THE AUSTRALASIAN
MEAT INDUSTRY
EMPLOYEES’ UNION

(Federal Council)

A.M.I.E.U. SUBMISSION

Submission of the
Australasian Meat Industry Employees’ Union
to the Fair Work Act Review Panel
1. Introduction:

The Australasian Meat Industry Employees’ Union (AMIEU) is an organisation of employees registered under the *Fair Work (Registered Organisations) Act* 2009. It is the trade union which represents employees in the meat industry – including meat processing, smallgoods, and meat retail sectors.

The AMIEU has did not make submissions to the Fair Work Act Review Panel in the initial round.

The AMIEU endorses and expresses its support for the submissions already made by the Australian Council of Trade Unions.

The AMIEU notes that a submission has been made to the Panel by the Australian Meat Industry Council (AMIC). AMIC is the principal organisation of employers in the meat industry. This submission for the AMIEU is largely confined to commenting on the matters raised by AMIC, indicating areas where the AMIEU either disagrees with the view presented by AMIC, or provides the union’s perspective on those views.

For ease of reference, this submission will extract the relevant parts (in italics) of the AMIC submission and insert the AMIEU’s commentary below.

2. Response to the Australian Meat Industry Council’s Submission

In its submissions, AMIC begins with general statements regarding the impact of the new legislation:

2. OVERVIEW
   General Observations

   iii) There is little doubt that the Act has given rise to much litigation before tribunals and the courts. The scope and width of the Act has presented interested parties with many avenues to advance agendas that were previously not fully unavailable. We refer mainly to unions.
As a general observation, the above statement may well be accurate, as indeed it would be accurate of many new pieces of legislation. However, the AMIEU does not believe that there has been a significant increase of litigation, if any, in the meat industry. While it is true that the AMIEU has made use of some of the new avenues provided by the Act (including an application for a scope order, applications for bargaining orders, and applications for majority support determinations), the bulk of the litigation in which the Union has been involved relate to issues of compliance with agreements or awards, or disputes over the application of agreements. These are issues upon which the current form of the Act has no real bearing, and would have been litigated in essentially the same fashion under the earlier *Workplace Relations Act*. The AMIEU considers that it would have been involved in more workplace disputation and litigation during the *WorkChoices* era than under the *Fair Work Act* regime.

(iv) *It is little wonder the Act has presented legal firms with increased workload with IR practitioners publicly stating they have never been busier representing clients.*

The AMIEU considers it would be axiomatic that any significant change in legislation necessarily produces some increase in industrial litigation, aimed at testing the limits of new statutory provisions, until such time as courts and tribunals establish clear precedents. This was no different under the *WorkChoices* amendments to the *Workplace Relations Act*. At that time, for instance, the introduction of protected action ballots (for instance) produced a spate of litigation as employers sought to prevent ballots from occurring. Now, as a result of that litigation, employers and unions have a generally good understanding of the boundaries for such applications, and protect action ballot orders are frequently issued by commissioners on the papers, without the need to even appear before the tribunal.

**General concerns to AMIC members**

Here, AMIC trumpets the cause of “flexibility” – but the use of neutral sounding terms like “flexibility” and “productivity” ignore that these often describe the introduction of work arrangements that are to the financial detriment of employees. In practice, “flexibility” often refers to the flexibility of an employer to pay employees less than what they are currently obliged to do under current industrial instruments.

(iv) *There is the large meat retail/wholesale sector that effectively operates seven (7) days per week in the major cities and surrounds and in other key geographical areas where trading hours are mostly unrestricted. The retail/wholesale sector of*
the meat industry in these geographical areas is dependant upon wide ranging flexible work arrangements. The conclusions of the Productivity Commission Report of 4 November 2011 into the retail industry are relevant to the meat retail/wholesale sector.

Again, the above is no doubt true as a general statement of principle. The AMIEU observes only that, during the award modernization process, AMIC argued vehemently (and successfully) to exclude stand-alone butcher shops from the coverage of the General Retail Industry Award, and to retain their inclusion in the Meat Industry Award.

(v) If we turn to enterprises that have years of experience with enterprise agreement negotiations and ratifying agreements before the operation of the Act, flexibility and productivity offsets appear to have stalled since the introduction of the Act. It is true there may exist any number of reasons but in many of the periodic negotiations taking place, we hear that union money claims are on the table with scant regard in the bargaining process given to improvements in workplace flexibility or productivity.

