12 September 2022

Ms Michele O'Neil
President
Australian Council of Trade Unions (ACTU)
Level 4 365 Queen St
MELBOURNE VIC 3000

Dear Ms ~~O'Neil~~ Michele,

As you would be aware, Australian Resources and Energy Employer Association (AREEA) is the industrial relations specialist body for Australia's mining, hydrocarbons and all contracting and service sectors.

I'm also on the Australian Chamber of Commerce and Industry (ACCI) Board and one of seven statutorily appointed employer representatives to the National Workplace Relations Consultative Committee (NWRCC).

The resources and energy industry directly employs over 302,000 people – its highest level on record – and is estimated to account for more than 1.2 million jobs directly and indirectly due to its wide flow-on effects throughout the economy[1].

In terms of economic benefits, Australian resources exports continue to set new records at $405 billion in 2021-22, estimated to increase to $419 billion in the next financial year. Further, the industry contributes around $46 billion annually in royalties and taxes[2].

It is also well documented that employees of AREEA's members are very well remunerated with top tier wages and conditions. The average wage for the resources sector is by far the highest in the country at $2701.50 per week.

The industry's significant benefit to the nation's economic prosperity is only set to increase. The question that remains to be answered is 'by how much'.

AREEA's major project analysis[3] shows there are 107 new or expansion resources and energy projects advanced in Australia's investment pipeline for the period of 2022-2027, which are conservatively forecast to create demand for 24,000 additional jobs. In addition to those projects already announced there is the potential for another 200 projects and more than 100,000 additional job opportunities in the sector in the next five years.

AREEA is routinely called upon to provide due diligence advice on industrial relations issues that may impact new projects and existing operations alike. Hence, the purpose of this correspondence is to seek clarity on the position of the ACTU in relation to several significant industrial relations reforms currently subject to consultation with the social partners i.e. employers, trade unions and the government.

The following matters are also important to our overarching mission, that being to help the industry secure as much of its future investment pipeline as possible and thus expand and prolong the sector's positive contribution to the nation to the maximum extent possible.

---

[1] Based upon RBA estimates of resources economy flow-on effects
[2] Combined public estimates including companies taxes, mining royalties and PRRT.
[3] https://www.areea.com.au/wp-content/uploads/2022/07/2022_07_22_AREEA_Resources_and_Energy_Workforce_2022-2027.pdf

Multi-Employer Bargaining

AREEA notes the government has committed to investigate a new system of multi-employer and industry bargaining within its suite of forthcoming industrial relations reforms. Most of AREEA's members moved on from 'industry bargaining' styles of wage fixation many decades ago.

With the ACTU being the primary advocate for change in this area, AREEA respectfully seeks clarity on the following enquiries:

1. When multi-employer and industry bargaining existed in the 1970s and 1980s, Australia was viewed as a strike prone and unproductive nation. What evidence or business case is there that bargaining across multiple employers would be a good thing for employees and the economy in the 21st century?

2. AREEA understands this proposal may be confined to "low paid and female-dominated sectors". If this is the case it may not be a major issue for our members, and limited to a few areas in the supply chain.

   In relation to the latter, can the ACTU clarify its position on:

   a) What are the deficiencies with the current "low paid authorisation" provisions of the Fair Work Act (ss242-245), which already allow for bargaining across multiple enterprises for low paid workers?

   b) Why has this option been very rarely used over the past 13 years?

   c) If amendments to allow for multi-employer or industry bargaining are made to the Fair Work Act, would the ACTU support those amendments clearly confining multi-employer bargaining to low-paid sectors?

   d) Would the ACTU support the legislation clearly defining a limited set of circumstances where multi-employer or industry bargaining would be permitted, such as where wages growth has been flat for multiple years and business profits growing?

   e) Would the ACTU support prohibiting or excluding sectors that do not have a clear business case for multi-employer bargaining?

   f) Will the ACTU advocate for multi-employer or industry bargaining to be extended to sectors beyond low paid sectors?

3. Does the ACTU view multi-employer or industry bargaining as being a voluntary, "opt in" option for employers?

4. Is the ACTU's position that unions or the Fair Work Commission should have powers under the Act to compel employers into multi-employer or industry bargaining against their choosing?

