AMMA
RESOURCE INDUSTRY EMPLOYER GROUP

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The Hon Bill Shorten
Minister for Financial Services and Superannuation, Minister for Workplace Relations
Parliament House
Canberra House
CANBERRA ACT 2600

Dear Minister

Re: Impending Full Court of the Federal Court Decision – JJ Richards & Sons Pty Ltd and AMMA v Fair Work Australia

With the Full Court of the Federal Court set to hand down its ruling in the above matter tomorrow (April 20), regardless of which way the decision goes, AMMA proposes a simple solution to rectify what it assumes is the unintended interpretation of the Fair Work Act in tribunal decisions to date.

In the event of an adverse judgment by the Full Court tomorrow, AMMA is unlikely to appeal the matter to the High Court. However, the Fair Work Act does need to be amended to give effect to undertakings your Government gave to employers when the Fair Work Act was first being drafted.

The central issue arising from the series of decisions to date in the JJ Richards matter is the ability for employees to access protected industrial action before bargaining commences.

In an address to the National Press Club in Canberra on 17 April 2007, then-Opposition Leader Kevin Rudd promised, in the lead-up to Labor winning office and subsequently implementing its Fair Work reforms:

> *The only time industrial action will be legally permitted is if it is taken in pursuit of a collective enterprise agreement during a bargaining period. And even then it will only be protected from legal penalty if it is authorised by the employees who will be taking the action through a secret ballot supervised by the independent industrial umpire.* (emphasis added)

It was always employers' understanding, and this understanding was confirmed by the Federal Government in consultations with key stakeholders including AMMA over the drafting of the Act, that under the new bargaining system:

- Employers would be able to bargain with their workforce for a new agreement if they agreed to; but

- In the absence of that agreement, employees and unions would need to use one of several mechanisms to compel employers to bargain, the central mechanisms being to obtain a majority support determination or a scope order from Fair Work Australia.

As is now a matter of public record in the JJ Richards case, neither of those mechanisms was utilised by the Transport Workers Union (TWU) before applying and later successfully obtaining orders to take protected industrial action, all while the employer continued to exercise its right to refuse to bargain.

Only the most perfunctory of attempts was made by the TWU to initiate bargaining with the employer, with the union giving scant details at best of what it would seek in any proposed agreement. However, the tribunal said this was enough to satisfy the 'genuinely trying to reach agreement' test, which was the only test that stood in the way of the union applying for a secret ballot. The tribunal found that bargaining need not have even commenced before protected industrial action could be taken, disregarding Former Prime Minister Kevin Rudd's comments cited above.

A subsequent Fair Work Australia Full Bench ruling upheld the original Commissioner's findings and AMMA soon after initiated an appeal to a Full Court of the Federal Court along with employer JJ Richards.

Whatever the outcome of that appeal, AMMA seeks further clarification from the government on this issue, especially given it declined AMMA's requests to get involved in court and tribunal proceedings and make its position clear earlier.

If the Government has changed its position and now seeks to allow a minority of workers to bypass the specific mechanisms established by the Act and commence strike action against the wishes of the majority and outside the context of bargaining, AMMA and other key employer groups seek official advice so that we may advise our respective members accordingly of this key policy change.

If the outcomes in tribunal proceedings to date are an unintended consequence of the current drafting of the legislation, this can easily be fixed with a minor legislative change.

Proposed legislative amendment

Section 443 of the Fair Work Act, which specifies the situations under which Fair Work Australia must make a protected action order, could be amended to replicate the provisions that the Fair Work Act has already adopted elsewhere under s.230(2).

Section 230(2) expressly requires the tribunal to be satisfied that one of the established trigger events for bargaining – employer consent, a majority support determination or a scope order – has happened before Fair Work Australia can make a bargaining order.

The same pre-conditions could easily be inserted as a new section (c) under s.443(1) to clarify the situations under which Fair Work Australia must make a protected action ballot order.

The revised s.443(1) could read as follows:

(1) FWA must make a protected action ballot order in relation to a proposed enterprise agreement if:
  (a) An application has been made under section 437; and
  (b) FWA is satisfied that each applicant has been, and is, genuinely trying to reach an agreement with the employer of the employees who are to be balloted; and
  (c) FWA is satisfied that one of the following applies:
    (i) The employer or employers have agreed to bargain, or have initiated bargaining, for the agreement;
    (ii) A majority support determination in relation to the agreement is in operation;
    (iii) A scope order in relation to the agreement is in operation;
    (iv) All of the employers are specified in a low-paid authorisation that is in operation in relation to the agreement.

Consequences for the resource industry

Even if the current interpretation of the Fair Work Act is overturned by the Federal Court on appeal, the legislation may remain contentious in this area. If the legislation is subject to the clarification proposed by AMMA, it will provide greater certainty for employers generally and reflect your Government's pre-Fair Work Act legislative commitments to employers.

AMMA has been involved in the case from its earliest stages because of the implications it has for employers generally. AMMA sought leave to intervene and was later granted the right to appeal the original Commissioner's finding to a Full Bench of Fair Work Australia along with the employer.

The threat of strike action and strike action itself is a serious issue for the capital-intensive resources industry, as you would be well aware. Your Government acknowledged recently that there was $430 billion in resource project investment in Australia's pipeline, with $82 billion of that expected to flow through this year alone.

The enormous economic significance of the resource industry is evident and has the capacity to be positively or negatively impacted by the industrial relations system of the day, including by the ability for a small minority of employees to take damaging strike action against the wishes of the majority.

A high proportion of individual and collective industrial agreements in the industry are set to expire in 2013 and 2014, opening the industry up for a campaign of widespread protected industrial action in support of new enterprise agreements. This will be the first time in many years that some projects have faced the spectre of industrial action.

In the wake of the current tribunal interpretations in the JJ Richards matter, having minority employee access to protected industrial action before bargaining has even commenced or been ordered, left unchallenged, means damaging industrial action as part of a union reorganisation campaign is in many instances all but assured. In addition, the bar is set low for the 'genuinely trying to reach agreement' test, something that may have an effect on the industry in upcoming bargaining rounds unless the Government acts.

Given that a review of the operation of the Fair Work Act is currently under way, now would be the ideal time to close this legislative loophole for the sake of the industry and the economy.

Accordingly, further to verbal discussions on this issue, we seek your urgent consideration of the above matter.

Yours sincerely

Steve Knott
Chief Executive
Australian Mines and Metals Association (AMMA)