Raffaelli erred in finding that the agreement provisions ... did not contravene s55 of the Act in respect of long service leave and redundancy and did not preclude approval of the agreement by reference to s186(2)(c) of the Act. Permission to appeal is granted and we uphold the appeal on this basis." http://www.fwa.gov.au/decisionssigned/html/2011fwafb1537.htm
32	[2010] FWA 9958. Cmr Ryan	Aperio Group (Australia) Pty Ltd t/as Aperio Finewrap v V Sulemanovski	Appeal against reinstatement order	[2011] FWAFB 1436. 4/3/11. SDP Watson, SDP McCarthy, Cmr Deegan	"Given that we are not satisfied that the dismissal was harsh, unjust or unreasonable, we are not satisfied that Mr Sulemanovski has been unfairly dismissed, within the meaning of s385 of the Act." http://www.fwa.gov.au/decisionssigned/html/2011fwafb1436.htm
31	[2010] FWA 8727. Cmr Cargill	Parmalat Food Products Pty Ltd v Mr Kasian Wililo	Appeal against reinstatement order	VP Watson, DP Sams, Cmr Asbury	"In our view, there are no mitigating factors that should have led to a lesser penalty than dismissal being adopted... It is not for the tribunal to place itself in the shoes of the employer and determine what it would have done in the circumstances ... For the reasons above, we grant permission to appeal and allow the appeal." http://www.fwa.gov.au/decisionssigned/html/2011fwafb1166.htm
30	[2010] PR505143 and	Power Projects International Pty Ltd v	Appeal against	[2011] FWAFB 1327. 1/3/11.	"In granting the orders as his Honour did he was in error. There was no valid application under s437 of the Act for the purposes of the

	Original decision being appealed	Appeal	Nature of S604 appeal	Full Bench decision	Appeal outcome
	PR505210. DP Harrison	AMWU	granting of two protected action ballot orders	SDP Watson, SDP Harrison, Cmr Raffaelli	requirement for the making of a ballot order under s443(1)(a) of the Act. The two applications should have been dismissed. Given the error, and its nature and effect, we grant permission to appeal and uphold the appeal." http://www.fwa.gov.au/decisionssigned/html/2011fwafb1327.htm
29	[2010] FWAA 8421 and FWAA 8435. Cmr Blair	CFMEU. TCFUA and Solaris Paper Enterprise Agreement 2010	Appeal against the approval of an enterprise agreement	[2011] FWAFB 222. 17/1/11. SDP Acton, SDP Cartwright, Cmr Smith	"For the reasons we have given, we think the Commissioner made an appealable error in concluding the TCF Award 2010 is the appropriate award for the purposes of assessing whether the Solaris Agreement passes the BOOT." http://www.fwa.gov.au/decisionssigned/html/2011fwafb222.htm
28	[2010] FWA 7672. Cmr Ryan	Abigroup Contractors Pty Ltd v CFMEU	Appeal against decision on the applicability of the National Building & Construction Industry Award	[2011] FWAFB 24. 5/1/11. SDP Kaufman, SDP Richards, Cmr Crib	"The appeal is competent and in our opinion the matter is of such importance that leave to appeal should be granted. We allow the appeal and quash the decision of Commissioner Ryan." http://www.fwa.gov.au/decisionssigned/html/2011fwafb24.htm
27	[2010] FWA 7925. Cmr Ryan	Inghams Enterprises Pty Ltd	Appeal against order for a protected action ballot	[2011] FWAFB 33. 5/1/11. SDP Kaufman, SDP Richards, Cmr Cribb	"When it was put to the commissioner that without knowing who was to be employed a respondent could not comply with the order, the commissioner took the view that that was something that would be sorted out by the AEC. In our view, that is not the appropriate manner in which to deal with such an issue ... There being no valid application, s443(2) of the Act precluded the making of the protected action ballot order. The Commissioner exceeded his jurisdiction by making the order and thereby erred."