5. Does the ACTU believe it would be fair for workplaces to be compelled into multi-employer or industry bargaining campaigns when employees at that workplace have shown no interest in working under such an arrangement?

6. Does the ACTU believe multi-employer or industry bargaining should allow for protected industrial action to be taken across multiple employers or entire industries simultaneously?

   a) If so, would the ACTU agree to new public interest or economic harm tests to be inserted into the provisions around protected industrial action?

Outside 'low paid' sectors, AREEA's members are opposed to multi-employer and industry bargaining. Since the early 1990s agreements reached at the individual enterprise level have been fundamental to underpinning workplace relations and national productivity growth.

AREEA members hold concerns that muti-employer and industry bargaining taking place amongst a small cohort of supply chain employers could see nationally significant projects ground to a halt through coordinated strike action. This could in-turn massively impact the sector's enormous export revenues, forego federal and state-level taxes and royalties, and see employees with no connection to those supply chain operators stood down until such issues are resolved.

Examples of niche critical supply sectors to the resources industry that would have high exposure to such a scenario include offshore helicopter services, tugboat operators and various mining transport and logistics activities.

Better Off Overall Test / Enterprise Bargaining reforms

AREEA was a member of the 2020 Industrial Relations Working Groups, convened by the Attorney General at the time. The then-government brought several key employer groups and unions together in the hope of reaching some consensus about practical industrial relations reforms.

During that process AREEA (then known as 'AMMA') opposed a position taken by the ACTU that the Better Off Overall Test ('BOOT') could be more flexibly applied by the Fair Work Commission to agreement approval applications that were supported by a trade union. The proposal, in effect, was to create 'two streams' for the agreement approval process – a 'fast track' stream for union-backed agreements and a 'slow lane' stream for non-union agreements.

Given the context of 2020, AREEA and its members are concerned that present discussions around 'simplifying' the BOOT, as well as potentially other pre-approval tests applied by the FWC, may result in a resurrecting of the 'two stream' proposal.

We respectfully seek the ACTU's views on the following enterprise bargaining related matters:

7. Does the ACTU support the more practical / flexible BOOT being applied by the FWC to both union and non-union agreements?

8. If not:

    a) How would this not effectively result in a different legislative framework for union agreements compared to non-union agreements?

    b) Would such an outcome be consistent with Freedom of Association and ILO principles?

    c) How could special treatment for union-backed agreements be justified when over 90% of the private sector currently do not belong to a trade union?

9. With regard to the current FWC approval requirement that employers adequately explain the contents of a proposed new agreement to their employees:

    a) Is it the ACTU's position that the legislation should allow unions to jointly explain the contents of a proposed new agreement to employees, to help satisfy that test?

    b) If so, would union representatives be able to advance before the FWC that any agreement not explained by a union was not genuinely agreed to by employees?

10. Is it the ACTU's position that the legislation should allow for a union which is a bargaining representative to formally support the approval of a new agreement?

a) If so, could union representatives advance an argument that any agreement not endorsed by a union would be illegitimate?

b) Does the ACTU agree that FWC members should not discriminate against, or apply more rigorous scrutiny, to new agreements that do not have union involvement or support?

The BOOT – "Yesterday's IR Reform"

The ACTU and its affiliates are well aware that AREEA has a team of industrial relations advisors and employment lawyers acting for and representing resources and energy employers in various matters.

AREEA was not surprised to see a continued focus on the BOOT and other agreement approval matters by business representative groups with limited practical engagement in industrial relations matters 'in the field'. However, IR specialist organisations like AREEA and the ACTU fully understand that due to improvements in the FWC's internal processes, the BOOT is largely "yesterday's IR reform issue".

In mid-2019, focus on improving the BOOT was appropriate given a number of high-profile contentious decisions to reject new agreements on technical BOOT-related grounds. Further, the FWC's median timeframe for approving new enterprise agreement applications had blown out to 76 days, well exceeding the Commission's 32-day target.

