

18 September 2015



Peter Harris  
Presiding Commissioner  
Workplace Relations Framework  
Productivity Commission  
GPO Box 1428  
CANBERRA ACT 2601

Dear Mr Harris

**WORKPLACE RELATIONS FRAMEWORK – DRAFT REPORT**

Thank you for the opportunity to comment on the Draft Report.

The Association of Mining and Exploration Companies (AMEC) is the peak national industry body for hundreds of mining and mineral exploration companies throughout Australia.

AMEC supports the Inquiry, and the opportunity to modernise employment regulation. In doing so it is imperative that the workplace relations framework has the following features:

- Fair and equitable;
- Flexible and practical;
- Provides clarity and certainty;
- Promotes productivity and growth; and
- Remains internationally competitive.

As stated in AMEC's previous submission to the Inquiry, the mining industry is cyclical, often experiencing peaks and troughs in its activities due to a number of issues including project funding, approval delays, fluctuating commodity prices and exchange rates, increasing global competitive forces, the quantity and quality of mineral deposits and the mine life cycle itself.

It is primarily for these reasons that AMEC has recommended that the workplace relations framework is flexible and practical to cater for fluctuations in economic activity.

Generally, employers in the mining industry use common law employment contracts with some flexibility provisions built in to cater for the cyclical nature of the sector.

Any such variations (such as roster arrangements, inter-state travel re-imbursements) to contracts are normally dealt with through a consultation process between the employer and the employee in order to achieve an agreed outcome. These arrangements have been operating efficiently and effectively, and without undue disruption.

**Association of Mining and Exploration Companies**

Offices located in Perth and Brisbane. Please address all correspondence to:  
PO Box 948, West Perth WA 6872 | 6 Ord Street, West Perth WA 6005  
P: 1300 738 184 | F: 1300 738 185 | [info@amec.org.au](mailto:info@amec.org.au) | [www.amec.org.au](http://www.amec.org.au)

It should also be noted over the past decade that there has been an increased usage of third party contractors for the construction and operational phases of a project mine cycle. Under these arrangements employment is the direct responsibility of the appointed third party contractor under the specific Terms of the Project Agreement. This provides increased flexibility for short term activities and ensures that relevant skill sets are provided through the contractor.

In the event that specific skill sets are unavailable through the traditional Australian labour market place it is imperative that industry continues to have access to temporary workers through the skilled migration program.

Specific comments on the Framework are as follows:

### **1. Protected Industrial Action (PIA)**

Employers and Third Parties should be provided with viable options for terminating and suspending protected industrial action. Unfortunately, recent case law has set a very high, and virtually unattainable, benchmark for obtaining an order which suspends or terminates industrial action.

PIA should be used as a last resort after genuine and meaningful discussions have taken place between employers and employees (good faith), and such action should be restricted to the pursuance of sensible and realistic claims.

The proposed PIA must also be objectively reasonable and proportionate having regard to the conduct and progress of any negotiations, the matters in dispute, and the circumstances of the employer's business and the industry in which the business operates and the likely affect the proposed industrial action may have on the employees, the employer and other persons.

#### **Recommendation:**

*The definition of "significant economic harm" under section 426 and 423 of the FW Act should be replaced with a new test to assess whether industrial action is causing unreasonable economic harm to either a party to the dispute or third parties who are adversely affected.*

### **2. Enterprise Agreement**

Employee collective agreements have generally been used to engage operational personnel in traditional blue-collar, award-bound employee classes.

Common law contracts are also used for these employees as an over-arching, complementary document to provide company-wide consistent terms and conditions of employment.

Industry has been faced with the more complex, controversial and difficult aspects of the FW Act with respect to agreement-making, good faith bargaining and employee organisation representation.

Circumstances have occurred where despite low numbers of employees appointing unions as bargaining representatives, companies have been obliged to negotiate with unions notwithstanding their pursuit of claims that were not aligned with those of appointed employee bargaining representatives. A system that includes a higher threshold for union representation is preferred.

The FW Act provides that a union is the default bargaining representative if an employee is a member of the organisation and is entitled to represent the industrial interests of an employee in relation to work that will be performed.

Ascertaining those employees that are union members and those that are not can prove a futile exercise. The employer has little choice but to assume that those unions who are entitled to represent the industrial interests of the employee are the default bargaining representatives; the alternative, to survey the entire workforce to determine employee membership of unions, is generally impracticable and potentially inaccurate.

If union involvement is permitted in agreement making, it should be limited to circumstances where a majority of employees eligible to be represented by the employee organisation appoint that organisation.

Effective and productive business is derived from employers engaging directly with their employees every day. This engagement should continue into agreement-making. The third-party involvement via unions as the default bargaining representatives has the potential to derail the requirements of the business and employees and make those needs subservient to the needs of the employee organisation. Unions should not be default bargaining representatives.

