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Australian Workplace Relations Framework

Response to the Draft Report of the Productivity Commission
September 2015

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1.0 Executive Summary

BHP Billiton welcomes the opportunity to provide comments in response to the Draft Report of the Productivity Commission inquiry into the Workplace Relations Framework ("the Draft Report").

Through its review, the Productivity Commission has the opportunity to develop recommendations that will enhance Australia's productivity and long-term economic prospects through a diverse, productive, balanced and fair workplace relations framework.

BHP Billiton's approach to workplace relations

In our original submission of 29 March 2015 ("our March submission") we set down the five principles that underpin our views on workplace relations. These are:

1. *Safe and engaging workplaces* - Employees have a right to a safe and productive work environment that supports ongoing training and development in fulfilling jobs.
2. *Internationally competitive* - Businesses must have access to employment arrangements that enable them to adapt to the external environment in which they compete, making jobs more secure.
3. *Diverse and inclusive* - Policy and legislation should support diversity of thought, gender, experience, ethnicity and sexual orientation that will deliver superior capability.
4. *Reward aligned to performance* - While ensuring a fair and reasonable minimum, businesses must be able to better align the reward of employees with better business outcomes (both what and how).
5. *Simplicity* - Policy and legislation should drive towards a simplified system of both processes and agreements that enhance the levels of collaboration and cooperation between employers and employees (current and future).

Our March submission drew on examples from our businesses across Australia to point to areas where the current regulatory framework is either incompatible with these principles or makes their achievement difficult. The experience of employees and the industrial relations environment across these businesses varies considerably, providing us with an acute insight into what works and what does not under the current legislative framework.

The Current Workplace Relations Environment

In our March submission, we cited the 2015 Intergenerational Report as highlighting "the demographic headwinds faced by Australia" in relation to the labour market and the risk that "in the longer term Australia is likely to face the challenge of too few workers rather than too many". The Report says it will be important that "the future workplace relations framework facilitates greater inclusion of groups currently under-represented in the workforce, and enhances the productivity of those already participating".

Being able to create a strong culture of co-operation with our employees enables us better to respond to commodity price cycles and the current challenging market conditions. The workplace relations framework must provide the rights settings for employers and employees to come together to jointly tackle commercial challenges and respond to changing market dynamics.

Workplace Relations Reform to Boost Competitiveness

BHP Billiton March Submission

In our March submission we stated that the priority for reform should be the immediate passage through Parliament of the Government's Fair Work Amendment Bill 2014, particularly the provisions of that Bill that relate to right of entry regulations and for greenfields sites. We provided detailed examples from across our businesses of how current right of entry regulations were being misused, with a damaging impact on competitiveness, and how current greenfields regulations were adding costs and delays to new projects.

The changes to the Fair Work Act contained in this Bill are reasonable and we believe they should be supported. They will have a direct, positive impact on productivity, competitiveness and incentives for major capital investments in Australia.

Our submission also called for reforms in the following areas:

- ensuring that the Fair Work Act restricts enterprise agreement content to terms of employment only and not operational matters that limit productivity improvements;
- supporting an employee's choice of representation and equally enabling both non-union and union streams of enterprise bargaining;
- providing greater access to relief for employers where industrial action is taken and ensuring that protected industrial action is only available as a last resort; and
- amending the Fair Work Act provisions about adverse action to restore the limit on such claims to matters of victimisation due to union membership status or activity.

The Draft Report

The Draft Report makes a number of findings and recommendations relevant to these matters which would make a positive contribution to a workplace relations legislative framework. Specifically, we support:

- *Enterprise bargaining (Greenfields Agreements):* The recommendations in relation to agreement bargaining for greenfields sites (life of construction project agreement options, recourse to the Fair Work Commission for arbitration/approval) would allow greater certainty of costs for the full project construction phase.
- *Restoring balance to industrial action*: The measures proposed to tackle the "tactical use" of industrial action such as postponing strike action at the last minute as a means of exerting leverage during bargaining; the proposals to offer more graduated options to employers responding to industrial action than the single employee lock-out option; and enhancement to the ability of the Fair Work Commission to suspend or terminate industrial action would restore some balance in use of industrial action and take account of the economy-wide costs of major disputes.

However, we believe further consideration by the Productivity Commission in the following areas would be appropriate:

- *Limiting adverse action claims*: Adverse action claims (i.e. claims of a breach of an employee's workplace rights) are being used to interfere with reasonable management decision-making and performance management. These claims should be primarily focussed on protection against victimisation due to union membership status or activity.
- *Increasing the range of available options for enterprise bargaining and employment arrangements*: We suggest re-examination of the Draft Report's finding that the current workplace relations framework provides for multiple forms of employment arrangements that offer employees and employers flexible options for working. Our experience is that flexibility is currently limited. As we noted in our March submission, "(T) he future framework should facilitate freedom of choice by permitting a range of industrial instruments, in line with the specific needs and preferences of different workforces."
- *Restricting allowable content for enterprise agreements*: Content should be restricted to terms of employment only (wages and conditions of employment) and not operational matters. We support the Draft Report recommendation that engagement of individual contractors, labour hire and casual workers should be outside the scope of enterprise agreements but suggest that this will not go far enough. All matters that go to the relationship between an employer and a union or matters about how the agreement will operate should be excluded.
- *Restoring the balance of rights of entry*: The Draft Report proposals would improve capacity to deal with disputes about frequency of entry by an employee representative but are unlikely to be as effective as those proposed in the Government's Fair Work Amendment Bill presently before Parliament (which would remove the privileged access of a union official to remote sites and the default requirement that right of entry be granted in crib rooms).
- *Attracting the best qualified people to the Fair Work Commission*: While the recommendations in the Draft Report correctly reflect a concern about inconsistent judgments and a lack of predictability, the proposal for five year renewable terms for Commissioners may deter suitably qualified candidates for appointment to the Fair Work Commission.