Obviously, the AMIEU makes no apology for representing the interests of its membership, any more than AMIC would apologise for helping employers to attain “improvements in workplace flexibility or productivity” even though the result is to the financial detriment of our members. The AMIEU represents the interests of its members just as employers look after their own interests. It is not clear to the AMIEU, however, why this has anything to do with the legislative form of the Fair Work Act.

(vi) Many of the export meat industry companies are suffering. We refer in particular those in the meat processing and meat manufacturing sectors as defined under the modern meat award. They are at a major cost disadvantage compared to overseas competitors. Labour costs for these enterprises, relative to other direct and indirect costs, rank near the top of the ‘cost’ tree. The only way to offset this uncompetitive advantage is through continual productivity improvements and greater workplace flexibility. These meat industry exporters have been economically tested all through 2010/2011 with shortage of stock and unfavourable market conditions. In some cases there has been no alternative but to shut down shifts.

Recent years have indeed been difficult ones for the export meat industry, but the AMIEU does not accept that labour costs are a cause of the problem. Meat processing in particular has always been a capital intensive industry, and historically has produced low profit margins. The shortage of stock and unfavourable market conditions referred to in the penultimate sentence provide the real explanation for the meat industry’s current situation. The AMIEU has long
identified the export of live sheep and cattle as impacting negatively on the availability of stock for the meat processing industry, and has campaigned strongly against it.

(viii) There are situations, under the Act, where harmonious and productive enterprises are disturbed through union entry into the workplace and the demand to bargain. Unions with perhaps a mere one or two members or a sprinkling of financial or unfinancial members in a workplace seem intent in pushing demands thereby disturbing a relatively peaceful work environment. Valuable time and resources are wasted as the employer (and in some cases employees) face the full brunt of union bargaining reaction.

The serene imagery of the preceding paragraph belongs in 19th Century fiction, together with the “master and servant” notions of industrial relations still to be found amongst some meat industry employers. Patronizing remarks to the effect that “the workers were all so happy and content before these troublemakers came along” represent an ideological position adopted by AMIC, but not the realities of the meat industry.

From the union’s perspective of course, there are a great many smaller establishments which over the years had successfully excluded the union from its premises because they had introduced AWAs or employee collective agreements. One would wonder how much trouble the “full brunt of union bargaining reaction” could possibly be in a workplace with one or two union members. No doubt this is AMIC’s perspective. The workers tell a different story - if they get a chance to tell it, without security guards or management stooges looking over their shoulder.

(ix) Right of entry provisions are being utilised not to truly participate in discussions with employees who wish to have discussions because the union has not visited some sites for up to 20 years. The reason is to drive a wedge through decades of best practice relationships between employer and employees. How do we know? Because of the number of right of entry disputes involving AMIC members, some of which led to matters being arbitrated.

The above is apparently a particular reference to the decision in AMIEU v Goodchild [2011] FWA 8228 in Western Australia. A small branch of the AMIEU (WA) recently amalgamated with the SA branch. The combined branch shuffled some resources and found the money for an extra organizer to start visiting smaller sheds that had been previously neglected, or from which the Union had been excluded by the employer because, under earlier legislation, the right to enter for discussions could not be exercised in AWA sheds. Obviously, the purpose of the visits
were discussions, the AMIEU has no interest in attending workplaces other than to hold discussions with employees.

(x) Why should employers/employees find themselves in this situation when employees are contented with workplace arrangements? In the experience of AMIC in these situations, the right of entry provisions as presently drafted result in unnecessary confrontation.

Obviously, if their employees were truly content with their arrangements, employers would have no problem with the union accessing the lunch room to actually speak with the workers. If the workers were happy with their working arrangements and did not want to change them, then this would not change simply because they joined a union. Needless to say, disputes inevitably arise if employers impose restrictions upon union officials which are clearly aimed at making it more difficult for union officials to access workers on the plant.

(xi) This leads one to the modern awards. AMIC, unlike many other employer bodies, was reasonably content with the Modern Meat Industry Award 2010. During the process of the making of the award, AMIC was attacked by many unions seeking to carve up (mainly) ancillary segments of the meat industry like ‘rampaging dogs’ to suit their vested interests and against the efficiency interests of the meat industry employers. The AIRC, to its credit and impartiality, decided otherwise and placed a fence around the meat industry.

