Further Submission to the Ministerial Review of the State Industrial Relations System

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Commercial in confidence

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1. Introduction

The Australian Mines and Metals Association ("**AMMA**") was invited by correspondence dated 3 October 2017 from the Hon Bill Johnston MLA, Minister for Mines and Petroleum; Commerce and Industrial Relations; Electoral Affairs; Asian Engagement, to make a submission to the Review of the State industrial relations system being conducted by Mark Ritter SC and Stephen Price MLA (the "**Review**").

In November 2017 AMMA made a written submission to the Review.

On 20 March 2018 the Review published an Issues Paper and invited parties that had made submissions to the Review to meet with the Reviewers.

On 9 April 2018 following consultation with and feedback from our member companies, AMMA representatives met with the Reviewers. During that meeting AMMA foreshadowed that we would be making a further submission on a number of the matters raised by the Issues Paper.

2. About AMMA

AMMA is Australia's national resources industry employer group, a unified voice driving effective workforce outcomes. Having actively served resource employers for 100 years, AMMA's membership spans the entire resource industry supply chain: exploration, construction, commercial blasting, mining, hydrocarbons, maritime, smelting and refining, transport and energy, as well as suppliers to those industries.

AMMA works to ensure Australia's resources and energy industry is an attractive and competitive place to invest and do business, employ people and contribute to our national well-being and living standards.

The resources industry is, and will remain, a major pillar of the national economy. Its success will be critical to what Australia can achieve as a society in the 21st Century and beyond.

The Australian resources industry directly generates over 8% of Australia's GDP. In 2015-16, the value of Australian resource exports was $157.1 billion. This is projected to increase to $232 billion in 2020-21.

It is forecast that Australian resources will comprise the nation's top three exports by 2018-19. Approximately 50% of the value of all Australian exports is from the resources industry.

Australia is ranked number one in the world for iron ore, uranium, gold, zinc and nickel reserves, second for copper and bauxite reserves, fifth for thermal coal reserves, sixth for shale oil reserves and seventh for shale gas reserves.

AMMA members across the resources industry are responsible for a significant level of employment in Australia. The resources extraction and services industry directly employs 222,300 people. Adding resource-related construction and manufacturing, the industry directly accounts for 4% of total employment in Australia. Considering the significant flow-on benefits of the sector, an estimated 10% of our national workforce, or 1.1 million Australians, are employed as a result of the resources industry.

In Western Australia, AMMA is recognised as a significant party pursuant to the *Industrial Relations Act 1979* ("**IR Act**"). In Section 7 – Terms Used, of the IR Act, AMMA is defined.

AMMA is subsequently referred to pursuant to multiple sections of the IR Act[1].

AMMA members are overwhelmingly constitutional corporations. Since the passage of the *Workplace Relation Amendment (Work Choices) Act 2006* (Cth), constitutional corporations have been, subject to certain exceptions specified in the relevant legislation itself, covered exclusively by the Federal workplace relations system. Currently, the relevant Federal legislation is the *Fair Work Act 2009* (Cth) ("**Fair Work Act**").

Notwithstanding the primacy of the Federal workplace relations system, Western Australian legislation is still significant in a number of areas of workplace regulation. These areas include:

- Long Service Leave;
- Occupational health and safety;
- Workers Compensation;
- Equal Opportunity;
- Apprenticeships and traineeships; and
- Employment of children.

The IR Act itself also includes provisions that continue to apply to constitutional corporations and that have relevance in their workplaces, including provisions relating to right of entry (for workplace health and safety purposes) and the ability of individual employees to make contractual benefits claims.

[1] See sections 29A, 31, 40B, 47, 50, 51BA, 51I, 51J, 51K, 97VZ and 112A.

3. Overall Approach

If the Western Australian Government is intent on maintaining a separate IR system for WA private sector employers that are not constitutional corporations, and is intending on modifying that system with a view to improving it, there should in AMMA's submission be a focus on consistency and simplicity, both for the private sector corporations that will still be regulated in part by some aspects of the State system, and for the non-corporate employers within the State system, who will still be regulated in part by some aspects of the Federal system.

The adoption of an approach that seeks to have the WA IR system as consistent as possible with the Federal IR system will minimise the complexities of employers needing to operate under two sets of rules if:

- Any changes to the WA IR system are made with a view to avoiding the creation of inconsistencies with the Fair Work Act, and in that way; and
- Current anomalies and inconsistencies under the WA system are addressed.

Significant Concerns

AMMA makes the following submissions in relation to those proposals and recommendations set out in the Issues Paper with respect to which we hold significant concerns.