In addition to these specific measures, BHP Billiton would encourage the Productivity Commission to facilitate a discussion of what is required to ensure the regulatory framework evolves to keep pace with other jurisdictions and ensures enhanced employment outcomes for Australia in the longer term.

2.0 Detailed Comments on the Draft Report

Our comments reflect our day to day experience across our many sites in Australia. They are aimed at ensuring that the final proposals for reform are targeted in a manner which will harness co-operation between employees and employers to unlock improvements in competitiveness.

2.1 Fair Work Commission Structure (Draft Recommendation 3.2)

We support the findings of the draft report in relation to the effectiveness of the Fair Work Commission and welcome reform attempts that have the objective of improving consistency and predictability of judgments. The Fair Work Commission must be, and must be recognised as, a capable institution characterised by independence and integrity attuned to the need for supporting workforce productivity.

We would suggest, however, that the recommendation (3.2) that Fair Work Commission members be appointed on five year renewable terms with a performance based assessment made before renewal be given further consideration. We are concerned that this proposal would deter high quality candidates from industry or law applying for positions on these terms and also that performance based assessment would bring into question the independence of Commission members from Government.

2.2. General Protections – Adverse Action (Recommendations 6.1 to 6.5)

The Draft Report recommends:

- *Recommendation 6.1* - The Fair Work Act should be amended to align the discovery processes used in general protections cases with those in a current Federal Court Practice Note. This Practice Note suggests that orders for discovery are not obtained automatically and need to be tailored or narrowed by the Court to specific needs in the particular case. While we support this recommendation, we query whether it will lead to substantial change.
- *Recommendation 6.2, 6.3, 6.4, 6.5* - We support these recommendations but suggest there should be (a) a tightening of the definition of complaint or inquiry where arising in the definition of workplace right in the adverse action context; (b) preliminary Fair Work Commission steps to ensure that complaints are being made in good faith; (c) the introduction of exclusions for frivolous and vexatious complaints; (d) the introduction of a cap on compensation for adverse action claims; and (e) reporting measures.

The Draft Report discusses the issue of reinstatement of the sole or dominant purpose test in chapter 6.3 but in our view does not come to grips with the specific problem for which that test was designed and is still needed. We therefore urge further consideration of the need to lessen interference in ordinary business operations through misuse of the general protections provisions. We ask the Productivity Commission to consider:

- The need for the sole or dominant purpose test to be reinstated in one particular situation (see below); and
- The need for measures which will help to rebalance the general protections provisions so that they operate as a shield but less readily as a sword.

Adverse action or general protections provisions should have as their primary focus protection of employees against victimization for choosing to belong or not belong to a union and to undertake or not undertake a union role. They should not offer protections for all activities, no matter whether they are illegal or damaging to harmonious workplace relations.

Background: The Sole or Dominant Purpose Test

The sole or dominant purpose test was only ever part of the legislative makeup in respect of one element of these laws – namely where the allegation was that adverse action had been taken because an employee is entitled to the benefit of a workplace instrument.

The provision was introduced in 2006 to deal with a specific problem which had arisen under the law but was then removed with the introduction of the Fair Work Act.

The legal issue dealt with by the sole or dominant purpose test is an unmanageable and unintended situation grappled with by the Full Court of the Federal Court of Australia in *Greater Dandenong City Council v Australian Municipal, Clerical and Services Union*[1] and further discussed by Justice Branson of the Federal Court of Australia in *Maritime Union of Australia v CSL Australia Pty Ltd*.[2] The situation arose where an employer was making strategic business decisions such as to outsource work or to invest in one area rather than another. Situations like this happen routinely in business for good commercial reasons. The economic considerations underlying these decisions may often have some element of labour cost involved. Depending on circumstances, these may well relate to the provisions applicable under awards or enterprise agreements.

This is the situation, and the only situation, for which the sole or dominant purpose test applied under the predecessor legislation. Removing the test in the Fair Work Act reinstated the intractable problem identified above but provided no real alternative solution.

An employer making an ordinary investment, operational or other management decision should not be required to defend the decision because it was concerned about labour costs or some other feature of an applicable industrial instrument. Labour costs are an appropriate and unobjectionable factor relevant to many business decisions. The current provisions impose an expensive and unproductive burden on business decision making.

1 (2001) 184 ALR 648.

2 (2002) 113 IR 326.

2.3 Enterprise Bargaining – Greenfields Agreements (Draft Recommendations 15.3 and 15.7)

BHP Billiton supports the suggestions about the permissible duration of a greenfields agreement and there being a menu of options to break a deadlock in greenfields agreement negotiations as contained in Draft Recommendations 15.3 and 15.7.