It is true that there was significant agreement between AMIEU and AMIC as to the content of the Meat Industry Award 2010. There were some areas of disagreement, the bulk of which were decided by Fair Work Australia in favour of AMIC’s position. Both AMIC and the AMIEU acknowledged that the Federal meat awards had already undergone significant rationalization, and significant changes were unnecessary.

As for the “rampaging dogs” attacking AMIC to suit their “vested interests” (as if the employers’ ‘efficiency interests’ were somehow not also vested interests), the AMIEU can only recall two other unions which sought to encroach on the scope of the current Meat Industry Award. One was the SDA (who submitted that butcher shops should be in the general retail award, just as supermarket meat departments were) and the ASU (who wanted people engaged in clerical work to be covered by an occupational award). It is possible there may have been others. Arguments were heard before Fair Work Australia, who then determined those issues – in each case in favour of the position adopted by AMIC.
The description of unions making such applications in this process as “rampaging dogs” is laughable, and frankly, pathetic.

(xii) Some employer bodies are already publicly agitating for one industry award for all employers or a number much less than the present modern award number. Such an outcome would be a disaster for the bulk of employers in the meat industry and we suspect for most industries. It has been difficult enough reducing 70 meat awards over a period of 14 years into the present one award.

The AMIEU and AMIC were in agreement that there should be a separate and distinct award for the meat industry, and the AMIEU continues to hold that view. The AMIEU’s view on this matter is unlikely to ever change.

(xv) FWA must be presented with ample powers to decide on the proper model flexible clauses to be inserted into all modern awards. This model clause should also be compulsory for Enterprise Agreements as a safeguard (presently, the award model clause is limited to a mere 5 items and is at the behest of the farcical attitudes of unions to flexibility clauses in agreement bargaining which needs to be addressed).

The AMIEU notes that the Meat Industry Award contains quite broad flexibility provisions in addition to the model flexibility provisions required of modern awards. These were present in the pre-Modern awards, and have been retained. It is interesting that AMIC derides the “farcical attitude of unions to flexibility clauses” in enterprise agreements. The AMIEU presumes most unions would prefer not to have flexibility clauses in agreements at all, which is why they endeavour to narrow their scope as much as possible. Of course, the above passage signals that AMIC also wants to remove bargaining about flexibility clauses – by making a one-size-fits-all model clause compulsory.

(xvi) Full unfair dismissal rights have, more or less, been restored and claims have increased in number under the Fair Work Act. AMIC members are regularly involved in the ‘pay and go away’ cash cow system during conciliation. The system needs to provide for greater disincentives to commencing actions especially for small business. Some employers now find themselves under threat of ‘adverse action’ claims as an alternative to unfair dismissal claims.

Again, this is no doubt the perspective genuinely expressed by AMIC members. Obviously, the AMIEU supports the retention of full unfair dismissal rights, and would support a removal of some of the existing exemptions and limitations.
If AMIC members complain that they are regularly involved in the unfair dismissal jurisdiction, the AMIEU suggests that the likely explanation for this state of affairs has more to do with the conduct of those employers when terminating employees, than it does with the current state of the legislation.

It is the experience of the AMIEU that what employers describe as the “pay and go away” system has more to do with meritorious claimants being prepared to accept small financial settlements at conciliation conferences. Often these settlements are significantly less than the true extent of the losses they have suffered as a result of an unfair termination. The reason for claimants accepting such settlements is generally that:

- Despite the supposed focus of the legislation on reinstatement as the primary remedy, Fair Work Australia rarely reinstates a worker even when the worker’s claim of unfair dismissal is upheld – a properly advised worker will understand that no matter how meritorious the worker’s claim, the prospects of actually getting a job back are virtually nil.

- Claimants who are still unemployed at the time of a conciliation conference are often feeling significant financial pressures, often leading to their taking the certainty of even small settlement offers rather than waiting a couple of months for a hearing.

- Conversely, if a claimant has secured employment by the time the time of a conciliation conference, then usually they have little choice but to accept a small settlement offer. The reason is that if they have found work comparable to that from which they were terminated, then they will not be entitled to a significant compensation after a successful hearing, and there rarely any point in pursuing a matter to hearing seeking the largely illusory remedy of reinstatement.

No doubt there are some unscrupulous claimants in the mix as well. On balance however, employers have the advantage in such conciliation negotiations. The real complaint of employers is that when workers are represented by a union (meaning that they do not have legal costs and instead have the union’s resources at its disposal), the employer cannot use
their superior financial resources to their full negotiating advantage they way they could in many other situations.