3.1 Right Of Entry [Recommendation 67]

Notwithstanding that AMMA's members are Federal system employers, the preservation of certain State employment related legislation by Section 27 of the Fair Work Act means that State legislation setting out Right of Entry provisions can apply to AMMA members.

The primary position of AMMA is that Right of Entry should be governed by the provisions set out in Chapter 3, Part 3-4 of the Fair Work Act.

These provisions of the Fair Work Act set out a known and reasonably workable set of conditions for the exercise of Right of Entry by union officials to enter premises where work is performed for the purpose of:

- Investigating suspected contraventions of the Fair Work Act or industrial instruments applying in the workplace;
- Holding discussions with employees that can be represented by the industrial organisation the official is entering on behalf of; and
- To exercise Right of Entry under State or Territory Occupational Health and Safety legislation.

It would in our submission be efficient and practical to have State industrial relations legislation adopt the Federal Right of Entry provisions.

Such a course of action would:

- Provide one uniform set of Right of Entry provisions across both Federal and State jurisdictions;
- Eliminate the need for the Western Australian IR system to maintain and administer a system for the issuance of Right of Entry permits which essentially duplicate the Federal system of Right of Entry permits;
- Ensure that there was no confusion as to the primacy of the Federal Right of Entry provisions and sometimes mistaken view of persons seeking to exercise Right of Entry that the State Right of Entry provisions, particularly under State Occupational Health and Welfare legislation was in some manner independent of or not subject to the Right of Entry code set out in the Fair Work Act. On this point there is Full Federal Court authority that establishes that a person seeking to exercise a Right of Entry regime that may apply under State law, such as occupational health and safety legislation in relation to a Federal system employer, must also comply with the Right of Entry regime set out in the Fair Work Act. [2]

  The circumstances addressed in the Powell decision were recently replicated in a matter before the Federal Court when an interlocutory order was made against several union officials who were entering a construction site in Queensland allegedly to pursue occupational health and safety concerns. In granting the interlocutory order the Judge noted that requiring permit holders

[2] Australian Building and Construction Commissioner v. Powell [2017] FCAFC 89

of Federal Right of Entry to produce their Federal permits prior to entering the site was not an inconvenience or hardship to the permit holder.[3]

The continuing existence of State based Right of Entry regimes provides an opportunity for some permit holders to seek to choose when and if they will comply with the Federal Right of Entry regime.

If the Review is minded to recommend that a State based Right of Entry regime be maintained then in AMMA's view such a State based regime should encompass the checks and balances found in the Federal Right of Entry regime. These include:

- Permit holders must give notice to exercise Right of Entry;
- Permit holders must produce their permit if requested prior to exercising Right of Entry;
- Permit holders must comply with occupational health and safety requirements that apply at the premises;
- Permit holders must not intentionally hinder or obstruct any person whilst carrying out their Right of Entry;
- Permit holders must not misrepresent their authority whilst carrying out their Right of Entry; and
- Permit holders must not delay or obstruct the entry of other persons onto a premises whilst carrying out their Right of Entry.

[3] Australian Building and Construction Commissioner v. Construction, Forestry, Maritime, Mining and Energy Union [2018] FCA 553

3.2 Right To Make Electronic Recordings Or Records [Recommendation 68]

As noted above, notwithstanding that AMMA's members are Federal system employers, the preservation of certain State employment related legislation by Section 27 of the Fair Work Act means that State legislation setting out Right of Entry provisions can apply to AMMA members.

We note that there is no demonstrated need to allow a permit holder exercising Right of Entry to be able to make electronic recordings or records.

AMMA further submits that should the Review be minded to make a final recommendation in the nature of Recommendation 68, that this should be subject to the following conditions:

- Compliance with relevant legislation particularly the Surveillance Devices Act 1998;
- Compliance with site safety requirements applying at the premises (e.g. electronic items such as phones and cameras are an ignition source and routinely controlled/prohibited on oil and gas installations and refineries);
- Protection of intellectual property, patents and copyrights;
- Prior and continuing disclosure that the video or electronic means will and is being used for obtaining records; and
- A sole purpose test in respect of use or disclosure of any video or electronic record, proof of which is on the permit holder.

We note there have been cases where the use of recording devices by permit holders exercising right of entry has been held to be improper behaviour.[4]

[4] See *Fair Work Australia*, [2001] FWA 4096

3.3 Long Service Leave [Recommendation 49]

AMMA notes that as set above, by virtue of the operation of Section 27 of the Fair Work Act, Western Australian Long Service Leave legislation applies to Federal system employers.