This was an issue AREEA assiduously highlighted as unacceptable to business, employees and trade unions, by shining a spotlight on this unacceptable performance by the FWC. This in part led to technical changes together with a massively improved agreement approval performance by the FWC.

In June 2022, AREEA was delighted to review FWC's records showing the median approval time for **'all agreement applications'** over the previous year was just 15 days. For agreements not requiring undertakings, this was just 12 days.

AREEA notes this agreement approval performance is far superior to the 21-day timeframe that AREEA and other business groups advocated for inclusion in the former government's package of Fair Work Act reforms.

In summary, AREEA's firm view is changes to the BOOT are not necessary given the FWC's own internal performance has both dramatically improved and largely made agreement approval timeframes a non-issue.

It is also our firm view that any changes made to the BOOT should not be a tradable commodity for other changes to the enterprise bargaining system such as those advocated by the ACTU.

Terminating Agreements

The ACTU has been advocating for a number of years that employers should lose the longstanding ability to apply to the FWC for consideration to terminate an expired enterprise agreement.

This advocacy has ramped up in recent months with the government joining this policy chorus.

AREEA highlights the following facts and analysis leading to no evidence of so-called 'rorts' regarding termination of agreements, including both active applications and threats to do so.

Recent analysis by Actus Workplace Lawyers showed the FWC terminated 95 enterprise agreements across the three years of 2020-2022 (to date), of which 97% (92 applications) were not contested by any party[3]. Of the three applications that were contested by unions, two had no employees working under them and in the third, the FWC was satisfied the employees would not lose any entitlements.

Looking further back, the FWC's own analysis from five years ago showed less than 3% of agreement termination applications during 2015-2016 were contested.

---

[3] Smith, S. *Workplace relations policy and research paper: Termination of Enterprise Agreements*, Actus Workplace Lawyers, 19 August 2022 (link)

Further, the Productivity Commission's draft report[4] released on 9 September 2022 in relation to its inquiry into Australia's maritime logistics system, found the following reasons as to why an employer may be forced to take this course of action (emphasis added):

- *Parties can also apply to the FWC to terminate an agreement once it has nominally expired, and there are no restrictions on when or why they might do so. In practice, however, the factors that the FWC has to take into account in considering such applications (including the public interest and circumstances of the employer, employees and union covered by the agreement) mean* ***terminations are rarely granted*** *(*page 26).

- *Three employers in the ports (Patrick Terminals, Smit Lamnalco and Svitzer) applied to terminate their agreements in late 2021/early 2022.* ***Termination is a serious step****, and the fact it was pursued three times in recent negotiations is further evidence in support of the need for* ***additional mechanisms to help parties reach agreement*** (page 26).

- *Mechanisms in the Fair Work Act 2009 (Cth) do not appear to have offered a solution to protracted bargaining in Australia's ports. Recent applications to terminate agreements suggests other remedies to support the bargaining parties in resolving disputes were either* ***lacking or not sufficiently effective*** (page 46).

On this matter, AREEA seeks clarity from the ACTU on the following enquiries:

11. Given the strong focus on this issue, what is the ACTU's view on the limited circumstances in which this function has been used?

12. Does the ACTU accept the evidence that there is a high bar for the FWC to approve applications to terminate an agreement, such as during protracted bargaining disputes?

13. Does the ACTU accept that terminating agreements is a 'last resort' for employers when the industrial relations system offers no other practical options to help disputing parties reach agreement?

14. Does the ACTU's position on unilateral applications to terminate agreements extend to the ability for unions to make such applications? Or is it only an employer's ability that should be removed?

15. If the ability to terminate an expired agreement is removed by legislation, would the ACTU support new functions within the Act or provided to the Commission to cease industrial action and assist parties to reach agreement based on the reasonableness of union claims and competitive position of the business?

The resources and energy industry is not a big user of the ability to apply for termination of workplace agreements. However, where this function is considered, it can be very important. The highly cyclical and globally exposed nature of resources and energy markets mean the competitive pressures facing an employer can be vastly different from one bargaining period to the next.

More generally, employers in every sector of the economy continue to face unforeseen market challenges, technological changes and pandemic-related effects. In many instances employers agree not to reduce wages but are seeking changes to rosters, working hours and so forth due to changing business conditions.