As for “adverse action” claims, the AMIEU does not believe it has run any “adverse action” claims under the new legislation which it would not have run as a “freedom of association” claim under previous forms of the legislation, including the Work Choices variant of the Workplace Relations Act.

The AMIEU is unaware of, and therefore unable to comment upon, the experiences AMIC employers may have had with claimants with private legal representation.

3. AMIC KEY ISSUES FOR CONSIDERATION

National Employment Standards

We note that AMIC does not take any major objections to anything in the National Employment Standards. Some minor alterations are proposed by AMIC. The AMIEU observes only that it does not see the need for the changes suggested by AMIC, and do not share AMIC’s views on those matters.

Modern Awards

We repeat some of the issues raised by AMIC earlier in their submission:

- FWA must be presented with proper powers to decide on the proper model flexible clauses to be inserted into all modern awards;

We have responded to this matter above. Our view is that individual flexibility provisions should not be included in modern awards.

- For many AMIC members who are award reliant there was little gain in flexibility relief/benefit for them in the making of the Modern Meat Industry Award 2010;

Most AMIC members were covered by the federal award system prior to modernisation (award coverage being defined for employers in terms of AMIC membership), but there were some states where the Federal award did not apply. When the modernisation process occurred, AMIC submitted that the existing federal awards had already been significantly rationalised.
(which was quite true), that it was not desirable to go re-examining old provisions and the modern award should essentially be a compilation of the three existing federal awards (Processing, Smallgoods, and Retail/Wholesale). AMIC got what they asked for, and the AMIEU does not believe that it is legitimate for it to now complain that the award modernisation process did not produce significant changes.

- The making of modern awards was supposed to be cost neutral but it was not. AMIC members, especially those defined as a 'small business', have suffered cost increases and will do so at least until 2014 because of transitional arrangements and costs associated with the NES.

The AMIEU does not really have any comment except to say that if people working for meat industry employers got pay rises as a result of the implementation of the modern award and NES, they deserved them.

**Industrial Action**

The AMIEU cannot take seriously the ideological portrayal of “harmonious workplaces” where there is no union involvement. Where the AMIEU develops a presence at a truly harmonious and cooperative workplace, the nature of the workplace remains such. The nature of a workplace and those who work there does not change merely because some or all decide to become union members. What changes is the capacity of the employees to articulate their concerns or discontent.

The AMIEU notes the last sentence of the first paragraph which reads: “Protected action can take place prior to bargaining even taking place.” I assume that is a reference to the JJ Richards case. It is true as far as it goes, but of course, it is only going to happen if the employer refuses to bargain. Again, the AMIEU finds it difficult to take seriously the supposed indignation of an employer who refuses to bargain, but then complains that employees wish to take industrial action without first bargaining with the company.

In any event, the AMIEU has never yet taken protected industrial action (or sought a ballot) before bargaining had commenced. In one particular case, in South Australia, an employer sought to resist the making of a ballot order by claiming that bargaining had not commenced – and that although there had been lengthy discussions between the employer, the union, and
employees about the content of a proposed agreement, the parties were simply bargaining about what they would do when ‘formal bargaining’ commenced. Unsurprisingly, this argument was not accepted by the tribunal, and the employer was held to have agreed to bargain.

**Enterprise Bargaining**

AMIC expresses the following views in their submission:

- *We see no rationale behind representation rights defaulting to the union other than to conclude that ‘sleeping’ union members a privileged species? In many cases, when the representational procedures are finalised, many employees remain unrepresented at the bargaining table leaving self-interested union officials to bargain.*

The AMIEU considers it a perfectly straightforward proposition that employees who have elected to join the AMIEU should be represented by AMIEU in bargaining negotiations, and cannot see any reason why such a proposition would be controversial to any reasonable employer. If non-union employees are not adequately represented in the bargaining processes, then that is no fault of the participating union or unions. In the experience of AMIEU officials, many non-union members are quite content for the union to conduct bargaining processes without any effort or involvement from themselves, knowing that they will enjoy the benefits of the resulting agreement.