Coverage by an agreement should not be extended to unions in circumstances where the union has expressed that it does not support or endorse the proposed agreement at the conclusion of bargaining. When a union is covered by an agreement, it may have certain entitlements that it would not otherwise have. These entitlements should not be afforded to a union in such circumstances.

---

Agreement-making under the FW Act is intended to reinforce the intent of the Forward with Fairness policy direction that employees and an employer reach an agreement that reflects the needs of the business and that fosters productivity and flexibility. Agreement making provisions in the FW Act should avoid excessive technicality, facilitate agreement-making and be flexible for business.

Discretion should be provided to the Fair Work Commission to waive compliance with mandatory pre-approval requirements when approving an enterprise agreement

particularly when voted up by the majority of employees. The procedural requirements of the agreement making process are overly onerous.

While the FW Act provides for employees to be appointed as bargaining representatives there is very little protection for employee bargaining representatives when they are subjected to untoward conduct from unions or fellow employee bargaining representatives. The Fair Work Review<sup>1</sup> did not traverse this issue. Such untoward conduct does not readily fall under the protections in the FW Act.

Recommendations:

*Agreement making could be improved by adopting the following reforms:*

- *Unions should not be the default bargaining representative.*
- *If union involvement is permitted in agreement making it should be limited to circumstances where a majority of employees eligible to be represented by the union appoint that union.*
- *Discretion for the Fair Work Commission to waive compliance with mandatory pre-approval requirements.*
- *Protections for employee bargaining representatives regarding untoward conduct of unions and fellow employee bargaining representatives.*
- *Provision of bargaining periods to ensure genuine bargaining.*

### **3. Greenfields Agreement**

The current exclusion of employer greenfields agreement under the FW Act grants unions an entrenched right to demand prescriptive guaranteed wage escalations rates that are in excess to market and CPI. Unions wield power over the terms and conditions on critical development projects.

With regard to prevailing pay and conditions within the relevant industry for equivalent work, the proposed section 187(6), as drafted, is not workable.

The concept of requiring agreements made under section 182(4) to meet “prevailing pay and conditions within the relevant industry for equivalent work” would lead to a vast number of problems including unions having the power to delay and frustrate the approval of greenfields agreement (amongst other things).

Major delays would be experienced in commencing projects, with flow on and reinforcement of many unproductive and inflexible clauses which currently appear in greenfields agreements. Unnecessary disputation and litigation would result.

Recommendations:

- *a return to non-union (employer) greenfields agreements to be reintroduced, as were previously available under s 330 of the Workplace Relations Act 1996 (Cth); and*
- *Greenfields Agreements to be for the length of the project.*

---

<sup>1</sup> Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation. Fair Work Act Review (2012) Canberra: Department of Education, Employment and Workplace Relations

#### **4. Transfer of business**

The current transfer of business rules require that an employee's industrial agreement transfers across if the business is acquired by a new owner, unless there is an exemption by the FWC.

AMEC considers this is expensive, time consuming and administratively burdensome. It can cause industrial unease in transition when employees are subject to different conditions.

Generally, under Part 2-8 of the Fair Work Act, when an employee transfers between entities, the industrial instrument covering the old employer and the employee automatically transfers with the employee. The only way to prevent the old employer's instrument applying to the new employment is to secure an order to that effect from the FWC.

Section 318(3) of the FW Act obliges the Fair Work Commission to take into account seven factors.<sup>2</sup> It follows that evidence adduced in such an application is comprehensive and further it is not always the case that the prospects of success with regard to the application are high.

*Recommendation:*

*AMEC considers that a reversion back to the pre-FW Act transmission of business rules; namely, such that if a business is outsourced employees' industrial agreements do not transfer.*

This would encourage increased employment and general productivity. In addition to reversion of the characteristics of the business (WR Act).

#### **5. Right of Entry**

The proposed changes to the right of entry (ROE) provisions do not adequately address excessive union visits especially when the union does not have members or a member at site.

When completing union right of entries on a Project or in Operations it would usually take in excess of approximately 12 hours to arrange and then provide an escort for the union ROE.

---

*Recommendation:*

*The arrangements that existed from 2006 should be reintroduced – where a union's right to enter a workplace is because:*

- (a) the union is covered by or is a party to an enterprise agreement that covers the site or be attempting to reach one;*
- (b) the union can demonstrate that it has members on that site; and*

---

<sup>2</sup> Views of the business, views of employees who would be affected by the order, disadvantage, nominal expiry date, impact on workplace, business synergy and public interest.

*(c) those members have requested the union's presence.*

## **6. Unfair Dismissal**

In the calendar year of 2014 one member of AMEC received more than 30 claims arising from about 200 dismissals. . It is not uncommon for members to require external legal support to deal with such claims and therefore significant cost can be incurred.

Industry generally adopts a commercial view to unfair dismissal claims given the cost to proceed to arbitration with legal representation.

If conciliation does not resolve the matter, there is no close-out. The employee may elect to continue with the matter to the hearing stage. Despite it being absolutely conceivable and practical for the Conciliator to direct the parties, the Conciliator does not have the authority to dispense with the matter after discussions with the employer and employee.

