

New Directions in Labour Law – A fork in the road or a disastrous U-turn

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Introduction

Australia is on the eve of the Federal Election campaign. The future direction of the Australian Industrial Relations system appears to be the centerpiece of the campaign. Despite recent amendments to Coalition and ALP policy, industrial relations remains an one area where there is a major gap between the two parties.

It is also an area where a wide range of lobbyists, commentators and academics are making active contributions to the debate. Many years ago the title 'academic' carried with it the perception of independence. In more recent times a number of industrial relations academics have become actors rather than observers, this has resulted in some injuries, for as we now know industrial relations is a 'contact sport'.

I should reveal my bias. The Australian Mines and Metals Association represent employers in the Australian resources industry including the coal, metalliferous, hydrocarbons and support services sector. The resources sector through AMMA has a vested

interest in ensuring that Australia's national workplace relations system works for all parties. My presentation today advocates the position of the AMMA membership.

In 2007/08 our industry will contribute minerals and energy exports in the order of \$112 billion.

Our industry directly employs 135,600 employees. It is estimated that we indirectly employ another 400,000 persons.

The coal sector is the most unionised sector with 66 percent of employees being members of a union.¹ In the metalliferous sector the level of union membership is 11 percent.² This is significantly lower than the average level of unionisation in the private sector of 15 percent.

The average productivity growth in the mining industry from 1986 to 2005 is 3.3 percent as compared to 2 percent for all other industries.

So, what sort of industrial relations system is the resource sector looking for into the future?

AMMA believes that a modern workplace relations system must provide parties with the capacity to determine the working arrangements that best suit their needs, and that includes access to statutory collective, greenfield and individual agreements. The

¹ Australian Bureau of Statistics, *Employee earnings, Benefits and Trade Union Membership*, Australia, Cat No 6310.0, 3 April (reissued 18 April) 2007. (Table 18)

² Australian Bureau of Statistics, *Employee earnings, Benefits and Trade Union Membership*, Australia, Cat No 6310.0, 3 April (reissued 18 April) 2007. (Table 18)

agreement making system should be underpinned by a sensible, stable range of clearly defined minimum conditions to protect vulnerable employees. Parties to agreements should have the capacity to depart from the minimum standards where the agreed alternative arrangements are globally not less favourable.

A modern workplace relations system should enable employers to enter into supply agreements in the knowledge that those arrangements will be free from the consequences of industrial action. Where grievances do occur the industrial relations system should encourage the direct parties to take responsibility for dispute resolution, whilst normal work continues, and restrict the taking of industrial action so that it becomes a 'last resort'.

A modern workplace relations system should explicitly recognize that freedom to associate includes the freedom not to associate, and that Unions and employer organizations like other service providers should not have a mandated role. This does not mean that employers or employees who chose to be represented by an eligible organization should not be able to require that their 'agent' be recognized.

Steps towards Industrial Nirvana

A recently released AMMA research paper titled *Employee Engagement – A lifetime of Opportunity*³ found that employers who had high levels of employee engagement experienced improved business outcomes in areas including safety, employee retention, customer satisfaction and profitability.

A precondition for employee engagement is the existence of high levels of trust and mutual interest. High levels of employee engagement can support rapid improvements in organisational performance. The existence of high quality management systems (including performance management, communications, consultation, leadership and development) has a significant impact on the level of employee engagement.

AMMA's research revealed that employee engagement is more readily achieved via a direct relationship between the employer and employees. Whilst engagement is possible via a third party relationship, long term sustained relationships of this nature are rare.

The current workplace relations framework provides a broad range of agreement making options and the removal of mandated representational roles for unions. This provides a solid footing upon

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http://www.amma.org.au/home/publications/employeeengagement_a_lifetime_of_opportunity_s_ept2007.pdf (11 October 2007)

which to build employee engagement and organisational effectiveness.

Regrettably in the current environment the focus is not on moving forward but the retention of the status quo.