Recommendation 49 sets out a number of sub recommendations that deal with the issue of Long Service Leave.

Set out below are our submissions in respect of each of the sub recommendations:

3.3.1 That there be an express provision for casual employees to be entitled to receive Long Service Leave and guidance on how to calculate their continuous employment.

AMMA submits that it is sensible to provide legislative guidance on this point. It often raises issues as casuals rarely work exactly the same hours each week over the course of a number of years.

3.3.2 That there be an express provision for seasonal workers to be entitled to receive Long Service Leave and guidance on how to calculate their continuous employment.

AMMA submits that it is sensible to provide legislative guidance on this point.

3.3.3 That there be a provision that no Long Service Leave may be "cashed out" until it is an entitlement that has accrued or crystallised as a legal entitlement.

AMMA disagrees with this sub recommendation. Many employers in the resources sector provide and pay Long Service Leave benefits either in excess of the State standard provision or in advance of the State standard provision. This is done to attract and retain employees in remote and often harsh working environments.

Examples of this is a practice in the mining industry, particularly for those employers with operations in the North West of Western Australia, to provide pro rata Long Service Leave benefits to their employees after five years of continuous service rather than seven years.

In the hydrocarbons sector some employers operate a two weeks on, two weeks off, two weeks on, four weeks off roster and this roster includes the employees' entitlement to Long Service Leave. Given this style of roster has employees working four weeks out of every ten weeks, or twenty weeks per annum, employees employed on this style of roster are plainly better off than if they were being paid Long Service Leave after ten years of service.

A legislative prohibition on employers paying Long Service Leave prior to the benefit crystallising would, in our submission, only serve to create employee relations issues and may act to reduce entitlements for some employees.

3.3.4 That there be a provision for all forms of paid leave to count towards an employee's continuous employment.

AMMA agrees with this sub recommendation.

3.3.5 That there be a provision for continuous employment to apply in circumstances equivalent to when there has been a transfer of business under Part 2-8 of the Fair Work Act.

AMMA disagrees with this sub recommendation. The current State Long Service Leave Act, which provides for continuity of accruals where a transmission of business occurs, is quite clear cut in its application. Transmission of business is a long standing, well understood legal concept that has been the subject of considerable judicial consideration.

The Transfer of Business provisions of the Fair Work Act are poorly drafted and difficult to interpret and apply in some cases, particularly where a new employer has no direct business relationship with the old employer. If the employing entity does not change then an employee's Long Service Leave accrual is unaffected and clearly able to be determined. If there is a change of employer, then employment should only be continuous if there is a transmission of business, as currently set out in the Long Service Leave Act.

3.3.6 That there be a provision that an employer be obliged provide a copy of an

employee's employment records, relevant to an assessment of if, and when, they will be entitled to Long Service Leave, to any subsequent employer to whom the first employer's business has been transferred, at the time of or within one month of the transfer of the business.

AMMA disagrees with this sub recommendation. There is, in our submission, no demonstrated need for such a provision. The recommendation creates an administrative burden on employers where there may be no direct business relationship with (or even any knowledge of) the new employer.

3.3.7 That there be a provision for the taking of Long Service Leave in alternative ways.

AMMA agrees with this sub recommendation with the caveat that such alternatives must be agreed in writing between the employee and their employer.

3.3.8 That there be a provision that service as an apprentice counts towards an employee's continuous employment.

AMMA disagrees with this sub recommendation. From a public policy perspective increasing the cost to an employer of employing an apprentice will, all factors being equal, serve to reduce the capacity of some employers to take on apprentices. AMMA submits that the Review should be cautious about making any Recommendations that may have the effect of reducing the employment young people.

3.3.9 That there be a provision that the term "one and the same employer" in s 8(1) of the *Long Service Leave Act 1958* (LSL Act) includes related bodies corporate within the meaning of s 50 of the *Corporations Act 2001* (Cth).

AMMA agrees with this sub recommendation.

3.4 Industrial Appeals Court/ Appeal of Decisions [Recommendation 7]

AMMA agrees with recommendation 7 (a). In our submission the abolition of the Industrial Appeals Court and appeals from the Western Australian Industrial Relations Commission ("**WAIRC**") being heard before the Supreme Court is not

controversial.

AMMA disagrees with recommendation 7 (b) that the proposed 2018 Industrial Relations Act be amended to include a right of appeal to the Court of Appeal of Western Australia, upon a grant of leave by a Justice of the Court, from a decision of the Presiding Member, the Judicial Bench, or the Arbitral Bench on the ground that the decision involved an error of law.

