

13 March 2015

## Submission

Air Conditioning and Mechanical Contractors' Association (AMCA) is the organisation representing and promoting the air conditioning and mechanical services industry along with the well being of its members.

AMCA acts as the industry's voice in dealing with governments at all levels, other construction and service industry groups, and the unions.

AMCA is the only industry and employer association that is exclusively dedicated to the air conditioning and mechanical services industry. The Association represents its members in a range of ways. It actively participates in a wide range of policy and advocacy committees at the National and State levels. These committees deal with matters related to construction procurement, standards, regulation, industrial relations, and occupational health and safety.

Since its inception in the early 1960's, AMCA's objectives have been to promote and protect the interests and welfare of the air conditioning and mechanical services industry, its members, and the public they serve.

Members of AMCA design, install, and provide ongoing service of air conditioning and mechanical ventilation systems. Our members:

- Have years of experience in the industry;
- A proven record of achievement in the installation of commercial and industrial plant;
- Have worked on the most complex projects in Australia;
- Maintain all of the appropriate licences and the regulatory requirements; and,
- Train and develop their staff.

AMCA has more than 500 companies as members Australia wide who employ thousands of employees including: sheet metal workers, refrigeration mechanics, plumbers, drafting officers, clerical and administrative staff, Supervisors and Managers.

## The Questions and Issues

### ***What works well in the system?***

The laws that deal with Enterprise Agreements (EA) work well insofar that once an EA has been approved by the Fair Work Commission (FWC) the employees cannot take lawful industrial action. From the unions that our organisation deals with that law is pretty well adhered to – there are one or two exceptions such as protest rallies, and sometimes bogus Occupational Health and Safety disputes. Also, generally speaking, the new system for dealing with unfair dismissal via telephone mediation has worked efficiently and effectively. Finally, the approval process for EA's is also efficient and effective, but only in terms of the EA's being approved "on the papers" rather than a face to face appearance at the Commission.

***Do you have any views about minimum wages, awards, penalty rates, unfair dismissal, bargaining, the compliance burdens of the system and the performance of the Fair Work Commission and the Fair Work Ombudsman?***

**Minimum wages** – AMCA supports the concept of a minimum wage for adult workers as well as appropriate junior rates. However, the methodology by which the minimum wage changes is always controversial. Recent attempts to “simplify” the system have failed. The fact remains that the Full Bench takes submissions from the union and the employers and seems to come down more or less in the middle.

**Awards** – AMCA supports Modern Awards, however, they too can be simplified further. The current 4 year review may address this problem. But certainly the onset of Modern Awards has decreased the number of awards, but there are still areas of overlap.

**Compliance burden** – The FWA 2009 has 1871 pages (in my version) and has 627 Sections, transitional provisions and consequential amendments. It is just far too complicated!! By way of example, to lodge an Enterprise Agreement for approval an employer must lodge a F.16 and a F.17 – both forms ask basically the same sort of questions, but even if they asked different questions – why do they have to be two separate forms. The whole system is rife with unnecessary detail which the employer must complete – it all takes time and takes the employer away from their core objectives.

**Fair Work Commission** – Too many rules, too many forms. Overall, Commissioners do a very good job – but they are administering a system that is overly legalistic and completely process driven. There is at least one Commissioner who has been repeatedly, successfully appealed. This has always been at the additional cost of the employer, or possibly the employee. Regardless, there does not seem to be a process for Commissioner to be re-trained, performance managed or under extreme circumstances, terminated. Notwithstanding the comments above regarding the Enterprise Agreement approval forms; the actual approval process works very well now and is a significant improvement on the old system where the parties had to physically appear before a Commissioner to obtain approval. As a result, the system is far more effective and efficient than previously, with less downtime for all users.

**Fair Work Ombudsman** – AMCA has had a number of FWO encounters. There was one instance where there were two unnamed “employees” who made a number of unsubstantiated claims against one of our member companies. It was impossible to adequately respond to the allegations not knowing who the individuals were and being unable to clarify the circumstances. When we advised the FWO of this situation the officer concerned started suggesting what the Ombudsman could do to the company if we did not cooperate. We were told that privacy laws prevented them from advising who the complainants were. We eventually contacted a senior officer in the Department who fixed it all up.

**Have any of these parts of the system assisted you, or on the other hand, created problems for you, and if so how?**

As can be seen by the above comments AMCA members, and ourselves as an organisation representing those members, have had a variety of experiences.

