WHAT THE ALP'S AGENDA MAY MEAN FOR WA'S MINING SECTOR

24 April 2019 | Australia
Legal Briefings – By **Rachel Dawson and Giacomo Giorgi**

After a number of years in the doldrums, 2018 saw the WA mining and resources sector turn a corner. A number of significant projects were commenced or announced and there is a palpable buzz in the air (although there is an almost universally acknowledged but unspoken agreement that no-one will use the 'B' word). Some people are estimating that there is up to $75b in capital and infrastructure investment coming down the pipeline, including billions of dollars in massive new and expanded iron ore mines, as well as a number of large-scale lithium, nickel and cobalt projects driven by the global demand for lithium-ion EV batteries.

Hence, it seems that WA's mining sector will be a particularly fertile battleground for some of the ALP's planned IR changes to be put into effect. There are a number of changes that have been announced by the ALP, or have been called for by the union movement and not yet adopted or rejected by the ALP, that would have a striking impact on this sector, and potentially the ability for the sector to continue its recovery from the mining downturn.

THE ENGAGEMENT OF LABOUR IN A CONTINUOUS PROCESS INDUSTRY

Reliability in all aspects of a mining operation and its supply chain is essential in the continuous process operations of our large WA miners. Continuous processing is heavily dependent on a complex and interconnected supply and logistics chain (both for inputs and outputs), often thousands of kilometres long and involving dozens of specialist contractors and suppliers, to get the product, out of the ground from remote in-land mine sites to a port and loaded onto ships for delivery to customers. Bottlenecks and pinch points in these supply and logistics chains can have a devastating impact on the ability to continue production.

The ability to best utilise the heavily capital intensive plant and equipment required for the operations has also become essential to generate profits. Employee engagement plays a key role in this regard.

In this article, we focus on three major changes announced by the ALP, in the context of these key characteristics of the mining industry. We consider what impact they might have on a unique sector that is a major contributor to Australia's GDP and export performance, and plays such an important role in the Australian psyche.

COMPULSORY ARBITRATION AND INDUSTRY-WIDE BARGAINING

Industry-wide bargaining is one of the most high profile aspects of the ALP's IR agenda. Our colleague, Heidi Fairhall, has recently published an article Industry bargaining – the impossible dream? that looks at the issue of industry-wide bargaining in some detail. Such a regime, if implemented, would likely have significant impacts on the mining sector by limiting the ability for principals to mitigate risks by ensuring there is a diversity of contractors and other suppliers. Effectively, this will increase the ability for unions to exert industrial pressure by focussing on the bottlenecks and pinch points that are critical to maintain production.

Another big ticket item in the agenda is universal access to compulsory arbitration about a broad range of employment issues.

Dispute resolution clauses in enterprise agreements that allow compulsory arbitration by the FWC, a regular feature of agreements in other jurisdictions, have historically been less common in WA's mining industry, where direct relationships with employees typically see disputes resolved at the workplace level. A critical feature of such dispute resolution clauses, however, is that work should continue unabated while the dispute is resolved.

The ALP's national platform is to expand the ability for workers and unions to request that the FWC arbitrate disputes regarding a broad variety of issues, both during and outside of bargaining, where disputes cannot be resolved through discussion, conciliation or mediation. It is unclear whether the default position during such arbitration will be that work continue while the matter is before the FWC, but at the very least such a change opens the door for the FWC to make 'interim orders' that alter the status quo and put at risk continuous processing.

Unfettered access to arbitration might also impact on the behaviour of workplace participants. That is, the balance that currently exists encourages parties to disputes and grievances to work collaboratively and make concessions to solve issues, at a workplace level, as they arise. If universal compulsory arbitration were to be available, it is possible that parties will be less likely to focus on collaborative problem solving, in favour of seeking the intervention of the tribunal – which largely restricts the outcomes to win/lose.

These changes will also allow unions and the FWC to be more interventionist when it comes to proposed changes aimed at increasing productivity, for example by putting roadblocks in place to prevent the implementation of autonomous mining techniques, changing rosters or making other changes to working arrangements.