What has evolved from a potentially effective process is an avenue for employees to seek 'go-away' money even where claims lack merit. This is due to the fact that in the absence of agreement the matter progresses.

This creates an incentive for employers to put money on the table to avoid the time and cost expense of engaging in a full tribunal hearing.

Initial matters in s 396(b) and s 396(a) should be an administrative consideration and applications not satisfying this subsection should be rejected by FWC staff.

A guarantee of annual earnings should effect that the relevant modern award neither covers nor applies – hence taking well paid professional employees, such as engineers, outside of the scope of the unfair dismissal protections.

Further, irrespective of whether an employee is award or agreement covered, those employees whose annual earnings are above the high income threshold should be excluded from bringing unfair dismissal claims.

Coverage by an industrial instrument should not be a determinative factor as to whether access to a legislative protection should be provided.

### *Recommendation:*

---

*The Guarantee of Annual Earnings should take an employee out of modern award coverage and application hence removing unfair dismissal protections.*

In relation to the time for an employer-respondent to respond to an unfair dismissal/general protections application, AMEC recommends requesting that the employer's response be filed at least 3 - 4 days before conciliation (not 7 days after the application has been served).

The requirement to file and serve an Employer Response within 7 days on receipt of the Application is completely unrealistic in circumstances where a predominately FIFO workforce working roster swings. Access to potential witnesses or key personnel is near impossible in that time frame.

There is a need for greater transparency concerning the factors considered when granting an adjournment and a requirement for more notice of an adjournment to be provided rather than on the conciliation conference call.

Examples have been provided where adjournments have been granted on application of the employee, or when the conciliator has been ill, but not in circumstances where the mining company has requested an adjournment.

*Recommendation:*

*That the employer's response be filed at least 3 – 4 days before conciliation.*

## **7. Individual Flexibility**

Efficient and productive business requires a fundamental principle to exist that an employer is able to directly engage with its employees.

Companies have been known to have pursued the renewal of employee collective agreements because the FW Act removed the ability to use individual agreements.

In place of individual agreements was the provision for all enterprise agreements to include a 'flexibility term'. This term provides the ability for an employer and employee to agree to an Individual Flexibility Agreement (IFA) to vary the terms of an agreement for that individual subject to the employer ensuring that any individual flexibility arrangement agreed to under the term must result in the employee being better off overall than the employee would have been if no individual flexibility arrangement were agreed to.

Where an employer and employee agree to work flexibly and enter into an IFA, for true value to be realised, a minimum set term for the IFA must be permissible.

Longer terms could present barriers for employees to commit due to the 'unpredictability' of their personal circumstances such a distance into the future. Shorter terms continue to present the challenge of realising the value. However, a maximum four year term should be considered appropriate.

---

At present the IFA remains an undesirable agreement option.

*Recommendation:*

*The value of the IFA could be improved if:*

- *compliance with being better off overall only arose on request of either the employer or the employee; once the IFA is agreed no challenge can be raised;*
- *the maximum term was a period of four years or termination by mutual consent and protected industrial action could not be taken during its term;*

- *on termination of an IFA the FW Act specified that the employee's terms and conditions of employment are those that applied immediately prior to the operation of the IFA, or in the case of an employee who commenced employment on an IFA those prescribed by the relevant award/agreement; and*
- *the ability to make an IFA which deals with any matter prescribed by the relevant modern award or agreement.*

#### **8. No-disadvantage test**

The Commission is recommending replacement of a 'better off overall test' for approval of enterprise agreements with a new 'no-disadvantage test'.

The mining industry has generally been faced with a rapidly falling and increasingly competitive market. Project economics have necessitated various efficiency measures, including realignment of salaries and / or employment conditions with the market and economic environment.

Great care will therefore be necessary in adopting the parameters for a no-disadvantage test to ensure that they are reasonable and practical. Although the mining industry usually provides above award conditions, the issue of realigning or lowering salary levels whilst remaining above the award could be problematic.

If the no-disadvantage test is too restrictive, industry may be forced to engage new employees rather than work through the salary adjusting exercise with existing employees. This appears to be a counter-productive and inefficient outcome. The parameters for the no-disadvantage test therefore need to be carefully worded.

AMEC notes the Draft Report refers to the precedent in Western Australia where a no-disadvantage test is used in assessing Employer Employee Agreements. The Registrar of the Western Australian Industrial Relations Commission determines the relevant award (or other instrument as prescribed in the regulations) that would apply to the employee and is required to be satisfied that the agreement is no less favourable than the applicable award or order 'when considered as a whole'.

#### **Recommendation:**

*The approach taken by the Western Australian Industrial Relations Commission regarding the no-disadvantage test should be adopted.*

---

AMEC looks forward to further consultation on this important public policy issue.

Yours sincerely

**Simon Bennison**  
Chief Executive Officer