	Original decision being appealed	Appeal	Nature of S604 appeal	Full Bench decision	Appeal outcome
					http://www.fwa.gov.au/decisionssigned/html/2011fwafb33.htm
26	[2010] 28 October 2010. Cmr Ryan	Armacell Australia Pty Ltd. Wilmaridge Pty Ltd as Trustee for the O'Neill Family Trust t/as Direct Paper Supplies. Downer EDI Works Pty Ltd	Appeal against three unsuccessful applications for approval of enterprise agreements on the basis of clauses relating to the cashing out of annual leave	[2010] FWAFB 9985. 24/12/10. Pres Justice Giudice, SDP Acton, Cmr Lewin	"In the circumstances we think the appropriate course is to indicate that we are prepared to approve the Armacell agreement and the DPS agreement on the basis of the undertakings provided by the employer in documents dated 13 September 2010 and 15 September 2010 respectively, subject to two things…We are prepared to approve the Downer EDI agreement on the basis of the undertakings given by the employer in the letter dated 20 July 2010." http://www.fwa.gov.au/decisionssigned/html/2010fwafb9985.htm
25	[2010] FWA 4538. Cmr Williams	Fonterra Brands Australia (P&B) Pty Ltd v TWU and another	Appeal against interpretation of enterprise agreement clause	[2010] FWAFB 9986. 24/12/10. SDP Acton, SDP Richards, Cmr Cargill	"The Commissioner came to the conclusion that the term 'ordinary base weekly rate of wage' in clause 22 of the Fonterra Agreement means the weekly rate of the annualised salary for an employee on an annualised salary … We consider the Commissioner erred in so concluding." http://www.fwa.gov.au/decisionssigned/html/2010fwafb9986.htm
24	[2010] FWA 5674. Cmr Lewin	Alcoa Australia Rolled Products Pty Ltd v AWU and others	Appeal against decision over deductions for partial work bans	[2010] FWAFB 9832. 21/12/10. SDP Acton, SDP Cartwright, Cmr Smith	"The Commissioner's failure to consider the matters in ss709(1)(b) or 710(b) of the WR Act in deciding he had jurisdiction to deal with the applications of the unions, because they concerned disputes in respect of which clause 27 of the Alcoa Agreement applied, constitutes an error of law." http://www.fwa.gov.au/decisionssigned/html/2010fwafb9832.htm
23	[2010] FWA 7423. SDP O'Callaghan	Brent Gorman v Australia Post	Appeal against dismissal of unfair dismissal application	[2010] FWAFB 9413. 16/12/10. Justice Boulton, SDP	"Having considered the evidence and submissions in the proceedings before the Senior Deputy President and the submissions in the appeal, we have decided that the Senior Deputy President fell into error in reaching his conclusion to dismiss Mr Gorman's application. Given this finding, we have decided to grant permission to appeal and to allow

	Original decision being appealed	Appeal	Nature of S604 appeal	Full Bench decision	Appeal outcome
			for being vexatious or frivolous	Hamilton, Cmr Raffaelli	the appeal." http://www.fwa.gov.au/decisionssigned/html/2010fwafb9413.htm
22	[2010] FWA 6227. Cmr Cloghan	The Jewellery Group Pty Ltd t/as Zamels Jewellers v Nicola Jones	Appeal against compensation ordered for unfair dismissal	[2010] FWAFB 9337. 13/12/10. SDP Acton, SDP Richards, Cmr Cargill	"We have considered the length of Ms Jones' employment, the summary nature of her dismissal and the procedural deficiencies in effecting her dismissal against the nature of Ms Jones' conduct that constituted the valid reason for her dismissal. We are not persuaded on balance that Ms Jones' dismissal was harsh, unjust or unreasonable." http://www.fwa.gov.au/decisionssigned/html/2010fwafb9337.htm
21	[2010] FWA 4581. SDP Drake	Sere Corporate Solutions Pty Ltd t/as Perth Freightlines Pty Ltd v Andrew Bennett	Appeal against order that employer pay costs for applicant's unfair dismissal claim	[2010] FWAFB 8315. 28/10/10. SDP Acton, SDP Cartwright, Cmr Thatcher	"In all the circumstances, therefore, we are not satisfied Sere acted unreasonably in failing to agree to terms of settlement that could lead to the discontinuance of Mr Bennett's s643(1) application." http://www.fwa.gov.au/decisionssigned/html/2010fwafb8315.htm
20	[2010] FWA 3701. Cmr McKenna	Cheval Properties Pty Ltd t/as Penrith Hotel Motel v Janette Smithers	Appeal against extension of time to file unfair dismissal claim	[2010] FWAFB 7251. 17/10/10. SDP Acton, SDP Cartwright, Cmr Thatcher	"We are not satisfied our findings in respect of the matters in s394(3)(a) to (f) of the FW Act constitute exceptional circumstances …Accordingly, we quash the commissioner's decision and order of 14 May 2010 and decline to allow Ms Smithers the necessary further period to make her unfair dismissal remedy application." http://www.fwa.gov.au/decisionssigned/html/2010fwafb7251.htm
19	[2010] FWA 2826. Cmr Cloghan	Wayne Shortland v The Smiths Snackfood Co Ltd	Appeal against rejection of unfair dismissal claim for want of jurisdiction	[2010] FWAFB 5709. 16/9/10. VP Lawler, SDP Drake, Cmr Lewin	"We are satisfied that the issues raised by Mr Shortland's grounds of appeal are of sufficient importance that permission to appeal should be granted …We grant permission to appeal and allow the appeal." http://www.fwa.gov.au/decisionssigned/html/2010fwafb5709.htm