- *Unions with perhaps a mere one or two members or a sprinkling of members in a workplace are able to push for an Enterprise Agreement disturbing a relatively peaceful work environment as employers are met with a union log of claims with scant regard for improvements to workplace flexibility or productivity.*

The important point here is that no employer will be agreeing to a union log of claims unless the employer realizes the union’s position is supported by the bulk of the workforce. To suggest otherwise simply seems fanciful to the AMIEU. Further, the AMIC submission implies that the pursuit of an enterprise bargaining agreement is somehow to be equated with “disturbing a relatively peaceful work environment.” It is difficult to see how this would be the case unless it is an acknowledgment that some employers and managers react in hostile fashion toward those employees who seek to exercise their statutory rights. The AMIEU notes that the promotion of
collective bargaining is one of the objectives of the Fair Work Act, notwithstanding the apparent reluctance of AMIC to come to terms with this reality.

- The Fair Work Act’s bargaining laws for an enterprise agreement have made it difficult to negotiate with unions on productivity and flexibility. Experience dictates that unions are generally not interested in productivity or flexibility until jobs are threatened and this is the overall experience of AMIC members.

A claim is made here about the legislation, but no explanation as to how the legislation supposedly made this difficult. The comment implies that it is more difficult to bargain about these matters under the Fair Work Act than under its predecessors. The AMIEU is not aware of any reason why this would be the case.

- The Modern Meat Industry Award contains an extremely flexible “payment by result” clause arbitrated by a FB of the AIRC in 2000 with rights and obligations. The flexibility of this clause is in jeopardy in many of the bargaining processes in establishments new to the bargaining process with a decade long history of resistance by union officials to agree for the insertion of this flexible award clause into agreements;

This is just nonsense. There would not be few if any major meat processing establishments whose enterprise agreements (or their pre-Fair Work Act equivalents) did not include some kind of incentive payment or payment by result system - even those which are nominally “time-work” arrangements. Sometimes incentive arrangement are not formally set out in the enterprise agreement – at the employer’s request, because they do not want competitors to see what they actually pay. Where time-work is in place, it is invariably because the employer wants it, not because the union opposes incentive systems.

**Productivity issues and agreement approval**

“Nowhere in the procedure relating to the approval of enterprise agreements is the issue of productivity addressed.”

One would assume this is because an enterprise agreement going before the tribunal has been agreed by the employer (and a majority of employees). The AMIEU notes that, although a union may well have agreed to the terms of the enterprise agreement, this is not necessarily the case, nor is it a requirement for approval of the agreement. The AMIEU can see no reason for the agreement approval process to examine “productivity” considerations.
Right of Entry

Needless to say, the AMIEU does not share AMIC’s views on right of entry. I think our organisation has made the point often enough that we regard the right to access lunch rooms and meal areas to be critical, and the legislation needs to be strengthened in favour of unions, not the reverse.

The AMIEU supports the submission made by the ACTU to the effect that a union official entering premises for the purpose of holding discussions during meal times or breaks should, prima facie, be entitled to go to the place where the workers are during those mealtimes or breaks.

The AMIEU does not express a view on AMIC’s complaint about unions with a theoretical “rules coverage” accessing worksites in a “free for all.” On balance, the AMIEU notes only that it believes the current legislative arrangements are superior to those which preceded it.

Unfair Dismissal

Again we repeat, in part, some of the earlier points:

- AMIC members are regularly involved in the ‘pay and go away’ cash cow system and AMIC represents these members at conciliation proceedings;
- The system needs to provide for greater monetary disincentives be it higher filing fees or some other procedural method to prevent the filing of unmeritorious claims.

The AMIEU has addressed this issue above, and simply reiterates that the AMIEU does not support the AMIC position. The AMIEU considers that the financial disincentives referred to AMIC would not distinguish between meritorious and unmeritorious claims.

Section 27

Section 27 deals with the non-exclusion of matters under the Fair Work Act (such as state or territory workers’ compensation, state or territory OH &S, state or territory Anti-Discrimination legislation, state or territory training arrangements, state or territory declaration of public holidays, state or territory workplace surveillance, state or territory business trading hours etc.).

This is a critical issue for the larger AMIC members, especially those with operations in more than one state. State statutes – in particular workers compensation – do conflict
Submission of the Australasian Meat Industry Employees’ Union to the Fair Work Act Review Panel

with various provisions of the Act. The existing state legislation can be in conflict or inconsistent with various remedies available under the Act and yet parties are bound by the state legislation because of the exclusion. The issue needs to be addressed.

The AMIEU does not express any particular view on Section 27, other than to note that union presumes that the trend towards developing uniform national laws will continue.

Yours faithfully

Graham Smith
Federal Secretary
Australasian Meat Industry Employees’ Union

Craig Buckley
National Industrial Officer
Australasian Meat Industry Employees’ Union

2 March 2012.