2.4 Enterprise Bargaining – Desirability of Further Options

The draft report states that the current legislative framework provides "multiple forms of employment arrangements that offer employees and employers flexible options for working".[3] Our experience is that the flexibility is currently limited.

The Fair Work Act prohibits previously available options for different employment arrangements without offering sufficient effective alternatives. Alternatives under state systems are no longer available.[4] The successful Australian workplace agreements which operated since 1996, well prior to the 2006 Work Choices amendments which drew some criticism, have been removed.

We acknowledge the proposal for developing "Enterprise Contracts" in the draft report and would support further development of this concept. However, if such an instrument were developed, it would be appropriate for it to be freestanding under the Fair Work Act, available from the commencement of employment and not subject to exclusion via any collective agreement. Further, we recognize that the draft report makes a range of recommendations to improve the individual flexibility arrangements. In our view, the individual flexibility arrangements offered in the Act are not wholly adequate for reasons unrelated to poor levels of awareness (as suggested in the draft report). They are piecemeal and temporary, giving neither party sufficient certainty where needed – e.g. when dealing with rosters. Although the Act does not in form require union participation in collective enterprise agreements, the bargaining scheme leans heavily towards union participation, whether or not it is the employees' preference to involve them in the bargaining process.

It should be recognized that the agreement forms now available under the legislation are restricted and they restrict responsiveness to the current and future competitive circumstances confronting Australian firms and workplaces.

Our experience in the metalliferous mining areas of our business is that employees were quick to choose individual workplace agreements in circumstances even where a collective option was also available.[5] Where this occurred, the benefit of these agreements has been that they delivered flexible and productive work practices accommodating the needs of rapidly changing workplaces and with attractive salaries and working conditions for employees. Our employees in our metalliferous mining operations have demonstrated a particular interest in remaining under an agreement which is personal to them and which reflects their direct relationship with the Company. This approach would provide further support for fair and competitive workplace arrangements.

Having recourse to a variety of agreement options would better equip Australia to deal with external competition. It would also assist employees and firms to take ownership of their own employment arrangements, whether via collective or individual statutory schemes or via non-statutory staff arrangements.

For these reasons, we would support development of individual statutory agreements as an option under the legislation. They would apply subject to a robust no disadvantage test which could take account of any otherwise applicable enterprise agreement as well as a modern award.

2.5 Enterprise Bargaining – Pattern Bargaining (Chapter 15 – Information Request)

The Productivity Commission seeks feedback on whether there is a mechanism that would restrain pattern bargaining where it is imposed by a party with excessive leverage or where it is likely to be anti-competitive, while at the same time allowing it in circumstances where it is not disadvantageous e.g. it is conducive to low transaction cost agreements to which the parties genuinely consent.

As the draft report identifies, pattern bargaining need not necessarily be regarded as objectionable. However, the workplace relations framework loses its essential balance if parties can be forced into pattern bargains by protected industrial action. Protected industrial action is intended to be available to employees in an enterprise seeking to negotiate terms and conditions of employment for their distinct circumstances. It was never intended to be available to help in campaigns to impose common terms across an industry. The practical consequence is that competition within that industry is restricted.

The current legislation has proven itself to be inadequate to prevent such conduct. We believe the focus, therefore, should be upon restricting the availability of protected action in support of pattern bargaining claims rather than the claims themselves.

One possible approach to this issue is outlined in our submission to the Competition Policy Review Panel (June 2014) in paragraphs 7.51 to 7.55. The submission includes the following (references excluded):

> *7.53 – Sections 409(4), 412 and 422 of the Fair Work Act remove protection for industrial action in support of pattern bargaining claims. ... [Pattern bargaining] is defined in the Fair Work Act to mean claims designed to impose common terms in more than one enterprise agreement. However, the particular*

[3] Draft report, page 3.

[4] This was a result of the Work Choices amendments to the Fair Work Act, continued under the Fair Work Act.

[5] Indeed, some employees in businesses where AWAs were available have so far elected to remain governed by their expired AWAs rather than to come under an available collective instrument.

> *exclusion from protected industrial action has been so narrowly interpreted by the Fair Work Commission and its predecessors that the pattern bargaining practice and problem go unchecked. The result is high cost and uniform terms and conditions of employment to the detriment of the economy.*
>
> *7.54 – An exceptional intervention in industrial relations through the predecessor of the CCA [Competition and Consumer Act] was considered appropriate to stamp out anti-competitive secondary boycotts in the late 1970s (section 45DDff). This intervention proved very beneficial for the economy. A similarly beneficial effect can and should be achieved through the CCA in respect of the wrongful use of industrial action to support common industrial claims outside legitimate enterprise bargaining where there are anti-competitive consequences.*
>
> *7.55 – It is suggested, therefore, that the employment exception in section 51(2) (a) of the CCA be adjusted so that it does not apply to acts done in the form of industrial action (whether or not protected industrial action) engaged in by a union or persons in concert with others for the purpose, and likely to have the effect, of imposing on employers substantially common terms and conditions of employment throughout an industry or industry sector.*

Under this approach, the capacity to take protected industrial action in support of pattern bargaining would remain expressly subject to competition laws. Those laws, however, would not apply merely because industry participants are agreeing to common terms. It would be the use of protected industrial action to obtain agreement to such common terms which would enable the competition laws to apply. This is another approach which warrants consideration by the Productivity Commission.