Benefits of the existing system

In the resources sector, the flexibility and certainty provided by the current workplace relations system has delivered

- improved flexibility;
- historically low industrial disputation levels;
- higher wages outcomes;
- increased employment;
- improved export earnings; and
- Increased investor confidence

So lets look at each of these outcomes.

1. Improved flexibility.

Both collective and individual employment arrangements have been utilised by the resources sector although a clear preference towards AWAs exists outside of the coal sector.

The ability to negotiate at the workplace level as opposed to relying on industry based awards has enabled employers to implement

flexible employment practices. The flexibility afforded by the present system has been credited with providing;

- A more rewarding work environment
- Increased productivity
- Greater efficiency and effectiveness
- A more sustainable alignment with the business cycles

This includes multi-skilling, removal of demarcations, flexible shift arrangements suited to production activities and performance-linked remuneration arrangements.

Based on data sourced from the ABS and Workplace Authority one in two mining employees (including coal) are now working under an AWA. In Western Australia 80% of our industry works under AWAs.

Deputy Opposition Leader Julia Gillard (and more recently the authors of the *Australia@Work Report*) assert that only 16% of miners are covered by AWAs – so why the difference? AMMA understands that the 16% figure is based on the biennial *ABS Employee Earnings and Hours report*. The Workplace Authority data relies upon the number of AWAs over a period of three years to estimate the number of 'live' AWAs.

The ABS data is compiled via a survey of a sample of Australian workplaces which does not mirror the AWA population. By way of example the ABS data shows a 2.2 per cent decline in Western Australian AWA coverage in the two years to May 2006. This is entirely at odds with Workplace Authority data (supported by

anecdotal evidence) that live AWAs increased by 71,000 in this period.

With respect to the mining industry data, the ABS figure of 16 per cent figure is a May 2006 figure. In March 2007 the Workplace Authority estimated the AWAs covered 37.2 per cent of the mining industry. More recently the Workplace Authority advised that 80% of employees in the last quarter were covered by an AWA. .

The ALP and some academics are using information that is unrepresentative and out of date.⁴ What should be clear that the majority of the entire resource sector work under AWAs with a direct relationship between the employer and the employees.

2. Disputation Levels

Up until the 1980s, Australia was considered a strike prone country. It is claimed that in 1976 Hamersley Iron alone suffered from 157 instances of industrial action, one of which occurred over the flavours of ice-cream offered by the canteen.

There has been a steady decline in the number of days lost per thousand employees as a result of industrial disputes between 1985 and 2006. In the June 2007 quarter the ABS recorded nil lost time due to industrial action in the metalliferous mining sector. Regrettably the largely collectively organized highly unionised Coal

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<http://www.amma.org.au/home/Media%20Releases/5%20july%202007%20media%20release.pdf> (11 October 2007)

sector has not been able to match this stellar performance with 67.1 days lost per thousand employees in the same quarter.

AMMA contends that improved employee engagement levels achieved by a direct employer/employee relationship, the increased role of the AIRC in the area industrial action, improved access to civil remedies for wrongful action, the retention of secondary boycott laws and the introduction of the rule of law to the Building and Construction Industry by the ABCC have all made an active contribution to the historically low disputation levels.

3. Higher wage outcomes

The resource sector rewards its employees well. In May 2007, the average full time adult total earnings were \$1856.60 per week, approximately \$700 more than the all industry average.⁵

The average total annual remuneration in our industry is approximately \$97,000 per annum.

Highly skilled, experienced employees working at 24/7 operations regularly receive \$120-\$130K p.a. for an average 42 hour week. There is no spin needed here – no-one can seriously contend that the resource sector has used workplace reform to reduce wages.

But what of the claim by Peetz & Preston⁶ and others⁷, that AWAs pay less than Collective agreements. The CFMEU claim is based on

⁵ Australian Bureau of Statistics, *Average Weekly Earnings*, Australia, Cat No. 6302.0,

a comparison between the coal and Western Australian metalliferous sector. It is a historical fact that the coal sector pays more than the metalliferous mining sector – it is the nature of the industry - not the employment arrangements.