AMMA notes that in recent years, there have been very few appeals to the Industrial Appeals Court. In 2013/14 there were two, in 2014/15 there were three, in 2015/16 there were five and in 2016/17 there were two. This would tend to suggest that appeals to the Supreme Court would be relatively infrequent. In our submission there is no demonstrated need to have a process of seeking leave to filter out appeals that are instituted with little chance of success. Having a requirement to seek leave to appeal is likely to add to the time taken to resolve appeals and the attendant legal costs for all parties.

3.5 Jurisdiction of the Industrial Magistrates Court ("IMC") [Recommendation 8]

AMMA supports the recommendation that if the jurisdiction of the IMC is to be amended so that if a claim for enforcement of a State Employment Standard ("**SES**"), State award, or other State industrial instrument is made to the IMC, the IMC has jurisdiction to deal with all enforcement proceedings, claims and counterclaims arising between the employer and the employee, or former employer and employee, including any claims by the employee or former employee for a denial of a contractual benefit and any claims of set-off from, or counterclaim to, the denial of contractual benefit alleged by the employee, subject to there being appropriate disincentives to ensure that unmeritorious claims for damages are not added to enforcement proceedings.

3.6 Regulation of Industrial Agents [Recommendation 13]

AMMA supports the recommendation to permit the WAIRC to regulate the conduct of paid industrial agents other than employees or officers of unions or employer associations.

3.7 Representation Before the WAIRC [Recommendation 18]

AMMA submits that there is no demonstrated reason why the WAIRC should be given the power to deny a party the right to be legally represented. The private sector employers remaining in the WA IR system are likely to be of a size such that they will not have in house IR expertise and as such will need external assistance.

3.8 Power to Award Costs [Recommendation 19]

AMMA submits that the WAIRC should have the power to award costs including representational costs in similar circumstances to the Fair Work Commission.

3.9 The Definition of Employee [Recommendations 37, 38, 39]

AMMA submits that the definition of "Employee" should not be expanded beyond its current scope, save consideration being given to removing the exclusion of persons employed in domestic service.

3.10 Right of Entry onto Personal Private Dwellings [Recommendation 42]

AMMA submits that as a matter of principle, Industrial Inspectors should be required to obtain additional authority (such as a Warrant from a Magistrate or an Industrial Registrar) before entering any private residence that is also a workplace.

Persons holding Right of Entry permits should not be able to enter premises or part of a premises mainly used for residential purposes. AMMA notes that under the Fair Work Act, Section 493 Right of Entry is not permitted in relation to any part of a premises that is used mainly for residential purposes.

3.11 Regulation of Non Permitted Employment Relationships [Recommendation 45]

AMMA does not endorse any expansion of the jurisdiction of the WAIRC to employment relationships that are otherwise regulated by other legislation. The WA IR Act should not in any manner regulate employment relationships that are unlawful under other laws such as the Migration Act 1958 (Cth).

3.12 Minimum Standards of Employment/State Employment Standards ("SES") [Recommendations 47, 48, 51, 52, 53, 54]

AMMA agrees that the proposed 2018 IR Act should include a Part that provides for minimum conditions of employment for employees covered by the State system to be called the State Employment Standards (SES). AMMA submits that the SES should be set by the WA Parliament and broadly align with the National Employment Standards under the Fair Work Act. There is no logical reason why minimum employment conditions should vary between Federal system employers and WA State system employers. Where there is a demonstrated need for any additional entitlements for a distinct occupational or geographic group of employees these can be regulated by an updated State Award.

3.13 Powers of Industrial Inspectors [Recommendation 58]

AMMA notes the Issues Paper suggests that Industrial Inspectors be empowered to issue infringement notices and compliance notices for breach of record-keeping and pay slip obligations.

AMMA notes that record keeping is a complex and often changing set of requirements at both Federal and State levels. Any alleged breaches of record keeping requirements should be enforced in a Court of competent jurisdiction.

The Issues Paper also canvasses Industrial Inspectors being able enter into enforceable undertakings, based on the model contained in Section 715 of the Fair Work Act, if it is in the public interest to do so.

AMMA supports this proposal as an alternative to prosecution, particularly if the breach is of an unintentional manner.

3.14 Penalty Provisions [Recommendation 59]

The Issues Paper sets out that penalties in enforcement proceedings brought in the IMC be amended to be equivalent to the penalties set out in s 539 of the Fair Work Act, and contain a method for indexation of the penalties, so that the maximum penalties change over time to take into account inflationary change.

