

2 April 2020

The Hon. Christian Porter MP  
Attorney-General and Minister for Industrial Relations  
House of Representatives  
PO Box 6022  
Parliament House  
Canberra ACT 2600

*Minister*

Dear Attorney-General,

### **Suspension of industrial awards and enterprise agreements for three to six months**

Australian Resources and Energy Group AMMA urges the Morrison Government to consider temporarily suspending the application of all industrial awards and enterprise agreement provisions to provide Australian business with the necessary capacity to respond to COVID-19 operational and employment matters.

The ability for businesses to respond to the threat of COVID-19 in their workplaces is being significantly hampered by Australia's industrial relations system. This has been broadly acknowledged by business representatives and trade unions through joint applications to vary a number of industrial awards in recent days.

The Fair Work Commission (FWC) has now further acknowledged, in statement published yesterday (1 April 2020), that the industrial relations system does not provide enough flexibility to deal with the current crisis and is therefore proposing to vary 103 awards in response to the COVID-19 pandemic.

*Application to the resources and energy sector:*


AMMA notes the awards relevant to the mining, hydrocarbons, maritime and construction industries are excluded from the majority of awards the FWC intends on varying to provide additional flexibilities. The reasoning provided by the FWC, in effect that these sectors have not been as badly impacted by the crisis and a large number of Enterprise Agreements are in use, does not reflect reality and further shows how out-of-touch this national industrial relations tribunal is with workplaces at the ground level.

In recent weeks AMMA has been conducting daily podcasts, numerous webinars and so forth with more than 100 substantive resources and energy employers.

While initially the focus was on COVID-19 OHS and logistical responses, ***I can assure you there is a tsunami of significant commercial impacts on its way*** in Australia's resources and energy sector.

Where legislatively able to do so, actions taken by AMMA members have included:

- a) Changes to operational rosters to lengthen roster swings and minimise movement between workplaces / worksites.

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- b) Including isolation periods, in some instances double isolation periods for interstate FIFO workers, in changed rosters to allow for quarantine requirements.
  - c) Implementing working from home arrangements or split office / workplace rosters to reduce number of people in a workspace.
  - d) Directing employees to take leave and considering options to access future leave accruals in advance.
  - e) Considering stand down or redundancies for non-essential workers where there is unlikely to be work for the foreseeable future.
  - f) Paying hardship allowances where employees are away from home for extended periods, taking on additional functions, etc.

In many circumstances AMMA members in these sectors have managed to achieve changes in response to COVID-19 without the assistance of variations to enterprise agreements or awards. Others have found it immensely difficult to do so under the current system. Further, as the crisis worsens the rigidity of the relevant awards and some enterprise agreements will create even further barriers to employer response strategies intended to keep operations viable and people in employment.

It would seem the logic of the FWC is that providing employers with flexibilities to deal with COVID-19 will only be considered once business and employment damage is already sustained i.e. too late for many.

*Award variations have limited benefit:*

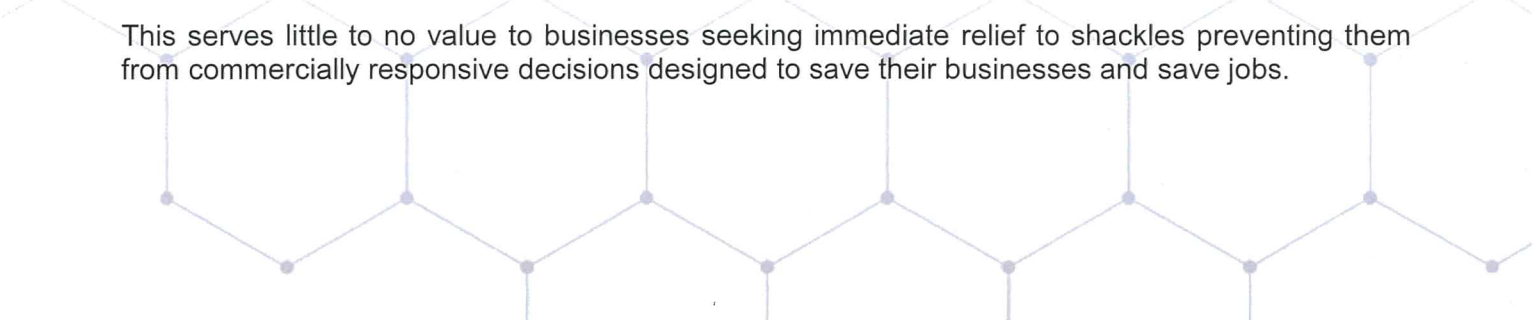
It is no surprise to AMMA to see Australia's industrial relations system is failing to provide the rapid response our country needs to deal with urgent workforce matters arising from an unprecedented dual economic and health crisis.


We note the review being led by you and your team into various aspects of Australia's employment system, a process that was well in progress as the COVID-19 crisis hit, was widely expected to look closely at the utility of the awards system – a system that has been in place since 1904 and is the only one of its type in the world.

While industry bodies in collaboration with unions and the Fair Work Commission have varied some awards seeking to provide flexibility to business, the relief delivered to business through these processes has been far too slow. Applications, hearings and approvals can and have been expedited by the FWC, but by the time any real options for change are made available to and understood by businesses, the impacts on employment will largely already be done.