### **What changes would you like to see to the workplace relations system, and why?**

AMCA is of the view that the system is far too regulated with too many rules, too many forms and just too legalistic. Employers and employees should be able to come to their own employment arrangements (including individual agreements), which would have some minimum standards such as: Minimum wage, National Employment Standards and Superannuation payments. For example, it may be that there is a letter of engagement such as appears on the FWC web site. An employee (or employees) who is unhappy with the working conditions or with the wages on offer could still lodge a complaint with their Union (if they are a member), or lodge or with the Fair Work Ombudsman or with the Fair Work Commission. **Refer case study at Appendix 1**

### **How would you achieve the changes you might like to see?**

There would need to be legislative changes to enable individual agreements to be made.

### **How quickly could these changes be made – in the next few years or much later?**

Legislative change is always difficult so most likely in two or three years.

### **Can you see any downsides to your policy suggestions?**

There will certainly be opposition to the suggestion as it is such a radical departure from the status quo. The Trade Unions will oppose because it will restrict their influence in the workplace. However, it should be noted that these days the unions only have 17% of all employees as union members. (Source: A.B.S. August 2013). In the private sector the level of trade union membership drops to 12% (Source A.B.S August 2013). The level of union membership has decreased steadily over the past few years.

### **Most people are good employees and employers, but some are not. Taking account of your own experiences, please tell us your views about what you would require a workplace relations system to do about this.**

#### **Bad Employer example:**

My daughter worked in our local supermarket on a part-time basis whilst still at school. One day she worked on a public holiday, when she received her pay she asked me whether she had been paid correctly. She was paid double time for the day, despite the Award (there was no Enterprise Agreement) clearly stating that she was entitled to double time and one half. When she enquired with the payroll officer she was told: "Yeah, I know but the boss has told me to only pay the higher amount if anyone asks".

#### **Bad employee example:**

A service technician for a medium-sized air conditioning installation company was running his own air conditioning business, effectively competing with his employer. When the technician went out to a potential client he quoted a price for the work for his employer and then often, but not always, provided that client with a quote for his own company. The explanation he gave was that the other company was run by his brother, and would look after him. This practice went on for several months before it was discovered and then the employee was terminated.

The first of the two examples would be addressed by a vigilant, well resourced Fair Work Ombudsman. It would require a significant increase in the number of inspectors who would need to have wide-ranging powers to enter workplaces. In the second example, once the matter was discovered, would require a rigorous "unfair dismissal regime".

**Have existing workplace regulations ever stopped you from doing something you would reasonably like to do? For example, for a business, this might be hiring a new worker or deciding to become an employer in the first place. For an employee, it might be getting more flexible hours of work?**

**Employer:** There is a clause in our enterprise agreement that restricts employing casuals for longer than 2 successive weeks. Our employees are unable to cash out their annual leave because there is not clause dealing with it in the enterprise agreement, despite the fact that there are several who want to do it and the employer would also agree and put the arrangement in writing.

**Employee:** There is another clause in the Agreement called Workplace Flexibility – however, it is anything but flexible. Sections 202, 203 and 204 of the Fair Work Act 2009 have extraordinary layers of restriction on how an employee may be able to gain some flexibility in their employment instrument. The only two areas where the employee can gain some flexibility is for salary sacrifice for superannuation and the extra pay if the employee is a leading hand.

**Who would you go to for help if you had a workplace issue or needed information about an issue? Are existing systems and organisations working acceptably? If not, what should be done about it?**

The obvious organisations are:

- Fair Work Commission;
- Fair Work Ombudsman;
- Fair Work Building and Construction;
- Employer Associations; and,
- Lawyers specialising in workplace relations.

As has already been stated – the whole system is just too complicated that all of the above organisations are probably extremely busy answering questions. The waiting time for calls to be answered is often up to 10 minutes. Also, the fact that neither the FWC nor the FWO are able to give legal advice restricts their usefulness. However, that limitation is further proof that the system is too legalistic.

**How much “red tape” is involved in complying with requirements? What could be done to reduce this, while maintaining a good workplace relations system?**

The answer to this question depends on what is meant by a “good workplace relations system? As an employer representative I would firstly say, and as has been demonstrated in this submission, the red tape is overwhelming. Secondly, I would say that a “good” workplace relations system is one where employers and their employees are able to make their own arrangements using whatever employment instrument of their choice; with the appropriate checks and balances that could be provided through The Fair Work Ombudsman, Fair Work Australia, Trade Unions and Employer Associations.

The former President of Fair Work Australia (as it was then) Geoffrey Giudice said when addressing the Industrial Relations Society of South Australia on 25<sup>th</sup> September 2012

“Successive reform acts have made the bargaining process more elaborate. And the increasing complexity of industrial action procedures has provided opportunities for unions to increase the negotiating pressure on employers. The legislation contains a series of pressure points in the bargaining process, some inbuilt and others discretionary, which progressively deepen hostilities”.