The approach above would have the features identified by the Productivity Commission as desirable in allowing for pattern agreements where they make sense to industry participants but proscribing the use of protected action to support claims for pattern agreements.

2.6 Enterprise Bargaining – Process and Content Matters

Draft Recommendations 15.1 to 15.4

BHP Billiton supports various recommendations made in the draft report in connection with process matters as contained in Draft Recommendations 15.1 to 15.4. We also support Draft Finding 15.1 against the introduction of productivity clauses within all enterprise agreements.

Use of contractors and labour hire, and permitted matters - Chapter 15

The draft report suggests changes to the Fair Work Act to limit the capacity of agreements to regulate the use of contractors and labour hire. It also suggests that apart from the employment of labour hire employees and contractors, further evidence is required to assess whether particular sorts of terms should or should not be permitted.

On the first matter (use of contractors and labour hire) we are regularly faced with claims from unions which would:

- Restrict usage of contractors or labour hire;
- Dictate the rates at which these labour categories are to be paid;
- Prevent employees being replaced by contractors or labour hire;
- Limit the duration or conditions of employment of supplementary employees; or
- Restrict usage of non-agreement covered labour.

Provisions such as these would represent a significant limitation on an employer's right to manage its own business and add substantially to costs. They would impose a significant restriction on efforts aimed at improving productivity in the workplace by inhibiting flexible use of contractors or labour hire arrangements as a supplement to the main workforce. We therefore support the Productivity Commission's proposal for change in this area.

As to whether other particular sorts of matters should not be permitted in enterprise agreements, we draw attention to pages 8 and 9 of our March submission under the heading "Restrict enterprise agreement content to terms of employment only and not operational matters". In that section, we set out a number of examples of inappropriate claims being advanced against our coal industry operations.

A particular concern is the recent expansion of matters able to be dealt with in an enterprise agreement beyond matters pertaining to the employment relationship. Agreements, and therefore protected industrial action in support of bargaining claims, may now extend to subjects pertaining to matters of institutional concern to unions and their officers but separate to the employment relationship. Enterprise agreements, which are only between employees and their employer, should not contain provisions designed to regulate the relationship between employees *and unions*. It is unreasonable that an employer should be faced with protected industrial action in support of claims about relations between employees and unions.

The Fair Work Act's extension of permitted matters in an enterprise agreement beyond matters pertaining to the employment relationship involved a departure from a century of industrial relations practice in Australia. The appropriate course is to return the available content to the tried and tested formulation of matters pertaining to the employment relationship. Any specific additions (e.g. machinery matters) or deletions (e.g. strike pay or preference for union members) should be specifically itemised.

Good faith bargaining – Chapter 15 (pp 541-543, 557-560)

In relation to good faith bargaining, the draft report comments that the requirements are procedural only and the parties are not required to make concessions or to sign up to an agreement. This is generally true, but not universally so.

The decision of the Full Court of the Federal Court in the recent *Endeavour Coal Pty Ltd v APESMA*[6] case, commented upon in box 15.4 on page 558 of the draft report, is an example of where this was shown not to be the case. Endeavour Coal was not permitted to rest on provisions in the Act asserting that a party cannot be forced to make concessions or to reach agreement on terms.[7] Rather, the good faith bargaining requirements meant it had to "advance for consideration a proposal which it may be prepared to accept".

Bargaining representatives – Chapter 15 (pp 540-541, 577-579)

Draft Recommendation 15.5 is to the effect that the Fair Work Act be amended so that:

- A bargaining notice will specify a reasonable period in which nominations to be a bargaining representative must be submitted;
- A person may only be a bargaining representative if he or she represents a trade union with at least one member to be covered by the proposed agreement, or if able to indicate that at least 5 per cent of the employees to be covered by the agreement have nominated that person as a representative.

We suggest a re-examination of these proposed changes. We expressed concern in our March submission about the highly preferenced position for a union as the default bargaining representative regardless of the actual level of workforce representation. We gave a specific example drawn from our own Macedon operations (see pages 10 and 11).

We suggest that validating non-union bargaining representatives only if 5 per cent of the workforce chooses them, while well intentioned, may sometimes make the problem worse. That is, the union officer who may be able to point to just one member (who need not even be financial) will have an automatic status, but an employee or group of employees wishing to act independently will have a substantial hurdle to get over before having any particular status accorded to them in the bargaining.

One alternative approach would be to reduce the mandated role of bargaining representatives under the Fair Work Act. The current provisions surrounding bargaining representatives are relatively recent. The appointment of persons to fill the identified role of bargaining representative is not a necessary feature of an enterprise bargaining system. The current provisions came about because of the rule that bargaining must be commenced by the service of a notice of representational rights and the centrality of bargaining representatives to the provisions about good faith bargaining.