	Original decision being appealed	Appeal	Nature of S604 appeal	Full Bench decision	Appeal outcome
18	[2010] FWA 3634. Cmr Ryan	Regency Showerscreens & Wardrobes Pty Ltd v CFMEU	Appeal against decision relating to redundancy provisions	[2010] FWAFB 6311. 31/10/10. SDP Acton, DP Ives, Cmr Lewin	"In our view, the three employees are not entitled to the [redundancy] payments in clause 7 [of the enterprise agreement] … Accordingly, we quash the decision and reasons for decision of Commissioner Ryan of 6 May 2010 and 9 June 2010 respectively." http://www.fwa.gov.au/decisionssigned/html/2010fwafb6311.htm
17	[2010] FWA 4460. DP Leary	Lois O'Grady v Royal Flying Doctor Service of Australia, South Eastern Section	Appeal against decision to dismiss unfair dismissal application	[2010] FWAFB 6177. 17/8/10. VP Watson, DP Sams, Cmr Asbury	"We do not consider that it is clear that Ms O'Grady is not covered by the Agreement. Indeed on the evidence of Mr Kumar, such a conclusion appears doubtful… For the reasons above we grant permission to appeal and allow the appeal." http://www.fwa.gov.au/decisionssigned/html/2010fwafb6177.htm
16	[2010] FWA 2945. Cmr Cribb	Campbell Australasia Pty Ltd v Mr Greg McNay and Mr Patrick Humphreys	Appeal against decision to dismiss objection to unfair dismissal claim	[2010] FWAFB 604. 11/8/10. SDP Acton, DP Ives, Cmr Ryan	Majority decision of SDP Acton, DP Ives: "Both Campbell and Mr Humphreys and Mr McNay submitted that should we uphold the appeal, we should remit the unfair dismissal remedy applications of Mr Humphreys and Mr McNay to a member to deal with having regard to our decision. We are of the view this is an appropriate course given the limited basis on which the applications were dealt with by both parties at first instance." http://www.fwa.gov.au/decisionssigned/html/2010fwafb6177.htm
15	[2010] FWA 4880, DP McCarthy	CFMEU v Woodside Burrup Pty Ltd (first respondent) and Kentz E&C Pty Ltd (second respondent)	Appeal against an order that industrial action cease	[2010] FWAFB 6021. 6/8/10. VP Lawler, DP Ives, Cmr Roe	"It is not appropriate that the employees be permanently deprived of their right to take protected industrial action in relation to bargaining that has been proceeding for the best part of a year … The proper orders on appeal are to allow the appeal, to quash the decision and order of the Deputy President and dismiss the originating application." http://www.fwa.gov.au/decisionssigned/html/2010fwafb6021.htm
14	[2010] FWA 1981. Cmr Larkin	RPEP Holdings Pty Ltd	Appeal against construction	[2010] FWAFB 4672. 21/7/10. VP	"The nature of the error in the Commissioner's application of the no-disadvantage test makes her ultimate conclusion on the test unreliable. In these circumstances, permission to appeal should be granted and