Whilst the Peetz/Preston report concludes that mining industry employees on AWAs are paid less than their collective agreement colleagues, little attention has been paid to the trend revealed by the Peetz/Preston report where AWA remuneration rates are increasing at a much faster rate in comparison to collective agreement wages. This is demonstrated by the fact that in 2004 mining industry AWA employees used to earn 18.6% less than their Collective Agreement counterparts. This gap shrunk to 3.6% by 2006. If this trend continues mining industry AWA employees will soon overtake their Collective Agreement colleagues.

This position is supported by the May 2007 Melbourne Institute Wages Report Survey⁸ which found that employees remunerated on individual contracts received wages increases of 6.8% compared to 3.4% obtained by persons on enterprise agreements (and 2.6% on safety net awards). Increases to individual contracts were found to better reflect differences in experience and performance.

⁶ Peetz D, & Preston, B. (2007) *AWAs, Collective Agreements and Earnings: Beneath The Aggregate Data* report for Industrial Relations Victoria (11 October 2007) <<http://www.business.vic.gov.au/busvicwr/assets/main/lib60013/awa-ca-earnings-paper.pdf> >

⁷ CFMEU, Does the mining industry "need" AWAs? (11 October 2007) <http://www.cfmeu.com.au/storage/documents/AWA_brief_010507.pdf >

⁸ <http://melbourneinstitute.com/research/macro/wages.html>

4. Increased employment

In May 2002, 80,700 people were employed in the mining industry and this has increased to 135,600 in May 2007. Of these employees, 132,500 are full time. ABARE projects an additional \$130B of new mining projects (and this prediction is looking more conservative by the day), as these projects come to fruition an 500,000 direct and indirect jobs will be created. These increased labour requirements together with an aging workforce and employee reluctance to live remotely will sharpen the focus on our existing skill shortages. This area which is presently being addressed by some of AMMA's key members.

5. Improved Export Earnings

Australia jumped off the sheep's back long ago is presently living of the toil of miners.

In 2001/02 the resource sector contributed 48% of Australian exports. Since 2004/5 the resource sector has contributed more that half of Australia's export revenue. Last year the figure rose to nearly 60%. There indications that the current 'boom' will continue for some years.

6. Increased Investor Confidence

ABARE data indicates that there are approximately 275 mining and energy projects under construction, committed or at a less advanced

The total capital expenditure for these projects is estimated to be in the order of \$130 billion. This provides further confirmation that the so called 'boom' is set to continue for some years to come.

A fork in the road on IR policy?

In April 2007 AMMA released its *Industrial Relations Scorecard Criteria*⁹, In July AMMA reviewed the ALP and Coalitions industrial relations policy against the Scorecard¹⁰ – it failed with a mark of 9/28. The Scorecard was reviewed in October light of the additional information contained in the Forward with Fairness – Implementation Plan – it has improved but still fails at 13/28.

In industrial terms Coalition's industrial relations policy represents the continuation of the status quo is and much closer to AMMA's industrial nirvana at 22/28.

Despite the 'me-tooism', there is a wide gap between the Coalition and the ALP industrial relations policy. The ALP policy platform represents a U-turn towards a destination that has long since passed.

A review of the following areas confirm this view;

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http://www.amma.org.au/home/publications/ammaworkplacereationsscorecard_24april2007.pdf
(11 October 2007)

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[http://www.amma.org.au/home/publications/ammaanalysiscoalitioanalworkplacereationsscorecard\(final\).pdf](http://www.amma.org.au/home/publications/ammaanalysiscoalitioanalworkplacereationsscorecard(final).pdf)

Minimum standards and awards

The proposed two-part safety net will reduce the flexibility available to employers to determine their working conditions. Of particular concern are the ten minimum conditions proposed to be contained in awards and subject to variation by the new ALP Tribunal 'Fair Work Australia'. The capacity for Tribunal to determine and impose increased minima is a return towards centralised wage fixation.