The current system assumes that the onerous level of dispute resolution is similar to that required when there are two kids squabbling in a school yard; realistically, a much better system should aim for a mature level of dispute resolution with transparent outcomes. As noted earlier there are good employers and bad employers, **but no employer sets out to be bad**. The majority of employers aspire to be employers of choice and take great pride in their reputations. Our current, “one size fits all” industrial relations system encourages too much union oversight and drags the whole system down to the lowest common denominator. We need stronger legislation to ensure that enterprise bargaining actually delivers demonstrable productivity measures, especially where the outcomes exceed the Consumer Price Index percentage. To sum up, AMCA believes the current system is too legalistic, too invasive, and too complex and requires significant resources to understand and manage.

Peter Verberne

Executive Officer, Human Resources

## Appendix 1

### Case study

Millennium Air conditioning had operated successfully for nine years when the three directors had very conflicting visions for the future direction and in the end decided it would be best to fold the company and establish new entities. The two companies were called Triple AAA and the other was called HVAC Commercial. The information in this case study only deals with Triple AAA.

All the Millennium Air Conditioning on site employees were employed under an Enterprise Agreement which would expire on 31 October 2015. All these employees were made redundant and 22 were re-employed by Triple AAA.

Triple AAA decided that it wished to continue to employ its employees under the same terms as the previous Agreement. The Fair Work Act 2009 required the Millennium Agreement to be terminated and then a new Triple AAA Agreement to be certified and approved by the Fair Work Commission.

AMCA advised Triple AAA of the process required by the Act to both terminate one agreement and obtain approval for a new one. The employees were required to vote on both questions. Also the union (CEPU) needed to be told. I have reproduced the advice given by AMCA to Triple AAA below:

#### Process for the approval of an Enterprise Agreement

1. All employees who are to be covered by the Agreement must be given a copy of their representational rights form (attached).
2. All employees to be covered by the Agreement must have access to the document for 7 days before there is a vote.
3. **Employees cannot vote on the Agreement until 21 days has elapsed from the issuing of the notice in Step 1.**
4. The vote can be a show of hands at a meeting or meetings or a ballot paper (attached) issued with pay slips. Either way employees must be advised as to when and how the ballot will occur.
5. During the access period (step 2) the employer should ensure that employees with language/culture problems and young employees have the opportunity to have the Agreement explained to them in an appropriate way.
6. The Agreement and a statutory declaration must be lodged with Fair Work Australia within 14 days of the ballot. AMCA will prepare the statutory declaration for the manager/Chief Executive to sign.

In order to complete this last step AMCA will need the following information as soon as possible after the ballot has been completed:

- Number of employees to be covered by the Agreement.....
- Number of employees who voted.....
- Number of employees who voted for the agreement .....
- Date the copy of the representational rights was issued .....
- Date on which the vote commenced .....
- Date on which voting ceased.....
- Copy of the representational form on your letterhead.

<b>GROUP</b>	<b>Number of employees</b>
Female	
Non-English speaking background	
Aboriginal or Torres Strait Islander	
Disabled	
Part-time	
Casual	
Under 21 years of age	
Over 45 years of age	

This process had to be rigidly adhered to. AMCA produced an F.24 – Application for termination of an enterprise agreement by agreement, an F-24A – Statutory Declaration in support of termination of an enterprise agreement. AMCA arranged for the Director of Triple AAA to sign the statutory declaration. Then AMCA produced an F.17 – Employer's declaration in support of application for approval of enterprise agreement, and an F.16 Application for approval of enterprise agreement. All the above paperwork was lodged at the Melbourne office of the Fair Work Commission on 22 January 2015.

I might just point out here that there were 22 employees eligible to vote – only 4 bothered to vote and they all voted for the termination and the replacement Agreement.

On the 11 February 2015 I received a letter from the Fair Work Commissioner assigned to the matters (AG2015/1730 and AG2015/1731) stating that:

1. The Commission needed to be assured that the relevant Union (CEPU) was supportive of the termination of the agreement;
2. The agreement is signed but not dated;
3. The Consultation clause in the agreement does not meet the requirements of Section 205.

The letter then provided two alternatives as a solution one of which was adopted. The solution was that the company provide the FWC with an undertaking that:

*“notwithstanding Clause 10 of the Agreement the company undertakes to consult employees to whom the agreement applies about a change to their regular roster or ordinary hours of work or shifts in accordance with Section 205(1A) of the Fair Work Act”.*

That letter was supplied to FWC on 12 February 2015.

On the 17 February 2015 we received a Notice of Listing highlighting the matters cited above for a “Hearing on the papers”

On the 18 February 2015 the company received the formal approval from the Fair Work Commission.