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Held to ransom under Fair Work: employers forced to 'agree' and still pay the price

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The current industrial relations (**IR**) framework sees employers with little choice than to give in to exorbitant wages and conditions demands – or pay an unsustainable commercial price.

Almost three years since its introduction on 1 July 2009, the resources industry has seen no real improvement to labour productivity under the Fair Work regime. Productivity can often not be discussed let alone achieved via enterprise negotiations, even with the assistance of the independent umpire. This is despite the Government's pre-election promise to deliver on 'the big drivers of productivity' – and productivity being a key object of the legislation.

The current IR framework has also seen resource industry employers held to ransom in their commercial and managerial decision making by the counter productive restrictions on greenfield agreements, virtually unfettered access to protected industrial action and the unjustifiably broad reach of the 'general protections' provisions.

And it is not just employers who are paying the price. Escalating labour costs, costs of delay and industrial uncertainty are causing investors and other industry stakeholders to seriously question the financial viability of future resources projects.

AMMA's February 2012 submission to the Fair Work Act review panel makes 54 recommendations for legislative change to the current IR framework with the aim of restoring balance to the current system in these and other areas.

Three key areas of change in AMMA's submission relate to productivity; the rules around taking protected industrial action and the process for making greenfield agreements.

It is these three issues that I want to talk about today.

Productivity is elusive

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

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.

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[1].

Back in March 2007, the Labor Opposition promised that its IR policies would be 'focused on the big drivers of productivity'[2] and that 'enterprise collective bargaining is an important driver of productivity and a key feature of our policy'[3].

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?

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.

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.

Employers' perceptions of what's happening to labour productivity

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[1] AMMA WR Research Project Survey 3 report, April 2011, by Dr Steven Kates, RMIT University
[2] Deputy Opposition Leader Julia Gillard, Australian Workplace Relations Summit, 14 March 2007
[3] Deputy Opposition Leader Julia Gillard, Speech – Melbourne Press Club – 25 June 2007

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**

As one AMMA member said[4]:

> *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.*

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.

One AMMA member went so far as to say[5]:

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

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.

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 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.

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.

Greenfield agreements an unrealistic vehicle

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 greenfield agreements is now mandatory. This imbalance can be seen in the exorbitant pay and conditions outcomes able to be achieved in many greenfield agreements under the current system, which often do not include any improvements in productivity or changes in workers' duties.

In AMMA's view, it makes no economic sense to hand unions the power of veto over a project's terms and conditions at such an early stage, i.e. before the first ground has even been turned, and when employees have yet to be hired or begin work.

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 lasting for up to 12 months. Under the *Fair Work Act*, employers' only option is to make a greenfield agreement with one or more unions. In many cases, this is easier said than done.

Not only does mandated union involvement in greenfield negotiations give unions the power of veto over any terms and conditions an agreement might include, it also gives them the power to refuse to make an agreement at all. This happens more often than might be

assumed, with unions sometimes holding grudges against employers for many years over what the unions see as employers' past transgressions.

As one AMMA member said of their experience in greenfield negotiations under the current system[6]:

> *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.*

One choice for employers under the current system is to start up a project without a greenfield agreement in place, leaving the project vulnerable to protected industrial action from the minute 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 generally demand industrial certainty before signing on the dotted line.

The only other choice for employers, if they want to have an industrial agreement in place from the start of a project, is to agree to unions' often exorbitant wage and conditions demands, including extensive union rights agendas that are being pursued across the board.

AMMA maintains that 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 and are not behaving reasonably.

Where unions are demanding fanciful or exorbitant outcomes and are refusing to negotiate, employers must have a safety valve.

That safety valve could consist of having 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 having to obtain consent from unions.

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 to issue a 'greenfield determination' if agreement cannot be reached between the parties. That greenfield determination would be a de facto industrial agreement that would operate for 12 months until a new agreement could be entered into.

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[6] AMMA WR Research Project Survey 4, October 2011, Dr Steven Kates, RMIT University

AMMA also 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.

The costs associated with delays in greenfield negotiations

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. A further 34.6 per cent said it was 'too soon to tell' if projects would be delayed[7].

Also, 40 per cent of respondents to that survey 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[8].