There should be no objection to a facilitation of genuine bargaining representatives where that makes sense to the participants at an enterprise. However, the *requirement that* there be such persons is not necessary. For example, if an employer (which needs no other identified status) puts forward a proposal to its employees for consideration as an enterprise agreement, and the agreement is voted up by the employees, it should be able to be presented to the Fair Work Commission for approval subject to a no disadvantage test and other requirements to ensure genuine agreement about permitted content. That there was no notice of representational rights or employees/unions identified as bargaining representatives should not be relevant.

An additional approach which is favoured by many industry participants is to remove the automatic or default status of a union. A union member may not wish the union to be involved on his or her behalf but baulk at being identified as a person opting out from the union's representation, or (often the case) not think to do so. The employee may be a member because it suited him or her in a previous job to join the union, or because services offered by the union other than bargaining representation are of interest. The employee, especially in contracting industries, may be a member of more than one union.

The automatic or default status for a union under the Fair Work Act thwarts achievement of a sound balance in the bargaining equation. It brings in unions or a particular union which may not happen if left entirely to employees to determine. This is not necessary for the effective operation of the bargaining regime under the Fair Work Act. Representation decisions in enterprise bargaining should be active. In some areas within our metalliferous mining operations, our employees have demonstrated a consistent preference not to take up the opportunity for union membership and representation in their work. This is despite it having always been available to them. As the opportunity arises for collective bargaining under the Fair Work Act, these employees will be able to engage or not engage a relevant union to assist them. It is unfair to these employees to impose a default representation decision on them.

In summary, the default arrangement is not effective because it discourages active engagement by employees in the process and hinders their own decision making about their representation. Further, it gives a union with only few members in an enterprise a disproportionate capacity to become covered by an enterprise agreement with all the institutional rights and benefits which that brings under the Act. Finally, in combination with good faith bargaining requirements which give preference to negotiations via bargaining representatives, it discourages direct engagement with employees.

An additional and equally important point is that a union bargaining representative should only have the capacity to act as a bargaining representative when acting within its eligibility for membership rule. Such a restriction has stood the test of time in Australia. Both the Fair Work Act and the Fair Work (Registered Organisations) Act rely upon it as a critical buffer against demarcation disputes between unions and for the effective operation of the union governance regime.

Choice of a bargaining representative should be a matter of active choice and not a default arrangement.

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6 (2012) 217 IR 131.

7 Section 228(2) of the *Fair Work Act 2009*.

Dealing with an expired enterprise agreement – Chapter 15 (pp 559-560)

The draft report draws attention to the delays which can sometimes occur in achieving the replacement of an expired enterprise agreement. There are further issues that arise where provisions of an expired enterprise agreement are out of date or hindering achievement of productivity improvements.

The continuation of an enterprise agreement under the Fair Work Act after its nominal expiry date unless terminated is derived from the way in which enterprise agreements have legislatively grown out of consent awards. As the recent proceedings in *CFMEU v Aurizon Operations Ltd*[8] demonstrated, it can be both important and appropriate that an expired enterprise agreement not continue indefinitely where it is impeding introduction of updated work practices or similar arrangements. The legislation should facilitate the termination of expired agreements more readily while at the same time containing appropriate protections for employees.

2.7 Individual Arrangements (Chapters 16 and 17)

The draft report recommends that the notice required to terminate an Individual Flexibility Agreement may be up to 12 months and that a clarified no disadvantage test replace the current Better off overall test ("BOOT"). We support these recommendations. However, we suggest that the parties should have the capacity to enter an IFA at the outset of employment, not just when the employment has already commenced. For example, a workplace may have set rosters in which all must participate. Where this is the case, it would be fair all round, and supportive of efficiency, to allow an IFA capturing this requirement to be an aspect of the arrangement from the outset.

The workplace relations framework must genuinely permit alternative approaches that are fair and equitable to all employees. Prior to the current uniform national system – introduced by the Work Choices amendments in 2006 and continued under the Fair Work Act – state industrial relations systems were helpful in providing alternatives, albeit with uneven efficiency. Alternative paths were provided under the *Workplace Relations Act 1996* from inception until the expiry of transitional arrangements associated with the introduction of the *Fair Work Act 2009*[9] through both a non-union collective bargaining model and an individual bargaining stream. As the case study below shows, these arrangements proved attractive for employees and, in our view, formed the basis of the highly collaborative and successful workplace relations that we have seen in our metalliferous mining operations.

Case Study: BHP Billiton's Workplace Relations Experience Across our Metalliferous and Coal Mining Operations

BHP Billiton has had a long direct involvement in mining in Australia, including in both metalliferous mining and black coal mining. As at the early 1990s, the industrial model across all operations involved industrial awards and agreements characterised by a high level of prescription of work practices, high union density and many disputes. Commencing with the workplace agreements legislation introduced in Western Australia, the forms of industrial regulation potentially applicable to BHP Billiton's operations began to expand.

In late 1999, BHP Billiton Iron began offering staff arrangements to operators and maintainers utilising workplace agreements under the new Western Australian legislation. Over the next two or three years, the great majority of these operators and maintainers chose to come onto the new arrangements notwithstanding considerable attempts by unions through the courts and other campaigning to avoid that outcome.