AMMA submits that the penalties prescribed by the proposed 2018 IR Act should reflect the nature of the relatively small scale, private sector employers that remain

within the WA system. AMMA further submits that any amendments or increases to penalties should not be automatic and should be enacted by the WA Parliament.

3.15 Power to Address Involvement in Contraventions [Recommendation 60]

The Issues Paper proposes that the 2018 IR Act to include provisions comparable to Section 550 of the Fair Work Act to enable those involved in any contravention of a relevant breach to be penalised and/or ordered to rectify any non-payment, or ordered to pay compensation or any other amount that the employer may have been ordered to pay.

AMMA submits that to the extent that the recommendation goes to accessorial liability, in relation to a contravention, and is subject to the other provisions set out in Division 4 of Part 4-1 of the Fair Work Act, then AMMA has no other issues with the proposal.

3.16 Sharing of Information [Recommendation 64]

The Issues Paper proposes that the proposed 2018 IR Act include provisions requiring Industrial Inspectors to share information acquired during an investigation within DMIRS or with other State Government agencies, or to obtain relevant information within DMIRS or from another State Government agency.

In AMMA's submission there is no demonstrated need for this provision.

3.17 Powers of the Judicial Bench

The Issues Paper proposes that the proposed 2018 IR Act include provisions that would permit the Judicial Bench to impose a maximum penalty for a breach of $12,000 or imprisonment for not more than 12 months or both. (This is consistent with *Magistrates Court Act 2004* (WA) s 16(4)).

AMMA submits that the legislation should only prescribe fines as penalties not imprisonment.

4.0 Recommendations Supported By AMMA

AMMA supports the following Recommendations set out in the Issues Paper:

- Recommendation 1 – That the IR Act 1979 be re-named.
- Recommendation 2 – That the proposed IR Act 2018 be reviewed after three years.
- Recommendation 3 – That the re-written IR Act 2018 be gender neutral and plain English drafting.
- Recommendations 4, 5, 6 and 7 – That the structure of the WAIRC be reformed and rationalised.
- Recommendations 9 and 10 – That the proposed IR Act 2018 permit dual appointments with the Fair Work Commission.
- Recommendation 11 – That the proposed IR Act 2018 permit appointees to serve until age 70.
- Recommendation 14 – That the proposed IR Act 2018 have:
    - A "slip rule" for orders made by the WAIRC;
    - An amendment to the current requirement for a "speaking to the minutes" of orders, to give discretion to the WAIRC to dispense with a speaking to the minutes in a particular case if it is warranted in the opinion of the WAIRC;
    - An amendment to the requirement for a "speaking to the minutes" of orders that would permit the WAIRC to specify that unless parties indicate by a specified time that a speaking to the minutes is requested, that the WAIRC may issue the order in the terms of the minutes; and
    - Power for the WAIRC to conduct conciliations by telephone.

- Recommendation 15 – Removal of the privative clause set out in s 34 of the IR Act 1979.
- Recommendation 16 – That the proposed IR Act 2018 have no provisions dealing with the appointment of Boards of Reference.
- Recommendation 61 – That the proposed IR Act 2018 is to include provisions to enable the IMC to impose penalties for a breach of the SES or any applicable award, agreement, or other industrial instrument, including but not limited to breaches of long service leave obligations.
- Recommendation 62 – That the proposed IR Act 2018 is to include provisions comparable to s 557C of the Fair Work Act to the effect that if, in a contravention proceeding against an employer where an applicant makes an allegation in relation to a matter, and the employer was required to make and keep a record, or make available for inspection a record or give a pay slip in relation to the matter, and the

employer has failed to comply with the requirement, the employer has the burden of disproving the allegation.

- Recommendation 63 – That the proposed IR Act 2018 is to include provisions comparable to ss 535(4) and 536(3) of the Fair Work Act prohibiting an employer from wilfully making, keeping or maintaining a false or misleading employment record or wilfully providing a false or misleading pay slip.
- Recommendation 65 – That the proposed IR Act 2018 be amended so that there is no restriction on the powers of industrial inspectors only being exercised at an "industrial location". Instead, consistent with the Fair Work Act, an industrial inspector may exercise their powers at either:
    - The premises where work is or was being performed; or
    - Business premises where the Industrial Inspector reasonably believes there are relevant documents or records.

5.0 Issues That AMMA Has No Submission On

AMMA does not make any submission on the following areas covered by the Issues Paper:

- Chapter 3 of the Issues paper which deals with access to the WAIRC by public sector employees.
- Chapter 7 of the Issues paper which deals with the updating of State Awards.
- Chapter 9 of the Issues paper which deals with regulation of industrial relations matters within the local government sector.

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