As one AMMA member said[9]:

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

The extra costs associated with the *Fair Work Act*'s greenfield agreement making rules are unique to each project and the circumstances involved. However, costs associated with delays in getting an agreement up and running on time or a failure to get one in place at all, not to mention the often exorbitant wage and conditions outcomes, are:

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

[7] AMMA WR Research Project Survey 3, April 2011, Dr Steven Kates, RMIT University
[8] Ibid
[9] Ibid

By virtue of the veto power that unions have in greenfield negotiations under the new rules, agreements are also 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.

One AMMA member described the problem this way[10]:

> *[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.*

In an October 2010 survey of AMMA members[11], 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'.

So, in summary, Fair Work Australia should, on application by an 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. Relevant good faith bargaining principles should apply to greenfield negotiations.

Inadequate rules around protected industrial action

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

AMMA maintains that protected industrial action should only be available as a last resort and only after a demonstrated attempt has been made to exhaust all bargaining options, including mediation. This is among the recommendations in AMMA's submission to the Fair Work Act review.

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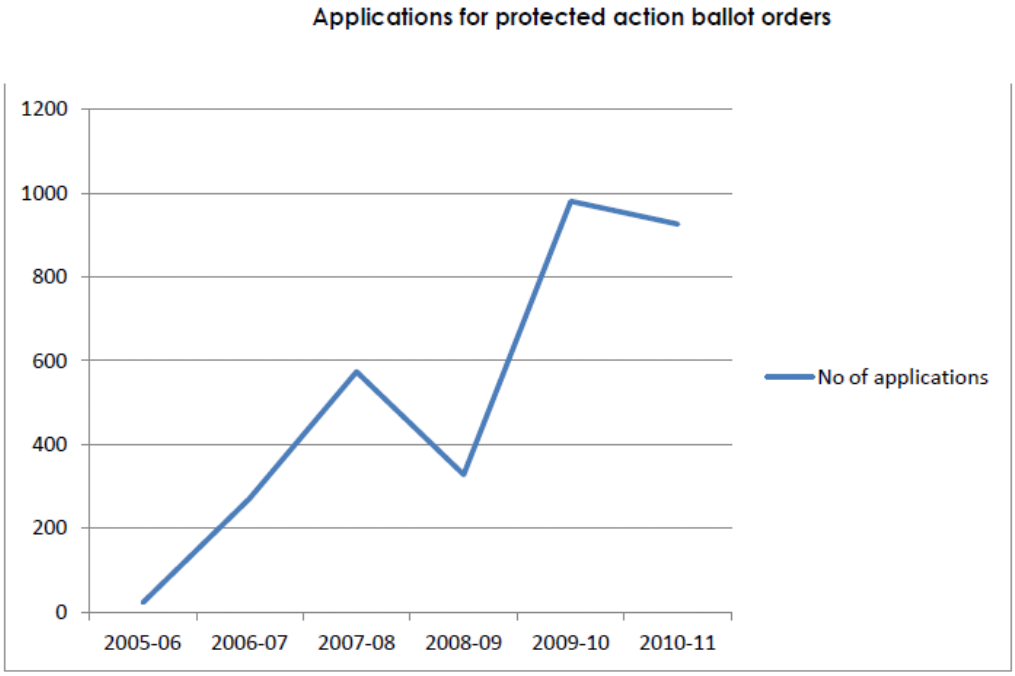
[10] AMMA WR Research Project Survey 2, October 2010, Dr Steven Kates, RMIT University
[11] Ibid.

Under the current interpretation of the *Fair Work Act*, employees can take protected industrial action despite only a minority of employees supporting it, as long as that minority represents the majority of union members to be covered by the agreement.

AMMA believes this is unfair to other employees who are not union members and also to the employer who 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.

The graph below shows the number of union applications for secret ballot orders for protected industrial action in the past five years. As you can see, the number of applications increased sharply 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*.



The dip in the number of applications made in 2008-09 is reportedly due to the low number of agreements that expired that year[12].

So which unions are the most active in this area? The AMWU leads the way in terms of the number of secret ballot applications filed under the Fair Work Act, having lodged 190 applications in 2010-11, but it is closely followed by:

- The Community and Public Sector Union (CPSU) with 94 applications;

[12] AIRC Annual Report, 2008-09

- 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;
- 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.

On top of the increased number of protected action ballot applications being lodged and granted under the Fair Work Act, there is also the often-used tactic of employees notifying the employer of plans to take protected action, then cancelling it with little or no notice.