The move to all staff arrangements in the metalliferous mining operations has led to a dramatic reduction in workplace disputes industrial action. The last strike experienced by BHP Billiton Iron Ore was in 2000. BHP Billiton Iron Ore and its workforce has moved away from institutionalised *us and them* relationships fostered by a cycle of collective bargaining events. At the same time, attractive terms and conditions of employment have been maintained and high workforce engagement achieved. This experience has been similar in other BHP Billiton metalliferous mining operations.

The development of increased production to meet higher demand growth for iron ore has been met efficiently and effectively. As production requirements have eased over the last year or so, staff have responded flexibly to the changed requirements.

By contrast, the industrial arrangements in black coal mining have stayed collective. There have been successive cycles of enterprise bargaining with huge cost produced by protected industrial action, other disputes, litigation and management and workforce distraction.

Even outside formal bargaining rounds, there continues to be disputation in the coal mining operations at local levels interfering day by day in the running of the business. Little progress has been achieved in introducing remuneration incentives or other measures to align earnings with performance and business outcomes.

The contrasting experience within two businesses within the same company is striking. The arrangements described in metalliferous mining have proven to be advantageous for both employers and employees. While they have been maintained under the Fair Work Act, reflecting their high level of acceptance within the workplace, there would have been great difficulty introducing them under the Fair Work Act. The expanded array of employment arrangement options available through state and federal industrial relations legislation in the 1990s, including the option of a statutory individual agreement, were critical in this experience.

[8] [2015] FCAFC 126, upholding the decision of the Full Bench of the Fair Work Commission at [2015] FWCFB 540.

[9] *Individual transitional employment agreements* introduced into the *Workplace Relations Act 1996* by the *Workplace Relations Amendment (Transition to Forward with Fairness Act 2008.*

We are therefore supportive of the Productivity Commission's consideration of the re-establishment of greater options in agreement-making. In particular, we would welcome the consideration of individual statutory agreements as an option subject to a robust no disadvantage test. They should be available to candidates for employment with the employment conditional upon its acceptance. The facility should be freestanding under the Fair Work Act and not subject to exclusion via any collective agreement. The no-disadvantage test could require measurement against an otherwise applicable enterprise agreement, not just the modern award.

We note the discussion in the draft report about a new type of instrument to be called an enterprise contract which would operate by reference to a template contract, would vary the relevant award in certain respects, and would be subject to a suitable no disadvantage test. We recognise that this is a nascent idea which has not yet fully taken shape. We encourage the further development of this idea as an additional facility under the Fair Work Act. It may well prove to be useful and popular in a number of workplaces such as remote sites or amongst staff employees where awards operate but there is little practical interest in formal enterprise bargaining.

Finally, we do not believe IFAs are a true substitute for individual statutory agreements. The latter can focus on the whole employment relationship, not just a temporary adjustment of otherwise applicable common provisions.

2.8 Industrial Disputes

Access to protected action ballot order (Draft Recommendation 19.1)

The draft report recommends that access to a protected action ballot order should not be available unless enterprise bargaining has commenced by mutual consent or if a majority support determination has been made.

We support this recommendation. It is consistent with the clear legislative intention when the Fair Work Act was originally passed: see in particular paragraphs 651 and 948 of the Explanatory Memorandum to the Fair Work Bill. It is consistent with the recommendations of the Fair Work Act Review Panel in 2012. It is also consistent with the provisions of the *Fair Work Amendment Bill 2014* presently before Parliament.

Suspension or termination of industrial action and meaning of significant harm (Draft Recommendation 19.2 and Information Request)

The draft report recommends that the Fair Work Commission should have capacity to suspend or terminate industrial action where it is causing or threatening to cause significant economic harm to the employer or to the employees – i.e. there should not be a requirement that the harm must be to both parties as is presently the case in section 423 of the Fair Work Act.

The draft report also seeks input on how "significant harm" should be defined when the Fair Work Commission is deciding whether or not to exercise its powers of intervention in protected industrial action.

These matters should be considered together. They raise the question about the height of the bar when the Fair Work Commission is asked to deal with an intractable dispute.

The Fair Work Act makes provision for either the suspension or termination of protected industrial action where such action:

- is causing or threatening to cause *significant economic harm* to any employer or employees who will be covered by the proposed enterprise agreement, provided such harm is imminent (section 423); or
- has threatened, is threatening or would threaten to endanger the life, the personal safety or health, or the welfare, of the population or a part of it, or to cause *significant damage* to the Australian economy or an important part of it (section 424); or
- is threatening to cause s*ignificant harm* to a third party (section 426).

A distinction needs to be drawn between a situation where protected industrial action is *terminated* with the consequence that the Fair Work Commission is empowered to undertake a compulsory arbitration of the issues in dispute and a situation where the protected industrial action is *suspended* where this will not lead to compulsory arbitration.

The Fair Work Commission must have an evidentiary basis for deciding that industrial action is threatening to cause significant damage to the Australian economy or an important part of it. The High Court has said that the presence of the words "significant" and "important" in the predecessor of section 424 indicates that the decision maker must have some basis for his or her satisfaction over and above generalised predictions as to the likely consequences of the industrial action in question.