Agreement Making

The ALP policy proposes to abolish AWAs and employer greenfields agreements without provision for a workable alternative (or any alternative in respect of Employer Greenfield Agreements). AWAs are not were not a product of the WorkChoices amendments. Some employees in our sector have been working on statutory individual agreements since 1993, AWAs have been used for over 11 years. Some resource sector employees have never seen an award or a union official. The effect of abolishing AWAs means that employers and employees who would have entered into an individual agreement will be forced to enter into a collective agreement.¹¹

The ALP proposal to allow access to common law agreements (CLAs) is a sham. The proposed threshold which does not recognize Superannuation contributions will result in 70% of the non-managerial employees in the mining sector being denied access. Of the remaining 30% many of these persons are in the

¹¹ For some a common law agreement or an ITEA may be available.

Hydrocarbon, Maritime or Coal industry and will have to elect to exit from their existing award arrangements – fat chance.

The ALP have advised that an employment offer cannot be made conditional upon acceptance of an Common Law Agreement

Employers who are able to make Common Law Agreement need to be aware that they will have no protection from industrial action.

For employers who already have AWAs, ITEAs will be available for a maximum of two years. With employee turnover levels of up to 25% per annum, the ITEA will quickly produce a two speed individual agreement system. The use of ITEAs raises a number of questions;

- Can an employee on an ITEA take industrial action?
- Can an ITEA be overridden by an CA
- Can an offer of employment be made based on the basis of acceptance of an ITEA
- Will an ITEA transmit to a new employer?
- What happens to the ITEA after 2009? Does it continue or does the employee go back to the minimum standards?

The ALP's collective agreement regime has the consequence of increasing union involvement in the bargaining process – even for non-union agreements. It appears that there might be three types of collective agreements;

1. non-union collective agreement: available where there is no union membership at the workplace and the employees elect not to involve a union.
2. union collective agreement: where one or more union members request their union to become involved.
3. hybrid collective agreement: are entered into where one or more union members request their union to become involved but an agreement cannot be reached. In that case the employer may try to reach agreement with the employees directly but the union will be bound by the agreement.

The ALP transitional arrangements represent a transition to a union focused collective bargaining system of the Hawke era.

Compliance

The significance of maintaining a strong and effective industrial relations compliance regime in the resources sector was discussed in an AMMA paper titled *Constructing Lawful Workplaces*.¹²

The ALP has recognised the importance of retaining the current secondary boycott provisions in the *Trade Practices Act 1974* and committed to retaining secret ballots, current procedures to obtain orders to stop or prevent industrial action and unrestricted access to courts.

¹² <http://www.amma.org.au/home/publications/constructinglawfulworkplaces.pdf> (11 October 2007)

AMMA also has serious concerns in respect to the ALP's policy to abolish the Australian Building and Construction Commission (ABCC) in 2010. The ABCC has been a stunning success – in the last decade industrial disputes in the construction industry have fallen from a high of 263.9 working days per thousand employees in the 1996 September quarter to just 1.6 working days per one thousand employees in the 2006 September quarter.¹³ Many major resource sector construction projects will straddle the 2010 abolition date.

IN addition the ALP policy expands Union access to workplaces. By removing AWAs unions will have access to non-union workplaces who are regulated by AWA, Union will also have access to workplaces covered by collective agreements where the union was not a party. In addition non-award workplaces will now be subject to Union recruitment drives. The ALP policy takes the ACTU's policy of re-unionising Australia one step closer to reality.

Despite the blurring of the line between the ALP on Compliance Arrangements, AMMA contends that having reached the fork in the road the adoption of the ACTU driven industrial relations policy represents a disastrous U turn. The ALP needs to re-consider its decision to reject statutory individual contracts, and release a more comprehensive, detailed industrial policy to allow for informed debate rather than conjecture.