This puts employers to the inconvenience of having to notify their customers of delays, etc, and results in virtually the same expense as if the action went ahead anyway. The benefit to workers, of course, is if they turn up to work as usual, they themselves don't lose any pay.

A recent example of this was in the Qantas dispute late last year. Three unions - the TWU, the ALAEA and the AIPA - had been negotiating with the airline for separate enterprise agreements, with members of all three unions having taken protected industrial action earlier that year to support the making of the agreements.

However, on two occasions during one week in October 2011, two unions called off their separately notified industrial action with just a few hours' notice[13]. The first union was the ALAEA (the engineers union) which called off four-hour stoppages in Brisbane, Sydney and Melbourne; the second was the TWU which called off a two-hour strike by its members.

[13] *Union cancels Qantas strike action on short notice*, 10 October 2011, Courier Mail

Qantas had already made major flight changes to minimise disruption to its customers, including cancelling 13 flights in and out of Brisbane. Another six flights had to be delayed or rescheduled. These tactics by unions and workers cause maximum disruption to employers and their customers but no disadvantage to employees.

AMMA maintains it is unfair for employees to be able to notify employers that they will take protected industrial action and then not take it at short notice.

In an October 2010 survey of AMMA members as part of the ongoing *AMMA Workplace Relations Research Project* in partnership with RMIT University[14]:

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

AMMA's submission to the Fair Work Act review panel argued that where notices of protected industrial action were given to an employer and less than 24 hours' notice was given of cancellation of the action, 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.

The high cost of industrial action

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

In an August 2010 decision by a Full Bench of Fair Work Australia in *CFMEU v Woodside Burrup Pty Ltd and Kentz E & C Pty Ltd*[15], the Bench commented on Pluto project operator Woodside's application under s.426 to stop protected action by the employees of one of its sub-contractors. Woodside applied as a third party experiencing 'significant harm' as a result of the strike.

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[14] AMMA WR Research Project Survey 2 Report, October 2010, Dr Steven Kates, RMIT University
[15] *CFMEU v Woodside Burrup Pty Ltd and Kentz E & C Pty Ltd* [2010] FWAFB 6021, 6 August 2010

Woodside said 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.

The Full Bench disputed Woodside's claim that $3.5 million was the daily loss that would be sustained, but said even so, 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.*

This case clearly shows that the federal industrial tribunal views potential economic losses of $3.5 million a day as insignificant simply because they occur in the context of a large project. This is of great concern to resource industry employers.

In another dispute in 2009-10, two resource industry employers opposed secret ballot applications that were lodged by the MUA because of the exorbitant wage and conditions demands the union had on the table at the time. Claims included an increased construction allowance from $87 to $500 a day. The tribunal declined to support the employers' positions, instead granting the union applications for secret ballots. In one of the two 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[16].

AMMA has recommended to the review panel that 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'. In other words, if millions of dollars a day in damages are being caused, this should not be swept aside simply because it is in the context of a multi-billion-dollar project.

A lack of remedies for employers

In contrast with the 90 per cent of union secret ballot applications that are approved by Fair Work Australia 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.

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

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

- s.423 of the Fair Work Act (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).

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

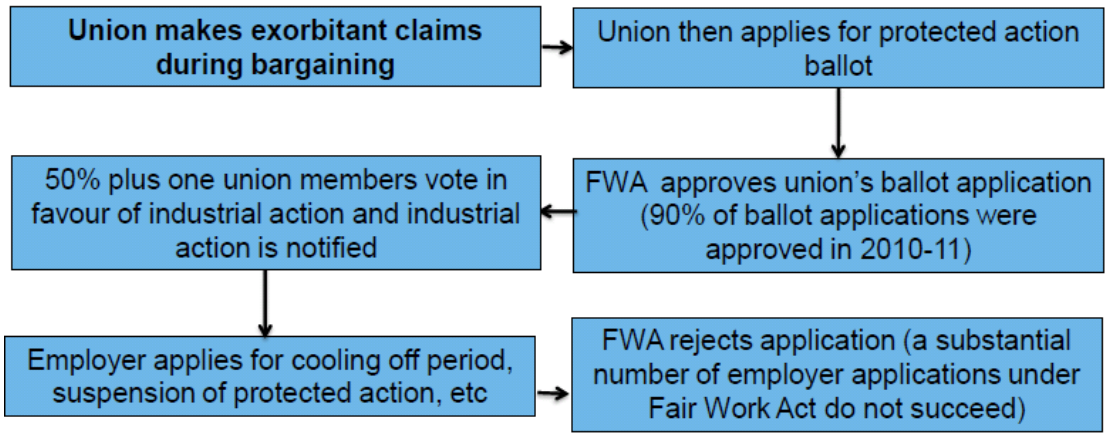
The situation was similar in 2010-11, with 39 applications filed by employers under those sections, and just 18 applications being subject to a published outcome. Of those 18 cases, six employer applications were successful in obtaining orders for the action to stop.