An example is the variation approved on Saturday 28 March to the *Clerks – Private Sector Award*, while the process was delivered fairly quickly, the variation itself does not provide business with any expediated provisions to make flexible changes in a timely manner. In order for employers to enact the special conditions the award still requires strict consultation processes, agreement by 75% of affected employees, and consideration of personal circumstances of employees before directions can be made.

This serves little to no value to businesses seeking immediate relief to shackles preventing them from commercially responsive decisions designed to save their businesses and save jobs.





AMMA does not deride the various parties from working within the boundaries available to them to seek real relief for businesses in the sectors they represent. Some positive change has come of these processes, but in terms of an effective response to COVID-19 these outcomes fall well short of what's needed to assist the broad majority of businesses.

*Enterprise Agreements are leaving employers with no options:*

The multitude of COVID-19 related applications to vary modern awards has demonstrated that industry and trade unions are working collaboratively to deal with the unprecedented and challenging changes across Australian workplaces.

Unfortunately, these award variations in isolation do nothing for the many employers and employees who are covered by terms and conditions of enterprise agreements. There are currently around 10,877 in term enterprise agreements, covering some 2.16 million people. Employer parties to those agreements often get little value from award variations that are likely to arise from this situation.

The option available to these employers is to seek variation to their enterprise agreements. Typically such variations will take time to be reviewed and approved by the FWC. Many will require consultation with employees which will almost certainly see any variation approved too late, often after significant and sometimes unsustainable damage to business.

On 31 March 2020, the FWC acknowledged it may very well consider variations to existing enterprise agreements even where it fails to pass the better off overall test (BOOT) against the relevant award, due to the “exceptional circumstances” provisions of the Fair Work Act. The FWC further stated:

*It is untested whether the ‘exceptional circumstances’ provisions also apply to variations to agreements. Consequently, the Commission will convene a Full Bench to determine the issue when the first COVID-19 motivated application to vary an enterprise agreement is made.*

These are hardly words of encouragement for any business considering making a variation to its agreement that may fall short of the award, but ultimately keep the doors open save jobs.

Such a variation would need to be available to the employer immediately, not subject to a time-consuming technical review process that would see members of the tribunal review the application, consider it against the relevant award and then debate whether it passes the BOOT and/or should waved through anyway. The FWC's track record in this area is poor - there are numerous examples of the tribunal taking nearly 12 months to approve Enterprise Agreements.


*Suspension of the industrial awards system and enterprise agreements for three to six months*

AMMA proposes there is an option available to the Morrison Government that would deliver immediate and overwhelming relief from regulatory burden for all Australian employers and employees – temporary suspension of the industrial awards system and enterprise agreements for three months.

Those employers still seeking to observe those conditions would be free to do so; and minimum wages and the National Employment Standards would continue to operate.

The awards system was a dominant feature of Australia's IR system for the early and middle parts of the 20<sup>th</sup> Century. In recent decades however, the relevance of industrial awards in the contemporary business and economic context has been questionable and debated at length. It is





clear from the mass variations being made to awards that the system adds unnecessary red tape to employment decisions now required to be made in Australian workplaces.

Enterprise agreement making has been the cornerstone of Australian industrial relations since the early 1990s but in recent years has been in steep decline due to their increasingly limited ability to facilitate genuine trade-offs between productivity and increased conditions and pay for employees.

Instead of a productive industrial relations system facilitating business growth, effective decision-making and employment outcomes, Australia has been left with a complex web of red tape. During times of uninterrupted economic growth – such as the past 30 years – this can be debated in the background as an inconvenience. It is only now during this global pandemic the country is realising how poorly designed and confusing the system really is.

All social partners would agree now is not the time for parties to opportunistically put forward long-term fundamental reforms – irrespective of how sound such reforms may be. The purpose of this letter is not to ask the Morrison Government to finally abolish modern awards and enterprise agreement making, but to propose an immediate suspension of provisions of all awards and agreements for a nominal period of three to six months, up to 30 June or 30 September 2020.

Such a course of action would result in Australian businesses managing one level of industrial regulation – minimum wages alongside the National Employment Standards - whilst seeking to make changes to employment arrangements and maintain their viability during COVID-19.

This would deliver the significant capacity businesses require to enact real changes in their workplaces in response to COVID-19, ultimately seeing more Australians remain in their jobs, reduced reliance on the welfare system and swift economic recovery once this crisis is behind us.

Without this more decisive action, Australia will almost certainly see weekly, if not daily tinkering of modern awards and enterprise agreements through technical and lengthy processes facilitated by a national IR tribunal far removed from the workplaces, employers and employees requiring immediate regulatory relief.

Businesses need the capacity for agile and urgent decision making with real practical outcomes to keep people employed during this dual economic and health crisis.

AMMA urges the Attorney General to suspend the operation of all modern awards and enterprise agreements until the COVID-19 crisis is behind us, in order to provide unprecedented ability and agility for businesses to make change in response to this global pandemic.

Yours sincerely,



Steve Knott  
Chief Executive