In those types of circumstances, the option to have expired, unsustainable agreements reviewed and potentially terminated by the independent umpire may assist in keeping many businesses open and save jobs.

---

[4] *Lifting productivity at Australia's container ports: between water, wharf and warehouse,* Productivity Commission, 9 September 2022, (link)

Same Job, Same Pay

Another significant policy the ACTU has advocated for is "Same Job, Same Pay" for labour hire arrangements. AREEA has been involved in many consultations including with the Department of Employment and Workplace Relations. Perhaps the best description of conversations around what this policy means and how it could be implemented is 'confusion'.

In the resources and energy sector, as well as many other industries, it is not uncommon for individuals to hold the same base qualifications and work tasks as a work colleague but be paid differently. This is due to factors including experience, business operational knowledge, length of service with their employer, performance assessment, and other differentiating factors.

There is also a significant difference between use of long-term, ongoing labour hire employees in casual positions – a practice that was largely addressed with casual conversion clauses introduced in 2021 – and the use of labour hire for specialised and often short-term contract work.

AREEA is not clear on what 'Same Job, Same Pay' means in practice and makes the following enquires:

16. How does the ACTU interpret by "Same Job"? Can this be efficiently assessed and by who?
17. How would "Same Pay" be administered in practice? Does this include total take home pay or a like-for-like analysis of base rate of pay? Whose obligation is it to ensure 'same pay'?
18. Does the ACTU see this policy being only applied to traditional labour hire arrangements where there is a clear, uncontentious like-for-like employment comparison in the workplace?
19. Does the ACTU see this line of policy extending to other 'traditional' contracting arrangements whereby people are brought into a business for specific skills and/or contract work?
20. Does the ACTU accept that labour hire is a legitimate and valuable form of work and is often used in many parts of the economy for flexible and fast resourcing?

Major Project Greenfields Agreements

In the aforementioned Industrial Relations Working Groups convened by the former government in 2020, another issue explored by employer and union representatives was the concept of a "Major Project Greenfields Agreement".

This new type of agreement would allow for major projects in the resources, energy and construction sectors to utilise, after negotiation with unions, employment terms that could exceed the current maximum duration of four years. This is critical as the construction of large-scale resources and energy projects can often exceed four years.

Without the ability to negotiate longer agreements that can better meet the expected duration of larger projects, many large resources and energy projects will always have the looming threat of industrial disruption, including strikes and at the very least the requirement to renegotiate terms and conditions, midway through their completion schedule.

For many in the international investment community, an industrial relations system that exposes their multi-billion-dollar projects to such uncertainty and risk, is a dealbreaker. This is a reality constantly reinforced to AREEA by top tier ASX-listed resources and energy companies, who routinely advise AREEA that extended greenfields employment terms would assist in securing Final Investment Decision for several major projects actively under consideration.

During the 2020 Working Groups union representatives did not support the former government's original position for eight-year maximum agreement terms to be open to projects with a minimum capital value of $250 million. However, in my discussions six-year maximum terms for projects with a minimum capital value of $1 billion was more generally supported by unions, both in the formal working groups and in separate dialogue with AREEA. Such agreements would be required to have review mechanisms and

dispute settlement procedures in the event market and/or business circumstances materially change during the course of the project.

In addition to positive engagement with key union leaders on this matter, at the time AREEA also had constructive conversations with senior leaders of the ALP including the now Deputy Prime Minister the Hon. Richard Marles MP.

21. Given this simple amendment to the Fair Work Act would assist in securing new multi-billion-dollar major investment projects, which are overwhelmingly in the interests of the nation including working people and regional communities, is this a policy proposal the ACTU would consider going forward?

Concluding Comments

AREEA thanks the ACTU for its willingness to engage in constructive dialogue with the business community and in particular industrial relations specialist organisations like AREEA on these important issues.

We look forward to your response to the matters above together with the opportunity to continue respectfully discussing these issues and many others through the NWRCC and other appropriate forums.

Regards,

Steve Knott AM
Chief Executive