What can be done to make things fairer?

One of AMMA's recommendations to the review panel was that protected industrial action should not be available if a union has exorbitant wage and conditions demands on the table that would fail to satisfy a public interest or 'reasonableness' test.

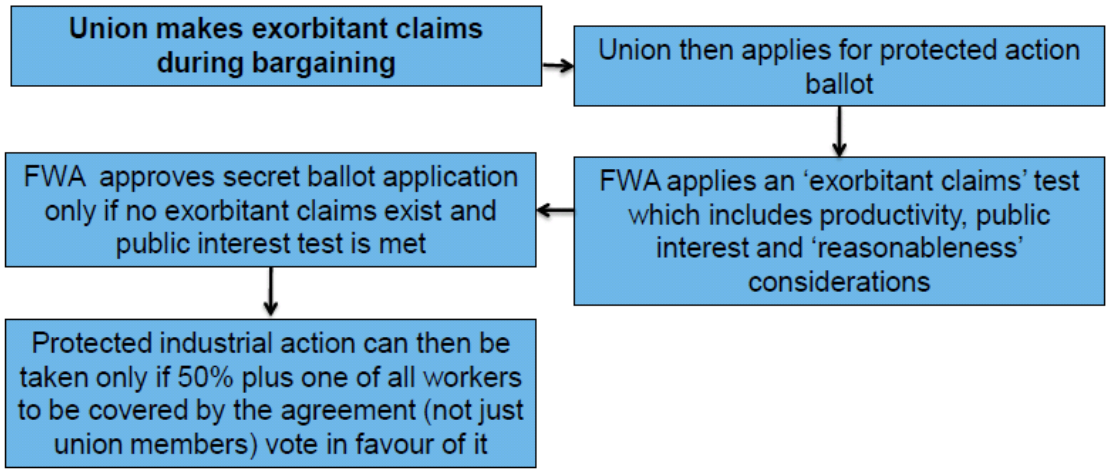
Below is a depiction of how the current IR system works in relation to applications for protected industrial action.

How the current IR system works in relation to protected industrial action



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

How AMMA's proposed system would work



The public interest test that Fair Work Australia would apply under AMMA's model would take into consideration a number of factors including:

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

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

- the overall cost of the proposed claims to the employer, including allowances and increases in all terms and conditions, not just the quantum annual wage rise;

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

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

Hands tied by 'general protections'

Employer hands are also tied by the *Fair Work Act*'s adverse action or 'general protections' provisions, which are unjustifiably broad and create untold liabilities for employers for up to six years into the future.

With all the existing legislative 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 any time in the next six years.

The provisions are a vast and unjustified 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.

Employers' key concerns with the adverse action jurisdiction

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

- The scope is too broad;

- The time limits for claims are too long (60 days or six years depending on whether a dismissal is involved);

- They are open to abuse by vexatious and litigious employees given the reverse onus of proof on employers to defend claims;

- There is unlimited compensation and orders available; and

- Both prospective and current employees have access to the jurisdiction.

Specific concerns cited by AMMA members based on their experiences include:

- The fabrication of 'anti-union' complaints where a union delegate is disciplined or terminated;

- The potential for challenges to management exercising its normal prerogative;

- The potential for the jurisdiction to be used 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[17]:

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

Growing numbers of general protections claims

Applications to Fair Work Australia under s.372 of the *Fair Work Act* (dealing with alleged adverse action not involving dismissal) doubled in the 12 months from 30 June 2010 to 30 June 2011[18], rising from 254 to 504.

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

AMMA members are also reporting it is often the case that adverse action claims are agitated by unions rather than individuals.