In *CFMEU v Woodside Burrup and Kentz*,[10] a Full Bench of the Commission overruled an order made under section 426 of the Fair Work Act to suspend industrial action on the basis that the requirement for *significant* harm to a third party, Woodside on its Pluto project, had not been satisfied. The evidence was that industrial action by contractors' employees was costing Woodside about $3.5 million per day in unproductive time and in addition it would sustain consequential delays in the commencement of the revenue stream from LNG sales. The Full Bench considered that this did not qualify as significant harm.

[10] [2010] FWAFB 6021, Lawler VP, Ives VP and Roe C.

Where protected industrial action is terminated so that compulsory arbitration may follow, there needs to be a high bar. The law as currently framed and explained by the High Court in the *Coal & Allied case* should remain. Instances such as the recent *Qantas case*[11] show that the relevant sections (sections 423 and 424) are working satisfactorily.

Where protected industrial action is suspended because of the harm being done to a third party, legislative reform is needed to overcome the ruling in *CFMEU v Woodside Burrup* concerning the Pluto project. The Full Bench in that case placed the bar to intervention so high that affected third parties were not able to obtain relief. Parliament's purpose in enacting section 426 is being frustrated. Different words need now to be used, with accompanying explanation, so that intervention is available where damage to a third party is significant for the third party. The word "significant", if retained, should attract its ordinary meaning and the suggestion that it means harm different from the sort of harm which might ordinarily be expected to flow from industrial action in a similar context (as suggested in *CFMEU v Woodside Burrup*) may need reconsideration.

The draft report seeks input on the question whether section 424 of the Fair Work Act should be amended to allow industrial action to proceed where the Fair Work Commission is satisfied that the risk of a threat to life, personal safety, health or welfare is "acceptably low".

The consequence of industrial action being protected is that the person undertaking it has immunity from legal suit in spite of the fact that he or she is causing damage to other persons (section 415). There is no warrant for giving such immunity where the Fair Work Commission is satisfied that the industrial action would cause the risk of a threat to life, personal safety, health or welfare of the population or a part of it. There is no "acceptably low" level of such risks. Zero harm should be the aim, and no licence given by legislation for anything less.

Aborted industrial action (Draft Recommendations 19.3, 19.4, 19.5)

The draft report recommends various measures to discourage the unilateral withdrawal of industrial action notices, and having more effective responses available to an employer where it meets such tactics. We raised this matter in our March submission. We encourage and support all of the measures proposed in the draft report.

Responses to industrial action (Chapter 19 Information Requests and Draft Recommendation 19.6)

The draft report, while suggesting a prima facie case for allowing employers to deduct a minimum of 25 per cent of normal wages for the duration of any partial work ban impacting on performance of normal duties, has requested feedback about the risks that such a change may entail.

In our March submission, we suggested that immunity for industrial action in the form of partial work bans should not be granted. We pointed out that there is a loss of balance if the industrial action is a selective work ban: a partial work ban enables considerable damage to the employer's operation but does not result in significant economic impact on employees imposing the ban.

If partial work bans are to remain permissible, steps need to be taken to enable an employer to remove or to reduce pay to nil and remove benefits (such as superannuation contributions or housing subsidies) where the consequence of the work ban to the employer is profound. A banned activity (e.g. loading out or maintaining electrical tags on equipment) may take only a small amount of time but, if not performed, may stop all production. There is no sense in approaching the matter in such a situation by reference to the time taken.

The draft report also seeks feedback on what forms of more graduated employer industrial action should be permitted and how these should be defined in statute.

We suggested in our March submission the following additional measures:

- Upon the conclusion of a defined bargaining period and with appropriate notice (for example, 12 weeks), it should be possible for an employer to terminate an expired enterprise agreement. In such circumstances, the employer could be required to maintain base pay rates, but would be enabled to move away from inefficient work practices and non-productivity related payments or allowances, subject to maintaining conditions in the NES and modern award.
- Preventing unions that engage in repeated giving and withdrawal of protected action notices from giving further notices for a specified period (e.g. 90 days), unless the Fair Work Commission has certified that the withdrawal was reasonable based on appropriate tests or the employer has specifically agreed to the withdrawal. (Draft Recommendation 19.4 is consistent with this suggestion.)

Draft Recommendation 19.6 suggests that the maximum ceiling of penalties for unlawful industrial action should be raised. We support this recommendation.

Specification of type of protected industrial action (Chapter 19 Information Request)

The draft report seeks further input on protected action ballot procedures including in connection with:

- Removing the requirement for a ballot order to specify forms of industrial action contemplated;
- Amending or removing the requirement that industrial action be taken within 30 days of a ballot declaration;
- Granting the Fair Work Commission discretion to overlook minor procedural defects when determining if protected industrial action is authorised by a ballot.

[11] *Minister for Tertiary Education, Skills, Jobs and Workplace Relations* [2011] FWAFB 7444.

As mentioned above, the consequence of industrial action being protected is that the person undertaking it has immunity from legal suit in spite of the fact that he or she is causing damage to other persons. It is reasonable that a union proposing such action should state what the action is and when it will be undertaken. This is not an onerous requirement and neither is it causing difficulty in practice for unions. There is no warrant for any relaxation of the rules surrounding access to protected action ballots. On the contrary, an additional substantive feature should be added to those rules.