LABOUR HIRE AND CONTRACTOR PAY PARITY

Like the mining sector in other states (and many other industries) labour hire and contractor arrangements are ubiquitous in WA. Another of the main changes in the platform, which appears designed to limit the attractiveness of labour hire companies and contractors, is to legislate that workers engaged through labour hire providers and contractors receive the "same pay and conditions" as those workers engaged directly by the principal.

While this lofty ideal is readily understandable at an abstract or theoretical level, and clearly makes for a compelling soundbite, there are serious questions about how such a system will operate in practice, and whether it is workable.

Principal among these is what the relevant 'comparator' will be. For example, if a 'baseline' EA, a common feature of WA's mining sector, applies to the principal's employees, will this provide the basis for comparison, even if the principal's employees are ultimately paid over and above the EA (under common law contracts of employment)?

If it is instead based on actual salary paid to the principal's employees, will this require an annual reconciliation to ensure parity? How will privacy issues be addressed, and will the principal be required to disclose the salary of its employees to its contractors even without the employees' knowledge or consent? It is difficult to see how the objectives of the proposal could be met without such disclosure.

What about performance? Will this new regime allow principals, labour hire providers and other contractors to set and vary their employees' pay based on performance, or will they all simply default to a 'highest common denominator' position irrespective of the manner in which they go about performing their work?

Finally, what happens if there truly is no comparator, such as where a principal has outsourced an entire site or function to contractors and labour hire providers? Will the new laws require these employees to be engaged on the pay and conditions applicable at other sites, or based on 'industry standards' (and, if so, who will determine what the industry standard is)?

There are many unanswered questions. Nevertheless, it is clear that giving effect to this part of the ALP Platform will potentially require very detailed and prescriptive regulation about how such a scheme will operate in practice, and who will be responsible for policing compliance and resolving disputes. Such regulation can only operate to restrict flexibility in a sector which, due to ever increasing global competition, needs more than ever to remain nimble and responsive.

RESTRICTIONS ON THE USE OF CASUAL EMPLOYEES

The use of casuals in mining operations is an issue that has received significant air time in the past year or so, given the *Skene v WorkPac* decisions and the flurry of litigation (including class actions) that have been commenced and/or announced. The central issue is the characterisation of long-term casual employees.

The ALP has stated that it will set an 'objective test' for determining whether a worker is casual, and it has said that this test will prohibit long-term or permanent casuals. Further, while the Coalition government has introduced regulations designed to minimise the existing liabilities for employers as a result of the *Skene* decision, by allowing casual loadings paid to employees to 'offset' against any NES entitlements they are found to have, the ALP is likely to disallow this regulation, potentially resulting in a significant backpay liability for some employers.

The above changes are likely to disproportionately impact on labour hire providers and contractors (rather than principals), as these are the entities who overwhelmingly engage casual employees. Given the thin margins on which some of these businesses operate, one has to assume that these changes would represent a fundamental risk to their underlying business models, which appears to be an aim (at least indirectly) of the ALP's proposed changes. The platform seems directed to minimising the numbers of workers engaged by labour hire providers and contractors, seemly because it is thought this will have the effect of driving up wages.

While an increase in wages may ultimately be the short-term effect of such changes, the longer term impacts are more difficult to identify.

WHERE TO FROM HERE?

While any changes are likely to remain uncertain for some time yet, we will hopefully start to see some further flesh put on the bones of these policies during the election campaign.

For mining companies, carefully monitoring policies as they are developed, including after the election, will be critical. This will not only allow businesses to understand and prepare for their impact, but will allow them to participate fully in the consultation process foreshadowed by the ALP.

Please click here to return to the Australian Federal Election Reforms Hub

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

ROHAN DOYLE
PARTNER,
MELBOURNE
+61 3 9288 1099
Rohan.Doyle@hsf.com

ANTHONY WOOD
PARTNER,
MELBOURNE
+61 3 9288 1544
Anthony.Wood@hsf.com

NATALIE GASPAR
PARTNER,
MELBOURNE
+61 3 9288 1091
Natalie.Gaspar@hsf.com

WENDY FAUVEL
PARTNER, BRISBANE

+61 7 3258 6388
wendy.fauvel@hsf.com

LEGAL NOTICE