In an April 2011 survey of AMMA members[19], 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.

In one AMMA member's experience[20]:

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[17] AMMA WR Research Project Survey Report 3, April 2011, Dr Steven Kates, RMIT University
[18] Fair Work Australia, Annual Report, 2010-11
[19] Ibid.

The employee advised he hadn't wanted to make a case of it – the union pushed him into it.

Adverse action v unfair dismissal

The *Fair Work Act's* adverse action jurisdiction has provided a new and emerging alternative for unfair dismissal claims but with:

- More generous timeframes within which to lodge claims (60 days compared to 14 days for unfair dismissal claims);
- No six-month qualifying period, unlike the requirement for the unfair dismissal jurisdiction; and
- No high-income salary cap, unlike the high-income cut-off currently set at $118,100 for unfair dismissal claims for non-award/agreement-covered employees.

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.

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.

[20] Ibid.

Of course, adverse action claims are not limited to situations where dismissal is involved and can be made over almost any type of employment-related issue. AMMA members have reported some unusual claims being made under this banner, including[21]:

- 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 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.

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 dispute over a classification structure.

Almost anything can now be characterised as 'adverse action' for a prohibited reason given that virtually everyone has a workplace right that can arguably be violated[22].

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[23];

- Union activists cannot be disciplined for conduct they engage in under the umbrella of 'union activities'[24];

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[21] *AMMA WR Research Project Survey Report 3*, RMIT University, Dr Steve Kates, April 2011
[22] *Jones v Queensland Tertiary Admissions Centre Ltd (No 2)* [2010, FCA 399, 29 April 2010
[23] Ibid
[24] *Barclay v The Board of Bendigo Regional Institute of TAFE* [2011] FCAFC 14. 9/2/11

- Revoking benefits for all staff can be seen as adverse action against one particular staff member[25]; and

- Corporations probably do not have workplace rights, including arguably no protection against unions' misleading notices of industrial action[26].

AMMA has recommended to the review panel that the Fair Work Act's adverse action jurisdiction be removed in its entirety.

Failing that, an entitlement to a workplace right should have to be the dominant reason for the adverse action being taken, rather than one of several factors, in order 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.

AMMA also maintains that the six-year time limit for bringing adverse action claims under s.372 where dismissal is not involved is unreasonably long and should be reduced to 60 days, the same time limit applying to adverse action claims made under s.365 where dismissal is involved.

Also, the application of the general protections to prospective employees and independent contractors is unwarranted and should be removed, as should the reverse onus of proof on employers as it encourages non-meritorious claims and allows claims to proceed further than they otherwise would if the burden of proof rested on the applicant.

AMMA members' experiences under the Fair Work Act

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.

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.

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

[25] *ALAEA v Qantas Airways Ltd & Anor* [2011] FMCA 58. 11/2/11
[26] *Boral Resources (NSW) Pty Ltd* [2010] FWAFB 1771, 31 March 2010, Full Bench

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.

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[27]:

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

One AMMA member even went so far as to say that under the new IR system[28]:

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

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

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

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

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*.

The table below shows how employers' rating of their WR environment changed every six months from April 2010 to October 2011[29].

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**

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.

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'.

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.

Conclusion

Under the current IR framework, employers are held to ransom in more ways than one. Basic managerial discretion, necessary for delivering commercial success and in particular productivity improvements, is severely limited by the scope of the current legislation. This

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

comes at a cost to employers who are forced to accept exorbitant wages and conditions than face a fatal commercial outcome.

There is also a much broader economic impact on account of escalating labour costs associated with constructing and running major projects under the *Fair Work Act* causing investors and other industry stakeholders to seriously question the financial viability of future projects. 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.

AMMA maintains that meaningful legislative change is required to Australia's current IR system in order to make the system fairer and more responsive to business needs. In particular, the bar for taking damaging industrial action must be raised so that access to such measures by employees and unions is a last resort rather than a first means of attack. Also, given the significant protections already in place under anti-discrimination laws, the Fair Work Act's general protections provisions represent and unjustified broadening of the scope for claims, and potentially unlimited liabilities for employers for six years into the future. This is not a reasonable way to expect companies to do business. Finally, empowering unions to either refuse to make an industrial agreement for a start-up project, or letting them set the terms and conditions that will be included in such agreements, is an extremely unhelpful development for business and the economy.