A union should not be able prematurely to obtain a protected action ballot order. It is the routine experience of employers, however, that protected action ballot orders are sought and obtained as a preliminary step in enterprise bargaining whether or not there is any immediate intention to take protected action and whether or not an impasse has genuinely arisen.

The appropriate measure, therefore, is to add to the prerequisites for grant of a protected action ballot order that the Fair Work Commission be satisfied that the applicant is and has been bargaining in good faith and that an impasse in negotiations has been reached.

Case Study: Premature Granting of Protected Action Ballot Orders

In *Total Marine Services Pty Ltd v Maritime Union of Australia*[12] a Full Bench (Watson VP, Hamberger SDP and Roberts C) upheld an appeal from a decision granting a protected ballot order on the basis that the application was premature and insufficient steps had been taken to satisfy the test that the applicant had genuinely tried to reach an agreement. Regrettably, later the same month another Full Bench (Lawler VP, Ives DP and Spencer C) declined to follow this decision, rejecting the idea that because the application was at a premature stage of the negotiations, a protected action ballot order should not be granted: see *Farstad Shipping (Indian Pacific) Pty Ltd v Maritime Union of Australia*.[13] The Full Bench approach evident in the Farstad Shipping case appears to have prevailed.[14] The legislative purpose would be far better served, however, if the approach of the Full Bench in the *Total Marine Services case* were to apply and be bolstered.

BHP Billiton has its own recent experience of this problem in the 2011-12 BMA coal mining enterprise agreement negotiations in the Bowen Basin. The CFMEU, AMWU and CEPU each obtained protected action ballot orders and commenced taking protected industrial action as soon as the nominal expiry dates of current agreements were reached. This occurred despite the parties being engaged in apparently useful negotiations with further negotiations programmed. It occurred without the unions needing even to articulate the particular claims in support of which the action was taken.

2.9 Right of Entry (Draft Recommendations 19.7 and 19.8)

Draft Recommendation 19.8 suggests amending the Fair Work Act so that unions without members employed at the workplace and not covered by or currently negotiating an agreement at the workplace would only have a right of entry for discussion purposes on up to two occasions every 90 days.

The Fair Work Act has introduced a significant practical change to right of entry rules. The change was the removal of the former requirement that a union exercising a right of entry be covered by an award or agreement applicable to the workplace. It is now sufficient for a union official wishing to exercise a right of entry that employees in the workplace are eligible to be members of the particular union. It does not matter that the union may have no relationship with the site or that there is another well-established union which represents the industrial interests of the employees at the site under a current agreement.

It is an unreasonable burden on an employer, or a gate supervisor needing to administer the system, to be expected to understand the intricacies of union eligibility for membership rules. These rules tend to be complex and potentially confusing. By contrast, an employer or company officer will readily know if the site is covered by a particular award or agreement, and the relationship of the union in question to that award or agreement.

The principal right to be provided here is that of the employees to be industrially represented and assisted, if they wish, by a union of their choice. Another right to be balanced is that of the employer not to be unreasonably required to permit uninvited union officials onto its site, or to have an outside union, acting in its own interest, come on site to disturb settled industrial representation arrangements. Membership drives and competitive union initiatives should not be any part of the equation. If a union wishes to market its industrial representation capacity to potential members, it is free to do so but this should not attract statutory rights of entry.

The solution is to reinstate the link with coverage under a relevant industrial instrument. We acknowledge that this is more complicated than previously was the case because, under the Fair Work Act, unions are not party to modern awards and are merely persons covered by enterprise agreements. We suggest as follows:

- Where employees are for the time being covered by an enterprise agreement or enterprise award which also covers particular unions, any union not so covered should not have a statutory right of entry to the workplace in respect of those employees.

12 [2009] FWAFB 368.

13 [2011] FWAFB 1686 at [7]-[8]. These reasons for decision were issued on 17 March 2011, the outcome having been announced in transcript on 23 October 2009.

14 See *J.J. Richards & Sons Pty Ltd v Transport Workers' Union* [2010] FWAFB 9963 at [84]-[91].

- Where employees are covered by a modern award only, a relevant union's right of entry should be limited to a right to talk to current members or to investigate suspected breaches affecting members. Such rights should not extend to persons who are merely eligible for membership.

In our view, there is no warrant for a statutory right of entry for uninvited union officials without members or a current representative role at a workplace. However, if such a right is to persist, it should be limited as proposed in the draft report. It is suggested that a limit to, say, three such uninvited visits to non-members per year should be more than sufficient.

Draft Recommendation 19.7 suggests greater powers for the Fair Work Commission to make orders in disputes about frequency of entry taking into account matters such as impact on the employer's operations, the likely benefit to employees, and the union officials' reasons for frequency of entry.

We support these suggestions but reiterate the importance of support for passage of the provisions relating to right of entry in the *Fair Work Amendment Bill 2014* currently before the Parliament. These would remove the privileged access of a union official to remote sites and the default requirement that right of entry be granted in crib rooms.

2.10 Transfer of Business (Draft Recommendation 22.1)

The draft report recommends that the Fair Work Act be amended so that an employee's terms and conditions of employment would not transfer to a new employment if the change is at his or her own instigation.

We support this recommendation as a simple and practical measure, noting that it was a recommendation of the Fair Work Act Review Panel in 2012.