	Original decision being appealed	Appeal	Nature of S604 appeal	Full Bench decision	Appeal outcome
			of enterprise agreement	Watson, SDP Cartwright, Cmr Macdonald	the appeal allowed." http://www.fwa.gov.au/decisionssigned/html/2010fwafb4672.htm
13	[2010] FWA 1347. Cmr McKenna	McDonald's Australia Pty Ltd. Shop, Distributive and Allied Employees' Association	Appeal against refusal to approve an enterprise agreement	[2010] FWAFB 4602. 21/7/10. VP Watson, SDP Kaufman, Cmr Raffaelli	"We have considered the comparative material which explains the relevant advantages and disadvantages to employees and have concluded that the Agreement does not result, on balance, in a reduction in the overall terms and conditions of employment of the employees who are covered by the Agreement under reference instruments applying to the employees. For the above reasons, on 22 June we granted permission to appeal, allowed the appeal and quashed the decision of Cmr McKenna." http://www.fwa.gov.au/decisionssigned/html/2010fwafb4602.htm
12	[2010] FWA 2850. SDP Hamberger	Airport Fuel Services Pty Ltd v TWU	Re: protected action ballot order	[2010] FWAFB 4457. 17/6/10. SDP Acton, DP Ives, Cmr Thatcher	"As a result we do not think it was open to his Honour to be satisfied, as required by s443(1)(b) of the Fair Work Act, that the TWU had been genuinely trying to reach an agreement with AFS as the employer of the employees to be balloted." http://www.fwa.gov.au/decisionssigned/html/2010fwafb4457.htm
11	[2010] FWAA 1401. Cmr Ryan	Australian Industry Group	Re: approval of an enterprise agreement	[2010] FWAFB 4337. 11/6/10. Pres Justice Giudice, SDP Watson, Cmr Blair	"With respect to the commissioner, in our view the conclusion that clause 44 is not an unlawful term is wrong. The decision approving the agreement must be quashed." http://www.fwa.gov.au/decisionssigned/html/2010fwafb4337.htm
10	[2010] FWA 985. SDP O'Callaghan	Dr F Tiver v University of South Australia	Re: disciplinary action for misconduct	[2010] FWAFB 3544. 31/5/10. SDP Watson, SDP	"We find that Senior Deputy President O'Callaghan erred in finding that the 15 Dec 2009 materials satisfied the requirements of clause 46.5(b)(i) of the agreement."

	Original decision being appealed	Appeal	Nature of S604 appeal	Full Bench decision	Appeal outcome
				Kaufman, Cmr Cargill	http://www.fwa.gov.au/decisionssigned/html/2010fwafb3544.htm
9	[2010] FWA 148. SDP Kaufman	J Boag and Son Brewing Pty Ltd v Allan John Button	Re: unfair dismissal	[2010] FWAFB 4022. 26/5/10. VP Lawler, SDP O'Callaghan, Cmr Williams	"Permission to appeal is granted. The appeal is allowed and the decision of the senior deputy president is quashed." http://www.fwa.gov.au/decisionssigned/html/2010fwafb4022.htm
8	[2010] FWAA 1485. Cmr Ryan	Minister for Employment & Workplace Relations	Re: approval of an enterprise agreement (s605 – minister may apply for review of a decision)	[2010] FWAFB 3552. 19/5/10. Pres Justice Giudice, SDP Harrison, Cmr Blair	"For these reasons the cmr fell into error. Clause 12.1 is a valid flexibility term and the model term does not apply. In the circumstances, the cmr's decision on this point cannot stand." http://www.fwa.gov.au/decisionssigned/html/2010fwafb3552.htm
7	[2010] FWA 167. Cmr Raffaelli	Ulan Coal Mines Ltd v Henry Jon Howarth and others	Re: unfair dismissal and genuine redundancy	[2010] FWAFB 3488. 10/5/10. SDP Justice Boulton, SDP Drake, Cmr McKenna	"The commissioner decided that, in view of his conclusions regarding the matters in s389(1), it was not necessary for him to deal with the third limb of the requirement for there to be genuine redundancy." http://www.fwa.gov.au/decisionssigned/html/2010fwafb3488.htm
6	[2010] FWA 16. Cmr Smith [2010] FWA 339. Cmr	Bupa Care Services Pty Ltd P&A Securities Pty Ltd as trustee for the D'Agostino Family	Re: approval of two enterprise agreements	[2010] FWAFB 2762. 15/4/10. SDP Acton, DP Sams, Cmr Williams	"In the circumstances, the appropriate course is for us to grant permission to appeal, uphold the appeal, and quash the decision of Cmr Smith of 5 Jan 2010." "In the circumstances, we grant permission to appeal, uphold the appeal, and quash the decision of Cmr McKenna of 20 Jan 2010." http://www.fwa.gov.au/decisionssigned/html/2010fwafb2762.htm