So where to from here?

¹³ Australian Bureau of Statistics, *Industrial Disputes*, December 2006, 6321.0.55.001.

So what stands between the current system and the return to the past? The first issue is obviously the result of the election for the House of Representatives. The second is the composition of the Senate - most commentators do not believe that the ALP will take control of the Senate. The current Senate will remain in place until June 2008.

The ALP (if elected) intends to introduce a Transition Bill to be implemented on 1 January 2008 and claims a mandate to do so. This mandate has been rejected by the Democrats who will remain in the Senate until June 2008 regardless of the election result. The passage of this legislation in 2007 is optimistic at best.

But does the ALP need to pass legislation to implement its IR policy? Many provisions of the *Workplace Relations Act* rely on regulatory instruments or administrative order. The Act was drafted in a flexible manner to allow changes to be made in the early cat and mouse game between the Government and the Union movement. By way of example Section 16(2) allows the Federal Government to specify by regulation State Laws that will survive the operation of the *Workplace Relations Act*. With the co-operation of State Labour Governments the granting of new rights or obligations via State legislation is a real possibility –a different ‘fairness test’ is just one example.

Whilst AWAs could not be immediately abolished without control of the Senate, a Minister for Industrial Relations Julia Gillard, could use her administrative powers to direct that the Head of the

Workplace Authority publish all AWAs and/or require an in depth analysis by an external body prior to approval.

AMMA understands that most of the ALP policy objectives could be implemented by regulation and/or administrative order. Such an approach if timed well could avoid parliamentary scrutiny for some months.

Conclusion

AMMA does not contend that the current workplace relations system is perfect. The goal of a plain English Workplace Relations Act remains an elusive goal.

It is regrettable that the election of an ALP Government will be accompanied by the backswing of the Industrial Relations Pendulum instead of building on the successes of the legislative reform.

The global nature of resources sector markets demands the pursuit of workplace practices, policies and a legislative framework that best fosters productivity, growth and prosperity. You have to *'run fast, just to stand still'*

The resources sector is better positioned than most to deal with the backswing of the industrial relations pendulum.

Our strengths include;

- our remuneration arrangements put us at the 'top end of the food chain' giving us an enhanced capacity to attract good employees
- our individual employment arrangements are well established and accepted by our employees
- our workforce is accustomed to working flexibly .

The threats we face include;

- Taking the high level of employee engagement for granted.
- A significant number of managers are unfamiliar with a disputes approach to industrial relations
- Many employers have become deskilled in the industrial relations arena

So what should employers do in the current industrial relations climate?. One of our Board Members recently suggested the following

1. Recognise that pendulums swing - they're meant to
2. Consistently focus on your people as individuals
3. Engage your people (or continue to)
4. Reward flexibility

Sound advice indeed.

AMMA members' recall the days when they had to consult with unions before implementing a new roster; when they had to apply up to six different state awards, be conversant with a plethora of legislation; when millions of man hours were lost to industrial action and when the unemployment rate peaked at 11 percent in 1993.¹⁴

Having made the hard decisions to reform industrial relations, Australia is now reaping the benefits. The ALP policy position if translated into legislation will produce a sub-optimal outcome for our industry at a time we should be capitalizing on our opportunities.

What stands between us and a return to the old days and the old ways is our relationship with our most valuable resource – our employees.

¹⁴ Australian Bureau of Statistics, *Labour Force Australia*, Cat No 6202.0, November 1993. [http://www.ausstats.abs.gov.au/ausstats/free.nsf/0/8F968D905CCB44DFCA257225000736B3/\\$File/62020_1293.pdf](http://www.ausstats.abs.gov.au/ausstats/free.nsf/0/8F968D905CCB44DFCA257225000736B3/$File/62020_1293.pdf) (site accessed 25 July 2007).