Submission to the Ministerial Review of the State Industrial Relations System

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Commercial in confidence

www.amma.org.au

MELBOURNE
Level 14,
55 Collins Street
☎ 03 9614 4777

PERTH
Level 7,
12 St Georges Terrace
☎ 08 6218 0700

BRISBANE
Level 3,
22 Cordelia Street
☎ 07 3210 0313

HOBART
Level 3,
85 Macquarie Street
☎ 03 6270 2256

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**").

Set out below is AMMA's submission to the Review.

We would welcome the opportunity to meet with the Reviewers to expand on our Submission if this would be of assistance to the Review.

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 99 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 reserve.

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

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

exclusively by the Federal workplace relations system. Currently, the relevant Federal legislation is the *Fair Work Act 2009* (Cth).

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. AMMA notes, however, that the terms of reference of the Review do not call for any review and/or recommendations in respect of either of these areas.

3. Referral of Industrial Relations Powers

The terms of reference of the Review do not include any explanation for the express statement that the Western Australian Government does not intend to refer any industrial relations powers to the Commonwealth, notwithstanding that all other States have done so.

Unincorporated businesses in Western Australia[2] are effectively the only private sector employers in Australia that are not covered by the Federal workplace relations system.

It is variously estimated that approximately 20-30% of employees in Western Australia are non-government employees covered by the State industrial relations system. It has been recognised that the relevant private sector employers are generally small businesses, employing only a small number of employees. [3]

There is no obvious reason as to why the Western Australian industrial relations system should continue regulating the employment conditions of a comparatively small group of Western Australian private sector employees, particularly noting the nature of the businesses that employ those employees.

Apart from any other benefits of referral, at least in respect of non-government employers, the regulatory environment would be simplified, by ensuring that all Western Australian private sector employers and employees have their workplace relations regulated in the same manner.

A further benefit of referral would be the potential for the Western Australian Government to reduce expenditure, in not having to fund and maintain a secondary industrial relations framework for the private sector. If the Government chose to retain the Western Australian Industrial Relations Commission ("**WAIRC**") as an industrial tribunal for Western Australian public sector employees, that could be in a reduced form.

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[2] And those incorporated entities that are not constitutional corporations.

[3] See, for example, the Review of the Western Australian Industrial Relations System, Final Report, 30 October 2009, Section 5.

4. Terms of Reference

AMMA makes the following submissions in relation to the eight matters set out in the terms of reference of the Review.

4.1 Structure of the WAIRC

The workload of the WAIRC has diminished since the Work Choices legislation in 2006. This reduction is permanent. There would seem to be reasonable grounds upon which to consider whether the current size and structure of the WAIRC is appropriate, including whether there is a need to maintain the roles of both Chief Commissioner and President.

4.2 Jurisdiction and Powers of the WAIRC for Public Sector Employees

AMMA does not seek to make any submission in relation to this paragraph of the terms of reference of the Review.

4.3 The Inclusion of an Equal Remuneration Provision in the IR Act

It is not clear from this paragraph of the terms of reference of the Review what is envisaged. However, in general terms, consideration should be given to the practical benefit of including an equal remuneration provision in the IR Act.

There are essentially two groups of employees subject to the IR Act.

One group is made of employees of the Western Australian Government. It is generally open to the Western Australian Government to set whatever remuneration practices it wishes for its own workforce, provided it maintains remuneration at levels established under existing industrial instruments. Other than where it might seek to reduce remuneration below those levels, it is not apparent that the Western Australian Government would need the approval or involvement of the WAIRC to implement any equal remuneration principles it may consider appropriate.

The other group of employees subject to the IR Act is made up of employees of unincorporated, and typically small, employers. It is difficult to envisage precisely how the conduct of equal remuneration cases would operate to the benefit of employers and employees within that group. Given the characteristics of the relevant employers, there is a risk that such employers would not become involved in major proceedings or test cases before the WAIRC.

4.4 Review the Definition of "Employee"

The definition of "employee" under the IR Act is as follows:

> *"**employee** means —*
>
> *(a) any person employed by an employer to do work for hire or reward including an apprentice; or*
>
> *(b) any person whose usual status is that of an employee; or*

(c) any person employed as a canvasser whose services are remunerated wholly or partly by commission or percentage reward; or

(d) any person who is the lessee of any tools or other implements of production or of any vehicle used in the delivery of goods or who is the owner, whether wholly or partly, of any vehicle used in the transport of goods or passengers if he is in all other respects an employee,

but does not include any person engaged in domestic service in a private home unless —

(e) more than 6 boarders or lodgers are therein received for pay or reward; or

(f) the person so engaged is employed by an employer, who is not the owner or occupier of the private home, but who provides that owner or occupier with the services of the person so engaged;

This definition is also applied under the *Minimum Conditions of Employment Act 1993* (WA).

There is, in AMMA's submission, no demonstrated reason why the definition needs to be altered. Leaving aside the exclusion of persons directly providing private domestic services, it is not clear that any persons who at common law are employees would not be covered by the current definition.

Having regard to the words of the terms of reference, there is currently comprehensive coverage of all employees. AMMA notes that the terms of reference of the Review do not suggest any expansion of the definition to include additional persons who are not employees.

AMMA agrees that the Review should not consider any such expansion, including because it would have the potential to create disharmony with the Federal workplace relations system, increasing complexity and the regulatory burden on Western Australian businesses.

4.5 Review minimum conditions of employment

There is in AMMA's submission no demonstrated need to change the process for altering minimum employment conditions. In Western Australia, certain core minimum employment conditions have been established under legislation since 1993, and under the Federal system since 2006.

Long service leave entitlements and conditions have also been established under legislation means for many years. The parliament can change legislation.

Improvements above legislative minimum conditions are able to be achieved through industrial instruments, including, where justified and relevant, through any process for reviewing State awards (to the extent that may be necessary).

AMMA also notes that in recent times there have been examples where political parties have sought to overrule decisions of industrial tribunals that they do not agree with. If tribunal decisions on alterations to minimum conditions under industrial

instruments are likely to be revisited by the parliament in any event, there would appear to be few benefits in any such change.

Further, in the context of the Western Australian industrial relations system, given that the private sector employers that remain in the system are predominantly small businesses and typically with very few employees, there is a risk that such employers would not become involved in major proceedings or test cases before the WAIRC.

4.6 Devise a process for the updating of State Awards for private sector employees and employers.

As already noted in this Submission the private sector employers that remain in the Western Australian industrial relations system are generally very small, unincorporated businesses.

Any system for reviewing State awards, to the extent that may be necessary, would need to have regard to the risk that such employers would not become, or may not have the resources to be able to be, involved in major proceedings or award arbitrations before the WAIRC.

4.7 Review statutory compliance and enforcement mechanisms

AMMA is not aware of any deficiencies or serious issues with the current compliance and enforcement mechanisms for State industrial relations instruments.

The Industrial Magistrates Court is a low cost and accessible jurisdiction for parties who believe they have not been paid their correct statutory entitlements to seek redress.

4.8 Regulation of local government employers and employees in Western Australia

AMMA does not seek to make any submission in relation to this paragraph of the terms of reference of the Review.

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AMMA, Australian Mines and Metals Association

Email: policy@amma.org.au

Phone: (08) 6381 0378

Website: www.amma.org.au

ABN: 32 004 078 237