	Original decision being appealed	Appeal	Nature of S604 appeal	Full Bench decision	Appeal outcome
	McKenna	Trust t/as Michel's Patisserie Murwillumbah and others			
5	[2010] FWAA 1257. Cmr Williams	Modern Industries Australia Pty Ltd and another	Re: approval of an enterprise agreement	[2010] FWAFB 2541. 30/3/10. SDP Watson, SDP Kaufman, Cmr Cargill	"On the facts before us, we are not satisfied that the agreement has been genuinely agreed to by the employees covered by the agreement or that the agreement was 'made' in accordance with s182 of the Act." http://www.fwa.gov.au/decisionssigned/html/2010fwafb2541.htm
4	[2010] FWA 30. Cmr Smith	Woolworths Ltd t/as Produce and Recycling Distribution Centre	Re: approval of an enterprise agreement	[2010] FWAFB 1464. 26/2/10. Pres Justice Giudice, SDP Acton, Cmr Hampton	"For these reasons the Commissioner's decision was affected by appealable error. We grant permission to appeal. Clause 30 of the agreement includes a term that provides a procedure that requires or allows Fair Work Australia to settle disputes about any matters arising under the agreement." http://www.fwa.gov.au/decisionssigned/html/2010fwafb1464.htm
3	[2009] FWA 1599. VP Lawler	Telstra Corporation Ltd v CEPU	Re: notice of industrial action	[2009] FWAFB 1698. 15/12/09. Pres Justice Giudice, SDP Acton, Cmr Whelan	"We respectfully disagree with the Vice President's conclusion that the notice specifies action involving all CEPU members at all worksites and that such a notice specifies the nature of the industrial action and complies with s414(6)." http://www.fwa.gov.au/decisionssigned/html/2009fwafb1698.htm
2	[2009] FWA 136 SDP Drake	Australian Postal Corporation v CEPU	Re: Protected action ballot order	[2009] FWAFB 599. 12/10/09. SDP Acton, DP Hamilton, Cmr Blair	"As a result of a jurisdictional pre-requisite for making the protected action ballot order sought by the CEPU in its s437 application concerning Australia Post employees, excluding Post Logistics' employees, was not satisfied. Her honour erred in concluding otherwise." http://www.fwa.gov.au/decisionssigned/html/2009fwafb599.htm

	Original decision being appealed	Appeal	Nature of S604 appeal	Full Bench decision	Appeal outcome
1	[2009] FWA 187. Cmr Thatcher	Total Marine Services Pty Ltd v MUA	Re: protected action ballot order	[2009] FWAFB 368 09/10/09. VP Watson, SDP Hamberger, Cmr Roberts	"For the reasons above, we are of the view that the jurisdictional pre-requisite for making the order in s443(1)(b) of the Act was not satisfied and the application should have been dismissed. We grant permission to appeal, allow the appeal and quash the order of Cmr Thatcher dated 1 Sept 2009." http://www.fwa.gov.au/decisionssigned/html/2009fwafb368.htm

Appendix 3: Questions answered in this submission

General

1. Has the Fair Work Act created a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians? If so, how? If not, why not?

Please see:

- Executive summary;
- Chapter 1 – AMMA members' experiences;
- Chapter 2 – The value of the resource industry to the Australian economy;
- Chapter 6 – Statutory individual agreements; and
- Chapter 19 – Fair Work Australia.

2. Can the Fair Work Act provide flexibility for businesses and is this being achieved? If so, how? If not, why not?

Please see:

- Chapter 5 – The case for internal regulation;
- Chapter 6 – Statutory individual agreements; and
- Chapter 7 – Individual flexibility arrangements (IFAs).

4. Has the Fair Work Act facilitated flexible working arrangements to assist employees to balance their work and family responsibilities?

Please see:

- Chapter 7 – Individual flexibility arrangements (IFAs).

5. Has the Fair Work Act's focus on enterprise level collective bargaining helped to achieve improved productivity and fairness?

Please see:

- Executive summary;
- Chapter 1 – AMMA members' experiences;
- Chapter 3 – Wages growth; and
- Chapter 4 – Productivity.

6. What has been the impact, if any, of the Fair Work Act on labour productivity?

Please see:

- Chapter 4 – Productivity;
- Chapter 5 – The case for internal regulation; and
- Chapter 6 – Statutory individual agreements.

Safety net

8. Is the safety net established under the Fair Work Act fair and relevant?

Please see:

- Executive summary; and
- Chapter 18 – The National Employment Standards (NES).

10. What are the advantages and disadvantages of the Fair Work Act providing a safety net of employment conditions on a national basis through the National Employment Standards and modern awards rather than a state by state basis?

Please see:

- Chapter 6 – Statutory individual agreements; and
- Chapter 18 – The National Employment Standards (NES).

11. Does the Fair Work Act allow for safety net terms and conditions of employment to be set in a way that is appropriately industry or occupationally specific? If not, why not?

Please see:

- Chapter 6 – Statutory individual agreements; and
- Chapter 18 – The National Employment Standards (NES).

13. Do Individual Flexibility Arrangements, as provided for in modern awards, allow employers and employees to individually tailor modern award conditions to meet their genuine personal needs? If so, how? If not, why not?

Please see:

- Chapter 7 – Individual Flexibility Arrangements (IFAs).

14. Are employees appropriately protected when making Individual Flexibility Arrangements? Is the safety net of minimum employment conditions appropriately guaranteed and protected from being undermined?

Please see:

- Chapter 7 – Individual Flexibility Arrangements (IFAs).

15. How could the operation of the safety net be improved, consistent with the objects of the Fair Work Act and the Government's policy objective to provide a fair and enforceable set of minimum entitlements?

Please see:

- Chapter 18 – The National Employment Standards (NES).

Bargaining and agreement-making

20. Does the bargaining framework promote discussion and uptake of measures to improve workplace productivity?

Please see:

- Chapter 3 – Wages growth;
- Chapter 4 – Productivity;
- Chapter 10 – Good faith bargaining;
- Chapter 11 – Greenfield negotiations; and
- Chapter 12 – Majority support determinations.

21. How have employers pursued productivity improvements during bargaining for a new enterprise agreement? Are there any obstacles to achieving productivity improvements in bargaining in the legislation? How do these obstacles differ from the situation that existed prior to the Fair Work Act?

Please see:

- Chapter 3 – Wages growth; and
- Chapter 4 – Productivity.

22. Have enterprise agreements helped employees to better balance work and family responsibilities?

Please see:

- Chapter 7 – Individual flexibility arrangements (IFAs).

23. What has been the impact of allowing a wider range of matters to be included in enterprise agreements by removing the list of "prohibited content" provided under the Workplace Relations Act? What has been the impact on bargaining and productivity? What has been the impact on employees' capacity to be represented in the workplace?

Please see:

- Chapter 9 – Agreement content.

24. Did Individual Transitional Employment Agreements help to provide greater certainty of wage costs for employers using Australian Workplace Agreements and assist in the transition to a system focused on enterprise level collective bargaining?

Please see:

- Chapter 6 – Statutory individual agreements.

25. Are Individual Flexibility Arrangements allowed for under the flexibility terms of enterprise agreements providing employers and employees with the flexibility to tailor working arrangements to meet their genuine needs? If so, how? If not, why not?

Please see:

- Chapter 7 – Individual flexibility arrangements (IFAs).

26. Are employees appropriately protected when making Individual Flexibility Arrangements?

Please see:

- Chapter 7 – Individual flexibility arrangements (IFAs).

29. How have the good faith bargaining requirements affected enterprise agreement negotiations?

a. Are there ways in which the good faith bargaining requirements could be improved to better facilitate bargaining?

b. Are the powers possessed by FWA adequate to remedy breaches of the good faith bargaining requirements?

Please see:

- Chapter 10 – Good faith bargaining;
- Chapter 11 – Greenfield negotiations; and
- Chapter 12 – Majority support determinations.

30. Have majority support determinations and scope orders encouraged enterprise bargaining? If so how? If not, why not?

Please see:

- Chapter 12 – Majority support determinations.

Transfer of business

34. Does the new broader definition of transfer of business help to clarify when a transfer of business occurs?

Please see:

- Chapter 17 – Transfer of business.

35. What has been the effect of the new transfer of business provisions on corporate restructuring activities, such as in-sourcing and outsourcing?

Please see:

- Chapter 17 – Transfer of business.

36. Do the range of matters which FWA must consider when making an order in relation to a transfer of business strike the right balance between protecting employee and employer interests?

Please see:

- Chapter 17 – Transfer of business.

General protections

37. Do the general protections provisions provide adequate protection of employees' workplace rights, including the right to freedom of association and against workplace discrimination?

Please see:

- Chapter 15 – The adverse action provisions.

38. Do the provisions provide effective relief for persons who have been discriminated against, victimised or otherwise adversely affected as a result of contraventions of the general protections?

Please see:

- Chapter 15 – The adverse action provisions.

39. Should dismissed employees be able to invoke the general protection provisions to challenge their termination without any time limit on making an application? If so, why, and if not, why not?

Please see:

- Chapter 15 – The adverse action provisions.

Unfair dismissal

42. Do the unfair dismissal provisions balance the needs of business and employees' right to protection from unfair dismissal?

Please see:

- Chapter 16 – Unfair dismissal.

44. Are the procedures for dealing with unfair dismissal quick, flexible and informal and do they meet the needs of employers and employees? What is the impact of the changed processes upon the costs incurred by employers and employees?

Please see:

- Chapter 16 – Unfair dismissal.

45. Has the ability of FWA to deal with unfair dismissal claims in a more informal manner improved the experience for participants?

Please see:

- Chapter 16 – Unfair dismissal.

48. Are the remedies available in the case of an unfair dismissal appropriate?

Please see:

- Chapter 16 – Unfair dismissal.

Industrial action

54. Should applications for protected action ballots be permitted where no majority support determination has been made by FWA, and where the employer has not agreed to engage in collective bargaining? If so, why, and if not, why not?

Please see:

- Chapter 8 – Industrial action;
- Chapter 10 – Good faith bargaining; and
- Chapter 12 – Majority support determinations.

55. Are the powers and procedures possessed by FWA to suspend or to terminate protected industrial action adequate to resolve intractable disputes? If not, why not, and if so, why?

Please see:

- Chapter 8 – Industrial action;
- Chapter 10 – Good faith bargaining; and
- Chapter 11 – Greenfield negotiations.

56. Should compulsory conciliation play a more prominent role, either generally, in the enterprise bargaining regime, in settling disputes over the application of enterprise agreements or more especially in the machinery which governs the settlement of intractable disputes?

Please see:

- Chapter 8 – Industrial action; and
- Chapter 11 – Greenfield negotiations.

57. Are employees able to resort to protected industrial action more easily or quickly since the passage of the Fair Work Act? If so, which provisions of the Act facilitate this?

Please see:

- Chapter 8 – Industrial action;
- Chapter 10 – Good faith bargaining; and
- Chapter 12 – Majority support determinations.

58. Is the taking of industrial action in support of pattern bargaining effectively prohibited by the Fair Work Act?

Please see:

- Chapter 10 – Good faith bargaining.

Right of entry

62. What has been the impact of union right of entry being linked to the right of a union to represent the industrial interests of an employee, rather than coverage by a type of instrument?

Please see:

- Chapter 13 – Right of entry; and
- Chapter 14 – Demarcation disputes.

63. Do the right of entry provisions balance the right of unions to enter workplaces to meet with employees and investigate breaches of legislation and the right of employers to go about their business without undue inconvenience?

Please see:

- Chapter 13 – Right of entry; and
- Chapter 14 – Demarcation disputes.

Institutional framework

64. Are the processes and procedures set out in the Fair Work Act that apply to FWA, the Federal Magistrates Court of Australia and to the Federal Court of Australia appropriate having regard to the matters coming before it? What changes, if any, would you suggest?

Please see:

- Chapter 19 – Fair Work Australia.

68. In comparison to the previous arrangements, does the increased educative role for the FWO help employers and employees to better understand their rights and obligations under the Fair Work Act?

Please see:

- Chapter 18 – The National Employment Standards (NES).